Press Release

The COMESA Court of Justice rules that Mauritius breached the COMESA rules for the Free Trade Area and orders a refund of customs duties to a small company

In a landmark case, the COMESA Court of Justice has decided that the Government of Mauritius, by imposing a customs duty on imports of a product (car paint) from Egypt, acted contrary to Article 46 of the COMESA Treaty, which required that member states eliminate by the year 2000 all customs duties and other charges of equivalent effect on goods which originate from the member states that are in the COMESA Free Trade Area. The Court ruled in addition, that an agreement between two or more member states to re-instate customs duties on trade among themselves, in this case between Egypt and Mauritius, is contrary to the object and purpose of the Treaty and in breach of the Treaty; that instead, member states can use Article 61 of the Treaty which provides a possibility of taking safeguard measures against import surges, for one year after informing the Secretary General, and for additional years if approved by the Council of Ministers.

A company called Polytol Paints, based in Mauritius, on 15 February 2012 brought a case in the COMESA Court against the Government of Mauritius complaining that the Government imposed a customs duty of 40% on its imports of Kapci paints from Egypt from 16 November 2001 up to 20 November 2010, over which period the company paid the duties which it sought to be refunded. The Mauritius Revenue Authority had declined the claim for the refund. The Supreme Court of Mauritius supported this rejection, in a case in which it decided that that "non-fulfillment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts". The company contended that since Mauritius joined the COMESA FTA on 1 November 2000, when it eliminated duties on products originating from COMESA member states in the FTA including the kapci paints imported from Egypt, the Government acted inconsistently with the Treaty, in particular with Article 46, by re-introducing a customs duty subsequently in November 2001; even if this was done purportedly under an agreement with Egypt to address import surges experienced from 1997 to 2000 as the Government claimed.

The court dealt with a number of specific issues. First, the company was challenged that it had no basis for challenging the failure by the Government of Mauritius to implement some Treaty obligations into its national law. On the question of whether the company could sue the Government for failing to implement some obligations under the COMESA Treaty, the court held that only the Secretary General or a member state could sue a member state for failing to fulfill its obligations, under Article 24 of the Treaty. At the same time, the Court cited Article 26 of the Treaty, which says that "any person who is resident in a member state may refer for determination by the Court the legality of any act, regulation, directive or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty". The Court therefore held that "a legal or natural person is only permitted to bring to Court matters relating to conduct or measures that are unlawful or an infringement of the Treaty but not the non-fulfillment of a Treaty obligation by a Member State. The responsibility of bringing a matter relating to non-fulfillment of obligations under the Treaty is reserved for Member States and the Secretary General".

The Court then proceeded to the question of whether or not the Government of Mauritius acted consistently with the Treaty when it introduced a customs duty on imports of the car paints from Egypt. The Government argued that obligations under the COMESA Treaty are to be implemented progressively "irrespective of the Treaty timeframe", because only some member states joined the COMESA FTA and not others, and also because the COMESA Council of Ministers recently extended the transition period for the Customs Union. The COMESA Court rejected both these arguments. After citing Article 31 of the Vienna Convention on the Law of Treaties which provides that "a treaty shall 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 the its object and purpose", the court held that "Article 46 is clear and unambiguous and its terms must be interpreted with their ordinary meaning in the context of the purpose and objective of the treaty to achieve free trade with the COMESA area", and that "Mauritius infringed Article 46 by reintroducing duties on Egyptian products including Kapci paints even if it was for the protection of its industries".

On the question of whether or not individuals who reside in the member states can have an enforceable right under the COMESA Treaty, the Court again cited Article 26 of the Treaty and held that "the content of this rule shows the extent the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA territory not only to the Member States but also to individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States".

The Government had tried to argue that the COMESA Treaty was not enforceable in Mauritius as the Government had not taken measures to domesticate the Treaty. The Court made it a point to explain at length that the Government's actions had breached the Treaty and caused prejudice to the company in breach of its rights provided by the COMESA Treaty, and the Government could not use its own internal laws as an explanation or a defence for not implementing the COMESA Treaty.

> The Court said "In the case at hand, the Respondent has imposed a customs tariff that is in breach of the Treaty. If the Respondent's Customs Tariff

> Regulations were consistent with the rules of the Treaty, the Applicant would have paid no customs duty on the Kapci products imported from Egypt during the relevant time. The Applicant was therefore clearly prejudiced because of the Regulations of the Respondent that was in breach of the Treaty. The argument of the Respondent's Counsel that the Treaty is not directly enforceable in some jurisdictions, including Mauritius, and therefore the individuals cannot have rights emanating from the Treaty is misconceived. It is indeed true that there are differences in legal systems regarding their position towards the domestication of international law. In some Member States, Treaties become directly applicable; in others they require another domestic legal instrument for their incorporation. Notwithstanding the differences in domestic legal systems the Treaty objectives can be achieved when all Member States fulfill their obligations under the Treaty. Any Member State that acts contrary to the Treaty cannot, therefore, plead the nature of its legal system as a defence when citizens or residents of that State are prejudiced by its acts. This is clearly stipulated in Article 27 of the Vienna Convention on the Law of Treaties, 1969 which provides that ' [a] party may not invoke the provision of its internal law as justification for its failure to perform a treaty'."

The COMESA Court drew upon the decision of the European Court of Justice, on a similar issue that arose before it. The European Court of Justice held that,

> The … Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community… according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect".

Another important issue the COMESA Court decided on was whether or not the bilateral agreement between Egypt and Mauritius could be relied upon by the Government of Mauritius, under which it was agreed to impose customs duties on imports from Egypt contrary to the COMESA rules which required that no customs duties or charges of equivalent effect should be imposed on imports that originate from other member states. The COMESA Court again went at length to explain that bilateral agreements between member states should aim to promote the achievement of the objectives of the COMESA Treaty, and that by instead seeking to reverse the rules under the COMESA FTA, the bilateral agreement could not stand. The Court explained that Article 61 of the Treaty provides for the possibility of a safeguard measure that a member state facing import surges can use, instead of seeking bilateral agreements that are inconsistent with the object and purpose of the Treaty. As the Court explained,

> The Treaty allows Member States to enter into bilateral agreements with each other or with third states. This should not however, be construed as giving the Member States a right to enter into agreements that defeat the main purpose of the Treaty which they have undertaken to respect.
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> In this connection Article 56(3) states that

> *Nothing in this Treaty shall prevent two Member States from entering into new preferential agreements among themselves which aim at achieving the objectives of the Common Market, provided that any preferential treatment accorded under such agreements is extended to the other Member States on a reciprocal and non-discriminatory basis.*
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> Article 56(3) of the Treaty allows Members States to enter into agreements among themselves only if some basic requirements are met. First, whatever agreement the Member States enter into must contribute towards the achievement of the objectives of the Common Market. Second, the agreement should relate to a preferential treatment. Third, such preferential treatment should be extended to all the other Member States provided that the other Member States reciprocate. That there was communication between the States of Mauritius and Egypt on this matter is admitted by the Applicant's Counsel. The argument is that even if there was such an agreement it was contrary to the requirements of the Treaty.
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> The Court has examined the nature of the communication preceding the imposition of the duties and the impact of the Regulations in light of Article 56(3) of the Treaty. The Regulation that was issued in 2001 by Mauritius imposed a 40% duty on Kapci products imported from Egypt. The purpose of the negotiations was not therefore to give preferential treatment to the products from Egypt, as envisaged by Article 56 but to levy additional duty on the same products. What Article 56(3) envisages is a situation where Member States give additional benefits to products apart from the minimum protection given to them under the Treaty. The agreement between Egypt and Mauritius had in effect raised the duty from zero, which is the rule under the Treaty, to 40%. This bilateral act was clearly against the basic objectives of the Treaty which include the elimination of customs duty and other non tariff barriers within the time limit provided by the Treaty.
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> Under Article 55 of the Treaty any practice which negates the objective of free and liberalized trade shall be prohibited. The agreement between Egypt and Mauritius hampered the process of liberalization of trade within the COMESA territory and could not relieve the Respondent from its obligations to uphold the principles of the Treaty.

The Court then went on to cite Articles 18 and 41 of the Vienna Convention on the Law of Treaties, which provides that any such bilateral agreement can be entered by member states if it is not prohibited by the Treaty and if the bilateral agreement does not create a derogation that is incompatible with the effective executive of the object and purpose of the COMESA Treaty as a whole.

In conclusion, the COMESA Court issued an order that the Government of Mauritius should refund to the company the customs duties paid for the period from 1 April 2005, when the company first sent a letter formally complaining about the customs duties, to 20 November 2010 when the law was removed, with interest at the rate applied by the courts in Mauritius, and to pay 70% of the costs the company incurred in pursuing the case.