

The COMESA Court of Justice has accepted to hear a case brought by a company against the Government of Mauritius. The Court took this decision in a unanimous ruling by five judges delivered yesterday 6 December 2012 in a case called: The Republic of Mauritius Vs Polytol Paints & Adhesives Manufacturers Co Ltd, Preliminary Application No 1 of 2012.

The company, Polytol Paints & Adhesives Manufacturers Co. Ltd, is based in Mauritius and imports paints from Egypt as part of its business of manufacturing and selling automotive paints. Both Egypt and Mauritius are in the COMESA Free Trade Area and therefore should not levy import taxes (customs duties) on products made in COMESA. However, Mauritius was charging a 40% tax on imported paints under a law adopted on 16 November 2000 but which was subsequently repealed on 20 November 2010. During that period, the company paid a total of Mauritian Rupees 13,275,261 in customs duties on the product when imported from Egypt. The company tried to challenge the law in the domestic courts of Mauritius, going up to the Supreme Court of Mauritius, but the Supreme Court decided that it could not enforce the COMESA Free Trade Area regime, saying "in the absence of any specific legislation to that effect, non-fulfillment by Mauritius as a Member State of its obligations, if any, under the Treaty is not enforceable by the national courts". Following this decision of the Supreme Court of Mauritius, the Company brought a case before the COMESA Court; seeking a declaration that the law of Mauritius under which it had been required to pay customs duties on imports from another COMESA Member State which is in the Free Trade Area, was illegal for contravening the COMESA rules; and asking for an order for refund of the taxes paid.

In the hearings before the COMESA Court, the Government of Mauritius argued that the company did not have a basis for bringing the case because the law was no longer in operation, having been repealed; and that the COMESA Court did not have jurisdiction to hear cases asking for monetary remedies against Governments. The COMESA Court did not agree with these arguments. Citing Article 26 of the COMESA Treaty, the COMESA Court set out the three requirements to be met before a company can bring a case: the case should be brought by a resident of a Member State, the case should be challenging the legality of a regulation in view of the provisions of the COMESA Treaty, and the company should have exhausted local remedies. The Court decided that the case was properly brought because the company was a resident of Mauritius, the case was challenging the legality of the regulation enacted by the Government of Mauritius on the ground that it was illegal under COMESA rules, and the company had tried to get remedies in Mauritian Courts going all the way to the Supreme Court.

The COMESA Court decided that even if the regulation being challenged has been repealed and is no longer in operation, the Court can still hear the case. The Court said, "It is the considered view of this Court that prejudice connected with an illegal Act arises at the commencement of the action. If the respondent (ie the company) is correct in its claim, prejudice would have arisen from the date the regulation came into operation affecting it in monetary terms on each occasion of payment of import duty. The subsequent repeal of a regulation by a Member State should not however deprive the Court of its jurisdiction under

Article 26 in so far as there is a party that claims that it has been prejudiced during the time such regulation was in force. ... The repeal of the regulation may have prevented further payment of customs duties on goods imported after the repeal but does not cure previous grievances in so far as there is no recognition of the legality of the same when it was in force.”

On the question of exhaustion of local remedies, that is, seeking remedies in the local courts of the Member State before going to the COMESA Court, the Court decided that there is no requirement to continue pursuing local remedies if the final court in the country has already taken a decision on the matter, since the decision binds all other courts in the country. The local remedy to be pursued should be “effective and sufficient”; and it would not be effective and sufficient if the final court has already ruled against the possibility of a remedy. The Court said, “The Supreme Court (of Mauritius) dismissed the claim on the grounds that non-fulfillment of Treaty obligations is not enforceable by the national courts in so far as there was no specific legislation to this effect. Under such circumstances, one cannot reasonably expect that the Respondent (that is, the company) would get an effective and sufficient remedy from the courts of Mauritius. Once the Respondent obtains a decision on this matter from the final court in the land, it should not be obliged to have recourse to other courts or tribunals within the country, as such courts and tribunals being subordinate to the highest court are bound by the decision of that court.”

So, the COMESA Court has decided to hear the substantive claim by the company, which challenges the legality of the regulation passed by the Government of Mauritius and under which the company paid taxes when it was in operation.

This is a landmark case. First, because it has confirmed that companies can bring cases in the COMESA Court to challenge actions by Governments if the actions break COMESA rules, and second because it has demonstrated that it is feasible for even small companies to do this. Polytol Paints is a SME based in Mauritius. What is also significant is that the COMESA Court delivered its ruling after only one day, following the arguments of the lawyers for the company and the Government of Mauritius. This expedition by the COMESA Court is welcome and to be commended. It is a landmark judgment, for its clarity and simplicity, explaining clearly what the COMESA rules on the matter are, and opening the door to the public to have recourse to the COMESA Court in cases where some laws in the region would adversely affect and reduce trade and investment in the COMESA region. Furthermore, this judgment should encourage Member States to be clear about whether their obligations under COMESA rules have been properly accepted by their respective Governmental organs and have been domesticated into the laws and the policy and institutional frameworks of the country.

Contact: Francis Mangeni, Director of Trade Customs and Monetary Affairs (fmangeni@comesa.int)