

# *Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA)*

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*This case commentary uses the in-depth case study and thick-description approach to analyze and comment on two important cases from the East Africa Court Justice (EACJ) and the OHADA Common Court of Justice and Arbitration (OHADA CCJA). The cases are the British American Tobacco v Attorney General of Uganda (EACJ), 2019 (BAT case) and GETMA International v The Republic of Guinea (OHADA CCJA arbitral award), 2014 (GETMA case). The BAT case is the first case decided by the EACJ on a purely international trade and commercial law subject matter. This is significant since the EACJ's docket has since its first decision in 2006 been dominated mainly by human rights, rule of law, opposition politics, and employment cases. The GETMA case on the other hand is renowned because of the action of the arbitrators in the OHADA CCJA arbitration to request a significant increase in their arbitration fees over the amount set under the OHADA arbitration rules. Outside of this controversial issue in the GETMA case, this commentary delves deep into the other accompanying cases involving the same parties in International Center for the Settlement of Investment Disputes (ICSID) and the enforcement proceedings in the US Federal Court in DC. The two cases thus present many lessons for future litigants, stakeholders, commentators, academics, and students in the East African regional integration process and in OHADA harmonization of business laws and arbitration.*

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## *General Introduction*

The case commentaries analyzed in this contribution come from two important international courts in Africa: The East Africa Court of Justice (EACJ) and the OHADA Common Court of Justice and Arbitration (OHADA CCJA). Both international courts are sub-regional courts established in East and West Africa respectively. They are part of the wider economic and political integration, and business law harmonization processes in East and West Africa. Both decisions analyzed are important in their different economic, political, and legal contexts. The *British American Tobacco (U) LTD v The Attorney General of Uganda*, EACJ Reference No. 7 of 2017 decision is special because it is the first case on a purely international trade and commerce question that the EACJ has determined. It is therefore the inaugural case where the economic obligations of the Partner States of the East Africa Community embedded in the East African Community (EAC) integration treaty and protocols are tested in active litigation. This is significant considering that the one of the main reasons for the formation of the East Africa Community is economic integration. The second case, *GETMA International v the Republic of Guinea (I)*, Case No. 001/2011/ARB is an arbitral award issued by the OHADA CCJA tribunal. OHADA is the French acronym for the Organisation pour l'Harmonisation en Afrique du Droit des Affaires, which is a group of seventeen (17) mainly Francophone West African countries that signed a treaty on the Harmonization of Business Law in Africa. The OHADA CCJA is OHADA's judicial organ and is the first supranational regional system in Africa with binding laws for all its member States.

This contribution, unlike most traditional case commentaries or case reviews, uses a different analytical approach. Most traditional case commentaries are normally limited and cursory presentations of the important aspects of the case and in many cases restrained in terms of depth and breadth of analysis. This commentary is radically different and is influenced by Professor James Gathii's analytical framework on the performance of international courts in Africa: the in-depth case study and thick description approach.<sup>1</sup>

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1 James T. Gathii, *Introduction: The Performance of Africa's International Courts*, in *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS* (JAMES T. GATHII, ED., FORTHCOMING Oxford University Press, 2020).

“This approach emphasizes thick description and analysis on how the cases enable, spur, and embolden political and legal mobilization.”<sup>2</sup> While the contrast of this approach is the measurement of impact of courts based on set defined and discrete variables, this case commentary foregrounds and presents the particular and localized contexts in which these cases are litigated. It analyzes and draws linkages that these cases have with other similar cases litigated in other forums while maintaining the in-depth and thick description approach. This case commentary broadens the analysis from the State-centric approach that easily influences most cursory case commentaries through the presentation of the role of the many different stakeholders involved in these two cases at the micro and macro level. Another aspect of the in-depth case study and thick description approach is to maintain an analysis that does not take comparisons with European supra-national institutions as a baseline for evaluating performance of Africa’s international courts.<sup>3</sup> This case commentary analyses the two cases presented on their own merits and demerits without unduly focusing on any comparators with any European supra-national institutions as baseline comparators. Finally, this approach has the advantage of bringing life names of individuals, their commitments, places, and groups in ways that a cursory case review or analysis cannot easily do.

Additionally, the in-depth case study and thick description approach broadens the aspects under review. Unlike traditional case reviews, which decontextualize cases by only emphasizing on doctrinal dilemmas and theoretical quandaries — what Professor James Gathii refers to as “the plain vanilla or colorblind scholarship and practice”,<sup>4</sup> the in-depth case study and thick description approach contextualize cases to laying bare the many facets. This commentary thus focuses on the many aspects that the decisions have both at a systemic macro level and at the contextual micro-level. As seen above, this approach allows us to unlock the many vital names, facts, places, and figures that would ordinarily not be revealed in cursory summary commentaries. There are many lessons that the many stakeholders inside and outside of these courts can draw from this in-depth and thick description approach on the factual and legal analysis that will assist in the future trajectories of these courts specifically

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2 *Id.*

3 *Id.* See also MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 9 (1996) (arguing that the dependency theory came to view most understandings of developing countries as based on binary opposites creating a form of history by analogy).

4 James T. Gathii, *Beyond Color-Blind National Security Law*, *JUST SECURITY* (Aug 3, 2020), <https://www.justsecurity.org/71769/beyond-color-blind-national-security-law/>.

and for international law generally. This is especially true because in mainstream circles, these international judiciaries have been ignored and underappreciated as sources of robust jurisprudence that shapes the course of international law.<sup>5</sup> As these case commentaries reveal, this notion is inaccurate and these African international courts, despite their numerous challenges, offer an important avenue for the creation, discussion, and dissemination of robust international law knowledge and practice.<sup>6</sup>

This contribution proceeds as follows: the first part covers the commentary on the first international trade law case in the EACJ: *BAT v The Attorney General of Uganda*. This section covers a specific introduction to this case and to the EACJ, the facts and procedural history of the case, the specific determinations by the court, detailed sections of commentary on these determinations, a commentary on how this case is part of a concerted effort by “big tobacco” corporations to protect their dwindling fortunes because of the health hazards involved in the use of tobacco, and finally a conclusion on how this case might have the consequence of emboldening other transnational companies in the EAC to use the EACJ as a vehicle for ensuring the Partner States do not circumvent trade liberalisation commitments in the EAC Community law. The second part covers the commentary on the *GETMA International v The Republic of Guinea* and like the first part it addresses the following: a general introduction to the case and to OHADA, the facts and procedural history of the dispute, the determinations of the tribunal, specific commentary on the arbitral award, the cascading cases in the International Centre for Investment Disputes (ICSID) and the US Federal District Court of District of Columbia, the vexed question of the increase of arbitrator’s fee and a conclusion that the arbitrators’ unilateral request to increase fees outside the OHADA arbitration rules torpedoed GETMA International’s arbitration win but strengthened the fact that the OHADA CCJA remains one of the legitimate centers for the resolution of investment disputes in West Africa even though some commentators see the case as repellent for investment in the OHADA region.

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5 James T. Gathii, *The Promise of International Law: A Third World*, 2020 American Society for International Law Grotius Lecture (July 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3635509](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509).

6 *Id.*

## I. COMMENTARY ON THE FIRST TRADE CASE BY THE EACJ: BRITISH AMERICAN TOBACCO (U) LTD V THE ATTORNEY GENERAL OF UGANDA, EACJ REFERENCE NO. 7 OF 2017

### A. Introduction

The *British American Tobacco (U) LTD v The Attorney General of Uganda*, EACJ Reference No. 7 of 2017 (BAT Case) is a significant milestone in the process of judicialization of trade, business and commercial disputes in the East African Community Court of Justice (EACJ).<sup>7</sup> It is the first case addressing a purely international trade question (internal taxation of goods) that the court has adjudicated since it was inaugurated in 2001. This case offers ample opportunity to assess the preparedness of the court and its current and potential litigants to address, present, and litigate questions of international trade law for the first time. The Applicant in this case is British American Tobacco (BAT), a multinational company with great economic and political muscle internationally. BAT eventually won the case with the court declaring that the imposition of excise duty of cigarettes manufactured in Kenya and imported into Uganda was in violation of provisions in the Treaty for the Establishment of the East African Community (EAC Treaty),<sup>8</sup> the EAC Customs Union Protocol,<sup>9</sup> and the EAC Common Market Protocol.<sup>10</sup> This commentary presents an in-depth case study analysis of the decision and its implications for the Court, future litigants, and the EAC integration process. The case was filed in 2017 and in 2018 the Applicant had already bagged its first win in the preliminary application for the preservation of interim orders. Thus, this commentary focuses on the main decision issued in March 2019 that effectively decided the case on its merits.

It is important to note that “business actors in general and the East African Business Council (EABC) in particular have eschewed litigating before the EACJ.”<sup>11</sup>

7 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, East African Court of Justice [EACJ] (Mar. 26, 2019).

8 Treaty for the Establishment of the East African Community, Nov. 30, 1999, 2144 U.N.T.S. 255.

9 Protocol on The Establishment of The East African Customs Union, Mar. 2, 2004, <https://www.eac.int/documents/category/eac-customs-union-protocol>.

10 Protocol on The Establishment of The East African Community Common Market, Nov. 20, 2009, [http://www.minecofin.gov.rw/fileadmin/templates/documents/Common\\_Market\\_Protocol.pdf](http://www.minecofin.gov.rw/fileadmin/templates/documents/Common_Market_Protocol.pdf).

11 James T. Gathii, *The East African Court of Justice: Human Rights and Business Actors Compared*, in International Court Authority 60 (Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen eds., Oxford University Press, 2018).

This is because not a single case had been presented before the EACJ that dealt with the international movement of goods and services prior to this BAT case. Prof James Gathii argues that this lack of trade cases is surprising given that economic integration is the primary goal of the EAC.<sup>12</sup> Since this is the first case that the court has decided on an international trade law question, there are many lessons that can be drawn from the decision at both micro and macro levels. This case commentary will analyze these lessons as follows: at the micro-level, the Court still has many lessons to learn on how to address international trade law cases vis-à-vis other types of cases that involve other subject matter areas such as human rights, domestic opposition politics, or employment disputes. First, the court interpreted its jurisdiction correctly as wide enough to capture cases that have no relation to the East African Community law specifically but are of an international law character generally and that also involve the violation of a Partner State's domestic law. Second, the Court misapplied Article III: 2 of GATT 1994 and its relationship to the EAC Treaty and also substantively erred in its interpretation and application of the World Trade Organization (WTO) law on *de jure* and *de facto* discrimination. Third, the court implied an overbroad application of a source of Community Customs law provision in a manner that would make any Common Market Protocol violation a violation of the EAC Treaty, and finally the Court broadened its remedial powers by granting some mandatory orders over and above the declarations it normally issues, thus ordering the rescinding and withdrawal of payments on receipts already made. At the macro level, this dispute shows how powerful multinational tobacco companies are willing to use all types of regimes, including triggering the EACJ trade dispute jurisdiction, at both domestic and the international level to win economic gains and safeguard their transnational capital.<sup>13</sup>

Finally, it is important to offer a small description on the general framing of the case. Interestingly, even though the applicants framed the case as one that involves the violation of the EAC Community integration pillars on the elimination of tariff and non-tariff barriers (NTBs), the case should be correctly characterized as a trade liberalization (non-discrimination principle: national treatment principle) violation case involving internal taxation. The case has nothing to do with tariff or non-tariff barriers in the EAC. In other words, but for the fact that an individual company—in this case BAT—was suing in its own capacity, if the case were presented on behalf

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12 *Id.* at 60, 62.

13 Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARVARD J. INT'L L. 383 (2016); JAMES T. GATHII & CYNTHIA HO, *Regime Shift of IP Lawmaking and Enforcement from WTO to the International Investment Regime*, 18 MINN. J. L. SCI. & TECH. 427 (2017).

of Kenya or any other member of the WTO, it would easily be accepted within the jurisdiction of the World Trade Organization (WTO) Dispute Settlement System. This consequently means that the dearth of cases that deal with the elimination of tariff and NTBs to trade in the EACJ continues despite this important case.<sup>14</sup> Despite the fact that under-judicialization of NTBs related disputes still continues in the EACJ, another case on trade liberalization by Tanzanian glass manufacturer Kioo Limited is now in the offing.<sup>15</sup>

## **B. Facts and Procedural History**

This case was instituted by British American Tobacco Uganda Limited (BAT) challenging the legality of section 2 (a) and (b) of the Republic of Uganda's Excise Duty (Amendment) Act No. 11 of 2017.<sup>16</sup> BAT contended that Uganda's Excise Duty Amendment Act contravened provisions in the Treaty for the Establishment of the East Africa Community (EAC Treaty), the Protocol on the Establishment of the East African Customs Union (Customs Union Protocol), and the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol).<sup>17</sup> BAT is a company limited by shares that manufactures and otherwise deals with tobacco and tobacco products incorporated and domiciled in Uganda.<sup>18</sup> It restructured its business and 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 Uganda market.<sup>19</sup>

Both Uganda and Kenya are members of the East Africa Community and have signed and ratified the EAC Treaty, the EAC Customs Union Protocol, and the EAC Common Market Protocol.<sup>20</sup> The Republic of Uganda enacted the Excise Duty Act No. 11 of 2014 that sought to consolidate the laws applicable to excise duty and related matters. Uganda subsequently introduced the Excise Duty (Amendment) Bill No. 6 of 2017 to have all tobacco products manufactured within the EAC region to have a uniformly applicable excise duty rate with an increment of the duty chargeable on

14 See Gathii, *supra* note 10, at 62.

15 Kioo Limited v Attorney General of the Republic of Kenya, Reference No. 13 of 2020, East African Court of Justice [EACJ].

16 British American Tobacco (U) LTD v The Attorney General of Uganda, Reference No. 7 of 2017, para. 1, East African Court of Justice [EACJ] (Mar. 26, 2019).

17 *Id.*

18 *Id.* at para. 2.

19 *Id.*

20 *Id.* at para. 4.



soft cap cigarettes from Ushs. 50,000 per 1,000 sticks to Ushs. 55,000 for the same number of sticks.<sup>21</sup> It is this bill that Uganda eventually passed into the Excise Duty (Amendment) Act No. 11 of 2017 with amendments to create differential treatment between goods ‘locally manufactured’ in Uganda and ‘imported’ goods, with higher duty chargeable on ‘imported’ goods.<sup>22</sup>

After the enactment of the Excise Duty (Amendment) Act, the Uganda Revenue Authority (URA) issued BAT with tax assessment notices that re-classified as imported goods the company’s cigarettes that had been up to this point categorized, assessed and taxed as locally manufactured products.<sup>23</sup> BAT filed this case claiming that this differential treatment 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 EAC Treaty, the EAC Customs Union Protocol, and EAC Common Market Protocol.<sup>24</sup> Specifically, BAT contended that section 2 of the Excise Duty (Amendment) Act is unlawful, discriminatory and negates the purpose for which the EAC 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 EAC Treaty; Articles 15 (1) and (2) of the EAC Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the EAC Common Market Protocol.<sup>25</sup> BAT took issue with both the enactment of the Act which violates the EAC Treaty and the two Protocols provisions and its implementation 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.<sup>26</sup> Additionally, BAT argued that the Act violates section 23 (Prohibition of incentives or privileges to tobacco businesses) of the Ugandan Tobacco Control Act. No. 22 of 2015.<sup>27</sup>

Uganda responded to the claims above by stating 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

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21 *Id.* at para. 6.

22 *Id.* at para. 7.

23 *Id.* at para. 8.

24 *Id.* at para. 9.

25 *Id.* at para. 11.

26 *Id.*

27 *Id.* at para. 13.

in those countries being lower than 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.<sup>28</sup> Additionally, the Respondent State contended 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 sought to have the reference dismissed with costs.<sup>29</sup>

### C. The EACJ's Broad Infringement Jurisdiction

The Court began its decision by addressing certain important preliminary jurisdictional questions. First, Article 27(1) of the EAC Treaty defines the jurisdiction of the Court as jurisdiction on 'interpretation and application of the Treaty.' Article 30(1) then demarcates the acts that would give rise to a cause of action before the court. Citing *Simon Peter Ochieng & Anor v Attorney General of Uganda*, EACJ Ref. No. 11 of 2013 and *B.E Chattin (USA) v. United Mexican States*, 1927 UNRIAA, vol. IV, p 282 at 310, the court concluded that there are two categories of acts that would give rise to sustainable cause of action before the 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."<sup>30</sup> This is an expansive interpretation of the court's jurisdiction. Article 30(1) of the EAC Treaty grants the Court jurisdiction to receive from any person who is resident in the Partner State cases on the determination of the legality of any Act, regulation, directive, decision or action of Partner State or an institution of the Community on the grounds that such Act, regulation, directive, or decision is unlawful or is an infringement of the provisions of the treaty. The Court construed this provision by dividing the last section into two requirements: unlawfulness and infringement. The Court found that "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 readily apparent."<sup>31</sup> The court then found that such unlawful act would "arise from violation of any other laws—domestic or international."<sup>32</sup>

### D. Commentary

28 *Id.* at para. 15.

29 *Id.* at para. 16.

30 *Id.* at paras. 29, 30, 31.

31 *Id.* at para. 29.

32 *Id.* at para. 29.

This interpretation, while it grants the court close to limitless jurisdiction, is textually and legally sound based on the general rule of interpretation of treaties in Article 31 of the Vienna Convention on the Law of Treaties, 1969 (VCLT).<sup>33</sup> This means that unlike other international courts whose judicial review on unlawfulness might be limited to the establishment treaty and community law,<sup>34</sup> the EACJ has one of the broadest subject matter jurisdictions an international court can have. This means that any Act, regulation, directive, or decision that is unlawful in the sense that it violates either domestic or international law by a Partner State or an institution of the Community is amenable to EACJ's jurisdiction.<sup>35</sup> The breadth of the domestic law or international law is not circumscribed in any way and thus the EACJ hears a broad swarth of cases in terms of subject matter, from international trade to human rights and any matter or question in domestic law including the constitutional review of Acts of Parliament and executive decisions. Indeed, Uganda had claimed the violation of Objective xxiii(i)(b) of the Ugandan Constitution and section 23 of Uganda's Tobacco Control Act—claims the Court dismissed for not having been pleaded.<sup>36</sup>

The cases the Court used to support this broad jurisdictional view require further commentary. The EACJ decision in *Simon Peter Ochieng & Anor v Attorney General of Uganda*, EACJ Ref. No. 11 of 2013 only makes reference to national laws as the Court correctly notes: “where a matter was held to justiciable before this Court if it was one *the legality of which is in issue viz the national laws of Partner States, or one that constitutes an infringement of any provision of the Treaty.*”<sup>37</sup> To fortify its view on violation of international law, the Court is contented to cite a 1927 US-Mexico General Claims Commission decision in *B.E Chattin (USA) v. United Mexican States*, 1927 UNRIAA, vol. IV, p 282 at 310. This is indeed a far-fetched decision since it fetches authority from an international arbitration tribunal established in 1923 by a bilateral treaty to “settle and adjust amicably claims by the citizens of each country against

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33 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

34 For Regional Human Rights Systems, the European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court) restrict the mandate of the supervisory bodies to the interpretation and application of the European Convention on Human Rights (European Convention) and the Inter-American Convention of Human Rights (Inter-American Convention) respectively.

35 See *Alade v. Nigeria Suit*, ECW/CCJ/APP/05/11, para. 25, Judgment (June 11, 2012) (the ECOWAS Court of Justice finding that that its human rights mandate extended beyond the African Charter and encompassed UN human rights instruments to which ECOWAS member states are parties).

36 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 35, East African Court of Justice [EACJ] (Mar. 26, 2019).

37 *Id.* at para. 30.

the other.”<sup>38</sup> The US-Mexico General Claims Commission also has its legacy tied to the early twentieth century imperial tendencies and invocation of different standards of civilization of Mexico through denial of justice by the US.<sup>39</sup> Its subject matter jurisdiction was to cover the “Law of Nations, in particular ‘standards of civilization’, an uncodified body of jurisprudence that included the writings of international jurists, the decisions of international tribunals, and the actions of states deemed to be civilized.”<sup>40</sup> It is unlikely the EACJ First Instance judges closely checked the implications of citing this arbitral decision to affirm its position that the EACJ had jurisdiction over acts by Partner States that infringed a rule of international law. It is not clear how far or where such rule of international law should be found whether in binding treaties, customary international law, or even general principles of law recognized by civilized nations. Since the EACJ is a standing international court and not an arbitral tribunal and since the subject matter of the dispute was not analogous to the claims in the US-Mexico Claims Tribunal, this reference by the court perhaps shows a lack of in-depth understanding and appreciation of the substance, nature, and jurisprudence of international courts and arbitral tribunals. Despite the cited decision being far-fetched and maybe raising some curiosity, the implication and lesson in this finding is that the EACJ can hear Investor-State Dispute Settlement (ISDS) cases involving investors resident in any of the EAC Partner States and using the substantive law of any binding bilateral or multilateral investment treaty.

Additionally, if the infringement jurisdiction of the EACJ under Article 30(1) of the EAC Treaty covers any Act or decision by a Partner State or institution of the Community that violates any law both municipal and international, then it further broadens the jurisdiction of the Court to receive human rights cases where international human rights treaties have been violated. This easily adds to the arsenal and fortifies the human rights jurisdiction of the Court which the Partner States have challenged but the Court has affirmed since its celebrated decisions in *Katabazi v. Secretary General of the EAC*, Ref. No. 1 of 2007; *Rugumba v. Secretary Gen. EAC*, Ref. No. 8 of 2010; and *Independent Medical Legal Unit v. Attorney General of Kenya*, Ref. No. 3 of 2010.<sup>41</sup>

38 United Nations, *Reports of Arbitral Awards, General Claims Commission (Agreement of September 8, 1923) (United Mexican States, United States of America): Volume IV*, at 11 (2006).

39 Allison Powers Useche, *The Standard of Civilization on Trial at the United States/Mexico Claims Commission 1923-1937*, 1 *JUS GENTIUM: J. INT’L LEGAL HIST.* 391 (2016).

40 *Id.* at 393.

41 See James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice’s Human Rights Strategy*, 24 *DUKE J. COMP. & INT’L L.* 249 (2013).

### E. EAC Treaty Principles and Free Movement of Goods

On the first issue, the Court conclusively found violation and negation of the EAC Treaty objectives. It held that the Uganda Revenue Authority (URA) misconstrued the term ‘import’ and thus infringed Article 1 of the EAC Treaty and Article 1(1) of the Customs Union Protocol.<sup>42</sup> Additionally the court held that this misconstruction also negated the objectives of the Treaty in Articles 2(2), 5(2) and 8(1)(c) of the EAC Treaty.<sup>43</sup> The Court reasoned that if the URA had read the definitions of ‘imports’ in section 2 of Uganda’s Excise Duty Act, 2014 and section 1(j) of the Value Added Tax Act, Cap 349 together with the same definitions in the Article 1 of the EAC Treaty and Article 1(1) of the Customs Union Protocol, it would have reached the conclusion that a ‘foreign country’ under Uganda’s law does not include Kenya which is an EAC Partner State.<sup>44</sup> The court stated, “it is manifestly clear that the intention of the framers of the EAC 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.”<sup>45</sup> The Court cited the doctrine of *pacta sunt servanda* in Article 26 of the VCLT and the doctrine of non-invocation of domestic law for the violation of international law in Article 27 of the VCLT to fortify this position.<sup>46</sup> The Court also correctly defines a “Custom Union as region or geographic 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-partners, while a Common Market 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 person, as well as EAC nationals’ right of residence and establishment.”<sup>47</sup>

The Applicant also argued that the enactment and application of section 2 of Excise Duty (Amendment) Act No. 11 of 2017 infringed on Article 6(d) and (e) of the EAC Treaty which cover fundamental principles of the of the Community such as good governance, democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, promotion of human and peoples’

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42 *British American Tobacco (U) LTD v The Attorney General of Uganda*, EACJ Reference No. 7 of 2017, para. 45.

43 *Id.*

44 *Id.* at paras. 39, 40, 41.

45 *Id.* at para. 41.

46 *Id.* at para. 42.

47 *Id.* at para. 46.

rights, and equal distribution of benefits.<sup>48</sup> Specifically, on Article 6(d) and (e) of the EAC Treaty, the Applicant contended that the principle of equal opportunities and equitable distribution of benefits is the specific obligation that has been violated.<sup>49</sup> The Court then proceeds to use the Collin English Dictionary and Uganda's Equal Opportunities Commission Act, 2007 to find the definition of 'equal opportunity' under the Treaty.<sup>50</sup> The court using these two definitions concludes that the concept of 'equal opportunity' is meant to curtail discrimination in person's access to social services on account of various factors such as age, gender, race, and creed. The court found that since the dispute accrues purely from a commercial transaction as opposed to the socio-political thrust of the considerations in the notion of equal opportunities, the claim under Article 6(e) is disallowed.<sup>51</sup> It is also, surprisingly, on this basis that the claims on the impugned law are dismissed as being at cross-purposes with the establishment of the Customs Union or Common Market as objectives of Article 2(2) and 8(1)(c) of the EAC Treaty or the removal of barriers and constraints to market development in Article 127(2)(b) EAC Treaty.<sup>52</sup>

## F. Commentary

The first concern over this ruling is whether a fundamental principle of the Community can be a specific legal obligation of a Partner State. Since the human rights cases have already answered this question in the affirmative,<sup>53</sup> and was actually the basis for the human rights decisions of the EACJ, it is not surprising that the Court does not tackle this question. Unlike human rights cases, for trade and commercial cases, there are specific legal obligations spelt out in the EAC Treaty, the EAC Customs Union Protocol, and the EAC Common Market Protocol. These include international trade law obligations like the national treatment obligation in Article 75(6) of the EAC Treaty which forms the crux of this dispute.<sup>54</sup> This means that the substantive obligations on EAC integration on trade and commerce are found in the EAC Community law and

48 *Id.* at paras. 48–49.

49 *Id.* at para. 65.

50 *Id.* at para. 66.

51 *Id.* at para. 67.

52 *Id.*

53 *Rugumba v. Secretary Gen. EAC*, Ref. No. 8 of 2010, EAC (2012); *Democratic Party v. The Secretary General of the EAC & 4 Others*, Ref. No. 2 of 2012, EAC (2012) (finding that fundamental principles had binding effect).

54 EAC Treaty, Article 75(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).

unlike for human rights cases, the EAC Summit in its 15<sup>th</sup> Ordinary Summit of Heads of State extended the Court's jurisdiction over trade, investment, and cases arising under the EAC Monetary Union treaty to the Court.<sup>55</sup> There are therefore some good reasons why the Court should have refrained from judicializing fundamental principles in trade and commerce cases. The Court's decision, is however, still acceptable for having bitten the bullet in the human rights jurisdiction cases and, with the parties having developed 'a stable normative expectation'<sup>56</sup> scaling back these jurisprudence would not have been credible.

Secondly, having found the fundamental principles justiciable, using the Collins English dictionary and the Uganda's Equal Opportunities Commission Act, 2007 to find that the term 'equal opportunity' covers only socio-political notions goes against the rule of treaty interpretation in Article 31 of the VCLT. This is because for trade and commerce cases, 'equal opportunity' would ordinarily mean 'equal commercial or trading opportunities' not equality of opportunity in relation to socio-political aspects. Thus the 'equal opportunity' in Article 6 (d) and 'equitable distribution of benefits' in Article 6 (e) of the EAC Treaty when read in good faith textually, in their context, and in light of the object and purpose of the EAC Treaty might have led to the conclusion that the equality here most probably referred to equality of competitive commercial and trading opportunities.

Additionally, while erroneously terming the interpretation rule under Article 31 of the VCLT literal,<sup>57</sup> the court cites the case of *Rwenga Etienne & Another v The Secretary General of the East African Community* (case involving recruitment quotas in the EAC), EACJ Ref. No. 5 of 2015 to support the finding that the term 'equitable distribution of benefits' in Article 6(s) denotes a fair and just allotment that seeks to redress apparent imbalances.<sup>58</sup> The court found that the notion of 'equitable distribution of benefits' alludes to the elimination of imbalances that could accrue

55 EAC, Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, ¶ 9 (Feb. 20, 2015), <http://repository.eac.int/bitstream/handle/11671/547/COMMUNIQUE%2016TH%20ORDINARY%20EAC%20HEADS%20OF%20STATE%20SUMMIT%2018TH%20FEB%202015-1.pdf?sequence=1&isAllowed=y>; *EACJ Gets New Judges and Deputy Principal Judge*, EAST AFRICAN COURT OF JUSTICE (Dec. 4, 2013), <http://eacj.org/?p=1754>.

56 Armin Von Bogdandy & Ingo Venzke, *On The Functions of International Courts: An Appraisal In Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49–72 (2013).

57 The Rule of Interpretation in Article 31 of the VCLT is much more holistic covering aspects of textualism and teleological interpretation.

58 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 68, East African Court of Justice [EACJ] (Mar. 26, 2019).

from the very existence of the EAC that are not necessarily trade-related.<sup>59</sup> The court justifies this position by stating that trade-related provisions are covered under Article 7(1)(a) on ‘market-driven cooperation’ in the EAC Treaty and Article 77 of the Treaty.<sup>60</sup> This effectively means that the EAC fundamental principles in these provisions cannot be applied in trade or commercial cases. This is a narrow position especially considering that one of the main reasons for EAC integration is economic integration through the creation of equality of trade and commercial opportunities.

## G. Violations of the EAC Treaty

### *i. Violation of Article 7(1)(c) and 80(1)(f) of the EAC Treaty*

On the claim of violation of Article 7(1)(c) of the EAC Treaty (principle of the community to achieve the objective of the establishment of an export oriented economy with free movement of goods, persons, labour, services, capital, and information technology) and 80(1)(f) of the EAC Treaty (Partner states to take measures to harmonise and rationalize 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), the court found that the gist of these 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.<sup>61</sup> The Court begun answering this issue by affirming the principle of Variable Geometry and Asymmetry encapsulated in Article 7(1) of the EAC Treaty that ensures that economies that were relatively less developed were not swamped by goods from relatively better economies.<sup>62</sup> The Principle of Variable Geometry is encapsulated in Article 7(1)(e) of the EAC Treaty as an operational principle that ‘allows for progression in cooperation among groups within the community for wider integration schemes in various fields and at different speeds.’ The Principle of Asymmetry is captured in Article 1(1) of the Customs Union Protocol to mean ‘the

<sup>59</sup> *Id.* at para. 70.

<sup>60</sup> *Id.* at paras. 70–71.

<sup>61</sup> *Id.* at paras. 72–73.

<sup>62</sup> *Id.* at para. 74 (citing Leonard Obura Aloo, *Free Movement of Goods in the EAC*, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS 306 [EMMANUEL UGIRASHEBUJA, JOHN EUDES RUHANGISA ET AL., BRILL 2017]).



principle which addresses variances in the implementation of measures in an economic integration process for purpose of achieving a common objective.<sup>63</sup>

Giving the example of Article 10 and 11(1) of the Customs Union Protocol on progressive elimination of internal tariffs and other charges,<sup>64</sup> the Court found that the provisions on intra-regional trade are anticipated to be progressive, and some instances differential.<sup>65</sup> Additionally, the Court makes reference to section 111(1) of the East African Community Customs Management Act of 2004 that acknowledges the interim tariff in Article 11 above and also provides that “goods originating from the Community shall be accorded Community tariff treatment in accordance with the Rules of Origin provided for under the (Customs Union) Protocol.”<sup>66</sup> The Court then, interestingly makes the following observation: “that whereas it is well recognized 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.”<sup>67</sup> The Court secondly gives the example of Article 25(1) of the Customs Union Protocol that provides for the establishment of Export Promotion Schemes and Article 25(2)(b) that permits the levying of duties and other charges upon the goods benefiting from export promotion schemes in the event that they are sold within the Partner States.<sup>68</sup> These two provisions according to the Court relate to the promotion of an export-oriented economy as stipulated in Article 7(1)(c) of the Treaty.<sup>69</sup> The Court in this instance found that since both parties to the dispute did not avail any evidence in proof, rebuttal or clarification of the seeming avenues under which the imposition of ‘qualified’ duties may be permissible under the EAC Community regime, the 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.<sup>70</sup> The Court thus ruled that the Applicant did not meet the onus of proof for the violation of these provisions.<sup>71</sup>

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63 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 74, East African Court of Justice [EACJ] (Mar. 26, 2019).

64 *Id.* at para. 75.

65 *Id.* at para. 74.

66 *Id.* at para. 76.

67 *Id.*

68 *Id.* at paras. 77–78.

69 *Id.* at para. 77.

70 *Id.* at para. 78.

71 *Id.* at para. 79.

### *ii. Commentary*

Since Article 7(1)(c) of the EAC Treaty sets out a principle for establishment in the EAC export-oriented economies and free movement of goods, persons, labour, services, capital, and information technology, and the BAT case deals specifically with differential internal taxation by one Partner State, it is easy to see how the court would have dismissed this claim without entering the issue of the Principle of Variable Geometry and Asymmetry. The Court would thus have avoided this claim much more easily than it did in this instance. This view could also easily apply to the claim on Article 80(1)(f) which is a harmonization obligation for the establishment of a single investment area. Since these issues were not well pleaded and the facts that could help the Court rule on them were not presented, it would have been better for the Court to stir away from making the *obiter* observation that it hopes these provisions are actually being implemented.

### *iii. Violation of Article 75(1), (4) and of the EAC Treaty*

Article 75(1) provides that the Partner States agree to establish a Customs Union, details of which shall be contained in a Customs Union Protocol which shall include the elimination of internal tariffs and other charges of equivalent effect and the elimination of tariff barriers. Article 75(4) provides that effective on 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 for the relevant institutions of the community.<sup>72</sup>

The Court begun here by stating that the primary obligation upon the Partner States in Article 75(1)(b) and (c) is 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.<sup>73</sup> The Court took judicial notice that a Customs Union Protocol was concluded by the Partner States in 2004 and thus the Court was hard pressed to find a violation of this primary obligation.<sup>74</sup> The Court for this reason disallowed this claim. On the claim of Article 75(4) the Respondent argued that this provision places an obligation upon the Partner States that is conditional upon the Council of Ministers designating a date of which such obligation accrues.<sup>75</sup>

<sup>72</sup> *Id.* at para. 80.

<sup>73</sup> *Id.* at para. 81.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at para. 82.

The Court found that no evidence was furnished by the Applicant to demonstrate that the Council of Ministers have ever designated such a date of accrual.<sup>76</sup> Thus, the Applicant had not discharged its burden of proof and the claim was dismissed.<sup>77</sup>

#### *iv. Commentary*

Article 75(4) of EAC Treaty provides that “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.” Despite the fact that the date for the accrual of this provision has not been made, it is unclear whether the taxes referenced here include internal taxes. It is clear that such taxes include tariffs and duties at the border. The EAC Customs Union requires elimination of tariffs and other non-tariff measures at the border but not the elimination of internal taxes. This provision seems to require that Partner States refrain from imposition of new (internal) taxes or increase existing ones in respect to products traded within the Community. It is quite unlikely that the Partner States would limit their internal taxation flexibility *de facto* despite the fact that the EAC Establishment sets out this requirement. This might explain why the Council of Ministers has not set up such a date.

#### **H. Violation of the National Treatment Obligation in the EAC Treaty and the EAC Customs Union Protocol**

The Applicant on violation of the national treatment obligation argued that the impugned Act was indicative of Respondent State’s perceived disregard for its obligation under Article 75(6) of the EAC Treaty to refrain from enactment of laws or administrative measures that have the effect of discrimination against like products from within the EAC.<sup>78</sup> Additionally, Article 15(1) of the EAC Custom Union Protocol provides that 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; or (b) impose on each other’s products any internal taxation of such nature as to afford indirect protection to other products.” Additionally, Article 15(2) adds that “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,

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

directly or indirectly, on similar domestic products.” The Court noted that Article 15(1)(a) of the Protocol is identical to Article 75(6) of the Treaty save that the Protocol is couched in conclusively mandatory terms.<sup>79</sup> A reading of these provisions shows that in both, the word ‘shall’ is used to impose the obligation on the Partner State and therefore both provisions are actually mandatory if the word ‘shall’ is interpreted as setting a mandatory obligation.

The Court noted that both legal provisions explicitly prohibit the enactment of legislation that has the effect of discriminating against like products originating from other Partner States.<sup>80</sup> The Court construed Article 75(6) of the Treaty and 15(1)(a) of the Customs Union Protocol to delegitimize discrimination not so much attendant on the process of promulgating a law *per se*, but that in respect of the substance and content of the law is ultimately formulated.<sup>81</sup> The Court then dismissed the Applicant’s claim on the challenge on the law-making process using the case of *Mangin v Inland Revenue Commissioner*.<sup>82</sup> The reasoning here, according to the Court, is that this case involved the interpretation and application of tax laws to deduce the intention of the law-makers as the incidence of a tax obligation while this case involves the interpretation of treaties which should be done in accordance with the VCLT.<sup>83</sup> Despite this correct, conclusion and finding, the Court stated that for completion it will evaluate the Applicant’s argument on the Hansard and thus does not fault the Applicant for citing this as indicative of the Houses’ position on the issue of differential tax rates.<sup>84</sup> The Court found that the predisposition of the House sufficiently demonstrates the intent of the Honorable members of Parliament to discriminate against the Applicant’s cigarettes.<sup>85</sup>

The Court does not stop there. It admonishes the Ugandan Parliament for being oblivious of Uganda’s treaty obligations or the dictates of Community Law as appositely encapsulated in *Burundi Journalists Union v The Attorney General of Burundi*, EACJ Ref No. 7 of 2013.<sup>86</sup> Despite this, the Court found that this parliamentary intention did not provide evidence that the impugned law introduced differential treatment in the

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79 *Id.* at para. 84

80 *Id.*

81 *Id.* at para. 85.

82 *Id.*

83 *Id.*

84 *Id.* at para. 86.

85 *Id.* at para. 87.

86 *Id.*

taxation of domestic and imported goods contrary to Article 75(6).<sup>87</sup> This reasoning is based on the fact that a plain reading of section 2 of the impugned law does not establish for a fact that cigarettes from any of the Partner States would be classified as imported goods so as to impute discrimination.<sup>88</sup> The court noted that it is only after the definition of imported goods is read within the ambit of Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol that the discrimination becomes evident.<sup>89</sup> On a plain reading, the law is neither discriminatory nor unlawful.<sup>90</sup> The court emphasized this position using the literal interpretation of tax statutes from *Mangin v Inland Revenue Commissioner* which they had previously dismissed since it was not the statute they were interpreting but the Treaty.<sup>91</sup> It is on the conclusion that the impugned law does not have a provision that succinctly demarcates goods from Partner States as imported goods that the court found that Article 75(6) or Article 15(1)(a) of the Customs Union had not been violated.<sup>92</sup>

## I. Commentary

It is important to unbundle Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol in order to understand the Court's position here. These two provisions are general national treatment obligations requiring Partner States to refrain from enacting legislation or applying any administrative measures which directly or indirectly discriminate against the same or like products of other Partner States. For purposes of a rigorous interpretation based on Article 31 of the VCLT, these provisions cover any enacted legislation or applied administrative measures, which directly (on face value) or indirectly (neutral but with disparate effects) discriminate against same or like products of other Partner States. It seems as if the legislation covered under these provisions does not distinguish between internal regulatory legislation and internal taxation legislation like Article III of the General Agreement on Tariffs and Trade (GATT) 1994 does. The implication here is that tax legislation can be easily covered under Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol. On the second part of direct versus indirect discrimination, the Court focused on the process of enactment versus the substantive provision of the impugned Act instead of focusing on the substantive provision of the Act and how it

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87 *Id.* at para. 88.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at para. 89.

92 *Id.*

is applied. By focusing on the process of enactment, they reach the conclusion that the intention of the parties does not matter— rather, the substantive provision of the impugned Act is the focus. However, they ought to have gone further to question the “design, architecture, revealing structure, operation, and application”<sup>93</sup> of the Act as required by applying the administrative measures standard. Looking at the Act more wholesomely and not rigidly as a tax statute and using the *Mangin v Inland Revenue Commissioner* standard of construing tax legislation literally, the Court might have reached a different conclusion on this provision. It is actually curious that the Court rejects the use of *Mangin v Inland Revenue Commissioner* in another instance and uses the same standard in this analysis. Thus, the manner of application and operation of the statute despite being neutral substantively would have easily constituted indirect discrimination in this case.

#### **J. Violation of Article 15(2) of Customs Union Protocol: National treatment in Internal Taxation**

Moving on to Article 15(1) (b) & (2) of the EAC Custom Union Protocol, the Court begun by drawing instruction from World Trade Organization (WTO) Law. The Court stated that “Article 1” of GATT provides the most favoured nation (MFN) obligation while “Article 3” provides for the National Treatment obligation.<sup>94</sup> Here, by the Court referring to GATT provisions in Arabic numerals, we see an uncharacteristic application by the Court of the normal practice and usages in international trade law since the GATT 1994 text itself and WTO law and practice, these provisions are normally referred to as Roman numerals.<sup>95</sup> The Court correctly notes that it is the National Treatment obligation that is in question in the case.<sup>96</sup> The Court then cited the Appellate Body decision in *Brazil – Certain Measures concerning Taxation and Charges*, AB report, 2018, p. 29 on the interpretation of Article III:2 first sentence.<sup>97</sup> The Court thus deduced a two-part test from this case: whether the taxed imported and domestic products are ‘like’ products; and whether the taxes applied to the imported

93 World Trade Organization, Report of the Appellate Body: United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, para. 182 (Apr. 4, 2012) (In analyzing discrimination for purposes of the TBT Agreement, a panel must “carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue.”).

94 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 90, East African Court of Justice [EACJ] (Mar. 26, 2019).

95 This might indicate the little exposure that the Court has had with International Trade Law.

96 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 90, East African Court of Justice [EACJ] (Mar. 26, 2019).

97 *Id.* at para. 91.

products are ‘in excess’ of those applied to like domestic products.<sup>98</sup> The Court then found that Article 15(1)(a) of the Customs Union Protocol and Article 75(6) are acutely similar in form and substance to the provisions of Article III:2 of GATT.<sup>99</sup> Citing *Brazil—Certain Measures concerning Taxation and Charges*, the Court found that the Applicant is 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 vis-à-vis the tax rates applicable to like cigarettes that are locally manufactured in Uganda.<sup>100</sup> The court found evidence that there is actual additional charges in evidence on the same batch of cigarettes.<sup>101</sup> The court does this in lieu of the likeness test analysis. On the ‘in excess of’ test, the court found a disparity in evidence of excess taxation applicable to like cigarettes that are locally manufactured in Uganda.<sup>102</sup>

It is at this point that the Court pointed out without any analysis that the re-classification of the Applicant’s cigarettes as imported was done in absolute oblivion and in disregard for the provisions of Article 15(2) of the Customs Union Protocol.<sup>103</sup> The Court noted correctly that this provision 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.<sup>104</sup> The Court reached the interesting conclusion that the letter of the impugned law *per se* did not impute an obligation upon URA to apply the differential tax rate to the Applicant’s cigarettes.<sup>105</sup> Rather in complete disregard to Community Law, URA seemingly misconstrued its own Excise Duty Act and VAT Act to suggest that goods from EAC Partner States would correspond to the definition of imports.<sup>106</sup> To that extent, the Court found that the URA misapplied Ugandan tax laws, stepped out of its 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.<sup>107</sup> It is only after calling URA’s action an administrative measure that the court found a violation of Article 75(6) of the Treaty

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98 *Id.* at para. 92.

99 *Id.* at para. 93.

100 *Id.*

101 *Id.* at paras. 95–96.

102 *Id.* at para. 97.

103 *Id.* at para. 98.

104 *Id.* at para. 98.

105 *Id.*

106 *Id.*

107 *Id.*

and Article 15(1)(a) of the Customs Union Protocol.<sup>108</sup> The Court then also found that the Respondent's interpretation and implementation of section 2 of Excise Duty (Amendment) Act No. 11 of 2017 violates Article 15(2) of the Custom Union Protocol and was flawed and unlawful.

### **K. Commentary**

The Court here makes a number of errors in interpreting the EAC Treaty, the EAC Customs Union Protocol on one hand and the provisions of GATT Article III on the other. The first acute error is to find that: "Article 15(1)(a) of the Customs Union Protocol and Article 75(6) are acutely similar in form and substance to the provisions of "Article 3.2" of GATT."<sup>109</sup> This is a misreading of the form and substance of Article III:2 of GATT. First, in terms of form, unlike Article III:2 of GATT, both Article 75(6) of the EAC Treaty and Article 15(1)(a) do not have an overall anti-protectionism provision similar to Article III:1 of GATT.<sup>110</sup> Secondly, unlike GATT III:2 which is divided into two separate sentences which have legal implications,<sup>111</sup> Article 75(6) of the EAC Treaty and Article 15(1)(a) are all in a single sentence. In terms of substance, while Article III:2 specifically refers to internal taxation, both Article 75(6) of the EAC Treaty and Article 15(1)(a) do not refer to internal taxation. It is in fact Article 15(1)(b) and (2) of the EAC Customs Union Protocol that refer to internal taxation that would have been closer substantively to Article III:2 of GATT. It is thus not possible to distill the two-pronged test the Court distills from the provisions of Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol but it is possible to do the same from the provisions of Article 15(1)(b) and (2) of the EAC Customs Union Protocol. Since the Court mixes up these provisions and equates them to Article III:2 of GATT, it found a violation of Article 75(6) of the EAC Treaty and Article 15(1)(a) of the EAC Customs Union Protocol in paragraph 99 of the judgment yet they had found non-violation of the same provisions in paragraph

108 *Id.* at para. 99.

109 *Id.* at para. 93.

110 The General Agreement on Tariffs and Trade, Article III:1 (1947) [hereinafter GATT 1947] (The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production).

111 See Robert Hudec, "Like product": *The Difference in meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101–23 (THOMAS COTTIER & PETROS MAVROIDIS EDs., UNIVERSITY OF MICHIGAN PRESS, 2000).



89 of the judgement. Despite this, the Court also found a violation of Article 15(2) of the Customs Union Protocol in paragraph 99. Curiously, Article 15(1)(b) of the Customs Union Protocol does not feature in the Court's analysis even though it has some similarity to anti-protectionism provision in Article III:1 of GATT and specifically mentions internal taxation which is at the core of the claim in this case.

The interpretation confusion above is further compounded by the Court's manifestly erroneous interpretation of *de jure* versus *de facto* discrimination. The Court in paragraph 93 found as follows: "The Applicant is 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 vis-à-vis the tax rates applicable to like cigarettes that are locally manufactured in Uganda." This is erroneous and in fact what the Court refers to as *de jure* discrimination is *de facto* discrimination. *De jure* discrimination for both MFN and national treatment purposes is said to be discrimination in law, that is when it is clear from reading the text of the law, regulation or policy that it treats products from different [Partner States] differently, while *de facto* discrimination or 'in fact' discrimination occurs when reviewing all facts relating to the application of the measure, it becomes clear that it treats, in practice or in fact, the product from one [Partner State] differently.<sup>112</sup> It is therefore possible to say that direct discrimination equates to *de jure* discrimination while indirect discrimination equates to *de facto* discrimination. Read this way, Article 15(1)(b) and (2) of the Customs Union Protocol would be *lex specialis* law for any national treatment that involves internal taxation. This would thus leave Article 15(1)(a) of the Customs Union Protocol and Article 75(6) of the EAC Treaty to cover any other form of internal regulations more in the style of Article III:4 of GATT 1994. It is possible that if the litigants and judges in the EACJ's First Instance Division in this case were well attuned to the WTO *acquis* and practice, they would have been more rigorous and careful in their analysis of these provisions. This would have easily avoided a conclusion that has internal inconsistencies on the law even though the outcome might have still been similar. As a first case of international trade law and based on the errors above, it might be a prudent recommendation for the judges in the EACJ First Instance Division to go through some substantive training in WTO law.

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112 PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS* (Cambridge University Press, 4thED. 2017).

#### **L. Violation and Infringement of Article 4, 5, 6 and 32 of the Common Market Protocol**

On claim in relation to the Common Market Protocol, the Applicant argued that Article 4 (on widening and deepening cooperation among Partner States and providing the specific objectives of the common market); Article 5 (on elimination of tariff, non-tariff and technical barriers to trade, harmonization and mutual recognition of standards to implement a common trade policy for the community); Article 6 (on the free movement of goods in the Community being governed by the Customs Law of the Community as specified in Article 39 of the Customs Union Protocol); and Article 32 (the Partner States undertaking 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) were violated.<sup>113</sup> On the claim in Article 32, the Respondent counteracted by arguing that the invoked provision provides for progressive harmonization of tax policies and laws and the removal of distortions, an undertaking that is ‘work in progress’ and ‘cannot happen overnight.’<sup>114</sup> The Court found that the Applicant had not presented any evidence on the record to show the violation of the progressive realization obligation for tax harmonization and the elimination of tariffs and non-tariff barriers to trade in Article 4(1), (2), (3), and Article 36 of the Common Market Protocol.<sup>115</sup>

The Court also dismissed the Applicant’s claims of violation of Article 5(2)(a) on elimination of tariffs and non-tariff and technical barriers since the Applicant did not present any proof that the cooperation between Kenya and Uganda required in this provision had been breached.<sup>116</sup> This finding is premised on the view that this obligation is preconditioned on cooperation between Partner States as prescribed in Articles 2(4) and 5(1) of the Protocol.<sup>117</sup> On the claim in Article 6, which the Court views as the sum collection of the laws applicable to the free movement of goods, the Court found that URA’s interpretation and application of Ugandan Tax laws to the exclusion of the Respondent State’s obligation under Community Law is misconceived and not legally tenable.<sup>118</sup> The Court reiterated Article 27 of the VCLT that a State’s domestic law cannot be invoked as a justification for the failure to perform a treaty

113 *Id.* at para. 101.

114 *Id.* at para. 102.

115 *Id.* at para. 103.

116 *Id.* at para. 104.

117 *Id.*

118 *Id.* at para. 106.

obligation.<sup>119</sup> The Court cited the 2014 World Bank/EAC Secretariat Scorecard to show how institutional barricades are a problem to the EAC integration process.<sup>120</sup> Additionally, the Court points out to Uganda's domestication of the Protocol in its section 3 of the East African Community Act No. 13 of 2002.<sup>121</sup> Since Article 39 of the Custom Union Protocol lists the Community law by dint of Article 6(1) of the Common Market Protocol, it means that any violation of the EAC Treaty, The Common Market Protocol and its Annexes, Regulations and directives made by the Council, Applicable decisions of the Court, Acts of the Community enacted by the Legislative Assembly, and relevant principles of international law would cause of violation of Article 6(1).<sup>122</sup>

### **M. Commentary**

This is another problematic conclusion from the Court. Article 6 seems to be a provision pointing to the sources of EAC Customs Territory Law. Saying that since the Customs Union Protocol and the Treaty have been violated then this provision is violated is circular reasoning since then every time the EAC Treaty is violated then this provision stands violated. It is similar to saying that if a treaty under Article 38 of the International Court of Justice (ICJ) statute is violated, then Article 38 is also violated.<sup>123</sup>

### **N. Commentary on the Broader “Big Tobacco” Implications of the BAT Case**

The BAT case in the EACJ heralds the commencement of tobacco litigation in a sub-regional African international court. The so called “Big tobacco” companies that included BAT and Phillip Morris International (PMI) still see Africa as an important frontier for generating transnational capital-based profits.<sup>124</sup> Sadly, “tobacco use remains the most preventable cause of death worldwide and is responsible for the deaths of approximately half of its long-term users.”<sup>125</sup> Additionally, according to the American

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at para. 110.

123 Statute of the International Court of Justice, art. 38, <http://www.icj-cij.org/en/statute> (“The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part.”).

124 Rachel Rose Bath, *Tobacco industry accused of ‘intimidation and interference’ in Kenya*, THE GUARDIAN (MAR. 2, 2015), <https://web.archive.org/web/20190325154944/https://www.theguardian.com/sustainable-business/2015/mar/02/tobacco-industry-accused-intimidation-interference-kenya>.

125 Evan Blecher & Hana Ross, *Tobacco Use in Africa: Tobacco Control through Prevention*, AMERICAN CANCER SOCIETY (2013), <https://pdfs.semanticscholar.org/cdca/3abed84b9cd3ae5cbb8ede->

Cancer Society, the inequalities in tobacco use and tobacco-attributable death in the developed and developing world are likely to get even worse.<sup>126</sup> Between 2002 and 2030, tobacco-attributable deaths are projected to decline by 9% in high income countries (HICs) but are expected to double from 3.4 million to 6.8 million in Low and Middle Income Countries (LMICs).<sup>127</sup> In Kenya for example, BAT controls 70% of the tobacco market in a country with the highest recorded smoking prevalence at 10% of 13 to 15 year old's in sub-Saharan Africa.<sup>128</sup>

Consequently, there has been a number of cases in African domestic courts relating to tobacco regulation and challenging tobacco use. In Uganda, in *BAT Uganda Ltd v. Attorney General, et al*<sup>129</sup> the “BAT filed a lawsuit in the Constitutional Court of Uganda challenging the constitutionality of several key provisions in the Tobacco Control Act, 2015, including, but not limited to, the law’s smoking ban, the 65% pictorial health warnings, the prohibition on the sale of electronic cigarettes, the prohibition on privileges and incentives of the tobacco industry, and other WHO FCTC Article 5.3 implementing measures. The Court dismissed the petition in its entirety and awarded costs to the government. The Court found that the Petition appeared to have been misconceived or brought in bad faith as part of a global strategy to fight tobacco control legislation.”<sup>130</sup>

In Kenya, the litigation begun in 2016 when in *British American Tobacco Kenya Ltd. v. Ministry of Health*,<sup>131</sup> BAT claimed that Kenya’s Tobacco Control Regulations were unconstitutional. The court ruled against BAT finding that the regulation that required the following: a 2% annual contribution by the tobacco industry to help fund tobacco control education, research, and cessation; picture health warnings; ingredient disclosure; smoke-free environments in streets, walkways, verandas adjacent

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126 *Id.*

127 *Id.*

128 Rachel Rose Bath, *Tobacco industry accused of ‘intimidation and interference’ in Kenya*, THE GUARDIAN (MAR. 2, 2015), <https://web.archive.org/web/20190325154944/https://www.theguardian.com/sustainable-business/2015/mar/02/tobacco-industry-accused-intimidation-interference-kenya> (Kenya’s Tobacco Control Act 2007 took more than 13 years to be passed, largely due to what has been labelled by the Kenya Ministry of Public Health and Sanitation as “intimidation” and “interference” from the tobacco industry).

129 *BAT Uganda Ltd v. Attorney General et al.*, Petition No. 46 of 2016, Constitutional Court of Uganda (May 28, 2019).

130 *See Litigation by Country: Uganda*, TOBACCO CONTROL LAWS, <https://www.tobaccocontrollaws.org/litigation/decisions/ug-20190528-bat-uganda-ltd-v.-attorney-gen>

131 *British American Tobacco Kenya Ltd. v. Ministry of Health*, Petition No. 143 of 2015, High Court of Kenya (Mar. 24, 2016).

to public places; disclosure of annual tobacco sales and other industry disclosures; and regulations limiting interaction between the tobacco industry and public health officials were constitutional.<sup>132</sup> BAT appealed this ruling to the Court of Appeal in 2017 which upheld the High Court ruling. BAT was not satisfied and in 2017 decided to appeal the Court of Appeal ruling to the Supreme Court of Kenya which is the apex court in Kenya. The Supreme Court ruled in 2019 that the tobacco's company appeal had no merit, dismissed the petition in its entirety and affirmed the decision of the Court of Appeal.<sup>133</sup>

In South Africa, the high court ruled amidst (at the time of writing) the ongoing COVID-19 pandemic that the governments ban of sale of all tobacco sales was constitutional.<sup>134</sup> The South African government included the ban of the sale of tobacco on regulations designed to curb the spread of COVID-19 in March 2020. Furthermore, there have been many threats to fight tobacco regulations in domestic courts in other African countries like Namibia, Togo, Gabon, Democratic Republic of Congo, and South Africa.<sup>135</sup>

International Courts have also received many cases instituted by the “Big Tobacco.”<sup>136</sup> Sergio Puig has typologized these claims by tobacco companies into four categories: (1) property rights claims (including intellectual property); (2) authority to regulate claims; (3) discrimination claims; and (4) unnecessary obstacles to trade claims.<sup>137</sup> For the property claims, he traces the fairly uncontroversial claims that involved expropriations under the famous Iran-US Claims Tribunal and the less

132 *Id.* (The court struck down a few minor elements of the regulations, ruling that (1) the tobacco industry is not required to provide evidence of its market share to the government; and (2) that penalties for violation cannot exceed the maximums authorized by law.)

133 *British American Tobacco Kenya, PLC v. Ministry of Health, et al.*, Petition No. 5 of 2017, Supreme Court of Kenya (2019).

134 *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 246 (26 June 2020), <https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market>.

135 Sarah Boseley, *Threats, Bullying, Lawsuits: Tobacco Industry's Dirty War for the African Market*, THE GUARDIAN (July 12, 2017), <https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market>.

136 Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARVARD J. INT'L L. 383 (2016) (Listing ten different international courts and tribunals that have dealt with tobacco litigation: the European Court of Justice (“ECJ”), ISDS arbitration tribunals under the International Centre for Settlement of Investment Disputes (“ICSID”) and the Permanent Court of Arbitration (“PCA”), the Court of Justice of the European Free Trade Association (“EFTA”), the Eritrea-Ethiopia and the Iran- United States Claims Tribunals, the Court of Justice of the Andean Community (Tribunal de Justicia de la Comunidad Andina, or “TJCA”) as well as the WTO, tribunals under its predecessor the General Agreement on Tariffs and Trade (“GATT”), and the Southern Common Market (Mercado Común del Sur, or “MERCOSUR”).

137 *Id.*

known Eritrea-Ethiopia Claims Commission (EECC).<sup>138</sup> More controversial cases have been adjudicated under Investor-State Dispute Settlement (ISDS) under the North-American Free Trade Agreement (NAFTA) in *Marvin Feldman v. Mexico*, where US investor lost an expropriation claim against Mexico's attempts to halt exports by resellers that deprived the government of tax revenue (gray market exports).<sup>139</sup> The now controversial Intellectual Property (IP) related claims brought by Phillip Morris (PM) which made trademark violation claims in relation to the use of brands and other symbols with respect to tobacco products against Uruguay's and Australia's<sup>140</sup> packaging and labeling regulations. Australia has prevailed in both the ISDS case and in the WTO case that had been instituted by Cuba, Indonesia, Honduras, and Dominican Republic.<sup>141</sup> Thus both the WTO panels and Appellate Body have confirmed that plain packaging is "apt to, and does, contribute" to Australia's objective of improving public health by reducing tobacco consumption and exposure to tobacco smoke.<sup>142</sup>

On the second types of claims that relate to claims over authority to regulate, the Big Tobacco companies have challenged the authority over tobacco products or related services including the marketing of cigarettes.<sup>143</sup> "These claims have only occurred in nations that have delegated power to a supranational authority to seek deeper policy coordination or in the context of political integration."<sup>144</sup> This second category covers a few claims which mainly come from the EU. The third type of claims relating to discrimination, disparate effects, discriminatory intent, or violation of due process that provide an advantage to tobacco products or tobacco producers cover a large chunk of tobacco litigation. The EACJ BAT Case falls squarely within this category since these claims are covered under Non-discrimination provisions in free trade agreements (FTAs). The cases can also be brought under the fair and equitable treatment provisions in bilateral investment treaties (BITs) in the case of ISDS.

138 See SEAN D. MURPHY, WON KIDANE & THOMAS R. SNIDER, *LITIGATING WAR: MASS CIVIL INJURY AND THE ERITREA-ETHIOPIA CLAIMS COMMISSION* (Oxford University Press, 2013).

139 *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, (Dec. 16, 2002).

140 *Philip Morris Asia v. the Commonwealth of Australia*, Notice of Arbitration (Nov. 21, 2011); World Trade Organization, Reports of the Appellate Body: Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/AB/R; WT/DS441/AB/R (June 9, 2020).

141 World Trade Organization, Reports of the Appellate Body: Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/AB/R; WT/DS441/AB/R (June 9, 2020).

142 *Id.*

143 Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARVARD J. INT'L L. 383 (2016).

144 *Id.*

Even though governments can make arguments on the exceptions in some of these agreements that involve the protection of human, animal, or plant, life or health,<sup>145</sup> this is only possible after appropriate balancing on proportionality and effectiveness tests are passed.<sup>146</sup> In the EACJ BAT Case, there was very little discussion on the tensions created between trade liberalization and the public policy goal of protection of health despite Uganda's feeble attempt to invoke the World Health Organization Framework Convention on Tobacco Control (WHO FCTC).

In response to the first issue in the BAT Case, The Respondent State referred to its being a signatory to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC).<sup>147</sup> Article 6 of the WHO FCTC recognizes that price and tax measures are effective and important means of reducing Tobacco consumption. Since the Guidelines under Article 6 of the WHO FCTC recognize the sovereign right of (states) parties to determine their own tax policies, but also encourage such taxes and prices as would inhibit tobacco consumption for health reasons, the Respondent State's increase of the excise duty on both locally and imported cigarettes to protect young, vulnerable groups from consumption.<sup>148</sup> Additionally the Respondent argued that the law helped tackle smuggling as per Article 15 of the WHO FCTC. Responding to the discrimination of section 2 of Excise Duty (Amendment) Act No. 11 of 2017, the Respondent argued that the Tax law should be considered on an 'as is' basis and there was nothing in the impugned Act to suggest discrimination as alleged.<sup>149</sup> The Applicant responded to this argument by arguing 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.<sup>150</sup>

The Court dismissed the response by the Respondent in relation to Article 6, Article 15 and the Guidelines to Article 6 of the WHO FCTC by recognizing that Article

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145 General Agreement on Tariffs and Trade, art. XX, 61 Stat. A-11, Oct. 30, 1947, 55 U.N.T.S. 194; EAC Customs Union Protocol, art. 22 (a Partner State may, after giving notice to the Secretary general of her intention to do so, introduce or continue to execute restriction or prohibitions affecting: the protection of human life, the environment and natural resources, public safety, public health or public morality; and the protection of animals and plants).

146 Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARVARD J. INT'L L. 383 (2016).

147 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 23, East African Court of Justice [EACJ] (Mar. 26, 2019).

148 *Id.* at para. 23.

149 *Mangin v Inland Revenue Commissioner*, 1 ALL ER 179 (1971), <https://www.casemine.com/judgement/uk/5b2897cf2c94e06b9e19b876>.

150 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, para. 26, East African Court of Justice [EACJ] (Mar. 26, 2019).

15 of the WHO FCTC acknowledges a nation states' sovereign right to develop and implement national laws in addition to sub-regional, regional, or global agreements to which they are party.<sup>151</sup> The Court concluded that since the EAC Treaty is undoubtedly one such Treaty, the obligations accruing from it must be observed by each EAC Partner State.<sup>152</sup>

The Court here interestingly ignores BAT's argument that Uganda was using the WHO FCTC as a fig leaf since it was not treating other Ugandan tobacco produces similarly. The argument sounds similar to the GATT Article XX *chapeau* argument that the state was using the measure [impugned Act or its implementation] as an arbitrary or unjustifiable discrimination between countries where similar conditions prevail or disguised restriction for international trade.<sup>153</sup> Instead the Court uses a general carve out provision from the WHO FCTC itself to dismiss Uganda's defense. This is a weaker route for dismissing Uganda's public health claim because it means that trade liberalization goals will always or easily prevail over public health concerns like those present in the WHO FCTC. It is easy to see that the Court does not take the WHO FCTC defenses seriously, but it is also possible that Uganda did not plead them as vigorously. Even if they had, the case shows in the Ugandan Hansard that some legislators in Uganda were not happy that BAT Uganda had moved its manufacturing from Uganda to Kenya.<sup>154</sup> So there is a high probability that they would have lost the case on disguised protectionism.

## O. Conclusion

The BAT Case fits the narrative of the aggressive and litigious "Big Tobacco" companies global strategy of resistance through litigation of any form of government regulations related to tobacco use and consumption. BAT has triggered the EACJ's trade jurisdiction and the EACJ Court of First Instance has rendered its inaugural trade case. This commentary has delved deep into the various issues addressed in the case and made a commentary of some doctrines that the EACJ had already confirmed previously and some that are new. The broad jurisdiction of the Court is not new since the human rights cases in the court have already firmly established this trend. It is the first time,

151 *Id.* at paras. 45–47.

152 *Id.* at paras. 45, 46, & 47.

153 General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

154 *British American Tobacco (U) LTD v The Attorney General of Uganda*, Reference No. 7 of 2017, paras. 58–59, East African Court of Justice [EACJ] (Mar. 26, 2019).



however, that the Court addresses the trade liberalization aspects of the EAC Customs Union Protocol and the EAC Common Market Protocol and makes a specific ruling on the national treatment obligation in the EAC Treaty and the EAC Customs Union Protocol. The judges in a number of instances seemed to struggle with international trade law concepts and made erroneous interpretations and applications stated in some instances. It is important to note that these errors would not have changed the outcome of this case, but for purposes of legal rigor and accuracy, the judges and potential litigants in the court would benefit from more training in the law, substance and practice of international trade. The judges' writing on and interpretation of WTO law specifically and international trade law generally comes out as insufficient and in need of concerted capacity building for future purposes. This is important because at the time of writing, a Tanzanian glass manufacturer Kioo Company Limited has sued the Kenya Revenue Authority (KRA) in the EACJ over the introduction of a 25% excise duty on imported glass from Tanzania.<sup>155</sup> It therefore seems that the "Big Tobacco" industry has now emboldened another industry to present another case that bears very close similarities to the BAT Case. If this is an indication of future trajectory, then the Big Tobacco industry will see the regional economic courts as an additional avenue to continue with their relentless litigation on tobacco regulation. Other industries and business actors will also now see the BAT win as an indicator that the court will play an important role in dealing with any EAC Partner States violation of the trade liberalization obligations of the EAC Community law. The EACJ therefore needs to be prepared to apply its broad jurisdiction in a way that shows the judges and potential litigants have a real appreciation, understanding and commitment to international trade law that is both persuasive, balanced, and relevant for the EAC Community. If the BAT Case is anything to go by, one of the biggest lessons we draw from the case is that the EACJ, at least the First Instance Division, is not yet fully prepared to effectively adjudicate on international trade/commercial law cases.

## II. COMMENTARY ON *GETMA INTERNATIONAL V. REPUBLIC OF GUINEA* (I) CCJA CASE NO. 001/2011/ARB (OHADA COMMON COURT OF JUSTICE AND ARBITRATION'S (OHADA CCJA))

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<sup>155</sup> Kioo Limited v Attorney General of the Republic of Kenya, Reference No. 13 of 2020, East African Court of Justice [EACJ]; See Luke Anami, *Tanzanian Glass Company takes KRA to Court over a 25% Import Tax*, THE EAST AFRICAN (June 7, 2020), <https://www.theeastafrican.co.ke/business/Tanzanian-glass-company-takes-KRA-to-court/2560-5572644-g0engkz/index.html>.

## A. Introduction

The OHADA Common Court of Justice and Arbitration (OHADA CCJA) like other African international courts is neither well known nor its jurisprudence well appreciated by many scholars both in the global South<sup>156</sup> and in the global North.<sup>157</sup> Embedded in a supranational legal system of an innovative kind for Africa, the OHADA CCJA “functions as a supranational Supreme (or Cassation) court tasked with ensuring the common interpretation and application of OHADA laws.”<sup>158</sup> For this reason, it is important to offer a general introduction of this court which has been one of the most active international courts in Africa having heard over 500 cases since its formation in 1998. The case under review, *GETMA International v. Republic of Guinea* (I) CCJA CASE NO. 001/2011/ARB (GETMA case) is one of the most publicized and controversial decisions of the OHADA CCJA that emanates from both an OHADA administered arbitral tribunal and the court’s supervisory jurisdiction over arbitration. The notoriety of the decision is tied mainly to the actions of the arbitrators in the case and not the substantive decision itself. Additionally, the decision gained further attention after the OHADA CCJA decided to annul the OHADA administered arbitral award and a US Federal District Court in the District of Columbia refused to allow recognition and enforcement based on OHADA CCJA’s annulment. This commentary will address both the substance of the arbitral case which is an investor-state dispute settlement (ISDS) case and its tumultuous aftermath. First, a general introduction to the OHADA CCJA.

156 For a notable exception, see James T. Gathii, *The Under-Appreciated Jurisprudence of African Regional Trade Judiciaries*, 12 OR. REV. INT’L L. 245 (2010) (showing how African Regional Trade Agreements (RTAs) judiciaries have received little acknowledgement in the academic literature).

157 See Robert Howse & H el ene Ruiz-Fabri et al., *THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS* (Cambridge, 2018) (Lacking a chapter on OHADA but including WAEMU and COMESA Court of Justice). For notable exceptions, see KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 335–43 (Princeton Univ. Press, 2014) (covering the OHADA CCJA but stating that to her knowledge arbitration mandate of the OHADA CCJA is not used); Claire Moore Dickerson, *OHADA Common court of Justice and Arbitration: Its Authority in the formal and Informal Economy*, in *International Court Authority* (Karen J. Alter, Laurence R. Helfer, Miakel Rask Madsen eds., Oxford University Press, 2018); James T. Gathii & Harrison O. Mbori, *Chapter Eight: Reference Guide to Africa’s International Courts: An Introduction*, in *The Performance of Africa’s International Courts: Using International Litigation for Political, Legal, and Social Change* (James T. Gathii ed., Oxford University Press, forthcoming 2020).

158 *20 years of OHADA Arbitration: Coming of age for Arbitration in Africa*, ASHURST (Oct. 16, 2019), <https://www.ashurst.com/en/news-and-insights/legal-updates/20-years-of-ohada-arbitration--coming-of-age-for-arbitration-in-africa/>.

Sixteen mainly francophone West Africa states signed the treaty on the Harmonization of Business Law in Africa (OHADA treaty) on 17 October 1993 in Port Louis, Mauritius.<sup>159</sup> The acronym OHADA translates to its French title, *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*. The organization currently has seventeen members after the Democratic Republic of Congo (DRC) joined in 2012.<sup>160</sup> This means that OHADA currently has seventeen member states mainly within the CFA Franc zone<sup>161</sup> and are thus largely civil law-based francophone countries.<sup>162</sup> The OHADA treaty is, however, open to membership by any State of the African Union (AU).<sup>163</sup> OHADA connects countries in both the West African Economic and Monetary Union (WAEMU), which mainly covers the West Africa CFA Franc zone and the Central African Economic, and Monetary Community (CEMAC) covering the Central African CFA Franc zone. It is the West African CFA Franc Zone that has recently announced the change of name of its currency from the CFA Franc to the Eco.<sup>164</sup> The first sixteen members revised the OHADA treaty in Quebec, Canada on 17 October 2008. One of the amendments to the OHADA treaty increased the official languages of OHADA from one, French, to four: French, English, Spanish, and Portuguese.<sup>165</sup> The OHADA treaty establishes the Organization for the Harmonization of Business Law in Africa (OHADA),<sup>166</sup> with the objective of harmonizing business law in State Parties by developing and adopting simple, modern, and common rules, adapted to their economies, setting

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159 Preamble, Treaty on the Harmonization of Business Law in Africa, ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA (Nov. 24, 2016), <http://www.ohada.com/content/newsletters/3247/jo-ohada-se-nov2016-official-translation.pdf> (The sixteen members were Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo (Brazzaville), Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, & Togo.) [hereinafter Treaty on the Harmonization in Africa of Business Law, Official Translation].

160 *OHADA History: Table of Ratifications*, OHADA, <https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique> (accessed on Feb 12, 2020).

161 These countries use the CFA franc as their currency and are former French colonies within a colonially established monetary cooperation policy created in the late 1930s.

162 All members are Francophone except Cameroon (bilingual English-French and English common law applies), Equatorial Guinea (Spanish), and Guinea-Bissau (Portuguese).

163 Article 53, Treaty on the Harmonization in Africa of Business Law, Official Translation.

164 Ange Aboa, *West Africa renames CFA Franc but keeps it pegged to Euro*, Reuters (Dec 21, 2019), [https://www.reuters.com/Article/us-ivorycoast-france-macron/west-africa-re-names-cfa-franc-but-keeps-it-pegged-to-euro-idUSKBN1YP0JR#:~:text=ABIDJAN%20\(Reuters\)%20-%20West%20Africa's,creation%20soon%20World%20War%20Two](https://www.reuters.com/Article/us-ivorycoast-france-macron/west-africa-re-names-cfa-franc-but-keeps-it-pegged-to-euro-idUSKBN1YP0JR#:~:text=ABIDJAN%20(Reuters)%20-%20West%20Africa's,creation%20soon%20World%20War%20Two).

165 *Id.* art. 42.

166 *Id.* art. 3.

up appropriate judicial procedures, and encouraging recourse to arbitration for the settlement of contractual disputes.<sup>167</sup>

The OHADA treaty establishes four organs: the Conference of Heads of State and Government, the Council of Ministers, the Common Court of Justice and Arbitration (OHADA CCJA), and the Permanent Secretariat.<sup>168</sup> The treaty also declares the headquarters or official seat of OHADA to be Yaoundé, Cameroon and that this location is transferable by the decision of the Conference of Heads of State.<sup>169</sup> The OHADA CCJA as a separate organ has its seat in Abijan, Côte d'Ivoire, though the court can rove in the territories of any of the seventeen members and in recent years has held sessions in several member states.<sup>170</sup> OHADA harmonizes business laws among its State Parties through the enactment and adoption of Uniform Acts (UAs).<sup>171</sup> It currently has nine Uniform Acts that override national legislation in areas including general commercial law, law of commercial companies and of economic interest grouping, law of sureties, law of cooperative societies, arbitration, and mediation.<sup>172</sup> The OHADA CCJA is thus established as an organ of this *de-novo* and innovative supranational regionally binding law-making system.<sup>173</sup>

The OHADA CCJA has four types of jurisdiction: interpretive and dispute settlement jurisdiction in contentious cases; advisory jurisdiction, appellate jurisdiction from national courts, and supervisory jurisdiction over OHADA administered arbitrations. First, the OHADA CCJA has the jurisdiction of verifying OHADA draft Uniform Acts (UAs) and issuing opinions to the other OHADA organs.<sup>174</sup> Second, it has advisory jurisdiction over consultations or questions presented by any State Party or the Council of Ministers on any questions within the scope of the OHADA treaty, regulations, UAs, or other decisions.<sup>175</sup> Third, the OHADA CCJA has appellate jurisdiction to receive appeals from the national appellate courts of State Parties on all matters

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167 *Id.* art. 1.

168 *Id.* art. 3.

169 *Id.* art. 3.

170 *Presentation of the CCJA*, OHADA, <https://www.ohada.org/index.php/fr/cour-commune-de-justice-et-d-arbitrage-ccja/ccja-en-bref> (accessed Jul 17, 2020).

171 *Id.* art. 4.

172 *OHADA History*, OHADA, <https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique> (accessed Feb. 12, 2020).

173 See Regis Y. Simo, *Regional Integration in Africa through Harmonization of Laws*, in REGIONAL INTEGRATION AND POLICY CHALLENGES IN AFRICA 118 (ADAM B. ELHARAIIKA, ALLAN C.K MUKUNGU & WANJIKU NYOIKE EDS., PALGRAVE MACMILLAN 2015).

174 Article 7, Treaty on the Harmonization in Africa of Business Law, Official translation.

175 *Id.*

over the application of the UAs, regulations, except those decisions administering criminal sanctions. Finally and importantly for the GETMA decision, the OHADA CCJA supervises both inter-state arbitration and investor-state OHADA administered disputes.<sup>176</sup> The OHADA CCJA can also exercise its appellate jurisdiction on decisions from national courts, which are not appealable to their national court of appeal.<sup>177</sup> The court has compulsory jurisdiction and acts as the apex judicial entity on OHADA law.

The OHADA system can administer two types of arbitrations: a OHADA CCJA administered arbitration and a Uniform Act arbitration. Under a OHADA CCJA arbitration, the CCJA operates as the administering body and is subject to OHADA CCJA Arbitration rules.<sup>178</sup> In such cases, the CCJA has a dual role where it functions both as an arbitral institution and as a supervising court.<sup>179</sup> Its role as an arbitral institution entails stipulation of the applicable procedural rules and playing an administrative role.<sup>180</sup> As a supervisory court, it has authority to hear and deal with applications to annul an award rendered under a CCJA Arbitration.<sup>181</sup> OHADA CCJA acts as an arbitration centre or institution for arbitrations invoked pursuant to an arbitration clause in a contract or by agreement. In a Uniform Act arbitration, the court can assume arbitral jurisdiction where any of the parties is domiciled or has his usual place of residence in the territory of a State Party, or where the contract is performed or will be performed wholly or partly in the territory of one or more State Parties.<sup>182</sup> It is not the OHADA CCJA itself that hears the arbitration in both instances but rather the court appoints or confirms arbitrators who then keep the court informed of the progress of the proceedings and submit the draft award to the court for approval in conformity with Article 24 of the treaty.<sup>183</sup> The court acts as an appointing authority where the parties fail to agree on a slate of arbitrators within a period of thirty days, or where the parties fail to agree on a sole arbitrator.<sup>184</sup> The treaty mandates also empowers the court to approve the arbitrators the parties choose.<sup>185</sup> The court selects arbitrators from a list of arbitrators updated annually and also finally decides any

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176 Articles 2 & 3, OHADA Uniform Act on Arbitration (2017).

177 *Id.*

178 Kwadwo Sarkodie & Joseph Otoo, *GETMA v Republic of Guinea – implications for African arbitration*, 33 *ARBITRATION INT'L* 167, 168 (2017).

179 *Id.*

180 *Id.*

181 *Id.*

182 Article 21, Treaty on the Harmonization in Africa of Business Law, Official translation.

183 *Id.* art. 21.

184 *Id.* art. 22.

185 *Id.* art. 22.

challenge of appointment of arbitrator made by a party to a dispute.<sup>186</sup> The treaty also empowers the court to verify the form of arbitral awards before the arbitral tribunal.

## **B. Facts and Procedural History**

The parties to the dispute were GETMA International, a company registered in the Register of Commerce and Companies RCS of Paris, France as Claimant and the Republic of Guinea as the respondent.<sup>187</sup> The arbitral tribunal was made up of Juan Antonio Cremades, Spanish appointed by the Claimant, Eric Teynier, French appointed by the Respondent, and Professor Ibrahim Fadlallah, French/Lebanese appointed jointly by the co-arbitrators.<sup>188</sup> The OHADA CCJA affirmed the appointment of the three arbitrators between November 2011 and January 2012 in accordance with Articles 2 and 3 of the Arbitration Rules of the OHADA CCJA.<sup>189</sup>

The dispute emerged from the termination of a “Concession agreement for the Container Terminal of the Port of Conkary, its expansion and the development of a railway station” (the Concession Agreement) signed by the Republic of Guinea and GETMA International on September 22, 2008.<sup>190</sup> The process begun in February 13, 2008 when the council of Ministers of the Republic of Guinea decided to launch a call for bids for “work item No. 1 pertaining to the expansion of the Container Terminal.”<sup>191</sup> The call for bids was intended “exclusively for candidates with lengthy and solid experience in designing, financing, building, operating and maintaining container terminals.”<sup>192</sup> GETMA International applied for the bid and on April 7, 2008 the General Manager of the Autonomous Port of Conkary (Société Nationale du Port Autonome de Conakry) informed GETMA International that it had been short-listed.<sup>193</sup> Three other companies were also short listed: Africa Marine (group Maritime TCB), Bolloré Group, and Maersk (APM terminal).<sup>194</sup>

The bid opening was done on July 31, 2008 in the presence of the bidders, the National Commission for Major Supply Contracts represented by various ministers

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186 *Id.* art. 22.

187 GETMA International v. Republic of Guinea (I), Case No. 001/2011/ARB, para. 1 & 2, Award, Common Court of Justice and Arbitration of OHADA [CCJA] (Apr. 29, 2014).

188 *Id.* at para. 3.

189 *Id.*

190 *Id.* at para. 4.

191 *Id.* at para. 27.

192 *Id.*

193 *Id.* at para. 29.

194 *Id.*

and administrations., and two members from the Autonomous Port of Conkary.<sup>195</sup> The National Commission for Major Supply Contracts selected GETMA International as provisional successful bidder.<sup>196</sup> After negotiations between the parties, the Concession Agreement was signed on September 22, 2008.<sup>197</sup> The Concession in Article 7 stipulated that an operating company for the Container Terminal was to be set up in Guinea and controlled by GETMA International for a period of at least fifteen (15) years.<sup>198</sup>

Consequently, and even before the agreement took effect, GETMA's selection and contents of the Agreement were subject to sharp criticism in the press, reports, and internal Government.<sup>199</sup> In the political front, on December 22, 2008 the President of the Republic of Guinea Mr. Lansana Conte died and the next day the government and constitution were suspended.<sup>200</sup> A National Council for Democracy and Development was established by the members of the Army and on December 24, 2008 Captain Moussa Dadis Camara was named President.<sup>201</sup> After communication between the various government departments including the President, the Agreement was amended on November 7, 2009 adjusting the time frames stipulated in the agreement.<sup>202</sup> In December 2009, another political change occurred after an assignation attempt on Moussa Dadis Camara.<sup>203</sup> He was replaced as President by General Sekou Konate who organized presidential elections that led to the election of Professor Alpha Condé as President in December 2010.<sup>204</sup> From January 4, 2011 the new Minister of Transport summoned the concessionary with intentions of reviewing the Agreement.<sup>205</sup>

Eventually the new President of Guinea Prof Alpha Condé by decree issued on March 8, 2011 terminated the concession "for failure by the Concessionary to fulfill its obligations" with Concession being awarded to the Bolloré Group with immediate effect.<sup>206</sup> On March 18, 2011, GETMA received official notification of the termination and requisition decrees.<sup>207</sup> It sent the Minister of Public Works and Transportation

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195 *Id.*

196 *Id.* at para. 30.

197 *Id.*

198 *Id.* at paras. 31 & 40.

199 *Id.* at para. 33.

200 *Id.* at para. 34.

201 *Id.*

202 *Id.* at paras. 34–36.

203 *Id.* at para. 37.

204 *Id.*

205 *Id.*

206 *Id.* at paras. 4 & 38.

207 *Id.* at para. 5.

a notice of protection served on March 22, 2011.<sup>208</sup> GETMA attempted to reach amicable settlement and stated that this failed.<sup>209</sup> It therefore resorted to arbitration and filed its request with the OHADA CCJA on May 10, 2011. Concurrently, on September 29, 2011, GETMA International and its Group NCT NECOTRANS, filed a request for arbitration against the Republic of Guinea with International Centre for Settlement of Investment Disputes (ICSID).<sup>210</sup> By award concerning competence of the OHADA CCJA tribunal dated December 29, 2012, the arbitral tribunal decided:

1. This tribunal is not competent to rule on the effects of the termination of the Concession Agreement with regard to the four Claimants.
2. This tribunal is competent to rule on the effects of the requisition and other alleged violations of the Investment Code that do not come within the framework of the Concession Agreement with regard to the four Claimants.

Article 31 of the Concession Agreement contained the Arbitration Agreement provided as follows:

“This clause will survive the termination of the agreement.

The OHADA treaty and its subsequent uniform acts apply to this agreement. All disputes or differences arising from this agreement or its amendments will be settled amicably.

If no amicable settlement can be reached within three (3) months following the dispute, the Parties may resort to arbitration in the manner stipulated below:

- ▶ The claim, dispute or difference will be permanently and irrevocably settled through arbitration proceedings subject to the Arbitration Rules of the Common Court of Justice and Arbitration of the OHADA (“The CCJA Arbitration Rules”).
- ▶ The arbitration commission will be made up of three (3) arbitrators, one appointed by the Grantor, the second by the Concessionary and the third by mutual agreement of the two arbitrators. If a Party does not appoint an arbitrator within thirty (30) days of receipt of a request to do so from the other Party, or if the two arbitrators cannot agree on the selection of the third arbitrator within thirty (30) days (of the appointment of the last

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at para. 42.

<sup>210</sup> *Id.* at para. 43.



arbitrator to be appointed), the Common Court of Justice and Arbitration will substitute for the Parties in accordance with the CCAA arbitration rules.

- ▶ Each of the Parties will bear the cost of the arbitrator it appoints. The other costs incurred for arbitration will be shared equally by the Parties.

The arbitration will be conducted in French in Abidjan, Republic of Côte d'Ivoire.

The Granting Authority expressly waives claiming any sovereign immunity for itself and for its property in order to evade the enforcement of an award rendered by an arbitration commission set up in accordance with this clause.”<sup>211</sup>

The Claimant submitted a request for arbitration to the secretariat of the OHADA CCJA on May 10, 2011 and the Respondent despite not answering the request for arbitration, appointed Eric Teynier as its party chosen arbitrator on December 1, 2011.<sup>212</sup> The first hearing was held on March 12, 2012 in Paris.<sup>213</sup> The report of this first meeting confirmed that the arbitration is governed by the provisions of title IV of the OHADA treaty, the Rules of Procedure of the Court and its annexes and also contains the parties' claims and requests.<sup>214</sup> Additionally, the report confirmed that the seat of arbitration would be Abidjan, Republic of Côte d'Ivoire, but states that hearings and meetings may be held in any location that the arbitral tribunal deems advisable, that the language of arbitration would be French, that the law applicable to the Concession Agreement is the OHADA Treaty and its subsequent Uniform Acts (UAs), as well as regulations and agreements in force in the Republic of Guinea.<sup>215</sup>

The Claimant and Respondent after this submitted their documents including statements of claims, statement of replies, rejoinders, counterclaims, letters, and exhibits starting from June 18, 2012 to December 27, 2012.<sup>216</sup> The discovery of documents took place from December to June 2013.<sup>217</sup> During the proceeding, the Claimant also sent a copy of an award concerning the competence of the arbitral tribunal formed under the authority of the International Centre for the Settlement of Investment Disputes (ICSID) dated December 29, 2012 as exhibit.<sup>218</sup> The tribunal then issued the following eight procedural orders covering mainly rulings and decisions of production

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211 *Id.* at para. 5.

212 *Id.* at paras. 6–7.

213 *Id.* at para. 11.

214 *Id.* at para. 12.

215 *Id.*

216 *Id.* at paras. 13–14.

217 *Id.* at para. 15.

218 *Id.* at para. 16.

of documents and exhibits including on the authority of the ICSID arbitral tribunal. The tribunal then held hearings for the witnesses and expert witnesses in Paris on May 27, 28, and 29, 2013.<sup>219</sup>

A penultimate hearing was held on July 8, 2013 where the Parties' counsel presented their arguments and a final hearing was held on December 16, 2013.<sup>220</sup> By procedural order 11 of January 8, 2014 the tribunal decided to reserve its decision on the Respondent's request to obtain a 4-month period to gather evidence of the corruption it had alleged. By this order the tribunal also declared the proceedings closed pursuant to Article 15.4 of OHADA CCJA Arbitration Rules.<sup>221</sup> Despite the Respondent's complaining of the close of proceedings, the tribunal pursuant to Article 23 of the OHADA CCJA Arbitration Rules, sent a draft of the final award to the General Secretariat of the CCJA on January 13, 2014.<sup>222</sup> GETMA International had made the following request for reliefs:

- (a) Decide and rule that the termination of the Concession Agreement by the President of the Republic of Guinea is illegal and null and void;
- (b) Find that, because of the new Concession Agreement granted on March 11, 2011 to Bolloré Group, or to any other company of the Bolloré group, a return to the "status quo ante bellum" is now impossible;
- (c) Dismiss the counterclaim of the Republic of Guinea.
- (d) Order the Respondent to compensate the Concessionary for the damages suffered as a result of the termination of the Concession Agreement, and order it to pay the sum of €42,005,221 broken down as follows:
  - a. Lump-sum Termination Compensation  
€20,884,966
  - b. Termination compensation (relative to the Property Granted)  
€3,616,394
  - c. Compensation for the Entrance Fee  
€14,201,096
  - d. Compensation for repatriated employees  
€172,874
  - e. Compensation relating to invoices to be issued  
€589,418

<sup>219</sup> *Id.* at para. 23.

<sup>220</sup> *Id.* at para. 24.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

- f. Compensation relating to the property returned  
€2,095,790
- g. Compensation relating to the contracts not terminated  
€185,849
- h. Compensation relating to crisis management expenses  
€258,834

All with interest compounded annually at the Central European Bank rate plus one point as of March 9, 2011;

- (e) Award to the Respondent all expenses, costs and professional fees, particularly attorneys' fees and other advisors' fees borne by the Claimant for the Arbitration proceedings."<sup>223</sup>

The Republic of Guinea on the other hand requested the tribunal to:

“Find and rule the immediate and uncompensated termination of the Concession Agreement for the Container Terminal of the Port of Conakry and of its Amendment No. 1 regular and justified; Dismiss all of the requests made by GETMA International against the Republic of Guinea; Order GETMA International to assume all costs of these arbitration proceedings, including attorneys' fees and all other expenses incurred by the Republic of Guinea for the needs of its defense.”<sup>224</sup>

### C. The OHADA CCJA administered Arbitral Award

GETMA International asserted that the “failures to fulfill the concessionary's obligations” referenced by the decree terminating the Concession Agreement are merely a pretext for the decision of the President of the Republic to award the concession to a “friend.”<sup>225</sup> Additionally, GETMA argued that the termination Decree was a legal act imposed on it with immediate effect and without any possible return to prior *status quo* because of the signing of the contract with a new concessionary.<sup>226</sup> GETMA thus applied the provisions of Article 32.5 of the Agreement relative to “Changes of Law and Acts of Public Authority impeding the smooth operation of the Activities Granted.”<sup>227</sup> It proceeded with a Preliminary Notification of Change of

<sup>223</sup> *Id.* at para. 56.

<sup>224</sup> *Id.* at para. 57.

<sup>225</sup> *Id.* at para. 59.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

Law, to which the respondent did not respond, and with a final notification after 60 days.<sup>228</sup> Therefore, GETMA argued that Article 32.5 for the Concession Agreement required compensation in case of termination resulting from a change of Law and Acts of Public Authority that impede the smooth operation of the Activities Granted.<sup>229</sup> GETMA thus requested for the compensation as required under Article 32.3 in case of the violation of Article 32.5 or a minimization of the effects of the Change of Law of the Acts of the Public of Authority.<sup>230</sup>

In response to these arguments, the Republic of Guinea justified its immediate termination of the Agreement on the seriousness of GETMA's behavior.<sup>231</sup> The State argued that in the bidding stage, GETMA allegedly deliberately invoked a false partnership with Mediterranean Shipping Company (MSC) and Europe Terminal and provided inaccurate financial information about its financial capabilities and the profitability of the project to favour its chances of being selected as the successful bidder.<sup>232</sup> Additionally, the State argued that GETMA at the time of Amendment of the Concession Agreement in 2009 refrained from indicating its ability to raise the financing and thus the bidding procedure was manipulated.<sup>233</sup> Thus the Respondent State argued that GETMA's tactics constitute fraud, and since GETMA was unable to finance the expansion of the container Terminal due to the lack of MSC's support, it failed to fulfill its investment obligations and delayed the expansion work for the terminal.<sup>234</sup> This seriousness of GETMA's behaviour justified the termination of the Concession Agreement without prior notification.<sup>235</sup> According to the tribunal, the Republic of Guinea cited corruption in view of obtaining the Concession from the start of the proceedings and returned to this argument in 2013 when it requested for extra time to produce proof of the corruption invoked.<sup>236</sup> In the alternative, the Respondent State contested the principle and/or amount of the damages for which GETMA was requesting reparation.<sup>237</sup>

Accordingly, the Tribunal ruled that it had to decide on five specific areas:

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228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.* at para. 60.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

1. The Corruption allegation
2. The Applicable Law
3. The Validity of the Termination Agreement
4. The Right to Compensation
5. The amount for Relief

***i. Corruption***

The tribunal dismissed the allegation on corruption as unverifiable on the ground that the evidence presented by one Mr. Steven Fox was not direct or indirectly witnessed.<sup>238</sup> The tribunal found that he referred to unreported statements from witnesses, which he characterized as direct or indirect and whose identity he refused to reveal and he also refused to refer to any documents.<sup>239</sup> Additionally, the witness did not directly challenge GETMA and does not make any references to any account it held that was used to make illegal payments.<sup>240</sup>

***ii. Applicable Law***

On applicable law, despite the parties having accepted the applicable law to be in accordance with Article 31(2) of the Concession Agreement, that is the OHADA treaty and its subsequent Uniform Acts (UAs), the claimant introduced a different argument all together.<sup>241</sup> The Claimant argued that the Concession Agreement at issue is an internationalized State contract whose termination cannot be governed by internal Guinean law.<sup>242</sup> GETMA relied on the opinion of Professor Mathia Audit for this view and also cited in support a resolution of the International Law Institute (ILI) (Athens, 1979; Rev. crit. DIP 1980.427) which states that, if such is their desire, the parties to a State contract may decide to exclude it from the exclusive application of a determined internal law, particularly for problems of contractual liability raised by the exercise by the State of its sovereign powers against a commitment that it made toward the co- contractor.<sup>243</sup> Additionally this view is premised on the idea that the express reference of the Agreement to the OHADA Treaty, coming under public international law, the wording of the choice of law clause gives precedence to the stipulations of the Agreement and relates Guinean law to a subsidiary role, and

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<sup>238</sup> *Id.* at para. 70.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at para. 84.

<sup>242</sup> *Id.* at para. 85.

<sup>243</sup> *Id.*

above all, the Article 32.5 of the Agreement, which subjects the exercise of the State's normative power to compensation.<sup>244</sup> Accordingly, the Claimant argued that the Parties agreed to apply the contractual stipulations and the principles of international law including the principle of good faith and the principle of “*venire contra factuum proprium*.” (To come against one's own fact (is not allowed)).<sup>245</sup> Here the claimant cited international investment scholarship from C. McLachlan, L. Shore, M. Weininger, R. Dolzer and C. Schreuer, E. Gaillard and ICSID case law *Ioannis Kardassopoulos v. Georgia*, *SPP v. Egypt*, *Innaris v. Ukraine*, *Desert Line Project v. Yemen*, *Fraport v. Philippines*.<sup>246</sup>

The Republic of Guinea on the other hand claimed that Article 17 of the OHADA CCJA Arbitration Rules establishes the autonomy of the Parties concerning the determination of the law applicable to the merits of the dispute.<sup>247</sup> This was accordingly specified in Article 3 of the Agreement, which stipulates that the OHADA Treaty and its subsequent Uniform Acts apply and in Article 5 of the specifications, which subject the concession “to the laws, regulations and agreements in force in the Republic of Guinea.”<sup>248</sup> This position, the Respondent argued is also reiterated in the arbitration agreement (this is the report made when the arbitral process had begun) of March 12, 2012.<sup>249</sup> Additionally, the Respondent State argued that GETMA did not indicate any reservations concerning the designation of the applicable law when the agreement was signed.<sup>250</sup> Thus using the same ILI Resolution cited by Claimant, the Respondent stressed that the Parties are subject to the rules of law that they chose and may, in this regard, designate in the contract.<sup>251</sup> The Resolution mentions the possibilities of choice: “either one or several domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law.”<sup>252</sup> This means that since the Arbitration Agreement do not refer to the principles of international law, GETMA cannot ignore the law expressly formulated which is Guinean law.<sup>253</sup>

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244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.* at para. 87.

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.*

They also rebutted the view that reference to the OHADA Treaty is reference to international law arguing that the reference to the OHADA Treaty does not exclude Guinean law.<sup>254</sup> According to the Respondent, the OHADA Uniform Acts are, in reality, directly incorporated into the internal law (Art. 10 of the OHADA Treaty) in the limited domain of business law and this is not a complete system of standards that could be substituted for Guinean law or internationalize the contract.<sup>255</sup>

The arbitral tribunal held that the stipulations in Article 31 and Article 5 of the Concession Agreement clearly referenced Guinean law.<sup>256</sup> It additionally held that this covers the OHADA Uniform Acts that constitute pieces of uniform legislation incorporated in the internal law of the OHADA member states, or “the laws, regulations and agreements in force in the Republic of Guinea” and no other legislation, no other normative system is mentioned.<sup>257</sup> The tribunal also rejected GETMA’s view that the wording of Article 5 relegates Guinean law to a subsidiary position and that this would open the door to the priority application of principles governing State contracts.<sup>258</sup> The tribunal thus correctly found that the Concession Agreement is subject to the laws, regulations and Agreements of the Republic of Guinea.<sup>259</sup>

### *iii. The Validity of the Termination Agreement*

The Claimant’s claim here was that Professor Alpha Condé the newly elected President of the Republic of Guinea in 2010 had personally decided to reconsider the Concession Agreement in order to award it to the companies of his friend Vincent Bolloré who had supported him financially during his opposition years, and during the election campaign.<sup>260</sup> The Claimant referenced a France 24 interview in which the President had told friends that had supported him that he would cancel the Agreement.<sup>261</sup> The Claimant thus argued that this termination that was done without any notification was illegal.<sup>262</sup> It characterizes the termination as a change of law and act of public authority impeding the smooth operation of the granted activities in Article 32.5 of

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254 *Id.*

255 *Id.*

256 *Id.* at para. 91.

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.* at para. 96.

261 *Id.* at para. 97.

262 *Id.*

the Concession Agreement which entitles it to the compensation set forth in Article 32.4 of the Concession Agreement.<sup>263</sup>

The Respondent State responded to this argument by citing the seriousness of GETMA's behavior when the Concession Agreement was signed and then throughout its performance.<sup>264</sup> They first respond by accusing GETMA of fraud for claiming to have entered into a partnership with Mediterranean Shipping Company (MSC), one of the world leaders in maritime transport, for the performance of the Concession Agreement.<sup>265</sup> Second, the Respondent State states that GETMA supplied false financial information in its bid stating an anticipated 100 million Euros yet the anticipated funding amounted only to 20 million Euros through equity capital.<sup>266</sup> Third, the Respondent State argues that the involvement of the German firm of Inros Lackener in the capacity of Consultant of the Bid Evaluation was made for the benefit of GETMA and constituted manipulation of the bid.<sup>267</sup> Fourth, still with regard to fraudulent acts, the Respondent claimed that GETMA renewed its commitment to make investments in full knowledge of its inability to finance them, given the Group's indebtedness, its ineligibility for a dedicated bank loan and the depletion of equity funds.<sup>268</sup> Fifth, the Respondent claims, in substance, that all the work experienced delays, and in particular, the new Terminal for which the delay was, on the date of the termination Agreement, 5 or 11 months depending on whether the execution schedule is calculated based on GETMA's bid or the work schedule appended to the Agreement.<sup>269</sup> Sixth, the Respondent argued GETMA was unable to obtain the dedicated loan that would have allowed it to finance the several hundred millions of Euros it agreed to obtain during the first five years of the Concession Agreement.<sup>270</sup> Seventh, the Respondent argued that GETMA had not fulfilled its commitments relative to the opening up of transport to and from Mali.<sup>271</sup> Finally, Respondent argued that GETMA did not facilitate the acquisition of a stake in the capital of the Société du Terminal à Conteneurs de Conakry (STCC) as required call for bids.<sup>272</sup>

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263 *Id.*

264 *Id.* at para. 99.

265 *Id.* at para. 101.

266 *Id.* at para. 102.

267 *Id.* at para. 104.

268 *Id.* at para. 105.

269 *Id.* at para. 107.

270 *Id.* at para. 108.

271 *Id.* at para. 109.

272 *Id.* at para. 110.



The arbitral tribunal found that the decree of termination issued by the President violated both procedural and substantive requirements for termination. First, the tribunal found that the 60 day notification was not fulfilled and the Respondent did not cite the alleged contractual breaches which are conditions for termination required in Article 32.2 of the Concession Agreement.<sup>273</sup> Thus, the termination decree was doubly defective procedurally since it did not fulfill the legal requirements of notification and presentation of the allegations of breach against the Claimant.<sup>274</sup> The arbitral tribunal finds that this procedural defect was enough to make the termination illegal but out of concern of thoroughness, the tribunal still went ahead to rule on the substantive conditions of termination.<sup>275</sup> The arbitral tribunal rejected the argument that seriousness of the actions of the Claimant waived the 60-day notification requirement.<sup>276</sup> On the substantive claims, for which the arbitral tribunal devoted a lengthy analysis of the eight substantive arguments presented by the Respondent State for the termination of the Concession Agreement above, the tribunal rejected most of the arguments as justifications for termination of the Concession Agreement.<sup>277</sup> Importantly, the tribunal rejected GETMA's argument that the claims of fraud, if they existed, were done prior to the signing of the Agreement and thus the tribunal lacks competence to arbitrate over them since they did not arise from the Agreement.<sup>278</sup> This view was tied to the language of Article 31 of the Concession Agreement that: "Any dispute or difference stemming from this Agreement or from its amendments."<sup>279</sup> The tribunal found that the words "to stem" express a natural or logical link for which the term "to result" is a synonym.<sup>280</sup> The tribunal rejected all of the Respondent's arguments on fraud in the process of bidding and on the breaches of conditions that would occasion termination.<sup>281</sup>

#### ***iv. The Right to Compensation***

The arbitral tribunal noted that Article 32.5 of the Concession Agreement (Changes of law and Act of Public Authority impeding the proper functioning of the Granted

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<sup>273</sup> *Id.* at paras. 112–20.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at para. 121.

<sup>276</sup> *Id.* at para. 118.

<sup>277</sup> *Id.* at paras. 128–87.

<sup>278</sup> *Id.* at para. 125.

<sup>279</sup> *Id.* at para. 126.

<sup>280</sup> *Id.* at para. 127.

<sup>281</sup> *Id.* at paras. 128–87.

Activities) on which GETMA based its compensation requests, provides that “In case of termination due to a Change of law and Acts of Public Authority impeding the proper functioning of the Granted Activities, the Licensee shall receive the compensation provided under Article 32.3 of the Agreement.”<sup>282</sup> Article 32.3 provides for four types of compensation: the lump-sum termination compensation; the termination compensation, for the property granted under concession; the compensation for the entry; and the amount of any termination compensation.<sup>283</sup> After assessing and analyzing the compensatory claims of the Claimant, the arbitral tribunal found that the Respondent should pay a lump-sum termination compensation of €20,884,966; A termination compensation for the property granted under concession of €3,234,995; The unamortized amount of the entry fee of €14,201,096; and further compensation for the unreturned inventory of €210,070.<sup>284</sup> This adds up to a total of €41,531,127 plus interest at the discount rate of the European Central Bank plus once percent, from the date of the arbitration request dated May 10, 2011 until complete payment. Finally, the arbitral tribunal determined that the parties pay each pay its legal costs and orders that parties to equally bear the arbitration costs at CFA Francs 100,480,332 (Appx €152,000) and the arbitrators fee of CFA Francs 40,480,332 (Appx €61,000).<sup>285</sup> This final arbitral award was dated April 29, 2014.

#### D. Commentary

Before delving into some specific commentary over this arbitral award, it is important to note that the award itself as we have seen did not mention anything about the most controversial aspect of the case: the question of increase of arbitrators’ fees. The arbitrators even in this final award assessed their arbitrators fee at appx €61,000. The changes of this amount as we will see is what has given the GETMA case more notoriety and elevated it to “saga level.”<sup>286</sup> The first important lesson from the arbitral award and what in my assessment is a strength of the OHADA arbitration system is the value of non-internationalization of concession agreements that the OHADA system upholds and that this arbitral award affirms.

282 *Id.* at para. 192.

283 *Id.* at para. 193.

284 *Id.* at paras. 192–278.

285 *Id.* (operative provisions).

286 *GETMA v Guinea: The saga Continued*, HERBERT SMITH FREEHILLS (June 16, 2016) <https://hsfnotes.com/arbitration/2016/06/16/GETMA-v-guinea-the-saga-continued/>.

As part of internationalizing the Concession Agreement in this case, GETMA argued that the Concession Agreement with the Republic of Guinea was governed by public international law.<sup>287</sup> Thus, accordingly any change of this agreement or dispute revolving around it should be governed by international law and not domestic law. According to M. Sornarajah, this rule that GETMA was propounding “is aimed at conferring maximum protection upon the foreign investor and at ensuring that the initial bargain and the terms last through the period of the contract.”<sup>288</sup> The alternative to this is to insert a “stabilization clause” in the Concession Agreement to ensure that future changes in laws of the host state do not affect the agreement.<sup>289</sup> Article 32.5 of the Concession Agreement between GETMA and the Republic of Guinea that provided: “In case of termination resulting from a Change of Law and Acts of Public Authority impeding the smooth operation of the Activities granted, the Concessionary will receive the compensation set forth in Article 32.3 of the Agreement” is a good example of a stabilization clause.

The basic idea behind internationalization is that the host State’s laws and judicial system are inadequate for the resolution of foreign investor’s disputes.<sup>290</sup> Thus the foreign investor wants to settle its disputes at a different forum other than the local courts and under a law different from the host State’s law.<sup>291</sup> The OHADA arbitration system deals with the first concern by allowing arbitration thus removing the dispute from the local courts but maintains the use of domestic laws in this case the OHADA Uniform Acts and domestic law of the member State. Though as this case shows, the dispute is wholly resolved around the contract without any reference to any OHADA Uniform Acts or Guinean domestic laws. It means that idea of delocalizing the dispute is still present even in this contract-based arbitration. While OHADA arbitration maintain subject-matter localization, this can still be easily avoided by contractual terms that maintain broad foreign investor interests such as stabilization clauses. Yet there is risk in arbitration even though valorized as neutral, for the selection of arbitrators and the application of rules to be manipulated to serve interest of power.<sup>292</sup>

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287 GETMA International v. Republic of Guinea (I), Case No. 001/2011/ARB, para. 87, Award, Common Court of Justice and Arbitration of OHADA [CCJA] (Apr. 29, 2014).

288 M. Sornarajah, *The Myth of International Contract Law*, 15 J. WORLD TRADE L. 187 (1981).

289 Roland Brown, *Choice of Law Provisions in Concession and Related Contracts*, 39 MODERN L. REV. 625, 628 (1976).

290 JAN OLE VOSS, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS 25* (MARTINUS NIJHOFF PUBLISHERS, 2011).

291 *Id.*

292 M. SORNARAJAH, *RESISTANCE AND CHANGE IN INTERNATIONAL LAW ON FOREIGN INVESTMENT 82* (CAMBRIDGE UNIVERSITY PRESS, 2015).

Additionally, it is easy to see the possibility of increased cultural bias in the GETMA cases (the OHADA and ICSID cases) since all the arbitrators and a large number of the litigation teams are from the global North in a dispute that has its locus in Africa.<sup>293</sup>

Consequently, M. Sornarajah has argued that the objective of capital exporting countries has been for a long time to ensure “the freezing of the conditions prevailing at the time of the bargain and their subsequent immutability despite any changes in the economy or the policies of the host government.”<sup>294</sup> Accordingly, this immutability through stabilization clauses or internationalization of concession agreement “represents an instance of the norms of international law created during colonial times to further the interests of European powers continuing to survive and justify the perpetuation of a situation of dominance by erstwhile colonial powers.”<sup>295</sup> Sornarajah presents this claim based on the fact that many concession agreements have been for the exploitation of resources in developing countries and mainly those in the global South. He argues that East European and the socialist bloc countries rejected such notion outright.<sup>296</sup> In this case, Guinea’s goose seemed to have been cooked in terms of not winning this, at least at this stage, way before it signed the concession agreement. This is because the template of negotiation for such concession agreements would follow the path of fomenting interests of European powers in a continual economic dominance from colonial times. It does not seem to matter that the upholding of non-internationalization is in favour of Guinea because the stabilization clause forestalls any possibility of non-compensatory termination or expropriation.

Despite this doomed outlook for the Republic of Guinea, it is important to note that the structure of the OHADA arbitration system is fundamentally contractual. Thus, the consent for arbitration in the Concession Agreement points to the choice of law as the OHADA Uniform Acts and Guinean law. This system therefore eschews treaty-based protections and remedies in bilateral and multilateral investment treaties (BITs/MITs) that have become the bedrock of the current Investor State Dispute Settlement (ISDS) regime. While the OHADA system maintains the contractual arbitration system, the ICSID system enforces treaty arbitration and thus the possibility

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293 See WON KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* (Oxford University Press, 2017); YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (The University of Chicago Press, 1996).

294 Sornarajah, *supra* note 291, at 188.

295 *Id.*

296 *Id.*

of duplication emerges. Indeed, like in the *Fraport v Philippines* case,<sup>297</sup> where there was an International Chamber of Commerce (ICC)<sup>298</sup> and ICSID simultaneously, in GETMA, there was also a simultaneous ICSID case instituted.<sup>299</sup> The cost for this litigation exceeded over US\$ 58 million for Philippines and considering the cost for the arbitration for Guinea in the OHADA administered arbitration was €115,000 before the change of arbitrators' fee upwards and without including the legal cost (lawyer fees), the ICSID, and the US federal district court enforcement decisions it is easy to see that the cost for all the GETMA cases would be close to or even exceed those in the *Fraport v Philippines* case. M. Sornarajah argues that contract-based arbitration is the precursor for the current version of treaty-based arbitration that pervades ISDS and both systems are built on system that flies in the face of fundamental theoretical premises of international law.<sup>300</sup> Thus he views the whole international investment legal system as it stands today a feature of imposition through power by former imperial powers.<sup>301</sup> This is of course one of the main themes of the scholarship generated by Third World Approaches to International Law (TWAAIL), that is, the colonial origins of foreign investment law.<sup>302</sup> Thus, the international investment law system embodies "the continuities of what existed under colonialism but now supported through a substantial positive law of treaties." This means that both contract-based and treaty-based arbitrations are products continued colonial imposition for the protection of transnational capital.<sup>303</sup>

### E. The Vexed Question of Arbitrators' Fees

In April 2013, while the OHADA administered proceedings were underway, the

297 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, Case No. ARB/03/25, Award, ICSID (Aug. 16, 2007).

298 *Philippine International Air Terminals Co., Inc. (Philippines) v. The Government of the Republic of the Philippines (Acting through the Department of Transportation and Communications and the Manila International Airport Authority)*, Case No. 12610/TE/MW/AVH/JEM/MLK, Final Award (May 10, 2011).

299 *GETMA International and others v. Republic of Guinea [II]*, Case No. ARB/11/29, Award, ICSID (Aug. 16, 2016).

300 M. SORNARAJAH, *RESISTANCE AND CHANGE IN INTERNATIONAL LAW ON FOREIGN INVESTMENT* (Cambridge University Press, 2015), 79.

301 JOHN LINARELLI, MARGOT E SALOMON & M. SORNARAJAH, *THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY* 154 (Oxford University Press, 2018).

302 ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND INTERNATIONAL LAW* 224 (Cambridge University Press, 2005).

303 See Bhupinder S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1–37 (2004).

tribunal sought and was granted permission of the CCJA Secretary General to ask the parties for consent to increase the set fees.<sup>304</sup> The suggested fee increase by the arbitrators was significant (approximately from €62,000 to €450,000) and the parties did not initially consent. However, the parties consented after repeated request from the tribunal and an indication that the tribunal might reconsider its involvement if consent was not forthcoming.<sup>305</sup> In August 2013, the CCJA made it clear that only the CCJA could set the tribunal's fees in relation to a CCJA Arbitration and that any separate fee agreement should be considered void.<sup>306</sup>

In 2014, the tribunal reached a decision and notified the CCJA that it would include within the award a demand for €450,000 in arbitrators fees.<sup>307</sup> The CCJA Secretary General prohibited the tribunal from seeking a fee increase from what had been set by the CCJA, stating that doing so had the likelihood of invalidating the award.<sup>308</sup> As presented in detail above, in April of 2014, the arbitral tribunal ruled in favour of GETMA International, ordering Guinea to pay over €40 million in damages, plus interest.<sup>309</sup> The tribunal excluded references to its increased fees in the award and in fact indicated the OHADA set fee of €62,000 yet in the background it continued to pursue the payment of the sum (€450,000) from the parties. GETMA made payments (€225,000) to the arbitrators but Guinea refused to pay any increased arbitrators fees. Instead, it made an application to the CCJA for setting aside of the award on the grounds that the arbitral tribunal had not fulfilled its mandate and had breached CCJA rules by entering into a private fee agreement with the parties.<sup>310</sup>

Article 23.2 of the OHADA rules on CCJA Arbitration grants the CCJA the authority to determine tribunal fees.<sup>311</sup> Furthermore, in 1999, a decision by the CCJA affirmed that arbitrators' fees are exclusively set by the Court in accordance with its Rules and that any separate agreements are void. The function of setting arbitrators' fees falls under the CCJA's role as an arbitral institution.<sup>312</sup> The tribunal fees are established

304 Sarkodie & Otoo, *supra* note 177, at 168.

305 Sarkodie & Otoo, *supra* note 177, at 169.

306 Sarkodie & Otoo, *supra* note 177, at 169.

307 Sarkodie & Otoo, *supra* note 177, at 169.

308 Sarkodie & Otoo, *supra* note 177, at 169.

309 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

310 *Id.*

311 *Id.*

312 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, KLUWER ARBITRATION BLOG (May 12, 2016), <http://arbitrationblog.kluwerarbitration.com>.

by the CCJA Assembly and approved by the OHADA Council of Ministers.<sup>313</sup> This ensures that there is a degree of foreseeability in relation to arbitrator costs as well as ensuring that costs are proportional to the sums in dispute.<sup>314</sup> After arbitration commenced in October 2011, the CCJA set the tribunal's fees. It is worth noting that Article 24.3 of the OHADA Rules also grants the CCJA the authority to set arbitrator fees at a higher or lower rate than those set out in the schedule in 'exceptional' and 'necessary' circumstances.<sup>315</sup>

## F. OHADA CCJA Annulment of OHADA CCJA administered Arbitral Award

On 19 November 2015, the CCJA ruled that the award should be set aside on the grounds that the arbitrators had exceeded their mandate by entering into a separate fee agreement with the parties.<sup>316</sup> According to CCJA Arbitration, the CCJA has an administrative role of governing the conduct of arbitrations, including setting arbitrator's fees. Direct negotiation with the parties over the fees was a breach of CCJA rules and a 2011 court order issued by the CCJA which limited arbitrators' fees to approximately €62,000.<sup>317</sup> In December 2015, the three arbitrators responded by writing an 'open letter' to the arbitration community which was published in *Jeuene Afrique*, a French publication focused on Africa.<sup>318</sup> The letter publicly criticized the decision of the CCJA and called for their colleagues' support.<sup>319</sup> The letter alleged that the CCJA had been hostile towards the tribunal and that the award set by the CCJA failed to take into account the significant time put in by the tribunal.<sup>320</sup> The letter stated that the CCJA's decision did not reflect the agreement reached by the parties

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com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing\_wp\_cron=1593602771.2344129085540771484375.

313 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

314 *Id.*

315 *Id.*

316 *Id.*

317 *Id.*

318 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, KLUWER ARBITRATION BLOG (May 12, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing\\_wp\\_cron=1593602771.2344129085540771484375](http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375).

319 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

320 Sarkodie & Otoo, *supra* note 172, at 169.

and courts assurance that the fees could be revised if the parties were in agreement. It also criticized the CCJA for not barring Guinea from instituting annulment proceedings.<sup>321</sup> The arbitrators also alleged that the CCJA's decision on annulment was influenced by the interests of OHADA member States.<sup>322</sup>

Despite the setting aside of the award, GETMA commenced proceedings to enforce the arbitral award in the US Courts on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>323</sup> GETMA argued for the enforcement of the award on the basis that the parties had agreed to the increase of the tribunal's fees. It further argued that the CCJA, through the Secretary General, had 'encouraged' the tribunal to consult with and solicit an agreement from the parties regarding increased arbitrators' fees, only to reverse its position subsequently.<sup>324</sup>

### G. The GETMA ICSID Arbitration

The ICSID Arbitration also involved GETMA International as first Claimant but in addition had NCI Necotrans as second Claimant, GETMA International Investissements as third Claimant, and NCT Infrastructure & Logistique as fourth Claimant.<sup>325</sup> The ICSID decision on jurisdiction stated that NCT Necotrans is the group leading holding company owning directly or indirectly 100% of three other Claimants, and financed the investment in Guinea.<sup>326</sup> Additionally on the Claimants, GETMA International was the Concessionary of the container terminal while GETMA International Investissements was an intermediary holding company controlled by GETMA International and controlling the Guinean Company STCC which is the company which operates the terminal, and NCT infrastructure & Logistique was NCT Necotrans' technical subsidiary responsible for the work of extending the terminal.<sup>327</sup> The arbitral tribunal was composed of Mr. Bernardod M. Cremades of Spain, Prof Pierre Tercier of Switzerland, and Mrs. Vera Van Houtte of Belgium.<sup>328</sup>

321 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

322 *Id.*

323 *Id.*

324 Sarkodie & Otoo, *supra* note 172, at 170.

325 GETMA International and others v. Republic of Guinea [II], ICSID Case No. ARB/11/29, paras. 1–4, Decision Regarding Jurisdiction, ICSID (Dec. 29, 2012).

326 *Id.* at para. 26.

327 *Id.*

328 *Id.* at paras. 8–10.



All the arbitrators had been appointed by January 20, 2012,<sup>329</sup> and the request for arbitration was filed on September 29, 2011.<sup>330</sup> Considering that the OHADA CCJA administered arbitration was instituted on May 10, 2011, these arbitrations started only four months apart. Unlike the OHADA administered arbitration, the ICSID arbitration relied on Article 28 of the of Court Order no.00/PRG/87 of January 3, 1987, amended by law no L/95/029/CTR in of June 30, 1995 governing the Investment Code of the Republic of Guinea.<sup>331</sup> This provision grants ICSID jurisdiction to foreign nationals on disputes concerning the application or interpretation of the Code.<sup>332</sup> The facts in this case were in fact identical to those on the OHADA CCJA administered arbitration.<sup>333</sup>

As expected, one of the arguments by the Respondents in this case was that the ICSID Tribunal lacked jurisdiction for the following reasons: first since the OHADA CCJA arbitration acted as a contrary agreement as required under the Guinean Investment Code, and second, the parties and facts to this case were identical to the OHADA CCJA administered administration.<sup>334</sup> The tribunal rejected both arguments, first by reasoning that by granting jurisdiction to the OHADA CCJA, the arbitration clause in Article 31 of the Concession Agreement did not specify that this jurisdiction replaces that of ICSID nor did it explicitly exclude the ICSID's jurisdiction.<sup>335</sup> Additionally, the clause did not specifically attribute jurisdiction to the OHADA CCJA to settle disputes "pertaining to the application and interpretation of the Investment Code."<sup>336</sup> Thus disputes "resulting from this agreement" were not *a priori* necessarily the same as those "pertaining to the application and interpretation of the Investment Code."<sup>337</sup> The tribunal cites the jurisprudence of ICSID in *Vivendi v Argentina*, annulment decision, Case ARB/97/3, para 96; *Bayindir v Pakistan*, decision on jurisdiction, Case. ARB/03/29, para 148; and *Impregilo v Pakistan*, decision on jurisdiction, April 22, 2005, Case. ARB/03/3, para 258 to reject Claimants views of lumping together contract claims and treaty claims.<sup>338</sup> Thus upholding the view that

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329 *Id.* at para. 10.

330 *Id.* at para. 24.

331 *Id.* at para. 12.

332 *Id.* at para. 12.

333 *Id.* at paras. 13–63.

334 *Id.* at para. 60.

335 *Id.* at para. 105.

336 *Id.*

337 *Id.*

338 *Id.* at para. 106.

the same fact can constitute both a breach of contractual obligation and a violation of the Investment Code, and that the same may be subject to two different courts.<sup>339</sup>

To deal with the question of parallel jurisdiction and double damages, the tribunal rendered itself as follows:

“...In as much as an act of the state would constitute both a breach of the contract and a violation of the Investment Code, there would then be the parallel jurisdiction of the two Tribunals. However, it would not be competitive, given that the focus of the jurisdiction of each Tribunal would depend on the respective legal grounds of each request, the rights violated, the parties injured, the prejudice sustained and the entitlement to respective compensation under the Concession Agreement, or the Investment Code. The fact that the parallel jurisdictions can lead to a double collection of damages, does not mean that each court will not be called upon to exercise its own jurisdiction. It is in the handling of the merits and in particular at the time of the verification of the evidence of the prejudice, that the double collection of compensation shall be avoided.”<sup>340</sup>

The tribunal found that the Concession Agreement constituted as “contrary agreement” pursuant to which the jurisdiction of the OHADA CCJA tribunal replaces that of ICSID as per Article 28 of the Investment Code but the scope of the application of such an agreement is strictly circumscribed by the terms of Article 32.5 of the Concession Agreement.<sup>341</sup> This meant that there would be no competing jurisdiction between the two tribunals for requests based on the termination of the agreement as a result of the act of Public Authorities, but at the very most the ICSID tribunal would have additional jurisdiction if the Concessionary deemed that an act of the Public Authorities constituted a violation of the Investment Code and has entailed damaging consequences other than those of the termination of the agreement.<sup>342</sup> The tribunal thus eventually finds that it has jurisdiction to entertain and to rule on the effects of the requisition and other alleged breaches of the Investment Code which do not fall into the framework of the Concession Agreement with respect to the four claimants.<sup>343</sup>

After the decision on jurisdiction, the ICSID proceedings were suspended midway

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339 *Id.*

340 *Id.* at para. 108.

341 *Id.* at para. 125.

342 *Id.*

343 *Id.* at para. 180.

between October 2013 and June 2014, pending the award from the OHADA tribunal.<sup>344</sup> The proceedings then resumed after 2014 when the OHADA CCJA administered award was rendered. The case continued against the background of the annulment of the OHADA CCJA administered award by the OHADA CCJA in 2015. The Claimant appointed arbitrator Mr. Bernardo Cremades wrote a dissenting opinion annexed to the final ICISD award signed by the all the arbitrators by August 6, 2016. Mr. Cremades mainly disagreed with the majority's view that the annulment of the OHADA CCJA award did not constitute denial of justice.<sup>345</sup> He summed up his views as follows:

“Consequently, if one takes account: of the letter from the Claimants to the Arbitral Tribunal following the annulment of the CCJA award, in which the Claimants announce the denial of justice that such a situation implied for them, as well as the possible exclusive responsibility of the members of the CCJA Tribunal concerning the amount of the fees and the total annulment of the [OHADA CCJA] award to the sole prejudice of the parties, it is not possible to conclude, simply, that the Claimants can initiate another arbitration before an institution which no longer enjoys the parties' trust as regards their fundamental procedural guarantees. Contrary to that which was asserted by the majority of the Arbitral Tribunal, the consideration of a possible denial of justice alleged by the Claimants concerns this Arbitral Tribunal.”

This is a position, as we will see, was rejected by the majority and thus does not form part of the tribunal's holding that the OHADA CCJA award annulment constituted a denial of justice claim. Yet the dissenting arbitrator did not dissent on the tribunal's decision on jurisdiction or the tribunals distinction between contract and treaty claims which formed important positions on the tribunal's ultimate decision of rejecting GETMA's expropriation claims.

Expectedly, like in the OHADA CCJA's award, the claims of corruption and fraud by the Respondent State in the process of acquiring the Concession Agreement were dismissed.<sup>346</sup> After finding the burden of proof on claims of corruption is no higher than in other cases,<sup>347</sup> the tribunal found that the direct testimonies by the

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344 GETMA International and others v. Republic of Guinea [II], Case No. ARB/11/29, paras. 20–26, Award, ICSID (Aug. 16, 2016).

345 GETMA International and others v. Republic of Guinea [II], Case No. ARB/11/29, Appendix B, Award, ICSID (Aug. 16, 2016) (Dissenting opinion of Mr. Bernardo Cremades).

346 *Id.* at paras. 185–218.

347 *Id.* at paras. 181–84.

Respondent's witnesses and the documentary evidence adduced was not clear or convincing of the corruption it alleged against GETMA International.<sup>348</sup> Similarly, the tribunal rejected the fraud allegations that GETMA had obtained the concession through misrepresentation of its relationship with the MSC group.<sup>349</sup> On a detailed analysis of the tendering process and the evidence presented, the tribunal found that GETMA would have won the concession in any event.<sup>350</sup> Additionally, the tribunal rejected the Respondent's argument that in 2008 the corruption in Guinea was so endemic that the Concession Agreement must have been procured through corruption.<sup>351</sup> The tribunal reasoned that: "Even widespread corruption does not permit one to consider that a specific alleged corruption is proven. Inversely, the absence of widespread or endemic corruption does not permit one either to neutralize proof of a specific instance of corruption. Even if one accepts that corruption is plausible, in a specific case because it is endemic in the country, this does not prove that it effectively exists."<sup>352</sup> The tribunal also found that GETMA International was not fraudulent in its expression of interest for the bid and the tactics it used in its expression of interest were nothing but commonplace commercial tactics that were not fraudulent.<sup>353</sup>

On the substantive claim of expropriation, the Claimants argued that the decree of termination constituted expropriation based on loss of profits as a consequence of termination.<sup>354</sup> The tribunal rejected this claim reasoning that the Claimants distinction between "termination" and "the act of termination" was not warranted.<sup>355</sup> It was not because the manner in which the termination was carried out, in this case by decree, which is explicitly stipulated in Article 32.5 that the termination does not constitute a breach of the contract and would become a violation of the Investment Code.<sup>356</sup> The tribunal thus found that an irregular termination constitutes a *fortiori* a breach of contract and that the ensuing litigation falls within the jurisdiction of the court stipulated in the contract.<sup>357</sup> Thus the claimants insistence that the termination of the Concession Agreement constituted expropriation is all in vain since expropriation

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348 *Id.* at paras. 218–26.

349 *Id.* at paras. 232–67.

350 *Id.*

351 *Id.* at paras. 227.

352 *Id.* at paras. 228.

353 *Id.* at paras. 268–76.

354 *Id.* at paras. 311–14.

355 *Id.* at para. 316.

356 *Id.*

357 *Id.*

is included in Article 32.5 of the Concession Agreement.<sup>358</sup> The tribunal also ruled that the claims of *res judicata* in relation to the annulment of the CCJA award were valid since the contractual claims did not cease to exist with the annulment.<sup>359</sup> Thus the annulment of the CCJA award would not trigger the jurisdiction of the ICSID award as the contractual jurisdiction clause which contractualized the Acts of Public Authorities, impeding the execution of the agreement was still valid.<sup>360</sup> The tribunal thus held that, “this contractualization also comprises the limitation of the damages following the termination of the agreement. The issues of the validity and applicability of this limitation are contractual issues which continue to fall within the jurisdiction of a CGA Tribunal.”<sup>361</sup>

The ICSID tribunal thus affirmed the fact that even if GETMA International had never submitted the OHADA CCJA claims, the tribunal would still have declared its lack of jurisdiction.<sup>362</sup> The reasoning is that the claims of loss of profit as expropriation result directly from the termination of the concession agreement which is a prejudice purely resulting from the contract. And that the annulment of the OHADA CCJA award could not grant the ICSID tribunal jurisdiction it never had.<sup>363</sup> The tribunal also rejected the claim by the Claimants which is supported by the dissenting opinion of Mr. Bernardo Cremades that the ICSID tribunal was “the last bastion separating the claimants from a denial of justice.”<sup>364</sup> The tribunal suggested that the claim could then be brought from start and that the Claimants are not deprived of all access to the courts systems.<sup>365</sup> Despite this finding, the tribunal awarded claimants €449,000 (plus interest) for actions of Public authorities that were not necessary for the termination of the agreement.<sup>366</sup> This includes the presence of police and soldiers in front of GETMA’s offices on the eve of March 8, 2011,<sup>367</sup> and the temporary requisition of GETMA’s property.<sup>368</sup>

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358 *Id.*

359 *Id.* at para. 345.

360 *Id.*

361 *Id.*

362 *Id.* at para. 346.

363 *Id.* at para. 347.

364 *Id.* at para. 348.

365 *Id.*

366 *Id.* at para. 378.

367 *Id.* at paras. 353–79.

368 *Id.* at paras. 381–88.

## H. The US Federal District Court of District of Columbia Refusal of Enforcement

In June 2016, the US Federal Court of the DC refused to confirm and enforce the arbitral award in favour of GETMA.<sup>369</sup> The court held that while the New York Convention confers courts discretion to enforce an award notwithstanding its annulment, the discretion was narrowly confined.<sup>370</sup> Discretion could only be exercised in extraordinary circumstances in order to prevent a violation the US' 'most basic notions of morality and justice'.<sup>371</sup> The court held that the parties had agreed, under the Concession Agreement, to be bound by the CCJA arbitration Rules and that the CCJA had the ultimate discretion on the fees.<sup>372</sup> The court noted that in accordance with the CCJA's 1999 precedent and the CCJA Arbitration Rules, it was the CCJA and not the Secretary General who held ultimate authority and discretion to set and/or adjust the tribunal's fees.<sup>373</sup> The judge concluded that there was no reason to discredit the annulment and thus the award could not be enforced.<sup>374</sup>

Commentators have argued that the decision of the CCJA may have implications on the willingness of international arbitrators to sit as arbitrators in arbitrations governed by CCJA rules.<sup>375</sup> This is because low fees will not attract experienced arbitrators who sit in tribunals of global North-based arbitration institutions. The fees in *GETMA v Guinea* (€62,000) have been considered low in comparison to other arbitral institutions specifically located in the global North.<sup>376</sup> Future CCJA arbitrators may refrain from increasing fees without approval of the CCJA, however, the low fees may not appeal to international arbitrators that would prefer to sit in arbitrations where there fees would be higher.<sup>377</sup> The possibility of not attracting international arbitrators may be considered detrimental to the OHADA CCJA. However, it also presents an opportunity for advancement for African arbitrators who have less opportunities in international

369 Sarkodie & Otoo, *supra* note 172, at 167.

370 Sarkodie & Otoo, *supra* note 172, at 170.

371 Sarkodie & Otoo, *supra* note 172, at 170.

372 Parker Chris, Shore Laurence and Maguelonne de Brugiere, *GETMA v Guinea: The saga continued*, HERBERT SMITH FREEHILLS (June 16, 2016), <https://hsfnotes1.com/arbitration/2016/06/16/GETMA-v-guinea-the-saga-continued/>.

373 Sarkodie & Otoo, *supra* note 172, at 170.

374 Sarkodie & Otoo, *supra* note 172, at 170.

375 Maguelonne de Brugiere, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

376 *Id.*

377 *Id.*

arbitral institutions.<sup>378</sup> This, according to some commentators, is a double-edged sword as international investors who would want international arbitrators to settle their disputes might consider the CCJA a less attractive arbitral institution.<sup>379</sup> This commentary seems to be a move to influence change to the OHADA system in a direction that favors private transnational capital interests.

Additionally, some commentators have also argued that *GETMA v Guinea* undermines the principle of party autonomy as it overruled an agreement between the parties to increase the tribunal fees.<sup>380</sup> The argument on party autonomy takes two forms. On the one hand, the argument is that where parties have agreed (e.g. through a dispute settlement clause in a contract) to subject themselves to a particular system or institution, they agree to the rules under the institutional set up and should thus follow it without undermining the system. This is particularly because arbitral institutions, including the OHADA CCJA, have carefully crafted provisions to maintain institutional integrity. One way of doing so is by safeguarding or regulating arbitrator conduct such as timelines on rendering awards, disclosure obligations, and regulation of arbitrator fees.<sup>381</sup> Such regulation is particularly important where there is a likelihood that the tribunal might jeopardize the case for example through an indication that the tribunal might not be able to continue mid-arbitration, as was the case in *GETMA v Guinea*. On the other hand, the argument is that parties should have the autonomy to determine matters related to their dispute and where they agree, this agreement between the parties should not be undermined.<sup>382</sup> This line of argument contends that parties should remain free to agree fees once the dispute has occurred.<sup>383</sup> It has been argued that the expression of autonomy in the first instance should supersede a subsequent exercise of autonomy.<sup>384</sup>

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378 *The ICSID Caseload, Statistics, Special Focus—Africa*, ICSID 28 (May 2017), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20\(English\)%20June%202017.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20(English)%20June%202017.pdf).

379 Maguelonne de Brugiére, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

380 Sarkodie & Otoo, *supra* note 172, at 171.

381 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, KLUWER ARBITRATION BLOG (May 12, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing\\_wp\\_cron=1593602771.2344129085540771484375](http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375).

382 Sarkodie & Otoo, *supra* note 179, at 171.

383 Maguelonne de Brugiére, *A Step Back for OHADA Arbitrations?*, KLUWER ARBITRATION BLOG (Feb. 10, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing\\_wp\\_cron=1596064752.5843379497528076171875](http://arbitrationblog.kluwerarbitration.com/2016/02/10/a-step-back-for-ohada-arbitrations/?doing_wp_cron=1596064752.5843379497528076171875).

384 Sarkodie & Otoo, *supra* note 179, at 171.

According to Rogers, one of the most fundamental obligations of arbitrators is to apply the arbitral rules agreed by the parties including those rules by the institution governing the arbitration.<sup>385</sup> She emphasizes that arbitrators simply do not have an option of substituting their personal preferences for the institution's decision. Where there is a disagreement between arbitrators and the institution, she contends that the arbitrator should resign, in a timely manner, on a well-founded basis.<sup>386</sup> The arbitrators in *GETMA v Guinea* have also been criticized on the approach of their criticism of the CCJA. Where critiques against institutions are welcome, they are generally proper only outside the context of individual, pending cases.<sup>387</sup> This is because arbitrators should not be seen as attempting to influence outcomes in cases in which they preside, especially where not only arbitrator's conduct is in question but also where such conduct involves obtaining compensation.<sup>388</sup>

## I. Conclusion

This case commentary has offered a detailed in-depth case study of the OHADA CCJA tribunal award in the GETMA case and a commentary of how the case was influenced by a similar case in the ICSID tribunal. Additionally, the commentary has offered an in-depth rendition of the chronological events that occurred in the complex web of arbitral awards, cases, and extra-judicial actions involved in the GETMA case. Apart from the issue of the unilateral increase of arbitrators' fees which is the specific issue that the case is mostly known for, this commentary has addressed other lesser known issues and lessons that the case presented. It has thus been important to present the case with this wide panoramic view but also with a detailed microscopic view to understand both the legal and extra-legal aspects of the case that are normally ignored in snapshot commentaries.

As we have seen, the GETMA cases are a series of cases straddling the OHADA CCJA to ICSID and finally to the US Federal District Court in DC. They are of great significance not only to the African international courts' jurisprudence but also for ISDS generally. The cases shows how different regimes can be invoked by a foreign investor to assert protections for actions of a host State. The OHADA CCJA tribunal actions

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385 Catherine A. Rogers, *When Arbitrators and Institutions Clash, or the Strange Case of GETMA v Guinea*, KLUWER ARBITRATION BLOG (May 12, 2016), [http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing\\_wp\\_cron=1593602771.2344129085540771484375](http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-GETMA-v-guinea/?doing_wp_cron=1593602771.2344129085540771484375).

386 *Id.*

387 *Id.*

388 *Id.*



which can only be described as factored on arbitrators' unilateral actions might have essentially barred any possibility for GETMA to win the fruits of the OHADA CCJA arbitral award which was in their favor. The attempts of GETMA to characterize their contractual dispute as a treaty claim are also effectively rejected by a well-reasoned judgement by the ICSID tribunal that renders its ruling after the OHADA CCJA. It is in fact only in the OHADA CCJA annulled award that GETMA International wins in these series of cases. This shows how disastrous the unilateral action of requesting a significant increase in fees out of the OHADA rules by the OHADA CCJA tribunal was for GETMA. While the GETMA counts it many loses, it is also clear that the Republic of Guinea bore the great burden in terms costs in defending all these cases. The case thus has great lessons for arbitrators, future litigants and African States as they think of ways of reforming and better structuring the future of ISDS.

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