

December 7, 2022

Legal Alert: Protocol to Operationalize the Extended Jurisdiction of the East African Court of Justice.

NEW! EAC Integration News

ALP Alerts is a free legal information service provided by ALP East Africa in respect of the firm's practice areas in its country presence in Kenya, South Sudan, Tanzania, and Uganda.

The Alerts are also available on the ALP website www.alp-ea.com

Tanzania's ratification of the protocol extending the Court's jurisdiction is another step towards a functional and well-structured trade and investment regime within the East African Community.

Tanzania ratifies protocol to empower regional court to handle business and investment matters

Introduction

Article 27 of the Treaty for the establishment of the East African Community provides for the jurisdiction of the East African Court of Justice, as a regional court. Article 27(2) of the Treaty provides for the enactment of protocol to operationalise extended jurisdiction of the court.

On February 20, 2015, the Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice was signed by the Heads of State of the Partner States. The Protocol seeks to extend the jurisdiction of the court to cover trade and investment matters arising out of the implementation of the EAC Customs Union, Common Market and Monetary Union protocols.

Since then, the Protocol has been ratified by Kenya, Rwanda and Uganda. By a letter to the EAC Secretariat dated December 6, 2022, Tanzania communicated its ratification of the Protocol by an instrument of ratification dated November 27, 2022. Notably, reliable sources intimate Burundi is engaged in process to ratify the Protocol. This would leave ratifications by South Sudan and the recently admitted Democratic Republic of the Congo.

Implications of the Tanzania ratification of the Protocol

The EAC regional court has in the recent past grappled with the issue of its jurisdiction over business and trade-related matters. In *East African Law Society v Secretary General of the East African Community*, EACJ Reference No 1/2011, the court clarified that its interpretative jurisdiction of Community law is not affected by other trade dispute settlement mechanisms—including the Committee on Trade Disputes (created under the Common Union Protocol) and national laws and administrative procedures as envisaged under Customs Union and Common Market protocols. It settled the issue in *East African Centre for Trade Policy and Law v Secretary General of the East African Community*, EACJ Reference No 9/2012, where the court held its jurisdiction covers the interpretation of the Treaty and relevant protocols, including the Customs Union and Common Market protocols.

Since then, the court has handled trade-related matters, including *British American Tobacco v Attorney General of the Republic of Uganda*, EACJ Reference No 7/2017 that involved a differentiated tax on goods, in this case, cigarettes manufactured in Kenya and imported into Uganda. The *BAT case* is ground-breaking as the first-ever largely trade related matter the court has decided.

At another level, in its decision in *Hon Sitenda Sebalu v Secretary General of the East African Community*, EACJ Reference No 1/2010, the court underscored the significance of extended jurisdiction and its bearing on good governance in the Community. The court noted that the "delay to extend the jurisdiction of the EACJ contravenes the principles of good governance as stipulated in Article 6 of the Treaty", and the delay to complete consultations on protocol on extended jurisdiction constituted a failure to abstain from measures likely to jeopardise the implementation of the Treaty under Article 8(1)(c) of the Treaty.

The foregoing decisions are the strides the court has taken as regards trade-related disputes and efforts towards its extended jurisdiction.

The ratification of the Protocol by an additional Partner State is a progressive step in the regional integration bloc towards realizing the extended jurisdiction that has been exhibited by the courts in the above highlighted decisions. It is imperative that issues related to trade and investment in the region are prioritised and it is no surprise that this is reflected in the Court's Strategic Plan, 2018-2023.

Despite a robust legal regime on trade, the EAC still lacks a functional regulatory body on trade disputes. The EAC Committee on Trade Remedies, which is ideally the go-to body in addressing trade disputes, remains non-operational to-date. In the meantime, on a perennial basis, there is a spreading culture of trade wars in the region between the Partner States. This leaves not so many options, except resort to courts and, in this case, the regional court. The ratification of the Protocol on extended jurisdiction of the court by more Partner States is to this end.

The EAC Treaty, under Chapter 12, provides for investment and industrial development in Partner States. Despite this, no framework exists in the regional bloc that specifically speaks to matters of investments, resolution of related disputes, or minimum requirements of the same at national level. This presents a situation where only recourse by the courts is to the Treaty itself or the Common Market Protocol since investments are largely regulated by bilateral investment treaties.

It ought to be noted that such jurisdiction extends to investments from Partner States alone. The extended jurisdiction of the court to such matters is well intended; however, this calls for the streamlining of a few factors, including drafting of a regional investment law. It has the potential to grow investment within the region once adequate and operational laws and structures are in place.

Conclusion

The continuing ratification of the Protocol stands as a beacon of hope that soon all Partner States will have ratified the same and that trade and investment matters will have stronger legal and enforcement regime in place. This will not only create an investment-conducive environment in the EAC but it should go a long way in better preparing the EAC for trade and negotiations at a higher regional level, that is, the AfCFTA. Notably, there is need to put in a place a comprehensive legal regime on investment policies within the EAC.

Disclaimer: No information contained in this alert should be construed as legal advice from ALP East Africa or ALP

For additional information in relation to this alert, please contact the following:

Henry Onoria

Head, Integration and Cross-Border Transactions Department

honoriam@alp-ea.com

Christine Byaruhanga

Associate, Integration and Cross-Border Transactions Department

cbyaruhanga@alp-ea.com

Location: ALP Advocates, Lotis Towers, 5th floor, Plot No 16 Mackinnon Road, P.O. Box 28611, Kampala, Uganda.

Contacts: Tel: +256 414 671 997. E-mail: info@alp-ea.com

ALP East Africa

Who we are

ALP East Africa is a premier integrated legal and professional services firm. ALP combines high impact analysis, strategy, and innovation to provide a single service point for clients' legal and professional services' needs. ALP has a deep understanding of Africa and in all assignments, the practice deploys a multidisciplinary and integrated approach using an extensive network of global and local partners to support our clients.

Our other country offices

ALP Kenya

Westpark Towers, 5th floor,
Mpesi Lane (off Parklands Rd)
P.O. Box 102942-00101
Nairobi, Kenya
+254 721 836 545
Kenya@alp-ea.com

ALP Tanzania

Janqid Plaza, 1st floor
Ali Hassan Mwinyi Rd (off
Chambruma Rd)
P.O. Box 1652
Dar-es-Salaam, Tanzania
+255 717 425 183
Tanzania@alp-ea.com

ALP South Sudan

Pyramid Continental Hotel, 4th
floor,
Stadium Road,
Juba, South Sudan.
Tel: +211 920 016 573.
E-mail: SouthSudan@alp-ea.com

Website: www.alp-ea.com Email: info@alp-ea.com

