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Legal Alert: Trade Agreements in the East African Community

NEW! EAC Integration News

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The East African Court of Justice finds that, in negotiating a trade agreement and entering into arrangements for certification of wheat with the United States, Kenya acted in contravention of the East African Community Treaty and the Customs Union Protocol

Regional court nullifies Kenya-US trade agreements

Introduction

In a judgment delivered on December 2, 2022, the First Instance Division of the East African Court of Justice (EACJ) in *Christopher Ayieko & Another v Attorney General of the Republic of Kenya & Another*, Reference No 5/2019 took a firm stand on Partner States negotiating and concluding bilateral trade agreements and arrangements with foreign countries in non-adherence to the EAC Treaty and Protocols.

The dispute, in a reference filed by two Kenyan citizens who are advocates, involved Kenya's negotiation and intention to enter into a Free Trade Agreement with the United States. Additionally, it related to a phytosanitary protocol and memorandum of understanding on the Certification of Wheat negotiate with the United States. Both the trade agreement and wheat grain arrangements were undertaken without complying with the requirement to send the proposed agreements to the Secretary General of the Community as stipulated under Article 37 of the EAC Customs Union Protocol. Additionally, the reference impugned the failure of the Secretary General to caution Kenya that the said trade arrangements were in contravention of Community law. The regional court delivered its judgment that upended Kenya-United States trade relations during its rotational sitting at Kampala, Uganda.

Judgment of the Court

In addressing the challenged Kenya-United States trade agreement and arrangements, the court reflected on critical aspects of Article 37 of the Customs Union Protocol:

- (a) The court clarified what constitutes a *proposed agreement* under Article 37(4)(a) of the Protocol—in order to trigger notification of the other Partner States—and held that it is the “intention” to conclude an agreement (as opposed to an actual agreement being in place). To that end, the court found that there was evidence of the intention, as framed by negotiations, to enter into a trade agreement on the part of Kenya and the United States.

“... [A]rticle 37 of the Customs Union Protocol does not envisage a completed agreement but a proposal of the agreement ... [T]he term “proposed agreement” as used in Article 37(4) of the Customs Union Protocol implies and includes all negotiation documents ... These, in our view, constitute a proposed agreement that would warrant notification to the other Partner States pursuant to Article 37(4)(b) of the Customs Union Protocol”

- (b) The court rejected Kenya's assertions of sovereignty and its right enter into agreements with other States, holding that such agreements should not contravene the EAC Treaty and Customs Union Protocol.
- (c) The court rejected Kenya's argument that the wheat certification memorandum was not a trade agreement, finding it “properly characterized as a trade agreement within the meaning of Article 37 of the Customs Union Protocol”.
- (d) The court held that Kenya, as a Partner State, is incapable of *entirely acting individually* in concluding a separate trade agreement with the United States, as a foreign country. It found this to be the import of Article 37(4) of the Customs Union Protocol in requiring

the other Partner States to be *notified and given opportunity* to provide input to a trade agreement negotiation process.

- (e) The court held that, in entering into trade negotiations with the United States, Kenya failed to perform, in good faith, treaty obligations binding on it as an EAC Partner State, especially in relation to the other Partner States.

In particular, the Court considered Kenya's actions to—

- (i) potentially jeopardize coordination of Partner States economic policies through the institutions of the Community (Article 37 of the Customs Union Protocol).
- (ii) undermine the aspirations of Partner States to adopt common negotiating positions and promote participation (Article 37 of the Customs Union Protocol) and, in turn, the objectives of the Community (Article 5 of the Treaty) and the fundamental and operational principles of the Community (Articles 6(d) and 7(2) of the Treaty).
- (iii) undermine the precedence of the Community organs, institutions and laws on the implementation of the Treaty (article 8 of the Treaty).

In the end, the court held Kenya's trade agreement and arrangements with the United States to contravene Article 5, 6(d) and (f), 7(2), 8(1)(c), (3) and 4 of the EAC Treaty and Article 37 of the Customs Union Protocol (and Article 37 of the Common Market Protocol). As a result, the court declared as **illegal, null and void**, the Free Trade Agreement and the Certification of Wheat memorandum of understanding.

Conclusion

EAC Partner States should adhere to the negotiation and participation arrangements under Article 37(4) of the Customs Union Protocol in concluding trade agreements with foreign countries. Common negotiated positions on part of the EAC Partner States strengthens the trade in the Common Market and Customs Union territory in addressing how goods—in this instance, wheat—from a foreign country are imported into the Community. On a final note, the regional court expressed the frustration in the failure to operationalize the EAC Sanitary and Phytosanitary Protocol since it was adopted in 2012, with only the singular ratification by Kenya. While it remains in limbo, the court warned: "The delayed operationalization of the Protocol could be a recipe for recurrent litigation".

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