



**EAST AFRICAN COMMUNITY
EAST AFRICAN LEGISLATIVE ASSEMBLY**

**REPORT OF THE COMMITTEE ON COMMUNICATION, TRADE AND
INVESTMENT ON THE STATUS OF RATIFICATION OF THE AMENDED ARTICLE
24(2)(a) OF THE PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN
CUSTOMS UNION TO PROVIDE FOR THE ESTABLISHMENT OF THE TRADE
REMEDIES COMMITTEE**

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ACRONYMS

AfCFTA	African Continental Free Trade Area
CET	Common External Tariff
EAC	East African Community
EALA	East African Legislative Assembly
NTBs	Non- Tariff Barriers

1.0 INTRODUCTION

The East African Legislative Assembly (EALA) is one of the Organs of the East African Community (EAC) established under Article 9 of the Treaty. The Treaty bestows upon the Assembly three cardinal functions: legislation, oversight and representation. In particular, the Assembly largely exercises the oversight function through its Committees. Currently, the Committee on Communication, Trade and Investment is one of the 6 Standing Committees of the Assembly. Annex 5 (c) of the Rules of Procedure of the Assembly provides for the specific functions of the Committee on Communication, Trade and Investment as follows:

1. The main functions of this Committee are broadly to receive reports on the status of implementation of the provisions of the Treaty falling within their mandate; complaints of non-compliance in facilitating the achievement of the objectives/goals of the Treaty; oversight of work and activities of the Sectoral Committee of the EAC and Organs charged with implementation of provisions in this realm.
2. The broad functions in 1 above shall hinge on the following provisions of the Treaty, but not limited to them, these are-
 - a) Chapter Eleven-Co-operation in Trade, Liberalization and Development;
 - b) Chapter Twelve-Co-operation in Investment, and Industrial Development;
 - c) Chapter Thirteen-Co-operation in Standardization, Quality Assurance, Metrology and Testing;
 - d) Chapter Fourteen-Monetary and Financial Co-operation;
 - e) Chapter Fifteen-Co-operation in Infrastructure and Services;
 - f) Chapter Twenty Five-The Private Sector and Civil Society;
 - g) Chapter Twenty Six-Relations with other Regional and International Organization and Development Partners.

In light of the above, the main function of the Committee on Communication, Trade and Investment is to receive reports on the status of implementation of the provisions of the EAC Treaty falling within its mandate, complaints of non-compliance in facilitating the achievement of the objectives of the EAC as enshrined in the Treaty.

In the exercise of its oversight mandate, the Committee on Communication, Trade and Investment held meetings and interacted with stakeholders in all the Partner States from 2nd – 4th September, 2019 to assess the status of ratification of the amended

Article 24(2)(a) of the Protocol on the Establishment of East African Community Customs Union to provide for establishment of the Trade Remedies Committee.

2.0 OBJECTIVES OF THE OVERSIGHT ACTIVITY

The principal objective of the oversight activity was to assess the status of ratification of the amended Article 24(2)(a) and the implication of the delayed establishment of the Trade Remedies Committee. It was expected that, during this assignment the Committee would be able to assess the progress made by the Partner States in the ratification of the above Article of the Customs Union Protocol by, among others:

- a) appreciating the procedure of ratification of international laws/instruments in each of the Partner States;
- b) understanding the reasons for the delayed ratification and challenges, if any, encountered by the Partner States in the ratification of the said provision of the Protocol; and
- c) examining the implication of the delayed ratification on the implementation of the EAC Elimination of Non-Tariff Barriers Act, 2017.

3.0 METHODOLOGY

During the oversight activity, the Committee:

- i) held meetings with officials from the Ministries responsible for EAC Affairs, the Ministries of Trade, the Ministries of Foreign Affairs, Offices of the Attorneys General and Members of Parliament on the Committees on Trade;
- ii) interacted with officers from the EAC Secretariat from the Directorate of Trade;
- iii) consulted with and got the views of the East African Business Council on this subject matter; and
- iv) prepared a report on the above subject matter for consideration by the Assembly.

4.0 BACKGROUND INFORMATION

4.1 The Customs Union Protocol

The Protocol on the Establishment of the East African Customs Union was signed in December 2004 and its implementation by the three founding EAC Partner States (The Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania) commenced on 1st January 2005. The Republics of Burundi and Rwanda joined the EAC in July 2007 while the Republic of South Sudan became a Member of the EAC in September 2016.

As a key pillar and first stage of EAC integration process the Customs Union has key features which include: Trade Facilitation, Common External Tariff (CET), Elimination of Internal Tariffs Program, Mechanism for identifying and monitoring removal of NTBs, Rules of Origin, National Treatment, Anti-Dumping Measures, Subsidies and Countervailing Measures, Safeguard Measures, Dispute Settlement Mechanism, Export Promotion Schemes and the EAC Customs Management Act, 2004.

4.2 The Trade Remedies Committee

Article 24 of the Protocol on the Establishment of the East African Customs Union provides for the establishment of the East African Community Committee on Trade Remedies. Precisely, **Article 24(1)** provides for the mandate of the Committee as thus:

"For purposes of this Protocol, there is hereby established an East African Community Committee on Trade Remedies (hereinafter referred to as "the Committee" to handle any matters pertaining to:

- a) Rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules,
- b) Anti – dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations.
- c) Subsidies and countervailing measures provided for under the East African Community Customs Union (subsidies and Countervailing Measures) Regulations
- d) Safeguard measures provided for under the East African Community Customs Union (safeguard Measures)
- e) Dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations,
- f) Any other matter referred to the Committee by Council".

4.3 Composition and Membership of the Committee

Article 24(2) of the Customs Union Provides for the composition and membership of the EAC Committee on Trade remedies follows:

Article 24 (2) (a) **The Committee shall be composed of nine members, qualified and competent in matters of Trade, Customs and law.**

(b) Each Partner State shall nominate three members to the Committee.

4.4 Functions of the Committee

Article 24(4) of the Protocol provides that the functions of the Committee shall be as follows:

- a) Initiate, through the investigating authorities of the Partner States, investigation on disputes under the regulations in paragraph 1 of the Article;
- b) Make affirmative or negative determinations on investigation arising from sub-paragraph (a) of this paragraph;
- c) Recommend provisional measure to prevent injury to a domestic industry where preliminary affirmative determination has been made under any matter in paragraph 1 of the Article;
- d) Undertake consultation with Partner States and other countries on matters before it;
- e) Report to the council on all determinations in relations to matters that are submitted to it and decision made by it;
- f) Provide advisory opinion to the Partner States in relation to matters under paragraph 1 of the Article;
- g) Review annually the implementation and operations of the matters in paragraph 1 of the Article;
- h) Issue public notices under the matters in paragraph 1 of this Article;
- i) Facilitate consultations by Partner States and parties to the dispute before it, to ensure timely fulfilment of all requirements by parties to the dispute and provide advice as may be appropriate;
- j) Administer and manage the dispute settlement mechanism; and
- k) Undertake any functions that may be assigned to it by any regulation under the Protocol or by the Council.

4.5 Amendment of Article 24(2)(a) of the Protocol

At its 10th Ordinary Meeting held on 29th April 2009, the EAC Summit of Heads of State approved the amendment of Article 24 (2)(a) of the Protocol on the Establishment of East African Community Customs Union. The amendment removed the word **"nine"** from paragraph 2(a) of that Article. The effect of this amendment was/is that the membership of the Committee became open ended. The text of the amendment was as follows:

"The Committee shall be composed of members, qualified and competent in matters of trade, customs and law"

5.0 FINDINGS

While undertaking this oversight activity, the Committee made the following findings:

5.1 Efforts made by the relevant EAC Organs

- i. In a letter dated 18th January 2013, the then Director General, Customs and Trade, Mr. Peter N. Kiguta(acting on behalf of the Secretary General) wrote to the Partner States requesting them to nominate members to the EAC Committee on Trade Remedies(**Annex 1**).
- ii. Between March–July 2013, all the five Partners States (the Republic of Burundi, the Republic of Kenya, the Republic of Rwanda, the Republic of Uganda and the United Republic of Tanzania) submitted the names of Persons to Constitute the EAC Committee on Trade Remedies (**Annex 2**).
- iii. At its Meeting held from 27th October to 1st November 2014, the Sectoral Council of Legal and Judicial Affairs, while considering the operationalization of the EAC Trade Remedies Committee, noted that the Partner States were yet to ratify the amendment of Article 24 (2)(a) of the Protocol.
- iv. In the same meeting above, the Sectoral Council underscored the need for the Partner States to expedite the ratification process and to deposit the instruments of ratification by 28th February 2015, to enable the operationalization of the Trade Remedies Committee.
- v. In his letter dated 10th November 2014, the then Deputy Secretary General (Political Federation), Mr. Charles Njoroge transmitted to Partner States the approved amended Article 24 (2)(a) of the Protocol on the Establishment of the East African Community Customs Union(**Annex 3**).
- vi. At its sitting of 27th February 2016, convened in Arusha, Tanzania, the Sectoral Council of Trade, Industry, Finance and Investment, among others, directed Partner States to deposit with the Secretary General instruments of ratification of the amended Article 24(2)(a) of the Protocol on the Establishment of the East African Customs Union by 15th August 2016.
- vii. While acting on behalf of the Secretary General, in his letter dated 23rd August 2017, the Director General, Customs and Trade, Mr. Kenneth Bagamuhunda reminded all the Partner States about the above directive of the Sectoral Council of Trade, Industry, Finance and Investment and the need to deposit instruments

of ratification of the amended Article 24(2)(a) of the Protocol on the Establishment of the East African Customs Union by 30th October 2017 **(Annex 4)**.

- viii. In the report of the Committee on Communication, Trade and Investment titled, "*The Status of Implementation of the Single Customs Territory in the EAC Partner States*" that was debated and adopted by the House in February 2019, on page 30 the House urged the Council of Ministers to expedite the establishment of the Trade Remedies Committee. The same report was transmitted to Partner States for action.

5.2 Indifference by Partner States

- i. During the Committee's interaction with stakeholders, all officials representing the Ministries responsible for EAC Affairs in the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania confirmed receipt of the letters from the Secretary General urging Partner States to expedite the process of ratification of Article 24(2)(a) of the Customs Union and deposit the instruments of ratification.
- ii. In the Republic of South Sudan, the officials representing the Ministry responsible for EAC Affairs neither confirmed nor denied receipt of the said letters from the Office of the Secretary General on this subject matter. The only explanation they gave was that the Ministry had internal administrative challenges in the year 2017 when the Director General, Customs and Trade wrote to them on the same subject matter.
- iii. While the Partner States confirmed receipt of the various letters requesting them to expedite the process of ratification, no action had been taken at the time of carrying out this activity, with the exception of the Republics of Burundi and Kenya. The Republic of Burundi informed the Committee that the amended provision of the Protocol was before the National Assembly for consideration. In his letter to the Clerk of EALA dated 17th September 2019, the Principal Secretary, Ministry of East African Community and Regional Development informed the Committee that the matter was before the Kenya National Assembly awaiting approval **(Annex 5)**.

- iv. Despite several reminders by the Secretary General, no Partner State made an effort to respond to these reminders or at least inform the Secretary General about the delayed ratification or reasons for not ratifying the said provisions of the Protocol.
- v. Shortly after the Committee undertook this oversight activity, on 6th September 2019, Mr. Urujeni Bakuramutsa, the Permanent Secretary, Ministry of Foreign Affairs and International Cooperation, Republic of Rwanda wrote to the Secretary General informing him that the Republic of Rwanda found out that the text of the amended Article 24(2)(a) that was sent to them for ratification was "*not signed by the competent authority and was not in the format of law*". In the same letter, the Permanent Secretary requested the Secretary General "*to resubmit a dully signed text of amendment in the format of law to enable the Republic of Rwanda start the process of ratification*" **(Annex 6)**.

5.3 Ratification of legal instruments in Partner States

The Committee noted that the procedure of ratification of international instruments such as the Treaty and Protocols is more or less the same in all the Partner States. The following are the salient features of the ratification process in the EAC Partner States:

- i. The Sector Ministry takes the lead by initiating the process whereby it convenes a Sector Working Group meeting to get the inputs of other affected government institutions/sectors.
- ii. The Instrument together with comments from the affected sectors is forwarded to the Office of the Attorney General for legal advice.
- iii. After the legal input from the Office of the Attorney General, the Sector Ministry prepares a Cabinet Memorandum and forwards the instrument to Cabinet for consideration.
- iv. Once Cabinet approval is secured, in most Partner States, the Instrument is taken to Parliament for Approval. Parliament may approve with or without amendments or even decline to approve the Instrument.
- v. After Parliamentary approval, in some Partner States, the Instrument is prepared and signed by the President while in other cases, the Cabinet Secretary/Minister in Charge of Foreign Affairs prepares, signs and deposits the Instrument of ratification with the requisite Depository body.

6.0 SPECIFIC OBSERVATIONS

6.1 Implication of the delayed ratification on the EAC Elimination of NTBs Act, 2017

- i. The delayed ratification of the amended Article 24(2) of the Protocol and establishment of the EAC Trade Remedies Committee makes it impossible to effectively implement the EAC Elimination of Non-Tariff Barriers Act, 2017 especially Section 12(2), (3) and (4) which allows the Council of Ministers to refer matters on elimination of NTBs to the EAC Committee on Trade Remedies.
- ii. The non-existence of the Committee on Trade Remedies makes it impossible for the Council of Ministers to refer matters of elimination of NTBs to the EAC Committee on Trade Remedies as provided for in the Act. This implies that any person aggrieved by a directive, decision, or recommendation of the Council may refer such matter to the East African Court of Justice. Such litigation would be exorbitantly expensive and time-consuming for most traders and businesses.

6.2 Impact of the delayed ratification on the Business Community

- i. Given the fact that Committee on Trade Remedies is supposed to handle any matters pertaining to Rules of Origin, Anti-Dumping Measures, Subsidies and Countervailing Measures; Safeguard Measures; and Dispute Settlement Mechanism further delay will impact negatively the business community and traders as there is no dedicated Committee to handle these matters which have bearing impact on businesses.
- ii. Further delay implies that all the issues/challenges arising out of trade related aspects such as Rules of Origin, Anti-Dumping Measures/Regulations; Safeguard Measures; Safeguard Measures, Dispute Settlement Mechanism Regulations cannot be effectively addressed because the Committee dedicated to handle these regulations has not been established and operationalized.
- iii. Further delay implies handling disputes such as Rules of Origin, NTBs, Other Charges of Equivalent Effect, and Discriminatory Tax Practices prohibitively becomes more expensive for traders as it may involve litigation or negotiation among EAC Partner States after an alleged violation of trade measures has occurred. Currently, the time frame for resolving trade disputes or elimination of

identified NTBs is too long and depends on winding EAC processes such as bilaterals between the Partner States.

- iv. Further delay has a negative impact on intra-EAC trade. According to the EAC Trade and Investment Report 2016, intra- EAC exports declined from US\$3.2 billion in 2015 to US\$2.6 billion in 2016 representing 17.4% due to an inadequate trading regime which restricts the export of certain commodities to Partner States. Lack of product diversification and existence of Non-Tariff Barriers in the region have continued to affect intra-regional trade among other factors.

6.3 Available Dispute Resolution Mechanism

Due to the delayed operationalization of the Trade Remedies Committee, the Business Community/traders have been compelled to use the available dispute resolution mechanisms in the Community to address challenges faced while conducting trade in the EAC region. However, the current dispute resolution mechanism is lengthy, unpredictable and time-consuming and costly to the businesses. The current dispute resolution mechanism includes:

- a) National and Regional Monitoring Committees of Non-Tariff Barriers.
- b) Bilateral Meetings between EAC Partner States.
- c) EABC reports challenges to the EAC Secretariat which channels the issue to respective EAC Organs (Committee, Sectoral Council, Council or Summit of Heads of States) for proper directives/decisions.
- d) Litigation through the East African Court of Justice.

7.0 GENERAL OBSERVATIONS

- i. While the Protocol on the Establishment of the East African Customs Union came into force on 1st January 2005, the founding Members of the EAC never made effort to operationalise the EAC Trade Remedies Committee in accordance with the Provisions of Article 24(2) of the Protocol. By the time the Summit amended Article 24(2)(a) in October 2009, the Committee should have been operational since all the Partner States then had ratified the Protocol.
- ii. The original provision of Article 24(2)(a) of the Customs Union Protocol had capped the membership of the EAC Committee on Trade Remedies at nine(9). Therefore,

the amendment of this provision by the Summit of Heads of State in 2009 was necessary to allow the increase in membership of the Committee following the admission of the Republics of Burundi and Rwanda in July 2007, and to further accommodate more representation in future in the event of more countries joining the EAC.

- iii. Whereas in the year 2013 all the Partner States submitted their nominations for the Trade Remedies Committee, the Committee could not be operationalised until the ratification process was concluded and all the Partner States deposited the instruments of ratification with the Secretary General.
- iv. While the Summit approved the amendment of Article 24(2)(a) of the Customs Union in October 2009, it took the Secretary General five years (10th November 2014) to transmit to the Partner States the approved amendment for ratification. This unjustified delay raises serious questions about the level of commitment to the EAC integration the Office bearers had at that time.
- v. The month of October 2019 marks ten years since the Summit of Heads of State approved the amendment of Article 24(2)(a) of the Customs Union Protocol to pave way for the operationalisation of the Trade Remedies Committee. A decade later, as the House debates this report, none of the Partner States has ratified the aforementioned provision of the Protocol thus making it impossible to constitute this important Committee.
- vi. While in his letter to the Clerk of EALA dated 17th September 2019, the Principal Secretary, Ministry of EAC and Regional Development, Republic of Kenya informed the Committee that the matter was before the Kenya National Assembly for consideration, the Committee was unable to ascertain when exactly the Republic of Kenya commenced the process of ratification of Article 24(2) of the Customs Union Protocol.
- ix. Whereas the concerns raised by Mr. Urugeni Bakuramutsa, the Permanent Secretary, Ministry of Foreign Affairs and International Cooperation, Republic of Rwanda in his letter dated 6th September 2019 need to be addressed, the Committee was concerned as to why it had to take the intervention of the Assembly for the Ministry to respond, four (4) years since the Secretary General wrote to the Partner States about this subject matter.

- vii. In light of the ratification process in the Partner States, it is apparent that the responsible technical officers in the Ministries in charge of EAC Affairs failed in their duty to advise their respective Permanent/Principal Secretaries or personally initiate the process of ratification of the amended Article 24(2)(a) of the Customs Union Protocol. To this end, they are culpable for the unjustified delay.
- viii. While the Committee commends the Council of Ministers and the Summit for the initiative of amending Article 24(2)(a) of the Customs Union Protocol, and the EAC Secretariat for the constant reminders to Partner States to expedite the process of ratification, the Committee expresses its displeasure at the manner in which the Partner States handled this matter. The unjustified delayed ratification of Article 24(2)(a) of the Customs Union Protocol by Partner States undermines the spirit of integration.
- ix. Despite the delayed ratification, all the Partner States pledged their commitment to expedite the ratification process. They undertook to conclude the ratification of the amended provision of the Protocol and have the instruments deposited with the Secretary General at the earliest possible opportunity.
- x. It is apparent that the signing of the African Continental Free Trade Area (AfCFTA) will lead to increased volumes of trade in the region and there will be NTBS of continental and global nature. The EAC should create safeguards to enable the region engage firmly in continental and global trade. Therefore, it is important that the Partner States expeditiously ratify Article 24(2)(a) of the Customs Union Protocol and operationalise the EAC Committee on Trade Remedies to address issues of dumping, subsidies and surge of imports.

8.0 RECOMMENDATIONS

In view of the foregoing, the Committee recommends as follows:

1. The Assembly to urge the Council of Ministers to urge the Partner States to conclude the process of ratification of Article 24(2)(a) of the Protocol on the Establishment of the East African Customs Union and deposit instruments of ratification with the Secretary General by 28th February 2020.
2. The Secretary General should transmit to the Republic of South Sudan the amended provision of Article 24(2)(a) of the Protocol on the Establishment of the

East African Customs Union by 20th October 2019 to enable them expedite the process of ratification of the same.

3. The Secretary General should respond to the concerns raised by the Republic of Rwanda in the letter of the Permanent Secretary, Ministry of Foreign Affairs and International Cooperation, Republic of Rwanda dated 6th September 2019, not later than 15th October 2019.
4. The Council of Ministers should operationalise the East African Committee on Trade Remedies by 30th April 2020.
5. The Council of Ministers recommends to the Summit of Heads of State sanctions against any Partner State that will not have ratified Article 24(2)(a) of the Protocol on the Establishment of the East African Customs Union Customs Union and deposited instruments of ratification with the Secretary General by 28th February 2020.