

INVESTMENT REGULATION IN THE EAST AFRICAN COMMUNITY: COMMUNITY AND DOMESTIC LEGAL REGIMES

Emmanuel Sebijjo Ssemmanda* and Edmond Ashivaka Shikoli**

Abstract

Investment regulation is a driver of investments globally. Some key principles are universally expected by investors – equal treatment, facilitation, licensing, repatriation, protection from expropriation and dispute resolution. The investment regulations in the EAC cover all these.

Keywords: Investing in East Africa, Investment Protection in East Africa, FDI, Investment Regulation, Investment License, EAC Law, Cross Border Investment.

* Executive Director at African Institute of Regional Integration Studies and Lecturer of Law at International University of East Africa; LL.B (Hons) University of Nottingham; LL.M Regional Integration and East African Community Law University of Dar es Salaam – University of Bayreuth; PG. Dip Institute of Legal Practice and Development, Rwanda; Advocate of the High Court of Rwanda.

** Lecturer of Law at Kabarak University School of Law; LL.B (Hons) Moi University; LL.M Regional Integration and East African Community Law University of Dar es Salaam – University of Bayreuth; PG. Dip Kenya School of Law; Advocate of the High Court of Kenya.

1.0 Introduction

With a population of 170 million people and GDP of US\$ 160 Billion, the East African Community (EAC) – made up of Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda – offers a remarkably attractive market for foreign and cross-border investors. Excluding international agreements – which mostly have secondary status in the EAC Partner States, the primary legal regime governing investment in the EAC consists of two major parts: the Community regime and domestic regime. These, although complimentary of each other in one sense, are fraught with divergences that ought to be remedied with harmonisation for maximum efficiency and investment protection.¹

2.0 Community Regulation and Dispute Settlement Mechanisms

The Community investment regime stretches over a number of instruments. They set out rules on investment generally, although they entail some specific provisions on cross-border investments. The Community investment regime covers investor treatment and protection, and sets out a number of dispute settlement mechanisms.

2.1.0 Treaty Establishing the East African Community (EAC Treaty)

The EAC Treaty was enacted in 1999 and came into force in 2000. It endeavours to create an attractive environment in all Partner States for foreign and cross-border investments.² To achieve this, Partner States are obliged to take measures to improve the competitiveness of their industrial sectors,³ encourage the development of local entrepreneurs,⁴ harmonise and rationalise their investment incentives thereby promoting the EAC as a ‘single investment area’,⁵ refrain from double taxation measures,⁶ as well as improve

¹ See G C Moss, ‘Full Protection and Security’, in A, Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2006), 131-150.

² Paragraph 11, Preamble to the EAC Treaty.

³ Article 79(a) EAC Treaty.

⁴ Article 79(c) EAC Treaty.

⁵ Article 80(1)(f) EAC Treaty.

⁶ Article 80(1)(h) EAC Treaty. See the presently unratified Double Taxation Avoidance Agreement of the East African Community. Note that some Partner States have double taxation agreements with third States.

their business environments through conducive investment laws and proper regulation of their private sectors.⁷

In view of the fact that foreign investments are occasionally pursued within the framework of bilateral or multilateral international investment treaties, the EAC Treaty requires Partner States to respect their international obligations. Thus, investment treaties and their beneficiaries have, outside the main stream of international law, secondary protection via Community law.⁸

Insofar as arbitration is the preferred mechanism for investor-investor and investor-State dispute resolution,⁹ the EAC Treaty bestows upon the East African Court of Justice (EACJ) jurisdiction to determine matters arising from arbitration clauses in commercial contracts or agreements in which the parties have conferred jurisdiction upon it.¹⁰ Investment agreements between the Community organs or institutions and individual investors regarding, for example, the construction of Community property, may equally be submitted to the EACJ for arbitration if the contract or agreement confers such jurisdiction as may disputes between Partner States regarding their citizens' investments in host Partner States provided a special agreement in that regard is entered into between the relevant Partner States.¹¹

The EACJ's arbitration jurisdiction is particularly important given the sui generis nature of Community law whose application to investment disputes, in relation, for example, to cross-border investments, may require special expertise. In that regard, there are two major attractions about EACJ arbitration: the arbitrators are chosen solely from among the EACJ Judges, and their services come at no fee.¹²

⁷ Article 127(2)(a) EAC Treaty.

⁸ See *African Network for Animal Welfare (ANAW) v Attorney General of Tanzania (No 3)* [2014] EACJ Reference No 9 of 2010; Cf *East African Development Bank v Blueline Enterprises Ltd* [2011] Civil Appeal No 110 of 2009.

⁹ R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edition, Oxford University Press, 2012), 278-312; and L. Malintoppi, 'Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order', in C. Binder, U Kriebaum, A. Reinisch, and S. Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009), 157-184.

¹⁰ Article 32(c) EAC Treaty.

¹¹ Article 32(a), (b) EAC Treaty.

¹² Rules 8(1) and 37(1) EACJ Rules of Arbitration 2012.

2.2.0 Protocol on the Establishment of the East African Community Customs Union (EAC CUP)

The EAC CUP was enacted in 2005 pursuant to articles 2(2), 5(2), 75(2 and 7) and 151(1) of the EAC Treaty. Following a five-year transitional period, the EAC CUP came into full force in 2010. It primarily provides for the elimination of customs duties (and charges having equivalent effect, that is, disguised customs duties),¹³ the elimination of non-tariff barriers such as quotas and embargoes,¹⁴ the elimination of discriminatory internal taxation,¹⁵ and the establishment of a common external tariff.¹⁶ Together, these facilitate cross-border investment for manufacturers, farmers and transporters, among others, because they establish an enabling environment for the free movement of goods within the EAC.

The Protocol establishes an out-of-court dispute resolution mechanism managed by the East African Community Trade Remedies Committee.¹⁷ Disputes concerning Community rules of origin, anti-dumping measures, subsidies, countervailing measures, and safeguard measures are to be resolved by the Committee: any question regarding the interpretation of the Protocol or other Community legislation ought to be referred to the EACJ.¹⁸

2.3.0 Protocol on the Establishment of the East African Community Common Market (EAC CMP)

The EAC CMP was enacted in 2010 pursuant to articles 2(2), 5(2), 76(2 and 4), 104(2) and 151(1) of the EAC Treaty. Following a five-year transitional period, the EAC CMP came into full force in 2015. It provides for the free movement of goods,¹⁹ labour,²⁰ companies,²¹ services,²² and capital.²³ The

¹³ Articles 2(4)(a) and 10 EAC CUP.

¹⁴ Articles 2(4)(b) and 13 EAC CUP.

¹⁵ Article 15(1)(b)(2) EAC CUP.

¹⁶ Articles 2(4)(c) and 12 EAC CUP.

¹⁷ Article 24(1) EAC CUP.

¹⁸ See *East African Law Society v Secretary General of the East African Community (Jurisdiction to Interpret)* [2013] EACJ Reference No 1 of 2011.

¹⁹ Article 6 EAC CMP.

²⁰ Article 10 EAC CMP.

²¹ Article 13 EAC CMP.

²² Article 16 EAC CMP.

²³ Article 24 EAC CMP.

objective is to create a common market where local investors in one Partner State can expand their enterprises to another Partner State. For example, a soft drinks company in Uganda is entitled to set up a branch in Kenya, capitalise that branch, move some of its workers – including top management – to that branch, and sell the soft drinks produced by that branch throughout the EAC under the EAC CMP provisions on the free movement of companies, capital, labour, and goods. Cross-border investments need not be physical. Equity, securities, and intellectual property may equally constitute cross-border investments.²⁴

Aside from facilitating cross-border investments, the EAC CMP requires Partner States to ‘protect cross-border investments and returns of investors of other Partner States within their territories’. Such protection entails ensuring cross-border investors receive equal treatment not only with the national local investors but also the foreign investors of the host Partner State.²⁵ Expropriation of cross-border investments may occur only in pursuit of a public purpose, in non-discriminatory circumstances, in accordance with the due process of law, and entail prompt, reasonable and effective compensation.²⁶

Dispute resolution under the EAC CMP takes a dual approach: non-inter-state disputes, that is, investor-investor and investor-State disputes are adjudicated by national courts while inter-state disputes, that is, State-State disputes are adjudicated by the EACJ.²⁷ This system gives national courts a hand in investment protection and reassures investors of door-step justice. At the same time, by assigning a regional adjudicator for State-State disputes, the EAC CMP eliminates the risks that come with national courts adjudicating disputes between their State and another, in particular, the potential for bias driven by a sense of loyalty to their State.

2.4.0 East African Community Model Investment Code (EAC MIC)

The EAC MIC was enacted in 2006 in view of the fact that the Partner States, ‘before harmonisation of their investment laws and policies, need a

²⁴ Article 29(4) EAC CMP.

²⁵ Article 29(2)(b) CMP Cf Article 13(10) EAC CMP.

²⁶ Article 29(2)(c) EAC CMP.

²⁷ Article 54 EAC CMP See *Alcon International v Standard Chartered Bank & Ors* (No 4) [2015] EACJ Appeal No 3 of 2013.

Model Investment Code to assist them in improving their national investment codes and policies through capturing the best international investment practices while working towards harmonisation'.²⁸ As such, its provisions may be incorporated into national investment laws and policies, rendering it a guiding rather than a legally binding instrument.²⁹

The EAC MIC includes, *inter alia*, provisions on national treatment and non-discrimination of foreign investors with local investors,³⁰ expropriation,³¹ dispute settlement,³² the setting up of national investment agencies,³³ as well as special economic zones including free trade zones,³⁴ export processing zones,³⁵ zones for manufacturing under bond,³⁶ technology parks,³⁷ industrial parks,³⁸ and virtual zones,³⁹ among others.

3.0 Domestic Regulation and Dispute Settlement Mechanisms

Each Partner State has a legal regime for investments within its borders. Although foreigners and foreign owned entities can establish businesses in the Partner States under the latter's ordinary corporate regimes, establishing under the respective investment regimes is beneficial in the sense that investors get attractive incentives including tax holidays, immigration exemptions, and one-stop access to the necessary licences. The investment regimes also provide investors with absolute repatriation rights, expropriation protection, and a mixture of court and out-of-court dispute resolution mechanisms – particularly, initial amicable resolution upon whose failure recourse may be had either to national or international arbitration.⁴⁰

²⁸ Preamble to the EAC MIC.

²⁹ Article 3(1) EAC MIC.

³⁰ Article 5 EAC MIC.

³¹ Article 14 EAC MIC.

³² Article 15 EAC MIC.

³³ Article 18 EAC MIC.

³⁴ Article 23 EAC MIC.

³⁵ Article 24 EAC MIC.

³⁶ Article 25 EAC MIC.

³⁷ Article 26 EAC MIC.

³⁸ Article 27 EAC MIC.

³⁹ Article 28 EAC MIC.

⁴⁰ All EAC Partner States have ratified and/or domesticated (where appropriate) the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

3.1.0 Burundi

Investment in Burundi is domestically regulated by Law No. 1/24 of 10 September 2008 Establishing the Investment Code of Burundi (hereafter, Law Establishing the Investment Code of Burundi). The Law establishes the Burundi Investments Promotion Agency which authorises, promotes, and facilitates investment in Burundi.⁴¹

The Law does not distinguish between ‘foreign’ and ‘local’ investors. It generally defines an investor as any individual or legal entity, of Burundian nationality or not, carrying out investment operations on the Burundian territory, under the conditions defined in the framework of this code.⁴²

The Law provides for equal treatment with nationals in relation to the acquisition or lease of real property,⁴³ guarantees repatriation rights,⁴⁴ protects against expropriation of investors’ assets except in the public interest, in line with legal procedure, and in return for preliminary and fair compensation.⁴⁵ Investor-State disputes are to be settled strictly by amicable resolution mechanisms or arbitration except for disputes regarding expropriation compensation which may be referred to Burundi’s courts.⁴⁶

3.2.0 Kenya

Investment in Kenya is domestically regulated by the Kenya Investment Promotion Act, 2004. A ‘foreign investor’ under the Act is ;a natural person who is not a citizen of Kenya; a partnership in which the controlling interest is owned by a person or persons who are not citizens of Kenya; or a company or other body corporate incorporated under the laws of a country other than Kenya.⁴⁷

A ‘local investor’ is a natural person who is a citizen of Kenya; a partnership in which the controlling interest is owned by a person who is a citizen of Kenya; a company incorporated under the laws of Kenya, in which

⁴¹ Article 18 Law Establishing the Investment Code of Burundi.

⁴² Article 1(4) Law Establishing the Investment Code of Burundi.

⁴³ Article 10 Law Establishing the Investment Code of Burundi.

⁴⁴ Article 11 Law Establishing the Investment Code of Burundi.

⁴⁵ Article 13 Law Establishing the Investment Code of Burundi.

⁴⁶ Article 17, of Article 13 Law Establishing the Investment Code of Burundi.

⁴⁷ Section 2 Kenya Investment Promotion Act.

the majority of shares are held by a person who is a citizen of Kenya; or a trust or trust corporation established under the laws of Kenya, in which the majority of trustees and beneficiaries are citizens of Kenya.⁴⁸

The Act establishes the Kenya Investment Authority whose role is to authorise (by issuing investment certificates), promote, and facilitate foreign investments in Kenya.⁴⁹ The Act also establishes the National Investment Council whose role is primarily to advise the government and government agencies on how to increase investment and to promote public-private cooperation on the formulation and implementation of investment policies.⁵⁰ To acquire an investment certificate, a foreign investor requires minimum investment capital of \$100,000 and a local investor requires minimum investment capital of 1,000,000 KES (approx. \$9,600).⁵¹

The Act does not specifically guarantee repatriation rights, protection against expropriation, and out-of-court dispute settlement mechanisms. Nevertheless, the repeal of exchange control laws in 1995, the constitutional right to property, as well as Kenya's corporate and arbitration laws fill this gap. In any case, Kenya's bilateral and multilateral investment treaties with France, Finland, the Swiss Confederation, OPEC Member States, Burundi, Slovak Republic, Iran, Kuwait, and Mauritius specifically provide absolute repatriation rights, protection against expropriation without the due process of law and market value compensation, as well as alternatives for court and out-of-court dispute resolution for disputes between investors and the government.⁵²

3.3.0 Rwanda

Investment in Rwanda is domestically regulated by Law No 6/2015 of 28/03/2015 relating to Investment Promotion and Facilitation. The Law accords the Rwanda Development Board powers to authorise (by issuing investment certificates), promote, and facilitate investments in Rwanda.⁵³

⁴⁸ Ibid.

⁴⁹ Sections 14 and 15 Kenya Investment Act.

⁵⁰ Sections 26 and 27 Kenya Investment Promotion Act.

⁵¹ Section 4 Kenya Investment Promotion Act.

⁵² See the Foreign Investment Protection Act, Cap 518.

⁵³ Article 14 Law Relating to Investment Promotion and Facilitation.

The Law defines a ‘foreign investor’ as a natural person who is not a citizen of Rwanda or of a Partner State of the East African Community or the Common Market for Eastern and Southern Africa (COMESA); a business company or partnership not registered in Rwanda, or in an EAC or COMESA Partner State; and a business company or partnership registered in Rwanda whose foreign capital from countries other than the EAC or COMESA Partner States is at least 51% of the invested capital.⁵⁴ As such, citizens, companies, and partnerships from Rwanda, EAC, and COMESA Partner States are regarded as local investors for purposes of acquiring an investment certificate provided. In the case of companies and partnerships, at least 51% of their investment capital is not from countries outside the EAC or COMESA.⁵⁵

The law guarantees investors equal treatment with nationals,⁵⁶ absolute repatriation rights,⁵⁷ protection against unlawful and uncompensated expropriation,⁵⁸ and alternatives for court and out-of-court investor-State dispute resolution mechanisms – particularly amicable settlement and national or international arbitration.⁵⁹

3.4.0 South Sudan

Investment in South Sudan is domestically regulated by the Investment Promotion Act, 2009 (hereafter, South Sudan Investment Promotion Act). The Act establishes the South Sudan Investment Authority which authorises (by issuing investment certificates), promotes, and facilitates domestic and foreign investments in South Sudan.⁶⁰

The Act defines a ‘foreign investor’ as any natural or legal person who is a resident or a citizen of a foreign country, any legal entity that was founded and registered under the law of a foreign country or was founded under the law applicable in Southern Sudan with a legal address or principal place of business in a foreign country.⁶¹

⁵⁴ Article 2(24) Law Relating to Investment Promotion and Facilitation.

⁵⁵ See Article 2(22), cf Article 2(24)(c) and Article 11 Law Relating to Investment Promotion and Facilitation.

⁵⁶ Article 5 Law Relating to Investment Promotion and Facilitation.

⁵⁷ Article 8 Law Relating to Investment Promotion and Facilitation.

⁵⁸ Article 6 Law Relating to Investment Promotion and Facilitation.

⁵⁹ Article 9 Law Relating to Investment Promotion and Facilitation.

⁶⁰ Sections 6, 7, 8, and 21 South Sudan Investment Promotion Act.

⁶¹ Section 5 South Sudan Investment Promotion Act.

The Act defines a ‘national’ or local investor as any citizen of South Sudan or any company, partnership, association or body, whether corporate or non-corporate in which the majority capital or financial interest is owned by citizens of South Sudan as well as a statutory corporation.⁶²

The Act provides for equal treatment of foreign investors with nationals,⁶³ guarantees repatriation rights,⁶⁴ and protects against expropriation of investors’ assets except in accordance with the due process of law and in return for fair and adequate compensation without undue delay which may be repatriated without any limitations.⁶⁵ Investor-State disputes may be handled by the courts or through out-of-court dispute resolution mechanisms – particularly amicable settlement and national or international arbitration.⁶⁶

3.5.0 Tanzania

Investment in Tanzania is domestically governed by the Tanzania Investment Act, 1997. The Act applies to all business enterprises – whether domestic or foreign – that satisfy the requirements of the Act save for businesses authorized to conduct reconnaissance, explorations or production operations.⁶⁷ Businesses owned by foreign investors must have a minimum investment capital of \$300,000.⁶⁸ Businesses that are wholly owned by locals but which wish to benefit from the Act’s incentives must have a minimum investment capital of \$100,000.⁶⁹

The Act establishes the Tanzania Investment Centre – a one-stop centre for investors tasked with authorising, coordinating, encouraging, promoting, and facilitating investments in Tanzania as well as advising the government on investment policy.⁷⁰ All businesses under the Act are entitled to the benefits applicable under the Income Tax Act, 1973, the Customs Tariff Act, 1976, the Sales Tax Act, 1976, and any other law being in force during the time of

⁶² Ibid.

⁶³ Section 33 South Sudan Investment Promotion Act.

⁶⁴ Section 37 South Sudan Investment Promotion Act.

⁶⁵ Section 34 South Sudan Investment Promotion Act.

⁶⁶ Section 39 South Sudan Investment Promotion Act.

⁶⁷ Section 2 Tanzania Investment Act.

⁶⁸ Section 2(2)(a) Tanzania Investment Act.

⁶⁹ Section 2(2)(b) Tanzania Investment Act.

⁷⁰ Sections 5 and 17 Tanzania Investment Act.

formation and registration of the company.⁷¹

The Act defines a ‘foreign investor’ as a natural person who is not a citizen of Tanzania; a company incorporated under the laws of any country other than Tanzania in which more than 50% of the shares are owned by a person who is not a citizen of Tanzania; and a partnership in which the controlling interest is owned by a non-citizen of Tanzania.⁷²

The Act defines a ‘local investor’ as a natural person who is a citizen of Tanzania; a company incorporated under the laws of Tanzania in which the majority of the shares are held by a Tanzanian; and a partnership in which the controlling interest is owned by a Tanzanian.⁷³

The Act guarantees holders of investment certificates absolute repatriation rights,⁷⁴ protection against expropriation of assets except in accordance with the due process of law and in return for fair, adequate, and prompt compensation,⁷⁵ and investor-State disputes are to be settled solely through out-of-court dispute settlement mechanisms – particularly amicable settlement and national or international arbitration.⁷⁶

3.6.0 Uganda

Investment in Uganda is domestically governed by the Investment Code Act, 2019, recently enacted to replace the previous Investment Code Act Cap. 92. The previous Act defined a ‘foreign investor’ as a person who is not a citizen of Uganda; and a company in which more than 50% of the shares are held by a person who is not a citizen of Uganda unless the company is incorporated in Uganda and its majority shares are held by the government, or the company is an international development agency approved by the Uganda Investment Authority or it is a co-operative society, or a trade union.⁷⁷ In addition, there was no express provision for ‘local investors’.

⁷¹ Section 19 Tanzania Investment Act.

⁷² Section 3 Tanzania Investment Act.

⁷³ Ibid.

⁷⁴ Section 21 Tanzania Investment Act.

⁷⁵ Section 22 Tanzania Investment Act.

⁷⁶ Section 23 Tanzania Investment Act.

⁷⁷ See section 9(1), (2) of the old Uganda Investment Code Act Cap. 92.

However, the new Act adopts the EAC sentiment, becoming the second Partner State after Rwanda to expressly embrace East African integration within its investment statutory framework by broadening its definition of foreign investors and adopting a progressive definition of domestic investors both of which accommodate citizens and companies registered in other EAC Partner States.

Accordingly, the Act defines a ‘foreign investor’ as a natural person who is not a citizen of an EAC Partner State; or a company incorporated under the laws of any country outside the EAC; or a company incorporated in Uganda whose majority shareholder is not a citizen of any of the EAC Partner States; or a partnership whose controlling interest is owned by a person who is not a citizen of any EAC Partner State.⁷⁸

A ‘domestic investor’ is defined as a natural person who is a citizen of any EAC Partner State; or a company incorporated in any EAC Partner State and in which the majority shareholder is a citizen of any EAC Partner State; or a partnership whose controlling interest is owned by a citizen of any EAC Partner State.⁷⁹

Importantly, the old Act established the Ugandan Investment Authority, tasked with authorising (by issuing ‘investment licences’), promoting, facilitating, and supervising investments in Uganda. The new Act maintains this Authority in place and expands its objectives, in particular, requiring it to establish a ‘one-stop centre’ – in physical or electronic form, for purposes of coordination, promotion, facilitation, monitoring and evaluation of investments.⁸⁰ The Authority now grants ‘investment certificates’ which officially identify the incentives accorded to the investor. To acquire an investment certificate, a foreign investor must have minimum investment capital of \$100,000 and a domestic investor must have minimum investment capital of \$50,000.⁸¹

⁷⁸ Section 1 Investment Code Act 2019.

⁷⁹ Ibid.

⁸⁰ Sections 1 and 2 Investment Code Act 2019.

⁸¹ Uganda Investment Authority, Starting a Business, available at <https://www.ugandainvest.go.ug/why-uganda/starting-a-business/>, accessed on 12th July, 2019.

Previously, investors were guaranteed protection against expropriation except in accordance with the Uganda Constitution and for fair market value compensation.⁸² The new Act maintains this protection but modifies it by requiring payment of compensation prior to the State taking possession of the property.⁸³ In addition, compensation paid from expropriation is freely transferrable out of Uganda and is not subject to exchange control restrictions under the Foreign Exchange Act, 2004. However, this protection is not absolute as ‘applicable laws, rules and policies governing investors necessary for the reasonable control of foreign investments’ may apply.⁸⁴ If this is not the legislative version of taking with one hand that which has been given by the other, it will at a minimum be seen as setting the stage for a disappointed investor to be outdone by the system twice over, and must be a core consideration for any investor negotiating a compensation package in the event of expropriation. That said, the constitutional right to property can be a helpful buffer in the circumstances.

Previously, investor-State disputes were resolved primarily through out-of-court dispute settlement mechanisms – particularly amicable settlement and national or international arbitration – with the possibility of recourse to the Ugandan courts where those mechanisms fail.⁸⁵ The new Act modifies that process, requiring both parties to initially undertake efforts to amicably resolve the dispute through negotiations for amicable settlement in accordance with Uganda’s Arbitration and Conciliation Act.⁸⁶ If negotiations fail, the Act provides that the dispute must be submitted for arbitration by a mutually agreed procedure selected from three options: (a) the procedure under Uganda’s Arbitration and Conciliation Act; (b) the procedure of the International Centre for the Settlement of Disputes; or (c) the procedure under any bilateral or multilateral investment agreement of which Uganda and the home State of the investor are parties.⁸⁷ A selection may be made prospectively and mutually at the application stage so that it is specified on the investment certificate issued by the Uganda Investment Authority and is binding on the parties.⁸⁸ Crucially,

⁸² See section 27 of the old Investment Code Act Cap. 92.

⁸³ Section 24(1) and (2) Investment Code Act 2019.

⁸⁴ Section 24 (3) and (4) Investment Code Act 2019.

⁸⁵ See section 28 of the old Investment Code Act Cap. 92.

⁸⁶ Section 25(1) Investment Code Act 2019.

⁸⁷ Section 25(2) Investment Code Act 2019.

⁸⁸ Section 25(3) Investment Code Act 2019.

where the procedure for arbitration is not specified on the investment certificate and, upon failure of negotiations for amicable settlement, cannot be agreed upon by the parties, an aggrieved party may have recourse to national courts.⁸⁹ The Act is silent on investor-investor disputes.

Lastly, like in the previous Act, repatriation rights for investment returns or capital are not expressly provided for in the new Act (except for transfer of expropriation funds, discussed above). In that regard, transfer of money abroad is regulated by the Foreign Exchange Act, 2004, which spells out no express prohibition against repatriation except for generally applicable temporary measures on both in and out payments to protect the economy, and a requirement for payments in foreign currency to be made through a bank.⁹⁰

4.0 The Need for Harmonisation

Major differences exist between the national and Community investment regimes – which can be problematic for advisory tasks, strategic planning and litigation. The doctrine of primacy, by which Community law takes precedence over national law, may provide a natural remedy in some circumstances.⁹¹ Particularly, not all domestic investment regimes guarantee national and most-favoured nation treatment whereas they are guaranteed throughout the Community by the EAC CMP.⁹²

Although the domestic investment regimes are reasonably conducive, their most significant shortcoming in relation to cross-border investors is that the EAC Partner States, with the exception of Rwanda and Uganda, have insisted on construing local investors from other EAC Partner States as foreign investors, thus subjecting them to the heightened registration requirements for foreign investors as well as restrictions on the available investment sectors.⁹³

⁸⁹ Section 25(4) Investment Code Act 2019.

⁹⁰ These restrictions are not investment-centric and are equally available in the other Partner States. See, for example, Kenya's Exchange Control Act Cap 113.

⁹¹ See *Samuel Mukira Muhochi v Attorney General of Uganda* [2013] EACJ Reference No. 5 of 2011.

⁹² See, generally, Article 3(2)(a) EAC CMP.

⁹³ This criticism does not extend fully to Burundi as that Partner State does not distinguish between foreign and local investors.

On the other hand, their most significant shortcoming in relation to foreign direct investment is the divergence in definitions of ‘foreign’ and ‘local’ investors, their rules on investment registration and incentives, as well as the compensation rules in the event of expropriation which vary from ‘fair, adequate, and prompt’ compensation to ‘market value’ compensation, and simply ‘compensation’. These, among other divergences, make Community-wide investment less advantageous, especially, due to the inevitable burden of having to comply with different rules per Partner State. In particular, they put off foreign investors who look at the region as an entire market rather than as individual State markets.

Accordingly, to the extent that the Community investment regime is, first, itself largely stratified and, second, does not extend to all the areas of divergence in the domestic regimes, it is no panacea for the multiplicity of the latter. It may well be that adopting a harmonised regime will fit squarely with the Community agenda of establishing a customs union, common market and monetary union since these stages of integration require uniform rules for their success.⁹⁴ A uniform legal regime can also enhance legal certainty and thereby encourage investment. Furthermore, harmonisation can prevent potential regulatory competition among the Partner States whereby each may be tempted to adopt the best investment regime to attract more investors which can place social values at risk and create an unpredictable, ever-changing regulatory landscape.

That said, harmonisation, if opted for, can be used to establish uniform rules for investment; ensure investor and investment protection; establish a Community institutional and legal framework for the promotion, supervision and enforcement of investment laws; and ease investor entry into and crossing between the EAC Partner States.

⁹⁴ Joseph Kikonyogo, *Similar Solutions for Similar Problems: Harmonising Energy Trade and Investment Policies and Strategies in the East African Community* (LLM Thesis, University of Western Cape, Cape Town, 2009), 62.

5.0 Conclusion

This article has discussed the Community and domestic investment regimes in the EAC, highlighting the fundamental aspects in each regime and flagging the divergences that exist. A key solution would be harmonisation, which should be pursued swiftly but with consideration for the fact that investment regimes do not exist in a vacuum – they are linked to other regimes, particularly, corporate, financial, and property regimes both at the Community and domestic level. Accordingly, harmonising the EAC investment regime is likely to be more efficient if all feeder regimes are equally touched up.