IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(FIRST INSTANCE DIVISION)

(CORAM: Johnston Busingye,PJ; Mary Stella. Arach-Amoko, DPJ; John Mkwawa, J; Jean Bosco Butasi, J; and Isaac Lenaola, J.)

REFERENCE NO. 9 OF 2012

THE EAST AFRICAN CENTRE FOR TRADE POLICY AND LAW.....APPLICANT

AND

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....RESPONDENT

Date 9TH MAY 2013

JUDGMENT OF THE COURT

1. INTRODUCTION

1. This Reference dated 25th November, 2011, was premised on Articles 5, 6, 8 (1), (4) & (5), 23, 27(1), 30(1) & (3), 33 and 126 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of The East African Court of Justice Rules of Procedure (hereinafter referred to as the " Treaty" and the "Rules" respectively).

2. The Applicant is the East African Centre For Trade Policy, a registered company limited by guarantee in the Republic of Uganda whose address for purposes of this Reference was indicated as: c/o M.B Gimara Advocates, Plot 4, Jinja Road, 5th Floor, Northern Wing, Social Security House, P.O Box, 28661, Kampala, Uganda.

3.The Respondent is the Secretary General of the East African Community (hereinafter referred to as "the Community"), sued in the capacity of the Principal Executive Officer of the Community, the Head of the Secretariat and the Secretary to the Summit, pursuant to Article 67 of the Treaty.

BACKGROUND

4. The undisputed background to the Reference is as follows: On 30th November 1999, the Heads of State of Kenya, Uganda and Tanzania signed the Treaty for the Establishment of The East African Community. The Treaty entered into force on 7th July 2000. Article 9(e) established the East African Court of Justice (hereinafter referred to as "the EACJ"), as one of the organs of the Community. Article 23 of the Treaty stipulated the role of the Court as follows:

"The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty."

5. The jurisdiction of the Court was spelt out in Article 27 of the Treaty in the following words:

"1.The Court shall initially have jurisdiction over the interpretation and application of the Treaty.

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

6. Article 30 entitled ***"Reference by Legal and Natural Persons",*** made provision for the category of persons who are eligible to bring References before the Court and the cause of action. It read:

" 1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

7. The Partner States amended the Treaty on the 14th December, 2006 and 20th August, 2007, respectively, and introduced the amendments that form the first part of the subject of this Reference, namely, the proviso to Article 27(1) and Article 30(3) of the Treaty.

The proviso to Article 27(1) reads:

"Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty to the Organs of Partner States."

The new clause (3) to Article 30 reads:

"3. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under the Treaty to an institution of a Partner State."

8. On the 3rd March 2004, the Partner States concluded the Customs Union Protocol. The Protocol came into force on the 1st January, 2005. Article 24(1) (e) of the Customs Union Protocol established the East African Community Committee on Trade Remedies and vested

it with the jurisdiction for dispute settlement in accordance with the East African Customs Union (Dispute Settlement Mechanism) Regulations.

9. On 20th November 2009, the Partner States concluded the Common Market Protocol. Article 54 (2) thereof provides as follows:

"Settlement of Disputes

1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.

2. In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

(a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and

(b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress."

THE APPLICANT'S CASE

10. In the Reference, the Applicant states that, during the course of its work, it discovered that the East African Community Summit had amended Chapter 8 of the Treaty in particular, by introducing a proviso to Article 27(1) and creating Article 30(3) and had also concluded the East African Community Customs Union Protocol and the East African Community Common Market Protocol.

10. The Applicant avers that the amendments to the Treaty and the dispute settlement mechanisms provided for in the two Protocols, deny original jurisdiction to the EACJ, from handling disputes arising from the Protocols contrary to the expectations of the Treaty.

12. The Applicant further asserts that the above actions, in as far as they limit/oust the jurisdiction of the EACJ, are contrary to the provisions of the Treaty and in particular that:

i) the proviso to Article 27(1) and clause (3) to Article 30 , in as far as they grant concurrent jurisdiction to organs of Partner States and take away the supremacy of the EACJ in regard to interpretation of the Treaty, gravely contradict and infringe **Articles 5,6,8(1),(4) & (5), 23,33(2) and 126 of the Treaty.**

ii) The negotiation and conclusion of the East African Customs Union Protocol, specifically Annex IX and Article 54(2) of the Common Market Protocol, in as far as they do not grant original jurisdiction of handling disputes to the EACJ, infringe **Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1), (3) 33(2) and 126** of the Treaty.

13. From the accompanying affidavit dated the 24th November 2011, sworn on behalf of the Applicant by its researcher, one Henry Owoko, the main thrust of the Applicant's case is that the impugned amendments to the Treaty and the dispute settlement mechanisms provided for in both Protocols, limit / deny jurisdiction to the EACJ by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs.

14. The Applicant further contends that the act of granting national Courts concurrent jurisdiction with the EACJ to interpret the Treaty, is likely to lead to conflicting interpretation of the Treaty by national courts; and thereby diluting the special jurisdiction donated by the Treaty to the EACJ.

15. The Applicant asserts that the action of amending the Treaty by introducing the proviso to Article 27(1) and Article 30(3) is a measure likely to jeopardize the achievements of the objectives of the Community stipulated under Article 5 of the Treaty.

16.The Applicant further asserts that its lawyers have advised, and it verily believes, that the amendments to the Treaty, in particular in Chapter 8 Article 27 (1) and Article 30 (3), were done without adequate consultations and are an infringement to Articles 5, 6, 8(1), (4) & (5), 23, 33 (2) and 126 of the Treaty.

17. Mr Owoko avers in his affidavit that he has read the two Protocols and has discovered that both of them do not grant original jurisdiction to the EACJ regarding matters therein.

18. The Applicant contends that the EACJ is an international Court that was put in place, not as an afterthought, but as an important court for fostering the East African Community Integration process. That the above actions will lead to disjointed application of the East African Law and further delay in the integration process if they are not revisited.

19. Finally, it is the Applicant's contention that the presence of the proviso to Article 27(1) and Article 30(3), plus the dispute settlement mechanisms in the said Protocols, are contrary to the expectations and aspirations of the people of East Africa.

20. For the reasons above, the Applicant seeks the following declarations and orders from the Court:

i) That the proviso to Article 27 and Article 30(3) of the EAC Treaty contravene Articles 5,6,8(1),(4) & (5), 23,33(2) and 126 of the Treaty.

ii) That the dispute settlement mechanism provided for in the Customs Union Protocol and the Common Market Protocol contravene Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1)&(3), 33(2) and 126 of the Treaty.

iii) That the Respondent makes appropriate amendments to the Treaty and Protocols to cure the defects identified in this Reference.

iv) That the costs of and incidental to the Reference be met by the Respondent.

v) That the Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.

THE RESPONDENT'S CASE

21. As can be gathered from the response filed on the 16th of January 2012 and the affidavit of Dr. Julius Tangus Rotich, the then Deputy Secretary General (Finance and Administration) of the Community, filed together with the Response, the Respondent admits the amendments to the Treaty and their contents. The Respondent also admits the conclusion of the two Protocols by the Partner States of the Community as well as the establishment of the dispute

resolution mechanisms complained of by the Applicant. However, the Respondent denies the legality of the claims advanced by the Applicant and contends as follows:

22.That the jurisdiction of the Court is limited to the interpretation and application of the Treaty, provided that such jurisdiction does not extend to the application of any interpretation to jurisdiction conferred by the Treaty on organs of a Partner State. Therefore, the amendments do not infringe on the jurisdiction of the EACJ as currently provided in the Treaty or at all.

23. That the negotiation and conclusion of the said Protocols were based on Article 151 of the Treaty that empowers the Partner States to conclude such protocols as may be necessary in each area of cooperation for purposes of spelling out the objectives and scope of, and institutional mechanisms for cooperation and integration.

24. That the Protocols were negotiated and concluded by the Partner States for purposes of spelling out the objectives and scope of, and institutional arrangements under Articles 75 and 76 respectively and are to that extent in conformity with the Treaty.

25. That the Partner States, while negotiating and concluding the said Customs Union Protocol observed that the Court lacks jurisdiction on trade disputes such as those arising from the application of the rules of origin; anti-dumping practices; subsidies and countervailing measures; safeguard measures; and specialized dispute settlement as well as trade disputes that may arise under the Customs Union Protocol and the Common Market Protocol.

26. That due to lack of jurisdiction of any tribunal at the regional level, provisions had to be made for appropriate mechanisms to handle disputes arising out of the implementation of both the Customs Union Protocol and the Common Market Protocol .

27. Lastly, that the mechanism for dispute settlement provided for under Article 24 of the Customs Union Protocol is in harmony with the World Trade Organisation (WTO) Agreements to which the Partner States are signatory.

POINTS OF AGREEMENT

28. Arising from the above pleadings, at the scheduling conference held in this Court on 30th April 2012, the parties agreed:

1. That the Treaty was amended to create inter alia a proviso to Article 27(1) and Article 30(3).

2. That Article 24(1) of the Customs Union Protocol establishes an East African Community Committee on Trade Remedies and vests it with dispute settlement rules in accordance with the East African Customs Union (Dispute Settlement Mechanism) Regulations.

3.That Article 54(2) of the Common Market Protocol provides that Partner States shall guarantee in accordance with their Constitutions, national laws and administrative procedures that, "a competent judicial, administrative or legislative authority shall rule on

the rights of the person who is seeking redress" for infringement on rights under the Protocol.

4. That the stated status of the parties is valid.

5.That the Court has jurisdiction to determine the Reference.

ISSUES

29. The following issues were agreed upon for determination by the Court:

(1) Whether the amendment of the Treaty to introduce a proviso to Article 27(1) and Article 30(3) is inconsistent with or in contravention of Articles 5, 6, 8(1),(4) & (5), 23,33(2) and 126 of the Treaty.

(2) Whether the Customs Union Protocol and the Common Market Protocol in as far as they do not grant the East African Court of Justice jurisdiction of handling disputes arising from the implementation of these Protocols infringe Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1),(3) 33(2) and 126 of the Treaty.

(3) Whether the Applicant is entitled to the declarations sought

DETERMINATION OF THE ISSUES BY COURT

Applicable Rules and Principles of interpretation.

30. The Treaty is an international treaty and is subject to international law on the interpretation of treaties specifically, the Vienna Convention on the Law of Treaties. The relevant Article to this Reference is Article 31, which sets out the general rule of interpretation of treaties. Article 31 (1) provides that:

"1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."

31. In determining the Reference, we shall proceed to apply the above principles to the issues raised by the parties before us, and we shall take into account the fact that we have to interpret the provisions of the Treaty not only in accordance with their ordinary meaning, but also in their context and in light of their objectives and purpose. In addition, we shall, in so doing and in order to appreciate the contention by the Applicant, adopt the approach suggested by Counsel for the Applicant:

i) By examining the relevant provisions of the Treaty prior to the introduction of the proviso to Article 27(1) and the addition of Article 30 (3); as well as the creation of the dispute settlement mechanisms under the Customs Union Protocol and the Common Market Protocol.

ii) Then we shall proceed to examinine the said provisions of the Treaty as they are now, after the amendments and the conclusion of the two Protocols.

Issue No. 1

Whether the amendment of the Treaty to introduce a proviso to Article 27 and Article 30(3) is inconsistent with and/or in contravention of Articles 5, 6, 8(1),(4),8(5),23, 33(2) and 126 of the Treaty.

32. Under this issue, the Applicant's contention is that the proviso to Article 27(1) and Article 30(3) in so far as they grant concurrent jurisdiction to the organs of the Partner States take away the supremacy of the EACJ with regard to the interpretation of the EAC Treaty.

33. Mr. Francis Gimara, the learned Counsel for the Applicant, submitted that the Treaty establishes the EACJ as the primary dispute resolution body for the implementation of the Treaty and all protocols made thereunder. That Article 23 established the EACJ as the judicial body to ensure adherence to law in the interpretation and application of, and compliance with the Treaty. That the import of Article 23 buffered with the original Articles 27 and 30 as well as Article 33, is to avoid conflicting treaty interpretation by national courts as a crucial step in ensuring the effectiveness of Community law. That if Community law is to be effective, it must be applied uniformly throughout the Member States and the final word in its interpretation must rest with the EACJ. The clothing of the EACJ with original jurisdiction to determine disputes arising from the interpretation and application of the Treaty, is a natural and logical extension of the need to ensure the uniformity of the application of the Treaty provisions throughout the Member States, for it is this uniformity which promotes the stable economic environment upon which everything depends. He added that the primacy of the EACJ in Treaty interpretation can be discerned from Articles 5, 6, 8(1),(4) & (5), 23 and 33(2).

35. He further submitted that the nature of the legal order is supremacy of the EACJ and not equality as the proviso to Article 27(1) and Article 30(3) seem to provide. In support of his submission, he relied on excerpts from **(a) Prof. Peter Anyang' Nyongo and Others v Attorney General of Kenya and Others, EACJ Ref. No. 1 of 2006; (b) The East African Law Society and Others v Attorney General of Kenya, EACJ Ref. No. 3 of2007; (c) Costa v ENEL [1964] ECR 585.**

36. He also argued that under the Treaty, national courts at all levels are free to make references and wait for answers for questions they refer to the EACJ. That remedies and procedural rules should be scrutinized by the EACJ to ensure that they do not unduly impede the effective exercise of Community rights. If they do so, the national courts must not apply them. In this way, both the national courts and the EACJ will be working in conjunction, to promote that environment of stability and predictability, which investors and individuals require in order to participate fully in the integration process. In his view, the granting of concurrent jurisdiction on Treaty interpretation to national courts will detract from and diminish the essential aspect of the EACJ as the final and only body with the responsibility to interpret and apply the provisions of the Treaty.

37. He added that some aspects of the impugned amendment will have the effect of completely undermining the legal assumptions upon which the single economic space envisaged in the Treaty is based, namely, the resolution of disputes by law, legal process and above all, by an independent judiciary.

38. Lastly on this issue, Mr. Gimara submitted that even the process of amending the Treaty was found by the Court to be irregular for not being consultative enough. If wide consultations had been carried out in the manner expected by the Treaty, the proviso to Article 27(1) and Article 30(3) would never have been in the Treaty because they fundamentally contradict the harmony of intention of the framers of the Treaty expressed in 5,6,8(1),(4) & (5), 23, 27 and 33(2). He urged the Court to strike out the amendments since their foundation was weak.

39. Mr. Wilbert Kaahwa, learned Counsel to the Community, submitted that the EACJ is indeed established under Articles 23(1) and 27(1) as a judicial body to ensure adherence to law in the interpretation and application of the Treaty. He emphasized that the EACJ lacks jurisdiction in trade disputes such as those arising on application of rules of origin; ant-dumping practices; subsidies and countervailing measures; safeguard measures and dispute settlement.

40. He contended that the jurisdiction of the EACJ is not as wide as the Applicant pleads and shall only be extended after a protocol to that effect is concluded. Until then, the EACJ only has jurisdiction in ensuring adherence to the law in the interpretation of the Treaty in the following specific matters:

a) Disputes between the Community and its employees arising from the terms and conditions of employment or interpretation and application of the Staff Rules and Regulations (Article 31);

b) Disputes arising out of an arbitration clause contained in a contract or agreement, which confers such jurisdiction on the Court to which the Community or any of its institutions is a party (Article 32(a));

c) Disputes between Partner States regarding the Treaty if the dispute is submitted to it under a special Agreement (Article 32(b);

d) Disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court (Article 32 (c)).

41. He added that Articles 33 and 34 of the Treaty in any case, do provide for avoidance of conflict, that there is even no proof, let alone pleading, that the proviso to Article 27(1) and the introduction of Article 30(3) have adversely affected the spirit and usefulness of the two Articles.

42. Mr. Kaahwa contended that the amendment was effected in accordance with the provisions of Article 150 of the Treaty and was meant to cover a void arising out of the limited jurisdiction of the EACJ pursuant to Articles 23(1) and 27(1). The amendments thus did not take away the supremacy of the EACJ or limit / oust its jurisdiction as alleged by the Applicant. The jurisdiction remained intact. That the proviso to Article 27(1) takes into account the fact that as the EAC grows and the EACJ also grows, and before the protocol on the extended jurisdiction of the EACJ is concluded, there should not be a legal vacuum.

43. He argued that a reading of Article 27 as a whole shows that the EACJ does not have unlimited jurisdiction by the manner in which Article 27 was couched by the parties to the

Treaty. That the EACJ can only exercise the jurisdiction conferred upon it by the Treaty. That the Applicant's conceptualization of ***"wide jurisdiction" and "parallel dispute resolution"*** does not have a basis in law. Further, the fact that the said proviso circumscribes the jurisdiction of the EACJ to interpret does not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of the Partner States. (See**: EACJ Appeal No.1 of 2011, The Attorney General of Kenya v Independent Medical Legal Unit and EACJ Appeal No. 3 of 2011, The Attorney General of the United Republic of Tanzania v the African Network for Animal Wefare, ("the ANAW"** case.)

44. Regarding Article 30(3), Mr. Kaahwa again relied on the ANAW case (supra) and contended that the Appellate Division's reasoning in that case was that in the presence of an express provision in the Treaty which reserves jurisdiction to Partner States or their institutions, then the jurisdiction of the EACJ is automatically limited. That the introduction of Article 30(3) was effected by taking into account the circumstances of the EACJ and principally the current jurisdiction. (See: **EACJ Ref. No. 3 of 2007, The East African Law Society and Ors v The Attorney General of Kenya** read together with **ANAW.)** 20

45. Mr. Kaahwa also distinguished the case of **Flamino Costa v ENEL** (supra),arguing that unlike that case, this Reference does not deal with a conflict between Treaty provisions and national law.

46. Therefore, the amendments did not infringe the Treaty provisions mentioned in the Reference.

47. In his rejoinder, Mr. Gimara urged the Court in interpreting the Treaty provisions in this Reference, to also take into account the spirit of the Treaty and to ensure that the interpretation does not cause any absurdity, as was observed in the **Oils Platforms** case of the **ICJ 1993/6- Iran**. He emphasized that the purpose of Article 23 was to create the EACJ as the judicial body to ensure adherence to law in the interpretation and application of, and compliance with the Treaty.

48. Mr. Gimara disagreed with Mr. Kaahwa that there was a legal vacuum in the Treaty that necessitated the impugned amendments. He asserted that, the only legal vacuum is the deliberate delay by the Partner States in concluding the protocol to extend the jurisdiction of the EACJ under Article 27(2).

49. On the question of supremacy, Counsel submitted that the Court stated so in The **East African Law Society v The Attorney General Of Kenya, EACJ Ref. No. 3 of 2007**,and this is also what the ENEL case (supra) brings out.

50. Mr. Gimara asserted, in response to Mr. Kaahwa's reliance on **The Attorney General of Kenya v Independent Medical Legal Unit, EACJ Appeal No.1 of 2011,** that the jurisdiction of the EACJ is clearly stated by the Treaty provisions discussed above, therefore the subsequent amendments to include the proviso to Article 27(1) and the introduction of Article 30(3) are unwelcome intrusions into this jurisdiction as they contravene the Articles of the Treaty mentioned.

51. On the **ANAW c**ase, Mr. Gimara contended that the facts of that Reference are different from the instant one in that the Applicant is , unlike the case was in that Reference,

challenging the introduction of Article 30(3) into the Treaty to deny the EACJ supreme jurisdiction. He reiterated his earlier prayers.

52. We have carefully considered the pleadings and submissions on this issue and our findings and conclusions are the following: First, we find no dispute that the jurisdiction of this Court as spelt out under the provisions of Articles 23 read together with the original Article 27 (1) was "***initially over the interpretation and application of this Treaty".***

The use of the word ***"over",*** in Article 27(1), by the framers of the Treaty is in our view, not an afterthought. We think that it was deliberately and carefully chosen to mean "supremacy" in matters of the interpretation and application of the Treaty by the EACJ, the only judicial organ of the Community under the Treaty. It should also be noted that Article 23 is a fundamental Article of the Treaty which creates the EACJ as one of the organs of the Community under the Treaty, in the same way the other organs such as the East African Legislative Assembly (EALA), are created.

53. Notwithstanding this clear provision of the Treaty, we note that although the EACJ had the primacy and supremacy over the interpretation of the Treaty, Article 33 of the Treaty, which is entitled ***"Jurisdiction of National Courts",*** indicates that national courts also had some form of jurisdiction in interpretation of the Treaty even before the impugned amendments. Nevertheless, the issue was explained by the Court in the celebrated authority of ***Professor Anyang' Nyongo and Others vs The Attorney General of Kenya and Others, EAC Ref. No. 1 of 2006*** at page 20 of the judgment where the Court observed that:

"***Under Article 33(2), the Treaty obliquely envisages interpretation of the Treaty provisions by national courts. However, reading the pertinent provisions with Article 34, leaves no doubt about the primacy if not the supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty."***

54. For clarity, it is useful to reproduce the two Articles in full. Article 33 provides as follows:

"1.Except where jurisdiction is conferred on the Court by the Treaty, disputes in which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.

2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over the decisions of the national courts on a similar issue." (Underlining is supplied for emphasis).

Article 34 reads:

" When a question is raised before a national court or tribunal of a partner state concerning the interpretation or application of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that the ruling is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question."

55. To that extent, we find that the jurisdiction of the EACJ was, prior to the impugned amendments, wide and unlimited as Counsel for the Applicant has submitted.

56. On the other hand, we find that after the introduction of the amendments, the jurisdiction of the EACJ is limited because, one, under the proviso to Article 27(1), the Court's jurisdiction now excludes matters:

"….where jurisdiction is conferred by the Treaty on organs of Partner States."

This means that under the Treaty, jurisdiction can now be conferred on organs of the of the Partner States, yet the ***"organs"*** of Partner States are not defined in the Treaty. The proviso is therefore vague and inconsistent with the provisions of the Treaty. It also means that, Community law can be applied in the Partner States without any supervision by the judicial organ of the Community, namely, the EACJ. Therefore, this act alone flies in the face of Articles 23 and 27.

Two, under Article 30(3), the jurisdiction of the EACJ is now excluded:

"where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State."

The same argument applies to this amendment. It is not only vague, but it means an institution of a Partner State can interpret the Treaty as the EACJ sits idly by.

57. It is, therefore, clear from the foregoing that although the impugned amendments did not take away or oust the jurisdiction of the EACJ, they undermined the supremacy of the EACJ as the judicial body whose responsibility is to ensure adherence to law in the interpretation of the Treaty as per Article 23. It is thus our humble view that the greatest caution and restraint ought to have been exercised by the Partner States in introducing the impugned amendments because the dream of the framers of the Treaty was clearly that the interpretation of the Treaty was to be a preserve of the Community's judicial body, namely, the EACJ.

58. We further do not share the view of the Respondent's Counsel on the legal vacuum that purportedly necessitated the kind of amendment that was introduced under Articles 27(1) and 30. We instead agree with Applicant's counsel that the legal vacuum was created by the delay in concluding the protocol for the extended jurisdiction of the EACJ, and the amendments did not fill the same. To that extent, it is safe to conclude that the act of amending the Treaty in Article 27(2) and 30(3) is actually inconsistent with the Treaty, since it was retrogressive and did not fill the vacuum created by Article 27(2).

59. It also our finding that the amendment to Article 27(1) created a window for the amendment of the Treaty or conclusion of protocols conferring the jurisdiction to interpret the Treaty on organs of Partner States to the exclusion of the EACJ. The amendment to Article 30(3) indicates that an institution of a Partner State can now handle references brought by legal or natural persons directly, under Article 30 of the Treaty, if such jurisdiction is conferred on it by a Partner State. There is no doubt in our minds that this is likely to undermine the jurisdiction of the EACJ, since the EACJ will be powerless over such institutions. It is thus inconsistent with the object and the spirit of the Treaty in the Articles mentioned in this Reference.

60. Another argument by Mr. Kaahwa is that there is no pleading let alone proof by the Applicant, that the impugned amendments have adversely affected the spirit and usefulness of Articles 33 and 34. This argument is untenable, with due respect to the learned Counsel.

61. It should not also be a consolation because, in a situation where the impugned amendments now empower the five Partner States to confer on their various national organs and institutions jurisdiction to interpret the Treaty, surely, the fear that these amendments are likely to lead to the issuing of conflicting decisions among themselves, let alone with the EACJ, cannot be farfetched. Moreover, the situation is bound to be compounded, since there is a high possibility of an increase in the number of Partner States of the Community in future when the other neighbouring countries in the East African Region join the Community. In the **Costa vs. ENEL** case (supra), the ECJ noted that:

"The executive force of the Community law cannot vary from one state to another in deference to subsequent domestic laws without jeopardizing the attainment of the objectives of the Treaty…"

We agree.

62. We note that the purpose of Articles 33(2) and 34 reproduced earlier on is to, inter alia, ensure uniform interpretation and avoid conflicting decisions and uncertainty in the interpretation of the Treaty. However, the effect of the two amendments is likely to defeat or diminish the attainment of the above purpose, since the Partner States will now be in a position to confer jurisdiction directly to those organs and institutions, because of the impugned amendments. Additionally, the national courts will no longer have to refer all question to the EACJ for Preliminary Ruling under Article 34, once they have been clothed with jurisdiction over certain matters under the proviso to Article 27, further undermining the jurisdiction of the EACJ.

62. The claim by the Applicant that the implementation of the amendments is likely to undermine the objectives of the Treaty, in particular Articles 5 and 6 are not fanciful either. This is because, despite the undertaking by the Partner States under Article 27(2) that:

"2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

63. It is in the public domain that, although, the Partner States made that undertaking on 30th November, 1999, when they signed the Treaty, to- date, the Partner States have not concluded the Protocol for the extended jurisdiction of the Court. Instead of that, the Partner States came up with the impugned amendments, which have the contrary effect of undermining, as opposed to extending the jurisdiction of the Court, in clear breach of the objectives of the Treaty.

64. In **Hon. Sitenda Sebalu v The Secretary General of the EAC, EACJ Ref. No. 1 of 2010**, this Court took was alive to this fact and noted that,:

"…the issue of extended jurisdiction of the EACJ did not come as an afterthought. It was acknowledged as an important complement of the Court right at the inception of the

Community, the Court being recognized as a vital component of good governance which the Community Partner States undertook to abide by as Article 27(2) of the Treaty clearly demonstrates."

The Court held, inter alia, that:

" The delay in extending the jurisdiction of the Court not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and implementation of the Treaty and amounts to an infringement of Article 8(1) (c) of the Treaty and contravenes the principles of good governance as stipulated by Article 6 of the Treaty".

We share the same view.

65. Further, Mr. Owoko in paragraph 7 of his affidavit, deponed that the amendments were done without adequate consultation, according to information from his lawyers. We found no rebuttal to this statement in the affidavit of Mr. Rotich referred to earlier on in this judgment. Rule 43 of the Rules of the Rules of this Court provides that:

"1. Any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposing party in the pleading.

2. A denial shall be made either by specific denial or by a statement of non-admission and either expressly or by necessary implication.

3. Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be sufficient denial."

We would have expected the Respondent to tender evidence showing that the process of amending Articles 27and 30 was a consultative one and in accordance with Article 150. If such records exist, this was the time to scrutinize them. None was availed to us.

66. It is, therefore, justified for this Court to conclude that the amendments were actually made without adequate consultation; which is in itself, an infringement of one of the operational principles that are supposed to govern the objectives of the Community set out under Article 7 of the Treaty, namely, a ***"people-centered***" cooperation.

67. Further still on this point, in the **East African Law Society & Others v Attorney General of Kenya & Others, EACJ Ref. No. 3 of 2007,** the Court held at page 42 of the judgment that :

"The lack of people's participation in the impugned amendment process was inconsistent with the spirit and the intendment of the Treaty in general, and that in particular, it constituted infringement of the principles and provisions of Article 5(3) and 7(1) (a)."

68. In concluding this issue, we would like to echo the statement by the Court in the **East African Law Society (supra)** that:

"***1. By the provisions under Articles 23, 33(2) and 34, the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainty. The new***

(a) proviso to Article 27; and

(b) paragraph 3 of Article 30;

have the effect of compromising that principle and/or contradicting the main provision. It should be appreciated that the question of what "the Treaty reserves for a Partner States" is a provision of the Treaty and a matter that ought to be determined harmoniously and with certainty. If left as amended, the provisions are likely to lead to conflicting interpretations of the Treaty by national courts of the Partner States.
……

We strongly recommend that the said amendments be revisited at the earliest opportunity of reviewing the Treaty". (underlining is supplied for emphasis).

We need not say more.

Issue No. 2.

Whether the Customs Union Protocol and the Common Market Protocol in as far as they do not grant the EACJ jurisdiction of handling disputes arising from the implementation of the Protocols infringe Articles 5, 6, 8(1), (4), (5), 23, 27(1),30(1) , 33 (2) and 126 of the Treaty.

69. The cause of disagreement under this issue as can be discerned from the pleadings and submissions on record as being: (a) whether the Protocols do not grant or oust the jurisdiction of the Court from handling disputes there under; and (b) if so, whether they infringe the provisions of the Treaty mentioned.

70. The starting point, in our view, is the provision of the Treaty under which the Protocols were concluded. It is not in dispute that they were concluded under Article 151(1) of the Treaty, which provides that, the Partner States:

"1. shall conclude such Protocols as may be necessary in each area of cooperation which shall spell out the objectives and scope of and institutional mechanisms for cooperation and integration."

The Partner States were thus well within their rights to conclude the said Protocols.

71. Article 151(4) of the Treaty goes further to provide that:

"4. The Annexes and Protocols to this Treaty shall form an integral part of this Treaty."

It follows from the above provision of the Treaty, therefore, that the Customs Union Protocol and the Common Market Protocols are now integral parts of the Treaty. Article 33(2) establishes the supremacy of the decisions of the Court on questions of interpretation and application of the Treaty. Article 38(1) further provides that disputes concerning the interpretation or the application of the Treaty shall not be subjected to any method of dispute settlement other than those provided in the Treaty. In the interpretation provisions, Article 1

provides that: "**Treaty**" means "this Treaty for the Establishment of the East African Community and Annexes and Protocols thereto." In the same article, "**Protocol**" means any "agreement that supplements, amends or qualifies this Treaty."

72. This means that the Court has the role and jurisdiction to interpret and apply the provisions of the two Protocols as well, pursuant to the Court's jurisdiction under Articles 23 read together with Article 27 (1) of the Treaty. Consequently, the answer to question (a) above is that the provisions of the protocols did not oust the jurisdiction of the EACJ from handling disputes arising from the implementation of the said Protocols.

73. We are fortified in this conclusion from the law that jurisdiction is a creature of statute and can only be removed by an express provision of the law. According to **The Dictionary of Words and Phrases Legally Defined (edited** by John B. Saunders, 2nd Edition, and Volume 3 at p. 113) relied on by Mr. Kaahwa, ***"jurisdiction*** " means:

"The authority which a court has to determine matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by like means." (the underlining is provided).

74. As submitted by Mr. Kaahwa, this power of a court to hear and decide a case was emphasized in **R. vs Kent Justices ex parte Lye[1967] 2 QB 153; Union Transport Plc vs Continental Lines SA[1992] 1 WLR 15 and by this Court in EACJ Ref. No. 1 of 2008: Christopher Mtikila vs The Attorney General of The United Republic of Tanzania; EACJ Ref. No. 1 of 2008: Modern Holdings (EA) Ltd vs Kenya Ports Authority and EACJ Ref. No. 1 of 2010 Hon. Sitenda Sebalu vs The Secretary General of the EAC & 3 Others.** It therefore follows from the above authorities that the jurisdiction of the Court is specifically created and can only be extended or ousted pursuant to the provisions of Article 27 of the Treaty, and not by implication.

75. On this issue, we were also referred to Article 24 of the Customs Union Protocol, which establishes an East African Community Committee on Trade Remedies and vests it with dispute settlement rules in accordance with the East African Community Customs Union (Dispute Settlement Mechanisms) Regulations.

Article 24(1) confers on the Committee On Trade Remedies, the jurisdiction to handle matters pertaining to: "***the rules of origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement provided for under the East African Customs Union (Dispute Settlement Mechanisms) Regulations specified in Annex IX to the Protocol and any other matter referred to the Committee by the Council."***

76. While we agree that Article 24 does not mention the Court anywhere, it is evident that, in the course of exercising its mandate, an issue may arise before the Committee which requires the interpretation of the Treaty. In our view, nothing would prevent an aggrieved natural or legal person from referring such a dispute to this Court for interpretation directly under Article 30(1) in order to determine the:

" … legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty".

77. In the case of the Common Market Protocol, Article 54 provides that:

"Settlement of Disputes

1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.

2. In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

(a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and

(b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress."

78. It is clear from Article 54(1) that disputes between Partner States over the interpretation of the Treaty remain governed by the Treaty, which means that this Court is primarily the one vested with jurisdiction over such disputes. This means that the Protocol does not oust the jurisdiction of the Court entirely.

79. We, note that at the same time, the Common Market Protocol also affords under Article 54(2) opportunity to persons who feel that their liberties recognized under the Protocol have been infringed upon by persons acting in their official capacities, to seek redress from their competent judicial, administrative, legislative or other authorities.

80. While this would appear as if it is a parallel dispute resolution mechanism under the Treaty complained about in this Reference as argued by Mr. Gimara, our view is that, these dispute resolution mechanisms are merely alternative dispute resolution mechanisms intended for the speedy and effective resolution of trade disputes by experts in technical and specialized areas. Otherwise, the Court would be bogged down with the nitty gritty of disputes such as those in the area of trade, customs immigration and employment that are bound to arise on a regular basis as the integration process deepens and widens as a result of the implementation of the Protocols.

81. More importantly to this Reference, in our view, is the undertaking under Article 8(4), of the Treaty, which provides that:

"4. Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty".

The EACJ is an organ of the Community established under Article 9 of the Treaty. For that reason, the EACJ takes precedence over national courts or institutions on matters pertaining to the implementation of the Treaty.

82. Specifically, and with regard to the requirement of harmonization of activities in legal and judicial affairs under Article 126, we are of the firm view that the amendments and the establishment of specific dispute settlement mechanisms is unlikely to have any adverse bearing on the Court's discharge of its functions as provided for under Article 23(1) and 27(1) of the Treaty.

83. Even further, we note that the duty imposed on national courts by Article 34 of the Treaty which provides that where questions arise requiring interpretation of the Treaty, the court or tribunal may refer such a question for interpretation and a Preliminary Ruling to this Court, also applies to disputes that may arise under the two Protocols.

84. We are also in agreement with Mr. Kaahwa's argument that the Council is empowered under Articles 75(3) and 76(3) of the Treaty, to establish and to confer powers and authority upon such institutions as it may deem necessary to administer the Customs Union and the Common Market Protocol. Therefore, the creation of the Customs Union and the Common Market pursuant to Articles 75, 76 and 151 of the Treaty do not in any way jeopardize the achievement of the objectives or the implementation of the provisions of the Treaty. This is primarily because their very existence was envisaged under Articles 2(2), 5(2), 151, 75 and 76 of the Treaty. If anything, their establishment and powers and authority conferred upon them in order to discharge their mandate is in effect an actuation of the objective under Article 5(2). It cannot therefore be said to infringe Articles ***5, 6, 8(1), (4) &(5), 23, 27(1), 30(1),(3) 33(2) and 126 of*** the Treaty.

85. This is what the Court observed recently, on this issue in ***The East African Law Society v The Secretary General Of the East African Community, EACJ Reference No. 1 of 2011,*** at page 21 of the judgment:

".. it is also clear to us , and we have no doubt in our minds, that Articles 75 and 76 of the Treaty do not provide for setting up of judicial mechanisms to the exclusion of the Court, but only institutions Council may deem necessary to administer the Customs Union and the Common Market Protocol. We would imagine that these are Community institutions because we do not think that the Council would establish national institutions. Even then, national institutions clothed with authority to administer the Customs Union and the Common Market Protocol, are obligated to do so in accordance with the Principles and objectives of the Treaty, as if they were institutions of the Community. In any event, the Treaty is law applicable in each Partner State. What is clear to us, from the reading of the above, is that the establishment of the said institutions and the conferring power upon them is not a mandatory requirement upon Council; it may or may not establish them."

86. The Court went on to observe that:

'During the hearing, we were not told, nor did we find that jurisdiction to interpret the Protocols is conferred upon any known organ in a Partner State pursuant to Article 27(2) of the Treaty. We are therefore of the firm view that they came under Article 27(1) of the Treaty.

In the premises, we find that it is not necessary to first extend the jurisdiction of this Court, as overemphasized by the Respondent, in order for it to have jurisdiction over disputes arising from the interpretation of both Protocols."

We hold the same view in this Reference.

87. We also agree with Mr. Kaahwa's submission that the provision of specialized dispute resolution mechanisms, especially on technical matters, is not unique to the East African integration process. It is also not strange to international trade and dispute settlement. It is prevalent and common to all countries that have subscribed to multilateral trading arrangements. For instance, notwithstanding the existence of jurisdictions of national/municipal commercial courts of competent jurisdiction, members of the World Trade Organization (WTO) including the EAC Partner States, have subscribed to the WTO Dispute Settlement process provided under Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT). In so doing, the Partner States cannot be accused of having divested this Court of jurisdiction.

88. On the other hand, we respectfully disagree with the assertion by Mr. Kaahwa that Articles 24 (1) and 54(2) of the Custom Union and The Common Market Protocols, respectively, were concluded to cater for the lack of jurisdiction of the EACJ. As already discussed, the EACJ derives its jurisdiction from Article 23 and the original Article 27(1) of the Treaty which includes all annexes and protocols negotiated to implement the Treaty. As such, there was no "***vacuum"*** as far as the jurisdiction of the Court is concerned. As stated earlier in this judgment, our view is that, the mechanisms were created for administrative expedience, and if any vacuum exists in the Treaty then it is the absence of the protocol for the extended jurisdiction of the EACJ more than a decade after the conclusion of the Treaty.

89. We also find that the dispute resolution mechanisms under the two Protocols do not jeopardize in any way the achievements and objectives of the Treaty, given that Articles 33(2) and 34 may cure any conflicting interpretation by national courts or tribunals since the Court's decision will prevail over the ones of national courts over similar issues.

90. Mr. Gimara's other argument was that the action of leaving out the EACJ from any active role in Customs and Common Market matters (both treaty matters) and vesting the same with national institutions without even creating a right of appeal, is clearly, giving room and space for municipal jurisdictions to override international law bodies created by the Treaty. That this is what Article 26 of the Vienna Convention regarding the superiority of international law over municipal law seeks to avoid. Again, this issue was considered at length by this Court in the **East African Law Society vs The Secretary General of the EAC; Ref. No. 1 of 2011(supra)** and the eminent panel of judges of First Instance Division at page 22 of the judgment, made the following pertinent observation, which we quote in extenso:

" Pursuant to Regulation 6(7) of Annex IX of the Customs Union, decisions emanating from these mechanisms are final. It is thus clear that when parties submit themselves to a particular dispute resolution mechanism, they also undertake that the decision emanating there from will be final except in case where a party wishes to challenge the decision of the Committee on grounds of fraud, lack of jurisdiction, and other illegality. <u>This mechanism, in our view, represents a pragmatic approach to Customs dispute resolution, is an</u>

alternative to the long and often tedious court litigation approach. Much as we appreciate and support it, however, we do not think that it takes away, directly or by implication the interpretative jurisdiction of this Court."

Our view remains the same as above on the issue.

In conclusion, we answer Issue No. 2 in the negative.

Issue No. 3

Whether the Applicant is entitled to the Declarations sought.

91. Mr.Gimara urged the Court to grant the Applicant the declarations sought based on his arguments and the pleadings on record. Mr. Kaahwa contended, on the other hand, that the Applicant is not entitled to the declarations sought for the reasons already advanced. He urged the Court to dismiss the Reference with costs.

92. In light of our findings and conclusions in the foregoing issues, we find that the Applicant's Reference has partially succeeded in issue No. 1, but it has not made out a case of infringement of the Treaty provisions mentioned in issue No. 2. Consequently, we make the following declarations and order, in answer to issue No. 3:

1. The proviso to Article 27(1) and Article 30(3) undermine the supremacy of the EACJ and therefore contravene Articles 5, 6, 8 (1), (4) & (5) and 23 of the Treaty.

2. The dispute settlement mechanisms provided for under the Customs Union and the Common Market Protocol do not oust the original jurisdiction of the Court of handling disputes there under.

3. Either party shall bear his or its costs, since this Reference falls in the category of public interest litigation.

It is so ordered.

Dated and delivered at Arusha this 10th day of May, 2013.

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JOHSTON BUSINGYE

PRINCIPAL JUDGE

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M.S. ARACH - AMOKO

DEPUTY PRINCIPAL JUDGE

.....

JOHN MKWAWA

JUDGE

.....

JEAN BOSCO BUTASI

JUDGE

.....

ISAAC LENAOLA

JUDGE