

4.8 Role of the East African Court of Justice in the Realization of the Common Market and the Customs Union

The presentation was made by Dr. John Ruhangisa, Registrar of the East African Court of Justice. He covered the following:

4.8.1 Introduction

In the process of the regional integration on which the East Africa Community has embarked, one would expect the EACJ to play an instrumental role not only through peaceful settlement of disputes, but more importantly by contributing to the harmonization of the laws of Partner States through development of jurisprudence in the region.

This leads me to the question which this paper attempts to answer, namely, "*What is the role of the East African Court of Justice in the realization of the Customs Union and the Common Market?*"

It is my argument in this paper that the existence of the EACJ constitutes another forum within the Community for advancing the EAC integration agenda. I am at the same time demonstrating how the parallel dispute resolution mechanisms established under the Customs Union and Common Market Protocols are a challenge to the work of the Court and consequently undermine the EAC integration process.

4.8.2 The East African Court of Justice as an opportunity for the EAC integration

It is a reality that when people interact they are likely to get into differences and disagreement. That is human nature. Courts of law are purposely created to address this natural eventuality of human relationship. Similarly, the more East Africa gets integrated the more disputes of a trans-boundary nature are likely to happen. The visionary founders of the East African Community foresaw this situation and decided to create the East African Court of Justice to address such situations.

It is against the foregoing background that I consider the EACJ as constituting a unique opportunity for the EAC integration in that it is the main judicial organ of the Community, accessible, independent and that renders expeditious justice.

4.8.3 East African Court of Justice as Main Judicial Organ of the Community

As mentioned above, the Court was created by the EAC Treaty and its main mandate as enshrined in Article 23 (1) is to "ensure the adherence to law in the interpretation and application of and compliance with [the] Treaty".

The Treaty in this context means the Treaty for the Establishment of the East African Community and any annexes and protocol thereto³⁵. It should be understood that any annexes and protocol to the Treaty and any Community law are the ones that potentially generate work for the Court and that the Court can competently entertain any dispute arising out of those instruments. It is this finding that prompts me to argue in this paper that any attempt to take away the jurisdiction of the Court by any instrument other than the Treaty through establishment of other parallel dispute resolution mechanisms (quasi judicial bodies) is in itself illegal and objectionable.

4.8.4 Accessibility

The Court is accessible by a range of stakeholders from State level to that of a simple individual. The following have expressly given access to the Court by the Treaty:

- Partner states: when a Partner State considers that another Partner State or Community organ has failed to fulfill Treaty obligation, or that there is need for determination by the Court on legality of any Act, regulation, directive, decision or action on ground of being *ultra vires* the Treaty³⁶
- Secretary General: where he considers that a Partner state failed to fulfill obligation or breached the Treaty³⁷,
- National court: where national courts refers to EACJ for preliminary ruling question of Treaty interpretation or determination of legality of a Community law or action³⁸,
- Legal/ natural persons residents of East Africa: on legality of any Partner State/Community Act, regulation, directive, decision or action as *ultra vires* of Treaty³⁹

Apart from this statutory access provided for under the Treaty, the Court is in the process of establishing sub-registries within the Partner States.

The establishment of sub registries is not provided under the Treaty, but it is a practical arrangement initiated by the Court in a bid to bring accessibility and justice nearer to the people. In exercise of its powers under Article 42 (1) of the Treaty the Court formulated Rule 6 of its Rules of Procedure to make

³⁵ See Article 1 of the Treaty for the Establishment of the east African Community (The Treaty)

³⁶ See Article 28 Ibid.

³⁷ See Article 29 Ibid.

³⁸ See Article 34 Ibid.

³⁹ See Article 30 Ibid.

the establishment of sub-registries possible as an attempt to bring justice nearer to the people. This arrangement has proven to be very efficient with the Caribbean Court of Justice where Supreme Court registries of the member states are *ipso facto* its sub-registries.

The EACJ was directed by the Council when this idea was tabled before it, to do a comprehensive study on the subject and present the proposal after consulting widely. After obtaining the Council approval the Court will have to work out with national judiciaries, on the modalities of putting in place the sub-registries in Partner States. We think this will immensely contribute to the improvement of the regional judicial mechanism in at least bringing justice nearer to the people, among others.

4.8.5 Independence

A judicial body can only be efficient if it enjoys confidence of its users. This confidence heavily depends on the independence of the Court as an institution and that of its individual members. Worth is to mention that the Court is composed of Judges from the five Partner States. They are appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfill the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognized competence, in their respective Partner States.⁴⁰

Since its inauguration on 30th November 2001 to date, the EACJ has had on its bench Judges that fulfill those conditions: judges of the highest courts in the Partner States and/or jurists of recognized competence. This is quite a statutory guarantee of independence and impartiality of the Court.

The Court has so far proved to be an independent and impartial body. Indeed, the Court has experienced and survived what can be termed as apparent intimidation while discharging its noble duty as the Temple of Justice. This can be ably demonstrated by what transpired soon after delivery of one ruling on a matter that was before the Court. In their joint Communiqué of the 8th Summit, being a reaction to the Court's ruling and temporary injunction in *Anyang' Nyong'o case* the EAC Heads of State directed, among other things:

"that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty."⁴¹

and that

⁴⁰ Article 24 (1) of the Treaty.

⁴¹ Joint Communiqué of the 8th Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12.

"a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard."⁴²

Within a short time the Treaty was then amended accordingly. It appears from the foregoing interventions that the Judges by deciding the case the way they did committed an act that would have led for their suspension or removal but since such act was not covered by the Treaty, an amendment to the Treaty had to be effected so that should there be a repeat of such act by the Judges, punitive measures can be taken. Indeed by so doing security of tenure for EACJ Judges was seriously put at risk. However, this unfortunate reaction of the Summit did not deter the Judges from acting impartially and independently as it transpired in the subsequent decisions of the Court. Arguably this makes the EACJ an exemplary model of the Court that stands to propel the integration process as provided for in the EAC Treaty. Indeed Judges are committed to do justice without fear or favour as required by their judicial oath.

Cases which did not stand the competence test of the Court and were referred to national courts are also inspirational as to how some people believe more in the justice of the regional Court than that of their national courts. In this regard I would simply refer you to the cases *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community*⁴³, and *Modern Holdings v Kenya Ports Authority*

4.8.6 Challenges:

4.8.6.1 Working on an *ad hoc* basis

The fact that the Court works on an *ad hoc* basis is an element that undermines its efficiency. None of the ten (10) judges composing the Court resides at the seat of the Court, including the President. It has proven difficult to compose the panel of Judges to seat on a particular case due to their commitments within their respective home countries. It is also a sad reality that the judicial work of the Court is mainly organized by the Registrar instead of the Court's President.

While we wait for the Council to determine the period when the Court will become fully operational, the Court strongly feels that time has now come for at least the President of the Court and the Principal Judge, to start with, to be permanently resident in Arusha.

⁴² Ibid.

⁴³ Reference No 2 of 2007

Put briefly, while acknowledging that the present work load of the EACJ does not require all the Judges to reside permanently at the seat of the Court, it is highly recommended that the President and Principal Judge should be allowed to work on full-time basis in order for them to organize the administrative and judicial works of the Court.

For the President to perform his administrative and supervisory functions as envisaged by Article 24 (7) (a) read together with Article 45 (4) of the Treaty for the Establishment of the East African Community, it is necessary that he be resident in Arusha. An *ad hoc* President can hardly perform the administrative mandate of heading and leading the Court effectively and efficiently, giving it the guidance it deserves especially during these formative stages; and also attending high-level meetings with the Secretariat and sister organs. The current position where the Registrar is attempting to fill the void is inappropriate. Under the Treaty the headship of the Court is duly vested in the President of the Court. The Registrar is the Accounting Officer. He cannot give policy direction for the Court. The President cannot effectively discharge his functions under the Treaty by remote control.

Likewise, for the Principal Judge to direct the work of the First Instance Division, represent the Division and regulate the matters brought before the Court as provided for in Article 24 (8) of the Treaty, it is necessary for the Principal Judge to be present and resident where the seat of the Court is located.

This argument is buttressed by the fact that the Court workload has increased and also on the anticipation that it will increase more with the implementation of various Protocols of the Community

The African Court on Human and People's Right which is also based in Arusha has its President and Registrar resident in Arusha working on full time basis. The nature of the operations of this court is similar to that of the East African Court of Justice. The Judges of the African Court on Human and People's Rights also serve on *ad hoc* basis but for effective operations of the court the President of the Court resides in Arusha and works on full time basis.

Time has come for the President of the East African Court of Justice, an Organ of the Community, to concentrate, focus and direct his energies and planning towards the efficiency, growth and progress of the Court as a Regional Court, so that it can play its rightful role as envisaged in the Treaty and as expected by the citizens of EAC. An absentee leadership, for ten years, has clearly been a handicap to strategic growth and progress of the Court. We know that other major programs of the Community (customs union, common market, political federation, etc) have gained momentum and are in high gear. If the Court

lags behind in preparedness to guide application and interpretation of protocols governing these programs, it will be bad for us all.

4.8.6.2 Slowness of the process of adoption of the Protocol extending the Court's jurisdiction to appellate and human rights

The decision of extending the jurisdiction of the Court to include appellate and human rights jurisdiction was taken in November 2004, but a Protocol that is meant to be the legal framework for this extension is yet to be concluded. This denies the Court opportunity to play a very important role in addressing the violations of human rights in East Africa at regional level. It should be noted that a regional jurisprudence in human rights is required as the Court will be called upon to decide on common market related matters such as free movement of people, right of establishment etc which have human rights elements.

People of East Africa particularly the business community and law societies have been agitating for appellate jurisdiction of this court so that it becomes the apex court in the region. Albeit for different reasons, the East African Magistrates and Judges Association (EAMJA) has also joined EALS the Bar Association to demand for the East Africa Court of Appeal. These clear demands can be found in the speech by President of the East African Magistrates and Judges Association during the association's Annual General meeting held in Dar Es Salaam in January 2004 when he said:

'We in the EAMJA believe that in order to fulfill the objective of the Community, especially those under Article 126 (c) of the Treaty which include, inter alia "... the harmonization of legal learning and the standardization of judgments of courts within the Community," the formation of the East African Court of Appeal is a necessary and overdue step. We need a court of the highest resort in East Africa whose decisions bind all our national courts. The world trend now is to use international norms and standards to interpret national laws ... And further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead'.⁴⁴

4.8.6.3 Parallel EAC Dispute Resolution Mechanisms (Establishment of Quasi Judicial Bodies)

Much as the EACJ is the main judicial organ of the Community that has been tasked with the resolution of disputes arising out of the Treaty and other Community laws, the EAC continues to establish other quasi-judicial bodies or mechanisms with the same mandate as the EACJ. The Customs Union and

Common Market Protocols are an example where such parallel mechanisms have been established with potentialities of making EAC redundant.

a) Customs Union Protocol

The dispute resolution mechanism put in place by the EAC Customs Union Protocol is in Annex IX of the same.⁴⁵

The mechanism consists of a possibility for an amicable settlement through good offices, conciliation and mediation to be arranged by the parties themselves⁴⁶ as well as proceedings before the East African Committee on Trade Remedies established under Article 24 of the Protocol (Committee). It is provided under the Customs Union Protocol that the Committee shall handle all matters pertaining to:

- rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in Annex III to the Protocol;
- anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;
- subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;
- safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;
- dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol; and
- any other matter referred to the Committee by the Council.⁴⁷

As if the foregoing was not enough the Protocol goes on to tie the note against the East African Court of Justice by stating that the decision of the Committee on these matters shall be final.⁴⁸

It is important to note that the EACJ is left out and therefore denied a role in all this process under the Customs Union Protocol except if any party

⁴⁵ Article 41 (2) of the Customs Union Protocol.

⁴⁶ Regulation 5 (1) and Regulation 6, Annex IX to the Customs Union Protocol.

⁴⁷ Article 24 (1) of the Customs Union Protocol.

⁴⁸ Regulation 6 (7) of Annex IX of the Customs Union Protocol.

challenges the decision of the Committee on grounds of *fraud, lack of jurisdiction or other illegality*,⁴⁹ in which case such party may refer the matter to Court for review in accordance with Article 28(2) of the Treaty and any other enabling provision of the Treaty.⁵⁰

Interesting enough, the review provided for under this provision can only be requested by Partner States as Article 28 of the Treaty referred to provide **only** for references by Partner States not by any other person.

From the aforesaid one would wonder whether the EACJ was established to play any significant role in the integration process of the East African Community. If the Court's main mandate is to ensure the adherence to law within the Community, would one conclude that the Customs Union Protocol is not part of the EAC law? I would not agree with that. The EAC Customs Union is part of the Community law whose application, interpretation and compliance therewith would have naturally come to the Court. The establishment of the above mentioned Committee with exclusive jurisdiction on matters arising out of Customs Union and the ousting of the jurisdiction of the East African Court of Justice is in my view, contradictory and illegal.

We may not be surprised why up to now, five years since Customs Union Protocol became operational, EACJ has received no single case on Customs Union. There was an attempt by one person whom for lack of a better word I prefer to call him "*a risk undertaker*" who filed a reference in the East African Court of Justice to test the waters⁵¹. However, the case did not even take off as the Court dismissed it on the preliminary objection ground which was raised by the Respondent that the Court had no jurisdiction.

Apparently the dismissal of this case by the Court for lack of jurisdiction was a big blow especially to the Business Community which had been urging for enhancement of the jurisdiction of the East African Court of Justice. The Court was taken to have shot itself on the foot by joining the Partner States in taking away the jurisdiction which according to the Treaty is supposed to be that of EACJ. Perhaps the Court should have played a more proactive role and hear the matter by ruling that it had jurisdiction, but we should appreciate the fact that it is not for the Court to confer to itself the jurisdiction that has been categorically taken away. As far as implementation of Customs Union Protocol is concerned we should not expect the miracle on the part of the Court unless the question of jurisdiction is addressed in the Protocol with necessary amendments, much as the judges may be proactive.

It may be of interest also to investigate whether the East African Committee on Trade Remedies that is being referred to under Article 24 of the Protocol have been formed. To the best of my knowledge no such Committee has been

⁴⁹ Emphasis added.

⁵⁰ Regulation 6 (7), *Ibid*.

⁵¹ See *Mordern Holdings v. Kenya Ports Authority*, Reference No 1 of 2008.

formed to date. This means, the people of East Africa have nowhere to present their disputes that arise out of Customs Union. Consequently the chances of EACJ receiving appeals under its limited jurisdiction are also not there unless the Committees are formed to generate work for the Court.

b) Common Market Protocol

The Common Market Protocol does not establish a new dispute resolution body. However the mechanism it has put in place does not give to the EACJ the powers that would have naturally come to it. Jurisdiction to entertain Common Market related disputes has mainly been given to national courts as it flows from Article 54 (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 enjoy the right of recourse, even where this infringement has been committed by persons exercising their official duties; and*
- b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is making the appeal".*

It is clear from the foregoing provision that an individual, whose rights accruing from the Common Market Protocol may be violated, shall take the matter to his/her national courts and shall have no immediate recourse to the EACJ. Unless a national court seized with a Community law related matter feels a need for interpretation and refers it to the EACJ in accordance with Article 34 of the Treaty, the EACJ shall never entertain a Common Market-related matter. The role of the EACJ in the realization of Common Market solely depends on the extent of its Judges in being proactive and on the discretion of the national courts judges to refer the matters for interpretation by the EACJ.

This introduces us to the fundamental question of the relationship of EACJ and national courts. Indeed among the stakeholders of the EACJ, are national courts. As I said earlier, one aspect of the EACJ's jurisdiction is to hear and determine cases referred to it for preliminary ruling by the national courts.

When faced with a case requiring the application or the interpretation of the Treaty or any other East African Community law, the national courts are required to refer the matter to the EACJ for preliminary ruling. This is a Treaty requirement. However, the obligation to refer a matter to the EACJ for preliminary ruling is not automatic whenever a question of interpretation or application of the Treaty or a question concerning the validity of the

regulations, directives, decisions or actions of the Community arises. The preliminary ruling should be **necessary** in the opinion of the national court judge to enable the national court give its judgment.

This of course leaves to the national court a very wide discretion to ascertain whether a decision on a question of Community law is necessary to enable it give its judgment. It means therefore that the EACJ finding on any reference from the national courts aims at assisting the national courts in making a decision on a matter that may be right before it. The interaction of the EACJ and the national courts through references for preliminary rulings is essential in making community law effective and development of uniform jurisprudence in the region. We hope that national courts will always remember that according to the Treaty *"decisions of EACJ on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter."*⁵²

It is important to note that much as the reference mechanism is crucial to the application of the Community law at the national level, to date this mechanism has not yet been used. This could be an indication that the East African Community law is not known within the region, even by the Judicial Community. If this mechanism is utilized, there is no doubt that the legal integration in the region would be faster. The utilization of this mechanism would also create more awareness on the rights flowing from the Treaty and the Partner States' obligations pertaining to these rights.

From the foregoing discussion, it can be confirmed that although Article 50(1) of the Common Market Protocol refers any dispute amongst Partner States arising from the Protocol to *"the procedure for the settlement of disputes stipulated in the Treaty"*, the likelihood of Partner states taking each other to Court is very little if at all. The individuals and body corporate would have been the ones to make the EACJ play a significant role in the realization of the Common Market. It should always be understood that the Court was not established for the sole and exclusive use of the Partner States and EAC Institutions. The main reason why it was put in place was indeed to assist the Community achieve its objectives through respect of the principles of rule of law, democracy, good governance and human rights which are very well enshrined in the Treaty.

4.8.7 Conclusion

The above discussion shows how the EACJ can potentially play its role of ensuring adherence to the rule of law but it is not given sufficient jurisdiction in this regard and in some instances the little jurisdiction it has is being taken away. Arguably, EACJ has been systematically reduced to a toothless dog that

⁵² See Article 33 (2) of the Treaty

cannot bite. The Court of Justice of the European Communities which, since its inception, has been playing a crucial role in the European integration process has, from January 2000 to November 2009, determined more than four hundred (400) cases related to Customs Union and Common Market.⁵³ This is what a fully fledged Community Court is capable of achieving and the EACJ has the potential of doing the same. All it needs is support from the EAC Policy Organs.

It should be understood that the existence of parallel dispute resolution mechanisms with the EACJ is not an asset to the EAC integration process for the following reasons among others:

Firstly, there will be different interpretations of the Community Law that will create a vicious circle of endless litigation. Secondly the process of harmonization of the national laws will take too long thereby delaying the whole integration process. Thirdly the co-existence of the EACJ and the Committee is not cost effective at all. The Committee shall be comprised of three (3) members per Partner State,⁵⁴ making a total of fifteen members. It will also need a secretariat just as the Court needs to have Registry staff. Lastly the procedure before the Committee will be extremely costly to the parties as they shall bear the remuneration and travel expenses of the members of the Panel and those of experts,⁵⁵ on the rate fixed by the Council of Ministers from time to time.⁵⁶ The number of Panel members is fixed by the Committee.⁵⁷

I have not made an exhaustive discussion on the topic but due to time constraint I have just raised issues to engage you in the discussion of this important topical issue that touches the role of the East African Court of justice in the realization of the Customs Union and Common Market.

⁵³ The cases finalized by the Court of First Instance are not included. See data existing at http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/Case_law/List_of_cases_6th_VAT_directive_a2_fr.pdf and http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_direct_taxation_en.pdf both websites accessed on 20 January 2010.

⁵⁴ Article 24 (2) of the Customs Union Protocol.

⁵⁵ Regulation 19 (2) of Annex IX, *Ibid.*

⁵⁶ Regulation 19 (1) of Annex IX, *Ibid.*

⁵⁷ Regulation 8(5) of Annex IX, *Ibid.*

5.0 Group Work: Preparedness and Measures to be taken by respective Stakeholders

The Seminar constituted itself into five working groups under four themes. The groups were requested to consider and propose measures and recommendations for adoption by the Seminar on:

- **Group I:** facilitating effective partnership between EALA and National Parliaments/Assemblies to promote and popularize EAC Integration as People-Driven Process (PDP).
- **Group II:** improving EAC Institutional linkages and communication to enhance coordinated and harmonized decision making on EAC matters.
- **Group III:** identifying significant gaps that need to be addressed in the EAC Common Market Protocol.
- **Group IV:** strengthening the capacity of key Actors at Regional and Partner State level for effective implementation of approved EAC Programmes and Projects.
- **Group V:** the role of EALA and EACJ in the realization of the Common Market and the Monetary Union.

After considering the reports of the groups, the Seminar adopted the following recommendations under the five themes:

5.1 *Measures on facilitating effective partnership between EALA and National Parliaments/Assemblies to promote and popularize EAC Integration as People-Driven Process (PDP).*

- Regular interface between EALA and National Parliaments.
- Establishing a Communication and information mechanism between EALA and National Parliaments.
- Sensitizing decision makers first, both the Political and executive in Partner States.
- EALA to regularly brief National Parliaments and to have joint platforms.
- Developing an action plan on the integration agenda, through the relevant Committees, on a periodic basis.

- Each National Parliament to facilitate sensitization and also involve EALA in the exercise.
- Monthly reports to National Parliaments by EAC Ministers.
- Popularizing the use of Swahili in meetings and in the sensitization process.
- Establish and operationalize a reporting mechanism between EALA and National Parliaments.

5.2 Measures for improving EAC Institutional linkages and communication to enhance coordinated and harmonized decision making on EAC matters.

- Amend the Treaty to fill the gaps unforeseen at the time when the EAC existing institutional structures were created.
- Institutionalize the annual address by the Chairman of the Summit to EALA and other measures that have been proposed to sensitize the Community.
- Formalize the existing institutional linkages by a necessary legal instrument.
- Harmonize the Rules of Procedure of EALA with those of National Parliaments
- Institutionalize the organic linkages between EALA, the East African Court of Justice (EACJ) and the Secretariat.
- Have EAC Ministers on a full time basis in Arusha for political leadership.
- Strengthen the EAC Secretariat in order to improve its efficiency in the implementation of agreed programmes.

5.3 Gaps that need to be addressed in the EAC Common Market Protocol and proposed measures to redress the gaps.

- The Protocol has not been fully understood by Members of both EALA and the National Parliaments. There is need to understand it first.
- The Protocol vests sovereignty exclusively to Partner States. There is need for Partner States to cede some power to the Community.
- The Protocol should establish clear supranational institutions for EAC to move forward.
- There is need for institutional reforms in order to effectively implement the Protocol.
- There are inadequate practical operational details in the Annexes to the Protocol.

- Since not all the Annexes to the Protocol have been negotiated, there is need to know when the negotiations will be completed, and when they will come into force.
- The National Parliaments should call upon the EAC to report on the Protocol.
- The Seminar findings and proposals should be communicated to both the Council and the Summit.
- There should be a clear Institutional framework to manage the Protocol.
- Both the EAC Treaty and the Protocol should be interpreted in popular version.
- There is urgent need to expand the jurisdictional basis of the Court of Justice.

5.4 Measures for strengthening the capacity of key Actors at Regional and Partner State level for effective implementation of approved EAC Programmes and Projects.

- Increase funding for oversight responsibilities for key actors, and a harmonized structure for resource mobilization for EAC projects.
- Formulate an alternative financing plan for EAC as a matter of priority.
- Have an effective communication/information strategy on the ongoing integration process for key stakeholders.
- Strengthen the negotiating capabilities of the sub-region.
- Establish an effective mechanism for the enforcement of laws and agreed decisions.
- Set up EAC Committees in Partner States to follow-up Community projects.
- Have clear punitive measures to ensure accountability and for dealing with any failure to perform and follow-up actions.

5.5 The Role of EALA and EACJ in the realization of the Common Market and the Monetary Union.

- EALA should be enabled to play its Legislative role.
- Both EALA and the Court should be more involved in the integration process through a structured approach
- EALA's role in this process should primarily be advocacy and consultations with stakeholders.
- EALA's oversight and representation roles should be strengthened.
- The EACJ should have regular interface with National Courts.
- The EACJ should be the judicial body of the Community on legal matters.

- There is need for the President Judge to be full-time at the seat of the EACJ, and the Court should have expanded jurisdiction.
- There is need to harmonize laws of Partner States and ensure the supremacy of Community laws over National laws on matters of the Community.

6.0 The Agenda for the Operationalization of the Common Market: Reflections from the Council of Ministers

Below is a statement of the Chairperson of the Council of Ministers, Hon. Dr. Diodorus Kamala, MP, presenting the position of the Council on some of the issues raised at the Seminar, and giving the way forward on them.

6.1 Introduction

The primary goal of the EAC integration is to widen and deepen cooperation of the Partner States in, among others, economic, social and political fields for mutual benefits of the people of East Africa.

The Treaty for the Establishment of the East African Community, signed in November 1999 outlines the fundamental principles and areas of cooperation for the Partner States. Article 5(2) of the Treaty envisaged the Customs Union as an entry point of the EAC integration process followed by the Common Market, Monetary Union and ultimately a Political Federation. The Customs Union was established in 2005 and currently Partner States are working towards the coming into force of the Common Market by July, 2010.

In accordance with the provisions of Articles 76 and 104 of the Treaty, Article 2(4) of the Protocol on Common Market sets forth the *free movement of goods; free movement of persons; free movement of labour; free movement of services; free movement of capital; right of establishment; and right of residence*. The implementation of the Common Market will be progressive and in accordance with the operational principles provided for under the Treaty and with the schedules approved by Council. For purposes of the establishment of the Common Market, the Council at its 19th Meeting adopted a post negotiation programme which includes the following critical milestones:-

6.2 Ratification

In accordance with Articles 151 and 153 of the Treaty, the Partner States are required to ratify the Common Market Protocol and deposit the instruments of ratification with the Secretary General. The target by which this process shall be concluded is 30th April, 2010. The Council is informed that the Partner States have already embarked on the ratification process of the Protocol.

6.3 Institutional Reforms

Article 76 (3) of the Treaty provides that the Council shall establish and confer powers and authority on institutions deemed necessary to administer the EAC Common Market. In this regard the EAC Secretariat institutional set up may be reviewed to enable it properly handle new responsibilities brought by the

Common Market. The proposals for institutional reforms will be considered by the Council at its Extra -Ordinary meeting in April, 2010, following the conclusion of the ongoing study on institutional reforms of the Community. We believe that the ensuing institutional framework that will be functionally capable of delivering the expectations of our people in the region in the context of the Common Market.

6.4 Amendment of the Treaty

Furthermore the Council has directed the Secretariat to undertake a comprehensive review of the Treaty. This is with the view to identifying any provisions that may require amendment to ensure the smooth implementation of the Common Market Protocol. The Secretariat is expected to complete the task by 31st May 2010.

6.5 Sensitization Program

The Common Market Protocol has far-reaching implications for the region in terms of free movement of factors of production, investment, doing business, immigration rules and labour laws. Therefore the people need to be sensitized. A comprehensive sensitization program is needed to inform our people of the reasoning behind the various provisions of the protocol. They need to be informed of the opportunities emerging from the coming into force of the Common Market Protocol. They need to be fully appraised of the rights and freedoms that they will enjoy from this stage of integration. The Organs of the Community in collaboration with the Partner States will spearhead regional sensitization of the Protocol during the period January to March, 2010.

6.6 Budgetary implications

The implementation of the Common Market activities entails cost implications on the budget of the Community. In this regard, the Secretariat will prepare an indicative budget and communicate it to Partner States for consideration by the Council at its extraordinary meeting in April, 2010. In this regard the Council is expected to carefully prioritise the activities that will require funding. I urge EALA to expeditiously approve this budget when it is tabled.

6.7 Partner States Obligation

The establishment of Common Market creates a number of obligations for Partner States.

First, Partner States need to enact relevant enabling legislation to domesticate the provisions of the Protocol in their domestic law. It is expected that all Partner States will accomplish this process by 31st August, 2010.

Secondly, the Partner States are obliged to undertake a review of their domestic laws with a view to allowing necessary amendments to be made to ensure that they are consistent with the Treaty and obligations arising from the Common Market Protocol. Partner States are expected to finalize this by 31st December, 2010.

Thirdly, Partner States are required to allocate adequate budgetary resources for the implementation of the Common Market. In this regard the Council will expeditiously decide on alternative means of funding of the Community in order to reduce the increasing dependence on the donor support.

Fourthly, Partner States are required to expedite the implementation of the Customs Union matters. There are number of challenges that need to be addressed individually and jointly in order to ensure that the growth of trade among Partner States is accelerated. The Governments recognize the negative impact of Non -Tariff Barriers on trade among Partner States and are undertaking substantial efforts to eliminate NTBS. Partner States will therefore endeavor to reduce bureaucratic administrative procedures, physical barriers and unilateral actions that impede cross-border trade.

Fifthly, infrastructure impediments such as the poor road net work, inadequate energy supplies, and the poor state of the railways, to mention a few, that affect competitiveness of the EAC region need to be addressed effectively. The cost of power and low rate of electrification in the region compared to our competitors like South Africa and Egypt hinders industrialization and value addition activities in the region.

Sixthly, public awareness about the East African integration and in particular what the Common Market Protocol provides is another challenge facing the Partner States . The Partner States have not fully sensitized their people on the mechanisms and benefits of the Common Market to allow them to position themselves to take advantage of the benefits. Partner States need to initiate a programme to sensitize all stakeholders and, particularly the business community, farmers and private sector at large on the opportunities provided by the Common Market. I am glad to note that the Partner States have initiated the sensitization programme in their respective countries.

6.8 Conclusion

The implementation of the Common Market Protocol will bring new business climate with increased cross border investments in all sectors of the East African economy. It is therefore expected to increase productivity, profitability and income and general welfare of the people of East Africa. The Common Market, if well implemented, will bring about an optimal allocation of

resources in the region, spur economies of scale, healthy competition, and distribution of income, enlarge market size and increase regional trade.

The successful implementation of the Common Market requires the Council to bring on board diversity of stakeholders basing on the principle of subsidiarity. Efforts are needed to empower the private sector through dissemination of information, interpretation of legal instruments and where possible make strategic interventions. This will ensure the growth of trade and investment among the Partner States and a readiness by Partner States to create a favorable business environment. I therefore call upon the business community to take advantage of the existing investment potential and conducive business environment by strengthening their collaboration and networking for their mutual benefit.

I also urge all the organs and institutions of the Community to play an active role in the implementation of the Common Market. There is need for each organ and institution to discharge its functions in such a manner as will fast bring the benefits of the Common Market to the people of East Africa. In all this endeavour will shall be guided by the provisions of the Treaty and the Common Market Protocol.

I would like to thank the Rt. Hon. Speaker of EALA for the excellent preparation and arrangements for this Seminar. I also applaud the Rt. Hon. Speaker of the Parliament of Burundi, the Government and the people of Burundi for the hospitality extended to us during this seminar. Last but not least, I thank you all for not only listening to me but also for ably contributing to the success of Nanyuki V.

7.0 Closing Session

The closing session was chaired by the Speaker of EALA, Hon. Abdirahin H. Abdi. The closing session included the adoption of a communiqué which had been prepared under the chairmanship of the rapporteur, Mr. Dan Ameyo, (EAC Consultant on the Common Market Protocol). The Communiqué appears as **Annex I** in the report.

The session was also addressed by the Speaker of the National Assembly of Burundi, the Rt. Hon. Pie Ntavyohanyuma. In his address, he congratulated the Speaker and EALA for hosting successfully the Nanyuki V. He thanked him for holding it in Bujumbura. He appreciated the Partner States for sending powerful delegations who effectively participated in the Seminar and came up with fruitful deliberations. He pledged his full support and that of the National Parliament of Burundi, for continued collaboration with EALA. He requested all delegates to be good ambassadors of Burundi and wished them safe journey back home.

The Rt. Hon. Speaker of EALA in his closing remarks saluted all participants for a job well done and assured them that Nanyuki Series is a permanent feature of EALA and will continue. He said, EALA will do everything possible in promoting the integration agenda for the welfare of the peoples of East Africa.

In his concluding remarks, the Speaker of EALA thanked his H.E. the President of the Republic of Burundi, for honouring his invitation to officially opening the Seminar; the Speaker of the National Assembly of Burundi for accepting to host the event and good facilities provided; and the people of Burundi for their warm and friendly hospitality. He also thanked the Parliamentarians from the Partner States for their presence and lively participation in the Seminar. He expressed his appreciation to our Development Partners and to AWEPA in particular, for the financial and logistical support to the Seminar. He wished all the delegates a safe journey home.