IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, John Mkwawa, J.)

REFERENCE NO. 9 OF 2010

AFRICAN NETWORK FOR ANIMAL WELFARE (ANAW)……. APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA……RESPONDENT

20TH JUNE, 2014

JUDGMENT

Introduction

1. The Reference herein is dated 8th December 2010 and was filed in Court on 10th December 2010.

2. The Applicant, African Network for Animal Welfare (hereinafter **"ANAW")** has described itself as a Charitable Pan-African animal welfare and community-centred organization registered as a Non-Governmental Organisation in Kenya and was registered as such on 21st June 2006. It is represented in these proceedings by Mr. Saitabao Kanchory Mbalelo, an Advocate of the High Court of Kenya and whose address for service was previously Odyssey Plaza, Ist Floor, Mukoma Road, South B, P. O. Box 23746 – 00100, Nairobi, Kenya but now said to be c/o Kanchory & Co Advocates, Upper Hill Gardens, Block C – 18, 3rd Ngong Avenue, PO. Box 23746 – 00100, Nairobi, Kenya.

3. The Respondent is the Attorney General of the United Republic of Tanzania sued as such on behalf of the latter, a Partner State within the meaning of Articles 1 and 3 of the Treaty for the Establishment of the East African Community (hereinafter, **"the Treaty"** and **"the EAC"**, respectively).

4. In the proceedings before us, he was represented by Mr. Gabriel Pascal Malata, Principal State Attorney, Ms. Stella Machoke, Senior State Attorney and Mr. Theophilo Alexander, Advocate.The address of service for the Respondent has been given as Attorney General's Chambers, Kivukoni Front, P.O. Box 9050, Dar es Salaam, Tanzania.

5. The Reference was filed to challenge the proposed action by the Government of the United Republic of Tanzania to construct and maintain a road known as the **"Natta-Mugumu – Tabora B-Kleins Gate – Loliondo Road"**, across the Serengeti National Park. The road is said to have been intended for the use of the general public with all the attendant consequences to the environment, generally.

6. On 26th August 2011, the Respondent's Preliminary Objection to the Reference on the grounds of jurisdiction, limitation of time and form was overruled and his appeal to the Appellate Division in **EACJ Appeal No. 3 of 2011** was dismissed on 15th March 2012 and the matter remitted to this Division for substantive trial and adjudication on the merits.

Applicant's Case

7. The Applicant tendered both oral and Affidavit evidence and its counsel filed written submissions on 4th October 2013 which he highlighted at the hearing on 10th February 2014.

8. Its case is that before the Reference was filed, a 53 km earth road existed between Tabora B Gate and Kleins Gate within Serengeti National Park and only 5 km of that road was paved with gravel or murram.

9. The road was mostly used by tourists and Tanzania National Parks Authority (TANAPA) officials and any other person who wanted to do so had to obtain special authorization from Serengeti National Park's Management to use it.

10. In his Affidavit in support of the Reference, sworn on 8th December 2010, Mr. Josephat Ngonyo Kisui, the Executive Director of ANAW stated at paragraph 4 thereof, that before filing the Reference, ANAW had received information that the Government of the United Republic of Tanzania was about to upgrade, tarmac, pave, realign, construct, create and/or commission a trunk road called **"Natta-Mugumu – Kleins Gate Loliondo Road"** (hereinafter, **"the road"** otherwise referred to as **"the North Road"** or **"the Superhighway")** across the northern wilderness of the Serengeti National Park (hereinafter **"the Serengeti"**).

11. It is now the Applicant's submission that the said action would have deleterious environmental and ecological effects and is likely to cause irreparable and irreversible damage to the delicate ecosystem of the Serengeti and adjoining national parks such as the Masai Mara in Kenya. These would include, it is urged:
    i) disruption in animal migration;
    ii) driving and scaring away wildlife from the game controlled areas;
    iii) fragmentation of animal habitats and weakening or disappearance ; of an entire generation of a given animal population disruption of the wildlife corridor;
    iv) loss of scenic and visual quality;
    v) increased and disruptive vehicular traffic;
    vi) enhanced and disruptive human activity;
    vii) increased wildlife mortality due to road kill from speeding vehicles ;
    viii) deterioration of air quality;

ix) surface water and soil pollution;

x) increased poaching activities.

12. In support of its stated position, the Applicant filed an environmental and impact assessment, feasibility and preliminary design for the road, which is said to be 239 kms in length, prepared by the Tanzania Roads Agency (TANROADS). In that report, all the above adverse effects are mentioned as negative impacts but they are said to be capable of mitigation, a position not shared by the Applicant.

13. It is the Applicant's further case that :

> *The actions of the Respondent are a violation of Article 114 (1) (a) of the Treaty which enjoins all Partner States to conserve, protect and manage the environment and natural resources and Articles 5 (3) (c), 8 (1) (c) and 111 (2) of the Treaty which obligate Partner States to co-operate in the management and utilization of natural resources within the Community and to abstain from any measures that would jeopardize the attainment of the objectives of the Treaty in that regard.*

14. It is also the Applicant's position that the United Republic of Tanzania's actions are a violation of its obligations in respect of Serengeti which has been declared a **"World Heritage Property"** of **"outstanding Universal value"** according to the United Nations Educational, Scientific and Cultural Organization (hereinafter **"UNESCO"**) and therefore its protection and conservation is a matter of international concern. That UNESCO for that reason, in its 34th Session held in Brasilia, Brazil, between 25th July 2010 and 3rd August 2010, expressed its concern about the proposed threat to the

environmental conservation of the Serengeti by the upgrading of the road as was the intention of the Government of the United Republic of Tanzania.

15. In addition, that all the above actions are unlawful and in conflict with the United Republic of Tanzania's obligations under the African Convention on the Conservation of Nature and Natural Resources, 2003; the Rio Declaration, the Stockholm Declaration and the United Nations Convention on Biodiversity, all of which create obligations on States with regard to environmental management and conservation.

16. In support of its case, the Applicant called an expert witness, Mr. John Mabala Kuloba, a registered Environmental Impact Assessment Expert working with M/S EarthCare Services Limited of Nairobi, Kenya. His report is dated 25th March 2013 and his conclusion upon visiting the Serengeti and having used the road, was that the proposed upgrading of the road and its opening up to use by the general public would create more negative impacts than the positive and that an alternative route should be created. He reached that conclusion from his findings that the following **negative impacts** would be occasioned should the road be built as proposed:

    i) impact on migratory species such as zebras and wildbeeste;
    ii) impacts on the Serengeti ecosystem;
    iii) impact on animal behavior;
    iv) impact on the country's image;
    v) increased wildlife poaching;
    vi) air quality and noise will increase in an environment where ambient noise levels have been low;

vii) Construction of camps will have an impact because of generation of waste, sewage disposal etc;

viii) impact on soils;

ix) generation of solid waste;

x) impact because of burrow pits and quarry sites;

xi) impact because of blasting and rock excavation;

xii) road safety and increased accidents;

xiii) impact on flora and fauna (ecosystem);

xiv) declines in scenic quality;

xv) conflict in management of the Serengeti between TANAPA and TANROADS, acronyms for the Tanzania National Parks and Tanzania Roads, both Government agencies.

17. It is for all the above reasons that the Applicant now seeks the following orders;

(i) A declaration that the action to construct a road across the Serengeti National Park is unlawful and infringes the provisions of the East African Community Treaty specified ;

(ii) A permanent injunction restraining the Respondent from undertaking the action complained of;

(iii) A permanent injunction restraining the Respondent from maintaining any road or highway across any part of the Serengeti National Park ;

(iv) The Respondent be permanently restrained from gazetting any part of the Serengeti National Park for the purpose of upgrading, tarmacking, paving, realigning, constructing, creating or commissioning the NATA-MUGUMU-TABORA B-KLEINS GATE-LOLIONDO ROAD;

(v) The Respondent be permanently restrained from removing or relieving herself from the UNESCO obligations in respect of the Serengeti National Park on the object of upgrading, tarmacking, paving, realigning, constructing, creating or commissioning the said road otherwise for that purpose upgrading, tarmacking, paving, re-aligning, constructing, creating or commissioning or maintaining a trunk road or highway across the Serengeti National Park.

(vi) Costs.

18. We must at this point state that when highlighting his written submissions, Mr. Kanchorry abandoned prayers (ii) and (iv) and so only prayers (i), (iii), (v) and (vi) will be the subject of determination in this Judgment.

Respondent's Case

19. The Respondent filed a Reply to Reference on 24th May 2012 and in it, the point made is that the road has been in existence and in use and has had no negative impact on the Serengeti ecosystem and is not the first of its kind in national parks. That a reputable consultancy firm was hired by the Government of the Republic of Tanzania to give a guiding report on how to overcome any negative impacts that its existence may cause and that the said consultant's recommendations when implemented, would reduce those negative impacts and enhance the safety of animals.

20. The Consultant's report is attached to the Reply to the Reference and its name and address are given as M/S Inter-consult Ltd, Inter House, New Bagamoyo Road, P. O. Box 423, Dar es Salaam, Tanzania.

21. It is the Respondent's further case that the road is merely being upgraded and that action is being taken within the mandate of the Government of the United Republic of Tanzania. That in doing so, the said Government intends to abide by its laws and rules on environmental preservation and conservation as well as its obligations to all international and regional treaties on the subject, including the Treaty for the Establishment of the EAC.

22. In addition, that as a sovereign State, the Government has decided to upgrade the road in order to stimulate the socio-economic growth of over two million of its citizens and reduce the prevailing costs of transport between Mugumu and Loliondo Centres and in doing so has mitigated all negative environmental impacts.

23. In the report by M/S Inter-Consult Ltd signed by its Acting Chief Executive, Mr. P.A.L. Mfugale, the conclusion reached is that **"considering the measures that are being put in place to ensure that possible adverse impacts on the Serengeti National Park will be adequately addressed, it is proposed that the Government should proceed with the implementation of the Natta-Mugumu-Loliondo road project."**

24. In that report, the Consultant also states that **"the project will entail upgrading of approximately 179 kms of the existing earth/gravel road from Natta-Mugumu-Loliondo to <u>bitumen</u> standard."**(emphasis is ours)

25. The Respondent further tendered oral evidence in support of its position and called three witnesses, Ms. Zafarani Madayi, the Head of Safety and Environment Unit in the Directorate of Planning within

TANROADS and Dr. James Wakibara, Principal Economist with TANAPA as well as Mr. William Simon Mwakilema, Chief Warden, TANAPA.

26. In her evidence, Ms. Madayi stated that whereas the report by M/S Inter-consult Ltd gave the intended road project a clean bill of health, environmentally, another consultant, M/S International Consultants and Technocrats PVT Ltd (India) in association with M/S Appex Ltd (Tanzania) Ltd were hired in 2009 by TANROADS to undertake, *inter alia*, a detailed engineering design and a comprehensive environmental impact assessment study for the said road project to be submitted to stakeholders including NGOs. That the said designs and study are yet to be completed and have therefore not been subjected to stakeholder discussions nor have they been submitted to the relevant Ministry for review and/or implementation.

27. Dr. Wakibara on his part stated that he is greatly involved in UNESCO's work and has submitted reports to it on the road project and since the Serengeti is a World Heritage site and that in "**Decision 35 COM 7A.18, UNESCO commended Tanzania for its intention to maintain the 53 km stretch of the project traversing Serengeti National Park to gravel standard and to reserve it mainly for the Park's tourism and administrative purposes".**(emphasis ours)

28. In his evidence, Mr. Mwakilema stated that the part of the road passing the Serengeti is 53 kms and is used mainly for tourism and administrative purposes and the intention of the Government is to upgrade it to **gravel status** only.

29. For the above reasons, the Respondent has urged the Court to dismiss the Reference and in addition, Mr. Malata filed a Notice of Preliminary Objection on 2nd May 2013 and it reads as follows:

"TAKE NOTICE THAT, on the first hearing date the humble Respondent shall raise a preliminary objection based on points of law to the effect that:

i. The Reference before this Honourable Court is bad and untenable in law as the same seeks to enforce a part of the East African Treaty which is yet to be ratified by all Partner States thus unenforceable in law;

ii. The Applicant has no locus stand to institute this Reference against the Respondent for the purported violation of International Conventions and Declarations on Environment and Natural Resources ;

iii. The Reference before this Honourable Court in particular on the violation of Articles of International Conventions and Declarations on Environmental and Natural Resources is untenable for being placed and enforced before the wrong forum."

Scheduling Conference

30. At the Scheduling Conference held on 21st January,2013 the following points of disagreement were recorded as were the agreed issues for determination:

Points of disagreement

(i) The road as proposed does not exist. It is being constructed, realigned, and upgraded (Applicant);

***(ii) The road exists. It is just being upgraded and realigned where necessary (Respondent*).**

Agreed Issues for determination

(i) Whether the Respondent intends to upgrade, tarmac, pave, realign, construct, create and/or commission a trunk road officially known as the NATTA-MUGUMU-TABORA B-KLEINS GATE-LOLIONDO ROAD also known as the North Road or Serengeti Super Highway across the northern wilderness of the world famous Serengeti National Park;

(ii) Whether the disputed road exists and is in use;

(iii) If so, whether the proposed action infringes the provisions of the EAC Treaty specified therein as well as the international instruments referred to;

(iv) *Whether the Applicant is entitled to the prayers sought*.

Determination

Preliminary objection

31. In determining the issues in contest within the Reference herein, we deem it appropriate and prudent to first dispose of the Preliminary Objections raised by the Respondent. We have elsewhere above indicated that the Respondent had initially raised preliminary

objections on grounds i*nter alia* of jurisdiction and limitation of time which objections were overruled both by this Division and the Appellate Division of the Court. It would have been expected that a diligent litigant would have filed all preliminary objections to the Reference at the time of filing its pleadings as is the expectation of Rule 41 of the Court's Rules instead of doing so piecemeal, as the Respondent has done. Nevertheless and in order to do substantive justice, we shall proceed to address the same with a reminder of the words of Sir Charles Newbold in **Mukisa Biscuit Co Ltd vs West End Distributors Ltd [1969] EALR 696** where he stated thus:

"The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice must stop."

32. With that background, the first issue raised by the Respondent is that the Reference is bad and untenable in law as it seeks to enforce a part of the Treaty which is yet to be ratified by all Partner States thus unenforceable in law.

33. At the hearing, Mr. Malata , with respect, was unclear on this point but in his written submissions, we deduced his argument to be the following:

That because some of the Partner States, specifically Tanzania, are yet to ratify a Protocol dated 2nd April 2006 to operationalise Chapter Nineteen of the Treaty, then all the provisions of Articles 111 – 114 of the Treaty are also yet to be ratified and are thus unenforceable in law. Further, that because there are no modalities and/or mechanisms to

deal with issues relating to the environment and natural resources, then the Applicant's case is misguided and cannot stand.

34. In response, Mr. Kanchory argued that there is no requirement that until a protocol is enacted, certain parts of the Treaty remain either unratified or become operational only when a protocol is enacted.

35. On this point, and with tremendous respect to Mr. Malata, while he cited no authority to support his contentions, we are clear in our minds that he has completely misunderstood the Treaty on this issue. We say so, because Article 152 thereof provides as follows:

"This Treaty shall enter into force upon ratification and deposit of instruments of ratification with the Secretary-General by all Partner States."

Article 153 (1) then provides as follows:

"***This Treaty and all instruments of ratification and deposit of instruments shall be deposited with the Secretary General who shall transmit certified true copies thereof to all the Partner States.***"

36. The Treaty was signed on 30th November 1996 and there is absolutely no evidence before us that the United Republic of Tanzania or any other Partner State never ratified it or ratified it with exceptions. In fact, from records held by the Secretary General of the Community and which are available for perusal, the United Republic of Tanzania ratified the Treaty on 28th June 2000 and deposited her Instruments of Ratification on 30th June 2000.

37. While therefore, we agree that signature and ratification are two different and distinct steps in the treaty – making process and that ratification is the final consent by a Partner State to be bound by the provisions of a treaty, there is no evidence before us that Tanzania has not ratified any part of the Treaty neither has it raised any reservations to it – See **Pimentel Vs Executive Secretary G. R. No. 158088 (2005)** per the Supreme Court of Phillipines on that issue.

38. Our finding above is also in line with Article 11 of the Vienna Convention which provides that ***"the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by other means if so agreed".*** (emphasis is ours)

39. The United Republic of Tanzania having signed and ratified the Treaty is clearly bound by each provision therein and it is very surprising to hear its Chief Legal Advisor submit to the contrary.

40. More fundamentally, and in answer to what was really the gist Mr. Malata's objection, whereas it is true that a protocol is expected to be concluded for each area of co-operation including on the environment and natural resources, non-conclusion of a protocol does not oust obligations placed on a Partner State by the Treaty itself. Article 151 with regard to protocols states as follows:

"(1) The Partner States shall conclude such protocols as may be necessary in each area of co-operation which shall spell out the objectives and scope of the institutional mechanism for co-operation and integration."

(2) ….

(3) Each protocol shall be subject to signature and ratification by the parties thereto."

41. In the context of the present Reference ,Chapter Nineteen of the Treaty is titled **"Co-operation in Environment and Natural Resources Management",** and in that regard, there is general agreement that a protocol has been concluded to operationalise these areas of co-operation between Partner States in the EAC and at the 26th Council of Ministers meeting held between 19th – 26th November 2012, the United Republic of Tanzania was directed to ratify that Protocol and deposit the instruments of ratification with the Secretary General by 15th December 2012. It is unclear whether it did so but, does that fact alone render all the provisions of Chapter Nineteen inoperable until the Protocol is ratified by all Partner States?

42. Mr. Malata gave us no authority to support his arguments in that regard, neither have we found any such authority. We understand Article 151 (4) of the Treaty to be saying that **"the Annexes and Protocols to [the] Treaty shall form an integral part of the Treaty"** and by its very nature, a protocol under Article 151 (1) of the Treaty spells out the objectives and scope of, and institutional mechanisms for co-operation and integration but failure to enact a protocol does not oust the obligations placed on a Partner State by clear and unambiguous provisions in the body of the Treaty. We make this categorical point because Chapter Nineteen is as binding on Tanzania as to other Partner States with or without a protocol in that regard.

43. **It is our finding therefore that for the above reasons the first objection must fail and is accordingly overruled.**

44. The second and third limbs of the preliminary objection are inter-related and shall be determined as one for reasons that both are premised on the argument that the Applicant has no locus standi to institute a reference premised on alleged violations of International Conventions and Declarations on the environment and natural resources and consequently the Applicant is in the wrong forum.

45. The objection speaks for itself but as can be seen above, the Applicant has alleged violations of the provisions of the African Convention on Conservation of Nature and Natural Resources, 2003, the Rio Declaration, the Stockholm Declaration and the United Nations Convention on Biodiversity. In that regard, Mr. Malata submitted that the Applicant has no *locus standi* to enforce those Declarations and Conventions and more specifically, enforcement of their provisions cannot be done before this Court.

46. Mr. Kanchory's answer to the above arguments, was that Articles 27 and 30 of the Treaty when read together, would show that whereas the principal mandate of this Court is to determine whether any Act, regulation, directive, decision or action of a Partner State is **unlawful** and an infringement of the Treaty, the choice of the word **"unlawful"** would extend to contravention of any law binding on a Partner State including International Conventions and Declarations.

47. This Court was recently confronted with a similar question in the case of **Democratic Party vs Secretary General, East African Community and 4 Others, EACJ Reference Non. 2 of 2012**. In that

case, the Applicant had sought orders *inter alia* that a declaration ought to be made that failure by some of the Partner States to accept the competence of the African Court in line with Articles 5 (3) and 34 (6) of the Protocol to the African Charter on Human and People's Rights and all other International Human Rights Conventions, is an infringement of Articles 5, 6, 7 (c), 126 and 130 of the Treaty as well as Articles 1, 2, 7, 13, 26, 62 and 66 of the African Charter on Human and People's Rights and the Vienna Convention on the Law of Treaties, 1969.

48. In dismissing that Reference, this Court stated partly as follows:

> **"But that is not the end of the matter because we heard the Applicant to be saying that failure to deposit the declarations aforesaid is a violation of Articles 6(d), 7 (2), 126 and 130 of the Treaty. Article 126 provides for the scope of co-operation in legal and judicial affairs while Article 130 provides for relations with other regional, international organizations and development partners. Article 130 (2) specifically states that:**
>
> **"*2. The Partner States reiterate their desire for a wider unity of Africa and regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community."***

Article 130 (1) also provides that:

> **"*1. The Partner States shall honour their commitments in respect of other multinational and international organizations of which they are members."***

Reading the above Articles together, it is obvious to us that where a Partner State *"fails to honour commitments"* made to other international organizations, with appropriate facts placed before the Court, a decision to ensure compliance thereof may be made in favour of a party that fits the description in Article 130 (4)and which has a genuine complaint in that regard.In fact, the Organisation of African Unity(*now the African Union*) , the United Nations and its agencies and other international organizations, bilateral and multi-lateral development partners interested in the objectives of the Community are specifically named in that regard and Partner States are implored to *"accord special importance to co-operation with those agencies"* and we have no doubt that in appropriate circumstances, a case may be made if a Partner States acted to the contrary.

In stating the above, the only rider is that this Court cannot purport to operate outside the framework of the Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol."

49. We reiterate the above holding and in applying it to the instant Reference, the gravamen of the Applicant's case is not alleged violations of the cited International Declarations and Conventions per se, but infringement of Chapter Nineteen of the Treaty, a matter well within the mandate of this Court and the Applicant has *locus standi* under Article 30(1) of the Treaty to bring proceedings in that regard. By our Ruling of 29th August 2011, we determined the issue of jurisdiction of this Court and the Appellate Division upheld our reasoning and we see no reason to revisit those issues.

50. **Without saying more, the second and third limbs of the objection must both fail.**

51. Having disposed of the preliminary objections by the Respondent, we shall here below determine each of the issues that were framed as points of disagreement between the Parties.

Issue No. 1 - Whether the Respondent intends to upgrade, tarmac, pave, realign, create and/or commission a trunk road officially known as the NATTA-MUGUMU-TABORA B-KLEINS GATE -LOLIONDO ROAD also known as the North Road or Serengeti Super Highway across the northern wilderness of the world famous Serengeti.

52. Looking at the above issue and based on the evidence submitted by both Parties, we consider it necessary to address the same together with issue No. 2 which is worded thus;

Issue No. 2 – Whether the disputed road exists and is in use

53. In that regard, two positions were placed before us; the first is by the Applicant which has alleged, through the evidence of Mr. Kuloba, that there is indeed a road traversing the Serengeti and in his own words (page 3 of his report):

"The road cuts across the park without particularly serving any population until the exit; there is only one tourist lodge located off the road. Currently, Klein's gate is an entry gate while Tabora B is not used as an exit gate, but rather for administration purposes. In its current form for the 53 kms, the road starts off at Klein's gate through a distance of about 3 km as gravel with a single culvert on that stretch, then for the rest of the distance of about 48

kms [it] is purely <u>an access trail</u> made and used by four wheel drive vehicles; the distance of about 2 km as you approach Tabora B is <u>minimally gravel</u>. The road is currently used for tourism and administration purposes only but the user will change to public and commercial once the construction is undertaken. In addition, the road is currently managed by TANAPA but when its constructed it will be managed by TANROADS."

54. The second position was that of the Respondent who relied on the evidence contained in the report prepared by M/S Inter-consult Ltd where at page 1 thereof, the following statement is found:

"The project will entail upgrading of approximately 179 km of the <u>existing gravel/earth</u> road from Natta-Mugumu-Loliondo to bitumenstandard."

55. Further, under a sub-heading titled, **"Issue of the Road Passing in the Serengeti National Park",** it is stated thus:

"A section of the Natta-Mugumu-Loliondo road from Tabora B – Klein's Gate for 54 kms is proposed to pass through the Serengeti National Park. The proposal to pass this road section in the Serengeti National Park has caused a number of protests from a number of environment based groups on the grounds that it will have harmful effects to the wild animals in the Serengeti…"

56. Further, in his evidence, Mr. Makwilema stated as follows:

"The section of 53 kms that is intended to be <u>upgraded</u> by the Government to <u>gravel status</u> will mainly cater for administrative and tourism activities for the Park. For tourism, the road will be

used by tourists going to more than five permanent tented camps situated along the road including Sayari, Kurya Hills, Bush Top, Lamai, Mara River Tented Camps. The road is also intended to service tourists going to more than twenty special camp sites, especially during the wildebeest migration period. There is also one permanent tented camp near Kleins Gate (known as Kleins Tented Camp). There is no lodge at the moment, either at the entry gate or at the Tabora B gate or within the Park along the 53 kms section."

57. Without belabouring the point and looking at Issues Nos. 1 and 2 again, there is little difference in the evidence presented by both the Applicant and Respondent because, save for the contradictions in the Respondent's case whether the whole stretch of 179 kms was to be upgraded to **bitumen** or **gravel** standards, one fact is obvious; namely that, the Respondent intends to upgrade the Natt-Mugumu-Tabora B – Kleins Gate-Loliondo Road from its current earth status. There is no evidence that it intends to re-align it but certainly upgrading involves construction and commissioning thereof.

58. **The answer to both issues in the totality of all evidence placed before us can only therefore be in the affirmative.**

<u>Issue No. 3 – Whether the proposed action infringes the provisions of the EAC Treaty and International Instruments</u>

59. .We have elsewhere above set out the respective arguments by the parties on this issue and we also note that while prayer (i) in the Reference uses the word **'action'**, both parties at the Scheduling Conference used the words **'proposed action'** as regards the road

project**.** We see no reason to worry about the semantics because the issue before us is the **decision** to build a road across the Serengeti and we have previously ruled that we have jurisdiction to determine that issue under Article 30 of the Treaty. But for the sake of clarity, it was argued by the Applicant that the Respondent's decision and action aforesaid were in violation of Articles 5(3)(c), 8(1) (c) and 111 (2) of the Treaty. These Articles provide as follows:

Article 5(3) (c);

"3. For purposes set out in paragraph 1 of this Article, and as subsequently provided in particular provisions of this Treaty, the Community shall ensure:

a) ……

b) ……

c) the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States."

Article 8 (1) (c);

"1. The Partner States shall:

(a) …

(b) …

(c) ***co-ordinate through the institution of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community***."

Article 111(2);

"2. Action by the Community relating to the environment shall have the following objectives:

a) To preserve, protect and enhance the quality of the environment;
b) …
c) …
d) …"

60. To put matters into proper perspective, both parties agree that construction of the road would have negative impacts on the Serengeti environment and ecosystem. In addition, both produced documents sharing the concerns expressed by UNESCO as to the project. For example, in its Report of the Decisions Adopted by the World Heritage Committee of UNESCO at its 34th Session in Brasilia, 2010 the Committee stated in Decision 35 COM 7B.5 that, it:

"***expresses its utmost concern about the proposed North Road which will dissect the northern wilderness area of the Serengeti over 53 kms, [and] considers that this proposed alignment could result in Irreversible Damage to the property's outstanding Universal value and therefore urges the State Party to submit an Environmental Impact Assessment to the World Heritage Centre before a decision to implement the project is taken."***

61. The same Committee in Decision 36 COM 7B.6 stated as follows, under the heading **"Serengeti National Park (United Republic of Tanzania) (N156);"**

"The World Heritage Committee,

i. <u>Having</u> examined Document WHC – 12/36.COM/7B;

ii. ***<u>Recalling</u> Decision 35 COM 7B.7, adopted at its 35th Session (UNESCO, 2011);***

iii. ***<u>Welcomes</u> the substantial efforts made by the State Party to implement the recommendations of the 2010 mission as requested by the World Heritage Committee at its 35th Session, and encourages the State Party to continue its efforts to fully implement them;***

iv. ***<u>Notes</u> the commitment of the State Party to solicit funding for a Strategic Environment and Social Assessment (SEA) for the northern Tanzanian road and calls on donors to provide funding for this study as well as the southern alignment, which will avoid Serengeti National Park;***

v. ***<u>Also welcomes</u> the announcement by the State Party that the planned railway linking the coast via Musoma to Kampala will not traverse the property but will go south of it.***

vi. ***....***
vii. ***....***
viii. ***....”***

62.From the foregoing and from the evidence on record, there is no doubt that the United Republic of Tanzania had **initially** intended to construct a **bitumen r**oad from Natta through Mugumu to Tabora B Gate at Serengeti and 53 kms of it would have had to go through the Park to Kleins Gate and onwards to Loliondo. The **intention**, according to the report by Inter-Consult Ltd, was to ***“provide an all-weather road linking the district town of Mugumu and Loliondo to the regional capitals of Musoma and Arusha and thereby stimulating socio-economic growth of 2.3 million people living in the districts of***

Serengeti and Ngorongoro whose respective capitals of Mugumu and Loliondo will be served by <u>bituminized</u> road"(emphasis is ours).

63. The report is dated 17th January 2011 and took into account the protestations by environmental based groups, including the Applicant which is specifically mentioned in the following words:

> "***The intention by the African Network for Animal Welfare (ANAW) to refer the matter to the East African Court of Justice seeking the Government of Tanzania to be restrained from upgrading the Natta-Mugumu-Loliondo road is yet another such protest."***

64. Further, that "***while protesters are entitled to pursue their interests, their opposition to the proposed route ignores the socio-economic needs of 2.3 million people living in Serengeti and Ngorogoro districts to whom the project is intended."***

65. The same report, however, acknowledges that the road would have grave negative impacts and to mitigate the said negative impacts of the project relative to Serengeti, the 53 kms stretch of the proposed road that passes through Serengeti should be constructed to **"*gravel standard only*".**

66. In addition, three gates between Tabora B and Kleins Camp should be operated by TANAPA **"*to curb speed and avoid animal kill along this sensitive section".***

67. The above facts would lead to the obvious conclusion that the **initia**l **proposal** by the Government of the Republic of Tanzania was that the road was intended to serve the general public and tourists in large numbers. Further, the said road would be **bituminized** including the

53kms that would be within the Serengeti. Consequently, upon the foregoing, we pause here to ask the following: Was that action proper, lawful and within the obligations imposed on Tanzania by Articles 5(1) (c), 8(1) (c) and 111 (2) of the Treaty?

68. The experts called by the Parties have differed on the consequences of negative impacts but agree on all the negatives. Happily for us, UNESCO, a renowned world body and objective on the subject has given us the answer to the question. Elsewhere above, it stated that:

(i) The proposed alignment of the road could result in irreversible damage to the property's (Serengeti's) Universal value;

(ii) It supports a Strategic Environmental and Social Assessment which would include a southern alignment which would avoid the Serengeti.

69. In the Inter-Consult Ltd report and in the evidence of Ms. Zafarani Madaya, and clearly acting on both pressure from environmentalists, including the Applicant as well as UNESCO, the Government of the Republic of Tanzania has not moved to the second stage of the project i.e the preparation of a detailed engineering design and a comprehensive Strategic Environmental and Social Assessment. It has also not moved to seek the input of TANROADS and the National Environmental Management Commission neither has the approval of the Minister in-Charge of the Environment been obtained. The road project in fact, although conceptualized in 2005 and the second stage commenced in 2009, has not moved at all and partly also because of the pendency of this Reference.

70. With that background, the Government of the Republic of Tanzania as can be seen from the UNESCO reports, seems to have taken into account the concerns raised on the negative impacts on the environment and from evidence before us, has not started construction of the proposed road.

71. But, that is not the end of the matter because the Applicant is seeking declaratory and injunctive orders that the project as **initially** conceptualized and **if implemented** would have grave and irreparable negative consequences to the Serengeti and that fact alone is sufficient to warrant a finding that the Respondent is in violation of the Treaty.

72. On that aspect of the case it is difficult to fault the Applicant because that is precisely what UNESCO specifically told the Respondent and also specifically suggested that the road should be constructed so as to avoid the Serengeti and certainly that is what caused M/s Interconsult Ltd to propose that the 53kms road should be upgraded to **gravel standards** only as opposed to the **initial proposal** to upgrade it to **bitumen** standard.

73. The point here is that all parties now agree that if the **initial proposal** is implemented, then the adverse effects would not be mitigated by all the good that the road was intended to bring to the 2.3 million people residing in the affected areas of Mugumu-Loliondo.

74.Turning back, therefore, to the obligations imposed on Tanzania by Articles 5(3),8(1)(c),111(2) as well as 114(1) of the Treaty, there is no doubt that if implemented, the road project as **initially conceptualized**, would be in violation of the Treaty to that extent only.

75. Regarding alleged breaches of the cited International Conventions and Declarations, once we have found as we have done above, our mandate would have been exercised and we see no reason to visit obligations in respect of other international instruments save reiterating our decision in **Democratic Party (supra)**. But having said so, we must also note that while the Applicant mentioned those instruments in its pleadings and submissions, it failed to show what parts of them were violated and in fact it was the Respondent who spent considerable time in his submissions in a bid to show that there were no violations of any of those International Instruments.

76. **In the circumstances, we can only answer the issue framed above partly in the affirmative and will make appropriate and necessary orders at the end of this Judgment.**

Issue No. 4 – Whether the Applicant is entitled to the prayers sought

77. We have already indicated that prayers (ii) and (iv) of the Reference were abandoned.

78. In regard to prayer (i), we find that whereas the Government of the Republic of Tanzania is lawfully entitled to construct roads within its territory, where it fails in its obligations to the conservation and protection of the environment within the meaning of Articles 5(3) (c), 8(1) (c) and Article 111(1) as well as Article 114(1), then this Court can properly make declarations in that regard. In the instant Reference, it is obvious that while its actions had the potential to cause irreversible damage to the Serengeti environment and ecosystem, once UNESCO and other bodies, including the Applicant intervened, it did not proceed with the road project and instead retreated to the drawing board and is

conducting further studies on it. Whatever orders we must make therefore must be preventative and geared towards restraining it from pursuing the **bituminized** road project and secure the Serengeti ecosystem and any roads in the Serengeti should generally be used by wildlife, tourists and Park administrators and not the general public because of the attendant risks associated with such use.

79.However and flowing from the above, there is no doubt that if is allowed to proceed with the road project as earlier conceptualized ,it would be in breach of the above Articles of the Treaty.

80. The necessary orders to make in that regard will shortly become apparent.

81. On prayer no. (iii), the Applicant seeks to restrain the Respondent from maintaining any road or highway across the Serengeti National Park. That prayer must necessarily be determined together with prayer no. (v) where the Applicant seeks orders to restrain the Respondent from removing or relieving itself from obligations imposed by UNESCO with regard to the intended road. Having anxiously considered the matter and as can be seen above, we have found that all evidence points to the fact that if the road project is implemented as originally intended, then following UNESCO's findings it could have an irreversible negative impact on the Serengeti environment and ecosystem. While this view is not expressly shared by the Respondent, we are persuaded by those findings. In fact, the Respondent seemed to have taken note of that fact and has effectively suspended the project and that is an admission that it has realized the error in the initial decision. His own consultant also gave a long list of possible negative impacts and which tally with those given by the Applicant.

82. We are therefore convinced that if the road project is implemented as originally planned, the effects would be devastating both for the Serengeti and neighbouring Parks like the Masai Mara in Kenya and it behoves us to do the right thing and stop future degradation without taking away the Respondent's mandate towards economic development of its people.

83. In the event, we find that prayer (iii) is practical and proper in the totality of our findings above and to ensure that the United Republic of Tanzania as a Partner State stays within its obligations under the Treaty. However the final orders to be made will be tailored so as not to tie its hands in programmes that it has designed for its people. This is within our mandate under Rule 68(5) of the Court's Rules of Procedure.

84. As to costs, we find that the litigation was in the wider public interest and for the sake of a sustainable future for the environment. The Applicant has no direct benefit in our final orders and so each party shall bear its own costs.

Conclusion

85.This Reference raises issues that are today the subject of wide debate across the world, including; environmental protection, sustainable development, environmental rule of law and the role of the State in policy formulation in matters relating to the environment and natural resources. In addition, the role of the Court in balancing its interpretative jurisdiction against the needs of ensuring that Partner States are not unduly hindered in their developmental programs has come to the fore. All these issues must however be looked at from the one common thread running through the Reference viz. the need to

protect the Serengeti ecosystem for the sake of future generations and whether the road project has potential for inflicting irreparable damage to the environment. The damage will be irreversible and we have already ruled on that subject based on the evidence before us and no more. And we have also restrained ourselves from merely approving the decision of the United Republic of Tanzania because it may be a popular decision with its policy makers-See **Society for the Protection of Silent Valley vs Union of India 1980 Kerala HC.** Whatever orders we must make therefore should be preventative and for obvious reasons; the environment, once damaged is rarely ever repaired.

86. Having so stated, the final orders that are appropriate in the unique circumstances of the matter before us are the following:

i)A declaration is hereby issued that the initial proposal or the proposed action by the Respondent to construct a road of bitumen standard across the Serengeti National Park is unlawful and infringes Articles 5(3)(c),8(1)(c),111(2) and 114(1) of the Treaty.

ii) A permanent injunction is hereby issued restraining the Respondent from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.

iii) Each party shall bear its own costs.

It is Ordered accordingly.

Dated, Delivered and signed at Arusha this **20th** day of **June 2014.**

……

JEAN BOSCO BUTASI

PRINCIPAL JUDGE

……

ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

……

JOHN MKWAWA

JUDGE