IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
APPELLATE DIVISION

(*Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; Edward Rutakangwa, Aaron Ringera and Geoffrey Kiryabwire, JJ.A*)

APPEAL NO. 06 OF 2014

BETWEEN

HENRY KYARIMPA……APPELLANT

AND

THE ATTORNEY GENERAL OF UGANDA……RESPONDENT

Appeal from the Judgment of the First Instance Division
(*Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ, Faustin Ntezilyayo, Monica Mugenyi and Fakihi Jundu, JJ.)*

Dated the 28th day of November, 2014 in Reference No. 4 of 2013.

JUDGMENT

A. INTRODUCTION

(1). This is an Appeal by Henry Kyarimpa ("the Appellant") against the Judgment of this Court's First Instance Division ("the Trial Court") dated 28th November, 2014 in Reference No. 4 of 2013 ("the Reference") by which the Trial Court dismissed the Reference and ordered the Parties to bear their own costs.

(2). The Appellant, who is a resident of Uganda, was the Applicant in the Trial Court. He described himself as a Procurement Consultant and Specialist operating and doing business in Uganda.

(3). The Respondent is the Attorney General of the Republic of Uganda, and was sued in the Reference as a representative for and on behalf of the Republic of Uganda.

(4). The Appellant was, both in the Trial Court and in this Court, represented by Mr. Mohamed Mbabazi, instructed by the firm of Nyanzi, Kiboneka and Mbabazi Advocates of Kampala, Uganda, and the Respondent was represented by Mr. Elisha Bafirawala, Senior State Attorney, Mr. Richard Adrole, State Attorney and Ms Susan Akello, State Attorney.

B. BACKGROUND

(5). The background to this Appeal as gleaned from the Memorandum and Record of Appeal filed in this Court is as outlined below.

(6). Sometime in the year 2013, the Government of Uganda ("the GoU") requested for bids for the construction of the 600 MW Karuma Hydroelectric Plant and its associated transmission lines ("the Karuma Dam"). The Appellant, in his capacity as a Procurement Consultant, aligned himself with a Company known as M/s China International Water

and Electric Construction Corporation ("China International") which placed a tender bid for the Karuma Dam.

(7). Before the award of the Tender was made, the Inspector General of Government of Uganda ("IGG") received a complaint regarding the transparency and integrity of the procurement process and, after investigations, issued a report dated 22nd March, 2013 recommending that the whole procurement process be cancelled and repeated.

(8). The Cabinet of the Republic of Uganda- under minute 190 (CT 2013) dated 12th April, 2013- debated the IGG's Report and directed the Minister of Energy and Mineral Development to cancel the procurement process for the Karuma Dam ("the initial procurement process").

(9). Subsequently, one Andrew Baryayanga Aja, instituted **Judicial Review Miscellaneous Application No. 11 of 2013** at the High Court of Uganda, at Nakawa, seeking Orders, *inter alia*, that the Attorney General be injuncted from implementing the recommendations of the IGG Report and that the Permanent Secretary, Ministry of Energy and Mineral Development ("ME&MD") be ordered to declare the best evaluated bidder of the initial procurement process.

(10). During the pendency of the hearing of the aforesaid Judicial Review Application, the Applicant therein lodged an Interlocutory Application by way of **High Court Miscellaneous Application No. 162 of 2013** in the same Judicial Review Cause. On 18th April, 2013, the Court issued, *ex parte,* an interlocutory order for the preservation of the *status quo* pending *inter partes* hearing of the Application. On 22nd April, 2013, at the scheduled *inter partes* hearing, and in the presence of both Counsel for the Attorney General and Counsel for the Applicant, the Court, by consent, (i) ordered that the *status quo* be maintained, restraining/prohibiting the implementation of the recommendation of the IGG Report, and (ii) directed the Permanent Secretary ME&MD to write to the complainant and responsive bidders requesting them to extend the

validity dates of their bids and renew their bid securities before the end of 22nd April, 2013 as the bids were to expire on the 23rd April, 2013.

(11). On the 23rd April, 2013, the Contracts Committee of the Ministry of Energy and Mineral Development pursuant to Section 75 of the Uganda Public Procurement and Disposal of Assets Act of 2003 ("PPDA Act") rejected all the bids and cancelled the procurement process of the Karuma Dam, and the decision to cancel was communicated to all bidders involved in the initial procurement process.

(12). On 24th April, 2013, the Constitutional Court of Uganda, in **Constitutional Application No. 03 of 2013: Andrew Baryayanga Aja vs The Attorney General of Uganda,** issued an interim injunctive order restraining the Government of Uganda ("the GOU") /Cabinet, or the ME & MD from implementing the recommendations of the IGG report dated 22nd March, 2013, or in any other manner from interfering with the final process of the initial procurement process, including awarding a contract to the best evaluated bidder, or in any other manner implementing the said recommendations or any of them, or from doing any other act or taking any further steps in connection therewith, until the determination of the main Constitutional Application ,or until such other or further order of the Court. That Order was served on the Respondent on 25th May, 2013.

(13). On 20th May, 2013, the High Court of Uganda, at Nakawa, issued Final Orders in the Judicial Review Miscellaneous Cause No. 11 of 2013 referred to in paragraph 9 above. Those Final Orders restrained the Respondent from implementing or taking into account the recommendations in the IGG Report, and directed the Respondent, through its agent, the Permanent Secretary ME & MD, to declare the best evaluated bidder for the Engineering Procurement and Construction Contract ("EPC Contract") for the Karuma Dam.

(14). The Respondent lodged an Appeal in the Court of Appeal of Uganda against the aforesaid orders.

(15). No contempt of Court proceedings were ever lodged in the High Court of Uganda against the Respondent in relation to the Orders issued in Miscellaneous Cause No. 11 of 2013.

(16). On 20th June 2013, the Government of Uganda signed a Memorandum of Understanding ("MoU") with M/s Sinohydro Corporation Limited ("Sinohydro") for the construction of the Karuma Dam.

The Reference

(17). Aggrieved by the cancellation of the bids and the subsequent selection of Sinohydro as the Contractor for the construction of the Karuma Dam, the Appellant instituted the Reference subject matter of this Appeal in the Trial Court on 26th June, 2013, under Articles 6, 7(2) , 8(1) (c), 23, 27 (1) and 30 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rule 24 of the East African Court of Justice Rules of Procedure, 2013 ("the Rules").

(18). In the Reference, the Appellant averred that:

(a). The selection and subsequent signing of the MoU was shrouded in mystery, secrecy and manipulation by the GoU officials, and was not transparent, objective, fair and competitive, but instead was full of illegalities, arbitrariness, discrimination and scheming of power brokers and "rain makers" in the Government.

(b). The selection and subsequent signing of the MoU was done in violation and breach of the PPDA Act and Regulation S1 70 of 2003 ("the Procurement Regulations"), which lay down the governing legal and statutory framework for Public Procurement, the MoU in dispute included.

(c). The selection and subsequent signing of the MoU was done in contempt of Court and violation of Court Orders granted in a Judicial Review Application for declarations, Mandamus and injunction in Nakawa High Court Miscellaneous Cause No. 11 of 2013.

(d). All the acts in (a) to (c) above breached and infringed the principles of rule of law, good governance, accountability and democracy and were inconsistent with Articles 6 (c) and (d), 7 (2) and 8 (1) of the Treaty.

(19). In the premises, the Appellant moved the Trial Court for Orders:

(a). Declaring that the selection of Sinohydro by the GoU and the subsequent signing of the MoU between the GoU and Sinohydro on 20th June, 2013 for the construction of the Karuma Dam were a breach of and an infringement of the Treaty.

(b). Enforcing and Directing the immediate compliance with the Treaty and/or performance of the State obligations and responsibilities of the GOU under the Treaty by:

(i). Directing the GoU to cancel the MoU signed between it and Sinohydro on 20th June, 2013 for the construction of the Karuma Dam.

(ii). Directing the GoU to comply with the Court Order in Nakawa **High Court Miscellaneous Cause No. 11 of 2013 – Hon. Andrew Baryayanga Aja vs. Attorney General** ordering award of the Contract to the best evaluated bidder for the EPC contract for the Karuma Dam.

(iii). Reinstating the *status quo* before the selection of Sinohydro and subsequent signing of the contract between the GoU and Sinohydro.

(c). That the costs of the Reference be paid by the Respondent.

(20). Contemporaneously with the Reference, the Appellant filed Applications Nos. 3 and 4 of 2013 seeking for a temporary injunction and an interim order, respectively, restraining the implementation of the MoU by;-

(i). Performing any of the scheduled activities there under including contract negotiations and the signing of the EPC Contract for the project.

(ii). Government of Uganda negotiating financing terms with China Exim Bank and obtaining disbursement.

(iii). Launching the on-site construction activities of the project by Sinohydro.

(iv). Mobilization by Sinohydro of engineers and technicians for the project to carry out further site investigations, detailed construction Planning and design works.

(v). Carrying out of preparatory works in the Annex to the MoU until the hearing and final disposal of the main Reference No. 4 of 2013.

(21). The Applications were not immediately heard but were scheduled for hearing on 28th August, 2013.

(22). On 18th July, 2013, before the Respondent filed its Response, the Appellant wrote to the Respondent and all stakeholders objecting to the continued implementation of the MoU on the grounds that he had filed the

Reference together with an application for interim orders of injunction and the Government of Uganda had knowledge of the existence of those matters. The Respondent's reply on 23rd July, 2013, noted that the Appellants application for interim orders had not been adjudicated upon by the East African Court of Justice, and, therefore, no injunctive reliefs were issued, and none could emanate from the mere filing of an application for interim orders. The Respondent, for those reasons, advised the concerned officials to disregard it with the contempt it deserved. On the 26th July, 2013, the Appellant again wrote to the Respondent beseeching the Respondent to apply the provisions of Article 38 (2) of the Treaty and refrain from doing an act that would be detrimental to the resolution of the dispute or which would aggravate it.

(23). During the period between the filing of the Reference and the scheduling of the same, when issue No. 2 was framed, there were various activities that were done by the Respondent towards the implementation of the MoU. They included the handover of the site of the Karuma Dam to Sinohydro as per the letter dated 3rd July, 2013, a formal ground breaking ceremony presided over by the President of Uganda on 12th August, 2013, and the signing of the Engineering, Procurement, Construction and Financing ("EPCF") Contract on 16th August, 2013.

(24). After hearing the Applications for Interlocutory Relief, the Trial Court refused to grant the Temporary Injunction sought and dismissed the Application for an Interim Order. That Order was not appealed.

The Response to the Reference.

(25). In brief, the Respondent's case was that the Appellant was engaged in frivolous, vexatious, scandalous and outrageous litigation aimed at derailing and/or delaying the construction of the Karuma Dam. The Respondent considered that the Appellant's interest in the matter was that of an agent who had not been paid for his services by his client and, accordingly, his remedy lay outside the Reference.

(26). With respect to the cancellation of the initial procurement process, the Respondent contended that upon the IGG recommending cancellation of the process, the Cabinet decided to accept the recommendation and, on 23rd April, 2013, the Contracts Committee of the ME&MD rejected all bids for the tender under Section 75 of the PPDA Act and Regulation 90 thereof.

(27). The Respondent also contended that the decision to select Sinohydro was neither arbitrary nor illegal and the same was carried out in a transparent manner and in conformity with the Constitution and the laws of Uganda. The Respondent also contended that the signing of the MOU with the said Company was in line with a bilateral arrangement between the GoU and the Government of China to secure funding through Exim Bank of China for the construction of the Karuma dam by Sinohydro, a wholly owned Government of China Company. The Respondent further contended that it was on the basis of the existence of the said bilateral arrangement that the award of the Karuma Dam contract to Sinohydro, without following the tender process prescribed by the PPDA Act, was based.

(28). It was the Respondent's further case that the Order of 24th April, 2013 by the Constitutional Court of Uganda restraining the Government from implementing the IGG recommendations was served well after the cancellation of the initial procurement process and the rejection of all bids, and thereafter the proceedings in Court were rendered lifeless and spent. The Respondent contended that the same fate befell the Orders issued by the High Court on 20th May, 2013. Moreover, the Respondent further argued, the said Orders of the High Court had been appealed against.

(29). The Respondent also took the position that the cancellation of the tender process was not caught in the web of disobedience of Court Orders as the said Orders did not suspend or put in abeyance Section 75 of the PPDA Act pursuant to which the cancellation was made.

The Rejoinder to the Response.

(30). In his rejoinder to the Respondent's case, the Appellant averred that there was no lawful bilateral arrangement between the Republic of Uganda and the Peoples' Republic of China as alleged, or at all. In any event, the Appellant further contended, if such a bilateral arrangement existed, the same would have been unconstitutional by dint of Article 159 of the Constitution of Uganda which requires that all loan agreements by the Government of Uganda had to be executed as authorized by an Act of Parliament.

(31). The Appellant further contended that a Cabinet Directive, such as the one relied on by the Respondent, could not override a Court Order. It was also the Appellant's case that the Orders for the maintenance of the *status quo* issued on 22nd April, 2003, with the consent of the Respondent, meant that the relevant Government authorities, including the Permanent Secretary, ME&MD, knew of the said orders, and could not, therefore, change the *status quo* as they purported to do.

(32). The Appellant also made the point that after the Reference was filed, and in spite of the express provisions of Article 38 (2) of the Treaty, the GoU proceeded to implement the challenged MoU in furtherance of the construction of the Karuma Dam. The Respondent contended that those actions were a perpetuation of the Government's unlawful conduct.

The Issues for Determination

(33). At the Scheduling Conference of the Trial Court, the Parties agreed that the issues for determination were:

1) Whether the selection and subsequent signing of the MoU between the GoU and Sinohydro was inconsistent with and an infringement of Articles 6 (c) and (d), 7 (2) and 8 (1) of the Treaty;

2) Whether the acts of the GoU in implementing the MoU after the filing of the Reference was inconsistent with and an infringement of Article 38 (2) of the Treaty; and

3) Whether the parties were entitled to the orders sought.

The Trial Court's Determination

(34). After considering the Pleadings of the Parties and Affidavits in support thereof, as well as the Submissions of Counsel, the Trial Court found that:

a) The selection of Sinohydro to undertake construction of the Karuma Dam without a tender, and the subsequent signing of a MoU between the GoU and Sinohydro, was not in breach of Uganda's own laws because:-

(i). though the bilateral agreement or arrangement relied upon by the Respondent as legitimizing the actions was not annexed to any affidavit or otherwise produced before the Court, the existence of the same could be, and was, in fact, inferred by the Court from the references thereto in the MoU dated 20th June, 2013, the Contract dated 16th August, 2013, and in the correspondence of various high ranking officials of the GoU. And furthermore, the burden of

producing the evidence of such an agreement or arrangement in the context of the dispute before the Court was placed on Synohydro, and the GoU could not be held responsible for actions of a party not before the Court; and

(ii). the Courts of Uganda having not found the Respondent to be in contempt of Court, as alleged by the Respondent, the Trial Court had no jurisdiction to determine whether the actions complained of were done in disobedience of Court Orders. Had the Courts of Uganda found the Respondent to have acted in contempt of their Orders, the Court could have properly taken their decision and applied it in determining whether the Respondent had, by that fact, acted in contravention of the principle of the rule of law under the Treaty.

Issue No. (1) Was, thus, answered in the negative.

b) The acts of the GoU in implementing the MoU after the filing of the Reference were not inconsistent with and were not an infringement of Article 38 (2) of the Treaty, because the Article did not expressly or impliedly provide for an automatic injunction or stay of the process or action complained of without the adverse party being heard.

Issue No. (2) Was, thus, also answered in the negative.

c) The Appellant was not entitled to the remedies sought and, as the litigation was partly in the public interest, it was a proper case for each party to bear its own costs.

C. THE APPEAL AND THE CROSS APPEAL TO THE APPELLATE DIVISION.

(35). Dissatisfied with the entire Judgment of the Trial Court, the Appellant instituted this Appeal on 31st December 2014 by lodging a Memorandum of Appeal. The Memorandum enumerated thirty three (33) grounds of appeal some of which, in the Court's view, displayed ignorance of the mandate of the Court, others were complaints about *obiter dicta* of the Court, and many others of which were simply argumentative and repetitive. Be that as it may, the substance of all of the said grounds of appeal was that the Trial Court erred in law in finding that the selection of Sinohydro as the contractor for the Karuma Dam and the subsequent execution of a MoU between it and the Government of Uganda, as well as the actions of the Government of Uganda in implementing the said MoU after the filing of the Reference, were, respectively, not in breach or contravention of Articles 6(c) and (d),7(2) and 8(1) or inconsistent with and an infringement of Article 38(2) of the Treaty.

(36). The Attorney General of Uganda, on his part, lodged a Notice of a Cross-Appeal on 31st March 2015 pursuant to the provisions of Rule 91(3) of this Court's Rules. The said Notice of Cross-Appeal was lodged out of time but was subsequently validated with the consent of both parties on 20th April 2015. In the Notice of Cross-Appeal, the Attorney General contended that the Trial Court erred in law in failing to award costs to the Respondent who was the successful party in the Reference on the ground that the Reference was brought for personal reasons and not in the public interest.

(37). At the Scheduling Conference of the Appeal, held on 20th April 2015 pursuant to Rule 99 of the Court's Rules, the Parties with the guidance of the Court agreed that those grounds of Appeal and of the Cross-Appeal may be distilled and compressed into the following issues:-

(i). Whether the Trial Court erred in law in finding that the selection and subsequent signing of the MoU between the GoU and Sinohydro was not inconsistent with and was not an infringement of Articles 6 (c) and (d), 7 (2) and 8 (1) of the Treaty.

(ii). Whether the Trial Court erred in law in finding that the acts of the GoU in implementing the MoU between itself and Sinohydro, after the filing of the Reference, was not inconsistent with and was not an infringement of Article 38 (2) of the Treaty.

(iii). Whether the Trial Court erred in law in declining to award costs to the Respondent.

(38). The Learned Advocates for the Parties canvassed those issues in that order in their written submissions which submissions they wholly adopted at the hearing of the Appeal. Their respective cases are summarized hereinafter.

Issue No. 1 : Whether the Trial Court erred in law in finding that the selection and subsequent signing of the Memorandum of Understanding between the GOU and Sinohydro was not inconsistent with and was not an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.

Appellant's Submissions.

(39). Mr. Mbabazi, the Learned Counsel for the Appellant, submitted that the Trial Court having found that there was no written bilateral agreement or arrangement produced before it, the Trial Court erred in law in finding that such an agreement existed on the basis of inferences drawn from other documents including correspondence between Government Officials. Counsel further argued that, in any case, the inferences made by the Trial Court were not predicated on the pleadings, evidence, or submissions of the Respondent, but were a departure from such

pleadings and evidence and, accordingly, amounted to an error of law. In support of that submission, Counsel referred extensively to the Statement of Reference and the affidavit of Mr. Christopher Gashirabake, the Director of Legal Services in the Office of the Attorney General of Uganda, and submitted that the Respondent's pleaded and sworn case before the Trial Court was that there was an executed bilateral agreement between Uganda and China, made pursuant to Article 123(1) of the Uganda Constitution, according to which the Karuma Dam would be funded through China Exim Bank and also that presentations by various Chinese Companies would be the method of selecting a Chinese Company to undertake the project.

(40). Counsel further submitted that the Trial Court ought to have found that the absence of a written bilateral agreement before the Court meant that the PPDA Act, 2003 was the applicable and operational law to the Procurement of the Contractor for the Karuma Dam and, accordingly, the procurement and selection of Sinohydro without applying the PPDA Act, 2003 was arbitrary, illegal and unlawful under Ugandan law and was, by extension, a breach of the Treaty's Fundamental and Operational Principles of adherence to good governance, the rule of law, transparency and accountability.

(41). With regard to disobedience of or failure to honour Court Orders, Mr.Mbabazi submitted that the Trial Court erred in law in finding that since the National Courts of Uganda had not been called upon to find, and had not found, that the Respondent in cancelling the initial procurement process, selecting Sinohydro to undertake the Karuma Dam and signing a MoU with Sinohydro to execute the project was in contempt of Court, it lacked jurisdiction to delve into alleged contempt and disobedience of the orders of those Courts and to determine whether such disobedience was a contravention of the principle of the rule of law under the Treaty. In that regard, Counsel recalled that the Respondent's case in the Trial Court was not that the Respondent should be found guilty of contempt and sanctioned for such contempt, but rather its case

was that in refusing to honour and comply with Court orders stopping the cancellation of the initial procurement process, the Respondent was in breach of the rule of law and good governance principles encapsulated in the Treaty.

(42). Counsel submitted that from a consideration of the sequence of events starting with the IGG recommendations, the Cabinet's Directive, the cancellation of the bids before the Award, the Selection of Sinohydro as the Contractor and the execution of a MoU with the said Company, it was patent that the Respondent had disobeyed or failed to comply with the orders of the High Court, as well as of the Constitutional Court, issued on 18th and 22nd April, 2013, 24th April, 2013 and 20th May, 2013. Consequently, the Respondent was in breach of its Treaty obligations.

(43). Counsel invoked the authority of the landmark case of **James Katabazi & 21 Others vs. The Secretary General of the East African Community and the Attorney General of Uganda** [**EACJ REFERENCE No. 1 of 2007**], for the proposition that the Court had jurisdiction to determine whether the acts of the Government of a Partner State in disobeying a Court Order amounted to a breach of the Treaty's fundamental and Operational Principles of rule of law and good governance without there being in existence in the first instance a finding of contempt by the National Courts.

(44). Counsel argued that the Trial Court's stand that the National Court's had first to determine whether the Respondent had acted in contempt of their orders, and the First Instance Division could, then, properly take that decision and apply it in determining whether the Respondent had, by that fact, also acted in contravention of the principle of the rule of law under the Treaty, was an abdication of the Court's mandate to interpret Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty so as to determine whether the acts of the Respondent violated and infringed the principles of the rule of law and good governance.

(45). Counsel concluded his submissions on Issue No. 1 by asking us to answer the issue in the affirmative.

The Respondent's Submissions.

(46). On whether there existed a bilateral agreement/arrangement between the Government of Uganda and the Peoples' Republic of China, Mr. Bafirawala, the learned Counsel for the Respondent, submitted that the documents from which the Trial Court inferred the existence of such agreement/arrangement were all part of the Court record and formed part of the evidence, and the Trial Court did not, therefore, err in referring to them, despite the Respondent having not referred to them in its submissions, and drawing the irresistible conclusion that there was a bilateral arrangement/agreement between the two countries to finance the construction of Karuma Dam through China Exim Bank by Chinese Construction Companies.

(47). As regards the cancellation of the initial procurement process and the subsequent selection of Sinohydro as the Contractor for the Karuma Dam, Counsel submitted, firstly, that the cancellation was done under Section 75 of the PPDA Act, 2003 and the Appellant had not challenged the authority of the Contracts Committee of the ME&MD to apply that provision of law; and secondly, that the procurement of Sinohydro was not challenged by the Appellant or any Chinese Company as being unfair, oppressive or devoid of transparency. Indeed, Counsel added, it was an incontrovertible fact that the selection was conducted through presentations made by several interested Chinese Companies which included M/s China Three Gorges Corporation (a parent Company of M/s China International) and that process resulted in M/s Sinohydro being selected for the Construction of the Karuma Dam and China International too benefited from the new process by being given the task of constructing the 183 MW Isimba Hydro Electric Power Project.

(48). On the sub issue of contempt of Court orders or disobedience of such orders, Counsel invited us to uphold the reasoning and findings of the Trial Court to the effect that in order to establish whether or not there was disobedience of Court Orders, an inquiry by the Court which issued the said orders was necessary in the first place. In that regard, Counsel pointed out that the acts of contempt complained of were never brought before any court in Uganda for determination by Andrew Baryayanga Aja (the Applicant in the proceedings in which the Court orders were issued).

(49). For all the above reasons, Counsel for the Respondent asked us to answer Issue No. 1 in the negative.

Appellant's Replying Submissions.

(50). Counsel for the Appellant replied that the import of Section 4 (1) of the PPDA Act and Regulation 5 (1) of the PPDA Regulations was that the bilateral agreement had to exist as a hard copy and contain provisions which, upon being read, had to be found to be in conflict with the PPDA Act before such an agreement could be allowed to prevail over the said Act. In his view, reliance on an inferred agreement or arrangement was contrary to Ugandan Law and was, thus, a contravention of the principles of the rule of law, good governance and accountability contrary to Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty.

Issue No. 2 : Whether the Trial Court erred in law in finding that the acts of the Government of Uganda in implementing the MOU between itself and Sinohydro after the filing of the Reference was not inconsistent with and was not an infringement of Article 38(2) of the Treaty.

Appellant's Submissions.

(51). Counsel for the Appellant submitted that the Trial Court erred in law in its interpretation of Article 38(2) and thereby rendered it redundant. According to Counsel, the Trial Court erred in basing its decision on what the Court discerned to be the intention of Article 38(2) not to confer on an Applicant in a Reference an automatic injunction as to do so would undermine the long held position that injunctions are discretionary judicial remedies. That approach, Counsel submitted, had two pitfalls. First, it presupposed that the Treaty is subordinate to internal law (also alternatively referred to as Municipal Law) and jurisprudence and, accordingly, it had to be harmoniously interpreted and enforced to conform therewith. Secondly, it equated the restraint called for in Article 38(2) to an order granted by the East African Court of Justice while exercising its judicial discretion. Counsel submitted that the correct approach was to have used the ordinary meaning of Article 38(2) in the context of the Treaty objectives and purposes. According to Counsel, the ordinary meaning of the provision is for a Partner State which has a dispute before the Council or Court to refrain from doing such acts as are detrimental to the resolution of the dispute or which would aggravate it. In Counsel's submission, Article 38 (2) was an automatic injunction on a Partner State to refrain from doing acts that were detrimental to the resolution of the dispute or which would aggravate it. Counsel submitted that the Respondent breached Article 38(2) when it did the acts it did after the filing of the Reference and issue No. 2 should be answered in the affirmative.

Respondent's Submissions.

(52). Counsel for the Respondent submitted that Article 38 (2) of the Treaty called for self-censorship by the Partner State to a dispute that had been lodged with either the Council or the Court, to refrain from any action that might be detrimental to the resolution of the dispute, but did not bar or stop the Partner State from doing acts which such State conceived not to

be detrimental to the resolution of the dispute or which would aggravate it. Counsel further submitted that the actions of the Respondent in implementing the MoU did not contravene or infringe upon Article 38(2) because what the Appellant had challenged in the Reference was the selection of Sinohydro and the subsequent signing of the MoU by the said Company with the Government of Uganda, and not the implementation of the MoU. Counsel added that the injunctive relief which sought to restrain the Respondent from implementing the MoU was an afterthought, and was not part of the Reference as filed on 26th June, 2013. In those circumstances, Counsel contended, the Respondent's actions could neither be detrimental to the resolution of the dispute as contained in the Reference nor aggravate the same.

(53). In Support of the submission that Article 38(2) did not bar or stop a Partner State from any further action once a dispute had been referred to the Court or the Council, Counsel for the Respondent relied on the authority of the Trial Court's own decision in **Timothy Alvin Kahoho VS The Secretary General of the East African Community [EACJ APPLICATION NO.5 OF 2012],** where the said Court delivered itself as follows:

> *"As for the Provisions of Section 38(2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of an injunction is a function of the Court in exercise of its discretionary power. Therefore Article 38 (2) cannot be seen to be removing that long held position without expressly saying so. Further, in the authority the Applicant referred to us, that is, <u>The East African Law Society and 3 Others VS the Attorney General of Kenya and 3 Others</u> [Reference No. 3 of 2007], the Applicant did not show us, neither were we*

able to find where the Court held that Article 38 (2) acts as an automatic injunction once a dispute has been referred to the Court or to the Council."

Counsel submitted further that to hold otherwise would in effect render Article 39 of the Treaty redundant, and would be contrary to the intention and spirit of Article 38(2), as a window for abuse would be opened because parties would be encouraged to file frivolous and vexatious applications in Court with the sole intent of paralyzing a Partner State's operations.

(54). In the result, Counsel submitted that issue No.2 should be answered in the negative.

The Appellant's Reply

(55). The Appellant's Counsel replied that the Respondent's invocation of the intention and spirit of Article 38(2) of the Treaty was misleading and contrary to the Law and Principles of Treaty Interpretation to the extent that the Respondent's interpretation required the Court to ignore the express language of the Treaty, which the Court could not do.

(56). Counsel submitted that the Court should adopt the ordinary meaning rule of interpretation as provided in the Case of **The East African Centre for Trade Policy & Law VS The Secretary General of the East Africant Community** – [EACJ REFERENCE No. 19 0f 2012] and other cases such as **The Sussex Peerage** (1844) and **Uganda Revenue Authority V. Siraje Hassan Kajura [**CIVIL APPEAL NO. 26 OF 2013]. All those cases hold that where the words of a text (Treaty or Statute) are clear and unambiguous, they must be given their natural and ordinary meaning. The Court should look at what is clearly said rather than the intendment or presumption.

(57). In Counsel's view Article 38(2) was clear and unambiguous: A Partner State which has a dispute before the Council or Court is to refrain from doing acts that are detrimental to the resolution of the dispute or which would aggravate it. It was an automatic injunction on the Partner State from doing acts which were detrimental to the resolution of the dispute or which would aggravate the same.

(58). As regards the argument that the interpretation advanced by the Appellant would in effect put Article 39 in abeyance, Counsel pointed out that Article 39 was wider than Article 38 in that the orders issued under the former were not confined to injunctive relief but could also be mandatory ones for inspection, survey, valuation, taking of accounts, appointment of Receivers or even mediation.

Issue No. 3: Whether or not the Trial Court erred in law in declining to award costs to the Respondent.

Appellant's Submission.

(59). The Appellant reserved its submission on costs until after knowing the Respondent's submissions thereon for the reason that he truly believed that the judgment ought to have been entered for him with costs.

Respondent's Submissions.

(60). Counsel for the Respondent submitted that the Trial Court erred in law in depriving a successful party of costs in a matter where the Appellant was fronting his personal interests – the recovery of his remuneration and commission fees from China International. Counsel further submitted that based on the pleadings, the Reference, though disguised as brought for and on behalf of the people of Uganda, was not a Reference in the public interest because the Appellant not only sought declarations but

also costs and fees lost as a result of the Uganda Government's failure to select China international for the Karuma dam Project.

(61). The Respondent thus asked for costs in both the Trial Court and the Appellate Division.

Appellant's Reply.

(62). The Appellant did not respond to the Respondents submissions on costs. He merely contented himself by contending that the Appeal should be allowed with costs here and below.

THE COURT'S DETERMINATION.

(63). We intend to make our own findings on the issues framed systematically.

Issue No. 1: Whether the Trial Court erred in law in finding that the selection and subsequent signing of the Memorandum of Understanding between the GoU and Sinohydro was not inconsistent with and was not an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.

(64). It is apposite to recall, albeit briefly, the way the Parties approached this issue and the Trial Court's Findings and Holding thereon. In doing so, we bear in mind that the conduct of the Respondent complained of by the Appellant was impugned as being inconsistent with and an infringement of Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty on two grounds: first, that it was done in violation and breach of the PPDA Act and Regulations, which lay down the governing legal and statutory framework for Public Procurement in Uganda, and secondly, that it was done in contempt of Court and in violation of High Court orders granted by the Courts of

Uganda. We will highlight the Parties approach and the Trial Court's Findings on a ground by ground basis.

(65). With regard to the challenged procurement's compliance with the internal law of Uganda, the Appellant's case, as disclosed in his Pleadings, Affidavit and Written Submissions was that the PPDA Act, which prescribed a tender process, was not followed and, accordingly, the procurement of Sinohydro and the subsequent signing of a MoU between it and the GoU were illegal. The Respondent's answer, as disclosed in its Pleading, the Affidavit in support thereof, and the Written Submissions was that the procurement, though not following the tender process prescribed by the PPDA Act, was legitimate on the strength of the existence of an executed bilateral agreement between the GoU and the Government of China to secure funding for the Karuma Dam through Exim Bank of China. The Appellant, in reply to the Respondent's case denied the existence of such a bilateral agreement. During the highlighting of the Parties Submissions at the trial, the Respondent, for the very first time, invoked the provisions of Article 123 of the Constitution of the Republic of Uganda and contended that though the physical document was not produced in Court, its existence was established in other documents on Court record, and it was the prerogative of the President of Uganda to make such a bilateral arrangement and the form thereof was not prescribed by the said Article of the Constitution. In a rejoinder to this new argument, Counsel for the Appellant argued that both Article 123 of the Constitution of Uganda and Section 4 of the PPDA Act contemplated a written agreement.

(66). The Trial Court dealt with this aspect of the issue in Paragraph 51 of its Judgment as follows:

> *"Taking all matters above into account, the bilateral arrangement may not be with us in writing but we have reflected over that fact and noting the terms of the contract signed on 16th August, 2013 as read*

with MOU dated 20th May, 2013 (sic), it is clear to us that an arrangement under Article 123(1) of the Uganda Constitution exists between the Government of Uganda and the Peoples' Republic of China whereby the latter, through its subsidiaries and agencies, would finance projects in Uganda on such terms as may be agreed between them. We say so because, it is inconceivable, to us at least, that the President, the Attorney-General, the Permanent Secretary in the relevant Ministry, the Executive Director of the PPA would all refer to "an arrangement" that does not exist. We have also noted that the obligation to produce evidence of such an arrangement in the context of the dispute before us was on Sinohydro. It is on record that Sinohydro was initially a party to these proceedings but was struck out for being improperly joined. How then can we hold the Respondent responsible for actions of a party not present to speak for itself? We reiterate that Clause 8 of the MOU enjoined Sinohydro in the following terms:

> *"This MOU shall be subject to Sino hydro's producing a supporting letter regarding this project from the Chinese Government within the bilateral arrangement between the Government of Uganda and the Chinese Government."*

(67). Before progressing further, we think it is essential to reproduce the pertinent Constitutional, Statutory, and Treaty Provisions relied upon by the Parties herein.

THE CONSTITUTION OF THE REPUBLIC OF UGANDA.

"Execution of Treaties, Conventions and Agreements.

123(1) The President or a person authorized by the President may make treaties, conventions, agreements, or other arrangements between Uganda and any other Country or between Uganda and any other international organization or body, in respect of any matter.

(2) Parliament shall make laws to govern ratification of treaties, conventions, agreements, or other arrangements made under Clause 1 of this Article."

THE PUBLIC PROCUREMENT AND DISPOSAL OF ASSETS ACT, 2003

"2(1). This Act shall apply to all Public Procurement and disposal activities and in particular shall apply to –

(a). . .

(b) Procurement or disposal of works, services, supplies or any combination however classified by –

(i) Entities of Government within and outside Uganda;

4(1) Where this Act conflicts with an obligation of the Republic of Uganda rising out of an agreement with one or more states, or with an

international organization, the Provisions of the agreement shall prevail over this Act."

THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS REGULATIONS 2003

"5(1) Where an International Agreement requires a procuring and disposing entity to use an alternative procurement or disposal method, the entity shall inform the Authority in writing with supporting documents, including a copy of the International Agreement embodying the obligation." [Emphasis added].

THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY

"Article 6

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(a). . .

(b). . .

(c) Peaceful settlement of disputes;

(d) good governance including adherence to the principles of democracy, rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples Rights;"

"Article 7

(2) The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."

"Article 8

(1) The Partner States shall:

(a). . .

(b). . .

(c) Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of the Treaty."

(68). With that brief recall of the respective party's cases and the conclusions of the Trial Court on this aspect of the matter, and bearing in mind the above provisions of Uganda's internal law and of the Treaty, and having fully considered the rival submissions, we take the following view of the matter.

(69). We accept the Appellant's submissions that the Trial Court having found there was no written bilateral agreement or arrangement produced before it, the Court erred in law in finding that such an agreement existed on the basis of inferences drawn from other documents on record including correspondence between Uganda Government officials. The Respondent's submissions to the contrary are rejected. We do so for the following reasons. First, as contended by Counsel for the Appellant, the Respondent's case as pleaded in the Response to the Reference and as deposed in the Supporting Affidavit of Christopher Gashirabake, the Director of Legal Advisory Services in the Attorney General's Chambers, was that the Government of Uganda had executed a bilateral agreement

with the Peoples' Republic of China to, *inter alia*, secure funding through China Exim Bank for exclusive use in the construction of the Karuma Dam. Needless to state, an executed bilateral agreement had to be a written one. Secondly, the Internal Laws of Uganda all contemplated a written agreement. The heading to Article 123 of the Constitution of Uganda refers to execution of Treaties, conventions and agreements. And sub-article (2) thereof enjoins Parliament to make laws to govern ratification of such treaties, conventions, or arrangements. Again it is plainly obvious to us that one cannot execute or ratify an oral instrument. Only an instrument in written form is capable of execution or ratification. The PPDA Act in Section 4 bespeaks of an international agreement embodying an obligation on the part of the Government of Uganda conflicting with the Act. We agree with Counsel for the Appellant that this Section contemplates a written instrument whose terms could be compared by any concerned person with the provisions of the PPDA Act. The *coup de grace* is delivered by Regulation 5 of the PPDA Regulations. It requires a copy of the international agreement to be furnished to the Public Procurement Authority. Obviously, there cannot be a copy of an oral agreement.

(70). Why then, it may be asked, all this analysis of Uganda's Internal law when the Court's jurisdiction is limited to the interpretation and application of the Treaty? To answer that question, we would adopt the exposition of the law and the reasoning of the Trial Court in Paragraphs 45 and 46 of its Judgment. The Trial Court delivered itself as follows:

> *"45. It cannot be gainsaid that this Court's jurisdiction is limited to the interpretation and application of the Treaty. In doing so, there may be instances where the Court may have to look to Municipal Law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty. That is why for example, in Rugumba V Attorney General of*

> *Rwanda, EACJ Ref. No. 8 of 2010, this Court had to invoke the Penal Laws of the Republic of Rwanda to find that where a Partner State does not abide by its own Penal Laws and Procedures, then its conduct amounts to a violation of the rule of law and hence the Treaty.*
>
> *46. Similarly, in Muhochi Vs The Attorney General of the Republic of Uganda, EACJ Ref No. 5 of 2011, the Court found that where a Partner State had declined to follow its immigration laws in declaring the Applicant a prohibited immigrant, then it was in breach of the Treaty and the Protocol on the Common Market which included the right of free movement of persons with EAC…"*

We entirely agree. In short, in adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with Internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the Principle of the rule of law, it is this Court's inescapable duty to consider the Internal Law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.

Be that as it may, we hasten to nonetheless sound a caution that it should constantly be borne in mind that the characterization of an act of the State as internationally wrongful- which is what a breach of a treaty is- is governed by international Law, and is not always necessarily coincident with the characterization of the same act as lawful by Internal Law. That principle was well stated in **Elettronica Sicula S.P.A. [Elsi] Judgment, [ICJ REPORTS], 1989,** p.15 at paragraph 73, as follows:

> "*Compliance with Municipal Law and compliance with the provisions of the Treaty are different questions. What is a breach of Treaty may be lawful in the Municipal Law and what is unlawful in the Municipal law may be wholly innocent of violation of a Treaty provision*."

With that understanding of the law, we now proceed to determine whether the challenged procurement was in violation of the Treaty.

(71). It is a cardinal principle of procedure in International Courts that he who asserts must prove. In **Shabtai Rosenne: The Law and Practice of The International Court,1920-2005,Volume III, Procedure, p.1040,** the general principles of evidence in the International Court of Justice is expressed thus:

> *"Generally, in the application of the principle* ***actori Incumbit probation*** *the court will formally require the Party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given. …As the Court has said: 'Ultimately…it is the litigant seeking to establish a fact who bears the burden of proving it.'…"*

In other words, the burden of proof is on the one who would fail if no proof was offered. In the instant matter, it was the Respondent who asserted the existence of a bilateral agreement between the GoU and the Peoples' Republic of China which ousted the application of the PPDA Act in the Procurement of Sinohydro. It was the Respondent who was bound to fail in the absence of proof of such an agreement. The burden of proof was thus squarely on the Respondent. The Respondent could only discharge such a burden by producing the agreement relied upon either as an annexture to an affidavit or through a competent witness. In the event, the Respondent did not do so, and thus miserably failed to discharge its burden of proof. The proposition by the Trial Court that the obligation to produce the evidence of the existence of such an agreement

was on Sinohydro is patently wrong. Sinohydro was not a party to the Reference and was not obligated to prove anything. Even the sentence in the MoU referred to by the Trial Court to support its conclusion in this respect does not, on a plain reading thereof, obligate Sinohydro to produce the bilateral agreement in any proceedings. Indeed, we wonder how an entity which was not a party to the agreement could have been expected to have had custody of that agreement in order to have been in a position to produce the same in Court. The Respondent having failed to discharge its burden to produce the written bilateral agreement or arrangement, the legal conclusion that the selection and subsequent signing of the MoU between the GoU and Sinohydro was arbitrary, illegal and unlawful under Ugandan law, for being outside the provisions of the PPDA Act, was inescapable, for it was only its production which would have revealed the provision thereof that required the use of and choice of the procurement method that was used by the Respondent to select Sinohydro outside the PPDA Act and the Regulations. The Trial Court's finding that a bilateral agreement existed on the basis of inferences drawn from other documents including intra-governmental correspondence, though attractive at face value on the basis of the doctrine of good faith on the part of public officials, was misconceived in law and cannot be supported by this Court. We are fortified in that view of the matter by a journal article by Anthony D'Amato entitled "**Good Faith"** in **Encyclopedia of Public International law,** 599-601, and (1992). The author after considering the evolution and application of the principle of good faith in international law concludes:

> *"In general, the uses to which the Principle of good faith now seem to be applied include statements made publicly, or in negotiations,* ***or in the course of judicial proceedings.*** *Nations must be more careful of what they say, because they may be held to it. This expanded role for the concept of good faith indeed appears to be consistent with its roots in a natural law conception of international law."*
>
> [Emphasis added*].*

Taking inspiration from the above, we take the view that the Respondent having stated in its Response to the Reference and deponed in the supporting affidavit thereto that there existed an executed bilateral agreement between the Peoples' Republic of China and the Republic of Uganda on the financing of the Karuma Dam, the principles of good faith and of transparency required nothing less than production in Court of the said executed bilateral agreement by the GOU which placed reliance thereon to legitimize its departure from the provisions of the PPDA Act.

(72). The upshot of our consideration of this aspect of the issue is that the procurement of Sinohydro to construct the Karuma Dam was in contravention of the Internal Laws of Uganda. We find in this case that such conduct by the Respondent offended the principles of the rule of law, transparency and accountability encapsulated in Articles 6(d) and 7(2) of the Treaty. We note in passing that the Appellant did not make out a case for the said conduct to be considered a violation of Article 6(c) of the Treaty which deals with peaceful settlement of disputes. However a case exists for holding that any conduct in breach of the rule of law is conduct which is likely to jeopardize the achievement of the objectives of the Treaty and, accordingly, offends Article 8(1) (c) thereof.

(73). With respect to the complaint about the procurement having been done in contempt of Court or in disobedience or disregard of Court orders, the Trial Court dealt with the matter at Paragraphs 51,58,59 and 60 of its Judgment as follows:

> *"51……The Respondent submitted that this Court cannot find contempt when the affected Courts have not done so. We have no choice but to agree with the Respondent in that regard.*
>
> *58 We say so because; the contempt of Court has been defined to mean "conduct that defies the authority or dignity of a Court. . ." – **Blacks Law***

Dictionary, Ninth Edition. *If that be so, the law and practice as we know it, is that contempt proceedings are in the nature of criminal proceedings and ordinarily an enquiry ought to be made as to the circumstances in which the alleged contempt was committed. Issues of service of the Court Orders, its contents and manner in which it was allegedly contravened are then addressed by the court that issued the said Orders. In the instant reference, we have seen no evidence that either the High Court or the Constitutional Court of Uganda were ever addressed on alleged disobedience of their orders. How then can this Court purport to take their place and determine that those orders were disobeyed or not; when the said Courts have not received any complaints in that regard?*

59 Whatever our view on the orders issued by the said Courts, and whether or not they were disobeyed, is a matter that we deem unfit to delve into lest we fall foul of our jurisdiction. Had those Courts found the Respondent to have acted in contempt of their orders, then this Court could properly take that decision and apply it in determining whether the Respondent by that fact had also acted in contravention of the principle of the Rule of Law under the Treaty.

60 Having declined the invitation to address the issue of contempt of a court other than contempt committed in this Court, it follows that we have nothing more to say on the subject."

(74). We have carefully considered the rival submissions on the aspect of contempt or disobedience of Court Orders. Having done so, we accept the Appellant's submissions that the Trial Court erred in law in finding that since the National Courts in Uganda had not been called to find, and had not found, that the Respondent in cancelling the procurement bids, selecting Sinohydro to undertake the Karuma Dam, and signing a MOU with Sinohydro to execute the project, was in contempt of Court, it lacked jurisdiction to delve into the alleged contempt and disobedience of the orders of those Courts and to determine whether such disobedience was a contravention of the principle of the rule of law under the Treaty. We also accept the submission that such a stand was an abdication of the Court's mandate to interpret Articles 6(d), 7(2) and 8 (1) (c) of the Treaty. In the same breath, we reject the submissions by the Respondent to uphold the reasoning and findings of the Trial Court in that regard. We do so for the following reasons: First, it is the duty of the East African Court of Justice to interpret the provisions of the Treaty and to determine whether there is a contravention thereof. The Court can only do so by applying the facts found by itself to the provisions of the Treaty. We have seen in Paragraph 69 above that when the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the Rule of Law under the Treaty, the Court has jurisdiction, and, indeed, a duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of the import of such internal law by the National Courts. By parity of reasoning, it should be equally obvious that when what is alleged to be a violation of the Treaty Principle of the Rule of Law is the disobedience of an order of the Court of a Partner State, the Court should not abide the determination, if any, by such National Court on whether such Court's order has been disobeyed. It is for this Court to satisfy itself, without the input of the National Court, whether there has been disobedience or disregard of a Court order and to apply that finding in the interpretation of the Treaty; Secondly, the stand taken by the Trial Court was a departure from this Court's previous decision in **James Katabazi & 21 others vs. the**

Secretary General of the East African Community and the Attorney General of the Republic of Uganda,[EACJ REFERENCE NO. 1 OF 2007]. In that case, James Katabazi and other persons were in 2004 charged with the offences of treason and misprision of treason and remanded in custody. The High Court of Uganda granted bail to fourteen of them. Immediately thereafter the High Court was surrounded by security personnel who interfered with the preparation of bail documents and they were re-arrested and taken back to jail. Subsequently, all the Claimants were taken before a Military Court Martial and charged with offences of unlawful possession of firearms and terrorism. The Uganda Law Society challenged in the Constitutional Court the aforesaid interference with the Court process by the security personnel. The Constitutional Court ruled that the interference was unconstitutional. Despite that decision of the Constitutional Court, the complainants were not released from detention. They referred the matter to this Court averring that the rule of law required that public affairs be conducted within the law and decisions of the Court are respected, upheld and enforced by all agencies of the Government and citizens, and that the actions of the Government of Uganda and its agencies were in blatant violation of the Rule of Law and an infringement of the provisions of Articles 6(d), 7(2) and 8(1) (c) of the Treaty on grounds of contempt of Court and interference with the independence of the Judiciary. After hearing arguments, the Court (which then, unlike today, did not have an Appellate Division) proceeded to propound on the meaning of the rule of law, and delivered itself as follows:

> *"We hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court Order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the Court decision is the cornerstone of the independence of the Judiciary which is one of the principles of the observation of the rule of law."*

What is important for the purpose of this Appeal - and we would emphasize it- is that the Court did not fold its arms and await the filing and determination of any contempt proceedings in the Ugandan Courts before considering and determining that the conduct complained of was a violation of the rule of law and, as such, a contravention of the Treaty .If we may say so, the approach taken by the Bench that presided in the **Katabazi case** was manifestly correct. Contempt of Court is defined in **Black's law Dictionary, 7th edition** as:

> ***"****A disregard of or disobedience to, the...orders of...a judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair respect due to such a body."*

If pertinent facts about the existence of National Court orders and a State's subsequent contrarian conduct are brought to the attention of this Court, the Court does not need, let alone require, the assistance of the National Court, in any form or shape, to determine whether the Treaty has been breached in those circumstances. Thirdly, it is offensive to principle and logic that in a Court whose jurisprudence is clear that a party does not have to exhaust domestic remedies before approaching it, the exercise of the Court's jurisdiction to interpret the Treaty should be tied to a determination of the import of the internal law or an adjudication of contempt of court by that State's National Courts. To support the position taken by the Trial Court would be perilously close to making this Court subservient to, and subject to, the vagaries of judicial interpretation by National Courts. It would be tantamount to surrendering to National Courts our jurisdiction to interpret the Treaty. We refuse to countenance such a spectacle. In short, we are of the firm view that the Trial Court was entitled to find whether there had been contempt of or violation of Court orders by the Respondent even without their having been such a

finding by the National Courts of Uganda and to apply such a finding(s) to its interpretation of Articles 6, 7 and 8 of the Treaty.

(75). Having found that the Trial Court abdicated its jurisdiction to interpret the Treaty in the context of alleged disobedience or contempt of Court orders by the Respondent, and the facts of the existence of the Court Orders and the Respondent's subsequent conduct being undisputed, we must now exercise that jurisdiction.

(76). From the record, it is not evident what date Sinohydro was selected to undertake the construction of the Karuma Dam. However, it is crystal clear that it was sometime between 24th April, 2013, when all bidders in the initial procurement process were notified of the cancellation of their bids, and 20th June, 2013, when the MoU between GoU and Sinohydro was executed.

(77). It is not in dispute that at all material times, the following Orders were in place:-

(a). In **Judicial Review Miscellaneous Application No. 11 of 2013,** the Uganda High Court at Nakawa had issued:

(i). An *ex parte* interlocutory order for the preservation of the *status quo* restraining/prohibiting the implementation of the IGG Report pending the final disposal of the Judicial Review Application on 18th April 2013, and the same was extended, by consent, on 22nd April,2013.

(ii). Final orders restraining the Respondent from implementing or taking into account the recommendations in the IGG Report and directing the Respondent through the Permanent Secretary ME & MD to declare the best evaluated bidder for EPC Contract for the Karuma Dam on 20th May,2013.

(b). In **Constitutional Application No. 13 of 2013: Andrew Baryayanga AJa vs. the Attorney General of Uganda**, the Constitutional Court on 24th April 2013 issued an Interim Injunctive order restraining the GoU/ Cabinet, or the ME & MD from implementing the recommendations of the IGG report dated 22nd March, 2013, or in any other manner from interfering with the final process of the procurement of a Contractor for the Karuma Dam, including awarding a contract to the best evaluated bidder, or in any other manner implementing the said recommendations until the determination of the main application or such further or other Order of the Court. This Order was served on the Respondent on 25th May, 2013.

(78). Despite those orders, the original procurement bids were cancelled on 23th April,2013 and Sinohydro was selected as the Contractor of the Karuma Dam outside the framework of the original procurement process subject matter of the IGG Report and the MoU between the Company and the Government of Uganda was signed on 20th June, 2013.

(79). The Appellant's case, it may be recalled, was that those actions were in contempt of or in breach of the Court Orders and, as such, a contravention of the principle of the rule of law encapsulated in Articles 6(c) and 7(2) of the Treaty. The Respondent's case was that those Orders did not suspend the application of Section 75 of the PPDA Act, under which the cancellation of the initial procurement process was effected, and that such cancellation rendered the Court orders futile, spent and lifeless.

(80). Upon full consideration of the rival arguments, we have come to the following findings and holding. Had the initial procurement process subject matter of the IGG Report not been cancelled on 23rd April, 2013, the selection of Sinohydro as the Contractor for the Karuma Dam and the subsequent signing of the MoU on 20th June, 2013 would not have

happened. From the Statement of Response and the Affidavit of the Director of Legal Advisory Services in the Attorney General's Chambers, the sequence of events is crystal clear: the IGG issued its report recommending cancellation of the procurement on 22nd March 2013; the Cabinet of Uganda debated the Report on 12th April, 2013 and directed the ME & MD to cancel the procurement process; and on 23rd April, 2013 the Contracts Committee of the ME & MD pursuant to Section 75 of the PPDA Act obliged. As of the date of the cancellation, there was in existence the Consent Order of 22nd April, 2013 given by the Ugandan High Court. The subsequent selection of Sinohydro was, therefore, *ex facie,* in disobedience or defiance of the said Court Order. And the signing of the impugned MoU on 20th June, 2013 was also, *ex facie,* in disobedience or defiance of the same order as well as the order of the Constitutional Court issued on 24th April, 2013. We find the argument by Counsel for the Respondent to the effect that since the cancellation was grounded on Section 75 of the PPDA Act it did not offend the Court Orders to be disingenuous. True, the said provision of law was not suspended or placed in abeyance by the said Court orders, nor was it in anywise mentioned in the said orders. However, the cancellation of the Procurement was clearly prohibited by the terms of the Order of 22nd April, 2013, preserving the *status quo*. Section 75 was merely the technical legal ground on which the cancellation- which was an obvious alteration of the *status quo*- was pegged. The Cabinet having directed the cancellation, it was not expected that the Procuring entity would implement the decision on the mere authority of the Cabinet Decision. Some legal basis had to be given. The invocation of Section 75 could not, and did not, however, remove the stigma of contempt of or disobedience of Court orders from the decision. Observance of the rule of law dictates that when an act has been prohibited by a court order, unless and until such an order has been set aside or vacated by the same Court or another court of competent jurisdiction, such act is prohibited, and no reason or ground advanced for doing it can suffice to legitimize such action. Lawful justification for disobedience of Court orders, we say loudly, is not a creature known to the law. It is a pure and

simple contradiction in terms. In the result, we find and hold that the selection and subsequent signing of the MoU between the GoU and Sinohydro was in disobedience or disregard of pertinent Court orders and, as such, a violation of the Treaty Principle of the Rule of Law.

(81). In Paragraph 72, we found and held that the selection and subsequent signing of the MoU between GoU and Sinohydro was in violation of the Law of Uganda and a contravention of the Treaty Principle of the Rule of Law. In Paragraph 80 above, we have found and held that the actions were also in disobedience or disregard of pertinent Court orders and, for that reason also, a contravention of the Treaty Principle of the Rule of Law. We have further found that any action which offends the Principle of the Rule of Law has the effect of jeopardizing the achievement of the objectives of the Treaty.

(82). Before concluding our consideration of the Principle of the Rule of Law in the Treaty, we must say this: Observance of the Rule of law restrains the arbitrary will of the strong, it is the sure protection of all, it equalizes the unequal, it is the antithesis of arbitrariness, and it is the nemesis of anarchy. Without the Rule of Law, justice, peace and security would be mere chimeras. In light of that, it is clear that observance of the Rule of Law is the premier value of the East African Community. Disregard of it will torpedo the ship of regional integration. If laws are disregarded and court orders treated with contempt, we will march back to the dark cold days of Thomas Hobbes' state of nature when life was solitary, poor, nasty, brutish and short. We believe it was in recognition of the above self-evident truths that the framers of the Treaty created this Court and placed it at the centre of its scheme of regional integration by vesting it with the authority to ensure adherence to law in the interpretation and application of, and compliance with the Treaty (Article 23).

(83). With respect to any Government's adherence to the rule of law, we think that the cardinal importance thereof was best expressed by Justice Louis Brandeis of the United States Supreme Court in the following eternal words in **Olmstead V United States,[**1928],277 U.S.438 :

> *"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example…. If the Government becomes a law breaker, it breeds contempt for the law."*

We cannot agree more. It behoves all Government functionaries, and especially those in the service of the law, to constantly keep their eyes fixed on that truth.

(84). In the result, whichever way we look at this matter, we are impelled to conclude that the conduct of the Respondent complained of was inconsistent with and an infringement of the Treaty. And the further inexorable conclusion is that the Trial Court erred in law in finding that the selection and subsequent signing of the MoU between the GoU and Sinohydro was not inconsistent with and was not an infringement of Articles 6(d), 7(2) and 8 (1) (c) of the Treaty.

(85). We accordingly answer Issue No. 1 in the affirmative.

Issue No. 2: Whether the Trial Court erred in law in finding that the act of the Government of Uganda in implementing the MoU between itself and Sinohydro after the filing of the Reference was not inconsistent with and was not an infringement of Article 38(2) of the Treaty.

(86). We think it is necessary for the determination of this issue to read the pertinent Treaty provision. It reads:

> "*38 (2). Where a dispute has been referred to the Council or the Court, the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute:"*

(87). We observe at once that this provision of the Treaty is incongruous. The heading to Article 38 is "Acceptance of Judgments of the Court". The provision clearly has nothing to do with acceptance of the Court's Judgments and is, thus, misallocated. Perhaps at an appropriate time, the Competent Authority to revise or amend the Treaty will find a more appropriate location for it.

(88). We now return to the consideration of the issue. We have seen in Paragraph 34 (b) above that the Trial Court found and held that Article 38(2) of the Treaty did not expressly or impliedly provide for an automatic injunction or stay of the process or action complained of without the adverse party being heard, for to hold otherwise would render the Rule of Law meaningless.

(89). The substance of the Appellant's submissions on this aspect of the matter was that the Trial Court erred in its interpretation of Article 38(2). In his view, a proper interpretation would have led to the conclusion that the Article was an automatic injunction on a Partner State to refrain from

doing acts that were detrimental to the resolution of the dispute or which would aggravate it. Counsel for the Respondent, on his part, took the view that the provision called for self-censorship by the Partner State in a dispute before either the Council or the Court, but that it did not bar or stop a Partner State from doing acts which it conceived as not being detrimental to the resolution of the dispute or not aggravating the same.

(90). We have considered the rival submissions. Having done so, we think our entry point into the issue should be a consideration of the proper approach to Treaty interpretation. We dealt with the matter extensively in the case of **A Request by the Council of Ministers for an Advisory Opinion,** [EACJ ADVISORY OPINION NO. 1 OF 2015]. In that case, we invoked the general rules of interpretation of treaties codified in Article 31 of the Vienna Convention on the Law of Treaties, 1969. That Article stipulates that:

> *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.*
>
> *2. The context for the purpose of the interpretation of a Treaty shall comprise, in addition to the text, including its preamble and annexes;*
>
> *(a) An agreement relating to the Treaty which was made between all the parties in connection with the conclusion of the Treaty;*
>
> *(b) An instrument which was made by one or more parties in connection with the conclusion of the Treaty.*
>
> *3. There shall be taken into account, together with the context:*

(a) Any subsequent agreement between the parties regarding the interpretation of the Treaty or application of its provisions;

(b) Any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rule of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

(91). Pursuant to the above guidance of Article 31 of the Vienna Convention of 1969, we take it that the golden rule of treaty interpretation is that the words of a treaty must, in the absence of ambiguity, be interpreted in good faith and in accordance with their ordinary and natural meaning. Adopting that approach, we think the issue here is what the good faith ordinary meaning of the phrase "*the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute."* According to **Collins English Dictionary &Thesaurus**, the word "refrain" means "to abstain (from action); to forbear." In the Thesaurus, the alternative meaning is given as "stop, avoid, give up, cease, eschew, and leave off." To our mind, there is no difficulty in comprehending the meaning of the words *"refrain from any action".* It simply means to apply a break to an intended action. The real difficulty lies in the interpretation of the phrase *"which might be detrimental to . . . or might aggravate*". We think the word "*might"* in the clause imports an element of opinion or judgement. The answer to the question of whose opinion or judgement is the material one is crucial to the determination of the issue before us. We are of the persuasion that the relevant opinion or judgement is that of the Partner State involved in a dispute which has been referred to either the Council or the Court. Being of that mind, we agree with the submission of the Respondent's Counsel

that the sub article is really a call by the Treaty to self-censorship by the Partner State concerned and does not amount to an automatic injunction by the Treaty against the Partner State concerned as contended by Counsel for the Appellant.

(92). The Government of Uganda having been thus entitled to exercise a judgement on whether or not the implementation of the MoU could have aggravated the dispute or been detrimental to its resolution, and having exercised such judgement in favour of the implementation of the MoU, could its conduct be censored and sanctioned by this Court as a contravention of the Treaty? No matter what our own views may be of its conduct in the circumstances obtaining at the time, our answer must be "No!"

(93). The above conclusion is sufficient to dispose of this issue. However, as the Trial Court reached the same conclusion on different reasoning, we are impelled to delve further into the the matter.

(94). As seen in Paragraph (34) (b) and (53) above, the Trial Court arrived at its decision by relying on the authority of its own decision in **Timothy Alvin Kahoho vs. The Secretary of the East African Community** [EACJ APPLICATION NO OF 2012] where it opined that Article 38 (2) did not act as an automatic injunction once a dispute had been referred to the Court or to the Council. The Court put the matter this way:

> *"As for the provisions of Section 38(2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of Injunctive relief is made by the Court in exercise of its discretionary power. Therefore Article 38(2) cannot be seen as removing that long held position without expressly saying so."*

Counsel for the Respondent supported that reasoning and submitted that to hold otherwise would in effect render Article 39 of the Treaty

redundant, and would be contrary to the intention and spirit of Article 38(2), as a window for abuse would be opened because parties would be encouraged to file frivolous and vexatious applications in Court with the sole intent of paralyzing a Partner State's operations.

(95). We wish to state that, in our opinion, Articles 38(2) and 39 are not related, and they address different concerns and situations. Article 38(2) concerns the conduct of a Partner State in a situation where a dispute in which it is a party has been referred to either the Council or the Court. It enjoins such Partner to exercise self-restraint in respect of conduct or actions with a possibility of aggravating the dispute or which would be detrimental to its resolution. The provision has nothing to do with the grant of coercive judicial injunctive relief. The latter is the province of Article 39. In the circumstances, the appreciation that Article 38(2) does not amount to an automatic Treaty (as opposed to a Judicial) injunction does not require to be supported by any references to the principles germane to the grant of judicial injunctive relief. In that regard, we think that the Appellant's Counsel's criticism of the Trial Court's reasoning is well merited, as the Court's reasoning suggested that the provisions of Article 38(2) were to be read subject to and with a view to harmonizing them with the Partner States' Internal law jurisprudence on interlocutory injunctions. That view was manifestly wrong as it offends the principle of customary international law now codified in Article 27 of the **Vienna Convention on the Law of Treaties of 1969** which provides that:

> *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*"

We need not say that National court decisions and their long held jurisprudence are internal laws and, as such, cannot be invoked to circumvent treaty obligations.

(96). In short, our opinion is that the Trial Court, albeit on flawed reasoning, arrived at the right conclusion in law on the import of Article 38(2) of the Treaty.

(97). The upshot of our consideration of this issue is that the Trial Court did not err in law in finding that the acts of the Government of Uganda complained of were not inconsistent with or an infringement of Article 38(2) of the Treaty.

(98). Issue No. 2 is, accordingly, answered in the negative.

Issue No 3: Whether the Trial Court erred in law in declining to award costs to the Respondent?

(99). We think that this issue is inextricably tied to the respective parties entitlement to the remedies prayed for. Indeed the award of costs was only one of the remedies sought. We will accordingly determine it under the broad rubric of remedies.

THE REMEDIES.

(100). The Appellant prayed that the Judgment and Order of the Trial Court dated the 28th day of November, 2014 in Reference No. 4 of 2013 be set aside and the Appeal be allowed with costs to the Appellant here and in the Trial Court. He further prayed that judgment be entered for the Appellant as prayed in the Statement of Reference.

(101). The Respondent naturally prayed for the Appeal to be dismissed with costs both in the Trial Court and in this Court.

(102). In Paragraph 19 above, we set out the remedies sought by the Appellant. We shall consider them one by one. Before we do so, we are constrained to observe that in this Appeal we did not have the benefit of the arguments of Counsel on the remedies. Perhaps that was as a result of how the issues in the Appeal were framed by the Parties with the guidance of the Court. No specific issue was framed with respect to remedies, and so it came to pass that no arguments thereon were made. We are in the circumstances impelled to proceed on the basis that the

submissions made thereon in the Trial Court and that Court's determination thereof, were taken by the Parties as adequate for the disposal of the Appeal.

(103). Our entry point into the issue of remedies is that in international law, a breach of a treaty obligation by a contracting State is an internationally wrongful act of that State and it entails its international responsibility. Treaties usually do not prescribe the remedies available. The remedies for a treaty violation are found in the body of law known as state responsibility. In 2001, the International Law Commission (ILC) produced a final set of draft articles (ILC draft articles) to codify the law on state responsibility [For a complete text of the draft articles and the official commentary thereon see **Year Book of the International law Commission,2001,volume II**]. Part II of the ILC codification details those remedies .They are cessation of the wrongful conduct and assurances of non repetition (article30) and reparation (article31). Reparation encompasses restitution in kind, compensation, and satisfaction. It is important to note that it is not disputable that the ILC Draft Articles are a codification of customary international law on State Responsibility.

(104). The Reference subject matter of this Appeal was however not made by an aggrieved Partner State but by an individual under Article 30 of the Treaty which creates a procedure whereby a non state entity can invoke the state responsibility of a Partner state on its own account without the intermediation of any other state as would have been the norm in customary international law, where individuals were not subjects of international law. The crucial question therefore is whether the above remedies which are available to other Contracting States are also available to non state subjects of international law, such as the Appellant. In that regard ILC draft article 33 is salutary. It reads as follows;

> *"33 (1). The obligations of the responsible state set out in this part may be owed to another state, to several states, or to the international community as*

a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

(2).This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."

The ILC official commentary on this Draft Article states that:

"The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than states, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke the responsibility on their own account. Paragraph 2 merely recognizes the possibility; hence the phrase "which may accrue directly to any person or entity other than a state."…" [See ***Year Book of ILC, 2001, vol.II, p.95]***

Now, we apprehend the provisions of Draft Article 33 and the commentary thereon to be comprehended in this: where a primary rule of international law (such as the Treaty) entitles a non State actor to invoke the international responsibility of a State, the legal consequences are not to be sought in the ILC Draft Articles 30 or 31 but are left to be determined by the Tribunal before which such responsibility is invoked in accordance with the primary rule.

(105). Article 23 of the Treaty has conferred on this Court the duty to ensure adherence to the law in the interpretation, application and compliance with the Treaty. And Article 30 has given any person who is resident in a Partner State the right to directly invoke State responsibility on his own account without the intermediation of the State to which he is a national. The Treaty itself (not unusually) has not prescribed the nature and form of the international responsibility entailed by a breach thereof. In those circumstances, we are of the considered opinion that the Treaty having provided a right, it is for the Court to provide such remedy or remedies as may be appropriate in each individual case. And it may be said that in providing a remedy, the Court does no more than implement the obligation that was not respected. In our view, the legal consequences to be visited upon the State in breach of its international obligation to a resident of a Partner State may, in appropriate cases, include cessation (usually known as Injunction in Internal law), or reparation (which usually takes the form of Damages), or similar, or other remedies. The jurisprudence of this Court indeed discloses that the remedies of Declaration and Injunction have been granted in appropriate cases. On that footing, we now proceed to consider the remedies sought by the Appellant *seriatim*

(a) **Declaration that the selection and subsequent signing of the MOU between GOU and Sinohydro was inconsistent with and an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.**

(106). In the Trial Court, the Appellant contended that a finding in the affirmative on Issue No. 1 in that Court (it was in substance Issue No. 1 in the Appeal) – should entitle him to the above order.

(107). The Respondent's submission was twofold: First, that issue number 1 was to be answered in the negative; and secondly, that Courts should not grant a declaration unless the remedy would be of real practical value to the Claimant. Reliance was placed on the English cases of ***Bennet V***

Chappell [1960] CH. 391, (C.A), where the Court held that "the Court in its discretion will not grant a declaration unless the remedy would be of real value to the Plaintiff", and **Williams V. Home Office** (No. 2) [1981] ALL ER 1211, where it was held that "the Court will not grant declarations which are academic and of no practical value." It was the Respondent's argument that the declaration sought is of no real value as the impugned MOU had already been fully implemented and replaced with a Commercial Contract for Engineering Procurement and Construction of the Karuma Dam signed on 16th August, 2013 between the GOU and Sinohydro.

(108). The Appellant's rejoinder was that this Court gives interpretative decisions declaring whether acts of Partner States are infringing or have infringed Treaty Provisions; and that a declaration to that effect was a sufficient driver for a Partner State respecting the principle of adherence to the rule of law to reverse all acts done pursuant to the impugned actions.

(109). The Trial Court answered Issue No. 1 in the negative and, accordingly, it did not deal with the Issue of the practical value of the declaration sought.

(110). On our part, we have answered the issue in the affirmative. The Appellant should, therefore, be entitled to the declaration sought unless we have been persuaded by the English authorities cited by the Respondent that the declaration sought ought to be declined on the grounds that it is of no real value to the Appellant.

(111). We say straight away that the English cases cited are of no persuasive value to this Court. They propound the law in a jurisdiction where the grant of the remedy of Declaration is discretionary [see **Halsbury's Laws of England, 4th Edition (Reissue), paragraph 108**]. In our Court, the interpretation and application of the Treaty is our core mandate. A declaration of violation, or infringement of, or inconsistency of any action of a Member State with a Treaty violation is not a discretionary remedy. It

is a command of the Treaty. The submission of the Respondent to the contrary is rejected as being ill founded. In the result, we find that the answer to Issue No. 1 being in the affirmative, the Appellant is entitled to the Order of Declaration sought subject to slight amendments thereof to align the facts with pertinent Treaty Provisions. We saw in Paragraph 83 that the Treaty Provisions offended by the Respondent's actions were Articles 6(d), 7(2) and 8(1) (c). An Order of Declaration will issue accordingly.

(b) **Order enforcing and directing the immediate compliance with the Treaty and/or performing of the State obligations and responsibilities of the GoU under the Treaty by:**

(i). Directing the GoU to cancel the MoU signed between it and Sinohydro on the 20th June 2013 for the construction of the Karuma dam.

(ii). Directing the GoU to comply with the Court Order in Nakawa high Court Miscellaneous Cause No. 11 of 2013 – Hon. Andrew Baryayanga Aja Vs Attorney General ordering award of the Contract to the best evaluated bidder for the Engineering Procurement and Construction Contract for the Karuma dam.

(iii). Reinstating the *status quo* before the selection of Sinohydro and subsequent signing of the contract between the GoU and Sinohydro.

(112). The Appellant submitted that under Article 23 of the Treaty, the Court has jurisdiction to ensure adherence to the law in the interpretation and application of and compliance with the Treaty against a Partner State found in breach. He further submitted that compliance meant doing what was required to be done under the Treaty and the Court was empowered to ensure such compliance by reversing acts done in breach of the

Treaty. The Appellant strongly contended that it was not enough for the Court to make and issue declarations. It had the duty to right the wrong by reversing the impugned acts by directing the cancellation of the MOU and reinstatement of the *status quo* as at the time of the Court order in Miscellaneous Cause No. 11 of 2013 ordering the Respondent to award the Contract to the best evaluated bidder.

(113). The Respondent's answer to the above submissions was this. First, with respect to the cancellation of the MoU, it was contended that the order sought was academic in nature as the MoU had been fully implemented and replaced with a Commercial EPC contract for the Karuma Dam. With respect to the direction to the GoU to comply with the Court order relied upon and a reinstatement of the *status quo* before the selection of Sinohydro, it was submitted that those orders were untenable in law and logics for the reasons that bids had been rejected and, at the time of the rejection, no award had been communicated to any of the bidders; the High Court order had been appealed against in the Court of Appeal of Uganda and the determination thereon was still pending; a Constitutional Petition on the same subject matter as the entire Reference was pending determination in the Ugandan Courts; and the Orders sought would also affect third parties, namely, the citizens of Uganda who seriously needed the important project, and Sinohydro who has been on site since 2013.

(114). The Appellant's rejoinder was this. With respect to the MoU having been displaced by the EPC Contract, the Appellant contended that the EPC Contract ought not to have been signed as by dint of Article 38(2) of the Treaty, nothing further ought to have been done after the filing of the Reference in June, 2013, and anything done thereafter was an abuse of the Court Process and the Court should not allow itself to be used to deny justice on account of abuse of its process. With respect to compliance with Court orders, the Appellant contended that once it was found that the Karuma Dam was proceeding contrary to the Rule of Law, then the Respondent had to be ordered to adhere to the Rule of Law by stopping the construction of the dam. With respect to the contention that

the orders would unfairly affect third parties, the Appellant argued that apart from the impossibility of Sinohydro being a party under Article 30 of the Treaty, the court orders relied upon were orders in *rem* and not in *personam* and, accordingly, bound all persons whether they were parties to the Reference or not. Furthermore, Counsel contended, the rule of law and good governance were so sacred that they could not be allowed to be breached to satisfy third parties.

(115). The Trial Court gave short shrift to the Appellant's submissions. With respect to the order for cancellation of the MoU, it merely found no merit in such an action. In addition, it noted that the same issue was live before the Courts in Uganda and advised the Appellant to pursue the pending matters in Uganda to their logical conclusion. With regard to the direction to comply with Court orders and the reinstatement of the *status quo* before the selection of Sino hydro, the Trial Court reiterated that it had no jurisdiction to entertain them before Courts in Uganda had made a finding of contempt of their orders.

(116). We have now reflected on the above weighty submissions and the Trial Court's determination on prayer (b). Having done so, we have come to the following conclusion.

(117). Prayer (b) is in substance seeking a Mandatory Injunction against the Government of Uganda directing it to comply with its Treaty obligations to observe the principle of the rule of law by reversing all the actions taken by its various agencies after the Court order of 22nd April, 2013 which maintained the *status quo* before the cancellation of the initial procurement process for the Karuma Dam and restrained any conduct contrary thereto.

(118). We agree with the submission of Counsel for the Appellant that the jurisdiction of this Court is not limited to the making and granting of declaratory relief only. On the authority of Article 23, this Court has the Jurisdiction and duty to make such other relief as may be congruent with

adherence to law in the interpretation and application of the Treaty. As seen in paragraph 104, such relief may in appropriate cases, include cessation (usually known as Injunction in Internal law), or reparation (which usually takes the form of Damages), or similar, or other relief. And, of course, Injunctions may be mandatory or prohibitory. Thus the only real issue is whether the relief sought by the Appellant was for granting in the circumstances of the matter before us.

(119). With respect to the order to cancel the MoU between the GoU and Sinohydro, we are persuaded that such an order would be academic and futile. There is no dispute that as at the time of the Reference, the MoU had been implemented and mutated into an EPC Contract for the Karuma Dam. There was no more left of the MoU. We must say that when we don our gowns, step out of our chambers, and enter the temple of justice to do our sacred duty of dispensing justice, we never ever leave our common sense outside. As a Court of Law, we cannot act in vain and we, accordingly, decline to order the Respondent to cancel the MoU between the GoU and Sinohydro. To the Appellant's argument that the EPC Contract ought not to have been signed after the filing of the Reference by dint of Article 38(2) of the Treaty, our answer is that we have found that Article 38(2) did not constitute a statutory injunction against a Partner State whose actions were the subject of a complaint before either the Council or the Court and, accordingly, the Government of Uganda was within the law to sign the EPC Contract.

(120). With regard to the Direction to comply with the Court order and reinstate the *status quo*, we reject the Respondent's objections thereto and wholly disagree with the Trial Court's reasoning on the issue. We have elsewhere found and held that the Trial Court's conclusion that it could not make a finding on whether the actions of the Respondent were in contempt of Court and were made in disobedience or disregard or dishonor of Court Orders, without a finding to that effect by the Courts of Uganda, was an abdication of that Court's duty to interpret the Treaty. Such an abdication of duty cannot obviously be sustained as a good

ground to decline the relief sought. And the proposition by Counsel for the Respondent, and the conclusion by the Trial Court, that the orders sought could not be granted because they would unfairly affect third parties to the Reference are also flawed. Decisions of this Court under Article 30 of the Treaty are decisions *in rem* (binding as against both the parties and non parties alike) and not *in personam* (binding only on the parties before the court). The Court cannot shirk its duty to make such decisions because third parties who have not been afforded an opportunity to be heard are thereby affected. In any event, we wonder how Sinohydro which was not alleged to be either an Organ or Institution of the Community, or the Citizens of Uganda in their collective self, who cannot be enjoined as a Party, would have been enjoined in the Reference, and by whom, in order that they could be granted an opportunity to be heard. The issue of who may be an Applicant or Respondent under Article 30 of the Treaty is determined by the Treaty itself and no party could seek to add thereto, and the Court could not direct otherwise. We also do not accept that it was a good reason not to grant the relief prayed for because there were live proceedings in the form of an Appeal and a Constitutional Petition in the Courts of Uganda concerning the self-same matters in the Reference. The Trial Court having been seized with a matter over which it had jurisdiction, it was bound to dispose it without deference to the Courts of Uganda.

(121). Despite our disagreement with the Trial Court's reasoning we have, without any hesitation, come to the conclusion that this relief was not, and is now not, for granting. The reason is simple. Remedies are only to be granted to the extent possible. Here, the court is faced with the sheer impracticability of the orders sought. The record reveals that too many actions, which ought not to have been done, have been done, and it is now impractical to reverse the construction of the Karuma Dam by Sinohydro. It is, from the stand point of fidelity to the law, an unfortunate *fait accompli*. The remedy sought by the Appellant was, thus, inappropriate in the circumstances and the same was, albeit for the wrong reasons, rightfully refused.

(**c**). **Order for costs.**

(122). The Trial Court denied the successful Respondent costs on the ground that the Reference was brought for personal reasons and in the public interest.

(123). In this Court, the fortunes of the Parties are mixed. The Appellant has succeeded in Issue No. 1 but failed in Issue No. 2. The honours are thus evenly divided. For that reason, we think the just order as to costs is that each party should bear its own costs here and below.

(124). To summarize our consideration of prayer (b) in the Reference, the Appellant is entitled to an order for a Declaration of breach of the Treaty by the Respondent. He is not however entitled to the enforcement orders sought including a restoration of the *status quo*. With regard to costs, each party shall bear its own cost.

D. SUMMARY AND CONCLUSION.

(125). We have held in Paragraph 84 that the Trial Court erred in law in finding that the selection and subsequent signing of the MoU between the Government of Uganda and Sinohydro was not inconsistent with and was not an infringement of Articles 6(c), and 7(2) and 8(1) (c) of the Treaty. In Paragraph 97, we have held that the Trial Court did not err in law in finding that the acts of the Government of Uganda in implementing the MoU between itself and Sinohydro after the filing of the Reference was not inconsistent with and was not an infringement of Article 38(2) of the Treaty. And in Paragraph 124, we held that the Appellant was entitled to the Declaration sought in Prayer (a) in the Reference, that he was not entitled to the enforcement orders sought in Prayer (b), and that each party should bear their own costs of the Reference and the Appeal.

(126). In the result, the appeal is partially allowed and the Cross-Appeal is dismissed with Orders that:

(a). That part of the Judgment of the Trial Court refusing to issue a Declaration that the selection and subsequent signing of a Memorandum of Understanding between the Government of Uganda and Sinohydro was inconsistent with and an infringement of Articles 6(c), 7(2), and 8(1) be, and is hereby, set aside.

(b). A Declaration be, and is hereby, issued that the selection and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro was inconsistent with and an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

(c). That part of the Judgment of the Trial Court issuing an order of Declaration that the acts of the Government of Uganda in implementing the Memorandum of Understanding between itself and Sinohydro after the filing of the Reference was not inconsistent with or an infringement of Article 38(2) of the Treaty be, and is hereby, upheld.

(d). Each party shall bear their own costs here and below.

It is so ordered.

DATED, DELIVERED AND SIGNED AT ARUSHA THIS _____DAY OF FEBRUARY, 2016.

Emmanuel Ugirashebuja
PRESIDENT

Liboire Nkurunziza
VICE-PRESIDENT

Edward Rutakangwa
JUSTICE OF APPEAL

Aaron Ringera
JUSTICE OF APPEAl.

Geoffrey Kiryabwire
JUSTICE OF APPEAL