SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO.22/2006 OF 17TH MAY, 2006

BETWEEN

PETRONET EAST AFRICA CONSORTIUM.....APPLICANT
AND
THE JOINT CO-ORDINATING COMMISSION OF THE KENYA-UGANDA PIPELINE EXTENSION
(PROCURING ENTITY)
AND
CO-CHAIRMAN TO JOINT CO-ORDINATING COMMISSION –
(INTERESTED PARTY)

Appeal for Administrative Review against the decision of the Kenya-Uganda Pipeline Extension Joint Co-ordinating Commission (JCC) Tender (Procuring Entity) made on the 21st day of April 2006, eliminating the Applicant from the Technical Evaluation stage of the Tender

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Eng. D. W. Njora	-	Member

Mr. J. W. Wambua	-	Member
Mr. P. M. Gachoka	-	Member
Ms. Phyllis Nganga	-	Member
Mr. K. N. Mwangi	-	Secretary

IN ATTENDANCE

Mr. I. K. Kigen	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 22/2006

Applicant	-	**Petronet East Africa Consortium**
Mr. Peter Kingara	-	Advocate
Mr. Jimmy Simiyu	-	Advocate
Mr. Messu T. Mwaniki	-	Director
Mr. Kairu Patrick Nginyi	-	Co-ordinator
Procuring Entity	-	**The Joint Co-ordinating Commission of the Kenya – Uganda Pipeline Extension**
Mr. Patrick M. Nyoike	-	Permanent Secretary, Ministry of Energy
Mr. G. Okungu	-	Managing Director, Kenya Pipeline Company Limited

Mr. Ronoh Tuimising	-	State Counsel, Attorney General Chambers
Mr. J. M. Gichuhi	-	Corporate Planning Manager, Kenya Pipeline Company Limited
Eng. A. K. Kosgei	-	Chief Technical Manager, Kenya Pipeline Company Limited
Mr. T. Mailu	-	Chief Planning Officer, Kenya Pipeline Company Limited
Ms. E. Akinyi	-	Senior Planning Officer, Kenya Pipeline Company Limited
Mr. W. Deche	-	Chief Economist, Ministry of Energy
Mr. P. G. Nduru	-	Petroleum Expert, Ministry of Energy

Interested Candidates

Mr. M. Nalyanya	-	Advocate, Tamoil East Africa Limited
Mr. D Onwonga	-	Advocate, Tamoil East Africa Limited
Mr. J. Ogola	-	Lawyer, Tamoil East Africa Limited
Eng. C. Olali	-	Engineer, Tamoil East Africa Limited
Mr. J. Thongori	-	Advocate, Energem Petroleum Corporation Limited
Mr. Titus Mwirigi	-	Co-ordinator, Energem Petroleum Corporation Limited

RULING ON PRELIMINARY OBJECTION ON JURISDICTION

Background of the Procurement

The procurement in this matter commenced by way of an expression of interest advertised in the East African Standard, Daily Nation and Kenya Times on 26th May, 2004, 27th May, 2004 and 15th June, 2004, respectively. The tender was by way of Request for Proposal for the Kenya – Uganda Oil Product Pipeline Extension.

The Expression of Interest opening /closing date was 2nd July 2004. A total of twenty three (23) applications were received. Out of these, 12 firms were pre-qualified by the Joint Co-ordinating Commission (JCC) to be invited to make detailed proposals. These firms were:-

1. Energem Petroleum Corporation Limited;
2. China Petroleum Pipeline Engineering Corporation;
3. Tamoil East Africa Limited, with two others;
4. Petronet East Africa Consortium, with three others;
5. Indian Oil Corporation;
6. Zakhem Construction (K) Limited, with ARB inc. (USA);
7. Stone & Webster management Consultants inc, with three others;
8. Asia Petroleum Limited, with four others;
9. Petroleum India International;
10. Stroytransgaz;
11. MISA Inc/Shell Uganda Limited, with two others; and
12. East Africa Infrastructure Consortium, with five others.

There was a project developer's pre-bid conference held in Kampala, Uganda, between 16th and 17th August, 2005 to discuss the dynamics of the project implementation and operation. The Joint Co-ordinating Commission team had invited the above pre-qualified firms to the conference.

During bid opening for the technical proposals on 31st October, 2005, six (6) firms submitted their proposals. All of them were accepted and recommended for further examination and evaluation. These were:-

1. MISA Inc.
2. China Petroleum Pipeline Engineering Corporation
3. ARB /Zakhem
4. Petronet East Africa Consortium
5. Energem Petroleum Corporation Limited
6. Tamoil East Africa Limited.

The (6) bid documents were subjected to preliminary examination based on the following parameters:-

1. Verification
2. Eligibility
3. Bid security
4. Completeness of bid
5. Conformity to major technical parameters.

Based on the above criteria, ARB Inc/Zakhem Limited, Petronet East Africa Consortium and Energem Petroleum Corporation Limited were disqualified for failing to meet the criteria.

On the other hand, MISA Inc/Shell Uganda Limited, China Petroleum Pipeline Engineering Corporation and Tamoil East Africa Limited qualified for technical evaluation.

This appeal was lodged on 17th May, 2006 by the Applicant, Petronet East Africa Consortium against the decision of the tender committee of the Joint Co-ordinating Commission (JCC) of the Kenya – Uganda Oil Product Pipeline Extension in the matter of Tender for the Kenya – Uganda Oil Product Pipeline Extension.

The Kenya – Uganda Oil Product Pipeline Extension is a creation of the Governments of Kenya and Uganda. The Governments have decided to involve private sector in the development and ownership of the pipeline. A Private sector developer will be expected to take up fifty one percent (51%) of the equity and the two governments will take up forty nine percent (49%) in equal shares.

The concession term of the project will be for a period of 20 years of commercial operation under a Build-Own-Operate and Transfer (BOOT) arrangement. Build-Own-Operate and Transfer is a method of financing projects and developing infrastructure where the private investors construct the project, own and operate it for a period of time (earning revenues from the project in this period), at the end of which ownership is transferred back to the public sector. The government may provide some form of revenue via long term contracts.

The Appeal

In this appeal, the Procuring Entity raised a preliminary objection contending that the Board had no jurisdiction to hear the appeal.

The Procuring Entity's objection was contained in its letter dated 7th June, 2006 written by Mr. Patrick Nyoike, the Permanent Secretary Ministry of Energy Kenya, and Co-Chairman of the Joint Co-ordinating Commission, to the Board's Secretary. The objection at Page 3 of that letter was worded as follows:

> "The Government of Kenya has signed a Memorandum of Understanding with Uganda on the Kenya-Uganda Oil Pipeline Extension Project. According to the Memorandum, all decisions on this project are made jointly by the two Governments through the Joint Co-ordinating Commission. Since the Memorandum of Understanding is an international obligation, the decisions of the Joint Co-ordinating Commission are exempt from the requirements of the Exchequer and Audit (Public Procurement) Regulations 2001, as per Regulation 5."

The Applicant's Counsel pointed out at the commencement of the hearing that he had not been served with a copy of the letter containing the said objection. Accordingly, the Applicant was handed a copy, and an adjournment was granted, as sought, to facilitate the Applicant prepare its response. The Board further requested that the parties do address it on the issues that arise in respect of the nature of the procurement. The questions

raised by the Board were as follows: What law applies to the procurement? What procurement procedures apply to the procurement? What bid protest mechanism, if any, was intended to apply to the procurement? Finally, parties were requested to address the question of conflict of laws, which was not dealt with in the Memorandum of Understanding (MOU).

After reconvening the hearing, Mr. Nyoike assisted by Mr. G. Okungu, the Managing Director of the Kenya Pipeline Corporation, for the Procuring Entity, submitted as follows.

Firstly, that the MOU between the Governments of Kenya and Uganda was an agreement creating a procuring entity, and does not provide for appeals to the tender process to be resolved by either the Ugandan Public Procurement and Disposal of Public Assets Authority or the Kenyan Public Procurement Complaints Review and Appeals Board. Secondly, the laws of Uganda and the procurement regulations thereof were not applicable or binding in Kenya, and vice versa. Thirdly, that only a smaller part, 120 kilometres out of 320 kilometres, of the pipeline project to be constructed upon identification of the developers and contractors would be in Kenya, and the larger part, 200 kilometres, would be in Uganda.

In addition, the Procuring Entity argued that the Government of Kenya and Uganda in their wisdom established the Joint Co-ordinating Commission as the competent authority to undertake the procurement. The Procuring Entity doubted that a Kenyan court or tribunal had jurisdiction to adjudicate over a question which was transnational in nature. It contended that the Board,

should it proceed with the hearing, would have no mechanism for enforcing the decision arrived at.

It was also argued by the Procuring Entity that the Joint Co-ordinating Commission, being a jointly constituted body of the two governments and having a joint membership with co-chairmen from each state, was only partially represented at the hearing, as the Ugandan co-chair and delegates had not been served or invited to the hearing. Continuation of the hearing would, therefore amount, to a breach of the rules of natural justice.

Finally, the Procuring Entity submitted that the Joint Co-ordinating Commission itself was a body which could, and did in fact, accept the bid protest of the Applicant when it was first raised in Uganda. The Procuring Entity however conceded that, although the MOU did contain an express provision at Article 10 for settlement of disputes between the states, it was deficient in providing for bid protest in respect of its functions such as invitations to tender or requests for proposals. However, the Procuring Entity argued that its general mandate under the MOU was wide, having the full authority of both governments to act as their agents under Article 1 (e).

Tamoil East African Limited, an Interested Candidate, represented by Mr. Nalianya, Advocate and Mr. Ogolla, a Lawyer supported the objection of the Procuring Entity. It argued that the pipeline development was a project of two countries and could not therefore be subjected to the laws of any one country. It submitted that the law that should apply is the East African Treaty which, under Article 89 (b), provided for the partner states of East Africa to, inter alia, maintain pipelines and harbours. Under Article 100

thereof, the Treaty envisages the construction of pipelines, but does not contain a dispute resolution provision. Counsel did not, however, provide copies of the Treaty to the Board.

Further, the Interested Candidate argued that the presence of a lacuna in the law did not mean that the Board had jurisdiction, since jurisdiction could only be conferred by law. Thus, where there is no provision as to dispute resolution the option was to revert to the body that had custody of the project. In this case, the Applicant had filed a review in Uganda against the co-chair of the Joint Co-ordinating Commission, and had filed before the Board the present application against the Kenyan co-chair of the Joint Co-ordinating Commission. This conduct amounted to an abuse of process as it constituted a multiplicity of actions, and would lead to the possibility of contradictory decisions being made.

The Interested Candidate also argued that the Public Procurement Regulations of Kenya do not apply to the project since Regulation 3 provides that the Regulations apply to all public procurements by procuring entities, and Regulation 2 defines a procuring entity as a public entity undertaking procurement. Such public entity must be one within Kenya, and cannot therefore refer to a body such as the Joint Co-ordinating Commission which was an entity of two states. As such, the Joint Co-ordinating Commission was a sovereign and independent entity.

Finally, the Interested Candidate argued that the nature of the Project as a Build Own Operate and Transfer (BOOT), did not indicate that there was to be use of public funds. In particular, if the two governments did not take

shares in the project there would be no use of government funds. Even if they did take shares, it would still not be a public procurement, unless such shares amounted to 51% in the project.

In response, the Applicant argued that the Board's jurisdiction was not excluded by Regulation 5 of the Public Procurement Regulations. The Applicant pointed out that for Regulation 5 to be relied upon, the objector must demonstrate that there was a conflict between the Regulations and the provisions of the agreement in question containing the obligation of the Government. In this case, he argued, the objectors had not demonstrated any such conflict.

The Applicant also argued that where conflict with the Regulations has not been demonstrated, all that is necessary to show for the application of the Regulations generally, is whether there was a public procurement. In this case, the fact that the Government of Kenya would contribute equity of up to 24.5% indicated use of public funds. The fact that the equity level would be below 51% was irrelevant so long as public funds would be spent. Thus, Regulation 3, which applies the Regulations to public procurements, could therefore be relied upon as Kenyan funds would be involved. The only way by which the Board's jurisdiction could be ousted is by statute or, under Regulation 3(2), where the Minister for Finance in consultation with the head of the procuring entity decides to use a different method of procurement which the Minister would then define. In this case, it has not been shown that the Minister has determined another procedure.

With regard to the MOU, the Applicant pointed out that it did not provide an alternative procedure for resolving disputes arising out of the tender process, and this was an oversight. Consequently, to the extent that Kenyan public funds are to be utilized, the Regulations were applicable and the Board was obliged to protect such funds in their utilization in accordance with the Regulations.

With regard to the submissions on the East Africa Treaty, the Applicant pointed out that no foundation had been laid by the Interested Candidate indicating the circumstances under which that treaty could be made applicable to the procurement. Further, it had not been indicated whether the treaty had become operative, nor was a copy thereof supplied to the tribunal. Accordingly the treaty could not be invoked.

In response to the issue as to the law applicable to the procurement, the Applicant referred to a letter Ref: MOE Kenya – ME/CONF/3/1/1 and MOEMD Uganda PET/249/250/01 dated 31st March, 2006 and signed by the Co-chairmen of the Procuring Entity. In that letter, it is clearly indicated that:

> "the procurement process for this project is being undertaken within the laws of both Uganda and Kenya."

The letter is copied to the respective Ministers of both countries. Counsel therefore submitted that each country's laws apply equally, and bind the respective governments in respect of the procurement. He added that decisions made under the laws of Kenya would bind the Kenya government delegates at the Joint Co-ordinating Commission, and those made under Ugandan laws would bind the Ugandan delegates. In the event that there

was a conflict between the positions of each government under their respective laws, such dispute would be resolved under the dispute settlement provisions of Article 10 of the MOU, by one or more arbitrators under the Rules of Arbitration of the International Chamber of Commerce.

On the issue of multiplicity of suits, the Applicant contended that, in the absence of a dispute resolution provision in the tender process, the Applicant filed a complaint in Uganda under Ugandan law, and the present one in Kenya. These complaints were filed out of necessity, and were therefore not an abuse of process. With regard to the possibility of contradictory decisions being reached under the disparate review processes in both countries, the Applicant reverted to its earlier argument that such decisions would be deemed to be the decisions of the respective governments. If contradictory, they would constitute a dispute that would be arbitrable under the provisions of the MOU, under the rules of the International Chamber of Commerce.

Finally, the Applicant argued that the proper entity to be considered as the procuring entity in this procurement as far as Kenya was concerned, was the Ministry of Energy. Under the arrangement set out by the Procuring Entity, the Joint Co-ordinating Commission was not a legal entity but merely an inter-government task force set up to implement the decision of the Ministry of Energy. On this point, however, the Applicant conceded that it had framed its present appeal to the Board citing the Joint Co-ordinating Commission as the procuring entity.

The Procuring Entity's closing submission was made by Mr. Ronoh Tuimising, State Counsel, of the Attorney General's Chambers in Kenya. He contended that the Joint Co-ordinating Commission was a creature of two sovereign states under the MOU and this was not an ad hoc arrangement. The Joint Co-ordinating Commission was established under Article 1 of the MOU, and its functions were set out under Article 3 thereof. Further, Counsel pointed out that under Rule 7 of the Annex to the MOU, the Joint Co-ordinating Commission could, whenever applicable, establish through its secretariat rules for procurement including rules governing invitation of tenders. In line with Rule 7, the procedures contained in the Request for Proposal documents constituted rules governing that specific procurement. Accordingly, there was no gap as to the rules and procedures applicable to the procurement in issue.

In addition, Counsel, argued that the Exchequer and Audit Act (Cap 412) of the Laws of Kenya, is a national legislation, and cannot purport to legislate for or govern external governments. The Board, as a creature of a national statute, could therefore not purport to make decisions on matters not governed by its enabling statute. Although it was conceded that the procurement in issue was a public procurement, it involved procurement jointly by two states, and the MOU therefore governs the relations arising thereunder. Thus, to the extent that the Board could not make a decision that binds another sovereign entity, there would be no legal basis for postulating that the Board's decision would bind the Joint Co-ordinating Commission or only the Kenya aspect or part thereof.

With regard to the submissions on the East African Treaty, Counsel submitted that the treaty was irrelevant for purposes of the procurement process as it had not been invoked in the MOU.

Finally, Counsel submitted that Article 3 of the MOU identifies the Joint Co-ordinating Commission as the Procuring Entity for purposes of the procurement in issue. In the context of the MOU, therefore, all disputes arising thereunder should be resolved by or through the Joint Co-ordinating Commission.

Mr. Okungu, for the Procuring Entity, pointed out in conclusion, that the Kenya Pipeline Corporation was acting as the Secretariat of the Joint Co-ordinating Commission as an entity. He therefore clarified that the Ministry of Energy was not a procuring entity but was merely an agency empowered by the governments of both countries in the MOU to facilitate the pipeline extension.

The Board has carefully considered the representations of the Procuring Entity, the Applicant and the Interested Candidates and all the documents availed to it.

The Board considers that two key issues arise for determination in this preliminary objection. These are, firstly, what is the status of Joint Co-ordinating Commission in this procurement? Secondly, whether Regulation 5 of the Exchequer & Audit (Public Procurement) Regulations, 2001, applies to oust this procurement from the Board's jurisdiction. A third issue arises for observation, which is, what is the law applicable to the procurement?

The issue with regard to the status of the Joint Co-ordinating Commission includes determining the legal status of the Joint Co-ordinating Commission and identifying its legal capacity vis-à-vis the procurement in question.

From the background already indicated, the Board observes that the Request for Proposal for this procurement was advertised by way of a Letter of Invitation for the submission of Proposals for the development of the Kenya – Uganda Oil Product Pipeline Extension. Paragraph 1 of the Letter of Invitation clearly indicates that the project was being promoted jointly by the Governments of Kenya and Uganda (therein described as "the Governments"). The extension would run from Eldoret, Kenya, to Kampala, Uganda.

The Letter of Invitation, at Paragraph 2, also indicates that the Joint Co-ordinating Commission was making the invitation on behalf of both Governments in the following terms:

> " 2. The Joint Co-ordinating Commission (the "JCC") on behalf of the Governments of Kenya and Uganda hereby invite proposals to find a project developer (the "Project Developer") who will commit financial resources to develop, own, operate and later transfer back to the Governments of Kenya and Uganda, petroleum products transport facility ("BOOT" concession)."

Proposals of bidders were to be submitted by 4th November, 2005 to the Ministry of Energy and Mineral Development, Amber House, Kampala

Uganda. The Letter of Invitation was co-signed by the Permanent Secretaries in the Ministries of Energy of both countries. It was to this invitation that the Applicant and other bidders responded, and submitted bids to the Joint Co-ordinating Commission as required. They thereby submitted themselves to that organ.

It is not disputed that the Joint Co-ordinating Commission was established pursuant to the MOU between the Government of the Republic of Kenya and the Government of the Republic of Uganda, in October 2000. The MOU is signed, for and on behalf of both Governments, by the respective Permanent Secretaries of the respective Ministries of Energy. The MOU indicates that the two Governments are acting through and represented by their respective Ministries of Energy.

In Paragraph 1 of the preamble to the MOU, the two Governments set out a political statement as follows:

> "The Government of Kenya and the Government of Uganda acknowledge the importance of continued and increased regional co-operation between them and have expressed their wish to strengthen this economic co-operation."

In our view, the MOU is a *state qua state* arrangement for the accomplishment of certain ends. It signifies a political act and arrangement between two sovereign states that have voluntarily agreed to co-operate in the manner set out in the MOU. Our understanding is that agreements or arrangements of this sort generally fall within the realm of international law,

which deals with the relations of states *inter se*. We will return to this topic later.

Article 6 of the MOU provides for it to come into force on the date of signature and to terminate upon full implementation of the Project, or upon impossibility of implementation due to unforeseen intervening events beyond the control of either the Government of Kenya or Government of Uganda. There was no indication, or contention, of its having been terminated.

Disputes between the two governments are required to be resolved by arbitration under the Rules of the International Chamber of Commerce, pursuant to Article 10 of the MOU. It is to be noted that the disputes that are arbitrable are only those in relation to government *qua* government, and not those arising out of the actions of the Joint Co-ordinating Commission itself *vis-a-vis* third parties it engages with, such as bidders.

Article 1 of the MOU provides as follows:

> "(a) A joint Co-ordinating Commission (hereinafter referred to as "JCC") is hereby established to be composed of two joint Chairmen and such other representatives nominated by GOK and GOU"
>
> (b).....
>
> (c) The GOK and GOU shall appoint equal number of members to the JCC
>
> (d).....
>
> (e) The JCC shall operate strictly as an agent of both GOK and GOU and anything done or purported to have been done by JCC shall for all

purposes be deemed to have been done by both GOK and GOU" (emphasis ours).

By Article 2, the Permanent Secretaries of the Ministries of Energy of both countries are appointed Joint Chairmen of the JCC. From these provisions of the MOU, it is clear that the legal status of the JCC is as follows:

a. It is established by agreement of the governments of Kenya and Uganda
b. It is an agency of the governments of both Kenya and Uganda
c. It is a joint and inseparable entity or agency of both governments with co-equal members and Co-equal chairmen.
d. It has power to bind both governments jointly, but not severally.

Accordingly, we find that the Joint Co-ordinating Commission is a legal but unincorporated *inter-state* or *inter-governmental* entity with capacity, as agent, to legally bind both principal governments.

With regard to the status or capacity of the Joint Co-ordinating Commission vis-à-vis the procurement in question, the following provisions of the MOU are relevant:

Preamble 3 which indicates that the two states are desirous of procuring the design, engineering, construction and commissioning of the extension of the Mombasa-Eldoret Pipeline to Kampala ("the Project").

Article 3 which provides for the functions of the Joint Co-ordinating Commission in, inter alia, the following terms:-

"The JCC shall:

a) ... . .

b) Invite evaluate and appoint consultants contractors and suppliers to undertake the Project;

c) Enter into negotiations with possible investors and/or financiers with a view to obtaining financial resources necessary and appropriate for the implementation of the Project;

d) Identify and appoint an appropriate Executing Agency endowed with capacity to act as a secretariat for the meeting of the Joint Co-ordinating Commission and administer funds allocated to it by the GOK and GOU for the purposes of the Project in accordance with the Financial Rules expressed in the Annex hereto;

e) Set up such committees or other subsidiary bodies as it may deem necessary for the performance of its functions;

f) Receive, analyze and make recommendations to GOK and GOU on the implementation of the Project . . . ."

These provisions clearly and unequivocally empower the Joint Co-ordinating Commission to carry out the whole spectrum of procurement proceedings, including negotiating the financing for implementation of the Project, and setting up committees, such as evaluation committees, if deemed necessary.

Accordingly, we find on the first issue that, as far as procurement is concerned, the Joint Co-ordinating Commission was a legal inter-state or

inter-governmental procuring entity empowered to carry out procurement on behalf of the two governments, jointly.

The next issue for determination is whether Regulation 5 of the Exchequer & Audit (Public Procurement) Regulations, 2001, applies to remove the procurement in question from the Board's Jurisdiction.

In resolving the above issue, it is first necessary to consider the applicability of the parent statute, the Exchequer & Audit Act, Cap 412, of the Laws of Kenya. That Act was enacted by the Parliament of Kenya, and commenced on 1st June 1955. In the preamble to the Act, it is stated to be an Act of Parliament to, inter alia, provide for the control and management of the public finances of Kenya, and for matters connected therewith.

By an amendment to that Act under Legal Notice No. 9 of 2000, Section 5A was inserted, by which Parliament empowered the Minister for Finance to promulgate regulations relating to public procurements. Section 5 A(1) of the Act provides as follows:

> "Notwithstanding any other provision of this Act or of any other written law to the contrary, the Minister may, in regulations, prescribe the procedure to be followed by any public entity in procuring goods or services out of public moneys" (emphasis ours)

Section 5 (A)(2) of the Act defines a public entity to include several types of organs. However, the relevant definition for our purposes is that contained in sub-section 2 (a); which defines "public entity" to mean:

"the Government and any department, service or undertaking thereof" (emphasis ours)

Any undertaking or agency or arm of the government of Kenya is therefore considered to be a public entity. No exception is expressly made for inter-state organs. Accordingly, whether, as in this case, the Joint Co-ordinating Commission as an inter-governmental agency is a public entity under the Regulations is subject to further interpretation, and is dealt with later herein.

Further, "public moneys" are defined in Section 2 of the Act as follows:

"'Public moneys' includes-

(a) revenue;

(b) any trust or other moneys held, whether temporarily or otherwise, by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not;

and

"'revenue' means all tolls, taxes, imposts, rates, duties, fines, penalties, forfeitures, rents, dues and all other receipts of the Government, from whatever source arising, over which Parliament has power of appropriation."

From the above provisions, it can be seen that public moneys comprise all revenues over which the Parliament of Kenya has the power of appropriation. Appropriations are made out of the Consolidated Fund of Kenya established under Section 11 of the Act. Public moneys also includes

trust moneys and other moneys held by an officer in his official capacity. "Officer" is defined in Section 2 as any person in the employment of the Government. The holding of money in an official capacity would therefore mean the holding of money as an official act in the course of employment with the government. In Black's Law Dictionary 6th Ed. 1990, an "official act" is defined as follows:

> "official act. One done by an officer in his official capacity under colour and by virtue of his office"

and "official" is defined therein as follows:

> "official. Pertaining to an office, invested with the character of an officer."

The question that arises, then, is whether members of the Joint Co-ordinating Commission were holding, or would hold, any moneys officially in the course of their employment with their respective Governments. As earlier seen, Article 3(c) of the MOU empowered the Joint Co-ordinating Commission to enter into negotiations with possible investors and/or financiers with a view to obtaining financial resources necessary for implementation of the Project. This it would do as an agency of both governments, jointly. The Joint Co-ordinating Commission was also empowered under Article 3 (d) of the MOU to identify and appoint an appropriate Executing Agency to administer funds allocated by GOK and GOU for the Project. In the Financial Rules applicable to the Executing Agency in the Annex to the MOU, Rule 1 on funds, provides as follows:

> "It [the Executing Agency) shall receive under the instructions of the Joint Co-ordinating Commission on behalf of GOK and GOU any

such funds as may be available for the project from any sources and shall deposit such funds in an account with a reputable bank"

From the foregoing, it is evident that the funds held or to be held by the Joint Co-ordinating Commission are held or to be held in trust for the joint governments. From this perspective, the funds of the Joint Co-ordinating Commission, to the extent only that they are distinctly identifiable and apportionable to the GOK are subject to the Exchequer and Audit Act.

The next question that arises is, at what point are such Joint Co-ordinating Commission funds distinguishable and apportionable to GOK? The answer is found in Article 5 of the MOU, which provides as follows:

> "Upon the withdrawal of either GOK or GOU, or upon termination of this MOU, for whatever reason, the liabilities or assets existing prior to such withdrawal or termination in respect of the Project, with exception of liabilities or assets that are specific to GOK or GOU, shall be distributed between GOK and GOU on a pro rata basis" (emphasis ours)

Clearly, therefore, it is not until termination of the MOU or upon withdrawal of a party from the MOU, that identification and apportionment of assets and funds under control of the Joint Co-ordinating Commission would be possible. In our view, it is at that point that the Exchequer and Audit Act would come into play, and we so hold.

Even if it was held that the Exchequer and Audit Act was applicable, and that the Minister's regulations made pursuant to Section 5A were intended to apply to an entity such as the JCC, we would immediately encounter two insurmountable difficulties.

The first is a difficulty of a conceptual nature. We would have to define the Joint Co-ordinating Commission as a procuring entity under the Regulations, thus subject to the Laws of Kenya. On the contrary, the MOU clearly creates the Joint Co-ordinating Commission as an *inter-state or inter governmental agency* that is joint and inseparable, until termination of the MOU or withdrawal of a party from the arrangement. As such, unless expressly provided for, it would be impossible to impose on it the law of either country.

The second difficulty is one arising from Regulation 5. That Regulation provides as follows:

> "To the extent that these Regulations conflict with an obligation of the Government under or arising out of an agreement with one or more other States or with an international organisation, the provisions of that agreement shall prevail."

The Regulations provide at Regulation 6(3) for the mandatory establishment of tender committees. In the structure of the Regulations, the key or principal organ involved in the procurement process, and the only one entitled to adjudicate tenders, is the tender committee. Each tender committee is constituted with specified officers including a single chairman,

a deputy chairman, a secretary and other specified persons. Its functions include reviewing tender documents and requests for proposals, making awards, approving contract variations, and generally conducting the procurement function or process. Each tender committee has a fixed quorum, and makes its decisions independently. The accounting officer of each procuring entity, however, carries power to veto its decisions for the purpose of controlling the expenditure of funds. For each of the entities prescribed under Section 5A of the Exchequer and Audit Act, tender committees are established, and their composition and role is set out in the First Schedule to the Regulations.

As far as the Government and its departments, services or undertakings is concerned, its duly established tender committees are the Ministerial Tender Committees under the Regulations. However, under the MOU, the procurement function is expressly vested in the Joint Co-ordinating Commission by the sovereign act of both governments. This is a key and critical conflict between the MOU and Regulation 5 of the Regulations. For, if the tender committee legally established under the MOU is the Joint Co-ordinating Commission, and, on account of the inter-governmental joint nature of its composition, it is incapable of conforming to the requirements of the Regulations, then its procurement functions cannot arise under the Regulations, and cannot be performed thereunder. This is a fatal conflict with the Regulations pursuant to which conflict the MOU must prevail over the Regulations, as provided in Regulation 5.

Accordingly, the question earlier raised as to whether the Joint Co-ordinating Commission as an inter-governmental agency is a public

procuring entity under the Regulations, can only be answered in the negative. Accordingly, we hold that the Exchequer and Audit (Public Procurement) Regulations, 2001, of Kenya do not apply to the Joint Co-ordinating Commission. The Board therefore has no jurisdiction to hear this matter.

The third issue in this matter was what law applies to the procurement by the Joint Co-ordinating Commission. This is not an issue which, having found that the Board has no jurisdiction, must be answered for the determination of the objection. However, the Board as a creature of the Government under the Exchequer and Audit Act, finds it necessary to make some advisory observations.

Firstly, the MOU is silent on the law applicable to the Joint Co-ordinating Commission, and this was conceded by the Procuring Entity's representatives. Although such lacuna does not automatically invite the application of the law of either country, the Co-chairmen to the Joint Co-ordinating Commission in their letter of 31st March 2001, earlier cited, indicated that the procurement would be conducted "in accordance with the laws of Kenya and Uganda". Unless the MOU is re-worded and the Project is segregated so as to be implemented by each state solely within its territory, using distinct funds, and under the auspices of a procurement entity which is not inter-governmental, the application of the laws of both countries is impossible. This raises a conflict of laws scenario, presumably for resolution by the arbitral tribunal pursuant to Article 10 under the International Chamber of Commerce Rules.

Secondly, from a jurisprudential point of view, it is trite law that municipal law applies within a state and regulates the relations of citizens with each other and with the executive, whilst the relations of states *inter se* are governed by international law. Accordingly, to avoid the vexatious complications of identification and interpretation of the applicable law, it is appropriate that the MOU should provide for not only the applicable law as between the states, but also the provisions that would be applicable for dealing with interactions by the Joint Co-ordinating Commission with third parties such as bidders.

Thirdly, as a matter of good governance, transparency and accountability generally, but especially in procurement matters, third parties dealing with the Joint Co-ordinating Commission are entitled to a mechanism for raising complaints and for such complaints to be addressed. With particular reference to procurements carried on by the Joint Co-ordinating Commission, Rule 7 of the Annex to the MOU provides for the Executing Agency to establish rules acceptable to the Joint Co-ordinating Commission for procurement, including rules governing the invitation of tenders in line with international standards.

Since both states have procurement legislations which respectively incorporate bid protest mechanisms, it is recommended that such a mechanism as appropriate to the situation, should be established by the Executing Agency under rules agreeable to the Joint Co-ordinating Commission. This would pre-empt confusion in the procurement process, and the costs and loss of time associated with filing complaints in both countries, as in this case. Ultimately, such rules would result in the

promotion of economy and efficiency in the public procurements conducted by the Joint Co-ordinating Commission, and consequently, contribute towards creation of a sound business climate for both states. This is also the object of the procurement legislations of both states.

Taking into account all the foregoing matters and the findings herein, we hereby dismiss the appeal for lack of jurisdiction, and recommend resolution through structures existing or to be established under the Memorandum of Understanding.

Delivered at Nairobi on this 16th day of June 2006

Chairman
PPCRAB

Secretary
PPCRAB