

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR MASTER OF LAWS (LL.M) DEGREE**

**TOWARDS EXPEDIENT INTEGRATION OF THE EAC: NAVIGATING THE  
DICHOTOMY BETWEEN IMPLEMENTATION OF THE VARIABLE GEOMETRY  
APPROACH VERSUS ADOPTION OF THE CONSENSUS APPROACH**

By

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## DECLARATIONS

### Student's Declaration

I declare that this thesis is my original work and has not been presented before for a degree in this or any other university.

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Date

### Supervisor's Declaration

This thesis has been submitted for examination with my approval as the University supervisor.

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Date

## **DEDICATION**

This thesis is dedicated to God, my parents and siblings.

## **ACKNOWLEDGEMENT**

I am grateful to all those who encouraged my endeavors in this area of study. In particular, I thank my supervisor Mr. Tirimba Machogu, who read all my drafts and gave me an opportunity to learn under his guidance.

I also express my deepest gratitude to Mr. Jackson Bett for his insightful comments and guidance.

Finally, I thank the interviewees for their time and invaluable input.

## **LIST OF ABBREVIATIONS**

AEC – Framework Agreement on Enhancing ASEAN Economic Cooperation

AFAS – ASEAN Framework Agreement on Services

AFTA – ASEAN Free Trade Area

ASEAN – Association of Southeast Asian Nations

EAC –East African Community

EACJ – East African Court of Justice

EPA – Economic Partnership Agreement

EU – European Union

NCIP – Northern Corridor Integration Projects

QMV – Qualified Majority Voting

IDs – Identification Cards

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

## **LIST OF STATUTES AND TREATIES**

ASEAN Charter

ASEAN Framework Agreement on Services, 1995

EAC Protocol on Decision Making by the Council

EAC Protocol on Environment and Natural Resource Management, 2006

Framework Agreement on Enhancing ASEAN Economic Cooperation

Protocol on the Establishment of the East African Common Market

Protocol to Amend the ASEAN Framework Agreement on Services, 2003

Single European Act, 1986

Treaty for the Establishment of the East African Community

Treaty of Nice

Treaty of Rome, 1957

Treaty on the Functioning of the European Union

## **ABSTRACT**

Decision making and implementation of regional decisions are key in determining the pace of integration of a regional bloc. This study interrogates whether consensual decision making and implementation by variable geometry can work together in sustaining the pace of integration of the East African Community. The purpose of this is to determine whether the East African Community needs to adopt a different decision making mechanism.

This study analyzes the decision making process adopted by the East African Community, which is consensual decision making, and how it has impacted its pace of integration. In doing so, this study relies on the intergovernmentalism theory as it takes into account the importance of the state in the integration process. It further acknowledges that a single state can throw the entire integration process into turmoil as a single member state can veto a decision hence holding back the other member states and slowing down the pace of integration

This study further looks at the application of variable geometry when implementing Community decisions, particularly its ability to allow the partner states that are willing to implement Community decisions to do so without being held back by the slower partner states. The effect of this is that partner states are able to fast track the pace of integration. This study finds that whereas consensual decision making slows down the pace of integration, variable geometry comes in to fast track the pace of integration at the point of implementation. This then makes it difficult to reconcile the two approaches as their impact on the pace of integration appears to be in stark contrast.

This study therefore establishes that it is necessary for a regional bloc to have a decision making mechanism that does not slow down the pace of integration and which can work together with variable geometry in sustaining the integration momentum.

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## CHAPTER ONE

### INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE

#### 1.0 Introduction

One of the major impediments to regional integration in Africa is the question of accumulation of unequal benefits among the countries in the regional bloc.<sup>1</sup> Differences in the benefits of cooperation in Africa date back to the colonial period.<sup>2</sup> This challenge is not new to the East African Community (EAC) as the original EAC had a long history of disputes about Kenya's disproportionate benefits relative to the then Tanganyika (now Tanzania) and Uganda.<sup>3</sup> At the time, Kenya's unequal gains, relative to both Uganda and Tanzania accentuated the conflicts among the three countries.<sup>4</sup> This was one of the reasons that led to the disbandment of the original EAC in 1977. With accrual of unequal benefits then comes the issue of placing national interests above regional interests.

The challenge of placing national interests above regional interests is mainly felt at the point of decision making. This is especially so where decisions are to be reached by consensus as a partner state has the power to veto proposals hence pulling back the other partner states. In the EAC, decisions are to be reached by consensus. This is in line with the Treaty for the Establishment of the East African Community (EAC Treaty) which requires the Summit to reach decisions by consensus.<sup>5</sup> The veto power that comes with this decision making mechanism was one of the issues raised by Mr. Kihoro during the debate on the Treaty for the Establishment of the East African Community Bill by the Kenya National Assembly, and he was of the view that any one of the Presidents could use his veto power when he does not want to go along with his colleagues.<sup>6</sup> The EAC Treaty has for instance empowered a Head of State to wield his veto power during the assent of Bills whereby if a Head of State withholds assent to a re-submitted

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<sup>1</sup> John Thuo Gathii, 'African Regional Trade Agreements as Flexible Legal Regimes' (2009) Working Paper Series No. 20, 33 <http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-08-james-thuo-gathii.pdf> .

<sup>2</sup>ibid 35.

<sup>3</sup>ibid 35.

<sup>4</sup>ibid 37.

<sup>5</sup>Articles 12(3) of the Treaty on the Establishment of the East African Community.

<sup>6</sup>Kenya National Assembly Official Record (Hansard) 6<sup>th</sup> June, 2000 at 878.

Bill, it lapses.<sup>7</sup> This is regardless of whether the other Heads of State have indicated their approval of the Bill.

An instance where a partner state has held back the rest is where Tanzania failed to ratify the EAC Protocol on Environment and Natural Resource Management, 2006 despite Kenya and Uganda having ratified it.<sup>8</sup> Consequently, this Protocol is currently not in force and does not bind any of the EAC Partner States.<sup>9</sup> Tanzania's refusal to ratify this Protocol until certain issues are addressed is understandable because it touches on land which is one of the issues that Tanzania has been hesitant to integrate on. This can be seen in the recommendations made by the Committee headed by Honorable Amos Wako<sup>10</sup> which recognized the feelings of Tanzanians concerning land and employment and recommended that these issues remain in the authority of the Partner States. It can therefore be seen that the effect of consensual decision making is that member states get to safeguard their national interests by holding back those who are willing and able to proceed with a Community issue.

Another instance where national interests prevail over regional interests is at the point of implementation. This is where a partner state fails or delays in implementing a Community issue so as to protect its individual interests and in turn slows down the pace of integration. It is therefore not always practical for partner states to move at the same pace as this would cause a regional bloc to move at the pace of the slowest state. In order to facilitate the practical achievement of the objectives towards integration, there are certain principles that are provided for in regional arrangements. One of these operational principles is that of variable geometry which is provided for in the EAC Treaty<sup>11</sup> and has been defined to mean "*the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds.*"<sup>12</sup>

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<sup>7</sup>Article 63 (1) of the Treaty on the Establishment of the East African Community.

<sup>8</sup> See <[http://www.eac.int/environment/index.php?option=com\\_content&view=article&id=122:eac-protocol-on-environment-and-natural-resource-management&catid=3:key-documents&Itemid=212](http://www.eac.int/environment/index.php?option=com_content&view=article&id=122:eac-protocol-on-environment-and-natural-resource-management&catid=3:key-documents&Itemid=212)> accessed on 19<sup>th</sup> September, 2015.

<sup>9</sup> See <[http://www.eac.int/environment/index.php?option=com\\_content&view=article&id=122:eac-protocol-on-environment-and-natural-resource-management&catid=3:key-documents&Itemid=212](http://www.eac.int/environment/index.php?option=com_content&view=article&id=122:eac-protocol-on-environment-and-natural-resource-management&catid=3:key-documents&Itemid=212)> accessed on 4<sup>th</sup> August, 2015.

<sup>10</sup> See East African Community Secretariat 'Report of the Committee on Fast Tracking East African Federation' (6<sup>th</sup> Summit meeting, 29 November, 2004).

<sup>11</sup> Article 7 (1) of the Treaty on the Establishment of the East African Community.

<sup>12</sup> Article 1 of the Treaty on the Establishment of the East African Community.

Variable geometry is a term used to explain a method of differentiated integration that embraces the differences within the integration structure and therefore allows for a permanent separation between a group of member states and a number of less developed integration units.<sup>13</sup> Variable geometry permits the integrationists who want to accelerate the integration process to do so without being held back by the slower member states. This is made possible as the member states that wish to slow or halt the integration momentum by being left out of policies they consider unsuitable to their national interests are permitted to do so.<sup>14</sup> These states will be exercising their right to opt out under the principle of variable geometry.<sup>15</sup> Consequently, variable geometry is beneficial to both the impatient integrationists and the skeptics as they are permitted to move at their chosen pace.<sup>16</sup> Further, member states are able to safeguard their national interests without frustrating the integration momentum.

In 2008 the Council of Ministers of the EAC sought an advisory opinion,<sup>17</sup> from the East African Court of Justice (EACJ) on the application of the principle of variable geometry vis-a vis the requirement for consensus in decision making. At the time, Kenya was engaged in negotiations with its neighbours regarding the Protocol on the Establishment of the EAC Common Market (Common Market Protocol). The negotiations evidently hit a snag as the EAC Partner States disagreed on the commitments which they were willing to make as individual members and as a Community. Given that the EAC Treaty requires both the Summit and the Council of Ministers to make decisions by consensus; this meant that the negotiations were likely to break down. The questions before the EACJ were, first, whether the principle of variable geometry was in harmony with the rule of consensus in decision making and second, whether the principle of

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<sup>13</sup> See <[http://europa.eu/legislation\\_summaries/glossary/variable\\_geometry\\_europe\\_en.htm](http://europa.eu/legislation_summaries/glossary/variable_geometry_europe_en.htm)> accessed on 31<sup>st</sup> March, 2015.

<sup>14</sup> Rodney Leach, *Europe: A concise encyclopedia of the European Union from Aachen to Zollverein* (3<sup>rd</sup> edn, Profile Books Limited 2000) 251. Available at <[https://books.google.co.ke/books?id=cEHDVZLLAmkC&pg=PA251&lpg=PA251&dq=proponents+and+opponents+of+variable+geometry+in+the+EU&source=bl&ots=qUIJ7X1p-D&sig=0ZmknuYmfC8nR3NUGmkdAjutMNM&hl=en&sa=X&ei=FX12VcjPKuSX7QbawYHgBA&redir\\_esc=y#v=onepage&q=proponents%20and%20opponents%20of%20variable%20geometry%20in%20the%20EU&f=false](https://books.google.co.ke/books?id=cEHDVZLLAmkC&pg=PA251&lpg=PA251&dq=proponents+and+opponents+of+variable+geometry+in+the+EU&source=bl&ots=qUIJ7X1p-D&sig=0ZmknuYmfC8nR3NUGmkdAjutMNM&hl=en&sa=X&ei=FX12VcjPKuSX7QbawYHgBA&redir_esc=y#v=onepage&q=proponents%20and%20opponents%20of%20variable%20geometry%20in%20the%20EU&f=false)> accessed on 9<sup>th</sup> June, 2015.

<sup>15</sup> Gathii (n 1) at 61.

<sup>16</sup> Craig Van Grasse and Pierre Sauve 'The Consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?' (2006) 9 (4), *Journal of International Economic Law* 837-864 3.

<sup>17</sup> Advisory Opinion - Application No. 1 of 2008 (East African Court of Justice, 2009).

variable geometry could be applied to guide the process of integration, notwithstanding the requirement of consensus decision making.<sup>18</sup>

According to the EACJ, Community decisions are made with two aspects in mind. The first being whether it is consistent with the objectives of the EAC Treaty and whether it is desirable at the time. At this level the basis of making the decision is consensus.<sup>19</sup> The second aspect is on the reality of implementing what has been decided which comes with practical realities such as the vital national interests, the negotiations, the give and take and consultations that each Partner State will inevitably have to take care of for the good of the Partner State and ultimately the Community.<sup>20</sup> The EACJ was of the opinion that Partner States may agree on implementation at different speeds due to different readiness levels or different priorities. All these were to be acceded by the Partner States, by consensus.<sup>21</sup>

The EACJ when giving its advisory opinion recognized that simultaneous implementation is impracticable in some circumstances. Variable geometry is, therefore, intended, and actually allows, those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so.<sup>22</sup> The EACJ therefore found that *“the principle of variable geometry, as its definition suggests, is a strategy of implementation of Community decisions and not a decision making tool in itself.”*

It is on this basis that the EACJ held that variable geometry was merely an implementation mechanism whereas consensus was a decision making mechanism. The EACJ further held that variable geometry and consensus decision making were not in conflict but in harmony as they are different stages of the same process. The challenge with this decision is that it does not support the pace of integration. The reason being, although variable geometry allows EAC Partner States to implement Community issues at different speeds hence fast tracking the pace of integration, consensus expects that all partner states move together hence slowing down the pace of integration. Seeing as decision making precedes implementation, the application of variable

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<sup>18</sup> Advisory Opinion (n 17) at 1.

<sup>19</sup> *ibid* 30.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*.

<sup>22</sup> *ibid* 35.

geometry while still maintaining consensus as the main decision making mechanism (as is the case in the EAC) may not always support the pace of integration.

### **1.1 Background to the problem**

For the EAC to achieve full integration, it needs to implement four stages. These are: a customs union that came into effect in 2005 and which allows the EAC to operate as a free trade area with a common external tariff; a common market that came into effect in 2010 providing freedom of movement of goods and services, the rights of establishment and residence; a monetary union whose Protocol was signed in 2013 with the aim of allowing the EAC to have a single currency and finally a political federation which would result in a regional political union.<sup>23</sup>

The customs union was to be progressively attained from 2005 to 2010 and the common market to be attained from 2010 to 2015.<sup>24</sup> The realization of the last two stages is still underway. Despite setting timelines within which these stages of integration are to be attained, EAC Partner States have not been able to adhere to all of them. For instance, the common market was to be fully established by December 2015,<sup>25</sup> a deadline that prove difficult to meet. A major challenge contributing to this, is delay by EAC Partner States to harmonize national laws to fit with the requirements of the Common Market Protocol.<sup>26</sup> The slow implementation has frustrated those Partner States that want to expedite integration as they are held back by the slower states. The challenge posed by this situation was well brought out when Kenya, Rwanda and Uganda came together to fast track integration to the exclusion of Tanzania and Burundi.

The three countries dubbed the ‘Coalition of the Willing,’ now referred to as the Northern Corridor Integration Projects (NCIP), made the tripartite decisions towards integration during three meetings held on: 24<sup>th</sup>-25<sup>th</sup> June 2013 in Entebbe Uganda; 28<sup>th</sup> August, 2013 in Mombasa,

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<sup>23</sup> See <<http://www.meaca.go.ug/index.php/activities.html>> accessed on 30<sup>th</sup> September, 2015. These stages are also provided for under article 5 (2) of the Treaty for the Establishment of the East African Community.

<sup>24</sup> Enos S. Bukuku ‘EAC Secretariat: Towards an Economic and Monetary Union – Progress on the EAC Monetary Union. Available at <[http://www.eac.int/news/index.php?option=com\\_docman&task=doc\\_view&gid=271&Itemid=78](http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=271&Itemid=78)> accessed on 30<sup>th</sup> September, 2015.

<sup>25</sup> See <<https://www.trademarka.com/news/eac-in-drive-to-eliminate-barriers-to-trade-in-services/>> accessed on 30<sup>th</sup> September, 2015.

<sup>26</sup> See <<https://www.trademarka.com/news/eac-partner-states-delaying-key-regional-protocol/>> accessed on 30<sup>th</sup> September, 2015.

Kenya; and 28<sup>th</sup> October, 2013, in Kigali Rwanda to the exclusion of Tanzania and Burundi.<sup>27</sup> The main reason for holding these meetings was to fast track integration. Some of the projects the three Partner States were to undertake touched on land, immigration, tourism, trade, labour and services.<sup>28</sup> The three Partner States were also to remove the non-tariff barriers that had hindered the full implementation of the Common Market Protocol. To achieve this, the three Partner States agreed to meet every two months to review progress of implementation of the decisions they had reached.<sup>29</sup>

Although the three Partner States were meeting to fast track the pace of integration, doing so in the absence of Tanzania and Burundi gave the impression that the two Partner States were being sidelined. In addressing Parliament, His Excellency Jakaya Mrisho Kikwete,<sup>30</sup> expressed his displeasure with the meetings held by the other Partner States without inviting his country. He made it clear that Partner States can enter into bilateral agreements in areas that are outside the Community agreements.<sup>31</sup> He however, he went on to state that the actions by the other three Partner States were causing tension on issues that had already been worked upon and decided.<sup>32</sup>

The advantage of the approach taken by the ‘Coalition of the Willing’ is that the participating Partner States are able to fast track implementation of projects without being held back by the rest. Further, they have constant meetings during which Partner States report on the progress made. However, looking at the position taken by Tanzania, the activities of the ‘Coalition of the Willing’ may hurt the integration process by causing unnecessary tension where non-participating Partner States feel sidelined. This then shows that adopting variable geometry as an implementation strategy without any guidelines to direct the implementation process may cause tension in a regional bloc.

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<sup>27</sup>Kamau Muthoni ‘EAC court drops case against Kenya, Uganda and Rwanda.’ *Standard Media* (Nairobi, 1<sup>st</sup> March 2015). Available at <[http://www.standardmedia.co.ke/evewoman/m/?articleID=2000153346&story\\_title=eac-court-drops-case-against-kenya-uganda-and-rwanda](http://www.standardmedia.co.ke/evewoman/m/?articleID=2000153346&story_title=eac-court-drops-case-against-kenya-uganda-and-rwanda)> accessed on 5<sup>th</sup> May, 2015.

<sup>28</sup> See <<http://www.nciprojects.org/>> accessed on 4<sup>th</sup> August, 2015.

<sup>29</sup> See the joint communique by H.E Uhuru Kenyatta, President of the Republic of Kenya after an official working visit to his counterpart, H.E Yoweri Kaguta Museveni, President of the Republic of Uganda on 24<sup>th</sup> – 25<sup>th</sup> June 2013 at State House Entebbe. Available at <<http://www.nciprojects.org/sites/default/files/downloads/1st%20COMMUNIQUE%20OF%20ENTEBBE.pdf>> accessed on 4<sup>th</sup> August, 2015.

<sup>30</sup> Speech by His Excellency Jakaya Mrisho Kikwete, (former) President of the United Republic of Tanzania, on the matter of the East African Community, delivered to the parliament, Dodoma, on 7<sup>th</sup> November, 2013.

<sup>31</sup> *ibid* 7.

<sup>32</sup> *ibid* 7-15.



## **1.2 Problem statement**

In order to sustain the integration momentum, Partner States that are willing to deepen integration should be allowed to do so without being held back by those who want to move at a slower pace. In addition, the decision making procedure should be one that accommodates this. However, within the EAC decision making is by consensus which essentially requires Partner States to move together as decisions must be made by all of them. Partner States may frustrate decision making by withholding consent to issues that appear to go against their national interests hence slowing down the pace of integration. There is then the principle of variable geometry which allows partner states to fast track the pace of integration without being held back by the rest. The challenge posed by the two approaches is the practicality of making decisions by consensus and implementing them through the variable geometry approach. While consensual decision making and variable geometry are part of the process of regional integration, the two cannot always work in harmony in sustaining the pace of integration.

## **1.3 Scope of the study**

This study has looked at consensus in decision making and the application of variable geometry in sustaining the pace of integration of the EAC. The advisory opinion rendered by the EACJ has been used to determine whether consensus in decision making and variable geometry can work together to sustain the pace of integration. The study has also looked at the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) particularly on the decision making mechanism each has adopted, their implementation of variable geometry and their pace of integration. The aim for this being to determine the lessons the EAC can draw from the two.

## **1.4 Justification of the study**

When it comes to regional integration, partner states get to decide the rules that will govern decision making. If consensus is the method of choice, then there is the challenge of what partner states should do if there is a difference in their views. Variable geometry offers an alternative to strategies that requires all parties to be bound. However it is yet to be understood how variable geometry and consensus in decision making can be used hand in hand to support the pace of integration.

Currently there is insufficient literature which specifically addresses the challenges that arise in regional integration and especially the interplay between decision making by consensus and adoption of variable geometry. This study offers insight on how the EAC can strike a balance between the two in order to sustain the pace of integration. The study also offers various strategies on how to deal with the challenges posed by adoption of consensus and variable geometry in sustaining the pace of integration of the EAC.

### **1.5 Research objectives**

Primary objective

- (i) To analyze whether decision making by consensus and implementation by variable geometry can sustain the pace of integration of the EAC in line with established timelines.

Secondary objectives

- (i) To examine the decision making mechanism adopted by the ASEAN and EU and how they have implemented variable geometry in deepening regional integration so as to establish whether their approach is more expedient at accelerating the pace of integration in comparison to the EAC approach.
- (ii) To determine if there is need for the EAC to adopt a different decision making mechanism.

### **1.6 Research questions**

The questions sought to be answered are:

- (i) Can decision making by consensus and implementation by variable geometry sustain the pace of integration of the EAC in line with established timelines?
- (ii) How is decision making and implementation of variable geometry done in ASEAN and EU and is their approach more expedient in accelerating the pace of integration as compared to the EAC?
- (iii) Is there need for the EAC to adopt a different decision making mechanism?

## 1.7 Hypotheses

This study tests the following hypotheses:

First, decision making by consensus slows down the pace of integration despite adoption of the variable geometry approach at the point of implementation.

Second, deeper integration can only be achieved if there is an alternative mechanism to consensus decision making that is in harmony with variable geometry.

## 1.8 Theoretical framework

The following integration theories are considered in this study in addressing the integration process and the dynamics of decision making in regional integration.

### 1.8.1 Neo-functionalism

Neo-functionalism is said to have been the first attempt at theorizing regional cooperation<sup>33</sup> and is closely associated with Ernst B. Hass who sought to understand how integration continues to evolve and takes on a life of its own.<sup>34</sup> Hass then defined integration as “*the process whereby actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new center, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result is a new political community superimposed over the pre-existing ones.*”<sup>35</sup>

One of the fundamental assumptions of this theory is that national states are not the principal drivers of integration and the supranational actors, institutions and interest groups are viewed as also playing an important role in the integration process.<sup>36</sup> This theory also advances the spillover concept which was defined as “*a situation in which a given action related to a specific*

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<sup>33</sup>Michelle Cini and Nieves Perez – Solorzano Borrigan *European Union Politics* ( 5<sup>th</sup> edn, Oxford University Press 2016) 54.

<sup>34</sup>Gabriel Abels and Heather MacRae (eds), *Gendering European Integration Theory: Engaging New Dialogues* (Barbara Budrich Publishers 2016) 58.

<sup>35</sup>ibid 59.

<sup>36</sup>ibid 60.

*goal creates a situation in which the original goal can only be achieved by taking further action creating a further condition and a need for more action.”*<sup>37</sup>

The spillover concept was challenged during the empty chair crisis and the slowing down of the integration process in the 1970's as these events appeared to disprove the premise that integration would be an ongoing progressive project.<sup>38</sup> This crisis further resulted in this theory losing its explanatory power as the negotiation power of France was influenced by its national interests.<sup>39</sup> This crisis therefore pointed out this theory's weakness which was its neglect of national interests<sup>40</sup> and its underestimation of the impact of state sovereignty and national interests on the integration process.<sup>41</sup> Consequently, Hass acknowledged that this theory was unable to fully explain the integration process.<sup>42</sup>

Neo-functionalism has been criticized for giving an inadequate account of the domestic political processes and for underestimating the role of the national leadership.<sup>43</sup> Whereas this theory pays little attention to the impact that individual member states have on the integration process, this paper places great emphasis on the role of the member states in determining the pace of integration. This theory is therefore acknowledged in this paper in illustrating that the influence that national interests have on the integration process cannot be overlooked.

### **1.8.2 Intergovernmentalism**

This theory is said to have added into integration theory what was missing in neo-functionalism which was the pursuit of national interests and interstate bargain without which the integration process would come to a stop.<sup>44</sup> This study favours this theory as it looks at the role that member states play in the integration process. Intergovernmentalism is a theory of regional integration that was largely developed by Stanley Hoffman and further refined by Andrew Moravcsik.<sup>45</sup> This theory takes into account the importance of the state in the integration process and claims that

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<sup>37</sup> Engin Sorhum and Umit Hacioglu and Hasan Dincer (eds), *Regional Economic Integration and the Global Financial System* (British Science Reference 2015) 101, 102.

<sup>38</sup> Abels and MacRae (n 34) 63.

<sup>39</sup> Istan Benzczes *Crisis in the West and the East Economic Governance in Times of Challenge* (Weiner Verlag fur Sozialforschung 2014) 51.

<sup>40</sup> *ibid* 51.

<sup>41</sup> Arne Niemann *Explaining Decisions in the European Union* (Cambridge University Press 2010) 21, 22.

<sup>42</sup> Abels and MacRae (n 34) 64

<sup>43</sup> Niemann (n 41) 23.

<sup>44</sup> Roy H. Ginsberg *Demystifying the European Union: The Enduring Logic of Regional Integration* (2<sup>nd</sup> edn, Rowman and Littlefield Publishers 2010) 85.

<sup>45</sup> *ibid* 66.

regional integration cannot succeed unless states decide to promote it.<sup>46</sup> It therefore acknowledges that the action of states is driven significantly by national interests and particularly for reasons of protecting national sovereignty.<sup>47</sup>

This theory arose during the French empty chair crisis,<sup>48</sup> a crisis that showed that a single state can throw the entire integration process into turmoil. This crisis occurred when President Charles De Gaulle boycotted EU Council meetings hence stalling negotiations until France got what it wanted.<sup>49</sup> President De Gaulle was in support of intergovernmental cooperation favouring the ascendancy of the member government relative to the common institutions.<sup>50</sup> Hoffman then interpreted the European integration as a process driven by the interests of member states as opposed to supranational or non-state actors.<sup>51</sup> Consequently, Hoffman argued that the scope of integration is determined by member states who, in pursuit of national interests, agree to advance regional interests.<sup>52</sup> His argument then brought out the delicate balance between national interests and regional interests and how it affects the pace of integration. This theory is therefore looked at when analyzing the impact of national interests on the integration process.

National interests should be understood as the basis upon which relationships between states are built and which drive the desire for survival, power and influence.<sup>53</sup> They are not fixed but instead vary depending on domestic pressures and interaction.<sup>54</sup> National interests can be distinguished as vital and secondary. Vital interests are those that have direct consequences for the practical survival of the state and are centered on security as an independent nation, and the protection of

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<sup>46</sup>Ernst Haas, *The Uniting of Europe* (Stanford University Press, 1958). See also Bertrand Fort and Douglas Webber (ed), *Regional Integration in East Asia and Europe- Convergence or Divergence* (Routledge 2006).

<sup>47</sup> Simon Hix, *The Political System of the European Union* (Macmillan Press, 1999)

<sup>48</sup> Ginsberg (n 24) at 66.

<sup>49</sup> See <[http://ballstatehistorydept.org/digitalhistory/studentprojects/mbdavis/623\\_Website/code-4/index.html](http://ballstatehistorydept.org/digitalhistory/studentprojects/mbdavis/623_Website/code-4/index.html)> accessed on 19<sup>th</sup> September, 2015.

<sup>50</sup> Ginsberg (n 44) at 66.

<sup>51</sup> Jeremy Richardson (ed) *European Union: Power and Policy Making* (4<sup>th</sup> edn, Routledge 2015) 94.

<sup>52</sup> Ginsberg (n 44) at 67.

<sup>53</sup> George Buchan 'National Interests and the European Union' (*The Burgees Group, 2012*). Available at <<http://www.brugesgroup.com/NationalInterest.pdf>> Accessed on 31<sup>st</sup> March, 2015. See also Mwaura Patrick Muigai 'Strategic National Interests in Regional Integration in East Africa- A Case Study of Kenya' (MA, University of Nairobi 2013).

<sup>54</sup> Alina Kaczorowska *European Union Law* (3<sup>rd</sup> edn, Routledge 2015) at 35.

its institutions, people and values. Secondary interests are those that pertain to wealth, prosperity and progression of the state.<sup>55</sup>

Since state interests are foundationally linked to the interests of its people, national interests cannot be justly removed from the interests of the people without becoming government or special interests.<sup>56</sup>What underlies national interests in democracies is that they are a product of self-determination and how that self-determination fits against the world order.<sup>57</sup>Due to this, countries rarely have identical interest and can only hope to have complementary interests. The disparity in national interests affects regional integration at the point of decision making where a country vetoes a decision that may appear to go against its national interests. The effect is that partner states that may have wanted to pursue a common issue are barred from doing so. This in turn frustrates the pace of regional integration as partner states that want to integrate at a faster pace are held back by those that want to move slowly.

The impact of national interests on community decisions is greatly felt where decisions are made by consensus as is the case in the EAC. This is because with consensus a veto by any EAC Partner State results in non-implementation of a Community issue. This then means that one Partner State can slow down the pace of integration of the EAC despite there being other Partner States that may want to fast track the pace of integration. This then brings in the implementation of the variable geometry approach which allows Partner States to integrate at different speeds hence ensuring that the states that want to integrate slowly do not hold them back. This has a positive impact on the pace of integration which is in contrast to the slow pace of integration that is occasioned by the adoption of consensual decision making.

## **1.9 Literature review**

### **1.9.1 Consensus as a decision making mechanism**

The main decision making mechanism in the EAC is consensus. Consensus is said to refer to agreement on a decision by all members of a group rather than the majority or a select

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<sup>55</sup> Buchan (n 53) 6.

<sup>56</sup> *ibid* 7.

<sup>57</sup> *ibid* 9.

group.<sup>58</sup>This necessitates the participation of all members in finding a solution that is acceptable to the entire group. Therefore, agreement among all members is paramount.

Luaha Lumu Ntumha in his paper ‘Institutional Similarities and Differences: ECOWAS, ECCAS and PTA’ examines the institutional and decision making structures underlying regional integration in Africa.<sup>59</sup> His main argument is that consensus in decision making promotes national interests over regional ones. While he recognizes various advantages of consensus as a decision making mechanism he still views it as a major drawback to integration.

His arguments are useful in bringing out the challenge of consensus as a decision making process in regional integration. This study furthers his arguments by demonstrating that decision making by consensus does not always work together with variable geometry in sustaining the pace of integration.

While Ntumha concentrates only on consensus as a decision making mechanism in Africa, this study narrows down the geographical scope to the EAC. It also ties down the concept of consensus in decision making with variable geometry in illustrating how the two affect the pace of regional integration.

In the paper ‘Diverging Paths: Economic Integration in the EU and ASEAN’ Zoe Bollinger looks at the importance of decision making rules in determining the forward momentum of a regional organization.<sup>60</sup> In doing so she looks at the EU and ASEAN both of which began with consensus decision making but the EU has since moved to a system of Qualified Majority Voting (QMV).<sup>61</sup>Her argument is that the differences in the decision making process is a core reason for the difference in the progress made towards regional integration by the EU and ASEAN.

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<sup>58</sup> See <<http://www.nd.gov/ndsd/docs/consensus-process.pdf>> accessed on 31<sup>st</sup> March, 2015.

<sup>59</sup>Luaha Lumu Ntumha ‘Institutional Similarities and Differences: ECOWAS, ECCAS and PTA’ available at <<http://storage.globalcitizen.net/data/topic/knowledge/uploads/20100428145323469.pdf>> accessed on 4<sup>th</sup> April, 2015.

<sup>60</sup> Bollinger, Zoë ‘Diverging Paths: Economic Integration in the EU and ASEAN’(Undergraduate Research Conference on the European Union, Claremont-UC, 2013).

Available at: <http://scholarship.claremont.edu/urceu/vol2013/iss1/4>

See also <<http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1079&context=urceu>> accessed on 4<sup>th</sup> April, 2015.

<sup>61</sup> A qualified majority refers to the number of votes required in the Council for a decision to be reached. The Treaty of Nice introduces a qualified majority system where the number of votes allocated to Member States (especially those with large populations) are reweighted so that Council decisions are safeguarded in terms of demographic

Bollinger's work looks at the impact that the decision making mechanism adopted by a regional bloc has on its pace of integration. Her arguments are important in looking at the lessons the EAC can draw from the ASEAN and EU. This is particularly with regards to the decision making mechanism each has adopted and how it has affected its pace of integration.

Although Bollinger looks at the consensus approach in decision making, she does not look at variable geometry and its impact on regional integration. Also, her work focuses on EU and ASEAN. This study aims to further her work by looking at whether decision making by consensus and variable geometry can always work together to support the pace of integration. It does this by focusing on the EAC integration process.

Benny Teh Cheng Guan in his paper 'ASEAN's Regional Integration Challenge: The ASEAN Process' focuses on the ASEAN Way or ASEAN process. He explains that the ASEAN Way is the bedrock of how ASEAN functions and it emphasizes on consultation and consensus.<sup>62</sup> His argument is that this process is incapable of leading ASEAN towards a successful regionally integrated institution despite its success in the past.<sup>63</sup> His view on consensus in decision making is that it is the organization's strong as well as its weak point.<sup>64</sup> This is because consensus puts each member on an equal footing but drags the organization from evolving rapidly.<sup>65</sup>

Guan acknowledges that consensus, as traditionally understood, is incapable of defending the organization's ideals in a global environment.<sup>66</sup> He therefore looks at the 'Ten minus X' principle which allows those who are ready to move forward to do so without being held back by the slower ones hence circumventing the challenge posed by consensus.<sup>67</sup> Guan's work relates to this study as it illustrates that consensus slows down the pace of integration hence the need for a

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representativeness. Now the Treaty of Lisbon is in application. Qualified majority voting has now replaced unanimous voting. See <[http://europa.eu/legislation\\_summaries/glossary/qualified\\_majority\\_en.htm](http://europa.eu/legislation_summaries/glossary/qualified_majority_en.htm)> accessed on 5<sup>th</sup> April, 2015.

<sup>62</sup> Benny Teh Cheng Guan 'ASEAN's Regional Integration Challenge: The ASEAN Process' (2004) The Copenhagen Journal of Asian Studies 20. Available at <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0CDcQFjAE&url=http%3A%2F%2Ffrauli.cbs.dk%2Findex.php%2Fcijas%2Farticle%2Fdownload%2F34%2F32&ei=55IVcawKuaO7Abog4DoDw&usg=AFQjCNHYfXpOMdJnYziEj5NWmSU1OYLlsg&sig2=FgurOuUDMSE3rMs-rtxowg&bvm=bv.92291466,d.ZGU>> accessed on 5<sup>th</sup> May, 2015.

<sup>63</sup> Guan (n 62) 72.

<sup>64</sup> *ibid* 88.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid* 89.

<sup>67</sup> *ibid*.



process that allows some member states to move forward without being held back by the slower ones. Such a process then comes in to deal with the consensus problem.

When looking at consensus and how to circumvent the challenges it poses, Guan looks at only ASEAN while this study focuses on the EAC. This study further looks at whether the EAC should adopt a different decision making mechanism so it can sustain the pace of integration, an issue that Guan has not focused on.

Joshua Kurlantzick in the paper 'ASEAN's future and Asian integration' looks at consensus decision making and how it has held back the ASEAN organization.<sup>68</sup> According to him the new ASEAN states are far from equals and since ASEAN operates by consensus, the laggard states cause progress to come to a standstill.<sup>69</sup> He therefore argues that for ASEAN to become a more powerful and unified organization, one of the things it may need to do is to discontinue the consensual decision making process.<sup>70</sup> He finds this to be an important move especially in instances where speed is important. He therefore suggests that decision making on all issues should be by supermajority voting.<sup>71</sup>

Kurlantzick's arguments are useful in bringing out the challenge that decision making by consensus poses especially in slowing down the pace of integration. Further, it is useful in assessing the possibility of moving to decision making by majority voting as a way of dealing with the challenge posed by consensus decision making.

While Kurlantzick concentrates only on the challenges posed by consensual decision making in the ASEAN, this study further addresses the adoption of variable geometry in regional integration. This study also looks at whether consensus and variable geometry can work together toward expedient integration of the EAC.

In his paper 'Why did regional integration fall in East Africa in the 1970s? A historical explanation,'<sup>72</sup> Bheki R. Mngomezulu explains that one of the reasons the first EAC collapsed

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<sup>68</sup> John Kurlantzick 'ASEAN's future and Asian integration.' (2012) International Institutions and Global Governance Program Working Paper.

<sup>69</sup> *ibid* 12.

<sup>70</sup> *ibid* 13.

<sup>71</sup> *ibid* 18.

<sup>72</sup> Bheki R. Mngomezulu 'Why did regional integration fall in East Africa in the 1970s? A historical explanation' Available at <<http://www.kznhass-history.net/files/seminars/Mngomezulu2013.pdf>> accessed on 28<sup>th</sup> January, 2015.

was because the countries did not think in regional terms but in national terms. National interests therefore dominated even in the East Africa Central Legislative Assembly. He gives an example where in 1957, Mr. Mulondo, a Member of the House from Uganda, argued that Uganda would only embrace regionalism in health and construction sectors as it stood to benefit, and not in any other areas.<sup>73</sup> Another illustration of where national sentiments prevailed over regional sentiments was where during the Council debates in Tanganyika, the Attorney General argued that one way of ensuring uniformity in East Africa was that Tanganyika had to make good policies that could be adopted by other East African countries.<sup>74</sup> Another instance he gives was where President Nyerere stated: *“Ultimately we are not in fact ‘East African’ leaders, but leaders of states in East Africa; and regional loyalty has sometimes to come second to our national responsibilities.”*<sup>75</sup>

The challenge of national interests prevailing over regional interests tie into this study in assessing how this impacts decision making and the pace of integration. Since Mngomezulu’s work takes a historical perspective by addressing the challenges the original EAC faced, this study furthers his work by looking at the present EAC and how the same challenges have negatively impacted decision making hence slowing down the pace of integration. This study further addresses the adoption of variable geometry and its impact on the pace of integration an issue that Mngomezulu has not looked at in his work.

Joshua M. Kivuva in his paper ‘East Africa’s dangerous dance with the past: Important lessons the new East African Community has not learned from the defunct’ examines the bottlenecks that continue to constrain integration within the EAC.<sup>76</sup> The argument he makes is that by concentrating decision making powers in the heads of state and other political units controlled by member states, the EAC is driven more by issues of high politics and therefore hard to reach a consensus or establish common interest.<sup>77</sup> According to him, the impact of national politics in Community decisions is reflected in the Summit, Council of Ministers and Sectoral Committees

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<sup>73</sup> *ibid* 51.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid*.

<sup>76</sup> Joshua M. Kivuva ‘East Africa’s dangerous dance with the past: Important lessons the new East African Community has not learned from the defunct’ (2014) 10 (34) European Scientific Journal. Available at <<http://eujournal.org/index.php/esj/article/viewFile/4843/4564>> accessed on 5<sup>th</sup> May, 2015.

<sup>77</sup> *ibid* 361.

whose decisions are by consensus and therefore a veto by any EAC Partner State means non implementation of an issue by the Community.<sup>78</sup>

His work is looked at as it gives the current situation within the EAC where we see the cumbersome nature of making decisions by consensus. This then demonstrates how consensual decision making slows down the pace of integration. This study looks at his arguments in illustrating that decision making by consensus ends up slowing down the pace of integration especially due to the veto power that is wielded by the individual Partner States.

Despite looking at the challenges that arise when making decisions by consensus, Kivuva focuses on the concentration of decision making power on the Summit. He then explains the need to strengthen the role of the Secretariat in decision making. This paper differs from his work as it further looks at the need for the EAC to adopt a different decision making mechanism. This study also looks at variable geometry and whether it can always work together with consensus in supporting the pace of integration, an issue that Kivuva has not addressed.

### **1.9.2 Variable Geometry**

The principle of variable geometry is defined in the EAC Treaty as the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds.<sup>79</sup>

In his paper, 'The Variable Geometry Approach to International Economic Integration,' Peter Lloyd, explains that in negotiations among countries, consensus among the negotiating parties is usually lacking and at times negotiations have stalled. Variable geometry has therefore emerged as a possible strategy to accommodate differences in views among nations.<sup>80</sup> He further explains that variable geometry is a strategy that allows negotiations of an issue to lead to an agreement that is not binding on all parties to the agreement and is therefore an alternative to strategies that requires all parties to be bound by an agreement.<sup>81</sup> The distinguishing features of variable

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<sup>78</sup> ibid 362.

<sup>79</sup> Article 1 of the Treaty on the Establishment of the East Africa Community.

<sup>80</sup> Peter Lloyd, 'The variable geometry approach to international economic integration' available at [ijbds.usb.ac.ir/pdf\\_1304\\_cf58b15ac0cec6fb55a894e891cb0520.html](http://ijbds.usb.ac.ir/pdf_1304_cf58b15ac0cec6fb55a894e891cb0520.html)

<sup>81</sup> ibid 52.

geometry are first, it is an opt-in agreement devised by a proper subset of a larger group of countries. Second, its benefits are restricted to the subset of the countries.<sup>82</sup>

Lloyd's work is important in addressing the issue whether consensus and variable geometry are in harmony. This is especially so, as he looks at variable geometry coming in where consensus has failed yet some member states want to attain certain goals.

Although Lloyd mentions consensus, he does not emphasize on how it is used as a decision making mechanism in regional integration and its impact on the pace of integration. Further, when addressing the issue of variable geometry, Lloyd focuses on the EU. This study furthers his work by bringing out the impact of decision making by consensus on the pace of integration and particularly in the EAC.

T. Ademola Oyejide in his paper 'Policies for regional integration in Africa' explains that the strategy implied by variable geometry is essentially pragmatic and incremental; it permits integration to proceed on the basis of progressive steps, allows smaller sub-groups to move faster than the whole group and provides that many decisions can be made by majority rather than by consensus.<sup>83</sup> He further explains that the concept of variable geometry may be usefully applied as African countries move away from the straight jacket plan of action to more heterogeneous strategies in the design and implementation of regional integration arrangements.<sup>84</sup> He further explains that a diligent application of variable geometry could considerably ease the tensions among various sub-regional integration arrangements in Africa and enhance prospects for closer and more fruitful regional cooperation in Africa.<sup>85</sup>

This author's work moves us away from decision making by consensus by acknowledging that decisions can be made by the majority. The idea of majority voting is a possibility that is considered in this study on instances when consensus cannot be reached yet a group of partner states is willing to take progressive steps towards integration.

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<sup>82</sup> *ibid* 58.

<sup>83</sup> T. Ademola Oyejide 'Policies for Regional Integration in Africa' (2000) Economic Research Papers No. 62. available at <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157658-EN-ERP-62.PDF>>

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid*.

Oyejide's work looks at the application of variable geometry when dealing with regional cooperation in Africa at large. This study narrows down this scope and instead looks at the application of variable geometry within the EAC. This study further looks at how decision making by consensus impacts the pace of integration. The aim for this is to determine whether consensus and variable geometry can always work together in sustaining the pace of integration an issue that Oyejide has not addressed.

Gathii in his paper 'African Regional Trade Agreements as Flexible Legal Remedies' looks at the advisory opinion rendered by the EACJ on consensus decision making and the principle of variable geometry where the EACJ interpreted this principle as providing flexibility in making progress towards integration by allowing projects to proceed at different speeds.<sup>86</sup> He sees the decision as allowing continued cooperation since objecting states will not be regarded as wielding a veto under the rule on consensus decision making as they will be exercising their right to opt out under the principle of variable geometry.<sup>87</sup>

His work is looked at when addressing the advisory opinion rendered by the EACJ and its benefits to the EAC. This is especially when looking at whether consensus and variable geometry can always work together to support the pace of integration.

Although Gathii looks at the EACJ advisory opinion and the application of variable geometry within the EAC, he does not focus much on the impact that consensual decision making has on the pace of integration. This is an issue that is addressed in this study in determining whether the EAC needs to move to a different decision making mechanism.

In his paper 'Rationalization or redundancy? Making Eastern and Southern Africa's Regional Trade Units Relevant,' Richard Gibb advocates for a policy of adopting a variable geometry approach to reconfiguring the regional institutions of eastern and southern Africa.<sup>88</sup> He notes that a key issue affecting the structure of regionalism is the level of diversity among the states of sub-Saharan Africa. He views a variable geometry approach as resulting in a group of states pursuing different integrative strategies on a permanent basis to those adopted by other regional

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<sup>86</sup> Gathii (n 1) 61.

<sup>87</sup> *ibid.*

<sup>88</sup> Richard Gibb, 'Rationalisation or redundancy? Making Eastern and Southern Africa's Regional Trade Units Relevant' (Brenthurst Discussion Paper 3/2006). Available at [http://test.thebrenthurstfoundation.org/Files/Brenthurst\\_Commissioned\\_Reports/BD0603\\_Regional\\_Integration.pdf](http://test.thebrenthurstfoundation.org/Files/Brenthurst_Commissioned_Reports/BD0603_Regional_Integration.pdf)

groupings.<sup>89</sup> Gibb states that a key issue affecting the structure of regionalism is the level of diversity among states and since regional integration is state led, weak states serve to undermine the cause of regionalism.<sup>90</sup>

His work is relevant to this study because it recognizes the diversity of member states involved in regional integration arrangements and how this impacts on the integration process. His work is looked at when addressing the impact of variable geometry on integration.

Although Gibb looks at variable geometry, he does not address the issue of consensus in decision making and its impact on the pace of integration. Also, his work looks at the regional institutions of eastern and southern Africa and not specifically at the EAC. This study furthers his work by looking at whether consensus and variable can always work together in sustaining the pace of integration. This is done by focusing on the integration of the EAC.

### **1.10 Research methodology**

This study relied on both primary and secondary data.

When collecting primary data, the study applied snowballing sampling and purposive sampling techniques. With snowballing sampling the existing respondents helped to identify future respondents. On the other hand, purposive sampling helped target respondents who were believed to have the required information with respect to this study.<sup>91</sup> These techniques were utilized because the information needed on the application of variable geometry and consensus within the EAC is only available with specific people who participate in EAC meetings and implementation of EAC projects and those under the NCIP.

The identified respondents were the staff working in the Ministry of East African Community (EAC), Labour and Social Protection, the Ministry of Foreign Affairs, Ministry of Interior and Coordination of National Government, Office of the Attorney General and Department of Justice, legal consultants who attend EAC meetings, Trademark East Africa and Kenya Tourism Board. The identified respondents were approached because they have vast knowledge of the EAC integration process. They also interact with representatives from the other EAC Partner

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<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> Olive M. Mugenda and Abel G. Mugenda *Research Methods*(Acts Press 2003) at 51.

States enabling them to understand the challenges faced by the Partner States and the EAC as a whole at the point of decision making and when implementing Community issues.

Face to face interviews were used as the primary strategy for data collection. This entailed the preparation of an interview guide comprising questions that are relevant to the research objectives, research questions and hypothesis. There were questions that were specifically meant for those respondents who participate in both EAC meetings and in implementation of the decisions reached. There was also a separate set of questions meant for those who are only involved in implementation of EAC projects and those under the NCIP. The theme of the interview guide was on navigating the dichotomy between implementation of the variable geometry approach versus adoption of the consensus approach. The advantage of using this mode of data collection was that it gave the researcher an in depth understanding of the study area. In total eighteen respondents were interviewed.

The data collected was then analyzed using thematic analysis where related information was grouped according to topics.

The major challenge encountered in collecting primary data was the unavailability or limited access to staff depending on their ranks in the Ministries. Another challenge was where some respondents chose to have an informal discussion.

Reference was also made to secondary data to supplement the primary data. Sources of secondary data included a review of academic materials such as text books, working papers, theses, reports and journals concerning the study area. There was also extensive use of internet sources to access electronic books and journals.

### **1.11 Limitations**

The sample size selected was small as it was restricted to a small group of people who directly participate in EAC meetings and implementation of Community projects. The sample size was also not as broad as to represent all EAC Partner States. This was mainly influenced by lack of resources to access a larger sample size and the limited duration within which the research was to be conducted. Also, as indicated in the research methodology, some of the proposed interviewees were unavailable and others inaccessible.

The literature available on the application of decision making by consensus and the application of the principle of variable geometry in the EAC is limited. The little that is available focuses on the EU and ASEAN.

## **1.12 Chapter breakdown**

### **1.12.1 Chapter one: A broad overview and layout of the study**

This chapter introduces the research topic. It then puts the study into context by giving a background of the research area, the justification of conducting the study, the views of authors and scholars concerning the area of study, the objectives of the study, the research questions the study seeks to answer, the theory underlying the study and the limitations of the study.

### **1.12.2 Chapter two: Reconciling the consensus and variable geometry approach in regional integration**

This chapter starts by looking at the decision making mechanism used in the EAC and its impact on the pace of integration. It then looks at what the variable geometry approach involves, its impact on the pace of integration and how it has been implemented in the EAC. Finally, it looks at the practicality of making decisions by consensus and implementing them by variable geometry. The aim of this is to determine whether the two can always work together to support the pace of integration as set within established timelines.

### **1.12.3 Chapter three: The ASEAN and EU approach to implementation of consensus and variable geometry**

This chapter looks at the decision making mechanisms adopted by the ASEAN and EU and how they have applied variable geometry in deepening and fast tracking integration. The EU is selected because it has applied the variable geometry approach for a long period of time and also over time it has moved away from consensus decision making. The ASEAN is looked at because it has maintained the practice of decision making by consensus which is the current practice in the EAC. The aim of this chapter is to determine whether there are lessons that the EAC could adopt from these two regional blocs.



#### **1.12.4 Chapter four: Findings, conclusion and recommendations**

This chapter is the concluding chapter and it gives the findings of the study and recommendations on the best practices in decision making and in the application of variable geometry in sustaining the integration momentum.

## CHAPTER TWO

### RECONCILING THE CONSENSUS AND VARIABLE GEOMETRY APPROACH IN REGIONAL INTEGRATION

#### 2.0 Introduction

This chapter focuses on consensus in decision making and implementation through the variable geometry approach. The aim being to determine whether the two approaches can work together towards expedient integration of the EAC. This chapter first looks at the major decision making organs within the EAC and the main decision making mechanism that has been adopted, which is consensus. Since consensus is not defined under the EAC Treaty and Protocols, it looks at other sources of its definition, how it has been applied in regional integration and its impact on the EAC integration process. This chapter then looks at the variable geometry approach in regional integration. It looks at the factors that necessitated its implementation, its impact on regional integration and how it has been applied in the EAC. The practicality of reconciling consensus and variable geometry in sustaining the integration momentum is then considered keeping in mind their impact on the pace of integration.

#### 2.1 Decision making in the EAC

The main decision making mechanism adopted by the EAC is consensus and the main decision making organs are the Summit and Council. The EAC Treaty provides that the Summit, which is the highest organ in the Community and comprises of the Heads of State or Government of the Partner States,<sup>92</sup> should make decisions by consensus.<sup>93</sup> The only exception to the consensus requirement is that the views of a Partner State that is being considered for suspension or expulsion will not count.<sup>94</sup> Similarly the Council, which consists of Ministers and the Attorney General of each Partner State,<sup>95</sup> is to make decisions by consensus but this is subject to the Protocol on Decision Making by the Council of the EAC.<sup>96</sup> This Protocol gives the occasions when the Council is to make decisions by consensus. These include: granting of observer status

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<sup>92</sup> Article 10 (1) of the Treaty on the Establishment of the East African Community.

<sup>93</sup> Article 12 (3).

<sup>94</sup> Article 148.

<sup>95</sup> Article 13. The Ministers are those responsible for East African Community Affairs of each Partner State and such other Minister of the Partner States as each Partner State may determine.

<sup>96</sup> Article 15 (4).

to an inter-governmental or civil society organization; making of the financial rules and regulations of the Community; approval of the expenditure of the Community and establishment of any Sectoral Council or Committee under the Treaty. Any other decisions of the Council that do not form part of these occasions are to be made by simple majority.<sup>97</sup>

The Council is the organ tasked with making policy decisions.<sup>98</sup> During Council meetings, all EAC Partner States must be represented for it to have the quorum necessary to reach a decision.<sup>99</sup> If at the point of decision making a Council member raises an objection to a proposal submitted for its decision, the Council must refer the matter to the Summit for a decision.<sup>100</sup> If there are no objections then the Council's decision is final.

At the Summit level, the EAC Treaty requires that if a Summit member is unable to attend a meeting, then that member may appoint a Minister to attend that meeting and that Minister shall have all the powers, duties and responsibilities of the absent Summit member.<sup>101</sup> Just like the Council meetings, all Partner States must be present for there to be quorum at the Summit. Unlike the Council, the EAC Treaty does not make provision for what ought to be done where a Summit member objects to a proposal. The practice has been that if consensus is not reached then the issue is revisited at a future date. An example of this is where Tanzania and Burundi backtracked on the Economic Partnership Agreement (EPA) that is to be entered into between the EAC and the EU. The Summit decided to revisit this issue in January next year to see if all Partner States will be agreeable to the signing of this Agreement.<sup>102</sup> Therefore, for a decision to be reached within the EAC, all Partner States must be represented and they must all agree on an issue for it to be a Community decision.

The EAC Treaty, Protocol on Decision Making by the Council, and the Rules of Procedure of the different Community organs simply give guidance on what forms quorum for each session of the Community organs and the decision making mechanism to be adopted. Unfortunately, these instruments fail to define what is consensus, how Partner States are to achieve this and what should be done to break an impasse where consensus on an issue cannot be reached. This gap in

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<sup>97</sup> Article 2 (2).

<sup>98</sup> Article 14 (1).

<sup>99</sup> Rule 11 of the Rules of Procedure for the Council of Ministers.

<sup>100</sup> Article 15 (3).

<sup>101</sup> Article 10 (2).

<sup>102</sup> Edwin Okoth 'Trade deal put off as Dar, Burundi balk' *Daily Nation* (Nairobi, 9 September 2016) 64.

defining consensus under the EAC Treaty and Protocol was one of the issues that the EACJ looked at when rendering its advisory opinion. The EACJ found that this term remains undefined under the Treaty, the Protocol on Decision Making and the Rules of Procedure of the various organs.<sup>103</sup> The EACJ then explained that if it was asked how consensus is to be applied under the Treaty and Protocol the answer would be guesswork.<sup>104</sup>

Despite the lack of a definition, the EACJ proceeded to find that consensus does not mean unanimity but noted that achieving consensus by unanimity is ideal but rarely possible.<sup>105</sup> Such a conclusion may be supported by the fact that where unanimity is followed it is expected that all members in a group will vote the same way<sup>106</sup> and the outcome will reflect everyone's preferences.<sup>107</sup> This rarely occurs but instead frustrates a group hence posing the risk of its demise.<sup>108</sup> The EACJ was therefore of the opinion that instead of equating consensus with unanimity, the Community should amend the relevant instruments that touch on decision making.<sup>109</sup>

### **2.1.1 The concept of consensus in decision making**

The word consensus comes from the Latin word *consentere* which means consent.<sup>110</sup> Consent has been defined as 'to do or allow something'<sup>111</sup> which shows that agreement among all group members is key. Consensus is said to have first been used in 1843 and its historical roots are largely traced to the Society of Friends (Quakers) who are said to have been making group decisions without voting for over three hundred years.<sup>112</sup> Their method aims at finding a sense of meeting which represents the consensus of those involved.<sup>113</sup> There is therefore unity which

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<sup>103</sup> Advisory Opinion (n 17) at 38.

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid* 37.

<sup>106</sup> Randy Schutt 'Consensus is not unanimity: Making decisions cooperatively' available at <[http://www.bhopal.net/old\\_studentsforbhopal\\_org/Assets/RS-ConsensusResponse.pdf](http://www.bhopal.net/old_studentsforbhopal_org/Assets/RS-ConsensusResponse.pdf)> accessed on 24<sup>th</sup> May, 2015.

<sup>107</sup> Guan (n 62) at 89.

<sup>108</sup> Schutt (n 106) at 1.

<sup>109</sup> Advisory Opinion (n 17) at 38.

<sup>110</sup> See <<http://www.merriam-webster.com/dictionary/consensus>> accessed on 1<sup>st</sup> June, 2015.

<sup>111</sup> See <[http://www.merriam-webster.com/dictionary/consent\[1\]](http://www.merriam-webster.com/dictionary/consent[1])> accessed on 1<sup>st</sup> June, 2015.

<sup>112</sup> L.A. Kauffman 'The Theology of Consensus' (2015) Berkeley Journal of Sociology available at <<http://berkeleyjournal.org/2015/05/the-theology-of-consensus/>> and also <<https://www.jacobinmag.com/2015/05/consensus-occupy-wall-street-general-assembly/>> accessed on 1<sup>st</sup> June, 2015.

<sup>113</sup> *ibid.*

means a higher truth that grows from the consideration of divergent opinions and unites them all.<sup>114</sup>

Although consensus has a religious background, it was introduced into the secular world because it is an inclusive and democratic form of decision making where the group takes no action that is not consented to by all group members.<sup>115</sup> Consensus therefore offers a cooperative model of reaching group unity which is essential in building a culture that values cooperation over competition.<sup>116</sup> This may explain why member states engaged in integration may choose consensus as their decision making mechanism as integration is a process that entails cooperation between two or more nation states to achieve peace, stability and wealth.<sup>117</sup>

Based on its historical use, consensus as a decision making mechanism may be described as a process that is used by groups seeking widespread levels of participation and agreement.<sup>118</sup> Consensus is then a cooperative process that allows everyone in a group to participate in finding good solutions for the group.<sup>119</sup> This process aims at: being inclusive as it involves as many stakeholders as possible; participatory as it seeks the input of all members; cooperative as members endeavor to reach the best decision for the group; egalitarian as all members have an equal opportunity to contribute; and solution oriented as it seeks to achieve a common agreement over differences by using compromise.<sup>120</sup>

Consensus as a decision making mechanism in regional integration aims at putting each member on an equal footing by allowing the voices of the weaker and smaller states to be heard.<sup>121</sup> It also enables members to forego initiatives that go against their national interests.<sup>122</sup> Although

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<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> See <<http://carleton.ca/ces/elearning/introduction/what-is-the-eu/extension-what-is-regional-integration/>> accessed on 1<sup>st</sup> June, 2015.

<sup>118</sup> Tim Hartnett, 'The principles of consensus decision making' available at <<http://www.groupfacilitation.net/Articles%20for%20Facilitators/The%20Basics%20of%20Consensus%20Decision%20Making.html>> accessed on 27<sup>th</sup> May, 2015.

<sup>119</sup> Schutt (n 106) at 1.

<sup>120</sup> Advisory Opinion (n 9) at 8. This formed part of the submissions of the applicant Community when it was explaining the aims of consensus decision making. Similar aims have been captured by Hartnett (n 92).

<sup>121</sup> Guan (n 62) at 88.

<sup>122</sup> *ibid.*

consensus does not necessarily mean unanimity, it still calls for general agreement and also the resolving of objections which takes time.<sup>123</sup>

### **2.1.2 Consensus as a decision making mechanism in regional integration**

In a regional bloc you have countries with different political visions, ideologies and philosophies about how to develop society. These countries also have different historical, social, economic and political histories. Further, all these countries are at different stages of development. These countries then come together to pursue a common vision which is a common political, economic and social-cultural destiny.<sup>124</sup> The interplay of all these factors results in state action at the regional level being mainly driven by national interests and also the consideration of which country will be the main beneficiary *vis a vis* the rest. Therefore only states can ensure that integration succeeds.<sup>125</sup>

This then brings in the issue of intergovernmentalism in regional integration which is as a result of the position occupied at the apex of the Community Organs which are made up of government representatives.<sup>126</sup> This situation is accompanied by the unwillingness of governments to cede authority to regional bodies<sup>127</sup> mainly in a quest to protect national sovereignty. In the African context, this situation can be attributed to the fact that many African countries are still dealing with sovereignty issues and are still unwilling to reduce certain state powers.<sup>128</sup> For instance, the original EAC, despite it being economically beneficial failed politically due to issues of national sovereignty and ideological incompatibility between partner states.<sup>129</sup>

This then shows the need for political will to ensure that integration succeeds. This is because political will is central to the process of integration and its absence results in the non-emergence of a regional identity. Since the building of a community requires the creation of a sense of solidarity among the people concerned, lack of political will tends to frustrate the integration process.<sup>130</sup> The challenge posed by lack of political will is magnified when the apex of

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<sup>123</sup> *ibid* 89.

<sup>124</sup> Interview with Respondent 2 on 5<sup>th</sup> July, 2015.

<sup>125</sup> See chapter one.

<sup>126</sup> Ntumha (n 59).

<sup>127</sup> Obuba Motanya Justus 'Politico – economic structural constraints and their impact on regional integration in East Africa: A case study of the East African Community (EAC)' (MA thesis, University of Nairobi 2005) at 22.

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid* 13.

<sup>130</sup> *ibid*.

community organs is composed of government representatives. This is because they will give primacy to national interests at the point of decision making as those involved will be keen on promoting what is best for their individual state as opposed to the region as a whole. Decision making then involves the interplay of national interests, issues of state sovereignty, high politics and state inequalities.

The control of partner states is most pronounced in the use of consensus in the process of adopting community decisions as it ensures the primacy of national sovereignty over the general community interests.<sup>131</sup> The impact of national politics is then felt when the Summit and Council are making decisions because a veto by any partner state results in the non-implementation of an issue by the community.<sup>132</sup> With consensus no obligation can be imposed on a member state without its acquiescence or expressed consent and this ensures that state sovereignty is respected.<sup>133</sup>

Since the aim of consensus is to find a good solution for the group, the final decision reached is often not the first preference of any individual in the group, and many may not even like the final result.<sup>134</sup> The challenge that this poses to regional integration is that member states tend to compromise and they also put up a façade of unanimity which hides a coalition of discontented parties.<sup>135</sup> It appears that consensus limits innovation at the community level<sup>136</sup> as new ideas risk rejection by some member states who feel that their national interests might be compromised.

Consensus in regional integration has the potential to retrogress the pace of integration. The reason being it slows down the integration process due to the time necessary to reach agreement on each topic<sup>137</sup> keeping in mind that all member states must be agreeable for an issue to move ahead. The overall result is that decisions reached are at times unable to sustain the integration momentum. Additionally, consensus implies compromise and results in the second or third best

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<sup>131</sup> Ntumha (n 59).

<sup>132</sup> Kivuva (n 76) 362.

<sup>133</sup> Ntumha (n 59).

<sup>134</sup> Schutt (n 106) 1.

<sup>135</sup> Ntumha (n 59).

<sup>136</sup> *ibid.*

<sup>137</sup> Bollinger (60) 19.

solution.<sup>138</sup> This means that if some partner states want to take up an issue that will deepen integration but one or more partner states are opposed to this, they will have to compromise. The net result is that member states are forced to move at the pace of the slowest moving member as they must accommodate its views.

### **2.1.3 The impact of the consensus approach in the EAC**

Although the EACJ, in its advisory opinion, found that consensus does not mean unanimity, the practice within the EAC has been that all parties must agree on an issue for it to move forward. From the interviews conducted, 60 per cent of the respondents were of the view that consensus in the EAC context has been taken to mean unanimity. According to the respondents, adopting consensus as the main decision making mechanism has its positive attributes. For instance, by accommodating everybody there is the feeling of collective achievement by Partner States as their views are taken into consideration when reaching the final decision. This then results in unity of the group and parties do not feel that decisions are being imposed on them.<sup>139</sup>

Also, Partner States move as one and have that feeling of belonging.<sup>140</sup> Consensus also helps Partner States maintain the spirit of integration which brought them together to forge ahead. Partner States therefore become stronger as they move together.<sup>141</sup> Since a decision is reached by all Partner States acting jointly, they all own it making implementation easier. Consensus has therefore been described as the glue that makes the EAC stick together with a deliberate emphasis that all partner states are equal and do things jointly.<sup>142</sup> This then facilitates the stability of the Community.

Despite these advantages, using consensus as the main decision making mechanism in the EAC has posed various challenges to the integration process. The major challenge that all respondents identified was that consensus had caused the integration process to be quite slow. This is because the agreement of all the member states is necessary for a decision to be reached giving them the

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<sup>138</sup> Mariam Fatuma Akoth Omoro 'Organisational Effectiveness of Regional Integration Institutions: A Case Study of the East African Community' (Master of Arts Thesis, University of South Africa 2008).

<sup>139</sup> Interview with Respondent 2 on 5<sup>th</sup> July, 2015.

<sup>140</sup> Interview with Respondent 7 on 16<sup>th</sup> July, 2015.

<sup>141</sup> Interview with Respondent 4 on 13<sup>th</sup> July, 2015.

<sup>142</sup> Interview with Respondent 8 on 22<sup>nd</sup> July, 2015.



power to veto any decisions that they do not agree with. This creates an obstacle in the decision making process as changes requiring unanimous support are difficult to achieve.<sup>143</sup>

An example given by 40 per cent of the respondents where consensus poses a challenge is where a Partner State fails to attend a meeting. In such a case, whatever decisions that are reached in its absence will not be binding unless it indicates its consent by signing the report containing the decision. This means that other Partner States who agree with that decision cannot move ahead with it unless the absent Partner State appends its signature on the report. In the absence of this, there is no consensus hence no binding decision.

This challenge is well brought out in the Rules of Procedure for the Co-ordination Committee which consists of Permanent Secretaries and meets just before the session of the EAC Council.<sup>144</sup> All representatives of the Partner States must be present for there to be quorum and where this is lacking the meeting can be adjourned for twenty four hours.<sup>145</sup> If after adjournment there is still no quorum but there is two-thirds Partner States representation then it becomes a consultative meeting whose recommendations are forwarded to the absent Partner State(s) for consideration and consent. If a decision is arrived at during a consultative meeting then it is not binding unless the absent Partner State(s) signs it.

The same applies to Sectoral Councils which can only be properly constituted if all Partner States are present. The reason for this is that the decisions of the Sectoral Councils are deemed to be those of the Council under Article 14(3) (i) of the EAC Treaty<sup>146</sup> and as earlier stated, the quorum of Council must be all Partner State representation. An instance where the quorum challenge arose was during the 19<sup>th</sup> Meeting of the Sectoral Council on Legal and Judicial Affairs during which Burundi was unrepresented and its notice of inability to attend was sent a few days before the meeting yet the conference facilities had been fully paid for.<sup>147</sup>

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<sup>143</sup> George Tsebelis Bridging qualified majority and unanimity decision making in the EU, (2013) Journal of European Public Policy, at 1089. Available at <<http://dx.doi.org/10.1080/13501763.2013.788368>>

<sup>144</sup> Rules 4 and 5 (1).

<sup>145</sup> Rule 12 (1) and (2).

<sup>146</sup> Calist Andrew Mwatela and 2 others v The East African Community EACJ Application No. 1 of 2005.

<sup>147</sup> EAC/CM/34/BP/2016 34<sup>th</sup> Meeting of the Council of Ministers 5<sup>th</sup> September 2016 Arusha, Tanzania.

When deliberating this issue, it was noted that the EAC Council at its 31<sup>st</sup> meeting had directed that Partner State(s) that will not attend Sectoral Council meetings should give 7 days' notice.<sup>148</sup> This directive was reaffirmed during its 32<sup>nd</sup> meeting where it directed that *“in the event that a 7 days' notice is not given and Partner States are already at the meeting venue, the meeting should proceed with deliberations and the decision reached shall bind the absent Partner State.”*<sup>149</sup> This is a good directive as it will ensure that meetings proceed. However, since the Sectoral Council gives its recommendations to the Council which it may adopt or vary, the Partner State that was absent during the Sectoral Council meeting may veto such a decision at Council level. This is a challenge that ought to be considered when implementing this directive.

The other instance where consensus poses a challenge is where a Partner State is present in a meeting but fails to sign a report, it means that the report will not be binding as it will not be a decision of the Community. This is quite different from the practice in the EU where abstentions by members present in person or represented do not prevent the adoption by the EU Council of acts which require unanimity.<sup>150</sup> The practice in the EAC therefore results in wastage of time and resources as it takes long to reach unanimity, it is expensive and decision making becomes very frustrating even on simple matters.

The need for consensus has also prevented Partner States that are willing to move ahead with an issue from doing so. An example given by 30 per cent of the respondents concerned the EAC Protocol on Environment and Natural Resource Management, 2006. As earlier mentioned, this Protocol was signed by Kenya, Uganda and Tanzania in 2006 before Rwanda and Burundi joined the Community. Uganda and Kenya ratified this Protocol in 2010 and 2011 respectively but Tanzania failed to do so. Instead it asked for the Protocol to be opened for discussion as it required certain provisions to be amended. The challenge posed by this situation is that Partner States that were willing and able to proceed with any obligations under this Protocol cannot do so. The reason being consensual decision making precedes implementation and if a Partner State rejects an issue (as Tanzania did) the rest cannot proceed with its implementation.

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<sup>148</sup>EAC/CM 31/Directive 23.

<sup>149</sup>EAC/CM 32/Decision 09.

<sup>150</sup> Article 148 (3) Treaty of Rome now Article 235(1) of the Treaty on the EU and the Treaty on the Functioning of the EU as amended by the Treaty of Lisbon.

The above shows that consensus enables Partner States to safeguard their national interests by holding back those who are willing and able to proceed with a Community issue. Consequently, consensual decision making derails the integration process by causing it to move at the pace of the slowest partner state. This occurs despite there being other partner states that may want to fast track implementation. This then shows the necessity of having a mechanism that allows partner states that are able and willing to proceed with certain Community issues to do so without being held back by unwilling partner states.

## **2.2 Implementation of the variable geometry approach in regional integration**

The concept of a community in which some countries may integrate more or faster than others has been given many names among them; variable geometry, flexibility, differentiated integration and closer or enhanced cooperation.<sup>151</sup> Variable geometry originated in the EU and emerged in the later stages of the evolution of the EU integration.<sup>152</sup> At the beginning of the integration process, the idea was that all member states would be considered equal and they would jointly take all the necessary steps towards deeper integration.<sup>153</sup> As the EU continued to grow, new member states joined it that had a different economic and institutional background from the initial members.<sup>154</sup> There was therefore need to put in place an institutional framework that would balance between asymmetry and unity without affecting the achievements so far made due to integration.<sup>155</sup> The challenges that the EU member states faced differed thus ad hoc institutional frameworks were put in place to allow a group of member states with the political will to foster integration to bypass the veto of unwilling countries.<sup>156</sup>

Variable geometry was incorporated in the EU law and is now referred to as the provision for enhanced cooperation.<sup>157</sup> Enhanced cooperation is to be used when the objectives of such

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<sup>151</sup> Leach (n 14)

<sup>152</sup> Lloyd (n 80) 53.

<sup>153</sup> Carlo Maria Cantore 'We're one, but we're not the same: Enhanced cooperation and the tension between unity and asymmetry in the EU.' Available at <[http://on-federalism.eu/attachments/103\\_download.pdf](http://on-federalism.eu/attachments/103_download.pdf)> accessed on 31<sup>st</sup> May, 2015.

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> *ibid.*

<sup>157</sup> Lloyd (n 80) 54. Enhanced cooperation allows those countries of the union that wish to continue to work more closely together to do so, while respecting the legal framework of the Union. See <[http://europa.eu/legislation\\_summaries/glossary/enhanced\\_cooperation\\_en.htm](http://europa.eu/legislation_summaries/glossary/enhanced_cooperation_en.htm)> accessed on 26<sup>th</sup> May, 2015.

cooperation cannot be attained within a reasonable period by the Union as a whole.<sup>158</sup> It therefore aims at accelerating the building of Europe for the most ambitious member states while leaving the door open to other member states wishing to join them at a later stage.<sup>159</sup> When such cooperation is being debated all EU Council members may participate but only EU Council members of the member states participating in the enhanced cooperation are to vote.<sup>160</sup> Variable geometry therefore allows countries to opt out of policies rather than being obliged to choose between vetoing them or accepting a majority verdict.<sup>161</sup>

### **2.2.1 Application of variable geometry in the EAC**

The principle of variable geometry, as held by the EACJ, is a strategy of implementing Community decisions and not a decision making mechanism.<sup>162</sup> The EACJ further explained that “*variable geometry allows the Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so.*”

Although the principle of variable geometry is provided for in the EAC Treaty and the EACJ has given an advisory opinion on its application, it appears that there are no guidelines to guide Partner States when applying it. From the interviews conducted, 70 per cent of the respondents stated that there are no guidelines on how variable geometry is to be applied while the rest were not sure if such guidelines existed. Despite the lack of guidelines on its application, all respondents agreed that Kenya, Uganda and Rwanda proceeded under variable geometry in the implementation of projects under the NCIP.

As earlier mentioned the integration stages of the EAC include establishment of a customs union, a common market, a monetary union and eventually a political federation.<sup>163</sup> Despite the customs union being established in 2005 and the common market in 2010, EAC Partner States were still

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<sup>158</sup> Article 20 (2) of The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon (2007) Title IV Enhanced Cooperation

<sup>159</sup> See <[http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0018\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0018_en.htm)> accessed on 8<sup>th</sup> June, 2015.

<sup>160</sup> Article 20 (3) of The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon (2007) Title IV Enhanced Cooperation

<sup>161</sup> Leach (n 122) 252. See also <<http://www.euro-know.org/europages/dictionary/v.html>> accessed on 31<sup>st</sup> May, 2015.

<sup>162</sup> Advisory Opinion (n 17) 34.

<sup>163</sup> Beatrice Kiraso ‘EAC Integration and the Enabling Peace and Security Architecture’ (EAC Peace and Security Conference, Kampala Uganda, 5<sup>th</sup> October, 2009.

lagging behind in meeting their obligations under these two stages. The view generally held by the respondents was that the move by Kenya, Uganda and Rwanda to use variable geometry was mainly due to the slow pace of implementation of Community Projects. The three Partner states were therefore using this approach at the point of implementation to avoid the veto challenge that comes with consensus. The reason being, by applying variable geometry, only the Partner States who are ready to implement these projects are involved at the point of deciding the way forward. The three Partner States were therefore taking Community projects and fast tracking their implementation without being held back by the other Partner States who were not ready to implement them at that time.

One of the projects that the three Partner States undertook involved fast tracking the free movement of persons. They did this by issuing a single tourist visa<sup>164</sup> to ease movement of tourists among them. They also implemented the use of national identification cards (IDs) as travel documents within the three countries to ease movement of their citizens. Under the Common Market Protocol a citizen of a Partner State wishing to travel to another Partner State is allowed to do so using a valid common standard document.<sup>165</sup> The Common Market Protocol then permits Partner States agreeable to using machine readable and electronic identity cards as travel documents to do so and to work out modalities to this effect.<sup>166</sup> Kenya, Uganda and Rwanda were ready to implement this but Tanzania was not and it had indicated its position on issues concerning employment and immigration.<sup>167</sup> The three Partner States therefore undertook implementation of these projects without being held back by the other Partner States who were not ready at the time. Although the Common Market Protocol came into force on 1<sup>st</sup> July, 2010 the use of IDs as travel documents was effected on 1<sup>st</sup> January, 2014.<sup>168</sup> This may have taken longer if Kenya, Uganda and Rwanda had not proceeded under variable geometry.

The activities of the three Partner States have had a positive impact because in the absence of variable geometry they may have taken even longer to be implemented. These activities have

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<sup>164</sup> See the 4<sup>th</sup> Northern Corridor Integration Projects Summit Joint Communiqué at page 3. Available at <<http://www.nciprojects.org/sites/default/files/downloads/4th%20Joint%20Communique.pdf>> accessed on 4<sup>th</sup> August, 2015.

<sup>165</sup> Article 9.

<sup>166</sup> Article 9 (2) and (3).

<sup>167</sup> Speech by His Excellency Jakaya Mrisho Kikwete (n 30) 13.

<sup>168</sup> See the 2<sup>nd</sup> Infrastructure Summit Joint Communiqué at page 3. Available at <<http://www.nciprojects.org/sites/default/files/downloads/2nd%20COMMUNIQUE.pdf>> accessed on 4<sup>th</sup> August, 2015.

also brought a lot of efficiency. For instance, by having a single tourist visa, the Partner States are able to market the region as one destination. Consequently, tourists get a better package that allows them to visit the various Partner States through the use of the single tourist visa.<sup>169</sup>

Despite this success, there is need for the EAC to lay out guidelines on how variable geometry is to be applied in future to ensure that no Partner State feels sidelined as this could result in mistrust and also trigger internal conflict. The risk of this arising could be seen in the speech delivered by President Kikwete to his Parliament. An example is when he questioned why the three Partner States had met to decide on issues concerning and strengthening the stability of the EAC based on discrimination.<sup>170</sup>

### **2.2.2 The impact of variable geometry on the integration process**

Looking at the implementation of variable geometry in regional integration, it becomes apparent that some member states will move forward while others are left behind. This is a situation that attracts support as well as opposition from those engaged in the integration process. Those who support variable geometry can be put into two groups. The first group comprises of the integrationist who want to accelerate the integration process without being held back by the slower member states.<sup>171</sup> The integrationists expect that the slower member states will follow later and that what the community has acquired will ensure that there is no regression to national individualism.<sup>172</sup>

The second group comprises of member states that wish to slow or halt the integration momentum but are prepared to allow others to go ahead provided that they themselves can be left out of policies they consider unsuitable to their national interests.<sup>173</sup> The ability to safeguard national interests without frustrating the integration process is an important feature of variable geometry. This is especially so when addressing the challenge posed by national interests at the point of decision making by consensus and the potential for this to slow down the integration

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<sup>169</sup> Interview with respondent 10 on 27<sup>th</sup> August, 2015. See also the 10<sup>th</sup> Northern Corridor Integration Projects Summit Joint Communique at page 3. Available at <<http://www.nciprojects.org/sites/default/files/downloads/10th%20Summit%20Communique.pdf>> accessed on 4<sup>th</sup> August, 2015.

<sup>170</sup> Speech by His Excellency Jakaya Mrisho Kikwete (n 22) 9.

<sup>171</sup> Leach (n 14) at 251 and Advisory Opinion (n 17) 13.

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*

process. Variable geometry therefore allows a member state to safeguard its national interests without slowing down the pace of integration.

Those opposed to variable geometry can also be divided into two groups. The first group comprises of those who fear that variable geometry will create a privileged inner circle of decision makers from which they will be excluded.<sup>174</sup> The second group comprises of those who fear that they will end up being forced to participate in an unwanted process of deeper integration.<sup>175</sup> There is a final group that falls between the proponents and opponents of variable geometry which believes institutionalized flexibility may lead to the break-up of the community or transform it into a free trade area.<sup>176</sup>

It is clear from the above that variable geometry permits member states to safeguard their national interests without frustrating the integration process. This is done by permitting the integrationists to accelerate the integration process while at the same time accommodating member states that wish to slow or halt the integration momentum but are prepared to allow others to go ahead to do so. The effect of this is that a member state may lag behind as the rest forge ahead. However, such a member state gets to participate when such cooperation is being debated hence is part of the process and is only left out when the rest are implementing it.

Further, such a member state is permitted to join the rest when it is ready and it can exercise this option at its own pace without holding back the rest. Consequently, member states are given an avenue to ensure that they do not lag behind permanently. This then shows that variable geometry is a principle of flexibility that permits for progression among a sub-group without locking out the rest. However, it ought to be implemented under the regulation of laid down guidelines to avoid conflict among member states.

### **2.3 Reconciling the consensus approach with the variable geometry approach**

The dilemma on the application of the principle of variable geometry as provided in the EAC Treaty and the application of this principle *vis-a-vis* the requirement for consensus in decision making is one that was faced by the EAC Council of Ministers when seeking an advisory opinion

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<sup>174</sup> *ibid.*

<sup>175</sup> *ibid.*

<sup>176</sup> *ibid.*

from the EACJ.<sup>177</sup> In determining this matter, the EACJ found that consensus is a decision making mechanism while variable geometry is a strategy for implementation.<sup>178</sup> The EACJ further held that variable geometry can comfortably apply and was intended to guide the integration process and therefore it does not conflict with consensus in decision making.<sup>179</sup> Consensus and variable geometry have been used together within the EAC where decisions are reached using consensus and implemented using the variable geometry approach.

Despite the possibility of applying the two together in deepening integration, there is the question of the practicality of this approach in sustaining the pace of integration. The reason being, the application of consensus in the EAC as the main decision making approach has slowed down the pace of integration. Variable geometry on the other hand has come in to fast track the pace of integration by allowing some Partner States to move ahead with implementation without being held back by the rest. While consensus causes the entire bloc to move at the pace of the slowest state, variable geometry allows a group of partner states to move at the pace of the faster states. It then appears that whereas consensus slows down the pace of integration, variable geometry comes in to fast track the pace of integration at the point of implementation. It then becomes difficult to reconcile the two approaches as their impact on the pace of integration appears to be in stark contrast.

Since decision making precedes implementation, the decision making mechanism that has been adopted primarily sets the pace of integration. Variable geometry as an implementation strategy can only come in to fast track the implementation of an issue that has already been decided by the Community as a whole. This can be seen where President Kikwete stated that Tanzania did not have any contention with the use of IDs as travel documents and the use of a single tourist visa because all Partner States had agreed that the ones ready to start could go ahead.<sup>180</sup>

Seeing that consensus and variable geometry have very different impacts on the pace of integration, it then becomes a challenge to maintain the two in sustaining the integration momentum. This then makes it necessary to have a decision making mechanism that does not

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<sup>177</sup> Advisory Opinion (n 17) 1.

<sup>178</sup> *ibid* 30.

<sup>179</sup> *ibid* 34.

<sup>180</sup> Speech by His Excellency Jakaya Mrisho Kikwete (n 30) 10.



frustrate the integration process to ensure that the pace of integration is maintained from the point of decision making to the point of implementation.

#### **2.4 Resolving the Consensus Challenge in the EAC**

On the issue of adopting a different decision making mechanism, 60 per cent of the respondents were of the view that consensus should be maintained while the other 40 per cent were of the view that it should be completely done away with. The respondents who wanted consensus to be completely done away with were of the view that decision making is a very slow process that is time consuming and results in wastage of money especially where a meeting lacks quorum.<sup>181</sup>

The respondents who wanted consensus to be maintained were of the view that despite consensus slowing down the integration process, it has its advantages. For instance, consensus ensures that the views of all Partner States are taken into consideration hence the feeling of collective achievement. The overall result is the unity of the Community as Partner States do not feel that decisions are being imposed on them. However, under the category of the respondents that wanted consensus to be maintained, 33 per cent qualified their position and were of the view that consensus ought to be maintained if directions are given on how it is to be applied. These respondents were also of the view that, since Partner States make equal contributions, they should have equal decision making power but if there was a change in contribution then consensus can be done away with. This would essentially introduce weighted voting in the EAC.

One of the fundamental principles of the EAC as provided by the EAC Treaty is that of sovereign equality.<sup>182</sup> Weighted voting has been criticized as being incompatible with the principle of sovereign equality.<sup>183</sup> It is a system that has been used by the International Monetary Fund and the World Bank and in these organizations; the principle of sovereign equality has all but disappeared.<sup>184</sup> The challenge posed by this approach is that it is biased against the less financially able partner states.<sup>185</sup> For instance in the EAC, if two Partner States that contributed

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<sup>181</sup> Interview with respondents 1 and 6 held on 24<sup>th</sup> June and 16<sup>th</sup> July, 2015 respectively.

<sup>182</sup> Article 6 (a)..

<sup>183</sup> Sergei A. Voitovich, *International Economic Organization in the International Legal Process* (Martinus Nijhoff Publishers 1994) at 78.

<sup>184</sup> Nigel D. White, *The Law of International Organizations* (Manchester University Press 2005) at 131.

<sup>185</sup> Dennis Leech and Robert Leech 'A new analysis of a priori voting power in the IMF: Recent quota reforms give little cause for celebration' (2012) Warwick Economic Research Paper No. 1001. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.303.1412&rep=rep1&type=pdf> accessed on 30<sup>th</sup> September, 2015.

the highest amounts (which translates to more votes under this system) were opposed to a Community issue, they would be able to veto it although the other three Partner States were agreeable to it. In this case the minority would be dominating Community decisions on the basis of their contribution. It then poses the risk of the financially stronger countries imposing their way by vote hence violating the principle of sovereignty.<sup>186</sup> One limitation that weighted voting cannot operate without is that it should not legalize domination of one or a few partner states.<sup>187</sup>

The principle of ‘one state one vote’ under which sovereign equality seems to be respected<sup>188</sup> is an alternative that the EAC should consider. This is a system that might encourage those partner states that are opposed to an issue to compromise as opposed to being out voted and ending up with a decision that they completely object to.<sup>189</sup> It will then ensure that the pace of integration of the EAC is not curtailed through the exercise of veto power while Partner States still enjoy sovereign equality. The possibility of voting in the EAC is one that has been provided for in Protocol on Decision Making by the Council of the EAC where it states that “*all other decisions of the Council shall be by simple majority.*”<sup>190</sup> However, as earlier stated, the practice in the EAC has been to reach decisions unanimously and where a decision is not reached in the Council it is referred to the Summit to make the final decision.

Considering the above and the advantages of consensus as earlier discussed, it is hard to completely do away with consensus despite its slowing down the pace of integration. The EAC should then consider maintaining consensus on specific issues and moving to majority voting on the rest. This will go a long way in sustaining the pace of integration while at the same time accommodating the views of all EAC Partner States when deliberating sensitive issues.

## 2.5 Conclusion

This chapter has looked at the application of consensus and variable geometry in regional integration. The aim being to demonstrate that the two cannot always work together to support the pace of integration. Consensus as a decision making mechanism aims at placing all

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<sup>186</sup> Barry O’Neil and Bezalel Peleg ‘Voting by count and account: Reconciling power and equality in international organizations’ (2000). Available at <[http://www.sscnet.ucla.edu/polisci/faculty/boneill/index\\_files/c&a.html](http://www.sscnet.ucla.edu/polisci/faculty/boneill/index_files/c&a.html)> accessed on 30<sup>th</sup> September, 2015.

<sup>187</sup> Voitovich (n 183) at 78.

<sup>188</sup> Jan Klabbers and Asa Wallendahl (ed), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing Limited 2011)

<sup>189</sup> White (n 184) at 134

<sup>190</sup> Article 2(2).

participants on an equal footing by ensuring that their views are taken into consideration before a decision is reached. This means that a partner state can reject an issue that goes against its national interests despite other partner states supporting it. The outcome is that the pace of integration is determined by the slowest state. This shows that consensus plays an integral part in determining the pace of integration.

Variable geometry then comes in to allow partner states that are willing and are able to implement an issue to do so without being held back by those that are not ready. This has been illustrated using the projects undertaken under the NCIP where Kenya, Uganda and Rwanda undertook implementation of Community projects without being held back by Tanzania and Burundi who were not ready at the time to implement them. Although variable geometry has its benefits in fast tracking the pace of integration, it should be adopted in a manner that maintains cohesiveness to avoid mistrust and conflict.

As has been discussed, consensus comes in at the point of decision making while variable geometry is mainly utilized at the point of implementation. Since what is decided at Community level is what will be implemented, the decision making mechanism in place has the greatest impact on the pace of integration. This chapter has then illustrated why it is necessary to have a decision making mechanism that does not slow down the pace of integration and which can work together with variable geometry in supporting the pace of integration. This will ensure that the integration momentum is sustained from the point of decision making to the point of implementation.

## CHAPTER THREE

### THE ASEAN AND EU APPROACH TO IMPLEMENTATION OF CONSENSUS AND VARIABLE GEOMETRY

#### 3.0 Introduction

The decision making mechanism utilized by a regional bloc plays an integral part in determining its pace of integration. This chapter looks at the decision making mechanism adopted by ASEAN and EU and how the two have adopted variable geometry. The aim being to determine the lessons the EAC can adopt from these two regional blocs.

ASEAN, just like the EAC uses consensus as its main decision making mechanism. Its choice of consensus in decision making can be traced back to the period when it was established. Considering that ASEAN has almost twice the number of member states as the EAC, it is looked at in determining the viability of this decision making mechanism as the EAC continues to grow. Still under ASEAN, the Minus X Formula is looked at as its objectives are similar to those of variable geometry. The aim for this is to assess whether the application of the Minus X Formula while still maintaining consensus as the major decision making mechanism has enabled ASEAN sustain the integration momentum.

The EU is then looked at as it has over time moved away from unanimity as its main decision making mechanism to largely using QMV. This is an approach that enables member states to avoid the veto challenge at the point of decision making. Variable geometry, which developed in this regional bloc, is also looked at and how it has been implemented. The aim for this, is to assess how the application of variable geometry together with QMV has enabled the EU sustain the pace of integration.

#### 3.1 Establishment of ASEAN

ASEAN was founded on 8<sup>th</sup> August, 1967.<sup>191</sup> This was not done through the signing of a legally binding treaty but through a declaration commonly referred to as the Bangkok Declaration of

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<sup>191</sup>See 1967 ASEAN Declaration available at <<http://cil.nus.edu.sg/rp/pdf/1967%20ASEAN%20Declaration-pdf.pdf>> accessed on 24<sup>th</sup> June, 2015.

1967.<sup>192</sup> At the point of establishment, ASEAN comprised of five states (Malaysia, Indonesia, Singapore, Philippines and Thailand) all of which were engaged in the process of nation building.<sup>193</sup> What these nations had in common was that they all faced internal and external security threats and they were all concerned about national sovereignty.<sup>194</sup> ASEAN was therefore formed to contribute to the stability of the state system without interfering with domestic affairs.<sup>195</sup>

ASEAN's founding members were reluctant to cede any authority to the regional organization due to the circumstances arising at the time of its formation.<sup>196</sup> ASEAN has therefore been described as having member states whose leaders have little experience in sharing political power with a supranational organization.<sup>197</sup> As a result, ASEAN does not have a supranational institution to pool members' sovereignty hence ASEAN member states never have to compromise their sovereignty.<sup>198</sup>

### 3.1.1 Decision making in ASEAN

The reluctance of ASEAN member states to cede some of their sovereign power is reflected in ASEAN's major decision making organs which are similar to those in the EAC. There is the ASEAN Summit, which comprises of the Heads of State or Government of the member states, and is the supreme policy-making body of ASEAN.<sup>199</sup> Part of its duties include; deliberating, providing policy guidance and taking decisions on key issues pertaining to the realization of the objectives of ASEAN.<sup>200</sup> There is also the ASEAN Coordinating Council which comprises of

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<sup>192</sup> See 1967 ASEAN Declaration available at <<http://cil.nus.edu.sg/rp/pdf/1967%20ASEAN%20Declaration-pdf.pdf>> accessed on 24<sup>th</sup> June, 2015.

<sup>193</sup> Kim Hyung Jong 'ASEAN Way and its implications and challenges for regional integration in Southeast Asia' (2007) 12 Jati. Available at <<http://repository.um.edu.my/1073/1/Kim%20Hyung%20Jong-ASEAN%20Way%20and%20Its%20Implications%20and%20Challenges%20for%20Regional%20Integration%20in%20Southeast%20Asia.pdf>> accessed on 10<sup>th</sup> May, 2015. The five states together with Cambodia, Myanmar, Vietnam, Brunei Darussalam and Lao People's Democratic Republic are the current ASEAN member states. See <<http://www.asean.org/asean/asean-member-states>> accessed on 21<sup>st</sup> June, 2015.

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid.*

<sup>196</sup> Justyna Szczudlik – Tatar 'Regionalism in East Asia: A Bumpy Road to Asian Integration' (2013) The Polish Institute of International Affairs Policy Paper No. 16 (64), 2.

<sup>197</sup> Kurlantzick (n 68) 14.

<sup>198</sup> Jong (n 193) 19.

<sup>199</sup> Article 7(1).

<sup>200</sup> Article 7 (2).

ASEAN Foreign Ministers. Its duties include the coordination and implementation of agreements and decisions of the ASEAN Summit.<sup>201</sup>

Apart from the decision making organs, there is the ASEAN Way which has a great bearing on decision making in ASEAN. The ASEAN Way is a term that has been used to describe the development and practices of ASEAN.<sup>202</sup> It prioritizes, among other things, preservation of sovereignty, consensus decision making and national identity of all nations.<sup>203</sup> Under the ASEAN Way the decision making procedure is strictly intergovernmental, based on consensus and consultation.<sup>204</sup> Consultation and consensus as part of the ASEAN Way is provided for under the ASEAN Charter. The Charter does this by providing that, ‘as a basic principle, decision making in ASEAN shall be based on consultation and consensus.’<sup>205</sup> Consensus will be reached if there are enough members that support it and not all need to agree to it. Consensus will only be blocked where one or more members perceive an issue as being injurious to their national interests and they completely oppose it.<sup>206</sup>

The emphasis on consensus encourages the removal of contentious issues and allows member states to focus on matters that have the potential of cooperation.<sup>207</sup> The ASEAN Way has therefore been described as a willingness to see the point of view of another and persevere in reaching consensus without exerting influence over other member states.<sup>208</sup> This then ensures that the voices of all participants are heard as opposed to the stronger states drowning out the voices of the weaker states. This approach has proven useful in solving problems, harmonizing

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<sup>201</sup> Article 8 (2) (b).

<sup>202</sup> Jong (n 193) 18.

<sup>203</sup> Tatar (n 196) 2. The ASEAN Way also prioritizes non-interference in internal affairs, mutual respect for the independence, equality and territorial integrity.

<sup>204</sup> *ibid.*

<sup>205</sup> Article 20 (1).

<sup>206</sup> Rodolfo C. Severino *Southeast Asia in search of an ASEAN Community: Insights from the former ASEAN secretary-general* (ISEAS 2006) Available at [https://books.google.co.ke/books?id=D2m74ag0ixgC&pg=PA31&lpg=PA31&dq=what+led+to+the+ASEAN+minus+X+principle&source=bl&ots=nKdotMldHE&sig=O234g4iNJw8YA1Yf35iQvRfqUM&hl=en&sa=X&ei=pQiRVbruHsPe7Aalm7vQDw&redir\\_esc=y#v=onepage&q=what%20led%20to%20the%20ASEAN%20minus%20X%20principle&f=false](https://books.google.co.ke/books?id=D2m74ag0ixgC&pg=PA31&lpg=PA31&dq=what+led+to+the+ASEAN+minus+X+principle&source=bl&ots=nKdotMldHE&sig=O234g4iNJw8YA1Yf35iQvRfqUM&hl=en&sa=X&ei=pQiRVbruHsPe7Aalm7vQDw&redir_esc=y#v=onepage&q=what%20led%20to%20the%20ASEAN%20minus%20X%20principle&f=false) accessed on 29<sup>th</sup> June, 2015.

<sup>207</sup> Kei Koga ‘The normative power of the “ASEAN Way”: Potentials, limitations and implications for East Asian Regionalism’ (2010) *Southeast Asia Winter*. Available at <http://web.stanford.edu/group/sjeaa/journal101/w2010-SEA1.pdf> accessed on 31<sup>st</sup> August, 2015.

<sup>208</sup> *ibid.*

diverging interests and managing conflicts among member states<sup>209</sup> with member states being able to forego any initiatives that run contrary to their national interests.

Despite the success that the ASEAN Way has achieved, there is the perception that consensus based decision making has become a weakness that limits the growth of ASEAN as an organization especially where it confronts differing opinions.<sup>210</sup> This is because decision making is based on the principle that national interests take precedence over regional interests regardless of the circumstances.<sup>211</sup> Consequently ASEAN only adopts policies that all member states agree with<sup>212</sup> and when member states are unable to reach agreement, decisions are simply deferred.<sup>213</sup> This makes it very difficult for the ASEAN Way to promote deeper cooperation in contentious matters due to its soft approach.<sup>214</sup> The outcome of this approach is that consensus reached is normally the lowest and at times the slowest common denominator.<sup>215</sup> Due to using consensus as the main decision making mechanism, ASEAN is said to be suffering from the convoy problem in which the bloc's pace of integration is determined by the most hesitant member state.<sup>216</sup>

By adopting consensus as the main decision making mechanism, ASEAN is viewed as losing its competitiveness especially when it comes to coping with the rapid pace of economic change.<sup>217</sup> This can be attributed to the fact that due to consensus, ASEAN is constrained to moving at the pace of the slowest member state which means that the organization cannot keep up with the global economic changes. Consensus based decision making has therefore become a weakness limiting the growth of ASEAN as an organization hence the need to look at alternative ways of integrating without being held back by the slowest moving member state.

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<sup>209</sup> *ibid* 14, 15.

<sup>210</sup> Koga (n 207) 89.

<sup>211</sup> W. Andrew Axline *The Political Economy of Regional Cooperation : Comparative Case Study* (Pinter 1994)

<sup>212</sup> Lee Leviter 'The ASEAN Charter: ASEAN Failure or Member Failure?' 43 *International Law and Politics*.

<sup>213</sup> *ibid*.

<sup>214</sup> Koga (n 207) 90.

<sup>215</sup> Guan (n 62) 88.

<sup>216</sup> *ibid*.

<sup>217</sup> Obaid Ul-Hussan 'ASEAN: A Complex Phenomenon in a Complex Region' *EU-Asia at a Glance Publication Series* available at <<http://www.eias.org/sites/default/files/EU-Asia-at-a-glance-Obaid-Ul-Hassan-ASEAN.pdf>> accessed on 30<sup>th</sup> June, 2015.

ASEAN is said to be facing a dilemma on the practicality of the ASEAN Way. If ASEAN maintains the ASEAN Way, its member states' political solidarity will benefit but it will continue facing the limitation of cooperation. If it does away with the ASEAN Way, there may be deeper cooperation but its member states' political solidarity will be affected and in turn weaken cooperation.<sup>218</sup> This dilemma then shows that deepening cooperation while maintaining consensus as the main decision making mechanism may be futile. Hence, the need for a decision making mechanism that deepens integration without harming political solidarity. This is perhaps the reason why the ASEAN Charter in Article 20 (2) provides that “*where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.*” This opens the possibility of voting if the ASEAN Summit so decided.<sup>219</sup>

### **3.1.2 Implementation of the Minus X formula in ASEAN**

The Minus X Formula was adopted by ASEAN as a way of achieving more flexibility<sup>220</sup> and is expressly provided for under the provisions of implementation and procedure under the ASEAN Charter.<sup>221</sup> In assisting the organization to go around the consensus challenge, this principle allows member states that are ready to move forward with liberalization to do so without being held back by the slower states.<sup>222</sup> It does this by allowing some member states to opt out of policies so that those who want to move ahead can do so without being held back by those that are unwilling to adopt such policies.<sup>223</sup> This is a mechanism that is used to facilitate enhanced cooperation and has the same objectives as variable geometry.

The Minus X Formula is based on the principle laid down in the Framework Agreement on Enhancing ASEAN Economic Cooperation (AEC), which the ASEAN leaders signed in

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<sup>218</sup> Koga (n 207) 91.

<sup>219</sup> Tommy Koh, Rosario G Manalo and Walter Woon (eds) *The Making of the ASEAN Charter* (World Scientific Publishing Co. Pte. Ltd 2009).

<sup>220</sup> Pei-Fei (Veronica) Chang ‘Enhanced cooperation in the EU and ASEAN? Provision of enhanced cooperation in the European Union in comparison to similar institutional developments in the Association of Southeast Asian Nations’ (2008) 2 (2) *Political Perspectives*. Available at <<http://www.politicalperspectives.org.uk/wp-content/uploads/2010/08/Vol2-2-2008-5.pdf>> accessed on 1<sup>st</sup> July, 2015. The ASEAN Chamber of Commerce and Industry delivered a proposal in 1986, seeking for more flexibility in the ASEAN decision making method through the Minus X Formula.

<sup>221</sup> Article 21.

<sup>222</sup> Guan (n 62) 89.

<sup>223</sup> Chang (n 220).



Singapore on 28<sup>th</sup> January, 1992.<sup>224</sup> This principle provides that “*All member states shall participate in intra ASEAN economic arrangements. However, in the implementation of these economic arrangements, two or more member states may proceed first if other member states are not ready to implement these arrangements.*”<sup>225</sup> One of the areas of cooperation under AEC is the establishment of an ASEAN Free Trade Area (AFTA) within fifteen years.<sup>226</sup> There is then the ASEAN Framework Agreement on Services, 1995 (AFAS) which came in to help achieve trade in services in furtherance of AFTA.

One area where the Minus X Formula has been applied is in the implementation of the AFAS. The ASEAN Minus X Formula was introduced in the Protocol to Amend the ASEAN Framework Agreement on Services, 2003 with the aim of accelerating market access among members.<sup>227</sup> This was done during the ASEAN Economic Ministers retreat on 6<sup>th</sup> July, 2002 where Malaysia called for a 10 Minus X Principle (later renamed as the ASEAN Minus X Formula) to be applied in services negotiation with the desire of expediting liberalization of trade in services.<sup>228</sup> The implementation of the AFAS had been slow as ASEAN member states were reluctant to liberalize their service sectors. This impasse resulted in the introduction of the Minus X Formula<sup>229</sup> as member states desired to expedite the liberalization of trade in services within ASEAN.<sup>230</sup> The Minus X Formula then came in to allow a pair or group of ASEAN member states which were ready to open any service sector to proceed to do so without concession from other member states that were not ready.<sup>231</sup>

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<sup>224</sup> Severino (n 206) 31.

<sup>225</sup> Article 1 (3).

<sup>226</sup> Article 2 (1) of the Framework Agreement on Enhancing ASEAN Economic Cooperation.

<sup>227</sup> Suthiphand Chiratjivat and Piti Srisangnam ‘The 2030 architecture of Association of Southeast Asian Nations Free Trade Agreements’ (2013) ADBI Working Paper Series No. 419. Available at <<http://www10.iadb.org/intal/intalcdi/PE/2013/11830.pdf>> accessed on 29<sup>th</sup> June, 2015.

<sup>228</sup> ASEAN integration in services Jakarta : ASEAN Secretariat, August 2009. Available at <<http://www.asean.org/archive/Publication-Integration-in-Services.pdf>> accessed on 6<sup>th</sup> June, 2015.

<sup>229</sup> Kiichiro Fukasaku, Masahiro Kawai, Michael G. Plummer and Alexandra Trzeciak – Duval (ed) *Policy Coherence towards East Asia Development Challenges for OECD countries*. (OECD Publishing 2005), 539. Available at

<[https://books.google.co.ke/books?id=kZfVAgAAQBAJ&pg=PA539&lpg=PA539&dq=why+was+the+minus+x+formula+introduced+in+the+ASEAN+framework+agreement+on+services&source=bl&ots=eKKNXwPCqd&sig=uO71lh8ACjO8\\_8bIkKiF4fk&hl=en&sa=X&ei=IXKbVfurN8nU7AaB4IGQDg&redir\\_esc=y#v=onepage&q=why%20was%20the%20minus%20x%20formula%20introduced%20in%20the%20ASEAN%20framework%20agreement%20on%20services&f=false](https://books.google.co.ke/books?id=kZfVAgAAQBAJ&pg=PA539&lpg=PA539&dq=why+was+the+minus+x+formula+introduced+in+the+ASEAN+framework+agreement+on+services&source=bl&ots=eKKNXwPCqd&sig=uO71lh8ACjO8_8bIkKiF4fk&hl=en&sa=X&ei=IXKbVfurN8nU7AaB4IGQDg&redir_esc=y#v=onepage&q=why%20was%20the%20minus%20x%20formula%20introduced%20in%20the%20ASEAN%20framework%20agreement%20on%20services&f=false)> accessed on 7<sup>th</sup> July, 2015.

<sup>230</sup> See the Preamble to the Protocol to amend the ASEAN Framework Agreement on Services.

<sup>231</sup> Chiratjivat and Srisangnam (n 227) 8.

To achieve this, the Protocol amended the AFAS by adding a new “Article IV bis” immediately after the existing article IV. It provides that, “*notwithstanding the provisions of Article IV of this Framework Agreement, two or more member states may conduct negotiations and agree to liberalize trade in services for specific sectors or subsectors...*”<sup>232</sup> In doing so, the participating member states are expected to keep the remaining member states informed of the progress they have made. Also, any member state that is not a party to the agreement can become party to it in due course.<sup>233</sup> Article IV of the AFAS provides for negotiations on specific commitments and states that “*member states shall enter into negotiations on measures affecting trade in specific service sectors.*”<sup>234</sup>

It appears that under the AFAS negotiations were to involve all member states but with the amendment, negotiations could be conducted between two or more member states without necessarily requiring the participation of all member states. This provision is indicative of the frustration faced by member states that want to move ahead with implementation of an issue but are deterred by the slower states from doing so at the point of deliberating the way forward. The Minus X Formula appears to have dealt with this challenge under the AFAS by allowing two or more member states to negotiate without necessarily requiring the participation of the other member states who would have held them back.

Just like variable geometry, the Minus X Formula is an implementation strategy that ensures that the negotiation process is not stalled. The Minus X Formula thus allows ASEAN member states that are willing and able to implement specific projects to do so without being held back by other member states that are not ready hence playing a similar role as variable geometry.

### **3.1.3 Lessons for the EAC**

ASEAN and the EAC have striking similarities with regard to their decision making organs, their decision making mechanism and the approach they have taken in allowing flexibility at the point of implementation. Seeing that ASEAN has twice the number of member states as the EAC, the

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<sup>232</sup> Article 1 (1) of the Protocol to Amend the ASEAN Framework Agreement on Services.

<sup>233</sup> Article 1 (3) of the Protocol to Amend the ASEAN Framework Agreement on Services.

<sup>234</sup> Article IV (1) of the ASEAN Framework Agreement on Services.

question that arises is whether the EAC should maintain the same practices as it increases its membership and deepens integration. Although ASEAN has adopted the Minus X Formula, it is still unable to sustain the pace of integration. This has been attributed to its adoption of consensus as its major decision making mechanism.

This then shows that if a regional bloc adopts an implementation mechanism that allows it to fast track integration but still maintains a rigid decision making mechanism that slows down integration, the overall result will be a slow pace of integration. The reason being that decision making precedes implementation, so the pace of integration will be mainly hinged on decision making. Although at the point of implementation those willing to move ahead will be allowed to, their pace will already have been curtailed at the point of decision making.

As earlier mentioned, under the ASEAN Charter, where consensus cannot be reached the ASEAN Summit can look at alternative ways of making a decision. This shows that even the ASEAN Charter concedes that there are instances where alternative decision making mechanisms will have to be used if a regional bloc is to move forward. The EAC should then consider permitting the Summit, which is the highest EAC organ, to look at alternative ways of decision making where it is unable to reach consensus on an issue.

### **3.2 Decision making in the EU**

The main decision making organ in the EU is the European Council. It consists of the Heads of State or Government of the member states, its President, the President of the Commission and the High Representative of the EU for foreign affairs and security policy who also takes part in its work.<sup>235</sup> The role of the Commission is to promote general Union interests.<sup>236</sup> Although Council members first assert the interests of their respective governments, they still respect the needs of the EU as a whole and this is seen through the representation of the Commission in Council meetings. This then distinguishes the EU Council from an intergovernmental conference where national interests prevail over the common interests.<sup>237</sup> Unlike the EAC and ASEAN, the EU has managed to mitigate the challenge of placing national interests above regional interests

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<sup>235</sup> Article 15 (2) of the Treaty on European Union.

<sup>236</sup> Article 17 (1) of the Treaty on European Union.

<sup>237</sup> See <[http://europedia.moussis.eu/books/Book\\_2/2/4/3/index.tkl?all=1](http://europedia.moussis.eu/books/Book_2/2/4/3/index.tkl?all=1)> accessed on 31<sup>st</sup> August, 2015.

during decision making through the composition of its main decision making organ. Another area where the EU differs with the EAC and ASEAN is in the approach taken when making decisions.

The core reason for the differences between the EU and ASEAN in their progress towards market integration has been attributed to the differences in their decision making mechanism with the EU being able to pursue more rapid integration.<sup>238</sup> The decision making mechanism adopted by a regional bloc is key in sustaining the integration momentum. The reason being it determines whether member states that are willing to move forward are able to do so without being held back by unwilling member states. As has been discussed above, it is difficult to fast track integration when consensus is the main decision making mechanism as members of a regional bloc are constrained to moving at the pace of the slowest member state. An alternative decision making mechanism that has been suggested to deal with the consensus challenge is the adoption of majority voting.<sup>239</sup> This is a mechanism that the EU has managed to adopt over time and which it has managed to extend to most of its decision making.

### **3.2.1 Moving from unanimity to QMV**

Initially, decision making within the EU mostly required unanimity. This is first seen in the Treaty of Rome, 1957 which established the European Economic Community. This Treaty required the Council to reach most of its decisions unanimously although it also had provisions for QMV. Due to the unanimity requirement, the veto power of member states became a central feature in the EU. Those involved in the early integration process therefore argued that an ever closer union implied the erosion of the right of individual nations to veto legislation; otherwise progress could be blocked in the Council by a member state however small.<sup>240</sup> The EU eventually faced the reality of the challenges posed by unanimity in 1965 during the Empty Chair Crisis that was caused by President Charles De Gaulle of France.<sup>241</sup>

This crisis, as earlier mentioned, arose when President De Gaulle refused decisions to be taken by the EU Council when France found itself as the only member state that was against proposals

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<sup>238</sup> Bollinger (n 60) at 19.

<sup>239</sup> *ibid.*

<sup>240</sup> Leach (n 14) at 252.

<sup>241</sup> Bollinger (n 60) at 18.

made by the EU Commission on financing of the Common Agricultural Policy.<sup>242</sup> President De Gaulle's argument was that the loss of veto would expose France to be overruled by foreigners.<sup>243</sup> This led to the Luxembourg Compromise, 1966 which required that when a particular majority vote threatened vital national interests, discussions would be prolonged until a unanimous agreement was reached.<sup>244</sup> The Luxembourg Compromise, despite it not being legally binding, led to an unofficial practice of seeking unanimity which was done alongside the official procedure of majority voting.<sup>245</sup> The outcome of this practice was that unanimity ended up usurping the EU Council's majority voting procedure.<sup>246</sup> This then meant that EU decisions could be vetoed by any member state making it hard to move forward. With time the EU then started extending the policies that could be reached by majority voting.

### 3.2.2 The implementation of QMV in the EU

QMV is a voting procedure that roughly reflects the population size of a member state and therefore each member state is given a number of votes depending on its population size.<sup>247</sup> Initially a qualified majority would be reached where majority of the member states (this being fifteen member states) voted in favour of an issue; and a minimum of two hundred and sixty votes out of the total three hundred and fifty two votes were cast in favour of a decision.<sup>248</sup> This system was criticized for having such a high threshold for member states' approval resulting in limited proposals being approved.<sup>249</sup> The rules were revised and currently a qualified majority will be reached where fifty five percent of participating member states vote in favour and the

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<sup>242</sup> Hansin Dogan 'How are decisions made in the European Union?' available at <<http://80.251.40.59/politics.ankara.edu.tr/hdogan/essays/essay8.html>> also see <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:xy0025>> accessed on 9<sup>th</sup> July, 2015.

<sup>243</sup> Leach (n 14) 252.

<sup>244</sup> Andrew Moravcsik 'De Gaulle and Europe: Historical Revision and Social Science Theory' Harvard University Program for the Study of Germany and Europe Working Paper Series 8.5 at 62. Available at <[http://aei.pitt.edu/39396/1/PSGE\\_WP8\\_5.pdf](http://aei.pitt.edu/39396/1/PSGE_WP8_5.pdf)> accessed on 9<sup>th</sup> July, 2015.

<sup>245</sup> Kevin Mason 'European Community- Luxembourg Compromise- Council of the European Community ignores British Attempt to exercise implied veto power of Luxembourg Compromise' 13 G. j. Int'l & Comp. L.

<sup>246</sup> *ibid.*

<sup>247</sup> See Council of the European Union Voting System available at <<http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>> accessed on 20<sup>th</sup> July, 2015.

<sup>248</sup> See Council of the European Union Voting System available at <<http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>> accessed on 20<sup>th</sup> July, 2015.

<sup>249</sup> Eva-Maria Poptcheva and Conall Devaney 'Changed rules for qualified majority voting in the Council of the EU.' European Parliamentary Research Service available at <<http://eprthinktank.eu/2014/12/09/changed-rules-for-qualified-majority-voting-in-the-council-of-the-eu/>> accessed on 21<sup>st</sup> July, 2015.

proposal is also supported by at least sixty five percent of the total EU population.<sup>250</sup> There are also provisions that a blocking minority must include at least four members representing thirty five percent of the population of participating member states.<sup>251</sup> This then helps to avoid a situation where larger states come together to block a proposal based on their individual interests.

The Treaty of Rome had already made provision for majority voting<sup>252</sup> and how votes would be weighted where the EU Council opted for a qualified majority.<sup>253</sup> What the EU did was to pass Treaties which greatly extended the areas in which decisions could be taken by QMV. There is the Single European Act, 1986 which extended the application of QMV to cover single market measures, environment and the Economic and Monetary Union.<sup>254</sup> It also changed some provisions which initially required unanimity to now be adopted through QMV.<sup>255</sup> This then made decision making in the EU Council to be more efficient as it removed the unanimity requirement in some areas which had earlier hindered adoption of legislation.<sup>256</sup> This was vital in improving decision making because it made it harder for a single country to veto legislation.<sup>257</sup> Subsequent treaties either moved to or introduced QMV. For instance under the Treaty of Nice, forty six articles were moved or introduced subject to QMV.<sup>258</sup>

The advantage of using QMV was captured during the Intergovernmental Conference where it was acknowledged that as the EU grows in size decision making by unanimity can become more difficult and QMV can help make things easier.<sup>259</sup> The extension of the use of QMV in the EU has therefore eroded veto power by hindering individual member states from unilaterally

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<sup>250</sup> See Council of the European Union Voting System available at <<http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>> accessed on 20<sup>th</sup> July, 2015.

<sup>251</sup> Poptcheva and Devaney (n 249).

<sup>252</sup> Article 148 (1) provides that the EU Council shall act by a majority except where provided otherwise.

<sup>253</sup> Article 148 (2).

<sup>254</sup> Vaughne Miller 'The extension of qualified majority voting from the Treaty of Rome to the European Constitution' (2004) International Affairs and Defence Section Research paper 04/54 7, 8. Available at <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDOQFjADa\\_hUKEwjintOC\\_OrGAhXL8ROKHc6qBkw&url=http%3A%2F%2Fwww.parliament.uk%2Fbriefing-papers%2FRP04-54.pdf&ei=epKtVeL5GsvjU87VmuAE&usg=AFQjCNEyUSQCmdUpc1k4M4m\\_2bm5U-OBnQ&bvm=bv.98197061.d.ZGU](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDOQFjADa_hUKEwjintOC_OrGAhXL8ROKHc6qBkw&url=http%3A%2F%2Fwww.parliament.uk%2Fbriefing-papers%2FRP04-54.pdf&ei=epKtVeL5GsvjU87VmuAE&usg=AFQjCNEyUSQCmdUpc1k4M4m_2bm5U-OBnQ&bvm=bv.98197061.d.ZGU)> accessed on 20<sup>th</sup> July, 2015.

<sup>255</sup> For instance Article 16 amended Article 84 (2) of the Treaty establishing the European Economic Community by replacing the term unanimously with qualified majority.

<sup>256</sup> Re-launching the Single Market- European Union Committee available at <<http://www.publications.parliament.uk/pa/ld201011/ldselect/lduecom/129/12905.htm>> accessed on 20<sup>th</sup> July, 2015.

<sup>257</sup> See <[http://europa.eu/eu-law/decision-making/treaties/index\\_en.htm](http://europa.eu/eu-law/decision-making/treaties/index_en.htm)> accessed on 15<sup>th</sup> July, 2015.

<sup>258</sup> Miller (n 254) 15.

<sup>259</sup> *ibid* 9.

blocking measures that are unpopular at home. Instead, they have to team up with other member states that are likeminded so as to form a blocking minority and prevent adoption of an act.<sup>260</sup>

Further, the Treaty on European Union (TEU) provides that “*the Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.*”<sup>261</sup> The Treaty on the Functioning of the European Union (TFEU) further provides that “*where a vote is taken, any Member of the Council may also act on behalf of not more than one other member.*”<sup>262</sup> The advantage with this provision is that if a member state is unable to attend a meeting, voting will still proceed as another member state can act on its behalf.

Despite its advantages, there are those issues that still require unanimous voting. For instance the EU Council may determine by unanimity the existence of serious and persistent breaches by a member state of Community values.<sup>263</sup> Also, where a member state intends to oppose a decision that is to be reached by QMV due to vital and stated reasons of national policy, the matter may be referred to the EU Council for a decision by unanimity.<sup>264</sup> Although the EU has extended the use of QMV when reaching most of its decisions, it has still maintained the use of unanimity but only in the most sensitive issues such as defence, foreign policy, taxation and social security.<sup>265</sup> The EU has therefore managed to adopt a flexible decision making mechanism that enables it to deepen integration while still maintaining unanimity in certain areas. This then shows that a regional bloc can be able to maintain consensus or unanimity in some areas and still adopt a decision making mechanism that supports the pace of integration.

### **3.2.3 Application of variable geometry in the EU**

As earlier discussed, variable geometry is a concept that emerged in the EU which allowed a group of member states willing to foster integration to bypass the veto of unwilling member states.<sup>266</sup> Within the EU, variable geometry is provided for under provisions for enhanced

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<sup>260</sup> Miller (n 254) 8.

<sup>261</sup> Article 16(2).

<sup>262</sup> Article 239.

<sup>263</sup> Article 7 of the Treaty on the Functioning of the European Union.

<sup>264</sup> Article 31 of the Treaty on the Functioning of the European Union.

<sup>265</sup> See <<http://esharp.eu/jargon/qualified-majority-voting-qmv/>> accessed on 21<sup>st</sup> July, 2015.

<sup>266</sup> See chapter 2.

cooperation.<sup>267</sup>The EU not only makes provision for enhanced cooperation, it goes ahead to state how it is to be applied. This is unlike the approach taken by the EAC where variable geometry is mentioned in the EAC Treaty but no guidelines are given on its application.

Under the TFEU enhanced cooperation is to be adopted by the EU Council as a last resort after certain conditions are met. First, the EU Council needs to establish that the objectives of such enhanced cooperation cannot be attained by the Union as a whole. Second, at least nine members are ready to participate in the cooperation.<sup>268</sup> Once the above conditions are met, the next two stages involve deliberations and decision making. At the point of deliberation all EU Council members can participate but at the point of decision making only EU Council members representing member states participating in the enhanced cooperation can participate in voting for it.<sup>269</sup> This ensures that those not participating in the enhanced cooperation do not veto it.

Although the EU largely uses QMV, there are those instances where a decision is to be reached unanimously. The issue then is how some member states can move ahead under enhanced cooperation on an issue that requires unanimity. The reason being with unanimity all member states are expected to agree on an issue unlike QMV where only some need to have agreed on it. The EU, being aware of the challenge that unanimity poses at the point of decision making, has found a way of dealing with this when member states are engaging in enhanced cooperation. This is seen where the TFEU provides that where a certain decision is to be reached by unanimity then such unanimity is to be constituted by the votes of the representatives of the participating member states.<sup>270</sup>

This clarification on how unanimity is to be reached when member states are engaged in enhanced cooperation is important. The reason being, it moves us away from the usual requirement that all member states must agree for there to be unanimity to only participating member states are to decide on an issue for there to be unanimity. This then takes away any veto powers that non-participating member states may have over the process of enhanced cooperation. This requirement is similar where QMV is to be applied which guarantees consistency and equal treatment at the point of deciding how enhanced cooperation will be achieved.

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<sup>267</sup> See Chapter 2.

<sup>268</sup> Article 20(2).

<sup>269</sup> Article 20 (3).

<sup>270</sup> Article 330.



The above position was reiterated in the judgment of the Court of Justice of the EU in *Spain and Italy v Council*<sup>271</sup> in which Spain and Italy were requesting the Court to annul a decision by the EU Council. The decision in question was one where the EU Council authorized the use of enhanced cooperation in creating a single European Patent between twenty five EU member states out of twenty seven as Spain and Italy had refused to participate. One of the arguments advanced by Spain and Italy was that the EU Council, by authorizing enhanced cooperation, had circumvented the requirement of unanimity and brushed aside their objections to the proposals that had been made by the EU Commission regarding the language arrangement for the single European Patent.

The Court in finding that the EU Council had not circumvented the unanimity requirement explained that nothing prohibits the use of enhanced cooperation where the EU Treaties require use of unanimity. Where unanimity is to be used, then only the votes of the member states participating in the enhanced cooperation shall constitute unanimity. This case shows the advantages of having guidelines on how enhanced cooperation is to operate especially where the decision making mechanism allows for unanimity. The reason being, these guidelines offer clarity where some member states feel sidelined by the actions of the rest. The EAC should then consider having guidelines on how variable geometry is to be applied to avoid a situation where the application of variable geometry triggers internal conflict.

### **3.2.4 Lessons for the EAC**

The EU and EAC have taken very different approaches to integration. The difference between them is most apparent in their major decision making organs and mechanisms. In the EAC the composition of the main decision making organs makes them susceptible to placing national interests above regional interests. In the EU, this challenge is dealt with by having the Commission as part of the major decision making organ and this ensures that common interests are looked at during decision making.

When it comes to decision making, the EAC has adopted consensus as its major decision making mechanism which has caused it to continue facing the veto challenge. The EU on the other hand has moved away from unanimity to largely using QMV and has therefore managed to deal with

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<sup>271</sup> Joined cases C-274/11 and C-295/11 available at <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/cp130047en.pdf>> accessed on 21<sup>st</sup> July, 2015.

the veto challenge. The EU further permits its member states to act on behalf of other member states where a vote is taken. This minimizes the challenge of attaining quorum during meetings which currently affects the EAC.

The one similarity that the two blocs have is that they have made provisions on fast tracking integration. Despite this similarity, their pace of integration is markedly different. This difference may be attributed to their decision making mechanism which is their main point of departure. The EU appears to have managed to adopt a decision making mechanism that enables it to fast track integration. This mechanism works in tandem with its provisions for enhanced cooperation as both ensure that member states that are willing to move ahead are not held back at the point of decision making and at the point of implementation.

This is an approach that the EAC should consider adopting so as to ensure that member states are able to sustain the integration momentum from the point of decision making to the point of implementation. In doing so, the EAC should look at its circumstances and see whether it is able to move to a new decision making mechanism in all areas or in just specific areas. If the EAC is to maintain consensus decision making, then it should adopt a decision making structure that ensures that national interests do not prevail over Community interests at the point of decision making. It can do this by empowering the EAC Secretariat so it is able to represent the common interests of the Community at the point of decision making.

The EAC should also consider having guidelines on how variable geometry is to be adopted. This will ensure that any EAC Partner State that is dissatisfied with its application can look to these guidelines for clarity. Also in the event of court intervention, the decision reached will be based on laid down guidelines.

### **3.4 Conclusion**

This chapter has discussed the decision making mechanism adopted in ASEAN and EU the former having adopted consensus while the latter largely uses QMV. It has also looked at how the two have adopted a flexible implementation mechanism that allows some member states to move ahead with integration without being held back by other member states. The aim for this is to understand whether a flexible implementation mechanism can sustain the integration momentum despite the decision making mechanism in place.

Although enhanced cooperation and the Minus X Formula have similar objectives, the pace of integration in ASEAN is much slower than the EU. The difference in their pace of integration can therefore be traced to the decision making mechanism adopted by each as they are very different. Therefore, despite adopting a flexible implementation mechanism, a bloc's pace of integration may be curtailed by the decision making mechanism in place. Therefore there is need to ensure that the decision making mechanism in place is able to work together with a flexible implementation mechanism so as to sustain the pace of integration.

## CHAPTER FOUR

### FINDINGS, CONCLUSION AND RECOMMENDATIONS

#### 4.0 Findings

The main objective of this study was to analyze whether decision making by consensus and implementation by variable geometry can sustain the pace of integration of the EAC in line with established timelines. The research has shown that although it is possible to reach decisions by consensus and variable geometry be applied at the point of implementation, the two cannot always work together in sustaining the pace of integration. The reason being whereas consensus slows down the pace of integration, variable geometry comes in to fast track it. Therefore, since decision making tends to precede implementation, consensus will tend to slow down the pace of integration at this level. Although variable geometry will increase the pace of implementation, the pace of decision making will still play a major part in determining the overall pace of integration.

The secondary objectives of the study were two: to examine the decision making mechanism adopted by the ASEAN and EU and how they have implemented variable geometry in deepening regional integration so as to establish whether their approach is more expedient at accelerating the pace of integration in comparison to the EAC approach; and to determine if there is need for the EAC to move to a different decision making mechanism. The research reviewed various literature on the practice in the ASEAN and the EU. The research found that the practice in ASEAN was quite similar to that in the EAC and it had not served it well as its pace of integration was still slow. The EU's approach to integration was found to be markedly different from that taken by the EAC. This approach has enabled the EU to deepen and fast track integration. These findings brought out the need for the EAC to reconsider its approach to integration for it to be able to sustain the integration momentum. In addressing the above objectives, the study was able to answer the research questions which mirrored these objectives.

This study sought to test the following hypotheses. First, decision making by consensus slows down the pace of integration despite adoption of the variable geometry approach at the point of implementation. Second, deeper integration can only be achieved if there is an alternative mechanism to consensus decision making that is in harmony with variable geometry. These

hypotheses were proved in Chapter Two when looking at the impact of consensus and variable geometry on the integration process and also in Chapter Three when looking at ASEAN and the EU. The study found that although the two have applied variable geometry they have adopted different decision making mechanisms which have been the core difference in the progress they have made in achieving integration. The study found that decision making, which precedes implementation, greatly impacts the pace of integration. This then necessitates adoption of a decision making mechanism whose impact on the pace of integration is similar to that of variable geometry.

#### **4.1 Conclusion**

The primary focus of this study was to establish whether consensual decision making and implementation by variable geometry can sustain the pace of integration of the EAC. The aim being to determine whether there is need for the EAC to move to a different decision making mechanism. This study has shown that consensual decision making aims at placing all participants on an equal footing by ensuring that their views are taken into consideration before a decision is reached. Consequently, a partner state can reject an issue that goes against its national interests despite other partner states supporting it hence slowing down the pace of integration. Consensus therefore enables partner states to protect their national interests by slowing down the pace of integration.

Variable geometry on the other hand is an implementation strategy that allows partner states that are willing and are able to implement an issue to do so without being held back by those that are not ready. It does this by permitting the integrationists who want to accelerate the integration process to do so without being held back by the slower partner states which are allowed to be left out of policies they consider unsuitable to their national interests. Variable geometry therefore allows partner states to safeguard their national interests without frustrating the integration momentum.

Since what is decided at Community level is what will be implemented, the decision making mechanism in place has the greatest impact on the pace of integration. This makes it necessary for a regional bloc to have a decision making mechanism that does not slow down the pace of integration and which can work together with variable geometry in supporting the pace of

integration. This will ensure that the integration momentum is sustained from the point of decision making to the point of implementation.

In illustrating this position, this study has looked at practice in the ASEAN and EU, the aim of this being to determine the lessons the EAC can draw from the two blocs. ASEAN, just like the EAC, uses consensus as its main decision making mechanism. It has also adopted the Minus X Formula whose objectives are similar to those of variable geometry. The EU on the other hand has adopted QMV at the point of decision making, an approach that enables member states to avoid the veto challenge at the point of decision making. The EU has also adopted variable geometry at the point of implementation. As earlier noted in this study, the core reason for the differences between the EU and ASEAN in their progress towards integration has been attributed to the differences in their decision making mechanism with the EU being able to pursue more rapid integration. The comparison of the two regional blocs has revealed that the decision making mechanism adopted by a regional bloc is key in determining the integration momentum. The reason being, despite the two regional blocs adopting a similar implementation strategy, their progress towards integration is markedly different and this can be attributed to the decision making mechanism each has adopted which is their main point of departure.

This study has therefore shown the need for the EAC to reconsider its approach to decision making if it is to sustain the pace of integration from the point of decision making to the point of implementation.

## **4.2 Recommendations**

As has been shown in this study, the decision making mechanism in place largely determines the pace of integration. Looking at the views from the respondents, the practice in ASEAN and the EU, the EAC should consider the following:

### **4.2.1 Alternative approach to decision making in the EAC**

The possibility of the Council reaching decisions by simple majority is provided for in the Protocol on Decision Making by the Council of the EAC. The EAC may opt to gradually extend the areas in which the Council can reach decisions by voting just as the EU did when adopting QMV. This can be done by amending the EAC Treaty, the Protocol on Decision Making by the Council of the EAC and the EAC Council Rules of Procedure. The EAC Council may further

adopt majority voting on specific matters but consensus be maintained on sensitive issues such as taxation, defence, foreign policy and social security as has been done in the EU.

The advantage of adopting majority voting in decision making is that it seems to respect sovereign equality in line with the provisions of the EAC Treaty. This decision making mechanism will also ensure that a single partner state does not frustrate the pace of integration as it cannot veto decisions. It might further encourage EAC Partner States to compromise on issues they are opposed to instead of being out voted and ending up with decisions that they object to.

Decision making by majority voting may also assist the EAC deal with the quorum challenge that was raised by the interviewees and which has frustrated decision making. This may be done by permitting a Partner State to act on behalf of not more than one Partner State where a vote is to be taken as has been done by the EU. This will ensure that the inability of a Partner State to attend an EAC meeting will not result in the meeting becoming consultative but will instead ensure that matters proceed. This may be implemented through the amendment of the EAC Treaty and the EAC Council Rules of Procedure.

#### **4.2.2 Proposed approach where consensus is maintained**

If the EAC is to maintain consensus as its main decision making mechanism, it ought to address the issues that have been frustrating decision making. Two of the issues raised during the interviews were on the challenges that arise where a Partner State fails to attend a meeting and where a Partner State attends a meeting but fails to adopt a report.

##### ***4.2.2.1. Failure to attend meetings***

On the first issue of failing to attend a meeting, the directive given by the EAC Council in its 31<sup>st</sup> meeting and which was reaffirmed during its 32<sup>nd</sup> meeting ought to be implemented. This directive, as earlier stated, requires a Partner State that will not attend Sectoral Council meetings to give a seven days' notice of its non-attendance. If this notice is not given and the other Partner States are at the meeting venue, the meeting should proceed and the decisions reached shall bind the absent Partner State.

This directive should also be applied to the Co-ordination Committee meetings as its Rules of Procedure require that representatives of all Partner States must be present for there to be quorum and where this is lacking the meeting can be adjourned for twenty four hours. If after adjournment there is still no quorum but there is two-thirds Partner States representation then it becomes a consultative meeting whose recommendations are forwarded to the absent Partner State(s) for consideration and consent. This directive can be applied by amending the EAC Treaty and Rules of Procedure for the EAC Co-ordination Committee. This will help minimize wastage of resources which was cited by the respondents as one of the disadvantages of consensual decision making.

Additionally, where a Partner State is absent at a Sectoral Council meeting or at a meeting of the Co-ordination Committee, it should not be permitted to veto any recommendations that were made in its absence where these are brought before the Council for decision making. This will ensure that the absent Partner State does not have a chance of defeating what was agreed in its absence. Consequently, the implementation of the Council directive will be effective in deterring non – attendance of meetings. This can be effected by amending the EAC Treaty and EAC Council Rules of Procedure.

#### ***4.2.2.2 Abstentions***

On the second issue of failure by a Partner State to sign a report despite participating in a meeting, the EAC should consider adopting the EU approach whereby abstentions by members present in person or represented do not prevent the adoption by the EU Council of acts which require unanimity. This provision may be effected by amending the EAC Treaty.

#### ***4.2.2.3 Failure to reach consensus in the Summit***

The other issue that should be addressed is where the Summit is unable to reach consensus on an issue. As earlier noted, the EAC Treaty does not provide for the approach the Summit should take where a Summit Member objects to a proposal brought before it for decision. The practice has therefore been that such an issue is revisited as seen during the negotiation of the EPA. The EAC Treaty should be amended to allow the Summit to decide how a specific decision will be made where consensus cannot be reached, a practice that has now been adopted by ASEAN. This will avail the Summit, which is the highest EAC organ, with an alternative decision making



mechanism that will ensure that the integration process does not stall where consensus cannot be reached.

#### ***4.2.2.4 Participation of the Secretariat in Council meetings***

As noted earlier, the effect of consensual decision making is that member states get to safeguard their national interests by holding back those who are willing and able to proceed with a Community issue. The challenge with this practice is that national interests prevail over regional interests. The EAC should consider strengthening the Secretariat by permitting it to be represented in the Council meetings. This has been done in the EU where the Commission's President sits in the EU Council. The role of the Secretariat during Council meetings should be to represent the Community's interests which should be taken into consideration before a decision is reached and a directive issued. This can be effected by amending the EAC Treaty so that the Council membership includes the Secretary General who will sit in the Council on behalf of the Secretariat.

#### **4.2.3 Guidelines to direct the application of variable geometry in the EAC**

Adoption of variable geometry in fast tracking implementation should not be done at the expense of integration where some countries feel isolated as seen where Tanzania felt sidelined by the activities of the 'Coalition of the Willing.' Looking at the EAC Treaty, the principle of variable geometry has only been provided for as an operational principle but no guidelines have been given on its implementation. It is therefore necessary to give guidelines that bind all EAC Partner States on how they are to apply variable geometry to avoid internal conflict.

Since variable geometry, is an implementation strategy that permits a sub-group that wants to accelerate the integration process to do so without being held back by the slower member states, the guidelines to be put in place should ensure that this is achieved without sidelining other Partner States. This may be done by first indicating the number of Partner States that can proceed to implement Community decisions using variable geometry. The requirement here may be that two or more member states may proceed first if other member states are not ready to implement a Community issue which is the practice in ASEAN. At the next stage of deliberating the implementation process, all Partner States ought to be involved but at the point of deciding the implementation process only Partner States proceeding under variable geometry should make

this decision. This is the practice in the EU and it ensures that all member states are included but those not willing to implement common issues cannot stop the rest. These guidelines ought to be included in the EAC Treaty to guide the integration process.

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**APPENDIX 1**  
**SCHEDULE OF INTERVIEWS**

RESPONDENT NO.	SEX	PLACE OF INTERVIEW	RESPONDENT'S OCCUPATION	DATE OF THE INTERVIEW
1.	Male	Nairobi	Deputy Director	24 <sup>th</sup> June, 2015
2.	Male	Nairobi	Senior Director	5 <sup>th</sup> July, 2015
3.	Male	Nairobi	Principal Economist	13 <sup>th</sup> July, 2015
4.	Female	Nairobi	State Counsel	13 <sup>th</sup> July, 2015
5.	Female	Nairobi	Chief Trade Development Officer	14 <sup>th</sup> July, 2015
6.	Male	Nairobi	Senior State Counsel	14 <sup>th</sup> July, 2015
7.	Male	Nairobi	Ag. Director	16 <sup>th</sup> July, 2015
8.	Male	Nairobi	Advocate	22 <sup>nd</sup> July, 2015
9.	Male	Nairobi	Managing Partner	31 <sup>st</sup> July, 2015
10.	Female	Nairobi	Ass. Regional Marketing Manager - EA	27 <sup>th</sup> August, 2015
11.	Male	Nairobi	Immigration Officer	2 <sup>nd</sup> September, 2015
12.	Male	Nairobi	Immigration Officer	2 <sup>nd</sup> September, 2015
13.	Male	Nairobi	Immigration Officer	2 <sup>nd</sup> September, 2015
14.	Female	Nairobi	Immigration Officer	2 <sup>nd</sup> September, 2015
15.	Female	Nairobi	Immigration Officer	3 <sup>rd</sup> September, 2015

16.	Male	Nairobi	Immigration Officer	3 <sup>rd</sup> September, 2015
17.	Male	Nairobi	Immigration Officer	3 <sup>rd</sup> September, 2015
18.	Male	Nairobi	Immigration Officer	3 <sup>rd</sup> September, 2015

**APPENDIX 2**  
**INTERVIEW GUIDE**

**To be filled by the interviewer**

Interview location (city and country): \_\_\_\_\_

Date: \_\_\_\_\_ day of \_\_\_\_\_, 2015.

Place of interview: \_\_\_\_\_

**Section A: Preliminary**

Good morning/afternoon/evening. My name is Rachael WanjikuNdungu. I am doing my Master of Laws (LLM) at the University of Nairobi and this survey is part of my research project on navigating the dichotomy between implementation of the variable geometry approach versus adoption of the consensus approach. The research looks at the impact of consensus in decision making on the integration process and the role of variable geometry in deepening integration. It then assesses the discord between the consensus approach and implementation of the variable geometry approach and how this impacts deeper integration of the EAC. It proceeds to look at how other regional blocs have dealt with this issue and what the EAC can learn from them. I am therefore greatly humbled to invite you to be a participant in this study. All your responses herein shall be kept confidential and shall never be used for any other purpose other than this research.

**Section B: Respondent's Personal Information**

**Respondent's Name (and Title):** \_\_\_\_\_

**Ministry/Authority:** \_\_\_\_\_

**Position:** \_\_\_\_\_

**Contact Address:** \_\_\_\_\_

**Telephone:** \_\_\_\_\_

**Respondent:** I hereby certify that the above personal details are correct and true to the best of my knowledge.

Date: \_\_\_\_\_ Sign: \_\_\_\_\_

**Part 1: Questions for respondents who participate in EAC meetings and in implementation of EAC decisions**

**Section C: Consensus decision making**

1. Decisions by the EAC Summit and Council are reached by consensus. Has the absence of a definition of consensus in the EAC Treaty and Protocols posed any challenges to the integration process?
2. Have any steps so far been taken to define consensus?
3. In the EACJ advisory opinion, the court found that the vacuum left by the absence of how consensus is to apply has been filled by unanimity. Is this still the current practice within the EAC?
4. What considerations come into play at the point of decision making?
5. What has been the impact of the consensus approach on the pace of integration?
6. Seeing that more states want to join the EAC, is consensus still a viable decision making mechanism in working towards deeper integration?
7. Should the EAC consider moving to a different decision making mechanism?
8. What would be the advantages and disadvantages of such a move?

**Section D: Variable Geometry**

9. Please shed light on the principle of variable geometry.
10. Are there any guidelines on how variable geometry is to be applied within the EAC?
11. Has this principle so far been applied within the EAC? If so, how has this impacted the pace of integration?
12. What triggered the formation of ‘Coalition of the Willing’ within the EAC?
13. Were the activities of the ‘Coalition of the Willing’ an application of the principle of variable geometry?
14. Do the EAC partner states have any reservations on implementing the variable geometry approach in the integration process?
15. The EACJ rendered an opinion stating that consensus and variable geometry are in harmony.  
How can the two approaches be practically used together to deepen integration?

16. Has the EAC been able to successfully use these two approaches in deepening integration? If so, kindly give examples.
17. Should the EAC consider adopting a different decision making mechanism or should it maintain the consensus approach when implementing the variable geometry approach?

**Section E: The way forward**

18. What measures should be taken to deepen integration within the EAC at the point of decision making and implementation?

Thank you for your time and cooperation.

**Part 2: Questions for respondents who only participate in implementation of EAC decisions**

1. What challenges has the EAC been facing towards deeper integration?
2. Does the decision making mechanism in place hold back Partner States that want to move ahead on a project from doing so?
3. What challenges have Partner States been facing in implementing EAC projects?
4. What has been the impact of the activities being carried out by Kenya, Uganda and Rwanda on the integration process?
5. What has been done differently in implementing these projects as they seem to be moving quite fast?
6. Have Tanzania and Burundi come on board in implementing these projects?
7. Should Partner States that want to fast track integration be allowed to do so from the point of decision making to the point of implementation?
8. Is the current approach on decision making and implementation in the EAC sustainable?
9. Any comments or recommendations on the EAC integration process?

Thank you for your time and cooperation.