



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

*[Coram: Johnston Busingye, PJ; Mary Stella Arach-Amoko, DP]; John Mkwawa, J;
Jean-Bosco Butasi, J; Benjamin Patrick Kubo, JJ]*

APPLICATION NO. 1 OF 2008

IN THE MATTER OF A REQUEST BY THE COUNCIL OF MINISTERS OF THE EAST
AFRICAN COMMUNITY
FOR AN ADVISORY OPINION

ADVISORY OPINION OF THE COURT

1 Background:

The genesis of the present Application for this Court's Advisory Opinion was traced to a before us to a dilemma being faced by the Council of Ministers, (hereinafter referred to as "the Council") regarding:-

- (a) The Application of the Principle of variable geometry as provided in the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'); and

- (b) The Application of the Principle of variable geometry vis-à-vis the requirement for consensus in decision-making.

The Court was told that, arising from the aforesaid dilemma, the Council did at its 16th Meeting held at Arusha, Tanzania on 13th September, 2008 make, vide item 2.7 in its Report of the meeting, a proposal in the following terms:

2.7 Proposal for requesting for Advisory Opinion of the East African Court of Justice

2.7.1 Introduction:

According to the Treaty "The Summit, the Council or a Partner State may request the East African Court of Justice to give an Advisory Opinion regarding a question of law arising from the Treaty which affects the Community".

The purpose of seeking an advisory opinion is to enable the Community, its organs and institutions and the Partner States get a clear interpretation of the Treaty on matters that are contentious or not clear. To the extent that the legal position on following issues has affected the decision-making process, progress in the formulation and progress of programmes or have been challenged by other organs of the Community, it is important for the Council to seek an advisory opinion.

2.7.2 Application of the Principal of variable geometry:

The Treaty provides that one of the operational principles of the Community shall be "the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds".

This provision, read together with the relevant interpretation of this principle in the Treaty, suggests:

- (a) flexibility in the progression of integration activities, projects and programmes; and**
- (b) Progression of such activities, projects and programmes in co-operation by some of the Partner States as opposed to all the Partner States simultaneously.**

However, this interpretation is contestable on the basis of the fundamental requirement, under the Treaty and relevant annexes, for consensus as a basis for decision-making by the Summit of Heads of State and the Council of Ministers.'

Stemming from the above concerns;

'The Council:-

- (a) directed the Secretariat to seek an advisory opinion of the East African Court of Justice on the Application of the principle of variable geometry; (EAC/CM16/Decision 11);***
- (b) directed the Secretariat to file a request for an advisory opinion on the application of the principal of variable geometry in the East African Court of Justice by 31st October, 2008; and (EAC/CM16/Directive 12).'***

2 The Application:

Pursuant to the aforesaid directions, the Counsel to the Community did on 19th December, 2008 file the present Application under Articles 14(4) and 36 of the Treaty for the Establishment of the East African Community ("The Treaty") and Rule 75 of the East African Court of Justice Rules of Procedure.

The jurisdiction of this Court is founded in Articles 23(1), 27, 38(3) on acceptance of judgments and 1, on the definition of 'judgment'.

3 Initial scheduled hearing:

The hearing of the Application was initially scheduled for 13th February, 2009. On that date the Applicant was represented by Mr. Wilbert T.K. Kaahwa, learned Counsel to the Community; the Republic of Kenya was represented by Mr. Anthony Ombwayo, learned Senior Principal Litigation Counsel in Kenya's Office of the Attorney-General/State Law Office; the United Republic of Tanzania was represented by Mr. Sirilius Matupa, learned Assistant Director in Tanzania's Office of the Attorney-General, aided by Ms Mwema Punzi Juma, learned State Attorney there; while the Republic of Uganda was represented by Mr. Henry Oluka, learned Senior State Attorney.

(a) Joinder of East African Law Society as *Amicus Curiae* (Friend of the Court):

At the session of 13th February, 2009 three representatives of the East African Law Society (EALS), Mr. Alute Mughwai; Dr. Allan Shonubi, President of the EALS; and Mr. James Mwamu, Secretary-General of the said Society applied to this Court, to allow the said Society to appear as amicus curiae vide Application No 1 of 2008.

There was no opposition by the Counsel to the Community, or by the Partner States represented at the session, to the Society's request and the Court granted the said request.

The Republic of Rwanda had, on the previous day filled submissions but was not represented in Court on 13th February, 2009. The Republic of Burundi had neither filed written submissions nor was it represented in Court. Having regard to the importance of the Application Court decided that all Partner States as well as the East African Law Society ought to be given an opportunity to make inputs

into the impending debate. Accordingly, the Court ordered all Partner States and the EALS to file and serve their written submissions by 27th February, 2009.

Hearing of the Application was re-scheduled to 11th March, 2009 when the parties were to highlight their written submissions.

4 Actual hearing:

At the re-scheduled hearing of the Application on 11th March, 2009, the Applicant Community, The Republic of Kenya and The Republic Uganda were represented by the same Counsel who had represented them on 13th February 2009; The United Republic of Tanzania was represented by Mr. Yohana Masara, learned Senior State Attorney; while the EALS was represented by learned Counsel, Mr. Donald Deya. There was no appearance for The Republic of Rwanda and The Republic of Burundi but Burundi had filed written submissions as had the rest of the Partner States and the *amicus curiae*. Council for the Community, the Partner States and EALS made oral highlights of their written submissions. Summaries of all the submissions made to the Court are given below for ready reference.

5 Submissions on behalf of the Applicant Community:

Based on the questions posed at the beginning in the very first paragraph of the background, Counsel to the Community framed the following as the issues in contention in respect of which this Court's Advisory Opinion is sought:-

- (i) Whether the principle of variable geometry is in harmony with the requirement for consensus in decision-making.
- (ii) Whether the principle of variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwithstanding.

- (iii) Whether the requirement on consensus in decision-making implies unanimity of the Partner States.

It was Applicant's Counsel's contention that this Court has jurisdiction to handle the East African Community Council of Ministers' request for an Advisory Opinion pursuant to Articles 23(1), 27 and 36 of the Treaty. He pointed out that the request is of great significance in the implementation of the Treaty and the growth and development of the Partner States' integration process for the following reasons:-

- (a) The request serves to enhance the Court's role as the Community's judicial organ.
- (b) The outcome of the request will guide the process of decision-making which is critical to the institutional development of the East African Community.
- (c) The outcome of the request will also contribute to the development of regional jurisprudence as envisioned under Articles 6, 7 and 126 of the Treaty.

Turning to the issue of variable geometry, Applicant's Counsel pointed out that it is an innovation of European law allowing member states to tailor their participation in the European integration process. He said that in the case of the East African Community, the principle of variable geometry has not been applied to-date and indicated that the present Application seeks guidance on how the principle can be applied here. He reported that within the European Union, application of the principle of variable geometry allows Member States to negotiate exemptions from certain Treaty provisions and to individually apply a greater speed on some integration processes than others, using the institutions and procedures laid down in the Treaty. He gave as one example in this regard, the opt-out of Denmark, UK and Ireland from the European Community's provisions on free movement of persons, asylum and immigration.

The Applicant's Counsel submitted with particular reference to Article 7 (1) (e) of the Treaty, that the integration implied by variable geometry is essentially pragmatic and incremental; that 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. In the latter regard, he pointed out that the European Union and the United Nations have gradually shifted from consensus decision-making to appropriate application of majority decision-making. It was Applicant's Counsel's contention that application of variable geometry principles could considerably ease some of the tensions among sub-regional integration arrangements in the Community and enhance the prospect of closer and more regional co-operation.

With regard to consensus decision-making, Applicant's Counsel noted that the principle runs throughout the executive organs of the Community: for instance, in the Summit by virtue of Article 12(3); and in the Council by virtue of Article 15(4), subject to the Protocol on decision-making which enumerates vide Article 2(1) the matters on which decisions of the Council must be by consensus and provides vide Article 2(2) that all other decisions of the Council must be by simple majority, without specifying what those decisions are. Applicants' Counsel also drew attention to Article 148 providing express Exceptions to the Rule of Consensus, in matters pertaining to suspension or expulsion of a Partner State where the views of the Partner State being considered for suspension or expulsion do not count for purposes of reaching a decision on the proposed suspension or expulsion.

Quoting from *International Institutional Law*, by Schemers G. Henry and Niels, M. Blokker, Applicants Counsel identified the following as aims of consensus decision-making as opposed to the use of Majority rule approach:-

- (a) Inclusive: involving as many stakeholders as possible.
- (b) Participatory: soliciting the input and participation of all the parties charged with decision-making.

- (c) Co-operative: participants strive to reach the best possible decision for the group.
- (d) Egalitarian: all members in a given group being accorded an equal opportunity to make input;
- (e) Solution-oriented: striving to emphasize common agreement over differences, using compromise.

Applicant's Counsel, however, cited the following shortcomings as afflicting consensus decision-making:-

- (a) Delays in arriving at a consensus:
Since consensus decision-making focuses on discussion and seeks the input of all participants, it can be a time consuming process. Counsel considered this a potential liability in situations where decisions need to be made speedily or where it is not possible to canvass the opinion of all delegates in a reasonable period of time. He added that the time commitment required to engage in the consensus decision-making process can sometimes act as a barrier to participation for individuals unable or unwilling to make the commitment.
- (b) Intransigence associated with determining consensus;
- (c) The possibility of indiscriminate vetoing of proposals that may be favoured by the majority of Partner States, which in his view may lead to the preservation of the *status quo*. He pointed out that in decision-making bodies that use formal consensus, the ability of individuals or small minorities to block agreement gives an enormous advantage to anyone who supports the existing state of affairs; and that this could mean that a specific state of affairs can continue to exist in an organization long after a majority of members would like it to change;
- (d) The fact that consensus may not stand the test of usefulness when the membership of the Community increases to more than five countries;
- (e) Susceptibility to disruption: Giving the right to block proposals to all group members may result in the group becoming hostage to an inflexible

minority or individual. Counsel added that “opposing such obstructive behaviour” construed as an attack on freedom of speech and in turn resolve on the part of the individual to defend his or her position. He concluded that as a result, consensus decision-making has the potential to reward the least accommodating group members while punishing the most accommodating;

- (f) Abilene/Paradox: Applicant’s Counsel pointed out that consensus decision-making is susceptible to all forms of groupthink, the most dramatic being the Abilene paradox. He explained that in the Abilene paradox, a group can unanimously agree on a course of action that no individual member of the group desires because no one individual is willing to go against the perceived will of the decision-making body.

Finally, the Applicant’s Counsel concluded his submissions with the following prayer, namely, that the Court gives an advisory opinion on:-

- (a) the Application of the Principle of variable geometry;
- (b) the Application of the Principle of variable geometry *vis-à-vis* the requirement for consensus in decision-making;
- (c) Whether the requirement of consensus in decision-making implies unanimity of the Partner States.

6 Submission on behalf of Rwanda

Rwanda identified the core issues in this application as being:

To determine whether or not the principle of variable geometry and decision-making by consensus are in conflict.

It was Rwanda's submission that the two are not in conflict and that each of them caters for a different set of issues. Rwanda maintained that it is not a legal requirement under the Treaty that decision-making must be by consensus; and, in essence, that the concept of consensus has wrongly been over-emphasized by the Partner States on the basis that the co-operation and integration processes are still in their infancy. It was Rwanda's submission that the principle of variable geometry gives a right to some Partner States to engage into other activities for wider integration and not to engage in integration activities of the Community and that this would negate the objectives for which the Community was established.

To Rwanda, it was evident that for all integration programmes of the Community, consensus in decision making is indispensable until it is agreed between the Partner States to amend the Treaty. In Rwanda's view, the Treaty gives no flexibility to some groups and that all the Partner States must agree on each and every activity. Rwanda maintained that there are a number of activities and programmes that would need a total participation of all the Partner States, without which implementation would be difficult. In the latter regard, Rwanda noted that among the fundamental principles to govern the Community are principles of mutual trust, political will and sovereign equality; that among reasons leading to the collapse of the previous East African Community was lack of political will; that decision-making for progression of the integration programmes would highly depend on the political will of the Partner States and that, as such, the Partner States are bound by the Treaty under Article 6(a). It was Rwanda's view that issues such as delays in arriving at consensus and intransigence associated with determining consensus raised by the Council of Ministers should not be over-emphasized if there is a total agreement that the provisions of Article 6(a) bind the Partner States.

Rwanda pointed out that under Article 8(1) (c), it is the obligation of the Partner States to abstain from any measures likely to jeopardize the achievements of those objectives or the implementation of the provisions of this Treaty.

Rwanda noted that the Council had already initiated moves within the Sectoral Committee on Legal and Judicial Affairs to amend the Treaty. It was Rwanda's projection that the strict requirement for consensus, which, as we understood it, Rwanda considered necessary in the Community's infancy stages, is bound to be reversed in due course. Rwanda contended that since the issue of consensus is being handled by the Council through the Sectoral Committee on Legal and Judicial Affairs, the present Application to this Court is redundant.

In conclusion, Rwanda submitted that the principle of variable geometry is in harmony with the requirement of consensus in decision making in that the principle of variable geometry governs progression in the integration activities for some groups within the Community to engage in other activities outside the Community while the requirement of consensus in decision making caters for only activities of the Community and not otherwise. Rwanda reiterated:-

- (a) That the Application by the Council is redundant because the issue said to be in contention has been resolved; and
- (b) That the Court should advise the Applicant that the principle of variable geometry is in harmony with the requirement for consensus in decision-making.

7 Submissions on behalf of Burundi

In Burundi's submission, the principle of variable geometry may be questionable in practice in view of the mandatory requirement of decision making by consensus in all executive organs of the East African Community. To Burundi, it cannot be possible to move together and decide by consensus while it is at the same time allowed to go at

different speeds. As far as Burundi is concerned, the principle of variable geometry can apply and allow the integration process only if there is a clear provision which regulates decision-making by specifying certain new required quorum of representation in meetings. Burundi maintained that in practice, there remains a controversy between application of the principle of variable geometry and the principle of decision making by consensus by all Partner States. Accordingly, Burundi was categorical that the two principles are not in harmony as far as practice is concerned.

With regard to the second issue, Burundi applied similar arguments as the ones just advanced above and concluded that variable geometry cannot apply to guide the integration process in light of the requirement of consensus in decision-making.

As regards the third issue, Burundi's position was that unanimity requires complete agreement by all Partner States on discussed issues while consensus in decision-making requires flexibility in favour of quick decision-making and the integration process. It was Burundi's contention, as we understood it that, in the latter event, the requirement of decision-making by consensus necessitates unanimity of all Partner States except the one which has taken an option of applying the principle of variable geometry.

8 Submissions on behalf of Kenya

Counsel for Kenya referred to various dictionary definitions of the term 'consensus' and noted that they tended towards a general agreement or majority view, not necessarily amounting to unanimity. As regards the principle of variable geometry, he submitted that it is a strategy allowing negotiations of one or more particular issues to lead to an agreement.

Counsel referred to the European Community and identified proponents of variable geometry as falling into two camps:-

- (a) Integrationists – impatient to accelerate the process of unification and unwilling to be held up by the 'slowest ship in the convoy' to ensure there is no regression to national individualism.
- (b) Countries that wish to slow or halt the federal moment but are prepared to allow others to go ahead, provided they themselves can be left out of policies they consider unsuited to their national interest.

In further reference to the European Union, Counsel identified opponents of variable geometry as also falling into two camps:-

- (a) Those who fear it will be an excuse for creating a privileged inner circle, a 'top table' of decision makers from which they will be excluded.
- (b) Those who suspect that their exemptions will prove transient and that sooner or later they will be sucked into an unwanted process of ever deeper integration.

Counsel identified, also within the European Community, a middle group comprising members from both sides of the debate, i.e. those who believe that institutionalized flexibility may lead to ultimate break-up of the European Community or to its transformation into a 'mere' free trade area.

Counsel noted from the formulation entitled 'close co-operation' in the Amsterdam Treaty that groups of Member States wishing to act together using the European Community's institutions could 'as a last resort' do so by qualified majority vote in the Council of Ministers, provided none of the non-participants exercised a veto at Head of Government level. Counsel also noted that other conditions of application of the principle of variable geometry included the following:-

- (a) That the participants must represent a majority of Member States.
- (b) A right of deferred participation by those who chose to stay out initially.

The same Counsel also noted from the European Community experience that practical realities on the ground led to the Luxembourg compromise, under which it was conceded that decisions affecting a vital national interest would have to be unanimous even if the Treaty specified majority voting. He added, however, that the Luxembourg compromise was virtually abolished by the 1980's in favour of majority voting. Counsel, instructively, reported that the unanimity principle still exists for:-

- (a) Accession to Treaties and Treaty amendments;
- (b) Appointments to the European Commission;
- (c) Changes to the Community's revenue raising power;
- (d) Resolution of certain disputes within the European Parliament;
- (e) Common Foreign and Security Policy; and
- (f) Co-operation in Justice and Home Affairs.

Counsel pointed out, still with reference to the European Community, that the concept of variable geometry allows countries to opt out of unwanted policies rather than being obliged to choose between vetoing them or accepting a majority verdict.

Turning to the East African Community, Counsel for Kenya submitted that as far as the Community's non-judicial organs are concerned, their decision making process is by consensus which, in practice, has meant that there has to be complete unanimity over an issue. He wondered in the latter regard whether consensus really means complete unanimity and drew attention in this connection to Chambers 21st Century (English) Dictionary which defines 'Consensus' as the majority view. He acknowledged the challenges outlined by Applicant's Counsel as being associated with the requirement of consensus in decision-making and proceeded to compare and contrast the principles of variable geometry and consensus in decision making.

He submitted that the principle of variable geometry is very different from consensus in decision making and added that variable geometry is a flexibility that permits Member States in a regional integration arrangement to pursue integration at different levels in different fields/policy areas, so long as the enhanced integration contributes to

enhancing integration in the regional integration arrangements, and does not create a barrier to trade or discriminate among Member States. In Counsel's view, the principles of variable geometry and requirement of consensus in decision making can operate together if the scope of where each principle applies is clearly defined and there is no conflict in scope, otherwise the two cannot be in harmony with each other.

He maintained that the principle of variable geometry can guide the integration process notwithstanding the requirement of consensus in decision making, provided the scope of the policy areas in which each will apply are defined. He cited as a living example the fact that the European Community has two tracks towards integration, i.e. the body of common rights and obligations which bind all Member States within the European Community (*aquis communautaire*) and variable geometry.

Counsel pointed out that whereas the East African Community's Protocol on Decision-making provides that decisions on the matters specified in Article 2 (1) shall be by consensus, the said Article 2(1) does not specifically provide whether the consensus is unanimous or general majority view. He noted the definition of consensus in Chambers 21st Century Dictionary already alluded to and also to:-

- (a) Black's Law Dictionary which defines 'Consensus' as a general agreement or collective opinion; and
- (b) Wikipedia, The Free Encyclopedia which defines 'Consensus' as a group process that not only seeks the agreement of most of the participants, but also the resolution or mitigation of the objections of the minority.

Having noted that consensus is usually defined as meaning general agreement and the process of getting to such agreement, Counsel reminded this Court that in the case of the executive organs of the Community, consensus has been treated as being synonymous with unanimity. He submitted that the requirement of consensus in decision making does not necessitate Unanimity unless specifically provided for in the

subject document, as in the case of Article 10 of the North Atlantic Treaty (NATO) which specifically provides that there has to be a unanimous decision.

Counsel observed that in the case of the European Community, the need to accommodate States with different capacities within the same international framework gradually triggered various forms of variable geometry. He, however, noted the danger of unconstrained variable geometry arising from the concern that the more the Community allows countries to pick and choose the policies they like and form into small groups of like-minded countries, the greater the risk that some fundamental policies will not be addressed by some Member States.

In conclusion, Counsel for Kenya submitted that there is uncertainty as to what consensus in decision making precisely refers to and that the uncertainty is slowing down the success of the integration process as the Treaty is silent on the issue. He asked this Court to elucidate what consensus means. He noted that each country has a different rate of economic growth, different socio-economic factors and varying national policies that it takes into consideration when deciding whether or not to vote in favour of a specific proposal. He asked the Court to advise whether consensus in decision making refers to a strict 100% majority, 2/3 majority or simple majority; and that once such clarification is made, it is of paramount importance that the Treaty is amended to reflect the Court's decision in order to eliminate confusion and uncertainty in the future. He maintained that variable geometry is an important principle that operates side by side with consensus in decision making as it accommodates each country's unique features and that as such it should be embraced by the Community and not ignored by forcing States to adopt blanket proposals which may not be best suited to their interests. He commended to this Court the sentiments of Judge Tanaka of the International Court of Justice on the same issue in the West African case of Liberia against the Union of South Africa, namely:

'to treat unequal matters differently according to their inequality is not only permitted but required'.

He urged that the Court should define the policies that each Member State must participate in without derogation, taking into consideration that the Community is developing beyond issues of economics and governance into fields such as fundamental rights and freedoms, freedom of movement and information, competition, and the like. Finally he suggested the policies which in his view should be subject to consensus in decision-making and those which in his view should be subjected to the principle of variable geometry.

9 Submissions on behalf of Tanzania

Council for Tanzania opened his submissions by taking the adversarial position that the resolution of the Council of Ministers seeking the Courts' Advisory Opinion was not pleaded and that, therefore, it did not form part of the Application before this Court. This prompted the Court to call for the Council's resolution, which was provided and it is reproduced at the start of this Advisory Opinion. Tanzania's Counsel recited the three issues identified by the Applicant's Counsel and noted that the principle of variable geometry is captured under Article 7(1) (e) of the Treaty. He also noted the definition of the principle of variable geometry given in the interpretation Article 1 of the Treaty. He also revisited consensus in decision-making at meetings of the Council of Ministers as provided for under Article 15 of the Treaty and noted that vide Article 15 (3) a member of the Council who is a leader of his/her Partner States' delegation to a meeting of the Council may record his/her objection to a proposal submitted for the decision of the Council and that if such objection is recorded, the Council shall, unless the objection is withdrawn, refer the matter to the Summit for decision. Council submitted that this Court may, in determining whether the principle of variable geometry is in harmony with the requirements of decision-making by consensus, consider the operational principles laid down under Article 7, the fundamental principles laid down under Article 6 and the procedure for decision making which is predominantly by consensus.

He suggested to the Court that in determining the aforesaid question, the Court may wish to appreciate that the objectives of the Community are found in Article 5. He highlighted those objectives, laid down in Article 5(1), as: development of policies and programmes aimed at widening and deepening co-operation among Partner States in political, economic, social and cultural fields, research and technology, defence, security plus legal and judicial affairs – for the Partner States’ mutual benefit.

Counsel pointed out that in endeavouring to fulfill the objectives in Article 5, the Partner States are guided by the fundamental principles laid down in Article 6 which include: mutual trust, political will and sovereign equality; peaceful-co-existence and good neighbourliness and peaceful settlement of disputes. In his view, the operational principle of variable geometry, provided for in Article 7(1) (e), flows from the above fundamental principles, i.e. recognition of the fact that there may be in existence such groups of members in a larger integration scheme who require varied developmental speeds. He submitted that those sub-groups must be afforded their pace of development into an integrated Community. He also submitted that the principle of variable geometry likewise recognizes the existence of varied areas of integration. It was his view that all the integration processes alluded to above require the forging of a common stand in attaining the larger objective. He submitted that the only mechanism that may afford members and sub-groups with varied levels of developmental ability to forge a common voice is that of consensus in decision making. He drew the Court’s attention to the fact that in embracing both variable geometry and consensus in decision-making in the same Treaty, the Community need not re-invent the wheel as the European Community before it went through a windy path prior to attaining its present achievements.

It was Counsel’s plea that this Court should recognize that the decision by the framers of the Treaty to adopt consensus in decision making was purposeful to carry on board all members in its decision-making process. He contended that the decision took into account the stark reality that each Partner is a Sovereign State and that in the Partner States’ peaceful co-existence, mutual trust is of the essence. He noted that the people

the Partner States represent are varied in their stages of development and that the dual mandate of the leaderships of the Partner States to the people they represent on the one hand and to the Community on the other demands that the leaderships and their people be heard and their positions respected. He submitted that the Partner States' commitment that decisions be made by consensus is in clear accord with reality on account of their commitment to have a single voice, notwithstanding their variables in terms of sizes or stages of development. Alternatively, he asked the Court to look at the two principles as standing alone, each serving a specific purpose but each complementing the other. He contended that consensus in decision-making is pivotal to the attainment of the fundamental principles in Article 6 and operational principles in Article 7 of the Treaty.

Revisiting the question of definition of consensus, Counsel pointed out that the Thesaurus legal dictionary gives an outline of the meaning of consensus to the effect that it connotes general agreement and contended that consensus means unanimity.

Counsel urged this Court to advise that:-

- (a) the plain meaning of the provisions of Article 12 (3) is that decisions of the Summit shall be by consensus;
- (b) the plain meaning of Article 15(3) to the effect that a member of a Partner State's delegation to a meeting of the Council of Ministers can, by recording an objection, block a proposal submitted for the Council's decision thereby necessitating referral of such proposal to the Summit, comprising the Heads of State and Government of the Partner States; and
- (c) the plain meaning of the provisions of Article 15(4) that, subject to the Protocol on Decision-making, the decisions of the Council shall be by consensus;

indicate the intention of the Partner States to be that consensus should mean unanimity of all partner States in their decision-making. Counsel asked this Court to take note of the developments that have taken place in the Sectoral Committee on Legal and Judicial Affairs where initiative to amend the Treaty on the decision-making process of the Council has commenced; and submitted that the Council of Ministers, being a policy organ of the Community, is better placed to manage the amendments rather than the present judicial recourse. He questioned the appropriateness of the Council's decision to seek judicial recourse in what he considered a pure policy matter which it has power to address; and noted that both the process of amendment of the Treaty and the seeking of an Advisory Opinion of the Court are continuing simultaneously. He contended that the object of the present Application for the Court's Advisory Opinion is *sub-judice* as the Council of Ministers directed that the issue of amendment of the Treaty regarding consensus in decision-making be left to the Sectoral Committee on Legal and Judicial Affairs, which, according to Tanzania, is where the matter belongs; and submitted that this Application for the Court's Advisory Opinion is an abuse of the process of the Court.

10 Submissions on behalf of Uganda

Counsel for Uganda opened his submissions by acknowledging that the East African Community came into being on 7th July, 2000, thereby marking the beginning (re-birth) of formal collaboration of the East African countries of Kenya, Tanzania and Uganda in economic and social integration carried on informally over many years in the various fields of life in the East African region (after the collapse of the previous East African Community). He noted that the objects of the Community today stand out on a much broader vision comprising five Partner States following incorporation of Rwanda and Burundi in the East African Community bloc. He acknowledged that in pursuit of attainment of its vision of establishing an East African Customs Union, a Common Market and ultimately a Political Federation, the East African Community has set itself to ascribe to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice. He observed that in an endeavour

to bring the above norms of good governance to fruition, a set of operational principles were laid down in Article 7 of the Treaty.

He noted that the operational principle singled out for purposes of the present Application is that of variable geometry provided for under Article 7 (1) (e) of the Treaty and contended that the said principle is subject to the fact that under the Treaty, any decision made has to be arrived at with consensus and unanimity by all parties to the Treaty.

Counsel revisited the issues framed for determination. He noted the definition of variable geometry in Article 1 of the Treaty. With regard to consensus, he referred to the Advanced Learners Dictionary which defines consensus as an opinion that all members of a group agree with and repeated the core issue raised in the present Application, i.e. whether the principle of variable geometry is in harmony with the requirement for consensus in decision-making.

He identified the Summit, Council of Ministers and Co-ordination Committee of the East African Community as being endowed with specific wide ranging powers to give general direction as regards attainment of the objectives of the Community and pointed out that all the three organs have adopted and passed Rules of Procedure and that the overriding fact in their meetings is that decisions at these meetings are made by way of consensus. He wondered where this leaves the principle of variable geometry and submitted that it is one of the potential avenues for actualization or implementation of policies, visions and objects for which the Treaty was established. Counsel contended that with regard to the policies formulated in each of the Community organs, each Partner State is fairly well placed to have a local feel and understanding of the course of speed or urgency with which it can implement, actuate or formulate the policies adopted in the Community. In this regard, he maintained that the East African Community has to give each Partner State a reasonable time to adopt a method of compliance agreeable to its people and posited that it is the principle of variable geometry that would allow for this.

Counsel submitted that the principle of variable geometry is in harmony with the requirement of consensus in decision making since variable geometry would allow each country to pace changes brought about in the Treaty at a speed and course that meets and fits unique local conditions of each specific Partner State. He contended that variable geometry is one of the operational principles to enable the East African Community established under the Treaty to achieve its mission and goals. It was his submission that consensus and variable geometry cannot be put at par or side by side; and that one has to decide on a policy or objective before arriving at variable geometry which has to take account of practical realities in the different Partner States on the mode and speed of implementation of the policy.

He noted that policies, once conceived, have to be discussed, culminating in decisions being taken; that Articles 12 (3) and 15 (4) provide for decisions in the Summit and Council, respectively, by consensus; and that the Protocol on Rules of the Co-ordination Committee is also specific in that, vide Rule 13, the recommendations of the Co-ordination Committee have to be agreed by consensus. It was his contention that any decision made in the organs of the Community will only be carried through with the unanimous agreement of all the Partner States and that it is only after such agreement is reached that the principle of variable geometry comes into action.

Counsel then proceeded to frame what he considered to be the core question arising from the present application differently, namely:

‘Whether the principle of variable geometry should have an application in the process of decision making at the level of organs of the Community. In other words, can decisions between Partner States at the Summit, Council and Co-ordination Committee be made using variable geometry?’

He submitted that this question cannot be answered in this Court as in his view the Court is not the vehicle for amendment of the Treaty, nor is it a legislative organ for the

Community. He acknowledged that the present application has noted the fact that there are delays in arriving at consensus, intransigence associated with determining consensus, the possibility of vetoes, the fact that there are now five Partner States, and that these factors delay decision making. It was his contention, as we understood it, that the option of variable geometry or some other principle being used in the making of decisions by the Community is one that the governing bodies and the administrators of the East African Community should consider, but not this Court.

He submitted that the principle of variable geometry can guide the integration process, notwithstanding the need for consensus in decision-making.

On the question whether the requirement for consensus in decision making necessitates unanimity of Partner States, Counsel referred to the definition of unanimity in the Oxford Learners Dictionary, namely, '**... Complete agreement about something among a group of people...**' and submitted that signatories *to* the Treaty are bound to depict a sense of unanimity before a decision is made and that this is the only manner in which consensus can be arrived at. He concluded that it is pertinent to have unanimity of all Partner States in decision making.

11 Submissions on behalf of the East African Law Society

Mr. Deya, Counsel for the EALS acknowledged the East African Council of Ministers as the policy making body of the Community. He noted that increased integration under the Community has faced challenges of ever complex negotiations with notable differences arising between policies of Partner States and the Community's ambitions of integration. He saw the principle of variable geometry provided for under Article 7(1) (e) as envisaging flexibility in the integration process and allowing progression in the East African Community activities by some Partner States and not all. He pointed out that due to the requirement of consensus as well as the necessity of quorum in the decision-making processes of the Organs of the Community, it has been implied that application of the principle of variable geometry may be contestable and that the

principle cannot be relied on to quicken the process of integration since such decisions can be vetoed and challenged on the ground that they are not consistent with the Community Protocols.

Counsel for the EALS sought to borrow a leaf from comparable institutions outside the East African Community to show how the principle of variable geometry has been applied there. In this connection, he noted from the glossary of the official European Union website at: www.europa.eu that variable geometry is described as a term used to mean a method of differentiated integration which acknowledges that there are irreconcilable differences within the integration structure and, therefore, allows for a permanent separation between a group of Partner States and a number of less developed integration units. He suggested that such differences might be founded on aspects related to different sizes, different priorities, different levels of political development, and differences in economic development, culture and language which make it difficult for members to meet the criteria set for membership at the same speeds and depths, this resulting in either deeper integration or making use of 'opt-out' clauses in certain areas. He submitted that variable geometry connotes an endorsement of a 'flexible and pragmatic approach' to integration by States at different paces depending on their various determinants. He pointed out that the level of a country's commitment to the integration process is determined by the depth of its interest and that variable geometry applies where there is a lack of commonality of interests and values by the contracting parties who seek to deepen their co-operation and promote flexibility in decision making and co-operation.

It was the contention of Counsel that agreement on enhanced co-operation operates as multi-literal agreements within the general principles of the original Treaty and that any member is free to decide whether or not to join initiatives beyond the original Treaty. In this connection, he pointed out that in instances where the principle of variable geometry has been applied, it accommodates countries which feel that their interests were not being served in certain situations whereas those who wish to pursue deeper

international integration through multi-lateral agreements in that area could do so within the framework of the original Treaty.

He referred the Court to instances where variable geometry was applied in Europe such as The European Economic and Monetary Union, The Schengen Agreement and the European Defence Initiative.

Counsel noted that at the heart of variable geometry in Europe lies the distinction between:-

- (a) The core, which includes what all members have in common in their integration programmes;
- (b) The periphery, which contains those policies that are shared by some but not by all members of the European Community.

He submitted that variable geometry does not require all members to participate in all areas of integration and that it should not be interpreted to mean restricted membership.

Turning to the African continent, Counsel for the EALS pointed out that economic integration in Africa is moving the various economic blocs (pillars) toward an African Economic Community (AEC). He noted, for instance, that the Treaty of the Common Market for East and Southern Africa (COMESA) has two important innovations. Firstly, the concept of multiple speed or variable geometry provides for a group of countries to move faster in the regional economic integration process than some of the other countries or at the policy level, like at Southern Africa Development Community (SADC). He further pointed out that the preamble to the COMESA Treaty states that the parties were convinced that co-operation at sub-regional levels in all fields of human endeavour will raise the standards of living for the African Peoples, maintain and enhance economic stability, foster close and peaceful relations among African States and

accelerate the successive stages in the realization of the proposed African Economic Community and Political Union.

In the case of SADC, Counsel for the EALS noted that its common agenda are based on various principles, e.g. development orientation; subsidiarity; market integration and development, facilitation and promotion of trade and investment; and variable geometry. He added that SADC has also implemented a Free Trade Area (the Southern African Customs Union – SACU) and that under the protocol establishing the SACU, Angola, the Democratic Republic of Congo and Malawi chose to opt out of this arrangement.

Reverting to the East African Community, Counsel for the EALS noted that neither the Treaty nor the various protocols define consensus. Relying on Black’s Law Dictionary, 8th Edition, he contended that general consent when reached without objection is equivalent to consensus and that this implies that all parties are in agreement. He saw consensus as a decision making process that fully utilized the resources of the group and acknowledged that it is more difficult and time-consuming to reach than a democratic vote or an autocratic decision and complete unanimity is rarely possible.

He invited this Court to apply Article 31 (1) of the Vienna Convention on the Law of Treaties in interpreting the principle of variable geometry, i.e. interpret the principle in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty and in the light of its object and purpose. He urged the Court to apply the principle of harmonious construction in interpreting the principles of variable geometry and consensus in decision making. It was his submission that there is no conflict in application of the principle of variable geometry and the requirement for consensus in decision making. He pointed out that the requirement for consensus in decision-making has been stressed in the Treaty considering the history of the former Community which collapsed, *inter alia*, as a result of lack of political will and mistrust. He submitted that in the short-term consensus in decision making is necessary in order to get all Partner States on board in the integration process.

It was, however, his contention that in regional organizations, decision-making by application of variable geometry should be the exception rather than the norm.

Counsel for the EALS further submitted that the principle of variable geometry applies to guide the integration process, the requirement of consensus in decision-making notwithstanding as in his view the requirement of decision-making is not necessarily inconsistent with the principle of variable geometry. He also urged this Court to advise the East African Community to consider amending the Treaty and Protocols to provide for application of the principle of variable geometry in specific areas of activity.

As to whether the requirement of consensus in decision-making necessitates unanimity of the Partner States, Counsel for the East African Law Society submitted that the words 'unanimity' and 'consensus' substantively mean the same thing.

CONSIDERATION OF THE ISSUES RAISED IN THE APPLICATION AND OPINION OF THE COURT

12 Our Opinion on issues (i) and (ii), namely:-

- (i) Whether the principle of variable geometry is in harmony with the requirement on consensus in decision-making;
- (ii) Whether the principle of variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwithstanding;

is as follows:-

The principle of variable geometry is defined in Article 1 of the Treaty 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.**'

It is one of eight Operational Principles of the Community provided under Article 7 as **'The Principles which shall govern the practical achievement of the objectives of the Community....'** Article 7(1) (e) describes it as **"...the Principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds.'**

The term consensus is not defined in the Treaty. We have, therefore, sought guidance from sources outside it.

Wikipedia, The Free Encyclopedia, provides that 'Consensus has two common meanings. One is a general agreement among the members of a given group or community, each of which exercises some discretion in decision making and follow-up action. The other is a theory and practice of getting such agreements. Achieving consensus requires serious treatment of every group member's considered opinion. Once a decision is made it is important to trust in members' discretion in follow-up action. In the ideal case, those who wish to take up some action want to hear those who oppose it, because they count on the fact that the ensuing debate will improve the consensus. In theory, action without resolution of considered opposition will be rare and done with attention to minimize damage to relationships.' [Source: <http://en.wikipedia.org/wiki/consensus>].

We have also, in interpreting the principle of variable geometry and the requirement of consensus in decision-making as used in the Treaty sought guidance from the Vienna Convention on the Law of Treaties which provides, vide Article 31, *inter alia*, as follows:

'Article 31: General rule of interpretation

1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose.'

Having carefully considered the submissions of learned Counsel, the above definitions and interpretation guidelines, we opine as follows:-

Variable geometry is in harmony with the requirement for consensus in decision-making if applied appropriately.

Consensus as applied in the Treaty and Protocols referred to in this Application is purely and simply a decision-making mechanism in Summit, Council and in the other executive organs of the Community while variable geometry as used therein is a strategy for implementation.

It is the Court's opinion that decisions in any of the executive organs of the Community are made with two aspects in mind. The first aspect is that a decision is made on the basis of it being consistent with the objectives of the Treaty and desirable at the time. At this level the basis of making the decision is consensus.

The second aspect is the implementation of what has been decided as, in our view, a decision that will not be implemented is not worth the paper on which it is written.

With this aspect of implementation comes the 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 that of the Community.

Consensus in making the decision will then be tailored to the elements just above highlighted and a suitable operational principle, which may well be variable geometry, will be agreed upon to govern the practical implementation of that particular decision.

Partner States may agree on implementation at different speeds due to different readiness levels or different priorities, some may choose to opt out of implementation altogether due to national realities, yet others may decide to 'opt out' and at a future time they will 'opt in'. All these will be agreed by the Partner States, by consensus.

As submitted by Counsel for the Community as well as Counsel for EALS, the principle of variable geometry has been internationally applied to deepen integration. Examples include:-

(a) SADC:

Under the Protocol establishing the Southern African Customs Union within the Free Trade Area of SADC, the Republic of Angola, The Democratic Republic of Congo and The Republic of Malawi chose to opt out of the Customs Union.

(b) Schengen

The 1985 Schengen Agreement, and the 1990 Schengen Convention which supplemented it, relate to the free movement of persons among the signatories and the Schengen States. Since the freedom of movement is guaranteed within the Union for all persons who are nationals of an EU Member State, it related to the intra-union movement of non-EU nationals wishing to move among Member States.

The Schengen States have also agreed to establish common controls at their external borders and adopted a common visa policy. For the signatories, the effect was to allow the removal of all internal border controls on the movement of persons for both EU nationals and non-EU nations. It implements complete freedom of movement of all persons residing in or admitted to a Schengen State. The territory without internal borders is known as the Schengen Area.

Of the 15 "old" Members States at the time of negotiations, Ireland and the United Kingdom were not willing to remove controls on the intra-EU movement of non-EU nationals, and they retained their national border controls on the movement of persons from other EU member States.

(c) Monetary Union

Provision for a Monetary Union was formulated in the Maastricht Treaty on European Union of 1992 though the agreement was preceded by three stages and the initial Monetary Union did not come into effect until 1 January 1999. The European Economic and Monetary Union (EMU) involve adoption of a common currency (the Euro) and a common monetary policy administered by a common central bank (the European Central Bank or ECB). Member States that are not members of EMU retain their own currencies and central banks. At the time of its formation 12 of the 15 Member States opted in; the three member states that did not sign were the United Kingdom, Ireland and Denmark. Member States opting in to the EMU must meet specified conditions. They must meet a detailed set of convergence criteria and they must have their national currency in the European Exchange Rate Mechanism (ERM II) for two years.

(d) EU Social Policy agreement.

A third example in the EU is the 1991 Social Policy Agreement. It set out the policy objectives for the 1889 Social Charter relating to employment and working conditions and other social policies. 11 of the then 12 Member States signed this agreement. The United Kingdom opted out (or, more accurately, did not opt in). Following the election of a new Labour Government in 1997, the United Kingdom announced that it would drop its opt-out. The Social Policy Agreement was then incorporated into the Social Chapter of the EC Treaty through the Treaty of Amsterdam.

Looking at the three examples together, one feature is that, at the time of their formation, they involved different subsets of the members of the EU. The UK is the only country that opted out of all three. Another feature is that all involved the adoption of common policies in one policy area.

[Source: "The Variable Geometry Approach to International Economic Integration" by Peter Lloyd, University of Melbourne].

The Principle has also been incorporated in Integration Treaties. A case in point is its incorporation in the Treaty of the European Union by virtue of Article 43 under the title "Provisions on Enhanced Cooperation." We quote a few excerpts to illustrate this incorporation:-

'Article 43: Member states which intend to establish enhanced cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and by the Treaty establishing the European Community provided that the proposed cooperation:

- (a) aims at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration;***
- (b) respects said Treaties and the single institutional framework of the Union; does not constitute a barrier to or discrimination in trade between the Member States and does not distort competition between them;***
- (c) respects the competences, rights and obligations of those member States which do not participate therein.'***

(i) Article 43(b)

When enhanced cooperation is being established, it shall be open to all member States. It shall also be open to them at any time, in accordance with Article 27e and 40b of this Treaty and with Article 11a of the Treaty Establishing the European Community, subject to compliance with the basic decision and with the decisions taken within that framework. The Commission and the member States participating

in enhanced cooperation shall ensure that as many Member States as possible are encouraged to take part.'

The Partner States of the East African Community may wish to study, and possibly emulate some of the examples of application of these concepts to deepen integration.

The Court finds 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. Indeed as already noted, it appears in Article 7 of the Treaty only as one of the operational principles ***"...that shall govern the practical achievement of the objectives of the Community..."***.

The Court is of the opinion, therefore, that the principle of variable geometry can comfortably apply, and was intended, to guide the integration process and we find no reason or possibility for it to conflict with the requirement for consensus in decision-making.

It was also suggested by a number of learned Counsel, and the Court agrees, that variable geometry should be resorted to as an exception, not as the rule, as indeed institutionalized flexibility might lead to break-up of the Community or its transformation into "a mere free trade area". Even in the European Union where its application is incorporated into law Article 43b of that law provides conditions precedent for it to apply. It reads, ***"...Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying relevant provisions of the Treaty."***

Also, in applying the principle, the Community might wish to borrow a leaf from the European Union "core and periphery" approach which requires that Partner

States agree on certain areas over which the principle can apply and areas over which it cannot.

Difficulties arise, in the Court's view, where consensus in making a decision is equated and/or juxtaposed to consensus in implementing it and is debated as one and the same issue in the process of decision-making, as Partner States will hesitate to take a decision whose simultaneous implementation they may not undertake due to their respective practical realities.

It is the Court's opinion, and we so advise, therefore, that for avoidance of internal conflict and a possible emergence of mistrust among the Partner States, and in accordance with the Treaty provisions above discussed, decisions should be taken with the above two aspects in mind and simultaneous implementation thereof need not be forced upon an unready Partner just as refusal or delay of implementation thereof need not be used to block a ready Partner or Partners.

It is the Court's view based on the submissions that problems associated with obtaining consensus stems from hesitation to take particular decisions, not rejection thereof, as once a decision is consistent with the objectives of the Treaty there is no room left for rejecting it as such rejection would be tantamount to rejection of a particular Treaty provision. What seems to cause this hesitation is the requirement, inherent in decisions made, for simultaneous implementation by all Partner States.

Simultaneous implementation is impracticable in some circumstances and Partner States cannot be expected to operate within such strait jacket or one size fits all situations. 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.

As Tanaka J put it in ICJ Reports 1966, page 6 ***"... to treat unequal matters differently according to their inequality is not only permitted but required"***.

The upshot of the Court's above analysis of the concepts of consensus in decision-making and variable geometry is that consensus is fine at policy level. Take as an example the need for a superhighway linking Tanzania, Kenya, Uganda, Rwanda and Burundi. The mutual benefits of such a joint project are immediately clear to all the Partner States and none would require much persuasion to sign up for it. Since the project is a policy issue in line with objectives of the East African Community Treaty, there must be consensus at policy level for all Partner States to endorse the project. The policy having been agreed upon by consensus, the programme of implementation of the policy may, however, be agreed upon by the application of the principle of variable geometry bearing in mind the capacity of each Partner State to implement its portion of the task of constructing the superhighway within a given time frame. The Partner States may agree, for instance, on a 5-year time-frame for all portions of the superhighway to be completed. Two Partner States with the ability to start in the first year may go ahead and start; a third partner State may be able to start its portion in the second year; while the remaining two Partner States may be able to start only from the third year. In this scenario, both concepts of consensus and variable geometry are at play in the same decision, each playing its key role i.e. consensus in deciding to build the highway and variable geometry in deciding the implementation of the programme.

Another illustration may be taken from a project for modernization of the fishing industries in Kenya's and Tanzania's exclusive economic zones within the Indian Ocean. The project may not be of immediate or direct interest to the land-locked Partner States within the East African Community. Kenya and Tanzania may enter into bilateral arrangements to go into the project as a joint venture, in

the context of the objectives of the Community with full support of the non-participating land-locked Partner States.

13 Our Opinion on issue (iii), namely:-

Whether the requirement of consensus in decision-making implies unanimity of the Partner States.

Wikipedia defines unanimity as follows:-

'Unanimity is complete agreement by everyone. When unanimous, everybody is of same mind and acting together as one. Many groups consider unanimous decisions a sign of agreement, solidarity, and unity. Unanimity may be assumed explicitly after a unanimous vote or implicitly by a lack of objections.' [Source: <http://en.wikipedia.org/wiki/unanimity>].

Achieving consensus by unanimity is a desirable ideal but, in our opinion, rarely possible.

Consensus, and not unanimity, is provided for in the Treaty and Protocol on Decision Making as the basis for decision-making. Articles 12(3), 15(4) of the Treaty, Article 2 of the Protocol on Decision Making and Rule 13 of the Rules of Procedure of the various organs are all clear on this. The definition of both terms leaves us in no doubt that consensus does not mean unanimity.

Equating consensus to unanimity in decision making in the executive organs of the Community is a procedure that has obtained for years and it would appear from the instant Application that all has not been well.

We observe that, as integration deepens, different Partner States continue to have differing attachments to certain policies and their citizens continue to have differing

passions towards such policies. In that environment, understandably, choices become tougher, decisions become harder and the perceived unanimity enjoyed in decision making over the years begins to be less forthcoming. This in our view explains the emergence of this debate at this particular time.

Implying that consensus in decision-making as used in the Treaty means unanimity of Partner States is a mere perception based on the said practice as we have shown. Such perception is, in our view, neither supported by the Treaty nor the definitions surveyed.

As stated above, consensus as it stands in the Treaty, the Protocol on Decision Making and the Rules of Procedure of the various organs, is undefined and its application is unclear. Articles 12 (3), in 15 (4) and 148 of the Treaty, Rule 13 of the of Rules of Procedure for the Summit of the Heads of State or Government, Rule 13 Rules of Procedure for the Council of Ministers, Rule 13 of the Rules of Procedure for the Coordination Committees, Article 2 of the Protocol on decision making simply state "consensus" plain and naked.

It is not defined in terms of unanimous, absolute, qualified or simple majority. It is not defined in relation to differing weights of particular decisions. It is not defined in relation to the various executive organs of the Community according to their hierarchy. If anybody was to pose the question "How is consensus applied under the Treaty and Protocol?" we are afraid the answer would be guesswork. We were not shown any answer and we found none. Little wonder therefore that this vacuum was filled by unanimity. Consequently, the Court is of the opinion that the cure for this defect does not lie in equating it, from the blue, with unanimity. Rather it lies in amending the relevant instruments.

Further, it is our considered opinion, from the above discourse, that consensus does not mean unanimity either from ordinary english meanings or from legal dictionaries and it does not imply unanimity when used in the Treaty, the Protocol on Decision Making or the Rules of Procedure of the various organs. They are two different concepts.

- (a) Whether Article 15(3) of the Treaty implies that consensus is synonymous with unanimity

Article 15(3) was raised during submissions as evidence that consensus as used in the Treaty refers to unanimity. The Article provides that: **"...A member of the Council who is the leader of his or her Partner State's delegation to a meeting of the Council, may record his or her objection to a proposal submitted for the decision of the Council and, if any such objection is recorded, the Council shall not proceed with the proposal and shall unless the objection is withdrawn refer the matter to the Summit for decision."**

With due respect, this Court finds Article 15(3) to be a specific provision on how an objection in the Council of Ministers is handled. Suffice it to state that the position of the Treaty as we construe it is that either such objection is withdrawn and a decision is taken in Council or it is not withdrawn and the Council takes a decision to refer the matter to the Summit **'for decision'**. In the Summit, that decision will be made by consensus in accordance with Article 12 (3). Either way a decision will be made, by a competent organ of the Community, by consensus.

The import of Article 15 (3), therefore, in the Court's view, is to provide the above recourse only and neither means nor implies that consensus is synonymous with unanimity.

- (b) Whether the exception to consensus created by Article 148 of the Treaty implies unanimity

During the hearing, the exception created by Article 148 was raised as evidence that consensus as used in the Treaty actually refers to unanimity because of the title and content of the said Article which reads:

"Exception to the Rules of Consensus"

Notwithstanding the provisions of paragraph 3 of Article 12 of this Treaty, the views of the Partner State being considered for suspension or expulsion shall not count, for the purposes of reaching a decision under the provisions of Articles 146 and 147 of this Treaty."

The Court, with due respect, does not agree with this interpretation. The import of Article 148 is that consensus will be achieved as required, but for purposes of achieving that consensus the "***views***" of the Partner State being expelled or suspended will not count.

In other words, all Partner States, except the Partner State being sanctioned, will participate in reaching the decision. And this is, in the Court's view, irrespective of whether the views of the Partner State being sanctioned are supportive of the sanction or not. It does not imply even here, that consensus is synonymous with unanimity and we advise accordingly.

(c) The reported amendment of the Treaty

It was reported during submissions that there is a parallel process of amending the Treaty to take care of the issue of the decision-making process in the Community's executive organs. In particular the United Republic of Tanzania and the Republic of Rwanda submitted that this was purely a policy matter to be addressed by the Council rather than the Court; and that this application was not only redundant but also *subjudice* and an abuse of Court process.

The Court was not given any evidence, and it did not find any, that the two processes might be inconsistent or incompatible with each other and that the Application is an abuse of the process of this Court. The Court considered the above submission and is of the view that the process of amending the Treaty reported to be underway in the Executive Organs of the Community, as well as this Application for an Advisory Opinion are perfectly compatible. The application was brought to this court on a directive of the Council, the very organ reported to be overseeing the said amendment. It was properly

brought and the Court has jurisdiction. It is our considered view also that the reported amendment process is not "*subjudice*" as the term refers to a Court process that is pending "***before the Court or Judge for determination***" (see Black's Law Dictionary, 8th Edition, page 1466).

Conclusion:

In conclusion we answer issues (i) and (ii) in the affirmative and issue (iii) in the negative.

We advise accordingly.

Delivered at Arusha, Tanzania this.....Day of, 2009.

J. BUSINGYE
PRINCIPAL JUDGE

M.S.A. AMOKO
DEPUTY PRINCIPAL JUDGE

J. MKWAWA
JUDGE

J.B. BUTASI
JUDGE

B.P. KUBO
JUDGE