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The African Economic Community: Emancipation for African States or Yet Another Glorious Failure

Cover Page Footnote

International Law; Commercial Law; Law

The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?

Gino J. Naldi[†] and Konstantinos D. Magliveras[‡]

I. Introduction

Since independence, the economies of most African states have been dominated by a series of financial crises and largely characterized by sluggish performance.¹ A combination of internal and external factors have been responsible for this state of affairs.² Internal factors include the pursuit of ill-planned economic policies; lack of adequate financial resources; deficiencies in institutional and physical infrastructure; insufficient managerial and administrative capacities, often leading to rampant corruption; inadequate human resource development; political instability; and disparities in urban and rural development aggravated by ecologically unfriendly agricultural policies and exacerbated by a population boom.³ External factors include adverse terms of trade, a decline in financial flows, a decrease in the price of commodities on which African states largely depend, and high debt and debt-servicing obligations.⁴

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¹ See Rose M. D'Sa, *The Lagos Plan of Action – Legal Mechanisms for Co-operation between the Organisation of African Unity and the United Nations Economic Commission for Africa*, 27 J. AFR. L. 4, 4 (1983); Muna Ndulo, *Harmonisation of Trade Laws in the African Economic Community*, 42 INT'L & COMP. L.Q. 101, 101 (1993).

² See *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the Secretary-General*, U.N. GAOR, 52d Sess., Agenda Item 10, at 915-17, U.N. Doc. A/52/871 – S/1998/318 (1998).

³ See *id.*; IEUAN LL. GRIFFITHS, AN ATLAS OF AFRICAN AFFAIRS §§ C-D (2d ed. 1994).

⁴ See CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM: THE

Although the international community is attempting to adopt a coordinated program aimed at ensuring economic growth in Africa, the African states have arrived at the opinion that indigenous solutions are not only feasible but also preferable.⁵ The founding of an African Economic Community (AEC or Community), under the auspices of the Organization of African Unity (OAU), is the most significant development and most ambitious project to date in this field.⁶

In 1991 the OAU embarked on an ambitious economic program by adopting the treaty of the AEC, which entered into force in 1994.⁷ The treaty seeks to contribute to the development and economic integration of Africa, thereby leading to increased

POLITICS OF STATE SURVIVAL ch. 7 (1996); *see also* HEMMED IN: RESPONSES TO AFRICA'S ECONOMIC DECLINE (Thomas M. Callaghy & John Ravenhill eds., 1993) (surveying the major economic, political, and social aspects of Africa in recent years).

⁵ The Fourth Lome Convention, between the European Community and African-Caribbean-Pacific (ACP) States, is arguably the most important trade relationship for the developing world. *See* Fourth Lome Convention, Dec. 15, 1989, 29 I.L.M. 809.

⁶ *See* Charter of the Organization of African Unity, May 25, 1963, art. II(1)(b), 479 U.N.T.S. 39 (proclaiming the need of African states to "co-ordinate and intensify . . . co-operation efforts to achieve a better life for the peoples of Africa"). Economic development has always been a principal concern of the OAU. *See* D'Sa, *supra* note 1, at 4. One of the most important initiatives undertaken by the OAU to promote economic and social development and to advance the economic integration of Africa was the Lagos Plan of Action for the Economic Development of Africa: 1980-2000 (1980). *See id.* The Lagos Plan of Action was the outcome of a joint OAU/ECA venture to elaborate a successful regional strategy for development in Africa. *See id.* It aimed at creating conditions to encourage economic growth in the African continent, particularly in the sectors of food and agriculture, industry, and energy, and at protecting the environment. *See id.* But perhaps its most ambitious proposal was the objective of establishing an economic community in gradual steps by the year 2000. *See id.* *But see*, CLAPHAM, *supra* note 4, at 176 (describing the Lagos Plan of Action as "economically illiterate"). As progress on the implementation of the Lagos Plan of Action faltered, the OAU and the United Nations (U.N.) conducted an in-depth review of Africa's recovery process and devised conditions for long-term development in an effort to relaunch the agenda. *See* Conference on the Challenge of Economic Recovery and Accelerated Development, U.N. Doc. ECA/CERAD/87/75 (Abuja, Nigeria, June 1987). The Conference gave impetus to economic integration and urged African states to address this issue energetically by pursuing the close co-ordination of their economic and social policies. *See* GINO J. NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE 170-80 (1989).

⁷ *See* TREATY ESTABLISHING THE AFRICAN ECONOMIC COMMUNITY, June 3, 1991, 30 I.L.M. 1241, [hereinafter AEC TREATY], *reprinted in* DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 203 (Gino J. Naldi ed., 1992) [hereinafter DOCUMENTS OF THE OAU].

economic self-reliance and greater economic stability.⁸ It seeks to lessen the reliance on foreign economic aid and to eliminate Africa's inequitable trading relationship with the developed world, factors that have contributed to Africa's perilous economic condition.⁹ Like the European Economic Community, the African Economic Community also has a social and cultural dimension.¹⁰

This Article examines the African Economic Community Treaty (the Treaty) and assesses its chances of success. Part II outlines the basic framework and enumerates the goals of the Treaty.¹¹ Part III examines the institutions established under the Treaty, with a special emphasis on the Court of Justice.¹² The sources and supremacy of AEC law are discussed in Part IV,¹³ while membership issues are explored in Part V.¹⁴ Part VI analyzes the regulation of substantive law under the Treaty, drawing comparisons with the European Economic Community due to existing areas of similarity and speculation that the AEC may develop similarly, although the history of Africa suggest that African states will be reluctant to surrender economic power.¹⁵ Finally, in Part VII, the Article concludes that the African Economic Community will not succeed without sweeping political, economic, and legal reforms.¹⁶

II. The Framework of the AEC Treaty

The AEC Treaty was adopted at Abuja, Nigeria on June 3, 1991 and entered into force in May 1994.¹⁷ By virtue of Article 2, an

⁸ See *id.* art. 4(1)(a)-(c).

⁹ See *id.* art. 4(2).

¹⁰ See *id.* chs. 12, 13.

¹¹ See *infra* notes 17-30 and accompanying text.

¹² See *infra* notes 31-84 and accompanying text.

¹³ See *infra* notes 85-128 and accompanying text.

¹⁴ See *infra* notes 129-62 and accompanying text.

¹⁵ See *infra* notes 163-94 and accompanying text.

¹⁶ See *infra* notes 195-97 and accompanying text.

¹⁷ See AEC TREATY, *supra* note 7. The AEC was inaugurated at the 33d OAU Summit held in Harare in 1997. See 43 KEESING'S RECORD OF WORLD EVENTS 41,674 (1997). Fifty-one African states are parties to the Treaty; forty-two have ratified. See *Report of the Secretary-General on the Status of OAU Treaties*, 10 AFR. J. INT'L & COMP.

African Economic Community was established.¹⁸ Its wide-ranging objectives seek to: (1) promote economic, social, and cultural development; (2) integrate the African economies leading to increased economic self-reliance; (3) harness and develop Africa's human and material resources; (4) promote co-operation so as to raise the standard of living and enhance economic stability; (5) foster peaceful relations among member states; and (6) contribute to the progress, development, and economic integration of the continent.¹⁹

These aims are to be achieved by a number of different means, including the liberalization of trade between member states through the abolition of import and export customs duties and non-tariff barriers, which will eventually lead to the setting up of a free trade area; the adoption of a common trade policy and external tariff vis-à-vis third party states; the harmonization of member states' policies in the areas of agriculture, industry, transport and communications, energy, trade, finance, and science and technology; the removal of obstacles to the free movement of persons, goods, services, and capital; the conferment of the rights of residence for natural persons and establishment for legal persons; and, finally, the establishment of a common market.²⁰ This enumeration of the means to be employed reveals that, not unlike the European Union, the Treaty envisages for the AEC a role going beyond the economic sphere and covering the social and political domains, which might eventually

L. 522, 532 (1998); Bankole Thompson, *Economic Integration Efforts in Africa: A Milestone – The Abuja Treaty*, 5 AFR. J. INT'L & COMP. L. 743, 744 (1993); Bankole Thompson & Richard S. Mukisa, *Legal Integration as a Key Component of African Economic Integration: A Study of Potential Legal Obstacles to the Implementation of the Abuja Treaty*, 20 COMMONWEALTH L. BULL. 1446, 1447 (1994); Nutumba Luaba Lumu, *De la Nature de la Communauté Economique Africaine*, 8 AFR. J. INT'L & COMP. L. 51, 51 (1996).

¹⁸ See AEC TREATY, *supra* note 7, art. 2. The AEC forms an integral part of the OAU. See *id.* pmb., arts. 1(c), 98(1). Furthermore, the Treaty and Protocols are integral parts of the OAU Charter. See *id.* art. 99. Thompson and Mukisa are of the view that this language is not conclusive of the AEC's legal personality and predict trouble ahead. See Thompson & Mukisa, *supra* note 17, at 1452. However, since the OAU has legal personality, it would seem to follow that the same holds true for the AEC. See NALDI, *supra* note 6, at 14. Cf. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC TREATY].

¹⁹ See AEC TREATY, *supra* note 7, art. 4(1).

²⁰ See *id.* art. 4(2).

lead to political integration.²¹

As is the case with all Regional Economic Integration Organizations (REIOs), the accomplishment of integration in the AEC will be effected gradually.²² Thus, it will take place in six stages over a transitional period not exceeding forty years from the Treaty's entry into force,²³ that is, until 2034.²⁴ The first stage, reflecting the Lagos Plan recommendations, requires the strengthening of existing regional economic communities and creation of new ones where they do not exist.²⁵ In the second stage, the removal of tariff and non-tariff barriers between member states and the harmonization of customs duties in relation to third party countries should be achieved.²⁶ The third and fourth stages include the establishment of a free trade area and a customs union,²⁷ while the next stage should see the establishment of an African Common Market.²⁸ The final (sixth) stage envisages (a) the consolidation of

²¹ See *id.* art. 6(2)(f)(ii); Ndulo, *supra* note 1, at 102; Y. Omorogbe, *Economic Integration and African National Development*, 7 PROC. AFR. SOC. INT'L & COMP. L. 279, 286 (1995); Thompson, *supra* note 17, at 765-77.

²² See AEC TREATY, *supra* note 7, art. 6.

²³ See *id.*; Omorogbe, *supra* note 21, at 284-85.

²⁴ See AEC TREATY, *supra* note 7, art. 6(4). Transition from one stage to the other is not automatic when the relevant time frame has lapsed but is effected only when the Assembly has confirmed that it has attained its objectives and has approved the transition to the next stage. See *id.*

²⁵ See Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities, Feb. 25, 1998, art. 3, *reprinted in* 10 AFR. J. INT'L & COMP. L. 157 (1998) [hereinafter Protocol]; Sunday Babalola Ajulo, *Temporal Scope of ECOWAS and AEC Treaties: A Case for African Economic Integration*, 8 AFR. J. INT'L & COMP. L. 111, 116 (1996). The most important African regional organizations are the following: Economic Community of Western African States, May 28, 1975, 14 I.L.M. 1200 (1975), and Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1996) [hereinafter ECOWAS Treaty]; Common Market for Eastern and Southern Africa, 33 I.L.M. 1072 (1994); and Southern African Development Community, Aug. 17, 1992, *reprinted in* 5 AFR. J. INT'L & COMP. L. 415 (1993). See also Kenneth K. Mwenda, *Legal Aspects of Regional Integration: COMESA and SADC on the Regulation of Foreign Investment in Southern and Eastern Africa*, 9 AFR. J. INT'L & COMP. L. 324 (1997) (evaluating the strengths and weaknesses of the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC)).

²⁶ See AEC TREATY, *supra* note 7, art. 6(2)(b).

²⁷ See *id.* art. 6(2)(c)-(d).

²⁸ See *id.* art. 6(2)(e).

the African Common Market by allowing the free movement of persons, goods, capital, and services and the associated rights of residence and establishment; (b) the integration of all economic, political, social, and cultural sectors and the establishment of a single domestic market; (c) the development of an African Monetary Union with a single African Central Bank and currency; (d) the harmonization and coordination of the activities of regional economic communities;²⁹ (e) the setting up of the structures of African multinational enterprises in all sectors; and (f) the creation of the structures for the functioning of the AEC organs.³⁰

III. The Community Organs

According to Article 7(1), the following are the organs of the Community: (1) the Assembly; (2) the Council of Ministers; (3) the Pan-African Parliament; (4) the Economic and Social Commission; (5) the Court of Justice; (6) the General Secretariat; and (7) the Specialized Technical Committees.³¹

1. *The Assembly of Heads of State and Government*

The Assembly, which is the supreme organ of the AEC, has legislative and supervisory functions and is responsible for implementing its objectives.³² To that end, it has been endowed with power to determine the AEC's general policy, harmonize the sectoral policies of the member states, approve, on the recommendation of the Council, the AEC's program and budget, refer disputes to and seek advisory opinions from the Court of Justice, and take any necessary action to attain its aims.³³

²⁹ See *id.* art. 6(2)(f); Protocol, *supra* note 25.

³⁰ See AEC TREATY, *supra* note 7, art. 6(2)(f)(vi)-(vii).

³¹ See *id.* art. 7(1). The Assembly, the Council, and the General Secretariat are the same as those of the OAU. See *id.* art. 1(h), (i), (n). See also NALDI, *supra* note 6, 14-19 (describing the role of these institutions in the OAU).

³² See AEC TREATY, *supra* note 7, art. 8.

³³ See *id.* art. 8(2)-(3). The Assembly has been given a dispute resolution function under the Protocol on the Relationship between the African Economic Community and the Regional Economic Communities. See *id.* art. 30. Ordinarily, the Assembly meets once a year. See *id.* art. 9(1).

2. *The Council of Ministers*

The Council is responsible for the AEC's functioning and for its development.³⁴ To achieve these goals, it has been given the authority to make recommendations and submit proposals to the Assembly concerning Community programs and the budget, request advisory opinions from the Court of Justice, guide the activities of the subordinate organs of the AEC, and assemble the Commission and the specialized technical committees.³⁵

3. *The Pan-African Parliament*

The Parliament is established with a view of ensuring the participation of the peoples of Africa in the running of the Community.³⁶ However, its composition, functions, and powers are undefined, and the details are simply left to a later protocol.³⁷ There is, therefore, no indication how the people are to be involved nor whether the Parliament is meant to exercise any democratic accountability over the AEC. Although there is no intimation as to whether it will have legislative or supervisory powers, the answer should be given in the negative. The Treaty's framework would imply that all secondary legislation is, directly or indirectly, adopted by the Assembly and the Council, while the supervision of the activities of the AEC organs has been entrusted to the Court of Justice.³⁸ The Parliament of the European Community (EC) provides an obvious model.³⁹ Whether the political will exists in Africa, however, to set up a democratically elected body, over which the governments of the member states can exercise little or no control, is open to question.

³⁴ See *id.* art. 11(2).

³⁵ See *id.* art. 11(2)-(3). Ordinarily, the Council meets twice a year. See *id.* art. 12(1).

³⁶ See *id.* art. 14(1).

³⁷ See *id.* art. 14; Thompson, *supra* note 17, at 757.

³⁸ See AEC TREATY, *supra* note 7, arts. 8, 11, 18.

³⁹ See Case 138/79, *Roquette Frères v. Council*, 1980 E.C.R. 3333, 3360. The European Court of Justice (ECJ) referred to "the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly." *Id.*

4. *The Economic and Social Commission*

The Economic and Social Commission is composed of the ministers of member states responsible for economic development, planning, and integration.⁴⁰ The Commission, which has not been endowed with any decision-making authority, is expected to prepare policies and strategies for co-operation in the fields of economic and social development among African countries and between Africa and the international community; make recommendations to the Assembly on the coordination and harmonization of the activities of the regional economic communities; supervise the activities of the Secretariat and the Committees and assess the latter's recommendations before forwarding them to the Assembly; and supervise the preparation of international negotiations on behalf of the Assembly.⁴¹ The Commission does not have the right to communicate any documents to the Assembly directly but must channel them through the Council.⁴² This would invariably lead to unnecessary red tape and duplication of effort.

5. *The General Secretariat*

The Secretary-General directs the activities of the Secretariat and is charged with securing the implementation of the Assembly's decisions and the application of the Council's regulations.⁴³ Furthermore, he is responsible for promoting development programs and drafting studies on the attainment of AEC objectives.⁴⁴ Additionally, he is entrusted with preparing proposals on the program of activity and on the budget and securing their implementation upon approval by the Assembly.⁴⁵ He must also

⁴⁰ See AEC TREATY, *supra* note 7, art. 15(2). Representatives of regional economic communities have the right to take part in its meetings. See *id.* art. 15(3). The Commission meets at least once a year but can meet in emergency session on its own initiative or at the request of the Assembly or the Council. See *id.* art. 17.

⁴¹ See *id.* art. 16; see also Thompson, *supra* note 17, at 762 (espousing a view of the Commission's functions as central to the Community objectives).

⁴² See AEC TREATY, *supra* note 7, art. 16(c)-(e).

⁴³ See *id.* art. 22. Thompson sees the General Secretariat as the "nerve centre" of the AEC. Thompson, *supra* note 17, at 761.

⁴⁴ See AEC TREATY, *supra* note 7, art. 22(2)(b), (f).

⁴⁵ See *id.* art. 22(2)(c).

submit a yearly report on the AEC's activities to the Assembly, Council and Commission.⁴⁶ Finally, the Secretary-General shall participate fully in the meetings and deliberations of the regional economic communities.⁴⁷

Pursuant to Article 24(1), the Secretary-General and all staff shall be accountable only to the AEC.⁴⁸ Thus, they are considered to be international civil servants, who are prohibited from seeking and accepting instructions from any member state or being otherwise influenced in the exercise of their duties.⁴⁹ Although the Treaty does not expressly state that they are covered by the immunities that apply to OAU staff, it should be accepted that the General Convention on the Privileges and Immunities of the OAU is also applicable to them.⁵⁰

6. *The Specialized Technical Committees*

Article 25 establishes seven Specialized Technical Committees.⁵¹ Each of them is competent to deal with a particular sector of the AEC's activities and is composed of representatives from all member states.⁵² Their functions are enumerated in Article 26 and include, within their field of competence, the preparation of projects for submission to the Commission, the coordination of AEC programs, reporting to the Commission on the execution of the Treaty, and ensuring the supervision, follow-up, and evaluation of the "implementation of decisions taken by the organs of the Community."⁵³

This last stipulation might give rise to question of interpretation, as it is not clear how the word "decisions" should be understood. If

⁴⁶ See *id.* art. 22(2)(d).

⁴⁷ See Protocol, *supra* note 25, arts. 20(1), 23.

⁴⁸ See AEC TREATY, *supra* note 7, art. 24(1).

⁴⁹ See *id.*

⁵⁰ See General Convention of the Privileges and Immunities of the Organization of African Unity, Oct. 25, 1965, 1000 U.N.T.S. 393, *reprinted in* DOCUMENTS OF THE OAU, *supra* note 7, at 38.

⁵¹ See AEC TREATY, *supra* note 7, art. 25(1)(a)-(g).

⁵² See *id.* art. 25(3).

⁵³ *Id.* art. 26; see Protocol, *supra* note 25, art. 6-10 (establishing coordination organs).

it is taken as a generic term, then the decisions of the Court of Justice would also be included. However, this would contradict their technical character and their overall role in the AEC's structure as organs assisting the Commission.⁵⁴ Decisions should be taken to mean secondary legislation, such as Council decisions and Commission regulations.

7. *The Court of Justice*

Given the lack of any judicial organ in the original structure of the OAU, the creation of a Court of Justice should be regarded as a very significant development. The Court has been assigned the task of ensuring adherence to the law in the interpretation and application of the Treaty and with the adjudication of disputes submitted to it.⁵⁵ The Court, whose independence is guaranteed,⁵⁶ has jurisdiction over actions brought by a member state or the Assembly on grounds of a violation of a Treaty provision or of a legislative measure or on grounds of lack of competence or abuse of powers by an organ or a member state.⁵⁷ Furthermore, it should be observed that, under the Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities, the Assembly may refer any dispute concerning the Protocol to the Court as a measure of "last resort."⁵⁸

The wording of Article 18(3)(a) is vague, and it is not apparent whether the Court is empowered to annul Community or even municipal legislation.⁵⁹ The lack of competence to annul

⁵⁴ See AEC TREATY, *supra* note 7, art. 27 (stipulating that its Rules of Procedure shall be approved by the Commission).

⁵⁵ See *id.* art. 18(1)-(2).

⁵⁶ See *id.* art. 18(5).

⁵⁷ See *id.* art. 18(3)(a); see also *id.* art. 8(3)(k) (specifying an absolute majority vote in the Assembly to refer a matter to the Court). No express provision is made for finding a member state or organ in breach of a general principle of law.

⁵⁸ Protocol, *supra* note 25, art. 30.

⁵⁹ See AEC TREATY, *supra* note 7, art. 18(3). The Article states:

[The Court shall] decide on actions brought by a member state or the Assembly on grounds of the violation of the provisions of this Treaty, or of a decision or a regulation or on grounds of lack of competence or abuse of powers by an organ, an authority or a member state

Id. art. 18(3)(a). Cf. EC TREATY, *supra* note 18 art. 230(2).

Community legislation would undermine the rule of law and marginalize the Court to the point of irrelevancy. Such a power must be implied. On the other hand, the provision can also be read to mean that the Assembly or a member state could bring an action against another member state's municipal legislation for lack of competence or abuse of powers. A capacity to annul municipal legislation would be a radical development.⁶⁰ This provision is badly drafted and calls for speculation which may only be resolved with the adoption of the protocol relating to the Court.⁶¹

Additionally, the Council cannot bring an action before the Court even though it may be a defendant.⁶² The only avenues open to the Council are either to rely on the parties with standing to defend its interests before the Court⁶³ or to invoke the Court's advisory jurisdiction to obtain what in effect would be a declaratory judgment. The Assembly may additionally confer on the Court of Justice, jurisdiction over any other dispute.⁶⁴ Finally, the Court's judgments are binding on member states and organs of the AEC.⁶⁵

In addition to Article 18, the Treaty stipulates the involvement of the Court in the "procedure for the settlement of disputes."⁶⁶ More particularly, Article 87 envisages that all disputes regarding the Treaty's interpretation and application shall be initially settled through amicable agreement by the parties involved.⁶⁷ Should this

⁶⁰ Although the European Court of Justice cannot invalidate municipal law it can set aside a national statute. *See* Case C-221/89, *The Queen v. Sec'y of State for Transp., ex parte Factortame Ltd.* (No 2), 1991 E.C.R. I-3905.

⁶¹ *See* AEC TREATY, *supra* note 7, art. 20.

⁶² *See id.* art. 8. Other Community organs may also be named as defendants. *See id.* art. 8(3)(k) (empowering the Assembly to refer cases to the Court when it has confirmed that any organ has not honored its obligations or has abused its powers).

⁶³ This has occurred in the EC, in a ruling of the European Court of Justice in relation to the European Parliament. *See* Case 302/87, *European Parliament v. Council*, 1988 E.C.R. 5615, *rev'd as inadequate*, Case C-70/88, *European Parliament v. Council*, 1990 E.C.R. 2041.

⁶⁴ *See* AEC TREATY, *supra* note 7, art. 18(4). As the settlement of staff disputes is not regulated in the Treaty, this provision may be employed by the Assembly to cover such disputes as well. *See id.*

⁶⁵ *See id.* arts. 5, 19.

⁶⁶ *Id.* art. 87.

⁶⁷ *See id.*

settlement fail, either party may, within the next twelve months, refer the matter to the Court, whose decisions shall be final and not subject to appeal.⁶⁸

It is not immediately obvious how these two provisions co-exist. Assume, for the sake of argument, that a member state argues that the Assembly, by adopting a certain decision, has acted in breach of the Treaty. While such a dispute definitely falls within the ambit of Article 18(3)(a), it is also a dispute concerning the interpretation or application of the Treaty provision allegedly breached. In effect, the procedure of Article 87 comes into play. Should the member state in question attempt, in the first instance, to settle the dispute amicably with the Assembly, or is it entitled to proceed immediately with a request to the Court for judicial review of the decision?

Assume further that the former suggestion is the correct one, that the dispute is not amicably resolved, and the member state refers the matter to the Court. In such an eventuality, is the matter referred to the Court as an Article 18(3)(a) action or does Article 87 offer a distinct and separate jurisdictional basis? The answer to this question is of some importance, as Article 87(2) provides that Court decisions are not subject to appeal, whereas this stipulation does not appear in Article 18.⁶⁹ Although there is consensus that the judgments of the courts of international organizations are final and not subject to appeal even if there is no specific provision to that effect in the constitutive instrument,⁷⁰ this inconsistency could potentially lead to problems.

Although it remains to be seen how the Court will operate in practice, the Treaty leaves many questions unanswered. An obvious omission is a procedure for obtaining a preliminary ruling on the interpretation of AEC law comparable to that available under Article 177 of the EC Treaty.⁷¹ Although the different African legal

⁶⁸ See *id.* Cf. *supra* note 58 and accompanying text.

⁶⁹ See AEC TREATY, *supra* note 7, arts. 18, 87(2).

⁷⁰ See TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 66 (3d ed. 1994) (referring to the European Court of Justice); P. VAN DIJK & G. J. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 133, 156 (2d ed. 1990) (referring to the European Court of Human Rights).

⁷¹ See EC TREATY, *supra* note 18, art. 177; see also Gerhard Bebr, *Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect*, 18 COMMON MKT. L. REV. 475 (1981) (discussing the Court's jurisdiction, the applicability of Article 177, and

traditions may make agreement on this issue rather difficult, there is no doubt that, if adopted, such a procedure would contribute greatly to the advancement of the rule of law and would permit the indirect involvement of private individuals in ensuring that Treaty obligations are observed in the domestic legal systems.⁷²

Furthermore, there is no provision on whether the Court may issue interim measures of protection⁷³ or whether it will be allowed to determine its own jurisdiction. For instance, Article 18(3) states that the Court *shall* give advisory opinions.⁷⁴ Does this mean that the Court is compelled to do so even if it considers the question frivolous or without merit? In addition, the very limited number of parties with standing must be criticized as unduly restrictive.⁷⁵ Unlike the African Commission on Human Rights⁷⁶ and the proposed African Court of Human Rights,⁷⁷ no guidance is provided as to whether the Court can draw inspiration from general principles

the binding authority and temporal effect of preliminary rulings).

⁷² See Ndulo, *supra* note 1, at 107.

⁷³ See Guus Borchardt, *The Award of Interim Measures by the ECJ*, 22 COMMON MKT. L. REV. 203, 204-06 (1985); Konstantinos D. Magliveras, *Force Majeure and Interim Measures in European Community Law* (1989) (unpublished LL.M. thesis, University of East Anglia (U.K.)) (on file with author).

⁷⁴ See AEC TREATY, *supra* note 7, art. 18(3).

⁷⁵ See Ndulo, *supra* note 1, at 107. Ndulo argues that the Assembly may refer to the Court disputes between natural or legal persons and member states concerning the latter's compliance with the obligations imposed by the Treaty or concerning breaches of Community legislation. See *id.* He also points out that natural and legal persons have proved effective guardians of the EC legal order and have contributed enormously to the evolution of EC Law. See *id.* at 109-10. See, e.g., Christopher Harding, *The Private Interest in Challenging Community Action*, 5 EUR. L. REV. 354 (1980); Carol Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 Y.B. EUR. L. 213 (1992).

⁷⁶ See African Charter on Human and Peoples' Rights, June 1981, 21 I.L.M. 58, arts. 60, 61 (1982), reprinted in DOCUMENTS OF THE OAU, *supra* note 7, at 109.

⁷⁷ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Dec. 12-13, 1997, OAU/LEG/EXP/AFCHPR/PROT(III), reprinted in 9 AFR. J. INT'L & COMP. LAW 953 (1997). This Protocol was adopted by the OAU Assembly of Heads of State of Government at its thirty-fourth ordinary session in Ouagadougou, Burkina Faso, June 8-10, 1998. See, e.g., Gino J. Naldi and Konstantinos D. Magliveras, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights*, 16 NETH. Q. HUM. RTS. 431 (1998) (explaining the Court's powers and structure and urging the Protocol's ratification).

of international law, as these have been developed or applied by other REIOs.⁷⁸ The Court must be given the freedom to be guided by persuasive authorities from other jurisdictions. By being allowed to do so, it will have the benefit of the wide experience gained by similar institutions.

Finally, there is no express reference to the enforcement of judgments, and an expectation that member states will simply abide by the Court's decisions may be naive.⁷⁹ However, Article 5(1)-(2) requires member states to take all necessary measures to fulfill their obligations and allows for sanctions against a member that persistently fails to honor its Treaty undertakings.⁸⁰ This provision could be used against a state that flouts the Court's decisions.

Given that African states have traditionally been wary of binding adjudication, past experience might suggest that the Court will be underused.⁸¹ However, the Court has a central role to play in the AEC's development, and it must be permitted to contribute fully to that growth. One can only anticipate that the Court will assume effective powers. The experience of the EC has demonstrated on numerous occasions that without an active, dynamic, and forceful Court, its objectives would have been thwarted.⁸² Neither should the salient role of the European Court of Justice (ECJ) in making the EC Treaty and secondary legislation effective and in evolving general principles of EC Law be overlooked.⁸³ The EC experience provides a role model for the AEC, and it is up to the African states to take

⁷⁸ See CASES AND MATERIALS OF EUROPEAN COMMUNITY LAW chs. 13-16 (George A. Bermann et al. eds., 1993).

⁷⁹ See AEC TREATY, *supra* note 7, arts. 3(e), 5; Thompson & Mukisa, *supra* note 17, at 1454; Ndulo, *supra* note 1, at 107.

⁸⁰ See AEC TREATY, *supra* note, art. 5(1)-(2).

⁸¹ See Tiyanjana Maluwa, *The Peaceful Settlement of Disputes Among African States, 1963-1983: Some Conceptual Issues and Practical Trends*, 38 INT'L & COMP. L. Q. 299, 301-03 (1989).

⁸² See, e.g., Francis Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court?*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW (Deirdre Curtin & Dennis O'Keefe eds., 1985).

⁸³ See, e.g., Paul Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEGAL STUD. 453, 453-54 (1992); Lars B. Krogsgaard, *Fundamental Rights in the EC After Maastricht*, LEGAL ISSUES OF EUR. INTEGRATION, 1993/1, at 99, 100-02.

full advantage of it; whether they are prepared to do so remains to be seen.

According to Article 20, the details relating to the Court's statute shall be determined by the Assembly and embodied in a Protocol, which has not yet been adopted.⁸⁴ This provision raises a very important issue. Since there is no stipulation as to the Protocol's legal form, will it be an international treaty subject to ratification by member states to enter into force or will it be an Assembly decision? The consequences of the first alternative are obvious: if certain members opt not to sign the Protocol, they can never be brought before the Court of Justice. This would automatically create two categories of members: those that are subject to the Court's jurisdiction and those that are not. Such an eventuality is unthinkable in a REIO, whose effective functioning is based on uniformity in the application of rules. Furthermore, members may use their ability to withdraw from the Protocol as a weapon akin to revocation of a declaration accepting a Court's compulsory jurisdiction.

IV. AEC Law

1. Primary and Secondary Sources of Law

The AEC Treaty provides for various sources of law. First and foremost, there is the Treaty itself, which constitutes the primary source.⁸⁵ By virtue of Article 18(3)(a), the Treaty takes precedence over conflicting legal obligations contained in secondary sources of law, namely decisions and regulations.⁸⁶

The Treaty empowers both the Assembly and the Council to adopt subordinate legislative measures.⁸⁷ However, the Treaty establishes a clear hierarchy of secondary sources of law. The Assembly acts by decisions which are binding on member states,

⁸⁴ See AEC TREATY, *supra* note 7, art. 20.

⁸⁵ See *id.* art. 5(2) (requiring that "[e]ach member state shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of this Treaty").

⁸⁶ See *id.* art. 18(3)(a).

⁸⁷ See *id.* arts. 8-10 (Assembly) and 11-13 (Council).

organs, and regional economic communities.⁸⁸ Once the Chairman of the Assembly signs a decision, it is automatically enforceable in thirty days.⁸⁹

The Council issues regulations that are similarly binding on members, organs, and regional economic communities after their approval by the Assembly.⁹⁰ However, no prior permission is necessary where the Council is acting under powers delegated by the Assembly.⁹¹ Regulations are likewise automatically enforceable thirty days after the date of signature by the Chairman of the Assembly.⁹²

It is not immediately apparent whether decisions and regulations are meant to take effect without further legislative enactment on the part of member states, that is, whether they are self-executing.⁹³ The phrase "automatically enforceable" employed in Articles 10(3) and 13(3) seems to refer to their effect on the international plane, governing the relationship between the AEC and its members.⁹⁴ The effect in the domestic arena seems to be a matter for each individual member state, in accordance with national requirements, as stipulated by Article 5(2).⁹⁵ This then begs the question whether the Court of Justice will take the giant step of adopting the EC concept of direct effect, *i.e.*, measures which give rise to rights or obligations which individuals can invoke before their national courts, thereby

⁸⁸ *See id.* art. 10(1)-(2). Decisions are adopted by consensus, or failing that, by a two-thirds majority of member states. *See id.* art. 10(4). However, the Treaty is vague, and no quorum is specified. *See id.*

⁸⁹ *See id.* art. 10(3).

⁹⁰ *See id.* art. 13(1)-(2). Regulations are adopted by consensus, or failing such consensus, by a two-thirds majority of member states. *See id.* art. 13(4). Again, no quorum is specified. *See id.*

⁹¹ *See id.* art. 13(2).

⁹² *See id.* art. 13(3). As regulations are not self-standing instruments but are always subject to approval by the Assembly, the conclusion could be reached that the Assembly may not attack regulations before the Court, with the possible exception of those which were issued under delegated powers. However, it is rather unclear if an action for judicial review of a regulation must, by necessary implication, include the decision approving it.

⁹³ *See* Thompson, *supra* note 17, at 763-64.

⁹⁴ AEC TREATY, *supra* note 7, arts. 10(3), 13(3).

⁹⁵ *See id.* art. 5(2).

promoting the realization of AEC policies.⁹⁶

Article 5 of the AEC Treaty requires member states to take all necessary measures to fulfill their obligations.⁹⁷ This provision is similarly worded to Article 5 of the EC Treaty, from which the ECJ has derived the principle of indirect effect, which requires all state organs to achieve the result stated in the EC legislation, and the duty of interpretation, which requires national courts to interpret all relevant domestic laws in the light of EC law.⁹⁸ An activist Court of Justice may follow a path similar to that cleared by the ECJ.

Under Article 8(3)(a) the Assembly can also issue directives.⁹⁹ These do not appear to be legislative measures, but rather seem to be "instructions" or "guiding principles."¹⁰⁰ The Council, the Commission, and the Specialized Technical Committees are authorized to make recommendations and submit reports,¹⁰¹ which are not legally binding.¹⁰²

Under Article 8(3)(b) the Assembly enjoys broad general powers; to attain the AEC objectives, these powers must necessarily include residual legislative powers.¹⁰³ So long as it operates within

⁹⁶ See Case 43/75 *Defrenne v. Sabena*, 1976 E.C.R. 455; Cases C-6, 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357; Case 34/73, *Variola v. Amministrazione Italiana delle Finanze*, 1973 E.C.R. 981.

⁹⁷ See AEC TREATY, *supra* note 7, art. 5(2).

⁹⁸ See, e.g., Case 14/83, *Von Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891, 2 C.M.L.R. 430 (1986) (noting that, while member states may choose among alternative means to achieve the prohibition against sexual discrimination, any compensation must "be adequate in relation to the damage sustained"); Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135; Case C-91/92, *Faccini Dori v. Recreb Srl*, 1995 All E.R. (E.C.) 1, 1 C.M.L.R. 665 (1995) (stating that the court must interpret directives "in light of the wording and purpose of the directives so as to achieve the intended result").

⁹⁹ See AEC TREATY, *supra* note 7, art. 8(3)(a).

¹⁰⁰ Protocol, *supra* note 25, art. 21(1)-(2). Both the Assembly and the Council can address directives to regional economic communities and their member states. See *id.*

¹⁰¹ See AEC TREATY, *supra* note 7, arts. 11(3)(a), 16(d), 26(d).

¹⁰² See *Thompson*, *supra* note 17, at 764. However, the ECJ has held that hortatory measures are not necessarily without legal significance. See Case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, 1989 E.C.R. 4407, 2 C.M.L.R. 265 (1991).

¹⁰³ Cf. EC TREATY, *supra* note 18, art. 235 (allowing for implied powers but only if the Council "acts[s] unanimously on a proposal from the Commission and . . . consult[s] the European Parliament"); Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, 1971 C.M.L.R. 335 (1971) (interpreting the Treaty as conferring on the Community the power

the scope of these powers, the Assembly does not suffer any severe restraint, except that it may not bring about changes tantamount to Treaty amendments solely by employing this provision.¹⁰⁴

2. *The Progressive Development of General Principles of Law*

Through its jurisprudence, the Court of Justice has developed the fundamental principles of law enshrined in the AEC Treaty, including the observance of the Community's legal system and the protection of human rights.¹⁰⁵ Moreover, Community members have undertaken to promote and refrain from hindering the objectives of the AEC.¹⁰⁶ There is, therefore, an explicit commitment on the part of the member states to the rule of law.¹⁰⁷ In addition, it has been submitted that, under Article 18(3)(a), the Court has the power to annul legislation on the grounds of, for example, abuse of powers.

Although the Treaty does not define the concept of "abuse of powers," it likely includes general principles of administrative law such as misuse of power and bad faith.¹⁰⁸ It does not seem unreasonable to assert that the Court may find that some legislation violates human rights norms, such as the principle of non-

to "negotiate and conclude agreements with third countries" beyond the scope of the court's judicial interpretation); Opinion 1/76, Re Draft Agreement on European Laying-Up Fund for Inland Waterways Vessels, 1977 E.C.R. 741, 2 C.M.L.R. 279 (1977); HARTLEY, *supra* note 70, 167-76. See also Case 8/55, Federation Charbonniere de Belgique v. High Authority, 1956 E.C.R. 245 (finding action beyond the express terms of the Treaty unwarranted where another express term conflicts with the action taken); Cases 281, 283-85, 287/85, Germany v. Commission, 1987 E.C.R. 3203, 1 C.M.L.R. 11 (1988) (allowing for those implied powers "which are indispensable to carry out [a specific] task" that was conferred by the Treaty itself).

¹⁰⁴ See AEC TREATY, *supra* note 7, art. 103. Article 103 of the Treaty provides the method for amending the treaty. See *id.*

¹⁰⁵ See AEC TREATY, *supra* note 7, art. 3(e), (g).

¹⁰⁶ See *id.* art. 5(1).

¹⁰⁷ See Thompson & Mukisa, *supra* note 17, at 1454. These authors see the "chronic disregard for the principle of legality" on the part of many African governments as one of the most formidable obstacles to economic integration. *Id.*

¹⁰⁸ Cf. EC TREATY, *supra* note 18, art. 173(2) (conferring the power of judicial review on the Court of Justice with respect to actions brought on the grounds of, *inter alia*, "misuse of powers"). See also Cases 18, 35/65, Gutmann v. Commission of the European Atomic Energy Community, 1966 E.C.R. 103, 116 (holding that "a decision may amount to a misuse of powers if it appears, on the basis of objective, relevant and consistent facts, to have been undertaken for purposes other than those stated").

discrimination on the basis of nationality and sex.¹⁰⁹ Similarly, the Court may determine that legislation violates more general principles of law, such as legal certainty,¹¹⁰ legitimate expectations,¹¹¹ and proportionality.¹¹² These principles have been distinctive features of the jurisprudence of the European Court of Justice.¹¹³

3. *Supremacy of AEC Law*

As the states of Africa proceed towards economic integration and beyond, they must address fundamental question of supremacy. Economic integration implies and demands transfer of sovereignty from member states to the Community.¹¹⁴ Furthermore, if the AEC

¹⁰⁹ See, e.g., EC TREATY, *supra* note 18, arts. 6, 48, 52, 59, 60 (prohibiting discrimination on the basis of nationality) and 119 (requiring “application of the principle that men and women should receive equal pay for equal work”). See also Chris Docksey, *The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law*, 20 INDUS. L.J. 258 (1991) (calling equality a “general principle of Community law” upon which no law may impinge).

¹¹⁰ See, e.g., Case 98/78, *Firma A. Racke v. Hauptzollamt Mainz*, 1979 E.C.R. 69 (noting that legal certainty requires that regulations “enter into force at the same time throughout” the European community); Case 63/83, *The Queen v. Kent Kirk*, 1984 E.C.R. 2689, 3 C.M.L.R. 522 (1984) (noting that “penal provisions may not have retroactive effects”).

¹¹¹ See, e.g., Case 120/86, *Mulder v. Minister van Landbouw en Visserij*, 1988 E.C.R. 2321, 2 C.M.L.R. 1 (1989) (finding that a producer who voluntarily drops out of the market “cannot legitimately expect to be able to resume production” without being subject to rules adopted in his absence); Eleanor Sharpston, *Legitimate Expectations and Economic Reality*, 15 EUR. L. REV. 103, 105 (1990) (discussing more generally the principle of legitimate expectations, which is defined as “the particular form of economic prediction for which an economic agent can claim legal validity in Community law”).

¹¹² See, e.g., Case C-331/88, *The Queen v. Minister for Agric., Fisheries & Food ex parte FEDESA*, 1990 E.C.R. I-4023, 1 C.M.L.R. 507 (1991) (stating that proportionality requires that the EC Council only enact “prohibiting measures [that] are appropriate and necessary in order to achieve the objective legitimately pursued by that legislation”); Grainne de Burca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 103, 105 (1993) (defining proportionality as requiring “that there be a reasonable relationship between a particular objective and the administrative or legislative means used to achieve that objective”).

¹¹³ The ECJ had little difficulty in developing these principles because the legal systems of the original member states shared a common background. By contrast, the lack of coherence in the African legal systems will make the Court’s task far more onerous.

¹¹⁴ See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*,

objectives are to be achieved and disparities between members diminished, a uniform approach to the incorporation, application and interpretation of Community law seems necessary. As the ECJ has stated, the European Community "would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law."¹¹⁵ However, the traditional emphasis on sovereignty and domestic jurisdiction in African states is bound to cause problems.¹¹⁶ The success or failure of the AEC will depend to a large extent on whether member states are prepared to change their philosophy and abandon their distrust of supranationalism.

The AEC Treaty is an international agreement entered into by sovereign states.¹¹⁷ Its ratification takes place in accordance with the constitutional procedures of the participating countries.¹¹⁸ The Community has the features of a supranational organization with all that this implies.¹¹⁹ While the AEC Treaty does not refer to sovereignty or domestic jurisdiction,¹²⁰ the Community is about the division of competence between it and the member states.¹²¹ In addition, the AEC Treaty requires the coordination and harmonization of laws and policies across all spectrums of

1963 E.C.R. 1, 1963 C.M.L.R. 105 (1963) (discussing the obligation imposed on individuals and member states to uphold the terms of the Treaty); Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 1964 C.M.L.R. 425 (1964) (discussing the proper balance between national laws and Treaty obligations, as well as which entity should litigate conflicts).

¹¹⁵ Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 1964 C.M.L.R. (1964).

¹¹⁶ See Thompson & Mukisa, *supra* note 17, at 1449-51. The authors see the issue as one of national sovereignty versus supranationality. See *id.*

¹¹⁷ See AEC TREATY, *supra* note 7, pmb1.

¹¹⁸ See *id.* art. 100. For a discussion of some general problems in the ratification process, see Thompson & Mukisa, *supra* note 17, at 1448-49.

¹¹⁹ In the context of the EC, these implications have been elaborated upon by the ECJ. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 1963 C.M.L.R. 105 (1963).

¹²⁰ See Thompson & Mukisa, *supra* note 17, at 1450.

¹²¹ This question remains controversial in EC law. See EC TREATY, *supra* note 18, art. 3b (the subsidiarity clause). See also *Brunner v. The European Union Treaty*, 1 C.M.L.R. 57 (1994) (Federal Constitutional Court of Germany) (noting that "the protection of fundamental rights provided by the German constitution is not displaced by supra-national law").

activity.¹²² The Community is unlikely to function effectively until and unless it is accorded supremacy in its areas of competence. How will its objectives ever be achieved if conflicting national laws are given precedence over AEC law? Logic dictates that AEC law must have priority over national legislation. Article 5 of the Treaty does seem to lend support to the principle of supremacy of Community law over national law.¹²³ Thus, it follows from the precedent provided by the jurisprudence of the ECJ that AEC law must not be invalidated by national law¹²⁴ or annulled by domestic courts.¹²⁵ Conflicting national legislation must be either superseded¹²⁶ or set aside at the initiative of domestic courts,¹²⁷ and relevant national law must always be interpreted in light of AEC law.¹²⁸ In this context, the application of the principle of direct effect of AEC law will be of paramount importance in securing the harmonization of member states' legislation.

V. Membership Issues

1. Accession to and Withdrawal from the AEC

Article 102(1) provides that any OAU member state may accede to the Community by addressing to its Secretary-General a communication to that effect.¹²⁹ The procedure for admission is very straightforward: it is decided by a simple majority of the existing members.¹³⁰ Thus, unlike the EC, there is no involvement of the

¹²² See, e.g., AEC TREATY, *supra* note 7, arts. 39 (discussing customs cooperation and administration), 40 (discussing trade documents and procedures).

¹²³ See Thompson, *supra* note 17, at 749.

¹²⁴ See Case 11/70, Internationale Handelsgesellschaft GmbH v. Einfuhr-und-Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125.

¹²⁵ See Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 4199, 4199-4200.

¹²⁶ See Case 196/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629, 629-30.

¹²⁷ See C-221/89, The Queen v. Sec'y of State for Transp., *ex parte* Factortame Ltd. (No 2), 1991 E.C.R. I-3905.

¹²⁸ See Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, 1990 E.C.R. I-4135, 4135-36.

¹²⁹ See AEC TREATY, *supra* note 7, art. 102.

¹³⁰ See *id.* art. 102(2).

Community organs in the accession process.¹³¹ Although this does expedite proceedings, it has the negative consequence that no study is undertaken by the Community on whether the proposed member is in the position to fulfill the obligations imposed by the Treaty.

Withdrawal from the Community is envisaged in Article 104.¹³² Any member state wishing to secede must give one year's written notice to the Secretary-General.¹³³ Any such notice may be canceled at any time during this period.¹³⁴ The withdrawal shall become effective upon expiration of the one year period.¹³⁵ The notice for secession does not exonerate the member state in question from complying with its duties throughout the one year period; the member state is bound to discharge its obligations up to the date that withdrawal becomes effective.¹³⁶

There is no stipulation in the Treaty as to what will happen if these obligations are not fulfilled.¹³⁷ As Article 104 is worded, it appears that secession occurs automatically upon expiration of the one year period and the Community does not have the right to postpone the withdrawal until all obligations are fully discharged.¹³⁸

The Treaty also foresees the possibility of the Community's dissolution.¹³⁹ According to Article 105, the Assembly is empowered to dissolve the Community and determine the conditions for distributing its assets and liabilities.¹⁴⁰ It is rather peculiar that the Treaty does not stipulate what grounds may justify dissolution. The constitutive instruments of other international organizations anticipating such possibility usually make dissolution contingent on a significant decrease of member states.¹⁴¹ However,

¹³¹ *See id.*; cf. EC TREATY, *supra* note 18, art. 300.

¹³² *See* AEC TREATY, *supra* note 17, art. 104.

¹³³ *See id.* art. 104(1).

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See id.* art. 104(2).

¹³⁷ *See id.* art. 104.

¹³⁸ *See id.*

¹³⁹ *See id.* art. 105.

¹⁴⁰ *See id.*

¹⁴¹ *See, e.g.*, Convention Establishing the European Space Agency, May 30, 1975, art. 25, 14 I.L.M. 855; Convention Establishing the International Fund for

this does not appear to be very relevant here, as the Community already numbers fifty-one member states.¹⁴² Another possible ground for dissolution might be that the AEC does not achieve, or it appears questionable whether it will ever secure, its aims and objectives.¹⁴³ Notwithstanding the significant political, economic, and monetary questions raised, the dissolution would also bring about complex institutional implications, especially if all six stages have already been concluded.

2. *Suspension of Membership Rights*

The AEC Treaty envisages suspension of membership rights and privileges in two situations.¹⁴⁴ The first is regulated by Article 5(3): any member persistently failing to honor its general undertakings or abide by Community decisions or regulations may be subjected to sanctions by the Assembly upon the action recommended by the Council.¹⁴⁵ These sanctions may be lifted by the Assembly following the Council's recommendation.¹⁴⁶

It is rather difficult to determine whether the only measure expressly mentioned, namely the suspension of membership rights, should be understood as the "upper limit" of such sanctions, in other words, whether the Assembly is allowed to take more severe action. An affirmative answer raises the obvious question whether Article 5(3) gives it *carte blanche* to go as far as expelling a member. Whereas expulsion is, undoubtedly, a sanction in the ordinary meaning of the word, it is submitted that the word "sanctions" in the context of this provision refers to measures that, on the one hand, inflict "punishment" on errant members and, on the other hand, aim at securing compliance with obligations. If this distinction is valid, it follows that expulsion is not a sanction in the meaning of Article 5(3) because it only punishes the recalcitrant state by permanently terminating its membership.

Compensation for Oil Pollution Damage, Nov. 29, 1969, art. 43, 23 I.L.M. 177.

¹⁴² See AEC TREATY, *supra* note 7, pmbl.

¹⁴³ See *id.*

¹⁴⁴ See SERGEI A. VOITOVICH, INTERNATIONAL ECONOMIC ORGANIZATIONS IN THE INTERNATIONAL LEGAL PROCESS 147 (1995).

¹⁴⁵ See AEC TREATY, *supra* note 7, art. 5; Protocol, *supra* note 25, art. 21(3).

¹⁴⁶ See AEC TREATY, *supra* note 7, art. 5(3).

The second situation for suspension of membership rights is regulated by Article 84: member states in arrears equaling or exceeding the assessed amount for the previous two financial years are threatened with having their membership rights suspended.¹⁴⁷ The decision is reached by the Assembly, and the Council has no role to play here.¹⁴⁸ Article 84 enumerates the consequences for suspended members, the most important being that they lose the right to vote or participate in Community decisions.¹⁴⁹ Considering that, according to Article 10(1), the word "decisions" describes the legally binding legislative acts that the Assembly adopts, it could be argued that this sanction does not extend to regulations, the legislative acts which are taken by the Council.¹⁵⁰ This argument is in conformity with the provision of Article 13(2), whereby regulations acquire their mandatory nature once they have been approved by the Assembly.¹⁵¹ Thus, the conclusion could be reached that the member in arrears is allowed to vote in the Council but is excluded from the Assembly.

Despite the draconian nature of Article 84, the drafters, being aware of the difficult economic situation in Africa, inserted Article 84(2) which contains a *force majeure* clause.¹⁵² Thus, the Assembly is authorized to defer the enforcement of sanctions relating to non-payment of contributions if it is satisfied, on the basis of a well supported and detailed report prepared by the member in question, that the non-fulfilment of the financial obligations is due to circumstances beyond the control of the recalcitrant state.¹⁵³

¹⁴⁷ See *id.* art. 84. Article 82(2) of the AEC Treaty expressly provides that the Community budget shall be funded by contributions of member states. See *id.* art. 82(2); Lumu, *supra* note 17, at 63.

¹⁴⁸ See AEC TREATY, *supra* note 7, art. 84.

¹⁴⁹ See *id.* art. 84(1). Other consequences include losing the right to enjoy Treaty benefits, to address meetings, and to present candidates for vacant Community posts. See *id.* There is no enumeration of the consequences of suspension of membership rights ordered under Article 5(3). See *id.* art. 5(3). They are likely to be the same as those in Article 84(1). See *id.* art. 84(1).

¹⁵⁰ See *id.* art. 10.

¹⁵¹ See *id.* art. 13(2).

¹⁵² See *id.* art. 84(2).

¹⁵³ For a similar clause, which extends to the non-fulfilment of any obligation, see ECOWAS Treaty, *supra* note 25, art. 77(3).

Furthermore, members may be released from the obligation to pay financial contributions on the basis of Article 79.¹⁵⁴ It stipulates that the least developed, land-locked, and island countries shall be granted, where appropriate, temporary exception from the full application of certain Treaty provisions.¹⁵⁵

Article 5(3) requires that members must have persistently failed to honor their undertakings or abide by decisions or regulations before suspension can be contemplated.¹⁵⁶ The Treaty reserves a special role in this procedure for the Court of Justice. The Assembly is compelled, in pursuance to Article 8(3)(k), to refer to the Court any matter in which it has determined that a member state has not honored any of its obligations.¹⁵⁷ The jurisdiction with which the Treaty has endowed the Court signifies that Assembly decisions concluding that a state has infringed its duties are not of a juridical nature, as the Assembly may not act in any quasi-judicial capacity; its decisions are only determinations of fact.¹⁵⁸

Suspended member states may take advantage of the judicial review system of Community acts that the AEC Treaty has established.¹⁵⁹ Thus, if a member believes that the decision suspending its membership rights is legally defective, it can invoke Article 18(3)(a) conferring exclusive competence on the Court to decide on member states' actions against a decision on the grounds that the Assembly lacked the necessary competence or abused its powers.¹⁶⁰ Since the disputed decision on suspension is based on the prior determination that the member in question had violated its obligations, it follows that, in these circumstances, the Court's role is only to adjudicate whether the contested decision is unconstitutional or *ultra vires* and may not act as an appellate body on the issue of Treaty infringements, as this has already been resolved authoritatively in the context of the Article 8(3)(k)

¹⁵⁴ See AEC TREATY, *supra* note 7, art. 79(1)-(2).

¹⁵⁵ See *id.* Under Article 78(1) of the AEC Treaty, signatory states have already agreed to grant such exemptions to Botswana, Lesotho, Namibia, and Swaziland. See *id.* art. 78(1).

¹⁵⁶ See *id.* art. 5(3).

¹⁵⁷ See *id.* art. 8(3)(k).

¹⁵⁸ See *id.* arts. 7, 8, 18.

¹⁵⁹ See *id.* art. 18.

¹⁶⁰ See *id.*

procedure.¹⁶¹

During suspension proceedings the Court of Justice has an important role to play, particularly in determining that the sanctions imposed against the recalcitrant member state are in accordance with the relevant Treaty provisions. However, the Court may not encroach upon the domain of the Assembly and must respect all material findings in its decisions. Because Article 19 makes Court judgments binding upon member states and Community organs, the AEC is well equipped to ensure that the rule of law is observed during the imposition of sanctions.¹⁶²

VI. The Regulation of Substantive Law in the AEC Treaty

The Treaty seeks to regulate various areas of economic activity at both regional and continental levels.

1. Customs Union and Liberalization of Trade

Article 29 requires the progressive establishment of a customs union and the adoption of a common external customs tariff.¹⁶³ Subsequent provisions set out how these objectives are to be achieved and include: a prohibition on the imposition of any new customs duties or the increase of existing ones with the aim of eventual elimination of customs duties;¹⁶⁴ the relaxation and ultimate prohibition of quota restrictions and other non-tariff barriers;¹⁶⁵ the establishment of a common external customs tariff applicable to goods originating from third party countries imported into member states;¹⁶⁶ a prohibition on customs duties on goods originating in one member state and imported into another and on goods originating from third party countries in free circulation in member states;¹⁶⁷ a

¹⁶¹ See *id.* arts. 7, 8, 18.

¹⁶² See *id.* art. 19.

¹⁶³ See *id.* art. 29. These measures are to be taken at the level of regional economic communities. See Protocol, *supra* note 25, arts. 13, 14.

¹⁶⁴ See AEC TREATY, *supra* note 7, arts. 30(1)-(2), 33(1).

¹⁶⁵ See *id.* art. 31(1). Curiously, the AEC Treaty does not seem to include a provision prohibiting quotas on exports between member states comparable to the EC Treaty. See EC TREATY, *supra* note 18, art. 34.

¹⁶⁶ See AEC TREATY, *supra* note 7, art. 32(1).

¹⁶⁷ See *id.* art. 33(1). According to paragraph (3), goods from third party states are

ban on national legislation directly or indirectly discriminating against products originating from another member state;¹⁶⁸ a proscription on internal taxes in excess of those levied on similar domestic goods originating from a member state and imported into another;¹⁶⁹ and the progressive elimination of internal taxes levied for the protection of domestic products.¹⁷⁰

The experience of the EC demonstrates that states are ingenious in developing all kinds of new barriers obstructing the free movement of goods in order to protect domestically produced goods.¹⁷¹ Therefore, the phrase "and all measures having equivalent effect"¹⁷² should have been inserted in the relevant provisions of the AEC Treaty.¹⁷³ As the situation now stands, it will take a great effort by the Court of Justice to build consistent case law declaring such barriers incompatible with the AEC Treaty.

As is the case in all other REIOs,¹⁷⁴ the AEC Treaty permits members to derogate from the application of these provisions if certain conditions are present.¹⁷⁵ However, as Article 35 expressly states, none of these derogations may be used to discriminate arbitrarily against other members.¹⁷⁶ It is not clear whether the derogations are subject to the principle of proportionality, in other words, whether members are allowed to derogate only to the degree

considered to be in free circulation in a member state where the import formalities have been complied with, where customs duties have been paid in the member state, and where the goods have not benefited from any exemption from custom duties. *See id.*

¹⁶⁸ *See id.* art. 33(4).

¹⁶⁹ *See id.* art. 34(1).

¹⁷⁰ *See id.* art. 34(2).

¹⁷¹ *See, e.g.,* Cases 51 and 54/71 *International Fruit v. Produktshap voor Groenten en Fruit*, 1971 E.C.R. 1116.

¹⁷² EC TREATY, *supra* note 18, art. 30.

¹⁷³ *See id.* arts. 30-34; AEC TREATY arts. 29-34; *see also* René Barents, *Charges of Equivalent Effect to Customs Duties*, 15 COMMON MKT. L. REV. 415 (1978) (describing difficulties encountered by EC member states due to measures imposed by other member states having an effect equivalent to customs duties on imports and exports); René Barents, *New Developments in Measures Having Equivalent Effects*, 18 COMMON MKT. L. REV. 271 (1981) (discussing developments in case law interpreting Articles 30-36 of the EC Treaty).

¹⁷⁴ *See* EC TREATY, *supra* note 18, art. 36.

¹⁷⁵ *See* AEC TREATY, *supra* note 17, art. 35.

¹⁷⁶ *See id.*

that appears to be absolutely necessary under the circumstances.¹⁷⁷ The grounds of derogation, which appear to be exhaustive, refer to national security, control of arms and military equipment, safeguarding health, human life, and public morality, preservation of national treasures of artistic or archaeological value, protection of industrial, commercial, and intellectual property, exportation of strategic minerals, protection of infant industries, control of hazardous wastes and nuclear materials, balance of payment difficulties, and serious economic damage because of imports from another member state.¹⁷⁸

Other areas of cooperation include re-exportation of goods and intra-community transit facilities,¹⁷⁹ harmonization of customs procedures,¹⁸⁰ simplification of trade documents and procedures,¹⁸¹ corrective measures in respect of substantial diversion of trade arising from barter agreements,¹⁸² and trade promotion.¹⁸³ In relation to intra-community trade, Article 37 requires member states to accord one another most-favored-nation treatment, and in no case must tariff concessions granted to a third party country be more favorable than those applicable under the AEC Treaty.¹⁸⁴ Clearly, member states must never be put at a disadvantage vis-à-vis third party countries. However, it remains to be seen whether this provision will affect negatively the trade between member states and the former colonial powers.

2. *Free Movement of Persons*

Pursuant to Article 43, member states undertake to progressively

¹⁷⁷ See Case 145/88, *Torfaen Borough Council v. B & Q plc*, 1989 E.C.R. 3851. Under the AEC Treaty, the Council oversees the operation of such restrictions and prohibitions and is authorized to take appropriate action in this regard. See AEC TREATY, *supra* note 7, art. 35(6). This could include seeking an advisory opinion from the Court on whether national measures are compatible with AEC law. See *id.*

¹⁷⁸ See EC TREATY, *supra* note 18, arts. 36, 115.

¹⁷⁹ See AEC TREATY, *supra* note 7, art. 38.

¹⁸⁰ See *id.* art. 39.

¹⁸¹ See *id.* art. 40.

¹⁸² See *id.* art. 41.

¹⁸³ See *id.* art. 42.

¹⁸⁴ See *id.* art. 37.

secure for their nationals the rights of free movement, of residence, and of establishment within the Community.¹⁸⁵ The details have been left to be regulated in a Protocol.¹⁸⁶ The free movement of persons is an essential element of economic integration.¹⁸⁷ By analogy to the EC experience,¹⁸⁸ the issues which will need to be addressed in the Protocol include rights of entry and residence; the right to take up offers of employment; the right to seek employment;¹⁸⁹ rights associated with employment, equality in employment, unemployment, and incapacity to work, and the right to remain after employment; family rights, including the rights of non-AEC national dependents; entitlement to social security;¹⁹⁰ access to public sector employment; the mutual recognition of qualifications; the rights of legal persons;¹⁹¹ and derogations on grounds of public policy, public security, or public health, and the appropriate safeguards for persons whose rights of free movement may be restricted on such grounds.¹⁹²

3. Monetary, Finance and Payment Policies

Member states are to harmonize their monetary, financial, and

¹⁸⁵ See AEC TREATY, *supra* note 7, art. 43. The EC Treaty uses the term "movement of workers," which is much more restrictive than "movement of persons." EC TREATY, *supra* note 18, art. 48. Although Article 43 of the AEC Treaty has been drafted in very brief terms, it would appear that it anticipates a general movement of population and not just workers. See AEC TREATY, *supra* note 7, art. 43. No express provision is made for the freedom to provide services, although the scope of the provision seems broad enough to encompass this freedom. Cf. EC TREATY, *supra* note 18, art. 60.

¹⁸⁶ See AEC TREATY, *supra* note 7, art. 43(2).

¹⁸⁷ See AEC TREATY, *supra* note 7, art. 71(2)(a). Thompson laments the lack of reference to "Community citizenship," since he regards a common position on this issue as imperative for the accomplishment of the AEC's goals. Thompson, *supra* note 17, at 753-54. Cf. EC TREATY, *supra* note 18, art. 8. The free movement of persons is described as one of the "fundamental freedoms" of EC Law. Case 53/81, *Levin v. Staatssecretaris van Justicie*, 1982 E.C.R. 1035.

¹⁸⁸ See CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW, *supra* note 78, chs. 13-16.

¹⁸⁹ See AEC TREATY, *supra* note 7, arts. 71(2)(b), (e).

¹⁹⁰ See *id.* art. 72(2)(b).

¹⁹¹ Article 43(1) of the AEC Treaty must be read as applicable to legal persons, or the policies to be pursued under Articles 44-45 would be considerably hindered. See *id.* arts. 43(1), 44-45; cf. EC TREATY, *supra* note 18, arts. 52, 58.

¹⁹² See AEC TREATY, *supra* note 7, art. 72(2)(g).

payment policies, including the insurance and banking sectors, with the eventual aim of establishing an African Monetary Union.¹⁹³

Furthermore, the free movement of capital is to be achieved through the elimination of restrictions on the transfer of capital between member states.¹⁹⁴ This should facilitate the opening of bank accounts with, or the obtaining of loans from, a financial institution in another member state. However, the risk exists that the liberalization of monetary controls, particularly exchange controls, exacerbated by the problems of globalization, could lead to the flight of funds from the less stable to the more politically and economically stable countries. If the free movement of persons is to be accomplished, then restrictions on the movement of capital belonging to residents of the various member states must be reduced accordingly.

VII. Conclusion

The creation of the AEC is an ambitious (some might argue overly ambitious) project that reflects the global trend towards regional economic integration. In addition, it is a clear indication of the readiness of African states to confront and solve their economic problems through indigenous solutions and to turn away from their heavy reliance on aid and the economic policies foisted upon them by international institutions. Each stage successfully completed in this project will constitute a significant boost to the confidence of African countries and should contribute to the removal of the animosity and confrontation that have plagued the continent.

However, there cannot be any doubt that this long-term proposition is littered with obstacles to overcome. The success of the AEC will depend to a large measure on the political attitude of its members, particularly whether they will be prepared to surrender the degree of control over their financial and economic affairs which is indispensable for the Community's proper functioning. Enmities and rivalries will have to be set aside permanently and replaced by conditions of good neighborliness. The weakness and mismanagement of many African economies also pose obvious

¹⁹³ See *id.* art. 44.

¹⁹⁴ See *id.* art. 45.

difficulties. Indeed, they should not be underestimated. One only has to compare the economic and political hurdles that have plagued the European Union in its march towards greater integration to appreciate that the unsophisticated economies of most African states will not be in a position to meet the stages set by the AEC Treaty.

But neither should legal problems be underestimated. The diversity of legal systems and the differences in commercial, company, and mercantile laws will not facilitate cooperation and harmonization.¹⁹⁵ Moreover, it would seem that many such laws are so antiquated that they will be unable to meet the challenges ahead.¹⁹⁶ Law reform, usually a painfully slow process, appears necessary on a vast scale as a condition precedent for the success of the AEC. Nevertheless, these difficulties should not be exaggerated since the states of the EC have faced similar hurdles that have been overcome and that Community continues to evolve towards a longer term project. In principle, the AEC Treaty seems sound enough to fulfill its objectives, but whether it will function in practice remains to be seen. Much will depend on the various Protocols, which are yet to be drafted, and on the creativity of the Court of Justice, whose pivotal role could compensate for certain deficiencies or shortcomings of the Treaty. The success of the AEC will depend in large measure on the political will of the member states to put aside their differences, to suppress the national interest, and to cooperate through the Assembly and Council to attain the AEC's objectives.¹⁹⁷

¹⁹⁵ See Ndulo, *supra* note 1; at 107-09; Thompson & Mukisa, *supra* note 17, at 1452-53.

¹⁹⁶ See Thompson & Mukisa, *supra* note 17, at 1453-54.

¹⁹⁷ See Thompson, *supra* note 17, at 762.

