AFRICAN INTERNATIONAL ORGANISATIONS
SUSPENSION AND EXPULSION OF MEMBERS

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INTRODUCTION

Africa is in a part of the world that has been characterised by animosity and deadly conflicts. The proliferation of African international organisations of a primarily economic nature is undoubtedly a very important development in fostering closer state relations on this continent. In this context, a legal analysis of the organisations that exist is long overdue. Although that may be so, it is intended that this article analyses only one aspect of the constitutive instruments of African international organisations, namely, the clauses that permit the suspension of membership rights and expulsion of recalcitrant members.

Four international organisations are discussed in this article: the Common Market for Eastern and Southern Africa ("COMESA"); the Southern African Development Community ("SADC"); the Economic Community of Western African Members ("ECOWAS"); and the African Economic Community ("AEC"). Since these organisations aim at the economic integration of participating members, where pertinent, reference to the law of and the experience gained in the EC ("EC") is made, as the EC is widely considered to be the economic integration institution *par excellence.*

THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

The Treaty establishing the COMESA[1] contains clauses dealing with both the suspension of membership rights and expulsion of recalcitrant

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[1] Signed in Kampala, Uganda on 5 November 1993; (1994) 33 International Legal Materials 1067, in force since 4 December 1994. According to Article 188(1) it formally replaced the Preferential Trade Area for Eastern and Southern African Members that was established on 13 September 1982; see Hofmeier R and anor, Politisches Lexikon Africa (1988, 4th edition, CH Beck, Munchen, Federal Republic of Germany) 496-498. The original membership of 15 has now grown to 24 members.

members[2]. The expulsion of members is not envisaged as an independent act of the COMESA but rests on the continual breach of constitutional provisions by members. It is the ultimate sanction that can be imposed.

In comparison to the constitutive instruments of other international organisations, the COMESA Treaty is innovative. It expressly explains why members consented to the imposition of these sanctions. Since they agree that the objectives of the COMESA can only be achieved if all members are fully committed, failure to comply with them is not acceptable behaviour. Consequently, they have accepted *a priori* that sanctions may have to be ordered against recalcitrant members to secure fulfilment of the objectives.[3] The rationale behind this is not difficult to follow: as the participating members strive to achieve full market integration so that their economies may converge, they are determined to strike hard at anything that threatens the materialisation of these aims.

Under Article 171(2), the COMESA Authority[4] shall impose sanctions in the following two instances. First, when a member "defaults" in performing treaty obligations. Secondly, when the Authority believes that a member engages in "conduct prejudicial to" the attainment of the COMESA's objectives under Article 171(2). However, it is unfortunate that the Treaty seeks to punish the non-performance of the obligations by members without requiring that their infraction be persistent and/or serious. Also, it does not specify which obligations are so important as to warrant the imposition of sanctions. For example, the drafters of the Treaty could have provided that the imposition of sanctions applied to breaches of specific undertakings which, by virtue of Article 4, must be observed to give effect to the COMESA's objectives.[5]

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[2] See Article 171 of the COMESA Treaty entitled "Sanctions". Compare Friedmann, "General Course in Public International Law" (1969-II) 127 Recueil de Cours 39, 115-116 on distinguishing "sanctions" in the sense of reprisals that an organisation may impose against recalcitrant members from what is termed "the sanction of non-participation". This means exclusion from the benefits conferred by membership.

[3] Article 171(1). Thus, apart from their undisputed deterrent nature, these measures attempt to secure compliance through "punishment".

[4] According to Article 8, the supreme policy organ consists of Government or Heads of States responsible for the achievement of the COMESA's aims. The Treaty creates a Council of Ministers that can issue regulations and directives to members and make recommendations to the Authority on policy matters; see also Article 9.

[5] The aims of the COMESA are set out in Article 3.

At first sight, it may appear that the use of the word "defaults" in the first instance is superfluous in view of the wide-ranging reference to prejudicial behaviour in the second instance. However, this is not true as the latter breach may occur even though the allegedly recalcitrant member performs its obligations. The inclusion of the words "conduct prejudicial to" in Article 171(2) signifies that the COMESA is in a position to "punish" behaviour which, although not necessarily entailing non-fulfilment of obligations, nevertheless leads to the disruption of the organisation's proper functioning.

The inclusion of a similar clause in the Treaty establishing the EC[6] would have effectively addressed the consequences of the policy of non-cooperation pursued by the British government between March and July 1996. Britain had retaliated when the EC decided to impose a worldwide ban on exports of British beef in the aftermath of the so-called "mad cow disease" scare.[7] More particularly, the British government had adopted a policy of consistently vetoing decisions in the Council of Ministers (the principal decision-making organ) on matters unrelated to the issue in contention.[8] The realisation of the importance of clauses like Article 171(2) became apparent when in June 1996, Mr J-L Dehaene, then Prime Minister of Belgium, suggested that new provisions ought to be inserted in the EC Treaty. This would have subjected a member to sanctions if that member tried to use its veto in such a destructive way.[9]

The COMESA Treaty does not specify which is the competent organ to determine whether a member has defaulted in performing its obligations. It is submitted that this function ought to be exercised by the Court of Justice established by the COMESA Treaty.[10] Pursuant to Article 7, the Court of

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[6] Signed in Rome on 25 March 1957; 298 United Nations Treaty Series 11.

[7] The ban was imposed under Commission Decision 96/239 of 28 March 1996, OJ 1996 L 78/47. Its validity was challenged before the ECJ by the British government in Case C-180/96 (United Kingdom v Commission). On 12 July 1996 the interim measures requested by the British government were refused: see (1996) European Court Reports I-3903. The ECJ delivered its judgment on 5 May 1998, (1998) European Court Reports I-2265 where it dismissed the British action for annulment.

[8] See also Point 3 of the European Parliament Resolution of 19 June 1996 condemning the British policy of non-cooperation, which was considered to be contrary to the spirit and letter of the European Commission Treaty, OJ 1996 C198/76.

[9] See "EU acts to prevent beef tactics repeat", The Guardian (London), 22 June 1996 at 13.

[10] The fact that the Treaty establishes a Court of Justice should be considered to be of

Justice has exclusive jurisdiction to hear complaints. The complainants may be members of the COMESA, the Secretary General, or other legal or natural persons on the ground that a member had failed to fulfil its Treaty obligations or has otherwise infringed the Treaty.[11] However, since the procedure of Article 171(2) would invariably invoke a determination by the Authority on the unconstitutional behaviour of members, it is conceivable that in cases involving the non-fulfilment of obligations, the two organs may reach conflicting conclusions.

If such a situation arises, is the Authority obliged to accept the decisions of the Court of Justice as binding?[12] The answer should be in the negative, since the Court of Justice is not empowered to review the Authority's decisions and there is no link between the two organs. Furthermore, the Court has been endowed with the right to review the acts of the Council of Ministers only.[13]

In accordance with Article 171(3), the Authority may impose one of the following sanctions against the recalcitrant member:

(a) suspend the exercise of any of its membership rights and privileges;
(b) impose a monetary penalty; or
(c) suspend it from the COMESA on conditions and for a period deemed appropriate.

This choice in punitive measures should allow the COMESA to respond proportionally to the violation perpetrated but as mentioned above, the legality of the imposition of sanctions and especially the severity of the financial penalty are not open to judicial review.

The Court of Justice may also impose sanctions that are deemed necessary when a member does not implement the decisions of the organisation.[14]

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immense importance given the traditional approach by African organisations to entrust the settlement of disputes to political organs; see generally Bedjaoui, "Le reglement pacifique des differends africains" (1972) 18 Annuaires français de droit international 85.

[11] Articles 24(l), 25 and 26 respectively.

[12] It is assumed that the Court of Justice will be the first organ to make a pronouncement because, if the Authority has already suspended the recalcitrant member's membership rights on the basis of its findings, the Court of Justice has no role to play.

[13] Article 24(1).

[14] Article 34(4). According to Article 34(3), a member is obliged to take, without delay, the measures required to implement the Court's judgments, which are "final and

Since no indication is offered on the nature of the Court's sanctions, the following two questions arise. First, can the Court of Justice order all three measures stipulated in Article 171(3)? Secondly, if the Court exercises its right to act under Article 34(4), can the Authority subsequently apply the procedure stipulated in Article 171 against the same recalcitrant member?

In answering the first question, it is arguable that the Court of Justice may order the recalcitrant member to pay a monetary penalty only. The other two sanctions mentioned in Article 171(3) concern exclusive membership issues. As is almost universal practice in international organisations, membership issues are dealt with solely by the plenary political organ, and in this case, the COMESA Authority. However, when a member ignores the Court's judgment, the Court should not consider the imposition of a monetary penalty as the only penalty it may impose. There appears to be no good reason why the Court could not, in suitable instances, bring the matter to the attention of the Council of Ministers as the matter falls within the function of the Council to ensure the proper operation of the COMESA.[15]

In cases of persistent non-compliance with judgments of the Court of Justice, the Court may conceivably go as far as suggesting that the member in question be suspended from exercising some of its membership rights and privileges. The Council of Ministers may then forward the suggestion to the Authority adding its own recommendation, though the ultimate decision will have to be reached by the Authority itself as the organ expressly authorised by the Treaty to order suspensions. Suspending a member is an extremely important decision that undermines the membership of an organisation. Consequently, it should only be taken by the organ responsible for membership matters, namely the Authority.

The proposition that the court of an international organisation should be empowered to impose monetary penalties on recalcitrant members is not new. In the context of the EC, the ECJ may impose a "lump sum or penalty payment" on any member found to have not complied with judgments rendered against it. The relevant procedure is enshrined in Article 171 of the EC Treaty, which was amended in 1993 to provide for the imposition of monetary sanctions.[16] Members are under a strict obligation to give full

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conclusive and not open to appeal".

[15] See Article 9(2).

[16] It was amended by virtue of Article G(51) of the Treaty on European Union signed in Maastricht, The Netherlands on 7 February 1992; (1992) 31 International Legal Materials

effect to judgments delivered by the ECJ. In case they fail to do so, the European Commission, as the executive organ of the EC, is authorised to record the infraction. Should the member in question still defy its obligation to abide by the judgment, the Commission may bring an action before the ECJ for a declaratory decision that the member in question has infringed its treaty obligations. At the same time, the Commission may recommend that a monetary penalty be imposed as a punitive measure for the default. If the ECJ finds in favour of the Commission, it has the discretion to impose such a penalty. The first two cases under this new procedure were lodged in April 1997 and one of them is still *sub judice.*[17]

The answer to the second question, namely, whether the Authority may impose additional sanctions, may be based on the rule *non bis in idem*, a general principle of customary international law that is applicable to international organisations.[18] Although the *non bis* rule is a cornerstone of national law[19] and included in international instruments protecting human rights,[20] it has not attracted much attention in international legal literature. One commentator has considered this maxim to be a general principle of

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247 in force since 1 November 1993. See generally Usher, "Compliance with judgments of the Court of Justice of the European Communities" in Bulterman MK and anor (eds), Compliance with Judgments of International Courts (1996, Martinus Nijhoff, The Hague) 92-93; Cloos J (ed), Le Traite de Maastricht, (1994, E Bruylant, Bruxelles) 430-434.

[17] Case C-121/97 (Commission v Germany) was removed from the register on 23 September 1997 whilst Case C-122/97 (Commission v Germany) is still on the pending list.

[18] Note that the non bis rule appeared as Article 13 of the Harvard Research in International Law: (1935) 29 American Journal of International Law (Supplement) 442, 602-616. It means that no member shall prosecute or punish an alien after it is proven that the alien has been convicted in another member for the same crime.

[19] Especially of penal law: see Articles 103(3) and 68(2) of the German and Dutch Criminal Codes respectively. In Roman law, this principle was expressed in Corpus Juris Civilis, D.48.2.7.2 and C.9.2.9. See also the Fifth Amendment to the 1791 United Members Constitution: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb".

[20] See Article 14(7) of the 1966 International Covenant on Civil and Political Rights; Article 4 of the Seventh Protocol to the European Convention for the Protection of Human and Fundamental Rights, Strasbourg, 22 November 1984; (1985) 24 International Legal Materials 435; Article 8(4) of the 1969 American Convention on Human Rights. See also Article 54 of the Schengen Implementing Agreement, 19 June 1990; (1991) 30 International Legal Materials 84 and Article 20 of the Statute of the International Criminal Court adopted in Rome on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, United Nations Doc A/CONF 183/9.

law that expresses the negative effect of *res judicata,* itself an undisputed juridical axiom.[21] The *non bis* rule has been elaborated in EC law[22] where the ECJ has held that the rule prohibits the imposition of two disciplinary measures for a single offence. In addition, the rule prohibits the conduct of disciplinary proceedings more than once in relation to the same facts.[23]

Applying the *non bis* rule to the COMESA, it becomes clear that the Authority should not be allowed to enforce Article 171. The reason is that only one penalty may be imposed on the same recalcitrant member and this would occur in the Court of Justice. On the other hand, it could be counter-argued that different organs should not be prohibited from pursuing parallel proceedings aimed at different ends.[24] However, it is almost impossible to maintain that, in these circumstances, the intention of the Authority and the Court is not the same. The aim of both is to force the recalcitrant member to comply with its obligations and when breach occurs, sanctions are applied.

As noted earlier, expulsion from the COMESA cannot be ordered as an independent sanction, but is envisaged as the ultimate punishment when the recalcitrant member continues its offending behaviour despite the

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[21] See Cheng B, General Principles of Law as Applied by International Courts and Tribunals (1953, Stevens, London) 337 where he refers to the following jurisprudence: the Machado Case, Spanish-United States Claims Commission (187l), reproduced in Moore, History and Digest of International Arbitrations to which the United States has been a Party, Volume III (1898, Government Printing Office) 2193-2194; The Banque Meyer Case, France-German Mixed Claims Tribunal (1923), reproduced in Recueil des Decisions des Tribunaux Arbitraux mixtes institues par les Traites de Paix, Volume III (1924, Sirey, Paris) 639

[22] See Vaughan D (ed), Law of the European Communities, Volume 1 (1986 Butterworths, London) para 2.305; Schermers HG, Judicial Protection in the EC (1992, 5th edition, Kluwer, Deventer) 49-51. See also the European Parliament Resolution of 16 March 1984 urging members to harmonise their national legislation pertaining to this rule: OJ 1984 C 104/133; and the Report of the European Parliament Committee on Public Liberties and Internal Affairs on the Protection of Human Rights in the EC of 27 January 1993, Doc A3-0025/93 at 12, 48.

[23] Joined Cases 18, 35/65 (Gutman v EAEC Commission), Judgment of 5 May 1966, (1966) European Court Reports 103, 119.

[24] This has been accepted by the ECJ in Case 14/68 (Wilhelm v Bundeskartelamt) Judgment of 13 February 1969, (1969) European Court Reports 1, 15; (1969) COMESA Law Reports 100, 120-121. (1969) Texas International Law Forum 320; and in Case 7/72 (Boehringer Mannheim v Commission) Judgment of 14 December 1972, (1972) European Court Reports 1281, 1289; (1973) COMESA Law Reports 864, 887.

imposition of measures under Article 171(3). Pursuant to Article 17l(4), the Authority may expel a member when its membership rights and privileges have been suspended and it has failed to remedy its default within the specified period[25] or when it refuses to pay the financial penalty imposed.

In relation to a sanction that suspends a member from the COMESA *in toto* if it fails to meet the conditions imposed on it within the period allowed, the Authority does not have any discretion in deciding whether to expel it. Article 17l(5) stipulates that the member "shall automatically cease to be a Member". By disallowing the Authority to determine if a member should be expelled in such circumstances, it appears that the drafters of the Treaty wanted to ensure that no political consideration be permitted to influence the Authority's decision. The effect of Article 171(5) is that all members being equal, an individual member is prevented from hindering its expulsion from the organisation for committing Treaty violations.[26]

One negative consequence of linking expulsion to previous suspension is this: if a member is determined to undermine the organisation, the latter would not have the capacity to react effectively. Take this scenario for instance. A member continually breaches its obligations. Whenever it is re-instated to the organisation following a period of suspension, it re-offends. This attitude can continue *ad infinitum,* and yet the COMESA would be unable to order expulsion even though in such circumstances it would probably be the only effective measure to prevent further disruptive behaviour. This is because expulsion, as a sanction, can only be enforced against suspended members that refuse to remedy their default. As long as they remedy their default, they would be re-instated after a period of suspension, and it is another issue altogether that they re-offend at a later date.

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[25] Note that Article 17l(3) does not require that the Authority specify a period of time for the suspended member to remedy its failure; in effect, there appears to be an inconsistency between this provision and Article 17l(4).

[26] The opposite is true in those international organisations where only certain of the members enjoy the right to veto decisions prejudicial to their interests. Thus, in the context of the United Nations, the suspension of membership rights (United Nations Charter Article 5) and expulsion (United Nations Charter Article 6) require positive action by the Security Council, where its five permanent members enjoy the veto power. The veto has the practical effect of nullifying the application of these clauses against the permanent members and all those members that are supported by them.

Article 172(1) stipulates that during the period of suspension the member is not relieved from performing its obligations towards the COMESA. It follows that the recalcitrant member is bound by the legislative acts taken by the Council of Ministers or found in Treaty amendments made by the Assembly[27] during that period, and which are adopted even though the member did not participate because of its suspension. Further, although Article 172(2) allows the expelled member to apply for re-admission, the Authority may attach to the re-admission decision certain conditions that are considered necessary in order to avoid repetition of the same behaviour.

A final problem in the COMESA Treaty is Article 8(7). It stipulates that all Authority decisions shall be taken by consensus. The two main forms of decision making are illustrated by Paragraph 69 of the Rules of Procedure of the Conference on Security and Cooperation in Europe[28] and Article 161(7)(e) of the 1982 United Nations Convention on the Law of the Sea. Both refer to the procedure of adopting a text without proceeding to a vote in the absence of formal and substantive objections.[29] The definition of consensus in the COMESA Treaty is found in Article 2. It is general agreement that is characterised by the absence of objection to issues. This is secured through a process that involves taking into account the views of all parties concerned and reconciling any conflicting arguments.

Recalcitrant members are not prevented from taking part in the deliberative process on sanctions envisaged in Article 171(3) and on expulsion orders in Article 17l(4). When this happens, it is doubtful if the Authority is able to reach decisions in such circumstances by consensus and reconcile the conflicting interests involved. Although the insistence on consensus clearly showed the close-knit relationship between the COMESA members in the beginning, at the same time, it appears that the requirement of consensus is a problematic method of decision-making in the context of the sanction clause and its wide reach.

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[27] Article 190 regulates the revision of the COMESA Treaty.

[28] Reproduced in (1975) 14 International Legal Materials 1292. It was later changed to the "consensus minus one" rule: see generally Heraclides A, Helsinki II and its Aftermath (1993, Pinter Publishers, London) 20-22.

[29] See generally Jenks WC, "The veto, weighted voting, special and simple majorities and consensus as modes of decisions in international organizations" in Cambridge Essays in International Law: Essays in Honour of Lord McNair (1965, Cambridge University Press, Cambridge) 48; Zemanek, "Majority rule and consensus technique in law-making diplomacy" in MacDonald R St J and anor (eds), The Structure and Process of International Law (1983, Martinus Nijhoff, the Hague) 857.

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

Contrary to the elaborate expulsion and suspension clauses enshrined in the COMESA Treaty, the corresponding provisions in the Treaty establishing the SADC[30] are disappointing.

Article 33 of the Treaty provides that sanctions may be imposed by the Summit[31] against a member that either persistently fails without good reason to fulfil its Treaty obligations, or fails to implement policies, thus undermining the principles and objectives of SADC. The Treaty also fails to specify what form the sanctions may take. For example, are the sanctions to consist solely of diplomatic, economic or financial sanctions or can they go as far as affecting the membership status?

In June 1996, the Summit resolved to set up the Organ on Politics, Defence and Security through which members would coordinate their policies and activities in these three areas.[32] One of the Organ's objectives is to seek an end to conflicts between participating members through the employment of diplomatic means. If this fails, the Organ is empowered to recommend that the Summit consider punitive measures, the contents of which is to be agreed in a Protocol on Peace, Security and Conflict Resolution.[33] However, the relationship between these punitive measures and the sanctions envisaged in Article 33 have not been clarified. Although it is true that not all Treaty infractions fall within the Organ's competence, the response to those that do will probably be channelled through the Organ, and the Summit will decide if and what measures should be ordered taking into consideration the circumstances of each infraction.

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[30] Signed in Windhock, Namibia in August 1992; (1993) 5 African Journal of International and Comparative Law, 418. Under Article 44, the Treaty replaces the Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference, which was established on 20 July 1991. On the latter, see Fredland RA, Guide to African International Organizations (1990, Hans Zeller Publishers, London) 41-42. On the structural distinctions between the SADC and the COMESA, see Mwenda, "Legal aspects of regional integration: the COMESA and SADC" (1997) 9 African Journal of International and Comparative Law 324, 346-348.

[31] According to Article 10, the supreme policy-making organ consists of Heads of states or governments.

[32] See Communique, Summit of Heads of Member and Government, Gaborna, Botswana, 28 June 1996, reproduced in (1996) 4 South Africa Journal of International Affairs 147.

[33] Point 4(2)(l)(g) of the Communique, ibid. The Protocol has not yet been adopted.

ECONOMIC COMMUNITY OF WESTERN AFRICAN MEMBERS

Neither the Articles of Association establishing the Economic Community of West Africa[34] nor the subsequent Treaty establishing the Economic Community of Western African Members[35] envisaged suspension of membership rights or expulsion from the organisation for non-fulfilment of obligations.[36] However, the ECOWAS Revised Treaty,[37] the latest attempt in African regional economic integration, introduced Article 77 which is on "Sanctions Applicable for Non-Fulfilment of Obligations".

This provision endows the Authority, the plenary organ, with the discretion to order any of the following five measures:

(a) suspension of new Community loans or assistance;
(b) suspension of disbursement of on-going Community projects or assistance programs (since ECOWAS membership includes some of the poorest countries in the world, for example, Cape Verde, Benin, Burkina Faso, The Gambia, Guinea-Bissau, it could be expected that suspending such vital sources of income would result in immediate compliance);
(c) exclusion from presenting candidates for statutory and professional posts (although Article 1 of the Revised Treaty defines "statutory appointees" as including the Community's Executive Secretary, the Deputy Secretary, the Financial Controller and any other senior officer designated as such by the Authority and the Council, there is no definition of the term "professional posts"; it could be argued that this term denotes such offices as that of the External Auditors);[38]
(d) suspension of voting rights; and
(e) suspension of participation in Community activities (this sanction,

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[34] Signed in Accra on 4 May 1967, 595 United Nations Treaty Series 287; (1967) 6 International Legal Materials 776.
[35] Signed in Lagos, Nigeria on 28 May 1975; (1975) 14 International Legal Materials 1200.
[36] With the exception of Article 54(3) of the 1975 Treaty which allowed the Authority to suspend a member's participation in the activities of the Community organs, if it was in arrears in paying its financial contributions.
[37] Signed in Cotonou, Benin on 24 July 1993; (1996) 35 International Legal Materials 660; (1996) 8 RADIC 187, in force since 30 July 1995.
[38] For the function and appointment of External Auditors, see Articles 7(3)(e) and 75 of the Revised Treaty.

which would appear to encompass all previous measures, results in temporary exclusion from the Community).[39]

Failure to fulfil obligations owed to the Community includes non-compliance with the judgments of the ECOWAS Court of Justice, which was not established under the Revised Treaty but under a 1991 Protocol attached to the 1975 Treaty.[40] According to Article 76 of the Revised Treaty, disputes regarding the interpretation or application of its provisions shall be settled amicably through direct agreement. If this fails, either party to the conflict or the Authority may refer the matter to the Court of Justice, whose decisions shall be final and not subject to appeal.

Although the Revised Treaty does not expressly state that members must observe the Court's decisions, the Protocol states that decisions shall be immediately enforceable and members are obliged to promptly take all necessary measures to ensure compliance.[41] It should be noted that the Court itself has an indirect means to force members to observe decisions, found in Article 25(3) of the Protocol. This article provides that before the Court entertains proceedings for the revision of a judgment, it may require prior compliance with its terms.[42]

ECOWAS membership encompasses some of the poorest countries in the world. As such, they are bound to face multiple political and economic problems in fulfilling their obligations. The drafters of the Revised Treaty noted the serious nature of this consideration, as manifested in Article 77(3). This provision authorises the Authority to defer the enforcement of sanctions if it is satisfied that the non-fulfilment of obligations is due to reasons beyond the control of the recalcitrant member. However, the reasons have to be based on a well-supported and detailed report prepared by an independent body and submitted through the Executive Secretary. Therefore, this provision expressly acknowledges the existence of *force*

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[39] The May 1997 coup d'etat in Sierra Leone was discussed at the 20th Annual ECOWAS Summit (29-30 August 1997) which adopted a package of sanctions against the illegal military regime; see Keesings, Volume 43, August 1997 at 41763. As no details were given, it is unclear whether Article 77 was applied.

[40] Adopted at the 14th Authority Session in July 1991, Doc A/P.l/7/91, reproduced in (1996) 8 African Journal of International and Comparative Law 228, not yet in force.

[41] Articles 19(2) and 22(3) of the Protocol.

[42] Compare Article 6l(3) of the Statute of the International Court of Justice; note that Article 41 of the Statute of the ECJ does not require prior compliance.

majeure leading to non-compliance of obligations by states. When this happens, in a sense, this negates the effect of the sanctions and their implications.

Force majeure operates as an exception to the rule that treaties must be strictly observed *(pacta sunt servanda),* a legal principle which has been consolidated in Article 26 of the Vienna Convention on the Law of Treaties.[43] The fact that the report on the existence of a justifiable *force majeure* situation is not produced by ECOWAS organs but by an independent entity might indicate the drafters' reservations as to the political impartiality of the former.

The Revised Treaty is one of the few constitutive instruments that incorporates a *force majeure* clause of general application. Although a similar clause has not been included in the EC Treaty, members have invoked *force majeure* as a defence in the ECJ, arguing that the alleged non-fulfilment of obligations was due to unusual and unforeseeable circumstances. The ECJ has never held that such defence is unacceptable but none has been successful so far.[44] In spite of the EC Treaty being revised on numerous occasions, no such provision has been inserted. This could signify that there is no real desire to see such an open-ended exception enshrined in the constitutive instrument of an organisation whose complicated structure requires nothing less than a diligent observance of obligations.

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[43] The fact that force majeure is not listed in the Vienna Convention as a ground allowing signatory parties to validly consider themselves as not bound by a treaty (for example, fraud in Article 49 or corruption in Article 50) does not undermine its function as one of the main reasons for permitting the non-fulfilment of obligations. See Reuter P, Introduction to the Law of Treaties (1989, Pinter Publishers, London) 145 where its exclusion from the Convention as a result of force majeure is considered a ground of exception for the international responsibility of members, a subject which Article 73 of the Vienna Convention has excluded from its ambit. Force majeure has been included in Article 3.1 of the Draft Articles on Member Responsibility, produced by the International Law Commission in 1996. It precludes the wrongfulness of an act of a member not in conformity with its international obligations; see Report of the International Law Commission on the Work of its 48th Session, United Nations Doc A/5l/10 at 136, reproduced in (1998) 37 International Legal Materials 40.

[44] See Magliveras, "Force majeure in Community Law" (1990) 15 European Law Review 460, 463.

AFRICAN ECONOMIC COMMUNITY

Contrary to other African economic organisations that are aimed at regional integration, the AEC[45] is the most elaborate attempt to set up an economic institution encompassing all African nations.[46] According to Article 98, the AEC is complementary to the Organisation of African Unity, the pan-African political institution.

The AEC Treaty envisages suspension of membership rights and privileges in two situations.[47] The first is regulated in Article 5(3) which provides that any member persistently failing to honour its general undertakings[48] or abide by Community decisions or regulations may be subject to sanctions by the Assembly upon the recommended action of the Council of Ministers. The Assembly upon a recommendation of the Council may lift these sanctions, which expressly refer to the suspension of rights.

As can be the case with loosely worded constitutional provisions on sanctions, it is difficult to determine if the only measure expressly mentioned, namely, the suspension of membership rights, is understood to be the "upper limit" of such a sanction. In other words, is the Assembly allowed to take more severe action? An affirmative answer raises the obvious question of whether Article 5(3) gives to the Assembly *carte blanche* to go as far as expelling a member. Whereas expulsion is a sanction in the ordinary meaning of the word, the word "sanctions" in the context of Article 5(3) denotes measures in two contexts. On the one hand, it may mean to impose "punishment" on recalcitrant members. On the other hand, it may be aimed at securing compliance with obligations. If this distinction is correct, it follows that expulsion is not a sanction within the meaning of Article 5(3) because it punishes the recalcitrant member by terminating its membership, instead of requiring compliance.

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[45] Treaty Establishing the African Economic Community signed in Abuja, Nigeria on 3 June 1991, in force since May 1994: (1991) 4 African Journal of International and Comparative Law 792; (1991) 30 International Legal Materials 1245

[46] See Article B(2) of the AEC Treaty.

[47] See Voitovich SA, International Economic Organizations in the International Legal Process (1995, Martinus Nijhoff, The Hague) 147.

[48] According to Article 5(1)-(2), these provisions refer to the harmonisation of the members' strategies and policies and ensure the enactment and dissemination of national legislation necessary for the implementation of Treaty provisions.

Regarding the substantive condition in Article 5(3) that members must have persistently failed to honour their undertakings or failed to abide by decisions or regulations before suspension is contemplated, the role which the Treaty reserves for the AEC's Court of Justice should be mentioned. According to Article 8(3)(k), the Assembly is compelled to refer to the Court any case when it has confirmed by an absolute majority that a member has not honoured its obligations. The exclusive jurisdiction reserved to the Court in this matter means that Assembly decisions which find a member has infringed its obligations are not of a judicial nature. This is because the Assembly does not act in a quasi-judicial capacity and their decisions are only determinations of fact.

The second situation envisaging the suspension of membership rights is regulated in Article 84. Members states that have not paid their financial contributions[49] and that are in arrears equalling or exceeding the assessed amount for the last two financial years would have their membership rights suspended. The decision on suspension is for the Assembly and unlike the procedure in Article 5(3) the Council has no role to play. Article 84 enumerates the consequences for suspended members, the most important being the loss of voting rights or participation in AEC decision making.[50]

A distinction has to be drawn between decisions of the Assembly and the Council. According to Article 10(1) the word "decisions" describes the binding legislative acts that the Assembly adopts. As such, it may be argued that this sanction does not extend to suspension in the Council for breaches of the legislative acts adopted by the Assembly.[51] This argument is in line with Article 13(2) and the fact that the regulations acquire their mandatory nature once the Assembly has approved them in the form of a "decision". Thus, the conclusion that may be reached is that suspended members who are in arrears with their financial contributions are allowed to vote in the Council but are excluded from participating in the Assembly.

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[49] Compare Article 82(2) which expressly provides that the Community budget shall be funded by contributions made by members; see Lumu, "De la nature de la Communaute Economique Africaine" (1996) 8 African Journal of International and Comparative Law 51, 63.

[50] Other consequences include losing the right to enjoy Treaty benefits, address meetings and present candidates for vacant Community posts.

[51] See Article 13(l) of the AEC Treaty.

Article 84 has a somewhat draconian nature. Consequently, the drafters of the Treaty who were aware of the difficult economic situation in Africa inserted Article 84(2). This provision contains a *force majeure* clause that is similar to Article 77(3) of the ECOWAS Treaty, although it can be seen that the latter has a wider application. Furthermore, AEC members may be released from the obligation to pay financial contributions on the basis of Article 79(1)-(2). These provisions stipulate that the least developed, land-locked and island countries especially shall be granted temporary exception from the full application of certain Treaty provisions in appropriate circumstances.[52]

Finally, reference should be made to the system of judicial review of the AEC acts established under the Treaty. If a member believes that the decision to suspend its membership rights is legally defective, it may invoke Article 18(3)(a). This provision confers exclusive competence on the Court of Justice to deal with claims brought by a member disputing a suspension decision on the grounds that the Assembly lacked the necessary competence to decide or had abused its powers, *inter alia*. Since such a disputed decision is based on the prior determination that the member in question has violated its obligations, it follows that in these circumstances, the role of the Court of Justice is only to adjudicate whether the contested decision is unconstitutional or *ultra vires*. In other words, the Court of Justice cannot act as an appellate body on the issue of breach of Treaty provisions, as this issue is for determination under Article 8(3)(k).

CONCLUSION

With the exception of the SADC, the constitutive instruments of the other three organisations appear to have quite sophisticated clauses on the suspension of membership rights and/or expulsion. Whether and how these clauses are going to be implemented remains to be seen. It can only be hoped that the need for their enforcement will not arise. However, by including such clauses in their constitutive instruments, the organisations are, in varying degrees, equipped to address breaches of obligations. This is a rather important development. Even if these clauses are never applied in

[52] Note that under Article 78(1) signatory parties have already agreed to grant Botswana, Lesotho, Namibia and Swaziland such exception.

practice, they send a message that there is an institutional framework in place that could be employed if infractions persist.

This should be contrasted with the case of the EC, which until recently lacked the framework for imposing sanctions on recalcitrant members. The traditional EC approach that such measures were not required, because there was no question that a member would not always fulfil its obligations, was abandoned in the 1990s. Apart from the afore-mentioned imposition of monetary penalties, the recent Treaty of Amsterdam has envisaged the suspension of membership rights, including voting rights, for the serious violation of democratic norms and the rule of law.[53]

[53] See the new Article 309 of the EC Treaty inserted under the Treaty of Amsterdam Amending the Treaty on European Union and the Treaties Establishing the European Communities and Certain Related Acts concluded in June 1997 and signed on 2 October 1997, OJ 1997 C 340/1.