

Chapter 1

**Redefining the relations between the African Union
and regional economic communities in Africa**

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1. Introduction

Africa is awash with regional economic communities (RECs). Indeed, as far back as 1976, Ajomo (1976: 101) picturesquely described the ‘mercurial proliferation and disappearance’ of regional economic institutions in Africa. For political, economic and strategic reasons many countries belong to more than one REC. The multiplicity of RECs and the concomitant multiple state memberships have created a complex patchwork that complicates decision making for states, community officials, individuals and businesses. In what is, to date, the only detailed continent-wide empirical study into the effect of the twin phenomena of many RECs and multiple memberships, the United Nations Economic Commission for Africa (UNECA) concluded that the phenomena impact negatively on the achievement of the goals of the African Economic Community (AEC).¹ In June 2009, some member states could not join the newly formed COMESA customs union due to the fact they belonged to other RECs. The phenomena also impact negatively on Africa’s international trade relations. In the recent European Union led Economic Partnership Agreements negotiations, countries in Eastern and Southern Africa – the regions where the phenomena are most prevalent – had to form new regional groupings for the purposes of the negotiations (Jakobeit et al. 2005).

Against this background, a fundamental issue with Africa’s economic integration is the relationship between the African Union (AU), RECs and the AEC. This is a complex matter. But, so far, it has not received any systematic examination in the discourse on Africa’s economic integration.² Finding answers to it and clarifying the relationship are important for the success of economic integration in Africa.

¹ See UNECA (2006). See also Jakobeit et al. (2005).

² Senghor’s (1993) commentary on the processes leading to the formation of the AEC suggests that there were some discussions on this question. Indeed, he suggests that the relationship between the OAU and the AEC was a theme of special study by experts. Arguably, the existing legal framework does not suggest that the question was thoroughly addressed. See Senghor (1993: 183).

The proliferation of RECs in Africa is part of a wider international phenomenon, the proliferation or increased density of international institutions. Against the background of this phenomenon, scholars have recently begun to discuss in great detail theories on 'regime complexes' (Raustiala and Victor 2004: 277) or 'international regime complexity' (Alter and Meunier 2009: 13). A regime complex is an 'array of partially overlapping and non-hierarchical institutions governing a particular issue-area' (Raustiala and Victor 2004: 279). The components of a regime complex are the 'elemental regimes' (Ibid.). International regime complexity refers to the presence of nested, partially-overlapping, and parallel international regimes that are not hierarchically ordered (Alter and Meunier 2009). International regime complexity empowers and disempowers (Drezner 2009: 65). It may work to the advantage of certain groups by providing opportunities for 'forum shopping' and arbitrage (Raustiala and Victor 2004: 280, 299-300). It may also disadvantage certain states or groups, such as on the basis of the sheer volume of information that has to be processed from the various regimes.

Studies on regime complexes help in understanding the relations between the many RECs in Africa. These RECs are non-hierarchical regimes with overlapping membership and jurisdiction. However, in terms of the focus of this paper, there is one limitation in the studies I have so far examined which is worth pointing out. The existing studies have focused mainly on the evolution and interactions between rules or norms generated by elemental regimes of a regime complex. However, this paper focuses principally on the institutional aspects of the co-existence of elemental regimes. In other words, the focus is mainly on institutions, not the norms generated by the institutions. Specifically, the paper addresses the issue: how do the RECs as regional institutions relate to each other and with the AU and AEC? Also, the issues discussed in this paper arise largely from the specific and apparently unique character of institutional density on economic integration in Africa. That is, the RECs ostensibly operate under an umbrella regime, the AEC, and their activities should be geared towards the realisation of one objective, namely the creation of an African Economic Community. Thus, unlike other complex regimes, what exists in Africa is a complex regime on economic integration consisting of many elemental regimes (the RECs) and an umbrella regime (the AEC) all working towards a common and singular treaty-mandated vision.

2. Existing regulatory legal framework

International regime complexity on many issues, such as intellectual property protection, human rights, international security and environment, do not have an overarching or umbrella regime that regulates the multiple regimes dealing with the particular issue. Arguably, as regards international trade in goods and services and regional trade agreements, an overarching regime apparently exists in the World Trade Organisation (WTO).³ WTO law provides the legal foundation for regional trade agreements on goods and services. The WTO has mechanisms for notifying such agreements, reviewing them and for monitoring their compliance with WTO law. Such mechanisms do not affect the non-hierarchical nature of regional trade agreements. But, the mechanisms could have ensured a measure of coordination and harmonisation among them through their compliance with a higher norm – WTO law. However, as scholars have noted, the mechanisms are ill-equipped and ineffective, and the powers of enforcement and review have not been exercised rigorously (Devuyst and Serdarevic 2007–2008: 1).

Unlike with the WTO and regional trade agreements, international regime complexity on economic integration in Africa benefits from an umbrella regime, the AEC, and a modest regulatory framework under the Protocol on Relations between the African Union and the Regional Economic Communities (Protocol on Relations).⁴ The framework aims at harmonising and coordinating the activities of the RECs (Protocol on Relations 2009: 3(a)(b)). This is important since, unlike regional trade agreements established with the imprimatur of the WTO, the aim of Africa's RECs is to evolve and ultimately be absorbed into the African Economic Community.⁵ Article 3(a) of the Protocol on Relations aims to formalise, consolidate and promote close cooperation among the RECs, and between them and the AU through the coordination and harmonisation of their policies, measures, programmes and activities in all fields and sectors. Another object of the protocol is to establish a framework for coordinating

³ See the General Agreement on Tariffs and Trade, art. XXIV; General Agreement on Trade in Services, 15 April 1994: 46, art. V; Decision on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 November 1979, GATT B.I.S.D (1980 203, par. 2(c)).

⁴ July 2007, (2010) 18 Afr. J. Int'l & Comp. L. (forthcoming) [Protocol on Relations]. This protocol replaces the *Protocol on Relations between the African Economic Community and the Regional Economic Communities*, 25 February 1998, (1998) 10 Afr. J. Int'l & Comp. L 157.

⁵ See the *Treaty establishing the African Economic Community*, 3 June 1991: art. 88(1) [AEC Treaty].

the activities of RECs in their contribution to the realisation of the objectives of the Constitutive Act of the African Union and the AEC Treaty (Protocol on Relations 2009: art. 3(b)).

To ensure the realisation of these objectives, the parties to the protocol (namely the AU and the RECs) have undertaken to cooperate and coordinate the policies and programmes of the RECs with those of the AU (Ibid.: art. 4(a)). Specifically, the RECs have undertaken to establish an organic link with the AU with a view to strengthening their relations with the AU and provide for their eventual absorption into the African Common Market as a prelude to the AEC (Ibid.: art. 5). To enhance cooperation among the RECs, there are also provisions mandating or advocating entering into cooperation arrangements (Ibid.: art. 15(1)), and participation in each other's meetings (Ibid.: art. 16(1)). The RECs and the AU can, without voting rights, attend and participate in each other's meetings (Ibid.: art. 17;19). The Protocol of Relations establishes the Committee on Coordination and the Committee of Secretariat Officials as the institutions responsible for ensuring the coordination of policies and activities of the RECs and the implementation of the protocol (Ibid.: art. 6-10). The AU is also expected to open a liaison office at the headquarters of each REC (Ibid.: art. 21).

The regulatory framework under the Protocol on Relations is complemented by provisions in the founding treaties of the RECs dealing with their relations with other RECs and the AEC. For example, the EAC Treaty provides that the member states 'shall foster cooperative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community' (EAC Treaty 1999: art. 130(3)). The COMESA Treaty (1993: art. 179(1)) also allows the organisation to 'enter into cooperation agreements with other regional communities'. A similarly worded provision is contained in the ECOWAS Treaty.⁶ Obviously, these provisions are empowering, and some RECs have relied on them to establish cooperation arrangements with other RECs.

⁶ See the Revised Treaty establishing the Economic Community of West African States (1993 art. 79(1)) [ECOWAS Treaty]. The Treaty of the Southern African Development Community (1992: 120) contains little detail on its relations with the AEC apart from a reference to the AEC in its preamble and a general reference to cooperation with regional and international organisations in article 24.

The first and perhaps the most historic was the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government held in Kampala, Uganda in October 2008 under the theme, 'Deepening COMESA-EAC-SADC Integration'. In a joint communiqué issued after the summit,⁷ it was noted that the Heads of State and Government reviewed the activities of the three RECs, agreed on a programme of harmonisation of their activities, and expressed their resolve to cooperate in the future. It was also resolved that the three RECs should immediately start working towards a merger into a single REC with the objective of fast-tracking the attainment of the African Economic Community. A taskforce was set up to design a roadmap for this merger. The Heads of State and Government also approved the expeditious establishment of a free trade area encompassing the member states of the three RECs with the ultimate aim of establishing a single Customs Union. In line with a mandate from the Heads of State and Government, a Memorandum of Understanding on Interregional Cooperation and Integration has been signed among the three RECs and joint meetings have been held since the Tripartite Summit.

As regards relations with the AEC, the founding treaties of the RECs acknowledge the existence of the AEC and undertake to facilitate its goals.⁸ However, they do not provide much detail on what form their relations with the AEC are or should be. The COMESA Treaty (art. 178(1)), the most detailed as far as this issue is concerned, affirms that its ultimate objective is to facilitate implementation of the AEC Treaty. It enjoins member states to implement the provisions of the COMESA Treaty with due consideration to the provisions of the AEC Treaty (art. 178(1)(b)), and convert the organisation, at a time to be agreed between it and the AEC, into an organic entity of the AEC (*Ibid.*). It enjoins the Secretary General of the Community to coordinate the activities of COMESA with the AEC and report regularly to the Council of Ministers (art. 178(2)). Indeed, in the preamble to the COMESA Treaty, the foundation of COMESA is traced to article 28(1) of the AEC Treaty which called for the strengthening and creation of RECs as the first stage in the evolution of the AEC. Also, 'the establishment, progress and the realisation of the objectives of the African Economic Community' are stated among the aims and objectives of COMESA (art. 3(f)). These very generous provisions demonstrate a level of attention to problems of

⁷ See Final Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government (22 October 2008).

⁸ ECOWAS Treaty, art. 78; EAC Treaty, art. 130(2)(3); COMESA Treaty, art. 3(f).

the relations between the AEC and COMESA. Admittedly, they still leave many hard issues unresolved. But, compared with those of other RECs, they are advanced. In the EAC Treaty (art. 130(2)), the EAC is described as ‘a step towards’ the achievement of the objectives of the AEC Treaty. In the ECOWAS Treaty (art. 78), members undertake to facilitate ‘the coordination and harmonisation’ of the community’s policies and programmes with those of the AEC. However, none of the treaties provide concrete details on its relations with the AEC. In other words, they do not address specific issues such as: the legal nature of their relations with the AEC, whether they are bound by decisions of the AEC, and whether AEC law will prevail over their law in cases of conflict.

The above framework for regulating relations among the RECs as well as their relations with the AEC is short on detail and leaves many issues unaddressed. The next section discusses some of these issues and argues that, unless addressed, they could undermine the effectiveness of Africa’s economic integration.

3. Unaddressed inter-community relational issues

3.1 Legal status: RECs within the AEC, AEC within the AU

Perhaps one of the greatest mysteries about Africa’s economic integration is the legal status of the RECs within the AEC, and the AEC within the AU. The treaties do not shed much light on the issue and academic commentary on it is largely non-existent.⁹ The starting point to unravelling this mystery, if it can be done at all, is the idea of legal personality.¹⁰ All the RECs are endowed with legal personality in their founding treaties.¹¹ Although the AEC Treaty does not expressly say so, the legal personality of the AEC can be inferred from article 98(2), which provides that, in his capacity as the legal representative of the community, the Secretary-General may, on behalf of the community, enter into contracts and be a party to judicial and other legal proceedings. The Constitutive Act of the African Union [Constitutive Act] is silent on the legal personality of the AU. This may, however, be explained by the fact

⁹ See generally M.A. Ajomo, “International Legal Status of the African Economic Community” in M.A. Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty: Issues, Problems and Prospects* (Lagos: Institute of Advanced Legal Studies, 1993) at 40.

¹⁰ See generally Amerasinghe 2005: 66-104).

¹¹ COMESA Treaty, art. 186(1); EAC Treaty, art. 138(1); ECOWAS Treaty, art. 88(1).

that, under the General Convention on Privileges and Immunities of the Organisation of African Union, the OAU (now AU) possesses ‘juridical personality’.¹²

With these provisions, the legal separateness of the RECs, AEC and AU is established in international law. Accordingly, the legal status of one within the other should be defined by agreement to which both are parties, or, at least, in some definite and binding agreement. As regards the AEC and the AU, the AEC Treaty (art. 98(1)) is very clear that the AEC is an ‘integral part’ of the AU. The Constitutive Act further provides that its provisions take precedence over and supersede any inconsistent or contrary provisions of the AEC Treaty (art. 33(2)). If one envisions the AU as a political and umbrella organisation championing the cause of Africa unity – social, cultural, political and economic – then the AEC is that part of the AU solely devoted to the issue of economic integration. Comparatively, the relationship between the AEC and the AU is akin to that between the European Community (EC) and the European Union (EU). But, it must be admitted that even the relationship between the EC and EU is not without difficulty.

A difficult issue concerning the idea of the AEC as an integral part of the AU is how the idea appears to have been interpreted and applied. Like many words, ‘integral’ has multiple meanings. To the extent relevant here, the word describes component parts which, together, constitute a unity. It emphasises divisibility, separateness and unity at the same time. As regards the relations between the AEC and the AU, it seems unity has been overemphasised and this has led to the complete or near complete loss of the separateness or distinct identity of the AEC. Laws and policies dealing with AEC-related issues are adopted by the AU instead of the AEC.¹³ Also, institutions of the AU have been coopted to perform the functions of institutions of the AEC. But, there has been neither a clear separation of mandates nor examination of whether, as designed, the AU institutions are effectively equipped to manage the economic integration agenda.

¹² See the General Convention on Privileges and Immunities of the Organization of African Unity, 25 October 1965.

¹³ See e.g. Protocol on Relations (which should in principle have nothing to do with the AU but is misleadingly titled as such and signed ‘for the AU’ not the AEC). Compare Protocol on Relations between the African Economic Community and the Regional Economic Communities (which was signed by the AEC).

An equally difficult issue is the legal status of the RECs within the AEC. Although the AEC Treaty contains over twenty references to ‘regional economic communities’, provides that the African Economic Community shall be established through the coordination, harmonisation and progressive integration of the activities of the RECs, and imposes many duties with exact timelines on them, there is not a single provision on the status of the RECs within the AEC. Are they mere institutional observers within the AEC? Are they its organs, members, agents or subjects? Commentators on Africa’s integration have assumed, and rightly so, that the RECs are the building blocks of the AEC. But, so far, none has investigated this important issue. The Protocol on Relations does not address this issue either.¹⁴ It is an issue of both theoretical and practical importance. For example, it is legally difficult to suggest that a REC is bound by decisions of the AEC¹⁵ unless one is able to prove that the former is an organ, member, agent or subject of the latter.

The AEC Treaty does not set out a membership criterion, but it is implicit in article 2 that states which parties to the treaty are members of the AEC. There is no provision limiting membership of the AEC only to states.¹⁶ However, membership of an international organisation cannot be inferred; there must be a conscious act on the part of a prospective member to become a member of an international organisation and an acceptance of its membership application by the organisation (Amerasinghe 2005: 104-114). In the absence of a definite agreement to that effect, it cannot be suggested that the RECs are members of the AEC. Nor can it be argued that the RECs are organs of the AEC; article 7 of the AEC Treaty clearly does not mention them.¹⁷ From a purposive reading of the AEC Treaty (to which the RECs are not parties) and the Protocol on Relations (to which they are parties), it can, however, be argued that the RECs are subjects of the AEC. They are also agents of the AEC with a mandate to work towards the realisation of the AEC.

¹⁴ Articles 18 and 20 deal with the status of the RECs at AU meetings and the status of the AU at the RECs meetings respectively.

¹⁵ See AEC Treaty (1991: arts. 10(2) and 13(2)).

¹⁶ There are international organisations that allow other international organisations to become members. See e.g. Statute of The Hague Conference of International Law, art. 3; Marrakesh Agreement Establishing the World Trade Organisation, art. XII; Constitution of the Food and Agriculture Organisation of the United Nations, art. II.

¹⁷ It provides that the organs of the Community shall be the Assembly of Heads of State and Government, Council of Ministers, Pan-African Parliament, Economic and Social Commission, Court of Justice, General Secretariat and Specialised Technical Committees.

3.2 The Future merger of the Regional Economic Communities

The foundation of the AEC is the RECs; progress by the RECs is one step closer to the African Economic Community. This unique and hitherto unexplored approach to forming the AEC raises numerous legal challenges. The size of the AEC makes the approach of using RECs as its building blocks almost inevitable. But this approach comes at a price. For example, a recent UNECA (2006) study suggests that there is often tension between member states' commitment to the goals of the RECs and those of the AEC. Also, concurrent membership of RECs creates tension among member states and between the RECs (Ibid.).

The RECs are ultimately expected to merge or be 'absorbed' (Protocol on Relations, art. 5(1)(d)) to form the AEC. Under article 88(1) of the AEC Treaty, the African Economic Community 'shall be established mainly through the coordination, harmonisation and progressive integration of the activities of [RECs]'.¹⁸ The simplicity of this provision masks the complexity of the engagement of merging or absorbing international organisations such as RECs. Firstly, it is a unique and quite complicated approach to economic integration. To my knowledge, it has not been experimented with anywhere else. Usually, countries form economic communities – free trade areas, customs union, economic unions, or complete economic integration. Indeed, to date, it appears the only known case of a successful 'merger' of RECs has been the merger of the European Community with the European Free Trade Area to form the European Economic Area.¹⁹ A more recent attempt is the Union of South American Nations²⁰ which is a continent-wide free-trade zone that unites the Common Market of the Southern Cone and the Andean Community. Secondly, the status of the RECs after the formation of the African Economic Community is not free from doubt. Whether they will disappear entirely or would continue to operate as a

¹⁸ Article 3 of the Constitutive Act of the African Union also underscores the need to 'coordinate and harmonise the policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the [African] Union'. Indeed, this is described as an 'objective' of the Union.

¹⁹ See Riechenberg (1995: 63).

²⁰ It consists of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. See Union of Southern American States Constitutive Treaty, 23 May 2008.

mid-level legal system is not dealt with in the AEC Treaty or any protocol.²¹ Nor do the founding treaties of the RECs shed any brighter light on these issues.

The COMESA Treaty (art. 178(1)(c)) envisages the conversion of COMESA into an organic entity of the AEC. This suggests that COMESA does not envision the formation of the AEC as its demise. The treaty provides that the Authority of Heads of State and Government may, on the recommendation of the Council of Ministers, terminate the operations of the COMESA (art. 192(1)). This suggests that a legal mandate exists for bringing COMESA to an end, if that is what is envisioned under the AEC Treaty after the formation of the African Economic Community. Neither the ECOWAS Treaty²² nor the EAC Treaty²³ contains any provision directly relevant to their status after the formation of the African Economic Community. Indeed, the EAC Treaty (art. 144) is of perpetual duration.²⁴ Also, some of the RECs have pursued and are pursuing objectives beyond economic integration such as conflict prevention and political unification. Accordingly, it is difficult to suggest that the formation of the AEC will represent the end of the RECs.

The founding treaties of the RECs were drafted after the AEC Treaty. Therefore one would have expected them to address the issue of their status after the formation of the AEC more comprehensively and, perhaps, uniformly. As organisations created by treaties, the state parties retain an inherent right to terminate the treaties (Vienna Convention on the Law of Treaties 1969: art. 54(b)) if that is what will be needed for them to merge and form the AEC. As the RECs are progressing further through the stages of integration, the merger issue should engage the attention of the AEC. A merger protocol is needed. Indeed, I would suggest that negotiating a merger protocol should start now, given the complexity and size of the undertaking. It should

²¹ UNECA conceives the future relationship between the AEC and the RECs in this way: After the RECs have achieved a customs union and a common market, they will merge to form the African Common Market, and the fully-fledged African Economic Community intervention will follow. The African Economic Community will take the lead on dealing with member countries, and the functions and structures of the regional economic communities will be revised to serve as its implementation arms. See UNECA (2005: 94).

²² Article 2(1) provides that the member states have decided that ECOWAS shall ultimately be the sole economic community in the region for the purpose of economic integration and the realisation of the objectives of the African Economic Community.

²³ In the preamble to the treaty, the member states affirmed their desire for a wider unity of Africa and regarded the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community.

²⁴ This provision modifies the wording of article 92(2) of the Treaty for East African Cooperation (1967: 932), which provided that the treaty 'shall have indefinite duration'.

address *inter alia* issues relating to the post-merger legal status of the RECs, their assets and liabilities after the merger, whether the merger is compulsory or voluntary and, if compulsory, how that is going to be enforced, when the merger is to occur (simultaneously for all the communities or incrementally after each reaches the necessary stage of integration), status of their personnel and institutions such as the various community courts, and the status of active RECs which are not AU-recognised (such as the Southern African Customs Union), and, accordingly, will not, in my opinion, participate in the anticipated merger of the RECs.

The anticipated merger of the RECs to form the African Economic Community raises other issues. Some RECs, like the EAC, are at an advanced stage of development. It is difficult to predict whether they would willingly merge with the AEC or with their less progressive counterparts such as the Inter-Governmental Authority on Development. Indeed, one may query whether the AU has the political will, legitimacy and wherewithal to impose its vision of an African Economic Community on the RECs. They are not parties to the AEC Treaty. Additionally, the treaty provisions of some of them on issues such as the jurisdiction of their community courts, *locus standi* for private parties, supremacy of community law, and the relations between community courts and national courts are superior to those of the AEC Treaty. Arguably, these advancements in community law and economic integration could be lost when they merge with the AEC if AEC law is not amended to incorporate those advances.

It is also debatable whether a merger of the RECs will be supported by interest groups within the RECs. Public choice theorists characterise international organisations as bureaucracies that are more responsive to the demands of organised interest groups, including their staff. As Vaubel (2003: 319) notes, 'like all bureaucracies, international organisations fight for their survival and for more powers and resources. Thus, it is more difficult to abolish an international organisation than to establish it, or to reduce its powers and resources than to increase them'. Indeed, already, an appreciable number of staff cases have appeared before the community courts. This is evidence of people trying to protect their 'turf'.²⁵ The number of staff

²⁵ See e.g. *Muleya v. Common Market for Eastern and Southern Africa (No. 3)* (2004: 173); *Muleya v. Common Market for Eastern and Southern Africa (No. 2)* (2003: 623); *Muleya v. Common Market for Eastern and Southern Africa* (2003: 173); *Ogang v. Eastern and Southern African Trade and Development Bank* (2003: 217); *Eastern and Southern African Trade and Development Bank v. Ogang* (2001: 46); *Eastern and Southern African Trade and Development Bank v. Ogang (No. 2)*

cases and the tenacity with which they appear to have been litigated, lend some credence to Rasul Shams' (2005: 6-7) thesis that economic integration has become a job-generating venture for Africa's educated elite, and raises the prospect of obstructionist litigation before, during, and, perhaps, after the merger.

Additionally, the RECs are legal systems in their own right. Unlike the AEC, they are expressly endowed with separate legal personality.²⁶ Thus, even before the merger, there is the need to structure and manage the relations between the AEC and RECs' legal systems as well as among the RECs.²⁷ The current legal framework on the relations between the AEC and the RECs does not go very far in addressing these complicated issues.

3.3 Conflict of laws and jurisdictions

A central issue in the relations between the AEC and RECs' legal systems is the prospect of conflict of jurisdictions and laws. Alter and Meunier (2009: 16) have observed that international regime complexity, such as that which exists in Africa on the issue of economic integration, reduces the clarity of legal obligations by introducing overlapping sets of legal rules and jurisdictions governing an issue. To Raustiala and Victor (2004: 279), 'regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in ... elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules'. In the area of international trade, especially against the background of the proliferation of regional trade agreements, this is becoming a very prominent issue.²⁸

The AEC appreciates the potential for these conflicts. The Protocol on Relations is meant to provide the institutional framework for coordinating and harmonising relations between the AEC and the RECs. It emphasises the coordination and harmonisation of their activities. However, characteristic of the minimal significance

(2002: 54); Tokunbo Lijadu Oyemade v. Executive Secretary of ECOWAS (2006); Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade, (2006); Executive Secretary of ECOWAS v. Tokunbo Lijadu Oyemade (2006).

²⁶ See the COMESA Treaty art. 186(1); EAC Treaty, art. 138(1); ECOWAS art. 88(1); SADC Treaty, art. 3(1).

²⁷ See generally Udombana (2002: 222-24). A similar issue currently playing out at international law level is the relationship between the WTO and the various regional trade arrangements it sanctions under article XXIV of the GATT, 1994.

²⁸ See e.g. Graewert (2008: 287); Kwak & Marceau (2006); Davey & Sapir (2009: 5).

given to relational issues in Africa's economic integration processes, there are no definitive provisions in the protocol addressing the issue of conflict of jurisdictions and laws. Does AEC law enjoy supremacy over conflicting laws of the RECs? Are the RECs also enjoined to 'observe the legal system' (AEC Treaty, art. 3(e)) of the AEC? Are there any areas where only the AEC can legislate? How are breaches of AEC decisions and directives to the RECs to be enforced? (AEC Treaty, art. 3(e))²⁹ Are the RECs competent before the African Court of Justice and Human Rights? And can the AEC intervene in an action before an REC community court where the interest of the AEC is affected? The answers to these important questions remain largely unknown.³⁰

The protocol's lack of attention to these complex relational issues is disheartening. This is because it explicitly recognises that external and internal policies of the RECs may conflict with the objectives of the AEC Treaty.³¹ In this, we witness a manifestation of inattention to relational issues; the possibility of conflict of jurisdictions and laws is acknowledged, but concrete steps have not been taken to address them.

3.4 The relations between the Regional Economic Communities

An important issue for the RECs and AEC is the need to rationalise relations between the RECs in the light of the fact of their multiple memberships. It is arguable that this issue is short-term; as they progress along the stages of integration, a process of natural selection will take place. It will be difficult for a state to maintain membership of two custom unions – apply two different external tariffs – unless the policies of the customs unions are harmonised. At that stage, each state will have to decide, taking into account political, economic and geographic considerations, which community it wants to be part of. Thus, some scholars speculate that if the customs union of the Southern African Development Community (SADC) succeeds, the Southern African Customs Union (SACU) 'would fall away' (Draper et al. 2007: 20).

²⁹ This article allows the Assembly or Council to give directives to the communities. Their decisions may include sanctions. A similar provision is in article 22 of the Protocol on Relations.

³⁰ The Protocol of Relations sheds dim light on some of these issues. For example, it allows the AU to sanction RECs or member countries that do not comply with its directives. It also includes a dispute resolution mechanism which gives RECs standing before the African Court of Justice and Human Rights.

³¹ See Protocol on Relations, art. 28(1).

However, this is a too optimistic vision. The trajectory of Africa's integration suggests that it is not only legal and economic considerations that dictate membership of RECs.³² A more dominant consideration is political. Indeed, the only case I know of, of REC demise, was that of the first East African Community in 1977. Even with this, its demise was due mainly to political mistrust between the members. Therefore it has to be accepted that unless there are structured mechanisms instituted and enforced to eliminate the problem of multiple memberships, the vision of some communities 'dying a natural death' will not materialise.

4. Addressing the problems – the two steps solution

Effectively and boldly addressing the problems resulting from multiple memberships and the troubling relational issues between the RECs and AEC requires legal imagination, economic thought, and strong institutional and political will. There is an urgent need for the AEC actively to rationalise the relations among the RECs, and between the RECs and itself. This is important for the development of the African Economic Community. The 2006 AU moratorium on the establishment and recognition of more RECs was an important first step.³³ So far, it has been heeded. Another important step is for the AEC to adopt a protocol founded on the principle of 'one country, one community' of the eight AU recognised RECs. With the help of national institutions and commissioned experts, countries should be guided to decide on predominately economic criteria, which REC best suits their needs taking into account the fact that the ultimate realisation of the vision of an African Economic Community may help address some of the needs. This should be viewed not as an inappropriate infringement on state sovereignty, but as a measure needed to pool state sovereignty effectively for the common good.

The legal foundation for this protocol can be found in article 5(1) of the AEC Treaty. In it, member states undertook to 'create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonising their strategies and policies', and to 'refrain from any unilateral action that may hinder the attainment of the said objectives'. I argue that the unilateral decision of AEC

³² UNECA has observed that 'countries seem to have barely analysed the economic rationale of belonging to a particular group'. See UNECA (2006: 36).

³³ See African Union (2006).

member states to be members of more than one REC creates unfavourable conditions for the development of the AEC.

Admittedly, getting support for and enforcing this protocol will be difficult. It will be the ultimate test not only of the enforcement powers of the AEC, but also member states' commitment to the realisation of its vision beyond their political rhetoric of support. It is suggested that non-complying states should be threatened with expulsion and, ultimately, be expelled from the AEC and all but one of the RECs of which they are members.³⁴ I dare say that the vision of an African Economic Community should not be founded on the ideal of all African countries as members. The European Community does not consist of all the states in Europe. The North American Free Trade Agreement does not include all countries on the North American continent. And the World Trade Organisation comprises fewer than all the countries of the world. There is no legitimate reason why an African Economic Community cannot consist of something less than all of Africa! For a continent consisting of 53 states, a few of them dysfunctional, collapsed or collapsing, and many with different levels of socioeconomic, legal and political development, the pursuit of this ideal will delay, indeed thwart, the timely realisation of a noble economic vision.

Writing in the context of the collapse of the OAU, Kufuor (2005: 133) perceptively observed that 'unrestricted access in the form of virtually no entry requirements led to the tragedy of the regional commons, the degrading of the OAU as an organisation of any value'. Wouldn't the stature, integrity and effectiveness of the OAU/AU be enhanced if it consisted of, say, twenty democratic, human-rights-respecting, socially- and economically-developed states which extend the benefits of the organisation to non-members on defined conditions? Like Kufuor, I argue here that Africa's economic integration is being devalued, delayed and diluted due to the fact that countries are able to sign up at will without strict, previously-defined and continuous commitments to implementation. An African Economic Community which consists of a few African states can extend, through conditioned agreements, the benefits of integration to other countries that need not necessarily be members. The expansion of economic space need not be a concomitant of the expansion of institutional space.

³⁴ These countries can still maintain their membership of the African Union, which is largely a political association of states.

The 'one country, one community' principle advocated above should be combined with full integration of the RECs into the legal framework of the AEC by making them members. It is unfortunate that neither the Protocol on Relations between the AEC and the RECs, nor the new Protocol on Relations, does this. For the RECs to become members of the AEC, it may demand an amendment to the AEC Treaty. Currently, the treaty does not have a membership provision or criterion, but it appears to assume that all African states are potential members. By becoming fully signed-up members of the AEC, the RECs will be bound by all AEC laws including laws aimed at rationalising and coordinating their activities. They will become subject to AEC-enforcement processes and active and interested participants in its decision-making processes. This will help eliminate, or at least minimise, the potential for conflicting laws, policies and jurisdictions.

The two steps advocated above, as solution to the problem of multiple memberships and multiple RECs, and the latter's relations with the AEC differ in material respects from the five potential solutions advocated by the UNECA.³⁵ Central to the two steps is the principle of 'one country, one community', the view that membership of RECs should be determined largely on the basis of an economic criterion, and a call to abandon the ideal of an AEC consisting of all African states. It should be emphasised that although the RECs have independent legal personality, they exist because they have states as members. Therefore any solution to the above problem should begin with the members, or at least pay very close and immediate attention to them. Although the two steps are radical and will demand a lot of political will to be mustered, in my opinion, it is the only sure and rapid path to achieving an African Economic Community using states and RECs that are genuinely committed to that objective.

5. Conclusion

In this paper, the complexity of the path to the formation of the African Economic Community has been discussed. The approach of using RECs as building blocks of the AEC is fraught with legal challenges most of which have not been adequately addressed by the existing legal framework. The paper provides means of overcoming

³⁵ These are: (1) maintaining the status quo; (2) rationalizing by merger and absorption; (3) rationalizing around rooted communities; (4) rationalizing through division of labour; and (5) rationalizing by harmonising policies and instruments. See UNECA (2006: 115-126).

some of the challenges. More generally, it shows that one of the ways of overcoming the challenges posed by international regime complexity is to provide for an umbrella regime responsible for coordinating and harmonising the activities of elemental regimes within the complex regime. However, providing for such a regime, if deemed necessary at all, comes with difficulty: defining the legal status and mandate of the regime and ensuring the binding effect and compliance with its laws are potentially difficult issues. The AEC as an apparent umbrella regime for the elemental regimes of African RECs is a case in point.

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