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**African Regional Trade Agreements as
Flexible Legal Regimes**

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Abstract

Based on the types of treaty commitments contained in African Regional Trade Agreements (RTAs) and how these RTAs are understood by their members, this article argues these RTAs are flexible legal regimes. Flexibility here refers to the following defining features of African RTAs. First, these RTAs are regarded as establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence. Second, African RTAs incorporate as a central feature the principle of variable geometry according to which different speeds towards meeting time tabled and other commitments are adopted. Third, African RTAs adopt a broad array of social, economic and political objectives without giving salience to any set of objectives. Fourth, African RTAs demonstrate a particular preference for functionally specific objectives to undertake discrete projects and as forums for the integrated development of common resources such as river basins that cut across national boundaries. Fourth, African RTAs demonstrate a remarkable commitment to the equitable distribution of gains from trade and a corresponding weakness in the adoption of non-discrimination trade principles and the related objectives of trade liberalization. Fifth, African RTAs are characterized by multiple and overlapping memberships exemplifying a classic case of the spaghetti bowl. Multiple RTA membership illustrates the flexibility or open-door membership African RTAs offer.

This view of African RTAs sharply contrasts with the current trends that examine trade integration in Africa in light of the European Union and other regional integration arrangements like the North American Free Trade Agreement (NAFTA). From this perspective, integration is regarded as necessarily destined to proceed on a linear path where tariffs and non-tariff barriers are progressively eliminated and the trade regimes of member countries are linked together, and eventually their fiscal and monetary policies are harmonized. This article by contrast shows that some of the central concerns of African RTAs have diverged from these classical cases of regional integration. In so doing, it focuses on the central problems African RTAs have been designed to address and shows that trade liberalization is sought to be achieved within a broader set of non-trade goals. Further, this article shows how the principle of variable geometry and the related focus on equitable sharing of gains from trade integration have set non-discriminatory African regional trade into the background.

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James Thuo Gathii*

Introduction

Trade integration in Africa is often regarded in light of the European Union and other regional integration arrangements like the North American Free Trade Agreement (NAFTA). From this perspective, integration is regarded as necessarily destined to proceed on a linear path where tariffs and non-tariff barriers are progressively eliminated and the trade regimes of member countries are linked together, and eventually their fiscal and monetary policies are harmonized. In the European experience, trade integration has been the result of a series of treaty commitments that also created a supranational organization that the states transferred certain types of authority to.

Seen in this light, African RTAs contrast sharply with their counterparts in Europe and North America where there is a much higher commitment to compliance with the legal obligations contained in the treaties establishing them. From this view, African RTAs have not resolved the ‘problems of coordination, collaboration or [of] domestic politics’ that treaty regimes are argued to provide.¹ In addition, it does not appear that the treaty commitments in these African RTAs have raised ‘the political costs of noncompliance’ such as reputational losses.² In short, from this view the existence of regional trade rules and institutions have not done much to change the behavior of African countries.³

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¹ This is a view strongly associated with institutionalists such as Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int'l Org.* 421, 424 (2000).

² Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *Int'l Org.* 495 (1991). Lipson does acknowledge that loss of reputation does promote compliance but does not guarantee it.

³ See Stephen Krasner, *International Regimes* 5-10 (Stephen Krasner, ed., Cornell University Press) (1983); see also Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 *Case W. Res. J. Int'l L.* 394 (2000) (defining effectiveness in terms of the degree to which treaty rules produce “observable desired changes in behavior”).

The foregoing views are caricatures that are not based on the actual treaty commitments and experiences of African and indeed developing country RTAs.⁴ This article develops a more accurate account of African Regional Trade Agreements (RTAs) than existing ones. This alternative view of African RTAs is based on the types of treaty commitments contained in these treaties as well as how these RTAs are understood by their members. These treaty commitments and understandings show that African RTAs are designed as flexible regimes. Flexibility here refers to the following defining features of African RTAs. First, these RTAs are regarded as establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence. Second, African RTAs incorporate as a central feature the principle of variable geometry according to which different speeds towards meeting time tabled and other commitments are adopted. Third, African RTAs adopt a broad array of social, economic and political objectives without giving salience to any set of objectives. Fourth, African RTAs demonstrate a particular preference for functionally specific objectives to undertake discrete projects and as forums for the integrated development of common resources such as river basins that cut across national boundaries. Fourth, African RTAs demonstrate a remarkable commitment to the equitable distribution of gains from trade and a corresponding weakness in the adoption of non-discrimination trade principles and the related objectives of trade liberalization. Fifth, African RTAs are characterized by multiple and overlapping memberships exemplifying a classic case of the spaghetti bowl. Multiple RTA membership illustrates the flexibility or open-door membership African RTAs offer.

Understood as flexible regimes, African RTAs therefore contrast sharply with the views of Jorge Dominguez in the Latin American context, where he has argued trade integration agreements have 'lax implementation' as a 'rule' governing international relations in the Americas. According to Dominguez lax implementation "is so pervasive and long-lasting across issue-areas and time periods, unpunished by co-signatories and generally accepted

⁴ Four decades ago, regional integration in developing countries was argued not to be expected to "produce spectacular results in the short or even medium term" and these efforts will experience "delays and frequent breakdowns" which will "soon lead to disappointment and discouragement," Andre Philip, *Preface, in F. Kahnert, P. Richards, E. Stoutjesdijk and P. Thomopoulos, Economic Integration Among Developing Countries, OECD 9 (1969).*

even when its existence hampered the procedures or organizations that states sought to create.”⁵

Seeing African RTAs as flexible regimes has the advantage of understanding these RTAs on their own terms rather than as treaty regimes on a path toward becoming much like their European or North American counterparts. In so doing, it becomes possible to better and more accurately understand the challenges that these RTAs have been designed to address and that have in turn shaped them. As Tiyajana Maluwa has argued, African countries have preferred informal institutions to the “bureaucratic strictures and international rule-making or legislative processes of formal international institutions.”⁶ Indeed, as this article shows, African RTAs are not overseen by powerful supranational bureaucracies but rather by relatively weak institutions that leave ample sovereignty to their member states.

Tiyanjana Maluwa in essence alludes to a very important and often overlooked point by pessimists of regional integration in Africa. These pessimists primarily examine the performance of African RTAs on how well member states rigorously conform their behavior to the formally binding trade liberalization commitments they make in treaties and similar agreements. While there is clearly merit in assessing these rule and institution

⁵ Jorge Dominguez, *International Cooperation in Latin America: The Design of Regional Institutions by Slow Accretion*, in *Crafting Cooperation: Regional Interdependence in Comparative Perspective* 83, 95 (Amitav Acharya and Alastair Johnson eds. 2007).

⁶ Tiyanjana Maluwa, *The Move From Institutions? Examining the Phenomenon in Africa*, 100 *Am. Soc’y of Int’l L. Proceedings* 294 (2006). Seeing African RTAs as flexible regimes introduces a perspective where they can be understood on their own terms rather than as treaty regimes on a path toward becoming much like their European or North American counterparts. In so doing, it becomes possible to unravel the challenges and experiences that have actually shaped these RTAs. Tiyajana Maluwa has in fact argued that African countries have preferred informal institutions to the “bureaucratic strictures and international rule-making or legislative processes of formal international institutions,” *id.* If this is true, as this article shows, then as institutions African RTAs are overseen not by powerful supranational bureaucracies but rather by relatively weak institutions. Tiyanjana Maluwa used the New Economic Partnership for African Development, (NEPAD), as an example of this move away from formal institution building governed by a treaty or rule system. In his view, the design of NEPAD was as a framework of development cooperation and interaction outside the African Union. Tiyanjana argued that NEPAD reflected a shift “toward action and results rather than legislation and rule making.”⁶ In his view African governments are more likely to accede to objective, voluntary and peer evaluation measures than “punitive and overly prescriptive measures,” *id.* His second example besides NEPAD was the African Peer Review Mechanism, a regional effort to have African countries review each other’s governance performance, *id.* While the case of Robert Mugabe’s Zimbabwe shows some difficulty of voluntary processes, the mechanism has been used in Kenya in 2006 and in South Africa in 2007.

building efforts in light of the goals that the States have themselves committed themselves to accomplish, such an approach misses the following crucial insights..

Such an approach is based on the false belief, like in the first generation of African RTAs that ‘integration could be legislated from above, *ex nihilo*,’⁷ without reference to what was in fact possible on the ground. The failure of first generation efforts to build RTAs in post-colonial Africa legislated essentially from above is in part represented by the collapse of the East African Community in 1977 and the failure of the Mano River Union economic cooperation arrangement which was established in 1973 after its original members Liberia and Sierra Leone experienced civil wars.⁸ The Mano River Union was revived again in 2004. The collapse of the East African Community showed the importance of cooperation around discrete projects where gains and benefits could not only be realizable in the short term, but where the gains were mutually beneficial to the members as well. In addition, the failure of these first generation efforts at pan-Africanism showed the limits of ambitious projects driven by unity in ending colonial rule and apartheid that could not easily be translated into projects of economic cooperation in post colonial Africa. In fact, long before the collapse of the East African Community in 1977, “the vision of an African common market in the neo-classical/comparative advantage model had disappeared by 1965.”⁹ By the late 1970’s regional trade integration in Africa, Asia and the Caribbean had been declared to have been in “various degrees of serious crisis, in states of stagnation or in processes of

⁷ John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 205, 210 (Ralph I. Onwuka and Amadu Sesay eds., Macmillan Education 1985).

⁸ Even today, the Maghreb Union countries through the Arab Maghreb Union continue to experience particularly severe growing pains. As far back as 1969, the goal of an AMU common market was referred to as “still very much an ideal rather than a reality,” F. Kahnert, P. Richards, E. Stoutjesdijk and P. Thomopoulos, *Economic Integration Among Developing Countries*, OECD 67 (1969) . Today, the AMU is still the least developed of all African RTAs identified by the African Union as pillars of regional integration.

⁹ Miguel S. Wionczek, *Introduction - Present Status and Prospects of Economic Integration Movements in Developing Countries: Political Atomization and Economic Backwardness of the Southern Hemisphere*, in *Economic Cooperation in Latin America, Africa and Asia*, 8-9 (Miguel S. Wionczek ed., 1969). The vision of African economic integration was a popular theme in the early part of the 1960’s, see Economic Commission on Africa, Standing Committee on Trade, Background Paper on the Establishment of an African Common Market No. E/CN.14/STC/20 (Oct. 13, 1963); see also Economic Commission on Africa, Economic Integration and African Trade No. E/CN.14/STC/4 (Aug. 23, 1964).

disassociation.”¹⁰

Economic and political cooperation in light of such a legacy of failure could therefore hardly be remedied by a regionalism based exclusively on a neo-classical/comparative advantage model and have been expected to succeed. Thus in the second generation of RTAs that followed the collapse of the first wave of African RTAs, the role of treaty commitments became that of providing a framework for initiatives such as joint ventures or initiatives around an entire series of areas including trade, investment and capital, but also extending further into transport, security, water, electricity supply, labour movement as well as agreements for the management of common resources such as river basins. Not only were the range of objectives increased, but flexibility was built into these RTAs by allowing functionally specific objectives and incorporating the principle of variable geometry as outlined above and discussed more fully in this article. This contrasts sharply with an approach to regional integration that is primarily or solely focused on trade integration and that would require rigorous formal compliance with liberalization commitments within specific time frames. This does not of course preclude such treaty commitments having solemnly binding obligations.¹¹ Indeed, many if not all African RTAs have exactly those kind of commitments. In short, flexibility is not necessarily incompatible with assuming legally binding commitments. Often these obligations are assumed on the understanding that compliance would not be stringently enforced because the commitments are balanced off against a variety of safety valves such as the principles of variable geometry and the equitable sharing of the benefits of regionalization.

Let me now give more examples of flexibility in African RTAs. As noted above, these RTAs adopt flexibility by incorporating rules that provide different obligations between members and differences in timelines to comply with commitments that are based on the differences in the economic abilities of their members. For example, in the Treaty for the Establishment of the East African Community, the principle of variable geometry allows

¹⁰ Constantine V. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Development* 719 (1978).

¹¹ For a similar view, see Abram Chayes & Antonia-Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Harvard University Press 1995).

the commitments in the treaty to be undertaken at different speeds.¹² The principle of asymmetry allows variances in measures of economic integration, showing that flexibility is built right into the framework of RTAs. In the South African Customs Union, (SACU), one of the ways in which flexibility is achieved is by allowing protection of new industries from competition from similar goods from SACU and non-SACU countries for a period of no more than eight years for the poorest SACU states. In addition, as noted below, Botswana, Lesotho and Swaziland are entitled to tariff assistance for industries of major importance to their economies. Tariffs with regard to such industries may only be decreased with the concurrence of a country that has designated such an industry as being of importance to it.¹³ I address the question of flexibility in more detail below.

RTAs also provide an umbrella within which bilateral and even inter-regional links among a group of countries along functional lines whose benefits are often more immediately available, (than through trade liberalization). This in turn has spurred 'sectoral planning and coordination'¹⁴ which is now a major feature of African RTAs.

This paper proceeds as follows. In Part One, I discuss how flexibility enmeshes well in the African context with examples showing how African RTAs have adopted the classic Vinerian customs union model as well as their adoption of multiple objectives. This part also discusses the how African RTAs act as forums for forums for integrated development and functionally specific projects. These projects are often nestled or nested within the RTAs and they include cooperation on issues relating to security and common river basin management. Part One ends with another feature of RTAs enmeshment to the

¹² See *infra* Part Three.

¹³ Article 26 of the SACU Agreement makes provision for protection of infant industries for Botswana, Lesotho, Namibia and Swaziland. See also Jan Isaken, *Prospects for SACU After Apartheid*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 183 (Bertil Oden ed., 1993). In addition, South Africa may give sympathetic consideration to increasing the customs duty on imports of competing goods as well as to reducing such duty for materials that are used in the production of goods designated as being of importance by Botswana, Swaziland or Lesotho. Article 34 of the SACU Agreement makes provision for the revenue sharing formula which determines the respective shares of the members of the total customs, excise and additional duties. See also Article 2(g) of the SACU Agreement which provides one of SACU's objectives is to "facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States."

¹⁴ See Emang Motlhabane Maphanyane, *SADCC-Future Challenges*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 174, 175 (Bertil Oden ed., 1993) (also arguing that SADCC initially decided to undertake "large programmes in agricultures, transport, communications and the energy sector. Also deliberately, the basis of cooperation was the discrete project. This had the effective of making the benefits of cooperation immediate and tangible, and also building confidence among member states").

African context – the view that African regionalism is a bulwark for economic self independence. Part Two discusses how African RTAs have adopted variable geometry as a mechanism for ensuring equality in the sharing of the benefits of trade liberalization within RTAs and how the prevalence of this concern has as a result back-grounded the commitment to non-discriminatory trade liberalization. In this part of this article, I discuss at length the highly significant April 2009 decision of the East African Court of Justice advisory opinion on variable geometry and its implications for African RTAs. Part Three focuses on another important feature of African RTAs as flexible regimes – multiple memberships in RTAs. Part Three begins by reviewing the phenomenon of multiple membership and the advantages it offers African countries with such multiple memberships. It then proceeds to examine how the resulting spaghetti bowl effect of these multiple RTAs and assesses the transaction costs associated with it. The paper ends with a conclusion.

Part One: Flexibility as Enmeshment to the ‘African’ Context

Adaptations of the Vinerian Model

African RTAs, like others in the Third World, exhibit differences from the classic European market-based customs union integration model.¹⁵ Under the European model, economic integration would start with a free trade area, to a custom union, to a common market, an economic union with a political union as the last stage.¹⁶ This classic integration model associated with Jacob Viner,¹⁷ came under serious scrutiny as a model for the Third World integration many decades ago.¹⁸ The Vinerian model was developed

¹⁵ C.A. Cooper & B.F. Massell, *Toward a General Theory of Customs Unions for Developing Countries*, 73(5) *Journal of Political Economy* 461, 475 (1965).

¹⁶ Bela Balassa, *The Theory of Economic Integration* (Greenwood Press 1961).

¹⁷ Jacob Viner, *The Customs Union Issue* (Carnegie Endowment for International Peace 1950). Extensions of this theory by others includes: J.E. Meade, *The Theory of Customs Unions* (Greenwood Press 1955); R.G. Lipsey, *The Theory of Customs Unions: Trade Diversion and Welfare* (Economica, New Series 1957).

¹⁸ Among the critics are: C.A. Cooper & B.F. Massell, *Toward a General Theory of Customs Unions for Developing Countries*, 73(5) *Journal of Political Economy* 461, 475 (1965); R.L. Allen, *Integration in Less Developed Areas*, 14(3) *Kyklos* 315 (1961); G.M. Meier, *Effects of a Customs Union on Economic Development*, *Soc. & Econ. Stud.*, Mar. 1960; R.F. Mikesell, *The Movement Towards Regional Trading*

in an industrial context, while many developing countries were agrarian and raw material producing. The Vinerian model, for example, assumed that trade creation or trade expansion would outweigh trade diversion when trade barriers were lifted. This assumption is often undermined since a majority of African economies have largely similar products without necessarily having comparative cost advantages between them sufficient to overcome this similarity.¹⁹ The resulting lack of complementarity in effect undercuts gains in trade. Under such conditions, firms in African RTAs end up trading with high cost producers within the region than with low cost producers from outside the region.²⁰ The small sizes of most of these economies also means that significant economies of scale are not realizable without enlarging the market through regionalism. The small size of African economies is exacerbated by the fact that economic integration in Africa even while otherwise enlarging markets sizes does not lead to globally significant increases in productivity, productive area or the purchasing power of the enlarged market relative to productive areas and markets in other regions.²¹ In addition, African integration arrangements have often resulted in protecting high cost multinational or local firms that have commanded market share by producing for a segmented market within the individual countries and subsequently within a region.²²

Some economists therefore argued that African economies need structural changes

Groups in Latin America, in *Latin American Issues: Essays and Comments*, The Twentieth Century Fund (A.O. Hirschman ed., 1961); Peter Robson, *Economic Integration in Africa*, (George Allen & Unwin 1968); R.F. Mikesell, *The Theory of Common Markets as Applied to Regional Arrangements Among Developing Countries*, in *International Trade Theory in a Developing World* (R.D. Harrod & D.C. Hague eds., 1963).

¹⁹ F. Kahnert, P. Richards, E. Stoutjesdijk and P. Thomopoulos, *Economic Integration Among Developing Countries*, OECD 23 (1969) (noting that the “traditional doctrine is based on differences in resource endowments which explain differences in factor prices. However, if one abstracts from natural resources in mining and agriculture, developing countries may not show very different resource endowments. In a general way, scarcity of capital and skilled labour, scarcity of entrepreneurial talent, usually considerable amounts of unemployed unskilled labour, and in many cases even no shortage of land resources, are some of the characteristics of developing countries”.) On similarity of factor endowments among developing countries, see pp. 31-35.

²⁰ One consequence of trade liberalization under regional integration schemes in developing countries is a rise in non-tariff barriers, see Constantine E. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Development* 719, 756 (1978).

²¹ Arthur Hazelwood, *Problems of Integration Among African States*, in *African Integration and Disintegration* 6 (Arthur Hazlewood ed., 1967).

²² See discussion *infra* in Part Two discussing reasons for adoption of variable geometry. For a discussion of the conditions under which the Vinerian customs union model are feasible, see Robert L. Allen, *Integration in Less Developed Areas*, 14 *Kyklos* 315, 317-334 (1961).

because they did not exhibit the conditions under which integration could confer benefits on them.²³ This was in part because developing countries tend to trade with developed countries more than they do with each other. In addition, their national outputs are dominated by trade with developed economies mainly in exporting unprocessed raw materials. The argument here was that African economies needed more than the increase in market size created by a common market because the increase in market size may be marginal relative to other limitations for firms such as high production costs and very low levels of income that make the effective size of regional markets small.²⁴

Thus as we note more fully below, a primary goal of trade integration in Africa became that of promoting large scale production with a view to shifting trade patterns from external sources. The idea was that such a production shift would in turn result in foreign exchange savings that could then be used to produce what was imported from outside Africa from the newly established production facilities within Africa.²⁵ In retrospect, this adaptation of the Vinerian model turned out to be a pie in the sky – yet it is an idea not wholly abandoned in African RTAs even today.²⁶

Another initial response to this classical customs theory were import substitution policies

²³ M. Bye, *Structural Changes Required by Growth, in Trade Theory in a Developing World* 161 (R. Harrod and D. Hague eds., 1963); *see also* Constantine E. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Development* 719, 751 (1978) (arguing the traditional theory of integration influenced by Ricardian comparative advantage theory and neo-classical economics did “not address itself to the issues of major interest on development, namely how the process of integration will dynamically change the structural conditions of production and technology, the process of inter-commodity and inter-activity (rather than simply inter-country) substitution, the dynamics of resource diversification going beyond the questions of specialization, the composition of investments and expectations, the capacity for absorbing externalities, etc.”).

²⁴ Arthur Hazelwood, *Problems of Integration Among African States, in African Integration and Disintegration* 9 (Arthur Hazelwood ed., 1967) (making reference to the view that “the present cash market of most African countries individually is not larger than that of a moderately sized European town”).

²⁵ Reginald H. Green & Ann Seidman, *Unity or Poverty: The Economics of Pan-Africanism* 265 (Penguin 1968). Some economists even suggested that trade creation would hurt poor economies because it would disrupt the desired country distribution rules and as such suggested ways of overcoming such losses through establishment of common industries in the ‘least-cost’ partner, *see* S.B. Linder, *Trade and Trade Policy for Development* (Praeger Series on International Economics and Development 1967); *see also* Fuat Andic, Suphan Andic and Douglas Dosser, *A Theory of Economic Integration for Developing Countries, Illustrated by Caribbean Countries*, (Allen and Unwin 1971).

²⁶ *See below* notes 59 to 79 (discussing functional specificity; RTAs as forums for integrated development of common resources; the equitable distribution of gains from trade and the principle of variable geometry)

particularly in the 1960's and 1970's²⁷ that have become increasingly abandoned through multilateral treaty commitments particularly since the 1990s. The Vinerian customs union theory was also adapted through a variety of devices to avert unequal integration gains between integrating economies, a theme I address more fully below.²⁸ Today while these developing countries have largely abandoned import substitution policies, many are yet to fully liberalize their economies under the GATT/WTO obligations they have assumed.

Today, African RTAs are not based on an approach that focuses on whether countries are complying point by point with regional trade treaty commitments. As such, regionalization grows not only out of formal institutions but independently of them as well. Daniel Bach has for example argued that while regionalism focuses on institution building and the conclusion of formal arrangements, regionalization – a much broader concept - arises from ‘transactions and interactions’ both formal and informal that a variety of state and non-state actors engage in within these regional spaces.²⁹ In fact, Africa has had its own forms of interregional interactions that date before the advent of colonial rule. While these interactions need not be overstated, we must not also lose sight of the manner in which colonial rule created economies that favored the interests of the various European metropolises at the expense of the colonies³⁰ and the manner in which independence subsequently restructured these interactions around the ideologies of

²⁷For example, *see* ECLA, *The Latin American Common Market*, UN Publication No. 59.II.G.4 (New York 1959).

²⁸F. Kahnert, P. Richards, E. Stoutjesdijk and P. Thomopoulos, *Economic Integration Among Developing Countries*, OECD 16 (1969) (arguing that the fact that trade theory (in the Vinerian model) “failed to integrate considerations of income distribution fully into its general framework is a serious shortcoming which invalidates many of its conclusions in terms of political feasibility and even political desirability”).

²⁹Daniel Bach, *Introduction*, in *Regionalisation in Africa: Integration and Disintegration* (Daniel Bach ed., 1999); *see also* K. W. Deutsch, *The Analysis of International Integration* (Prentice Hall 1988); E.B. Haas, *The Study of Regional Integration*, in *Regional Integration: Theory and Research* (L. Lindberg & S.A. Scheingold eds., 1971); and Bjorn Hettne, *Globalization, Regionalism and the New Third World*, in *Redefining the Third World* (Nana Poku and Llyod Pettiford eds., 1998); who all provide alternative conceptualizations of regional integration that go beyond the linear paradigm of establishing trade integration through free markets.

³⁰Reginald H. Green & Ann Seidman, *Unity or Poverty: The Economics of Pan-Africanism* 127 (Penguin 1968) (noting that “The existing economies of the separate African states were created under colonial control, the very opposite of the free market conditions which are assumed to be necessary for the best international division of labour. The economic principle of colonial rule dictated government in what was believed to be the best interests of metropolitan capital, in short the operation of a colony as if it were a subsidiary company”).

sovereignty and nationalism.³¹

RTAs today are caught in the cross-roads of seeking to overcome the defining features of separate countries whose goals encompass economic, political, social and cultural objectives in addition to the traditional integration goals of trade liberalization. This is a regionalism tethered by the commitment to separate nations but strengthened by regional connections in trade and other domains among an economically, religiously, socially and politically diverse group of countries. As I will note below, perhaps because of this diversity, it is not surprising the salience of objectives such as regional security and the welfare of the citizens within these RTAs. These trade plus objectives are contextualizing imperatives of African regional integration. From this perspective, African RTA treaties contain a multiplicity of objectives – after all trade integration cannot be achieved without simultaneously pursuing other objectives. For example, insecurity is a major barrier to trade integration and any regional integration efforts that do not include addressing insecurity as an objective would be atypical.³²

In addition, Africa is a diverse continent with variations from country to country of dramatic differences in legal regimes, religious and cultural values and norms, economic endowments and political regimes not to mention historical heritage. At one level, this contrasts with the European Union, which was “built on commonalities of economic interest, politics and culture”³³ and which also gave primacy to economic integration. In Africa by contrast, it is important to pursue links across a broad array of indicators to set the context within which trade integration would be successful. Such a broad range of

³¹ Unfortunately, post-colonial nationalism overstated the national state and excluded alternative notions of nationhood that preexisted the advent of the post colonial state in Africa and Asia, *see* Partha Chatterjee, *Nationalist Thought in the Colonial World: A Derivative Discourse* (University of Minnesota Press 1993); and Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1991); *see also* Donald Rothchild & Robert L. Curry, Jr., *Scarcity, Choice and Public Policy in Middle Africa*, (University of California Press 1978) (arguing that colonialism left “behind a patchwork of many sovereign states, but the states spawned by this process were themselves artificial entities”, *id.* at 228); and Makau Wa Mutua, *Redrawing the Map of Africa*, *Va. J. Int’l L.* (arguing that these artificial inherited African States lack moral and legal legitimacy).

³² Recently, the East African Community Council of Ministers argued to be an incomplete integration scheme without cooperation on defense and security matters, *see* East African Community, *Regional Peace and Security*, available at: <http://security.eac.int>.

³³ Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 *Wid. L. Symp. J.* 1, 15 (2001).

objectives would overcome what Arthur Hazelwood argued several years ago was “a conclusion of despair that mutually beneficial economic co-operation requires close similarity of social and political outlook.”³⁴ The first generation of African RTAs were narrowly focused on trade integration to the exclusion of other objectives and in so doing under-estimated the importance of cooperating on a broad range of objectives.³⁵

Thus, today it would be a mistake to simply regard African RTAs merely as ‘cognitive representations and formal arrangements.’³⁶ Rather African RTAs must be regarded in light of the initiatives and processes including state-society relationships that are cumulatively establishing regionalism in modern Africa.³⁷ It is apposite to note here that even in the European Union, it would be inaccurate to presuppose that its integration has been achieved solely or purely through legal transformations through the European Court of Justice. As J.H.H. Weiler has argued, ‘legal and constitutional structural change’ had been crucial to European integration, ‘*but only in their interaction with the Community political process.*’³⁸ (emphasis added) One African leader put it best:

“The basis of our cooperation, built on concrete projects and on specific programmes rather than on grandiose schemes and massive bureaucratic institutions, must be assured the mutual advantage of all participating states.”³⁹

In other words, looking to concrete projects that are mutually beneficial as well as the manner in which political and other processes are working towards building of regional integration are as important as legal and institutional perspectives that focus primarily on

³⁴ Arthur Hazelwood, *Economic Instrumentalities of Statecraft and the End of the EAC*, in *Integration and Disintegration in East Africa* 135 (C. Potholm & R. Fredland eds., University Press of America 1980).

³⁵ John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 51 (C. Potholm & R. Fredland eds., University Press of America 1980).

³⁶ Daniel Bach, *Introduction*, in *Regionalisation in Africa: Integration and Disintegration* (Daniel Bach ed., James Currey 1999).

³⁷ As in other areas of global governance, non-state actors have become integral in the creation of regionalism in Africa, see James N. Rosenau & Ernst-Otto Czempiel, *Governance Without Government: Order and Change in World Politics* (Cambridge University Press 1992).

³⁸ J.H. H. Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403, 2407 (1991).

³⁹ Sir Seretse Khama, as quoted in John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 217 (Ralph I. Onwuka and Amadu Sesay eds., Macmillan Education 1985).

states as unitary actors. Joseph Nye cautioned several decades ago that “scholars studying integration in Africa must remember the primacy of politics and not be misled by assumptions natural to ‘developed’ societies. It is important to pay attention to social, historical, and economic factors,”⁴⁰ he argued. That is why this article adopts a multifaceted approach that at once follows the legal and institutional efforts being made to build regionalization as well as the interactions among regional national and regional trade officials and non-state actors including business groups, institutions and professionals⁴¹ to find out the extent to which their increased interactions have influenced the realization of regional commitments in trade and related areas.⁴² This article therefore explores not only the treaty commitments made in the RTAs, but other types of instruments containing trade and non trade agreements between and among African states such as ministerial declarations and memorandums of understanding.⁴³ Such informal decisions taken within the context of RTA commitments that are designed to take advantage of regional complementarities help in building and consolidating regional integration initiatives such as infrastructural projects. In doing so, African RTAs have adapted to an environment often characterized by political instability and inter-country inequality that would threaten a grand scheme of integration that was exclusively based

⁴⁰ Joseph Nye, *Pan-Africanism and East African Integration* 250 (Harvard University Press 1965).

⁴¹ Consider for example the establishment in April of 2006 of an East African Phytosanitary Information committee by scientists under the auspices of the International Plant Convention Treaty which though intended for information sharing purposes nevertheless dovetails particularly well with building capacity for phytosanitary trade related issues. For more information, *see* <https://www.ippc.int/servlet/CDSServlet?status=ND0xMzM4MS4yMTAxODEmNj11biYzMz11dmVudHMmMzc9aW5mbw~~>

⁴² Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1409-1410 (1999); Harold Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1986); and Harold Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479, 1502 (2002-3) (explains what he terms as vertical internalization or absorption of rules of international law into domestic legal systems as follows: “...the key to understanding whether nations will obey international law, I have argued, is transnational legal process: the process by which public and private actors namely, nation states, corporations, international organizations and non-governmental organizations interact in a variety of for a to make, interpret, enforce, and ultimately internalize rules of international law. The key elements of this approach are interaction, interpretation, and internalization. Those seeking to create and embed certain human rights principles into international and domestic law should trigger transnational interactions, that generate legal interpretations, that can in turn be internalized into the domestic law of even resistant nation states”).

⁴³ These types of decisions though sometimes regarded as informal relative to the more solemn formal treaty commitments are now regarded as sources of obligations between states, *see* Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823, 1879-1884 (2002).

on a Vinerian customs union model.⁴⁴

Flexibility as Enmeshment in the African Context

Flexibility does not make African RTAs any less than those in other parts of the world that are thought of as more rule bound. Indeed, highly legalized legal regimes are now not necessarily thought of as superior to those that are not highly legalized.⁴⁵ In one context high legalization is defined by the extent to which obligation, precision and delegation of a formal instrument may serve an important purpose.⁴⁶ However, in a different context, such legalization may not necessarily serve the best interests of the parties since it may not ‘enmesh’ well within the economies, political frameworks and normative commitments of a particular regime.⁴⁷ Yet, precisely where parties to formal and informal agreements are continuously reiterating their commitments and making new ones contributes to the process of gradually building the regime’s norms and rules as well as the political will and economic investment necessarily to give these norms and rules efficacy. For example, the increasing absorption of regional rules into national law of RTA member countries as well as the continual building of a cadre of international trade lawyers with expertise who are increasingly working for RTA members or for the RTAs themselves are important initial steps in building the efficacy of RTAs as legal regimes.⁴⁸

⁴⁴ John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 221, 221-222 (Ralph I. Onwuka & Amadu Sesay eds., 1985).

⁴⁵ Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int’l Org.* 421, 434 (2000) (arguing that the choice of soft norms by an international organization may be necessitated by seeking consensus as a way of limiting costs including contracting costs).

⁴⁶ Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *Int’l Org.* 401 (2000) (defining these terms as follows: “obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures and discourse of international law, and often of domestic law as well. Precision means that the rules unambiguously define the conduct they require, authorize or prescribe. Delegation means third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules”).

⁴⁷ Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 *N.Y.U.J. Int’l L. & Pol.* 303, 304 (2005). Two scholars have suggested that the degree to which countries cooperate under a regime such as an RTA will depend upon factors such as “the character of the activity, the character of the accord, country characteristics policy, history, leadership, information, the role of...NGOs, actions of other states, and the roles of international governmental organizations,” see Harold Oh & Edith Weiss, *Strengthening Compliance With International Environmental Accords: Preliminary Observations from a collaborative Project*, 1 *Global Governance* 119, 124 (1995).

⁴⁸ The importance of having a cadre of well trained legal professionals has recently been identified as having contributed significantly to the efficacy of the intellectual property regime of the Andean Community. See Lawrence R. Helfer, Karen J. Alter and M. Florencia Guerzovich, *Islands of Effective*

Clearly though African RTAs do not eschew legalization even while embracing policy based integration. Thus Article 5(3) of the Treaty for the Establishment of the AEC provides for possible sanction against a member state that “persistently fails to honour its general undertakings under this Treaty or fails to abide by the decisions or regulations of the Community.”⁴⁹ Article 29(2) of the Treaty for the Establishment of Common Market for Eastern and Southern Africa gives primacy of the decisions of the COMESA Court of Justice over those of the member countries on questions relating to the interpretation of the treaty. Such primacy is not only unusual among international tribunals including the international court of justice, but also in light of previous decisions of African courts when confronted with conflicting RTA treaty provisions.⁵⁰ Notwithstanding these examples, rather than being highly legalized regimes, African RTAs are flexible arrangements. A SADCC report observed that:

“Flexibility does not imply absence of institutions: it creates a need for bodies able to build, modify, and phase out arrangements. What it does imply is avoiding massive, interlocked institutional structures in which the institutional frame (not the content of the programme) becomes the justification of continued cooperation in one field are magnified into a general crisis of regionalism.”⁵¹

Thus, one significant manner in which African RTAs show a specific enmeshment particular to Africa is that they have focused less on building rigorously formal commitments backed up by sanctions, but rather as flexible frameworks of development coordination and cooperation that give countries choices of activities of most interest to

International Adjudication: Constructing An Intellectual Property Rule of Law in the Andean Community, 103 Am. J. Int'l L. 1 (2009).

⁴⁹ Such Council imposed sanctions “may include the suspension of the rights and privileges of membership and may be lifted by the Assembly upon recommendation of the Council,” Article 5(3) of the Treaty for the Establishment of the AEC.

⁵⁰ *Okunda v. Republic*, EA 457 (1970), *affirmed by* EA 460 (Court of Appeal in East African Community 1970) (where a Kenyan court asserted supremacy of Kenyan law over a competing East African Community statute).

⁵¹ Southern African Development Coordination Conference, *First Steps Toward Economic Integration: Interests, Instrumentalities* 36 (Arusha: Mimeo 1979), *as cited in* John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 212 (Ralph I. Onwuka and Amadu Sesay eds., 1985).

participate in.⁵² In this sense, African RTAs often adopt ‘functionally specific’⁵³ objectives that do not wrestle sovereignty away from national governments given that it is not always clear if intra-regional trade would “compensate for the inevitable erosion of their autonomy in policy-making.”⁵⁴ Such flexibility is also important given the diversity not only of the economies of individual members of the RTAs, but differences based on culture, geography, ethnicity, religion and political allegiances as well. This multiplicity of identities and loyalties could be insurmountable barriers to integration if African RTAs were constructed as unitary and inflexible frameworks that made it difficult for cooperation along any axis of cooperation as steps towards increasing legitimacy for

⁵² John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 212 (Ralph I. Onwuka and Amadu Sesay eds., 1985) (also arguing that a “rigid framework, as was the case with the Treaty for East African Cooperation, makes it impossible for countries to participate selectively in those activities which are of most interest to them...[and that] flexibility of institutions and instruments of cooperation is desirable also in that this recognizes that actors’ interests do not remain constant. In part this is related to change in the extra-regional economic environment...It also anticipates that there will be a continuing rapid turnover of governments in many African states, possibly accompanied by dramatic shifts in policy. Since such transformations have often precipitated the collapse of regional institutions in the past, it is desirable that the framework of cooperation be insulated as much as possible from the consequences of sudden withdrawal of a member state. Flexible arrangements improve the prospects for projects to be continued with a minimum amount of damage”).

⁵³ See, for example, Article 4 (specific undertakings) of the Treaty for the Establishment of the Common Market for East and Southern Africa (COMESA) providing for broad range of undertakings within each of the following areas: trade liberalization and customs cooperation (Article 4 (1)(a)-(f)), transport and communications (Article 4(2)(a)-(c)), industry and energy (Article 4(a)-(d)), monetary affairs and finance (Article 4(4)(a)-(d)), agriculture (Article 4(5)(a)-(g)), and in the field of economic and social development (Article 4(5)(a)-(i)); the Treaty for the Establishment of the East African Community Chapter 11 (Co-operation in Trade Liberalization and Development), Chapter 12 (Cooperation in Investment and Industrial Development), Chapter 13 (Cooperation in Standardization on Quality Assurance, Metrology and Testing), Chapter 14 (Monetary and Financial Cooperation), Chapter 15 (Cooperation in Infrastructure and Services), Chapter 16 (Cooperation in the Development of Human Resources, Science and Technology), Chapter 17 (Free Movement of Persons, Labour, Services, Right of Establishment and Residence), Chapter 18 (Agriculture and Food Security), Chapter 19 (Cooperation in Environment and Natural Resources Management), Chapter 20 (Cooperation in Tourism and Wildlife Management), Chapter 21 (Health, Social and Cultural Activities), Chapter 22 (Enhancing the Role of Women in Socio-Economic Development), Chapter 23 (Cooperation in Political Matters), Chapter 24 (Legal and Judicial Affairs), Chapter 25 (The Private Sector and the Civil Society), Chapter 26 (Relations With Other Regional and International Organizations and Development Partners), Chapter 27 (Cooperation in Other Fields); see also John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 212 (Ralph I. Onwuka and Amadu Sesay eds., 1985).

⁵⁴ John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 212, 214 (Ralph I. Onwuka and Amadu Sesay eds., 1985). Emang Motlhabane Maphanyane, *SADCC-Future Challenges*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 175, 176 (Bertil Oden ed., 1993) (also arguing that “SADCC eschewed the conventional market integrationist path to regional integration. A gradualist approach was instead adopted which aimed at consensus and avoidance of anything that would infringe on national sovereignty that had just been acquired often through the long and bitter and bloody struggle. It was the most sensible way to proceed in Southern Africa under the circumstances. Regional integration had to be a maturing process”).

broader forms of cooperation within the heterogeneous nature of African societies. Inflexibility can only help contribute to entrenching resistance to the legitimacy of cooperative frameworks along any of these lines of difference and asymmetry. Flexibility by contrast enmeshes very well within this context of heterogeneity and diversity.

Enmeshment within the African context is also manifested by the fact that African RTAs foreground issues of equity and balance in the relations among their members while back-grounding commitments to the promotion of free trade as a source of economic growth.⁵⁵ This is informed in large part by the fact that the prospects of regional integration have often been severely limited by the legacy of unequal gains from integration⁵⁶ not merely because it is market based but because it often pits economically richer countries within the same group as economically poorer countries.⁵⁷ That is why there has been a longstanding argument in favor of compensatory schemes for poorer African countries in the initial stages of economic integration with richer countries so that integration commitments do not impose high administrative costs without immediate advantages.⁵⁸

African RTAs as Forums of Integrated Development and Functionally Specific Projects

In addition, African RTAs often serve as forums for integrated development of common

⁵⁵ In its 1992 summit meeting, SADC adopted a development integration model which “stresses the need for close political cooperation at an early stage of the integration process, not at the end. Second, it calls for equity and balance in relations among member states, including compensatory measures for the weaker members in any transactions that might adversely affect them, such as trade or monetary liberation. Third, it sees a need for increased trade to be predicated on regional industrial planning, involving regional resource mobilization,” cited in Carol B. Thompson, *African Initiatives for Development: The Practice of Regional Economic Cooperation in Southern Africa*, 46 J. Int’l Aff. 128 (1992).

⁵⁶ Mytelka L.K. *The Salience of Gains in Third-World Integrative Systems*,” 25(2) World Politics 236 (1973).

⁵⁷ In the South African context for example, South Africa is the imperial power both within the South African Customs Union and SADC in the colonial and apartheid eras when South Africa played a destabilizing role against the frontline states that were opposed to apartheid, see Nana Poku, *Regionalization and Security in Southern Africa* 15-38, (Palgrave Macmillan 2001). Poku further notes that “SACU is unlikely to provide the framework for greater regionalism for the simple fact reason that the ending of apartheid has not eradicated a general suspicion among countries of southern Africa of South Africa’s imperial project,” *id.* at 89.

⁵⁸ See P. Robson, *Economic Integration in Africa* 285 (George Allen & Unwin 1968) (arguing that Gambia’s integration within UMOA would deprive it of its monetary autonomy unless a mechanism for the equitable distribution of benefits and costs between the countries involved was devised). In Part Two I address the various types of compensatory arrangements devised in African RTAs to close the gap in opportunities between poor and richer members of an RTA.

resources like river basins with their secretariats or various arms serving as inter-governmental agencies for such purposes.⁵⁹ For example, the East African Community nestles within it the Lake Victoria Basin Commission which coordinates the management and utilization of the basin among three of the five community states which all share the Lake Victoria Basin.⁶⁰ There is a long history of integrated developed of river basins among African countries some nestled within economic integration arrangements⁶¹ and others by longstanding treaties entered into during the colonial period.⁶² Some have called this approach, development integration.⁶³ What is more, these integrated development arrangements have sometimes been designed with re-distributional considerations.⁶⁴

In short, African RTA's do not center integration around a vision of market led integration⁶⁵, but rather are also designed as forums for a variety of initiatives such as

⁵⁹ For example, S.K.B. Asante, F.O.C. Nwonwu and V.N. Mizvidziwa, *Towards An African Economic Community 15* (Africa Institute of South Africa 2001) (arguing in favor of increased efforts to harmonize and promote the implementation of joint projects given "the small size of most African economies").

⁶⁰ Among the goals of this autonomous body within the East African Community are: 'harmonizing policies and laws of the Lake's environment and catchment area; the management and conservation of aquatic resources including fisheries; promotion of investments and development in the basin and the revamping of the transport system on and around the Lake,' see The Lake Victoria Basin Commission, available at: <http://www.eac.int/lvdc.html>. Also nestled or nested within the East African Community as an institution of the Community is the Lake Victoria Fisheries Organization established by the member States in 1994 by treaty to manage the Lake's fisheries resources, see <http://www.lvfo.org/>.

⁶¹ For example, Gambia and Senegal have long sought to cooperate on the exploitation of the Gambia River Basin within UMOA, see Uka Enzenwe, *ECOWAS and the Economic Integration of West Africa* 114-116 (Palgrave Macmillan 1983); and Peter Robson, *Problems of Integration Between Senegal and Gambia, in African Integration and Disintegration* 115 (Arthur Hazlewood ed., 1967) (also noting Gambia's relative economic weakness relative to Senegal and the challenge of ensuring opportunities available to equalize gains between the two countries. The author also notes that the two countries entered into a defense agreement under which cooperation on mutual assistance from external threat was agreed, *id.* at 126-128).

⁶² The best example of this is the Nile River basin that is in part governed by a treaty entered into by the Egypt and Anglo-Egyptian Sudan of 7th May 1929. For an analysis, see Fasil Amdestion, *Scrutinizing the Scorpion Problematique: Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, 44 *Tex. Int'l L.J.* 1, 19-27 (2008).

⁶³ Andrew Axline, *Underdevelopment, Dependence and Integration: The Politics of Regionalism in the Third World*, in *Economic Integration in the Third World* 25 (P. Ghosh ed., 1994).

⁶⁴ Oliver S. Saasa, *Background to Regional Integration in Africa, in Joining the Future: Economic Integration and Co-operation in Africa* 14 (Oliver Saasa ed., 1991).

⁶⁵ According to Oliver Saasa, the "emphasis on non-market components of regional integration in developing countries...in no way implies that production efficiency and considerations of costs are irrelevant. To the contrary, it is fully acknowledged here that since such vehicles for integration involve astronomical sums of money and demand joint programming and execution, market integration that demands cost considerations and rational responses to price signals is important. Instead it is suggested that integration derived advantages usually result from areas of cooperation in which the market alone is not the

facilitating cooperation around common resources like international rivers and basins among riparian states⁶⁶ and cross border challenges that include trade⁶⁷, security⁶⁸ and health.⁶⁹ So rather than making the expansion of intra-regional trade as a framework for industrial growth, product diversification and the improvement of the global competitiveness of these products as ways of overcoming small domestic markets, African RTAs were and continue to be seen as frameworks for development cooperation in the first place and of trade integration within this context.⁷⁰ As Oliver Saasa put it this approach “is fundamentally dependent upon increased industrial production through specialization, exploitation of economies of scale, external economies, co-ordinated programming and development of infrastructure.”⁷¹ Here, regional cooperation is at the level of production in the arenas of capital and labour rather than merely in trade. This amounted to industrial planning in many regions complete with licensing legislation designed to “encourage investment in industry serving the regional market.”⁷² For this

principal variable accounting for such economic benefits,” Oliver S. Saasa, *Background to Regional Integration in Africa, in Joining the Future: Economic Integration and Co-operation in Africa* 21 (Oliver Saasa ed., 1991).

⁶⁶ See Kathy L. Powers, *Why Do States Pursue Water Cooperation through Regional Trade Agreements? Trade, Environment and Security Linkages in International River Basins*, Paper Prepared for delivery at the 2005 Annual Meeting of the American Political Science Association (Sept. 1-Sept. 4, 2005).

⁶⁷ Edward D. Mansfield & Rachel Bronson, *Alliances, Preferential Trading Arrangements, International Trade*, 91 *Am. Pol. Sci. Rev.* 94 (1997).

⁶⁸ See Kathy L. Powers, *International Institutions, Trade and Conflict: African Regional Trade Agreements From 1950-1992*, Phd Dissertation, Ohio State University (2001); David Bearce, *Grasping the Commercial Institutional Peace*, 47 *Int'l Stud. Quarterly* 347 (2003).

⁶⁹ See, Vincent Agu, Alexandre N. Correia & Kazem Behbehani, *Strengthening International Health Co-Operation in Africa Through the Regional Economic Communities*, 14 (3-4) *African Journal of Health Sciences* 104 (2007) (noting in part that “One of the important lessons arising... is that effective integration requires more than reducing tariffs and quotas. Wide ranging policy measures (which go beyond traditional trade policies) are needed to remove barriers which have the effect of segmenting markets and impeding the free flow of goods, services, investments, and ideas”).

⁷⁰ U. Ezenwe, *ECOWAS and the Economic Integration of West Africa* 45 (Palgrave Macmillan 1983).

⁷¹ Oliver S. Saasa, *Background to Regional Integration in Africa, in Joining the Future: Economic Integration and Co-operation in Africa* 20 (Oliver Saasa ed., 1991). Saasa further argues that, “contrary to the neo-classical theory of integration, increased, planned and co-ordinated industrial infrastructural development that recognizes the efficiency and developmental roles of industrial complementarity, specialization, external economies and economies of scale should be primary goals of Third World regional integration efforts. Thus trade expansion in these countries should be perceived as a tool for expanded industrial production, and not the other way around,” *id.* at 25.

⁷² Arthur Hazlewood, *Economic Integration: The East African Experience* 120 (Palgrave Macmillan 1975) (but also noting that the “Raisman Commission had been unsympathetic to the use of the licensing system as an instrument of industrial development planning, and it did not fit easily into the market-oriented regulatory scheme of the Treaty [of the East African Community]. Under the Treaty, industrial licensing was to continue, but only until 1973, when the existing licenses expired, and no new industries were to be scheduled,” *id.* at 121-122. The Treaty has instead of depending on regulation through a licensing scheme

reason, regional integration in Africa has and continues to be based on such planning 'rather than laissez faire forces.'⁷³

A major impetus of approach to integration with emphasis on cooperation at the level of production and not simply in trade is its dual emphasis on distributional equity amongst its members⁷⁴ rather than merely on market efficiency and competition between firms, in addition to providing a forum for cooperation on agreed projects that have tangible benefits for regional development. This has led advocates of regional integration in Africa to suggest the initial stages of trade integration should be "production-oriented and task directed approaches to economic integration which necessarily imply coordinated industrial production at the regional level."⁷⁵ This explains why the objectives of many African RTAs have a huge number of specific sector cooperative goals. Such objectives in turn play a significant role in setting the stage for trade among cooperating countries, which after all is a prerequisite for undertaking regional trade liberalization.⁷⁶

"established a market regulator, the transfer tax being the main device for influencing market forces in the desired direction," *id.* at 168. Note also, that under the Treaty, trade and development were to take place under market conditions rather than state planning or industrial licensing "as influenced by a common system of fiscal incentives and by the activities of the East African Development Bank," *id.* at 127.)

⁷³ John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 210 (Ralph I. Onwuka and Amadu Sesay eds., Macmillan Education 1985) .

⁷⁴ This desire for compensatory and corrective measures to accompany African RTAs takes into account the reality of highly unequal trading partners within one regional group. In East Africa, for example, Kenya is dominant economy relative to the other members. This was one of the major reasons for the dissolution of the original East African Community in 1977. See Agrippah Mugomba, *Regional Organizations and African Underdevelopment: The Collapse of the East African Community*, 16 *J. Modern African Stud.* 263 (1978). The new East African Community carefully balances between the goal of trade integration, on the one hand, and that of distributional equity and variable geometry (defined as means the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds), and the principle of asymmetry (which the treaty defines as a principle which addresses variances in the implementation of measures in an economic integration process for purposes of achieving a common objective) and distributional equity as fundamental principles of the community, see Article 6(e) and (h), respectively, of the Treaty Establishing the East African Community.

⁷⁵ Oliver S. Saasa, *SADCC Industrial Co-Operation and Donor Support*, in *Joining the Future: Economic Integration and Co-Operation in Africa* 59 (O. Saasa ed., 1991). One problem with such an approach is that where competing industries in different countries in a region are operating at below full capacity, the incentive for engaging in coordinated regional planning and investment is not very high, see Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa* 33 (Palgrave Macmillan 1983).

⁷⁶ As John Ravenhill, *The Future of Regionalism in Africa*, in *The Future of Regionalism in Africa* 205, 210 (Ralph I. Onwuka and Amadu Sesay eds., Macmillan Education 1985) argues, it cannot be assumed that there already exists a basis for integration where there are "low levels of development and...limited possibilities for profitable inter-regional exchange," *id.* at 210. This kind of sectoral integration has been referred to as neo-functional integration in so far as it seeks to promote transnational activities around a set

In this sense, integration is regarded as a diplomatic strategy of cooperation on a range of issues including infrastructural, industrial, political and economic⁷⁷ as well as for balancing forces between the RTA members on the one hand, and the global economic system on the other.⁷⁸ This approach of integration by projects rather than through integration of markets is one that has been argued to have accentuated underdevelopment rather than been a solution of development problems.⁷⁹ I address this issue of distributional equity and its merits and demerits at further length in Part Two below.

of functional needs, see Ernest Haas, *The Uniting of Europe* 313 (Stanford University Press 1958); Ernest Haas, *The Study of Regional Integration: Reflections on the Joy of and Anguish of Pre-Theorizing*, in *Regional Integration: Theory and Research* (Lindberg et al. eds., 1971). Notably, the limits identified by all these theorists about the absence of interest groups and 'modern associational groups' supportive of regional integration decades ago is no longer accurate. In the East African Community for example, there is a very active East African Business Council as well as the East African Law Society to name a few. Theorists who in the past postulated absence of such groups was not consistent with achieving regional integration include: Ernest Haas, *The Study of Regional Integration: Reflections on the Joy of and Anguish of Pre-Theorizing*, in *Regional Integration: Theory and Research* 14-15 (Lindberg et al. eds., 1971) (arguing that "absence of pluralism makes the formation of voluntary groups on a regional basis very difficult"); Joseph Nye, *Comparing Common Markets: A Revised Neo-Functionalist Model*, in *Regional Integration: Theory and Research* (Lindberg et al. eds., 1971) (arguing that the absence or weakness of such groups and political parties deprive regional bureaucrats necessary allies); John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in Africa* 48-50 (P. Potholm & Richard Fredland eds., 1980) (arguing low levels of economic development precludes the emergence of such groups).

⁷⁷ O. Saasa, *Economic Cooperation and Integration among Developing Countries: An Overview*, in *The Future of Regionalism in Africa* 10 (O. Saasa ed., 1991). Arthur Hazelwood, *Problems of Integration Among African States*, in *African Integration and Disintegration* 4-5 (Arthur Hazlewood ed., 1967) also argues that "the operation and development of services, such as transport, communications, electric power, and research, in common is a further measure of integration between states. Integration of this kind can operate even where there are no other forms of integration between the states").

⁷⁸ T.M. Shaw, *Towards a Political Economy of Regionalism in Africa*, in *The Future of Regionalism in Africa* 14 (Ralph I. Onwuka & Amadu Sesay eds., 1985); and Gunnar Myrdal, *Economic Theory and Underdeveloped Regions* (Harper & Row 1957) had already warned that adopting market based integration ideals among members with huge differences in the levels of economic development among developing countries would result in benefitting more developed member countries at the expense of poorer ones. According to Myrdal, "The freeing and widening of markets will often confer such competitive advantages on the industries in the already established centers of expansion, which usually work under conditions of increasing returns, that even the handicrafts and industries existing earlier in the other regions are thwarted," *id.* at 28. See also Peter Robson, *Integration, Development, and Equity: Economic Integration in West Africa* 33 (Unwin Hyman 1968) (arguing that a linear approach to integration which merely focused on reallocating resources based on the theory of comparative advantage without more would not necessarily be beneficial for developing countries). C. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) among Developing Countries: A Survey*, 6 *World Development* 736 (1978) has suggested that the content and social legitimacy of integration arrangements in a developing context should take account of their social economic and political structures, the needs for development and the new conditions such as internal dynamics and integration effects. Such an approach serve as an alternative to a linear market led process imported from elsewhere.

⁷⁹ Constantine V. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Development* 720 (1978).

Multiplicity of Objectives: The Merits and De-Merits of Nestling Non-Trade Objectives in African RTAs

As we saw above African integration often foreground development cooperation without wholly abandoning trade integration.⁸⁰ Thus critics of African integration have missed the mark by failing to appreciate the importance of African RTAs as frameworks for developing political consensus among their members about regional challenges including those of a development, political, or security nature. In short, while RTAs are established through treaty frameworks, operationally they are forums for nestling regional challenges and developing political consensus on how to cooperate.⁸¹ There is indeed evidence that shows that there are gains in non-trade areas such as security arising from economic integration arrangements associated with commercial institutions⁸² such as regional trade agreements. There are a variety of ways in which economic integration arrangements provide a framework for resolving security and other regional problems. For example, countries that belong to a regional integration framework like an RTA may regard the increased expectations of benefits from regional trade and investment as raising the opportunity costs of war. In addition, RTAs provide a forum for negotiating peaceful outcomes. Paul Collier has recently shown that although African countries are small and poor, their military spending is high and this results in wasteful military spending.⁸³ Collier suggests that cooperation is the solution to curtailing the arms race in Africa. However, cooperation in the absence of enforcement would only encourage a country's its "neighbors to coordinate reduction in their military spending while not doing so itself."⁸⁴

In addition, regional institutions established under the auspices of an integration

⁸⁰ Emang Motlhabane Maphanyane, *SADCC-Future Challenges, in Southern Africa After Apartheid: Regional Integration and External Resources* 174, 175 (Bertil Oden ed., 1993) (noting it is often erroneously argued that SADCC "does not have a programme of market integration through trade").

⁸¹ For similar arguments in the context of linking non-trade issues like human rights within the WTO, see Jose E. Alvarez, "How Not to Link: Institutional Conundrums of an Expanded Trade Regime," 7 *Wid. L. Symp. J.* 1, 15 (2001).

⁸² David H. Bearce, *Grasping the Commercial Institutional Peace*, 47 *Int'l Stud. Quarterly* 347 (2003).

⁸³ Paul Collier, *Wars, Guns and Votes: Democracy in Dangerous Places* 117 (Harper 2009).

⁸⁴ Paul Collier, *Wars, Guns and Votes: Democracy in Dangerous Places* 117 (Harper 2009) (suggesting designating a 'policeman' to oversee military spending in addition to restrictions on arms exports).

arrangement may provide information about the military capabilities of member states to each other so that each is able to assess the probable results of a war compared or contrasted with peaceful bargaining. Consequently, even where disparities are apparent, such institutions may help to cement trust that power asymmetries will not be exploited in future.⁸⁵ These institutions bring together their Executive leaders periodically thereby providing a forum within which they can interact and hopefully develop some trust amongst themselves and that provide a forum for peaceful bargaining and resolution of conflicts.⁸⁶ Thus, the nesting or nestling of security and development matters within trade integration agreements is a significant but overlooked phenomenon since it does not fit in especially well with standard integration models such as the one involving the European Community.⁸⁷

As a Nigerian Minister for External Affairs once noted:

“while focusing on certain economic development issues to be solved by sub-regional integration, the integrations in the ECOWAS have not failed to recognize the import of security. Integration and development are only likely to be guaranteed in the context of peaceful political and socio-economic environment, both at the national and sub-regional levels.

Hence, the first decade had also been characterized by certain forms of

⁸⁵ David H. Bearce, *Grasping the Commercial Institutional Peace*, 47 Int'l Stud. Quarterly 358 (2003).

⁸⁶ David H. Bearce, *Grasping the Commercial Institutional Peace*, 47 Int'l Stud. Quarterly 358 (2003). Similarly, Thomas Ohlson & Stephen J. Stedman, *Towards Enhanced Regional Security in Southern Africa?*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 106 (Bertil Oden ed., 1993) (arguing that security cooperation “would be an excellent instrument for confidence- building and increased transparency with respect to armed forces, the quality and quantity of military arsenals, actual and perceived threats and threat projections, etc. Second, it could provide a useful framework for regional conflict management and resolution. Third, it could provide the framework for an orderly planned, coordinated and mutually agreed regional disarmament process, involving reduced military spending, force level and hardware reductions, and conversion projects. Fourth, it could, with time, contribute to institutionalization that could further a process of equity based regional cooperation and integration over a wide range of issues, including but not only, economic issues. Conversely, dealing with economic and security aspects of cooperation and integration in the same framework could – if progress is made in the economic arena – contribute to reduced threat perceptions and, thus lead to quicker assessments and redefinitions of national security needs”).

⁸⁷ David H. Bearce, *Grasping the Commercial Institutional Peace*, 47 Int'l Stud. Quarterly 357 (2003).

defence cooperation and initiatives.”⁸⁸

Indeed in the ECOWAS context, trade integration was very early recognized as incapable of being pursued while ignoring economic development and regional security issues. After all, trade integration was not possible within a context of insecurity both among the member states and within the States. Thus soon after ECOWAS was established a non-aggression pact was entered into in 1979 which also called on the States to recognize the current borders. In 1981, a mutual defense pact was entered into to repulse external aggression or armed internal conflict. Security coordination and cooperation was institutionalized with the establishment of permanent structures of conflict management, prevention and resolution.⁸⁹

It in this sense that Thomas Ohlson and Stephen J. Stedman’s argument that ‘conflict, insecurity and underdevelopment are inextricably interlinked in Southern Africa,’ is true of most of sub-Saharan Africa.⁹⁰ The types of insecurity include those involving control over territory and governments; inclusion and exclusion in governance based on race and identity; over inequitable resource distribution; and certainly over war and reconciliation in light of vast imbalances in the distribution of military power.⁹¹ Conflicts have had a decisive impact on regional integration efforts in Africa particularly given that those regions with the most conflict have witnessed the slowest growth in regional integration.⁹² In the horn of Africa, the Inter-Governmental Authority on Development (IGAD), one of the African Union’s designated regional economic communities has a

⁸⁸ Ike Nwachukwu, Nigeria and the ECOWAS Since 1985: Towards a Dynamic Regional Integration 22 (1991) as cited in David H. Bearce, *Grasping the Commercial Institutional Peace*, 47 Int’l Stud. Quarterly 357 (2003).

⁸⁹ David H. Bearce, *Grasping the Commercial Institutional Peace*, 47 Int’l Stud. Quarterly 364 (2003). It is therefore surprising that some commentators suggested that the idea of having an Assembly of the Heads of State and Government of the African Economic Community was unwise because it the cost would be prohibitive and ‘the achievements of the deliberations not always of probative value,’ is surprising for not taking into account the potential such forums offer for resolution of challenges such as security, see Prof. O. Akanle, *The Legal and Institutional Framework of the African Economic Community*, in African Economic Community Treaty: Issues Problems and Prospects 31 (Prof. M.A. Ajomo & Omobolaji Adewale (Mrs.) eds. 1993).

⁹⁰ Thomas Ohlson & Stephen J. Stedman, *Towards Enhanced Regional Security in Southern Africa?*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 87 (Bertil Oden ed., 1993).

⁹¹ Thomas Ohlson & Stephen J. Stedman, *Towards Enhanced Regional Security in Southern Africa?*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 88 (Bertil Oden ed., 1993).

⁹² UN Economic Commission for Africa, *Assessing Regional Integration in Africa* (2004).

primary focus on rebuilding security in the region. In the South Africa, insecurity surrounding in-migration of African workers resulted in riots and violence in 2008 indicating yet again the potentially conflictual nature of migration across borders.⁹³ Today, the importance of economic development as a remedy to violence is increasingly being recognized and emphasized.⁹⁴

African RTAs as Bulwarks of Self-Reliance and Economic Independence

Another aspect of regional integration in Africa that is often understated is that second generation integration efforts of the post colonial order were often designed as frameworks within which African countries could eliminate dependence on their former colonizers with a view to attaining self-reliance. This is reflected in the seventh preambular paragraph of the Treaty Establishing the African Economic Community which recalls the Monrovia Declaration of Commitment on the Guidelines and Measures for the Establishment for National and Collective Self-Reliance in Economic and Social Development for the Establishment a New International Economic Order. Some of the treaties establishing Regional Economic Communities share a common preambular paragraph.⁹⁵ Article 3 (b) of the Treaty Establishing the Economic of Central African States (ECCAS) makes ‘solidarity and collective self reliance’ a principle to be adhered to by the members. Article 4(1)(a) provides that the integration of African economies is aimed at increasing ‘economic self-reliance’ and to promote “endogeneous and self-sustained development.’ Similarly, Article 4(b) of the ECOWAS Treaty provides ‘solidarity and collective self-reliance’ as a fundamental principle as does Article 6(b) of the COMESA Treaty. Article 5 (1) (d) of the SADC Treaty makes it an objective to “promote self-sustaining development on the basis of collective self-reliance, and interdependence of Member States.”

⁹³ Thomas Ohlson & Stephen J. Stedman, *Towards Enhanced Regional Security in Southern Africa?*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 92 (Bertil Oden ed., 1993); see also Jan Isaken, *Prospects for SACU After Apartheid*, in *Southern Africa After Apartheid: Regional Integration and External Resources* 199 (Bertil Oden ed., 1993) (predicting that a future South African government would face as a main problem the de-escalation of labour migration from neighboring countries [which is] likely to be considerable”).

⁹⁴ Paul Collier, *Wars, Guns and Votes: Democracy in Dangerous Places* 126 (Harper 2009); Azar Gat, *War in Human Civilization* (Oxford University Press 2006).

⁹⁵ For example, the third preambular paragraph of the Treaty Establishing the Economic Community of Central African States (ECCAS).

These provisions demonstrate that regional economic integration in Africa has been justified as necessary step for realizing self-sustaining economic development. On this view, Africa's external economic dependence and its lop-sided participation in the international trading system are key factors accounting for the dismal economic performance on the continent that are regarded as addressable through economic self reliance on a continental level.⁹⁶

Economic self determination is a theme strongly associated with the first generation of regional integration efforts in the post colonial era. For example, Kwame Nkrumah envisioned Africa's economic unity as a necessary precondition for Africa's economic self determination.⁹⁷ Many have since then argued that Africa risks being further marginalized if it did not fulfill the dream of early pan-Africanists like Kwame Nkrumah and Julius Nyerere's.⁹⁸ These early pan-Africanists dreamed of a single African political system within which Africa could address the challenges of its development and confront the control that its former colonizers had upon it.⁹⁹ Today, Mummar Gaddafi continues to subscribe to this model of immediate African political unity.¹⁰⁰

⁹⁶ For more on this, see James Gathii, *Third World Approaches to International Economic Governance*, International Law and the Third World: Reshaping Justice 255 (Richard Falk, Balakrishnan Rajagopal & Jacquelin Stevens eds., 2008).

⁹⁷ Kwame Nkrumah, *Africa Must Unite* 163 (Panaf Books 1963) (saying, "I can see no security for African States unless leaders like ourselves have realized beyond all doubts that salvation for Africa lies in unity. If we are to remain free, if we are to enjoy the benefits of Africa's enormous wealth, we must unite to plan the exploitation of our human and material resources in the interest of all our people"); *see also* Lagos Plan of Action for Economic Development of Africa 1980-2000 (1981) (affirming the commitment by African leaders by the year 2000 to ensure the economic, social and cultural integration of the continent under the African Economic Community).

⁹⁸ *See* Julius K. Nyerere, *Ujamaa-Essays on Socialism* (Oxford University Press 1968). Nkrumah is said to have told a meeting in Addis Ababa that "we shall be haggling and wrangling among ourselves until we are colonized again and become the tools of a far greater colonialism than we suffered hitherto," *as cited by* Thomas M. Franck, *East African Unity Through Law 3* (Yale University Press 1964), *citing* David Apter, *The Political Kingdom of Uganda 7* (Princeton University Press 1961).

⁹⁹ This model was referred to as the mobilization model, *see* Thomas M. Franck, *East African Unity Through Law 3* (Yale University Press 1964), *citing* Boutros-Ghali, *citing* David Apter, *The Political Kingdom of Uganda* (Princeton University Press 1961) for the mobilization metaphor.

¹⁰⁰ Gaddafi's proposal for a United States of Africa resulted in a Committee of Heads of State and Government on the Proposals of the Great Socialist Peoples' Libyan Arab Jamahiriya chaired by President Yoweri Museveni of Uganda. The Committee issued a report titled: Report of the Committee of Heads of State and Government on the Proposals of the Great Socialist Peoples' Libyan Arab Jamahiriya (2005),

By contrast, another group of pan-Africanists - who would today be referred to as the gradualists or incrementalists¹⁰¹ – subscribed to having a consociational design or loose federation beginning with “the regions of Africa which have developed a historical affinity [beginning] to lay the foundations for a wider unity.”¹⁰² Today the incrementalists have the upper hand. They subscribe to economic and eventually political unity over time although there is no consensus yet on the time frame and on the precise modalities for proceeding towards such a goal.¹⁰³

This looser idea of a federation with regional building blocks is the one adopted in the Treaty for the Establishment of an African Economic Community. Both the loose federation and political union ideas share a commitment to self sufficiency as embodied in initiatives such as the New International Economic Order of the 1970s.¹⁰⁴ This theme was also reflected in the Lagos Plan of Action which linked self sufficiency to Africa’s economic integration.¹⁰⁵ As Thomas Biersteker has explained economic self reliance or

available at: http://www.africa-union.org/Doc/Report_of_the_Committee_of_Heads_of_State_and_Government_on_the_Proposals_of_Libya.doc The African Union’s 50th Anniversary meeting in 2007 Accra Ghana was devoted to discussing the report of the Committee

¹⁰¹ In their final decision, the Heads of State at the African Union Meeting in Ghana on the discussion on the ‘Grand Debate on the Union Government,’ only agreed to accelerate Africa’s economic and political unity and to further study the proposals of the Union Government Proposal, *see* Accra Declaration of the African Union Summit Meeting (July 3, 2007), available at: <http://ausummit-accra.org.gh/index1.php?linkid=242&page=2§ionid=303>.

¹⁰² Thomas M. Franck, *East African Unity Through Law 3* (Yale University Press 1964). The Report of the Committee of Heads of State and Government on the Proposals of the Great Socialist Peoples’ Libyan Arab Jamahiriyah (2005), available at: http://www.africa-union.org/Doc/Report_of_the_Committee_of_Heads_of_State_and_Government_on_the_Proposals_of_Libya.doc did not embrace the idea of an immediate political union, but instead reiterated the “need to work towards the *ultimate* formation of Union Government in Africa [and] Encouraged those parts of Africa that are able to form political federations to do so,” *id.*

¹⁰³ *See* Nigerian President Olusegun Obasanjo, *Study on An African Union Government: Towards the United States of Africa*, Presented to the Seventh Session of the Assembly of the Heads of States of the African Union in Banjul (July 2006).

¹⁰⁴ S.K.B. Asante, F.O.C. Nwonwu and V.N. Mizvidziwa, *Towards An African Economic Community 1-2* (2001); *see also* James Gathii, *War, Commerce and International Law*, at Chapter 5 (forthcoming Oxford University Press 2009).

¹⁰⁵ Organization of African Unity, *Lagos Plan of Action for the Economic Development of Africa 1980-2000*, Adopted at the OAU Meeting in its Second Extraordinary Session ¶ 3(iii) of the Preamble (April 28-29 1980, Lagos, Nigeria) (stating “We commit ourselves individually and collectively, on behalf of our governments and peoples, to establish national, sub-regional and regional institutions which will facilitate the attainment of objectives of self-reliance and self-sustainment”); *see also* Kidane Mengisteb, *Globalization and Autocentricity in Africa’s Development in the 21st Century* (Africa World Press 1996).

disengagement:

“is not a call for complete autarky or absolute national self-sufficiency. Rather, disengagement is a call for a partial reduction in the magnitude of international economic transactions with industrial countries and for the attainment of self-sufficiency only in particular sectors of activities.”¹⁰⁶

This means reducing dependence on foreign investment and economic assistance as well as combining extremely limited individual markets and their scarce resources with a view to being able to better bargain for foreign capital and technology.¹⁰⁷ Most recently this theme of economic self reliance has been embraced by African leaders like Muammar Gaddafi who has asked African leaders not to beg from aid from the West.¹⁰⁸ Another proponent of African self sufficiency is Robert Mugabe of Zimbabwe who has recently urged COMESA members to pay into its development fund as a way of cutting dependence on foreign assistance.¹⁰⁹ Notably, these supporters of economic integration were all flavored by Africa’s struggles against colonialism, imperialism and apartheid.

While the theme of economic self determination still has its cache of support, the African Union’s New Economic Partnership for Economic Development, (NEPAD), shows a commitment towards market friendly development approaches particularly with a view to getting foreign funding to finance Africa’s development needs.¹¹⁰ Thabo Mbeki, the former South African President has represented this dual theme of self sufficiency and the necessity of foreign funding in his own call for an African renaissance and his support

¹⁰⁶ Thomas J. Biersteker, *Self-Reliance in Theory and Practice in Tanzanian Trade Relations*, 34 Int’l Org. 229, 231 (1980).

¹⁰⁷ Reginald H. Green & Ann Seidman, *Unity or Poverty: The Economics of Pan-Africanism* 80-81 (Penguin 1968) (also arguing that “the continental market is broad enough to absorb the products of planned industrial and agricultural growth. But as long as the individual states of Africa attempt to ‘go it alone,’ few if any, will achieve the real economic independence and higher living standards to which all Africans aspire”).

¹⁰⁸ Paul de Benders, *Gaddafi Urges Self-Reliance at Africa Summit*, Reuters, July 4, 2005, available at: http://www.int.iol.co.za/index.php?set_id=1&click_id=68&art_id=qw1120478401298B261

¹⁰⁹ Gift Chinene, *Africa Should End Conflicts, Increase Self Reliance: Mugabe*, Zimbabwe Times, June 8, 2009, available at: <http://www.thezimbabwetimes.com/?p=17552>

¹¹⁰ On NEPAD’s origins, background and analysis, see James Gathii, *A Critical Appraisal of the NEPAD Agenda in Light of Africa’s Place in the World Trade Regime in an Era of Market Centered Development*, 13 Transnat’l L. & Contemp. Probs. 179 (2003).

of NEPAD. NEPAD aims to generate both internal and external resources for development. According to Mbeki, Africa's regeneration depends on its ability "to generate internal resources" for its development.¹¹¹ From the resources generated from within Africa, a Pan-African Infrastructure Development Fund (PAIDF) been set up to "finance large-scale infrastructural projects."¹¹² A fund manager has been appointed for the Fund and by October 2007 had raised \$ 625 million to finance energy, technology, transport and water projects in Africa.¹¹³

NEPAD's capital flows initiative is slated to be primarily funded by western donors who condition access to their funds to the adoption of market based policies.¹¹⁴ Alongside this commitment to market based policies within NEPAD, the African Group at the 2003 Cancun WTO Ministerial Meeting played a crucial role in the formation of the Group of 20.¹¹⁵ The Group of 20 lobbied heavily in favor of ensuring that development remained at the center of the latest round of the WTO's trade negotiations.

Suffice it to say here, while the theme of self sufficiency has been a strong one, political differences between neighboring countries as well as the unwillingness of better off countries to sacrifice national economic gains for the sake of regional cooperation has hindered the success of the movement towards self sufficiency.¹¹⁶ This is also because many African countries are competing with each other for industrialized country firms to locate themselves in their own countries or for them to supply raw materials to developed economies or to the quickly growing economies of India and China. Often the

¹¹¹ Thabo Mbeki, Address of the President of South Africa, Thabo Mbeki, to the Joint Session of the Parliament of Namibia (October 30, 2007, Windhoek, Namibia), available at:

<http://www.polity.org.za/article/sa-mbeki-parliament-of-namibia-joint-session-30102007-2007-10-30>

¹¹² Thabo Mbeki, Address of the President of South Africa, Thabo Mbeki, to the Joint Session of the Parliament of Namibia (October 30, 2007, Windhoek, Namibia), available at:

<http://www.polity.org.za/article/sa-mbeki-parliament-of-namibia-joint-session-30102007-2007-10-30>

¹¹³ For more information, see the PAIDF fund manager website at:

<http://www.harith.co.za/investors/index.html>

¹¹⁴ African Union, The New Partnership for African Development ¶ 147, October 2001, available at: <http://www.sarpn.org.za/RegionalPovertyPapers/October2001/NEPAD5.pdf>.

¹¹⁵ Fatoumata Jawara & Aileen Kwa, Behind the Scenes at the WTO: The Real World of Trade Negotiations/The Lessons of Cancun (Zed Books 2004); see also James Gathii, *The High Stakes of WTO Reform*, 104 Mich. L. Rev. 1361 (2006).

¹¹⁶ J. Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 57 (C. Potholm & R. Fredland eds., University Press of America 1980).

competition for industrialized country firms may be regarded as outweighing regional integration particularly where if the choice is presented as one that might involve giving up the prospects, real or perceived, of foreign investors who will manufacture for export. Such a choice would certainly look brighter than regional cooperation particularly if such cooperation would involve sharing its benefits with weaker member States.¹¹⁷ A large number of African countries have passed legislation giving foreign investors very attractive incentives in this race for their capital, skills and technology.

Thus within the African Union and particularly in so far as regional economic integration is concerned, one sees a commitment to number of varied approaches. There is the continuing theme of economic self reliance, but there is also the recognition of the importance of foreign funding embraced within NEPAD as well as the continuing efforts to realize more favorable trading relationships with the rest of the world within the WTO. This multifaceted approach was best captured in the first Africa Forum for Dialogue organized by the Africa Union in Geneva by the Director General of UNIDO who declared that the challenges facing Africa had to be met by Africans and that while Africa “can blame colonialism for the past 350 years” it cannot do so for the next 50.¹¹⁸ Echoing the same view, Jing Ping, the African Commission’s Chairperson noted while Africa has unequal economic relations with the rest of the world, this did not mean that Africa did not need the rest of the world or dispense with the need to open up.¹¹⁹

Clearly though, a common theme that cuts across the range of responses to Africa’s economic challenges is the consensus on strengthening regional economic cooperation. As a result, the Accra Declaration arising from the African Union’s 50th Anniversary Meeting in 2007¹²⁰ resolved to review and shorten the time frame towards the

¹¹⁷ J. Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 49 (C. Potholm & R. Fredland eds., University Press of America 1980).

¹¹⁸ Annelise Sander, Africa: “Africa Should Seize Control of Its Development”, May 29, 2009, available at: <http://allafrica.com/stories/200905290267.html>

¹¹⁹ Annelise Sander, Africa: “Africa Should Seize Control of Its Development”, May 29, 2009, available at: <http://allafrica.com/stories/200905290267.html>

¹²⁰ Timed to coincide with Ghana’s 50th Anniversary of Independence as the first African country to be freed from colonial rule under Kwame Nkrumah, one of the leading exponents of Africa’s economic and political unity.

establishment of the African Economic community and to use the regional economic communities to achieve these objectives.¹²¹

Part Two: Variable Geometry: A Defining Aspect of African RTAs

“The strategy of promoting trade liberalization...without concomitantly phased positive policies promises to be a recipe for stagnation”¹²²

“If the economic characteristics of the counties of Africa are examined in the light of these various criteria for a beneficial customs union, it would appear that the formation of customs unions in Africa was irrelevant, if not positively harmful.”¹²³

“...non-trade equilibrating mechanisms...must be built into multinational economic cooperation schemes; if the regional development process is left to liberalization and to market forces alone, these schemes are bound to fail.”¹²⁴

¹²¹ Accra Declaration of the African Union Summit Meeting (July 3, 2007), available at: <http://ausummit-accra.org.gh/index1.php?linkid=242&page=2§ionid=303>, which declared the agreement “to accelerate the economic and political integration of the African continent,” *id.* at ¶ 1; as well as “to rationalize and strengthen the Regional Economic Communities, and harmonize their activities, in conformity with our earlier decision, so as to lead to the creation of an African Common market, through the stages set in the Treaty Establishing the African Economic Community (Abuja Treaty), with a reviewed and shorter timeframe to be agreed upon in order to accelerate the economic and where possible, political integration,” *id.* at ¶ 2(a).

¹²² Peter Robson, *Integration, Development, and Equity: Economic Integration in West Africa* 123 (Unwin Hyman 1968).

¹²³ Arthur Hazelwood, *Problems of Integration Among African States*, in *African Integration and Disintegration* 6 (Arthur Hazlewood ed., Oxford University Press 1967).

¹²⁴ Miguel S. Wionczek *Introduction - Present Status and Prospects of Economic Integration Movements in Developing Countries: Political Atomization and Economic Backwardness of the Southern Hemisphere*, in *Economic Cooperation in Latin America, Africa and Asia* 15 (Miguel S. Wionczek ed., M.I.T. Press 1969) (also noting that arrangements to ensure equitable sharing of regionalization benefits include: “a regional development bank; a regional mechanism for financial settlements and for monetary policy coordination; a regime harmonizing incentives for regional and external private investment; an instrument for the promotion of industrial specialization by agreement; and a formula for the equitable distribution of customs revenues and other taxes, with due account being taken of the development needs of the most backward participants,” *id.* at 16.).

In this part, I discuss the principle of variable geometry as adopted in African Regional Trade Agreements. The aim of this part of the paper is to show how variable geometry is a central feature of African RTAs as flexible regimes. I begin by outlining the origins of this principle and giving examples of how various African RTAs incorporate and operationalize it. The last section of this part then discusses the April 2009 advisory opinion of the East African Court of Justice on the appropriate relationship between the principle of variable geometry and the rule of consensus decision making in the Treaty for the Establishment of the East African Community.

Although variable geometry is a central feature of African RTAs, this has largely been overlooked particularly in the legal literature on RTAs. In the African context, variable geometry refers rules, principles and policies adopted in trade integration treaties that give member states particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces time-tabled trade commitments and harmonization objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investments from regional banks.

Variable geometry therefore limits more ambitious trade liberalization goals since it is designed to accommodate less well off or unwilling members of an RTA concerned about the economic and political costs of liberalization for itself in the short run. From this perspective, African RTAs may be argued to undercut the more stringent multilateral (GATT/WTO) liberalization commitments that their members have assumed. In fact, African RTAs do not systematically adopt the unconditional most favored nation treatment. Where this principle or other non-discrimination principles are adopted they have rarely if ever been used to challenge adoption of discriminatory trade

measures.¹²⁵ This is most acutely demonstrated in the East African Court of Justice’s recent decision on variable geometry. In this advisory opinion that the Council of Ministers of the East African Community sought from the Court, the Council framed the issue not as one of squaring the principle of variable geometry and that of non-discrimination under the Treaty for the Establishment of the East African Community, but as question of reconciling between the principle of variable geometry and that of consensus decision making. I discuss this decision further below.

Reasons for the Adoption of Variable Geometry

One of the most important impediments to regional integration schemes in Africa has been the question of unequal benefits that accrue from integration that is primarily focused on trade liberalization.¹²⁶ Distributional equity in African RTAs is a question not

¹²⁵ For example, Article 43 of the Treaty for the Establishment of ECOWAS provides for the Most Favored Nation Treatment in the following terms:

- (1) Member States shall accord to one another in relation to trade between them the most favored nation treatment. In no case shall tariff concessions granted to a third country by a Member State be more favourable than those applicable under this Treaty.
- (2) Any Agreement between a Member State and a third country under which tariff concessions are granted, shall not derogate from the obligation of that Member State under this Treaty.
- (3) Copies of such agreements referred to in paragraph 2 of this Article shall be transmitted by the Member States which are parties to them, to the Executive of the Secretariat of the Community.

This provision not only establishes the classic most favored nation treatment within ECOWAS, but it also prohibits member countries from giving third countries more favorable treatment than that made available to ECOWAS member countries. It further obliges Member States to report any agreements in which tariff concessions are made to third countries to the Executive of the Community Secretariat. Notably, the provision “in no case shall tariff concessions granted to a third country by a Member State be more favourable than those applicable under this Treaty” of Article 43(1) of the ECOWAS Treaty does not definitively establish the type of unconditional MFN obligation in Article 1 of GATT 1948. GATT Article 1 obliges members of the WTO to extend on an unconditional and immediate basis “any advantage, favor, privilege or immunity...to any product originating in or destined for any other country...to the like product originating in or destined for the territories of all other contracting parties”. Article 35 of the Treaty Establishing the Economic Community of Central African States (ECCAS) establishes the Most Favored Nation norm in exactly the same terms as Article 43 of the Treaty for the Establishment of ECOWAS. However, the ECCAS Treaty has a fourth sub-paragraph not present in the ECOWAS Treaty. Article 35(4) of the ECCAS Treaty provides: “No member shall conclude with any third country an agreement whereby the latter would grant such Member State tariff concessions not granted to the other Member States.”

¹²⁶ Oliver S. Saasa, *Background to Regional Integration in Africa, in* *Joining the Future: Economic Integration and Co-operation in Africa 14* (Oliver Saasa ed., 1991) (noting that the “management of distributional questions has ... remained a difficult task in most, if not all, integrations schemes in developing countries”; *see also* Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa* 58-65 & 151 (Palgrave Macmillan 1983) (declaring “ECOWAS represents another glaring case of a partnership of unequal partners”); United Nations, *Current Problems of Economic Integration: The Distribution of Benefits and Costs of Integration Among Countries* No. TD/B/394 (New York, 1973). For

only of the asymmetrical economic benefits of trade integration, but also a function of unequal ‘networks of power, information and knowledge’¹²⁷ between African economies. Compensating countries that suffer losses from liberalization commitments has long been identified as one of the ‘most serious difficulties’ encountered in the integration process.¹²⁸ This is reflected in the technological and economic dominance of countries like Kenya in East Africa, Nigeria in West Africa and South Africa in the Southern African region.

the case of Latin America, *see* Mathew Edel, *Regional Integration and Income Distribution: Complements or Substitutes?*, in *The Movement Toward Latin American Unity* 185 (Ronald Hilton ed., Praeger 1969) (noting that “It is felt, for example, that capital, which is normally mobile across borders, will be drawn to the region in which wages are lowest, thus helping to reduce the difference [between rich and poor countries]. However, these effects are no more certain... There seem, over long periods in a country or region’s development, to be strong tendencies for industry to concentrate in the already most industrialized locations. These effects, often described in terms of ‘polarization’ ‘dominance’, or ‘backwash’ effects, have not been fully explored in theory, but they seem to have a basis in economies of scale in infrastructure, external economies in the labor market and elsewhere, and mutual support of market demand created in advanced sub-regions, when trade throughout the region even free of tariffs is subject to transport costs,” *id.* at 189).

¹²⁷ Oliver S. Saasa, *Background to Regional Integration in Africa*, in *Joining the Future: Economic Integration and Co-operation in Africa 1* (Oliver Saasa ed., 1991).

¹²⁸ Andre Philip, *Preface*, in F. Kahnert, P. Richards, E. Stoutjesdijk and P. Thomopoulos, *Economic Integration Among Developing Countries*, OECD 9 (1969) (further noting “the aim of preventing a widening gap between participating countries...[make it] essential that financial compensation should be given to the weaker members. But in any association of poor countries, this compensation cannot be provided without external help. In a situation where international aid is stagnating, if not declining every country considering participating in an attempt at regional integration will be convinced that the aid granted to the integrated group will turn out to be less than the sum of the aid previously granted to the same countries individually”, *id.* at 10).

Differences in the benefits of cooperation in Africa date back to the colonial period.¹²⁹ The East African Community whose origins date back to 1917¹³⁰ had a long history of disputes about Kenya's disproportionate benefits relative to then Tanganyika and Uganda.¹³¹ Kenya not only had a bigger share of the employees of the various institutions of the community, most of which were located in Kenya as well, but also the largest share of customs revenue.¹³² Mechanisms to redistribute the gains were put in place from time

¹²⁹ See Thomas M. Franck, *East African Unity Through Law* (Yale University Press 1964) (explaining how white settlers pursued East Africa Federation during the colonial period with opposition from Africans culminating in a Hilton Young Commission and hearings in London in 1931 before a Joint parliamentary committee at which African representatives protested against federation in East Africa, *id.* at 28-54); see also, Arthur Hazlewood, *The Economics of Federation and Dissolution in Central Africa*, in *African Integration and Disintegration* 248 (Arthur Hazlewood ed., Oxford University Press 1967) (noting that the removal of all trade restrictions between Northern Rhodesia, Southern Rhodesia and Nyasaland together with the development of a common tariff resulted in disadvantaging Nyasaland and Northern Rhodesia and for Nyasaland's case, "fiscal transfers failed to compensate for the adverse effects of the customs union," *id.* at 249). This problem has arisen in a variety of developing country regional arrangements as well. For example, Article 39 (Promotion of Industrial Development in Less Developed Territories) of the 1965 Caribbean Free Trade Association Agreement (Text Consolidating the Provisions of the Principal Agreement and the Supplementary Agreement), reproduced in Miguel S. Wionczek *Introduction - Present Status and Prospects of Economic Integration Movements in Developing Countries: Political Atomization and Economic Backwardness of the Southern Hemisphere*, in *Economic Cooperation in Latin America, Africa and Asia*, 130-158 (Miguel S. Wionczek ed., M.I.T. Press 1969), allowed the less developed territory upon application to suspend area tariff treatment of imports "in order to promote the development of an industry in any of those Territories," *id.* at 150.

¹³⁰ Arthur Hazlewood, *Economic Integration: The East African Experience* 22-23 (Palgrave Macmillan 1975) (noting that the features of the East Africa Customs Union completed in 1927 included: "an external tariff common to the three territories, but enacted separately in each territory; a single collection of import duty at the point of entry into East Africa and subsequent free movement of imported goods within East Africa the allocation of customs revenue between the territories on the basis of 'derivation', that is according to the territory of ultimate destination, the allocation being based on information from the Transfer forms which were returned to the customs administration when goods were moved between the territories; free trade between the territories in products of East African origin and from 1949 a common customs administration. In addition, there was free movement of capital and substantially free movement of labour. The economic unity of the area was supported, and transactions with the area fostered by a common currency and the common administration of transport and communications and other 'infra-structure'").

¹³¹ Arthur Hazlewood, *Economic Integration: The East African Experience* 23 (Palgrave Macmillan 1975) (noting for example "in 1922, the East African Customs union consciously embarked on the protective policy it continued to pursue, and which according to persistent claims by Tanganyika and Uganda has been primarily protective of Kenyan interests," *id.*; that "from 1957...it came to be felt more and more strongly in Tanganyika and Uganda that the customs union was designed for the benefit of Kenya," *id.* at 25; and that "by the 1950s it was widely appreciated that if the integration arrangements were to survive, their benefits would have to be spread more evenly," *id.* at 26). On a comment of Hazlewood's assessment of protective tariffs, see R.N. Wood, *The East African Common Market: A Reassessment*, 28(3) *Bulletin of the Oxford University of Economics and Statistics*, November 1966; see also A. J. Brown, *Economic Separation Versus a Common Market in Developing Countries*, *Yorkshire Bulletin of Economic and Social Research*, May & November 1961.

¹³² Arthur Hazlewood, *Economic Integration: The East African Experience* 21-26 & 38-45 (Palgrave Macmillan 1975) (pointing out that "The staffing of the Organization was, in fact, a cause of contention between the countries. There were complaints that an inordinate proportion of EACSO officials were Kenyans. One reason was that the headquarters of the Organization were in Kenya, as were most of the

to time.¹³³ In 1961, a Commission was proposed fiscal distributions to compensate for losses suffered particularly by Tanganyika, but also to keep the customs union together.¹³⁴ Article 87 of the 1967 Treaty for East African Cooperation sought to end the unequal distribution of the organs of the Community which were concentrated in Kenya. Article 87 provided that Arusha would become the headquarters of the community and its Tribunal; the East African Community Bank as well as the East African Posts and Telecommunications Corporation would be headquartered in Kampala, Uganda; Dar-es-Salaam Tanzania would be the headquarters of the East African Harbours Corporation while Nairobi would be the headquarters of the East African Railways Corporation and the East African Airways Corporation.

In the Union Douaniere et Economique de l’Afrique Centrale (UDEAC) established in 1964 between Cameroon, Central African Republic, Chad, Congo Brazzaville and Gabon, a Solidarity Fund to apportion revenue between the members as a method of compensating for the differences in revenue accrued from UDEAC integration.¹³⁵

In addition, distributional questions may arise because regional cooperation pursued ‘solely on the basis of commercial integration’ which often results in increasing the ‘bargaining power of transnational corporations’ which then bargain with each government for the best conditions they could obtain.¹³⁶ Regional integration in developing countries results in the merger of locally controlled firms. By contrast in the European Union, competition policy has encourage mergers of such firms. African regional integration has not encouraged such mergers and this often results on local

other departments and institutions. It was said to be easier to recruit Kenyans for this reason, and also because the supply of suitable candidates for the appointments at that time was much greater from Kenya than from the other two countries,” *id.* at 38).

¹³³ Arthur Hazlewood, *Economic Integration: The East African Experience* 39-45 (Palgrave Macmillan 1975).

¹³⁴ Arthur Hazlewood, *Economic Integration: The East African Experience* 43 (Palgrave Macmillan 1975).

¹³⁵ See Peter Robson, *Economic Integration in Equatorial Africa*, in *African Integration and Disintegration* 36-41 (Arthur Hazlewood ed., Oxford University Press 1967).

¹³⁶ Vaitos C.V., *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Dev.* 730 (1978); see also Vaitos C.V., *The Role of Multinational Enterprises in Latin American Economic Integration Efforts: Who Integrates With Whom, How and for Whose Benefit?* (1978); Constantine V. Vaitos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Dev.* 730-736 (1978).

subsidiaries of foreign firms enjoying the protection of both regional and national tariff walls.¹³⁷ From this view, unequal gains in trade integration schemes arise where integration is solely based on a classical free market/comparative advantage model. Besides unequal national gains, integration based on a classical free trade/comparative advantage model does not necessarily create new opportunities that induce a greater number of people enjoy the benefits of growth in poor economies that largely share the same characteristics.¹³⁸ The adoption of such a model without adapting it to the African context of huge disparities in the export and economic power among the countries is one of the reasons for the failure and ultimate disbandment of the original East African Community (EAC) in 1977. At the time the unequal gains Kenya was getting relative to both Uganda and Tanzania accentuated the conflicts among the three countries. Notably, in 1964, Kenya declined to formally ratify the Kampala Agreement that embodied ‘corrective measures’ that would have arrested the ‘growing inequalities’ among EAC members.¹³⁹

Often distributional questions are exacerbated by insecurity including civil and other wars as well as a time horizon problem – gains from integration arise from gains in dynamic efficiency that take time to materialize. Politicians by contrast focus on short term gains and losses yet trade integration schemes take time for demonstrable benefits to be visible.¹⁴⁰ This makes the utilization of methods of compensating countries that may lose revenues and other benefits from trade liberalization attractive to assuage groups that lose out. There is a rough analogy here with developed economies like the United States that establish trade adjustment assistance programs for industries and workers that suffer

¹³⁷ Constantine V. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Dev.* 730-736 (1978).

¹³⁸ Constantine V. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 *World Dev.* 739 (1978).

¹³⁹ Oliver S. Saasa, *Background to Regional Integration in Africa*, in *Joining the Future: Economic Integration and Co-operation in Africa* 14 (Oliver Saasa ed., 1991); *see also* Arthur Hazlewood, *Economic Integration: The East African Experience* 67 (Palgrave Macmillan 1975) (discussing Kenya’s decision not to ratify the Kampala Agreement even though the Kenyan President has signed it in a meeting with the other Heads of State in January 1965, *Id.* at 57. Kenya had signed the agreement subject to there being a common currency board in East Africa which Tanzania later reneged on, Kenya as a result decided not to ratify the Kampala Agreement, *id.* at 67).

¹⁴⁰ Oliver S. Saasa, *Background to Regional Integration in Africa*, in *Joining the Future: Economic Integration and Co-operation in Africa* 15 (Oliver Saasa ed., 1991).

as a result from production or sale losses pursuant to international trade liberalization commitments.¹⁴¹

Variable Geometry as a Solution of Adjusting the Costs and Benefits of Integration

To address this problem, African RTAs have come up with mechanisms to adjust the benefits and burdens of trade adjustment between themselves.¹⁴² Some of these mechanisms of moderating and containing unequal benefits have been borrowed from other developing country RTAs. Over time they have included non-financial and financial redistributive policies. Below, I give the example of how SACU engages in financial redistribution through its development account. Non-financial redistributive policies have included the allocation of key industries to disadvantaged countries as way of countering the tendency of investors to ‘gravitate towards the already developed member countries.’¹⁴³ In the Andean Pact, the following mechanisms were used:

“(1) a relatively longer period to adjust to import competition; (2) longer time given to them to harmonize their national tariffs with the common external tariff (3) preference for foreign direct investment in the least developed economies under Decision 24; and (4) preferential treatment for the least developed states from the Andean Development Corporation in terms of loans disbursements.”¹⁴⁴

¹⁴¹ The Trade Act of 2002 establishes Trade Adjustment Assistance which authorizes the President to provide relief to workers, farmers, communities and fishermen ‘seriously injured or threatened with serious injury due to surges of imports. See § 2102(c) (4) of the Trade Act of 2002 which provides that the President report to Congress the impact of future trade agreements on US employment, including labor markets and to make the report public. See Trade Act of 2002 § 2102(c) (4); and 19 U.S.C.A. § 3802(c). The Trade Act of 2002 also establishes Trade Adjustment Assistance which authorizes the President to provide relief to workers adversely affected by the reduction in production or sales which results from international competition arising from a free trade agreement, see § 113 (Group Eligibility Requirements) of the Trade Act of 2002.

¹⁴² This is somewhat analogous to the Trade Adjustment Assistance Program in the United States except that the assistance is targeted to industries and individuals who lose out because of trade liberalization while in the African context the assistance is to the countries that lose out.

¹⁴³ Oliver S. Saasa, *Background to Regional Integration in Africa*, in *Joining the Future: Economic Integration and Co-operation in Africa* 17 (Oliver Saasa ed., 1991).

¹⁴⁴ Oliver S. Saasa, *Background to Regional Integration in Africa*, in *Joining the Future: Economic Integration and Co-operation in Africa* 26 footnote 9 (Oliver Saasa ed., 1991). In addition, such countries can receive “complementary support, market studies, technical and managerial assistance etc.,” *id.* at 17. For more on similar proposals, see, Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa* 20-28 (Palgrave Macmillan 1983) (discussing the following instruments of achieving equity: fiscal

Other mechanisms include having harmonized industrial and investment policies to make sure that members of an RTA get “a fair share in the distribution of integration-induced projects and their benefits,”¹⁴⁵ advancing generous access to development funding and credit to less development countries as well as designing tax concessions for them.¹⁴⁶

In the original East African Community, five arrangements were agreed upon in 1965 to address the imbalances in inter-territorial trade. These were:

- A shift in the “territorial administration of production by a number of firms which operated in two or more of the countries”¹⁴⁷
- Instituting “quotas on inter-territorial trade,”¹⁴⁸
- Allocating “certain major industries between the countries,”¹⁴⁹
- Increasing “sales from a country in deficit in inter-territorial trade allocations of industry to secure an equitable distribution of industrial development between the three countries.”¹⁵⁰

The creation of these mechanisms to equalize the benefits of customs cooperation in terms of development and revenue in the mid-1960s indicate beyond any doubt how central the equal sharing of benefits of development (in terms of the location of factories, industries etc) and trade imbalances were considered crucial in relations between more and less developed integrating members. The introduction of measures such as quotas

compensation; fiscal incentives to influence the emergent location of industry; regional industrial policy and planned industrial specialization and planning models). Other similar positive measures designed to help poorer countries in a regional integration scheme might include permitting them to “operate less restrictive rules of origin; [and] they might be permitted to enter into transitional bilateral agreements involving balanced trade expansion,” *see* Peter Robson, *Integration, Development, and Equity: Economic Integration in West Africa* 121-122 (Unwin Hyman 1968).

¹⁴⁵ Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa* 56 (Palgrave Macmillan 1983).

¹⁴⁶ Uka Ezenwe, *ECOWAS and the Economic Integration of West Africa* 55-56 (Palgrave Macmillan 1983).

¹⁴⁷ Arthur Hazlewood, *Economic Integration: The East African Experience* 57 (Palgrave Macmillan 1975).

¹⁴⁸ Arthur Hazlewood, *Economic Integration: The East African Experience* 57 (Palgrave Macmillan 1975).

¹⁴⁹ Arthur Hazlewood, *Economic Integration: The East African Experience* 57 (Palgrave Macmillan 1975).

¹⁵⁰ Arthur Hazlewood, *Economic Integration: The East African Experience* 57 (Palgrave Macmillan 1975).

and the equitable allocation of industries while important in rebalancing the inequities, undermined the primary purpose of integration under a market based model of free competition among the most efficient producers. The East African Community Treaty of 1967 continued a variety of these arrangements though it primarily adopted market mechanisms for achieving integration.¹⁵¹ For example, it established an East African Bank with a view to investing “more of its funds into each of the less-developed states than in Kenya” although each state contributed the same amount to its equity.¹⁵² Here the financing of development projects through a bank rather than through the previous system of industrial planning and licensing in East Africa eventually collapsed in 1973. The preference of a bank as opposed to industrial planning and licensing indicated some movement towards market based integration initiatives even in this area of equalizing the benefits of integration among the members.

Even though the 1967 Treaty Establishing the East African Community did away with some of Kenya’s dissatisfaction with having to bear an unequal burden within the Community, it nevertheless failed to effectively deal with it, and this was a primary factor leading to its dissolution in 1977.¹⁵³ This pointed to the double-edged sword of efforts to equalize opportunities for countries at different levels of development. As pointed out more than three decades ago:

¹⁵¹ Arthur Hazlewood, *Economic Integration: The East African Experience* 168 (Palgrave Macmillan 1975) (noting that the 1967 Treaty of the East African Community “established a market regulator, the transfer tax being the main device for influencing market forces in the desired direction,” instead the industrial licensing that preexisted it). In addition, under the Treaty, trade and development were to take place under market conditions rather than state planning or industrial licensing “as influenced by a common system of fiscal incentives and by the activities of the East African Development Bank,” *id.* at 127.) *But see* John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 44 (C. Potholm & R. Fredland eds., University Press of America 1980) (noting that “The principal regulatory device introduced by the Treaty -- the transfer tax system—would seem a somewhat perverse method of attempting to equalize the benefits from regional co-operation for, in promoting this objective, the principle of the free movement of goods within the region was breached by the imposition of intra-community tariffs”).

¹⁵² Arthur Hazlewood, *Economic Integration: The East African Experience* 104 (Palgrave Macmillan 1975). Kenya also contributed “about half of the total revenue of the General Fund...and this fact has led to some feeling that Kenya subsidizes the other partner states through the General Fund Services,” *id.* at 92-93).

¹⁵³ John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 42 (C. Potholm & R. Fredland eds., University Press of America 1980) (also noting that even “if the Treaty had provided an effective long-term answer to the distribution problem, it would still have to be judged a failure since its inability to furnish the means for an immediate amelioration of the problem was the cause of its inconsequential impact on partner states’ perceptions,” *id.* at 43).

“Fiscal transfers from more fortunate to less prosperous members of a regional scheme are in themselves an insufficient solution to the distribution problem. Such transfers may amount to little more than the customs revenue foregone as a result of the exclusion of extra-regional imports, and are an inadequate substitute for the employment opportunities and such spinoffs as improved local skills, technology and infrastructure—not to forget prestige—which are brought by industrial development. Manipulation of rates of taxation to encourage substitution of local production for imports from more developed states within a region has the effect, regardless of whether this was the intention—of encouraging the duplication of inefficient plants within a region. Frequently the primary beneficiary of such policies are multinational corporations, able to establish uneconomic which is protected from competition from within the region by the tax system, and from extra-regional rivals by the external tariff. One of the principal justifications for the creation of customs unions – the realization of the economies of scale in producing for a larger market – is undermined.”¹⁵⁴

Notwithstanding the questionable efficacy of efforts to equalize gains, today almost without exception, the Treaties Establishing these regional trade agreements provide for ways of dealing with unequal gains. For example, Article 21 of the ECOWAS Treaty establishes a “Fund for Co-operation, Compensation and Development of the Community,” while Article 48 provides for a mechanism to compensate a member state for loss of import duties suffered as a result of the liberalization of trade commitments contained in Chapter VII of the ECOWAS Treaty.¹⁵⁵ This is anticipated by Article 4 of

¹⁵⁴ John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 49 (C. Potholm & R. Fredland eds., University Press of America 1980); *see also* Arthur Hazelwood, *Problems of Integration Among African States*, in *African Integration and Disintegration* 6 (Arthur Hazelwood ed., Oxford University Press 1967) (arguing that the trouble with compensatory mechanisms is “that they deprive the country offering them of revenue. The less-developed members of the union could ill afford this loss of revenue, particularly as their concessions might have to be very great if their disadvantages for industry were to be significantly reduced,” *id.* at 18).

¹⁵⁵ Chapter 7 is titled: Co-Operation in Trade, Customs, Taxation, Statistics, Money and Payments.

the ECOWAS Treaty which specifies ECOWAS' fundamental principles. These include the "equitable and just distribution of the costs and benefits of economic cooperation and integration."¹⁵⁶ Peter Robson argued that the Fund is of "potentially great importance for promoting positive integration, development and balance."¹⁵⁷

Notably, by embracing distributional equity, African RTAs do not abandon formal equality. Thus the ECOWAS treaty, like all African RTAs, recognizes equality among the member States as a fundamental principle.¹⁵⁸ In this sense therefore one sees in African RTAs an interesting recognition of both equality between States, but also of substantive equality in terms of sharing of the benefits of cooperation.

ECOWAS has set up a Protocol Relating to the Fund for Cooperation, Compensation and Development of the Economic Community of West African States.¹⁵⁹ This Protocol sets out the purposes of the Fund to include:

- Providing "compensation and other forms of assistance to Member States which have suffered losses as a result of the application" of the ECOWAS Treaty;¹⁶⁰
- Providing "compensation to Member States which have suffered losses as a result of the location of Community enterprises;"¹⁶¹
- Providing grants for financing development activities¹⁶² or feasibility studies of such activities¹⁶³;

¹⁵⁶ Article 4(k) of the ECOWAS Treaty. In addition, Article 3 (b) makes solidarity and collective self reliance fundamental principles.

¹⁵⁷ Peter Robson, *Integration, Development, and Equity: Economic Integration in West Africa* 119 (Unwin Hyman 1968). Robson however notes that though the fund provides compensation for revenue losses, it does not "compensate for the contingent losses from trade creation, which- in the absence of an effective Community regional policy-could be significant, or for the important constraints on development policy that the acceptance of the programme would necessarily impose upon them. In these circumstances, the less advanced countries may justifiably be tempted to hang back from implementing formal commitments to trade liberations until they are assured, either through the ECOWAS Fund or in other ways, that their interest will be fully safeguarded," *id.* at 121.

¹⁵⁸ Article 4(a) of the ECOWAS Treaty recognizes equality and inter-dependence of Member States as fundamental principles.

¹⁵⁹ Available at: <http://www.comm.ecowas.int/sec/index.php?id=ap051176fund&lang=en>

¹⁶⁰ Article 2(a) of the Protocol.

¹⁶¹ *Id.* at Article 2(b).

¹⁶² *Id.* at Article 2(c).

¹⁶³ *Id.* at Article 2(d).

- Guaranteeing foreign investments undertaken pursuant to ECOWAS treaty commitments¹⁶⁴;
- Providing the “means to facilitate the sustained mobilization of internal and external financial resources for the Member States and the Community,”¹⁶⁵ and
- Promoting “development projects in the less developed Member States of the Community.”¹⁶⁶

The procedure for compensation is set out in the Protocol Relating to the Application of Compensation Procedures for Loss of Revenue Incurred by ECOWAS Member States As a Result of the Trade Liberalization Scheme.¹⁶⁷ There is also a Protocol on Assessment of Loss of Revenue by Member States.¹⁶⁸ In 2002 for example, Benin received over 373 million CFA Francs as compensation for customs revenue lost between the years 1998-2000.¹⁶⁹

Article 34 of the SACU Agreement of 2002 makes provision for a revenue sharing formula among SACU members. It provides that:

“Member States agree that in determining their respective shares of the total customs, excise and additional duties collected in the Common Customs Area during any financial year, the share accruing to each Member State will be calculated from three distinct components as set out in the paragraphs below.”¹⁷⁰

¹⁶⁴ *Id.* at Article 2(e).

¹⁶⁵ *Id.* at Article 2(f).

¹⁶⁶ *Id.* at Article 2(g).

¹⁶⁷ Available at:

<http://www.ehu.es/ceinik/tratados/11TRATADOSSOBREINTEGRACIONYCOOPERACIONENAFRICA/111ECOWAS/IC11121.pdf>

¹⁶⁸ Available at:

<http://www.ehu.es/ceinik/tratados/11TRATADOSSOBREINTEGRACIONYCOOPERACIONENAFRICA/111ECOWAS/IC11113.pdf>

¹⁶⁹ Fostering Economic Integration Through NEPAD Implementation, Annual Report of the Executive Secretary of ECOWAS, 2002 (ECW/CM/XLIX/2), Abuja, ECOWAS Secretariat, 2002 at paragraph 204. Report is available at http://www.sec.ecowas.int/sitecedea0/english/rapport/es_annual_report_2002.pdf

¹⁷⁰ Article 34 of the SACU Agreement.

With regard to financing the costs of the Secretariat, Tariff Board and Tribunal, the treaty provides that it will come from proportionate deductions from the “gross amounts of customs, excise and additional duties collected, before distribution” from customs, excise and development of SACU components.¹⁷¹

For the customs components, a Member's share is determined based on “the value of goods imported from all other Member States in a specific year as a percentage of total intra-SACU imports.”¹⁷² The Excise component is determined as a percentage of the total SACU Gross Domestic Product in any specific year.¹⁷³ To achieve some equitable balance among the SACU members, the distribution of development component of SACU which is funded from fixed percentages of the excise component¹⁷⁴ is “weighted in favour of the less developed Member States.”¹⁷⁵ The equitable distribution of SACU's development fund as well as the ‘generous’ system of compensatory payments that South Africa gives to participant States has been regarded as an important part of SACU's success.¹⁷⁶ In addition, SACU has exempted its poorest members, Swaziland and Lesotho from the tariff reduction commitments made by the other members.¹⁷⁷

Provisions like this show how economically small states have sought or demanded accountability from big more economically advanced States in making decisions on how to proceed with economic liberalization through RTAs. For example, Article 5(2) of the Treaty for the Establishment of the East African Community provides that the gains of cooperation “shall be equitably shared” and that development in the community shall be

¹⁷¹ *Id.* at Article 34(2).

¹⁷² *Id.* at Article 34(3)(b).

¹⁷³ *Id.* at Article 34(4)(b). The Treaty's Annex A provides for the exact methods and procedure of calculating each State's share of their customs, excise and development components, *see id.* at Articles 34(3)(c); 34 (4)(c) and 34(5)(c).

¹⁷⁴ *Id.* at Article 34(5)(a).

¹⁷⁵ *Id.* at Article 34(5)(b).

¹⁷⁶ Nana Poku, *Regionalization and Security in Southern Africa* 89 (Palgrave Macmillan 2001) (also noting that it has been in South Africa's interest to improve trust among its neighbors since it also creates a market for its producers); *but see* Umesh Kumar, *Economic Dominance and Dependence: The Case of the Southern African Customs Union*, in *Joining the Future: Economic Integration and Co-operation in Africa* 101 (Oliver Saasa ed., 1991) (quoting from a report that conceded that the “existing SACU provisions failed to fuel economic development” in Botswana, Lesotho and Swaziland).

¹⁷⁷ Nana Poku, *Regionalization and Security in Southern Africa* 95 (Palgrave Macmillan 2001).

‘harmonious and balanced.’¹⁷⁸ Article 6(e) makes the ‘equitable distribution of benefits’ a fundamental principle of the community while Article 7 (1)(f) makes the “equitable distribution of benefits accruing or to be derived from the operations of the Community and measure to address economic imbalances that may arise from such operations,” an operational principle of the community. The Treaty defines equitable distribution as the “fair and proportionate distribution of benefits.”¹⁷⁹

The Treaty for the Establishment of the East African Community provides for the principles of variable geometry according to which some members are allowed to progress in the integration “in various fields and at different speeds.”¹⁸⁰ The Treaty for the Establishment of the East African Community also recognizes the principle of asymmetry which allows ‘variances in implementation of measures in an economic integration process for purposes of achieving a common purpose,’¹⁸¹ showing that flexibility is built right into the framework of RTAs.¹⁸²

As we shall see in more detail in the next section, the East African Court of Justice has recently interpreted the principle of variable geometry as providing flexibility in making progress towards integration by allowing activities, projects and programmes to proceed at different speeds “for the avoidance of internal conflict and a possible emergence of mistrust among the Partner States,” so that decisions are not “forced upon an unready Partner just as refusal or delay of implementation thereof need not be used to block a ready Partner or Partners.”¹⁸³

¹⁷⁸ Article 5(3)(a) of the Treaty Establishing the East African Community further provides that in pursuance of the Community’s objectives, the members shall ensure “the attainment of sustainable growth and development of the Partner States b the Promotion of balanced and harmonious development of the Partner States”).

¹⁷⁹ See Article 1 (Interpretation) of the Treaty for the Establishment of the East African Community.

¹⁸⁰ Article 7(f) of the Treaty for the Establishment of the East African Community.

¹⁸¹ This definition of the principle of asymmetry is contained in Article 1(1) of the Treaty for the Establishment of the East African Community.

¹⁸² Article 7(h) of the Treaty for the Establishment of the East African Community.

¹⁸³ *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion, at 35 (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009).

These types of provisions show the responsiveness of the integration arrangements to these concerns of inequity. Invariably, these provisions and decisions influence the degree and patterns of trade integration – integration therefore ought not to be regarded as being effortlessly pursued through binding non-reversible commitments or as being spurred effortlessly by technology. Instead, the RTA treaties embed within themselves accommodations on integration that show sensitivity to how the gains and losses are shared.

One way of viewing these clauses addressing distributional equity is as mechanisms of addressing collective action problems among respective RTA members. They are initiatives aimed at creating regional coordination and cooperative mechanisms to overcome collective action problems and prevent free riding and domestic political constraints such as those involving Tanzania's opposition to joining the East African Common Market which I address in more detail below. Of course, they could also easily be regarded as brakes on trade integration initiatives, but this would be to miss the larger point about the importance of these clauses in rebalancing the unequal costs and benefits that arise from trade integration opening.

Are redistributive mechanisms a recipe for unequal gains and what is their effect on integration initiatives? Arthur Hazlewood in reflecting on the break-up of the common market arrangements in East Africa at the end of the 1960s answered this question pessimistically when he noted that 'the relative backwardness' of the Ugandan and Tanzanian economies "would not have neutralized the disadvantages under which they labored. The dissolution of the common market, given the small size of the economies of Tanzania and Uganda, would not have diverted much industrial development to them from Kenya, though it would have been likely significantly to reduce the future rate of industrial growth in East Africa as a whole."¹⁸⁴

This is the dilemma that economic integration schemes between countries with high levels of difference in the economic structure of their economies face when they

¹⁸⁴ Arthur Hazlewood, *Economic Integration: The East African Experience* 67 (Palgrave Macmillan 1975).

integrate. In East Africa, this problem is now compounded by the fact that the even smaller and landlocked economies of Rwanda and Burundi have joined the East African Community further exacerbating the relative differences between poorer and richer countries. This ought not to be a problem since the fact that Rwanda and Burundi are now part of the East African Community, the market size has expanded and therefore the scope for economies of scale for efficient industries even bigger. One of the initiatives that the East African Community has decided to initiate is an East African Community Development Fund¹⁸⁵ whose purpose will be mobilize resources from domestic sources and Partner states to finance productive sectors including energy, transportation and infrastructure.¹⁸⁶ President Kibaki of Kenya suggested on Rwanda and Burundi joining the EAC, that the Fund as well as the enhanced contributions of the Partner States approved in November 2006 would help defray the additional cost of running the affairs of the Community.¹⁸⁷ Such an approach in large measure departs from the early efforts of attaining a balance of benefits using redistributive schemes. Instead, it relies on the development of projects that will promote regional trade.

The East African Court of Justice's Variable Geometry Advisory Opinion

While in the past doubts were expressed about the significance of trade integration based on market-led integration¹⁸⁸, today there are clearly efforts and commitments that show that regional development cooperation is understood as capable of being undertaken alongside market-led integration rather than as an extreme alternative to market based integration. In the East African Community for example, the treaty carefully balances the commitments, on the one hand, with those relating to equity and distribution among the

¹⁸⁵ The decision to establish the fund was made by the East African Community Council of Ministers on 8th August, 2005, see David S.O. Nalo (Permanent Secretary, Ministry of East African Community on Kenya National Consultation Workshop For the Study on the Establishment of the East African Community Development Fund), Statement by Mr. David S.O. Nalo, at 2 (October 6-7, 2008, Grand Regency Hotel), available at: www.meac.go.ke/index.php?option=com_docman&task=doc_download&gid=47&Itemid=47

¹⁸⁶ *Id.* at 3.

¹⁸⁷ Biketi Kikechi, Rwanda and Burundi Join the East African Community, June 18, 2007, available at: <http://www.assatashakur.org/forum/afrikan-world-news/23459-rwanda-burundi-join-east-african-community.html>

¹⁸⁸ John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, in *Integration and Disintegration in East Africa* 48 (C. Potholm & R. Fredland eds., University Press of America 1980); and T. Ostergaard, *Classical Models of Regional Integration-What Relevance for Southern Africa?*, in *Southern Africa After Apartheid* 27 (Bertil Oden ed., 1993).

members, on the other.¹⁸⁹ This was recently confirmed by the East African Court of Justice in its advisory opinion on whether the rule on consensus decision making was inconsistent with the principle of variable geometry that allows member states flexibility to assume commitments in a variety of areas at different speeds.¹⁹⁰

This case arose against the background of ongoing common market negotiations in the East African Community.¹⁹¹ These negotiations made it increasingly clear that the five members of the East African Community were not in agreement on what common market commitments they were willing to make both as a Community and as individual members of the Community.¹⁹² Tanzania for example objects to opening up land ownership to other East Africans fearing that it would upset Tanzania's policy against landlessness by allowing residents of other countries to buy land there. Tanzania has also proposed that each member country in the common market retain its own labor laws which would further limit the adoption of the right of residence conferring automatic rights to work anywhere in the East African Community.¹⁹³

The lack of agreement on the details of the common market negotiations meant that the Council of Ministers and the Summit could delay the negotiations until consensus was created or they could agree to proceed in a manner that accommodated the differences.

¹⁸⁹ Similarly, the sixth Preambular paragraph of South African Customs Union Agreement notes that the members are mindful of "the different levels of economic development of the Member States".

¹⁹⁰ On this see *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009) (finding that there is no conflict between the principle of variable geometry –which allows for phased implementation of community commitments- and that of consensus in decision making within the organs of the East African Community).

¹⁹¹ The Treaty for the Establishment of the East African Community provides the common market as the second stage of integration after the establishment of a customs union, see Article 76.

¹⁹² According to the Court, the context for the Council seeking the advisory opinion emerged because "as integration deepens, different Partner States continue to have differing attachments to certain policies and their citizens continue to have differing passions toward such policies. In that environment, understandably, choices become tougher, decisions become harder and the perceived unanimity enjoyed in decision making over the years begins to be less forthcoming. This in our view explains the emergence of this debate at this particular time," *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion, at 38 (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009).

¹⁹³ Sub Committee Report on Annex II of the Protocol on the Establishment of the East African Common Market, at 2

So the Council of Ministers asked the EAC Secretariat to seek an advisory opinion on the application of the principle of variable geometry because according to the Council, interpreting variable geometry as permitting progression of the different activities, projects and programs at different speeds, was “contestable on the basis of the fundamental requirement under the Treaty and relevant annexes for consensus as a basis for decision-making by the Heads of State and the Council of Ministers.”¹⁹⁴

Under the Treaty for the Establishment of the East African Community, the Summit¹⁹⁵ and Council¹⁹⁶ are required to make decisions by consensus. The council request for an advisory opinion therefore posited a conflict between the rule of consensus decision making, on the one hand, and the principle of variable geometry, on the other. It sought a ruling from the East African Court of Justice which is the principle judicial body of the Community with jurisdiction to “ensure the adherence to law in the interpretation and application of and compliance with [the] Treaty.”¹⁹⁷ In addition to the Court having “initial jurisdiction over the interpretation and application of [the] Treaty,”¹⁹⁸ also has jurisdiction to issue advisory opinions on request from the Summit, a Partner State or the Council of Ministers.¹⁹⁹

The Community asked the court to decide if the Treaty’s rule of consensus decision making implied unanimity of all the member states²⁰⁰ and “whether the principle of variable geometry can apply to guide the integration process, the requirement on

¹⁹⁴Council of Ministers, Proposal for Requesting for Advisory Opinion of the East African Court of Justice, reproduced at *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion, at 3 (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009).

¹⁹⁵ Article 12(3) of the Treaty for the Establishment of the East African Community

¹⁹⁶ Article 15(4) of the Treaty for the Establishment of the East African Community subject to the Protocol on Decision Making. Article 2(1) of the Protocol states which decisions are to be made by consensus and Article 2(2) specifies which are to be made by majority rule.

¹⁹⁷ EAC Treaty, Article 23.

¹⁹⁸ EAC Treaty, Article 27.

¹⁹⁹ Article 36(1) of the Treaty for the Establishment of the East African Community.

²⁰⁰ *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion, at 6 (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009).

consensus in decision-making notwithstanding.”²⁰¹

The Arguments of the Partner States and the East African Law Society As Amicus

The Community argued that the outcome will help guide its process of decision making that was critical for its “institutional development” and that it would “contribute to the development of regional jurisprudence as envisioned under Articles 6, 7 and 126 of the Treaty.”²⁰²

According to the Community, variable geometry was an innovation of European law that allowed “Member States to negotiate exemptions from certain Treaty provisions and to individually apply a greater speed on some integration processes than others, using the institutions and procedures laid down in the Treaty.”²⁰³ In the Community’s view, the principle of variable geometry could “considerably ease some of the tensions among sub-regional integration arrangements within the Community and enhance the prospect of closer and more regional cooperation.”²⁰⁴

For this reason, the Community supported decisions to be made by majority rather than by consensus because this would allow for agreement among “smaller sub-groups to move faster than the whole group.”²⁰⁵ In the Community’s view, there had been movement away from consensus decision to majority decision making within the United Nations and the European Union. The Community therefore argued that the East African Court of Justice should construe the Treaty for the Establishment of the East African Community consistently with this trend.²⁰⁶

According to the Community argued that consensus decision making resulted in delays, was time consuming and came with the dangers of ‘intransigence’ and possibility of

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 6-7 (giving the example of Denmark, Ireland and the United Kingdom opting out of the European Community’s provisions of free movement of persons, asylum and immigration).

²⁰⁴ *Id.* at 7.

²⁰⁵ *Id.* at 7.

²⁰⁶ *Id.* at 7

vetoes which in turn allowed “individuals or small minorities to block agreement.”²⁰⁷ On its part Rwanda argued that consensus decision-making and variable geometry did not conflict with each other since each was designed for different circumstances.²⁰⁸ For Rwanda, the Treaty gave “no flexibility to some groups” since it required all the Partner States to agree on each and every activity.²⁰⁹ For Rwanda, the Treaty was based on the principles of mutual trust, political will and sovereign equality (See Article 6(a)) without which the Community was in danger of collapsing very much like the original East African Community. As such, for Rwanda, the principle of variable geometry allowed groups of members to engage in activities outside the Community rather than within it.

By contrast, Burundi argued that the rule of consensus decision making and the principle of variable geometry were not in harmony based on the practice of the Community. For Burundi, unanimity required complete agreement of the Partner States while decision making required flexibility of decision making in the integration process.²¹⁰

Kenya on its part argued that the term consensus did not necessarily equate to unanimity as Burundi had contended.²¹¹ Kenya argued that the practice in the European Communities was to allow countries to opt out of “unwanted policies rather than being obliged to choose between vetoing them or accepting a majority verdict.”²¹² Consensus decision making and variable geometry Kenya argued, could co-exist as long as the sphere and scope of the operation of each could be clearly defined.²¹³ According to Kenya:

²⁰⁷ *Id.* at 8. In addition, the Community argued that with the increase of members from 3 to 5, this increased the susceptibility to disruption with small groups holding the others in obstructive ways. In this manner the Community argued consensus decision making was “rewarding the least accommodating group members while punishing the most accommodating,” *id.* at 9. According to the Community, consensus decision making resulted in the Abilene Paradox according to which when a group unanimously agrees on a course of action no one individual desires, because “because no one individual is willing to go against the perceived will of the decision-making body,” *id.* at 9.

²⁰⁸ *Id.* at 10.

²⁰⁹ *Id.* at 10.

²¹⁰ *Id.* at 12.

²¹¹ *Id.* at 12-13.

²¹² *Id.* at 14-15.

²¹³ *Id.* at 15.

“Variable geometry permits Member States in a regional integration arrangement to pursue integration at different levels in different fields/policy areas, so long as the enhanced integration contributes to enhancing integration in the regional integration arrangements, and does not create a barrier to trade or discriminate among members.”²¹⁴

Thus while Kenya supported variable geometry, it argued that if unrestrained by allowing countries to cherry pick their favorite policies and small group of like-minded countries, there was a danger that “some fundamental policies would not be addressed by some Member States.”²¹⁵ I will turn to the question of multiple and overlapping memberships in African RTAs in Part Three below.

For Kenya therefore, the role of the Court in issuing the advisory opinion was to clarify the uncertainty of what consensus decision making in the treaty refers to because it was slowing down the integration process.²¹⁶ According to Kenya:

“...each country has a different rate of economic growth, different socio-economic factors and varying national policies that it takes into consideration when deciding whether or not to vote in favor of a specific proposal²¹⁷ ...[and that] variable geometry is an important principle that operates side by side with consensus decision making as it accommodates each country’s unique features and that as such it should be embraced by the Community and not ignored by forcing States to adopt blanket proposals which may not be best suited to their interests.”²¹⁸

Thus Kenya sought guidance from the Court if consensus decision making meant 100% majority, 2/3 majority or a simple majority because this would ‘eliminate

²¹⁴ *Id.* at 15.

²¹⁵ *Id.* at 16.

²¹⁶ *Id.* at 16.

²¹⁷ *Id.* at 16.

²¹⁸ *Id.* at 17.

confusion and uncertainty in the future.”²¹⁹

Tanzania, like Rwanda and Burundi, argued that consensus decision making under the treaty meant unanimity²²⁰ and that such an interpretation was supported by reading the provisions on consensus decision making in light of the ‘stark reality’ recognized in the Treaty that each Partner is a sovereign State and that in the Partner States peaceful co-existence and mutual trust was of the essence.²²¹ For Tanzania, the Partner States had designed the Treaty as recognized in the operational principles in Article 7 and the fundamental principles in Article 6 as requiring them to have a “single voice, notwithstanding their variables in terms of sizes and stages of development.”²²² Tanzania also argued that such an interpretation was consistent with “the dual mandate of the leaderships of the Partner States to the people they represent on the one hand and to the Community on the other [which] demands that the leaderships and their people be heard and their positions represented.”²²³ Tanzania also objected to the request for an advisory opinion because, the political process through treaty amendment had been initiated to clarify how variable geometry and consensus decision making were related. Doing so through the Court, Tanzania argued was removing the question from where it properly belonged [in the Sectoral Committee on Legal and Judicial Affairs] and as such the request for an advisory opinion was “an abuse of the process of the court.”²²⁴ The Court rejected this argument.²²⁵

This view that the question of the proper relationship between consensus decision-making and variable geometry belonged to the treaty amendment process

²¹⁹ *Id.* at 16.

²²⁰ *Id.* at 20.

²²¹ *Id.* at 19.

²²² *Id.* at 19.

²²³ *Id.* at 19.

²²⁴ *Id.* at 20.

²²⁵ According to the Court, “the process of amending the Treaty reported to be underway in the Executive organs of the Community, as well as this Application for an Advisory Opinion are perfectly compatible. The application was brought to the court on a Directive of the Council, the very organ reported to be overseeing the said amendment. It was properly brought and the Court has jurisdiction,” *id.* at 41.

was also shared by Uganda.²²⁶ Uganda argued that the question before the Court was whether the organs of the Community could make decisions using variable geometry.²²⁷ For Uganda, variable geometry “would allow each country to pace changes brought about in the Treaty at a speed and course that meets and fits unique local conditions of each specific Partner State.”²²⁸ The two principles could not according to Uganda be put alongside each other because one had to first “decide on a policy or objective before arriving at variable geometry which has to take account of practical realities in the different Partner States on the mode and speed of implementation of the policy.”²²⁹ In essence, Uganda was suggesting that the question before the court was a non-justiciable political matter within the sovereign prerogatives of the Partner States.²³⁰

The East African Law Society argued that flexible geometry allowed “flexibility in the integration process by allowing progression in the East African Community activities by some Partner States and not all.”²³¹ The East African Law Society argued that there was not much merit to the claim that decisions not in accordance with consensus decision making as required by the Treaty could be challengeable if made by applying the principle of variable geometry.²³² The Society argued that in the European Union differentiation in the integration structure was permissible to accommodate irreconcilable differences “between a group of Partner States and a number of less developed integration units.”²³³ The Society argued variable geometry was a “flexible and pragmatic approach’ to integration that allowed country’s to proceed on the integration agenda based on the ‘depth of their interest.’ As such, variable geometry applied because of differences in sizes, priorities, levels of political and economic development, as well as in culture and

²²⁶ *Id.* at 23.

²²⁷ *Id.* at 23.

²²⁸ *Id.* at 23.

²²⁹ *Id.* at 23.

²³⁰ According to Uganda, the question was one for “the governing bodies and administrators of the East African Community,” but not for the Court, *Id.* at 10 & 23.

²³¹ *Id.* at 24.

²³² *Id.* at 24.

²³³ *Id.* at 24.

language “which make it difficult for members to meet the criteria for membership at the same speeds and depths.”²³⁴ The Society argued that the principle of variable geometry and the rule of consensus decision making were therefore not necessarily inconsistent with each other and if so, the Court could advice the Partner States to amend the Treaty and related Protocols “to provide for the application of the principle of variable geometry in specific areas of activity.”²³⁵

Based on these submissions, it is clear that Kenya favored a rapid progression of the Community into a Common Market much more readily than Tanzania, Rwanda and Burundi which interpreted the consensus decision making as requiring unanimity.

The Decision of the Court

The Court began by noting the two issues it had to decide were, first whether the principle of variable geometry was in harmony with the rule of consensus in decision making and second, whether the principle of variable geometry could be applied to guide the process of integration, the requirement of consensus decision-making notwithstanding.²³⁶ The Court noted that the Treaty defined the principle of variable geometry but provided no definition of consensus decision making. It therefore proceeded to develop a definition from extraneous sources.²³⁷ Surprisingly, the Court first resorted to Wikipedia, The Free Encyclopedia.²³⁸ This is a source that is hardly recommendable for an authoritative dictionary meaning of any word.

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

²³⁴ *Id.* at 25.

²³⁵ *Id.* at 27.

²³⁶ *Id.* at 28.

²³⁷ *Id.* at 28.

²³⁸ *Id.* at 29.

implementation.”²³⁹ The Court then distinguished between decisions made consistently with the objective of the Treaty where “the basis for making the decision is consensus,” on the one hand, and the implementation of the decision, on the other.²⁴⁰ It is in the implementation of decisions that according to the Court “the practical realities such as vital national interests, the negotiations, the give and take of consultations that each Partner State will inevitably have to take care of for the good of the Partner State and ultimately that of the Community.”²⁴¹ Notably, the Court does not give any basis at all in the Treaty or the EAC’s Protocols for this distinction between decision and implementation. This is not to suggest there could be no such basis, but the Court does not try to establish any at all.

Based on this distinction between decision and implementation, the Court then finds consistency between the principle of variable geometry and the rule of consensus decision making in the following terms. This consistency is established by noting that consensus in the making of decision is a “suitable operational principle, which may well be variable geometry...to govern the practical implementation of that particular decision.” Thus from noting the distinction between decision and implementation, the Court proceeds to find that both are different stages in a single process, except that perhaps variable geometry is not always the implementation choice if there are no considerations such as those necessitating differentiated implementation of a decision. Like the arguments made before the Court by the Partner States and the amicus East African Law Society, the considerations relevant to identifying how variable geometry squares with consensus decision making are tailored as ways to accommodate countries intent on proceeding with integration decisions that may not be uniformly shared, rather than as a strategy of accommodating countries unable to proceed with certain integration decisions. In any event, this observation does not mean that the definition of variable geometry adopted by the Court and used by the Partner States necessarily excludes meanings that are consistent with accommodating laggard Partner States. In essence,

²³⁹ *Id.* at 30.

²⁴⁰ *Id.* at 30.

²⁴¹ *Id.* at 30.

variable geometry gets a very positive spin – it is a policy of allowing forward movement rather than the lowest common denominator. One alternative that the Court of course does not accept, and in fact explicitly rejects, is that of consensus decision making as requiring unanimity.²⁴² It is by excluding this possibility of the meaning of consensus it becomes possible to reconcile variable geometry with the rule of consensus decision making. Here is the Court’s neat integration of variable geometry and consensus decision making into a single process:

“Partner States may agree on implementation at different speeds due to different readiness levels or different priorities, some may choose or opt out of implementation altogether due to national realities, yet others may decide to ‘opt out’ and at a future time they will ‘opt in.’ All these will be agreed by the Partner States, by consensus.”²⁴³

In addition, the Court also found that the principle of variable geometry “is a strategy of implementation of Community decisions and not a decision making tool in itself”²⁴⁴ consistent with Article 7 of the Treaty which provides the treaty’s operational principles “shall govern the practical achievement of the objectives of the Community.”²⁴⁵ What is more the Court argues that the principle of variable geometry “has been internationally applied to deepen integration,”²⁴⁶ and gives the examples from SADC and the European Union²⁴⁷ in addition to the provisions relating to Enhanced Cooperation among a group of

²⁴² *Id.* at 36 (Where the Court notes that “Implying that consensus decision-making as used in the Treaty means unanimity of Partner States is mere perception...Such perception is, in our view neither supported by the Treaty nor the definitions surveyed,” *id.* at 38).

²⁴³ *Id.* at 30.

²⁴⁴ *Id.* at 34.

²⁴⁵ *Id.* at 29.

²⁴⁶ *Id.* at 31.

²⁴⁷ The Court uses the 1985 EU Schengen Agreement and the 1990 Schengen Convention which Ireland and the United Kingdom opted out of and decided to retain their “national border controls on the movement of persons from other EU member states,” *id.* at 31. Another example is the EU Economic and Monetary Union which Ireland and the United Kingdom have opted out as well as the EU Social Policy Agreement which the United Kingdom has opted out, *see id.* at 31-32.

EU Member States.²⁴⁸ The Court recommended that the East African Community to study and “possibly emulate some of the examples of application of these concepts to deepen integration.”²⁴⁹

Of course if the only meaning of variable geometry was that of allowing countries willing to proceed with integration to move forward rather than be held back, the Court is right. Yet, it is not entirely clear that by allowing laggard States not to proceed with implementation of deeper integration measures that variable geometry is necessarily a win-win for deeper integration – it is as much a framework for allowing a group of like-minded States to proceed with certain integration initiatives as much as it is for objecting States to opt-out of time-tabled integration commitments when the moment of decision to assume the commitments and begin implementation arrives.

That is why the Court advised the Community to consider making variable geometry to “ be resorted to as an exception, not as the rule, as indeed institutionalized flexibility might lead to break-up of the Community or its transformation into a ‘mere free trade area,’” as contemplated by the provisions of Article 43b of the Treaty of the European Union.²⁵⁰ Another idea the Court recommended to the East African Community was that it could borrow from the European Union the idea of a set of core and periphery obligations which would differentiate the areas where variable geometry could and could not apply.²⁵¹

The Court in conclusion held that:

“...for the avoidance of internal conflict and a possible emergence of

²⁴⁸ *Id.* at 31-34 (the provisions of Enhanced Cooperation in the Treaty of the European Union are contained in Article 43 and 43(b)).

²⁴⁹ *Id.* at 34.

²⁵⁰ *Id.* at 34. Article 43b of the European Union Treaty provides that “...Enhanced cooperation may be undertaken as a last resort, when it has been established with the Council that the objectives of such cooperation cannot be attained within a reasonable period of applying relevant provisions of the Treaty,” *id.* at 34.

²⁵¹ *Id.* at 34.

mistrust among the Partner States, and in accordance with the Treaty provisions above discussed, decisions should be taken with the above two aspects in mind [variable geometry and consensus in decision making] and simultaneous implementation thereof need not be forced upon an unready Partner just as refusal or delay of implementation thereof need not be used to block a ready Partner or Partners.”²⁵²

In so doing, the Court avoided gave States skeptical of progressing into the common market stage of East African cooperation a reason to derail the commitment of those states that support this transition to a common market. The Court then expressed the view, which it also argued was shared in the submissions before it, that the problems associated with obtaining consensus arose from hesitation to make certain decisions rather than a rejection of such decisions.²⁵³ Indeed, according to the Court, a rejection of a decision consistent with the treaty was not possible since “it would be tantamount to a rejection of a particular Treaty provision.”²⁵⁴ The Court noted that hesitation seemed to arise from the requirement that decisions required simultaneous implementation by all Partner States.²⁵⁵ Yet, according to the Court:

“Simultaneous implementation is impracticable in some circumstances and Partner States cannot be expected to operate within such a strait jacket or one size fits all situations. Variable geometry is, therefore, intended, and actually allows, those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so.”²⁵⁶

The Court cited Tanaka J. in the 1966 ICJ opinion in the South West African Cases (Second Phase) to the effect that “to treat unequal matters differently according to their

²⁵² *Id.* at 35.

²⁵³ *Id.* at 35.

²⁵⁴ *Id.* at 35.

²⁵⁵ *Id.* at 35.

²⁵⁶ *Id.* at 35.

inequality is not only permitted but required.”²⁵⁷ In this manner, the Court found that consensus was required under the Treaty for approving Community decisions but that variable geometry played a role “in deciding the implementation of the programme.”²⁵⁸ It also found that the term is consensus decision-making was not defined in the Treaty for the Establishment of the East African Community or Community Protocols.²⁵⁹ Thus rather than equate the term with unanimity it recommended amending the Community’s instruments.²⁶⁰

Notably, the Court and those that appeared before it did not address the related principle of asymmetry under the Treaty for the Establishment of the East African Community. This principle allows member states to vary “the implementation of measures in an economic integration process for purposes of achieving a common objective.”²⁶¹ It would seem that there is a close relationship between the principles of variable geometry and that of asymmetry to the extent both allow variation in implementation timetables, yet the Court did not allude to it. In fact, the Court did not necessarily have to refer to examples from the European Union, it could have looked at the East African Customs Union Protocol which already incorporates the principles of variable geometry and asymmetry by virtue of the variation in the tariff reduction schedule. While the Protocol the member States to eliminate all internal tariffs and similar charges on trade among the Partner States upon the entry into force of the Protocol,²⁶² it nevertheless gives Uganda and Tanzania more favorable tariff removal commitments than it gives the more

²⁵⁷ ICJ Reports 355, as cited in *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion, at 36 (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009).

²⁵⁸ *In the Matter of a Request By the Council of Ministers of the East African Community for an Advisory Opinion (On the Relationship Between the Principle of Variable Geometry and the Requirement of Consensus in Decision Making)*, Application No. 1 of 2008 Opinion, at 36 (E. African Ct. of Justice At Arusha, First Instance Div. April 24, 2009).

²⁵⁹ In particular, the Court rejected the argument that Article 148 of the Treaty for the Establishment of the East African Community could be construed as implying that consensus was synonymous with unanimity, *id.* at 40.

²⁶⁰ *Id.* at 38-39.

²⁶¹ This definition is provided in Article 1(1) of the Treaty. The principle is provided as an operational principle of the treaty in Article 7(h).

²⁶² See the Protocol on the Establishment of the East African Customs Union, at Part B Article 10(1) Page 14, available at: <http://www.eac.int/customs/articles/key-documents/3-key-documents/2-customs-union-protocol.html>.

economically developed Kenyan economy. Article 11(2) provides that as between Uganda and Tanzania, goods are duty free, while goods from Uganda and Tanzania into Kenya are duty free. Kenyan goods do not enjoy such duty free treatment in Uganda and Tanzania. Article 11(3) provides for the categorization of goods from Kenya into Uganda and Tanzania. This section sets out two categories of goods – Category A goods, which are eligible for immediate duty free treatment, and Category B goods, which are eligible for gradual tariff reduction. Further, Category B goods from Kenya into Uganda will have a five year phase-out tariff reduction period for all products. This phase-out tariff reduction period begins by 10% during the first year, 8% during the second, 6% during the third, 4% during the fourth, and 2% during the fifth. Additionally, Category B goods from Kenya into Tanzania have a similar phase-out tariff reduction period. The underlying requirement is that no internal tariff can exceed the common external tariff with respect any of the specified products.²⁶³ The differentiation in the tariff schedules are in Uganda and Tanzania’s advantage pursuant to the principle of variable geometry.

In any event, the EACJ’s variable geometry decision is highly significant decision because it provides an exist route within the treaty framework for states like Tanzania which are deeply suspicious they will be economically disadvantaged by relatively more economically powerful States like Kenya. In short, the principle of variable geometry has given states like Tanzania a legal foothold within the East African Community not to make commitments they believe with unfairly distribute rewards towards them. For those states willing to continue into the common market stage of the integration process, the decision also provides a legal basis for their continued cooperation since objecting states will not be regarded as wielding a veto under the rule on consensus decision making, but rather as exercising their right to opt out of commitments under the principle of variable geometry. This flexibility as I noted before is a central feature of second generation African RTAs.

Evaluating the Effectiveness of Variable Geometry

²⁶³ See the Protocol on the Establishment of the East African Customs Union, at Part B Article 11 Page 14-15, available at: <http://www.eac.int/customs/articles/key-documents/3-key-documents/2-customs-union-protocol.html>.

Having seen how African RTAs have adopted various versions of variable geometry and discussed the EACJ's variable geometry decision, it is now time to briefly and preliminarily evaluate the effectiveness of these measures. To do so, a variety of baselines could be used. One obvious point of departure is whether these measures promote or undermine trade liberalization, a question that I address in greater length in my discussion of multiple memberships in RTAs in Part_ below. Another is whether these measures nudge countries that would otherwise not adopt even minimal liberalization commitments to do so. Finally, one may ask whether variable geometry plays a non-economic role in encouraging integration. I take up each of these in turn.

Certainly variable geometry especially understood as phased implementation allowing some countries to remain behind while others proceed to higher levels of trade integration slows trade liberalization down. The question then is whether the increased levels of integration nudged even with variable geometry are better than no liberalization at all. The answer to this question is complicated by the fact that variable geometry also involves paying off countries that lose from gains made by other member states as well as the preferential access to capital in regional development banks. From this perspective, variable geometry can only confidently be argued to primarily serve goals other than encouraging deeper trade integration.

Clearly, some measures of variable geometry are indispensable in encouraging countries to participate in integration schemes but they may not necessarily encourage deeper liberalization than a beneficiary country is likely to undertake in the absence of such measures of accommodation. This is clearly the case of Tanzania in the East African Community. From this perspective, variable geometry helps to build trust and confidence among members whose benefits from integration are likely to be rather lopsided, rather than to necessarily nudge liberalization otherwise not possible.

Variable geometry stands in sharp contrast to the premise of the global trading regime which punishes defections from the rules under a sanctions regime backed up by a compulsory and binding dispute settlement system. African RTAs have indeed yet to put

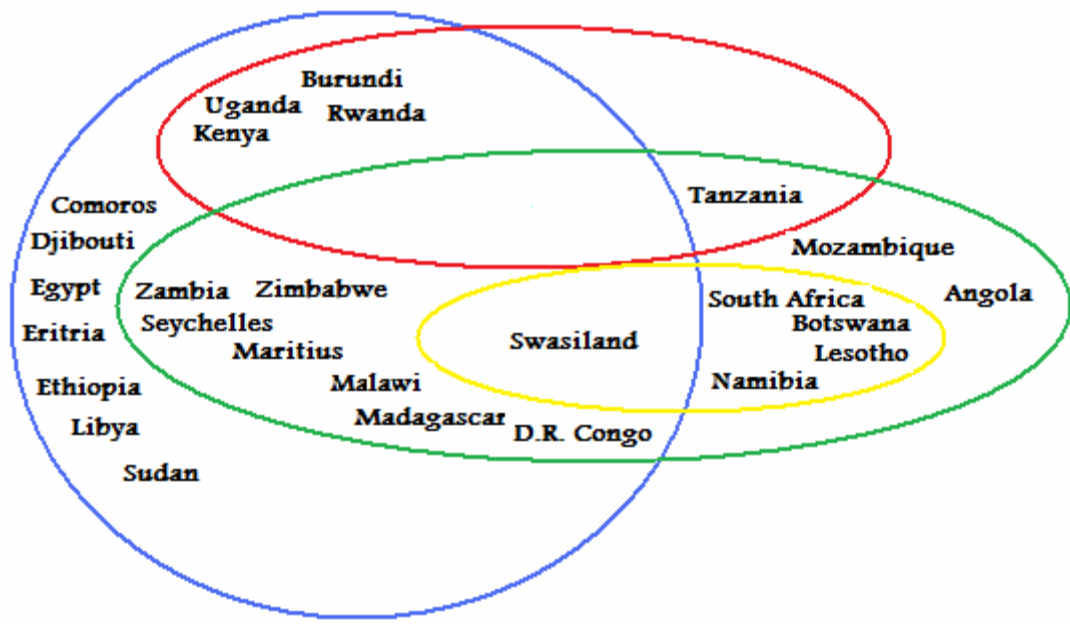
in the threat of sanctions among each other in that sense where there has been non-compliance with liberalization commitments.

So what are the benefits of collaboration and cooperation under RTAs in the absence of coercive mechanisms and that are characterized by whole variety of variable geometry measures? African RTAs are only beginning to provide avenues of increased transparency and openness in regional trade in ways that are particularly useful in breaking down the especially high tariff and non-tariff barriers to regional trade in Africa. They are also beginning to provide regional checks on domestic interest groups and industries that are opposed to trade liberalization. However, these benefits are still in their infancy in terms of becoming a reality on the ground. In the meantime, variable geometry remains one of the most visible feature of African RTAs today. As argued throughout this paper, variable geometry is one of the most important features that demonstrates the flexibility of African RTAs.

Part Three: Multiple Memberships in RTAs

In this part of the paper, I examine another important feature of the flexibility of African RTAs – multiple memberships. Of the 51 countries in Africa, only 9 belong to one RTA. The other 43 belong to at least two or more RTAs. Swaziland belongs to three RTAs - COMESA, SADC and SACU. Of all five countries in the EAC, four are also members of COMESA while Tanzania is a member of SADC. Of the fifteen countries in SADC, eight are also members of COMESA. Figures 1 through 4 show multiple memberships in African RTAs.

Figure 1: Multiple Memberships in COMESA/EAC/SADC/SADU







- EAC..... 
- COMESA..... 
- SADC..... 
- SACU..... 

Figure 2: Multiple Memberships in COMESA/EAC/SADC/SADU

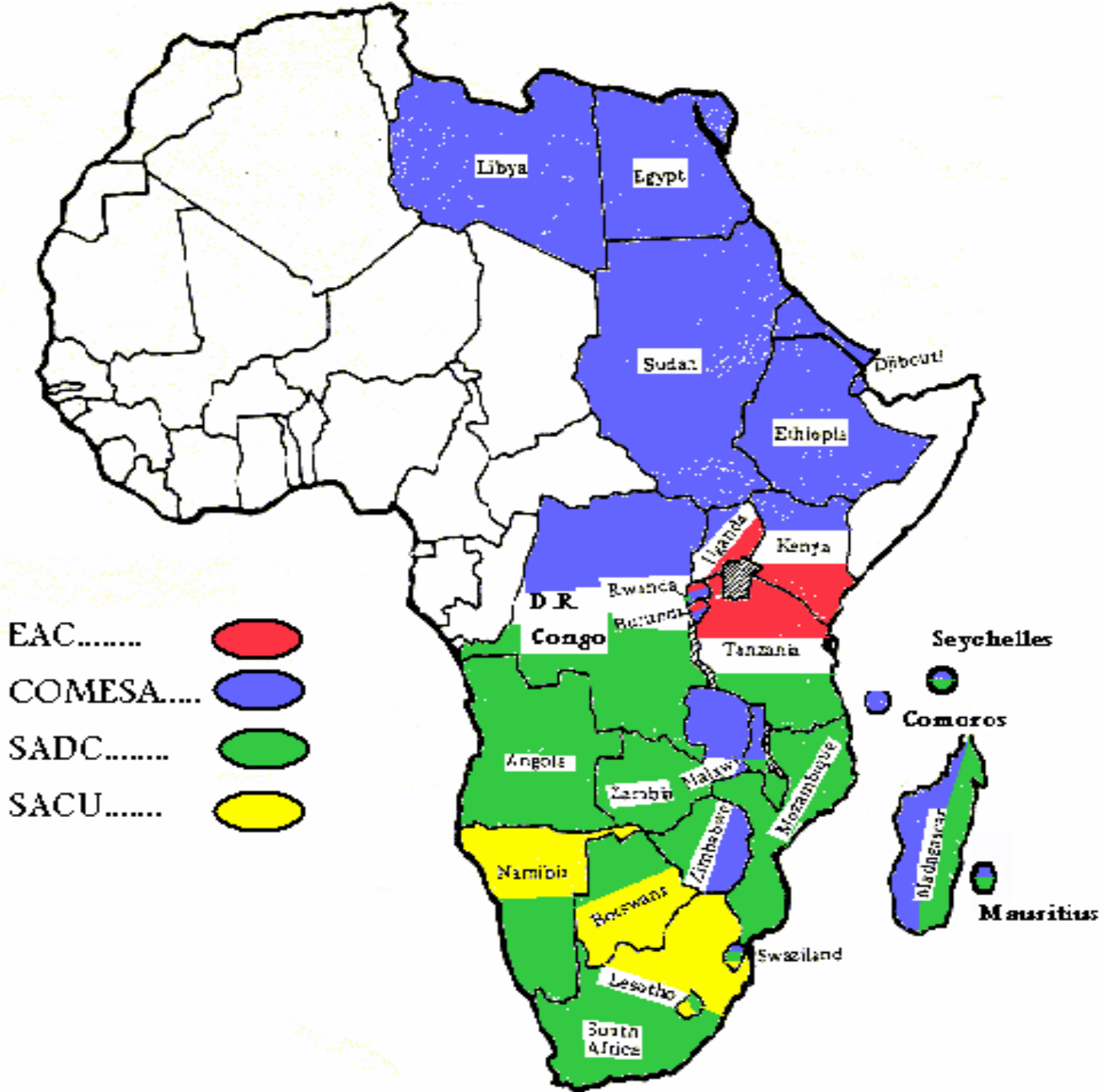
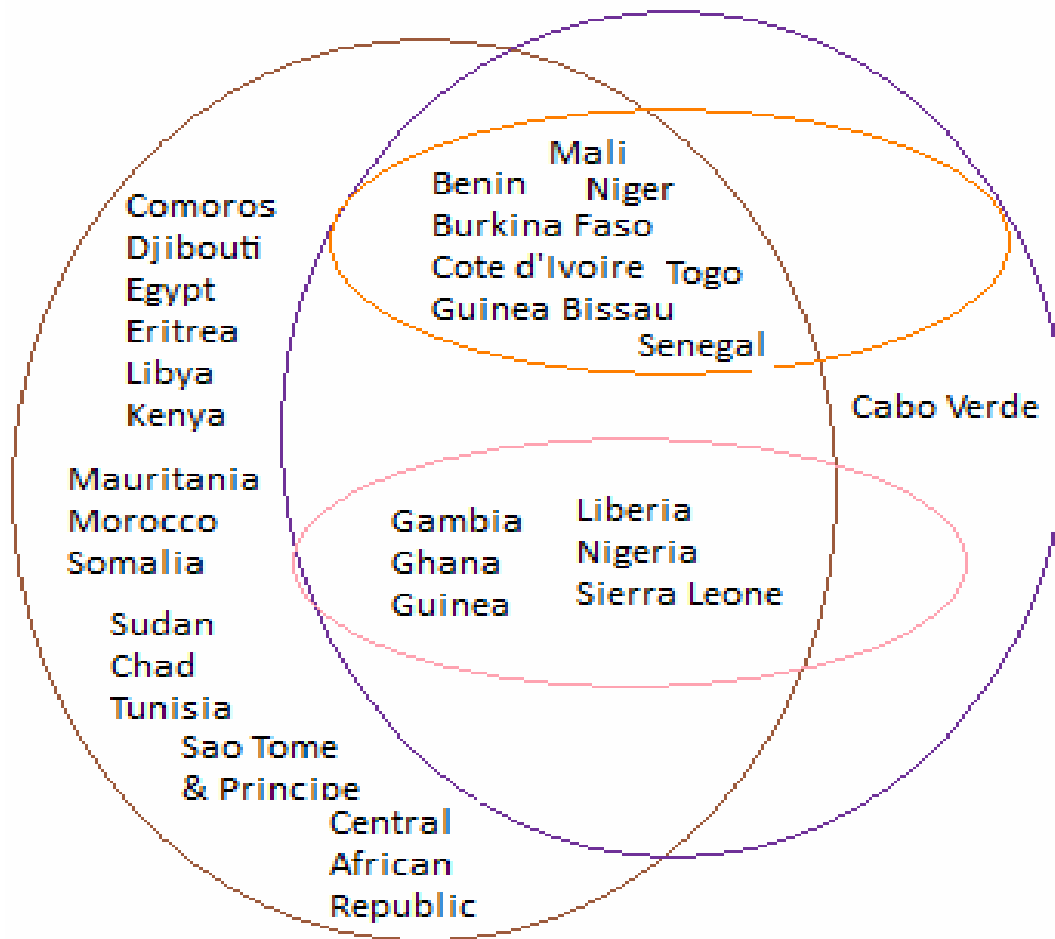


Figure 4: Overlapping Memberships in ECOWAS/CENSAD/UEMOA/WAMZ



Overlapping memberships in several RTAs is a reflection of the large number of all sorts of bilateral and regional trade agreements that Jagdish Bhagwati has referred to as the spaghetti bowl. This part of the paper examines multiplicity of memberships and the variety of regional trade agreements as a further illustration of the thesis of this paper –

that African RTAs are flexible regimes. This part of the paper also examines the extent to which this multiplicity of memberships and trade agreements has contributed to the spaghetti bowl which I address in further detail below.

My claim that multiple memberships in RTAs is a reflection of the character of African RTAs as flexible regimes does not understate or underestimate the criticisms of these multiple memberships. These criticisms can be divided into two main categories. The first relates to the fact that multiplicity of memberships in RTAs is a reflection of the undesirable proliferation of RTAs which creates what Jagdish Bhagwati has referred to as a spaghetti bowl. A second category of criticisms relates to the high transaction costs and administrative difficulties of complying with multiple Rules of Origin (RoOs). Multiple memberships also sap the little trade capacity and budgets of African governments from focusing on a single regional economic bloc. In addition, jurisdictional uncertainty arises as a result of overlapping legal regimes.

This part proceeds as follows. First, it examines the reasons accounting for multiple memberships in African RTAs and how multiple memberships are a reflection of Africa's diversity. It then examines criticisms of the multiplicity of memberships in African RTAs. The final part of this part, which is also the penultimate section of the paper, addresses the spaghetti bowl critique of multiplicity of RTAs.

Why Countries Have Multiple Memberships in RTAs

Multiple memberships reflect the desire of countries to pick and choose various options offered by competing RTAs.²⁶⁴ Different RTAs offer different benefits to members beyond the goals of providing of the reduction or removal of tariff barriers and the harmonization of trade policies like customs policies.²⁶⁵ Take the example of example the

²⁶⁴ Arvind Panagariya, *The Regionalism Debate: An Overview* 20, at 32 n.33 (revised draft from Nov. 1998), available at: [http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we\(1\).pdf](http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we(1).pdf) (downloaded August 5, 2009).

²⁶⁵ See generally Kathy L. Powers, *Why do States Pursue Water Cooperation through Regional Trade Agreements?* (Prepared for delivery at the 2005 Annual Meeting of the American Political Science Association Sep. 1-4, 2005).

transportation of commodities through waterways. African international river basins cover the largest percentage area of any region in the world and as a result are important for the transit of goods from country to country.²⁶⁶ Because waterways do not divert or conform to the signing and changing climate of trade agreements, the use and rights of these waterways that span through multiple FTA's calls for water cooperation between RTAs and offers an important reason for multiple trade bloc membership. Multiple trade bloc membership give member countries access to aquatic trade routes that would otherwise be unavailable to them. This is particularly the case for landlocked countries than coastal ones. In fact, for landlocked countries in particular, transport costs are a main constraint on competitiveness and would then play a major factor for countries without access to waterways to diversify their agreements in multiple forums.²⁶⁷ As a result Africa's landlocked countries and their coastal neighbors are members of the same RTAs, sharing ports and trade routes.²⁶⁸ Water basin states in fact often share membership in more than one RTA, and some RTA's overlap in the basins that they manage.²⁶⁹

African RTAs therefore serve as institutions of basin management demonstrating the entwined relationships among trade, environment and security aspects of international river basins.²⁷⁰ From this perspective RTAs are trade plus institutions to the extent to which trade is linked to environment issues as well as to security issues as well.²⁷¹ In short, natural resource management in general and water cooperation are interwoven with to trade and security.²⁷² Indeed, in Part One we saw how African RTAs nestle within them a variety of non-trade objectives and institutions.

²⁶⁶ *Id.* at 16.

²⁶⁷ Nick Charalambides, *The Private Sector's Perspective, Priorities and Role in Regional Integration and Implications for Regional Trade Arrangements*, in European Centre for Development Policy Management, Discussion Paper No. 66, at 10 (Sep. 2005).

²⁶⁸ Yongzheng Yang & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward*, IMF Working Paper No. WP/05/36, at 9 (2005).

²⁶⁹ Kathy L. Powers, *Why Do States Pursue Water Cooperation through Regional Trade Agreements? Trade, Environment and Security Linkages in International River Basins*, Paper Prepared for delivery at the 2005 Annual Meeting of the American Political Science Association, *supra* at 18 n.20 (Sept. 1-Sept. 4, 2005).

²⁷⁰ *Id.* at 11.

²⁷¹ *Id.* at 25.

²⁷² *Id.*

Another major benefit of multiple memberships in RTAs is the ability to shift lawmaking initiatives from one international venue as opposed to another that may not offer the same advantages. This is referred to as regime shifting. According to Laurence Helfer, “The existence of multiple, discrete regimes, any one of which may plausibly serve as a site for future policy development, leaves considerable room for maneuvering by different clusters of states seeking to maximize their respective interests.”²⁷³ On this argument, countries enter into regimes to reduce the transactional costs and information problems that plague uncoordinated state relations.²⁷⁴ A few examples are necessary to illustrate this point more fully in the African RTA context.

At present, Kenya is a member of COMESA and the East African Community (EAC). There are benefits that Kenya accrues under COMESA currently unavailable under EAC. COMESA gives Kenya the opportunity to protect its economy against dumping as it has in the case of sugar and wheat exports which Kenya has sought and got. The EAC does not currently offer Kenya that important possibility. In addition, COMESA offers a broader group of countries which Kenya can defend itself against unfair trade practices than the EAC. The EAC also has advantages that COMESA does not give Kenya. For example, the EAC provides a closer regional proximity with Kenya’s immediate and near neighbors than does the expansive COMESA region that spans to Egypt in North Africa. In short, there are things Kenya can achieve better in one and not another regional bloc.

During the latter stages of South Africa’s apartheid era, SACU was comprised of Botswana, Lesotho, Swaziland (BLS), and South Africa. These countries being part of a customs union, enjoyed a higher level of economic integration than would be found in either a preferential trade area or a free trade area. However, rather than belonging to an organization based on interdependence and mutual cooperation, SACU was a direct reflection of the high level of dependence of the BLS countries on South Africa.²⁷⁵ Geographic and economic factors such as shared boundaries, interlinked transportation

²⁷³ Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *Yale J. Int’l L.* 8 (2004).

²⁷⁴ *Id.* at 7.

²⁷⁵ Robert D.A. Henderson, *The Southern African Customs Union: Politics of Dependence in The Future of Regionalism in Africa* 225, 239 (Ralph I. Onwuka & Amadu Sesay ed., 1985).

and employment exemplified this dependant relationship.²⁷⁶ This dependency was the root of much conflict due to South Africa's maintenance of a white-minority government. Geographic proximity and integration economically prevented BLS from breaking off ties fully with South Africa even though the BLS countries repeatedly denounced South Africa's apartheid system.²⁷⁷ While the BLS countries were strongly opposed to the South African form of government and the dominant role South Africa played in their economies, it was not in their best interests to take an extreme position against South Africa as it might have crippled them economically.²⁷⁸ The other problem the BLS countries faced was that South Africa's apartheid government not only alienated itself from a number of international organizations, but also resulted in the rejection of SACU as a whole.²⁷⁹ The result of this was an increasing effort on the part of the BLS countries to lessen their dependency on South Africa gradually by exploring other economic options. This was referred to as "gradual disengagement," and led to the BLS contingency joining other economic affiliations such as SADCC.²⁸⁰ The resulting multiple memberships of the BLS countries was not intended to directly compete with South Africa or BLS's obligations with SACU, but to be complementary with the goal of making these countries more economically independent, and less dependent on a county denounced by the world for its racist policies.

The Communate Economique de l'Afrique de l'Ouest (CEAO) and ECOWAS offer another example from West Africa that has historical reasons accounting for multiple memberships.²⁸¹ CEAO was an economic grouping that carried over from the colonial period, while ECOWAS was created in an effort to cut across cultural and linguistic

²⁷⁶ *Id.*

²⁷⁷ *See id.* at 238.

²⁷⁸ *See id.* at 243, 241.

²⁷⁹ The best example of the BLS countries joining others in the region in rejecting South Africa's dominance of SACU is the Lusaka Declaration, *see* SADCC, Southern Africa: Towards Economic Liberation: A Declaration by the Governments of Independent Africa Made at Lusaka on the 1st of April 1980, *in* Record of the Southern African Development Coordination Summit Conference (Lusaka, 1980).

²⁸⁰ Robert D.A. Henderson, *The Southern African Customs Union: Politics of Dependence in The Future of Regionalism in Africa* 243-244 (Ralph I. Onwuka & Amadu Sesay ed., 1985).

²⁸¹ S.K.B. Asante, *ECOWAS/CEAO: Conflict and Cooperation in West Africa*, *in* The Future of Regionalism in Africa 74, 78 (Ralph I. Onwuka & Amadu Sesay ed., 1985).

barriers.²⁸² Instead of abandoning one in favor of the other because they both were based on the same principles, the members of CEAO agreed to join ECOWAS while being able to retain their membership in CEAO. The economic dominance of Nigeria is very similar to South Africa's dominance in the previous example. However, Nigeria's dominance had the opposite effect of drawing members into ECOWAS instead of pushing them away as South Africa had done.²⁸³

These examples show that in some cases, multiple memberships were anticipated from the beginning. As such case, changing political, social and economic environments play a major role in multiple memberships. These examples add to one of the central claims pursued in this paper, that African RTAs are trade plus regimes that reflect a broad set of goals and are not simply trade treaties. Seeing African RTAs as regimes adds to the argument that countries that are members of more than one RTA may well regard treaties establishing RTAs as providing a framework for cooperation but not necessarily as creating binding obligations.²⁸⁴ For these countries multiple membership in RTAs offers them flexibility and adaptability to member states since they can retain their sovereignty and accrue benefits from multiple regimes otherwise not available through sole memberships.

Multiple Memberships Reflects Africa's Diversity

As noted earlier in this paper, regionalism in Africa is often regarded as necessary to aggregate bargaining power to negotiate with powerful trading partners like the European Union. While this argument has much merit and ought not to be downplayed, it presumes that unity in regionalism can overcome the variety of ways in which African countries are divided. Indeed presuming African unity through regionalism is easily achievable is based upon "certain sociological, cultural and psychological affinities already identified," and "conceives of Africa's foreign policy as being singular and consensual."²⁸⁵ Further, such a view presumes that for Africa's voice to be heard in the world trade arena, it must

²⁸² *Id.* at 75, 76.

²⁸³ *See id.* at 82.

²⁸⁴ Helfer, *supra* at 10 n.20.

²⁸⁵ Timothy M. Shaw, *Towards a Political Economy of Regionalism in Africa*, In *The Future of Regionalism in Africa* 8, 13 (Ralph I. Onwuka & Amadu Sesay ed., 1985).

be unified through “externalization for continental integration as well as extra continental effectiveness.”²⁸⁶ Yet while the hope of unity for these purposes would ideally serve Africa well, the search for African unity and regional integration has proved very daunting. Multiple memberships reflect the reality of diversity among African countries and the complexity of their conflicting, overlapping and sometimes congruent interests. In fact as William Zartman, a leading Africanist, has argued:

The recognition of overlapping systems in interpreting foreign policy alternatives and possibilities for states with dual membership is both a more helpful and more realistic way of looking at foreign policies than is the attempt to force such states exclusively into one area or the other.²⁸⁷

Zartman’s support for overlapping systems for African countries espoused several decades ago continues to have relevance today. Consider for example how some African States have recently defected from signing Economic Partnership Agreements (EPAs) with the European Union (EU) in their designated regional groupings. For example, non-LDC countries in ECOWAS decided to go it alone and signed their own EPA with the EU.²⁸⁸ In addition, Ghana and Cote D’Ivoire, two of the three non-LDCs, signed interim EPAs with the EU under pressure from the EU further widening the wedge among ECOWAS member states. ECOWAS LDCs were concerned that by signing an EPA with the EU would allow Nigeria to become a conduit for channeling goods originating from Europe into their economies.²⁸⁹ Thus differing interests among ECOWAS members resulted in multiplying the number of EPAs the EU was signing with ECOWAS members further exacerbating multiplicity of trade and related agreements in Africa.

²⁸⁶ *Id.*

²⁸⁷ I. William Zartman, *Africa as a Subordinate State in International Relations*, 2(3) Int’l Org. 581 (Summer 1967).

²⁸⁸ Ken Akaoha, ECOWAS EPA- The Facts and the Fallacies (Jan. 21, 2008), available at: http://www.bilaterals.org/article/php3?id_article=10985

²⁸⁹ It is of course not clear that once Nigeria signs an EPA with the EU that this will necessarily protect these LDCs from EU exports destined for Nigeria reaching them, *see* Ken Akaoha, ECOWAS EPA- The Facts and the Fallacies (Jan. 21, 2008), available at: http://www.bilaterals.org/article/php3?id_article=10985

Another example is Tanzania's decision to stay away from ESA group of countries (essentially the members of the EAC), in the negotiations over an EPA. Tanzania decided to negotiate its EPA under within the SADC group to which it is more ideologically aligned than with the ESA group. In so doing, Tanzania choice of SADC to protect its strategic interests is a reflection of the argument advanced here – that African RTAs offer alternative choices of how best to advance the interests of the member countries. Indeed, Tanzanian's interests as a least developed country are not necessarily consistent with those of countries like Kenya which is not a least developed country under the classifications used by the United Nations.

In SACU, Angola and Botswana are signing different EPA agreements than those being signed by the rest of SADC's members.²⁹⁰ Fifteen SADC members in all are negotiating EPAs under four different configurations.²⁹¹ Under the EPAs, ACP countries will have duty free and full quota access to the EU, but they will also be required to open their own borders to European products and services over time.²⁹² This presents a conflict with SACU's CET structure and with other member states in SADC negotiating their own agreements, transshipment is likely. The Cotonou agreement does not address the question of who the proper parties to the EPAs should be. Are the proper parties the regions or countries themselves? Ultimately, it is the countries that ought to sign the agreements under their own constitutional rules. Yet, they have to negotiate as groups-groups with differing interests. This in turn has resulted in the formation of de facto coalitions within the context of EPA negotiations.

Criticisms of Multiple Memberships

As noted at the beginning of this Part of the paper, there are three categories of criticisms of the multiplicity of membership in African. I address each of these in turn.

²⁹⁰ *Southern Africa Region Makes Progress on EPA*, 13(1) International Centre for Trade and Sustainable Development (March 2009).

²⁹¹ *Id.*

²⁹² *Id.*

Sphagetti Bowl: Are RTAs Building or Stumbling Blocks?

The path towards the establishment of an African Economic Community is preceded by the establishment of six regional trade agreements. These six trade agreements referred to as the pillars of the yet to be formed African Economic Community are: the East African Community; the Economic Community of West African States; the Inter-Governmental Authority on Development; the Southern African Development Community; the Common Market for Eastern and Central Africa; ECCAS and the Arab Maghreb Union. In this sense, the Treaty for the Establishment of the African Economic Community regards these RTAs as building blocks towards an eventual continental wide trade block. The economist Jagdish Bhagwati argued that multiple regional and bilateral trade agreements are a stumbling rather than a building block for the multilateral trade regime.²⁹³ Bhagwati has referred to this increase in the number of bilateral and regional trade agreements as the sphagetti bowl.²⁹⁴ Since the goal of each of these agreements is to liberalize trade within the group, Bhagwati argued these agreements had discriminatory consequences for trade creation. For example, the same product gets different tariff treatment depending on its origin since members of a preferential trade arrangement treat their members better off than they would non-members even if the same product from the non-member was produced at a lower cost. In effect, multiple bilateral and regional trade agreements undermine the goal of non-discriminatory international trade under the umbrella of the GATT/WTO framework since they create rules of origin that discriminate across products and countries.²⁹⁵ The ten year assessment of the WTO, referred to as the Sutherland Report, regretted the lack of harmonization produced by the complex web of inconsistent rules of origin in multiple RTAs which in turn increased transaction costs for business and hampered trade flows.²⁹⁶ These complex webs of rules of origin also counteract trade creation as the ability of a partner country to undermine an inefficient

²⁹³ Jagdish Bhagwati, *The World Trading System at Risk* (Princeton University Press 1991); *see also* Jagdish Bhagwati, David Greenway & Arvind Panagariya, *Trading Preferentially: Theory and Policy*, 108(449) *The Economic Journal*. 1128, 1138 (1998).

²⁹⁴ Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation With Free Trade Areas*, in *The Dangerous Drift to Preferential Trade Agreements* (Jagdish Bhagwati & Anne O. Krueger eds., Aei Press 1995).

²⁹⁵ Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 *J. of Econ. Lit.* 287, 328 (2000).

²⁹⁶ Peter Sutherland et al., *The Future of the WTO addressing institutional challenges in the new millennium*, in *Report by the Consultative Board to the Director-General Supachai Panitchpakdi* 22 (2005).

domestic industry is reduced, since they have the effect of requiring a country bound by them to purchase inputs from less efficient sources.²⁹⁷ In effect, the trade preferences which are extended under bilateral and regional trade agreements undermine the GATT/WTO obligation that members unconditionally extend any trade concessions made to one WTO member to all WTO member countries.

One of the primary justifications for the formation of RTAs is geographic proximity among a group of countries. Bhagwati and Panagariya argue that geographic proximity does not provide benefits between natural trading partners as argued by its proponents for a number of reasons. First, they argue that arguments about natural trading partners are based on static theories' that say little about trade diversion as a primary reason the establishment of regional trade agreements.²⁹⁸ Another justification in support of the natural trading partners thesis, argues that geographic proximity favors the formation of trading unions between neighbors since this would eliminate large transport costs in addition to promoting specialization in production.²⁹⁹ But according to Bhagwati and Panagariya, eliminating tariffs between member countries leaves each country worse off as the resulting welfare gain will be less than the revenue lost by the elimination of tariffs.³⁰⁰ In addition to lost revenue, RTAs also result in trade diversion. Trade diversion occurs where the creation of an RTA in one country leads to the production of a similar product in a different country that is less efficient than the first country but is less expensive to the other country because preferential tariffs reduce the final cost of the good.³⁰¹

Bhagwati and Panagariya also dispute the claim that RTAs reduce tariffs among members. They argue that since the Uruguay Round of GATT talks which ended in the

²⁹⁷ Arvind Panagariya (1998), *The Regionalism Debate: An Overview* 18 (revised draft from November 1998), available at: [http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we\(1\).pdf](http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we(1).pdf) (downloaded August 5, 2009).

²⁹⁸ *Id.* at 1129.

²⁹⁹ *Id.* at 1130

³⁰⁰ *Id.*

³⁰¹ For a full, and quite good explanation of trade diversion, please see Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38(2) *J. of Econ. Lit.* 287, 290 (2000).

mid-1990s left a number of tariffs in place particularly in agriculture. As such, preferential trade agreements among these countries would be particularly harmful, because their exposure to high external tariffs encouraged other countries to diversify away from the products that are protected by high tariff walls.³⁰²

Finally, Bhagwati and Panagariya refute two other arguments often made in favor of regional trade agreements - that reduced transportation costs are a basis for formation of RTAs, (which I alluded to in a different context above), and that a high volume of trade resulting from an RTA is good for both trading partners. They argue that it is unlikely that a high initial volume of trade will offset any form of trade diversion caused by two states entering into a PTA.³⁰³ They argue that this is unlikely because elasticity of production is the primary determinant of the amount of trade diversion, not the volume of trade.³⁰⁴ They point out that in countries with imperfect substitutes, a gradual reduction in tariffs leads to an eventual loss of welfare by each of the states even though each state is specialized in the form of production for each good.³⁰⁵

For transport costs, the common wisdom is that lower transport costs will allow countries to capture more of the marginal cost of production because of fewer costs of production and sale. This is not true, they argue, since a specialized producer can act as a monopsonist and the increased cost of transport makes a distant country have a higher elasticity. As a result, it is not always the best course of action to sell only to countries with lower costs of transport.³⁰⁶ Bhagwati and Panagiriya also argue that lower transport costs for a neighboring partner may however be outweighed by cost advantages in a distant one as is currently demonstrated by China's ability to compete with other producers in the textile market of many countries around the world. Bhagwati and Panagiriya therefore argue that these theories for the formation of RTAs are "static" to the extent that they assume that they assume all welfare gains and losses are created at the

³⁰² Arvind Panagariya (1998), *The Regionalism Debate: An Overview* 1130 (revised draft from November 1998), available at: [http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we\(1\).pdf](http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we(1).pdf) (downloaded August 5, 2009).

³⁰³ *Id.* at 1132.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 1134.

same time and are therefore instantaneous. Bhagwati and Panagariya therefore recommend a dynamic model of free trade. To them, a dynamic theory of free trade is more consistent with a WTO type system than with the proliferation of RTAs.³⁰⁷

For these reasons, free trade economists argue that the best solution to the proliferation of RTAs is to speed up multilateral unconditional most favored nation non-discriminatory trade liberalization since this would tariff preferences will be disappear once external tariffs drop to zero.³⁰⁸

High Transaction and Administrative Costs

A second category of criticisms relates to the high transaction costs and administrative difficulties of complying with multiple Rules of Origin (RoOs). Multiple memberships sap the little trade capacity and budgets of African governments from focusing on a single regional economic bloc. In addition, jurisdictional uncertainty arises as a result of overlapping legal regimes. This criticism has much in common with the spaghetti bowl argument we saw above and may in fact be regarded as a subset of it.

One of the most important features of customs union is that all the member countries adopt one common external tariff (CET). This raises a major concern with regard to loss of revenue for countries that enjoy monies from tariffs through their various trade interests. In joining a customs union, these countries would be subject to one CET which could significantly diminish the funds they previously collected through their own agreements.³⁰⁹ There is also a fear that once a country joins a CU, its trading policy cannot be altered without the consent of the other union members.³¹⁰ Further, exporters who have benefited from regional preferential market access will want to keep their

³⁰⁷ *Id.* at 1142.

³⁰⁸ Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 J. of Econ. Lit. 287, 328 (2000).

³⁰⁹ Yongzheng Yang, & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* IMF, Working Paper No. WP/05/36, at 14 (2005).

³¹⁰ *Id.* at 6.

unique markets and local producers who have benefited from favorable rules of origin will resist reductions in external trade barriers and efforts to make rules less restrictive.³¹¹

There are difficulties that may arise from countries participating in various RTAs including the human and financial costs associated with membership, lack of harmonization of policies in the areas of rules of origin, (ROOs), and customs procedures, and the changing political climate of RTAs or the countries themselves.³¹² Legal uncertainties may also arise in cases where more than one trade arrangement applies to trade between two countries.³¹³ Which jurisdiction hears the matter and which RTA's trade policies are to be followed may hinder trade practices and thus increase transactional costs as well.

When a country has membership in multiple RTA's, multiple ROOs need to be applied as well. ROOs specify when a product will qualify for duty-free movement within the RTA and specifies what proportion of value added it must if it originates within the trade bloc, or require that a product undergo a substantial transformation in a country before being allowed to cross the border duty free.³¹⁴ Knowing which ROOs to follow depending on where commodities originate when involved in various RTA's undoubtedly makes the customs clearance process more complex and delays transactions.³¹⁵ The more RTAs a country is involved in, the cost on producers to ship their goods increases in order to offset the need for increases in administrative supervision necessary to keep track of proper origin documentation and procedures.³¹⁶ This may in turn have the effect of

³¹¹ *Id.* at 6.

³¹² Alemayehu Geda, & Haile Kebret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA*, 17(3) *J. of African Econ.* 357 (2008).

³¹³ Cord Jakobeit, et al, *Overlapping Membership in COMESA, EAC, SACU and SADC Trade Policy Options for the Region and for EPA Negotiations*. Eschborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), at 22 (2005).

³¹⁴ Arvind Panagariya (1998), *The Regionalism Debate: An Overview*, at 17 (revised draft from November 1998), available at: [http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we\(1\).pdf](http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we(1).pdf) (downloaded August 5, 2009).

³¹⁵ Anne O. Krueger, *Problems with Overlapping Free Trade Areas, in Regionalism Versus Multilateral Trade Arrangements* 9, 18 (O. Takatoshi & Anne O. Krueger ed., Chicago: University of Chicago Press 1997).

³¹⁶ *Id.* at 16.

producers turning to other countries not involved in multiple RTA's to those requiring less complex procedures.

Due to the fact that Free Trade Agreements (FTAs) allows each of its member states to implement its own tariff structure, ROOs need to be included in agreements involving FTA's in order to prevent transshipment.³¹⁷ Because FTA's do not have the innate CET system inherent in customs unions, ROOs are important in order to ensure that a product destined to a high-tariff member country does not first get imported through a lower-tariff member country.³¹⁸ CET's already in place make this type of trade deflection less of a problem in customs unions.³¹⁹ These are real and complex issues regarding the transportation of goods among member states and non member states and states belonging to multiple RTAs that would need to be addressed before customs unions are to be established. However according to Yang & Gupta, "given the small share of intraregional trade in Africa's total trade, the direct contribution of any trade deflection to overall trade performance is likely to be limited."³²⁰ Further, an elimination of ROOs altogether may be a solution to this problem as well. Transshipment would be inevitable, as products would no doubt find their way into high-tariff countries through low-tariff members, however it could be argued that this would force the high-tariff members to lower their external tariffs in order to be competitive. This would in effect, minimize trade diversion and have the secondary effect of creating a CU in which the members of the FTA would be forced to agree on a set CET.³²¹

³¹⁷ Cord Jakobeit, et al, *Overlapping Membership in COMESA, EAC, SACU and SADC Trade Policy Options for the Region and for EPA Negotiations*. Eschborn, Germany: Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ), at 46 (2005).

³¹⁸ Arvind Panagariya (1998), *The Regionalism Debate: An Overview*, at 17 (revised draft from November 1998), available at: [http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we\(1\).pdf](http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we(1).pdf) (downloaded August 5, 2009).

³¹⁹ Anne O. Krueger, *Problems with Overlapping Free Trade Areas, in Regionalism Versus Multilateral Trade Arrangements* 9, 15 (O. Takatoshi & Anne O. Krueger ed., Chicago: University of Chicago Press 1997).

³²⁰ Yongzheng Yang, & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* IMF, Working Paper No. WP/05/36, at 19 (2005).

³²¹ Arvind Panagariya (1998), *The Regionalism Debate: An Overview*, at 17-18 (revised draft from November 1998), available at: [http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we\(1\).pdf](http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/overview-we(1).pdf) (downloaded August 5, 2009).

Multiple memberships in RTAs opens up the possibility that a country is in a customs union as well as a separate FTA. This country would be able to enjoy preferential tariffs from the FTA but would not be able to reciprocate the preferential favor to the FTA, being forced to uphold its CET. If the commodities are valuable enough, those in the FTA may deem these transactions to be of value superseding to the benefits of special tariffs that they are unable to enjoy. This situation is currently exemplified in looking at the status of Swaziland and its multiple memberships. Swaziland is currently a member of the Southern African Customs Union (SACU), the Southern African Development Community (SADC), and the Common Market for Eastern and Southern Africa (COMESA). Swaziland is therefore a member of a customs union, and being the only member of that union with membership in COMESA as well, it enjoys free market access with COMESA, but may not allow members of COMESA duty-free importing due to their CET.³²² To do so would undermine the customs union, downgrading it to an FTA where ROOs would apply making Swaziland a transit country.³²³

There are also other vested interests in countries and their RTAs as they stand now, that further exemplify the complexities of taking the “next step” into a CU. As stated, the most important feature of a CU is that all of the member countries adopt one CET. This raises a major concern in regards to loss of revenue for countries that enjoy monies from tariffs through their various trade interests. In joining a CU, these countries would be subject to one CET which could significantly diminish the funds they previously collected through their own agreements.³²⁴ There is also a fear that once a country joins a CU, its trading policy cannot be altered without the consent of the other union members.³²⁵ Further, exporters who have benefited from regional preferential market access will want to keep their unique markets and local producers who have benefited

³²² Cord Jakobkeit, et al, *Overlapping Membership in COMESA, EAC, SACU and SADC Trade Policy Options for the Region and for EPA Negotiations*, Eschborn, Germany: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), at 60 (2005).

³²³ *Id.*

³²⁴ Yongzheng Yang, & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* IMF, Working Paper No. WP/05/36, at 14 (2005).

³²⁵ *Id.* at 6.

from ROOs will resist reductions in external trade barriers and efforts to make rules less restrictive.³²⁶

Implications for African RTAs

If the goal of trade liberalization is increase efficient production and therefore to lower costs, African RTAs seem to have strayed far from this goal. Reducing costs on each unit of trade created by entering into the next RTA is not the motivation for African countries belonging to more than one RTA. Instead, multiple memberships in RTAs have been driven by historical circumstances, political and ideological considerations as well as strategic considerations such as access to riparian waterways. In this sense, trade diversion may very well have increased the magnitude of costs of production further exacerbating the problems of trade liberalization within Africa.

Indeed African RTAs are not regarded by their members as exclusively trade regimes.³²⁷ Rather, they serve multiple goals including as frameworks for coordination of development projects as alluded to more fully in part one of this paper. Further, to the extent to which African RTAs are regarded as trade regimes, African countries have most been concerned with balancing gains and losses and ensuring the poorest members are compensated for any losses they suffer as a result of liberalization commitments as we saw at length in our discussion on variable geometry in Part Two.

There are still large external tariffs remain in place in a variety of African countries while other countries have lower tariffs on the same product. This results in product diversion between countries and effectively reduces the effectiveness of RTAs as liberalizing trade regimes in Africa.³²⁸ Much of the current available data supports the notion that RTAs are either ineffective at stimulating inter-regional trade or are at best, non-factors. If RTAs are working optimally in promoting liberalizing trade, more regional trade should

³²⁶ *Id.* at 6.

³²⁷ Notably, Pravin Krishna and Jagdish Bhagwati, *Necessarily Welfare Enhancing Customs Unions With Industrialization Constraints*, 9(4) *Japan World Econ.* 441 (1997) have argued that it is possible to pursue non-economic benefits within customs unions and for the members to come out better off.

³²⁸ Yongzheng Yang, & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* IMF, Working Paper No. WP/05/36, at 13 (2005).

be occurring and external trade increasing due to specialization. However, between 2004 and 2006, many African countries did not get involved with a great amount of inter-regional trade.³²⁹ In this period, three countries, Swaziland, Togo and Zimbabwe, exported more than half of all exports to countries inside of their regional grouping - SADC.³³⁰ Only five countries exported more than half of their exports to Africa generally including Djibouti and Mali in addition to the countries listed above.³³¹ Many countries contributed 10 percent or less of total exports to African and even less to their regional trade group.

Based on this data, ECCAS has three of the ten bottom countries for inter-regional trade while COMESA had two.³³² Out of all of the RTAs, ECCAS had the lowest volume of intra regional trade with only \$320 million of exports traded between the countries.³³³

In COMESA, Kenya leads with a third of all exports with the main export link being Kenya to Uganda. While many of these don't contribute in a large way to regional trade, many have an obvious link to external markets. Gambia, for instance, contributes 23 percent of its exports to intra-regional trade among ECOWAS countries. While this is higher than many African countries, 71 percent of Gambian exports go to developed European countries.³³⁴ The same trend holds for Botswana and Burundi. Both contribute around 13 percent of exports to inter-regional trade but contribute 83% and 65% percent of exports to Europe respectively. This data again supports the idea that transport costs are not the only factor, if even a large factor in inter-regional trade success. A better example might be Chad, a land locked, unstable country that contributes only .01 percent of exports to the ECCAS but 99.8 percent of exports to Europe, the U.S. and Asia. If transport costs are the large barrier they are assumed to be, then Chad would probably be doing a much larger amount of interregional trade due to trade diversion created by increased costs.

³²⁹ Norbert Lebale, Janvier Nkurunziza, Shigehisa Kasahara & Martin Halle, *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development*, United Nations Conference on Trade and Development 34 (2009).

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 35

³³⁴ *Id.* at 34

More recent data suggests the impact of the global recession is affecting African exports to the U.S. Total African exports for the U.S. for the year to date period from 2008 to 2009 are down anywhere from 4 percent to 99 percent with some countries although some countries have increased their share of trade with the United States.³³⁵ Chad's amount dropped 59 percent while South Africa dropped 52 percent. The question here becomes if this is a permanent drop or just a demand generated price shock that will resolve itself in the short and medium term.

Conclusions

This paper has demonstrated that African regional trade agreements are flexible legal regimes. African regional trade agreements are not designed to commit their members to scrupulous and rigorous adherence, rather they have been designed as flexible regimes of cooperation. These regimes provide a forum for cooperation on a whole range of objectives including trade liberalization. They nestle or nest within these regimes an entire range of other objectives including those relating to security and the sharing of common river ways.

In so far as trade liberalization is concerned, African RTAs have modified the neo-classical/comparative advantage classical free trade model in two significant ways. First, African RTAs have embraced the principle of variable geometry according to which time tabled liberalization commitments are undertaken at different speeds depending on the economic ability and interest of the members. Second, these regimes have made distributional equity amongst themselves a central feature. This means they have designed compensatory mechanisms to ensure losses arising from liberalization commitments are given to the losers. By foregrounding variable geometry and

³³⁵ AGOA, *Resource on the African Growth and Opportunities Act*, available at: http://www.agoa.info/index.php?view=trade_stats&story=agoa_trade (last visited Aug. 6, 2009).

distributional equity concerns, African RTAs have correspondingly distanced non-discriminatory free trade between themselves.

In addition, the multiplicity of memberships in African RTAs which further confirms their nature as flexible regimes, illustrates how they are a classic case of the spaghetti bowl. Thus while flexibility has enmeshed well with the preferences of African governments not to build strong supranational bureaucracies, this has undermined the achievement of more thoroughgoing intraregional trade. Since African governments understand these RTAs as flexible regimes, they regard them less from the efficiency gains that non-discriminatory free trade may offer, but rather from the short term benefits that these regimes offer particularly as forums for integrated development of common resources such as river basins and in terms of any gains arising from functionally specific objectives that may be nestled within these regimes that do not have to await the long term horizon non-discriminatory free trade is likely to offer.