NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW

Volume 35 | Number 3 Article 3

Spring 2010

# African Regional Trade Agreements as Flexible Legal Regimes

James Thuo Gathii

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
James T. Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. 571 (2009).
Available at: https://scholarship.law.unc.edu/ncilj/vol35/iss3/3

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

# African Regional Trade Agreements as Flexible Legal Regimes

Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol35/iss3/3

# African Regional Trade Agreements as Flexible Legal Regimes

*James Thuo Gathii†*

I. Introduction ..... 572
II. Flexibility as Enmeshment in the "African" Context ..... 579
A. Adaptations of the Vinerian Model ..... 579
B. Flexibility as Enmeshment in the African Context ..... 587
C. African RTAs as Forums of Integrated Development and Functionally Specific Projects ..... 592
D. Multiplicity of Objectives: The Merits and De-Merits of Nestling Non-Trade Objectives in African RTAs ..... 597
E. African RTAs as Bulwarks of Self-Reliance and Economic Independence ..... 600
III. Variable Geometry: A Defining Aspect of African RTAs ..... 608
A. Reasons for the Adoption of Variable Geometry ..... 610
B. Variable Geometry as a Solution of Adjusting the Costs and Benefits of Integration ..... 615
C. The East African Court of Justice's Variable Geometry Advisory Opinion ..... 625
D. The Arguments of the Partner States and the East African Law Society as Amici ..... 628
E. The Decision of the Court ..... 633
F. Evaluating the Effectiveness of Variable Geometry ..... 640
IV. Multiple Memberships in RTAs ..... 642
A. Why Countries Have Multiple Memberships in RTAs ..... 648
B. Multiple Memberships Reflect Africa's Diversity ..... 653
C. Criticisms of Multiple Memberships ..... 656
D. Spaghetti Bowl: Are RTAs Building or Stumbling Blocks? ..... 656
E. High Transaction and Administrative Costs ..... 660
F. Implications for African RTAs ..... 664
V. Conclusions ..... 666

## I. Introduction

Trade integration in Africa is often viewed 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, 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 to which the states transferred certain types of authority.

Seen in this light, African Regional Trade Agreements (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 domestic politics" that treaty regimes are argued to remedy.[1] In addition, the treaty commitments in African RTAs do not appear to have raised "the political costs of noncompliance" such as reputational losses.[2] In short, the existence of regional trade rules and institutions has not done much to change the behavior of African countries.[3]

The foregoing views are caricatures that are not based on the

---

†Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Law, Albany Law School. Thanks to my research assistants Elizabeth Trachy, Ryan Manley, Paul Timpone and Joseph Rogers for their help. This article is part of a book-length project titled AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES (Cambridge University Press forthcoming 2011).

[1] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 424 (2000). This is a view strongly associated with institutionalists.

[2] Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 508 (1991) (acknowledging that loss of reputation does promote compliance but does not guarantee it).

[3] *See* Stephen Krasner, *Structural Causes and Regime Consequences; Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 5-10 (1983); *see also* Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 394 (2000) (defining effectiveness in terms of the degree to which treaty rules produce "observable, desired changes in behavior.").

actual treaty commitments and experiences of African RTAs.[4] This article aims to develop a more accurate account of African RTAs than do existing analyses. This alternative view is based on the types of 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, adopting steps for meeting time tabled and other commitments. 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 to serve as forums for the integrated development of common resources, such as river basins that cut across national boundaries. Fifth, 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. Sixth, African RTAs are characterized by multiple and overlapping memberships, exemplifying a classic case of the "spaghetti bowl."[5] Multiple RTA membership illustrates the flexibility of open-door membership that African RTAs offer.

Understood as flexible regimes, African RTAs therefore contrast sharply with the views of Jorge Dominguez in the Latin

---

[4] *See* Andre Philip, *Preface* to FRIEDRICH KAHNERT ET AL., ECONOMIC INTEGRATION AMONG DEVELOPING COUNTRIES 9 (1969). Four decades ago, it was argued that regional integration in developing countries could not be expected to "produce spectacular results in the short or even medium term," and that these efforts would subsequently experience "delays and frequent breakdowns [which] will soon lead to disappointment and discouragement." *Id.*

[5] *See* Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Agreements*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2-3 (Jagdish Bhagwati & Anne O. Krueger eds.,1995). A "spaghetti bowl" is a metaphor used to describe a system in which crisscrossing strands of bilateral trade agreements create a tangled mess of restrictions and regulations, ultimately disrupting rather than promoting free trade. *Id.*

American context. Dominguez has argued trade integration agreements have "lax implementation" as a "rule" governing international relations in the Americas.[6] According to Dominguez, lax implementation is "pervasive and long-lasting across issue-areas and time periods, unpunished by co-signatories and generally accepted even when its existence hampered the procedures or organizations that states sought to create."[7]

Viewing African RTAs as flexible regimes has the advantage of allowing these RTAs to 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 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."[8] Indeed,

---

6 Jorge Dominguez, *International Cooperation in Latin America: The Design of Regional Institutions by Slow Accretion*, *in* CRAFTING COOPERATION: REGIONAL INTERDEPENDENCE IN COMPARATIVE PERSPECTIVE 83, 94-95 (Amitav Acharya & Alastair Johnson eds., 2007).

7 *Id.* at 95.

8 Tiyanjana Maluwa, *The Move From Institutions? Examining the Phenomenon in Africa*, 100 AM. SOC'Y OF INT'L L. PROC. 294, 294 (2006). 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. *Id.* at 295. In his view, the design of NEPAD was as a framework of development cooperation and interaction outside the African Union. *Id.* at 295. Tiyanjana argued that NEPAD reflected a shift "toward action and results rather than legislation and rule making." *Id.* at 297. In his view, African governments are more likely to accede to objective, voluntary and peer evaluation measures than "punitive and overly prescriptive measures." *Id.* at 298. Another example that Maluwa discusses is the African Peer Review Mechanism, a regional effort to have African countries review each other's governance performance. *Id.* at 296-97. 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. *See* AFRICAN PEER REVIEW MECHANISM, KENYA PROGRESS REPORT ON THE IMPLEMENTATION OF THE AFRICAN PEER REVIEW MECHANISM (APRM) NATIONAL PROGRAMME OF ACTION, *available at* http://www.nepadkenya.org/Documents/progress_report_jan06.pdf (detailing the progress Kenya has made in implementing changes since its peer review in 2006); AFRICAN PEER REVIEW MECHANISM, SOUTH AFRICAN COUNTRY REVIEW REPORT NO. 5 (2007), *available at* http://www.aprm.org.za/docs/ SACountryReviewReport5.pdf (detailing South Africa's progress after implementing the mechanism).

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 based on how well member states rigorously conform their behavior to the formally binding trade liberalization commitments found within treaties and similar agreements.[9] While there is clearly merit in assessing these rules and institution-building efforts in light of the goals to which these states have committed themselves, such an approach misses the following crucial insights.

The pessimist approach is based on the false belief, similar to the first generation of African RTAs, that "integration could be legislated from above, *ex nihilo*," without reference to what was in fact possible on the ground.[10] 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 by 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.[11] The Mano River Union was revived again in 2004.[12] The collapse of the East African Community

---

9 *See, e.g.*, Gino J. Naldi and Konstantinos D. Magliveras, *The African Economic Community: Emancipation for African States or Yet Another Glorious Failure*, 24 N.C. J. INT'L L. & COM. REG. 601, 603 (1999) (concluding that "the African Economic Community will not succeed without sweeping political, economic and legal reforms"). *See also* Colin McCarthy, *Regional Integration in SubSaharan Africa: Past, Present and Future, in* 4 REGIONAL INTEGRATION AND TRADE LIBERALIZATION IN SUBSAHARAN AFRICA 230 (Oyejide et. al eds., 1999) (arguing that African countries have adopted over-ambitious regional integration schemes and that this has not been a good policy); *infra* notes 13-15 and accompanying text for discussion of specific failings.

10 John Ravenhill, *The Future of Regionalism in Africa, in* THE FUTURE OF REGIONALISM IN AFRICA 205, 210 (Ralph I. Onwuka & Amadu Sesay eds., Macmillan Education 1985).

11 *See* FRIEDRICH KAHNERT ET AL., ECONOMIC INTEGRATION AMONG DEVELOPING COUNTRIES 67 (1969).

12 *See* U.S. DEP'T OF STATE, BUREAU OF PUBLIC AFF., BACKGROUND NOTES: SIERRA LEONE (06/09), http://www.state.gov./outofdate/bgn/s/ 125195.htm. (last visited Apr. 6, 2010). In 2004, the domestic turmoil began to settle and the first local government elections in 32 years were held in 311 wards nationwide. Sierra Leone along with Guinea

showed the importance of alternative models of cooperation around discrete projects where gains and benefits could not only be realizable in the short term, and 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 the desire to unify 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."[13] By the late 1970s, regional trade integration in Africa, Asia, and the Caribbean was declared to have been in "various degrees of serious crisis, in states of stagnation or in processes of disassociation."[14]

In light of such a legacy of failure, economic and political cooperation could therefore hardly be remedied by a regionalism based exclusively on a neo-classical/comparative advantage model and be expected to succeed. Thus in the second generation of RTAs that followed the collapse of the first, the role of treaty commitments became that of providing a framework for joint ventures or initiatives in areas including trade, investment, and capital, while also extending further into transport, security, water, electricity supply, and labor movement, as well as agreements for the management of common resources such as river basins.[15] Not only was the range of objectives increased, but flexibility was built into these RTAs by allowing functionally specific objectives and

---

and Liberia formed the Mano River Union (Cote d'Ivoire later joined in May 2008). *Id.*

13 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 1, 8-9 (1969); *see also* United Nations Economic Commission on Africa, *Background Paper on the Establishment of an African Common Market*, No. E/CN.14/STC/20 (Oct. 13, 1963); United Nations Economic Commission for Africa, *European Integration and African Trade*, U.N. Publ. No. E/CN.14/STC/4 (Aug. 23, 1964) (displaying that the vision of African economic integration was a popular theme in the early part of the 1960s).

14 Constantine V. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 WORLD DEV. 719 (1978).

15 *See* Yongzheng Yang & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* 5 (IMF, Working Paper 05/36, 2005).

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 requires rigorous formal compliance with liberalization commitments within specific time frames. This does not of course preclude such treaty commitments having solemnly binding obligations.[16] Indeed, many if not all African RTAs have exactly those kind of commitments.[17] In short, flexibility is not necessarily incompatible with assuming legally binding commitments. Often these obligations are assumed on the understanding that compliance will not be stringently enforced because the commitments are balanced against a variety of safety valves, such as the principles of variable geometry and the equitable sharing of the benefits of regionalization.

There are several other examples of flexibility in African RTAs. As noted above, these RTAs adopt flexibility by incorporating rules that provide different obligations between members, as well as differences in timelines to comply with commitments that are based on the varying economic capabilities of their members. For example, in the Treaty for the Establishment of the East African Community, the principle of variable geometry allows the commitments in the treaty to be undertaken at different speeds.[18] The principle of asymmetry allows variances in measures of economic integration, building flexibility right into the framework of RTAs. In the South African Customs Union (SACU), flexibility is achieved in part by allowing protection of new industries from competing goods from SACU and non-SACU countries for a period of no more than eight years

---

16 *See generally* ABRAM CHAYES & ANTONIA-HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (Harvard Univ. Press 1995).

17 *See, e.g.*, Protocol on the Establishment of the East African Community Common Market, art. 47(1), Nov. 20, 2009, *available at* http://eabc.info/node/410 ("The Partner States undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol."). Article 47(2) goes on to provide that the "Council shall issue directives for purposes of implementing this Article," *Id.* at art. 47(2).

18 *See infra* Part III.

for the poorest SACU states.[19] In addition, as noted below, Botswana, Lesotho, and Swaziland are entitled to tariff assistance for industries of major importance to their economies.[20] 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.[21] The question of flexibility is addressed in more detail in Part II.

RTAs also provide an umbrella within which bilateral and even inter-regional links are formed among a group of countries along functional lines, and whose benefits are often more immediately available than through trade liberalization. This in turn has spurred "sectoral planning and coordination"[22] which is

---

[19] Southern African Customs Union Agmt. Art. 26, Oct. 11, 2002 ("The Government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area (2). Infant industry means an industry which has been established in the area of a Member State for not more than eight (8) years. (3). Protection afforded to an infant industry in terms of paragraph 1 shall be for a period of eight (8) years unless otherwise determined by the Council. (4). The Council may impose such further terms and conditions as it may deem appropriate.").

[20] *See infra* Part IV.A.

[21] *See* Southern African Customs Union Agreement art. 26, Oct. 11, 2002, *available at* http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/main.html [hereinafter SACU Agreement]. Article 26 of the SACU Agreement makes provision for protection of infant industries for Botswana, Lesotho, Namibia and Swaziland. *Id.* Article 34 of the SACU Agreement provides for the revenue sharing formula which determines the respective shares of the members of the total customs, excise and additional duties. *Id.* art.34. *See also* Jan Isaken, *Prospects for SACU After Apartheid, in* SOUTHERN AFRICA AFTER APARTHEID: REGIONAL INTEGRATION AND EXTERNAL RESOURCES 182 (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. *Id.* art. 2 (stating that one of SACU's objectives is to "facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States").

[22] Emang M. Maphanyane, *SADCC-Future Challenges, in* SOUTHERN AFRICA AFTER APARTHEID: REGIONAL INTEGRATION AND EXTERNAL RESOURCES 174, 175 (Bertil Oden ed., 1993) (arguing that SADCC initially decided to undertake "large programmes in agricultures, transport, communications and the energy sector."). Maphanyane further

now a major feature of African RTAs.

This paper proceeds as follows. Part I discusses 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 how African RTAs act as forums for integrated development and functionally specific projects. These projects are often nestled within the RTAs, and they include cooperation on issues relating to security and common river basin management. Part I ends with another feature of RTAs' enmeshment in the African context—the view that African regionalism is a bulwark for economic self- independence. Part II discusses how African RTAs have adopted variable geometry as a mechanism for ensuring equality in the sharing of the benefits of trade liberalization and how the prevalence of this concern has back-grounded the commitment to non-discriminatory trade liberalization. In this part of this article, I discuss at length the highly significant April 2009 East African Court of Justice (EACJ) advisory opinion on variable geometry and its implications for African RTAs. Part III focuses on another important feature of African RTAs as flexible regimes—multiple memberships in RTAs. Part III begins by reviewing the phenomenon of multiple membership and the advantages it offers African countries with such multiple memberships. It then proceeds to examine the resulting "spaghetti bowl" effect of these multiple RTAs and assesses the transaction costs associated with it.

## II. Flexibility as Enmeshment in the "African" Context

### *A. 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.[23] Under the European model, economic integration starts with a free trade area, then progresses to a

notes that "the basis of cooperation was the discrete project. This had the effect of making the benefits of cooperation immediate and tangible, and also of building confidence among member states." *Id.*

23 *See* C.A. Cooper & B.F. Massell, *Toward a General Theory of Customs Unions for Developing Countries*, 73 J. OF POL. ECON. 461, 475 (1965).

customs union, then to a common market, and finally to an economic union, with a political union as the last stage.[24] This classic integration model associated with Jacob Viner[25] came under serious scrutiny as a model for Third World integration many decades ago.[26] The Vinerian model was developed 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.[27] 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.[28] The resulting lack of complementary trade in effect undercuts gains in trade. Under such conditions, firms in African RTAs end up trading with high-cost producers within the region, rather than with low-cost producers from outside the region.[29] The small size of most of these economies also means that significant

---

24 *See generally* BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION (Greenwood Press 1961) (summarizing the basic elements of the integration model).

25 *See* JACOB VINER, THE CUSTOMS UNION ISSUE (Carnegie Endowment for International Peace 1950); *see also* 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).

26 *See, e.g.*, Cooper & Massell, *supra* note 23, at 461; Robert Loring Allen, *Integration in Less Developed Areas*, 14 KYKLOS 315 (1961); Gerald M. Meier, *Effects of a Customs Union on Economic Development*, SOC. & ECON. STUD., Mar. 1960, at 29; R.F. Mikesell, *The Movement Towards Regional Trading Groups in Latin America*, *in* LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS, THE TWENTIETH CENTURY FUND (A.O. Hirschman ed., 1961); ROBSON, *infra* note 74; R.F. Mikesell, *The Theory of Common Markets as Applied to Regional Arrangements Among Developing Countries*, *in* INTERNATIONAL TRADE THEORY IN A DEVELOPING WORLD (Roy Harrod & Douglas Hague eds., 1963) (all criticizing the Jacob Viner integration model).

27 *See infra* Part IV.E for an extended discussion.

28 *See* KAHNERT ET AL., *supra* note 11, at 23. (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 *id.* at 31-35.

29 One consequence of trade liberalization under regional integration schemes in developing countries is a rise in non-tariff barriers. *See* Vaitsos, *supra* note 14, at 746.

economies of scale are not realizable without enlarging the market through regionalism. This is exacerbated by the fact that economic integration in Africa, even while otherwise enlarging market sizes, does not lead to globally significant increases in productivity, productive area, or purchasing power of the enlarged market relative to productive areas and markets in other regions.[30] 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.[31]

Some economists therefore argue that African economies need structural changes because they do not exhibit the conditions under which integration can confer benefits on them.[32] This is in part because developing countries tend to trade with developed countries more than they do with each other.[33] In addition, their national outputs are dominated by trade with developed economies, mainly in exporting unprocessed raw materials.[34] The argument here is that African economies need more than the increase in market size created by a common market because the increase in market size may be marginal relative to other

---

30 Arthur Hazlewood, *Problems of Integration Among African States*, *in* AFRICAN INTEGRATION AND DISINTEGRATION 1, 6 (Arthur Hazlewood ed., 1967).

31 *See infra* Part II (discussing reasons for adoption of variable geometry); *see also* Allen, *supra* note 26, at 317-34 (discussing the conditions under which the Vinerian customs union model are feasible).

32 Maurice Bye, *Structural Changes Required by Growth*, *in* TRADE THEORY IN A DEVELOPING WORLD 161 (Roy Harrod and Douglas Hague eds., 1963). *See also* Vaitsos, *supra* note 14, at 751 (arguing that 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.).

33 Yongzheng Yang & Sanjeev Gupta, *Regional Trade Arrangements in Africa: Past Performance and the Way Forward* 18 (IMF, Working Paper No. WP/05/36, 2005) ("For many RTAs, intra-arrangement trade as share of their total external trade remains below intra-African trade as share of total African external trade.").

34 ECONOMIC COMMISSION FOR AFRICA, ASSESSING REGIONAL INTEGRATION IN AFRICA 19 (2004) (noting that primary products accounted for sixty-four percent of African exports in 1995).

limitations for firms such as high production costs and very low levels of income that make the effective size of regional markets small.[35]

Thus, as noted 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.[36] 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.[37] 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.[38]

Import substitution policies were another initial response to this classical customs theory, particularly in the 1960s and 1970s.[39] These policies have increasingly been abandoned through multilateral treaty commitments, particularly since the 1990s.[40] The Vinerian customs union theory was also adapted through a variety of devices to avert unequal integration gains between

---

35 *See* Hazlewood, *supra* note 30, at 9 (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").

36 *See infra* Part II.E.

37 *See* REGINALD H. GREEN & ANN SEIDMAN, UNITY OR POVERTY: THE ECONOMICS OF PAN-AFRICANISM 265 (Penguin 1968); *see also* FUAT ANDIC, SUPHAN ANDIC AND DOUGLAS DOSSER, A THEORY OF ECONOMIC INTEGRATION FOR DEVELOPING COUNTRIES, ILLUSTRATED BY CARIBBEAN COUNTRIES (Allen & Unwin 1971). *See generally* STAFFAN LINDER, TRADE AND TRADE POLICY FOR DEVELOPMENT (Praeger Series on International Economics and Development 1967) (suggesting that trade creation would hurt poor economies because it would disrupt the desired country distribution rules and suggesting ways of overcoming such losses through establishment of common industries in the "least-cost" partner).

38 *See infra* section II.C and accompanying notes (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).

39 *See* Economic Commission for Latin America, *The Latin American Common Market*, UN Publication No. 59.II.G.4 (New York 1959).

40 *See* Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past*, 19 U. PA. J. INT'L ECON. L. 513, 516 (discussing the replacement of import substitution policies with trade liberalization via multilateral agreements).

integrating economies, a theme addressed more fully below.[41] Today, while developing countries have largely abandoned import substitution policies, many have yet to fully liberalize their economies under the GATT/WTO obligations they have assumed.[42]

Currently, 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.[43] In fact, Africa has had its own forms of interregional interactions that predate the advent of colonial rule.[44] While these interactions need not be overstated, we also must not lose sight of the manner in which colonial rule

---

41 *See* KAHNERT ET AL., *supra* note 11, at 16 (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").

42 *See* WORLD TRADE ORG., UNDERSTANDING THE WTO 97 (2007), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Apr. 6, 2010). The WTO is also known as the World Trade Organization, and is the only global international organization dealing with the rules of trade between nations. *Id.* at 9; *see also* WTO, *GATT and Goods Council*, *available at* http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (last visited April 6, 2010). The General Agreement on Tariffs and Trade (GATT) covers international trade in goods. The workings of the GATT agreement are the responsibility of the Council for Trade in Goods (Goods Council) which is made up of representatives from all WTO member countries. *Id.*

43 Daniel Bach, *Foreword*, *in* REGIONALISATION IN AFRICA: INTEGRATION AND DISINTEGRATION xvii, xvii-xviii (1999). *See generally* KARL DEUTSCH, THE ANALYSIS OF INTERNATIONAL RELATIONS (Prentice Hall 1988); Earnest Haas, *The Study of Regional Integration*, *in* REGIONAL INTEGRATION: THEORY AND RESEARCH (Leon Lindberg & Stuart Scheingold eds., 1971); Bjorn Hettne, *Globalization, Regionalism and the New Third World*, *in* REDEFINING THE THIRD WORLD (Nana Poku & Llyod Pettiford eds., 1998) (all providing alternative conceptualizations of regional integration that go beyond the linear paradigm of establishing trade integration through free markets).

44 ECONOMIC COMMISSION FOR AFRICA, ASSESSING REGIONAL INTEGRATION IN AFRICA 27 (2004) ([Regional integrations have] "been part of Africa's strategy for economic transformation . . . in some cases for almost a century. The first experiment with integration, the Southern African Customs Union, began in 1910.").

created economies that favored the interests of the various European metropoles at the expense of the colonies,[45] and the manner in which independence subsequently restructured these interactions around the ideologies of sovereignty and nationalism.[46]

RTAs today are caught at 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 noted below, perhaps because of this diversity, it is not surprising that objectives such as regional security and the welfare of the citizens are salient 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 address insecurity as an objective would be atypical.[47]

---

[45] *See* GREEN & SEIDMAN, *supra* note 37, at 127. ("[T]he 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 the best interests of metropolitan capital, in short the operation of a colony as if it were a subsidiary company.")

[46] 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, e.g.*, Donald Rothchild & Robert L. Curry, Jr., SCARCITY, CHOICE AND PUBLIC POLICY IN MIDDLE AFRICA 228 (Univ. 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"); Makau Wa Mutua, *Why Redraw the Map of Africa: A Legal and Moral Inquiry*, 16 MICH. J. INT'L L. 113 (1995) (arguing that these artificial inherited African States lack moral and legal legitimacy). *See generally* PARTHA CHARTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE (Univ. of Minnesota Press 1993) (analyzing the relationship between nationalism and colonialism); BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (Verso 1991) (same).

[47] *See, e.g.*, East African Community, Regional Peace and Security,

Africa is a diverse continent, composed of countries with dramatic differences in their legal regimes, religious and cultural values and norms, economic endowments, political regimes, and historical heritage. At one level, this contrasts with the European Union, which was "built on commonalities of economic interest, politics and culture"[48] 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 will be successful. Such a broad range of objectives would overcome what Arthur Hazlewood argued was "a conclusion of despair that mutually beneficial economic co-operation requires close similarity of social and political outlook."[49] The first generation of African RTAs were narrowly focused on trade integration to the exclusion of other objectives and in so doing underestimated the importance of cooperating on a broad range of objectives.[50]

Thus, today it would be a mistake to simply regard African RTAs merely as "cognitive representations and formal arrangements."[51] 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.[52] It is apposite to note here that even in the European Union, it would be inaccurate to presuppose that its

---

http://security.eac.int ("Peace and Security has been acknowledged as critical to creation of the right environment upon which regional integration in all aspects can be fostered.") (last visited Feb. 11, 2010). Recently, the East African Community Council of Ministers argued to be an incomplete integration scheme without cooperation on defense and security matters. *Id.*

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

49 Arthur Hazlewood, *Economic Instrumentalities of Statecraft and the End of the EAC*, *in* INTEGRATION AND DISINTEGRATION IN EAST AFRICA 123, 137 (Christian Potholm & Richard Fredland eds., Univ. Press of America 1980).

50 *See* John Ravenhill, *The Theory and Practice of Regional Integration in East Africa*, *in* INTEGRATION AND DISINTEGRATION IN EAST AFRICA 37, 51 (Christian Potholm & Richard Fredland eds., Univ. Press of America 1980).

51 Bach, *supra* note 43.

52 *See* JAMES N. ROSENAU & ERNST-OTTO CZEMPIEL, GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (Cambridge Univ. Press 1992) (arguing that as in other areas of global governance, non-state actors have become integral in the creation of regionalism in Africa). *See also* JAMES THUO GATHII, WAR, COMMERCE AND INTERNATIONAL LAW 1 (2010).

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*."[53] 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."[54]

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, is equally as important as legal and institutional perspectives that focus primarily on 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."[55] That is why this article adopts a multifaceted approach which follows both the legal and institutional efforts being made to build regionalization. It also considers the interactions among national and regional trade officials and non-state actors including business groups, institutions, and professionals,[56] examining the extent to which their increased interactions have influenced the realization of regional commitments in trade and related areas.[57] This article

---

53 J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991) (emphasis added).

54 Ravenhill, *supra* note 10, at 217 (quoting Sir Sereste Kharma, the first president of Botswana).

55 JOSEPH NYE, PAN-AFRICANISM AND EAST AFRICAN INTEGRATION 250 (Harvard Univ. Press 1965).

56 *See* International Plant Protection Convention, https://www.ippc.int/index.php?id=1110589&L=0 (follow "Core Activities" hyperlink; then follow "Commission (CPM)" hyperlink). 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. *Id.*

57 *See* 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); Harold Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479,

therefore explores not only the treaty commitments made in the RTAs, but also other types of instruments containing trade and non-trade agreements between and among African states such as ministerial declarations and memorandums of understanding.[58] 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 on a Vinerian customs union model.[59]

### *B. Flexibility as Enmeshment in the African Context*

Flexibility does not make African RTAs any less significant than those agreements 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.[60] In one context, high legalization is defined by the extent to which obligation, precision, and delegation of a

---

1502 (2003) (explaining what Koh terms as vertical internalization or absorption of rules of international law into domestic legal systems). Koh explains that

> the key to understanding whether nations will obey international law . . . 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 fora 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.

Koh, 55 STAN. C. REV. 1479, 1502 (2003).

58 *See* Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1879-84 (2002). Though sometimes regarded as informal relative to the more solemn formal treaty commitments, these types of decisions are now regarded as sources of obligations between states. *Id.*

59 *See* Ravenhill, *supra* note 10, at 221-22.

60 *See* Abbott & Snidal, *supra* note 1, at 434 (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).

formal instrument may serve an important purpose.[61] 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.[62] Yet, where parties to formal and informal agreements are continuously reiterating their commitments and making new ones, this 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.[63] 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 African Economic Community provides for possible sanction against a member state that "persistently fails to honour its general undertakings under this Treaty or fails to abide

---

61 *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000). ("[O]bligation 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 there under 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.").

62 *See* Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT'L L. & POL. 303, 304 (2005); *see also* Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance With International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119, 124 (1995). The 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." *Id.*

63 *See* Lawrence R. Helfer, Karen J. Alter and M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing An Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1 (2009). The efficacy of the intellectual property regime of the Andean Community has been attributed in a large part to a cadre of well-trained legal professionals. *Id.*

by the decisions or regulations of the Community."[64] Article 29(2) of the Treaty for the Establishment of a Common Market for Eastern and Southern Africa gives primacy of the decisions of the Common Market for Eastern and Southern Africa (COMESA) Court of Justice over those of the member countries on questions relating to the interpretation of the treaty.[65] 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.[66] Notwithstanding these examples, rather than being highly legalized regimes, African RTAs are flexible arrangements. A Southern African Development Coordination Conference (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 [and is] magnified into a general crisis of regionalism.[67]

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 on building flexible frameworks of development, coordination, and cooperation that give countries their choice of activities that interest them most.[68] In this sense,

---

64 *See* Treaty for the Establishment of the African Economic Community art. 5(3), June 3, 1991, 30 I.L.M. 1241 (1991). 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." *Id.*

65 Treaty Establishing the Common Market for Eastern and Southern Africa, art. 29(2), Nov. 5, 1993, *available at* http://about.comesa.int/attachments/149_090505_COMESA_Treaty.pdf.

66 *See* Okunda v. Republic, (1970) E. Afr. L. Rep. 457 (Kenya), *affirmed by* E. Afr. L. Rep. 460 (asserting supremacy of Kenyan law over a competing East African Community statute).

67 Ravenhill, *supra* note 10, at 212 (citing Southern African Development Coordination Conference, *First Steps Toward Economic Integration: Interests, Instrumentalities* 36 (Arusha: Mimeo 1979)).

68 *Id.* at 212. ("[A] rigid framework, as was the case with the Treaty for East

African RTAs often adopt "functionally specific"[69] 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."[70] Such flexibility is also important given the

---

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.").

[69] *See, e.g.*, Treaty Establishing of the Common Market for Eastern and Southern Africa, *supra* note 65, art. 4 (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 economic and social development (Article (4(5)(a)-(i))); Treaty for the Establishment of the East African Community, ch. 11- 27, Nov. 30, 1999, *available at* http://www.eac.int/ (click on "About EAC" tab and follow "Treaty Establishing the EAC" hyperlink) (providing for broad range of undertakings, including Chapter 11 (Co-operation in Trade Liberalization and Development), Chapter 12 (Co-operation in Investment and Industrial Development), Chapter 13 (Co-operation in Standardization on Quality Assurance, Metrology and Testing), Chapter 14 (Monetary and Financial Co-operation), Chapter 15 (Co-operation in Infrastructure and Services), Chapter 16 (Co-operation 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 (Co-operation in Environment and Natural Resources Management), Chapter 20 (Co-operation 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 (Co-operation 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 (Co-operation in Other Fields)); *see also* John Ravenhill, *supra* note 10, at 212.

[70] Ravenhill, *supra* note 10, 214; *see also* Maphanyane, *supra* note 22, at 176 ("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.")

diversity not only of the economies of individual members of the RTAs, but differences based on their culture, geography, ethnicity, religion, and political allegiances as well. This multiplicity of identities and loyalties could present insurmountable barriers to integration if African RTAs were constructed as unitary and inflexible frameworks. Such rigidity would make cooperation difficult along any axis as steps are taken towards increasing legitimacy for broader forms of cooperation within the heterogeneous nature of African societies. Inflexibility can only 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 bring to the foreground issues of equity and balance in the relations among their members, while commitments to the promotion of free trade as a source of economic growth are relegated to the background.[71] 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 integration,[72] not merely because it is market based, but because it often pits economically richer countries against economically poorer countries.[73] That is why there has

---

71 *See* Carol B. Thompson, *African Initiatives for Development: The Practice of Regional Economic Cooperation in Southern Africa*, 46 J. INT'L AFF. 125, 133 (1992). In its 1992 summit meeting, SADCC adopted a development integration model which

> stresse[d] the need for close political cooperation at an early stage of the integration process, not at the end. Second, it call[ed] 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 [saw] a need for increased trade to be predicated on regional industrial planning, involving regional resource mobilization.

*Id.*

72 *See* Lynn Mytelka, *The Salience of Gains in Third-World Integrative Systems*, 25 WORLD POLITICS 236 (1973).

73 *See* NANA POKU, REGIONALIZATION AND SECURITY IN SOUTHERN AFRICA 15-38 (Palgrave Macmillan 2001). In the South African context for example, South Africa was 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. *Id.* Poku further notes that "SACU is unlikely to provide the framework for greater regionalism for the simple fact reason that

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.[74]

### C. *African RTAs as Forums of Integrated Development and Functionally Specific Projects*

In addition, African RTAs often serve as forums for integrated development of common resources with their secretariats or various arms serving as inter-governmental agencies for such purposes.[75] 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 share the Lake Victoria Basin.[76] There is a long history of integrated development of river basins among African countries, some nestled within economic integration arrangements[77] and others that were developed by

---

the ending of apartheid has not eradicated a general suspicion among countries of southern Africa of South Africa's imperial project." *Id.* at 89.

[74] *See* PETER ROBSON, ECONOMIC INTEGRATION IN AFRICA 285 (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). *See also infra* Part II (addressing the various types of compensatory arrangements devised in African RTAs to close the gap in opportunities between poor and richer members of an RTA).

[75] *See, e.g.*, S.K.B. ASANTE ET AL., 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").

[76] *See* East African Community – Lake Victoria Basin Commission, http://www.lvbcom.org (last visited April 14, 2010). 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." *Id.* at 1. Also nestled 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 generally* Lake Victorian Fisheries Organization: An Institution of East African Communities, http://www.lvfo.org/.

[77] *See* UKA EZENWE, ECOWAS AND THE ECONOMIC INTEGRATION OF WEST AFRICA 114-16 (Palgrave Macmillan 1983). For example, Gambia and Senegal have long sought to cooperate on the exploitation of the Gambia River Basin within UMOA. *Id. See also*

longstanding treaties entered into during the colonial period.[78] Some have called this approach "development integration."[79] Moreover, these integrated development arrangements have sometimes been designed with re-distributional considerations.[80]

In short, African RTAs do not merely center integration around a vision of market-led integration.[81] They are also designed as forums for a variety of initiatives, such as facilitating cooperation around common resources like international rivers and basins among riparian states[82] and cross-border challenges that include trade,[83] security[84] and health.[85] Rather than simply using

---

Peter Robson, *Problems of Integration Between Senegal and Gambia*, *in* AFRICAN INTEGRATION AND DISINTEGRATION 115, 126-28 (Arthur Hazlewood ed., 1967) (noting Gambia's 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.*

78 *See* Fasil Amdetsion, *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) (analyzing the best example of a longstanding treaty entered into during the colonial period, the 1929 Agreement Between Egypt and Anglo-Egyptian Sudan governing the Nile River basin).

79 *See* W. Andrew Axline, *Underdevelopment, Dependence and Integration: The Politics of Regionalism in the Third World*, *in* ECONOMIC INTEGRATION IN THE THIRD WORLD 25 (Pradip Ghosh ed., 1994).

80 *See* Oliver S. Saasa, *Background to Regional Integration in Africa*, *in* JOINING THE FUTURE: ECONOMIC INTEGRATION AND CO-OPERATION IN AFRICA 1, 14 (1991).

81 *See id.* at 21. ("[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 principal variable accounting for such economic benefits.").

82 *See* Kathy L. Powers, Why Do States Pursue Water Cooperation through Regional Trade Agreements? Trade, Environment and Security Linkages in International River Basins (Sept. 1, 2005) (unpublished manuscript, on file with the American Political Science Association).

83 *See* Edward D. Mansfield & Rachel Bronson, *Alliances, Preferential Trading Arrangements, International Trade*, 91 AM. POL. SCI. REV. 94 (1997).

84 *See* Kathy L. Powers, International Institutions, Trade and Conflict: African Regional Trade Agreements From 1950-1992, Ph.D Dissertation, Ohio State University (2001); David Bearce, *Grasping the Commercial Institutional Peace*, 47 INT'L STUD. Q.

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.[86] As Oliver Saasa put it, this approach "is fundamentally dependent upon increased industrial production through specialization, exploitation of economies of scale, external economies, coordinated programming and development of infrastructure."[87] Here, regional cooperation is at the level of production in the arenas of capital and labor, rather than merely in trade.[88] This amounted to industrial planning in many regions complete with licensing legislation designed to "encourage investment in industry serving the regional market."[89]

---

347 (2003).

[85] *See* Vincent Agu, Alexandre N. Correia & Kazem Behbehani, *Strengthening International Health Co-Operation in Africa Through the Regional Economic Communities*, 14 (3-4) AFR. J. OF HEALTH SCI. 104, 105 (2007) (noting in part that "[o]ne 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.").

[86] *See* EZENWE, *supra* note 77, at 45.

[87] Oliver S. Saasa, *Economic Cooperation and Integration Among Developing Countries*, *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.

[88] *See* ARTHUR HAZLEWOOD, ECONOMIC INTEGRATION: THE EAST AFRICAN EXPERIENCE 14 (St. Martin's Press 1975).

[89] *Id.* at 121. Hazlewood also notes 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 121-22. Instead of depending on regulation through a licensing scheme, the treaty

For this reason, regional integration in Africa has been and continues to be based on such planning, "rather than laissez faire forces."[90]

A major impetus to approaching integration with emphasis on cooperation at the level of production, and not simply in trade, is its dual emphasis on distributional equity amongst members,[91] (rather than merely on market efficiency and competition between firms), and on providing a forum for cooperation on agreed projects that have tangible benefits for regional development.[92] This has led advocates of regional integration in Africa to suggest that 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."[93] This explains why the objectives of many African RTAs have a huge number of sector-specific cooperative goals. In turn, such objectives play a significant role in setting the

---

has "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.

90 Ravenhill, *supra* note 10, at 210.

91 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 the 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. MOD. AFR. STUD. 261, 261-63 (1978). The new East African Community carefully balances the goals of trade integration with that of distributional equity and variable geometry (defined as 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), 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* Treaty Establishing the East African Community, *supra* note 69, art. 6(e) and (h).

92 *See* Oliver S. Saasa, *SADCC Industrial Co-Operation and Donor Support*, *in* JOINING THE FUTURE: ECONOMIC INTEGRATION AND CO-OPERATION IN AFRICA 59 (1991).

93 *Id.* at 59. 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* EZENWE, ECOWAS, *supra* note 77, at 33.

stage for trade among cooperating countries, which, after all, is a prerequisite for undertaking regional trade liberalization.[94]

In this sense, integration is regarded as a diplomatic strategy of cooperation on a range of issues including infrastructural, industrial, political and economic concerns,[95] as well as for balancing forces between the RTA members on the one hand and the global economic system on the other.[96] Some have argued that

---

[94] Ravenhill, *supra* note 10, at 210 (arguing that 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."). 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 of functional needs. *See* ERNEST HAAS, THE UNITING OF EUROPE 313 (Stanford Univ. 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 3, 23-24 (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. Theorists who have postulated that absence of such groups was not consistent with achieving regional integration include Haas, *supra* at 14-15 (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 192 (Lindberg et al. eds., 1971) (arguing that the absence or weakness of such groups and political parties deprive regional bureaucrats of necessary allies); and Ravenhill, *supra* note 50, at 48-50 (arguing that low levels of economic development preclude the emergence of such groups).

[95] *See* Saasa, *supra* note 87. Arthur Hazlewood 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." Hazlewood, *supra* note 30, at 4-5.

[96] *See* Timothy M. Shaw, *Towards a Political Economy of Regionalism in Africa*, *in* THE FUTURE OF REGIONALISM IN AFRICA, *supra* note 10, at 14. *See generally* GUNNAR MYRDAL, ECONOMIC THEORY AND UNDERDEVELOPED REGIONS (Harper & Row 1957) (warning that adopting market based integration ideals among members with huge differences in the levels of economic development among countries would result in benefitting more developed member countries at the expense of poorer ones). According to Myrdal, "[t]he 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). Constantine

this approach of integration by projects, rather than through integration of markets, has accentuated underdevelopment rather than solved development problems.[97] This issue of distributional equity and its merits and demerits is addressed at further length in Part II below.

### *D. Multiplicity of Objectives: The Merits and De-Merits of Nestling Non-Trade Objectives in African RTAs*

As we saw above, African integration often forewent development cooperation without wholly abandoning trade integration.[98] 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 around regional challenges, including those involving development, politics, or security. In short, while RTAs are established through treaty frameworks, operationally they are forums for addressing regional challenges and developing political consensus on how to cooperate.[99] There is indeed evidence showing that there are gains in non-trade areas, such as security, arising from economic integration arrangements associated with commercial institutions like regional trade agreements.[100] 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.[101] Paul Collier has

---

Vaitsos 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. Vaitsos, *supra* note 14, at 736. Such an approach serves an alternative to a linear market-led process imported from elsewhere.

97 *See* Vaitsos, *supra* note 14, at 720.

98 *See* Maphanyane, *supra* note 22, at 175 (noting it is often erroneously argued that SADCC "does not have a programme of market integration through trade").

99 For similar arguments in the context of linking non-trade issues like human rights within the WTO, see Alvarez, *supra* note 48, at 15.

100 Bearce, *supra* note 84, at 347.

101 *See* PAUL COLLIER, WARS, GUNS AND VOTES: DEMOCRACY IN DANGEROUS PLACES 191-96 (Harper 2009).

recently shown that although many African countries are small and poor, their military spending is high and often wasteful.[102] Collier suggests that cooperation is the solution to curtailing the arms race in Africa.[103] However, cooperation in the absence of enforcement would only encourage a country's "neighbors to coordinate reduction in their military spending while not doing so itself."[104]

In addition, regional institutions established under the auspices of an integration 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 so that power asymmetries will not be exploited in the future.[105] These institutions bring together their executive and military leaders periodically, thereby providing a forum within which they can interact and hopefully develop some trust amongst themselves in order to achieve peaceful bargaining and resolution of conflicts.[106] Thus, the nesting or nestling of security and development matters within trade integration agreements is a significant but overlooked

---

102 *Id.* at 117.

103 *Id.*

104 *Id.* suggesting designating a "policeman" to oversee military spending in addition to implementing restrictions on arms exports).

105 Bearce, *supra* note 84, at 358.

106 *Id. See also* 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). ("[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.")

*Id.* at 106.

phenomenon since it does not fit in especially well with standard integration models such as the one involving the Economic Community.[107]

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 defence cooperation and initiatives.[108]

Indeed, in the context of the Eastern Community of Western African States (ECOWAS), trade integration was very early recognized as incapable of being pursued while ignoring economic development and regional security issues.[109] After all, trade integration was not possible within a context of insecurity both among and within the member states.[110] Thus, soon after ECOWAS was established, a non-aggression pact was entered into in 1979 which also called on the member states to recognize the current borders.[111] In 1981, the states entered into a mutual defense pact to repulse external aggression or armed internal conflict.[112] Security coordination and cooperation were institutionalized with the establishment of permanent structures of conflict management, prevention, and resolution.[113]

---

107 Bearce, *supra* note 84, at 363.

108 IKE NWACHUKWU, NIGERIA AND THE ECOWAS SINCE 1985: TOWARDS A DYNAMIC REGIONAL INTEGRATION 22 (Ministry of External Affairs, Republic of Nigeria 1991), *as cited in* Bearce, *supra* note 84, at 364.

109 Bearce, *supra* note 84, at 357.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* 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 the cost would be prohibitive and "the achievements of the deliberations do not always have much probative value." *See* Professor O. Akanle, *The Legal and Institutional Framework of the African Economic Community*, *in* AFRICAN ECONOMIC COMMUNITY TREATY: ISSUES PROBLEMS AND PROSPECTS 31 (M.A. Ajomo & Omobolaji Adewale eds., 1993). This view does not take into account the

It is 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.[114] The types of conflicts include those involving control over territory and governments; inclusion and exclusion in governance based on race and identity; inequitable resource distribution; and insecurities created by war and reconciliation in light of vast imbalances in the distribution of military power.[115] 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.[116] In the horn of Africa, the Inter-Governmental Authority on Development (IGAD), one of the African Union's designated regional economic communities, primarily focuses on rebuilding security in the region.[117] In South Africa, insecurity surrounding in-migration of African workers resulted in riots and violence in 2008, indicating, yet again, the potentially conflicting nature of migration across borders.[118] Today, the importance of economic development as a remedy to violence is increasingly being recognized and emphasized.[119]

### *E. 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

---

potential such forums offer for resolution of challenges such as security. *Id.*

114 Ohlson & Stedman, *supra* note 106, at 87.

115 *Id.* at 88.

116 U.N. ECON. COMM. FOR AFR., ASSESSING REGIONAL INTEGRATION IN AFRICA II 17 (2004), *available at* http://www.uneca.org/aria2 (follow "Chapter 1: The Drivers of Regional Integration of Africa's Development" hyperlink).

117 *See* EARLY WARNING AND CONFLICT MANAGEMENT IN THE HORN OF AFRICA (Ciru Mwaura & Susanne Schmeidl eds., 2002).

118 *See* Ohlson & Stedman, *supra* note 106, at 92; *see also* Isaken, *supra* note 21, at 199 (predicting a substantial reduction in the immigration of workers from surrounding countries for South Africa).

119 COLLIER, *supra* note 101; AZAR GAT, WAR IN HUMAN CIVILIZATION 658 (Oxford Univ. Press 2006).

African countries could eliminate dependence on their former colonizers with a view to attaining self-reliance.[120] This is reflected in the seventh preambular paragraph of the Treaty Establishing the African Economic Community.[121] Some of the treaties establishing regional economic communities share a common preambular paragraph.[122] Article 3(b) of the Treaty Establishing the Economic Community of Central African States (ECCAS) makes "solidarity and collective self reliance" a principle to be adhered to by the members.[123] Article 4(1)(a) provides that the integration of African economies is aimed at increasing "economic self-reliance" and to promote "endogenous and self-sustained development."[124] Similarly, Article 4(b) of the ECOWAS Treaty provides "solidarity and collective self-reliance" as a fundamental principle,[125] as does Article 6(b) of the COMESA Treaty.[126] 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."[127]

These provisions demonstrate that regional economic integration in Africa has been justified as a necessary step for realizing self-sustaining economic development.[128] On this view, Africa's external economic dependence and its lopsided

---

120 *See, e.g.*, 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, July 17-20, 1979, *available at* http://www.africa-union.org/root/au/Documents/Decisions/hog/pHoGAssembly1979.pdf.

121 Treaty Establishing the African Economic Community, *supra* note 64, at pream. para. 7.

122 *See* Treaty Establishing the Economic Community of Central African States para. 3, Oct. 19, 1983, 23 I.L.M. 945 (1984).

123 *Id.* art. 3(b).

124 *Id.* art. 4(1)(a).

125 *See* Treaty of ECOWAS art. 4(b), May 28, 1975, *available at* http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en.

126 Treaty for the Establishment of the Common Market for East and Southern Africa, *supra* note 65, art. 6(b).

127 Treaty of the Southern African Development Community (SADC), art. 5(1)(d), Aug. 17, 1992.

128 *See* James Gathii, *Third World Approaches to International Economic Governance*, *in* INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 255 (Richard Falk, Balakrishnan Rajagopal & Jacquelin Stevens eds., 2008).

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.[129]

Economic self determination is a theme strongly associated with the first generation of regional integration efforts in the post-colonial era.[130] For example, Kwame Nkurumah envisioned Africa's economic unity as a necessary precondition for Africa's economic self-determination.[131] Many have since argued that Africa risks being further marginalized if it does not fulfill the dream of early pan-Africanists like Kwame Nkurumah and Julius Nyerere.[132] 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 exercised upon it.[133] Today, Mummar Gaddafi continues to subscribe to this model of immediate African political unity.[134]

---

129 *Id.*

130 *See* KWAME NKURUMAH, AFRICA MUST UNITE 101 (Panaf Books 1963).

131 *Id.* at 163. ("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* Organization for African Unity [OAU], *Lagos Plan of Action for Economic Development of Africa* 1980-2000 (OAU, Addis Ababa, (1980) (affirming the commitment by African leaders to ensure the economic, social and cultural integration of the continent under the African Economic Community by the year 2000).

132 *See* JULIUS K. NYERERE, UJAMAA-ESSAYS ON SOCIALISM (Oxford Univ. Press 1968). Nkurumah 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." THOMAS M. FRANCK, EAST AFRICAN UNITY THROUGH LAW 3 (Yale Univ. Press 1964) (citing DAVID APTER, THE POLITICAL KINGDOM OF UGANDA 7 (Princeton Univ. Press 1961)).

133 This model was referred to as the mobilization model. *See* APTER, *supra* note 132, at 4-7 (using the mobilization metaphor). *See also* FRANCK, *supra* note 132, at 3, *citing* Boutros-Ghali, *The Addis Ababa Charter*, 546 INT'L CONCILIATION 19 (1964).

134 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, June 13, 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. The African Union's 50th

By contrast, another group of pan-Africanists—who would today be referred to as the gradualists or incrementalists[135]—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."[136] 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 or on the precise modalities for proceeding towards such a goal.[137]

This looser idea of a federation with regional building blocks is adopted in the Treaty for the Establishment of an African Economic Community.[138] 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.[139] This theme was also reflected in the Lagos Plan of Action, which linked self-sufficiency to Africa's economic integration.[140] As Thomas Biersteker has explained, economic

---

Anniversary meeting in 2007 held in Accra, Ghana, was devoted to discussing the report of the Committee.

135 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&sectionid=303.

136 FRANCK, *supra* note 132, at 3. The Report of the Committee of Heads of State and Government on the Proposals of the Great Socialist Peoples' Libyan Arab Jamahiriya 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." African Union [AU], *The Report of the Committee of Heads of State and Government on the Proposals of the Great Socialist Peoples' Libyan Arab Jamahiriya*, at para. 12 (June 13, 2005), (Presented at the AU-CSO Pre-Summit Meeting in Accra, Ghana).

137 *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), *available at* http://www.africa-union.org/Doc/study_on_ AUGovernment _june2006.pdf

138 *See* Treaty for the Establishment of an African Economic Community, *supra* note 64.

139 ASANTE ET AL., *supra* note 75, at 1-2; *see also* JAMES GATHII, WAR, COMMERCE AND INTERNATIONAL LAW ch. 5 (Oxford Univ. Press 2009).

140 Organization of African Unity, Lagos Plan of Action for the Economic

self-reliance or 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.[141]

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 better able to bargain for foreign capital and technology.[142] 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 for aid from the West.[143] 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.[144] Notably, these supporters of economic integration were all influenced by Africa's struggles against colonialism, imperialism, and apartheid.[145]

---

Development of Africa 1980-2000. This plan was adopted at the OAU Meeting in its Second Extraordinary Session, pmbl. ¶ 3(iii), April 28-29, 1980, available at www.uneca.org/itca/ariportal/docs/lagos_plan.pdf (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 MENGISTEAB, GLOBALIZATION AND AUTOCENTRICITY IN AFRICA'S DEVELOPMENT IN THE 21ST CENTURY 172 (Africa World Press 1996).

141 Thomas J. Biersteker, *Self-Reliance in Theory and Practice in Tanzanian Trade Relations*, 34 INT'L ORG. 229, 231 (1980).

142 GREEN & SEIDMAN, *supra* note 37, at 80-81 (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").

143 Paul de Bendern, *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.

144 *See* MacDonald Dzirutwe, *Mugabe Calls For Self-Reliance, End to Conflicts*, REUTERS, June 7, 2009, *available at* http://in.reuters.com/article/businessNews/idINIndia-40138720090607.

145 ZDENEK CERVENKA, THE UNFINISHED QUEST FOR UNITY: AFRICA AND THE OAU 1 (1977) (noting the similarity in goals among various groups of Africa states "in the fundamental aims . . . particularly those concerning decolonization, racial discrimination,

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 the goal of obtaining foreign funding to finance Africa's development needs.[146] 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 of NEPAD.[147] 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.[148] From the resources generated from within Africa, a Pan-African Infrastructure Development Fund (PAIDF) has been set up to "finance large-scale infrastructural projects."[149] A fund manager has been appointed, and by October 2007 the fund had raised $625 million to finance energy, technology, transport, and water projects in Africa.[150]

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.[151] Alongside this commitment to market based policies within NEPAD, the African Group at the 2003 Cancun World Trade Organization (WTO) Ministerial Meeting played a crucial role in the formation of the

---

maintenance of world peace, and the urgent need for economic cooperation between African States").

146 *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) (providing information on NEPAD's origins, background and analysis).

147 President Thabo Mbeki, Address of the President of South Africa to the Joint Session of the Parliament of Nambia (October 30, 2007), *available at* http://www.polity.org.za/article/sa-mbeki-parliament-of-namibia-joint-session-30102007-2007-10-30.

148 *Id.*

149 *Id.*

150 For more information, see the PAIDF fund manager website at http://www.harith.co.za/investors/index.html.

151 African Union, *New Partnership for Africa's Development Framework* 37-39 (Oct. 2001), *available at* www.nepad.org ("follow "The NEPAD Framework" link).

"Group of Twenty".[152] The group lobbied heavily in favor of ensuring that development remained at the center of the latest round of the WTO's trade negotiations.[153]

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, have hindered the success of the movement towards self-sufficiency.[154] The move towards self-sufficiency has also been delayed because many African countries are competing with each other as potential locations for industrialized-country firms, or as suppliers of raw materials to developed economies or the quickly growing economies of India and China.[155] Often the competition for industrialized-country firms may be regarded as outweighing regional integration, particularly 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.[156] Such a choice would certainly look brighter than regional cooperation, especially if such cooperation would involve the sharing of benefits with weaker member States.[157] A large number of African countries have passed legislation giving foreign investors very attractive incentives in this race for their capital, skills, and technology.[158]

---

152 FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF TRADE NEGOTIATIONS/THE LESSONS OF CANCUN xv (Zed Books 2004); *see also* James Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361, 1366 (2006).

153 JAWARA & KWA, *supra* note 152, at xix.

154 Ravenhill, *supra* note 50, at 37.

155 *Id. See also* Jian-Ye Wang, What Drives China's Growing Role in Africa? 23 (Working Paper No. 07/211, 2007).

156 Wang, *supra* note 155, at 5.

157 Ravenhill, *supra* note 50, at 49.

158 For example, the 1991 Investment Code in Uganda set up the Uganda Investment Authority whose primary purpose is to promote foreign investment in Uganda. *See* Uganda Investment Authority-Our Mission, Vision, And Role, http://www.ugandainvest.com/uia.php?uhpl=mission&&uhpll=Mission,Vision,Role. In Rwanda, Law No. 14/98 of 12/18/1998 established the Rwanda Investment Promotion Agency with the mandate of promoting foreign investment in the country. *See* Rwanda Investment Promotion Agency, http://www.gov.rw/economy/rwanda_investment_promotion_agency.htm.

Thus, within the African Union, and particularly insofar as regional economic integration is concerned, one sees a commitment to a 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.[159] 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 the United Nations Industrial Development Organization, 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.[160] Echoing the same view, Jean Ping, the African Commission's Chairperson, noted that, 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 that it could dispense with the need to open up.[161]

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 2007[162] resolved to review and shorten the time frame towards the establishment of an African economic community and to use the regional economic communities to achieve these objectives.[163]

---

159 *See* AFRICA AND DEVELOPMENT CHALLENGES IN THE NEW MILLENNIUM: THE NEPAD DEBATE (J. O. Adésínà, Yao Graham and A. Olukoshi, eds., 2006).

160 Annelise Sander, *Africa Should Seize Control of Its Development*, Inter Press Service News Agency, May 29, 2009, *available at* http://allafrica.com/stories/200905290267.html.

161 *Id.*

162 The meeting was timed to coincide with Ghana's 50th Anniversary of Independence. Ghana was the first African country to be freed from colonial rule. Ghana Gov't Offical Portal, Ghana at a Glance, http://www.ghana.gov.gh (click on "About Ghana"; then "Ghana at a Glance") (last visited Apr. 14, 2010).

163 *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&sectionid=303. The Declaration memorialized the intent of the parties "to accelerate the economic and political integration of the African continent." *Id.* ¶ 1. The parties also agreed

> to rationalize and strengthen the Regional Economic Communities, and

## III. 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.[164]

> If the economic characteristics of the countries 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.[165]

> [N]on-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.[166]

The aim of this part of the paper is to show how variable geometry is a central feature of African RTAs as flexible regimes. Part II begins by outlining the origins of this principle and giving examples of how various African RTAs incorporate and use it. The last section 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

---

> 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).

164 ROBSON, *supra* note 96, at 123.

165 Hazlewood, *supra* note 30, at 6.

166 Wionczek, *supra* note 13, at 15. Wionczek notes 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.

the East African Community.

Although variable geometry is a central feature of African RTAs, it has largely been overlooked, in the legal literature on RTAs. In the African context, variable geometry refers to 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; and (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 that are concerned about the economic and political costs of liberalization for themselves in the short run. From this perspective, it is arguable that African RTAs 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.[167] When this other non-discrimination principles are adopted, they rarely, if ever, are used to challenge adoption of discriminatory trade measures.[168] This is

---

[167] *See* Yongzheng Yang, *Africa in the Doha Round: Dealing with Preference Erosion and Beyond* 9-10, 21-33 (IMF Policy Discussion Paper No. 05/8, 2005).

[168] 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.

most acutely demonstrated in the East African Court of Justice's recent decision on variable geometry.[169] 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 a question of reconciling the principle of variable geometry and that of consensus decision making.[170]

### *A. Reasons for the Adoption of Variable Geometry*

One of the greatest 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.[171] Distributional equity in African RTAs is not only

---

Treaty of ECOWAS, *supra* note 125, art. 43. 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 1947.

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." General Agreement on Tariffs & Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

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 ECOWAS Treaty. 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." Treaty Establishing the Economic Community of Central African States art. 35(4), Oct. 18, 1983.

169 *See In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion*, App. No. 1 of 2008 Opinion (E. Afr. Ct. of Justice at Arusha, First Instance Div. April 24, 2008) [hereinafter Advisory Opinion Request].

170 *See infra* Parts III.C-E.

171 Saasa, *supra* note 87, at 14. Saasa notes that the "management of distributional questions has . . . remained a difficult task in most, if not all, integration schemes in developing countries." *Id.* at 15. *See also* EZENWE, *supra* note 77, at 58-65, 151 (declaring "ECOWAS represents another glaring case of a partnership of unequal

a question of the asymmetrical economic benefits of trade integration, but also a function of unequal "networks of power, information and knowledge"[172] 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.[173] 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.[174]

Differences in the benefits of cooperation in Africa date back

---

partners"); U.N. CONF. ON TRADE AND DEV., *Current Problems of Economic Integration: The Distribution of Benefits and Costs of Integration Among Countries* U.N. Doc. TD/B/394 (New York, 1973). For 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). Edel notes 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.

172 Saasa, *supra* note 87, at 2.

173 Philip, *supra* note 4, at 9. Phillip notes that

> 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.

174 Severine Rugumamu, *Africa's Search for Regional Cooperation and Integration in the Twenty-First Century*, AFRICAN CAPACITY BUILDING FOUNDATION, Working Paper No. 3, at 12 (2004), *available at* http://www.acbf-pact.org/knowledge/documents/ACBF%20WORKING%20PAPER%20NO.%203.pdf.

to the colonial period.[175] The East African Community, whose origins date back to 1917,[176] had a long history of disputes about Kenya's disproportionate benefits relative to then Tanganyika and Uganda.[177] Kenya not only had a bigger share of the employees of

---

[175] *See* FRANCK, *supra* note 132, at 28-54 (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). *See also* Arthur Hazlewood, *The Economics of Federation and Dissolution in Central Africa*, *in* AFRICAN INTEGRATION AND DISINTEGRATION 248, 249 (Arthur Hazlewood ed., Oxford Univ. 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, disadvantaged Nyasaland and Northern Rhodesia; for Nyasaland's case, "fiscal transfers failed to compensate for the adverse effects of the customs union"). 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) 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." *See* Wionczek, *supra* note 13, at 150.

[176] *See* Hazlewood, *supra* note 88, at 22-23. Hazlewood notes 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'.

*Id.*

[177] *Id.* at 21. Hazlewood also notes that, 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"; 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"; 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 25-26. For a commentary on Hazlewood's assessment of protective tariffs, *see* R.N.

the various institutions of the community, most of which were located in Kenya, but also the largest share of customs revenue.[178] Mechanisms to redistribute the gains were put in place from time to time.[179] For example, in 1961 the Raisman Commission proposed fiscal distributions to compensate for losses suffered particularly by Tanganyika, but also for the purpose of keeping the customs union together.[180] Article 87 of the 1967 Treaty for East African Co-operation 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; and Nairobi would be the headquarters of the East African Railways Corporation and the East African Airways Corporation.[181] In the Union Douaniere et Economique de l'Afrique Centrale (UDEAC) established in 1964 between Cameron, 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.[182]

In addition, distributional questions may arise because regional

---

Wood, *The East African Common Market: A Reassessment*, 28(3) BULL. OF THE OXFORD U. OF ECON. AND STAT., Nov. 1966; *see also* A. J. Brown, *Economic Separation Versus a Common Market in Developing Countries*, YORKSHIRE BULL. OF ECON. & SOC. RES., May & Nov. 1961.

178 Hazlewood, *supra* note 88, at 21-26, 38-45 ("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 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.

179 *Id.* at 39-45.

180 *Id.* at 43.

181 Treaty for East African Co-operation art. 87, Kenya-Uganda-Tanz., June 6, 1967, 6 I.L.M. 932.

182 *See* Peter Robson, *Economic Integration in Equatorial Africa*, *in* AFRICAN INTEGRATION AND DISINTEGRATION 36-41 (Arthur Hazlewood ed., Oxford Univ. Press1967).

cooperation pursued "solely on the basis of commercial integration" often results in an increase in the "bargaining power of transnational corporations," which then bargain with each government for the best conditions they can obtain.[183] Regional integration in developing countries results in the merger of locally-controlled firms. For example, in the European Union, competition policy has encouraged mergers of such firms.[184] By contrast, African regional integration has not encouraged such mergers, and this often results in local subsidiaries of foreign firms enjoying the protection of both regional and national tariff walls.[185] From this view, unequal gains in trade integration schemes arise where integration is solely based on a classical free market/comparative advantage model.[186] 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 to enjoy the benefits of growth in poor economies that largely share the same characteristics.[187] 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.[188] At the time, Kenya's unequal gains, 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.[189]

---

183 Vaitsos, *supra* note 14, at 729-36 (analyzing transnational enterprises and their effects on economic integration). *See generally* Constantine V. Vaitsos, The Role of Transnational Enterprises in Latin American Economic Integration Efforts: Who Integrates With Whom, How and for Whose Benefit? (1978) (same).

184 *See* Vaitsos, *supra* note 14, at 730.

185 *Id.* at 730-36.

186 *Id.* at 739.

187 *Id.*

188 *See generally* Richard Fredland, *Who Killed the East African Community?*, in INTEGRATION AND DISINTEGRATION IN EAST AFRICA (Potholm & Fredland, eds. 1980). *See also* Saasa, *supra* note 87, at 14.

189 Saasa, *supra* note 87, at 14. *See also* HAZLEWOOD, *supra* note 88, at 57-68 (discussing Kenya's decision not to ratify the Kampala Agreement even though the Kenyan President signed it in a meeting with the other Heads of State in January 1965).

Often distributional questions are exacerbated by regional 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.[190] 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 from production or sale losses pursuant to international trade liberalization commitments.[191]

### *B. 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.[192] Some of these mechanisms of moderating and containing unequal benefits have been borrowed from other developing country RTAs.[193] Over time, they have included both non-financial and financial redistributive policies. The discussion

---

Kenya's rejection was a result of Tanzania's reneging on an agreement to establish a common currency board in East Africa. *Id.* at 67.

190 *See* Saasa, *supra* note 87, at 14.

191 The Trade Act of 1974, as amended, 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. 19 U.S.C. 2251 *et seq.* (2006). *See also* 19 U.S.C. 2102 (2006) (stating the purpose of the Act); The Trade Act of 2002, 19 U.S.C. § 3802(c)(5) (2006) (requiring that the President report to Congress the impact of future trade agreements on US employment, including labor markets, and that the report be made public). The Trade Act of 1974, in establishing Trade Adjustment Assistance, also 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* 19 U.S.C. § 2272 (2006) (listing group eligibility requirements).

192 This is somewhat analogous to the Trade Adjustment Assistance Program in the United States except that the U.S. 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. *See* 19 U.S.C. § 2101 *et seq.* (2006).

193 African RTAs have borrowed many variable geometry ideas from the Andean Community, formerly known as the Andean Pact.

below illustrates 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."[194] 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.[195]

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,"[196] advancing generous access to development funding and credit to less developed countries, as well as designing tax concessions for them.[197]

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

- Shifting the "territorial administration of production by a number of firms which operated in two or more of the countries,"
- Instituting "quotas on inter-territorial trade,"

---

194 Saasa, *supra* note 87, at 17.

195 *Id.* at 26 n.9. In addition, such countries can receive "complementary support . . . , market studies, [and] technical and managerial assistance." *Id.* at 17. For more on similar proposals, see EZENWE, *supra* note 77, at 20-28 (discussing the following instruments of achieving equity: fiscal 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] to enter into transitional bilateral agreements involving balanced trade expansion." *See* ROBSON, *supra* note 96, at 121-22.

196 EZENWE, *supra* note 77, at 56.

197 *Id.* at 55-56.

- Allocating "certain major industries between the countries,"
- Increasing "sales from a country in deficit in inter-territorial trade," and
- Making "allocations of industry to secure an equitable distribution of industrial development between the three countries."[198]

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 the equal sharing of benefits of development (in terms of the location of factories, industries, and the like) and trade imbalances were considered crucial in relations between more and less developed integrating members. The introduction of measures such as quotas 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.[199] For example, it established an East African Bank with a view toward investing "more of its funds in each of the two less-developed partner states than in Kenya," although each state contributed the same amount to its equity.[200] Here, the financing of development projects through a bank, rather than through the previous system of industrial planning and licensing in East Africa, eventually

---

198 HAZLEWOOD, *supra* note 88, at 57.

199 *Id.* at 168 (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 129. *But see* Ravenhill, *supra* note 50, at 44 (noting that "[t]he 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").

200 HAZLEWOOD, *supra* note 88, at 104. 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.

collapsed in 1973.[201] The preference of a bank as opposed to industrial planning and licensing indicated some movement toward 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 bearing an unequal burden within the Community, it nevertheless failed to effectively deal with the issue, and this was a primary factor leading to its dissolution in 1977.[202] This exposed the double-edged sword of efforts to equalize opportunities for countries at different levels of development. As Ravenhill pointed out more than three decades ago:

> 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 beneficiaries of such policies are multinational corporations, able to establish [an] uneconomic plant 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

---

201 *Id.* at 119-23.

202 *See* Ravenhill, *supra* note 50, at 42. Ravenhill also notes 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 means for an immediate amelioration of the problem was the cause of its inconsequential impact on partner states' perceptions." *Id.* at 43.

also undermined.[203]

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.[204] This is anticipated by Article 4 of the ECOWAS treaty, which specifies ECOWAS' fundamental principles.[205] These include the "equitable and just distribution of the costs and benefits of economic cooperation and integration."[206] Peter Robson argued that the Fund is of "potentially great importance for promoting positive integration, development and balance."[207]

Notably, by embracing distributional equity, African RTAs do not abandon formal equality. Thus the ECOWAS treaty, like all

---

203 *Id.* at 47-48. *See also* Hazlewood, *supra* note 30, at 6. Hazlewood also argues 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.

204 Revised Treaty of the Economic Community of West African States (ECOWAS) arts. 21, 48, July 24, 1993, 35 I.L.M. 660. Chapter 7 is titled "Co-Operation in Trade, Customs, Taxation, Statistics, Money and Payments."

205 *Id.* art 4.

206 *Id.* In addition, Article 4(b) makes solidarity and collective self-reliance fundamental principles. *Id.* art. 4(b).

207 ROBSON, INTEGRATION, DEVELOPMENT AND EQUITY: ECONOMIC INTEGRATION IN WEST AFRICA, *supra* note 96, at 119. 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.

African RTAs, recognizes equality among the member states as a fundamental principle.[208] In this sense, therefore, one sees in African RTAs an interesting recognition of both equality between States, and 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.[209] 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;[210]
- Providing "compensation to Member States which have suffered losses as a result of the location of Community enterprises;"[211]
- Providing grants for financing development activities[212] or feasibility studies of such activities;[213]
- Guaranteeing foreign investments undertaken pursuant to ECOWAS treaty commitments;[214]
- Providing the "means to facilitate the sustained mobilization of internal and external financial resources for the Member States and the Community;"[215] and
- Promoting "development projects in the less developed Member States of the Community."[216]

The procedure for compensation is set out in the Protocol

---

208 Revised Treaty of the Economic Community of West African States, *supra* note 204, art. 4(a). (recognizing equality and inter-dependence of Member States as fundamental principles).

209 Protocol Relating to the Fund for Co-operation, Compensation and Development of the Economic Community of West African States Nov. 5, 1976 [hereinafter Fund Protocol], *available at* http://www.comm.ecowas.int/sec/index.php?id=ap051176 fund&lang=en.

210 *Id.* art. 2(a).

211 *Id.* art. 2(b).

212 *Id.* art. 2(c).

213 *Id.* art. 2(d).

214 Fund Protocol, *supra* note 209, art. 2(e).

215 *Id.* art. 2(f).

216 *Id.* art. 2(g).

Relating to the Application of Compensation Procedures for Loss of Revenue Incurred by ECOWAS Member States as a Result of the Trade Liberalization Scheme.[217] There is also a Protocol on Assessment of Loss of Revenue by Member States.[218] In 2002 for example, Benin received over 373 million CFA Francs as compensation for customs revenue lost between the years 1998-2000.[219]

Furthermore, Article 34 of the SACU Agreement of 2002 makes provision for a revenue sharing formula among SACU members:

> 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.[220]

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.[221] For the customs component, 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."[222] The excise component is determined as a percentage of the total SACU

---

217 Protocol Relating to the Application of Compensation for Loss of Revenue Incurred by ECOWAS Member States as a Result of the Trade Liberalisation Scheme, May 2002, *available at* http://www.ehu.es/ceinik/tratados/11TRATADOSSOBREINTEGRACIONYCOOPERACIONENAFRICA/111ECOWAS/IC11121.pdf.

218 Protocol Relating to the Assessment of Loss of Revenue by Member States, Nov. 5, 1976, *available at* http://www.ehu.es/ceinik/tratados/11TRATADOSSOBREINTEGRACIONYCOOPERACIONENAFRICA/111ECOWAS/IC1113.pdf.

219 Ann. Rep. of the Executive Secretary of ECOWAS, ECW/CM/XLIX/2, Fostering Regional Integration Through NEPAD Implementation, ¶ 204 (2002) *available at* http://www.sec.ecowas.int/sitecedeao/english/rapport/es_annual_ report_2002.pdf.

220 2002 Southern African Customs Union (SACU) Agreement art. 34, Oct. 21, 2002, *available at* http://www.trade.gov.ls/documents/2002%20Southern%20African%20Customs%20Union.pdf.

221 *Id.* art. 34(2).

222 *Id.* art. 34(3)(b).

gross domestic product in any specific year.[223] To achieve some equitable balance among the SACU members, the distribution of the development component of SACU, which is funded from fixed percentages of the excise component,[224] is "weighted in favour of the less developed Member States."[225] 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.[226] In addition, SACU has exempted its poorest members, Swaziland and Lesotho, from the tariff reduction commitments made by the other members.[227]

Provisions like this show how small, economically weak states have sought or demanded accountability from bigger, 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 (EAC) provides that the gains of cooperation "shall be equitably shared" and that development in the community shall be "harmonious and balanced."[228] 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

---

223 *Id.* art. 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 arts. 34(3)(c), 34(4)(c), 34(5)(c).

224 2002 Southern African Customs Union (SACU) Agreement art. 34(5)(a), Oct. 21, 2002, *available at* http://www.trade.gov.ls/documents/2002%20Southern%20African%20Customs%20Union.pdf.

225 *Id.* art. 34(5)(b).

226 POKU, *supra* note 73, at 89 (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 conceding that the "existing SACU provisions failed to fuel economic development" in Botswana, Lesotho and Swaziland).

227 POKU, *supra* note 73, at 95.

228 Treaty for the Establishment of the East African Community art. 5(2), Nov. 30, 1999, 2144 U.N.T.S. 255. Article 5(3)(a) 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 by the Promotion of a more balanced and harmonious development of the Partner States." *Id.* art. 5(3)(a).

the operations of the Community and measures to address economic imbalances that may arise from such operations," an operational principle of the community.[229] The treaty defines "equitable distribution of benefits" as the "fair and proportionate distribution of benefits."[230]

Moreover, the EAC treaty 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."[231] 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 objective,"[232] thus illustrating that flexibility is built right into the framework of RTAs.[233] 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.[234] The purpose of this approach is "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."[235]

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, and 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

---

229 *Id.* arts. 6(e), 7(1)(f).

230 *See id.* art. 1 (interpreting the treaty).

231 *See id.* art. 7(f).

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

233 Treaty for the Establishment of the East African Community, *supra* note 228, art. 7(h).

234 *See infra* Part III.C.

235 Advisory Opinion Report, *supra* note 169, at 35.

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 is addressed in more detail below.[236] Of course, they could also easily be regarded as brakes on trade integration initiatives, but this would 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:

> ["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.[237]

This is the dilemma that economic integration schemes between countries with highly disparate economic structures face when they 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. The expanding market size resulting from Rwanda and Burundi becoming members of the East African Community increases the scope for economies of scale for efficient industries but may not entirely negate the disparities in

---

236 *See infra* Part III.C.

237 HAZLEWOOD, *supra* note 88, at 67.

the economy in the East African Community.[238] One of the East African Community's recent initiatives is an East African Community Development Fund[239] which will mobilize resources from domestic sources and Partner states to finance productive sectors including energy, transportation and infrastructure.[240] President Mwai Kibaki of Kenya suggested, upon 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.[241] Such an approach in a 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.

### C. *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 integration,[242] 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

---

238 By joining the East African Community in 2005, Rwanda and Burundi increased the market size to 120 million people. *See Rwanda and Burundi Join EAC Customs Union,* E-EAC NEWSLETTER Issue No. 30, at 1 (July 15, 2009), *available at* http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=48&tmpl=component&format=raw&Itemid=73.

239 The decision to establish the fund was made by the East African Community Council of Ministers on August 8th, 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 at the Grand Regency Hotel, at 2 (Oct. 6-7, 2008), *available at* www.meac.go.ke (follow "Permanent Secretary's Speeches" hyperlink).

240 *Id.* at 3.

241 *See* Biketi Kikechi, *Rwanda and Burundi Join the East African Community*, E. AFR. STANDARD (Nairobi), June 19, 2007, *available at* http://allafrica.com/stories/200706181801.html.

242 *See* Ravenhill, *supra* note 50, at 48. *See also* T. Ostergaard, *Classical Models of Regional Integration-What Relevance for Southern Africa?*, *in* SOUTHERN AFRICA AFTER APARTHEID: REGIONAL INTEGRATION AND EXTERNAL RESOURCES 27 (Bertil Oden ed., 1993).

liberalization commitments, on the one hand, with those relating to equity and distribution among the members, on the other.[243] The East African Court of Justice recently confirmed this 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.[244]

This case before the East African Court of Justice arose against the background of the then ongoing common market negotiations in the East African Community.[245] 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.[246] Tanzania, for example, objected 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.[247] Tanzania also proposed that each member country in the

---

243 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." 2002 Southern African Customs Union (SACU) Agreement pmbl., Oct. 21, 2002. *available at* http://www.trade.gov.ls/documents/2002%20Southern%20African%20Customs%20Union.pdf.

244 *See* Advisory Opinion Request, *supra* note 169, at 10 (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).

245 *See* Treaty Establishing the East African Community, *supra* note 228, art. 76 (providing the common market as the second stage of integration after the establishment of a customs union). An East African Community Protocol was signed on November 20, 2009. *See* Protocol on the Establishment of the East African Community Common Market, Nov. 20, 2009, *available at* http://eabc.info/node/410.

246 Advisory Opinion Request, *supra* note 169, at 38. 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.

*Id.*

247 *See* Protocol on the Establishment of the East African Community Common

common market retain its own labor laws, further limiting the adoption of the right of residence, which confers automatic rights to work anywhere in the East African Community.[248]

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 reached or they could agree to proceed in a manner that accommodated the differences. Consequently, 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."[249]

Under the Treaty for the Establishment of the East African Community, the Summit[250] and Council[251] are required to make decisions by consensus. The Council's 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 principal judicial body of the Community with jurisdiction to "ensure the adherence to law in the interpretation and application of and compliance with [the] Treaty."[252] In addition to the Court having "initial jurisdiction over the interpretation and application of [the] Treaty,"[253] it also has jurisdiction to issue advisory opinions on request from the Summit, a Partner State, or the Council of Ministers.[254]

---

Market, art. 15, supra note 245.

248 *Id.* Annex II at 3.

249 Council of Ministers, *Proposal for Requesting for Advisory Opinion of the East African Court of Justice* (Sept. 13, 2008), reproduced in Advisory Opinion Request, *supra* note 169, at 3.

250 Treaty Establishing The East African Community, *supra* note 228, art. 12(3).

251 *Id.* art. 15(4). 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. *Id.*

252 *Id.* art. 23.

253 *Id.* art. 27.

254 *Id.* art. 36(1).

The Community asked the court to decide if the treaty's rule of consensus decision making implied unanimity of all the member states[255] and "whether the principle of variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwithstanding."[256]

### *D. The Arguments of the Partner States and the East African Law Society as Amici*

The Community argued that the outcome will help guide its process of decision-making, which was critical for its "institutional development" and would "contribute to the development of regional jurisprudence as envisioned under Articles 6, 7 and 126 of the Treaty."[257]

According to the Community, variable geometry, an innovation of European law, 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."[258] In the Community's view, "variable geometry principles could considerably ease some of the tensions among sub-regional integration arrangements in the Community and enhance the prospect of closer and more regional co-operation."[259]

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."[260] In the Community's view, there had been movement away from consensus decision-making toward 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 EAC treaty

---

255 *See* Advisory Opinion Request, *supra* note 169, at 6.

256 *Id.*

257 *Id.*

258 *Id.* The Community's Counsel also offered the examples of Denmark, Ireland, and the United Kingdom as countries that opted out of the European Community's provisions of free movement of persons, asylum, and immigration, respectively. *Id.* at 7.

259 *Id.* at 7.

260 *Id.*

consistently with this trend.[261]

The Community argued that consensus decision making resulted in delays, was time-consuming, and came with the dangers of "intransigence" and the possibility of vetoes, which would allow "individuals or small minorities to block agreement."[262] Rwanda argued that consensus decision-making and variable geometry did not conflict with each other since each was designed for different circumstances.[263] For Rwanda, "the Treaty [gave] no flexibility to some groups" since it required all the Partner States to "agree on each and every activity."[264] Additionally, Rwanda remarked that the Community was founded on the "principles of mutual trust, political will and sovereign equality," as set forth in Article 6(a) of the Treaty, and without which the Community was in danger of collapsing very much like the original East African Community.[265] As such, according to Rwanda, the principle of variable geometry allowed groups of members to engage in activities outside the Community, rather than within it.[266]

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.[267] For Burundi, "consensus decision-making requires complete agreement by all Partner States," while variable geometry requires flexibility in the integration process.[268]

Kenya argued that the term "consensus" did not necessarily

---

261 *See* Advisory Opinion Request, *supra* note 169, at 7.

262 *Id.* at 8. In addition, the Community argued that the increase of members from three to five increased the susceptibility to disruption, with small groups obstructing the others. In this manner, the Community argued, consensus decision-making could "reward the least accommodating group members while punishing the most accommodating." *Id.* at 9. According to the Community, consensus decision-making can result in the Abilene Paradox, where a group unanimously agrees on a course of action no single member wants, "because no one individual is willing to go against the perceived will of the decision-making body." *Id.* at 9.

263 *See id.* at 10.

264 *Id.*

265 *Id.*

266 *Id.* at 11.

267 *Id.* at 12.

268 *Id.*

equate to unanimity as Burundi had contended.[269] Kenya argued that the practice in the European Community was to permit members "to opt out of unwanted policies rather than being obliged to choose between vetoing them or accepting a majority verdict."[270] 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.[271] According to Kenya:

> [V]ariable 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 Member States.[272]

Thus while Kenya supported variable geometry, it argued that if the policy allowed countries to cherry pick their favorite policies and create smaller groups of similarly-minded countries, there was a danger that "some fundamental policies will not be addressed by some Member States."[273] The question of multiple and overlapping memberships in African RTAs will be discussed in Part IV below.

For Kenya, therefore, the role of the Court in issuing the advisory opinion was to clarify what the Treaty refers to as consensus decision-making because such uncertainty was slowing down the integration process.[274] According to Kenya:

> [E]ach country has a different rate of economic growth, different socio-economic factors and varying national policies that it takes into consideration when deciding whether or not to vote in favour of a specific proposal . . . . [V]ariable 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

---

269 Advisory Opinion Request, *supra* note 169, at 12-13.

270 *Id.* at 14.

271 *Id.* at 15.

272 *Id.*

273 *Id.* at 16.

274 *See* Advisory Opinion Request, *supra* note 169, at 16.

> 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.[275]

Thus Kenya sought guidance from the Court as to whether consensus decision making required unanimity, a two-thirds majority, or a simple majority, because this would "eliminate confusion and uncertainty in the future."[276]

Tanzania, like Rwanda and Burundi, argued that consensus decision making under the Treaty meant unanimity.[277] It believed that such an interpretation was supported by provisions in the treaty on consensus decision-making because "the stark reality" recognized in the treaty "that each Partner is a Sovereign State and that in the Partner States' peaceful co-existence, mutual trust is of the essence."[278] 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), in order to have a "single voice, notwithstanding their variables in terms of sizes or stages of development."[279] 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 in Tanzania's view] demands that the leaderships and their people be heard and their positions respected."[280] Tanzania also objected to the request for an advisory opinion since a treaty amendment had been initiated through the political process by the Sectoral Committee on Legal and Judicial Affairs to clarify how variable geometry and consensus decision-making were related.[281] Seeking an advisory opinion from the Court, Tanzania argued, removed the question from the political process, "where the matter belongs," and as such the request for an advisory opinion was "an abuse of the process of the court."[282] The Court rejected this argument.[283]

---

275 *Id.* at 16-17.

276 *Id.* at 16.

277 *Id.* at 20.

278 *Id.* at 19.

279 *Id.*

280 Advisory Opinion Request, *supra* note 169, at 19.

281 *Id.* at 20.

282 *Id.*

Uganda also shared the view that the question of the proper relationship between consensus decision-making and variable geometry belonged to the political amendment process.[284] Uganda argued that the question before the Court was whether the organs of the Community could make decisions using variable geometry.[285] 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."[286] 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."[287] 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.[288]

The East African Law Society argued that flexible geometry permitted "flexibility in the integration process and . . . progression in the East African Community activities by some Partner States and not all."[289] The East African Law Society contended 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.[290] The Society maintained that in the European Union, differentiation in the integration structure was permissible to accommodate irreconcilable differences, permitting "a permanent separation between a group of Partner

---

283 *Id.* at 41. ("The process of amending the Treaty reported to be underway in the Executive Organs of the Community, as well as this Application for an Advisory Opinion are perfectly compatible. The application was brought to this court on a directive of the Council, the very organ reported to be overseeing the said amendment. It was properly brought and the Court has jurisdiction.")

284 *Id.* at 23.

285 *Id.*

286 Advisory Opinion Request, *supra* note 169, at 22.

287 *Id.*

288 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 23.

289 *Id.* at 24.

290 *Id.*

States and a number of less developed integration units."[291] The Society reasoned that variable geometry was a "flexible and pragmatic approach to integration" that allowed countries to proceed on the integration agenda based on the extent of their interest.[292] As such, variable geometry applied because of differences in sizes, priorities, and levels of political and economic development, as well as in culture and language, "which make it difficult for members to meet the criteria for membership at the same speeds and depths."[293] The Society argued that the principle of variable geometry and the rule of consensus decision making were not necessarily inconsistent with each other, and therefore, the Court could advise the partner states to amend the treaty and related protocols "to provide for application of the principle of variable geometry in specific areas of activity."[294]

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.

### *E. The Decision of the Court*

The Court began by noting that the two issues it had to decide were, first, whether the principle of variable geometry was in harmony with the rule of consensus decision-making, and second, whether the principle of variable geometry could be applied to guide the process of integration, notwithstanding the requirement of consensus decision-making .[295] The Court noted that the treaty defined the principle of variable geometry, but provided no definition of consensus. It therefore proceeded to develop a definition from extraneous sources.[296] Surprisingly, the Court first resorted to Wikipedia, The Free Encyclopedia.[297] This online source is hardly recommendable for an authoritative dictionary

---

291 *Id.*

292 Advisory Opinion Request, *supra* note 169, at 25.

293 *Id.*

294 *Id.* at 27.

295 *Id.* at 28.

296 *Id.*

297 *Id.* at 29; *see* Wikipedia, http://www.wikipedia.org (last visited February 9, 2010).

meaning of any word.

According to the Court, "[c]onsensus 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 implementation."[298] The Court then distinguished between decisions consistent with the objectives of the Treaty, where "the basis for making the decision is consensus," with the implementation of the decision.[299] It is in the implementation of decisions that "the practical realities such as the 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."[300] Notably, the Court did not give any basis at all in the treaty or the EAC's protocols for this distinction between decision and implementation.[301] This is not to suggest there could be no such basis, but the Court did not try to establish any at all.

Based on this distinction between decision and implementation, the Court found consistency between the principle of variable geometry and the rule of consensus decision making.[302] This consistency was established by noting that consensus in decision-making is a "suitable operational principle, which may well be variable geometry . . . to govern the practical implementation of that particular decision."[303] Thus, establishing the distinction between decision and implementation from the outset, the Court proceeded to find that both are different stages in a single process, except that variable geometry is not always the implementation choice if there are no considerations such as those necessitating differentiated implementation of a decision.[304]

As had been agreed before the Court by the Partner States and the amicus East African Law Society, the court noted that the

---

298 Advisory Opinion Request, *supra* note 169, at 30.

299 *Id.*

300 *Id.*

301 *Id.* ("It is *the court's opinion* that decisions in . . . the community are made with two aspects in mind. (emphasis added)).

302 *Id.*

303 Advisory Opinion Request, *supra* note 169, at 30.

304 *Id.*

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. From this perspective, variable geometry was, therefore, a strategy for accommodating countries that are unable to proceed with certain integration decisions.[305] This definition of variable geometry adopted by the Court and used by the Partner States is consistent with accommodating laggard Partner States. In essence, variable geometry gets a very positive spin—it is a policy of allowing forward movement without compelling unwilling countries to do so. One alternative that the Court did not accept, and in fact explicitly rejected, is to require unanimity for consensus decision-making. By excluding this possibility of the meaning of consensus, it becomes possible to reconcile variable geometry with the rule of consensus decision-making.[306] As a result, the Court neatly integrates 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.[307]

In addition, the Court also held "that the principle of variable geometry . . . is a strategy of implementation of Community decisions and not a decision making tool in itself."[308] This is consistent with Article 7 of the treaty, which provides that the treaty's operational principles "'shall govern the practical achievement of the objectives of the Community . . . .'"[309] The Court found that "the principle of variable geometry has been internationally applied to deepen integration,"[310] and gave the

---

305 *Id.*

306 *Id.*

307 Advisory Opinion Request, *supra* note 169, at 30.

308 *Id.* at 34.

309 *Id.*

310 *Id.* at 31.

examples of SADC, the European Union,[311] and the "Provisions of Enhanced Cooperation" of the Treaty of the European Union.[312] The Court recommended that the East African Community "study, and possibly emulate some of the examples of application of these concepts to deepen integration."[313]

Of course, if the only meaning of variable geometry available 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 variable geometry is necessarily a win-win for deeper integration if laggard States can avoid proceeding with implementation of deeper integration measures. Variable geometry is as much a framework for allowing a group of like-minded states to proceed with certain integration initiatives as it is for objecting states to opt-out of time-tabled integration commitments when the decision to assume the commitments and begin implementation arrives.

That is why the Court advised the Community to consider using variable geometry "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 43(b) of the Treaty of the European Union.[314] The Court also recommended that the East African Community borrow from the European Union the idea of a set of "core and periphery" obligations which would require members to determine areas over which variable geometry could

---

311 The Court referenced the 1985 EU Schengen Agreement and the 1990 Schengen Convention in which Ireland and the United Kingdom opted out of and "retained their "national border controls on the movement of persons from other EU member states." *Id.* Another example is the EU Economic and Monetary Union, from which Ireland and the United Kingdom have opted out, and the EU Social Policy Agreement from which the United Kingdom has opted out. *See id.* at 31-32.

312 *Id.* at 33-34. The "Provisions of Enhanced Cooperation" in the Treaty of the European Union are contained in Articles 43 and 43(b), Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, arts. 43 and 43(b), Dec. 13, 2007, 2007 O.J. (C 306) 1.

313 Advisory Opinion Request, *supra* note 169, at 34.

314 *Id.* at 34. Article 43(b) of the European Union Treaty provides: "Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying relevant provisions of the Treaty." *Id.*

and could not apply.[315]

In conclusion, the Court held:

> [F]or avoidance of internal conflict and a possible emergence of mistrust among the Partner States, and in accordance with the Treaty provisions above discussed, decisions should be taken with the above two aspects in mind [variable geometry and consensus 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.[316]

In so doing, the Court avoided giving 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 noted was shared in the submissions before it, "that the problems associated with obtaining consensus" arose from the hesitation to make certain decisions, rather than a rejection of such decisions.[317] 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."[318] The hesitation seemed to arise from the requirement that decisions needed simultaneous implementation by all Partner States.[319] Yet, according to the Court:

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

---

315 *Id.*

316 *Id.* at 35.

317 *Id.*

318 *Id.*

319 *See* Advisory Opinion Request, *supra* note 169, at 35.

are able to implement immediately to do so.[320]

The Court cited Judge Tanaka in the 1966 ICJ Reports to the effect that "to treat unequal matters differently according to their inequality is not only permitted but required."[321] In this manner, the Court found that consensus was required under the Treaty for arriving at Community decisions, but that variable geometry played a role "in deciding the implementation of the programme."[322] It also found that the term "consensus decision-making" was not defined in the Treaty for the Establishment of the East African Community or in Community Protocols.[323] Thus, rather than equate the term with unanimity, the Court recommended amending the Community's instruments.[324]

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.[325] This principle allows member states to vary "the implementation of measures in an economic integration process for purposes of achieving a common objective."[326] It would seem that there is a close relationship between the principles of variable geometry and that of asymmetry to the extent that both allow variation in implementation timetables, yet the Court did not allude to it.[327] 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

---

320 *Id.*

321 *Id.* at 36 (quoting South West Africa (Ethiopia v. S. Afr.), 1966 I.C.J. 6, 306 (July 18) (Tanaka, J., dissenting)).

322 *Id.*

323 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 is synonymous with unanimity." *Id. at* 40.

324 *Id.* at 38.

325 *See* Advisory Opinion Request, supra note 169. *See infra* note 228 and accompanying text.

326 This definition is provided in Article 1(1) of the Treaty for the Establishment of the East African Community. The principle is provided as an operational principle of the treaty in Article 7(h). The East African Community Treaty, Nov. 30, 1999, *available at:* http://www.eac.int (last visited Feb. 9, 2010).

327 *See* Advisory Opinion Request, supra note 169.

variation in the tariff reduction schedule.[328] While the Customs Union Protocol urges member states to eliminate all internal tariffs and similar charges on trade among the Partner States upon the entry into force of the Protocol,[329] it nevertheless gives Uganda and Tanzania more favorable tariff removal commitments than those given to the more economically developed Kenya under other provisions. For example, Article 11(2) provides that as between Uganda and Tanzania, goods are duty-free,[330] and goods from Uganda and Tanzania into Kenya are duty-free.[331] However, Kenyan goods do not enjoy such duty-free treatment in Uganda and Tanzania.[332] Article 11(3) provides for the categorization of goods from Kenya into Uganda and Tanzania.[333] 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."[334] Further, Category B goods from Kenya into Uganda will have a five-year phase-out tariff reduction period for all products.[335] 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.[336] Additionally, Category B goods from Kenya into Tanzania have a similar phase-out tariff reduction period.[337] The underlying requirement is that no internal tariff can exceed the common external tariff with respect to any of the specified products.[338] The differentiation in the tariff schedules advantage Uganda and Tanzania pursuant to the principle of

---

328 *See* Protocol on the Establishment of the East African Customs Union, Nov. 30, 1999, *available at* http://www.eac.int/eac-tenders/doc_details/154-eac-customs-union-protocol.html (last visited Feb. 9, 2010).

329 *Id.* art. 10(1).

330 *Id.* art. 11(2)(a).

331 *Id.* art. 11(2)(b).

332 *Id.* art. 11(3).

333 Protocol on the Establishment of the East African Customs Union, *supra* note 328, at art. 11(3).

334 *Id.* art. 11(3)(a) and (b).

335 *Id.* art. 11(4). Category B goods include agricultural products, building materials, plastics, wood, paper, textiles, iron, steel, and other manufactured goods. *Id.*

336 *Id.* art. 11(4).

337 *Id.* art. 11(5).

338 *Id.* art. 11(6).

variable geometry.

In any event, the EACJ's variable geometry decision is a highly significant decision because it provides an existing route within the Treaty framework for states like Tanzania which are deeply suspicious that they will be economically disadvantaged by relatively more economically powerful states like Kenya.[339] The principle of variable geometry has given states like Tanzania a legal foothold within the East African Community not to make commitments that they believe will unfairly distribute rewards. For those states willing to continue in 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 of consensus decision-making, but rather as exercising their right to opt out of commitments under the principle of variable geometry. This flexibility, as noted before, is a central feature of second generation African RTAs.[340]

### *F. Evaluating the Effectiveness of Variable Geometry*

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 is addressed in greater length in the discussion of multiple memberships in RTAs in Part IV 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. This section addresses each of these in turn.

Variable geometry, especially as phased implementation that allows some countries to remain behind while others proceed to

---

339 *See* Advisory Opinion Request, *supra* note 169; James Thuo Gathii, *Kenya: Spat With Dar Over Trade*, BUS. DAILY (Nairobi), Feb. 4, 2008, *available at* http://multimedia.marsgroupkenya.org/ ?StoryID =211243&page=4. See also *infra* notes 175-189 and accompanying text for a discussion of the historical tension between Tanzania and Kenya.

340 *See* discussion *infra* pp.577-9.

higher levels of trade integration, slows down trade liberalization. Therefore, the question is whether the increased levels of integration with minimal 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.[341] 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 yet to threaten sanctions against one another where there has been non-compliance with liberalization commitments.[342]

---

341 *See, e.g.*, Lucio Castro et al., *Regional Integration in East Africa, Regional Trade Integration in East Africa: Trade and Revenue Impacts of the Planned East African Community Customs Union* (World Bank Africa Region Working Paper Series No. 72, Aug. 29, 2004) (arguing that a compensation fund may be needed to address the cost/benefit imbalances among East African Community members because Kenyan exporters disproportionately benefited from economic linkages under the East African Customs Union).

342 For example, while COMESA has granted Kenya safeguards for its sugar and wheat produce, COMESA member countries have not threatened retaliatory sanctions against Kenya for imposing an auction for sugar import licenses that caused COMESA members like Egypt and Swaziland to lose market share in the Kenyan sugar market. Instead, in September 2009, COMESA sent a Sugar Sector Safeguard Assessment Mission to Kenya which recommended removal of the auctioning of import licenses for sugar. Following this recommendation, Kenya removed this auction system for sugar license imports. *See Kenya Cancels Auction of Sugar Import Rights*, REUTERS, Mar. 10, 2010, available at

So what are the benefits of collaboration and cooperation under RTAs that are characterized by variable geometry measures in the absence of coercive mechanisms? 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.[343] 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 features 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.

## IV. Multiple Memberships in RTAs

Part IV will examine another important feature of the flexibility of African RTAs—multiple memberships. Of the fifty-one countries in Africa, only six belong to only one RTA.[344] The other forty-five belong to at least two or more RTAs.[345] Swaziland belongs to three RTAs—COMESA, SADC and SACU.[346] Of all five countries in the EAC, four are also members of COMESA,

---

http://af.reuters.com/article/investingNews/idAFJOE6270CP20100308. *See also* John Okuye, *COMESA Likely to Petition Kenya Over Safeguards on Sugar*, E. AFR. STANDARD (Nairobi), Dec. 1, 2009, available at http://www.standardmedia.co.ke/InsidePage.php?id=1144029312&cid=457&.

343 *Id.* Following COMESA's recommendation that Kenya remove the auction of import license for sugar, the Kenyan sugar industry declared that it would be ready to compete with duty free sugar from the COMESA region when the COMESA safeguards ended in 2012. *See* Walter Menya, *Sugar Industry in Bitter Wars Ahead of COMESA Date*, BUS. DAILY (Nairobi), Apr. 30, 2009, at 12, available at http://multimedia.marsgroupkenya.org/?StoryID=253746&page=4 (citing Dr. Evans Kidero, Chairman of the Kenya Sugarcane Millers Association). For an analysis of the variety of roles interest groups have played in the East African Community from a liberal inter-governmentalism perspective, see Mwita Chacha, The New Community: Liberal Intergovernmentalism and East Africa Integration (Sept. 2009) (American Political Science Association Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1449277.

344 ECONOMIC COMMISSION FOR AFRICA, *supra* note 44.

345 *See infra* Figures 1-4.

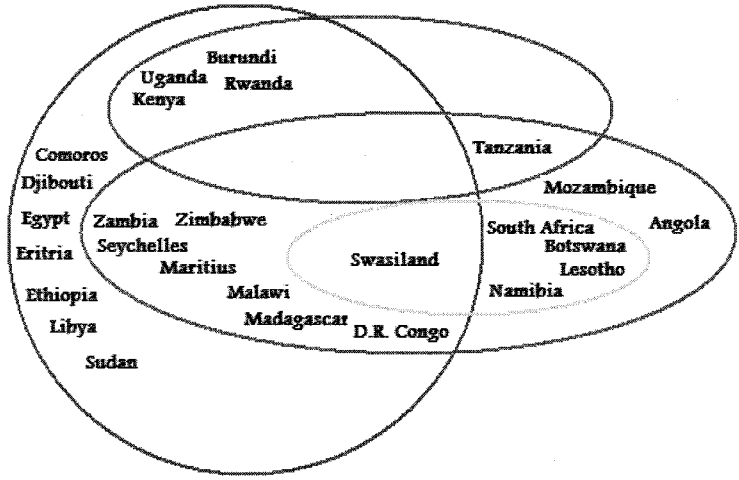
346 *See infra* Figure 1.

while Tanzania is a member of SADC.[347] Of the fifteen countries in SADC, eight are also members of COMESA.[348] Figures 1 through 4 illustrate the prominence of multiple memberships in African RTAs.

347 *Id.*

348 *Id.*

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



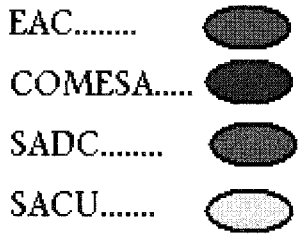



**Figure 2: Multiple Memberships in COMESA/EAC/SADC/SADU**

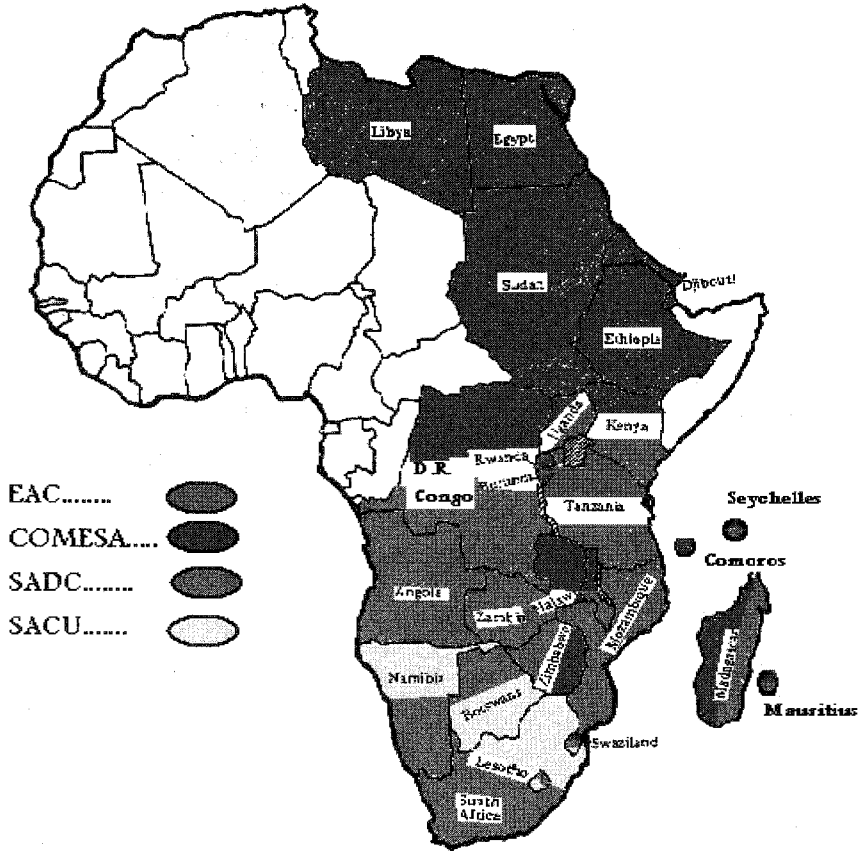


**Figure 3: Overlapping Memberships in**

**ECOWAS/CENSAD/UEMOA/WAMZ**

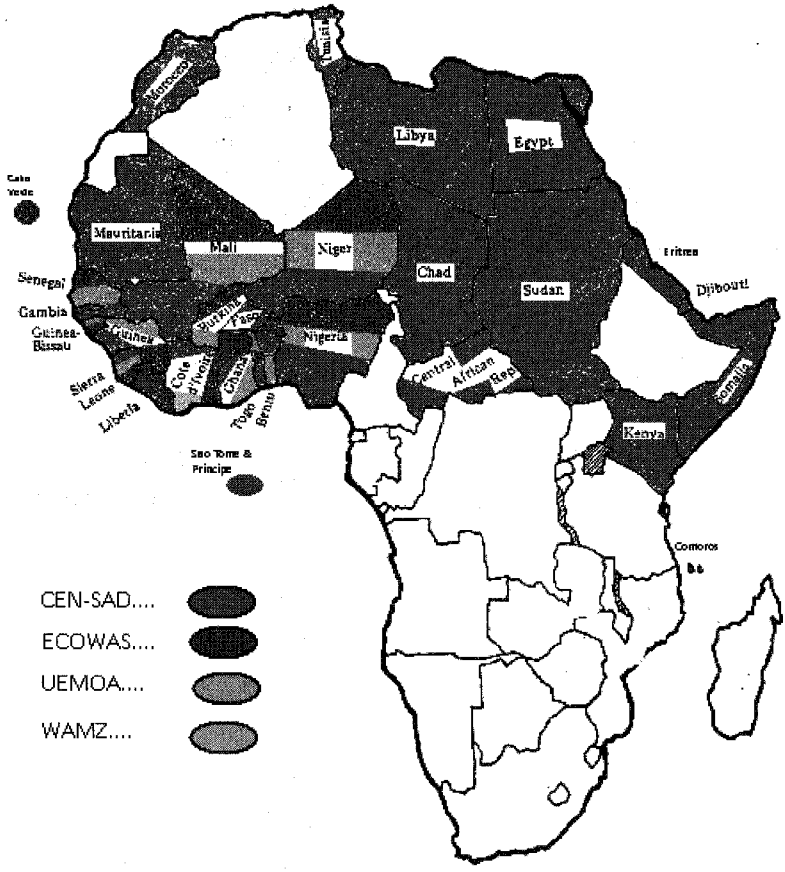
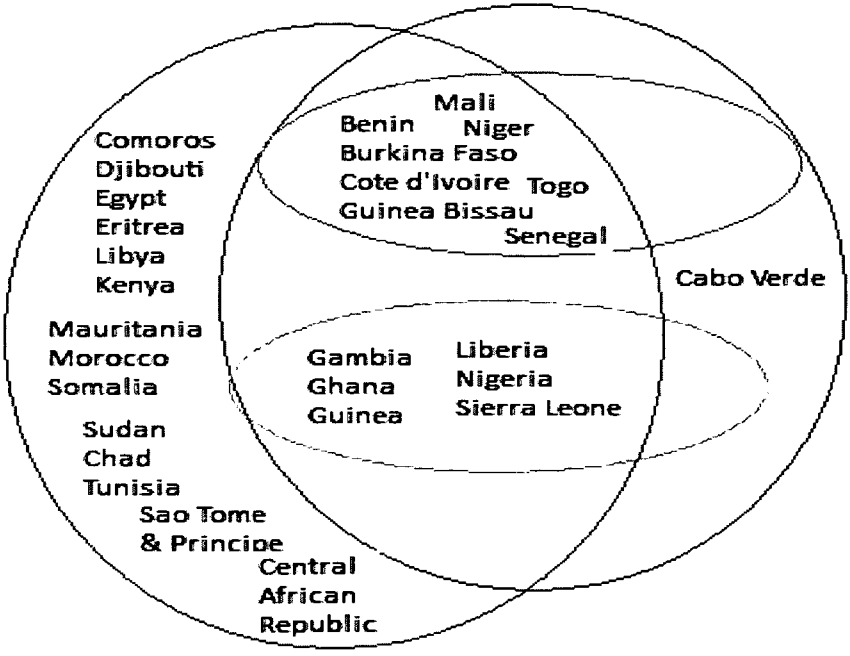


**Figure 4: Overlapping Memberships in ECOWAS/CENSAD/UEMOA/WAMZ**




Overlapping memberships in several RTAs is a reflection of the large number of bilateral and regional trade agreements, an occurrence that Jagdish Bhagwati has referred to as the "spaghetti bowl."[349] 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

---

[349] Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation With Free Trade Areas*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 2 (Jagdish Bhagwati & Anne O. Krueger eds., 1995). (According to Bhagwati, the "spaghetti bowl" phenomenon results when countries and intergovernmental organizations enter into multiple criss-crossing, instead of participating in multilateral trade.). *See also generally* Sungjoon Cho, *Defragmenting World Trade*, 27 NW. J. INT'L L. & BUS. 39 (2006).

extent to which this multiplicity of memberships and trade agreements has contributed to the "spaghetti bowl," which is addressed in further detail below.

Multiple memberships in RTAs is a reflection of the character of African RTAs as flexible regimes. This does not understate or underestimate the criticisms of 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 in creating 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).[350] Multiple memberships also prevent African governments from focusing on a single regional economic bloc, diminishing the little trade capacity and budgets of these countries. In addition, jurisdictional uncertainty arises as a result of overlapping legal regimes.

This part first 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, which is also the penultimate section of the paper, addresses the spaghetti bowl critique of the multiplicity of RTAs.

### *A. Why Countries Have Multiple Memberships in RTAs*

Multiple memberships reflect the desire of countries to pick and choose various options offered by competing RTAs.[351] Different RTAs offer benefits to members beyond providing the reduction or removal of tariff barriers and the harmonization of trade policies like customs policies.[352] For example, the

---

350 Rules of Origin (RoOs) specify when a product will qualify for duty-free movement within the RTA, what proportion of value must be added if it originates within the trade bloc, or whether it is required that a product undergo a substantial transformation in a country before being allowed to cross the border duty free. For more on rules of origin, see *infra* notes 447 to 458 and accompanying text.

351 *See* Arvind Panagariya, *The Regionalism Debate: An Overview*, 22 WORLD ECONOMY 477, 500 (1999) ("Even in the absence of any increase in trade barriers against nonmembers, the proliferation of crisscrossing FTAs leads to a replacement of the nondiscriminatory MFN tariff by a spaghetti bowl whereby tariffs vary according to the ostensible origin of the product.").

352 *See* Powers, *supra* note 82, at 3-4.

international transportation of commodities through waterways in Africa developed because the continent has the largest river basin coverage in the world.[353] Since 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 free trade areas requires cooperation between RTAs and offers an important reason for multiple trade bloc membership. Multiple trade bloc membership gives member countries access to aquatic trade routes that would otherwise be unavailable to them. This contributes to the diversification of agreements by landlocked countries, since transport costs limit competitiveness.[354] As a result, Africa's landlocked countries and the coastal nations they border are members of the same RTAs, sharing ports and trade routes.[355] Water basin states, in fact, often share membership in more than one RTA, and some RTAs overlap in the basins that they manage.[356]

African RTAs, therefore, serve as institutions of basin management demonstrating "the entwined relationships among trade, environment, and security aspects of international river basins."[357] From this perspective RTAs are trade-plus institutions to the extent to which trade is linked to environmental issues as well as to security issues.[358] In short, natural resource management and water cooperation on the one hand are interwoven with trade and security on the other.[359] Indeed, Part One examined how African RTAs nestle within them a variety of non-trade objectives and institutions.

Another major benefit of multiple memberships in RTAs is the ability to shift lawmaking initiatives from one international venue another that offers different advantages. This is referred to as

---

353 *Id.* at 16.

354 Nick Charalambides, *The Private Sector's Perspective, Priorities and Role in Regional Integration and Implications for Regional Trade Arrangements* 10 (ECDPM, Discussion Paper No. 66, 2005).

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

356 *See* Powers, *supra* note 82, at 18.

357 *Id.* at 11.

358 *Id.* at 25.

359 *Id.*

regime-shifting.[360] 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 (or states and NGOs) seeking to maximize their respective interests."[361] On this argument, countries enter into regimes to reduce the transaction costs and information problems that plague uncoordinated state relations.[362] A few examples are necessary to illustrate this point more fully in the African RTA context.

At present, Kenya is a member of both COMESA and the EAC.[363] Some benefits that Kenya accrues under COMESA, are currently unavailable under the EAC.[364] COMESA gives Kenya the opportunity to protect its economy against dumping, as it has done in the case of sugar and wheat exports, which Kenya has sought and obtained.[365] The EAC does not currently offer Kenya that important possibility.[366] In addition, COMESA offers a broader group of countries from which Kenya can defend itself against unfair trade practices than does the EAC.[367] The EAC also has advantages that COMESA does not give Kenya.[368] 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.[369] In short, there are things Kenya can better achieve in one regional bloc than

---

360 *See* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 5 n.17 (2004) (explaining that the term international "regime" refers to the principles, norms, and rules governing a particular issue area of international relations and the institutional structures and decision-making procedures through which they are developed.) Helfer also explains that regimes are formed when the interests of states converge around certain shared objectives that can best be achieved through interstate cooperation. *Id.*

361 *Id.* at 8.

362 *Id.* at 7.

363 East African Community–Kenya, Uganda, Tanzania, Rwanda, Burundi, http://www.eac.int/ (last visited Feb. 4, 2010).

364 Gathii, *supra* note 339.

365 *Id.*

366 *Id.*

367 *Id.*

368 *Id.*

369 *Id.*

in another regional bloc.

During the latter stages of South Africa's apartheid era, SACU was comprised of Botswana, Lesotho, Nairobi (which became a member upon its independence in 1990), and Swaziland (BLNS); as well as South Africa.[370] As part of a customs union, these countries enjoyed a higher level of economic integration than would be found in either a preferential trade area (PTA) or a free trade area (FTA).[371] However, rather than being an organization based on interdependence and mutual cooperation, SACU was a direct reflection of the high level of dependence of the BLNS countries on South Africa.[372] Geographic and economic factors such as shared boundaries, interlinked transportation, and employment exemplified this dependant relationship.[373] This dependency was the root of much conflict due to South Africa's maintenance of a white-minority government.[374] Geographic proximity and integration economically prevented BLNS from breaking off ties fully with South Africa, even though the BLNS countries repeatedly denounced South Africa's apartheid system.[375] 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.[376] The other problem the BLNS 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.[377] The

---

370 Robert D.A. Henderson, *The Southern African Customs Union: Politics of Dependence*, *in* THE FUTURE OF REGIONALISM IN AFRICA 225, 225 (Ralph I. Onwuka & Amadu Sesay eds., 1985).

371 *Id.* at 226.

372 *Id.* at 239.

373 *Id.*

374 *Id.* at 241.

375 *See id.* at 238 (by explaining that the BLNS countries are open to South African economic pressure being dependent on South Africa for a large portion of their government revenue in the form of shares from the common customs pool, manufactured goods and food, and wage employment).

376 *See id.* at 241 (stating that any attempt to impose economic sanctions against South Africa would certainly result in serious economic disruption within the BLNS countries as well as certain neighboring countries as well).

377 The best example of the BLNS countries joining others in the region in rejecting

result of this was an increasing effort on the part of the BLNS countries to lessen their dependency on South Africa gradually by exploring other economic options.[378] This was referred to as "gradual disengagement," and led to the BLNS contingency joining other economic affiliations such as SADCC.[379] The resulting multiple memberships of the BLNS countries was not intended to directly compete with South Africa or BLNS's obligations with SACU, but rather to complement the goal of making these countries more economically independent, and less dependent on a country denounced by the world for its racist policies.[380]

In West Africa, he Communate Economique de l'Afrique de l'Ouest (CEAO) and ECOWAS offer another example of the historical reasons for multiple memberships.[381] 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 barriers.[382] 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.[383] The economic dominance of Nigeria is very similar to South Africa's dominance in the previous example.[384] However, Nigeria's dominance had the opposite effect of drawing members into ECOWAS instead of pushing them away as South Africa had done.[385]

---

South Africa's dominance of SACU is the Lusaka Declaration. *See* Southern Africa Development Coordination Conference [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 35 (Lusaka, 1980).

378 *See* Henderson, *supra* note 370, at 243-44.

379 *Id.*

380 *See id.* at 244 & n.44.

381 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 eds., 1985).

382 *Id.* at 75-76.

383 *Id.* at 78.

384 *Id. See also* Rugumamu, *supra* note 174.

385 *See id.* at 82 & n.13 (citing John Ravenhill, who observed that Nigeria's presence in ECOWAS allows it to sustain existing integrative arrangements and to extend into new areas of cooperation).

These examples show that in some cases, multiple memberships were anticipated from the beginning. In such cases, changing political, social, and economic environments play a major role in multiple memberships. These examples add to one of the central claims of 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 treaties creating binding obligations.[386] For these countries, multiple memberships 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.

### *B. Multiple Memberships Reflect 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.[387] 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 that 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."[388] Further, such a view presumes that for Africa's voice to be heard in the world trade arena, it must be unified through "'externalization' for continental integration as well as extra continental effectiveness."[389] Yet while the hope of unity for these purposes would ideally serve Africa well, the search for African unity and regional integration has proven very daunting. Multiple memberships reflect the reality of diversity among African countries and the complexity of their conflicting, overlapping, and sometimes congruent

---

386 *See* Helfer, *supra* note 360, at 10 & n.20.

387 *See supra* note 183 (referencing Vaitsos, *supra* note 14, at 729-36).

388 Shaw, *supra* note 96, at 13.

389 *Id.*

interests.[390] 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.[391]

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.[392] For example, non-least developed countries (LDCs)[393] in ECOWAS decided to go it alone and signed their own EPA with the EU.[394] In addition, Ghana and Cote D'Ivoire, two of the three non-LDCs, signed interim EPAs under pressure from the EU, thus further deepening the wedge among ECOWAS member states.[395] ECOWAS LDCs were concerned that signing an EPA with the EU would allow Nigeria to become a conduit for channeling goods originating from Europe into their economies.[396] Thus, differing interests among ECOWAS members resulted in multiplying the number of EPAs the EU was

---

390 *See infra* Part IV.A.

391 I. William Zartman, *Africa as a Subordinate State in International Relations*, 2(3) INT'L ORG. 581 (Summer 1967). *See also* William Lyakurwa et al., *Regional Integration in Southern Africa: A Review of Experiences and Issues, in* REGIONAL INTEGRATION AND TRADE LIBERALIZATION IN SUBSAHARAN AFRICA: FRAMEWORK ISSUES AND METHODOLOGICAL PERSPECTIVES 196 (A. Oyejide et al., ed., 1997).

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

393 "Least developed country" is a term of art used by the United Nations to describe countries which exhibit the lowest levels of socioeconomic development. *See* OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND THE SMALL ISLAND DEVELOPING STATES, Least Developed Countries: Criteria for Identification of LDCs, http://www.unohrlls.org/en/ldc/related/59/ (explaining the criteria by which countries are evaluated to determine their LDC status).

394 *Id.*

395 *Id.*

396 Once Nigeria signs an EPA with the EU, it is of course not clear that the agreement will necessarily prevent exports destined for Nigeria from reaching the LDCs. *See id.*

signing with ECOWAS members, further exacerbating multiplicity of trade and related agreements in Africa. Another example is Tanzania's decision to stay away from the Eastern and Southern Africa (ESA) group of countries (essentially the members of the EAC) in the negotiations over an EPA.[397] Tanzania decided to negotiate its EPA under the SADC group with which it is more ideologically aligned, rather than with the ESA group. In so doing, Tanzania's choice of SADC, made 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, Tanzania'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.[398]

In SACU, Angola and Botswana are signing different EPA agreements than those being signed by the rest of SADC's members.[399] In all, fifteen SADC members are negotiating EPAs under four different configurations.[400] Under the EPAs, African, Caribbean, and Pacific Group of States' (ACP)[401] duty free and full quota access to the EU will end, and they will be required to open their own borders to European products and services.[402] EPA negotiations in the SACU region present a potential conflict between SACU's Common External Tariffs (CET) structure and

---

397 Gathii, *supra* note 339.

398 *See* United Nations, World Population Prospects Population Database, http://esa.un.org/unpp/definition.html (last visited Apr. 7, 2010) (defining "least developed countries" and listing which countries are included in the group of least developed countries).

399 *Southern Africa Region Makes Progress on EPA*, 13(1) BRIDGES 15, 15 (March 2009), *available at* http://ictsd.org/downloads/bridges/bridges13-1.pdf [hereinafter *Southern Africa Region*].

400 *Id.*

401 The African, Caribbean and Pacific Group States (ACP) is a group of countries created by the Georgetown Agreement in 1975. The group's main objectives are sustainable development and poverty reduction within its member states, as well as their greater integration into the world's economy. All of the member states, except Cuba, are signatories of the Cotonou Agreement with the European Union. *See generally* ACP Member States, The Secretariat of the African, Caribbean and Pacific Group States, http://www.acpsec.org/en/acp_ states.htm (last visited Feb. 28, 2010) (listing the ACP Member States).

402 *See Southern Africa Region*, *supra* note 399.

the free trade commitments among SADC member States who are negotiating their own EPA with the EU. The overlap between the SACU CET and the free trade commitments under SADC are likely to result in transshipment. This is because importers enjoying a CET within SACU can export such imports to non-SACU members who are members of SADC.[403] I illustrate this with the example of Swaziland in Part IV below.

The Cotonou Agreement, which is the basis of the EU's negotiations with African, Caribbean, and Pacific countries over Economic Partnership Agreements (EPAs), does not also address the question of who the proper parties to the EPAs should be.[404] 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. As we have seen above, this in turn has resulted in the formation of de facto coalitions within the context of EPA negotiations.

### *C. Criticisms of Multiple Memberships*

As noted at the beginning of this Part, there are two categories of criticisms regarding the multiplicity of memberships in Africa. Each of these is addressed in turn.

### *D. Spaghetti 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;[405] the Economic Community of West African States;[406] the Inter-Governmental Authority on

---

[403] *See* Sean Woolfrey, *South Africa's Concerns Over Interim Economic Partnership Agreement*, Trade Law Centre for Southern Africa, Oct. 10, 2009, *available at* http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=75268&cat_id=1058.

[404] *See generally* EUROPEAN COMMISSION, The Cotonou Agreement, *available at http://ec.europa.eu/development/geographical/cotonouintro_en.cfm#revision2* (providing an overview of the agreement).

[405] Treaty for the Establishment of the East Community, supra note 69.

[406] ECOWAS, *supra* note 125.

Development;[407] the Southern African Development Community;[408] the Common Market for Eastern and Central Africa;[409] ECCAS[410] and the Arab Maghreb Union.[411] In this sense, the Treaty for the Establishment of the African Economic Community regards these RTAs as building blocks towards an eventual continent-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.[412] Bhagwati has referred to this increase in the number of bilateral and regional trade agreements as the spaghetti bowl.[413] 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.[414] 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.[415] 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 (RoO) that discriminate across products and countries.[416] The ten year assessment of the WTO, referred to as the Sutherland Report, regretted the lack of harmonization produced by the complex web

---

407 Agreement Establishing the Inter-Governmental Authority on Development, Mar. 21, 1996, available at http://igad.org/about/agreement_establishing_igad.pdf.

408 Treaty of the Southern African Development, *supra* note 127.

409 Treaty for Establishing the Common Market for Eastern and Southern African, *supra* note 65.

410 Treaty Establishing the Economic Community of Central African States, *supra* note 122.

411 Treaty Establishing the Arab Maghreb Union, Feb. 17, 1989.

412 JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK (Princeton Univ. Press 1991); *see also* Jagdish Bhagwati et al., *Trading Preferentially: Theory and Policy*, 108 THE ECONOMIC JOURNAL 1128, 1138 (1998).

413 *See* Bhagwati, *supra* note 349, at 1138.

414 *Id.*

415 *Id.*

416 Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 J. OF ECON. LIT. 287, 328 (2000).

of inconsistent rules of origin in multiple RTAs which in turn increased transaction costs for business and hampered trade flows.[417] These complex webs of rules of origin also counteract trade creation as the ability of a partner country to undermine an inefficient domestic industry is reduced, since they have the effect of requiring a country bound by them to purchase inputs from less efficient sources.[418] In effect, the trade preferences which are extended under bilateral and regional trade agreements undermine the GATT/WTO rule that requires members to 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. However, Bhagwati and Panagariya argue that geographic proximity does not provide benefits between natural trading partners as presumed by its proponents for a number of reasons.[419] First, they contend that arguments about natural trading partners are based on static theories that say little about trade diversion as a primary reason for the establishment of regional trade agreements.[420] Another justification in support of the natural trading partners thesis is 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.[421] But according to Bhagwati and Panagariya, eliminating tariffs between member countries in a regional grouping leaves each country worse off as the resulting welfare gain will be less than the revenue lost by the elimination of tariffs.[422] In addition to lost revenue, RTAs also result in trade diversion.[423] Trade diversion occurs where the creation of an RTA in one country leads to the

---

417 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).

418 Arvind Panagariya, *The Regionalism Debate: An Overview* 18 (revised draft from November 1998), *available at* http://econpapers.repec.org/paper/wpawuwpit/0309007.htm (last visited Apr. 7, 2010).

419 *See* Bhagwati et al., *supra* note 412, at 1134.

420 *See id.* at 1129.

421 *See id.* at 1130.

422 *See id.*

423 *See id.* at 1129.

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.[424]

Bhagwati and Panagariya also dispute the claim that RTAs reduce tariffs among members. Their argument is based on the fact that the Uruguay Round of GATT talks, which ended in the mid-1990s, left a number of tariffs in place, particularly in agriculture.[425] 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.[426]

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 are alluded to in a different context above), and that a high volume of trade resulting from an RTA is good for both trading partners.[427] 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 an RTA.[428] 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.[429] 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.[430]

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. Bhagwati and Panagariya argue that this is not necessarily true, since a specialized producer can act as a monopolist and the

---

424 For a full, and quite useful explanation of trade diversion, see Panagariya, *supra* note 416, at 290.

425 *See* Bhagwati et al., *supra* note 412, at 1130.

426 *Id.*

427 *Id.* at 1132.

428 *Id.*

429 *Id.*

430 *Id.*

increased cost of transport makes a distant country have a higher elasticity.[431] As a result, it is not always the best course of action to sell only to countries with lower costs of transport.[432] Bhagwati and Panagariya also argue that lower transport costs for a neighboring partner may also, 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.[433] Bhagwati and Panagariya therefore argue that these theories for the formation of RTAs are "static" to the extent that they assume all welfare gains and losses are created at the same time and are therefore instantaneous.[434] For this reason, Bhagwati and Panagariya recommend a dynamic model of free trade.[435] To them, a dynamic theory of free trade is more consistent with a WTO-type system than with the proliferation of RTAs.[436]

For these reasons, free trade economists argue that the best solution to the problems posed by proliferation of RTAs is to speed up multilateral, unconditional, most-favored-nation non-discriminatory trade liberalization, since tariff preferences would disappear once external tariffs drop to zero.[437]

### *E. High Transaction and Administrative Costs*

A second category of criticisms relates to the high transaction costs and administrative difficulties of complying with multiple RoOs.[438] Multiple memberships sap the limited trade capacities 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

---

431 Bhagwati et al., *supra* note 412, at 1134.

432 *Id.*

433 *Id.* at 1142.

434 *Id.*

435 *Id.* at 1146.

436 *Id.*

437 Panagariya, *supra* note 416, at 328.

438 *See, e.g.*, Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT'L ECON. L. 111, 115 (2010) (arguing that RoOs tend to especially discriminate against small poor developing countries and that they act like tariffs on intermediate products levied by the country importing the final good).

much in common with the "spaghetti bowl" argument we saw above and may in fact be regarded as a subset of it.[439]

One of the most important features of a customs union is that all the member countries adopt one common external tariff (CET).[440] 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 (CU), these countries would be subject to one CET which could significantly diminish the funds they previously collected through their own agreements.[441] 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.[442] Further, exporters who have benefited from regional preferential market access will want to keep their unique markets, and local producers who have benefited from favorable rules of origin (RoO) will resist reductions in external trade barriers and efforts to make rules less restrictive.[443]

Difficulties may also 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 RoOs, customs procedures, and the changing political climate of RTAs or the countries themselves.[444] Legal uncertainties may also arise in cases where more than one trade arrangement applies to trade between two countries.[445] Controversies regarding which RTA has proper jurisdiction in cases where there is more than one dispute settler may hinder trade by increasing transaction costs as well as uncertainty among the Member Countries.[446]

---

439 See section IV.D.

440 GATT, *supra* note 168, at art. XXIV.

441 *See* Yang & Gupta, *supra* note 355, at 14.

442 *Id.* at 6.

443 *Id.*

444 Alemayehu Geda & Haile Kebret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA*, 17 J. OF AFRICAN ECON. 357, 371-72 (June 2008).

445 Cord Jakobeit et al., *Overlapping Membership in COMESA, EAC, SACU and SADC: Trade Policy Options for the Region and for EPA Negotiations* 22 (2005), *available at* http://www.gtz.de/de/dokumente/en-epa-overlapping-memberships-2005.pdf.

446 *See, e.g.*, William J. Davey and Andre Separ, *The Soft Drinks Case: The WTO and Regional Agreements*, 8 WORLD TRADE REVIEW 5, 17 (2009) ("It would obviously be desirable from the perspective of avoiding duplication of proceedings and conservation

When a country has membership in multiple RTAs, multiple RoOs need to be applied. RoOs specify when a product will qualify for duty-free movement within the RTA, and what proportion of value must be added if it originates within the trade bloc, or whether it is required that a product undergo a substantial transformation in a country before being allowed to cross the border duty free.[447] Knowing which RoOs to follow depends on where commodities originate, and for states involved in various RTAs, this undoubtedly makes the customs clearance process more complex and delays transactions.[448] Increased RTAs involvement of a country may cause the cost of shipping to climb higher, in order to offset the need for increases in administrative supervision necessary to keep track of proper origin documentation and procedures.[449] This may in turn have the effect of producers turning to other countries not involved in multiple RTAs, or to those requiring less complex procedures.

Since Free Trade Agreements (FTAs) allow each of its member-states to implement its own tariff structure, RoOs need to be included in agreements involving FTAs in order to prevent transshipment.[450] Because FTAs do not have a CET, which is typical of a customs union, 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.[451] CETs already in place make this type of trade deflection less of a problem in customs unions.[452] 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 established. However, according to Yang and Gupta, "given the small share of

---

of resources if there were agreements negotiated as to how to allocate jurisdiction over disputes in respect of international agreements covering subjects in a way that multiple dispute-settlement procedures might be expected to be invocable.").

447 Panagariya, *supra* note 418, at 17.

448 *See* Anne O. Krueger, *Problems with Overlapping Free Trade Areas*, *in* REGIONALISM VERSUS MULTILATERAL TRADE ARRANGEMENTS 9, 18 (O. Takatoshi & Anne O. Krueger eds., Univ. of Chicago Press 1997).

449 *Id.* at 16.

450 Jakobeit, *supra* note 445, at 46.

451 Panagariya, *supra* note 418, at 12.

452 Krueger, *supra* note 448, at 15.

intraregional trade in Africa's total trade, the direct contribution of any trade deflection to overall trade performance is likely to be limited."[453] 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.[454] 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.[455]

Multiple memberships in RTAs raise the possibility that a country is at once a customs union as well as a member of an FTA. Such a country would be able to enjoy preferential tariffs from the FTA but would not be able to reciprocate the preferential favor to the FTA, since it has to uphold its CET in the customs union. If the commodities are valuable enough, those in the FTA may deem these transactions to supersede the benefits of special tariffs that they are unable to enjoy. This situation is currently exemplified by Swaziland and its multiple memberships. Swaziland is currently a member of SACU and COMESA (both customs unions), as well as SADC which is currently an FTA.[456] Swaziland is therefore a member of two customs unions and an FTA. As a COMESA member, Swaziland enjoys free market access within COMESA which has a fully developed FTA, but its duty-free importing beyond COMESA and SACU is limited due to their CETs.[457] Membership in SACU's and COMESA's CETs limits Swaziland's ability to extend more generous unilateral concessions to non-SACU and non-COMESA members since this would undermine Swaziland's CET commitments. For example, if Swaziland were to extend such unilateral concessions to SADC member countries who are neither SACU nor COMESA members, it would undermine these customs unions and effectively downgrade them into FTAs. In such a situation, the respective

---

453 Yang & Gupta, *supra* note 355, at 19.

454 Panagariya, *supra* note 418, at 17-18.

455 *Id.*

456 *See infra* Figure 1.

457 Jakobeit, *supra* note 445, at 60.

RoOs would apply, thereby effectively making Swaziland a transit country.[458]

*F. Implications for African RTAs*

If the goal of trade liberalization is to 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 does not appear to be the primary 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.[459] 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.[460] Rather, they serve multiple goals including as frameworks for coordination of development projects as alluded to more fully in Part I of this paper. Further, to the extent to which African RTAs are regarded as trade regimes, African countries have been most concerned with balancing gains and losses and ensuring that the poorest members are compensated for any losses they suffer as a result of liberalization commitments as was demonstrated at length in the discussion on variable geometry in Part II.

Large external tariffs still remain in place in a variety of African countries, while other countries have lower tariffs on the same product.[461] This results in product diversion between countries and effectively reduces the effectiveness of RTAs as liberalizing trade regimes in Africa.[462] Much of the current available data supports the notion that RTAs are either ineffective

---

458 *Id.*

459 *See* discussion *infra* Part II.C.

460 Notably, Pravin Krishna and Jagdish Bhagwati have argued that it is possible to pursue non-economic benefits within customs unions and for the members to come out better off. *See generally* Krishna and Bhagwati, *Necessarily Welfare Enhancing Customs Unions With Industrialization Constraints: The Cooper-Massell-Johnson-Bhagwati Conjecture*, 9 JAPAN & THE WORLD ECON. 441 (1997).

461 *See* Yang & Gupta, *supra* note 448, at 13.

462 *Id.*

at stimulating inter-regional trade or are at best, non-factors.[463] If RTAs are to work optimally in promoting liberalizing trade, more regional trade should 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.[464] In this period, three countries, Swaziland, Togo, and Zimbabwe, exported more than half of all exports to countries inside of their regional grouping—SADC.[465] Only five countries exported more than half of their exports to Africa generally, including Djibouti and Mali in addition to the countries listed above.[466] Many countries contributed ten percent or less of total exports to African countries and even less to those within their regional trade group.[467] Based on this data, ECCAS has three of the ten bottom countries for inter-regional trade while COMESA had two.[468] 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.[469]

In COMESA, Kenya leads with a third of all exports with the main export link being Kenya to Uganda.[470] While many of these countries do not contribute significantly to regional trade, many have an obvious link to external markets. Gambia, for instance, contributes twenty-three percent of its exports to intra-regional trade among ECOWAS countries.[471] While this is higher than many African countries, seventy-one percent of Gambian exports go to developed European countries.[472] The same trend holds for Botswana and Burundi. Both contribute around thirteen percent of exports to inter-regional trade but contribute eighty-three and

---

463 *Id.*

464 Norbert Lebale et al., *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 34 (2009).

465 *Id.*

466 *Id.*

467 *Id.*

468 *Id.*

469 Lebale, *supra* note 464, at 35.

470 *Id.*

471 *Id.*

472 *Id.*

sixty-five percent of exports to Europe, respectively.[473] 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 United States, and Asia.[474] 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.

More recent data suggests the impact of the global recession on African exports to the United States. Total African exports for the United States for the year to date period from 2008 to 2009 are down anywhere from four percent to ninety-nine percent with some countries. However, some countries have increased their share of trade with the United States.[475] Chad's amount dropped fifty-nine percent while South Africa dropped fifty-two percent.[476] The question here becomes whether this is a permanent drop or just a demand generated price shock that will resolve itself in the short and medium term.

## V. Conclusions

This paper has demonstrated that African RTAs are flexible legal regimes. These 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

---

473 *Id.*

474 Lebale, *supra* note 464, at 35.

475 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 Apr.10, 2010).

476 *Id.*

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

In addition, the multiplicity of memberships in African RTAs while further confirming their nature as flexible regimes, also 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, it has undermined the achievement of more thorough intra-regional 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 which non-discriminatory free trade is likely to offer.