

35 NCJILCR 571 Page 1

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Article

AFRICAN REGIONAL TRADE AGREEMENTS AS FLEXIBLE LEGAL REGIMES James Thuo Gathii [FNd1]

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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 In- tegrated 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 Independ- ence

600

III. Variable Geometry: A Defining As- pect 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

IV.

|  |  |
| --- | --- |
| 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 |
| 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 Member- ships | 656 |
| D. Spaghetti Bowl: Are RTAs  Building or Stumbling Blocks? | 656 |
| E. High Transaction and Adminis- trative Costs | 660 |
| F. Implications for **African** RTAs | 664 |
| Conclusions | 666 |

V.

**I. Introduction**

**Trade** integration in Africa is often viewed in light of the European Union and other regional in-

tegration arrangements like the North American Free **Trade** Agreement (NAFTA). From this per- spective, 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 to- gether, 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 suprana- tional **organization** to which the states transferred certain types of authority.

Seen in this light, **African** Regional **Trade** Agreements (RTAs) contrast sharply with their coun- terparts 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. [FN1] In addition, the treaty commitments in **African** RTAs do not appear to have raised “the political costs of noncompliance” such as reputational losses. [FN2] In short, the existence of regional **trade** rules and institutions has not done much to change the behavior of **African** coun- tries. [FN3]

The foregoing views are caricatures that are not based on the actual treaty commitments and ex- periences of **African** RTAs. [FN4] 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 con- tained 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 prin- ciple 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 sali- ence to any set of objectives. Fourth, **African** RTAs demonstrate a particular preference for function- ally specific objectives to undertake discrete projects and to serve as forums for the integrated devel- opment 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 ob- jectives of **trade** liberalization. Sixth, **African** RTAs are characterized by multiple and overlapping memberships, exemplifying a classic case of the “spaghetti bowl.” [FN5] 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 American context. Dominguez has argued **trade** integration agreements have “lax implementation” as a “rule” governing international relations in the Americas. [FN6] 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 proced- ures or organizations that states sought to create.” [FN7]

Viewing African RTAs as flexible regimes has the advantage of allowing these RTAs to be un- derstood 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 accur-

ately 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 inter- national institutions.” [FN8] Indeed, as this article shows, African RTAs are not overseen by power- ful supranational bureaucracies, but rather by relatively weak institutions that leave ample sover- eignty to their member states.

Tiyanjana Maluwa in essence alludes to a very important and often overlooked point by pessim- ists 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. [FN9] 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. [FN10] 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 ar- rangement, which was established in 1973 after its original members, Liberia and Sierra Leone, ex- perienced civil wars. [FN11] The Mano River Union was revived again in 2004. [FN12] The collapse of the East African Community 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 gener- ation 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 co- operation 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 neoclassical/comparative advantage model had disappeared by 1965.” [FN13] 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.” [FN14]

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. [FN15] Not only was the range of objectives increased, but flexibility was built into these RTAs by allowing functionally specific objectives and incorporating the principle of variable geometry as outlined above and discussed more fully in this article.

This contrasts sharply with an approach to regional integration that is primarily or solely focused on trade integration and that requires rigorous formal compliance with liberalization commitments within specific time frames. This does not of course preclude such treaty commitments having sol- emnly binding obligations. [FN16] Indeed, many if not all African RTAs have exactly those kind of

commitments. [FN17] In short, flexibility is not necessarily incompatible with assuming legally bind- ing 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 ad- opt 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 capabil- ities of their members. For example, in the Treaty for the Establishment of the East African Com- munity, the principle of variable geometry allows the commitments in the treaty to be undertaken at different speeds. [FN18] The principle of asymmetry allows variances in measures of economic in- tegration, 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 for the poorest SACU states. [FN19] In addition, as noted below, Botswana, Lesotho, and Swaziland are entitled to tariff assistance for industries of major importance to their economies. [FN20] 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. [FN21] 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 coordina- tion” [FN22] which is now a major feature of African RTAs.

This paper proceeds as follows. Part I discusses how flexibility enmeshes well in the African con- text, 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 con- text--the view that African regionalism is a bulwark for economic self- independence. Part II dis- cusses 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 dis- cuss at length the highly significant April 2009 East African Court of Justice (EACJ) advisory opin- ion 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 re- viewing 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 mar- ket-based customs union integration model. [FN23] Under the European model, economic integration starts with a free trade area, then progresses to a customs union, then to a common market, and fi- nally to an economic union, with a political union as the last stage. [FN24] This classic integration model associated with Jacob Viner [FN25] came under serious scrutiny as a model for Third World integration many decades ago. [FN26] 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. [FN27] This assumption is often undermined since a majority of African eco- nomies have largely similar products without necessarily having comparative cost advantages between them sufficient to overcome this similarity. [FN28] 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 re- gion. [FN29] The small size of most of these economies also means that significant 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. [FN30] In addition, African integra- tion 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. [FN31]

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. [FN32] This is in part because developing countries tend to trade with developed countries more than they do with each oth- er. [FN33] In addition, their national outputs are dominated by trade with developed economies, mainly in exporting unprocessed raw materials. [FN34] The argument here is that African economies need more than the increase in market size created by a common market because the increase in mar- ket size may be marginal relative to other limitations for firms such as high production costs and very low levels of income that make the effective size of regional markets small. [FN35]

Thus, as noted more fully below, a primary goal of trade integration in Africa became that of pro- moting large scale production with a view to shifting trade patterns from external sources. [FN36] 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 produc- tion facilities within Africa. [FN37] 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. [FN38]

Import substitution policies were another initial response to this classical customs theory, particu- larly in the 1960s and 1970s. [FN39] These policies have increasingly been abandoned through multi- lateral treaty commitments, particularly since the 1990s. [FN40] The Vinerian customs union theory was also adapted through a variety of devices to avert unequal integration gains between integrating economies, a theme addressed more fully below. [FN41] Today, while developing countries have largely abandoned import substitution policies, many have yet to fully liberalize their economies un- der the GATT/WTO obligations they have assumed. [FN42]

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, ar- gued that while regionalism focuses on institution building and the conclusion of formal arrange- ments, 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. [FN43] In fact, Africa has had its own forms of interregional interactions that predate the ad- vent of colonial rule. [FN44] While these interactions need not be overstated, we also must not lose sight of the manner in which colonial rule created economies that favored the interests of the various European metropoles at the expense of the colonies, [FN45] and the manner in which independence subsequently restructured these interactions around the ideologies of sovereignty and nationalism. [FN46]

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 commit- ment 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, per- haps 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 pur- suing other objectives. For example, insecurity is a major barrier to trade integration, and any region- al integration efforts that do not address insecurity as an objective would be atypical. [FN47]

Africa is a diverse continent, composed of countries with dramatic differences in their legal re- gimes, religious and cultural values and norms, economic endowments, political regimes, and histor- ical heritage. At one level, this contrasts with the European Union, which was “built on commonalit- ies of economic interest, politics and culture” [FN48] and which also gave primacy to economic in- tegration. 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 benefi- cial economic cooperation requires close similarity of social and political outlook.” [FN49] The first generation of African RTAs were narrowly focused on trade integration to the exclusion of other ob- jectives and in so doing underestimated the importance of cooperating on a broad range of objectives. [FN50]

Thus, today it would be a mistake to simply regard African RTAs merely as “cognitive represent- ations and formal arrangements.” [FN51] Rather, African RTAs must be regarded in light of the initi- atives and processes including state-society relationships that are cumulatively establishing regional- ism in modern Africa. [FN52] It is apposite to note here that even in the European Union, it would be inaccurate to presuppose that its integration has been achieved solely or purely through legal trans- formations through the European Court of Justice. As J.H.H. Weiler has argued, “legal and constitu- tional structural change” had been crucial to European integration, “*but only in their interaction with the Community political process*.” [FN53] One African leader put it best: “The basis of our coopera- tion, 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.” [FN54]

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 remem- ber the primacy of politics and not be misled by assumptions natural to ‘developed’ societies. It is im- portant to pay attention to social, historical, and economic factors.” [FN55] 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, [FN56] examining the extent to which their increased interactions have influenced the realization of regional commitments in trade and related areas. [FN57] This article 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 understand- ing. [FN58] 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 integra- tion initiatives such as infrastructural projects. In doing so, African RTAs have adapted to an envir- onment 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. [FN59]

*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. [FN60] In one context, high legalization is defined by the extent to which obligation, precision, and delegation of a formal instrument may serve an important purpose. [FN61] However, in a different context, such legaliza- tion 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. [FN62] 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 effic- acy. For example, the increasing absorption of regional rules into national law of RTA member coun- tries, 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. [FN63] 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 by the decisions or regulations of the Community.” [FN64] Article 29(2) of the Treaty for the Establish- ment 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. [FN65] 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. [FN66] Notwithstanding these examples, rather than being highly legalized regimes, African RTAs are flexible arrangements. A Southern African Development Coordination Conference (SADCC) re- port 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 insti- tutional 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. [FN67]

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 sanc- tions, but rather on building flexible frameworks of development, coordination, and cooperation that give countries their choice of activities that interest them most. [FN68] In this sense, African RTAs often adopt “functionally specific” [FN69] objectives that do not wrestle sovereignty away from na- tional governments, given that it is not always clear if intra-regional trade would “compensate for the inevitable erosion of their autonomy in policy-making.” [FN70] Such flexibility is also important giv- en the 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 di- versity.

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 commit- ments to the promotion of free trade as a source of economic growth are relegated to the background. [FN71] 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, [FN72] not merely because it is market based, but because it often pits economically richer countries against economically poorer countries. [FN73] That is why there has been a longstanding argument in favor of compensatory schemes for poorer African countries in the initial stages of economic integration with richer coun- tries so that integration commitments do not impose high administrative costs without immediate ad- vantages. [FN74]

*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. [FN75] For example, the East African Community nestles within it the Lake Victoria Basin Commis- sion, which coordinates the management and utilization of the basin among three of the five com-

munity states which share the Lake Victoria Basin. [FN76] There is a long history of integrated de- velopment of river basins among African countries, some nestled within economic integration ar- rangements [FN77] and others that were developed by longstanding treaties entered into during the colonial period. [FN78] Some have called this approach “development integration.” [FN79] Moreover, these integrated development arrangements have sometimes been designed with re- distributional considerations. [FN80]

In short, African RTAs do not merely center integration around a vision of market-led integration. [FN81] 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 [FN82] and cross-border challenges that include trade, [FN83] security [FN84] and health. [FN85] Rather than simply using the expansion of intra-regional trade as a framework for industrial growth, product di- versification, and the improvement of the global competitiveness of these products as ways of over- coming small domestic markets, African RTAs were and continue to be seen as frameworks for de- velopment cooperation. [FN86] As Oliver Saasa put it, this approach “is fundamentally dependent upon increased industrial production through specialization, exploitation of economies of scale, ex- ternal economies, coordinated programming and development of infrastructure.” [FN87] Here, re- gional cooperation is at the level of production in the arenas of capital and labor, rather than merely in trade. [FN88] This amounted to industrial planning in many regions complete with licensing legis- lation designed to “encourage investment in industry serving the regional market.” [FN89] For this reason, regional integration in Africa has been and continues to be based on such planning, “rather than laissez faire forces.” [FN90]

A major impetus to approaching integration with emphasis on cooperation at the level of produc- tion, and not simply in trade, is its dual emphasis on distributional equity amongst members, [FN91] (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. [FN92] 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 necessar- ily imply coordinated industrial production at the regional level.” [FN93] This explains why the ob- jectives of many African RTAs have a huge number of sector-specific cooperative goals. In turn, such objectives play a significant role in setting the

stage for trade among cooperating countries, which, after all, is a prerequisite for undertaking re- gional trade liberalization. [FN94]

In this sense, integration is regarded as a diplomatic strategy of cooperation on a range of issues including infrastructural, industrial, political and economic concerns, [FN95] as well as for balancing forces between the RTA members on the one hand and the global economic system on the other. [FN96] Some have argued that this approach of integration by projects, rather than through integra- tion of markets, has accentuated underdevelopment rather than solved development problems. [FN97] 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. [FN98] Thus critics of African integration have missed the mark by failing to appreciate the importance of African RTAs as frameworks for developing political con- sensus 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 co- operate. [FN99] There is indeed evidence showing that there are gains in non-trade areas, such as se- curity, arising from economic integration arrangements associated with commercial institutions like regional trade agreements. [FN100] There are a variety of ways in which economic integration ar- rangements 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 ex- pectations of benefits from regional trade and investment as raising the opportunity costs of war. In addition, RTAs provide a forum for negotiating peaceful outcomes. [FN101] Paul Collier has recently shown that although many African countries are small and poor, their military spending is high and often wasteful. [FN102] Collier suggests that cooperation is the solution to curtailing the arms race in Africa. [FN103] However, cooperation in the absence of enforcement would only encourage a coun- try's “neighbors to coordinate reduction in their military spending while not doing so itself.” [FN104]

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. Con- sequently, even where disparities are apparent, such institutions may help to cement trust so that power asymmetries will not be exploited in the future. [FN105] 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. [FN106] Thus, the nesting or nestling of security and development matters within trade integration agreements is a significant but overlooked phenomenon since it does not fit in especially well with standard integration models such as the one involving the Economic Com- munity. [FN107]

As a Nigerian Minister for External Affairs once noted:

while focusing on certain economic development issues to be solved by sub-regional in- tegration, 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. [FN108]

Indeed, in the context of the Eastern Community of Western African States (ECOWAS), trade integ- ration was very early recognized as incapable of being pursued while ignoring economic develop- ment and regional security issues. [FN109] After all, trade integration was not possible within a con- text of insecurity both among and within the member states. [FN110] 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. [FN111] In 1981, the states entered into a mutual defense pact to re- pulse external aggression or armed internal conflict. [FN112] Security coordination and cooperation were institutionalized with the establishment of permanent structures of conflict management, pre- vention, and resolution. [FN113]

It is in this sense that Thomas Ohlson and Stephen J. Stedman's argument that “conflict, insecur- ity and underdevelopment are inextricably interlinked in Southern Africa,” is true of most of sub- Saharan Africa. [FN114] 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 dis- tribution of military power. [FN115] Conflicts have had a decisive impact on regional integration ef- forts in Africa, particularly given that those regions with the most conflict have witnessed the slowest growth in regional integration. [FN116] 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. [FN117] In South Africa, insecurity surround- ing in-migration of African workers resulted in riots and violence in 2008, indicating, yet again, the potentially conflicting nature of migration across borders. [FN118] Today, the importance of eco- nomic development as a remedy to violence is increasingly being recognized and emphasized. [FN119]

*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 African countries could eliminate dependence on their former colonizers with a view to attaining self-re- liance. [FN120] This is reflected in the seventh preambular paragraph of the Treaty Establishing the African Economic Community. [FN121] Some of the treaties establishing regional economic com- munities share a common preambular paragraph. [FN122] Article 3(b) of the Treaty Establishing the Economic Community of Central African States (ECCAS) makes “solidarity and collective self reli- ance” a principle to be adhered to by the members. [FN123] Article 4(1)(a) provides that the integra- tion of African economies is aimed at increasing “economic self-reliance” and to promote “endogenous and self-sustained development.” [FN124] Similarly, Article 4(b) of the ECOWAS Treaty provides “solidarity and collective self-reliance” as a fundamental principle, [FN125] as does Article 6(b) of the COMESA Treaty. [FN126] Article 5(1)(d) of the SADC Treaty makes it an object- ive to “promote self-sustaining development on the basis of collective self-reliance, and interdepend- ence of member states.” [FN127]

These provisions demonstrate that regional economic integration in Africa has been justified as a necessary step for realizing self-sustaining economic development. [FN128] On this view, Africa's external economic dependence and its lopsided participation in the international trading system are key factors accounting for the dismal economic performance on the continent that are regarded as ad- dressable through economic self-reliance on a continental level. [FN129]

Economic self determination is a theme strongly associated with the first generation of regional integration efforts in the post-colonial era. [FN130] For example, Kwame Nkurumah envisioned Africa's economic unity as a necessary precondition for Africa's economic self-determination.

[FN131] 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. [FN132] These early pan- Africanists dreamed of a single African political system within which Africa could address the chal- lenges of its development and confront the control that its former colonizers exercised upon it. [FN133] Today, Mummar Gaddafi continues to subscribe to this model of immediate African politic- al unity. [FN134]

By contrast, another group of pan-Africanists--who would today be referred to as the gradualists or incrementalists [FN135]--subscribed to having a consociational design or loose federation begin- ning with “the regions of Africa which have developed a historical affinity [beginning] to lay the foundations for a wider unity.” [FN136] Today the incrementalists have the upper hand. They sub- scribe 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. [FN137]

This looser idea of a federation with regional building blocks is adopted in the Treaty for the Es- tablishment of an African Economic Community. [FN138] Both the loose federation and political union ideas share a commitment to self-sufficiency as embodied in initiatives such as the New Inter- national Economic Order of the 1970s. [FN139] This theme was also reflected in the Lagos Plan of Action, which linked self-sufficiency to Africa's economic integration. [FN140] As Thomas Bier- steker has explained, economic self-reliance or disengagement

is not a call for complete autarky or absolute national self-sufficiency. Rather, disengage- ment 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. [FN141]

This means reducing dependence on foreign investment and economic assistance, as well as com- bining extremely limited individual markets and their scarce resources with a view to being better able to bargain for foreign capital and technology. [FN142] 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. [FN143] Another proponent of African self-sufficiency is Robert Mugabe of Zimbabwe, who has recently urged COMESA members to pay into its develop- ment fund as a way of cutting dependence on foreign assistance. [FN144] Notably, these supporters of economic integration were all influenced by Africa's struggles against colonialism, imperialism, and apartheid. [FN145]

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 mar- ket-friendly development approaches, particularly with the goal of obtaining foreign funding to fin- ance Africa's development needs. [FN146] 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. [FN147] 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. [FN148] From the resources generated from within Africa, a Pan-African Infrastructure Development Fund (PAIDF) has been set up to “finance large-scale infrastructural projects.” [FN149] 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. [FN150]

NEPAD's capital flows initiative is slated to be primarily funded by western donors who condi- tion access to their funds to the adoption of market-based policies. [FN151] Alongside this commit- ment 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 “Group of Twenty”. [FN152] The group lobbied heavily in favor of ensuring that development remained at the center of the latest round of the WTO's **trade** negotiations. [FN153]

While the theme of self-sufficiency has been a strong one, political differences between neighbor- ing 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. [FN154] 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. [FN155] Often the competition for industrialized-country firms may be regarded as outweigh- ing 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. [FN156] Such a choice would certainly look brighter than regional cooperation, especially if such cooperation would involve the sharing of benefits with weaker member States. [FN157] A large number of African countries have passed legislation giving foreign investors very attractive incentives in this race for their capital, skills, and technology. [FN158]

Thus, within the African Union, and particularly insofar as regional economic integration is con- cerned, 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 em- braced within NEPAD, as well as the continuing efforts to realize more favorable trading relation- ships with the rest of the world within the WTO. [FN159] This multifaceted approach was best cap- tured 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. [FN160] 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. [FN161]

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 [FN162] 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. [FN163]

**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. [FN164]

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. [FN165]

[N]on-trade equilibrating mechanisms ... must be built into multinational economic cooper- ation schemes; if the regional development process is left to liberalization and to market forces alone, these schemes are bound to fail. [FN166]

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 ex- amples 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 Es- tablishment of 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** commit- ments and harmonization objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberaliza- tion commitments and policies aimed at the equitable distribution of the institutions and **organiza- tions** of regional integration to avoid concentration in any one member; and (iii) preferences in indus- trial 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 econom- ic and political costs of liberalization for themselves in the short run. From this perspective, it is ar- guable that African RTAs undercut the more stringent multilateral (GATT/WTO) liberalization com- mitments that their members have assumed. In fact, African RTAs do not systematically adopt the unconditional most favored nation treatment. [FN167] When this other nondiscrimination principles are adopted, they rarely, if ever, are used to challenge adoption of discriminatory trade measures. [FN168] This is most acutely demonstrated in the East African Court of Justice's recent decision on variable geometry. [FN169] 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 nondiscrimination 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. [FN170]

*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. [FN171] Distributional equity in African RTAs is not only a question of the asymmetrical economic benefits of trade integration, but also a function of unequal “networks of power, information and knowledge” [FN172] between African economies. Compensating countries that suffer losses from

liberalization commitments has long been identified as one of the “most serious difficulties” en- countered in the integration process. [FN173] 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. [FN174]

Differences in the benefits of cooperation in Africa date back to the colonial period. [FN175] The East African Community, whose origins date back to 1917, [FN176] had a long history of disputes about Kenya's disproportionate benefits relative to then Tanganyika and Uganda. [FN177] Kenya not only had a bigger share of the employees of the various institutions of the community, most of which were located in Kenya, but also the largest share of customs revenue. [FN178] Mechanisms to redis- tribute the gains were put in place from time to time. [FN179] For example, in 1961 the Raisman Commission proposed fiscal distributions to compensate for losses suffered particularly by Tanga- nyika, but also for the purpose of keeping the customs union together. [FN180] Article 87 of the 1967

Treaty for East African Co-operation sought to end the unequal distribution of the organs of the Com- munity 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 Corpora- tion; and Nairobi would be the headquarters of the East African Railways Corporation and the East African Airways Corporation. [FN181] In the Union Douaniere et Economique de l'Afrique Centrale (UDEAC) established in 1964 between Cameron, Central African Republic, Chad, Congo Brazza- ville, and Gabon, a Solidarity Fund to apportion revenue between the members as a method of com- pensating for the differences in revenue accrued from UDEAC integration. [FN182]

In addition, distributional questions may arise because regional cooperation pursued “solely on the basis of commercial integration” often results in an increase in the “bargaining power of transna- tional corporations,” which then bargain with each government for the best conditions they can ob- tain. [FN183] 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. [FN184] 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 nation- al tariff walls. [FN185] From this view, unequal gains in trade integration schemes arise where integ- ration is solely based on a classical free market/comparative advantage model. [FN186] Besides un- equal 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. [FN187] The adoption of such a model without adapting it to the African context of huge disparities in the export and econom- ic power among the countries is one of the reasons for the failure and ultimate disbandment of the original East African Community (EAC) in 1977. [FN188] At the time, Kenya's unequal gains, relat- ive 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 meas- ures” that would have arrested the “growing inequalities” among EAC members. [FN189]

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 effi- ciency 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. [FN190] 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 de- veloped economies, like the United States, that establish trade adjustment assistance programs for in- dustries and workers that suffer from production or sale losses pursuant to international trade liberal- ization commitments. [FN191]

*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. [FN192] Some of these mechanisms of moderating and containing unequal benefits have been borrowed from other developing country RTAs. [FN193] Over time, they have included both non-financial and financial redistributive policies. The discussion below illustrates the example of how SACU engages in financial redistribution through its develop- ment 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.” [FN194] 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 treat- ment for the least developed states from the Andean Development Corporation in terms of loans disbursements. [FN195]

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,” [FN196] advancing generous access to development funding and credit to less developed countries, as well as designing tax concessions for them. [FN197]

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 op- erated in two or more of the countries,”

• Instituting “quotas on inter-territorial trade,”

• 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 develop- ment between the three countries.” [FN198]

The creation of these mechanisms to equalize the benefits of customs cooperation in terms of de- velopment 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 in- troduction 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 mod-

el 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. [FN199] 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. [FN200] Here, the financing of development projects through a bank, rather than through the previous system of industrial planning and licensing in East Africa, eventually collapsed in 1973. [FN201] The preference of a bank as opposed to indus- trial 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. [FN202] 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 im- ports, 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 re- gion. 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 jus- tifications for the creation of customs unions - the realization of the economies of scale in pro- ducing for a larger market - is also undermined. [FN203]

Notwithstanding the questionable efficacy of efforts to equalize gains, today, almost without ex- ception, the treaties establishing these regional trade agreements provide for ways of dealing with un- equal 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. [FN204] This is anticipated by Art- icle 4 of the ECOWAS treaty, which specifies ECOWAS' fundamental principles. [FN205] These in- clude the “equitable and just distribution of the costs and benefits of economic cooperation and integ- ration.” [FN206] Peter Robson argued that the Fund is of “potentially great importance for promoting positive integration, development and balance.” [FN207]

Notably, by embracing distributional equity, African RTAs do not abandon formal equality. Thus the ECOWAS treaty, like all African RTAs, recognizes equality among the member states as a funda- mental principle. [FN208] In this sense, therefore, one sees in African RTAs an interesting recogni- tion 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 Devel- opment of the Economic Community of West African States. [FN209] This Protocol sets out the pur- poses 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; [FN210]

• Providing “compensation to Member States which have suffered losses as a result of the location of Community enterprises;” [FN211]

• Providing grants for financing development activities [FN212] or feasibility studies of such activities; [FN213]

• Guaranteeing foreign investments undertaken pursuant to ECOWAS treaty commitments; [FN214]

• Providing the “means to facilitate the sustained mobilization of internal and external fin- ancial resources for the Member States and the Community;” [FN215] and

• Promoting “development projects in the less developed Member States of the Com- munity.” [FN216]

The procedure for compensation is set out in the Protocol Relating to the Application of Com- pensation Procedures for Loss of Revenue Incurred by ECOWAS Member States as a Result of the Trade Liberalization Scheme. [FN217] There is also a Protocol on Assessment of Loss of Revenue by Member States. [FN218] In 2002 for example, Benin received over 373 million CFA Francs as com- pensation for customs revenue lost between the years 1998-2000. [FN219]

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. [FN220]

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. [FN221] 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.” [FN222] The excise component is determined as a percentage of the total SACU gross domestic product in any specific year. [FN223] 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, [FN224] is “weighted in favour of the less developed Member States.” [FN225] 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. [FN226] In addition, SACU has exempted its poorest members, Swaziland and Lesotho, from the tariff reduction commitments made by the other members. [FN227]

Provisions like this show how small, economically weak states have sought or demanded ac-

countability 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 Establish- ment of the East African Community (EAC) provides that the gains of cooperation “shall be equit- ably shared” and that development in the community shall be “harmonious and balanced.” [FN228] Article 6(e) makes the “equitable distribution of benefits” a fundamental principle of the community, while Article 7(1)(f) makes the “equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations,” an operational principle of the community. [FN229] The treaty defines “equitable distri- bution of benefits” as the “fair and proportionate distribution of benefits.” [FN230]

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.” [FN231] The Treaty for the Establishment of the East African Community also recognizes the prin- ciple of asymmetry which allows “variances in implementation of measures in an economic integra- tion process for purposes of achieving a common objective,” [FN232] thus illustrating that flexibility is built right into the framework of RTAs. [FN233] 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 pro- grammes to proceed at different speeds. [FN234] 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.” [FN235]

These types of provisions show the responsiveness of the integration arrangements to these con- cerns 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 nonreversible commitments or as being spurred effortlessly by technology. Instead, the RTA treaties embed within themselves accommodations on integration that show sensitivity to how the gains and losses are shared.

One way of viewing these clauses addressing distributional equity is as mechanisms of addressing collective action problems among respective RTA members. They are initiatives aimed at creating re- gional 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 join- ing the East African Common Market which is addressed in more detail below. [FN236] 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. [FN237]

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 coun- tries. 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 the economy in the East African Community. [FN238] One of the East African Community's recent initiatives is an East African Community Development Fund [FN239] which will mobilize resources from domestic sources and Partner states to finance product- ive sectors including energy, transportation and infrastructure. [FN240] 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. [FN241] 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 mar- ket-led integration, [FN242] today there are clearly efforts and commitments that show that regional development cooperation is understood as capable of being undertaken alongside market-led integra- tion, rather than as an extreme alternative to market-based integration. In the East African Com- munity, for example, the treaty carefully balances the liberalization commitments, on the one hand, with those relating to equity and distribution among the members, on the other. [FN243] The East African Court of Justice recently confirmed this in its advisory opinion on whether the rule on con- sensus 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. [FN244]

This case before the East African Court of Justice arose against the background of the then ongo- ing common market negotiations in the East African Community. [FN245] 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 individu- al members of the Community. [FN246] Tanzania, for example, objected to opening up land owner- ship to other East Africans, fearing that it would upset Tanzania's policy against landlessness by al- lowing residents of other countries to buy land there. [FN247] Tanzania also proposed that each member country in the 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. [FN248]

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 Min- isters 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.” [FN249]

Under the Treaty for the Establishment of the East African Community, the Summit [FN250] and Council [FN251] 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 adher- ence to law in the interpretation and application of and compliance with [the] Treaty.” [FN252] In ad- dition to the Court having “initial jurisdiction over the interpretation and application of [the] Treaty,” [FN253] it also has jurisdiction to issue advisory opinions on request from the Summit, a Partner State, or the Council of Ministers. [FN254]

The Community asked the court to decide if the treaty's rule of consensus decision making im- plied unanimity of all the member states [FN255] and “whether the principle of variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwith- standing.” [FN256]

*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.” [FN257]

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.” [FN258] In the Community's view, “variable geometry principles could consid- erably ease some of the tensions among sub-regional integration arrangements in the Community and enhance the prospect of closer and more regional co-operation.” [FN259]

For this reason, the Community supported decisions to be made by majority rather than by con- sensus because, this would allow for agreement among “smaller sub-groups to move faster than the whole group.” [FN260] 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 Uni- on. The Community, therefore, argued that the East African Court of Justice should construe the EAC treaty consistently with this trend. [FN261]

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.” [FN262] Rwanda argued that consensus de- cision-making and variable geometry did not conflict with each other since each was designed for dif- ferent circumstances. [FN263] For Rwanda, “the Treaty [gave] no flexibility to some groups” since it required all the Partner States to “agree on each and every activity.” [FN264] Additionally, Rwanda

remarked that the Community was founded on the “principles of mutual trust, political will and sov- ereign 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. [FN265] As such, accord- ing to Rwanda, the principle of variable geometry allowed groups of members to engage in activities outside the Community, rather than within it. [FN266]

By contrast, Burundi argued that the rule of consensus decision- making and the principle of vari- able geometry were not in harmony based on the practice of the Community. [FN267] For Burundi, “consensus decision-making requires complete agreement by all Partner States,” while variable geo- metry requires flexibility in the integration process. [FN268]

Kenya argued that the term “consensus” did not necessarily equate to unanimity as Burundi had contended. [FN269] Kenya argued that the practice in the European Community was to permit mem- bers “to opt out of unwanted policies rather than being obliged to choose between vetoing them or ac- cepting a majority verdict.” [FN270] Consensus decision making and variable geometry, Kenya ar- gued, could co-exist as long as the sphere and scope of the operation of each could be clearly defined. [FN271] According to Kenya:

[V]ariable geometry ... permits Member States in a regional integration arrangement to pur- sue integration at different levels in different fields/policy areas, so long as the enhanced integ- ration contributes to enhancing integration in the regional integration arrangements, and does not create a barrier to trade or discriminate among Member States. [FN272]

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.” [FN273] 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 integ- ration process. [FN274] 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 oper- ates side by side with consensus decision making as it accommodates each country's unique fea- tures and that as such it should be embraced by the Community and not ignored by forcing States to adopt blanket proposals which may not be best suited to their interests. [FN275]

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.” [FN276]

Tanzania, like Rwanda and Burundi, argued that consensus decision making under the Treaty meant unanimity. [FN277] 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.” [FN278] For Tanzania, the Partner States had designed the treaty, (as recognized in the op- erational 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.” [FN279] Tanzania also argued that such an interpretation was consistent with “the dual mandate of the leader- ships 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 po- sitions respected.” [FN280] 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 Leg- al and Judicial Affairs to clarify how variable geometry and consensus decision-making were related. [FN281] 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.” [FN282] The Court rejected this argument. [FN283]

Uganda also shared the view that the question of the proper relationship between consensus de- cision-making and variable geometry belonged to the political amendment process. [FN284] Uganda argued that the question before the Court was whether the organs of the Community could make de- cisions using variable geometry. [FN285] 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.” [FN286] 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.” [FN287] In essence, Uganda was suggesting that the question before the court was a non-justiciable political matter within the sover- eign prerogatives of the partner states. [FN288]

The East African Law Society argued that flexible geometry permitted “flexibility in the integra- tion process and ... progression in the East African Community activities by some Partner States and not all.” [FN289] 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. [FN290] The Society main- tained that in the European Union, differentiation in the integration structure was permissible to ac- commodate irreconcilable differences, permitting “a permanent separation between a group of Partner States and a number of less developed integration units.” [FN291] 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. [FN292] As such, variable geometry ap- plied 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 mem- bership at the same speeds and depths.” [FN293] The Society argued that the principle of variable geometry and the rule of consensus decision making were not necessarily inconsistent with each oth- er, 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.” [FN294]

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, notwithstand- ing the requirement of consensus decision-making, [FN295] 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. [FN296] Surprisingly, the Court first resorted to Wiki- pedia, The Free Encyclopedia. [FN297] This online source is hardly recommendable for an authorit- ative dictionary 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.” [FN298] 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. [FN299] It is in the implementation of decisions that “the practical realities such as the vital national interests, the ne- gotiations, 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.” [FN300] Notably, the Court did not give any basis at all in the treaty or the EAC's protocols for this distinction between de- cision and implementation. [FN301] 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. [FN302] 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 par- ticular decision.” [FN303] 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. [FN304]

As had been agreed before the Court by the Partner States and the amicus East African Law Soci- ety, the court noted that the considerations relevant to identifying how variable geometry squares with consensus decision making are tailored as ways to accommodate countries intent on proceeding with integration decisions that may not be uniformly shared. From this perspective, variable geometry was, therefore, a strategy for accommodating countries that are unable to proceed with certain integ- ration decisions. [FN305] 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. [FN306] 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. [FN307]

In addition, the Court also held “that the principle of variable geometry ... is a strategy of imple- mentation of Community decisions and not a decision making tool in itself.” [FN308] This is consist- ent 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 ....”’ [FN309] The Court found that “the principle of variable geometry has been internationally applied to deepen integration,” [FN310] and gave the examples of SADC, the European Union, [FN311] and the “Provisions of Enhanced Co- operation” of the Treaty of the European Union. [FN312] The Court recommended that the East African Community “study, and possibly emulate some of the examples of application of these con- cepts to deepen integration.” [FN313]

Of course, if the only meaning of variable geometry available was that of allowing countries will- ing 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 de- cision to assume the commitments and begin implementation arrives.

That is why the Court advised the Community to consider using variable geometry “as an excep- tion, 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. [FN314] 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 and could not apply. [FN315]

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. [FN316]

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. [FN317] Indeed, ac- cording 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.” [FN318] The hesitation seemed to arise from the requirement that decisions needed simultaneous implementation by all Partner

States. [FN319] 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 imple- ment 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 are able to implement immediately to do so. [FN320]

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.” [FN321] 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.” [FN322] 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. [FN323] Thus, rather than equate the term with unanimity, the Court recommended amending the Community's instru- ments. [FN324]

Notably, the Court and those that appeared before it did not address the related principle of asym- metry under the Treaty for the Establishment of the East African Community. [FN325] This principle allows member states to vary “the implementation of measures in an economic integration process for purposes of achieving a common objective.” [FN326] 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 vari- ation in implementation timetables, yet the Court did not allude to it. [FN327] In fact, the Court did not necessarily have to refer to examples from the European Union; it could have looked at the East African Customs Union Protocol, which already incorporates the principles of variable geometry and asymmetry by virtue of the variation in the tariff reduction schedule. [FN328] 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, [FN329] it nevertheless gives Uganda and Tanzania more favorable tariff removal commitments than those given to the more eco- nomically developed Kenya under other provisions. For example, Article 11(2) provides that as between Uganda and Tanzania, goods are duty-free, [FN330] and goods from Uganda and Tanzania into Kenya are duty-free. [FN331] However, Kenyan goods do not enjoy such duty-free treatment in Uganda and Tanzania. [FN332] Article 11(3) provides for the categorization of goods from Kenya in- to Uganda and Tanzania. [FN333] 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.” [FN334] Further, Category B goods from Kenya into Uganda will have a five-year phase-out tariff reduction period for all products. [FN335] This phaseout 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. [FN336] Additionally, Category B goods from Kenya into Tanzania have a similar phase-out tariff reduction period. [FN337] The underlying requirement is that no in- ternal tariff can exceed the common external tariff with respect to any of the specified products. [FN338] The differentiation in the tariff schedules advantage Uganda and Tanzania pursuant to the principle of 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 sus-

picious that they will be economically disadvantaged by relatively more economically powerful states like Kenya. [FN339] 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 ex- ercising their right to opt out of commitments under the principle of variable geometry. This flexibil- ity, as noted before, is a central feature of second generation African RTAs. [FN340]

*F. Evaluating the Effectiveness of Variable Geometry*

Having seen how African RTAs have adopted various versions of variable geometry and dis- cussed 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 ad- dressed in greater length in the discussion of multiple memberships in RTAs in Part IV below. An- other is whether these measures nudge countries that would otherwise not adopt even minimal liber- alization 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 be- hind while others proceed to 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 vari- able 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. [FN341] From this perspect- ive, 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 parti- cipate in integration schemes, but they may not necessarily encourage deeper liberalization than a be- neficiary 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 geo- metry 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 pun- ishes defections from the rules under a sanctions regime backed up by a compulsory and binding dis- pute settlement system. African RTAs have yet to threaten sanctions against one another where there has been noncompliance with liberalization commitments. [FN342]

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 begin- ning 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 indus-

tries that are opposed to trade liberalization. [FN343] 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 mem- berships. Of the fifty-one countries in Africa, only six belong to only one RTA. [FN344] The other forty-five belong to at least two or more RTAs. [FN345] Swaziland belongs to three RTAs-

-COMESA, SADC and SACU. [FN346] Of all five countries in the EAC, four are also members of COMESA, while Tanzania is a member of SADC. [FN347] Of the fifteen countries in SADC, eight are also members of COMESA. [FN348] Figures 1 through 4 illustrate the prominence of multiple memberships in African RTAs.

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Overlapping memberships in several RTAs is a reflection of the large number of bilateral and re- gional trade agreements, an occurrence that Jagdish Bhagwati has referred to as the “spaghetti bowl.” [FN349] 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 re- gimes. This part of the paper also examines the extent to which this multiplicity of memberships and trade agreements has contributed to the “spaghetti bowl,” which is addressed in further detail below.

Multiple memberships in RTAs is a reflection of the character of African RTAs as flexible re- gimes. This does not understate or underestimate the criticisms of multiple memberships. These criti- cisms can be divided into two main categories. The first relates to the fact that multiplicity of mem- berships 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). [FN350] Multiple memberships also prevent Afric- an governments from focusing on a single regional economic bloc, diminishing the little trade capa- city and budgets of these countries. In addition, jurisdictional uncertainty arises as a result of overlap- ping 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. [FN351] Different RTAs offer benefits to members beyond providing the reduc-

tion or removal of tariff barriers and the harmonization of trade policies like customs policies. [FN352] For example, the international transportation of commodities through waterways in Africa developed because the continent has the largest river basin coverage in the world. [FN353] Since wa- terways 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 un- available to them. This contributes to the diversification of agreements by landlocked countries, since transport costs limit competitiveness. [FN354] As a result, Africa's landlocked countries and the coastal nations they border are members of the same RTAs, sharing ports and trade routes. [FN355] Water basin states, in fact, often share membership in more than one RTA, and some RTAs overlap in the basins that they manage. [FN356]

African RTAs, therefore, serve as institutions of basin management demonstrating “the entwined relationships among trade, environment, and security aspects of international river basins.” [FN357] From this perspective RTAs are trade-plus institutions to the extent to which trade is linked to envir- onmental issues as well as to security issues. [FN358] In short, natural resource management and wa- ter cooperation on the one hand are interwoven with trade and security on the other. [FN359] Indeed, Part One examined how African RTAs nestle within them a variety of non-trade objectives and insti- tutions.

Another major benefit of multiple memberships in RTAs is the ability to shift lawmaking initiat- ives from one international venue another that offers different advantages. This is referred to as re- gime-shifting. [FN360] According to Laurence Heifer, “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.” [FN361] On this argument, countries enter into regimes to reduce the transac- tion costs and information problems that plague uncoordinated state relations. [FN362] A few ex- amples 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. [FN363] Some benefits that Kenya accrues under COMESA, are currently unavailable under the EAC. [FN364] 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. [FN365] The EAC does not currently offer Kenya that important possibility. [FN366] In addition, COMESA offers a broader group of countries from which Kenya can defend itself against unfair trade practices than does the EAC. [FN367] The EAC also has advantages that COMESA does not give Kenya. [FN368] For example, the EAC provides a closer regional proximity with Kenya's immediate and near neighbors than does the ex- pansive COMESA region that spans to Egypt in North Africa. [FN369] In short, there are things Kenya can better achieve in one regional bloc than in another regional bloc.

During the latter stages of South Africa's apartheid era, SACU was comprised of Botswana, Leso- tho, Nairobi (which became a member upon its independence in 1990), and Swaziland (BLNS); as well as South Africa. [FN370] 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). [FN371] However, rather than being an organization based on interdependence and mu-

tual cooperation, SACU was a direct reflection of the high level of dependence of the BLNS coun- tries on South Africa. [FN372] Geographic and economic factors such as shared boundaries, inter- linked transportation, and employment exemplified this dependant relationship. [FN373] This de- pendency was the root of much conflict due to South Africa's maintenance of a white-minority gov- ernment. [FN374] Geographic proximity and integration economically prevented BLNS from break- ing off ties fully with South Africa, even though the BLNS countries repeatedly denounced South Africa's apartheid system. [FN375] 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. [FN376] 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. [FN377] The 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. [FN378] This was referred to as “gradual disengagement,” and led to the BLNS contingency joining other economic affiliations such as SADCC. [FN379] The resulting mul- tiple 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. [FN380]

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. [FN381] CEAO was an econom- ic grouping that carried over from the colonial period, while ECOWAS was created in an effort to cut across cultural and linguistic barriers. [FN382] Instead of abandoning one in favor of the other be- cause 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. [FN383] The economic dominance of Nigeria is very similar to South Africa's dominance in the previous example. [FN384] However, Nigeria's dominance had the opposite effect of drawing members into ECOWAS instead of pushing them away as South Africa had done. [FN385]

These examples show that in some cases, multiple memberships were anticipated from the begin- ning. In such cases, changing political, social, and economic environments play a major role in mul- tiple 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 Afric- an 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. [FN386] 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. [FN387] While this argument has much merit and ought not to be downplayed, it presumes that unity in re-

gionalism can overcome the variety of ways in which African countries are divided. Indeed, presum- ing 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.” [FN388] 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 integra- tion as well as extra continental effectiveness.” [FN389] Yet while the hope of unity for these pur- poses 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 interests. [FN390] In fact, as William Zartman, a leading Africanist, has argued:

The recognition of overlapping systems in interpreting foreign policy alternatives and pos- sibilities for states with dual membership is both a more helpful and more realistic way of look- ing at foreign policies than is the attempt to force such states exclusively into one area or the other. [FN391]

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 de- fected from signing Economic Partnership Agreements (EPAs) with the European Union (EU) in their designated regional groupings. [FN392] For example, non-least developed countries (LDCs) [FN393] in ECOWAS decided to go it alone and signed their own EPA with the EU. [FN394] In ad- dition, 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. [FN395] 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. [FN396] Thus, differing interests among ECOWAS members resulted in multiplying the number of EPAs the EU was signing with ECOWAS members, further exacerbating multiplicity of trade and related agreements in Africa. An- other 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. [FN397] Tan- zania 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. [FN398]

In SACU, Angola and Botswana are signing different EPA agreements than those being signed by the rest of SADC's members. [FN399] In all, fifteen SADC members are negotiating EPAs under four different configurations. [FN400] Under the EPAs, African, Caribbean, and Pacific Group of States' (ACP) [FN401] 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. [FN402] EPA negotiations in the SACU region present a potential conflict between SACU's Common External Tariffs (CET) structure and 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. [FN403] 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. [FN404] Are the proper parties the regions or coun- tries 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 multi- plicity 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 estab- lishment 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; [FN405] the Economic Community of West African States; [FN406] the Inter-Governmental Authority on Devel- opment; [FN407] the Southern African Development Community; [FN408] the Common Market for Eastern and Central Africa; [FN409] ECCAS [FN410] and the Arab Maghreb Union. [FN411] 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. [FN412] Bhagwati has re- ferred to this increase in the number of bilateral and regional trade agreements as the spaghetti bowl. [FN413] 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. [FN414] For example, the same product gets different tariff treatment depending on its origin since members of a preferen- tial 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. [FN415] In effect, multiple bilateral and regional trade agreements undermine the goal of non-discriminatory international trade under the um- brella of the GATT/WTO framework since they create rules of origin (RoO) that discriminate across products and countries. [FN416] The ten year assessment of the WTO, referred to as the Sutherland Report, regretted the lack of harmonization produced by the complex web of inconsistent rules of ori- gin in multiple RTAs which in turn increased transaction costs for business and hampered trade flows. [FN417] 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. [FN418] In ef- fect, the trade preferences which are extended under bilateral and regional trade agreements under- mine 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 reas- ons. [FN419] First, they contend that arguments about natural trading partners are based on static the- ories that say little about trade diversion as a primary reason for the establishment of regional trade agreements. [FN420] Another justification in support of the natural trading partners thesis is that geo- graphic proximity favors the formation of trading unions between neighbors since this would elimin- ate large transport costs in addition to promoting specialization in production. [FN421] 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. [FN422] In addition to lost revenue, RTAs also result in trade diversion. [FN423] Trade diversion occurs where the creation of an RTA in one country leads to the production of a similar product in a different country that is less efficient than the first country but is less ex- pensive to the other country because preferential tariffs reduce the final cost of the good. [FN424]

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. [FN425] As such, preferential trade agree- ments 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. [FN426]

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 al- luded to in a different context above), and that a high volume of trade resulting from an RTA is good for both trading partners. [FN427] 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. [FN428] They ar- gue that this is unlikely because elasticity of production is the primary determinant of the amount of trade diversion, not the volume of trade. [FN429] They point out that in countries with imperfect sub- stitutes, 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. [FN430]

For transport costs, the common wisdom is that lower transport costs will allow countries to cap- ture 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 mono- polist and the increased cost of transport makes a distant country have a higher elasticity. [FN431] As a result, it is not always the best course of action to sell only to countries with lower costs of trans- port. [FN432] Bhagwati and Panagariya also argue that lower transport costs for a neighboring part- ner may also, however, be outweighed by cost advantages in a distant one as is currently demon- strated by China's ability to compete with other producers in the textile market of many countries around the world. [FN433] Bhagwati and Panagariya therefore argue that these theories for the form- ation 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. [FN434] For this reason, Bhagwati and Panagariya re- commend a dynamic model of free trade. [FN435] To them, a dynamic theory of free trade is more consistent with a WTO-type system than with the proliferation of RTAs. [FN436]

For these reasons, free trade economists argue that the best solution to the problems posed by pro- liferation of RTAs is to speed up multilateral, unconditional, most-favored-nation nondiscriminatory trade liberalization, since tariff preferences would disappear once external tariffs drop to zero. [FN437]

*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. [FN438] 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 much in common with the “spaghetti bowl” argument we saw above and may in fact be regarded as a subset of it. [FN439]

One of the most important features of a customs union is that all the member countries adopt one common external tariff (CET). [FN440] 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. [FN441] 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 mem- bers. [FN442] 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. [FN443]

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. [FN444] Legal uncertainties may also arise in cases where more than one trade arrangement applies to trade between two countries. [FN445] 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. [FN446]

When a country has membership in multiple RTAs, multiple RoOs need to be applied. RoOs spe- cify 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 un- dergo a substantial transformation in a country before being allowed to cross the border duty free. [FN447] Knowing which RoOs to follow depends on where commodities originate, and for states in- volved in various RTAs, this undoubtedly makes the customs clearance process more complex and delays transactions. [FN448] Increased RTAs involvement of a country may cause the cost of ship- ping to climb higher, in order to offset the need for increases in administrative supervision necessary to keep track of proper origin documentation and procedures. [FN449] This may in turn have the ef- fect 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. [FN450] 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. [FN451] CETs already in place make this type of trade de- flection less of a problem in customs unions. [FN452] These are real and complex issues regarding the transportation of goods among member states and non-member states and states belonging to mul- tiple RTAs that would need to be addressed before customs unions are established. However, accord- ing to Yang and Gupta, “given the small share of intraregional trade in Africa's total trade, the direct contribution of any trade deflection to overall trade performance is likely to be limited.” [FN453] 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. [FN454] 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. [FN455]

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. [FN456] Swaziland is therefore a member of two customs unions and an FTA. As a COMESA mem- ber, 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. [FN457] Membership in SACU's and COMESA's CETs limits Swaziland's ability to extend more generous unilateral con- cessions 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 mem- ber countries who are neither SACU nor COMESA members, it would undermine these customs uni- ons and effectively downgrade them into FTAs. In such a situation, the respective RoOs would apply, thereby effectively making Swaziland a transit country. [FN458]

*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 be- longing to more than one RTA. Instead, multiple memberships in RTAs have been driven by historic- al circumstances, political and ideological considerations as well as strategic considerations such as access to riparian waterways. [FN459] 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. [FN460]

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 re- garded 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 liber- alization 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. [FN461] This results in product diversion between countries and effectively reduces the effectiveness of RTAs as liberalizing trade regimes in Africa. [FN462] Much of the current available data supports the notion that RTAs are either ineffective at stimulating inter-regional trade or are at best, non-factors. [FN463] If RTAs are to work optimally in promoting liberalizing trade, more regional trade should be occurring and external trade increasing due to spe- cialization. However, between 2004 and 2006, many African countries did not get involved with a great amount of inter-regional trade. [FN464] In this period, three countries, Swaziland, Togo, and Zimbabwe, exported more than half of all exports to countries inside of their regional grouping-

-SADC. [FN465] Only five countries exported more than half of their exports to Africa generally, in- cluding Djibouti and Mali in addition to the countries listed above. [FN466] Many countries contrib- uted ten percent or less of total exports to African countries and even less to those within their re- gional trade group. [FN467] Based on this data, ECCAS has three of the ten bottom countries for inter-regional trade while COMESA had two. [FN468] Out of all of the RTAs, ECCAS had the low- est volume of intra-regional trade with only $320 million of exports traded between the countries. [FN469]

In COMESA, Kenya leads with a third of all exports with the main export link being Kenya to Uganda. [FN470] 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 per- cent of its exports to intra-regional trade among ECOWAS countries. [FN471] While this is higher than many African countries, seventy-one percent of Gambian exports go to developed European countries. [FN472] The same trend holds for Botswana and Burundi. Both contribute around thirteen percent of exports to inter-regional trade but contribute eighty-three and sixty-five percent of exports to Europe, respectively. [FN473] 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 per- cent of exports to Europe, the United States, and Asia. [FN474] 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 coun- tries have increased their share of trade with the United States. [FN475] Chad's amount dropped fifty- nine percent while South Africa dropped fifty-two percent. [FN476] 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-classic- al/comparative advantage classical free trade model in two significant ways. First, African RTAs have embraced the principle of variable geometry according to which time-tabled liberalization com- mitments are undertaken at different speeds depending on the economic ability and interest of mem- bers. 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 re- sources 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.

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