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African Regional Trade Agreements as flexible legal regimes

A Introduction

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

Seen in this light, African Regional Trade Agreements (RTAs) contrast sharply with their counterparts in Europe and North America, where there is a much higher commitment to compliance with the legal obligations contained in the treaties establishing them. From this view, African RTAs have not resolved the ‘problems of coordination, collaboration or domestic politics’ that treaty regimes are argued to remedy. In addition, the treaty commitments in African RTAs do not appear to have raised ‘the political costs of noncompliance’ such as reputational losses. In short, the existence of regional trade rules and institutions has not done much to change the behaviour of African countries.

The foregoing views are caricatures that are not based on the actual treaty commitments and experiences of African RTAs. This chapter aims to develop a more accurate account of RTAs than existing analyses. This alternative view is based on the types of commitments contained in the treaties, as well as how the 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, they are regarded as establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence. Second, African RTAs incorporate as a central feature the principle of variable geometry, adopting steps for meeting timetabled and other commitments. Third, African RTAs adopt a broad array of social, economic and political objectives without giving salience to any set of objectives. Fourth, African RTAs demonstrate a particular preference for functionally specific objectives to undertake discrete projects and to serve as forums for the integrated development of common resources, such as river basins that cut across national boundaries. Fifth, African RTAs demonstrate a remarkable commitment to the equitable distribution of gains from trade and a corresponding weakness in the adoption of non-discrimination trade principles and the related objectives of trade liberalization. Sixth, African RTAs are characterized by multiple and overlapping memberships, exemplifying a classic case of the ‘spaghetti bowl’. Multiple RTA membership illustrates the flexibility or 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 that trade integration agreements have ‘lax implementation’ as a ‘rule’ governing international relations in the Americas.
According to Dominguez, lax implementation is ‘pervasive and long-lasting across issue-areas and time periods, unpunished by co-signatories and generally accepted even when its existence hampered the procedures or organizations that states sought to create’.  

Viewing African RTAs as flexible regimes has the advantage of allowing these RTAs to be understood on their own terms, rather than as treaty regimes on a path toward becoming much like their European or North American counterparts. In so doing, it becomes possible to better and more accurately understand the challenges that these RTAs have been designed to address and that have in turn shaped them. As Tiyanjana Maluwa has argued, African countries have preferred informal institutions to the ‘bureaucratic strictures and international rule-making or legislative processes of formal international institutions’.  

Indeed, as this chapter shows, African RTAs are not overseen by powerful supranational bureaucracies, but rather by relatively weak institutions that leave ample sovereignty to their Member States. 

Tiyanjana Maluwa in essence alludes to a point that is very important, and often overlooked by pessimists of regional integration in Africa. These pessimists primarily examine the performance of African RTAs based on how well Member States rigorously conform their behaviour to the formally binding trade liberalization commitments found within treaties and similar agreements.  

While there is clearly merit in assessing these
rules and institution-building efforts in light of the treaty obligations 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.\textsuperscript{10} The failure of first-generation efforts to build RTAs in post-colonial Africa, legislated essentially from above, is in part represented by the collapse of the East African Community in 1977 and by the failure of the Mano River Union economic cooperation arrangement, which had been established in 1973 after its original members, Liberia and Sierra Leone, experienced civil wars.\textsuperscript{11} The Mano River Union was revived in 2004.\textsuperscript{12} The collapse of the East African Community in 1977 showed the importance of alternative models of cooperation around discrete projects where gains and benefits could be realizable not only in the short term, and where the gains were mutually beneficial to the members as well. In addition, the failure of these first-generation efforts at pan-Africanism showed the limits of ambitious projects driven by the desire to unify in ending colonial rule and apartheid that could not easily be translated into projects of economic cooperation in post-colonial Africa. In fact, long before the collapse of the East African Community in 1977, ‘the vision of an African common market in the neo-classical/comparative advantage model had disappeared by 1965’.\textsuperscript{13} By the late 1970s, regional

\textit{International Law and Commercial Regulation} 24 (1999) 601, 603 (concluding that ‘the African Economic Community will not succeed without sweeping political, economic and legal reforms’; ibid.); see also, C. McCarthy, ‘Regional Integration in Sub-Saharan Africa: Past, Present and Future’, in A. Oyejide, B. Ndulu and D. Greenway (eds), \textit{Regional Integration and Trade Liberalization in Sub-Saharan Africa, Vol. 4: Synthesis and Review} (London: Palgrave Macmillan, 1999), 230 (arguing that African countries have adopted over-ambitious regional integration schemes and that this has not been a good policy).


\textsuperscript{11} Kahnert et al., \textit{Economic Integration Among Developing Countries}, 67.

\textsuperscript{12} US Department of State, Bureau of Public Affairs, ‘Background Notes: Sierra Leone (06/09)’, www.state.gov/outofdate/bgn/s/125195.htm. In 2004, the domestic turmoil began to settle and the first local government elections in 32 years were held in 311 wards nationwide. Sierra Leone along with Guinea and Liberia formed the Mano River Union (Côte d’Ivoire later joined in May 2008). \textit{Ibid}.

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'.

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 wave of African RTAs, the role of treaty commitments became that of providing a framework for initiatives such as joint ventures or initiatives in areas including trade, investment and capital, while also extending further into transport, security, water, electricity supply and labour movement, as well as agreements for the management of common resources such as river basins. Not only were the range of objectives increased, but flexibility was built into these RTAs by allowing functionally specific objectives and incorporating the principle of variable geometry, as outlined above and discussed more fully in Chapter II.

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

There are several other examples of flexibility in African RTAs. As noted above, these RTAs adopt flexibility by incorporating rules that provide different obligations between members, as well as differences in timelines to comply with commitments that are based on the varying economic capabilities of their members. For example, in the Treaty for the Establishment of the East African Community, the principle of variable geometry allows the commitments in the treaty to be undertaken at different speeds.\(^{18}\)

The principle of asymmetry allows variations in measures of economic integration, building flexibility right into the framework of RTAs. In the South African Customs Union (SACU), flexibility is achieved in part by allowing protection of new industries from competing goods from SACU and non-SACU countries for a period of no more than eight years for the poorest SACU states.\(^{19}\) In addition, as noted below, Botswana, Lesotho, Namibia and Swaziland are entitled to tariff assistance for industries of major importance to their economies.\(^{20}\) Tariffs with regard to such industries may only be decreased with the concurrence of a country that has designated such an industry as being of importance to it.\(^{21}\)

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18 See infra Chapter III.
19 Section 26 of the South African Customs Union (SACU) Agreement of 2002 provides:

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


20 See infra Chapter III.
21 SACU Agreement, Art. 26, available at www.sacu.int/main.php?include=docs/legislation/2002-agreement/main.html. Article 26 of the SACU Agreement makes provision for protection of infant industries for Botswana, Lesotho, Namibia and Swaziland. Article 34 provides for the revenue-sharing formula which determines the respective shares of the
of flexibility in the context of variable geometry is addressed in more
detail in Chapter II.

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

This chapter is the first of three that explore this theme of flexibility. It
proceeds as follows. First, I discuss how flexibility enmeshes well in the
African context, with examples showing how African RTAs have changed
the classic Vinerian customs union model, as well as their adoption of
multiple objectives. This chapter also discusses how African RTAs act
as forums for integrated development and functionally specific projects.
These projects are often nested or nested within the RTAs and they include
cooperation on issues relating to security and common river basin man-
agement. The chapter ends with another feature of RTAs’ enmeshment in
the African context – the view that African regionalism is a bulwark for
economic self independence. Chapter II discusses how African RTAs have
adopted variable geometry as a mechanism for ensuring equality in the
sharing of the benefits of trade liberalization and how the prevalence of
this concern has back-grounded the commitment to non-discriminatory
trade liberalization. Chapter II also discusses at length the highly signif-
icant April 2009 East African Court of Justice (EACJ) Advisory Opinion
on Variable Geometry and its implications for African RTAs. Chapter III
focuses on another important feature of African RTAs as flexible regimes –
multiple memberships in RTAs. It begins by reviewing the phenomenon of
multiple membership and the advantages it offers African countries with

members of the total customs, excise and additional duties. See also J. Isaken, ‘Prospects
for SACU After Apartheid’ , in B. Oden (ed.), Southern Africa After Apartheid: Regional
Integration and External Resources (Uppsala: Nordiska Afrikainstitutet, 1993), 182. In
addition, South Africa may give sympathetic consideration to increasing the customs
duty on imports of competing goods as well as to reducing such duty for materials that
are used in the production of goods designated as being of importance by Botswana,
Swaziland or Lesotho: SACU Agreement, Art. 2 (stating that one of SACU’s objectives is
to ‘facilitate the equitable sharing of revenue arising from customs, excise and additional
duties levied by Member States’).

Apartheid, 174, 175 (arguing that SADCC initially decided to undertake ‘large
programmes in agricultures, transport, communications and the energy sector’).
Maphanyane further notes that ‘the basis of cooperation was the discrete project. This
had the effect of making the benefits of cooperation immediate and tangible, and also of
building confidence among Member States.’ Ibid.
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.

B Flexibility as enmeshment in the 'African' context

1 Adaptations of the Vinerian model

African RTAs, like others in the Third World, exhibit differences from the classic European market-based customs union integration model.23 Under the European model, economic integration starts with a free trade area, progresses to a customs union, then to a common market, and finally to an economic union, with a political union as the last stage.24 This classic integration model associated with Jacob Viner25 came under serious scrutiny as a model for Third World integration many decades ago.26 The Vinerian model was developed in an industrial context, while many developing countries were agrarian and raw material producing. The Vinerian model, for example, assumed that trade creation or trade expansion would outweigh trade diversion when trade barriers were lifted.27 This assumption is often undermined, since a majority of African economies have largely similar products without necessarily having comparative cost advantages between them sufficient to overcome this similarity.28 The resulting lack of complementary trade in effect undercuts gains in trade.

27 See infra Chapter III for an extended discussion.
28 Kahnert et al., Economic Integration, at 23. Kahnert notes that the traditional doctrine is based on differences in resource endowments which explain differences in factor prices. However, if one abstracts from natural resources in mining and agriculture, developing countries may not show very different resource endowments. In a general way, scarcity of
Under such conditions, firms in African RTAs end up trading with high cost producers within the region, rather than with low cost producers from outside the region. 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. In addition, African integration arrangements have often resulted in protecting high cost multinational or local firms that have commanded market share by producing for a segmented market within the individual countries and subsequently within a region. 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. This is in part because developing countries tend to trade with developed countries more than they do with each other. In addition, their national outputs are dominated by trade with developed economies, mainly in exporting unprocessed capital and skilled labour, scarcity of entrepreneurial talent, usually considerable amounts of unemployed unskilled labour, and in many cases even no shortage of land resources, are some of the characteristics of developing countries. See Vaitsos, ‘Crisis in Regional Economic Integration’, at 746.


See infra Chapter II (discussing reasons for adoption of variable geometry); see also Allen, ‘Less Developed Areas’, at 317–34 (discussing the conditions under which the Vinerian customs union model is feasible).

M. Bye, ‘Structural Changes Required by Growth’, in Harrod and Hague (eds), International Trade Theory in a Developing World, 161; see also Vaitsos, ‘Crisis in Regional Economic Integration’, at 751 (arguing that the traditional theory of integration influenced by Ricardian comparative advantage theory and neo-classical economics did ‘not address itself to the issues of major interest on development, namely how the process of integration will dynamically change the structural conditions of production and technology, the process of inter-commodity and inter-activity (rather than simply inter-country) substitution, the dynamics of resource diversification going beyond the questions of specialization, the composition of investments and expectations, the capacity for absorbing externalities, etc’).

According to Yang and Gupta, ‘Regional Trade Arrangements in Africa’, at 18. ‘For many RTAs, intra-arrangement trade as share of their total external trade remains below intra-African trade as share of total African external trade’, ibid. at 15.
raw materials. The argument here is that African economies need more than the increase in market size created by a common market because the increase in market size may be marginal relative to other limitations for firms, such as high production costs and very low levels of income that make the effective size of regional markets small.

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

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

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34 Assessing Regional Integration in Africa (Economic Commission for Africa, 2004), 19 (noting that ‘in 1995, primary products accounted for 64% of African exports’).
35 Hazlewood, ‘Problems of Integration’ at 9 (making reference to the view that ‘the present cash market of most African countries individually is not larger than that of a moderately sized European town’).
36 See infra Chapter II.
38 See infra nn. 59–79 (discussing functional specificity, RTAs as forums for integrated development of common resources, the equitable distribution of gains from trade and the principle of variable geometry).