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978-0-521-76983-9 - African Regional Trade Agreements as Legal Regimes

James Thuo Gathii

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AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES

African regional trade integration has grown exponentially in the last decade. This book is the first comprehensive analysis of the legal framework within which it is being pursued. It will fill a huge knowledge gap and serve as an invaluable teaching and research tool for policy makers in the public and private sectors, teachers, researchers and students of African trade and beyond. The author argues that African Regional Trade Agreements are best understood as flexible legal regimes, particularly given their commitment to variable geometry and multiple memberships. He analyses the progress made toward trade liberalization in each region, how the Regional Trade Agreements are financed, their trade remedy and judicial regimes and how well they measure up to Article XXIV of GATT. The book also covers monetary unions as well as intra-African regional integration, and examines Free Trade Agreements with non-African regions, including the Economic Partnership Agreements with the European Union.

JAMES THUO GATHII is Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law, Albany Law School. He is author of *War, Commerce and International Law* (2010) and over 50 articles and book chapters.

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ABBREVIATIONS

AAMP	African Agricultural Markets Programme
ACP	African, Caribbean and Pacific Group of States
ACTESA	Alliance for Commodity Trade in Eastern and Southern Africa
ADF	African Development Fund
AFC	Administration and Finance Commission
AFCAC	African Civil Aviation Commission
AfDB	Africa Development Bank
AFRAA	African Airlines Association
AFTAR	Africa's Agriculture and Rural Development Unit
AGOA	Africa Growth and Opportunities Act 2000
AMU	Arab Maghreb Union
ANSA	Angola, Namibia and South Africa
ASEAN	Association of Southeast Asian Nations
ASECNA	Agency for Aerial Navigation Safety in Africa and Madagascar
ASYCUDA	Automated System of Customs and Data Management
AU	African Union
AU/AEC/REC	(African Union/African Economic Community) (Regional Economic Communities)
AUC	African Union Commission
AVSEC	Aviation Security
BASA	Bilateral Air Service Agreements
BCEAO	Central Bank of West African States
BEAC	Bank of Central Africa
BEAU	Bank of Central West Africa
BIPPA	Bilateral Investment Promotion and Protection Agreement
BIT	Bilateral Investment Treaty
BLNS	Botswana, Lesotho, Namibia and Swaziland
CAADP	Comprehensive Africa Agriculture Development Programme
CAFTA	US–Central America Free Trade Agreement
CCIA	COMESA Common Investment Area
CCJ	Community Court of Justice

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ABBREVIATIONS

CEAO	Communauté Economique de l'Afrique de l'Ouest
CEMAC	Economic and Monetary Community of Central Africa
CEN-SAD	Community of Sahel-Saharan States
CET	Common External Tariffs
CFA	Colonies Françaises d'Afrique
CIF	cost, insurance and freight
CIP	Payment Incidents Centre
CMT	Committee of Ministers
COBAC	Commission Bancaire de l'Afrique Centrale
COHS	Conference of the Heads of State
CoJ	COMESA Court of Justice
COM	Council of Ministers
COMESA	Common Market for Eastern and Southern Africa
COMESA-CD	COMESA Customs Document
COPAX	Council for Peace and Security in Central Africa
COSCAP	Cooperative Development of Operational Safety and Continuing Air Worthiness Project
CPCM	Conseil Permanent Consultatif du Maghreb
CRTA	Committee on Regional Trade Agreements
CU	customs union
DSB	Dispute Settlement Body
DTI	Department of Trade International (Trade and Economic Development)
EAC	East African Community
EACJ	East African Court of Justice
EAFCA	Eastern African Fine Coffees Association
EALA	East African Legislative Assembly
EAPP	Eastern Africa Power Pool
EBA	Everything but Arms
EBID	ECOWAS Bank for Investment and Development
EC	European Communities
ECCAS	Economic Community of Central African States
EC-GSP	European Commission – Generalized System of Preferences
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
EC-SADC EPA	Economic Community–Southern African Development Community Economic Partnership Agreements
EDF	European Development Fund
EFTA	European Free Trade Area
EPAs	Economic Partnership Agreements
ESA	Eastern and Southern Africa
ESADA	Eastern and Southern African Dairy Association

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ABBREVIATIONS

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EU	European Union
EU-ACP EPA	European Union–African, Caribbean and Pacific Group of States Economic Partnership Agreements
FAA	Federal Aviation Administration
FDI	Foreign Direct Investment
FIFA	International Federation of Association Football
FOCAC	Forum on China–Africa Cooperation
FOMAC	Multinational Peace Keeping Force in Central Africa
FTA	free trade area
FTAg	free trade agreement
GAFTA	Greater Arab Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
HIV/AIDS	Human Immunodeficiency Virus/Acquired immune deficiency syndrome
IBSA	India, Brazil and South Africa
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICT	Information and Communication Technology
IEPA	Interim Economic Partnership Agreement
IGAD	Inter-Governmental Authority on Development
IGADD	Intergovernmental Authority on Drought and Development
IO	Indian Ocean
IOC	Indian Ocean Commission
IOM	International Organization for Migration
IPF	IGAD Partners Forum
IPR	Intellectual Property Rights
IRCC	Inter-Regional Coordination Committee
ITO	International Trade Organization
JCA	Joint Competition Authority
KPA	Kenya Ports Authority
LDC	least developed countries
MARAC	Early Warning Observation and Monitoring System for Central Africa
MC	Ministerial Committee
MEFTA	Middle East FTA
MERCOSUR	Southern Common Market
MFN	Most-Favoured-Nation
MMTZ	Malawi, Mozambique, Tanzania and Zambia

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ABBREVIATIONS

MPA	Millennium Partnership for the African Recovery Programme
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organization
NTB	non-tariff barriers
NTF	Nigeria Trust Fund
OAU	Organization of African Unity
OCA	Optimum Currency Areas
OHRLLS	Office of the High Representative for Least Developed Landlocked Developing and Small Developing Island Countries
OIE	World Organization for Animal Health
ORRC	other restrictive restrictions of commerce
PAIDF	Pan-African Infrastructure Development Fund
PAPED	EPA Development Programme
PCT	Patent Cooperation Treaty
PDCT-AC	Blueprint Consensus on Transport in Central Africa
PLT	Patent Law Treaty
PTA	preferential trade area
RABESA	Regional Approach to Biotechnology and Bio-safety for Eastern and Southern Africa
RATES	Regional Agricultural Trade Expansion Support
RCP	Regional Consultative Process
RICTSP	Regional Information and Communication Technology Support Programme
RISDP	Regional Indicative Strategic Development Plan
RMC	Regional Member Countries
RoO	Rules of Origin
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SARS	South African Revenue Service
SAT3/WASC/SAFE	South Africa/West Africa Submarine Cable/South Africa Far East
SCF	Stabilization and Cooperation Fund
SEACOM	Sea Cable System
SEA-ME-WE	South East Asia-Middle East-West Europe
SERAP	Socio-Economic Rights and Accountability Project
SICA	Automated Interbank Clearing System
SSATP	Sub-Saharan Africa Transport Programme

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ABBREVIATIONS

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STAR	Automated Transfer and Settlement System
TDCA	Trade and Development Cooperation Agreement
TEAMS	East Africa Marine System
TIDCA	Trade, Investment and Development Cooperative Agreement
TIFA	Trade and Investment Framework Agreement
TLS	Trade Liberalization Scheme
TMCM	Trade Monitoring and Compliance Mechanism
TRIPS	Trade-Related Intellectual Property Rights
UACC	Upper Air Space Control Centre
UDE	Union Douanière Equatoriale
UDEAC	Union Douanière et Economique de l'Afrique Centrale (Central African Customs and Economic Union)
UEMOA (WAEMU)	West African Economic and Monetary Union
UMAC	Union Monétaire de l'Afrique Centrale
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Economic and Social Council
USAID	United States Agency for International Development
VAT	Value Added Tax
WABA	West African Bankers Association
WAEMU (UEMOA)	West African Economic and Monetary Union
WAHID	World Animal Health Information Database
WAMI	West African Monetary Institute
WAMZ	West African Monetary Zone
WCO	World Customs Organization
WTO	World Trade Organization

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In this book, I discuss the legal framework that undergirds African Regional Trade Agreements (RTAs), both on their own terms as well as in the context of their relationship to the multilateral trading system. I argue that it is important to understand African RTAs on their own terms, because they have contextualizing imperatives grounded in African history, politics and realities that defy being strapped into the straitjacket of European or other non-African experiences. Thus, while African, like other RTAs, must necessarily be evaluated for their consistency or inconsistency with the World Trade Organization's (WTO) non-discriminatory trade rules, this book shows that one cannot overlook the particular nature of African RTAs.

In addition, this book seeks to fill a major gap in the literature on African trading arrangements as legal regimes. While there has been increased attention on Africa in the international trading system, this is one of the first book-length analyses of African RTAs as legal regimes. This book therefore seeks to fill the gap in writing about the legal framework of African RTAs as much as I hope it challenges students and teachers interested in international trade in Africa to carry forward the task of continuing to put into print analysis of the legal framework of African trading systems.

Indeed, a major reason I decided to write this book is because there now is a large and growing market for studying international and regional trade law based on materials specific to Africa. Yet, most teaching and research on trade in Africa continues to rely on materials developed for predominantly non-African audiences in Europe and the United States. While such materials can be a useful starting point, their relevance for African students and researchers seeking to understand African trading relationships may be limited. For example, there are extremely few legal texts prepared for teaching international trade law in Europe or North America that specifically focus on the challenges of livestock agriculture, which forms a significant share of trade for some African countries.

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This book is also invariably about the international institutional law that is emerging from African RTAs. As with international institutions, it shows that African regional institutions experience similar issues that other international institutions face. These issues include what to do with Member States who fail to pay their assessed dues; the competence of regional courts to decide cases relating to domestic law; whether RTA judiciaries can make decisions that bind Member States; whether organs of these RTAs may enforce decisions without the cooperation of Member States or take particular actions without the approval of the members, and so on.

As such, this is as much a sourcebook or reference book on the legal framework of African RTAs as it is an analytical examination of these legal arrangements. It advances the claim that African RTAs are not purely or exclusively trade agreements, but rather agreements that encompass a broad set of objectives. Nothing says this better than the Treaty for the Establishment of the African Economic Community, which provides that one of its purposes is to facilitate cooperation ‘in every field of human endeavor’. In addition to having an extremely broad range of areas of cooperation, it is a truism that the legal obligations assumed under these treaties are not understood by the leaders as containing punitive sanctions for non-compliance. It seems that African leaders, while eager to make legal commitments in numerous and increasing numbers of treaties, are not equally willing to take responsibility for non-compliance, or indeed to completely surrender certain competencies to the supranational organizations created by these treaties. I develop that argument in full in the first three chapters of the book, which examine three defining features of this flexible understanding of the legal commitments: multiple objectives alongside trade liberalization commitments, variable geometry and multiple memberships.

Chapter I examines how African RTAs have embraced multiple objectives, including a commitment to development that differs from the classic Vinerian laissez-faire trade liberalization model. It examines how these agreements incorporate non-trade objectives including the nestling within them of a variety of projects such as the management of common river basins. Within African RTA treaties, one sees extremely few non-discriminatory commitments such as most-favoured-nation and national treatment, as cornerstones of the liberalization commitments contained in them. This contrasts sharply with the GATT/WTO regime that is in large part premised on these principles of non-discrimination. Chapter II examines variable geometry, according to which RTAs embrace extended

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time frames for some members to come up to speed in implementing trade liberalization commitments. It also examines the extensive commitment to pay-offs made to countries that lose out from liberalization commitments, as well as preferential allocations of credit and industry to less well off members in trade integration schemes. Chapter III examines the phenomenon of multiple memberships in African RTAs and how this characteristic of open-door membership raises challenges such as those referred to as the *spaghetti bowl*.

The first three chapters of the book demonstrate that African RTAs are not predicated on a vision of market-led integration. Instead, they are largely designed as forums for a variety of initiatives, such as facilitating cooperation around common resources like international rivers and basins among riparian states, and cross-border challenges that include trade, security and health. Rather than simply using the expansion of intra-regional trade as a framework for industrial growth, product diversification and the improvement of the global competitiveness of these products as ways of overcoming small domestic markets, African RTAs were and continue to be seen as frameworks for development cooperation as well. This approach to integration is therefore committed to cooperation at the level of production in the arenas of capital and labour, as well as to coordinated programming and infrastructural development.

As such, African RTAs show a particular preference for multiple objectives that often have little to do with trade and are committed to a vision of development integration that may be regarded to be in tension with trade liberalization grounded on WTO rules of non-discrimination. However, as this book shows, African RTAs explicitly embrace WTO rules, particularly in the area of trade remedies. Indeed, as documented at length, trade integration through regional and bilateral agreements has gained a new momentum not simply to enhance intra-African trade, but rather to promote economic growth, especially because of the small size of individual African economies. In many regions there is an increasing commitment to the view that trade-enhancing rather than trade-protective integration is crucial to achieving long-term economic growth. In addition, such trade-enhancing integration is regarded as being most acceptable when it is consistent with the declared development priorities of African countries.

Regional integration is also regarded as a necessary step for shaking off Africa's external economic dependence and its lop-sided participation in the international trading system through economic self-reliance on a continental level. As I argue, such attitudes towards regional integration reflect the preferences of African governments. Put another way, regional

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integration as pursued by African governments is pursued in a manner that enmeshes with the preferences of African governments. Among those is a preference not to build strong supranational bureaucracies. This has in turn undermined the achievement of more thoroughgoing intra-regional trade. Indeed, since African governments understand these RTAs as flexible regimes, they regard them less from the efficiency gains that non-discriminatory free trade may offer, than from the benefits that these regimes offer, particularly as forums for integrated development of common resources such as river basins, and in terms of any gains arising from functionally specific objectives that may be nestled within these regimes that do not have to await the long-term horizon which non-discriminatory free trade is likely to offer.

There are eight RTAs, or regional economic communities, recognized by the African Union as pillars of the African Economic Community (AEC). The AEC is expected to be formed in 2027 when these eight RTAs cease operations in favour of the continental AEC. The RTAs are the Arab Maghreb Union (AMU/UMA); the Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Economic Community of Central African States (ECCAS/CEEAC); the Economic Community of West African States (ECOWAS); the Inter-Governmental Authority of Development (IGAD); and the Southern African Development Community (SADC). Each of these RTAs is discussed in greater detail in Chapter V. Chapter VI on the financing of these regional groupings sets out the relationship between these regional economic communities, on the one hand, and the African Union's AEC on the other, while Chapter X addresses relationships these communities are developing among themselves. There are, of course, many other African regional economic groupings, such as the monetary unions discussed in Chapter IX, as well as the offshoots of many of these RTAs discussed throughout this book. Africa's monetary unions as discussed in Chapter IX are the Economic and Monetary Community of Central Africa (CEMAC); the West African Economic and Monetary Zone (UEMOA); and the West Africa Monetary Zone (WAMZ). The fact that African countries belong not only to the above eight RTAs, but also to the monetary unions, not to mention other important groupings in the continent such as the Southern African Customs Union (SACU), the Mano River Union (MRU), the Economic Community of Great Lakes Countries (CEPGL) and the Indian Ocean Commission (IOC), only exacerbates the problem of multiple and overlapping membership in these groupings. As I argue, these downsides must

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also be seen against certain benefits that countries accrue from one rather than another regional bloc. In Chapter III, for example, I argue that there is an element of forum or regime shifting between different RTAs of which an individual country is a member that these countries regard as tactically defensible. Some countries like Namibia have conducted studies on their multiple memberships and decided to voluntarily withdraw from COMESA as membership was not in its economic advantage. In addition, it is praiseworthy that COMESA, EAC and SADC have decided to negotiate a tripartite free trade agreement (FTAg) that is another step towards rationalization of these multiple memberships. Chapters V and X discuss this planned tripartite FTA.

Chapter VI on the financing of African RTAs shows that promptness in meeting financial obligations is the exception rather than the rule. As such, most of these RTAs have increasingly become reliant on donor funding, which is inconsistent with the declared objective of regionalization as a necessary bulwark against dependence on such external support. From the information I was able to obtain, only SADC seems to have relative financial autonomy. Half, or perhaps more than that, of the EAC's budget is from donors. This, of course, raises questions of ownership of the programmes of the EAC.

This theme is continued in Chapter XI, which examines trade and investment agreements between African and non-African RTAs. A broad range and array of such agreements with European, America, Asian and even Latin American countries is examined. The chapter shows that Africa's external trading partners have invested heavily in negotiating these agreements. The slowdown in multilateral negotiations in the Doha Round has in part spurred the need to negotiate bilateral and regional agreements. In addition, Africa's external trading partners see these regional and bilateral agreements as offering opportunities to negotiate extensive commitments beyond those in current multilateral agreements in areas such as government procurement, services, investment measures, competition and other WTO-Plus commitments. The legacy of these agreements for Africa awaits further critical scrutiny to see whether the promise of mutual gains comes to fruition. At the moment, the mutuality of such gains in many of these agreements is not decidedly on the African side. Yet as the discussion particularly in Chapter IV on the provisions of Article XXIV of the GATT in relation to regionalism in Africa shows, there is much scope for well-founded arguments to justify the kind of extended time frames for meeting commitments African countries have sought in negotiations, as well as the arguments they have advanced on

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what liberalization of ‘substantially all trade’ means. There are debatable claims, too, that there is justification for regionalism outside Article XXIV under the Enabling Clause, as more fully discussed in Chapter IV.

Further, in terms of the WTO, Chapter VIII on trade remedy regimes shows that African RTAs have by and large borrowed the trade remedy rules of the WTO. That means that countries like Ethiopia which are not yet members of the WTO, are already subject to WTO disciplines in anti-dumping and countervailing duty law, since COMESA has adopted these rules as its trade-remedy rules.

This book also examines African RTA judiciaries which, to the best of my knowledge, no previous work in book or article form has attempted to do. It shows that African RTA judiciaries entertain a broad range of disputes from an extremely broad category of litigants, unlike the International Court of Justice, for example, which only accepts cases from states that have accepted its jurisdiction. African RTA judiciaries are not simply custodians of the trading arrangements – in fact, they do much less dispute settlement around trade issues compared to the broad range of cases they have assumed jurisdiction over. Many of these judiciaries, as we shall see, have also often entertained cases that are well beyond their treaty-defined jurisdictional bases.

Another feature of African RTA judiciaries that comes out clearly is the boldness of their decisions in relation to the fact that they are relatively new institutions operating in a context in which adherence to notions of national sovereignty is very strong. The East African Court of Justice, for example, has decided cases relating to human rights even though there is no explicit treaty basis for the court to assume jurisdiction over human rights cases that challenge the conduct of Member State governments. For taking such bold steps, the leaders of the EAC amended the Treaty Establishing the East African Community as a statement of the disapproval of some controversial decisions of the East African Court of Justice. Another example is the ECOWAS Court of Justice, whose jurisdiction was expanded in 2005 to allow cases challenging the conduct of Member States with respect to human rights, a jurisdiction it has since not spared in its use.

The examination of African RTA judiciaries shows that they are not sleeping sentinels of the treaties under which they are established. This chapter, like many others, in my view is therefore a call for more attention to be focused on these judiciaries. Ultimately, this book provides a panoramic view of African RTAs that I hope scholars and students will carry forward.