Reconsidering the Flexibility Paradigm of African Regional Trade Agreements and Informal Trade Engagements

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This article examines the meaning and implications of flexibility in understanding African Regional Trade Agreements (RTAs) and informal trading or business engagements. This examination is important because flexibility is often considered as one of the essential hallmarks of African trade regionalism.

African Conceptions of Flexibility

An established interpretation of flexibility in relation to RTAs has been developed to illustrate that African treaty commitments and understandings show that African RTAs were *designed* as flexible regimes and that they are *regarded* as establishing 'flexible regimes of cooperation as opposed to containing *rules requiring scrupulous and rigorous adherence*.' Of course, in the

context of international law, international trade law and international relations, flexibility can mean different things.

However, the big regional African RTAs (1) are not flexible regimes, at least not by design, that is if flexibility is considered as an institutional choice, (2) contrasted with legalisation in relation to explaining how international actors design international institutions and how institutions partake of the characteristics of law. Granted that these RTAs must be seen for their peculiarity and in their political and economic contexts, doing this, however, must also not take away from understanding these RTA as they are presently constituted.

Often, flexibility in the African regionalism context is used as part of the representation of the much aligned and less explored but *distinctive* African viewpoints and approaches to international law/regional integration. Flexibility in the African literature has been conceptualised to mean that African RTAs must be understood as trade plus/cooperation regimes that were conceived for a variety of objectives than just trade. Scholarship in this area has been very important because it has helped generally in the understanding of African RTAs for their own merits, and not as extensions or transplants of the European models of economic integration. It now forms part of the Third World Approaches to International Law (TWAIL) which continues to inconvertibly make clear that 'the historic origin of international law, its subsequent development, and contemporary manifestation reveals the decisive influence of asymmetric power and economic inequality in shaping its normative standards and direction'

Some Implications from the African Conceptions of Flexibility

Nevertheless, in telling the African story, we must be careful not to inadvertently sustain narratives that would do Africa no good. To explain, in international law, another sense in which flexibility is understood specifically in the context of trade agreements is as being 'incidental' to a treaty. This means that flexibility must be provided for by the treaty since the treaty itself must explicitly provide for occasions where it is lawful to derogate from it. It also means that flexibility is not 'accidental' to the treaty or as a consequence of

other factors existing outside the treaty. This 'incidental' flexibility refers to the differentiated commitments of member states to treaty obligations that the treaty itself provides for. In the WTO, this is referred to as 'flexibility of commitment, action and use of policy instruments.' For instance, contrary to the WTO principle of non-discrimination and principles of binding tariffs, Article VI GATT allow member states imposition of additional duties for products that have been 'dumped' in their territory as a way of protecting local industries. In an economic integration context, flexibility is reflected by the principle of variable geometry and differentiated integration; again, that is provided for in the treaty.

In the framework of African regionalism, it seems that flexibility is occasionally understood as being 'accidental' to the trade treaties. In a bid to sustain the argument that African RTAs must be judged on their merit, sometimes indigenous African scholarship seems to suggest (maybe inadvertently) that this is somewhat justifiable instead of highly problematic. The case of *Polytol Paints & Adhesives Manufacturers Co. Ltd V The Republic of Mauritius* illustrates this problem very clearly. In the above case, the COMESA Court of Justice was confronted with an application seeking the interpretation of Article 46 of the COMESA treaty. Article 46 of the COMESA treaty binds member states to reduce and ultimately eliminate customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods in the community before 2000. The argument of the Respondent was 'that member states [of COMESA] have *flexibility* in the determination of when to implement certain aspects of the Treaty that would be most advantageous to a successful establishment of a Customs Union.'(3) The Respondent was therefore of the view that the requirement to eliminate duties by the year 2000 is '*flexible*, intended to facilitate a process rather than rigid rules cast in stone.'(4) Flexibility was therefore used as a basis to justify derogations from clear treaty obligations. Undoubtedly, this accidental flexibility understood as suggesting that African states regard RTAs as somewhat 'discretionary' may not mean so well for the new agreements like the AFCTA.

To be sure, I do not advocate a minimalist understanding of African RTAs based on legal formalism. There is increasing literature which makes compelling arguments that regionalism in Africa has never been about regional economic

integration rather regional economic cooperation. These arguments flow into well-formed theoretical work in the political science/international relations literature which has sought to distinguish between 'regionalism', 'regionalisation' and 'region building' and which has advocated that all things 'regions' must be understood in the economic relations and political struggles behind them (See here.) Yet, the problem with this 'accidental' flexibility is that there is a clear mismatch between the commitments provided in the RTAs and how the RTAs are regarded or understood to be in relation to the legal obligations and commitments it creates. This mismatch must not be justified (whether passively or otherwise) in the effort to sustain or promote the narratives that explore the distinct features of African trade integration or cooperation as the case may be. It must constantly be shown clearly for the problem that it is so that Africa can begin to give clear thoughts on how it can be remedied bearing due regard to Africa's peculiar political economy dynamics. This is not to understate how extremely difficult this can be in view of often contrasting political and economic interests. However, the ASEAN experience shows that treaties can adopt a certain form of gradualism as it relates to what states are willing to accept and give effect to.

Flexibility and the African Informal Sector

Outside the legal parlance, it is my view that the flexibility paradigm in economic terms has been reflected by suggestions for a celebration of 'our' informality in the trade engagements/businesses happening in the continent. There have been calls to embrace our informal economy and not treat it as a problem. In highlighting the peculiarities and the distinctiveness of trade engagements in Africa, we must, however, make sure the problems surrounding these peculiarities are not eclipsed as well. Thoughts around embracing our informality totally, I find to be problematic. While I subscribe to the view that Africa's informal sector is a reality that should be accepted, I think what serves the continent best is to determine the best ways to formalise it maybe in our peculiar way. In this regard, anyone that is conversant with the large informal sector in Africa can only imagine the huge problems reliable data can solve. The COVID-19 pandemic underscores the problems of informality because when market systems are not standardised, particularly when reliable data is lacking, real effective and widespread solutions become difficult. Most

African nations may not have reliable data to properly identify and support informal businesses that have been severely affected by this pandemic.

Conclusion

Now that the commencement of AFCTA has been postponed in view of the COVID-19 pandemic, there is a need for a clear conceptualisation of flexibility in relation to the commitments and obligations created in African RTAs including the AFCTA. There is also a need to identify how some narratives that are subsumed in the flexibility paradigm may end up doing more harm than good to informal trade engagements in the continent.

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