African trade and integration: Law, practice and the courts

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• Much in this work may be familiar (either through experience or the available literature)

• Looks at three levels of trade dispute settlement in Africa

• AfCFTA with WTO-akin DSM – reality or a dream deferred? (Member states only)

• RECs (with SACU as ‘special’ case) – help where they can (may include private parties)

• Domestic/national courts – left to carry the can? (certainly private parties)
All because of the well-worn refrain:

IN AFRICA, STATES AVOID GOING TO COURT OR TAKING EACH OTHER ON OVER TRADE DISPUTES

Implication:

• Private parties (natural & legal persons/residents) left to own designs – in effect ‘abandoned’ (Eswatini BAT example)

• Aggravated if no access to REC court
REC Courts/dispute settlement mechanisms

Five of eight recognised RECs:

- COMESA, EAC, ECCAS, ECOWAS – courts (SADC, SACU on paper?)
- Arab Maghreb Union – ‘judicial organ’
- IGAD – ‘effective mechanism of consultation and cooperation for the pacific settlement of differences and disputes’
- Non-recognised organisations: Economic and Monetary Community of Central Africa (CEMAC); West African Economic and Monetary Union (WAEMU); ‘Organization for Harmonization in Africa of Business Laws (OHADA)
Private party access:

• COMESA, EAC, ECOWAS (CEMAC, WAEMU, OHADA)
• In 36 of 54 states private party access
• Remaining 18 not
• Among the 18 are number of SADC, including five of SACU
• Due to overlapping membership, in some members of SADC, e g, private parties have access
• They are the litigants, mostly
QUICK LOOK AT ECOWAS, COMESA, EAC

• ECOWAS single court; COMESA/EAC – FID/AD
• Jurisdiction – states, Communities, private parties, staff

Private parties:
• COMESA: exhaustion of domestic remedies
• ECOWAS: human rights & legal persons (‘narrow window’)
• EAC: 2-months rule & ‘institutions’
• Who are the litigants?
Jurisprudence

• Often criticised for not doing ‘trade’ cases
• ECOWAS not easy – jurisdictional restriction
• COMESA/EAC: Courts don’t create own cases, in hands of litigants
• Reasons for few trade matters?
• Cause célèbre: *Polytol* (COMESA; domestic remedies exhausted); *BAT* (EAC; direct access)
• Different approach to same issue (EAC Treaty arts 6(d) & 7(2); COMESA art 6(e)-(h): human rights, good governance, democracy, accountability: enforceable right?
SACU

• Interesting case study in domestic remedies
• Ad hoc Tribunal dormant
• Namibia & Eswatini protective measures
• *Parmalat, SAPA, Southern Trading; BAT - IIP*
• *Clear Enterprises* (art 27(3) SACU Agreement)
• In all instances SA could have intervened o b o aggrieved parties …
Miscellaneous points to ponder

• Role for REC & domestic courts in AfCFTA-related disputes?
• Preliminary rulings in REC Courts
• Enforcement of judgments
• ‘Spreading the word’ about REC Courts
• Litigation is expensive and time-consuming – are there less costly and equally or more effective and readily accessible alternatives available?