

# tralac Annual Conference

13 & 14 October 2022

## 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)

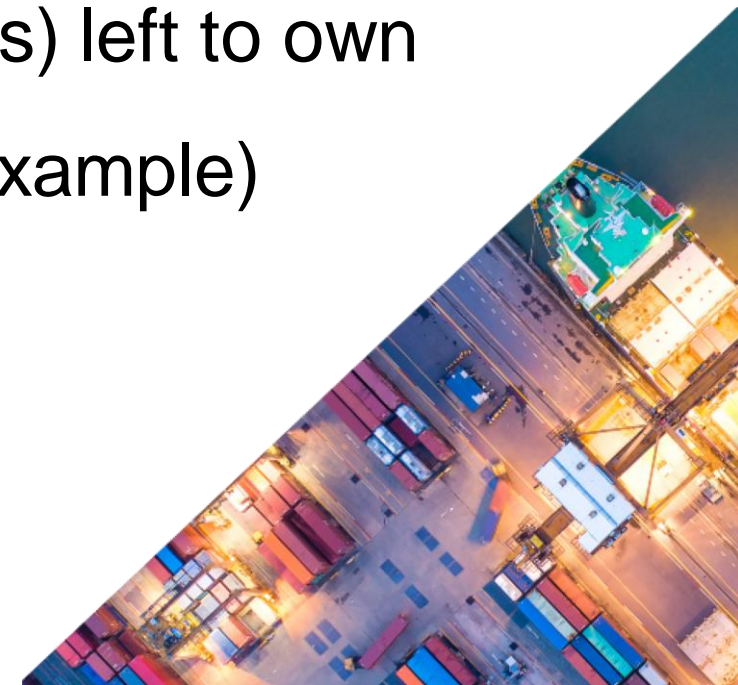


All because of the well-worn refrain:

**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:

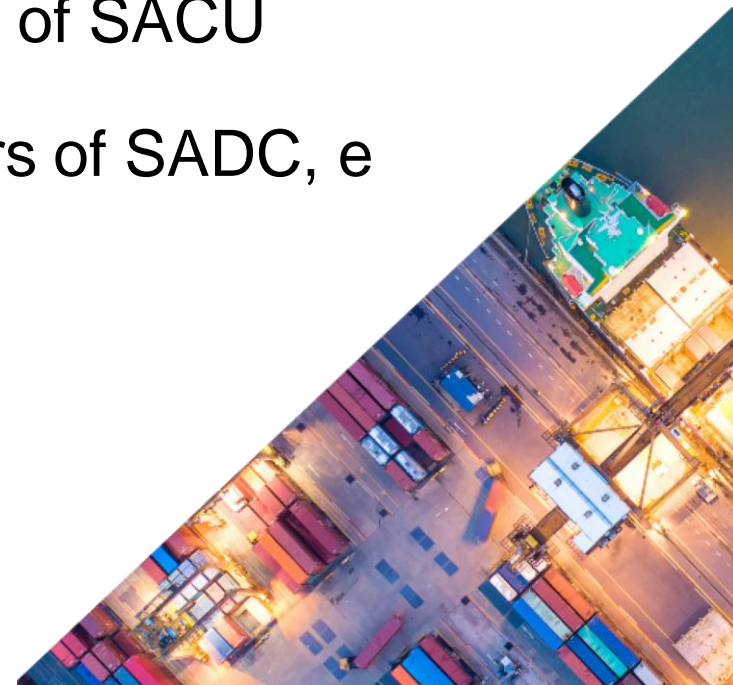
- COMESA, EAC, ECCAS, ECOWAS – courts (SADC, SACU on paper?)
- Arab Maghreb Union – ‘judicial organ’
- IGAD – ‘effective mechanism of consultation and cooperation for the pacific settlement of differences and disputes’
- Non-recognised organisations: Economic and Monetary Community of Central Africa (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

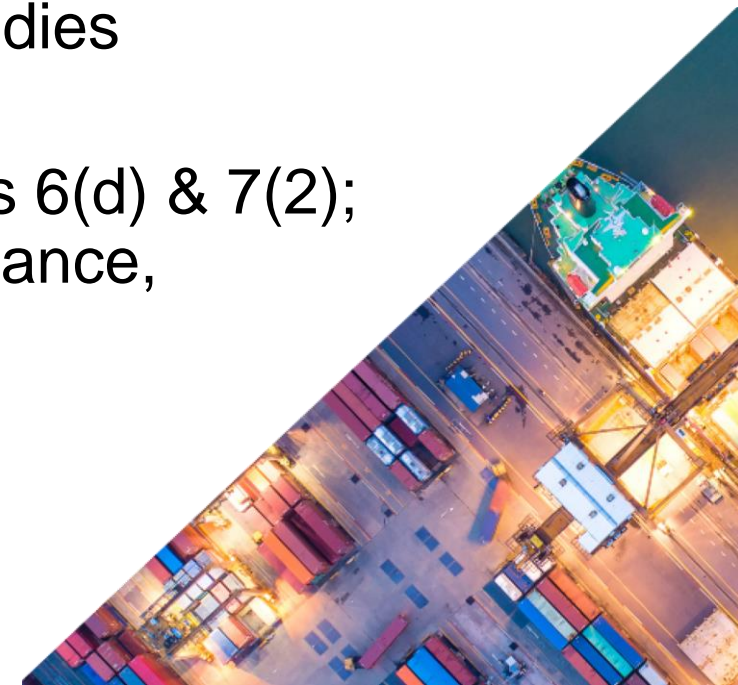
### **Private parties:**

- 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?

