

Report

tralac Dispute Settlement Workshop – 26 May 2014

On Monday 26 May 2014 **tralac** hosted a dispute settlement workshop at the University of Cape Town Business School in Cape Town, South Africa. The workshop provided a platform for officials, private sector representatives and legal experts from southern Africa to discuss technical issues, recent cases and possible solutions to practical dispute resolution issues of interest to private sector players, government officials, and legal practitioners involved in the area of trade and commerce.

The focus areas of the workshop included the development of community law in the African Regional Economic Communities (RECs); the state of dispute settlement arrangements in SADC and SACU, administrative law remedies and the access to domestic courts; and the issue of dispute resolution in the case of non-tariff measures in the region. The workshop concluded with an interactive debate among the participants to determine a potential agenda for research, capacity building and advocacy to ensure rules-based trade in southern Africa.

The workshop was opened by Trudi Hartzenberg, the Executive Director of **tralac**, who provided an overview of the importance of dispute settlement as an integral part of rules-based governance for regional integration.

A discussion on African community law, led by Professor Tiyanjana Maluwa, the H. Laddie Montague Chair in Law at the Dickenson School of Law and the Director of Penn State School of International Affairs, followed the opening remarks. His discussion focused on the conceptual issues, architecture and institutions of community law development in African RECs and the challenge of geography in and structure of African RECs in the development of African community law. He argued that the current state of community law in Africa is not

one overarching legal regime, but different legal regimes in various RECs that can be based on commonalities but lacks harmonisation and synchronisation.

Professor Gerhard Erasmus, **tralac** associate, emphasised the need for a rules-based dispensation and an effective dispute settlement mechanism in regional trade arrangements. His presentation also focused on the state of play of dispute settlement instruments and institutions in SADC and SACU. The fact that the SADC Tribunal has been suspended, Panel proceedings under Annex 6 of the SADC Trade Protocol have not been activated and SACU Tribunal negotiations have made no progress led to questions regarding the policy space for possible alternative dispute resolution mechanisms or new approaches to regional litigation in SADC and SACU. This also formed the basis for discussions among the workshop participants. At the end of the discussion many interesting questions were raised – what are the possibilities for public interest litigation and regional arbitration in SADC and SACU? What will the impact of a Continental Free Trade Agreement (CFTA) be on the current state of dispute settlement in southern and eastern Africa? What will be the design of a continental dispute settlement mechanism and institutions in the CFTA? Professor Erasmus also led a discussion to determine possible ways in which to address the practical issues related to trade facilitation issues and non-tariff measures through improved complaint mechanisms, advocacy programmes and interactions with government and legal professionals, possible alternative dispute resolution mechanisms and using existing mechanism more effectively.

Dawid van Wyk, Emeritus Professor of the School of Law at UNISA then led a discussion on domestic legal remedies available to traders in the context of regional trade agreements. The key point of the presentation was to establish to what extent constitutional and administrative law in member states offer efficient remedies in terms of the implementation of trade agreements. In order to answer this question an overview of four recent cases, pertaining to the rights and obligations of private parties under regional trade agreements was provided. These examples show that the potential exists for domestic courts to allow arguments based on the breach of international and regional trade agreements and to provide private parties with constitutional or administrative legal recourse to remedy the breach of international obligations.

The workshop concluded with active discussions on a research, capacity building and advocacy agenda that can ensure that regional integration in southern Africa proceeds within the framework of an effective rules-based dispensation. The suggestions for further work are:

- i) on improving dialogue between government and business (especially organised business and business leaders),
- ii) possible private sector interventions in certain aspects of capacity building,
- iii) more delivery of programmes on the law of regional integration in university law schools,
- iv) effective enforcement of measures to address trade facilitation issues and non-tariff measures,
- v) the potential of arbitration as an alternative way to resolve disputes,
- vi) advocacy programmes to create awareness of the need for effective dispute resolution especially for private parties, and the need for a practical agenda to address private sector disputes.

tralac will include these suggestions in its work programme going forward and keep participants informed of these initiatives. Further suggestions, including ideas for collaboration are most welcome. Please send these to trudi@tralac.org.