

Trade Remedies and Dispute Settlement in African RECs

1. Trade Remedies and Safeguards in the multilateral Trade Context

Trade remedies are trade policy tools that allow governments to take remedial action against imports which are causing injury to a domestic industry. These remedies are mostly triggered by requests from domestic industry. In terms of WTO rules such remedies are divided into

- safeguards (temporary relief from import surges; not aimed at unfair trade practices)
- countervailing duties (counteracting unfair subsidies)
- antidumping (counteracting unfairly low prices)

These are permissible import restraints that otherwise would be contrary to WTO principles; they are exceptions to the basic rules of binding tariffs and MFN (most favored nation) treatment. Their use is, therefore, subject to strict disciplines. National Investigation Authorities, legislative frameworks and domestic judicial review are required. They are often called “safety valves” to allow further trade liberalization.

Why are they so frequent? As tariffs are reduced or eliminated, more countries invoke trade remedies to assist domestic industries. The majority of DSU disputes concern AD. These cases are mostly about the correctness of local investigations or measures. (See example of Brazilian chicken case. Same issue figures prominently in renewal of AGOA benefits for SA.) Since there is a danger of disguised protectionism, DSU disputes are quite common.

Their use is linked to national industrialization policies; while private parties may approach national governments with requests to impose e.g. AD duties. (An example is the current South African chicken saga; with ditto developments in Namibia.)



2. REC Members do not use Trade Remedies --- Why not?

- African REC Agreements allow for WTO based trade remedies. However, they are not used. (Egypt and South Africa are the only active users of trade remedies on the multilateral level.)
- Do low levels of industrialization explain (partly) why formal trade remedies are not invoked? Is there less of a need; and are we not sufficiently integrated?
- Member states lack the necessary domestic arrangements; which require high levels of expertise, dedicated institutions and sophisticated laws.
- Our RECs are not true rules-based arrangements. The member states do not litigate against each other over trade issues. Same applies to NTBs.
- Availability of domestic remedies are generally not well developed. Even Administrative Law remedies are often absent.
- Trade agreements are not domesticated.
- There are alternatives; such as the Derogations allowed by Art 3 SADC Protocol on Trade, infant industry protection clauses, and SACU's Art 25. The latter allows import restrictions; but without a Tribunal to adjudicate the correctness of such measures.
- The sovereignty issue

3. A new Trend regarding Trade Remedies in African Regional Integration?

- During the Tripartite FTA negotiations the demand for "flexible" trade remedies became a major issue, and is still not resolved. South Africa and Egypt insist on WTO disciplines being used.
- Preferential safeguards seem to be acceptable.
- Will a solution be found as part of the built-in agenda?
- The use of trade remedies is inextricably linked to an effective dispute settlement arrangement; cannot have the one without the other
- Even if a solution is found, implementation will be difficult --- TFTA is not one single Free Trade Area. What will happen in COMESA, EAC and SADC?
- The logic behind a demand for effective remedies requires more respect for rules and compliance monitoring.

4. What is happening in Regional Trade Arrangements elsewhere?

A recent WTO study found:

- Be vigilant about increased discrimination arising from trade remedy rules in RTAs.
- Some RTAs have abolished trade remedies. They are characterized by a higher share of intra-RTA trade and deeper forms of integration that go well beyond the dismantling of border measures.
- Several RTAs have adopted RTA-specific rules that tighten discipline on the application of trade remedies on RTA members. For ADs some increased de minimis volume and dumping margin requirements and shortened the duration for applying AD duties relative to the WTO Anti-dumping Agreement.
- Many of the provisions on bilateral safeguards tightened disciplines or reduced the incentives to take safeguard actions. Safeguard measures can be imposed only during the transition period, have shorter duration periods and require compensation if put in place. Retaliation is allowed if there is no agreement on compensation.
- Under certain conditions RTA partners can be exempted from multilateral safeguard actions. This conflicts with multilateral rules which require that safeguard measures be applied to all sources of

imports and highlights the problem of trade diversion.

- A small number of RTAs give a role to regional institutions to conduct AD and countervailing duty investigations and to review final determinations of national authorities. This reduces the frequency of AD initiations and final determinations against RTA members.
- No major innovations in CVD rules and practice. A major reason for this may be the absence of commitments in the RTA on meaningful or significant curbs on subsidies or state aid.

5. What to do?

- We will not escape the need for legal certainty and predictability for how we trade; will have to rethink the basic nature of our RECs.
- This is essentially a governance issue; with domestic as well as regional dimensions.
- The costs involved in high margins of legal uncertainty undermine the benefits of regional integration and trade liberalization. Legal uncertainty has become our sui generis NTB.
- There is a danger of unilateral retaliation if present trends (e.g. at Beit Bridge) continue.
- Objective dispute resolution will in fact protect sovereignty and good neighbourliness.
- If the RECs become rules-based, trade remedies will find application; and vice versa.
- Rules-based preferential safeguards might be the best starting point.
- Many of the unfair trade practices which firms and governments in Africa complain of, can be tackled through national and regional competition laws and institutions.
- The objective behind trade remedies and competition law is very much about the protection of the rights and interests of private firms and traders. Much more can be done to advance this objective through effective domestic and regional arrangements to promote transparency and administrative justice.