

Workshop Report

tralac Trade Governance and Remedies Workshop 29 October 2015

Summary

On 29 October 2015 **tralac** hosted a workshop on the contemporary legislative and governance needs of Botswana, Lesotho, Namibia and Swaziland (BLNS) with respect to the promotion of their national trade and development policies as members of regional and multilateral trade arrangements. The aim of the workshop was to discuss the domestic policy, legal and institutional imperative for governance of international trade, specifically for the BLNS countries¹, taking into account the reality of 21st century international investment, production and trade. The workshop focused on the review of traditional trade governance instruments in the regional (SACU, SADC, Continental FTA and Tripartite FTA), and multilateral context, including an overview of trade remedies (anti-dumping measures and countervailing measures), safeguards, standards and trade facilitation and the 21st century requirements for effective trade governance (competition policy; services trade governance and sector regulation; national policy, legal instruments and institutional framework for trade governance and private sector remedies).

Discussions were guided by presentations by Trudi Hartzenberg (**tralac**), Professor Gerhard Erasmus (**tralac** Associate) and Abrie du Plessis on trade remedy and safeguard issues, outstanding matters in the SACU Agreement and trade governance in the 21st century, including the policy connections among trade, investment, services and competition. A central issue which emerged from the presentations is that the design of domestic policy, legislation and institutions within the SACU member states must take cognisance of the overall needs (trade, investment, competition, services) of the member states based on the principle of good governance (transparency, predictability, certainty in the law and effective dispute resolution). Pivotal to the design is the manner in which these domestic instruments

¹ All SACU member states are required, in terms of the 2002 SACU Agreement, to establish national (trade) bodies. **tralac** has received requests from BLNS countries to assist with this process; hence the country focus of this workshop.

will interact and complement other national policy objectives, multilateral and regional instruments and the domestic instruments of other SACU countries.

A critical review and assessment of the rules of the game for engagement in SACU are necessary due to flaws in the design of the 2002 SACU Agreement (including lack of rules-based governance and effective dispute settlement) and the lack of implementation of this agreement. In designing domestic policy and legislation pertaining to trade remedies and safeguards a balance must be struck between the common (SACU) and individual policy space. Instruments must be based on the principles of good governance, must be appropriate for the specific purpose, allow for the monitoring of compliance and provide for effective dispute resolution; taking into account the concern of the private sector. The Tripartite Free Trade Area negotiations created high expectations for the establishment of a Free Trade Area for the 26 member states of the Southern African Development Community (SADC), East African Community (EAC) and Common Market for East and Southern Africa (COMESA). However, with the interpretation of the principle of building on the *acquis* these expectations have not been met and the problem of overlapping membership has been exacerbated. What are the implications of these developments for the negotiations of a Continental Free Trade Area?

The discussions revealed some pertinent questions going forward:

- Regarding trade remedies and safeguards – how can industries in the BLNS countries show injury in the SACU market without South African industries participating in the process?
- Is SACU a well-functioning Customs Union given the lack of implementation of certain provisions in the SACU Agreement, and the lack of debate on pertinent issues related to the establishment of the Tariff Board, and other issues such as competition policy, unfair trade practices and dispute settlement at the SACU level?
- Has the open-ended mandate for South Africa's International Trade Administration Commission (ITAC) to serve as the SACU Tariff Board, created a new SACU reality as regards tariff (common external tariff) policy management and trade remedies?
- What about the provisions that have not been implemented? Will they be renegotiated, or (as some member states seem to prefer) can implementation be enforced, and what is the plan and seem unlikely to be implemented be re-negotiated among the SACU member countries or is it possible to enforce implementation, and how can this be done?

- How can SACU address certain 21st century trade issues currently not covered by the SACU Agreement, including investment and services?
- How can dialogue and debate amongst the member states be stimulated to address outstanding matters?

Way Forward

- Enhance the capacity of the BLNS countries to implement WTO compatible measures granted under the GATT and WTO when experiencing trade difficulties
- A forum is required for dialogue and debate to ensure a joint effort to address the outstanding matters related to the implementation of the SACU Agreement and prepare SACU negotiating strategies for future regional negotiations based on the needs of each SACU member state and the private sector
- Establish the needs of the BLNS states regarding national trade bodies (as required in Article 14 of the SACU Agreement); how can these national bodies function and interact with ITAC given the absence of the Tariff Board
- Analytical work is required to evaluate the national laws of all SACU member states relating to trade (trade remedies, safeguards and regulations) and competition to determine the needs and interest of the SACU countries to determine overlaps and meeting points in an effort to possibly harmonise these national laws.
- It is necessary to determine the manner in which issues related to competition and competition law and policy will be dealt with within SACU. Proposed reviews of the competition laws of Botswana, Namibia and Swaziland and renewed efforts to draft competition policy for Lesotho will require a joint effort among SACU states to determine the interface for implementation.
- Countries should establish their national interests in trade in services in preparation for further negotiations which can have implications for the regulations of specific services sectors, including the Tripartite Free Trade Area and Continental Free Trade Area negotiations.