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Trade Remedies in African Trade Arrangements

Trade remedies are based on disciplines applied within the GATT; they bind all WTO members. They are not compulsory; they may be imposed. When implementing trade remedies member states must comply with the applicable rules. Many free-trade agreements retain the possibility that the parties thereto may resort to trade remedy measures against each other. In some the inclusion of such provisions is linked to the depth of market integration to be achieved; they are more likely to do away with e.g. anti-dumping measures.

Anti-dumping duties are duties on imported goods which are exported at dumped prices (i.e. at a price lower than the price normally charged in the own home market) and are causing material injury to domestic industry. Anti-dumping action is mostly undertaken in response to an application from local industry. A proper investigation has to be conducted by an Investigating Authority prior to the adoption of anti-dumping measures. This procedure must be transparent and fair, while the applicable GATT rules are to be respected. Many governments take action against *dumping* in order to defend their domestic industries. The *WTO* Anti-Dumping Agreement on focuses on how governments react to *dumping;* it only disciplines *anti-dumping* actions.

Countervailing duties can be charged on subsidized imports, and after the importing country has conducted a proper investigation. There are comprehensive GATT rules for deciding whether a product is being subsidized, criteria for determining whether subsidized products are causing injury to domestic industry, procedures for initiating and conducting investigations, and rules on the implementation and duration of countervailing measures.

Safeguards are about "emergency action". They may be taken where a surge of imports causes or threatens to cause serious injury to a domestic industry. Such imports must be recent enough, sudden enough, sharp enough and significant enough. Safeguard action may involve the restriction of imports to help the domestic industry to adjust. They may take the form of tariffs, tariff rate quotas, or quantitative restrictions (import quotas). These measures must be temporary, product-specific and must be applied to all imports irrespective of the source. Safeguard action can only be imposed after a full inquiry by a competent national authority. Concessions might be required. Unlike anti-dumping and countervailing measures, safeguards are not directed against "unfair" trade practices.

The emphasis on **industrialization** has spurred a renewed interest in Africa in the use of trade remedies. The high tariff walls of former times have been eroded by multilateral obligations and through RTAs. As blatant protectionism is no longer permissible or desirable, the use of "smart" protection instruments such as trade remedies is proposed. Industrialization strategies must be accompanied by additional considerations; such as identifying goods with the potential for competitive production, how to include services in the mix, and how to attract investment. Services constitute vital inputs for the cost-effective production of goods.

Acquiring the technical capacity to implement trade remedies will not be without challenges. It is costly to develop and maintain this expertise and the required domestic mechanisms. The training of expert officials, new legislation, establishing Investigating Authorities, and ensuring proper judicial review are some of the challenges.

Most African countries have porous borders; trade remedies will mean additional responsibilities for customs services. Africa has a poor WTO participation record and lacks the expertise of trade remedy related WTO disputes. Trade remedies are among the most challenged measures before the WTO Dispute Settlement Body; African countries face that prospect too. Only 4 African countries (Egypt, Morocco, South Africa, and Tunisia) have functional trade remedy mechanisms. WTO laws on trade remedies are complex and demanding. African members are keen supporters of multilateral reforms, of AD and RTA rules in particular. Under the Doha Development Agenda (which seems to have lost momentum after the 2015 Nairobi Ministerial) they have been calling for more flexible trade remedies, and for technical assistance for the establishment of local trade remedy frameworks.

There are arguments in favour of the use of trade remedies as part of **rules-based trade governance**. It is claimed that they make countries more willing to accept trade liberalisation. Trade remedies are more desirable than other protection measures such as tariff hikes, quotas, import prohibitions, or "derogations". A genuine trade remedy system is more transparent as it follows due process, with participation by all stakeholders. Judicial review is also possible; the process brings impartiality and justice to the system. Tariff increases, quotas and import prohibitions are usually discretionary, administered by governments; which leaves room for political discretion, favouritism and rent-seeking.

The inclusion of trade remedies in the new TFTA Agreement has been a difficult issue and is one of the reasons why the finalization of that Agreement is still outstanding. (The other problem areas are tariffs and rules of origin.) Opposition by South Africa and Egypt to the inclusion of "flexible TFTA trade remedies" is the main explanation for this particular delay. Should trade remedies be included in the legal instruments of African integration arrangements? Trade remedies are instrumental for attaining the purposes and objectives on which the parties have agreed when they decided to form a particular FTA. They are not an end in themselves. FTAs which go beyond the elimination of border measures or adopt common internal regulations are more likely to do away with trade remedy measures. In a Customs Union there is a common external tariff and a single customs territory; precluding the use of strict anti-dumping measures. Competition rules should be used to curb anticompetitive firm behaviour.

Since African RECs are still plagued by unilateral derogations, few remedies for private parties, and a failure by member states to litigate against each other, the inclusion of trade remedies and their use amongst themselves (in addition to their multilateral use) could bring specific governance benefits. Such a development should be properly designed and be embedded in sound legal instruments. Once agreed there should be domestic legal reforms, new institutions and the development of expertise. This will require dedicated resources and technical assistance.