

**tralac Annual Conference  
7-8 April, Swakopmund, Namibia**

## **Towards Rules-based Governance in African Trade and Integration?**

This year tralac will structure its Annual Conference slightly differently. We are circulating this Concept Note to introduce the overall theme of the Conference; and to present the topics that we will discuss at this event in Swakopmund, Namibia. We hope this background note will add to the quality of our discussions; we hope that they will be inclusive and focused.

Since the conclusion of the Uruguay Round of multilateral trade negotiations and the establishment of the World Trade Organisation (WTO) the enthusiasm for multilateral trade reform and more generally, global economic governance instruments, has declined markedly. For African countries, the negotiations on rules, specifically pertaining to trade remedies and regional integration, in the Doha Development Round, held particular interest. This Round, which began in 2001, seems now to finally have run out of steam. There are efforts underway to explore new approaches or to broaden the scope of WTO disciplines; it remains to be seen what will emerge from these processes.

This leaves the African trade and integration discourse/agenda with a challenge. Where and how do we pursue our quest to enhance competitiveness and boost intra-African trade, global integration, and improved rules-based governance?

When we shift our focus away from Geneva we observe that there has been a proliferation of regional trade agreements (RTAs) in recent years. Some of these RTAs are breaking new ground; adding new disciplines to their reach to respond to emerging regional and global realities and political agendas, the changing demands of international trade and commerce, and areas of trade governance not included in the WTO agenda.

The RTAs, the mega regionals in particular, could have important implications for the governance of international trade and the future of the

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WTO. The recently concluded Trans Pacific Partnership (TPP) Agreement, the ongoing negotiations between the United States and the European Union to conclude a Trans Atlantic Trade and Investment Partnership, (TTIP), as well the Regional Comprehensive Economic Partnership (RCEP) between the ASEAN countries, Australia, China, India, Japan, Korea and New Zealand are good examples of 21<sup>st</sup> century RTAs. They are in many respects pushing the boundaries of international trade governance beyond where the collective of WTO members is prepared to go. Disciplines such as investment and competition policy that are not covered by multilateral agreements are now standard in these agreements.

Such developments are to be expected. Governments and regional blocks will respond to dynamic new developments to promote their economic development strategies. The results of the Uruguay Round were adopted more than 20 years ago, under very different international conditions.

In Africa, the fundamental economic logic for supporting regional integration remains sound. And political enthusiasm shows no sign of abating; provided that 'national sovereignty' is respected. In June 2015, the Tripartite Free Trade Area (TFTA) Agreement was signed, by 16 of the negotiating Member States, despite the fact that negotiations on tariff liberalization, rules of origin and trade remedies have not been concluded. At the 25<sup>th</sup> African Union Summit, also in June last year, the CFTA Framework for the Continental Free Trade Area (CFTA) was adopted. The negotiations to conclude the agreements necessary for forming the Continental Free Trade Area (CFTA) were launched during the week 22 to 27 February 2016.

Ambitious agendas, unrealistic time frames, the absence of effective dispute settlement regimes, as well as implementation challenges, still bedevil Africa's integration endeavours. There are developments, however, that could be shaping an incremental transformation of African integration towards rules-based governance. Their implications for the TFTA and CFTA will feature in our deliberations. These developments merit proper discussion; and should be analyzed within the contexts of regional and global trade governance.

At this year's **tralac** Annual Conference we will discuss, *inter alia*, the following issues:

- **Why African Trade and Integration efforts benefit from rules-based Governance**

The case for rules-based trade governance has to be stated again. The reasons why certainty, predictability and the availability of judicial review are sound and make good sense are not always and sufficiently accepted. This introduction will paint an introductory canvass; while relating the essentials to the principles of due process and administrative justice; which are trusted features of the rule of law in democratic systems.

- **Safeguards and Trade Remedies**

There is a new interest in trade remedies and specifically safeguards. We will discuss some examples and possible explanations for this new interest; while pointing out the many challenges which African governments still face in this area.

Some Governments in the region are interested to use such measures to address trade policy challenges, rather than resort to the use of, for example derogations, under Article 3 (1) (c) of the SADC Trade Protocol or imposition of other taxes or surtaxes, as we've seen in recent years.

Zambia notified the WTO's Committee on Safeguards, on 5 October 2015, that it had initiated a safeguard investigation on 'Flat-Rolled Products of Iron, Non-Alloy Steel, Trailers and Semi-Trailers, and that it imposed a provisional safeguard measure for 180 days from 10 July 2015 to 10 January 2016.

In February 2016, South Africa gave notice of the initiation of an investigation for safeguard measures in terms of article 16 of the Trade and Development Cooperation Agreement (TDCA) between South Africa and the European Union, on frozen bone-in portions of chicken.

Zambia's decision to use safeguard measures, sends an important signal of commitment to rules-based remedies to deal with the consequences of increases in imports. It also provides some assurance that it is possible to develop the capacity to comply with rules-based trade governance, in this case specifically with safeguards. The integration of unequal partners is one of the key challenges of African integration, and safeguards are an important rules-based response to the challenges of a surge of imports causes or threatens to cause injury to domestic industry.

Trade remedies became one of the contentious issues in the TFTA negotiations; with a sharp divide between those African countries that have the domestic legal and institutional arrangements and capacity to use multilateral trade remedies and the others that do not. The latter group is motivating for a more flexible regime that accommodates their needs. Should they be accommodated? How can this be done?

- **Standards**

Standards, both sanitary and phyto-sanitary measures (SPS), as well as technical barriers to trade (TBT), have legitimate public policy objectives, but can also be used with protectionist intent. Interesting recent cases of the use of SPS measures include South Africa's notification of SPS measures to the WTO Committee, with respect to livestock trade in the Southern African Customs Union. The deliberations, in the AGOA renewal context, between South Africa and the United States regarding SPS measures on chicken imports from the US, is another example.

Capacity for compliance with standards (policy, legal and institutional capacity) remains limited in many African countries. To enhance the competitiveness of Africa's agricultural and industrial products, this deficit has to be addressed. We are observing new trends in RTAs elsewhere to improve mechanisms regarding consultations, equivalence and compliance. Could we learn some lessons from these experiences?

- **Connecting Africa for competitiveness**

Enhancing competitiveness of Africa's producers and traders requires significant investment in infrastructure and supportive regulation to facilitate inter-connectivity among infrastructure services as well as access to quality, reliable supply and competitively-priced infrastructure services such as transport, communication and energy. Without these, any targeted industrial policy initiatives will have limited scope to succeed.

Since we will be convening in Swakopmund, our focus will include the transport-related developments in this sub-region. The cluster of port, transport corridor and logistics developments to open new trade pathways to neighbouring countries are being complemented by the development of associated customs and border management arrangements such as dry ports for these land-locked neighbours. Linking these initiatives to the broader trade facilitation agenda is essential. We will also reference energy-related developments and focus on water as a key regional resource for sustainable development.

An important cross-cutting theme in this discussion, is how to ensure regulatory coherence and consistency in a regional context. Technological and infrastructure developments are redefining markets in the African region. A range of governance options exists; including regulatory cooperation and harmonization. Implications for the trade in services agenda, new approaches to services trade negotiations to reflect the importance of regulatory reform for competitive services markets, will be considered.

- **Private litigation, dispute resolution and community law developments**

The involvement of the private sector in enforcing trade and integration-related rules has become important in some national jurisdictions, including Namibia. Cases brought by private parties have also been heard by the regional courts of the Common Market for East and Southern Africa (COMESA) and the East African Community (EAC), but as a result of the suspension of the SADC Tribunal in 2010, and the fact that the SACU Tribunal has not been established, we have not seen similar community law developments in southern Africa. These developments are particularly interesting if we take into account the fact that African countries generally do not litigate against each other, especially not on trade and integration matters. The quest by private parties to resolve disputes and hold governments accountable for the commitments that they have undertaken, can make an important contribution to the development of rules-based governance for trade and integration in Africa. This is essential for inclusive growth and sustainable development.