Annual Conference 2016

# When Private Party Rights are affected under African Trade Agreements

The fact that states are the parties to trade and regional integration agreements present private parties with a classical problem. They derive no direct rights from these agreements but they are the traders, service providers, freighters, and investors who will frequently suffer the consequences when such agreements are violated. There is in fact a double jeopardy; they do not normally enjoy standing before international dispute settlement fora such as the DSU of the WTO; only states are parties to such disputes. And in municipal orders based on the traditional dualist approach the national courts (where private parties do enjoy standing) may not give effect to unincorporated treaties.

In advanced regional integration arrangements there comes a point when this dichotomy needs to be addressed. "Community law" is developed through legal provisions on standing for private parties before regional tribunals, by expanding the latter's jurisdiction to hear private complaints, and through the jurisprudence of regional courts. But community law is a unique corpus of "international" law which has to be established. The member states have to put in place legal arrangements among them enforcing community law. This needs a legal foundation; typically through the foundational instruments of the community. The failure to develop community law results in fragmentation and legal uncertainty; the integration objective is undermined. Essential community law provisions need to have the same effect within member states; through e.g. their "direct effect".

The rights of private parties then need protection too; because of rule of law requirements and in order to advance effectiveness and the bigger societal wellbeing. Trade and economic integration benefits depend on the commercial activities of private parties across borders; their activities ensure the economic gains underpinning free trade and integration endeavours.

What is the nature of the private party rights within the context of trade and integration agreements? What protection should be granted when state

 

measures (or omissions) taken in terms of trade or integration agreements result in the infringement of private rights? How is this protection to be balanced against official economic development policies? What do the REC regimes provide for in this regard and what is the record and practice of individual African governments?

In the context of trade and integration private rights are about commercial and economic action in the market place. These are not typical human rights (which protect human dignity.) Private entrepreneurs and firms risk their own resources; which will not happen without sufficient (not absolute) certainty and fairness. Transparency, due process and administrative law should protect them and provide the required remedies. By way of an example: If a foreign service provider applies for a licence from a regulator in a state which is a party to an agreement liberalizing trade in services in a particular sector, there will be an international legal instrument (e.g. a protocol) which will apply. It will stipulate the nature of the service, extent of liberalization, and how the sector may be regulated by national regulators. What should happen if the foreigner's application is refused in a manner prima facie constituting a violation of its rights in the context of the applicable protocol? What remedies are available? Should the applicant be permitted to invoke the international protocol in question?

The answers firstly depend on the nature of the rights at stake. The private service provider is not entitled to a licence per se; it is entitled to fair and lawful treatment by the authority deciding the application and a full consideration of the relevant legal principles. The latter depends on what the specific protocol provides for (the obligations binding the state parties) in terms of liberalizing services trade in the specific sector and how that should happen. These are the substantive requirements. There are also procedural requirements. The legal elements pertaining to the process at hand are encapsulated in due process and administrative law principles. They are, broadly speaking, about the regular administration of the law. The state must respect all legal rights that are owed to private parties (whether own nationals or foreigners). They should not be treated in an unreasonable, arbitrary, or capricious manner.

The remedy when these administrative/due process requirements are violated is typically to allow the affected party to take the official decision (e.g. the refusal to grant a licence) on judicial review. A court may order a second and correct procedure; or in severe cases grant the licence itself. The specificities of these remedies depend on what the domestic legal order provides for. The international legal requirement will be that effective procedural and judicial remedies are available.

What happens if the substantive international requirements are violated; e.g. judicial remedies are refused or foreign service providers are discriminated against? Such action amounts to a treaty violation. The state of nationality or incorporation of the affected private party must utilize the dispute settlement mechanism available under the relevant trade/regional arrangement and litigate against the offending state.

In the WTO this is seldom a problem; there are numerous cases brought by governments on behalf of private parties suffering as a result of violations of treaty obligations. In the RECs this does not happen. This failure directly undermines our regional integration efforts and is a serious design flaw; which needs to be addressed during the negotiations currently underway in e.g. the context of the CFTA. Effective dispute resolution is a necessary building block for economic development and good governance at home, and in the context of regional and global trade. Without it, our efforts will remain flawed. Another consequence is the increasing preparedness of regional courts to come to the rescue of private parties; without clear jurisdictional powers to do so. That may cause other very undesirable effects for regional integration in Africa; as the demise of the SADC Tribunal testifies.