



**tralac** | trade law centre

# **Why Rules-based Governance matters for African Trade and Integration**

**Gerhard Erasmus**  
**tralac Annual Conference**  
**Swakopmund Namibia**  
**7-8 April 2016**

# What is Rules-based Governance?

- Rules-based governance guarantees that rules are respected by those in authority = better governance
- Achieved via *accountability, transparency...*
- Identify and hold public officials to account
- Transparency: Reliable, relevant & information
- Those affected informed re law & procedures
- In the absence of transparency officials are not answerable and **corruption** is likely to thrive.
- Note the increase in whistleblowers

# What is Rules-based Governance?....Cont'd

- *Respect for the rule of law* . Official actions must be consistent with the applicable law & within the powers granted. Prescribed procedures must be followed. (*Due process*)
- When rights are infringed or procedures ignored affected parties entitled to effective *remedies*
- Official structures should implement decisions and follow *processes* that guarantee *fairness*.
- *Participation by relevant stakeholders.*

# What is Rules-based Governance in Trade?

- A system based on **rules** rather than power
- But the rules involve treaties between **sovereign states** –transparency & accountability difficult
- Trade rules apply to all Parties
- Rules demand Non-discrimination, compliance & rules-based exceptions only.
- Agreed rules indicate which trade policies & measures are acceptable.
- So? There is a rules-based governance framework
- Why is its local implementation so problematic?

# What is Rules-based Governance in Trade?....cont'd

---

- The rules are negotiated agreements.
- How do rules apply **between** & **within** States?
- In WTO: Single undertaking, DSU (for state parties), compulsory jurisdiction & reversed consensus
- African states are WTO members but act differently at home
- RECs have unique features: adjustment needed for community law, coherence & remedies

# Value and Challenges of a **Rules-Based** Approach

---

- Playing by the rules requires minimum standards of practice.
- This can result in less-than-excellent standards or inflexibility.
- Rules improve governance but may encourage finding loopholes in the rules.
- Rules-based approach can ‘snap’ affected parties into action – but then need remedies
- Trust in the system?

# Value and Challenges of a **Principles**- Based Approach

- Principles have no minimum standard of practice,
- Explicitly required practices absent
- Onus on those affected to demand reporting
- How to 'police' the practices of organizations?
- Complex practices & lack of transparency make monitoring difficult
- Principles allow customizing -- how best to implement new practices for unique conditions
- Which involves interpretation and discretion



# General Implications

---

- Stakes are high – abuse, poverty, corruption...
- Trust, Vigilance, Monitoring & Oversight
- Self-policing?
- Private Corporate & government structures differ
- Domestic & **inter-governmental** arrangements differ
- RECs: Political/parliamentary remedies absent
- Judicial remedies? When, where and how?
- NB = REC legal & Institutional Design
- Jurisdiction Issues



# The Danger of an abstract Discourse

---

- This debate is not new
- REC Record mixed
  - SADC Tribunal saga
  - Derogations widely practiced & tolerated
  - No Inter-state disputes. Alternatives uncertain
- Geneva far away
- Will Doha ever negotiate new Rules? Will it matter?

# Danger of an abstract Discourse...cont'd

---

- The **need** for rules-based trade increasing
  - Chickens fluttering (AD & SPS)
  - SPS standards
- Some **hopeful signs**
  - Private litigation in regional courts (Polytol)
  - Trade remedies in TFTA
- **What to do? What does CFTA offer? How?**

# Implications for African Trade and Integration

---

- Good Governance starts at home
- Due process a priority
- Governance also important for global trade
- No surprise that SADC Tribunal bit the dust
- Will private party protection survive? How?
- **CFTA negotiations** – by whom about what?
- The **Acquis** -- new kid on the block
- Incrementally forward – Variable Geometry

