

Why Rules-based Governance matters for African Trade and Integration

Good governance is a standard for measuring how public authorities govern. It is not an end in itself; it secures the rule of law and prevents abuse of public power. It applies to all structures exercising public authority; typically government institutions. Good governance applies to the corporate world as well. The recent financial crisis revealed severe shortcomings in corporate governance; such as lack of transparency and the failure to comply with regulatory standards.

This Note discusses good governance in the context of intra-African trade and regional integration. The term *rules-based governance* is used to emphasize *legal* and *institutional* aspects essential for regulating trade and integration in a fair, transparent, lawful and predictable manner.

What is rules-based Governance?

Governance concerns the process by which authority is conferred on government structures. Rules-based governance guarantees that the applicable rules are respected. This is achieved through *accountability* and *transparency*, meaning that it should be possible to identify and hold public officials to account for their actions.

Transparency demands that reliable, relevant and timely information is available. Those affected by rules and official decisions must be informed about the applicable law, procedures and effects. In the absence of transparency officials are not answerable and corruption is likely to thrive.

Respect for the rule of law is another requirement. Official actions must be consistent with the applicable law and within the powers granted. Prescribed procedures must be followed - the *due process* requirement. When rights are infringed or procedures ignored effective *remedies* must be available to affected parties. Official structures should implement decisions and follow processes that guarantee *fairness*. *Participation* guarantees that those potentially affected by an official decision or policy will have the opportunity to participate in preceding deliberations.



Why is rules-based Governance important for Trade and Integration?

The short answer is that the opposite (bad governance) has unacceptable consequences. Rules-based governance should underpin trade and regional integration because far-reaching state powers are involved. Sovereign states conclude trade agreements and in doing so create institutions and grant powers which affect trade and traders directly. Good governance has implications for how governments understand *national sovereignty*. The failure to comply with international obligations mutually agreed upon cannot be exonerated by invoking 'sovereign policy space' or national laws. Even if we have a good national governance record it will not guarantee that the benefits of rules-based trade and integration will automatically follow. Trade remedies and safeguards will e.g. not be possible without national Investigating Authorities. The implementation of valid SPS and TBT measures requires expertise and technical capacity. Foreign traders and service providers should not suffer discrimination and they should be able to enforce their rights when necessary.

How is rules-based Governance ensured in Trade and Regional Integration?

International trade is conducted in terms of agreements entered into by sovereign states. This process lacks many of the controls provided by popular democracy (such as inclusive participation and elections). Different types of powers and policies are at stake and they impact directly on private rights and national interests. Rules-based governance offers criteria to build in checks and balances of a particular kind.

Africa's regional trade arrangements can benefit from good governance designs:

- Exceptions to binding obligations need to be stated with clarity. When invoked requirements about necessity and proportionality should be respected.
- Dispute settlement arrangements should be improved. The protection of private rights requires effective remedies; by regional tribunals as well as domestic courts. Dispute settlement between state parties must be accepted.
- International agreements need domestication when appropriate.
- Information about regional rules and decisions needs effective dissemination.
- When new trade agreements are negotiated wider participation should be accommodated.

Conclusion: The Challenge of African rules-based Trade Governance

- Important trade negotiations are underway. The media, civil society and research institutions should monitor negotiations more diligently.
- There are promising new developments. One example is the availability of trade remedies in the TFTA Agreement. This opens up prospects for private remedies and ameliorating negative effects of trade liberalization in a rules-based and balanced manner. Governments should follow up by undertaking the domestic reforms necessary to make this possible.
- Private litigation has secured important victories against government authorities violating regional trade agreements. Domestic courts pay more attention now to treaties and their implications for ruling on trade related rights and remedies.
- There is a growing awareness that standards (SPS standards in particular) are rules-based exceptions which can only be imposed when necessary and justified.
- Beware of overload. Regional tribunals, for example, have to apply and develop community law; they are not appeal courts which can cure all national ills.
- National parliaments and oversight bodies can play a more constructive role with regard to trade and regional integration policies and laws. They enjoy constitutional powers to do so; or should be granted the required powers.