



Submission by the Trade Law Centre (tralac) - Inquiry into Africa Free Trade initiative

The Trade Law Centre (tralac) is a trade-related capacity building organisation, registered as a non-profit organisation in South Africa. tralac works in African countries building capacity to enhance the quality of trade law and policy, as well as regional integration, to support development outcomes.

We would like to comment of the following topics:

- *Key opportunities and challenges for boosting trade in Africa, and promoting regional integration*
- *Suggestions for development partners like the UK in boosting trade and investment in Africa.*

Background

In January 2012, at the Assembly of the African Union, member states committed to boosting intra-African trade and the expeditious establishment of a Continental Free Trade Area (CFTA), to achieve that objective.¹ The CFTA is Africa's most ambitious integration project. To achieve the objectives of boosting intra-African trade and enhancing competitiveness, as well as contributing to the broader development objectives of poverty elimination, the CFTA should address practical challenges faced by investors, producers, traders and consumers. The CFTA must be a rules-based regime to provide transparency, predictability, legal certainty and access to legal remedies. This submission reflects on recent developments in African trade and intergration initiatives; with a view to identifying key pathways to support development outcomes, and to provide some suggestions for areas of intervention by development partners.

Key opportunities for boosting trade in Africa and promoting regional integration

The African continent remains fragmented, and marginal to the global economy. As a result it is no surprise that regional integration remains a priority for African countries. This is also consonant with prevailing global trends in trade policy. The appetite for global trade governance solutions, in the World Trade Organisation (WTO), remains weak, with no real indications of meaningful progress in most areas. 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, but it remains to be seen what will emerge from these processes. An area of potential progress is of course the Trade Facilitation Agreement concluded in December 2013. Its entry into force is still awaiting the requisite number of ratifications by member states. For African countries this resonates with a priority area on their regional integration agenda.

¹ See AU decision, available at:
http://www.tralac.org/images/Resources/Continental_FTA/AU_Decision_on_Boosting_Intra-African_Trade_Jan_2012.pdf

The proliferation of regional trade agreements (RTAs) in recent years, has become a defining feature of 21st century international trade governance. Some of these RTAs are breaking new ground; adding new disciplines 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.

RTAs, the mega-regionals in particular, could have important implications for the governance of international trade, the future of the WTO and Africa's trade and integration agenda. The recently concluded Trade 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 21st 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. These agreements may also erode or reduce preferential market access opportunities to Africa's traditional markets such as the European Union and the United States.

New generation disciplines such as investment and competition policy that are not covered by multilateral agreements are now standard in these agreements, and new boundaries are reached in key areas such as standards and technical regulations. Arguably these disciplines are essential to enhance the competitiveness of African enterprises and to ensure that Africa's exports meet the concerns of consumers regarding product and process standards as well as impact on the labour standards and the environment.

Although political enthusiasm in Africa, for integration, shows no sign of abating, concerns about policy space and national sovereignty have become prominent features of the integration discourse. Indeed, matters of policy space and sovereignty sometimes trump commitments to rules-based governance². Asymmetry in terms of levels of development, economic size and in particular, industrial development, do present significant challenges. Integrating unequal partners requires that the traditional market integration agenda, be complemented by initiatives to support industrial development and diversification, as well as infrastructure development. It is important to recognise that regional integration in Africa will make progress incrementally, and at different paces in different areas.

The capacity to produce tradeables competitively is indeed a fundamental challenge for African countries. Industrialisation requires innovative policy support, but, the market integration agenda already adopted by RECs, to support industrialisation and specifically value chain development, which features as a specific objective in this context, should not be neglected. This agenda provides the scope for achievement of economies of scale, attracting foreign direct investment and the associated learning and technology transfer processes – the dynamic benefits of regional integration. The broader scope of competitiveness development should infuse the negotiations to establish the CFTA. This requires, for example, recognizing the inter-connections between the trade-in-goods and the trade-in-services agenda's, as well as a trade facilitation agenda that complements the WTO Trade Facilitation Agreement. The design and scope of the CFTA should be such as to facilitate progress by willing partners in specific priority areas, while others may take longer to achieve such progress.

The role of services in African economies, in terms of contributing to overall economic activity, to employment, and to manufacturing competitiveness, is well documented. Services are also a key issue for infrastructure development; effective regulation of infrastructure services is essential to ensure competitive access to

² A good example is found in the Southern African Development Community, where some member states have introduced domestic taxes on imports from other SADC member states. Since the demise of the SADC Tribunal, private parties have no direct recourse to regional dispute settlement, and since governments are loathe to litigate against each other, such practices continue. See, a discussion of this matter at: <http://www.tralac.org/discussions/article/8088-zimbabwe-s-surtax-its-incidence-and-implementation.html>

transport, communication, energy and other such services. The links between the services agenda and trade facilitation are obvious. More work on an African services agenda is essential; we may have to re-visit the approach of the General Agreement on Trade in Services (GATS) with its strong focus on market access. The agenda needs to reflect the important connections between services sectors; the collection of ICT services is closely related to financial services innovation and provision, to education and health care services. These connections have to be accommodated and supported by an appropriate services governance regime. The role of regulation in services sectors should enjoy central focus. Shaping a *sui generis* services agenda for Africa; embedded in services sector development strategies, with key focus on appropriate levels of regulatory intervention, and regulatory cooperation or harmonization should be an integration priority. Services, such as transport, communication and energy are inputs into all economic activities and hence essential for industrial development and diversification. They are also important contributors to enhance household welfare. As such they are fundamental development issues for Africa.

Some small countries are recognizing the importance of building quality infrastructure and developing technical expertise to meet the requirements of importers and consumers in export markets. Namibia is a good example of a small country that has developed the capacity throughout its beef supply chain to meet the standards of the European Union, and Namibian beef producers export successfully to these markets. Attention to standards (sanitary and phyto-sanitary issues and technical barriers to trade), quality assurance and the elimination of non-tariff barriers is essential to develop competitive industries in Africa.

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.

Successful trade facilitation initiatives are built on policies implemented by governments as solutions to specific barriers to trade experienced by firms, service providers and traders operating in their economies. This involves national and regional action and reforms. Increased risk management at borders, and stronger coordination among border agencies will reduce the time spent at border posts, and hence costs. Improved access to trade information through trade portals will reduce the scope for rent seeking and corruption related to cross-border trade which impinge particularly heavily on small traders, many of whom are women.

An important emerging development is the search by private enterprises for transparency, legal certainty and remedies when regional integration agreements are not complied with. A recent case demonstrates this development. The case was brought to the COMESA Court of Justice by a small Mauritian company (Polytol Paints)³ when the Government of Mauritius did not comply with its tariff liberalisation commitments under the COMESA Free Trade Area. After exhausting local remedies in Mauritius, the company approached the COMESA Court of Justice, which found in its favour. This was possible because private parties (such as this company) have standing before the COMESA Court of Justice, as they also do before the East African Court of Justice. This development is significant, because African governments do not have a track record of litigating against each other on trade and integration matters.⁴ Hence private parties are seeking new pathways to obtain legal certainty and in the process, assisting with the development of rules-based governance of regional

³ See details of the case on the talac website at: <http://www.tralac.org/images/docs/5551/s14tb012014-mwanza-polytol-paints-v-mauritius-community-law-in-comesa-20140124.pdf>. The case concerns that fact that after duly reducing the tariff on the input product imported by Polytol Paints from Egypt (another COMESA member state), the tariff was subsequently raised, contravening, the liberalisation commitment that Mauritius had undertaken.

⁴ The exception is litigation concerning issues related to water – a very important resource especially in southern Africa.

integration. This will, however, not be the case once the new Protocol on the SADC Tribunal enters into force, since it provides only for inter-state disputes.⁵

Ambitious agendas, unrealistic time frames, the absence of effective dispute settlement regimes, as well as implementation challenges, still bedevil Africa's integration endeavours. But there are indications that incrementally, the integration agenda is becoming more pragmatic, addressing practical issues such as customs and border management, high transport costs and cumbersome regulation.

Suggestions for support by development partners

- **Enhancing rules-based governance** by i) supporting regional courts, ii) assisting private parties to access these courts (eg access to information)
- **Supporting a practical trade facilitation agenda** (eg inter-agency cooperation and national and cross-border levels, computerisation of processes and wingle window facilities, reduction of duplication of documentation and processes)
- **Regional integration for competitiveness** (support at enterprise-level; access to information on regional agreements, regional market opportunities)
- **Infrastructure services regulatory reform** (transport, energy, communication, water – identification of appropriate regulatory interventions to support cross-border economic activities (cooperation/harmonisation) through access to reliable supply, quality and competitively priced services)
- **Standards and technical regulations** (technical and institutional capacity for quality assurance and compliance with requisite standards for public policy objectives)

⁵ This had been possible under the initial SADC dispensation, until the SADC Tribunal was suspended and a new Protocol drafted, which permits only inter-state disputes.

Summary

Regional integration is an important pathway to development outcomes for Africa; provided the agenda focuses on:

- incremental progress (willing partners move ahead while others follow later)
- rules-based governance (transparency, accountability, legal certainty, availability of legal remedies)
- a competitiveness agenda addressing practical impediments to investment, production and trade is embedded and prioritised in regional trade and integration initiatives such as the CFTA:
 - i) trade facilitation,
 - ii) infrastructure development and associated regulatory reform,
 - iii) services trade and sector development support (eg financial services sector development and regulatory reform, to enhance access and achieve inclusivity),
 - iv) capacity to comply with standards and technical regulations (human, animal and plant health, safety, environmental and labour) is developed and accessible to enterprises