

**International  
Negotiations and  
Dispute Settlement in  
Southern Africa**

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**PALU REGIONAL  
SEMINAR**

**25 MAY 2011**



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- Introduction
- International Commercial Negotiations
- International Trade Negotiations
- International Dispute Settlement
  - International Commercial Transactions
  - International Trade

- **Main issues to consider in negotiations:**
- Applicable law – choice of law
  - NB for dispute settlement
- Due diligence
  - Legality and enforceability in terms of foreign law
  - Capacity of parties to negotiate/Title to land or goods
  - Compliance with domestic laws
- Payment method
- Investment incentives/Investment protection

- Very NB in any international commercial transaction
  - Impact on enforceability
  - Familiarity with legal systems/prohibitive costs
- Private parties – bargaining power
- Government/State-owned entity – local law
- Alternative – Int'l commercial arbitration
  - Neutral law e.g. UK law
  - Cost implications e.g. ICC

- Legal advice on legality and enforcement of agreements
  - Local Counsel
- Capacity of parties to negotiate/title and ownership
  - Eliminate competing claims
  - Leasing of land example
  - Also NB for governments
- Compliance with domestic laws
  - Foreign ownership restrictions
  - SA BBBEE/Namibia/Zim indigenisation
  - Exchange controls

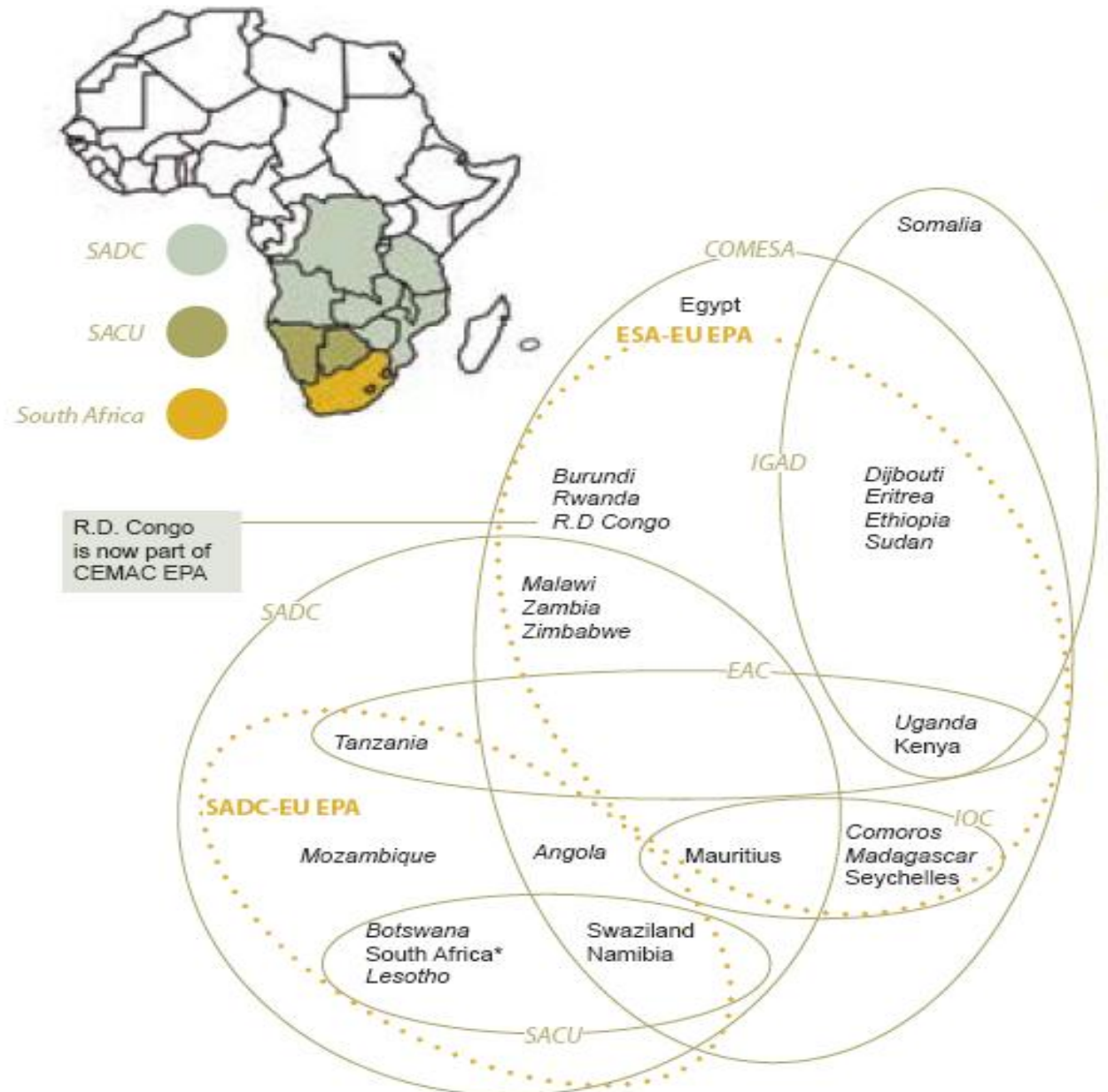
- Administrative legislation
  - Tender procedures/State financial laws e.g. SA PFMA
  - Various approvals often required, Treasury, Ministerial etc
- Anti-corruption laws
  - Domestic and foreign legislation
  - US – very strict legislation e.g. FCPA
  - DRC example - Common practice no excuse
- International commitments
  - WTO Commitments – GATT/GATS
  - Domestic legislation can be amended overnight
  - E.g. GATS Financial Services - banking licenses

- Private sector
  - Letters of credit safest option
  - Costs involved
- Lack of developed financial institutions
  - Country risk unacceptable to financiers
  - Cash upfront often only option
- Government/government entities
  - Payment guarantees

- Wide-ranging investment incentives in the region
- Tax breaks, low-interest loans, exemption from labour laws etc
- So-called “race to the bottom”
  - Namibia Ramatex example
  - Focus on short term gains, LT gains questionable
  - Increased Chinese investment in the region
- Investment not currently well regulated at multilateral level
  - TRIMS - basically prohibits discrimination against foreign investors
  - WTO members shying away from further negotiations

- Overview of existing RTAs in the region
- Form framework and serve as incentive for investment
  - Regional integration leads to bigger markets, economies of scale
  - Tariff preferences
  - Regional infrastructure projects
- Ongoing negotiations
  - Multilateral and Regional

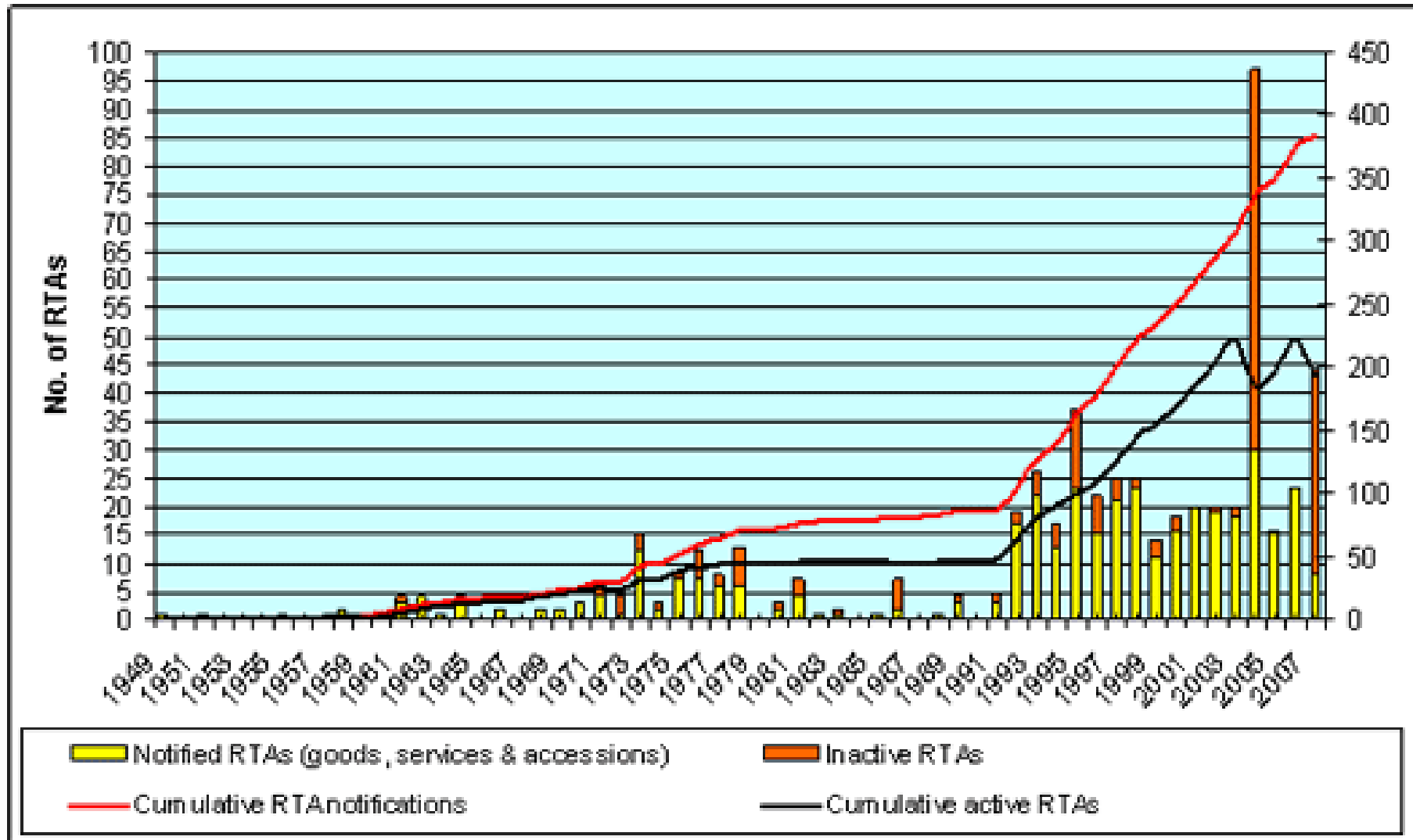
# RTA Spaghetti Bowl



- WTO rules govern international trade of 153 members
  - Covers trade in Goods, Services, Investment and Intellectual property
- Trade negotiations - Multilateral level
  - GATT 1947 - Uruguay Round - WTO 1995
  - Extensive tariff liberalisation
  - 2002 Doha Round – lack of progress
- Explosion in number of Regional Trade Agreements
  - Deeper tariff cuts/inclusion of other issues
  - Exception from WTO rules
  - Currently around 400 RTAs notified



# Notification of RTAs to the WTO



- Unilateral preferences
  - Developed countries offer market access to developing countries
- Regional/Preferential Trade Arrangements
  - Partial liberalisation
- Free Trade Agreements
  - Removal of internal barriers
  - Customs duties and NTBs
- Customs Union
  - FTA +
  - harmonised external tariff
- Monetary union, then Common Market

- GSP - Canada, US, Japan, EU, Russia, Turkey
- AGOA
  - duty-free and mostly quota-free access to US market for SSA
  - more than 6000 product lines
  - Special third country fabric rule e.g. Swaziland, Lesotho
  - **Expires 2015 – effect on investment in the region!!**
- EBA (Everything But Arms)
  - LDCs
- Cotonou (EPAs)
  - ACP countries
  - SA - TDCA

- Southern African Customs Union (SACU)
  - 1910 – new agreement in 2002
  - CET plus freedom of movement of goods
  - Common negotiating mechanism
  - Sharing of revenue
  - Harmonization of the industrial and trade policies
  
- Talks to review Agreement to include other aspects e.g.
  - market and monetary integration
  - trade in services
  - finance and investment
  - government procurement; and
  - environment.



- Ongoing discussions on enlargement
  - Mozambique possible new member
- Renegotiation of revenue sharing formula
  - SACU members (Botswana, Lesotho and Swaziland) initialed an EPA with the EC
  - threatens the continued existence of SACU
  - Reintroduction of border measures
- Infant industry protection/Unfair Trade Practices

- Southern African Development Community (SADC)
  - 14 Member States
  - Free Trade Agreement (FTA) launched in 2008
  - 85% of trade covered
- Draft Protocol on Trade in Services
  - Offers and requests in 6 priority sectors:
  - Business, communication, construction, financial, tourism and travel related and transportation services.



- COMESA
  - Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe
  - 400 million people
- EAC – Kenya, Uganda, Tanzania, Rwanda, Burundi
  - Customs union
- SADC-EAC-COMESA Tripartite FTA (527 million people)
  - Main focus is harmonisation and trade facilitation
  - Transport corridors offer investment opportunities
  - Attempt to solve overlap problem



- TDCA (SA-EU FTA) – 96/84
- SACU Mercosur PTA– signed in 2004
  - Argentina, Brazil, Uruguay and Paraguay
- SACU-EFTA FTA (Norway, Iceland, Switzerland and Liechtenstein)
  - signed in **June 2006** and entered into force on **1 May 2008**.
  - agreement to be implemented over a period of nine years.
- SACU – US FTA
  - Failed, signed TIDCA in 2008
- SACU –China, SACU India PTA WIP
  - China – list of products currently being finalised
- EPA negotiations
  - WTO compatible FTAs

- Increase in trade
  - RTAs have led to growth in trade
  - Many remaining opportunities
- Scope for increased market access
  - Business needs to lobby government
  - First mover advantage e.g. Chile, Norwegian salmon
- Possibility of legal recourse – Dispute settlement
  - E.g. SADC Tribunal, EAC Court and ECOWAS
- Platform for cooperation on trade facilitation

- International commercial transactions
  - Domestic courts, Arbitration
  - BITs, ICSID
  - Regional courts
- International trade dispute settlement
  - Regional level
  - Multilateral level

- Bilateral Investment Treaties – BITs
- BIT concluded between countries A and B offers a private investor coming from country A the assurance of being treated in line with certain international standards when investing in the territory of country B. If that obligation is breached, the investor can initiate international arbitration against the relevant Host State
- Protection against expropriation without compensation
- ICSID - Convention on the Settlement of Investment Disputes
  - World Bank – more than 140 Member States

<b>Table 5: South African bilateral investment agreements in Africa</b>	
<b>Country</b>	<b>Date of Signature</b>
Algeria	24-Sep-00
Angola	17-Feb-05
Democratic Republic of Congo	31-Aug-04
Egypt	28-Oct-98
Equatorial Guinea	17-Feb-04
Ethiopia	1-Jan-08
Kenya	
Libya	14-Jun-02
Mauritius	17-Feb-98
Mozambique	6-May-97
Rwanda	19-Oct-00
Senegal	5-Jun-98
Tanzania	22-Sep-05
Uganda	8-May-00
Zimbabwe	Negotiations underway
Source: Department of Trade and Industry; as of October 2009	

- BIPA signed in 2009
  - Excludes land reform programme
  - Ratification
  - Enforcement problematic
- Piero Foresti, Laura de Carli and others v RSA
  - MPRD Act
  - BITS SA and Luxembourg, Italy – ICSID Arbitration
  - Expropriation of investment in mineral rights
  - MPRD part of BBBEE
  - Impact of BITs on policy space

- **International trade dispute settlement**
- Regional level
  - SACU
  - SADC
- Multilateral level - WTO

- **SACU Agreement (2002) Articles 13 and 41**

## **‘Tribunal’ & ‘Unfair Trade Practices’**

Art 13: Any dispute regarding the interpretation or application of this Agreement [...] shall be settled by an ***ad hoc* Tribunal**.

Art 41: The Council shall [...] develop policies and instruments to **address unfair trade practices** between Member States. These policies and measures shall be annexed to this Agreement.

- Tribunal still not established



- Tribunal established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC
- Seat of Tribunal in Windhoek
- Wide jurisdiction – all matters covered by SADC Agreements
- **States as well as natural/legal persons** have *locus standi*
- Exhaustion of domestic remedies unless prevented from taking action
- Non-compliance by State – sanctions imposed by Summit of HoS

- Campbell case – ruled against Zimbabwe’s land reform programme
- Zimbabwe refused to accept ruling – challenged Tribunal’s validity
- 26 February 2010 – Gauteng High Court confirmed SADC Tribunal’s ruling as enforceable under SADC Treaty
- Paved way for seizure of Zimbabwean assets in South Africa, other SADC countries

- August 2010 SADC Summit
- Suspended Tribunal pending legal review of Tribunal's role, responsibilities and Terms of Reference
- Review recently completed
  - TLC and WTIA – Swiss Associates
- Extraordinary SADC Summit held on 20 May in Namibia
- Continuing suspension of Tribunal until August 2012

- Dispute Settlement System overhauled with establishment of WTO in 1995
  - Most effective international tribunal
  - Government to government - no access to private parties
  - Violation of WTO obligations, nullification of benefits under WTO agreements
- TLC was lead legal adviser to South Africa in its first WTO case - US Maize case
- Example of relevance - Walmart/Massmart merger
  - Local procurement requirement
  - Violation of GATT Art III – National Treatment
  - ASCM – prohibited subsidy

- Importance of seeking proper legal advice before entering into international commercial negotiations cannot be overstated

**Thank you!**

**Enjoy the rest of Africa Day!**

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