

Addressing Trade Restrictive Non Tariff Measures on Goods Trade in the East African Community

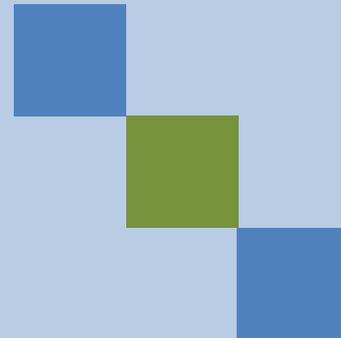
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Africa Trade Policy Notes

Note #7



Introduction

The East African Community (EAC) launched a regional common market in July 2010. This followed closely on the full implementation of the customs union, which was realized in January 2010 after a five-year transition period. While all the partners have been able to eliminate a significant proportion of tariffs on intra-EAC trade and agree on a common external tariff, there has been more limited progress in addressing trade restrictive non-tariff measures (NTMs), which are referred to as non tariff barriers (NTBs). The EAC Customs Union Protocol makes specific reference to the need to eliminate NTBs and to refrain from imposing new ones. Recognition of the importance of reducing NTBs has resulted in Partner States and the EAC Secretariat devoting considerable time and attention to identifying specific measures based on a series of surveys. Moving from identifying NTBs to their reduction and removal has proven to be more challenging.

NTMs are generally understood to refer to any measure other than a tariff that causes a trade distortion. A trade distortion exists where the price at the border diverges from the domestic price and can result from regulations or administrative procedures which are imposed to serve a specific objective such as ensuring food safety or addressing product safety or environmental issues. The pursuit of such domestic policy objectives is quite legitimate, however, in many cases the regulatory policies, procedures and administrative requirements are implemented in a manner that effectively discriminates against imports relative to domestically produced products. Thus a NTM has the potential to become a NTB when it serves to constrain imports. Any NTM that is not implemented in the 'least trade-restrictive' manner may be classified as a NTB. This policy note focuses on NTBs.

The reduction of tariffs in progressive rounds of trade liberalization at the multilateral and regional levels has been mirrored by the rise to prominence of NTBs.

The multilateral agreements of the WTO have focused on developing core principles for addressing NTBs. These include transparency, non-discrimination and proportionality. Using these three principles, the WTO members developed taxonomies for classifying NTBs with the objective of defining appropriate design criteria. All countries have made progress on significantly reducing “old style” NTBs, such as quotas and restrictive import licensing requirement. However, implementing regulatory reforms to minimize the trade restrictiveness of specific NTBs has largely taken place in the major developed and developing countries.

The new multilateral rules that established the WTO in 1995 included explicit agreements relating to the management of NTBs with a specific focus on customs and transit, technical regulations, and health and safety issues. Including these regulatory issues in the trade agenda requires extensive inter-government coordination as portfolio responsibility often rests with a non-trade ministry such as Agriculture, Health, Science and Technology, or Environment.

The policy recommendations in this note draw on the experience of both the WTO and other regional organizations to identify the characteristics of a successful approach for reducing and eliminating NTBs. Over the past 15 years members of the WTO have implemented the SPS and TBT Agreements through notifications and active participation and engagement in the Committees. In addition, the binding dispute settlement process of the WTO has resulted in a number of NTBs being resolved through enforceable legal process and the consequent development of precedent and case law. At the same time regional economic agreements have also turned their focus to addressing NTBs. While the European Union has pursued a legally

binding approach with sanctions to enforce compliance the majority of regional economic communities have chosen moral suasion through establishing committees and other institutional structures (i.e. technical expert groups) requiring dialogue, and the exchange of information.

The remainder of the note discusses the approach to NTBs within the EAC before outlining the key policy recommendations for reducing and removing NTBs. The policy recommendations draw on the relevance of the WTO rules and the experience of both the EU and ASEAN in addressing NTBs.

Non-Tariff Barriers in the EAC

Partner States within the EAC have made progress on addressing NTBs, and the EAC Secretariat with support from Ministers and Heads of State has entered into commitments to eliminate and reduce NTBs. All the Partners recognize that realizing the vision of the EAC to create an integrated market requires the reduction and removal of NTBs. To date, the approach has focused on developing national-level focal points and publicizing specific NTBs. Establishing formal notification requirements is an important element in monitoring NTBs and represents a necessary condition. However, it is not sufficient for moving to the next step—the reduction and removal of NTBs.

The legal framework governing the EAC provides a basis for addressing NTBs. Article 13 (1) of the EAC Protocol states that Partner States must agree to eliminate remaining NTBs and refrain from imposing new ones. The following paragraph provides that Partner States shall formulate a mechanism to identify and eliminate such NTBs. The Protocol defines NTBs as “administrative and technical requirements imposed by a Partner State in the movement of goods.” Implementing this Article

remains a major challenge for all five Partner States. The working definition of NTBs within the EAC is “quantitative restrictions and specific limitations that act as obstacles to trade,” other than tariffs that may be embedded in government laws, regulations and practices at the national and local level.

Identifying and classifying NTBs is often not straightforward as specific administrative practices and legislation has evolved over time in response to political economy developments at the national and local level. These practices inevitably pre-date the initiative to move towards a Common Market in East Africa and also pre-date the establishment of the WTO. Over the past several years Partner States and the EAC Secretariat have devoted considerable attention to addressing NTBs. A series of detailed studies has identified specific measures based on surveys undertaken by private sector advocacy organizations in the region. Further studies have made recommendations for establishing an implementation mechanism to facilitate their reduction and removal. As part of this process, Partner States have established National Monitoring Committees (NMCs).

The EAC Partner States have adopted a Time-bound Program for the Elimination of Identified Non-Tariff Barriers (2009). This classifies the listed NTBs into one of four categories (see box below) based on the level of political and economic complexity and the magnitude of the impact on EAC trade. The action agenda is prioritized according to the degree of difficulty in achieving a consensus and the quantitative impact on intra-regional trade flows. Essentially this approach seeks to identify ‘easy’ NTBs to remove in order to harness a growing consensus behind further reform.

EAC Categories for Non-Tariff Barriers

- **Category A:** NTBs with a low political and economic complexity and a low impact on EAC trade. Immediate Action required, consensus reached at EAC Council
- **Category B:** NTBs with a low political and economic complexity and a high impact on EAC trade. Short term (1-6 months) EAC Council consensus but no agreement on implementation
- **Category C:** NTBs with a high political and economic complexity and a high impact on EAC trade. Medium term (6-12 months) No political consensus as EAC Council
- **Category D:** NTBs with a high political and economic complexity and a low impact on EAC trade. Long Term (>12 months) No political consensus at EAC Council

Classifying NTBs in accordance with the dual criteria of political complexity and intra-regional trade impact is justified by arguing that it will deliver a few ‘quick wins’ that will increase trade. This in turn will result in an increased awareness of the trade benefits which will build the support necessary for addressing the more challenging NTBs. In practice there have been very few ‘quick wins’ over the past two years as it proven very difficult to remove the Category A NTBs. Some of the specific NTBs classified as Category A are shown in Table 1. While a number of NTBs may be explicitly protectionist, the majority of NTBs seek to meet an agreed regulatory objective—such as food safety or product safety. While there may be a consensus that an existing NTB should be abolished this does not mean that there is agreement on how to meet legitimate regulatory objectives in a less trade restrictive manner.

The publication of Non Tariff Barriers in EAC (now available on the EAC Web site for download) along with the existence of a high-profile forum within the EAC for discussing NTBs represents a major step forward. EAC Partner States and the Secretariat face the challenge of moving

from identifying and discussing NTBs to implementing regulatory reforms and reducing trade restrictive measures. Presently there is no mechanism for ensuring that Partner States follow a process of either justifying the NTB or agreeing to remove it once a NTB is identified and publicized. The absence of a clearly defined monitoring mechanism with time limits for action means each Partner State is responsible for voluntarily removing or reforming listed NTBs without being subject to possible sanctions for non-compliance. The 'moral suasion' approach to removing NTB within the EAC has, to date, failed to yield significant progress. This may be contrasted with the more formal legally binding mechanisms with sanctions that are practiced by the European Union.

At the national level the NMC is generally coordinated by either the Ministry of East African Affairs (Kenya) or the Ministry of Commerce (Rwanda and Uganda). The Ministry of East African Affairs does not have the capacity to analyze and review the identified NTB, and while the Ministry of Commerce may have more capacity to assess specific NTB it does not have the mandate to make decisions on their modification or removal. In the absence of a transparent process for removing and reforming specific NTB the National Monitoring Committees risk becoming ineffective 'talk shops' as the same issues are repeatedly referred back to the EAC Council of Ministers for resolution.

The five members of the EAC all belong to the World Trade Organization (WTO). As such they have already committed to organizing their multilateral trade relations in a transparent and non-discriminatory manner with least trade restrictive regulations, within a legally binding and enforceable system. Linking specific reforms, such as removing NTBs, to high-

level regional and multilateral commitments that already have buy-in, can assist in building support for the reduction and removal of NTBs and provides a basis for tackling difficult regulatory and procedural issues.

In Southern Africa, the SADC Ministry of Trade has established a transparent system for monitoring and ensuring compliance with the SADC Trade Protocol which includes procures for addressing reported barriers to trade including NTBs. The SADC Trade Monitoring and Compliance Mechanism (TMCM) requires all members to notify all trade laws and regulations and will function as a system for notification, consultations and negotiation among Member States as well as for implementing judgments and sanctions determined by the dispute settlement system.

Policy Recommendations

The commitment of Partner States and the EAC Secretariat to reduce and remove NTBs has, to date, focused on identifying specific NTBs and establishing NMCs. Raising awareness and improving transparency over NTBs represent necessary first steps however, it is apparent from the lack of progress in removing NTBs in East Africa and elsewhere that they are not sufficient. At the Partner State level, a commitment to implement in full their commitments under the GATT 1994 Articles V, VIII and X and the Agreements on Technical Barriers to Trade and Sanitary and PhytoSanitary measures would go a long way in advancing the EAC moves to promote a single market. Developing an effective program for reducing NTB requires governments, the private sector and civil society to consider the following policy issues.

Firstly, all existing notified NTBs should be subjected to a WTO Compliance review to

ensure that the measure is transparent, non-discriminatory, and minimizes trade restrictiveness. EAC Ministers could consider establishing a transparent rule that when a NTB is found to be non-compliant with the WTO the Partner State is required to abolish or modify the measure to ensure compliance within 12 months. This is consistent with each of the Partner States committing to implement their commitments under GATT 1994 Articles V, VIII and X.

Secondly, and with immediately effect, all proposed new regulatory measures/procedures should be required to be notified to the other Partners and the EAC Secretariat in advance to allow time (a minimum of 90 days) for consultation and review. When Partner States notify new regulatory requirements or procedures to the EAC Secretariat and each other they should also notify the WTO. For simplification, the reporting requirements should be identical. The experience of the WTO SPS and TBT Committees represent a relevant model for notification, reporting and discussion.

Thirdly, prior to any modifications or new technical regulations being announced, the Partner Country should undertake a regulatory impact analysis (RIA). While the RIA is widely used in developed economies it is rarely undertaken in developing countries. The RIA assesses the likely economic and social impact of a proposed regulation. Donors could potentially provide technical assistance to develop capacity for the EAC to undertake RIAs.

Fourthly, the EAC and Partner States should commit to ensuring all existing policies, regulations, administrative procedures, and any related fees and charges relating to the importation and export of goods are readily available through a publicized web site. Provision should also be made for all proposed changes to technical regulations to

be posted on the web site with a facility for interested parties to submit comments.

Fifthly, EAC Partner States and the Secretariat should ensure that the dispute settlement system is in place and ready to address NTBs. It is recommended that the EAC consider adopting the SADC approach of linking the management of NTBs with a formal monitoring and compliance mechanism that allows for fast track decision making and is linked to the formal dispute settlement mechanism with a legally binding outcome. The experience of the EU in establishing a legally binding mechanism with sanctions for non-compliance provides a relevant model.

About the Author

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Table 1: Examples of EAC Non-tariff Barriers Identified for Immediate Action

NTM Category	Summary Description	Objective	Potential for Non-Transparent & discriminatory application	Evidence/Scientific Basis	Alternative Measure
II	Non-recognition of EAC Rules and Certificates of Origin	Prevent trade diversion under the EAC FTA	High	Verification Missions	Apply risk assessment
I	Import Bans (Milk, day old chicks, beef, poultry)	Public Health	High	Inconsistent between imports and domestic production	Mutual recognition within EAC
II	Multiple Road Blocks	Prevent tax evasion on transit goods	High evidence of bribes	None	Document based controls at borders
IV	Kenya levies charges on Plant Import Permit for Ugandan tea	Protection	Yes	None	Abolish levy
IV	Kenya requires Ugandan tea to have a SPS certificate but does not recognize it	Public Health	Yes	Lack of confidence in UNBS certificates	Recognition of SPS certificates within EAC
II	Multiple weighbridges along Northern Corridor	Road Safety	High	None	Use risk assessment
II	Requirement for import license from the Ministry of Trade and Industry and a bond prior to Tanzania issuing excise duty stamps	Protection	Yes	None	Remove requirement
II	Discriminatory excise duty on cigarettes that do not have 75 per cent of Tanzanian tobacco	Domestic Content protection	Yes	None	Remove requirement
II	Landing certificates for exports from Kenya through Namanga issued by TRA in Arusha rather than at the border	Administrative	Yes	None	Abolish Landing Certificate requirement
II	Extra charges levied on Kenya pharmaceutical exports by Tanzania	Protection	Yes	None	Abolish requirement
II	Cotecna inspection required for imports to Tanzania	Undervaluation	Yes	None	Abolish requirement
II	Road Consignment note required from transporters prior to packing of goods	?	Yes	None	Abolish requirement
II	Corruption along Northern and Central Corridors at roadblocks, weighbridges, and borders		Yes	None	Increase transparency

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