

A CRITIQUE OF THE EAST AFRICAN COMMUNITY'S NON-TARIFF BARRIERS REGIME

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Abstract

The role of tariffs as instruments of control of international trade has gradually waned, with uniform tariffs applying in major regional economic communities (RECs). States desire, as is expected, to retain control over inflow and outflow of trade in their territories. Non-tariff measures (NTMs) have emerged as effective tools in the hands of states to maintain control over trade, where tariffs are no longer considered effective controls. Over time, discriminatory and unjustified uses of NTMs have resulted in unhealthy trade barriers commonly known as non-tariff barriers (NTBs). In the East African Community (EAC), inter-state trade has been adversely affected by NTBs. The outbreak of the Covid-19 pandemic in EAC in 2020, for example, highlighted the significance of rising NTBs in intra-EAC trade, with each Partner State adopting measures targeting flow of trade across borders. This paper is a critique of the EAC's legal regime on elimination of NTBs.

Keywords: EAC, non-tariff barriers, non-tariff measures, dispute settlement, National Monitoring Committee, National Focal Point, countervailing measures

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1. Introduction

Despite international trade growing in importance in the last century, new restrictions that seek to make inter-state trade difficult continue to emerge.¹ The irony of states erecting barriers to what is perceived as an important aspect of inter-state relations and economic health points to the complexity of geopolitics. These restrictions, normally termed non-tariff barriers (NTBs), deserve an in-depth study focusing on decisive ways to eliminate and prevent them from mushrooming. The importance of international trade today must be seen in the context of several states retaining open trading agreements between and amongst themselves, despite rising tension in complex geopolitical setups.² A good example is the recent flare of tension between the United States of America (USA) and the People's Republic of China over activities in the South China Sea and Pacific Islands, yet, the USA and China remain strong trading partners.³ The importance of retaining trading relations despite rising geopolitical tensions reflects the complex interdependence of nations on world trade and an increasingly interconnected global economy whose building blocks are the contributions of each nation, ranging from those providing raw materials to those specialised in manufacturing.⁴

Global trade carries a huge influence on geopolitical developments. Global trade negotiations following major world conflicts, especially the Second World War, reified global superpower relationships and the appreciation of international trade as an influence on power relations.⁵ With the reality of the need for international cooperation for development in mind, harnessing regional integration more effectively, for both goods and services, would help all countries lower their cost base, thereby enhancing global competitiveness.

¹ Luisa Kinzius, Alexander Sandkamp and Erdal Yalcin, *Global trade protection and the role of nontariff barriers*, CEPR, 16 September 2019.

² Ivo H Daalder and James M Lindsay, *The globalization of politics: American foreign policy for a new century*, Brookings, 1 January 2003.

³ Office of the United States (USTR), 'The People's Republic of China' <<https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>> on 17 November 2019.

⁴ Tanius Mina E, 'The impact of economic interdependence on the probability of conflict between states: The case of "American-Chinese relationship on Taiwan since 1995', 4(1) *Review of Economics and Political Science* (2019) 38-53.

⁵ Greg Buckman, *Global trade: Past mistakes, future choices*, Fernwood Publishing, 2005, 27.

For smaller nations, regional integration offers the prospect of improved access to neighbouring markets as well as the potential to attract greater foreign direct investment (FDI).⁶

In areas where trading partners seek to control the flow and balance of trade, they have employed tariffs, anti-dumping and countervailing measures⁷ to exert leverage. In other cases, however, free trade areas (FTAs) and customs unions (CUs) may eliminate the use of tariff measures through introduction of uniform tariffs.⁸ In CUs and FTAs, states retain enormous powers to surreptitiously employ measures other than tariffs to retain control of trade and slow inflow of trade from other countries into their territories. These measures include sanitary and phytosanitary standards, packaging and weight requirements, and other domestic regulations that are required of exporters or importers. Otherwise termed as non-tariff measures (NTMs), such measures are considered as NTBs when they are not justified in the context of the subject trade agreement, and are aimed at unfairly restricting flow of goods or services from another country.⁹

The EAC is a customs union re-established by Kenya, Uganda and Tanzania in 1999, with the aim of having uniform customs practices in respect to imports and exports in the region. The EAC has since grown to include, by end May 2022, an additional four states: Rwanda, Burundi, South Sudan and the Democratic Republic of Congo, listed by order of admission.¹⁰ Prior to its re-establishment, the EAC existed as a union of the three original members until it collapsed in 1977 due to geopolitical tensions and mutual suspicions.¹¹ The EAC is governed by the Treaty for the Establishment of the East African

⁶ Ian Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa', *World Bank Africa Trade Policy Notes*, note 9, November 2010.

⁷ According to World Trade Organisation, countervailing measures, also known as anti-subsidy duties, are trade import duties imposed to neutralise the negative effects of subsidies in distorting trade between states. They are imposed after an investigation finds that a foreign country subsidises its exports, injuring domestic producers in the importing country.

⁸ See Corporate finance institute, 'Free trade area', 29 April 2022.

⁹ See Institute for Government, 'Non-tariff barriers', 2022.

¹⁰ East African Community, 'Overview of EAC' EAC.int on 6 May 2022.

¹¹ Bheki Mngomezulu, 'Why did regional integration fail in East Africa in the 1970s? A historical explanation', *History and African Studies Seminar*, University of KwaZulu-Natal, 14 August 2013.

Community, 1999 (the EAC Treaty). The EAC Treaty establishes structures of the EAC. It also sets the foundation for the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol), the Protocol for the Establishment of the East African Community Customs Union (Customs Union Protocol) and the Protocol of the Establishment of the East African Community Monetary Union (Monetary Union Protocol). It is these Protocols that define areas of cooperation and the terms of trade among the EAC Partner States.¹²

The EAC's launch of a regional common market in July 2010 was followed back-to-back by the full realisation of the customs union, which was established in 2004.¹³ While all the EAC Partner States performed well in eradicating tariff barriers through compliance with the Customs Union Protocol, NTBs have remained a thorn in cross-border trade. Both the EAC Treaty and the EAC Customs Union Protocol pay specific attention to NTBs and call for their elimination.¹⁴ This reality has seen EAC Partner States dedicate attention to identification and classification of NTBs, and the establishment of the EAC Time-bound Program for Eliminating NTBs. Moving from identification of NTBs to actually eliminating them has, however, been a challenge. The intra-EAC trade continues to face hurdles related to NTBs.¹⁵

In 2017, the East African Legislative Assembly (EALA) passed the EAC Elimination of Non-Tariff Barriers Act (the EAC NTBs Act) with the view to decisively eliminate these chronic barriers to trade among Partner States. Despite the elaborate EAC legal regime on elimination of NTBs, numerous studies and documented incidents show that there has been a significant increase in NTBs in intra-EAC trade.¹⁶ The non-reduction of NTBs in the face of elaborate legal mechanisms raise concern over the efficacy of the legal regime or its implementation.

¹² See African Union, 'East African Community', au.int.

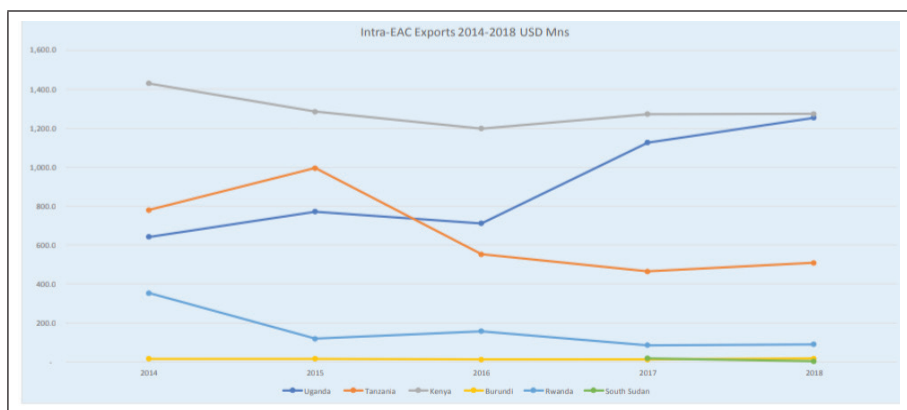
¹³ See East African Community, 'Customs Union', eac.int.

¹⁴ Treaty for the Establishment of the East African Community, Article 75(1).

¹⁵ Robert Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community', *World Bank Africa trade policy notes*, #note 7, August 2010.

¹⁶ Rosabela Oiro, Boniface Owino and Max Mendez-Parra, 'Non-tariff barriers and 'complaints' in the East African Community's reporting process', *CUTS International Policy Briefing*, March 2017.

Figure 1: Intra-EAC Exports 2014-2018



Source: EAC (2018 Trade Report)

Whereas integration within the EAC seems to be deepening, inter-state trade is reporting a significant decline. In its recent report, the United Nations Economic Commission for Africa (UNECA) has noted that the intra-EAC trade fell from United States Dollars (USD) 3.5 billion in 2013 to USD 2.4 billion in 2017. This decline was majorly attributable to NTBs that continue to mushroom as political tension between EAC Partner States rise.¹⁷ The long running geopolitical tension between Rwanda and Burundi, for instance, has led to near collapse of commercial or trade activities between the two countries.¹⁸ In another bizarre and unfortunate incident in early 2019, the two major crossing points between Rwanda and Uganda were completely shut to all motororing or human movement, following a drastic collapse of diplomatic relations between the two EAC Partner States.¹⁹ More recently, the diplomatic tiff between Kenya and Tanzania in the wake of immigration restriction measures adopted to manage the Covid-19 pandemic, constrained cross-border trade between the two Partner States, with momentary halt on passenger air transport between the two neighbours.²⁰

¹⁷ *The East African*, 'Why intra-EAC trade is dwindling', 23 March 2019.

¹⁸ See Trade Mark East Africa, 'Burundi, Rwanda ties deteriorate', 15 August 2016.

¹⁹ Alice McCool, 'Thwarted by Rwanda-Uganda border closures, women await resolution', *Al Jazeera*, 4 October 2019.

²⁰ Agence France-Presse, 'Tanzania bans Kenya Airways as coronavirus spat escalates', *VOA*, 1 August 2020.

2. Understanding non-tariff barriers

Global efforts to reduce tariffs have been immensely successful, as evidenced by the rise in global trade through multilateral cooperation and research-based policy considerations.²¹ Despite this success, other forms of trade restrictions remain widespread. These trade barriers, though not related to tariffs, affect more than twenty percent²² of global trade with the catastrophic effect of inhibiting competitiveness of products from affected regions, and constraining ability of domestic firms to export regionally and globally.²³

The question of what constitutes NTBs is a problematic one, especially, in the context of state sovereignty where states retain powers to institute measures required to protect their own economies and population, often in the form of weights and standards, sanitary and phytosanitary standards, among other measures. While classification of NTBs has been provided under the World Trade Organisation (WTO) and the General Agreement on Tariffs and Trade (GATT) framework, and under the EAC NTBs Act, each element must be examined under its unique circumstances to determine whether it does constitute an NTB or is a justified act of public policy. Indeed, the problem of defining NTBs was witnessed through various rounds of the United Nations Conference on Trade and Development (UNCTAD) negotiations, with a loose definition only agreed on after numerous rounds of negotiations.²⁴ The UNCTAD multi-agency sectoral team set up to classify NTBs recognised this difficulty, thus concluding that precise and balanced definition of NTBs posed substantial challenge, and that a distinction between NTBs and NTMs should not be attempted.²⁵

²¹ See International Monetary Fund, 'Global trade liberalization and the developing countries', November 2001.

²² See United Nations Press Release TAD/2030, 6 September 2005.

²³ Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

²⁴ See United Nations Conference on Trade and Development, 'Report of the expert meeting on methodologies, classification, quantification and development impacts of non-tariff barriers,' D/B/COM.1/EM.27/3, 8 November 2005.

²⁵ Hiroaki Kuwahara, 'Multi-agency effort to define and classify NTMs: Definition, classification (and collection) of NTMs, presentation to the UNESCAP/UNCTAD/WTO-OMC research workshop on rising non-tariff protectionism and crisis recovery', Macau, 14 December 2009.

NTMs refer to any measure other than a tariff that causes a trade distortion.²⁶ A trade distortion occurs where the price at the border differs significantly from the price in the domestic market of origin.²⁷ This distortion is usually attributable to skewed regulations or administrative procedures imposed to serve a specific objective such as ensuring consumer protection, public health or environmental safety. Even though the pursuit of such domestic policies is often legitimate, the mode of implementation could achieve the direct opposite of the policy's aim leading to unintended discrimination against imports. Effectively, an NTM could potentially transform into an NTB if its effect is to constrain trade. Similarly, an NTM that is not implemented in a least trade-restrictive manner could become an NTB.²⁸

Generally, NTBs have protectionist and discriminatory intent.²⁹ This is discernible where the measures are excessive, unequal, and unrelated to comparable measures elsewhere, and when they are, they are still poorly implemented. Hitherto, *bona fide* NTMs created for purposes of consumer or environmental protection or in the interest of the public could end up being trade barriers and burdensome to traders. This is especially if the cost of compliance is punitive, compliance procedures are lacking or unnecessarily cumbersome, or there is notable bad faith in implementing them, thus, constraining traders.³⁰

In the contemporary world, multilateral agreements on trade have opened wide cross-border market access based on uniform tariff rates. These can be seen in the European Union (EU), the EAC, the erstwhile Northern American Free Trade Agreement (NAFTA) and the Common Market for Eastern and Southern Africa (COMESA). The application of uniform tariff measures constricts the ability of states to employ tariffs as a trade regulation instrument. The steady decline of tariff barriers resulting from the successes of GATT

²⁶ See United Nations Conference on Trade and Development, 'Trade analysis: Non-tariff measures'.

²⁷ Bernard Hoekman and Will Martin, 'Reducing distortions in international commodity markets', Economic Premise no 82, *World Bank*, Washington DC, (2012).

²⁸ Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community'.

²⁹ See Trade Barriers Africa, 'Non-tariff barriers'.

³⁰ United Nations Conference on Trade and Development, 'Non-tariff measures: Evidence from selected developing countries and future research agenda', *Developing Countries in International Trade Studies*, 2010.

negotiations and the aforementioned regional economic communities (RECs) has raised a premium on NTBs as states seek to retain control of trade into and out of their territories. NTBs are therefore employed by states as protection measures as well as regulatory instruments.³¹

2.1 Classification of NTBs

According to UNCTAD, NTMs are policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both.³² The WTO sets international trade regulations through, among other instruments, its predecessor framework under the GATT. WTO recognises NTBs as falling under various categories, namely:³³ government participation in trade and restrictive practices tolerated by government, like preference to domestic bidders or suppliers; customs and administrative entry procedures, like misinterpretation of rules of origin, import licensing and arbitrary customs classifications; technical barriers to trade including restrictive technical regulations and standards not based on international standards; and sanitary and phytosanitary measures including measures aimed at addressing plant, animal and human health.

2.2 NTBs in the context of the EAC

NTBs are a thorny issue in EAC integration, and have been recognised as such throughout the negotiations of the EAC Treaty and the protocols under it. The EAC Partner States came up with the Time-bound Program for the Elimination of Identified Non-Tariff Barriers (the Time-bound Program) in 2009 with the aim of simplifying and accelerating the process of eliminating NTBs.³⁴ Under the Time-bound Program, NTBs are classified under one of four categories, each category being premised on the level of political and

³¹ UNCTAD, 'Non-tariff measures: Evidence from selected developing countries and future research agenda'.

³² UNCTAD, 'Non-tariff measures: Evidence from selected developing countries and future research agenda'.

³³ General Agreement on Tariffs and Trade, 15 April 1994, LT/UR/A-1A/GATT/2, annex A.

³⁴ Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community'.

economic complexity and the degree of impact on intra-EAC commerce. Similarly, the response mechanisms to elimination of NTBs are ranked based on the level of effort required to achieve consensus by the Partner States, and, simultaneously, on the overall impact on regional trade.³⁵

A strategy towards achieving some of the objectives of the Time-bound Program led to the EALA enacting the EAC NTBs Act in 2017. The law was designed to be a panacea to chronic NTBs and obstinate barriers to intra-EAC trade. Section 3 of the Act sets out its objective, with three broad focus areas: providing a legal framework for the removal of NTBs in the Community, providing a mechanism for identifying and monitoring the removal of NTBs within the Community, and removing restrictions that make importation or exportation within and outside EAC difficult or costly.

The EAC NTBs Act defines NTBs as laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State, whose effect is to impede trade.³⁶ It relies heavily on WTO's classification of NTBs.³⁷

The Act prohibits Partner States from engaging in activities that could constitute NTBs. These are activities that:³⁸

- a. Cause additional cost to the business of an affected party including surcharges and customs bonds;
- b. Result in wastage of time or loss of business or market, including delays in clearing imports and lengthy testing and certification procedures;
- c. Lead to ban on market entry and loss of potential markets;
- d. Amount to a corrupt practice;
- e. Restrict business transactions in the Partner State;

³⁵ The time-bound program for the elimination of identified non-tariff barriers in EAC (2009).

³⁶ EAC Elimination of Non-Tariff Barriers Act, Section 2.

³⁷ See Monica A Hangi, 'The non-tariff barriers in trading within the East African Community', *Research Paper CUTS Geneva Resource Centre*, Geneva, 2010.

³⁸ EAC NTBs Act, Section 3.

- f. Do not recognise the East African Rules of Origin and which lead to additional cost for verification of the goods and loss of business; and
- g. Cause any other impediment to trade within the EAC.

The definition of NTBs under the EAC NTBs Act is focused on positive actions or requirements, but is silent on non-action, passive or negative requirements. A comparison with the definition in the Protocol on Trade in the Southern African Development Community (SADC) region which defines NTBs as ‘any barrier to trade other than import and export duties’³⁹ highlights the inadequacy of the EAC’s definition. Compared to the definition under the EAC NTBs Act, the SADC definition is broader and more inclusive as it not only provides for requirements that may impede trade but also recognises as NTBs non-compliance or inaction by states that could as well have negative effects on trade.

2.3 Effects of NTBs on international trade

Integration of sovereign communities, mainly, through cross-border trade in RECs is a growing phenomenon. Regional integration as a political means of bringing countries together is premised on the appreciation that it promotes economic growth, reduces border conflicts and dissipates unhealthy competition among countries. From that position, regional integration is an important instrument towards establishing sustainable global peace.⁴⁰ Unfortunately, NTBs are cancerous to international trade because they gradually reduce trade volumes and negatively influence overall economic growth, as already seen in the case of the declining intra-EAC trade.

Greater exploitation of regional communities is critical to reducing the reliance of a country on exports of a single product to a single market. The risks associated with reliance on single products and single markets cannot be overemphasised, especially with geopolitical realities and the potential for

³⁹ Protocol on Trade in the Southern African Development Community (SADC), Article 1.

⁴⁰ Mngomezulu, ‘Why did regional integration fail in East Africa in the 1970s? A historical explanation.’

new competition emerging. For countries with robust and diverse exporting portfolio, expansion and free-flow of regional trade provide room to enhance sustainability of existing exports by lowering costs. This cost reduction is achieved through specialisation within the context of integrated regional value chains.⁴¹

NTBs affect trade in two distinct, yet, interrelated ways: by increasing the cost of doing business, and by restricting full access to the market. The NTBs that increase cost of doing business range from those relating to standards to cumbersome customs clearance procedures. Those that relate to restricting market access include Rules of Origin and countervailing measures like quotas.⁴² NTBs are often, by their design, aimed at addressing safety and environmental issues. It is notable, however, that many important players in international trade, small and medium scale enterprises do not have adequate knowledge of NTBs. This is something that could be addressed through transparency in administration of NTBs regime.⁴³

In 2017, the total EAC intra-Partner States' trade grew by 19.2%. In 2018, the volume declined to 13.9%, signalling some undercurrent activities.⁴⁴ The main culprits in the decline were trade barriers. Indeed, in an opinion-editorial in *The EastAfrican*, a weekly newspaper published in Kenya, it was noted that NTBs have caused frustrations to some Partner States, thus, compelling them to seek alliances outside the region.⁴⁵

⁴¹ Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

⁴² Stephen Byrne and Jonathan Rice, 'The impact of non-tariff barriers on EU goods trade after Brexit', *VOXEU*, 19 June 2018.

⁴³ International Trade Centre, 'Navigating non-tariff measures: Insights from a business survey in the European Union', 2016.

⁴⁴ EAC, 'Trade and investment report 2018: Maximising the benefits of regional integration', 2018.

⁴⁵ James Anyanzwa, 'NTBs and disputes blamed for the slowdown in trade among East African states', *The East African*, 27 February 2019.

Figure 2: Intra-EAC trade volumes (2014-2018)

		2014	2015	2016	2017	2018	Percentage Change			
							2015	2016	2017	2018
Imports	Uganda	684.6	630.2	530.0	565.5	796.3	-8.0	-15.9	6.7	40.8
	Tanzania	709.8	278.6	298.8	243.2	302.7	-60.7	7.2	-18.6	24.5
	Kenya	416.9	407.8	324.4	589.8	676.5	-2.2	-20.5	81.8	14.7
	Burundi	169.1	151.1	157.2	151.0	134.3	-10.7	4.0	-3.9	-11.1
	Rwanda	511.0	474.1	439.8	478.6	549.1	-7.2	-7.2	8.8	14.7
	South Sudan				462.5	377.0				-18.5
	Total	2,491.4	1,941.8	1,750.2	2,490.6	2,835.9	-22.1	-9.9	42.3	13.9
Exports	Uganda	642.2	771.6	711.0	1,126.3	1254.5	20.1	-7.9	58.4	11.4
	Tanzania	779.5	995.2	552.5	464.5	508.6	27.7	-44.5	-15.9	9.5
	Kenya	1,430.8	1,285.9	1,199.0	1,272.5	1273.8	-10.1	-6.8	6.1	0.1
	Burundi	15.7	14.8	12.3	11.5	16.6	-5.7	-16.9	-6.5	44.3
	Rwanda	352.4	118.8	156.6	84.6	89.7	-66.3	31.8	-46.0	6.0
	South Sudan				17.9	2.0				-88.8
	Total	3,220.7	3,186.3	2,631.4	2,977.4	3,145.2	-1.1	-17.4	13.1	5.6
Total EAC Trade value	Uganda	1,326.9	1,401.8	1,241.4	1,691.8	2,050.7	5.6	-11.4	36.3	21.2
	Tanzania	1,489.3	1,273.8	851.3	707.7	811.3	-14.5	-33.2	-16.9	14.6
	Kenya	1,847.7	1,693.7	1,523.4	1,862.3	1,950.3	-8.3	-10.1	22.3	4.7
	Burundi	184.8	165.9	169.5	162.5	150.9	-10.2	2.2	-4.1	-7.1
	Rwanda	863.4	593.0	596.4	563.2	638.8	-31.3	0.6	-5.6	13.4
	South Sudan				480.4	379.0				
	Total	5,712.1	5,128.1	4,382.0	5,467.9	5,981.1	-10.2	-14.6	24.8	9.4

Source: EAC (Trade Report 2018)

In the European Union (EU), lowering trade barriers has been recognised as a core ingredient of realising Sustainable Development Goals (SDGs). This enables more trading corporations to integrate within regional and global value chains, with a resulting spiral effect of encouraging and spreading growth beyond EU even to developing countries.⁴⁶ This is also true for the EAC where growth of cross-border trading corporations is being witnessed. Enhanced market access, facilitated by increased ease of doing business in the EAC, has already seen banking corporations like the KCB Bank Group and Equity Bank, both originally Kenyan banks, set up operations in almost all EAC countries. Insurance firms like the UAP Group and AAR, also originally Kenyan, have also spread their operations across EAC Partner States.

⁴⁶ International Trade Centre, 'Navigating non-tariff measures: Insights from a business survey in the European Union.'

Whereas more successful businesses are needed for growth, the African continent faces difficulty in recording success in business due to bad roads, unjustified road blocks and unofficial toll collection points, corrupt police officers and road officials, all contributing to a bizarre evil scheme to slow movement of goods across various regions in the continent.⁴⁷ Under the official classification of NTBs in the EAC, road tolls through weighbridges and bribery demands by traffic police officers are identified as major NTBs to movement of vehicles and goods across borders.⁴⁸ According to the WTO, intra-EAC trade is significantly low compared to trade in other RECs. This low ratio is mainly due to trade barriers such as poor infrastructure and cumbersome administrative procedures. Quite dishearteningly, about 87% of trade by EAC Partner States is with countries outside the EAC, including China, India and the EU.⁴⁹

When the NTBs are isolated and matched with their effects on international trade, an interesting pattern develops showing that small daily hurdles can build up to catastrophic hindrances of cross-border trade. A study on NTBs in SADC has identified some of these as: inefficiencies in transport, customs, and logistics leading to inordinate delays and high logistics costs; restrictive rules of origin limiting preferential trade and increasing cost of compliance, thus, denying traders the benefits of a united regional market; and poorly designed technical regulations and standards placing emphasis on mandatory item-by-item inspections and certifications; specific national (as opposed to universal) standards and testing procedures, saddled with overlapping regulatory mandates.⁵⁰ An example of the effects of costly Rules of Origin requirements is discernible in a comparison of commercial operations of leading retailers Shoprite and Woolworths in SADC. In order for Shoprite to enjoy USD 13.6 million in customs waivers in the SADC market, for instance, it has to spend USD 5.8 million per year to obtain exemption certificates. Its

⁴⁷ Robert Guest, *The shackled continent: Africa's past, present and future*, Macmillan, 2004, 172-183.

⁴⁸ The time-bound programme for the elimination of identified non-tariff barriers in EAC 2009.

⁴⁹ World Trade Organisation, 'Trade policy review' www.wto.org on 14 September 2021.

⁵⁰ Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa.'

competitor Woolworths, on the other hand, does not use SADC preferences at all. Instead, it pays full tariffs because it considers the process of administering Rules of Origin documentation to be too costly and cumbersome.

2.4 Trends within the EAC

Consistent with the foregoing, a study by the East Africa Law Society (EALS), through a project on supporting access to trade by small-scale cross-border traders in the EAC (2019) identified the following barriers as persistent in the intra-EAC trade:⁵¹

- a. Administrative burdens relating to regulatory compliance, including cumbersome administrative processes and multiple regulatory bodies involved in cross-border trade;
- b. Information barriers caused by Partner States effecting changes to their laws without cross-border consultations and without adequate notification to traders; and lack of centralised repository of the cross-border trade regulations, rules and forms;
- c. Duplication of standards and tests leading to high costs of compliance, with test centres located away from the borders;
- d. Lack of conducive facilities and infrastructure at the borders, inaccessibility of cold storage facilities and poorly maintained transport infrastructure;
- e. Nationalistic tendencies and discriminatory behaviour by officials, often unauthorised but prevalent, lead to capricious interpretation of customs classification and assessment of taxes, among other things; and
- f. Inordinately high payments of unofficial fees in bribes and facilitations, usually resulting from the bottlenecks erected by administrative requirements.

⁵¹ East Africa Law Society, *Supporting integration of small-scale traders in EAC*, 2019.

2.5 Quantifiable economic effects of NTBs in the EAC

On average, the tariff equivalent of NTBs is 40%. This is much higher for most traded commodities than the Most Favoured Nation (MFN) tariff applied by most countries. This alone is evidence that NTBs significantly increase costs both for firms that source intermediate inputs from the affected region as well as for consumers within the regional market.⁵² A study by the World Bank on the EAC Common Market makes interesting revelations on the economic impact of NTBs on domestic and regional economy. Listing chronic NTBs as identified in the EAC Time-bound Program, the report discloses the following:⁵³

- Weighbridges – calculation of *ad valorem* equivalents (AVEs), weighbridges increase cost of cross-border trade by an average resting between 0.16% and 0.86% of the price of the product.
- Border delays – delays associated with cumbersome inspection, clearance and customs procedures add about 20 hours to movement of goods across the borders, equivalent to a cost increase in regional trade ranging between 0.49% and 2.51% in transport.
- Other delays (e.g., traffic, roadblocks) – these delays mainly affect transport of goods, and may increase cost of transport and trade by a range of 1.17% to 6.05%.
- Bribes – bribery is rampant in the trade routes in the EAC, ranging from unofficial traffic fines to border facilitations. On average, each truck spares USD 35 on bribes per trip, translating to increase in costs of cross-border trade by a range of between 0.16% and 0.81%.

Based on Trade Policy Constraint Index (TPCI), if the NTBs are dealt with indiscriminately by the EAC Partner States, the net gain to the citizen and on the economic well-being of the region would be significant. Cumulatively, considerable efforts aimed at removing NTBs in the EAC could lead to the following positive impacts:

⁵² Celine Carrere and Jaime de Melo, 'Notes on detecting the effects of non-tariff measures', *CERDI working papers*, 2009/32 (2009).

⁵³ ODI, 'Resolving the unresolved non-tariff barriers in the East African community', 1 January 2016.

- a. The total intra-EAC trade volume rises by up to 13% where there are no discriminatory trade barriers;
- b. The real Gross Domestic Product (GDP) of the EAC Partner States rises by around 0.5%, and consumer welfare by 0.3-0.4%;
- c. Where the targeted NTBs are those affecting transportation of goods, the net effect is even greater with potential GDP impact of +2.8% to +1.7%;
- d. Consumer welfare gains are registered, ranging between +2.2% to 1.5%;
- e. The skills premium as measured by the relative wage of skilled to unskilled labour rises by 0.6% to 0.2% across the EAC Partner States;
- f. Average prices for consumer goods and traded commodities climb down significantly based on reduced cost of cross-border trade, with an average price fall of 2.8%;
- g. Looked at through the prisms of SDGs and the African Union's Agenda 2063, elimination of all NTBs may have a maximum combined poverty reduction of between 5.3% to 3.7% for the EAC Partner States; and
- h. Even more interesting is the distributive benefits of indiscriminate elimination of NTBs. Even though employment effects may be small, a significant reduction in the transport and logistics NTBs may reduce the prices paid by the poorest economies in the EAC. By way of example, elimination of barriers may reduce the purchase price for unskilled workers in Tanzania by almost 2% in sensitive products such as textiles.

3. Administrative mechanisms in handling NTBs

The EAC NTBs Act recognises that Partner States play a crucial role in facilitating trade. Correctly, the Act places the burden of eliminating trade

barriers on trade policy makers – government leaders. ‘The identified NTB shall, at the very first instance, be subjected to bilateral discussion between the affected Partner States.’⁵⁴ To enable bilateral negotiations, the Act creates the National Monitoring Committees (NMCs) for each Partner State, composed of trade officials and the private sector, with the following duties:⁵⁵

- a. Developing processes for elimination of NTBs in their respective Partner State;
- b. Monitoring the process of elimination of the NTBs in their respective Partner State;
- c. Receiving reports and complaints from affected parties on the existence of NTBs in their respective Partner State;
- d. Identifying NTBs that exist in their respective Partner State and notifying the concerned organ, institution or public authority for elimination action;
- e. Referring report or complaint of an affected party to the NMC of another Partner State, where the report or complaint is with regard to an NTB that exists in that other Partner State;
- f. Advising their respective Partner State on the policies and laws that are NTBs in nature.

The NMCs work is supported by the National Focal Point (NFP), composed of trade policy makers and whose main activities are:⁵⁶

- a. Initiating policies and strategies on the elimination of NTBs in their respective Partner States, and submitting to NMC for approval;
- b. Coordinating the activities of the NMC;
- c. Facilitating the implementation of the EAC Time-bound Program and monitoring its implementation;

⁵⁴ EAC NTBs Act, Section 10.

⁵⁵ EAC NTBs Act, Section 7.

⁵⁶ EAC NTBs Act, Section 8.

- d. Disseminating information to the business community within the EAC on NTBs identified within their respective Partner State and the steps being taken to eliminate them;
- e. Collaborating with NFPs and NMCs of other Partner States to facilitate the implementation of the EAC Time-bound Program;
- f. Referring the report or complaint of an affected party to the NFP of another Partner State, where the report or complaint is with regard to an NTB that exists in that other Partner State;
- g. Tracking and monitoring any new NTBs in the Community and notifying the NMC of the NTBs; and
- h. Submitting periodic reports of the NMC to the EAC Council of Ministers.

The NMCs have wider representation including government officials, trade agency officials and private sector representatives. The NFP, on the other hand, is a bureaucratic agency residing within the ministry responsible for the EAC affairs in each Partner State. It is considered the secretariat of the NMC. In setting up the NMC, the Partner States have wide discretion in determining who becomes a member of the Committee. In reality, the Committees are flooded with bureaucrats and thin representation of the private sector. In terms of duties, there is notable overlap of duties between the two bodies, and this could present a challenge when executing their respective mandates.

The Act provides that where an NTB is reported or has been identified, the NMCs of the concerned Partner States should organise a discussion on how to resolve it.⁵⁷ This is the foundation for bilateral negotiations. In reality, these discussions drag for months or even years, and are not considered expedient means of resolution. On the positive side, products of such negotiations usually lead to stability in handling identified NTBs.

It is envisaged that not all NTBs submitted for bilateral negotiations will be resolved. The Act provides that where no resolution is achieved through bilateral discussions, the complaining Partner State shall refer the matter to

⁵⁷ EAC NTBs Act, Section 10(1).

the Secretary General of EAC for onward reporting to the EAC Council of Ministers. There is no clear indication of how this notification process should be carried out, and whether the trader who reported the NTB is entitled to communication between their NFP and the Secretary General.

The law does provide, however, that the complainant (trader) may refer the matter on their own to the Secretary General if his Partner State does not do so within thirty days.⁵⁸ On its face, this seems like a good path for an affected trader to get involved in the NTB resolution process. The law does not, however, specify the timelines within which the bilateral negotiations should be concluded. In theory, the negotiations could go on for years without resolution. All this time, the affected trader will not have recourse until the Partner States declare that negotiations have failed.

Generally, states prefer mutual agreements when dealing with NTBs. The main concern around mutual agreements has to do with the fact that often, states do not get to conclude their agreements, thus leaving non-tariff barriers to persist. A problem that can arise with this mechanism is that Partner States do not always agree on the best strategy for the elimination of NTBs. Although mutual agreement is the fastest way to resolve NTBs, discussions may sometimes take a long time to be concluded, thereby allowing NTBs to persist, negatively impacting intra-EAC trade.

In the early establishment of GATT, for example, trade disputes were settled diplomatically. This not only allowed a resolution that produced clear winners and losers but also meant that more neutral outcomes were explored first before sanction-backed solutions were considered.⁵⁹ This is also true in the case of EAC where Partner States prefer to handle trade conflicts through bilateral discussions. Upon the Secretary General receiving a notification of an unresolved NTB, they are required to notify the Council of Ministers for further action.⁶⁰ It is worth noting that the Council of Ministers is a body of officials representing the respective Partner States. Its decisions are primarily reached by consensus.⁶¹ The Council of Ministers may itself take steps to re-

⁵⁸ EAC NTBs Act, Section 10(3).

⁵⁹ Buckman, *Global trade: Past mistakes, future choices*, 70.

⁶⁰ EAC NTBs Act, Section 12(1).

⁶¹ EAC Treaty, Article 15(4).

solve the NTB or, where it considers expedient, refer the matter to the EAC Committee on Trade Remedies.⁶²

Section 6 of the EAC NTBs Act introduces a compensation scheme for traders aggrieved by NTBs. It places the obligation to determine the dispute and to set compensation on the EAC Committee on Trade Remedies. While this is a noble feature of the law, the said Committee has not been set up leaving traders with no defined path to access remedy. A trader affected by NTBs only has recourse to judicial mechanisms through the East African Court of Justice (EACJ) after the full cycle has been exhausted, including the stage of the Committee on Trade Remedies.⁶³

In the absence of judicial remedies, traders have to make use of available administrative mechanisms. A major challenge with administrative processes is that directives, such as a recommendation to impose a sanction on non-complying parties, can be ignored as a result of political goodwill between Partner States.⁶⁴ A legally binding mechanism that provides for sanctions that can be imposed by the Council should be adopted to ensure compliance.

The EAC approach focuses on promoting national-level focal points and monitoring mechanisms. While this is an important step towards a formal notification procedure, it is not sufficient to inform elimination of NTBs. This remains one of the weakest links in the EAC policy on NTBs elimination.⁶⁵

4. The place of judicial mechanisms in eliminating NTBs

The EAC established a regional judicial mechanism in the form of the EACJ. The mandate of EACJ is to interpret and apply the EAC Treaty, interpret Community laws and resolve disputes related to the Treaty and the

⁶² EAC NTBs Act, Section 12(2).

⁶³ EAC NTBs Act, Section 12(4).

⁶⁴ Craig Mathieson, 'The political economy of regional integration in Africa: The East African Community report', *European Centre for Development Policy Management*, 2016.

⁶⁵ Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community'.

Community.⁶⁶ The EACJ is set up under Article 9 of the EAC Treaty.⁶⁷ It is divided into two divisions – the First Instance and the Appellate Division. The First Instance determines matters brought to the attention of the Court for the first time, while the Appellate Division determines appeals from decisions of the First Instance.⁶⁸ The Court currently sits on *ad hoc* basis, four times a year. This is already a challenge to the dispensation of justice, with matters taking long to be resolved.⁶⁹

The EAC is established as a people-centred Community.⁷⁰ The Treaty emphasises good governance and participatory processes that include granting voices to the private sector and civil society.⁷¹ This participatory approach must be considered also in the context of elimination of NTBs. As already highlighted, the administrative processes set out to deal with NTBs are not participatory and are largely bureaucratic. The role of the private sector, the civil society and the people generally is blurred with government officials getting prominence in the process. In *East Africa Law Society and 4 Others v Attorney General of Kenya and 3 Others*,⁷² the Court authoritatively interpreted the Treaty and gave life to the meaning of a people-centred approach to integration by finding that the process of amending the Treaty without involving non-state actors was not consistent with the people-driven values of the Treaty.

The EACJ's mandate puts it at the zenith of resolving disputes in the EAC, especially those relating to integration. As already observed, the main driver of integration is trade, hence, the EACJ is important in resolving trade disputes. As the judicial organ of the Community, the EACJ has a cardinal responsibility in interpreting and ensuring adherence to operational principles

⁶⁶ EAC Treaty, Article 27.

⁶⁷ Article 9 sets up the court as a judicial organ of the Community.

⁶⁸ EAC Treaty, Article 23.

⁶⁹ Gerald Andae, 'EACJ registrar calls for expanded court sittings as region's cases soar' *The East African*, 14 April 2021.

⁷⁰ EAC Treaty, Article 7(1).

⁷¹ Article 6(d) of the Treaty provides as principles of the Community good governance, equity, social justice, and respect for human rights.

⁷² *East Africa Law Society and 4 others v Attorney General of Kenya and 3 others* (Ruling on Jurisdiction), 3, EACJ (2007).

and objectives laid down in the Treaty. Without a doubt, the EACJ is an important and indispensable institution in ensuring predictable and harmonious resolution of disputes in the EAC, including trade disputes.⁷³

So far, the EACJ has not received significant trade dispute matters over the EAC trade regime. This could be attributed to the infiltration of provisions that establish administrative committees that chip parts of the jurisdiction of court.⁷⁴ This position is given credence by Ruhangisa who notes that:

much as the EACJ is the main judicial organ of the Community that has been tasked with the resolution of disputes arising out of the Treaty and other Community laws, the EAC continues to establish other quasi-judicial bodies or mechanisms with the same mandate as the EACJ. The Customs Union and Common Market Protocols are an example where such parallel mechanisms have been established with potentialities of making [the] EACJ redundant or be a cause for conflicting and confusing decisions in the region.⁷⁵

The EAC could learn from the WTO system. The binding dispute settlement process under WTO's Dispute Settlement Understanding (DSU) has considerably addressed international trade disputes.⁷⁶ The reality that NTBs will be subjected to enforceable legal or judicial processes is an incentive for member states to work towards eliminating them. The EAC has placed much reliance on goodwill of Partner States acting collectively as the Council of Ministers to enforce the decisions of EACJ as well as laws enacted by EALA. Even Section 17 of the EAC NTBs Act that grants the Council of Ministers some powers to eliminate NTBs only serves as a suggestion to the Council to consider sanctions against violations. There is no compelling incentive through tangible threats of sanctions for a Partner State to consider eliminating identified NTBs or take steps to ensure that new ones do not emerge.

⁷³ Philomena Apiko, 'Understanding the East African Court of Justice - the hard road to independent institutions and human rights jurisdiction', Policy brief *ECDPM*, 2017.

⁷⁴ James Otieno-Odek, 'Judicial enforcement and implementation of EAC law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community Law*, Brill, 2017.

⁷⁵ John Eudes Ruhangisa, 'East African Court of Justice: Ten years of operation (achievements and challenges)' 2011.

⁷⁶ Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African community'.

While the administrative processes set out under the EAC Treaty and the EAC NTB law provide flexibility for bilateral discussions, there is need for predictability of trade dispute resolution.⁷⁷ Individual traders and businessmen should have certainty as to what they should expect when they submit a complaint or dispute, and be assured of reasonable timelines within which a decision is expected. This is largely absent in the quasi-diplomatic administrative processes highlighted above, yet, capable of being introduced in judicial processes.

EAC could adopt a hybrid system, with administrative processes being backed by judicial mechanisms, and with the option for individual traders to pursue judicial remedies directly without being coerced into waiting for uncertain administrative processes. EAC could learn from the WTO's Dispute Settlement Understanding system on resolution of trade disputes, combining judicial and administrative mechanisms. While the DSU system is not fool proof, EAC could adopt a modified system that donates the powers to determine trade disputes and prescribe remedies to a specialised division of EACJ. This, unlike the WTO system that relies on *ad hoc* panel of experts to support the Dispute Settlement Body (DSB), will have consistent patronage of qualified judges selected based on skills and experience. They will be manning the Court on regular basis and get accustomed to handling simple and complex trade disputes.

A trade dispute resolution system does not have to be perfect; it only needs to be predictable and reliable. The WTO system enshrined under the DSU, for instance, is widely popular among WTO Member States for its predictability despite its inherent weaknesses.⁷⁸ Since its inception in 1995, the system has processed over 573 disputes and issued near 400 determinations. The WTO system places emphasis on timely disposal of disputes and effective remedies. These two elements are key ingredients to the success of a trade dispute system.⁷⁹ These key ingredients can almost be guaranteed where an effec-

⁷⁷ Kirk, 'Addressing trade restrictive non-tariff measures on goods trade in the East African community'.

⁷⁸ Marco Bronckers and Freya Baetens, 'Reconsidering financial remedies in WTO dispute settlement', 16(2) *Journal of International Law* (2013) 281.

⁷⁹ Arie Reich, *The effectiveness of the WTO dispute settlement system: A statistical analysis*, European University Institute, 2017.

tive judicial system exists to complement the administrative structures. In the EAC, this system can be achieved through empowering the EACJ to entertain trade disputes, and by addressing structural challenges faced by the court.

Absence of a clear and compelling enforcement mechanism of decisions remains a challenge to both the EACJ and other decision-making bodies in the EAC. In the case of EACJ, the Treaty provides that decisions not relating to monetary compensation shall be submitted to the Council of Ministers for enforcement.⁸⁰ The Council of Ministers, as already observed, is a bureaucratic body which makes decisions by consensus. This enforcement procedure basically renders decisions by the EACJ not relating to monetary compensation unenforceable where there is no goodwill among the Partner States. The WTO model of negative consensus, where decisions of the DSU's Appellate Body are considered adopted by the WTO Council without need for a vote, works well and a similar system could serve EAC well too.⁸¹

5. Conclusion: Case for review of the EAC NTBs Law

It is not enough that the EAC has a Customs Union. The benefits of the Customs Union are lost and remain vague if other trade-restricting measures are not addressed. Indeed, effective enjoyment of negotiated tariff arrangements requires states to actively aim at facilitating cross-border trade by addressing NTBs.⁸²

Access to remedies by traders is central to resolving NTBs. Remedies should give assurance and confidence to affected traders that cross-border trade works. Further, they should be effective and deterrent enough to make trade officials and governments to work towards eliminating causative acts and omissions. Lack of effective remedies in cases of NTBs is a strong incentive for offending governments not to work towards their resolution in a timely manner or at all.

⁸⁰ East African Court of Justice, 'Frequently asked questions', www.eacj.org.

⁸¹ World Trade Organisation, 'WTO bodies involved in the dispute settlement process', www.wto.org.

⁸² Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

This paper has noted the adverse effects of NTBs on intra-EAC trade, with a stunted growth of 13% while 87% of trade takes place with partners outside the EAC. This stunted growth is largely blamed on unresolved NTBs. The growth of the EAC Partner States and achievement of the SDGs will be fast-tracked if intra-EAC trade is encouraged through elimination of disruptive agents like NTBs. Free movement of goods in intra-EAC trade will not be achieved even after full realisation of the Customs Union as long as NTBs persist, and no tangible efforts are deployed to eliminate them yet.⁸³

It is observable that countries that are experiencing economic successes are, generally, liberal to cross-border trade. They employ suitable measures to ensure low cost of trade; improved infrastructure to support movement of goods and services; have less regulatory requirements and in most cases these regulatory functions are collapsed into one regulatory bucket; and they enjoy good governance and low levels of corruption and bureaucratic inefficiencies.⁸⁴

The EAC NTBs Act has inherent weaknesses that require resolution if the flow of cross-border trade is to be improved. These weaknesses include the uncertainties of the administrative process, absence of clear path to remedies and the peripheral role given to the EACJ.

5.1 Recommendations: Addressing deficiencies in the existing mechanisms

To ensure realisation of the intended aim of resolving NTBs in the intra-EAC trade, the EAC NTBs regime should be reviewed and improved with a focus on the following areas:

⁸³ Leonard Obura Aloo, 'Free movement of goods in EAC', in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds) *East African Community Law*, Brill, 2017.

⁸⁴ Mengistae Taye, 'The business environment in Southern Africa: Issues in trade and market integration', World Bank, 2010.

5.1.1 Reviewing composition of the national monitoring committees

The discretion of Partner States to determine who sits in NMCs, including from the private sector, is prone to abuse considering that open governance is at embryonic stages in many EAC Partner States. The law should clearly delineate the representation of private sector, civil society, trade policy experts and trade association officials as these are critical players in cross-border trade.

5.1.2 Harmonising mandates of the two agencies (NMCs and NFPs)

The overlapping mandate of the NMC and the NFP should be reviewed and addressed. While the NFP is a government agency, the NMC is a multi-sectoral agency comprising of government and private sector representation. To avert possible tension while executing their respective mandates, the law should provide that the NMC is responsible for identifying and initiating processes for elimination of NTBs. The NFP, on the other hand, should provide secretariat support to the NMC.

5.1.3 Granting more say to affected traders

The emphasis of bilateral negotiations in eliminating NTBs is an unsustainable one. It is also least disruptive as it involves diplomatic discussions. There are deficiencies in the processes laid out under the law. The processes largely ignore the affected traders. The law only recognises the affected traders on two instances – where a report is not made to the EAC Secretary General, and where the traders are dissatisfied with the final outcome of the NTB resolution process. The processes, as already discussed, could take years. The law has no clear demarcation of timelines, as they are often stated with overlaps.

In reviewing the law, there is need to grant more voice to traders. They should be entitled to be copied in correspondence between the Partner States during the bilateral negotiations, or at least entitled to updates on a regular basis. They should also be copied in the notification to the Secretary General where bilateral negotiations fail, or should be notified of the failure of the negotiations.

5.1.4 Enhancing access to judicial remedies

The requirement that an affected trader can only seek judicial remedies after exhaustion of the administrative process is itself draconian and spiteful on the rule of law. It is cumbersome and even punishing, to expect a private trader to exhaust remedies that are largely controlled by government bureaucrats and where the trader has no right to information or notification. In reviewing the law, affected traders should be entitled at any time to seek judicial remedies where they do not have confidence that the administrative mechanisms will bear fruit or where administrative processes do not return results within reasonable periods.

In a nutshell, the process of enhancing access to remedies by traders is essential in resolving NTBs. The access should be made available through administrative mechanisms that are easy to access and transparent, as well as through low-cost judicial processes that are easily available to every trader.

5.1.5 Adopting negative consensus

The EAC Treaty, the EAC Common Market Protocol as well as the EAC NTBs Act provide that decisions shall, generally, be made by consensus. Attaining positive consensus has been a challenge in an area with competing political and economic interests. To make decision-making flow free and easy, the law should be modified to provide for negative consensus. This means that once a committee, for instance the Trade Remedies Committee, has made a decision, the relevant administrative body like the Council of Ministers is considered to have adopted it unless by consensus they vote to reject the decision. The system is working under the WTO DSU, and the EAC Partner States already enjoy the efficiency in the system through their membership in the WTO.

5.1.6 Simplification of procedures

Procedures are essential to free flow of regional trade. They should always be simple, easy to understand and easy to comply with. While the EAC

has introduced the Simplified Trade Regime (STR)⁸⁵ to enhance understanding of regional trade policy and laws, knowledge of these regulations remain low even among custom and border officials.

The EAC Rules of Origin regulations remain one of the least understood of the facets of the Customs Union and the Common Market. For ease of compliance and to enable domestic producers in the EAC to derive true benefit of the low intra-EAC tariffs, the EAC Partner States should:

- i. Provide intra-EAC exporters with options as to which rule they should apply, based on net benefit as perceived by each. This could, for instance, provide a choice between a change in tariff heading test or a reasonable value-added rule;
- ii. Completely eradicate Rules of Origin requirements that are production process-specific;
- iii. Eliminate Rules of Origin certificate requirements for products whose preference margins fall below a defined percentage;
- iv. Apply the Rules of Origin regulations indiscriminately, fairly and consistently to avoid unhealthy competition; and
- v. Invest more in trade and customs intelligence and pass the benefits to especially large-scale exporters who should not be required to produce certificates of origin for each item but simply undergo periodic assessment to ensure they are complying with Rules of Origin regulations.

5.1.7 Facilitating regulatory convergence

Duplicity of roles and multiplication of governmental authorities involved in regulating regional trade has added more confusion than aid to intra-EAC trade. Being a common market, the EAC must now consider establishing supranational authorities to regulate cross-border trade as opposed to leaving it in the hands of national regulators. Joint standards and inspection

⁸⁵ Trade Mark East Africa, 'Why informal cross border trade remains important', 29 January 2015.

authorities, for instance, will reduce instances of non-recognition of standards by one country of another's.

The introduction of One Stop Border Posts (OSBPs) across intra-EAC borders is a positive step towards regulatory convergence. The OSBPs, however, still operate as separate borders only providing the convenience of meeting officials from the two border countries under one roof. A joint-border post should in the ideal, be managed centrally and jointly by the two border states. This will reduce bureaucratic burdens, heavy documentation and other redundant trade restrictions.

5.1.8 Harmonisation of tests and standards

Cumbersome and expensive standards and testing processes have been identified as a major barrier to trade in the EAC. Each Partner State has its own national standards and expects imports from other Partner States to comply with these standards. While the Community laws provide for mutual recognition of standards and reciprocity, in reality each Partner State rigidly holds to her standards. Sadly, there are also no testing facilities at the borders and traders often incur additional costs to take products for testing at the capital cities where testing facilities are located.⁸⁶

While standards and tests are aimed generally at protecting interests of the public, in the EAC there are no safeguards by which new or current technical regulations are assessed to ensure they are consistent with public policy objectives. In addition, new standards are formulated without a baseline survey on capacity of Partner States and the private sector to comply with them. The overall effect is that these standards undermine regional trade and product competitiveness.

To address this challenge, the EAC Partner States should work towards establishing common standards and by adopting existing universal standards, adjusted to accommodate the realities and capacities of private players and

⁸⁶ Luise Nudi Rasanga, 'Harmonization of standards in the East African Community: Challenges and opportunities (2000-2012)', Unpublished masters of arts in international studies dissertation, University of Nairobi, August 2013.

states in the region. This will make standards and testing regulations more efficient, responsive and in line with public policy objectives while facilitating regional trade.

In addition, Community laws and policies should target the current over-reliance on bureaucratic orders and commands on regional trade. High-handed traffic police officers on trade routes purporting to enforce standards, overzealous border officials and strict unbeneficial testing requirements that focus on inspection manually or through slow electronic scanning of every item passing through the border is slowing regional trade. This ends up tying up scarce regulatory and customs resources in mundane activities thus limiting capacity of these crucial facilities to carry out effective robust border management. The EAC Partner States could, for example, agree on a policy that individual testing and scrutiny at border posts shall be applied, based on trade and security intelligence, on traders or sectors for which the risks are greatest for circumventing national or regional trade policy measures.⁸⁷

5.1.9 Transparency in regulatory information

Difficulty in accessing regulatory and cross-border trade information has been noted in the EAC. There are no centralised websites or information resource centres where one can access all information under one roof. The EAC Secretariat should prioritise setting up a centralised information resource facility that provides simplified information on all regulatory requirements to cross-border traders. The resource should be a collaborative facility where each Partner State has a room (even virtual) and provides information, regulatory forms, tariff books and fees schedules to traders. This will not only reduce incidents of non-compliance by traders based on lack of information, but also reduce the time spent at the borders seeking clarifications and exemptions. Where states seek to introduce new regulatory measures, the resource centre should have this in time to enable traders and their associations to submit comments on them. These comments could be treated as forming part of the regulatory impact assessment.

⁸⁷ Gillson, 'Deepening regional integration to eliminate the fragmented goods market in Southern Africa'.

5.1.10 Transparent and predictable trade dispute resolution system

The EAC trade dispute system is unpredictable: it is not cast on a time-bound regulation, and it does not adequately provide for the role of judicial settlement and remedies. As opposed to the WTO's DSU system that emphasises judicial processes over administrative ones, the EAC system relies heavily on an administrative mechanism that is not backed by easily enforceable legal sanctions for violators. There is little incentive for states to comply with the dispute settlement system at the moment.

The EACJ should be empowered to determine trade disputes. Ideally, the EAC Trade Remedies Committee should be established as a division under the EACJ with specific mandate of determining trade disputes. This will create specialisation in the Court while ensuring that trade disputes receive elevated attention beyond lip service that characterises the present system. The WTO's DSU system could be adopted with specific modifications as already proposed, including setting the EAC's reasonable time-bound processes to ensure disputes are settled without unreasonable delays.

The foundation of the EAC integration is trade, and the EACJ should be sufficiently capacitated to administer trade disputes. As opposed to the current state where the Court sits on *ad hoc* basis three times a year, a division available on full time basis will ensure timely resolution of trade disputes. Having a full-time bench to hear trade disputes will require budgetary reviews of the EACJ's operations and provision of more resources.

There is further need to review the EAC Treaty to give express jurisdiction to the EACJ to administer trade disputes. Parallel mechanisms have been introduced, with mandates competing with the Court's thus clipping its jurisdiction. These should be addressed and harmonised.

In addition, the role of national courts should be highlighted and a collaboration mechanism with the EACJ be established and cast in policy. National courts will play an important role in ensuring decisions of the EACJ on trade disputes are implemented by Partner States. This will complement the role of the administrative mechanisms like the Council of Ministers and the Summit through sanctions and negotiated compliance matrices.

5.1.11 Reclassification and systemised elimination of NTBs

There is need to adopt a simple procedure for classifying NTBs and eliminating them. EAC Partner States, except South Sudan, are members of the WTO and, therefore, have access to an already simplified regime by WTO. All existing NTBs, as set out under the EAC Time-bound Program, should be microscopically examined against the WTO compliance benchmarks. This will reveal whether the NTBs are non-discriminatory, transparent and do not constitute an unnecessary restriction to cross-border trade. Once established that an NTB fails the WTO compliance test, the violating Partner State should be given a reasonable time to modify or altogether abolish the barrier. Where non-compliance is noted, the already discussed enforcement mechanism, including sanctions, should be triggered.

5.1.12 Regulatory impact assessment

The capricious manner in which new regulatory regimes are introduced by Partner States scores highly as a contributor to persistent trade barriers in the EAC. The area of standards is one of the sticky regulatory regimes most abused, with Partner States raising anything at any time as standard to block trade commodities from other Partner States.

Worth observing, imposing shifting and cumbersome regulatory requirements on especially small-scale cross-border traders is economically counter-productive and leads to corruption as these traders seek to circumvent these already difficult requirements. The EAC, for instance, has about eight standards applying to dairy produce exporters in the intra-EAC trade. Because these standards were mechanically adopted without appreciating the technological and economic constraints in the region, compliance remains at an all-time low.⁸⁸

Compliance with regulatory requirements and standards is accompanied by financial liability to traders. Creating a new regulatory measure or standard without appreciating this reality and its impact on trade is, to say the least, injudicious.

⁸⁸ Michael F Jensen, Nicholas Strychacz, and John Keyser Michael, 'Non-tariff barriers and regional standards in the EAC dairy sector', *Africa Trade Policy Notes*, note 2, June 2010.

Holding Partner States to their Treaty commitments, the EAC should have a policy requiring all Partner States to undertake, and submit reports to the EAC Council of Ministers, in-depth regulatory impact assessment of the proposed regulatory measure that could restrict intra-EAC trade. Such assessment will inform decision-makers at regional level on suitability of the proposed measures and to consider other less restrictive, yet, effective options that could be adopted.

5.1.13 Establishing an autonomous trade monitoring mechanism

NTBs persist partly because monitoring mechanisms are weak in the EAC. The capacity of the EAC Secretariat to adequately monitor NTBs and regulatory compliance is constrained. Borrowing from the Association of Southeast Asian Nations (ASEAN) model,⁸⁹ the EAC should consider setting up a trade monitoring directorate with specific resources dedicated to monitoring regional trade, assessing impacts of NTMs and new NTBs, without necessarily relying on periodic reports by Partner States. This mechanism will not only complement the role of the national monitoring mechanisms but will also serve as a crucial think-tank for EAC policy organs. With such a directorate, the EAC will readily assess impact of NTBs and new NTMs and also easily gather crucial statistics on impact of trade policies, national regulations and Community laws on trade and economic integration in the region.

⁸⁹ Association of Southeast Asian Nations, 'Guidelines for the implementation of ASEAN commitments on non-tariff measures on goods,' 2022.