

**POLICY AND LEGAL PROPOSALS FOR ELIMINATING NON-TARIFF
BARRIERS IN THE EAST AFRICAN COMMUNITY**

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CHAPTER ONE

INTRODUCTION

1.0 PREFACE

In the view of multilateral trade analysts, the removal of NTBs is much more important than tariff liberalisation or preferential trade agreements for boosting intra-state or intra- region trade.¹By definition, NTBs are quantitative restrictions and specific limitations, other than tariffs, that act as obstacles to trade, that may be embedded in government laws, regulations, practices and requirements at the national and local level. They are imposed to safeguard various legitimate and sometimes illegitimate reasons which include safeguarding health, environment, internal development and expansion of industries. Their effect therefore is that they cause delays and increase the cost of doing business which in turn hinders the free movement of goods, services and factors of production.² This in essence slows down market vibrancy or even hinders trade totally. Despite these negative effects on trade, EAC member states have continually imposed NTBs against goods from amongst other member states, thus diminishing intra-EAC trade which in essence negates the very intention of the regional co-operation pact whose aim as entrenched in Article East African Community Treaty and its incidental protocols was to expand the EAC market regime through trade liberalisation.

The claim of the existence of NTBs in intra EAC trade is evidenced by a number of NTBs that have been imposed by the EAC member states against goods from their counterparts as identified

¹Matthews, Alan, 'Doha negotiations on agriculture and future of the WTO multilateral Trade System.'(QA Rivistadell'Associazione Rossi-Doria,2014). See also Hertel T. 'The Earnings Effects of Multilateral Trade Liberalization: Implications for Poverty in Developing Countries.'(World Bank Economic Review, 2004) 18(2) 205-236. andLimao N., 'Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the United States.' (The American Economic Review,2006) 96(3)

²Ascent Limited, 'East African Integration- Dynamics of Equity, Trade, Education, Media and Labor.' (Nairobi, 2011)

and enumerated by the EAC secretariat. They include non-recognition of the EAC certificates of origin certified by Revenue Authorities, restrictive trade requirements by regulatory bodies, numerous levies and charges including discriminatory excise duties, red tape at border points and other deliberate technical barriers to trade.³

As has been stated, the East African Community Treaty entrenches liberalised trade within its provisions. In this respect it provides that; in order to promote the achievement of the objectives of the Community the Partner States shall develop and adopt an East African Community trade regime and co-operate in trade liberalization and development of the trade regime.⁴ On its part, the East African Common Market Protocol⁵ provides for freedoms such as free movement of goods, labour, services, and capital⁶ with the aim of significantly boosting trade and investments and making the region more productive and prosperous. On its part, the East Africa Community Customs Union Protocol provides for the elimination of internal tariffs and other charges of equivalent effect; and the elimination of non-tariff barriers.⁷ The imposition of NTBs by EAC member states therefore, contravenes the letter and spirit of the stated pieces of law, contradicts trade liberalisation and negatively impacts on the vibrancy and development of the EAC Common Market.

With such a firm legal backing for liberalised intra EAC trade, the existence and continued use of NTBs raises various issues. Fundamental amongst them is; do the existing laws lack the

³EAC, 'Synthesis Report on Non-Tariff Measures on Goods Trade in the East African Community.' (Arusha, 2008.)

⁴ Article 74 of the East African Community Treaty

⁵ The Protocol on the Establishment of the East African Community (EAC) Common Market (adopted 20 November 2009, entered into force 1 July 2010)

⁶ Article 2(40) of the East African Common Market Protocol

⁷ Article 5 of the East African Common Market Protocol

ability of providing the EAC a liberal market? If so, how else can the spirit of a liberal market as contained in the EAC treaty be attainable?

This paper thus seeks to come up with policy and legal proposals that can help in the elimination of NTBs in the EAC so as to attain a liberalised trading regime as envisaged in the East African Community Treaty and its incidental protocols. To achieve this, the paper is organised as follows; chapter one makes an introduction to the research topic and reviews literature relevant to the study. Chapter two seeks to disambiguate NTBs. This is to be achieved through a detailed description of NTBs through setting out the operational definitions thereof, describing the measures considered as NTBs, how the EAC law deals with the NTBs as well as how international trade law deals with and resolves them. This will be followed by an analysis on how areas of best practice such as NAFTA (North America Free Trade Area) and EU deal with NTBs this will be used to highlight the best practices that the EAC should implement so as to successfully attain a free market regime. Chapter Four analyses EAC trade legal and institutional framework and suggests reform options that can enable the EAC attain a free trade regime. This is achieved through analyzing the place of NTBs in the EAC Treaty, the East African Community Customs Union Protocol and the East African Community Common Market protocol. This will be followed by a detailed descriptive analysis on decision making process on NTB related dispute resolution, strengths, and weaknesses and how this impact at efforts to remove NTBs. This will also include a forecast to the past that analyses the mechanism for resolving disputes within the earlier EAC that collapsed in 1977 over NTBs, its effectiveness and the lessons it offers for current efforts towards NTB elimination. It also interrogates why traders are not filling cases at the EACJ and the efforts being undertaken by the EALA to ensure that the

EAC attains a free market regime. The chapter will conclude by highlighting the viable lessons from RECs such as the EU and NAFRA that can be used by the EAC to develop a policy that can help it deal with NTBs. Chapter four makes a conclusion to the study and makes recommendations thereof.

1.1 Background of the study

Regional integration in the EAC is not a recent endeavour. The earliest attempt at integration can be traced to the year 1917. This was marked by the coming into place of the Common Customs Union between Kenya and Uganda in the same year. Tanganyika joined hands with the other countries and became a member ten years later in 1927. The second milestone was attained between the years of 1948 and 1961 by the coming into place of the East African High Commission. The third was the coming into place of the African Common Services Organization between the year 1961 and 1967. The fourth milestone was the establishment of the East African Community in 1967 which eventually collapsed in 1977. Key among the factors that contributed to the collapse was the continued use of NTBs which frustrated co-operation. The major NTB that is identified is the inability of the 1967 treaty to guarantee free movement of labour among the member states. The other NTBs included existence of the transfer tax which was an internal levy that represented a selective deviation from internal free trade therefore violating the common market ideal of absence of internal trade restrictions; failure to provide any central means of industrial allocation or common scheme official incentives; and the entrusting of the

coordination of some vital matters of the county to the council, often without specific guidelines.⁸

The collapse did not mark the total collapse of cooperation in the region. Upon the dissolution of the community, the Presidents of the three original member states signed the Agreement for the Division of Assets and Liabilities in 1984 which in essence was a mediation agreement. Key amongst its provisions was the need for the three States to explore areas of future co-operation and to make concrete arrangements for such co-operation. Out of this mediation agreement was born the East African Co-operation which lasted between the year 1993 and the year 2000 and marked by the establishment of the Permanent Tripartite Commission for East African Co-operation on November 30, 1993. With many benefits now trickling from the cooperation there arose need for more consolidated co-operation, as a result of which the East African Heads of State, at their 2nd Summit in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to start the process of upgrading the Agreement establishing the Permanent Tripartite Commission for East African Co-operation into a Treaty. This took 3 years and on 7 July 2000 upon the coming into force of the Treaty establishing the East African Community the East African Community was reborn.⁹

The objective of the EAC Treaty's as set out under Article 5 is to develop policies and programs aimed at widening and deepening cooperation among the Partner States in economic, social, and

⁸ N. Mwase, 'regional economic integration and the unequal sharing of benefits: background to the disintegration and collapse of the East African Community.' (Africareview, 1978) 8; 28, 31 as cited in S. Fizake, 'the treaty of East African Co-Operation.' (Minnesota journal of global trade law, 1999) 8; 127, 137

⁹ East African Community, 'History of the EAC' (Arusha, 2009)

<http://www.eac.int/index.php?option=com_content&id=44&Itemid=54> accessed 20.07.2014

other spheres of interest, for their mutual benefit. To this extent the EAC countries established a Customs Union in 2005 and a Common Market in 2010.

The EAC Customs Protocol's¹⁰ purpose is to liberalize intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the partner states, to enhance domestic, cross border and foreign investment in the Community and to promote economic development and diversification in industrialization in the Community. The EAC Customs Union was established to among other things ensure that non-tariff barriers to trade among the Partner States are removed.¹¹ It is without doubt that the two instruments contain in their letter and spirit the aspiration towards the attainment of a liberalized EAC market regime.

The existing NTBs however continue to make elusive the highly sought after liberal EAC market regime thus diminishing intra EAC trade. To contextualise the above claims, an analysis of import index was done with the following results; the value of Kenya exports to EAC countries expanded from KES 34 billion in 2000 to KES 84.2 billion in 2008, a growth rate of 169%.¹² However, the phased removal of internal tariffs from January 2005 to 2010 had some immediate negative impact to Kenyan exports to the region, with the value of exports to Uganda and Tanzania dropping immediately the Customs Union came into force in 2005. This is the period when the Partner States started coming up with numerous non-tariff barriers, based on the fear that Kenyan firms would take over the EAC market due to their relatively higher competitiveness

¹⁰Protocol on the Establishment of the East African Customs Union (Enacted: 2004-03-08 came into force; 2005-01-01)

¹¹Protocol on the Establishment of the East African Customs Union Article 2(4)(b)

¹²*Kenya National Bureau of Statistics; International trade statistics 2008' (2008)*

over their counterparts in the other two EAC founder Partner States.¹³ According to 2014 Economic survey Kenya's exports to East African Community have reduced by a total of 7.4 percent from about Kshs. 134 billion in 2012 to 124 billion in 2013. At the same time, Kenya's exports to Tanzania reduced from 46 billion to 40 billion in 2013 while exports to Uganda reduced from 67 billion to 65 billion and to Rwanda from 16 billion to 13 billion.¹⁴ This reduction is attributable to NTBs that were imposed by EAC member states against goods from within their counterparts in the community.

With the foregoing in mind, it is without doubt necessary that a research aimed at finding the solutions on how to combat NTBs is carried out. It is through such an initiative that market liberalisation can be successfully pursued within the EAC.

1.2 Statement of the Problem

Trade within the EAC common market is regulated by a number of multilateral and regional laws and regulations. These include but are not limited to WTO and GATT legislation, the EAC Common Market Protocol, the EAC Customs Union Protocol and the EAC Customs Management Act. All of the above mentioned pieces of legislation are constructed with the view of establishing a free market as is the spirit of the Marrakesh Protocol to the General Agreement on Tariffs and Trade Services.¹⁵ However NTBs continue to exist and impact negatively on the trade between the EAC member States and the full attainment of a liberal EAC market regime. The current policies, regulations and institutions that are in place have been unable to counter

¹³EAC (Secretariat), 'Non-tariff measures on goods trade in the East African Community; Synthesis report. (Arusha, 2008) Report No. 45708-AFR

¹⁴Kenya National Bureau of statistics, 'Kenya Economic Survey 2014' (2014)

¹⁵Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154

NTBs and create a free market area in the EAC. This paper thus seeks to generate policy and legal proposals that can help eliminate NTBs in the EAC so as to attain market liberalisation.

1.3 Theoretical Framework

Various legal theories exist in regard to the use NTBs in multilateral trade. A perusal of these theories reveals that in most of them, the use of NTBs in multilateral trade is discouraged except in the mercantilism theory which is a 16th century theory. Proponents of the theory opine that a nation's wealth depends on how much accumulated financial treasure in form of gold and silver there is within that nation. To accumulate this financial treasure and thus create wealth for the particular nation, the theory suggests that a nation must encourage exports and discourage imports. This in essence means that a nation should prevent goods from another nation coming into its territories at every available opportunity. The theory's major flaw as identified by critics is that the restrictions it suggests are in themselves an impediment to growth. This therefore denies a nation the opportunity to accumulate the financial treasure it seems to suggest.¹⁶ This is without doubt the theoretical basis upon which the EAC member states have fortified their trade ideologies if the numerous NTBs evidenced by research studies are anything to go by. This paper takes the position taken by the critics of this theory.

The theory of comparative advantage as set out by Adam Smith in the wealth of nations was custom made to counter the mercantilism theory. Under comparative advantage theory, free interstate trading is encouraged. This is because each state is encouraged to produce what it has a production advantage over another state and sell it to that state while buying from that other state

¹⁶Mansfield, Edward D., Marc L. Busch, 'the political economy of nontariff barriers: a cross-national analysis.' (International Organization, 1995): 723-749.

what it could not produce easily. This theory therefore destroys the mercantilist notion of one country benefiting by introducing a system where each of the countries party to a trading pact gain.¹⁷ The free trade thread continues to run in the theory of comparative advantage as propagated by David Ricardo in his work *Principles of a Political Economy*.¹⁸ This theory too identifies free intra state trading as a beneficial resource allocation strategy that reduces resource wastage through barrier induced delays that visit depreciation on trade implements thus reducing the returns there from.¹⁹ This paper adopts the comparative advantage theory as the most viable theory and most practicable theory to enable the EAC attain market liberalization.

Some of the criticisms of this theory are that it makes unrealistic assumptions of labor cost; it assumes that commodities are supplied in fixed proportions; it unrealistically assumes that commodity costs are constant and it ignores transport costs and the role of technology in international trade.

The issue of free trade versus protection has been in dispute since the eighteenth century. The arguments are complex and subtle, although the controversy itself is obviously. Franklin R. Root, 2000 gives a strong argument of the benefits from free trade. The principle of comparative advantage demonstrates that for the world as a whole free trade leads to a higher level of output and income than no trade. Free trade also enables each nation to obtain a higher level of production and consumption than can be obtained in isolation. Under perfect competition, free

¹⁷ *Ibid.*

¹⁸ David Ricardo, 'The Works and Correspondence of David Ricardo' in Piero Sraffa, M.H. Dobb (eds.) *Principles of Political Economy and Taxation* (Indianapolis: Liberty Fund, 2005) <<http://oll.libertyfund.org/titles/113>> accessed 20.10.2014

¹⁹ Levy, Philip I, '*Non-Tariff Barriers as a Test of Political Economy Theories*' (Economic Growth Center, Yale University, 2003).

trade achieves a worldwide allocation of resources that meets the requirements of optimality. It is impossible to make anyone better off (through reallocation) without making someone else worse off. Free trade achieves equality between each country's marginal rate of transformation in production (MRT) and its marginal rate of substitution in consumption (MRS) and the international terms of trade (ITT). In contrast, trade barriers prevent this equilibrium condition by creating divergences between the domestic and international prices of tradable goods. It follows, therefore, that trade barriers cause a suboptimal allocation of the world's factors of production and a lower world real income than would exist under free trade.²⁰

Thompson Henry analyses the results by trade protectionism from different stakeholders such as government, firms, employees and consumers. Protectionism redistributes income. Protection of an industry creates gains for some and losses for others. Those who enjoy the gains can be expected to favour protection. Government protection of domestic industry from foreign competition began the debate on free trade and the effects of economic policy which led to the study of economics.

International economists have consistently advocated openly facing international competition with a policy of free trade. Both theory and evidence suggest that income rises and is more evenly distributed when countries pursue free trade. Comparative advantage is the foundation of international trade and one of the most universal principles in science. Nations, firms, or individuals that ignore their comparative advantage will be less efficient and ultimately not as well off as with specialization and trade. Protectionism restricts the ultimate beneficial effects of

²⁰ Franklin R. Root. *International Trade and Investment. Seventh edition*(The Wharton School University of Pennsylvania. South-Western Publishing Co., 2000).

exploiting comparative advantage through free trade. Protectionism restricts international trade, lowering national income and distributing income more unevenly. Economists have yet to persuade governments to give up protectionism.²¹

Tariffs, quotas, and other non-tariff barriers on imports are common government policy. The ultimate reason for protectionism is simple. Those who benefit from the policy, the owners and workers in the protected industry, are organized and willing to spend resources to lobby and influence political decisions. Disorganized consumers and taxpayers do not generally realize the extent of their losses with tariffs. The amount of the loss for each individual consumer is not large enough to spend resources lobbying against the harmful policy. The benefits of protectionism are concentrated but costs are thinly spread. The overall inefficiency of protectionism prevails.

As most nations and regions continue to become more involved in the world economy, it is critical that the states, in their economic development efforts, explore the foreign trade structure of their economies to obtain a clearer understanding of where their industrial comparative advantages lie. With this knowledge, a state will be able to maximize the benefits of foreign trade as it more efficiently targets its limited economic development resources. From Lea Ann Stagg's point of view, any one state's perspective, exporting to a foreign country or 'exporting' to another state represents equally good ways of generating new wealth. That is, both bring in additional income not otherwise possible had the state served a local market alone. To the extent that states rely on domestic trade to generate new wealth, however, one state's gains often comes

²¹ Thompson, Henry, *International Economics: Global Markets & International Competition*, (World Scientific Publishing Company, Incorporated, 2000). pp111

at the expense of another. By reaching new markets, states can actually increase the economic pie, rather than merely compete with each other for existing markets²².

1.4 Objectives of the study

The general objective of this paper is generating proposals through which the EAC may attain a liberalised trade regime through the elimination of NTBs.

The main objective of this study is to identify the loopholes that allow the imposition of NTBs and propose policy and legislative reform regulating the conduct of trade within the EAC common market so as to eliminate the existing NTBs imposed by member states.

The specific objectives;

1. To analyse the EAC trade regime and the effects of NTBs thereof
2. To analyse how the EAC Treaty and its Protocols deal with NTBs
3. To analyse how other RECs have dealt with NTBs as a source of lessons for EAC's reform agenda
4. To propose changes required in the legislative and policy framework within EAC to eliminate non-tariff barriers.

1.5 Justification of the study

Developed countries owe their ever expanding export and import market shares to liberalised trade amongst themselves and within the regional trade pacts to which they belong. Liberalised trade is less practised among developing countries a factor that may perhaps explain the low

²²Jing Ma, *Free Trade or Protection: A Literature Review on Trade Barriers*, School of Economics, (DUT Faculty of Management and Economics, 2011) pp70

volumes in inter developing countries' trade as measured against inter developed countries' trade. Statistics show that Africa's current internal trade is low making up only about 10 per cent of its total trade. This is evidenced by the fact that its exports go to the world's advanced economies, and most of its imports come from those same advanced economies.²³

Perhaps with the urge to attain benefits evident from trade pacts practicing liberalised trade the EAC integration and the subsequent creation of the EAC common market and the EAC customs union was aligned along the concept of free trade. However, the reality of the practice on the ground is that member states don't practice free trade. Instead, they have imposed NTBs on goods and services from other member countries thus obstructing the vibrancy of inter-member state trading.²⁴ For example, in the year 2010, trade between member states of the EAC was only 1,996 million dollars.²⁵ If this is weighed as against trade between Kenya and the USA alone, in the same period which totalled at \$259,942,523 for imports and \$201,302,066 for exports,²⁶ the most apparent conclusion is that trade as between EAC member states is minimal. The minimal trading tendency is without doubt occasioned by difficulties created by NTBs. The justification of this research paper is that if proposals made herein are followed by policy makers, then the NTBs will be eliminated and intra-EAC trading boosted through liberalisation which is lacking at the moment.

²³ Deardorff, A, 'Easing the burden of non-tariff barriers' (2012) <<http://www.intracen.org/Easing-the-burden-of-non-tariff-barriers/>> Accessed: 10 Nov 2013.

²⁴ *Ibid.*

²⁵ Mwangi S. Kimenyi, Zenia A. Lewis, Brandon Routman, 'Intra-African Trade in Context' 2012 in Brookings Africa Growth Initiative, 'Accelerating Growth through Improved Intra-African Trade.' (Brookings, 2012)

²⁶ Worldportsource.com

The research will be useful to the EAC Secretariat, EAC policy making bodies, the legal fraternity, EAC member states and businesses operating within EAC.

1.6 Hypotheses

The research is based on the hypotheses that non-tariff barriers are a significant impediment to the attainment of an EAC common market.

1.7 Research questions

- 1 How have NTBs affected the EAC trade regime?
- 2 How does the EAC Treaty and its Protocols deal with NTBs?
- 3 What lessons can the EAC learn from other RECs that may enable it deal with NTBs?
- 4 What changes can enable legislative and policy framework within EAC to eliminate NTBs?

1.8 Literature Review

To contextualize the issue of NTBs it is prudent to studiously look into literature on NTBs. This paper has zeroed in on the EAC as its case study, it will be more useful to first look into what the Treaty for the Establishment of the EAC and its Protocol provides in relation to NTBs. The Treaty for the Establishment of the East African Community stipulates that the integration of the EAC member states to form a community will entail among other forms of collaboration, the collaboration of the member states in multilateral trade through the EAC common market.²⁷ To this end, it encourages free trade between the member states by stating that under the common

²⁷Article 76(1) of the Treaty for the Establishment of the East African Community

market, member states should engage in free trade that allows for the free movement of labour, goods, services, capital, and the right of establishment.

Free trade is elaborated under the Treaty in Article 13 to the effect that free trade is attainable through elimination of NTBs from within the regional economic community. The Protocol allows such imposition only in instances where the NTBs have been expressly allowed therein. It provides under Article 75(5) that;

‘Except as may be provided for or permitted by this Protocol, each of the Partner States agrees to remove, with immediate effect, all the existing non-tariff barriers to the importation into their respective territories of goods originating in the other Partner States and, thereafter, not to impose any new non-tariff barriers.’

Further, the concept of free trade is also tackled under the Protocol for the Establishment of The East African Community Common Market as well as the Protocol for the establishment of the EAC Customs Union as a fundamental objective of the community. Article 4(2)(a) of the EAC Common Market Protocol provides that it is an objective the common market to accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labor, the rights of establishment and residence and the free movement of services and capital. On its part, the Protocol for the establishment of the EAC Customs Union, makes specific reference to the need to eliminate NTBs and to refrain from imposing new ones. Its main aim is to attain even development for all the five nations who are members of the EAC community. It specifically identifies that it is only through an increased intra EAC trading that this balanced development can be attainable.

A keen look at the manner in which all the Protocols stated above have been drafted, shows that there is every effort to make sure that NTBs do not thrive within the EAC common market. This is perhaps due to the effects of these NTBs to the pre 1977 EAC that collapsed. Literature indicates that at the time of founding the first EAC in 1967, the original three member states; Kenya, Tanzania and Uganda agreed to cooperate on a wide range of economic and social issues as is with the current EAC. Unfortunately, due to the fact that state internal affairs took precedence over the integrated unit's interests the EAC continued to face problems such as governance challenges, economic imbalances which arose from the socialist system in Tanzania and capitalist system in Kenya, political disagreements, and an extremely limited dissemination of information. The above gave rise to NTBs that made it impossible for continued integration which subsequently lead to the split in 1977.

It is not a secret that there are quite a number of NTBs within the member states to the EAC. According to the report on Implementation and Impact of the East African Community Customs Union,²⁸ the following NTBs are in place within the EAC common market; Non-recognition of EAC Rules and Certificates of Origin; Import Bans on Milk, day old chicks, beef and poultry; Multiple Road Blocks; Levies charged on Plant Import Permit for Ugandan tea by Kenya; requirement by Kenya for Ugandan tea to have an SPS certificate which it does not even recognize; existence of Multiple weighbridges along Northern Corridor; Requirement for import license from the Ministry of Trade and Industry and a bond prior to Tanzania issuing excise duty stamps; Discriminatory excise duty on cigarettes that do not have 75 per cent of Tanzanian tobacco; Landing certificates for exports from Kenya through Namanga issued by TRA in

²⁸EAC, 'Report on Implementation and Impact of the East African Community Customs Union,'(Arusha, 2009).

Arusha rather than at the border; Extra charges levied on Kenya pharmaceutical exports by Tanzania; Road Consignment note required from transporters prior to packing of goods; and Corruption along Northern and Central Corridors at roadblocks, weighbridges, and borders.

Trabelsi defines a non-tariff barrier as "Any device or other governmental practice that directly impedes the entry of imports into a country, which discriminates against imports, but does not apply with equal strength to production or distribution". The intent of imposing such measures is to protect country's people and environment and ensure national welfare while correcting market failures. However, the use of non-tariff barriers is without significantly effects on trade, as highlighted by various studies. Over bearing usage of NTBs can significantly restrict trade. Many experts hold the view that agricultural exports from developing countries are adversely affected by NTBs.²⁹

Literature on multilateral trade consistently identifies NTBs as inhibitors of free trade.³⁰ To this end, advocates of free trade under the concept of Most Favoured Nation advocate for free trade between nations of the world which among others involves the elimination of barriers to goods and factors of production from other states. Thus where a country puts any barriers to goods from another country from entering its markets it is in contravention of the global free trade concept.

²⁹I Trabelsi, 'Agricultural trade face to Non-tariff barriers: A gravity model for the Euro-Med area,' *Journal of Studies in Social Sciences*, 2013) 3(1) 20-32

³⁰P. Robson, '*The economics of international integration*' (4thedn, Routledge, 1998) 2; C, L, McCarthy, '*Regional integration of developing countries at different levels of economic development –problems and prospects Transnational law and contemporary problems*' (1994) 1-2.

Secondly, the most fundamental principle underlying multilateral trade under the auspices of WTO is the obligation to conduct international trade in a non-discriminatory manner. This is prominently set out in the preamble to the Marrakesh Agreement Establishing the WTO.³¹ Further, Article 1 of The General Agreement on Tariffs and Trade 1994,³² requires all WTO members to extend most-favoured –nation treatment to one another. This entails these states extending preferential treatment to goods from their counterparts in the WTO. It is without doubt that the WTO also vouches for free multilateral trade. To this end the question begs why free trade? The answer thence is best captured by Adam Smith in his work the wealth of nations.

To better understand Smiths position about free trade it is prudent to look at how Mutai H.K. describes the use of mercantilism in the wealth of nations. He states that the term mercantilism connotes five basic elements which he describes as; favourable trade balance required to accumulate precious metals; that economic policy must always be assessed in light of its effect on the national stock of gold and silver; that national advantage must be the overriding policy objective; that policies promoting industry should be adopted to increase investment and employment; and that rapid population growth and a large labour force are necessary to keep wages and prices low, thus encouraging exports.³³ Smith thus made strong arguments against mercantilism which he uses synonymously with protectionist policies by stating that they lead to massive misallocation of resources and were in conflict with laissez-faire capitalism. Thus according to Smith the benefits of free trade are that a system of free, competitive domestic and foreign markets would direct the employment of resources to those sectors where they would be

³¹1867 UNTS 154.

³²Herein after referred to as the GATT.

³³H.K. Mutai, *Compliance With International Trade Obligations : The Common Markets For Eastern And Southern Africa* (Kluwer law international, 2007)

most productive , thus ensuring the maximum level of economic welfare and the promotion of social harmony.³⁴

According to Patrick Kirk,³⁵ the approach taken by EAC member states to reduce and remove NTBs which focuses on identifying specific NTBs and establishing NMCs to combat them is non-viable because the same systems have been used elsewhere and failed to a great extent. Therefore he suggests that if the member states are keen on getting rid of the NTBs at the Partner State level, they must commit to implement in full their commitments under the GATT 1994 Articles V, VIII, and X and their commitment in respect to the Agreements on Technical Barriers to Trade and Sanitary and Phyto-Sanitary measures. That way, they will be able to advance the EAC's move to promote a single market. Further, all existing identified NTBs should be subjected to a WTO Compliance review to establish if the measure is transparent, non-discriminatory, and minimizes trade restrictiveness. The EAC Ministers could consider establishing a transparent rule that when an 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. He continued to propose that all regulatory policies made after the elimination of NTBs has been successful should be brought before the EAC secretariat for review before acquiring applicability. This in his view will help prevent the reintroduction of NTBs.

³⁴L. Gomes, *The economics and ideology of free trade area* (Edward Elgar Publishing, 2003) 3,4

³⁵East African Community Secretariat-East African Business Council (EAC-EABC), Proposed Mechanism of the Elimination of Non-tariff Barriers in the EAC.'(Arusha, 2006) In Robert Kirk, *Addressing Trade Restrictive Non-tariff Measures on Goods Trade in the East African Community* (2012)

A study by the World Bank on Non-Tariff Measures on goods trade In the East African Community established that trade barriers are an incredibly difficult analytical, as well as policy, area. Beyond traditional barriers such as tariffs, there are no databases that may inform policy makers about the gravity of the problem and where it is located. The diversity of potential barriers is extreme. This uncertainty makes NTMs the perfect place to look for protectionist interests wanting an edge in the domestic market. Protectionist interests are not alone in creating trade barriers. There are many new regulatory areas that EAC authorities will have to deal with which as international integration continues may create trade barriers by mistake rather than design. Food safety regulation, for instance, is a new topic which may be badly designed or implemented due to capacity problems rather than bad intentions. The study established that considerable efforts have been made to keep NTBs down and the market participants are experiencing the fruits of these efforts now. The dairy regulatory authorities, for instance, meet regularly in an attempt to liberalize trade. Yet, constant pressure is needed to keep trade flows open, in particular now when tariffs are gone.³⁶

According to Jing Ma, although free trade is commonly accepted as the main tendency of international trade development in most of facets, trade protections are still supported by some stakeholders due to the necessity in particular period or regions. Barriers to exportation consist of several aspects. Language and customs barriers exist naturally but it does not mean it is impossible to overcome. Tariff barriers are less and less important due to several-round hard negotiations on GATT and the following WTO as well. However non-tariff barriers should not be ignored especially in the main industrial countries. Countermeasures to these problems by

³⁶Jensen M, 'Non-Tariff Measures on goods trade In the East African Community; Assessment of Regional Dairy Trade.'(The World Bank, 2010)

many nations, especially developing countries, are being proposed one after another. WTO has been making every effort to promote international trade and solve trade disputes for one decade as subsequence of GATT. Nevertheless it is still far away from world trade court due to many complicated reasons.³⁷

A study carried out by Dean et al to estimate the price effects of NTBs established that NTBs represent an important source of trade frictions for many countries and many traded goods. Country-specific NTB price premia estimates for fruits and vegetables and for bovine meat are high, averaging about 44 and 54 percent, respectively, but variation across countries is wide. NTB premia for processed foods are lower on average (41 percent) with relatively narrow variance. Apparel NTB premia show both a high average (50 percent) and a very wide range. Results strongly suggest that NTBs are endogenous. In particular, NTBs are more likely to be imposed the higher the tariff on a product. There was also strong evidence that higher income countries had more restrictive NTBs on bovine meat, but less restrictive NTBs on processed food and apparel in 2001.³⁸

A study by OCED applies a cost-benefit analysis to quantify the economic effects of non-tariff measures in the agri-food sector. Three case studies are presented to demonstrate how such analysis can help identify least-cost solutions of Non-Trade Measures (NTMs) designed to ensure that imported products meet domestic requirements. The analysis examined benefits and costs for the different domestic and foreign stakeholders involved, thus taking a broader view

³⁷Jing Ma *Free Trade or Protection*: pp 71

³⁸M Judith, 'Estimating the Price Effects of Non-Tariff Barriers,' *The B.E. Journal of Economic Analysis & Policy*, (The Berkeley Electronic Press, 2009) 9(1) 12 pp 31

that goes beyond evaluating the trade impact alone. The analysis demonstrated the strong relationship between the impacts on producers and the probability of infection as well as to the probability of detection at the border. The results indicate that tighter inspection leads to losses for foreign suppliers, especially if inspection coincides with depreciated quality due to time spent during the inspection. Improved production methods in exchange for reduced inspection tightness also lead to diminished profits for foreign suppliers, because of higher production cost they must incur. In all cases, the increase in inspection costs outweighs the estimated gain to domestic producers from being less prone to the plant disease. Finally, the analysis suggests that taking all costs and benefits together, the estimated net benefits of tighter inspection are negative.³⁹

H. K. Mutai in his article on Regional trade integration strategies under SADC and the EAC is of the view that neither the EAC Treaty nor the EACCU Protocol contains any specific provisions allowing partners to regulate the use of either SPS measures or technical barriers to trade. It can be assumed, therefore, that these disciplines are governed by WTO Rules since all the partners are also WTO members. As a means of combating NTBs, and pursuant to Article 13 of the Protocol, a system known as the Monitoring Mechanism for the Elimination of Non-tariff Barriers in EAC has been developed jointly by the EAC and East African Business Council Secretariats.⁴⁰ The framework created by the mechanism is aimed at monitoring the existence of NTBs and suggesting ways through which they can be eliminated. The legal position in SADC is similar to that of the EAC. Recognising that NTBs can often serve as obstacles to the free

³⁹V. Tongeren et al, 'Case Studies of Costs and Benefits of Non-Tariff Measures: Cheese, Shrimp and Flowers,' (OECD Food, Agriculture and Fisheries Papers, No. 28, OECD Publishing).

⁴⁰Kazooba Charles, 'Uganda now lifts ban on Kenyan semen, beef still off the menu.' *The East African* (19–25 January 2009) 1–2.

movement of goods, the SADC Trade Protocol requires member states to “adopt policies and implement measures to eliminate all existing forms of NTBs” and “refrain from imposing any new NTBs”. He proposes that there is need to address the legal lacunae in the agreements that permit continued protectionism. If the partner states are truly serious about trade liberalisation, then more needs to be done about increasing intra-regional trade through the elimination of tariffs and the reduction, if not complete removal, of exceptions – which usually concern the very goods where partners have a comparative advantage.⁴¹

The literature review reveals the EAC position in regards to NTBs and the EAC Treaty and Protocols commit to the removal of NTBs for the free movement of goods within the region. It is however evident from the literature reviewed that there are still numerous NTBs within the region. Trabelsi and Robson are of the view that over bearing usage of NTBs can significantly restrict trade. These sentiments help the research topic because they support the free trade system of multilateral trade which is at the core of what this research paper aims to be achieved through the elimination of NTBs in the EAC common market.

Kirks study establishes that the use of the NMCs to combat them is non-viable because the same systems have been used elsewhere and failed to a great extent. The number of EAC NTBs still continue to increase despite the NMCs. Some NTBs being in place for as long as 8 years, the ban on exports of beef products to Uganda for example was in place for 8 years and was finally resolved in May 2014, but appears to be resurfacing. In some extreme cases, NTBs continue despite clear directions for elimination by the Heads of State to resolve the same. The NTB in

⁴¹H K Mutai, ‘Regional trade integration strategies under SADC and the EAC: A comparative analysis,’ (SADC Law Journal, 2011) 1

regards to the importation of motor vehicles from Kenya to other EAC states is an example where despite a Gazette signed in 2009 by the Heads of State, motor vehicles manufactured in Kenya still attract a duty rate of 25% despite meeting the Rules of Origin Criteria. WTO is a proposed option for resolution of NTBs by Kirk, however Jing is of the view that WTO has not been very effective in resolving NTBs and is still far away from world trade court.

Studies have been carried out to estimate the cost of NTBs. Dean established that NTBs represent an important source of trade frictions for many countries. A study by OECD on the NTBs impact to the agri-food sector established that taking all costs and benefits together, the estimated net benefits of tighter inspections are negative.

From the studies it is evident that NTBs impact on the cost of products in the export market which would in return lead to reduced competitiveness of the product or higher consumer prices for the affected products. The failure to effectively eliminate NTBs within EAC despite having a Monitoring Mechanism on NTBs is indicative of the need for a permanent solution for policy and legislative reform towards elimination of the same. Failure to establish this will impact on the regional integration. This study seeks to establish the legal and policy reforms required for the elimination of NTBs in EAC.

1.9 Research Methodology

To reach a conclusive argument regarding the research topic, the researcher will rely on scholarly materials available in trade law and economic law books, articles on international trade in legal journals, international law treaties and their ancillary protocols, the EAC treaty and its

ancillary protocols, World Trade Organisation Literature, internet resources and any other available resources that the researcher will find useful.

Chapter Two

Disambiguating NTBs

2.0 Introduction

This chapter seeks to disambiguate NTBs, this is to be achieved through a detailed description of NTBs through setting out the operational definitions thereof, describing the measures considered as NTBs, how the EAC law deals with the NTBs as well as how international trade law deals with and resolves them. This will be followed by an analysis on how areas of best practice such as NAFTA (North America Free Trade Area) and EU deal with NTBs this will be used to highlight the best practices that can provide lessons for reform for the EAC to attain a liberalized market regime.

2.1 Definition

The EAC Treaty defines NTBs as administrative and technical requirements imposed by a Partner State in the movement of goods. The Secretariat in setting out the operational definition of NTBs in the EAC, defines NTBs as quantitative restrictions and specific limitations that act as obstacles to trade, other than tariffs that may be embedded in government laws, regulations, practices and requirements at the national and local level. They are often used to safeguard various legitimate and sometimes illegitimate reasons which include safeguarding health, environment, internal development and expansion of industries. Even where they are used legitimately they have negative effects on trade as they hamper free trade. They are characterised with delays and increase the cost of doing business which in essence hinders free movement of

goods, services and factors of production.⁴² The direct effect of the imposition of NTBs is slowed down market vibrancy or even total collapse of interstate trade.

The effects of NTBs on an integrated trade pact such as the EAC are adverse as they have the ability of causing a disintegration of the pact. This is evidenced by the collapse of the EAC in 1977. Key among the factors that contributed to the collapse is the imposition of NTBs which frustrated co-operation. The major NTB that is identified is the inability of the 1967 treaty to guarantee free movement of labour among the member states. The other NTBs included existence of the transfer tax which was an internal levy that represented a selective deviation from internal free trade therefore violating the common market ideal of absence of internal trade restrictions; failure to provide any central means of industrial allocation or common scheme official incentives; and the entrusting of the coordination of some vital matters of the county to the council, often without specific guidelines.⁴³ Following is a description of measures that can be considered as NTBs.

2.2 Types of Non-Tariff Barriers

Generally, NTBs take various forms, this include; internal taxes; administrative barriers; health and sanitary regulations and government procurement policies; customs and administrative entry procedures; standards; government participation in trade; charges on import and other categories. This may be divided into three categories. The first category is that of measures directly aimed at restricting imports these include licensing and allocation of import quotas; antidumping and countervailing duties; import deposits; voluntary export restraints; and countervailing duties.

⁴² Ascent Limited, 'East African Integration, p 5

⁴³ N. Mwase, 'regional economic intergrationthe unequal sharing of benefits: background to the disintegration and collapse ofthe East African Community' pp 20

Under the second category are those methods whose direct aim is not the restraint of foreign trade but in their form and nature, are administrative bureaucracies whose net effect is the restraint of trade. These include customs procedures; technical standards and norms; sanitary and veterinary standards; requirements for labeling and packaging; and bottling. The third category consists of methods that are not directly aimed at restricting the import or promoting the export, but the effects of which often lead to results similar to those experienced where NTBs are imposed.⁴⁴

These types of NTBs are discussed below.

2.2.1 Licenses

They are the most common instrument used in the regulation of imports. They are made a mandatory prerequisite for anyone to carry out trade in the goods listed in the license system. There are two main types of licenses that can be issued. The first type is the general license while the second type is the one-time license. The general license permits unrestricted importation or exportation of goods included in the lists for a certain period of time. The one-time license on its part allows an importer of a certain product to import the commodity that is the subject matter of the license as a one-time venture.⁴⁵

2.2.2 Quotas

These are quantitative restrictions. They are used to limit imports in value or in physical terms for a certain period to regulate and keep in check factors such as dumping where there is an

⁴⁴ Report of the Multi-Agency Support Team (MAST) and Group of Eminent Persons on Non-tariff Barriers established by the Secretary General of UNCTAD in 2006 on classification of Non-Tariff Barriers <<http://ntb.unctad.org/docs/Classification%20of%20NTMs.pdf>> accessed on 17.08.2014

⁴⁵ Ibid

overflow of a particular commodity as an import. Quotas can be classified into global quotas in respect to specific countries, seasonal quotas, and voluntary export restraints. They are as a result of direct administrative policy by government. Just like licenses, quotas limit the independence of enterprises with a regard to entering foreign markets, narrowing the range of countries, which may enter into transaction for certain commodities, regulate the number and range of goods permitted for import and export. The negative effects are that consumers loose out because of higher prices and limited selection of goods. Companies that employ the imported materials in the production process are also disadvantaged, increasing their costs as they shift the entire costs to consumers.

Quotas can be unilateral, bilateral or multilateral. Unilateral quotas are those levied by the country without negotiations with exporting country while bilateral and multilateral quotas are imposed after negotiations and agreement with exporting country. An export quota is a restricted amount of goods that can leave the country. They not only restrict imports but also exports. For exports, they are used to guarantee the supply of the products that are in shortage in the domestic market, manipulation of the prices on the international level, and the control of goods strategically important for the country this may be done from within the country or by the importing country at the request of exporting country through requesting for the imposition of voluntary export restraints.⁴⁶

2.2.3 Embargo

Embargo is a specific type of quota prohibiting free trade. Just like quotas, embargoes may be imposed on imports or exports of particular goods, regardless of destination, in respect of certain

⁴⁶MAST n.32

goods supplied to specific countries, or in respect of all goods shipped to certain countries. Although the embargo is usually introduced for political purposes, the consequences, in essence, could be economic. This is best illustrated by Britain's embargo on Ugandan coffee during Amin's stay in power in Uganda. It brought the Ugandan coffee industry to its knees leading to the coffee being sold through Kenya a phenomenon that created the famous black gold of Chepkube scenario.⁴⁷

2.2.4 Standards

Standards are usually imposed on classification, labeling and testing of products. The major aim of imposing standards is to block sales of products of foreign manufactures so as to size down on competition with domestic products. As NTBs standards are sometimes entered under the pretext of protecting the safety and health of local populations.⁴⁸

2.2.5 Administrative and bureaucratic delays at the point of entrance

This are mostly used at the point of entrance as customs clearance procedures. As NTBs they take the form of too much red tape that increase uncertainty and the cost of maintaining inventory for exporters.⁴⁹

2.2.6 Import deposits

Under normal circumstances import deposits are used as foreign trade regulations. Importers must make this deposit to a specified bank for a definite period of time. The amount deposited is equal to all or part of the cost of imported goods in fixing the import deposit; value is fixed based

⁴⁷WamugundaGateria. '*Black gold of Chepkube*' (Heinemann Educational Books, 1985) 139

⁴⁸MAST n. 32

⁴⁹ Ibid

on GATT policies such as fair and equitable treatment, national treatment, and most-favored-nation (MFN).⁵⁰

2.2.7 Foreign exchange restrictions and foreign exchange controls

These constitute the regulation of transactions of residents and non residents with currency and other currency values. Also an important part of the mechanism of control of foreign economic activity is the establishment of the national currency against foreign currencies.

2.3 Effects of NTBS on Trade

There are about two approaches that can be used to determine the effect of NTBs on trade. The first is to estimate econometrically the effects of NTBs on markets, conditional on information about their incidence. The other approach is to infer the presence of implicit NTBs from anomalies in the market data, such as unexplained price gaps such as the differences between domestic and foreign prices or smaller-than-predicted trade flows. The first approach answers the policymaker's question about isolating the effects of known policies, while relying on other sources of information to identify the policies themselves. The second approach on the other hand helps to identify barriers that may otherwise be hidden. However to benefit from this approach, they must be able to link them to specific policies.⁵¹

The Econometric Specification point of view argues that the direct effect of an NTB on the price of a good in the domestic market is the increase of the price of the good in a domestic market. For example, if a given quota is imposed by a country, it will increase the domestic price of a

⁵¹M. Dean et al n. 33

product. However, the magnitude of its effect will depend on the extent of pre-existing tariff protection on that product. If there is no tariff on the product, the entire price increase will be attributable to the import quota. As long as the quota is binding, the additional imposition of a tariff should not affect the price impact of the quota.⁵² In essence therefore the approach suggests that the direct impact of some types of NTBs on multilateral trade is the increase of commodity prices of the affected goods.

The second effect of NTBs is that they become source of discrimination by preventing goods from a particular part of the world or country from accessing markets in some parts of the world. This is mostly apparent in regard to agricultural products from developing countries to developed countries. Currently, most developed countries have operational trade barriers and have established environmental standards that have a discriminative effect on products from developing countries.⁵³ Though challengeable in the WTO the low capacity to participate effectively in the dispute settlement procedures and the inability to demonstrate that their national measures are equivalent to the requirements of developed countries makes their sidelining inevitable.⁵⁴ The major problem faced by developing countries consists in the lack of access to the resources necessary for them to comply with product standardization as adopted by the developed countries because generally they suffer from access to the compliance resources. Thus, even if they wanted to comply with the set standards in some cases they cannot.⁵⁵

⁵² Ibid

⁵³ Fontagné, L., M. Mimouni and J-M. Pasteels, 'Estimating the Impact of Environmental SPS and TBT on International Trade,' (2005) 22 Integration and Trade Journal, 7.

⁵⁴ Henson S., W. Mitullah, 'Kenyan Exports of Nile Perch: The Impact of Food Safety Standards on year Export-Oriented Supply Chain', (2004) World Bank Policy Research Working Paper, 3349.

⁵⁵ Ibid.

In the EAC, NTBs are attributable to the high cost of doing business, in the region, high commodity prices and diminished intra-community trade.⁵⁶

2.4 NTBS and the EAC Treaty

East African Community Treaty and its incidental protocols entrench liberalised trade within their provisions. In its Article 74, the Treaty provides thus;

‘In order to promote the achievement of the objectives of the Community the Partner States shall develop and adopt an East African Community trade regime and co-operate in trade liberalization and development of the trade regime.’

The Partner States commit under Article 75 to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter to refrain from imposing any further non-tariff barriers.

On its part, the East African Common Market Protocol in Article 2 (40) provides for liberalised trade through the provision of such freedoms as free movement of goods, labour, services, and capital, which the member states should extend to their counterparts with the aim of significantly boosting trade and investments and making the region more productive and prosperous. The East African Community Customs Union Protocol in its Article 5 provides for the elimination of internal tariffs and other charges of equivalent effect; and most specifically the elimination of NTBs.

⁵⁶ ASARECA, ‘Impact of Non-Tariff Barriers on Cross-Border Trade in Eastern Africa.’ 3

In essence therefore the EAC treaty discourages the use of NTBs within the community and goes on to provide mechanisms for their elimination which mechanisms shall be discussed in chapter four.

2.5 NTBs and international law

It has been the business of law to regulate and control business so that merchants do their business in a manner most beneficial to the vendors and the consumers of goods and services. It is for a similar purpose that the GATT and later on, the WTO came into existence. Under the Protocol establishing the WTO and other international trade customs and practices that have gained the force of law such as free trade agreements (FTA) the most salient feature of international trade law, is its advocacy for free trade in international trade. An analysis of international trade law and what it provides for below will help support the claim above.

2.5.1 The GATT

The General Agreement on Tariffs and Trade (GATT)⁵⁷ was succeeded by the WTO in the year 1994. Be as it is that the operation of the GATT was extinguished upon the coming into operation of the WTO, it is relevant to talk about it as a relevant international trade law in this context because original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994.⁵⁸

⁵⁷General Agreement on Tariffs and Trade 1947 (GATT 1947), 55 U.N.T.S. 194

⁵⁸*World Trade Organization: WTO legal texts* WTO/REG/17

The most fundamental pillar of the GATT is the concept of National Treatment as envisaged in Article III of the GATT.⁵⁹ The concept of National Treatment is closely related to the Most Favored Nation (MFN) which is one of the central pillars of the free trade advocacy by the WTO Agreement. Under the National Treatment and MFN rules Members of the WTO, which includes all the members of the EAC, are required to extend non-discriminatory treatment to imports from partner states. In this respect, the partner states are bound to treat imports in the same manner they treat domestic products with the exception of course that they are allowed to impose tariffs which are a border measure. Therefore the concept of MFN and National Treatment prevents countries from taking discriminatory measures on imports on the one hand, and prevents countries from offsetting the effects of tariffs through NTBs on the other.

The purpose of the national treatment rule therefore is to eliminate hidden domestic barriers to trade by WTO Members through according imported products treatment no less favorable than that accorded to products of national origin. The provisions of the GATT as set out in Article III as discussed above, no doubt vouches for free trade more than anything else. Its view of multilateral trade is equal treatment of both domestic goods and imported goods. This is the exact opposite of what NTBs are created to do. Be it protectionist ideology based NTBs or just import NTBs the driving force behind them is the quest towards according domestic goods prevalence over imports which is a contravention of free trade policy in international multilateral trade.

⁵⁹ Thomas W. Zeiler. *Free Trade Free World: The Advent of GATT*. (Luther Hartwell Hodges Series on Business, Society and the State University of North Carolina Press, 1999) 288

2.5.2 General Agreement on Trade in Services

The GATS is the first and only set of rules covering international trade in services at the multilateral level⁶⁰. The GATS provides for MFN which as had been stated earlier is a twin concept to National Treatment. Under Article II while providing for Most-Favoured-Nation Treatment, the GATS states that with respect to any measure covered under it, each WTO member is bound to immediately and unconditionally upon the Protocol coming into force, accord goods and service suppliers from other Member countries treatment no less favourable than that it accords to like services and service suppliers of any other country. The only time a country is allowed to use these measures, is when its measures meet the threshold set out under the exemptions in the Annex on Article II Exemptions.⁶¹ It is worthwhile to note that a country is allowed to make trade with adjacent countries more liberal by according them advantage over other countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed, provided that the minimum free trade provisions under MFN are intact to apply generally to all the other countries' goods and services.⁶²

Further, Article XVI of the GATS makes provisions in relation to Market Access as provided for under Article I and maintains the free trade thread that runs through the preceding Article. Consequently in regard to imports receiving market access, each Member state is required to accord services and service suppliers from other Member states treatment no less favourable than that provided for under the terms, limitations and conditions agreed upon. Where a Member undertakes a market-access commitment in relation to the supply of a service from the territory of one Member into the territory of another Member, the member is thereby committed to allow

⁶⁰Marrakesh Agreement Establishing the World Trade Organization,1867 U.N.T.S. 154

⁶¹ Marrakesh Protocol Article II(2)

⁶² Ibid (3)

the movement of the related capital through its borders as well. Secondly, if a Member undertakes a market-access commitment in relation to the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member, that member is thereby committed to allow related transfers of capital into its territory.

In order to maintain free market access member countries are cautioned against imposing; limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.⁶³

Article XVII of the GATS also provides for National Treatment. Just like under the provisions of the GATT the Article provides that each Member is bound accord to services and service

⁶³Marrakesh Protocol Article XVI

suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Members are allowed to meet National treatment through according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers, the treatment will be considered less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

2.5.3 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁶⁴

Just as is the case in the foregoing multilateral trade agreements discussed above, the TRIPS has in its core the two principles of free trade i.e. the principle of National Treatment and MFN under Articles 3 and 5 respectively. In regard to intellectual property the TRIPS provides that each member state's intellectual property laws must not offer any benefits to local citizens which are not available to citizens of other TRIPS signatories. Notwithstanding, TRIPS has been considered as doing little to facilitate free trade as LDCs tended to view it as being favorable to the Intellectual Property (IP) exporting multinational companies in the developed countries.

However as it is, the protections set out under its provisions creates the most basic minimum of IP protection to be accorded to products from all member countries. Therefore countries are at liberty to, through the use of FTAs either pursues TRIPS-plus obligations or TRIPS flexibilities.

⁶⁴Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299

Most criticisms have been directed at TRIPS-plus obligations arrived at through FTAs as they hamper free trade in IP by raising the standards to go beyond those set in TRIPS.⁶⁵ The most visible conflict touching on TRIPS-plus obligations has been over AIDS drugs in Africa. The TRIPS plus FTAs had in essence made it difficult for African countries to address the drug related difficulties in fighting the AIDs pandemic. In regard to this, the World Health Organization emphasized that;

'Bilateral trade agreements should not seek to incorporate TRIPS-plus protection in ways that may reduce access to medicines in developing countries.'⁶⁶

The controversy was so big that it led to the negotiation of the Doha declaration⁶⁷ which relaxed the provisions of TRIPS IP protections as its imperative indicated that TRIPs should not prevent states from dealing with public health crises. After Doha, developed nations began working to minimize the effect of the declaration a factor that has opened up IP trade.⁶⁸

However, the existence of TRIPS flexibilities through which countries can negotiate FTAs that relax the protections set out in TRIPS has led to changes in the perception of TRIPS in regard to how it is an important tool of free trade. It is a view of the United Nations Human Rights Council that flexibilities in TRIPS are meant to allow States to take into consideration their economic and development needs.⁶⁹ Therefore states are urged to take steps to facilitate the use of TRIPS

⁶⁵U.N. Economics. & Social. Council, Sub-Commission on Promotion & Protection of Human Rights;*The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights*, U.N. DOC. E/CN.4/Sub.2/2001/13 (June 27, 2001) 27–28

⁶⁶World Health Organization, Report of the Commission on Intellectual Property Rights, Innovation and Public Health, Recommendation 4.26 (2006), <<http://www.who.int/intellectualproperty/documents/thereport/CIPiHReport23032006.pdf>>accessed 24.07.2014

⁶⁷ Issued in November 2001

⁶⁸Timmermann, Cristian, and Henk van den Belt. 'Intellectual property and global health: from corporate social responsibility to the access to knowledge movement.' [2013]. 34 (1)47-73Liverpool Law Review

⁶⁹U.N. HUMAN RIGHTS COUNCIL, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 96, U.N. Doc. A/HRC/11/12

flexibilities to expand their engagement in free trade. This avenue has continually been pursued and in 2003, the Doha Declaration informed by the AIDS drugs controversy loosened the domestic market requirement and allowed developing countries to export drugs to other countries where national health problem were being experienced as long as drugs exported are not part of a commercial or industrial policy.⁷⁰

2.5.4 Agreement on Import Licensing Procedures

This agreement on Import Licensing Procedures⁷¹ provides that import licensing should be simple, transparent and predictable. In this respect, governments are required to publish sufficient information for traders to know the procedure of attaining the licenses and the reasons for acquiring the licences. Further, the Agreement makes for provisions that make it mandatory for a government wanting to introduce new licensing or change the existing, to notify the WTO. To ensure uniformity and consistency the Agreement, sets out guidelines on how governments should assess applications for licences. Under these, the agreement provides for automatic issue of some types of licences where set conditions are met. Automatic licensing is used to ensure that trade is not restricted by procedure. However where conditions do not allow for automatic licensing, the agreement sets out timelines within which licences should be processed and granted. In that respect it provides that the agencies handling licensing should not take more than 30 days to deal with an application or 60 days when all applications are considered at the same

(Mar. 31, 2009)

⁷⁰[World Trade Organization, 'Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health'](#) (1 September 2003),

⁷¹Agreement on Import Licensing Procedures, 1868 U.N.T.S. 436

time. All this is aimed at ensuring that the administrative work carried out by the said agencies does not in itself restrict or distort imports.⁷²

2.5.5 Agreement on Customs Valuation

The Agreement on Customs Valuation⁷³ provides for a fair, uniform and neutral system for the valuation of goods for customs purposes. It thus creates a system that conforms to commercial realities, and which outlaws the use of arbitrary or fictitious customs values which may frustrate importers and act as hindrances to trade. To achieve that, it provides a set of valuation rules that expand and give greater precision to the provisions on customs valuation that were set out in the original GATT.⁷⁴

2.5.6 Agreement on Pre-shipment Inspection

The Agreement on Pre-shipment Inspection⁷⁵ subjects pre-shipment inspection to the principles and obligations of the GATT. In that respect therefore, the pre-shipment inspection agencies mandated by government to undertake pre-shipment inspection are required to be non-discriminatory, transparent, to protect confidential business information, to avoiding unreasonable delay, to use specified guidelines for conducting price verification and expressly state and avoid conflict of interest situations. On the other hand, exporting members are owed non-discrimination in the application of domestic laws and regulations, prompt publication of

⁷²Understanding The WTO: 'The Agreements'

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm>accessed on 08.08.2014

⁷³Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), 1868 U.N.T.S. 279

⁷⁴ WTO n 15

⁷⁵Agreement on Pre-shipment Inspection, 1868 U.N.T.S. 368

those laws and regulations and the provision of technical assistance where requested, by countries using pre-shipment inspection.

To achieve the above, the agreement establishes an independent review procedure, which is administered jointly by the International Federation of Inspection Agencies (IFIA), representing inspection agencies, and the International Chamber of Commerce (ICC), representing exporters. The chief purpose of the International Federation of Inspection Agencies is to resolve disputes between an exporter and an inspection agency.⁷⁶

2.5.7 Agreement on rules of origin

The Agreement on rules of origin⁷⁷ requires all member states to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard stating what confers origin rather than what does not.

For the longer term, the agreement aims at creating harmonized rules of origin among all WTO members, except in some kinds of preferential trade such as where countries wish to set up a free trade area in which case they will be allowed to use different rules of origin for products traded under their free trade agreement. Through this, the rules of origin will be made objective, understandable and predictable as they will be applied under non-preferential trading conditions by all WTO members in all circumstances once harmonisation is achieved.⁷⁸

⁷⁶ WTO n 15

⁷⁷ Agreement on Rules of Origin, 1868 U.N.T.S. 397

⁷⁸ Ibid

2.5.8 Trade-Related Investment Measures (TRIMs) Agreement

The agreement is custom made to safeguard the national treatment principles in GATT by ensuring that there is no preferential treatment in domestic goods and imports. It also outlaws investment measures that lead to restrictions in quantities which result to imposition of quotas. To achieve this, there is an illustrative list of TRIMs agreed to be inconsistent with these GATT articles appended to the agreement which discourages local content requirements and trade balancing requirements.

Under the agreement, countries must inform fellow-members through the WTO of all investment measures that do not conform to the agreement. To ensure that this works, here is established under the agreement, a Committee on TRIMs to monitor the implementation of these commitments.

2.5.9 Agreement on Agriculture

The fundamental objective of the Agreement on Agriculture⁷⁹ is to make trade in agricultural products predictable. Its main concern is on market access. To this end, the agreement seeks to eliminate trade restrictions confronting imports. Though the agreement allows governments to impose restrictions to protect their rural markets, the agreement requires that restriction be done through policies that cause less distortion to trade. Secondly the agreement attains market access through tariffication. In this case all the restrictions are converted into tariffs in which case consistency is attained. This is aimed at reducing the distortions caused by the unpredictability of NBTs.

⁷⁹Agreement on Agriculture, 1867 U.N.T.S. 410

Thirdly the agreement deals with domestic support which is another frontier for trade barriers. In this regard the agreement seeks to check subsidies that encourage overproduction in the domestic market which in turn squeezes out imports or leads to export subsidies and low priced dumping in the world markets. To mitigate the effects of these policies, the agreement provides that the existing domestic policies that have a direct effect on production and trade have to be cut back while measures with minimal impact on trade can be used freely.

The forth area of concern for the agreement is the area of export subsidies whose impact in trade is that it limits on spending and quantities of agricultural products in the international market. To avert this, agreement prohibits export subsidies on agricultural products unless the subsidies are specified in a member's lists of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies and the quantities of exports that receive subsidies.⁸⁰

2.5.10 Agreement on the Application of Sanitary and Phyto-sanitary Measures

The Agreement on the Application of Sanitary and Phyto-sanitary Measures⁸¹ allows countries to set their own Sanitary and Phyto-sanitary Measure standards. However the standards that lead to these regulations must be based on science and should be applied only to the extent necessary to protect human, animal or plant life or health. In all cases they should not be arbitrarily or unjustifiably discriminative between countries where identical or similar conditions prevail. To avert distortions member countries are encouraged to use international standards, guidelines and recommendations where they exist. However, members may use measures which result in higher

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⁸¹Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493

standards if there is scientific justification. Where there is scientific uncertainty, countries are allowed to a limited extent to apply the precautionary principle, to deal with scientific uncertainty.⁸² To safeguard from distortions, the agreement requires governments to provide advance notice of new or changed Sanitary and Phyto-sanitary Regulations, and establish a national enquiry point to provide information.

2.5.11 Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade⁸³ is meant to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles. While recognizing each country's rights to adopt the standards they consider appropriate, the agreement prohibits countries from imposing many regulations which in the end can be a nightmare for manufacturers and exporters. In this regard the agreement provides that the procedures used to decide whether a product conforms with relevant standards have to be fair and equitable. It discourages any methods that would give domestically produced goods an unfair advantage. To avoid re assessment which may cause delay in trade, the agreement encourages countries to recognize each other's procedures for assessing whether a product conforms. Without recognition, products might have to be tested twice, first by the exporting country and then by the importing country.

To enable Manufacturers and exporters know what the latest standards in their prospective markets are, the agreement requires all WTO member governments to establish national enquiry

⁸² Article 5.7 of the SPS

⁸³ Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120

points and to keep each other informed through the WTO. In pursuit of this, around 900 new or changed regulations are notified each year through the Technical Barriers to Trade Committee.

2.5.12 Agreement on Government Procurement

This agreement on Government Procurement⁸⁴ was negotiated in the Tokyo Round and entered into force on 1 January 1981. Its purpose is to open up as much government procurement business as possible to international competition by providing for laws, regulations, procedures and practices regarding government procurement that are more transparent and that do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

The agreement also reinforces rules guaranteeing fair and non-discriminatory conditions of international competition. This is effected by the agreement's governments will be required to put in place domestic procedures by which aggrieved private bidders can challenge procurement decisions and obtain redress in the event such decisions were made inconsistently with the rules of the agreement.

An analysis of the trade protocols and the sector specific agreements above reveals that the constant thread that runs through all of them is the quest for free multilateral trade. This is backed by the fact that in all the three protocols, the concepts of National Treatment and MFN are firmly entrenched therein each time emphasizes the need to accord equal treatment to exports and imports as well as foreign and national companies which in essence means that any trade concessions offered to a nation must be offered to others. Second is the concept of reciprocity which in essence means that nations should provide similar concessions for each other. Third is transparency under which negotiations and the negotiation process must be fair and open with

⁸⁴Agreement on Government Procurement, 1869 U.N.T.S. 508 (Text available at 1915 U.N.T.S. 103)

rules equal for all and finally the concept of special and differential treatment under which recognition that developing countries may require positive discrimination because of historic unequal trade is also maintained through MFN and National treatment.⁸⁵

This is so concluded based on the fact that NTBs are used world over to accord domestic goods advantage in the intra-jurisdictional market as against the Products and services from any other WTO member states. This is not to say that the provisions of these protocols have brought trade freedom in multilateral trade there is trade politics that continually bedevils the successes that could be reaped if the provisions were to be followed to the letter.⁸⁶ However the enormous appreciation that there is to free trade is depicted by the manner in which TRIPs plus FTAs were expressly opposed world over as weighed against the warm reception that has been accorded to TRIPs flexibility FTAs that have worked to eliminate the IP NTBs that there were under TRIPs itself and under the TRIPs plus FTAs.

2.6 Sources of NTBs

Sources of NTBs which are simply the reasons for the imposition of NTBs on imports are in each case variant depending on the country imposing such NTBs. For example the use of quotas as a non-tariff measure is applied for varying reasons which may include; the need to maintain an import quotient in a domestic jurisdiction, a means to protect domestic industries from low prices on similar goods from foreign industries with a competitive advantage, as a means to guard against dumping. As a means to maintain the import quotient, for example, NTBs are used to slow down the entry of imports of specific kind into a country where such import will create a

⁸⁵Shah, Anup. "The WTO and Free Trade." *Global Issues*. 02 Jul. 2007. <<http://www.globalissues.org/article/42/the-wto-and-free-trade>> accessed on 08.08.2014

⁸⁶ Ibid

surplus thus leading to reduction on the available market value of the imports and domestic goods enjoying the same market share as the imports. This is imposed in cases where domestic industries are likely to suffer due to the price decline occasioned by the inflated supply leading to diminished demand and consequently therefore, diminished returns from price of their goods.⁸⁷

The second source is the need to offer country's citizens safety in consumables. Thus NTBs may be imposed as a means to ensure that a country's consumers are being supplied with food that is safe to eat. This is one of the reasons that the Agreement on the Application of Sanitary and Phyto-sanitary Measures for example, seems to give countries a larger leeway for imposition of conditions on imports than any other agreement.⁸⁸

2.7 NTBs and the EAC market regime

The Treaty and the Customs Union Protocol envisaged that by the year 2005 free circulation of goods could have been attained within the EAC. So far, this has not been attained. For example in the year 2012 alone, a survey carried out and released in the 9th EAC Regional Forum on NTBs held between 13th – 15th December, 2012 in Dar es Salaam, Tanzania identified 40 different NTBs imposed by the EAC member countries against goods from other member states.⁸⁹ In this regard, the research is able to point out various NTB measures that are being used by member states. Some of the most commonly used measures include cumbersome inspection procedures on Gross Vehicle Mass and axle load regulations, cumbersome and costly quality

⁸⁷M. Dean et al, 'Estimating the Price Effects of Non-Tariff Barriers' (2009) 9 The B.E. Journal of Economic Analysis & Policy Contributions.

⁸⁸ImenTrabelsi, 'Agricultural trade face to Non-tariff barriers: A gravity model for the Euro-Med area' (2013) 3 Journal of Studies in Social Sciences 20

⁸⁹East African Community, 'Status Of Elimination of Non Tariff Barriers In East African Community' Volume 5 – December 2012

inspection procedures, inspection of products that are certified by accredited laboratories, inspection of imports that have certification marks of issued by the East African Standards Bureaus, varying quality inspection and testing procedures introduced without prior discussions and consensus and varying procedures for issuance of Certification marks.⁹⁰ Hereunder is an analysis of the institutions and the regulations supporting NTBs in each member state.

2.7.1 Kenya; Institutions involved in intra-regional trade

Trade in Kenya is regulated controlled and supported by a number of institutions. These range from ministries, Parastatals and government departments. Under the former political dispensation, the ministries that were responsible included Ministry of Trade, Finance, Justice and Constitutional Affairs, Public Health and Immigration. Though some of these ministries have been retained, the rest remain as departments within the newly constituted ministries under the current political dispensation. Therefore the part played by the ministries still remains intact. The ministry of International Trade for example is actively involved in negotiating the tripartite FTA while on the other hand acting as the governments' tool in pursuing reforms through the WTO dispute settlement system (DSS) and most importantly as the government's trade decision making organ.⁹¹

Other than ministries there are other agencies that make decisions and make policies that to a large extent affect international trade within Kenya. These include the Kenya Plant Health Inspectorate Service (KEPHIS) which is responsible in policy formulation in as far as import and export of agricultural product is concerned. Its chief responsibility therefore is to inspect plants

⁹⁰ David Ouma Ochieng and David S. Majanja Sub-Saharan Africa and WTO Dispute Settlement: A Case Study of Kenya 2007

⁹¹ Ibid

and issue a plant import permit; Kenya Revenue Authority (KRA) which sets up and manages tariff collection procedures and systems whose main purpose in trade is the effect in the cost of doing business; Kenya Bureau of Standards (KEBS) which implements standard procedures for entry of imports into Kenya by testing and grading the quality of goods; Kenya Ports Authority (KPA) and Kenya Roads Board (KRB); these two are responsible for policies for clearance of cargo and inland transit of the same. Where they are slowed down by procedure, weigh bridges and road blocks, then the cost of doing business is affected as well as losses occasioned where the goods involved are perishables; Immigration Department, whose responsibility is to issue work permits; Kenya police, which provide security and inspect cargo by verifying legal documents; Public Health Department, which inspects goods to ensure that they are fit for consumption. In essence, while performing their functions, these institutions and agencies sometimes hinder the free and smooth flow of goods and services in the EAC. These hindrances occur because of their functions such as setting product standards, technical regulations and conformity assessment procedures that cumulatively, constitute technical barriers to trade.

It is worthwhile to point out that, KRA has the most significant impact on intraregional trade in Kenya of all the institutions set out above and perhaps the source of the greatest effect on EAC trade as far as Kenya is concerned. It is responsible for the enforcement and management of the customs laws and the administration of common external tariffs. The clearance of goods by the KRA takes time because of the lack of harmonized import export documentation and procedures. Currently, the digital data exchange system used by revenue authorities is operational in Rwanda, Uganda and Kenya, but not in Burundi and Tanzania. Only Kenyan customs operates

for 24 hours, meaning that even if goods are cleared in Kenya, they are delayed for Burundi and Tanzania by other member states.⁹²

2.7.2 Regulatory Barriers to Trade imposed by Kenya

The birth of the use of NTBs as a tool for regulating trade with the EAC is attributable to the reduction of tariff barriers following the implementation of the EAC's customs union in 2005. As had been earlier on stated, NTBs applied within the EAC vary from state to state. The following are the most prevalent regulatory barriers to trade employed by Kenya as against goods from other member states;

2.7.2.1 Customs Clearance

It is mandatory policy within the EAC that before engaging in import business a trader should obtain an import declaration form (IDF). The IDFs are meant to be issued by an appointed government agency in the member states.⁹³ In Kenya, the issuance of IDFs involves numerous agencies (the government printer, the national bank, KEPHIS, KEBS, KPA and KRA), which conduct the procedures for the inspection, verification of dutiable value and certification of compliance. Because of the multiple institutions involved, the inevitable result is duplication which eventually translates wasted business time.

2.7.2.2 Standards and Certification

Kenya as well as other EAC member countries apply numerous certification and conformity assessments to ensure technical quality standards in intra-EAC trade. Though proper and

⁹² Augustus Muluvi, Paul Kamau, Simon Githuku and Moses Ikiara, Kenya's Trade within the East African Community: Institutional and Regulatory Barriers

⁹³The East African Community Customs Management Regulations, 2010

important, the issue arises where agencies mandated to carry out their standardization checks in some countries are not recognized in other countries. The end result of this is that it adds to the cost of conducting certification and wastes time. Case in point in Kenya is the Pre-shipment Verification of Conformity (PVOC) program. Under this program goods have to be re-examined to determine if they meet Kenyan pre-shipment standards. Being as it is that the program is inefficient because of the involvement of too many bodies in import inspection and certification procedures without collaboration, lack of testing laboratories for inspection bodies at major entry and exit points, and varying import requirements among EAC/COMESA countries, the program has in the long run caused delays and even disqualification of imports from other EAC countries whose standard accreditation should be recognized by all EAC member states.⁹⁴

2.7.2.3 Rules of Origin

The use of the Common Market for Eastern and Southern Africa (COMESA) rules of origin that do not envisage the unique circumstances of the EAC prove a nightmare as the procedure for obtaining the certificate of origin is cumbersome and lengthy, which itself is costly for the business community. Under these rules, a good must wholly be produced or contain imported content of no more than 40 percent of the cost, insurance and freight value of the materials used in its production. Neither Kenyan goods nor goods from the other member states have had it easy attaining these standards. The result therefore is a trade strain felt throughout all the member states.

⁹⁴Ihiga S, 'A Report on Survey Of Non-Tariff Barriers That Affect Kenyan Imports and Exports Within EAC and COMESA Countries' (Trade and Investment Consortium, 2007)

2.7.2.4 Licenses and Permits

Licenses required in Kenya for importers include an import/export license, a road transportation license and a municipal council license. The procedure for obtaining these licenses is the same be it for imports from the EAC member states or from elsewhere. In essence, there is no preferential treatment to EAC-originating businesses. Moreover, multiple licenses are required for the production, distribution and sale of goods this, coupled with the manual processes used in business names searches, registration and the payment of relevant charges, results in duplication and prohibitive costs of doing business in Kenya.

2.7.2.5 Police Checks and Roadblocks

Within the EAC, there are many roadblocks and police checkpoints along the major roads that disrupt the efficient movement of goods. For every 100 kilometers, traders encounter seven roadblocks in Kenya.⁹⁵ These stops are costly in terms of time and money. Making matters worse, police officers often solicit bribes at these locations from transporters and traders, especially those whose vehicles have foreign registrations.⁹⁶

2.7.2.6 Truck Scales and Inspections

The mandatory weighing of goods along the transit routes adds time and cost of upkeep for transporters. These costs are particularly significant on the Kenyan side this is because of the numerous truck scales along the Northern Corridor which also makes it difficult to move goods to destinations on time. Further, acceptable weights per axle and the number of axles per metric

⁹⁵Karugia, J. Waithaka, M. Freeman, A. Prabhu, R. Shiferaw, B. Gbegbelegbe, B. Massaw, S. Kyotalimye, M. Wanjiku, J. Macharia, E. 2009. *Responding to Food Price Crisis in Eastern and Southern Africa: Policy Options for National and Regional Action*. ReSAKSS Working Paper No. 27.

⁹⁶Muluvi et al n.5

ton as well as gross vehicle mass have not yet been harmonized among the EAC member states. As a result of this, Kenya allows 54 metric tons which is punitive to vehicles from Tanzania which allows 56 metric tons and Rwanda and Burundi both of which allow 58 metric tons.⁹⁷

2.7.3 Tanzania; Institutions involved in intra-regional trade

Trade in Tanzania as is in Kenya is regulated controlled and supported by a number of institutions. At the center of this regulation is the TRA Tanzania's Customs Department. Its main tasks involve Customs documentation and procedures, Destination inspection on dutiable Quantity before levying of applicable import duties, Assessment of degree of risk and consequent classification either under green, yellow and red channels under ASYCUDA⁹⁸ system, Interpretation of tariff descriptions and codes and issuance of import licenses/permits. While these are mandates that are properly within its auspices, the subcontract by TRA to TISCAN, to undertake inspection on dutiable quantity and value so as to facilitate charging of correct import duties, makes the procedure too cumbersome and time-consuming because TISCAN sends its preliminary report to Cotecna South Africa for approval before the report can be given to TRA Customs.

The other institutions include TFDA and Tanzania Atomic Energy Authority whose chief responsibility is the testing for prevalence of diseases, chemical residue levels. Then there is the Ministry of Industry, Trade and Marketing Attorney General's Chambers Business registration and licensing procedures. Weights and Measures Agency whose work is to assess weights and measures parameters such as weights, labelling, quality, tolerance in measurements, type and

⁹⁷ Ibid

⁹⁸ ASYCUDA – Automated System of Customs Data.

technology used in packaging. The Immigration Department which sets requirements for passports, work permits and visas; BRELA which handles Business registration; The Police which is involved with erecting roadblocks and Unloading of cargo for physical verification and Ministry of Agriculture and Food Security and TBS – Tanzania Bureau of Standards which is involved in the testing for prevalence of diseases, chemical residue levels. Though these are duties rightly bestowed upon these institutions to undertake. However the manner in which they are carried out occasions delay or causes business people to incur unplanned expenses through bribes as well as loses which in the long run affect trade within the region.⁹⁹

2.7.4 Regulatory Barriers to Trade imposed by Tanzania

The following are the most prevalent regulatory barriers to trade employed by Tanzania as against goods from other member states;

2.7.4.1 Licenses and Permits

While the search and registration for a business name can be done online, payment for a business certificate is still done manually, and a new applicant has to travel to Dar es Salaam to pay and obtain a business certificate from the Attorney General’s Office which is a tedious affair.

2.7.4.2 Customs formalities and documentation

Unnecessary time wasted to clear imports at border stations due to manual processes. Average days to declare imports, classify them, pay import duty, carry physical verification under Red

⁹⁹Mmasi J., Ihiga S., ‘A Report On The Survey of Non-Tariff Barriers That Affect Tanzanian Imports and Exports Within EAC, SADC and COMESA Countries.’ (2007, Trade and Investment Consortium)

Channel, clear them from customs area, and release them to importer is minimum of 7 days at Dar es Salaam International Airport which in effect causes undue delay.

2.7.4.3 Police Checks and Roadblocks

Within the EAC, there are many roadblocks and police checkpoints along the major roads that disrupt the efficient movement of goods. For every 100 kilometers, traders encounter two roadblocks in Tanzania.¹⁰⁰ Considering the size of the country, these stops are likely to be numerous and costly in terms of time and money. Making matters worse, police officers often solicit bribes at these locations from transporters and traders, especially those whose vehicles have foreign registrations.¹⁰¹

2.7.4.4 Truck Scales and Inspections

The mandatory weighing of goods along the transit routes adds time and cost of upkeep for transporters. Acceptable weights per axle and the number of axles per metric ton as well as gross vehicle mass have not yet been harmonized among the EAC member states. As a result of this, Tanzania which allows 56 metric tons may impose rules likely to be punitive on Rwanda and Burundi cargo trailers both of which allow 58 metric tons.¹⁰²

¹⁰⁰Karugia, J. et al n. 8

¹⁰¹Muluvi et al n.5

¹⁰²Ibid

2.7.4.5 Customs and administrative documentation procedures

Examples of NTBs under this cluster include varying systems for imports declaration and payment of applicable duty rates at entry points, limited customs working hours, and cumbersome inspection procedures used by TRISCAN.¹⁰³

2.7.4.6 Cumbersome inspection requirements

Various NTBs experienced under this cluster include repeated and long inspection queues during inspection of Gross Vehicle Mass and axle loads, faulty weighing equipment at some stations, cumbersome and costly quality inspection procedures.¹⁰⁴

2.7.4.7 Congestion at Dar es Salaam Port

The use of old equipment like cranes used to offload cargo from delivery vessels has led to serious clogging at the port, lack of warehousing space, slow turn-around time of the vessels and consequently to exorbitant charges for deliveries to Dar es Salaam port and demurrage charges on cargo.¹⁰⁵

2.7.5 Uganda; Institutions involved in intra-regional trade

Being as it is that Uganda is landlocked and most imports to the country pass through Kenyan and Tanzanian ports, most of the goods are directly handled by the same institution that handle Kenyan and Tanzanian imports. Therefore, institutions such as the KPA, KRB, Kenya police and Kenyan customs Authority directly affect Ugandan imports as they pass true their mandate before proceeding to Uganda. Other than the Kenyan institutions, there are a number of Ugandan

¹⁰³Mmasi J. n. 12

¹⁰⁴ Ibid, 23

¹⁰⁵Mmasi J. n. 12

institutions that are sources of NTBs in Uganda. Case in point is the Bank of Uganda which limits the business hours for all banks including banks at the border posts to between 8 am and 4pm. Also the working week is limited to between Monday and Friday 9.00 am to 3.00 pm, and Saturday 9.00 to 11 am. Consequently importers are unable to conveniently pay the required so customs duties and taxes on time. In turn they cannot clear their goods unless they have made the necessary payments. The other most crucial institution is the Uganda Customs.

Department which enforces matters to do with rules of origin which as discussed earlier on, are a big source of NTBs in EAC. UNBS which is concerned with import standardisation. The most severe NTB arising from this institution is the requirement that all imported

Products whose standard specifications are declared as compulsory under the UNBS Act be inspected for conformity to the relevant Ugandan Standard before release into the Ugandan market. This includes even products that are certified by internationally accredited laboratories.¹⁰⁶

2.7.6 Regulatory Barriers to Trade imposed by Uganda

During the 2005/06 EAC NTBs consultations, it was found out that a number of NTBs affect the ability of Ugandan businesses to import, which were as follows;

2.7.6.1 Customs documentation and administrative procedures

Obstacles experienced under this, include slow clearance of imports due to manual processes in most border entry points, lack of harmonised imports declaration systems and procedures within

¹⁰⁶Tumuhimbise C., Ihiga M. 'A Report on A Survey Of Non-Tariff Barriers That Affect Ugandan Imports And Exports Within EAC and COMESA Countries.' (2007)

EAC, interpretation of the rules of origin, consequent tariff lines to classify imports and import duty changeable, Import Declaration Fees charged by Kenya Customs, and limited customs and bank business hours.¹⁰⁷

2.7.6.2 Transiting procedures

Problems experienced under this cluster include slow and inefficient clearance of imports at Mombasa Port, lengthy time transiting through the Kenyan section of the Northern Corridor (Mombasa-Malaba) due to too many weighbridges, police roadblocks, and requirement by Kenya Police that all transit trucks must have Kenyan registration; and inefficient rail operations. All these obstacles result to lost business time and cost of accessing goods to Uganda.¹⁰⁸

2.7.6.3 Quality inspection and certification procedures

The major problems under this cluster include UNBS10 requirements for inspection of conformity to the relevant Ugandan Standard, and lack of EAC harmonised procedures for issuance of certification marks.¹⁰⁹

2.7.7 Rwanda and Burundi; Institutions involved in intra-regional trade

Same as in the Ugandan case, the institutions that act as sources of NTBs range from internal institutions of cross boarder institutions from both Kenya, Tanzania and in cases where the Kenyan port is used, institutions from Uganda may play a part as the goods will pass through Uganda before reaching the two countries. Of essence is the axle load limit which varies from count to country within the EAC. The varying axle load acts as a great source of NTBs as the

¹⁰⁷ Ibid.

¹⁰⁸ Tumuhimbise n. 19

¹⁰⁹ Ibid.

two counties have the highest axle load limit while their imports have to pass through other member states whose axle load limits are quite low. Internally, the authorities responsible include relevant revenue authorities, bureaus of standard roads' departments, ministries, police and customs authorities. Of interest though is the regulations on polythene bags imposed by the Rwanda Environment Management Authority and Rwanda Revenue Authority which cause delays because imports packaged in polythene bags have to be changed before being cleared.¹¹⁰

2.7.8 Regulatory Barriers to Trade imposed by Rwanda and Burundi

2.7.8.1 Truck Scales and Inspections

The mandatory weighing of goods along the transit route adds time and cost of upkeep for transporters. Acceptable weights per axle and the number of axles per metric ton have not yet been harmonized among the EAC member states. Both Rwanda and Burundi have the highest metric tons gross vehicle mass at 58. Considering that the imports have to pass through countries such as Uganda which has the lowest gross vehicle mass level at 45 metric tons, it is without doubt that traders from these countries suffer more than the rest of their counterparts in the EAC.¹¹¹

2.7.8.2 Language Barriers

English is the agreed-upon language across the EAC for the purposes of administration, public trade facilitation and private transactions. However, for francophone Burundi, customs officials still insist on documents being translated into French. To fulfill this requirement, traders must

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¹¹¹Muluvi et al n.5

incur extra costs and time. Translation can involve traveling to Bujumbura to get the documents.¹¹²

2.7.8.3 Double taxation

In Rwanda, the value added tax of good imported is calculated on CIF value. This CIF value includes the freight cost on which value added tax has already been paid.¹¹³

2.7.8.4 Distribution constraints

Both Rwanda and Burundi as a landlocked countries face high transport costs, but these are unnecessarily high in comparison to other countries in the region, e.g. Uganda costs are up to 50% lower. The costs are raised due to sabotage restrictions such as lengthy delays in border crossings particularly Kenya – Uganda and Uganda to Rwanda, Tanzanian restrictions on lorries only travelling in convoys, coupled with time barriers to get between weighbridges which mean that lorries are always late getting to the next weighbridge and face fines at each stage. Then there is the question of limited bonded warehouse storage capacity and operations in the two relatively small EAC member states.

2.8 Case study on how to deal with NTBs; Lessons from GATT, WTO, EU and NAFTA.

2.8.1 The GATT Approach

The approach taken by GATT can be discussed in two fronts. The first front is the approach it adopts in dealing with the border NTBs the second being the approach it takes in dealing behind the border NTBs on the import side.

¹¹² Ibid

¹¹³ Imani Development International (Ltd), 'A Report on The 2007 Survey of Non Tariff Barriers To Trade: Rwanda.' (2007) For Regional Trade Facilitation Programme

On the border NTBs GATT acts as a negotiating forum in which reciprocal, voluntary and nondiscriminatory (MFN) tariff bargaining among member governments is to be undertaken with the aim of achieving tariff bindings. The aim here being that tariff bindings can lead to meaningful increases in market access for foreign exporters, and for this reason, be found valuable by the participating governments.¹¹⁴ However because countries are likely to rely on other policy restrictions to trade that are not capable of being classified as NTBs,¹¹⁵ the GATT contains various restrictions that are aimed at restraining the likelihood of governments relying on policies to restrain trade.

These include restraints such as prohibition on the use of quantitative restrictions which is designed to induce tariffication of import-protective measures and prevent the substitution of alternative forms of import protection for tariffs.

With regard to the behind-the-border NTBs, the GATT takes a two-pronged approach. Under the first approach, The GATT requires that all domestic taxes, charges and regulations satisfy a basic non-discrimination rule similar to that under the national treatment concept. This prevents the most direct methods of substituting behind-the-border NTBs for tariffs such as discrimination in taxes or regulations against imported products. Because of the likelihood of non-discriminatory domestic taxes and regulations turning out to be partial substitute for tariffs, a second line of defense was developed against the substitution of behind-the-border NTMs for import tariffs. This line is contained in the impairment/ non- violation clause provision of GATT. Under this clause, a member is entitled to compensation from another GATT member if the two countries

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¹¹⁵Hudec (1990)

had originally negotiated an exchange of tariff bindings, and one of the countries subsequently introduces a new measure on which there exists no GATT commitments which erodes the market access value of its original tariff binding, if that the other country could not have reasonably anticipated at the time of their original market access negotiation.

2.8.2 The WTO Approach

With the coming into force of the WTO clear guidelines were set for the settlement of disputes emanating from barriers to trade. To this effect, the Dispute Settlement Understanding (DSU), formally known as the Understanding on Rules and Procedures Governing the Settlement of Disputes establishes rules and procedures that manage various disputes arising under the Covered Agreements of the Final Act of the Uruguay Round. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO members, which administers dispute settlement procedures. If an NTB is complained about the following are the most likely stages that it is to go through. The first stage is consultation, followed by good offices, conciliation and mediation, panel phase, Appellate Body review, and remedies.¹¹⁶

Consultation is normally requested by a member state where another member state has imposed restrictions prohibited by an agreement under the WTO. The member whose conduct is complained about should respond within 10 days or enter into consultations with the complaining member country. If both are not undertaken the complainant can directly request for the establishment of a panel to hear and settle the complaint. Unlike consultation where the complainant has the authority to force the respondent to the complaint against them, the next stages of good offices, conciliation and mediation are voluntary. In each case, any party has the

¹¹⁶ Rubenstein, Kim and Schultz, Jenny. 'Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO.' (1996) 11 St. John's Journal of Legal Commentary. 278.

right to withdraw from the process. However in all the stages, if a party is disgruntled by the decision arrived at from the process or if one withdraws prematurely, the disgruntled party can seek that a panel be constituted to finally determine the matter.¹¹⁷

The panel phase is in often the phase of last resort. The panels are constituted of well qualified people from public service or from the private sector whose governments are not the parties in the dispute unless the countries in dispute request otherwise. They are often composed of three members. Nominees to the panel are nominated by the secretariat. Parties to the dispute cannot oppose the nominations unless under compelling circumstances. The panel hears the parties and prepares a report to the DSB within 6 months of its formation. Interested parties are allowed to come before the panel to be heard and make their submissions thereof. Within sixty days after the report is circulated to the members, the report is then adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adapt the report.¹¹⁸

The DSB has a standing Appellate Body that hears and reviews the decisions of panels constituted thereof. It considers only issues of law covered in the panel stage. Its report is final and is adopted thirty days following its circulation to members. Countries failing to comply with the decisions of the panel or the appellate body within the set time are required to compensate the complainant who should start by initiating compensation negotiations within twenty days of effluxion of compliance time. The complainant has an option of requesting the DSB for leave to cancel all concessions or other obligations under the Covered Agreements.¹¹⁹ This retaliation

¹¹⁷ WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding)', art. 3, para. 2. <<http://www.wto.org/wto/dispute/dsu.htm>> accessed 12.08.2014

¹¹⁸ Ibid para art. 16, para. 4.

¹¹⁹ para. 2.

should be restricted to the same sectors but if the complaining party considers the retaliation insufficient, it may seek retaliation across sectors.¹²⁰

2.8.3 The NAFTA approach

Trade dispute resolution in NAFTA is administered by the NAFTA Secretariat. NAFTA employs the panel system of trade dispute resolution which is also the same system applied by the WTO. The agreement sets out the manner in which the panels should be constituted with the WTO requirement of members of the panel being experts from both the private and public sector replicated. Further the panels operate like quasi judicial bodies observing court processes and issuing binding orders the same way courts of law operate.¹²¹ Dispute resolution takes place within the legal framework of rights and obligations. Further dispute resolution under the NAFTA panels is characterized by firm timelines concerning the establishment and operation of the panels. There are strict restrictions in place barring parties to disputes from blocking the adoption of the panel's report. In some instances, dispute resolution under NAFTA intersects with dispute resolution under the auspices of WTO. Case in point, the United States requested a WTO panel review of Mexico's HFCS duties, in addition to using NAFTA mechanisms.

However before the disputes reach the panel level of dispute resolution; they pass through earlier stages such as consultation and negotiation carried out by NAFTA standing committees such as NAFTA SPS stages which also appear within the WTO dispute resolution system. Other dispute resolution methods such as governmental negotiations, private industry negotiations, and technical working groups have been used to offer assistance in initial stages of dispute resolution.

¹²⁰ Ibid

¹²¹ Link J., Wainio J., Zahniser S. 'NAFTA's Impact on U.S. Agriculture: A Broad Overview Developments in Trade Policies, Domestic Agricultural Programs, and Dispute Resolution.' WRS-02-1 8.

2.8.4 The EU approach

The EU has included dispute settlement mechanism based on the WTO dispute settlement mechanism in all of its Free Trade Agreements since 2000. In addition, since 2009 the EU also includes investor-to-state dispute settlement mechanisms in trade and investment agreements which also are characteristic of WTO dispute settlement procedures. Trade dispute resolution in the EU can be divided into three stages i.e. dispute settlement at the World Trade Organisation; Resolving differences between States under international trade agreements and Investor-to-State dispute settlement within international trade agreements.

In regard to dispute settlement at the World Trade Organization, the EU only initiates a dispute settlement case at the WTO where its systems of dispute resolution have failed. Resolution of differences between States under international trade agreements also known as bilateral dispute settlement is since the year 2000 included in all EU trade agreements all countries concerned can now resolve their differences on the basis of this mechanism. The strength of this system of dispute settlement is that it is rapid and it is modeled along the WTO dispute settlement system. Under investor-to-State dispute settlement within international trade agreements investors are permitted to bring claims when investment protection obligations owed to them have been breached. There is legislation in the offing setting out financial consequences flowing from investor-to-state dispute settlement. In this regard the commission established a legal and financial framework for investor to state dispute settlement. The framework manages any possible financial responsibility deriving from investor-to-state dispute settlement by allocating between the EU and the Member States the financial responsibility on the basis of

who adopted the treatment responsible for a breach of the agreement.¹²² Further, the international trade rules enforcement regulation, sets out new internal rules allowing for more effective enforcement of international trade agreements. Where a third country has not complied with its international obligations, the Commission can adopt commercial policy measures restricting access to the EU market of goods or services supplied by that third country until such time as compliance with the relevant international trade rules is achieved.¹²³

¹²² European Commission, 'Investment Protection and Investor To State Dispute Settlement in EU agreements fact Sheet.' November 2013 http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf

¹²³ European Commission, 'EU trade policy and dispute settlement'
<http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/>

Chapter Three:

EAC trade legal and institutional framework and suggested reforms

3.0 Introduction

This chapter analyses EAC trade legal and institutional framework and suggests reform options that can enable the EAC attain a free trade regime. This is achieved through analyzing the place of NTBs in the EAC Treaty, the East African Community Customs Union Protocol and the East African Community Common Market protocol. This will be followed by a detailed descriptive analysis on decision making process on NTB related dispute resolution, strengths, and weaknesses and how this impact at efforts to remove NTBs. This will also include a forecast to the past that analyses the mechanism for resolving disputes within the earlier EAC that collapsed in 1977 over NTBs, its effectiveness and the lessons it offers for current efforts towards NTB elimination. It also interrogates why traders are not filling cases at the EACJ and the efforts being undertaken by the EALA to ensure that the EAC attains a free market regime. The chapter will conclude by highlighting the viable lessons from RECs such as the EU and NAFRA that can be used by the EAC to develop a policy that can help it deal with NTBs.

3.1 The place of NTBS in the EAC

There is no contention that Partner states of the East African Community (EAC) have continued to fight NTBs to make intra-regional trade flourish. This is evidenced by the adoption of the EAC Time Bound program by the 28th meeting of the Council of Ministers that discussed the draft bill on legally binding enforcement mechanism on elimination of outstanding NTBs in the

EAC which was concluded and was due to be discussed before the 16th meeting of the Sectoral Council on Legal and Judicial Affairs for legal input.

During the 13th EAC regional forum on NTBs which was held in Bujumbura from 17th to 20th December 2013, Partner States' National Monitoring Committees considered country reports on elimination of NTBs it was noted that the following NTBs were resolved : The ban on entry of Rice, Small Fish and Palm Oil from Burundi into Rwanda was lifted; the ban on export of beer from Burundi through the border of Kobero/Kabanga into Tanzania which was reported at the meeting was thereafter lifted. The ban by Kenya on the extension of customs ware housing which was marked by Kenya notifying clearing agents through their website that from next financial year 2013/2014 there will be no further extension of customs warehousing was not resolved. However, it was recommended to the Sectoral Council on Trade, Industry, Finance and Investment to urge Kenya to eliminate it as well as urge other Partner States to eliminate outstanding NTBs. The delay by Kenya on inspection of export goods at factory level was also resolved; Lack of clearance of trucks at the border of Sirare between Kenya and URT by Tanzania Revenue Authority by declining to accept copies of bill of lading, clearing of part shipment, clearance of trunks without containers and not working on Saturdays and Sundays was also resolved at the same meeting.¹²⁴

The meeting also identified some long outstanding NTBs which it stated required the attention of the Council of ministers. This included;

¹²⁴NMC Rwanda; 'Fight against NTBs intensified by EAC partner states.'
<<http://www.nmcrwanda.org/spip.php?article144>> accessed 20.08.2014

Non-harmonized road user charges / road tolls in EAC Region; Weighing of empty tracks in the central corridor in Tanzania ; Lack of recognition of CTH criteria in the EAC Rules of Origin for motor vehicles manufactured in Kenya while exported to United Republic of Tanzania, Rwanda, and Burundi; Cigarettes manufactured in Kenya exported to Tanzania required to have a local 75% tobacco content; and Re-introduction of County transit Fee by Kajiado and Kwale County Governments of the Republic of Kenya. These were recommended to the Sectoral Council on Trade, Industry, Finance and Investment to give guidance on their resolution being as it is that they were long standing.¹²⁵

After updating the EAC Time Bound Programme, the status of NTBs in EAC showed that 24 NTBs were still outstanding while 3 NTBs were reported as new and 5 as resolved during the 13th EAC forum making 60 NTBs in total.

Following on the 28th meeting of the Council of Ministers, the 9th EAC Regional Forum on NTBs held in December 2013 updated the Time Bound Program taking into account the NMC reports presented during the meeting. The updated EAC Time Bound Program on elimination of identified NTBs shows the status of elimination of NTBs in the region as per December, 2012' stands at; Thirty seven NTBs unresolved; Three NTBs reported as new, and Forty NTBS stood resolved.¹²⁶

From the discussion above, there is no doubt at all that there are NTBs in existence in the EAC today, some even too hard for the authorities responsible to resolve as a result of which they are

¹²⁵ Ibid

¹²⁶ EAC, 'Status Of Elimination Of Non Tariff Barriers In The East African Community.' (2012) 5 Available at <http://www.eac.int/trade/index.php?option=com_docman&Itemid=132>accessed 20.08.2014

tasked with the work of talking imposing member states into eliminating the NTBs. According to the status of elimination of NTBs in East African Community by the EAC secretariat, the following main NTBs have been identified and eliminated within the set timelines;

3.1.1 Delays in transit bonds cancellation

The source institutions for this NTB included Kenya Revenue Authority and Tanzania Revenue Authority. The prioritized action in regard to this NTB was the prompt cancellation of transit bonds which the council of ministers required member states to undertake as at April, 2013 further, the council required the member states to implement the electronic cancellation of bonds within 24 hours. As at the deadline set by the council of ministers, Kenya reported that she is cancelling the bonds manually within 24 hours. Kenya further reported that she is in the process of upgrading the Simba system to enable her to cancel the bonds within 24 hours. Tanzania reported that they have complied with the 24 hour electronic cancellation.

3.1.2 Numerous institutions involved in testing goods.

All statutory bodies in the partner states were identified as the source institutions for this NTB. The prioritized action for the elimination of this NTB was identified as the need to invest in one-Stop- Centers and electronic single window systems at border stations and development and implementation of mutual recognition instruments. The council required that by end of December, 2012, collaboration among the regulatory agencies be enhanced; agencies operate under one stop post as is currently being done between Kenya and Uganda; agencies collaborate at the national borders with a view to fast tracking clearance of goods at border entry points; and Mutual recognition of certificates issued by agencies be implemented. As at the deadline set by

the Council of Ministers, Tanzania reported that Dar es Salaam port had started implementing electronic single window system. Malaba border between Kenya and Uganda is operating one stop border post while Rwanda reported that it had introduced an electronic single window through which most testing bodies share information through the system electronically.

3.1.3 Existence of several weighbridge stations in the Central and Northern Corridors

The source institutions for this NTB were identified as the Kenyan Ministry of Transport and Tanzania's TANROADS. The prioritized action for the elimination of the NTB was identified as Reduction of weighbridges to two, one at the port of entry and the other at the port of exit. In that respect the council required that by December 2012 the number of weigh bridges is reduced to three in Tanzania and Kenya. In case of Uganda, Burundi and Rwanda, each to reduce the number of weigh bridges to two. As at the set deadline, Kenya stated to have reduced its weighbridges to two one at the point of entry and the other at the point of exit which of course is not a true representation of facts on the ground while Tanzania claimed to be waiting for the outcome of the study on the impact of the reduction of the weigh bridges to two.

3.1.4 Several Police road blocks along Northern and Central Corridors

In total these were estimated at 36 between Mombasa- Kigali and 30 between Dar es Salaam to Rusumo border. The source institutions were identified as EAC member States Police Departments. The priority issue in regard to this NTB was the issuance of clear guidelines on reasons for stopping commercial vehicles, a daily record of vehicles stopped, reasons and measures taken. Thus far, the council of ministers required all member states to reduce the number of roadblocks by June 2013. As at the deadline set by the council of ministers, Kenya

had reduced the road blocks from 36 to 9. Rwanda removed all road blocks in November 2008. Uganda had reduced her roadblocks between Malaba and Gatuna/Katuna to six and indicated that it will further reduce these roadblocks and concentrate on highway patrols. Burundi had removed all road blocks. Tanzania had reduced her roadblocks from Dar es Salaam to Rusumo from 30 to 15.

To further ease cargo delays, the Council of Ministers decided that EAC member States undertake to explore measures to exempt transit traffic from inspection at the police road blocks and to adopt harmonized electronic cargo tracking system. In consideration of this proposal, Tanzania reinstated its Electronic Tracking System in November, 2012. The other member states were yet to follow up on the same.

3.1.5 Lack of interface within the customs' systems in the Revenue Authorities in Partner States

The Burundi Revenue Authority was identified as the source institution of the NTB. The prioritized action for this NTB was the prompt Interfacing of the systems. This was resolved in January 2013 vide the rolling out of the RADDEX 2.0 system in the five Member states which was a divergence from the use of ASYCUDA world which was interfacing with systems in Kenya, Uganda and Burundi, except and Tanzania and RADDEX system had interfaced Rwanda, Uganda and Kenya.

3.1.6 Lack of harmonized port procedures manual

The source institutions for this NTB were identified as the revenue authorities of Tanzania, Uganda, Rwanda and Burundi. The priority action towards the elimination of the NTB was identified as the harmonization of working hours so as to do away with the discrepancies further the council directed that border entry points along the main transport corridors should operate 24 hours for purposes of clearance of goods; and member states submit the names of the border entry points to start with by end of march 2012. The council of ministers set the date of compliance at December 2012. As at the deadline date, all the member states had put in place the 24hrs operations requirements as well as submitted the names of the boarder entry points as required by the council of ministers.

3.2 The EAC Treaty and how it deals with NTBS

The EAC Treaty and the EACCU Protocol create institutions that are tasked with the responsibility of ensuring free trade within the EAC. They are therefore chiefly tasked with the responsibility of monitoring the imposition of NTBs through receiving reports and investigating the reports thus received and eliminating the same through the powers vested in them by the enabling protocols. These institutions include the National Monitoring Committees; the EAC Secretariat; the EAC Sectoral Committee on Trade, Industry and Investment; the EAC Co-ordination Committee; the EAC Council of Ministers; the EAC Trade Remedies Committee; the EAC Secretariat among others. Most of these institutions are sectoral committees. The EAC Treaty provides that each Sectoral Committee is mandated to; Prepare a comprehensive implementation program and priorities relevant to its sector; Monitor and constantly review implementation of programs under its sector; Submit reports and recommendations to the Co-

ordination Committee on implementation of issues relevant to its sector; and to Undertake other functions conferred on it by the Treaty. If all this mandates were performed effectively then it is opined that the issue of NTBs would have been comprehensively and fully tackled.¹²⁷

3.2.1 The EAC Trade Remedies Committee

This committee is established vide the provisions Article 24(1) of the EACCU Protocol. Its main duty is to handle matters pertaining to rules of origin, anti-dumping measures, subsidies and countervailing duties measures, safeguarding measures, and Dispute Settlement Mechanism Regulations. Its purpose therefore as far as EAC trade is concerned is to work through investigating authorities established in each partner state in the initiation and conduct of investigations. The Committee is charged with the duty of, inter alia, making affirmative or negative determinations on investigations, recommending provisional measures, and reporting to the EAC Council of Ministers on all matters referred to it. The Committee is also charged with the administration and management of the Dispute Resolution Mechanism under Article 24(4) of the EACCU Protocol.

3.2.2 Trade, Investment and Industry Committee (TIIC)

The TIIC is the major sectoral committee of the EAC. Its main task is to prepare a comprehensive implementation program and priorities relevant to its sector; Monitor and constantly review implementation of programs under its sector; and to submit reports and recommendations to the Co-ordination Committee on implementation of issues relevant to its sector. Therefore, the TIIC Committee has the core responsibility for resolving trade related

¹²⁷EAC EABC, 'Monitoring Mechanism for Elimination of Non-Tariff Barriers in <EAC' http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=291&Itemid=158> accessed 20.08.2014

disputes within EAC. Under the direction of the Co-ordination Committee, the TIIC will resolve NTB cases of a regional nature and report to Coordination Committee on quarterly basis. The Coordination Committee will thereafter report to Council of Ministers regarding progress of NTBs elimination or minimization of impact. The TIIC is also tasked with the conduct of an annual verification of actual practices at borders.

The TIIC has found it hard to eliminate NTBs despite being a major sectoral committee as it is run in the same manner as other sectoral committees with meetings are convened on a need basis based on ad-hoc complaints received from member countries through the NMCs which are the national arms of the TIIC. In the absence of fixed meeting dates, the fixing of meeting is left to the discretion of members. The best approach would be to have the TIIC meet on quarterly basis to resolve the NTBs identified in the national NTBs elimination and monitoring plans. This will mark departure from the current unscheduled meetings whose agenda is dictated by ad-hoc complaints received from member states. Also, in order to discharge its mandate efficiently, the TIIC should incorporate ex-officio members from amongst NMCs whenever the need arises, including individual businesses.¹²⁸

3.2.3 National monitoring committees (NMC)

The key duty of NMCs is to work in close consultation with line ministries or agencies responsible for enforcing trade related requirements and with affected businesses to eliminate or minimize the impact of NTBs at the national level. This is done on two fronts. The first is through convening an annual regional forum during which its members share their experiences on the NTBs elimination process. These regional forums incorporate officials on the ground such

¹²⁸ Ibid

as drivers, clearing and forwarding agents, customs officials, policemen, immigration officers among others. The second is by receiving copies of NTB complaints sent to the line ministry or agency responsible for enforcing an NTB by individual businesspeople, business associations, chambers of commerce and clearing and forwarding associations. Out of these forums, the NMCs make reports to the EAC Secretariat through the EAC Director of Trade on a quarterly basis on the resolved or unresolved cases. The EAC Secretariat then prepares progress reports for the Co-ordination Committee and TIIC for information or for dispute resolution.

They work by reviewing progress of actions to eliminate NTBs elimination or minimize their impact through scheduled meetings in their respective countries. This is then followed by each NMC networking with respective NMCs in the other Partner States regarding cases of a cross border nature and pursues an elimination process. Where cases are resolved satisfactorily, the respective NMC will disseminate such information to businesses through their business association, chamber of commerce or clearing and forwarding association. The information will also be disseminated to the EAC Secretariat for onward transmission to NMCs in the other Partner States. They also use other communication media to reach small businesses that may not have an appropriate membership forum. In other instances, each NMC refers NTB cases of national or regional level that have not been resolved to the Co-ordination Committee, to initiate an elimination process through the TIIC. Such cases will be sent to the EAC Secretariat through the Director of Trade and Customs. The Director will also disseminate information on resolved cases to the TICC, Co-ordination Committee, respective NMCs and EABC for onward transmission to the business community.¹²⁹

¹²⁹ EAC, EABC. n 1

3.2.4 The EAC Secretariat

Receive quarterly progress reports from NMCs on resolved or unresolved cases. Prepare progress reports for the TIIC and Co-ordination Committee for information on resolved cases. Monitor actual practices at major exit/ entry points Initiate dispute resolution by the TIIC on cases that have not been resolved at the national level or Facilitate an annual verification of actual practices by TIIC.

3.2.5 Business associations/chambers of commerce

The main task of business associations and chambers of commerce is to act as watchdogs on the progress of eliminating NTBs. They will receive NTB cases from their members, and where possible verify the accuracy of such reports, and whether the requirement is backed by any law. They will then propose for a practical review of the requirement to the line ministry or agency under which the NTB is being experienced. If no satisfactory solution is given by the line ministry or agency within one calendar month from the date the NTB is reported, the associations/ chambers of commerce will refer the cases to National Monitoring Committee (NMC) and EAC secretariat for monitoring and policy action.

3.2.6 The Co-ordination Committee

As per Articles 17 and 18 of the EAC Treaty, the Co-ordination Committee is comprised of Permanent Secretaries responsible for regional Co-operation in each Partner State and other relevant Permanent Secretaries as each Partner State may determine. Its responsibilities are to: Submit report and recommendations to the Council of Ministers regarding implementation of the EAC Treaty. With respect to the Customs Union, this includes reporting on progress of

eliminating NTBs, implement decisions of the Council of ministers as directed, receiving and considering reports of the Sectoral Committees and coordinating their activities. The coordination committee can also request sectoral committees to investigate specific cases, which with respect to the Customs Union include NTBs.

As part of its mandate on trade promotion therefore, the Co-ordination Committee will therefore be involved in Monitoring progress of NTBs elimination. It will refer any NTB cases that cannot be resolved by the TIIC to the Council of Ministers, for necessary guidance or for dispute resolution by the EAC Trade Remedies Committee (EACTR). As specified under Article 24 of the EAC Customs Union Protocol.¹³⁰

3.2.7 The East Africa Business Council (EABC)

The responsibilities of East Africa Business Council include disseminating information on NTBs elimination progress to business people through its website and national members; Undertaking an annual Business Climate Index (BCI) Survey, which will indicate whether the business climate within the region is improving and whether new initiatives are required in dealing with NTBs; Convening a regional annual NMCs forum aimed at sharing experiences on NTBs elimination process; and Undertaking other activities which will facilitate elimination/reduction of NTBs and improvement of the business environment.¹³¹

¹³⁰ Ibid

¹³¹ EAC, EABC. n 1

3.3 Strengths and weaknesses of the NTB removal process

From the discussion on the place of NTBs in the EAC, it emerges that in most cases major NTBs that are identified are resolved with expedience. This may be one of the key strengths' of the EAC NTB removal process. However the most apparent weakness is that these NTBs are resolved in a somewhat abstract way because they are resolved in meetings that are outside of the systems set by the EAC treaty and its incidental Treaties without follow up mechanisms being put in place. Further, other than the major NTBs resolved, numerous other minor NTBs affecting either two or one partner were resolved making up a cumulative number of 43 resolved NTBs. In the same period only 3 new NTBs were reported which number is not included in the already unresolved NTBs.¹³² In a case where only 3 new NTBs are reported in a quarter but the number of unresolved NTBs goes as high as 36, then there is every indication that the existing systems have weaknesses that make it possible for NTBs to accumulate. In an earlier discussion above, a list of the major unresolved NTBs is provided. Some of the NTBs are of grave consequences to intra EAC trade yet they have taken too long to resolve. The institutions in whose power lies the mandate to monitor report and eliminate the reported NTBs are limited by very many factors such as the inability to sanction member states that do not comply to their orders as a result of which they are only capable of handling the very minor NTBs while the major NTBs receive referrals counter referrals and further referrals within the institutions without being resolved. This exposes a soft underbelly as in their nature the institutions lack the power to give binding orders such as those that are given by the WTO or NFTA dispute settlement panels.

¹³² EAC n. 4

3.4 Role played by the EALA in NTB elimination

The EALA has played somewhat passive role in the quest towards NTB elimination in the EAC. Other than conferences on NTB elimination carried out in various countries which involves reports presentation, nothing concrete has been done. The EALA being the legislative arm of the EAC, its chief concern as far as the NTBs issue is concerned is the legislation of laws that can work at eliminating NTBs imposition in EAC trade. To this end, on the 24.05.2012 the EALA proceedings report indicated that it is actively involved in a study on the development of a legally binding enforcement mechanism on the elimination of identified NTBs whose end result was expected to be a legislation on the NTBs Enforcement Mechanism law which law was thought to be an instrumental tool in the elimination of NTBs in the EAC by the end of the 2012/2014 fiscal year. . This never came to pass.¹³³ The Council of Ministers in November 2014 approved the NTB Bill and forwarded the same to EALA for enactment. It is thus opined that the EALA has taken a somewhat laidback approach to NTBs elimination and the process of enacting the EAC NTB Bill will be a determinant of the relevance of EALA in eliminating NTBs.

3.5 NTB Elimination Proposals

The discussion on the progress of elimination of NTBs carried out above has revealed that there are many weaknesses in the monitoring and elimination of NTBs systems and institution. It is the single reason that major NTBs remain unresolved while many NTBs which have minimal impact are resolved quickly. There thus arises a need to interrogate some of the simplest remedial steps that can be taken to help eliminate NTBs before going into the fundamental recommendations for change in the next chapter. These include;

¹³³ EAC (EALA) Official Report of the Proceedings of the East African Legislative Assembly FIFTH MEETING – FIFTH SESSION – SECOND ASSEMBLY Thursday, 24 May 2012

3.5.1 Establishment of a follow up mechanism

While the major NTBS are perpetrated by institutions in all the member states it's only a few that show compliance or steps towards compliance at the end of the deadlines that are set by the Council of Ministers. Case in point is the NTB on numerous institutions involved in the testing of goods. It is recorded that this NTB is visible in all the member states. However as at the deadline set, it is only Tanzania and Rwanda that made reports on the progress that had been made. Tanzania continues to subject goods from Partners States to numerous tests. To cure such issues a system of elimination compliance reporting should be put in place. This will help ensure that all the countries within whose systems and laws such an NTB is entrenched has pursued the elimination of the same so as once elimination is recorded as having occurred, the record bears a true representation of facts on the situation.

3.5.2 Creation of disciplinary sanctions system to punish non-compliance

The emerging trend from the discussion of the bodies responsible for monitoring and eliminating NTBs is that neither of the bodies has the power to impose disciplinary sanctions on any partner state for failing to eliminate a particular NTB that has been reported before it. The EAC Council of Ministers usually urges partner states to eliminate outstanding NTBs and in some cases it has taken 10 year to resolve outstanding NTB's like the ban on Kenyan Beef by Uganda. This depicts lack of proper sanctions for non-compliance by Partner States. This can be eliminated if proper authority is given for the Council of Ministers to direct Partner States to eliminate reported NTBs with failure sanctioned by disciplinary measures.

3.5.3 Streamlining of the monitoring and elimination procedures and institutions

As it stands there are a multiplicity of institutions dealing with the monitoring and elimination of NTBs which institutions don't form a chain of command. The result of this is that there are a couple of institutions each with the power to resolve NTBs but with a higher institution with the same power to do the same. This in essence creates duplication which also delays resolution of NTBs because each body may fail to confront pertinent NTBs by choosing to refer them to the next institution with authority while those affected by the same continue to suffer loss because of the NTB. To deal with this it may be prudent that the institutions be merged so that they can create a proper chain of command and decision making organ other than a group of decision making units.

Chapter Four

Conclusion and Recommendations

4.0 Conclusion

The study was intended at eliciting policy and legal proposals for eliminating Non-Tariff Barriers in the East African Community. At the introduction to this paper it emerged that notwithstanding the fact that the EAC was created as a Customs Union and Common Market the trade tariffs were quickly replaced by NTBs which the member states began to utilise to bar exports from other member states thereby compromising the Common Market dream.¹³⁴ Some of the main NTBs that are employed in the EAC include non-recognition of the EAC rules of origin certified by Kenya Revenue Authority, restrictive trade requirements by regulatory bodies like TFDA, numerous levies and charges including discriminatory excise duties and red tape at border points, numerous road blocks along the major transport corridors, restrictive bars to import of agricultural products and implements between member countries, stringent and time wasting methods of cargo inspection at border points. Limited customs operation times, varying maximum axle load regulation within countries on the same transport corridor which causes a transport nightmare. Non harmonised customs operations within the member states, the issue of language barrier as among the francophone Rwanda and Burundi as against the Anglophone rest of the EAC; and other deliberate technical barriers to trade.¹³⁵

The need to conduct this study was informed by various reasons mainly the reduction of Kenyan trade to EAC Partner States. Studies by the Kenya Bureau of Statistics indicated that the EAC

¹³⁴Kirk R. 'Addressing Trade Restrictive Non-tariff Measures on Goods Trade in the East African Community.' World Bank.N.W., Washington, D.C., United States.

¹³⁵ EAC EABC, 'Monitoring Mechanism for Elimination of Non-Tariff Barriers in <EAC' http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=291&Itemid=158> accessed 20.08.2014

was engaged in more vibrant trade with Western and Asian countries than there was within its members.¹³⁶ This is a worrying trend as the main intention of creating the EAC was to enhance cooperation in the region through the creation of not only a political block but also a common trading block which would be marked by the coming into place of the Common Market Protocol and the Customs Union Protocol.¹³⁷ As provided by the Treaty establishing the EAC under its Article 5 (2), the Partner States undertook to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.¹³⁸

The net effect of NTBs is that they compromise free trade which is the principle of modern multilateral trade. Free trade has been applauded for its suitability in the prevailing times. The imposition of protectionist ideologies characterised by NTBs being imposed by some EAC member states are actually straining and derailing the actualisation of the vision for the growth of the EAC common market. This is unacceptable considering that the first EAC collapsed due to the strains occasioned by the imposition of tariffs that restricted free trade and factors of production such as labour.¹³⁹

¹³⁶ Kenya National Bureau of statistics, *Kenya Economic Survey 2014*

¹³⁷ Kirk, n 1

¹³⁸ Treaty for the establishment of the East African Community, as amended on 14th December, 2006 and 20th August, 2007.

¹³⁹ H.K. Mutai, *'Compliance With International Trade Obligations : The Common Markets For Eastern And Southern Africa'* (Kluwer law international 2007)

On the international front, the WTO seeks to achieve a liberal multilateral trade regime through the Treaty establishing it and through various agreements that have been created under it. As it emerged, the treaty establishing the WTO, the GATS provides for free trade through the use of three concepts. The first is the concept of MFN, the second is Market Access while the final is National Treatment. The GATS¹⁴⁰ Under Article II while providing for Most-Favoured-Nation Treatment, it states that with respect to any measure covered under it, each WTO member is bound to immediately and unconditionally upon the protocol coming into force, accord goods and service suppliers from other Member countries treatment no less favourable than that it accords to like services and service suppliers of any other country. The only time a country is allowed to use these measures, is when its measures meet the threshold set out under the exemptions in the Annex on Article II Exemptions.¹⁴¹ Further, Article XVI of the GATS that makes provisions in relation to Market Access as provided for under Article I maintains the free trade thread that runs through the preceding Article it provides that each WTO Member state is required to accord services and service suppliers from other Member states treatment no less favourable than that provided for under the terms, limitations and conditions agreed upon. To maintain free market access member countries are required not to impose NTBs.¹⁴²

In its Article XVII, while providing for National treatment the GAT provides that each Member is bound to accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. The advocacy for free trade is continually replicated in

¹⁴⁰Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154

¹⁴¹ Marrakesh Protocol Article II(2)

¹⁴²Marrakesh Protocol Article XVI

WTO related agreements such as; The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹⁴³ which also entrenches MFN. Market Access and National Treatment; Agreement on Import Licensing Procedures,¹⁴⁴ which sets out guidelines on how governments should assess applications for licenses in order to make import licensing simple, transparent and predictable so that licensing in itself does not restrict or distort imports.¹⁴⁵ ; Agreement on Customs Valuation¹⁴⁶ which provides for a fair, uniform and neutral system for the valuation of goods for customs purposes thus creating a system that conforms to commercial realities, and which outlaws the use of arbitrary or fictitious customs values which may frustrate importers and act as hindrances to trade; The Pre-shipment Inspection Agreement¹⁴⁷ which requires pre-shipment inspection agencies mandated by government to undertake pre-shipment inspection to be non-discriminatory, transparent, to protect confidential business information, to avoiding unreasonable delay, to use specified guidelines for conducting price verification and expressly state and avoid conflict of interest situations; Rules of Origin Agreement¹⁴⁸ which requires all member states to ensure that their rules of origin are transparent, that they do not have restricting, distorting or disruptive effects on international trade, that they are administered in a consistent, uniform, impartial and reasonable manner, and that they are based on a positive standard stating what confers origin rather than what does not; Trade-Related Investment Measures (TRIMs) Agreement which is custom made to safeguard the national treatment principles in GATT by ensuring that there is no preferential treatment in domestic goods and imports.

¹⁴³ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299

¹⁴⁴ Agreement on Import Licensing Procedures, 1868 U.N.T.S. 436

¹⁴⁵ Understanding The WTO: 'The Agreements'

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm>accessed on 08.08.2014

¹⁴⁶ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), 1868 U.N.T.S. 279

¹⁴⁷ Agreement on Pre-shipment Inspection, 1868 U.N.T.S. 368

¹⁴⁸ Agreement on Rules of Origin, 1868 U.N.T.S. 397

Agreement on Agriculture¹⁴⁹ whose basic objective is to make trade in agricultural products predictable and rid it of restrictive practices; Agreement on the Application of Sanitary and Phytosanitary Measures¹⁵⁰ which restricts Sanitary and Phytosanitary Measure standards imposed by countries to only those based on science which it provides should be applied only to the extent necessary to protect human, animal or plant life or health.¹⁵¹ Agreement on Technical Barriers to Trade¹⁵² whose main aim is to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles; Agreement on Government Procurement¹⁵³ whose purpose is to open up as much government procurement business as possible to international competition by providing for laws, regulations, procedures and practices regarding government procurement that are more transparent and that do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

World over, NTBS arise as a means of maintaining an import quotient in a domestic jurisdiction, a means to protect domestic industries from low prices on similar goods from foreign industries with a competitive advantage, as a means to guard against dumping and as a means to maintain the import quotient.¹⁵⁴ In other circumstances, they are imposed to help protect human and plant life, which is the case where Sanitary and Phyto-sanitary Measures are applied.¹⁵⁵ NTBs therefore majorly applied are Licenses, Quotas, Embargo, Standards, Administrative and bureaucratic delays at the entrance, Import deposits, Foreign exchange restrictions and foreign

¹⁴⁹ Agreement on Agriculture, 1867 U.N.T.S. 410

¹⁵⁰ Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493

¹⁵¹ Article 5.7 of the SPS

¹⁵² Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120

¹⁵³ Agreement on Government Procurement, 1869 U.N.T.S. 508 (Text available at 1915 U.N.T.S. 103)

¹⁵⁴ M. Dean et al, 'Estimating the Price Effects of Non-Tariff Barriers' (2009) 9 The B.E. Journal of Economic Analysis & Policy Contributions.

¹⁵⁵ ImenTrabelsi, 'Agricultural trade face to Non-tariff barriers: A gravity model for the Euro-Med area' (2013) 3 Journal of Studies in Social Sciences 20

exchange controls. The net effect of the imposition of NTBs were identifies as unexplained price gaps such as the differences between domestic and foreign prices or smaller-than-predicted trade flows, delays that eventually lead to losses and as well as unforeseeable expenses, The second effect of NTBs is that they become source of discrimination by preventing goods from a particular part of the world or country from accessing markets in some parts of the world this was more so visible where products from developing countries have been discriminated against in the developed countries. In the EAC, NTBs are attributable to the high cost of doing business, in the region, high commodity prices and diminished intra-community trade.¹⁵⁶

Back home in the EAC, a survey carried out in 2012 and released in the 9th EAC Regional Forum on NTBs held between 13th and 15th December, 2012 in Dar es Salaam Tanzania identifies 40 different NTBs employed by the EAC member countries against goods from other member states.¹⁵⁷ These were enumerated as; cumbersome inspection procedures on Gross Vehicle Mass and axle load regulations, cumbersome and costly quality inspection procedures, inspection of products that are certified by accredited laboratories, inspection of imports that have certification marks of issued by the East African Standards Bureaus, varying quality inspection and testing procedures introduced without prior discussions and consensus and varying procedures for issuance of Certification marks.¹⁵⁸

An analysis of the institutions harbouring NTBs within the EAC member states identified the domestic tax institutions such as KRA as being at the top of the NTB harbouring institutions.

¹⁵⁶ ASARECA, 'Impact of Non-Tariff Barriers on Cross-Border Trade in Eastern Africa.' 3

¹⁵⁷ East African Community, ' Status Of Elimination of Non Tariff Barriers In East African Community' Volume 5 – December 2012

¹⁵⁸ David Ouma Ochieng and David S. Majanja Sub-Saharan Africa and WTO Dispute Settlement: A Case Study of Kenya 2007

Other institutions implicated across all the member states include the customs unions, trade and related portfolio ministries, government department's bureaus of standards in each member state and police departments among other domestic institutions implicated within each member's jurisdiction.

On an individual member basis it emerged that Kenya was employing the following NTBs against goods from other member states; Customs Clearance; though it is a mandatory requirement that an importer should have Import Declaration Form (IDF), in Kenya the issuance thereof has resulted in an NTB because the issuance involves numerous agencies i.e. the government printer, the national bank, KEPHIS, KEBS, KPA and KRA), which conduct the procedures for the inspection, verification of dutiable value and certification of compliance which in essence creates delays as a result of duplicity of roles. Second is the issue of Standards and Certification agencies mandated to carry out these standardization checks in some countries are not recognized in Kenya. This adds to the cost of conducting certification and wastes time. Third is the issue of Rules of Origin. The use of the Common Market for Eastern and Southern Africa (COMESA) rules of origin that do not envisage the unique circumstances of the EAC prove a nightmare as the procedure for obtaining the certificate of origin is cumbersome and lengthy, which itself is costly for the business community. Fourth is the issue of Licenses and Permits. Besides the fact that the procedure for obtaining the same is cumbersome, multiple licenses are required for the production, distribution and sale of goods this, coupled with the manual processes used in business names searches, registration and the payment of relevant charges, results in duplication and prohibitive costs of doing business in Kenya. Fifth is the issue of Police Checks and Roadblocks. There are lots of roadblocks within Kenya's main transit

corridors which occasion delays which situation is worsened by police soliciting bribes from traders resulting in unprecedented costs for traders.¹⁵⁹ Sixth is the issue of Truck Scales and Inspections. The mandatory weighing of goods along the transit routes adds time and cost of upkeep for transporters. These costs are particularly significant on the Kenyan side this is because of the numerous truck scales along the Northern Corridor which also makes it difficult to move goods to destinations on time.¹⁶⁰

On Tanzania's part the Regulatory Barriers to Trade identified included Licenses and Permits in regard to which the manual payment for a business certificate under which a new applicant has to travel to Dar es Salaam to pay and obtain a business certificate from the Attorney General's Office was identified as a major regulatory trade barrier as it caused major delays. The second issue was in regard to Customs formalities and documentation. The unnecessary time wasted to clear imports at border stations due to manual processes was identified as a major trade hindrance. Same as in Kenya, Police Checks and Roadblocks and Truck Scales and Inspections were also identified as trade barriers in Tanzania. The other issue identified was Customs and administrative documentation procedures which include varying systems for imports declaration and payment of applicable duty rates at entry points, limited customs working hours, and cumbersome inspection procedures used by TRISCAN.¹⁶¹ Then there was the issue of Cumbersome inspection requirements which was marked with repeated and long inspection queues during inspection of Gross Vehicle Mass and axle loads, faulty weighing equipment at some stations, cumbersome and costly quality inspection procedures.¹⁶² The final NTB identified

¹⁵⁹Muluvi et al n.5

¹⁶⁰ Ibid

¹⁶¹Mmasi J. n. 12

¹⁶² Ibid, 23

in respect to Tanzania was congestion at Dar es Salaam Port. This was attributed to the use of old equipment like cranes used to offload cargo from delivery vessels which leads to serious clogging at the port, lack of warehousing space, slow turn-around time of the vessels and consequently exorbitant charges for deliveries to Dar es Salaam port and demurrage charges on cargo.¹⁶³

On Uganda's part, it emerged that the most prevalent Regulatory Barriers to Trade included; Customs documentation and administrative procedures which was characterised with slow clearance of imports due to manual processes in most border entry points, lack of harmonised imports declaration systems and procedures within EAC, interpretation of the rules of origin, consequent tariff lines to classify imports and import duty changeable, Import Declaration Fees charged by Kenya Customs, and limited customs and bank business hours.¹⁶⁴ Second in the list were Transiting procedures which were characterised with slow and inefficient clearance of imports at Mombasa Port, lengthy time transiting through the Kenyan section of the Northern Corridor (Mombasa-Malaba) due to too many weighbridges, police roadblocks, and requirement by Kenya Police that all transit trucks must have Kenyan registration; and inefficient rail operations. All these obstacles result to lost business time and cost of accessing goods to Uganda.¹⁶⁵ Third is the issue on Quality inspection and certification procedures which is characterised by UNBS requirements for inspection of conformity to the relevant Ugandan Standard, and lack of EAC harmonised procedures for issuance of certification marks.¹⁶⁶

¹⁶³Mmasi J. n. 12

¹⁶⁴Ibid.

¹⁶⁵Tumuhimbise n. 19

¹⁶⁶Ibid.

Finally in the case of Rwanda and Burundi, the study identified Regulatory Barriers to Trade such as Truck Scales and Inspections ,Language Barriers, Double taxation and Distribution constraints.

The identification of the trade barriers above stated evidenced the continued use of NTBs within intra EAC trade a practice that was envisaged to have been fully tackled as at the year 2005. The institutions that have been set up to monitor and eliminate identified NTBs it is concluded, have failed to discharge their mandate effectively which is the reason there are not as many major NTBs that have been resolved. It is concluded that the institutions mandated to handle the monitoring and elimination mandate are ill equipped and lack the basic authority to sanction the continued use of NTBs within the EAC.

4.1 Recommendations

The commitment of Partner States and the EAC Secretariat to reduce and eliminate NTBs has, to date, focused on identifying specific NTBs and establishing NMCs. Raising awareness and improving transparency over NTBs represent necessary first steps. However, the lack of progress in eliminating NTBs in the EAC using the approach that has been set out above, means that the process is not fit for purpose. It is therefore recommended that each state a member of the WTO and EAC should make a commitment to implement in full its commitments under the GATT 1994 Articles V, VIII, and X and the Agreements on Technical Barriers to Trade and Sanitary and Phyto-Sanitary measures. This should be followed by the harmonization of the EAC trade dispute resolution system with that of the WTO in the same manner that RECs such as the EU and NAFTA have done. Through this, states not meeting their commitments will face sanctions

from the WTO which may include the affected countries seeking leave to backtrack on former commitments advanced to the state in fault from the WTO. The nature of the effects that may flow from such disciplinary action are likely to deter a country from failing to meet their commitments under the WTO agreements. It is thus recommended that the EAC dispute resolution system should be merged with the WTO system of trade dispute resolution.

Secondly, all existing identified NTBs should be subjected to a WTO Compliance review to ensure that the measure is transparent, non-discriminatory, and minimizes trade restrictiveness. To effectuate this, the council of ministers should 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. Under this head two policy recommendations will serve a vital role in the EAC. The first recommendation is that there should be in place, strict compliance time frames. Once an NTB has been identified reported and recommended for elimination, specific timelines should be set within which elimination should be complete. This way the EAC can be able to move forward as formerly eliminated NTBs cannot be able to linger around longer than necessary and continue to hamper trade. Secondly policy options that can enhance a transparent value system for determining NTB compliance with WTO should be pursued. This will eliminate feelings of injustice by affected member states which in essence breed sovereignty battles.

Thirdly, it is recommended that it should be made mandatory that all proposed new regulatory measures be reported to the other Partners and the EAC Secretariat in advance to allow time for

consultation and review. A notification to the EAC secretariat and other members should be then followed by a notification to the WTO this will help the EAC countries reap from the experience of the WTO, and the SPS and TBT Committees in regard to the suitable model for notification, reporting and discussion.

Fourthly, it is recommended that prior to any modifications or new technical regulations being announced, the member state should undertake a Regulatory Impact Analysis (RIA). The RIA has been widely used in developed economies with good results. It assesses the likely economic and social impact of a proposed regulation.

The EAC Member States and the Secretariat should also ensure that the dispute settlement system is in place and ready to address NTBs. In this regard, it is recommended that the multiple committees dealing with the identification and elimination of NTBs role be limited to the identification of NTBs. The power to eliminate NTBs should borne by a panel with quasi-judicial authorities under the EACJ with powers to give binding orders whose disobedience attracts binding sanctions. This will mark a shift from the current system where the committees' and EAC Secretariat's only option is to beg member states to drop NTBs.

Finally there is need to impose disciplinary sanctions for non-compliance. The experience of the EU in establishing a legally binding mechanism with sanctions for non-compliance provides a relevant model. The enactment of the EAC NTB Bill will go a long way in establishing the legal framework for elimination of NTBs in the Community.

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