

The proposed Tripartite Non-tariff Barrier Elimination Mechanism: Evaluation of Legal Texts and Practice

African regional integration endeavours have, as a rule, focused mainly on trade in goods with an emphasis on preferential tariffs and tariff phase-down schedules. Although tariffs are an important barrier to intraregional trade, evidence suggests that various other barriers, including inefficient and time-consuming border procedures, are more serious constraints on intra-regional trade, than tariffs. A variety of border and beyond-the-border constraints raise the cost of doing business, including cumbersome and ineffective customs documentation and border procedures, export taxes and quantitative restrictions.

Due to the proliferation of these non-tariff barriers (NTBs) and their impact on the cost of doing business in the region the elimination of NTBs has been identified as one of the priority areas of the Tripartite Free Trade Area (TFTA). To do so the TFTA Draft Agreement and its Annex 3 make provision for an online NTB reporting, monitoring and eliminating mechanism. The mechanism is a cross-cutting programme within the comprehensive Tripartite Trade and Transport Facilitation Programme (CTTFP) of the TFTA. The aim is to address all relevant border and beyond-the-border issues among the 26 tripartite member states by focusing on the elimination of barriers to trade along all transport corridors and across the whole region. The efficient use of this mechanism has the potential to benefit all role-players, including governments, the private sector and consumers. Eliminating NTBs in the tripartite region will also contribute significantly to the formation of regionally integrated industries and supply chains, while increasing the competitiveness of producers.



The mechanism has been developed to address the shortcomings in the respective NTB elimination systems of the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC). The legal instruments of the EAC (Article 75(5) of the EAC Treaty and Article 13 of the East African Customs Union Protocol), COMESA (Article 45 and 49 of the COMESA Treaty) and SADC (Article 6 of the SADC Protocol on Trade) do provide, in principle, for the removal of NTBs and also prohibit the adoption of new barriers to trade. However, the agreements fail to deal with NTBs in a comprehensive way and none of the agreements have identified measures, specific programmes or policy guidance to ensure that countries abide by these two basic commitments. To reduce NTBs the RECs implemented individual NTB elimination mechanisms. These are all *ex post facto* and a process to review problematic policies or regulations is absent. These mechanisms have been in place for some time, but their effectiveness remains doubtful. Transparency regarding the type of complaints lodged and those resolved is clearly lacking. The commitment to refrain from implementing new NTBs is vague and the existing NTB mechanisms do not ensure the fulfilment of this commitment. Most EAC, COMESA and SADC Members also face practical challenges in their efforts to reduce NTBs. These include the inadequate policies and laws, the lack of institutions to ensure implementation of and compliance with legal obligations, the enforceability of commitments, ensuring the participation of the private sector in the elimination process, and implementing efficient dispute resolution mechanisms.

The TFTA NTB mechanism has been hailed as a vast improvement on the NTB elimination mechanisms of the Regional Economic Communities (RECs) and generally welcomed as a much needed development to facilitate trade in eastern and southern Africa. The new mechanism aims to create an accessible online reporting mechanism, it establishes various national and regional institutions to administer the operationalisation of the mechanism, and it aims to formalise the complaint resolution process. The TFTA Member States are required to report, monitor and eliminate NTBs in accordance with the single mechanism provided for in Annex 3. When the final legal framework is in place Member States will be obliged to eliminate NTBs and to do so within designated time frames. The mechanism is expected to bring about more awareness and transparency with respect to those NTBs that affect intraregional trade. It is regarded as a better reporting system and depositary of existing NTBs. The TFTA Draft Agreement goes beyond the existing commitments of the respective RECs but various caveats about its effectiveness remain. Annex 3 includes several improvements; with regard to reporting, monitoring, and the resolution process. However, there are still a number of serious shortcomings. They touch on the general legal framework (lack of rules and procedures regarding the validation process, lack of judicial remedies for private-sector complainants and no explicit recognition of the need to keep private complainants informed), ineffective institutions (lack of communication and coordination among the different institutions and clear procedures), the overall functioning of the system (ambiguous principles, procedures and categorization requirements; time consuming resolution process; lack of root-cause analysis and review and the lack of built-in capacity to ensure countries abide by their commitment), and the fact that the proposed system will only deal with NTBs on an *ad hoc* and *ex post facto* basis.

With the launch of the Continental Free Trade Area (CFTA) negotiations the inclusion of an effective NTB elimination system becomes pertinent. The CFTA negotiations will involve 54 countries; all at different stages of development. An NTB mechanism, similar to the TFTA mechanism is currently in place in the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA). However, there is one key difference; the mechanism in place in the West African sub-

region is a private sector initiative that acts as an advocacy tool to assist with the identification and monitoring of NTBs in the region. The current TFTA NTB mechanism is essentially an administrative arrangement with a built-in agenda between sovereign states which have retained wide margins of freedom with regard to the implementation of obligations. The West Africa mechanism is currently a cataloguing exercise and a depository with no obligation placed on member states to address NTB complaints made. Currently it is unclear how these two systems will meet in the CFTA negotiations. Will an **obligation** be placed on all CFTA countries to eliminate intraregional NTBs?

To successfully remove NTBs effective legal frameworks should be in place at national and at regional levels; and countries must commit themselves to particular undertakings. These legal frameworks will have to be supported by national and regional institutions with the power to monitor compliance with obligations about the elimination of NTBs. Ultimately there should be effective remedies when NTB-related obligations are violated. Private firms and traders suffer as a result of NTBs; and the consequences are passed on to consumers. However, the international agreements regulating this aspect are concluded between states and the regional institutions which have been put in place are fora for state officials. Private sector stakeholders do not have standing before these bodies which results in the absence of effective dispute settlement mechanisms. The success of the mechanism is contingent on the capacity of individual Governments to implement their obligations and on advocacy programmes to inform the private sector. In this way the credibility of the mechanism as a means to eliminate NTBs and facilitate policy and regulatory reforms will be enhanced, provided that an effective dispute settlement system is established with standing for private parties.

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