

**THE REGULATION AND IMPACT OF NON-TARIFF BARRIERS IN THE EAST  
AFRICAN COMMUNITY CUSTOMS UNION**

**Thesis submitted in partial fulfillment of the requirements for the degree of Masters of  
Law in International Trade and Investment Law in Africa at International Development  
Law Unit, Centre for Human Rights University of Pretoria, Faculty of Law University of  
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### **Declaration**

I declare that this Mini-Dissertation which is hereby submitted for the award of *Legum Magister*(LL.M) in Trade and Investment at International Development Law Unit, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Annabel Nanjira

## **ACKNOWLEDGMENT**

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## **ABBREVIATIONS AND ACRONYMS**

AB	Appellate Body
ASEAN	Association of South East Asian Nations
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
NMC	National Monitoring Committee
NTBS	Non-Tariff Barriers to Trade
NTMs	Non -Tariff Measures
OSBP	One Stop Border Post
RoO	Rules of Origin
SADC	Southern African Development Community
SPS	Sanitary and Phytosanitary
SQMT	Standardization, Quality Assurance, Metrology and Testing
TBT	Technical Barriers to Trade
TFEU	Treaty for the Functioning of the European Union
TFTA	Tripartite Free Trade Area
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa

WTO World Trade Organisation

VCLT Vienna Convention on the Law of Treaties

REC(s) Regional Economic Communities

### **LIST OF CASES**

Brazil – Measures affecting imports of retreaded tyres 2009 WT/DS332/19

British American Tobacco (U) vs. The Attorney General of Uganda, East African Court of Justice Reference No.7 of 2017

Canada – Certain Measures affecting the automotive industry 2001 WT/DS139/12  
WT/DS142/12

Canada - Measures Affecting the Export of Civilian Aircraft 2000 WT/DS70/15

European Communities – Measures affecting asbestos and asbestos-containing products 2001  
WT/DS135/12

European Communities – Measures Concerning Meat And Meat Products (Hormones) 2017  
WT/DS48/27, G/L/91

European Union And Its Member States – Certain measures relating to the Energy Sector  
2008 WT/DS476/8

India– Quantitative Restrictions on Imports of Agricultural , Textile and Industrial Products 2001  
WT/DS90/16

Japan - Measures affecting consumer photographic film and paper 1998 WT/DS44/5

Turkey – Certain measures concerning the production, importation and marketing of  
pharmaceutical products 2019 WT/DS583/3

Turkey - Restrictions on imports of textile and clothing products 2001 WT/DS34/14

United States – Import Prohibition of certain Shrimp and Shrimp Products 2001 WT/DS58/23

## **LIST OF TREATIES AND OTHER INTERNATIONAL INSTRUMENTS**

EAC Customs Management Act 2004.

EAC Customs Union Protocol.

EAC Elimination of Non-Tariff Barriers Act 2017

EAC One Stop Border Post Act 2016.

EAC Rules of Origin 2015.

EAC Sanitary and Phytosanitary Protocol 1994.

EAC Standardization, Quality Assurance, Metrology and Testing Act 2006.

GATT Customs Valuation Code 1981.

General Agreement on Tariffs and Trade 1994.

SADC Trade Protocol 1996.

Technical Barriers to Trade Agreement 1994.

Treaty Establishing the East African Community 2000.

Treaty for the Functioning of the European Union.

WTO Agreement on Agriculture 1994.

WTO Agreement on Anti-Dumping 1994.

WTO Agreement on Import Licensing Procedures 1994.

WTO Agreement on Pre-Shipment Inspection 1994.

WTO Agreement on Rules of Origin 1994.

WTO Agreement on Safeguards 1994.

WTO Agreement on Textiles and Clothing 1994.

WTO Sanitary and Phytosanitary Agreement 1994.

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## **Abstract**

This thesis critically analyses the effectiveness of the non-tariff barriers' legal and institutional framework under the East African Community Customs Union. To this end, it identifies and discusses a list of non-tariff barriers to trade that are still prevalent in the EAC region despite the prohibition for their use under the EAC Customs Union Protocol. The list of these Non-Tariff Barriers (NTBs) is made up of quantitative restrictions, customs procedures and administrative requirements, technical standards, sanitary and phytosanitary measures, government participation in trade, lack of infrastructure, restrictive rules of origin and antidumping measures. Their impact is also addressed using some case studies based on the experience of businesses and people trading in the region. The dissertation will conclude that the widespread and continued existence of NTBs in the region is as a result of a weak regulatory framework aimed at addressing them. In order to illustrate this, this dissertation highlights the gaps that exist in the 2015 EAC's elimination of non-tariff barriers Act and other legislations. Lastly, in providing a solution to the persistence of NTBs in the EAC the dissertation draws recommendations from successful NTBs reduction strategies applicable to other regional economic communities. Such recommendations would be drawn from; the Southern Africa Development Community (SADC), the European Union (EU) and the Association of Southeast Asian Nations (ASEAN)

## **CHAPTER ONE**

### **1.1 Introduction**

Regional economic integration in Africa has been embraced by African governments as an important tool for economic development. <sup>1</sup>As a result, several regional economic communities such as the East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), and Southern African Development Community (SADC) have been established in the region. However, while other regions of the world have successfully used such regional economic communities to advance economic development, Africa still lags behind in terms of Gross Domestic Product (GDP) and general standards of living.<sup>2</sup> In essence, this means that regional economic communities in Africa are not achieving their mandate in terms of spearheading economic development in the continent.

Regional economic communities facilitate economic development in their member countries through inter-state trade. In order for trade to be used as an effective tool for economic advancement in regional economic communities, the member countries to the regional economic communities must liberalize trade. This is done through the elimination of both tariff and non-tariff barriers. In the EAC, the World Trade Organization and EAC itself through its Customs Union Protocol have achieved significant success in the reduction of tariffs barriers in trade. However, the decline in tariff rates has facilitated the rise of non-tariff barriers.

The existing non-tariff barriers to trade within the EAC are mostly institutional oriented in nature and include; the lack of co-ordination among various bodies responsible in testing of goods,<sup>3</sup> the existence of several weigh-bridges inside the member countries, lack of harmonized port procedures manuals for clearing goods to be shipped, corruption at border posts and police road blocks. Such non-tariff barriers have led to the decline of intra-EAC trade which is subsequently affecting growth in economic development in the region.<sup>4</sup>

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<sup>1</sup> T Hartzenberg, Regional Integration in Africa World Trade Organization, Economic Research and Statistics Division, October 2011 Staff Working Paper ERSD-2011-14

<sup>2</sup> Mzukisi Qobo, The Challenges of Integration in Africa, In the context of globalization and the prospects of a United States of Africa (2007) Institute for Security Studies, Paper 145 at 13

<sup>3</sup> East African Community Status on the elimination of non-tariff barrier in the EAC 2014 Report

<sup>4</sup> TRALAC, Resolving the unresolved non-tariff barriers in the East African Community : an ODI project 1<sup>st</sup> June 2007

There exists legal and institutional framework on the elimination of non-tariff barriers to trade within the EAC. The Legal framework relates to EAC Customs Union Protocol and the 2017 Elimination of Non-Tariff Barriers Act. Institutional frameworks have been instituted through the EAC Time Bound program. The program issues out yearly reports on the status on the elimination of Non-tariff barriers in the region. However, despite the existence of such frameworks, NTBs still constitute a major barrier to trade in the region. This thesis therefore seeks to provide alternative solutions to the elimination of NTBs within the EAC.

## **1.2 Background of the study**

The East African Community is a regional economic community comprising of six states; Kenya, the Republic of Uganda, the Republic of Tanzania, Burundi, South Sudan and Rwanda.<sup>5</sup> Its headquarters is in Arusha, Tanzania. The EAC is founded on the treaty establishing the Community which was signed on 30 November, 1999. It has four integration pillars: common market, customs union, monetary union and the formation of a political federation.<sup>6</sup>

Since the coming into force of the treaty establishing the EAC, significant progress has been made towards the achievement of the four integration pillars. In 2005, the EAC customs union came into force and enabled the establishment of a common external tariff. 2009 also saw the establishment of the EAC common market through the common market protocol.<sup>7</sup> All these are aimed towards enabling the free movement of goods, services, capital and people within the EAC member states.

The treaty establishing the EAC stipulates that the objectives of the community are; (a) attainment of sustainable growth and development of the partner states by promotion of a more balanced and harmonious development, (b) strengthening and consolidation of cooperation in agreed fields that would lead to equitable economic development within the members, (c) the promotion of sustainable use of natural resources and (d) the strengthening of economic, political and social ties.

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<sup>5</sup> The East African Community, Overview of the EAC, available at <https://www.eac.int/overview-of-eac> (accessed on 26 June 2019)

<sup>6</sup> Pillars of EAC integration available at <https://www.eac.int/integration-pillars> (accessed on 26 June 2019)

<sup>7</sup> History of the EAC available at <https://www.eac.int/eac-history> (accessed on 26 June 2019)

The EAC is comprised of seven structural bodies; the summit, the council of ministers, coordinating committees, sectoral committees, the East African Legislative Assembly, the East African Court of Justice and the Secretariat.<sup>8</sup> Inter-state trade within the EAC is important because of the huge population in the region. The EAC has a population of about 172 million people.<sup>9</sup> This big market provides the opportunity for the countries in the East Africa region to exchange goods and services which are produced in their countries within the EAC common market. The opportunity to trade effectively can only be facilitated by the free flow of goods, services, capital and people. Therefore, tariff and non-tariff (NTBs) barriers restrict inter-state trade within the EAC.

### **1.2.1 Brief history of the East African Community**

Regional integration in Africa has always been facilitated by the need to respond to social and economic challenges.<sup>10</sup> The EAC was no exception. It was first established in 1967 by three member states; Kenya, Uganda and Tanzania through the Treaty for East African Co-operation. This treaty aimed at the establishment of a common market, a common customs tariff and a range of public services in order to facilitate balanced economic growth within the region.

The 1967 EAC was successful in many aspects. It saw the establishment of major infrastructural projects. Such projects included; the East African Airways, the East African Railway and Harbors, the East African Posts and Telecommunications and the East African Development Bank.<sup>11</sup> Citizens of the community were also able to work across the region, ranging from professionals to laborers. However, such success was short-lived. The EAC member states disintegrated the union in 1977.

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<sup>8</sup> The United Nations Economic Commission for Africa, EAC available <https://www.uneca.org/oria/pages/eac-%E2%80%93-east-african-community> (accessed on 1 July 2019)

<sup>9</sup> Quick facts about the EAC available at <https://www.eac.int/eac-quick-facts> (accessed on 27 June 2019)

<sup>10</sup> Francis Akena Adyang, Regional Integration, a Prospect for Development: Lessons from Rwanda's Experience in the East African Community Counterpoints, Vol. 443, Emerging Perspectives on 'African Development': SPEAKING DIFFERENTLY (2014), pp. 128-141 available at [https://www.jstor.org/stable/pdf/42982052.pdf?ab\\_segments=0%2Fdefault-2%2Fcontrol&refreqid=search%3Af7c80d2cb7cda799fc85a459d7d4c6df](https://www.jstor.org/stable/pdf/42982052.pdf?ab_segments=0%2Fdefault-2%2Fcontrol&refreqid=search%3Af7c80d2cb7cda799fc85a459d7d4c6df) (accessed on 28 June 2019)

<sup>11</sup> History of the East African Community

Several reasons led to the collapse of the EAC in 1977. It started with the separation of the East African currency board in 1971.<sup>12</sup> This meant that each country was now free to come up with their own monetary and fiscal policies, unlike when the board existed.<sup>13</sup> Political differences between President Idi Amin of Uganda and President Nyerere of Tanzania also fueled the separation. Thereafter, the three states resorted to mediation in 1984 in order to decide on the sharing of the assets which were jointly owned.<sup>14</sup>

Two years later, the three member states agreed to form a tripartite working group in order to develop modalities for the new co-operation.<sup>15</sup> The development challenges that the member states were confronted with, and the need to achieve and consolidate regional co-operation, are some of the reasons that facilitated the re-union.<sup>16</sup> The working group was tasked with refurbishing the earlier treaty establishing the EAC. The process was successful.

The Treaty for the Establishment of the East African Community was signed in Arusha, Tanzania in 1999. It came into force in 2000. This was as result of ratification and deposition of instruments of ratification with the Secretary General by each of the three member states. Rwanda and Burundi subsequently acceded to the treaty on 18 June 2007 and became members on 1<sup>st</sup> July 2007. South Sudan acceded to the treaty on 15 April 2016 and became a member on 15 August the same year.

### **1.2.3 The East African Community and Non-Tariff Barriers**

When the EAC member states came together in 2002, they envisioned the formation of a regional economic bloc which would “widen and deepen economic, political, social and cultural integration”.<sup>17</sup> However, efforts towards achieving economic prosperity in the region through trade are being hindered by non-tariff barriers.<sup>18</sup> A report by the United Nations Commission for

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<sup>12</sup> R Ajulu, *The making of a region: The revival of the East African Community* (2005)13

<sup>13</sup> R Ajulu (n 9)

<sup>14</sup> JS Nye, *Pan- Africanism and East African Integration* (2014)53

<sup>15</sup> D Mazzeo, *African Regional Integration* (1984)105

<sup>16</sup> D Mazzeo (n 12)

<sup>17</sup> Article 3(1) a of the Economic Community Treaty

<sup>18</sup> The East African, February 27 2019 Non-Tariff Barriers and disputes blamed for the slowdown in trade among East African States available at <https://www.theeastafrican.co.ke/business/NTBs-and-disputes-blamed-for-the-slowdown-in-east-africa-trade/2560-5001816-aebug4/index.html> (accessed on 26 June 2019)

Africa (UNECA) issued in 2017 indicates a decline in trade within the EAC.<sup>19</sup> The decline has been attributed to non-tariff barriers and political tensions between the countries.

The EAC member states have also acknowledged the prevalence of NTBs in slowing down the process of full integration in the region. The preamble of the 2015-2016 EAC Development Strategy acknowledges that:

“...prevalence of NTBs, inadequate infrastructure; institutional handicaps; inadequate national level capacities to domesticate regional policies; divergent socio-economic structures; supply side constraints; weak legal, regulatory and dispute settlement mechanisms and requisite powers for EAC to enforce Community obligations and decisions... are some of the major constraints that slowed the achievement of the full benefits of the Customs Union.”<sup>20</sup>

The United Nations Conference on Trade and Development (UNCTAD) defines non -tariff barriers to trade to mean restrictions, unrelated to tariffs, that result from quotas, import licensing systems, prohibitions, regulations, conditions or specific market requirements that make the importation or exportation of products difficult or costly.<sup>21</sup> Additionally, the EAC defines NTBs as laws, regulations and administrative and technical requirements (other than tariffs) imposed by a partner state, whose effect is to impede trade.<sup>22</sup> Despite the high level of integration in the EAC, NTBs continue to become a major hurdle in the effective function of the customs union and the common market.<sup>23</sup>

In the East African Community, Non- Tariff Barriers are often justified on several grounds; safeguarding human, animal and plant health, combating environmental pollution, protecting home industries and consumers, safeguarding national security, and protecting the loss of

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<sup>19</sup> United Nations Commission for Africa Report on NTBs in the East African Community 2017 available at [https://www.uneca.org/sites/default/files/uploaded-documents/ACPC/annex\\_13\\_-\\_assessing\\_the\\_impact\\_of\\_climate\\_change\\_on\\_agricultural\\_production\\_trade\\_and\\_food\\_security\\_in\\_the\\_east\\_africa\\_community\\_-\\_report.pdf](https://www.uneca.org/sites/default/files/uploaded-documents/ACPC/annex_13_-_assessing_the_impact_of_climate_change_on_agricultural_production_trade_and_food_security_in_the_east_africa_community_-_report.pdf) (accessed on 26 June 2019)

<sup>20</sup> EAC Development Strategy, 2011/12- 2015/16 available at <http://industrialization.go.ke/images/downloads/4th-EAC-Development-Strategy.pdf> (accessed on 26 June 2019)

<sup>21</sup> United Nations Conference on Trade and Development, Regional Integration and Non-Tariff measures in the East African Community available at [https://unctad.org/en/PublicationsLibrary/ditctab2018d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditctab2018d1_en.pdf) (accessed on 26 June 2019)

<sup>22</sup> EACS (2012) ‘Status of the elimination of non-tariff barriers in the East African Community’ Vol. 2, March 2012. Arusha: EACS.

<sup>23</sup> TRALAC, Non-tariff barriers and ‘complaints’ in the East African Community’s reporting process available at <https://www.tralac.org/news/article/11493-local-farmers-not-benefitting-from-regional-rules-of-origin-experts.html> (accessed on 26 June 2019)

national revenue.<sup>24</sup> NTBs also constitute scenarios such as the lack of certainty on laws and regulations in actual or potential markets and arbitrary custom formalities and procedures.<sup>25</sup>

In theory, EAC member states have made concerted efforts towards the elimination of non-tariff barriers. In 2009, the EAC launched the Time-Bound Programme for the Elimination of Identified or reported Non-Tariff Barriers to improve trade in the region.<sup>26</sup> Under this programme, the monitoring and reporting of NTBs is facilitated at national and regional levels and is conducted at various stages by relevant trade officials.<sup>27</sup> The monitoring and reporting of NTBs begins with companies that identify and report their experiences of trading in the EAC to their business associations, or even directly through online or SMS-based tools.

The EAC has also legally made steps towards the reduction of non-tariff barriers within the community through the 2010 Protocol on the establishment of a customs union.<sup>28</sup> The protocol's main objective is to achieve economic integration through the elimination of both tariff and non-tariff barriers. Article 13 of the protocol speaks specifically to the elimination of NTBs. It mandates each of the member states to immediately remove existing NTBs and not to impose new NTB's.

However, in practice NTB's still constitute an impediment to trade in the EAC. In June 2016 at an EAC Committee meeting, of the 26 NTBs reported, six were found to be complaints. Kenya complained that Rwanda, Tanzania and Uganda did not provide adequate information on changes to their export procedures. This led to an increase in the cost of doing business for Kenyans. Tanzania also complained that Rwanda and Uganda did not give preferential treatment to rice originating from Tanzania, as per the EAC rules of origin, thereby denying them market entry.<sup>29</sup>

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<sup>24</sup> Status on the elimination of non-tariff barriers in the East African Community, available at [https://d3n8a8pro7vhmx.cloudfront.net/eatradehub/pages/605/attachments/original/1430380147/NTBs\\_Vol\\_8\\_-\\_compressed\\_\(1\).pdf?1430380147](https://d3n8a8pro7vhmx.cloudfront.net/eatradehub/pages/605/attachments/original/1430380147/NTBs_Vol_8_-_compressed_(1).pdf?1430380147) (accessed on 26 June 2019)

<sup>25</sup> P Van Den Bosche, W Zdouch, *The Law and Policy of the World Trade Organization* (2013)531

<sup>26</sup> Linda Calabrese and Andreas Eberhard-Rui, what type of non-tariff barriers affect the East African Community, Overseas Development Institute November 2016.

<sup>27</sup> Status on the elimination of non-tariff barriers (n 9 above)

<sup>28</sup> R Kirk, *Africa Trade Policy Notes- Addressing Trade Restrictive Non -Tariff Measures on Goods in the East African Community* (2010) 2.

<sup>29</sup> TRALAC (n 8 above)



In 2017 the Republic of Tanzania, through its ministry of livestock, set fire on over Ksh. 12.5 worth of one day old chicks being imported from Kenya into Tanzania.<sup>30</sup> The reason for restricting the entry of the chicks from Kenya was aimed towards restricting the spread of bird's flue in line with Tanzania's Animal Disease Act.<sup>31</sup>

In February 2019, the Rwandan Revenue Authority restricted over 100 trucks transporting perishable goods from Uganda, from accessing the Katuna border due to alleged construction of roads. President Kagame later clarified that the blockage was not as a result of the construction of roads but for political reasons. These two examples are few but clear indications of the presence of NTBs within the EAC despite the existence of institutional and legal mechanisms established to curb NTBs.

In relation to custom and administration documentation procedures, there exists prolonged formalities, multiplicity of institutions, duplication of clearance processes, limited capacity at the border posts and travel restrictions through convoy and time of day. All these restrictions continue to add monetary costs and transit time for goods traded in the EAC.<sup>32</sup> With respect to test certificates and certification marks, reference is to the existence of national product standard definition and certification.<sup>33</sup> National standards are developed by the bureaus of standards in each country where operate. The EAC harmonized standards are developing very slowly, product by product, and are not necessarily recognized by member agents at the internal borders even when they are in place.<sup>34</sup>

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<sup>30</sup> The Standard, 3<sup>rd</sup> November 2017, Tanzania kills chicks worth Sh12.5m over Avian Flu fears , available at <https://www.standardmedia.co.ke/article/2001259202/tanzania-kills-chicks-worth-sh12-5m-over-avian-flu-fears>(accessed on 26 June 2019)

<sup>31</sup> The Standard ( n 31 above)

<sup>32</sup> R Gibb, Regional Integration and Africa's Development Trajectory: metatheories, expectations and reality Third World Quarterly Vol 30 No 4(2009)708

<sup>33</sup>R Gibb(n32)

<sup>34</sup> AJ Venables, Winners and Losers in regional integration agreements Economic Journal (2003)114

### **1.3 Research Problem**

The East African Community customs union protocol has a key objective of attaining economic integration through the elimination of tariff and non-tariff barriers within the member states.<sup>35</sup> In order to achieve this objective, the protocol obligates EAC member states to remove the existing non-tariff barriers within their territories and to not create new ones. In 2009, the EAC also launched the Time Bound Program for the elimination of identified or reported NTBs in order to improve trade within the region.

Through the program, the EAC secretariat has published quarterly reports on the status of NTB elimination in the region. These reports provide detailed information on the nature of reported NTBs, their sources and the affected countries. In 2015, the East African Community Legislative Assembly passed the EAC Elimination of Non-Tariff Barriers Act.<sup>36</sup> The Act's objective is to provide a legal mechanism for the elimination of identified non-tariff barriers within the partner states and to give effect to Article 13 of the Customs Union Protocol.

Despite all these efforts being put towards the elimination of NTBs within the EAC, reports still indicate a decline in trade in the EAC as a result of NTBs. Governments through national legislation, are still applying some NTBs to protect selective sectors.<sup>37</sup> A study by UNECA in 2017 points to NTBs as the reason for the decline in trade within the EAC. It is also estimated that traders incur over US dollars 500 in costs associated with NTBs within the East African Community.<sup>38</sup>

The two main EAC legal frameworks dealing with the elimination of NTBs are the Customs Union Protocol and the 2017 Elimination of Non-Tariff Barriers Act. The institutional mechanism is the national reporting mechanism which is annually issued by the secretariat. Therefore, through the analysis of the existing legal and institutional framework, this study seeks to provide recommendations on what can be done to reduce the prevalence of NTBs within the EAC. Therefore, this thesis seeks to point out the inadequacy of the legal and institutional framework on NTBs within the EAC.

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<sup>35</sup> The East African Community Customs Union Protocol, 2010.

<sup>36</sup> The East African Community Elimination of Non-Tariff Barriers Act 2017.

<sup>37</sup> Joseph Karugia et al The impact of non-tariff barriers on maize and beef trade in East Africa, available at <https://core.ac.uk/download/pdf/132636545.pdf> (accessed on 29 June 2019)

<sup>38</sup> The Eastern African Sub-Regional Support Initiative for the Advancement of Women, Score Card on the Implementation of the EAC Elimination of Non-Tariff Barriers Act (2018) 15

#### **1.4. Research Questions**

This research seeks to provide a solution to the research problem described above. Despite the establishment of the EAC customs union and the enabling legislative and institutional support for the same, NTBs still exist within the EAC. Therefore, the overarching research question that this thesis seeks to address is: What are the existing NTBs within EAC and what necessary steps need to be taken for their reduction.

The following questions will assist in answering the main question.

1. What constitutes non-tariff barriers in international trade law?
2. What non-tariff barriers exist within the EAC?
3. Is the existing legal and institutional framework within the EAC sufficient to curb the NTBs?

#### **1.5 Research Objectives**

The general objective of this thesis is to examine the non-tariff barriers in the East African Community and their impact on free trade within the EAC. It also seeks to provide recommendations on the elimination of the NTBs in the East African Community. In achieving this, the specific objectives will include:

1. To expound on non-tariff barriers in international trade and subsequently distinguish them with tariff barriers.
2. To identify the existing non-tariff barriers within the EAC.
3. To examine NTBs from a legal and institutional perspective within the EAC.

#### **1.6 Justification of the study**

The EAC's vision of increasing intra-African trade is reflected in the Treaty leading to the formation of the EAC. Article 75 of the Treaty and the Customs Union Protocol provides a number of measures in achieving the same. They include ; (a) the elimination of tariffs, (b) elimination of non-tariff barriers, (c) the establishment of a common external tariff and lastly (d) the refund and remission of duties and taxes. It was anticipated that the elimination of the first two would significantly increase volumes of trade in the EAC community.<sup>39</sup>

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<sup>39</sup> Economic Policy Research Centre, I Shinyekwa, L Othieno, Trade Creation and Diversion Effects of East African Community Regional Trade Agreement: A Gravity Model Analysis Research Series 112 December 2013.

The elimination of tariffs within the EAC was facilitated by the coming into force, in 2005, of the EAC Customs Union that established a common external tariff. However, the EAC member states do not fully benefit from regional integration as a result of NTBs. This thesis in addressing the existing NTBs is therefore significant in the following ways.

Firstly, by examining the effectiveness of the existing legislative and institutional framework within the EAC in eliminating NTBs the study will help the EAC legislative assembly in re-designing the existing legislative framework to address NTBs. Examples of institutional frameworks that this study will propose include the establishment of one-stop border posts and joint product certification bodies, which the EAC currently lacks.

Secondly, this study proposes the inclusion of the principle of mutual recognition in the trade in goods and services within the EAC. The principle, which is applicable in the European Union, obligates member states to allow the sale of goods which are being legally sold in another member state. The inclusion of this principle in trade within the EAC would save institutional costs required in the double certification of products in their home country and in the importing state. It would also save costs for manufacturing companies within the EAC as they would not be required to certify their products in each of the EAC member states.

Lastly, by attempting to address the concerns of implementation of the EAC Customs union, this thesis will be relevant to both public and private stakeholders who are keen to see the benefits of trade liberalization in the EAC. The Implementation of the EAC Customs Union has left many gaps and such stakeholders are eager to see such gaps filled in order to facilitate the movement to the other stages of regional integration in the EAC.

### **1.7 Literature review**

Much literature has been written on the effect of NTBs within the EAC and their subsequent effect on trade within the Community. In this section, the thesis reviews some literature relating to NTBs within the EAC. The intention is to provide clarity in understanding the subject while at the same time identifying some gaps in knowledge in the writings that this research will contribute to filling.

The review will focus on four thematic areas ; (a) the definition of Non-Tariff Barriers and their distinction from Non-Tariff measures, (b) the effect of NTBs on trade within the EAC, (c)

existing NTBs within the EAC and lastly (d) proposals that have been made for the elimination of NTBs in the EAC common market.

### 1.7.1 Defining Non-tariff barriers

The broad and simple definition of NTBs would be all measures apart from tariffs that have an impact on trade flows. Article 1 of the Tripartite Free Trade Area Agreement (TFTA) provides a more precise definition of NTBs to mean; restrictions that results from prohibitions, conditions or specific market requirements that make importation or exportation of products difficult or costly.<sup>40</sup> The TFTA Agreement in Article 4 lists the improper application of sanitary and phytosanitary measures and technical barriers to trade as trade measures which may constitute NTBs to trade. In practice, NTBs are considered to be twice trade restrictive than tariff and other non-tariff measures.<sup>41</sup>

Non-tariff barriers and non-tariff measures (NTMs) are two related but distinct concepts in international trade law. Prof. Stagier defines NTMs as policy measures other than tariffs than impact trade flows.<sup>42</sup> This thesis does not agree with the definition as it does not distinguish Non-Tariff Measures from NTBs. UNCTAD provides a broader definition of NTMs to encompass all measures altering the conditions of international trade, including policies and regulations that restrict or facilitate trade.<sup>43</sup>

### 1.7.2 Existing non-tariff barriers within the EAC

The World Bank conducted a study in 2008 on the NTBs in the East African Community. The study was based on the major classifications of NTBs by the WTO. In the study the World Bank concluded that there existed NTBs within the EAC member state borders in the following three major aspects.<sup>44</sup> Firstly, the existence of different customs and documentation procedures at the

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<sup>40</sup> Tripartite Free Trade Area, Non-Tariff Barriers: Reporting, Monitoring and Eliminating Mechanism available at [https://www.tradebarriers.org/ntb/non\\_tariff\\_barriers](https://www.tradebarriers.org/ntb/non_tariff_barriers)(accessed on 1 July 2019)

<sup>41</sup> World Bank, The World Trade Report (2012)

<sup>42</sup> R W Stagier: Non-Tariff Measures and the WTO, World Trade Organization Economic Research and Statistics Division Staff Working Paper ERS-2012-January 2012 available at [https://www.wto.org/english/res\\_e/reser\\_e/ersd201201\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201201_e.pdf)(accessed on 1 July 2019)

<sup>43</sup> United Nations Conference on Trade and Development, Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries available at [https://unctad.org/en/PublicationsLibrary/ditctab20121\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditctab20121_en.pdf)(accessed on 1 July 2019)

<sup>44</sup>World Bank, Non-tariff measures on Goods Trade in the East African Community, Synthesis Report, September 29 2008 Report No. 45708-AFR available at <http://documents.worldbank.org/curated/en/207841468023380898/pdf/457080ESW0AFR01isclosed0Feb01902009.pdf>(accessed on 2 July 2019)

border posts. Secondly, each of the EAC member state has an agency in charge of export inspection and certification. Lastly, the existence of multiple road blocks within the EAC member states that result to delays in the delivery of goods.

The East African Community itself has acknowledged that major impediments to trade in the region are associated with procedural obstacles in the application of non-tariff measures.<sup>45</sup> Such procedural obstacles have subsequently resulted to administrative and bureaucratic inefficiencies in trade. However, the EAC does not highlight examples of such procedural obstacles. This thesis therefore seeks to fill this gap by highlighting the procedural obstacles within the EAC that can be considered to amount to NTBs.

Professor Tabitha Kirithi Nganga in her chapter titled “barriers to trade: a case study for Kenya” states that trade in the EAC is constrained by procedural obstacles imposed by individual countries.<sup>46</sup> She is further of the opinion that, although some progress has been made towards the implementation of the EAC Customs Union, NTBs still remain a serious obstacle to trade within the EAC. This thesis also agrees with her final opinion that the existence of NTBs within the EAC increases the cost of doing business and reduces the level of co-operation between the member states.<sup>47</sup>

Two authors, Linda Calabrese and Eberhard Ruiz note that the EAC has made significant progress in the elimination of NTBs affecting trade within the region.<sup>48</sup> However, providing an effective solution in eliminating NTBs in the EAC is problematic and as a result new NTBs have subsequently emerged. According to a study conducted by the authors, 45% of the NTBs relate to custom and trade facilitation procedures while the rest relates to tax-like measures.

M Hangi and S Ithinga in their study in 2016 concluded that major NTBs in the EAC relate to; custom and administrative entry procedures, sanitary and phytosanitary procedures, technical barriers to trade, time spent during inspection at borders and lack of harmonized procedures for the issuance of certifications. They further conclude that some of these NTBs that take the form of member states regulations have a negative impact on trade flows, economic efficiency, production and consumption.

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<sup>45</sup> East African Community Development Strategy 2016(n 11)

<sup>46</sup> TK Nganga, Barriers to trade: The case for Kenya available at [https://www.wto.org/english/res\\_e/booksp\\_e/cmark\\_chap4\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/cmark_chap4_e.pdf)(accessed on 2 July 2019)

<sup>47</sup> TK Nganga (n 37 above)

<sup>48</sup> L Calabrese and AE Ruiz, what type of NTBs exist within the EAC, Shaping Policy for Development 2016.

### **1.7.3 The effect of non-tariff barriers on trade and economic development within the EAC**

Prof. Geoffrey E Wood while commenting on the effect of NTBs on developing economies is of the view that the net benefits enjoyed by the protected domestic industries through NTBs tend to be outweighed by the losses occasioned by excessive production.<sup>49</sup> Therefore this means that the imposition of NTBs on imports by EAC member states does not facilitate economic development in the region. In fact, a study by UNCTAD in 2017 indicates a 31% decrease of intra-EAC trade which can be attributed to NTBs.<sup>50</sup>

Empirical evidence on the effect of eliminating NTBs on intra-East African community trade was provided by a study carried out by the EAC Research Fund in September 2017.<sup>51</sup> According to the study, the elimination of all NTBs affecting transport could increase intra-EAC trade by 13%. The reduction of trade costs is expected to positively affect individual countries through prices, imports, exports and imports. Such a reduction will also be in line with domestic and international practices and will expose firms and workers to foreign competition.

### **1.7.4 Suggested recommendations on the elimination of NTBs within the EAC**

This thesis agrees with the proposal made by the World Bank in its 2009 report on the elimination of NTBs.<sup>52</sup> The World Bank proposed that, for product specific NTBs, the EAC may want to develop specific region-wide technical and SPS standards. To date, the EAC does not have a joint body responsible for the development of standards relating to either trade in food or other goods. For example, Kenya still maintains its Kenyan Bureau of Standards which certifies products from other EAC member states despite the existence of a common market and customs union among them.

A further recommendation on monitoring for new NTBS was made by the World Bank in its report in 2010.<sup>53</sup> The World Bank proposed that, with respect to the monitoring of new NTBs and technical barriers that may be imposed by member states, the EAC could learn from the

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<sup>49</sup> G E Wood and C Coughlin, An introduction to Non-tariff Barriers to Trade available at [https://files.stlouisfed.org/files/htdocs/publications/review/89/01/Trade\\_Jan\\_Feb1989.pdf](https://files.stlouisfed.org/files/htdocs/publications/review/89/01/Trade_Jan_Feb1989.pdf) (accessed on 30 June 2019)

<sup>50</sup> United Nations Conference on Trade and Development East African Community Regional Integration: Trade and Gender Implications UNCTAD /DICT/2017/2

<sup>51</sup> East African Research Fun, Resolving the un-resolved barriers in the East African Community available at [https://assets.publishing.service.gov.uk/media/59d5fc36e5274a5be9d131ee/EAC\\_NTBs\\_Stage\\_2\\_report\\_260917\\_final.pdf](https://assets.publishing.service.gov.uk/media/59d5fc36e5274a5be9d131ee/EAC_NTBs_Stage_2_report_260917_final.pdf) (accessed on 1 June 2019)

<sup>52</sup> O Cadot M Malouche and S Saez, Streamlining non-tariff measures: A toolkit for policy measures International Bank for Reconstruction and Development / International Development Association or The World Bank(2012)15

<sup>53</sup> O Cadot(n 52 above) 32

EU's adoption of preventive measures. These preventive measures oblige member states to notify all draft regulations and standards related to technical specifications to be introduced in national territories. Such reporting of proposed regulations would contribute to the creation of legal certainty in terms of trade laws within the EAC.

Lastly, this thesis proposes the harmonization of custom and administrative procedures at border posts within the EAC. Such harmonization could further be supported by the establishment of one stop border posts which is currently lacking within the EAC. A one stop border post concept refers to the legal and institutional framework, facilities, and associated procedures that enable goods, people, and vehicles to stop in a single facility in which they undergo necessary controls following applicable regional and national laws to exit one state and enter the adjoining state.

### **1.8 Research methodology**

This is a desk and library based research. Primary and secondary sources will be used. Primary sources include the WTO legal texts such as the GATT 1994 which expounds on legal Non-Tariff Barriers in international trade. Since the study is based on the East African Community, treaties establishing the East African Community will also be referenced.

Relevant cases, decided by both WTO panels and the Appellate body will be cited. This will aid in providing the legal interpretation of the specific articles of the WTO legal texts. Much work on the WTO case law and analytical index of the specific articles of the WTO legal texts has been published on the internet and the writer takes advantage of this resource base as well. Secondary sources include, but are not limited to relevant textbooks, articles in journals and papers written by academicians on the subject matter.



## **1.9 Chapter breakdown**

### **Chapter 1**

This chapter introduces the research topic. It highlights the problem statement, research questions, objective statement, and justification for the research, the literature review and proposed research methodology.

### **Chapter 2**

This chapter in providing a basis to the study expounds on NTBs in international trade. It also briefly explains tariff barriers to trade with a view of distinguishing them from NTBs. Different NTBs, such as quantitative restrictions anti-dumping measures, technical barriers to trade and Sanitary and Phytosanitary measures are examined.

### **Chapter 3**

This chapter focuses on NTBs within the EAC. It highlights several NTBs such as the nonexistence of one-stop border posts, corruption, the lack of coordination among bodies responsible for monitoring the elimination of NTBs, SPS standards among others as the existing non-tariff barriers affecting trade within the EAC.

### **Chapter 4**

The chapter examines both the legal and institutional frameworks designed to eliminate NTBs within the EAC. The legal framework will majorly focus on the EAC Customs Union Protocol and the 2017 EAC Elimination of Non-Tariff Barriers Act. In analyzing the two frameworks, the chapter seeks to address their effectiveness in eliminating NTBs.

### **Chapter 5**

This chapter makes recommendations on the institutional and legal framework of the EAC in eliminating NTBs. Such recommendations shall be drawn from other regional economic communities (RECs) which have made significant steps in the elimination of NTBs in trade in goods. Such RECs include the European Union, SADC and ASEAN. This chapter also concludes the thesis.

## **CHAPTER TWO**

### **NON TARRIF BARRIERS IN INTERNATIONAL TRADE**

#### **2.1 Introduction**

This chapter provides a basis to the study by expounding on the concept of non-tariff barriers in international trade. It first provides concise definitions of Non -Tariff Barriers and then highlights several types of NTBs that have been set out by the World Trade Organisation (WTO) legal framework. The types of NTBs that will be addressed include the following: quantitative restrictions, technical standards, sanitary and phytosanitary measures imposed by governments on imports, rules of origin and import procedures among others.

Since the regulation of NTBs is covered under various GATT and WTO Agreements, the chapter will focus on the following Agreements; Sanitary and Phytosanitary (SPS) Agreement, the Technical Barriers to Trade Agreement, and Rules of Origin Agreement among others. Reference will also be made to the WTO Panel and Appellate Body Reports in explaining the various provisions of the mentioned Agreements.

#### **2.2 Defining Non-Tariff Barriers**

The WTO defines NTBs as trade measures, other than tariffs, that governments take in form of; regulations, government laws, policies, restrictions, conditions, practices of private sector businesses, that all aim to protect local industries from foreign competition.<sup>54</sup> NTBs may be imposed on trade in goods, services or investment. A more related definition of NTBs is provided by the United Nations Conference on Trade and Development (UNCTAD) to mean trade costs arising from a country's trade policies.<sup>55</sup>

UNCTAD classifies these NTBs into two main categories; technical measures and non-technical measures. Technical measures include SPS requirements, technical barriers to trade, and pre-shipment inspection. Non-technical measures on the other hand encompasses safeguard and anti-

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<sup>54</sup> AG Gebre and HW Kopf 'Non-Tariff Barriers to Trade and the WTO Regulations 'Public Economic Law Seminar (2014) 2 available at [http://www.eeacon.org/sites/default/files/webform/Non-tariff%20Barriers%20\(NTBs\)%20to%20Trade%20and%20the%20WTO-Final%20Paper.pdf](http://www.eeacon.org/sites/default/files/webform/Non-tariff%20Barriers%20(NTBs)%20to%20Trade%20and%20the%20WTO-Final%20Paper.pdf) (accessed on 18 July 2019)

<sup>55</sup> UNCTAD *Non-Tariff measures to trade: Economic and Policy issues for Developing countries* (2013)1

dumping trade measures.<sup>56</sup> UNCTAD further opines that whether or not a country has a protectionist agenda, NTBS have the potential of distorting international trade.

In analyzing non-tariff barriers, it is important to consider why governments prefer them to tariff barriers. According to two scholars, Stern and Deardorf one of the explanations as to why states impose non-tariff barriers is because they are perceived to be more effective in facilitating the collection of taxes than tariffs.<sup>57</sup> NTBs are also not easy to identify due to their ability to be imposed by private actors in the state. This includes the imposition of private SPS standards on foods by retailers or consumer groups in countries.

### **2.3 Sanitary and Phytosanitary Measures**

The WTO's Agreement on Sanitary and Phytosanitary Measures acknowledges the right of WTO members to take internal measures in order to protect human, animal or plant life or health from risks.<sup>58</sup> To this end, the objective of the SPS Agreement is twofold; it ensures that the food consumed by people is safe and prevents the spread of diseases and pests to plants or animals.<sup>59</sup> The imposition of SPS standards may require that the physical inspection of products at border posts, scientific inspection by established institutions, setting the minimum amount of additives to be used in the production of food, and requiring that products being imported be sourced from disease free areas.<sup>60</sup>

In designing their consumer, animal and plant protection policies, the SPS Agreement encourages governments to use international standards.<sup>61</sup> The Appellate Body in the *EC-Hormones case* highlighted the fact that, the obligation of states to use international standards is aimed at promoting the harmonization of SPS measures among WTO members while at the same time acknowledging the right of states to take measures to protect the life and health of their people.<sup>62</sup>

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<sup>56</sup> UNCTAD (n 2 above)

<sup>57</sup> A.V Deardorf; Why do governments prefer nontariff barriers? Proceeding of the Canegie- Rochester Conference on Public Policy, Jan. 1-1, Elsevier, USA, 1987, pp: 191-216

<sup>58</sup> The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) Article 2

<sup>59</sup> WTO website available at [https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm) (accessed on 22 July 2019)

<sup>60</sup> WTO website (n 6)

<sup>61</sup> SPS Agreement Article 3

<sup>62</sup> P Van Den Bosche, *The Law and Policy of the World Trade Organisation Texts Cases and Material* (2005)466

The Agreement also encourages countries to accept other WTO member's compliance procedures as equivalent to their own if the same level of sanitary and phytosanitary protection is achieved.<sup>63</sup> If countries feel the need to adopt SPS standards that are higher than international standards, then they are mandated to base the measures on risk assessment.<sup>64</sup> In doing so, such countries are required to take into account the risk assessment techniques developed by three international bodies: the Codex Alimentarius for food safety, the International Office for Epizootics for animal health, and the International Plant Protection Convention for Plant health.<sup>65</sup>

The WTO panel in the *EC Hormones* case highlighted that the burden of proof that trade measures adopted in order to protect human beings, plants or animals are taken based on risk assessment lies with the state imposing the measures.<sup>66</sup> The risk assessment process must in itself identify three things: the disease that the respondent state is trying to prevent, the likelihood of entry of the disease and lastly, the probability that the disease will subsequently spread in its territory.<sup>67</sup>

Trade measures taken under the SPS Agreement must also be based on scientific evidence. The rationale on basing such measures on scientific evidence is to distinguish genuine consumer or animal protection risks from protectionist measures intended to shield domestic industries.<sup>68</sup> Despite this, Article 5.7 of the SPS Agreement provides an exception to the scientific evidence rule. It adopts a precautionary approach that allows governments to still take measures to protect human, animal or plant life in the absence of sufficient evidence. However, the imposition of such measures without scientific proof is only but a temporary solution until scientific evidence on the basis of the measure is provided.<sup>69</sup>

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<sup>63</sup> Organisation for Economic Development, *The Impact and Regulations of Agro- Food Trade: The Technical Barriers to Trade and Sanitary and Phytosanitary Measures Agreements* (2013)8

<sup>64</sup> Organisation for Economic Development (n 8)

<sup>65</sup> Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary measures* (2009) 12

<sup>66</sup> Panel Reports, EC – Hormones (Canada), para. 8.10

<sup>67</sup> Appellate Body Report, Australia – Salmon, para. 121

<sup>68</sup> Jacqueline Peel, 'Of Apples and Oranges (and hormones in Beef: Science and the Standard of Review in WTO Disputes under the SPS Agreement)' (2012) *The International and Comparative Law Quarterly* Vol. 61 No. 2 at 427 458

<sup>69</sup> Panel Report, Russia – Pigs (EU), para. 7.772

### **2.3.1 SPS measures as Non-tariff barriers to trade**

SPS measures amount to technical barriers to trade when the imposition of such measures result in arbitrary or unjustifiable discrimination or the discrimination constitutes a disguised restriction on international trade.<sup>70</sup> In light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT) the WTO Panel in *US Poultry* (China) has interpreted the phrase arbitrary to mean something based on an opinion as opposed to the real nature of things.<sup>71</sup> The determination of whether a measure is justifiable on the other hand is based on the reasons proposed by the imposing state in justifying its existence.<sup>72</sup>

The lack of transparency on an SPS measures also results to them being a non-tariff barriers. In order to address this, the SPS Agreement under Article 1 annex B imposes an obligation on WTO members to ensure that the regulations relating to SPS measures are adequately published to enable interested parties to become familiar with them.<sup>73</sup> WTO members are also required to provide a reasonable period between the publication of a regulation relating to SPS requirements and its coming in to force.<sup>74</sup> In interpreting the obligation to allow a reasonable period of time before a published SPS measures comes into force, the Panel in *India- Agricultural Products* affirmed that the entry into force of an SPS on the day of its publication was inconsistent with Article 2 annex B SPS Agreement<sup>75</sup>

Evidence on the effect of SPS measures on trade especially for developing countries is provided by the World Bank's report in 2016.<sup>76</sup> According to the Report, the increase of tight regulations based on SPS standards has reduced the benefits of trade liberalization on poor countries. The World Bank lists three major concerns as a result of such. First, that standards act as the new non-tariff barriers that limit the export opportunities for poor countries who face obstacles in complying with the set stringent standards.<sup>77</sup> Second, that poor farmers and small scale suppliers are exempted from high standards food supply chains because of their inability to comply with

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<sup>70</sup> SPS Agreement, Article 5.5

<sup>71</sup> Panel Report, US – Poultry (China), para. 7.259.

<sup>72</sup> Panel Report, US – Poultry (China), paras. 7.260-7.261

<sup>73</sup> SPS Agreement, Annex B (1)

<sup>74</sup> SPS Agreement Annex B (2)

<sup>75</sup> Panel Report, India – Agricultural Products, paras. 7.757-7.758

<sup>76</sup> J Ederington and M Ruta Non-Tariff Measures and the World Trading system : Policy Research Working Paper 7661 World Bank Group Trade and Competitiveness Global Practice Group May 2016.

<sup>77</sup> J Swinnen and M Maeterns 'Standards, Trade and Developing countries' World Bank Trade and Research Department (2017)127

high standards.<sup>78</sup> Third, that the bargaining power of small farmer is reduced as a result of the exploitations by big firms and consumers in complying with strict standards in the supply chain.<sup>79</sup>

Another way in which SPS standards amount to non-tariff barriers is with respect to private standards set by either retailer or consumer associations.<sup>80</sup> Private standards relating to agricultural produce, or food for human consumption, aim at either regulating food safety or ensuring the use of sustainable means of production.<sup>81</sup> Critics have stressed that private standards may exclude small scale suppliers in developing countries since they tend to be more rigid than those set by public bodies.<sup>82</sup>

#### **2.4 Technical Barriers to trade as a Non-tariff barrier**

Technical barriers to trade can either take the form of standards or regulations.<sup>83</sup> The regulation of such technical barriers to trade is under the Technical Barriers to Trade Agreement, a product of the 1986-1994 Uruguay round negotiations.<sup>84</sup> The Agreement has a twofold objective: firstly, it ensures that standards, technical regulations and procedures for conformity assessment are both non discriminatory and do not create unnecessary barriers to trade.<sup>85</sup> Secondly, it recognizes the right of members to implement policies aimed at pursuing legitimate welfare objectives, such as the protection of the environment or human, health and safety.<sup>86</sup>

The TBT Agreement lays down six principles that are applicable in the preparation, adoption and implementation of technical regulations. The principle of non-discrimination mandates the equal treatment of like products which have either been imported or domestically produced.<sup>87</sup> The second principle obliges members to avoid unnecessary obstacles to trade.<sup>88</sup> It requires members

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<sup>78</sup> J Swinnen (n 15)

<sup>79</sup> J Swinnen (n 15)

<sup>80</sup> Lan Liu and Chengyan Yue, Non-Tariff barriers to trade caused by SPS measures and Custom Procedures with product quality changes, *Journal of Agricultural and Resource Economics* (2009)199

<sup>81</sup> M Moise Mbegue, Private Standards and WTO Law, *BIORES VOL 1* available at <https://www.ictsd.org/bridges-news/biores/news/private-standards-and-wto-law> (accessed on 22 July 2019)

<sup>82</sup> M Moise (n 23)

<sup>83</sup> T Epps and MJ Trebilcock, *Research Handbook on the WTO and Technical Barriers to Trade* (2013)160

<sup>84</sup> Agreement on Technical Barriers to Trade 1994

<sup>85</sup> WTO website, technical barriers to trade available at [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm)(accessed on 22 July 2019)

<sup>86</sup> WTO website (n 29)

<sup>87</sup> Agreement on Technical Barriers to Trade, Article 2.1

<sup>88</sup> Agreement (n 32) Article 2.2

to adopt regulations that fulfill legitimate welfare objectives, such as the protection of public health, national security or the environment.<sup>89</sup>

The third principle proposes the use of international standards, in the event they are applicable, and requires the participation by members in international standard setting activities.<sup>90</sup> The equivalence principle encourages members to accept other members' regulations provided they pursue the same legitimate objective.<sup>91</sup> The mutual recognition principle speaks to the recognition of other members' conformity assessment results. The last principle, requires members to notify the WTO of any measures they are about to adopt and give other countries an opportunity to comment on the measure.<sup>92</sup>

The regulation of specific standards and regulations set by states is done by the WTO Committee on Technical Barriers to Trade.<sup>93</sup> In regulating the same, it strengthens the implementation of the TBT Agreement by reviewing laws and regulations that have an impact on trade. Such reviews are conducted annually.

#### **2.4.1 Technical standards versus Technical Regulations**

##### a. Technical standards

The TBT Agreement defines standards in Article 2 of annex 1 of the Agreement to mean, “Documents approved by a recognized body that provide for common and repeated use, rules, guidelines or characteristics for products or related process and production methods with which compliance is not mandatory”.<sup>94</sup> The latter Article further explains that such may take the form of terminology, symbols, packaging, marking or labeling requirements as they relate to a product, process or production method.<sup>95</sup>

Standards can be set either by a private or public body. With standards producers can choose to comply with them out of their own volition either because of consumer tastes and preference or to make the product marketable. Some of the objectives that process standards aim to pursue

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<sup>89</sup> Agreement (n 32) Article 2.2 par. 2

<sup>90</sup> Agreement (n 29) Article 2.4

<sup>91</sup> Agreement (n 29) Article 2.7

<sup>92</sup> Agreement (n 29) Article 2.11

<sup>93</sup> WTO website (n 31)

<sup>94</sup> Agreement on Technical Barriers to Trade, Annex 1.2

<sup>95</sup> Agreement (n 40) par 2

include: raising production efficiency, promoting public welfare, safety health and environmental standards and variety control.

#### b. Technical Regulations

Annex 1.1 of the TBT Agreement defines a technical regulation as “consisting of a document which lays down product characteristics or their related process and production methods, including the applicable administrative provisions, with which compliance is mandatory.”<sup>96</sup>The latter Article expounds the scope of technical regulatory measures to include: terminology, packaging, symbols or labeling requirements as may be applicable to a product, process or production method.

Therefore, this denotes the fact that the fundamental distinction between a technical regulation and a standard lies in the fact that with the former compliance is mandatory. However, the same is not applicable to the latter.<sup>97</sup> It is also important to note that even though technical barriers aim to protect domestic producers from foreign competition, they do not generate revenue for the government like tariffs do.<sup>98</sup>

### **2.5 Quantitative restrictions**

Several Articles in the GATT 1994 deal with quantitative restrictions. these include Articles XI, XII, XIV, XIX, XX and XXI. The regulation of quantitative restrictions is also covered under other GATT agreements and protocols such as; the Protocol on Accession, the Protocol on Provisional Application ,the Arrangement relating to the international trade in textiles, Agreement on Trade in Civil Aircraft and the Agreement on import licensing procedures.<sup>99</sup> Despite the existence of a wide range of legal instruments and GATT Articles relating to quantitative restrictions, this thesis will focus on Article XI of the GATT ,as this is the main provision regulating quantitative restrictions.<sup>100</sup>

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<sup>96</sup> Agreement on Technical Barriers to Trade, Annex 1.1

<sup>97</sup> JH Weiler et al, *International and Regional Trade Law: The Law of the World Trade Organization* (2017) 2

<sup>98</sup> Linda Calvin and Barry Krissoff, Technical Barriers to Trade: A Case Study of Phytosanitary Barriers and the US -Japanese Apple Trade, *Journal of Agricultural and Resource Economics* (1996)351-366

<sup>99</sup> GATT 1994 Analytical index pg. 348-349

<sup>100</sup> WTO website, Quantitative restrictions, available at

[https://www.wto.org/english/tratop\\_e/markacc\\_e/gr\\_e.htm](https://www.wto.org/english/tratop_e/markacc_e/gr_e.htm)(accessed on 23 July 2019)



The scope of prohibited acts under Article XI of the GATT include restrictions other than tariffs that are instituted or maintained by a WTO member on the imports or exports of goods.<sup>101</sup> Such restrictions may take the form of quotas, embargos, export or import licensing procedures among others.<sup>102</sup> The elimination of quantitative restrictions was included in GATT 1994 due to their ability to restrict trade more than tariffs actually do.<sup>103</sup> The imposition of quantitative restrictions may also not be done in a transparent manner and they have the effect of placing absolute limits on imports thereby distorting competition.<sup>104</sup> However, there are several exceptions to the quantitative restrictions prohibition which this thesis will explore later in the chapter.

The WTO Panels in both *EU Energy Package*<sup>105</sup> and in *Argentina Import Measures*<sup>106</sup> have stated that, in instituting a claim against another WTO member under Article XI GATT, the complainant has to prove two things. First, that the respondent's measure falls within the scope of quotas, export or import licenses or other measures. Secondly, that the measure amounts to either a prohibition or restriction on the importation or exportation of a product.<sup>107</sup> The burden of proving that the measure is justified under any of the other GATT provisions subsequently shifts to the respondent state.<sup>108</sup>

### **2.5.1 Quantitative restrictions on imports**

The WTO panel in *Brazil Retreaded Tyres* interpreted the phrase “quantitative restriction on imports” to mean measures that prohibit the importation of products from any other members from accessing their markets.<sup>109</sup> Such import restrictions can take the form of embargos. Cases in point is the *US-Shrimp* case and the *Canada Periodical* case. In the latter case, the Panel found that Canada's regulation that completely banned certain periodicals was in violation of Article XI (1) of GATT 1994.<sup>110</sup> In the former case, the US had placed a moratorium on both shrimp products and shrimp that had not been harvested using methods that protected sea turtles.<sup>111</sup>

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<sup>101</sup> GATT 1994, Article XI

<sup>102</sup> GATT 1994 (n 46) par. 2

<sup>103</sup> PV Bosche, *The Law and Policy of the World Trade Organisation* (2004) 451

<sup>104</sup> Panel Report, Turkey – Textiles and Clothing, paras. 9.63-9.65

<sup>105</sup> Panel Report, EU – Energy Package, para. 7.243

<sup>106</sup> Appellate Body Report, Argentina – Import Measures, paras. 5.216-5.218

<sup>107</sup> GATT 1994 Analytical index Par 206 available at

[https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art11\\_gatt47.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_gatt47.pdf)(accessed on 23 July 2019)

<sup>108</sup> Panel Report, India – Quantitative Restrictions, para. 5.119

<sup>109</sup> Panel Report, Brazil – Retreaded Tyres, para. 7.29

<sup>110</sup> Panel Reports, Canada – Periodicals, para. 5.5

<sup>111</sup> Panel Report, US – Shrimp, para 7.16

Existing quantitative restrictions on imports that have been notified to the WTO by its members are those relating to; narcotic drugs, environmental protection, weapons and nuclear materials. Some quantitative restrictions extend beyond WTO members' WTO obligations. Such is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) the Convention on the protection of endangered species and the Montreal Convention on substances that deplete the ozone layer. The introduction of such a quantitative restrictions should be followed by a notification to the WTO. This requirement was introduced by the 2012 WTO's decision on notification procedures for quantitative restrictions.<sup>112</sup>

### **2.5.1 Quantitative restrictions on exports**

Such restrictions may take the form of export quotas or setting the minimum price for the sale of goods to be exported.<sup>113</sup> Export quotas refer to quantitative restrictions that have been placed on the volume of certain exports.<sup>114</sup> They are designed to either improve the world price of a product by causing shortages, or to protect local consumers and producers from unfair competition. Export quotas that are aimed towards increasing the world price of a product are only possible where a country dominates in the production of the product being protected.<sup>115</sup>

Export quotas and exports price setting were both dealt with by the Panel in *China Raw Materials*.<sup>116</sup> The Panel found that China had violated Article XI (1) of GATT by imposing export quotas on minerals such as coke, fluorspar and silicon and setting their minimum export price.<sup>117</sup>

### **2.5.3 Exceptions to quantitative restrictions**

Article XI GATT recognizes the right of members to place import or export quantitative restrictions on goods in order to respond to general welfare objectives.<sup>118</sup> To this end, paragraph 2 of Article XI allows members to impose quantitative restrictions in order to; (a) temporarily address shortages of foodstuffs and other items that are essential to a country, (b) implement standards and regulations necessary for the grading or classification of goods and lastly, (c)

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<sup>112</sup> World Trade Organisation, Decision on Notification Procedures for quantitative restrictions Adopted on 3<sup>rd</sup> July 2012 G/L/59/Rev 1

<sup>113</sup> Panel Reports, China – Raw Materials, paras. 7.1081-7.1082.

<sup>114</sup> WTO Glossary available at <http://tao.wto.org/site/glossary/en/QUOTAS.htm>(accessed on 24 July 2019)

<sup>115</sup> WTO Glossary (n 59)

<sup>116</sup> Panel Reports, China Raw Materials (n 59)

<sup>117</sup> Panel Reports, China Raw Materials (n 59)

<sup>118</sup> R Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005)345

regulate quantities of agricultural produce and fish in order to balance them with what is the locally produced.<sup>119</sup> However, in imposing such quantitative restrictions a state is required to issue out a public notice on the quantity of imported products allowed to be imported and the duration of the quantitative restriction.<sup>120</sup>

### **2.5.3.1 Interpretation of Article XI (2) GATT**

In interpreting the terms temporarily, foodstuff and items essential to a country, the WTO Appellate Body in *China Raw Materials* has clarified that such measures should only be taken in time of need and to respond to critical short time shortages of food or items that are indispensable to a country.<sup>121</sup> The scope of critical shortages was also expounded by the same Appellate Body to mean crucial deficiencies in quantities.<sup>122</sup> The Preparatory Committee of GATT saw it fit to include agricultural produce and fish in the exceptions to quantitative restrictions due to its flexibility in prices which is caused by dependency on nature for production.<sup>123</sup>

### **2.5.3.2 Article XX GATT general exceptions and the national security exception**

Article XX of the GATT allows members to take measures otherwise inconsistent with their WTO obligations in order to protect consumer, animals or plants, conservation of the environment, among others. However, such measures must not create unnecessary obstacles to trade or be discriminatory in nature. Article XXI of the GATT 1994 on the other hand allows WTO members to side-step their obligations in order to secure national security. In the context of quantitative restrictions, a member may limit the import of fissionable materials, arms, ammunitions and other implements of war.<sup>124</sup> Beyond limiting the importation of the three mentioned items, states are also permitted to take measures in time of war or any emergency in international relations.

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<sup>119</sup> GATT 1994, Article XI (2) a-c

<sup>120</sup> JH Jackson, *The World Trading System* (1997) 390

<sup>121</sup> Appellate Body Reports, China – Raw Materials, para. 323

<sup>122</sup> Appellate Body Report, China – Raw Materials, para. 324

<sup>123</sup> Analytical Index GATT 1994 page 328

<sup>124</sup> GATT 1994, Article XXI (b)

## **2.6 Anti-Dumping and Safeguard Measures**

With the negotiation and the subsequent reduction of tariffs in international trade, anti-dumping laws and regulations have become the popular way in which countries are seeking to protect domestic producers from competition.<sup>125</sup> Dumping is regulated under Article VI of GATT 1994 and the WTO Agreement on Anti-dumping. The former Article expressly prohibits the export of products below their cost of production. Such export must, however, cause material injury to a domestic industry for an anti-dumping action to be instituted.

### **2.6.1 The concept of dumping in international trade**

Dumping refers to the sale of an imported product, in a domestic market at a price which is less than the normal value, the cost of production or the price in its original domestic market.<sup>126</sup> The difference between the price of a product in the domestic industry and the exporting industry is referred to as the margin of dumping.<sup>127</sup> The country to which such low priced goods are exported into has the right to impose anti-dumping duties in line with WTO rules.

Despite its ordinary connotation, dumping has nothing to do with the importation into the domestic market of defective or sub-standard goods.<sup>128</sup> The objectives behind dumping may be for market expansion, gaining of monopoly or earning hard currency.<sup>129</sup> The importance of imposing anti-dumping duties by a state is two-fold. Firstly, it facilitates the creation of a level playing field by protecting domestic industries against unfair practices in international trade.<sup>130</sup> Secondly, it encourages countries to liberalize trade by acting as a safety valve regulating imports<sup>131</sup>

There are four elements for a trade measure to be considered as dumping:<sup>132</sup> the exportation of a product at price which is less than the normal value, such sales must be done in the ordinary

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<sup>125</sup> J P Durling, 'WTO Review on Anti-dumping measures (2003)6 Journal of International al Economic Law Vol. 127

<sup>126</sup> JH Jackson and EA Vermulst, *Anti-Dumping Law and Practice, A Comparative Study*, (1989) vii

<sup>127</sup> JH Jackson (n 69)

<sup>128</sup> International Trade Administration Commission of South Africa, Trade remedies, available at [http://www.itac.org.za/upload/Trade\\_Remedies.pdf](http://www.itac.org.za/upload/Trade_Remedies.pdf) (accessed on 24 July 2019)

<sup>129</sup> United Nations Conference on Trade and Development *WTO: Anti-dumping* (2003) 5

<sup>130</sup> Muslum Yilmaz, *Domestic Judicial Review of Trade Remedies: Experience of the Most Active WTO members*, (2013)3

<sup>131</sup> Muslum Yilmaz (n72)

<sup>132</sup> World Trade Organisation Agreement on Anti-dumping, Article 2.1

course of trade, products being assessed for dumping must be like domestic products and lastly that the dumping caused material injury to domestic industries producing like products.<sup>133</sup>

### **2.6.1 Safeguard measures**

Countries have the right to use safeguard measures to respond to unexpected rise in imports that cause “serious injury” to a domestic market.<sup>134</sup> The regulation of such response is covered under the WTO Agreement on Safeguards and Article XIX of the GATT 1994. Rules on the adopting of safeguard measures in the agricultural and textiles industry are addressed in Article 6 of the Agreement on Agriculture, and Article 5 of the Agreement on Textiles and Clothing. WTO members can, therefore, apply safeguard measures on goods provided that they do not exceed the bound rate set in their tariff concessions.<sup>135</sup>

Unlike anti-dumping which is intended to address goods being exported below their normal price, safeguards relate to exports being sold at a normal price in an importing country’s market.<sup>136</sup> Before a country imposes a safeguard measure, an investigating authority must certify that indeed a specific domestic market needs to be protected.<sup>137</sup> The safeguards agreement also sets out the criteria to be used to determine “serious injury” and the factors which must be considered in determining the effects of imports on the domestic industry. Serious injury has been defined by Article 4.1 of the safeguards agreement to mean a significant negative impact on the domestic industry.<sup>138</sup> When a safeguard measure is subsequently imposed, it should only be applicable to the extent that it helps the injured industry to adjust or to remedy or prevent serious injury.<sup>139</sup>

When a country safeguards its domestic industries, it is under an obligation to compensate the affected countries. Such compensation is achieved through consultations. If the parties do not agree on a solution, then the exporting country is allowed to retaliate by increasing tariffs. In

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<sup>133</sup> PC Mavroidis, PA Messerlin, JM Wauters, *The law and Economics of contingent Protection in the WTO*, (2008)43

<sup>134</sup> Willemien Viljoen, Safeguard measures in the SADC-EU Economic Partnership Agreement TRALAC 6 December 2017 available at <https://www.tralac.org/discussions/article/12513-safeguard-measures-in-the-sadc-eu-economic-partnership-agreement.html>(accessed on 25 July 2019)

<sup>135</sup> Yong-Shik Lee, *Safeguard measures in international trade* (2014) 5

<sup>136</sup> United Nations Conference on Trade and Development, *World Trade Organisation: Safeguard Measures* (2003)

<sup>137</sup> WTO Agreement on Safeguards, Article 2.1

<sup>138</sup> WTO Agreement on Safeguards, Article 4.2

<sup>139</sup> WTO webpage, Anti-dumping, subsidies, safeguards available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm#safeguards](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#safeguards) (accessed on 25 July 2019)

some situations, the exporting country has to wait for three years until they can retaliate.<sup>140</sup> Despite the temporary nature of safeguards and the existence of the above mentioned conditions for the imposition of safeguard, countries still use safeguards to as protectionist tools.<sup>141</sup> Therefore safeguard measures imposed through laws and regulations amount to NTBs to trade.

## **2.7 Rules of Origin as Non-Tariff Barriers**

Rules of origin (RoO) refer to the procedures used to ascertain the national origin of a product or service.<sup>142</sup> The WTO's Agreement on Rules of Origin Article 1 gives a more comprehensive definition of RoO to mean; regulations, laws and administrative requirements applied by a WTO member to determine the country of origin of goods.<sup>143</sup> The justification for the existence of rules of origin is because duties charged on goods and regulations are dependent on whether the goods are from a regional economic community or not. Rules of origin can also be used for government procurement, trade statistics, to implement commercial regulations, such as anti-dumping duties, and to determine whether imports shall receive the general Most-Favoured Nation treatment or are subject to certain preferences.<sup>144</sup>

The proliferation of regional trade arrangements taking either the form of Free Trade Areas or Customs Unions has facilitated the need of rules of origin. Because members of a Free Trade Area can apply lower tariff rates on goods originating from their partner states, then they must implement rules of origin to prevent the trans-shipment of duty free goods originating from the rest of the world.<sup>145</sup> Rules of origin that prevent trans-shipment tend to distinguish the transformations that may be made on a good and not merely where the good is located.<sup>146</sup>

In practice the application of rules of origin require the following criterion to be fulfilled in order for a good to enter the “duty free area” in either a customs union or a Free Trade Area member state. First is the change in tariff heading of the product. Secondly is the minimum local content in the product. Thirdly is the substantial transformation in terms of characteristics, changes in the

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<sup>140</sup> Winston W Chang, Anti- Dumping, Countervailing and Safeguard Measures, Gitam Review of International Businesses Vol.1 Issues 1 July 2008.

<sup>141</sup> LM Gard and J Riedel, Safeguard protection of industry in developed countries: Assessment of the Implications for developing countries Weltwirtschaftliches Archiv Bd (1980) 472

<sup>142</sup> WTO webpage; Technical Information on Rules of Origin available at [https://www.wto.org/english/tratop\\_e/roi\\_e/roi\\_info\\_e.htm](https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm)(accessed on 25 July 2019)

<sup>143</sup> WTO Agreement on Rules of Origin Article 1

<sup>144</sup> WTO webpage (n 80 above)

<sup>145</sup> EL Grinols and Peri Silva, Rules of Origin and gains from Trade (2011) Economic Theory Volume 47 No.1 at 160

<sup>146</sup> EL Grinols (n 83 above)

production process and name of the product and lastly, stages of the production process that took place in the Free Trade Area or the customs union.<sup>147</sup>

Rules of origin are supposed to be used as tools to give support to trade policy instruments implementation.<sup>148</sup> However, their misuse has resulted in RoO becoming the trade policy instruments themselves. The WTO's RoO Agreement obliges members to ensure that their RoO are transparent, do not distort or restrict international trade and that their administration is done in a transparent manner. Therefore, rules of origin amount to NTBs when they are not applied in a transparent manner or negatively distort trade.

## **2.8 Pre-shipment inspection**

Pre-shipment inspection involves all activities associated with the confirmation of the quantity, quality, price- financial terms and currency exchange rates and the customs classification of goods to be imported or exported from one country to another.<sup>149</sup> The United Nations Conference on Trade and Development gives a more related definition of pre-shipment inspection to mean mandatory quantity, quality and price control of goods before shipment to another country.<sup>150</sup> Such activities can be done by an independent inspecting agency deriving its authority from the importing country.<sup>151</sup>

The introduction of pre-shipment inspection in international trade was motivated by the need to help developing countries with the enforcement of customs procedures, to ensure that imported goods in such countries maintain their mercantile quality, and to ensure that the goods met their health and safety standards at the time of consumption.<sup>152</sup> The regulation and harmonization of pre-shipment inspection procedures have evolved from the GATT to the WTO era. Because of this, the WTO has an Agreement on pre-shipment inspection that came into force in 1994.

The Pre-shipment Agreement obliges WTO members to ensure that pre-shipment activities are non-discriminatory, protect confidential business information, the procedures are transparent and

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<sup>147</sup> Krueger A, Free Trade Agreements versus Customs Union, National Bureau of Economic Research (1995) 171

<sup>148</sup> KN Harilal and PL Beena, Reining of Rules of Origin based protectionism: A critique of the WTO initiatives, Economic and Political Weekly (2005) Vol 40 No. 51

<sup>149</sup> WTO Agreement on Pre-shipment Inspection 1994

<sup>150</sup> United Nations Conference on Trade and Development, Classification of Non-tariff measures (2012)15

<sup>151</sup> UNCTAD (n 88)17

<sup>152</sup> International Trade Procedures Working Group, Pre- Shipment Inspection in International Trade Document No. CEFACT/ITPWG/97NOO7, 24<sup>th</sup> October 1997 available at

<http://www.unece.org/trade/untdid/download/itp97007.pdf>(accessed on 25 July 2019)

do not result in delays, that the agencies responsible for inspection shall have appeal mechanisms for reviewing their decisions and that the price verification shall be the determinant of identical goods from both the importing and exporting states.<sup>153</sup> Therefore, a pre-shipment procedure that is not compliant with the already mentioned WTO obligations amounts to both a non-tariff barrier and a violation of the GATT Customs Valuation Code.<sup>154</sup>

Inefficient pre-shipment inspection procedures have a counterproductive effect on the importing country, its traders and consumers.<sup>155</sup> This is because it increases the costs and burdens of international trade. In order to counter this, the adopted pre-shipment inspection procedures should be accompanied by policies and standards to lessen the trade burdens that such pre-inspection procedures create. Such procedures should also have a reviewable time frame in order to accommodate changes to exist.

## **2.9 Import licensing procedures**

Import licensing procedures refer to administrative procedures used for the regulation of import licensing regimes that require certain documentation to be filed with the relevant authorities before goods are imported into a country.<sup>156</sup> Import licensing procedures in international trade law are regulated by the WTO Agreement on Import Licensing Procedures. The Agreement requires import licensing procedures to be transparent, simple and predictable. To this effect, the Agreement places an obligation on governments to ensure that they publish information that enable traders to know the types and reasons why certain licenses are required.<sup>157</sup>

Countries are further required to notify the WTO in case they make modifications on import licensing procedures or adopt new import licensing procedures.<sup>158</sup> The Agreement requires that the rules relating to import licensing procedures should be administered in a fair and equitable manner and that they should also be applied in a neutral manner.<sup>159</sup> The Agreement also offers guidance on how governments should assess the application for licenses.

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<sup>153</sup> WTO Agreement on Pre-Inspection, Article 2.5

<sup>154</sup> HS Kibola, Pre-shipment Inspection and the GATT (1989) *Journal of World Trade* at 23

<sup>155</sup> *International Trade Procedures* (n 90)

<sup>156</sup> WTO Import Licensing Agreement 1994 Article 1

<sup>157</sup> WTO webpage, Non-tariff barriers to trade: red tape available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm9\\_e.htm#import\(accessed on 29 July 2019\)](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm#import(accessed on 29 July 2019))

<sup>158</sup> WTO webpage (n 94)

<sup>159</sup> WTO Import Licensing Agreement 1994 Article 1(3)



The Procedure for making an application for an import license has also be simplified by requiring that the application documents should not be more than ten, and that the bodies responsible for processing the documents should not exceed three.<sup>160</sup> Despite the existence of an obligation to WTO members to ensure that import licensing procedures are efficient, a state may implore Article XXI national security exception to regulate such imports.<sup>161</sup>

### **Conclusion**

This chapter expounded on the regulation of non-tariff barriers in international trade under the WTO. It highlighted various NTBs such as SPS measures, technical regulations and standards, import licensing procedures, anti-dumping and countervailing duties, pre-shipment inspection among others. The chapter provides a basis for the subsequent chapter which focuses on the regulation and impact of NTBs within the East African Community.

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<sup>160</sup> WTO Import Licensing Agreement 1994 Article 1(6)

<sup>161</sup> WTO Import Licensing Agreement 1994 Article 1(10)

## **CHAPTER THREE**

### **EXISTING NON-TARIFF BARRIERS WITHIN THE EAST AFRICAN COMMUNITY**

#### **3.1 Introduction**

EAC members have made significant efforts towards eliminating tariffs. This was made possible through the 2010 launch of the EAC customs union that established a common external tariff on goods coming into the EAC member states.<sup>162</sup> However, the economic benefits to intra- EAC trade are still being reduced by unresolved Non-tariff barriers to trade. Despite their prohibition in the EAC Customs Union Protocol and the 2017 Elimination of Non-tariff barriers Act, EAC states still impose NTBs to trade through their national legislations.

The EAC Customs Union protocol makes specific reference to the need to eliminate existing NTBS and prohibits the creation of new ones. The 2017 Elimination of NTBs Act on the other hand expounds on Article 13 of the Customs Union Protocol by laying out procedural aspects of the elimination of NTBs within the EAC.<sup>163</sup> This chapter seeks to highlight NTBs such as SPS standards, the non-recognition of rules of origin, quantitative restrictions, import licensing procedures, pre-shipment inspection, and infrastructural problems among others that are still prevalent in the EAC.<sup>164</sup>

#### **3.2 Categories of NTBs In the EAC Common Market**

##### **3.2.1 Quantitative restrictions**

A quantitative restriction refers to a limitation on imports or exports.<sup>165</sup> Quantitative restrictions may take the form of import bans or embargos. As discussed in the previous chapter, Article XI of GATT 1994 regulates the imposition of quantitative restrictions by WTO members. Almost all of the EAC members (except South Sudan) are members of the WTO.<sup>166</sup> However, despite the prohibition of quantitative restrictions by GATT and Article 11 of the EAC Customs union

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<sup>162</sup> Robert Kirk, Addressing Trade Restrictive Non -Tariff Measures on Goods Trade in the East African Community (2010) African Trade Policy Notes

<sup>163</sup> East African Community, Elimination of Non-tariff barriers Act 2015, Article 1

<sup>164</sup> W Viljoen, *Non -Tariff measures affecting trade in the SADC-COMESA -EAC Tripartite Free Trade Area* (2011)15

<sup>165</sup> P Van Den Bosche, *The Law and Policy of the World Trade Organisation, Cases, Texts and Materials* (2015)441

<sup>166</sup> WTO webpage: WTO members and observers available at

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)(accessed on 30 July 2019)

protocol, evidence suggests that EAC member states are still using import and export bans to protect their local industries.<sup>167</sup>

In 2017, Kenya and Tanzania participated in diplomatic talks after each country had imposed import bans on products originating from each other's country.<sup>168</sup> The trade war between the two countries started with the restriction by the Kenya Revenue Authority (KRA) of forty-two trucks ferrying wheat from Tanzania. As a result of the talks, Tanzania re-opened its borders to milk products, cigarettes and unprocessed foods originating from Kenya. In reciprocity, Kenya re-instated the importation of wheat and liquid petroleum gas from Tanzania.<sup>169</sup>

Export bans within the EAC were also instituted by Burundi's trade ban that restricted exports to Rwanda. The ban came after allegations that Rwanda was supporting the failed coup against President Nkurunziza of Burundi.<sup>170</sup> Burundi subsequently justified its export ban on the protection of national food security.<sup>171</sup> The cumulative effect of the ban saw the economy of Burundi affected by 7.2 % decline while that of Rwanda also reduced by 4.7%.<sup>172</sup>

In January 2019, a Rwanda and Uganda trade disagreement resulted in the closure of the Katuna border which effectively banned exports from Rwanda to Uganda.<sup>173</sup> Earlier on, the Rwandan governments had introduced export permits for those who wished to export goods to Uganda.<sup>174</sup> Uganda described the introduction of export permits as a technical measure to limit exports as there was no trader who was successfully issued with the permit. In retaliation, Uganda banned all exports to Rwanda and also restricted its citizens from travelling to Rwanda.<sup>175</sup>

Quantitative restrictions have also played a role in the ongoing trade dispute between Tanzania and Uganda. Imports of sugar and edible oil from Uganda have been banned in Tanzania over

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<sup>167</sup> Economic Research Centre, *Resolving the unresolved non-tariff barriers in the East African Community* (2017) 12

<sup>168</sup> East Africa Trade Mark Webpage: Kenya Tanzania lifts import bans after the intervention of the heads of states available at <https://www.trademarka.com/news/kenya-tanzania-lift-import-bans-after-intervention-by-heads-of-state/> (accessed on 30 July 2019)

<sup>169</sup> East African Trade Mark (n6)

<sup>170</sup> The Independent August 31 2016, Trade war bite as Burundi bans exports to Rwanda available at <https://www.independent.co.uk/trade-war-bites-burundi-bans-exports-rwanda/> (accessed on 30 July 2019)

<sup>171</sup> The independent (n 9)

<sup>172</sup> The Independent (n 9) par 4

<sup>173</sup> Daily Monitor Kampala Friday 15 March 2019, Uganda trade war claims diversionary available at <https://www.monitor.co.ug/News/National/Uganda-trade-war-claims--diversionary---Rwanda-/688334-5026004-kq95so/index.html> (accessed on 30 July 2019)

<sup>174</sup> Daily Monitor(n12)

<sup>175</sup> Daily Monitor(n12)

allegations that the two products are being imported by Uganda from non-EAC member states, repackaged and then sold at a tax free rate within the EAC.<sup>176</sup> Despite bilateral talks between the two countries, Tanzania conducting investigations that indicated that Uganda was not re-packaging imported sugar, and a resolution to lift the ban, Uganda's sugar and edible oil are still being restricted from accessing Tanzania's market.<sup>177</sup> Tanzania also has an ongoing ban on the importation of chicks into the country due to fears of the spread of avian flu. The ban has also extended to the transportation of eggs from Zambia to Kenya through Tanzania.

a) Economic effects of quantitative restrictions within the EAC

Generally, non-tariff barriers are considered to be twice as trade restrictive as tariffs.<sup>178</sup> In the East African Community, NTBs have made the percentage of intra-EAC trade to constantly remain below the 20 percent mark.<sup>179</sup> This is very low compared to other regional economic communities, such as SADC and the European Union which have 58 and 68 per cent respectively.<sup>180</sup> Such NTBs have also resulted in EAC states preferring to trade with COMESA, SADC or other countries outside the continent.<sup>181</sup> This in the end defeats the whole purpose for the establishment of the East African Community common market and customs union.

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<sup>176</sup> The East Africa, July 16 2019 Six months later Tanzania yet to allow Uganda sugar into its market available at <https://www.theeastafrican.co.ke/business/Tanzania-yet-to-allow-Uganda-sugar-into-its-market/2560-5197792-xtmpe2z/index.html> (accessed on 30 July 2019)

<sup>177</sup> The East African(n15)

<sup>178</sup> Organisation for Economic Development; Protectionism? Tariffs and Other Barriers to Trade 2017(15)

<sup>179</sup> J Anyanzwa and E Onyango, Tanzania and Kenya work to resolve trade dispute, the East African 8 June 2019 at

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<sup>180</sup> J Anyanzwa (n 17)

<sup>181</sup> Trade Mark East Africa webpage: Non-tariff barriers slow trade available at <https://www.trademarka.com/news/non-tariff-barriers-slow-trade/> (accessed on 8 August 2019)

### **3.2.2 SPS standards as a non-tariff barrier in the EAC**

SPS standards refer to regulations that are aimed towards the protection of human, animal, plant life or health. Apart from the general WTO regulatory framework on consumer protection which constitutes the SPS Agreement and Article XX GATT exception, the EAC has a protocol on SPS measures. The protocol came into force in July 2013. So far the protocol has been ratified by all the EAC member states, except Burundi and Tanzania.<sup>182</sup>

The protocol aims to facilitate trade in agricultural products and foods. Just like the WTO SPS Agreement, the EAC SPS protocol recognizes the right of EAC members to implement SPS measures and elaborates on rules for the application of the SPS measures.<sup>183</sup> Article 38 of the EAC Customs Union Protocol also requires the EAC members to facilitate trade through the co-operation in the implementation of SPS measures.

Despite the existence of the SPS protocol, there are still long standing trade disagreements in the EAC based on SPS measures. One such example is the ban by Uganda on meat coming from Kenya, since 1997. The ban is based on health safety concerns of outbreak of diseases such as rinderpest. Kenya has accused Uganda of using the ban as a non-tariff barrier to trade.<sup>184</sup> A taskforce appointed by Uganda to investigate the ban on beef found that the ban violated the principles of free trade. The East African Community Secretariat has proposed that Kenya should invite Uganda to conduct a risk assessment on Kenyan beef, a proposal which is yet to be implemented by the two countries.<sup>185</sup>

In 2017, Tanzanian border authorities set fire to five thousand chicks. The chicks, worth Kenya Shillings 540,000, were burned on fears that they would cause the spread of birds flu from Uganda.<sup>186</sup> The authorities resorted to burning the chicks despite the non-existence of evidence suggesting the presence of birds' flue in Kenya. Just a few months before this incident, Tanzanian authorities also auctioned cows from Kenya, Uganda and Rwanda to prevent the

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<sup>182</sup> Trade Mark East Africa webpage; Burundi takes a step towards the ratification of the EAC SPS protocol available at <https://www.eatradehub.org/burundi-takes-a-step-towards-ratification-of-the-eac-sps-protocol>(accessed on 31 July 2019)

<sup>183</sup> HM Otieno, Combating the unjustified sanitary and phytosanitary measures in the African Tri-partite Free Trade Area(SADC-COMESA-EAC): SPS -plus or SPS minus (2011) Hungarian Journal of Legal Studies No. 4 at 416

<sup>184</sup> A Odhiambo, 'Uganda demands animal inspection to resolve beef ban' Business Daily 3 January 2011 at 14

<sup>185</sup> A Odhimbo (n16)

<sup>186</sup> E Mumbu, 'Tanzania burns alive 6400 chicks from Kenya 'East Africa Agri-News ,7 November 2017 at 2

spread of foot and mouth disease.<sup>187</sup> Therefore, lack of co-ordination among EAC members on SPS measures amounts to non-tariff barriers to trade.

The effect of NTBs has extended to the trade in flowers from Kenya.<sup>188</sup> Importing countries have standards based on the minimum level of pesticides to be used in farming and also the packaging to be used before exporting.<sup>189</sup> Non-tariff barriers also hinder the trade in grains in the East African Community. The transporting of grains in the EAC region requires seven types of certificates; phytosanitary certificate, import and export permits, quality certification, certificate of origin, pre-shipment verification of conformity, quality certification, radiation certification and non-GMO certification.<sup>190</sup> All these documents take a minimum of three weeks to process. The costs associated with processing them is USD 500 Dollars per transaction.

### **3.2.3 Rules of origin as a non-tariff barrier in the EAC**

In a customs union goods are either produced locally or imported from third party countries. Those goods not locally produced within the East African Community are subjected to a common external tariff since they do not to meet Rules of Origin criteria.<sup>191</sup> The implementation of rules of origin in a customs union is important due to the application of trade measures such as import bans and prohibitions, tariff quotas and restrictions that are discriminatory in nature.<sup>192</sup> The challenge that EAC member states face in determining the origin of imports is to ensure that only imports that meet the criteria of ‘made in the EAC’ (as set out in the RoO) are accorded preferential treatment. Since EAC States are also members of other trading blocs, RoO are necessary to prevent goods from outside the region being accorded similar preferential treatment to locally produced goods.<sup>193</sup>

The main regulation on rules of origin within the EAC is Article 14 of the Customs Union Protocol. It requires that only goods originating from the partner states shall be eligible to the EAC tariff preferential treatment. In extending the latter regulation, the EAC Customs Union

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<sup>187</sup> E Mumbu (n 19)

<sup>188</sup> A Disdier, B. Bekadu and S. Wong *Trade effects of SPS and TBT measures on tropical products International Centre for Trade and Sustainable development* (2013) 4

<sup>189</sup> A Disdier(n21)

<sup>190</sup> Sanitary and phytosanitary intervention in the Eastern African Grain Council (2016) 19

<sup>191</sup> East African Community Trade and Investment Hub, *Challenges in the implementation of the East African Rules of Origin; A case for A.K Oils and Fats Ltd* (2014)5

<sup>192</sup> East African Community, *Manual on the application of the East African Community Rules of Origin* (2006)5

<sup>193</sup> East African Community Trade and Investment Hub (n 24)

Rules of Origin came into force in 2005 and was subsequently amended in 2015.<sup>194</sup> The 2015 rules of origin aim at ensuring uniformity among the EAC member states in the application of rules of origin and making sure that the application of the rules of origin is transparent, predictable, fair and consistent with the rules of the Customs Union Protocol.<sup>195</sup>

Rules of origin in the EAC are trampled on by the transshipment of goods from outside the community.<sup>196</sup> Transshipment in the Customs Union refers to the “passing of” of goods as though they originated from the customs union in order to benefit from tariff preferences.<sup>197</sup> Transshipment constitutes a violation of the rules establishing a customs union in two ways. Firstly, because products are being moved from a non-member country to a member country to a customs union with a relatively low external protection. Secondly, the products are exported to another country outside the Customs Union that has a higher tariff protection.<sup>198</sup> However, transshipment is different from instances where goods are shipped to an intermediary country before reaching their final destination

The East African Court of Justice has had an opportunity to decide a case, *British American Tobacco vs. Uganda*,<sup>199</sup> which related to rules of origin. In 2019, the Ugandan government passed a legislation that sought to charge extra excise duty on cigarettes manufactured by the British American Tobacco Company, Uganda in Kenya.<sup>200</sup> The East African Court found that this was a violation of the EAC treaty since the goods still originated within the Union.

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<sup>194</sup> East African Trade and Investment Hub (n 24)

<sup>195</sup> The East African Community Customs Union (Rules of Origin) Rules 2015, Rule 2 available at [https://www.tanzania.go.tz/egov\\_uploads/documents/EAC\\_RULES\\_OF\\_ORIGIN\\_2015\\_\(2\)\\_sw.pdf](https://www.tanzania.go.tz/egov_uploads/documents/EAC_RULES_OF_ORIGIN_2015_(2)_sw.pdf) (accessed on 31 July 2019)

<sup>196</sup> Richard Mshomba, ‘EAC- An authentic customs union will end transshipment’ The Citizen 25 August 2019 at 1

<sup>197</sup> Alex Ordern, The Transshipment problem, Management Science (1956) 277 Vol.2 No. 3

<sup>198</sup> Richard Mshomba(n29)

<sup>199</sup> British American Tobacco(U) vs The Attorney General of Uganda East African Court of Justice Reference No.7 of 2017

<sup>200</sup> East African Community Court of Justice Webpage; Court decides that Uganda’s excise duty imposed over goods imported within the East African Community is a violation of the treaty available at <http://eacj.eac.int/?p=3490>(accessed on 31 July 2019)

### **3.2.4 Technical standards as a barrier to trade within the EAC**

Standards are made to guarantee the quality of goods accessing the domestic market. However, countries have resorted to use them as protectionist tools.<sup>201</sup> The importance of Standardization, Quality assurance, Metrology and Testing (SQMT) in the promotion of investment and trade in the EAC is recognized in Article 81 of the EAC treaty.<sup>202</sup> In order to effect this, EAC member states, through Article 5(2) of the Customs Union Protocol, agree to eliminate technical barriers to trade and to mutually recognize standards. The East African Community member states also have in place Principles and Procedures for the Development of East African Standards.<sup>203</sup> The principles expound on the methodologies for the development and maintenance of EAC standards<sup>204</sup>. 2006 saw the enactment of the EAC Standardization, Quality Assurance, Metrology and Testing Act which aims to harmonize standards and regulations in the region.

The Act establishes an EAC standards committee. The committee is mandated to come up with EAC standards on goods and services. It is made up of representatives of national standardization bodies in each of the EAC member states, and private sector partners.<sup>205</sup> Currently national standards bodies that work in collaboration with the committee consist of: the Kenya Bureau of Standards, the Rwanda standards body, the Tanzania Bureau of Standards, Burundi Bureau of standards and the Uganda National Bureau of Standards.<sup>206</sup> Other stakeholders in the committee include; consumers, academia, private sector and other interested parties. The comments received from such stakeholders are incorporated into the development of EAC standards for goods and services in the region. Such standards are also subject to review in order to keep them on par with technological advancements.<sup>207</sup>

Despite the existence of the above mentioned legal and institutional framework on standards, so far the EAC has only managed to harmonize 1, 240 standards despite the fact that each of the member states still maintains about 6, 000 national standards. There still exists varying

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<sup>201</sup> MH Hangi, *Non-Tariff Barriers in trading within the East African Community Economic and Social Research Foundation* (2010)12

<sup>202</sup> MH Hangi(n34)

<sup>203</sup> East African Community Principles and Procedures for the Development of East African Standards ; East African standards Committee 2012

<sup>204</sup> EM Nderitu and M Odongo; *A win for the private sector: Harmonizing standards in the East African partner states, International Finance Co-operation* (2017)1

<sup>205</sup> Wilson John, *Standards regulations and trade: WTO rules and developing country concerns in development, trade and the WTO* (2002) 54

<sup>206</sup> EAC webpage; Quality infrastructure in the East African Community available at <http://www.eac-quality.net/the-sqmt-community/national-bodies.html>(accessed on 1 August 2019)

<sup>207</sup> East African Community Standard document for woven polyolefin for cement Doc no;2256: 2019



procedures among the EAC standards bureaus in issuing certification marks, inspection and testing. Much still needs to be done to establish trust in inspection, testing and certification conducted by the other EAC countries to establish mutual recognition. Even in instances where common standards exist, EAC officials still insist on the re-inspection of goods. Goods that have been certified and declared fit in one country mostly get rejected in another country.

For instance, Kenya has a selected number of goods which must go through the Kenya bureau of standards for testing, even if they are coming from within the EAC. In March 2019, Tanzania and Kenya engaged in yet another trade war over the inspection of goods at their border posts. Kenya instituted a complaint with the EAC secretariat after Tanzanian authorities held Kenyan goods for over seven days citing reasons such as collecting samples for inspection.<sup>208</sup> In its defense, Tanzania stated that it was acting in retaliation after its tiles and spirits had been held for the same reason.

### **3.2.5 Customs administrative procedures at border posts in the EAC**

A study conducted by the East African Community Business council in 2007 found that the biggest obstacles to trade within the EAC constitutes of customs clearance procedures.<sup>209</sup> Almost twelve years after the study, EAC member states are still grappling with the problem of harmonizing custom administrative procedures.<sup>210</sup> While Article 6 of the East African Community Customs Union Protocol obliges member states to adopt common standard documents, reduce the documents required to trade, regularly review procedures relating to international trade and adopt common trade procedures, EAC member states still maintain non-transparent and long import and export clearance procedures.

Non-tariff barriers that fall under custom and administrative procedures include: limited or varying custom working hours, long procedures for verifying containerized imports, lack of sufficient or trained personnel a border posts, and poor infrastructure. Such constraints can be addressed through trade facilitation. Trade facilitation refers to policies, conditions and

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<sup>208</sup> Patty Magubira, 'Tanzania Kenya now row over border screening' The East African, 9 March 2019 at 1

<sup>209</sup> Association for Strengthening Agricultural Research in Eastern and Central Africa (ASERACA), *Impact of non-tariff barriers on cross border trade in Eastern Africa* (2014) 5

<sup>210</sup> A World Bank Flagship Report Doing Business 2019 Report available at [https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report\\_web-version.pdf](https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf) (accessed on 1 August 2019)

procedures that increase the efficiency of moving goods across a supply chain.<sup>211</sup> Trade facilitation can be categorized into two aspects; border policies and procedures related to customs (such as documentation and inspection requirements) and transport of goods before or after they have been cleared at the border.<sup>212</sup>

According to UNCTAD, trade within EAC requires the highest number of documentation and inspection requirements compared to other regions of the world.<sup>213</sup> For example, to import goods into Kenya through the Mombasa port, a person needs all of the following documents; a certificate of conformity, master bill of lading, import declaration form, packaging list and an exception letter if applicable.<sup>214</sup> The World Bank has also stated that the EAC's customs clearance times are seven times less predictable than the rest of the world.<sup>215</sup> Multiple inspection procedures generate duplicate paperwork and lead to unpredictable goods clearance times.<sup>216</sup>

An active complaint on long and costly customs clearance procedure exists at Namanga Border, which is between Tanzania and Kenya. Tanzania is accusing Kenya of introducing, through its national revenue authority, a new single customs entry clearance procedure which increases the cost of doing business.<sup>217</sup> The new system increases the cost of clearing one truck of wheat from Kenya Shillings 1506 to Kenya Shillings 8500, a cost which Tanzania drivers allege that it is only borne by them.

Long hours clearing goods for either imports or exports depends on the border post which the trader is using. Even so, customs clearance averagely takes one to twelve hours at all border posts in the EAC. Such long hours reduce the quality of perishable goods, or make them more expensive as producers want to make up for the time wasted at border posts. Therefore, in order for EAC member states to reap the full benefits of trade, they must invest in the development of trade facilitation. Improvements in trade facilitation are important not only to reduce time delays, but also to make trading less risky for firms. The need to manage risk imposes additional costs

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<sup>211</sup> United States International Trade Commission, *Trade facilitation in the East African Community: Recent developments and potential benefits* (2012) xi

<sup>212</sup> US International Trade Commission(n43)1-2

<sup>213</sup> UNCTAD, *Trade liberalization, Investment and Economic integration* (2011)24

<sup>214</sup> Aero shipping company webpage available at <http://aeromarine.co.ke/clearing-forwarding/custom-clearance/import-documents/> (accessed on 1 August 2019)

<sup>215</sup> World Bank, *Logistics performance index: Eastern and Southern Africa February 2016*(8)

<sup>216</sup> World Bank(n47)

<sup>217</sup> Tripartite Free Trade Area, Online Reporting Mechanism for NTBs: Tanzania- Kenya NTB No.000-892

on trading, for example, a trader might choose to use road transport, not because it is cheaper, but because of its reliability as compared to railway transport within the EAC.

### **3.2.6 The effect of infrastructural deficits on EAC trade**

The WTO acknowledges the critical role that infrastructure and infrastructure services plays in the development of international trade.<sup>218</sup> The African Union supports the WTO's view in its Agenda 2063 by also recognizing the central role of infrastructure in facilitating the movement of goods, services and people in the continent.<sup>219</sup> Such infrastructural support to trade takes the form of: railways, seaports, airports, roads and services such as those provided by telecommunication and the financial sector.<sup>220</sup> Poor transport infrastructure translates to an extended delivery of goods. such costs are usually factored in by producers in the price of goods.

The treaty establishing the EAC also speaks to the role of infrastructure in supporting trade within the region. Article 89 of the treaty outlines the obligation of EAC states to co-operate in transport and communications development. It further states that Partner States shall undertake to evolve coordinated, harmonized and complimentary transport and communications policies, improve and expand the existing links, and establish new ones as a means of furthering the physical cohesion of the countries, so as to promote the movement of traffic within the Community.

To achieve these goals, EAC states are required to make initiatives that harmonise their standards, regulations and practices, develop and integrate roads, railways, airports and ports within their territories, provide security and protection to transport systems and exchange information and technological developments in transport and communications. Roads and road transport are covered by Article 90 of the EAC Charter, while Railways, Civil Aviation, Maritime Transport, Inland Waterways Transport and Multimodal Transport are covered by Articles 91 – 95 of the same Charter. Co-operation in Postal Services and Telecommunications is presented in Articles 98 and 99.

However, despite such commitments in the EAC treaty, the cost of doing business within the East African Community is very high compared to other regions, such as SADC and

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<sup>218</sup> World Trade Organisation, *World Trade Report: Infrastructure in Trade and Economic Development* (2014) 114

<sup>219</sup> African Union, Agenda 2063(2015)4

<sup>220</sup> WTO (n 49)

ECOWAS.<sup>221</sup> These costs are associated with infrastructural deficits, especially in the railway transport network.<sup>222</sup> Despite the launch by the EAC secretariat of the EAC railway master plan in 2009, railway transport within the EAC is not yet integrated.<sup>223</sup> Existing railway networks within the member states are limited in capacity because of the low velocity in which the trains can operate, and limitations on the permissible axle loads. In order to effectively develop the railway sector within the EAC, the secretariat should work towards the establishment of a railways unit that will provide technical assistance in the integration of the five member states' railways network.<sup>224</sup>

In relation to marine transport, the cost of doing business within the EAC is also increased by the congestion at ports. The majority of EAC member states are landlocked, for example, Uganda, Burundi, South Sudan and Rwanda. Therefore, the only ports in operation in the EAC are in Kenya and Tanzania. In Kenya, marine transport is centered at one major sea port in Mombasa and smaller ports in the coastal towns of Malindi, Lamu, Kilifi, Shimoni and Mtwapa.<sup>225</sup> The port in Mombasa clears imports for goods coming into Kenya, the landlocked countries of the East African Community, and the Democratic Republic of Congo. Because of such dependence by many countries, the Mombasa port is constantly faced by congestion problems.<sup>226</sup> The congestion caused in the port slows down trade within the East African Community.

Road transport within the EAC is also not sufficiently developed. In 1998, EAC states launched a road network initiative with an aim to promote regional integration.<sup>227</sup> Through the road network, the following major highways were to be developed to link the EAC states; Mombasa-Malaba- Katuna road linking Kenya Rwanda and Uganda, Biharamulu- Lokichogio road linking South Sudan, Kenya, Uganda and Tanzania, Tunduma Nyakanazi road linking Burundi, Tanzania and Rwanda, and the Dar es Salaam – Mutukula – Masaka road connecting Rwanda,

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<sup>221</sup> N Adero and E Alingula, *Challenges facing transport infrastructure in the East African Community in African Research and Resource Forum, Research networking and Regional Development Policy making in the East African Community* (2012)110

<sup>222</sup> Nashon Adero (n 52)

<sup>223</sup> East African Community Railways Master Plan Study January 2009 available at <https://africog.org/wp-content/uploads/2017/06/The-East-African-Railways-Master-Plan.pdf>(accessed on 5 August 2019)

<sup>224</sup> East African Community Railways Master Plan (n 56)

<sup>225</sup> Fortune for Africa Webpage; Maritime and inland water transport in Kenya available at <https://fortuneofafrica.com/kenya/maritime-inland-water-transport-kenya/>(accessed on 5 August 2019)

<sup>226</sup> L Namono, Congestion at Mombasa port slows down trade in the EAC bloc, *The East African* 13 December 2012

<sup>227</sup> East African Community, NEPAD-OECD African Investment Initiative Overview of Regional Road Infrastructure Projects (2016) available at <http://www.oecd.org/investment/investmentfordevelopment/41775886.pdf>(accessed on 5 August 2019)

Burundi, Tanzania and Uganda.<sup>228</sup> However, to date all the major highways envisioned in the strategy have not yet been completed. The EAC road transport network is still based on member states' roads which are mostly congested because of traffic.

### **3.2.6.1 Establishment of One stop border posts within the East African Community**

Another major infrastructural deficit within the EAC is the development of one-stop border stops (OSBP) at the border posts of the EAC member states. OSBP concept in international trade relates to the joint co-ordination of customs procedures at border posts between two or more countries. As a trade facilitation tool, OSBP provide an effective tool for the co-ordination of the movement of goods, people and services between or among states.<sup>229</sup>

A OSBP is distinct from the traditional two-border post model which is characterized by lengthy clearance transactions, a lot of paper work, and duplication of exit or entry procedures that result to delays, and increase in the cost of doing business.<sup>230</sup> In essence, the OSBP concept encourages the application of joint controls in order to eliminate duplications and minimize routine activities.<sup>231</sup>

Although the EAC member states enacted the 2017 One Stop border posts regulation that encourages coordination in the establishment of OSBPs,<sup>232</sup> in practice there are few existing one stop border posts in operation. EAC has only the four one stop border posts: Busia-Uganda border, Mutukola border, Kagitumba, and Kobero/Kabanga border posts.

### **3.2.7 The impact of corruption on EAC trade**

The East African Community Business council, in its 2008 report on Business Climate Survey Index, found that corruption and unnecessary delays constitute major obstacles at the EAC customs union points.<sup>233</sup> Ten years later, EAC member states are still trying to find effective means of combating the effect of corruption on intra-EAC trade. President Uhuru of Kenya and President Magufuli of Tanzania acknowledged the effect of corruption at EAC borders during

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<sup>228</sup> East African Community(n62)

<sup>229</sup> Trade Law Centre(TRALAC) *One stop border Post Source Book* (2016)1-1

<sup>230</sup> J Musyoki, one stop border posts have strengthened cross border trade, *The East African*, 8 March 2018

<sup>231</sup> TRALAC (n 64)

<sup>232</sup> The East African Community One Stop- border regulations 2017

<sup>233</sup> Mbogori Charles, Why EAC: Reflections on the EAC Business Environment, Paper presented during the 1<sup>st</sup> East African Investment Conference (2002) 21

the opening of the Namanga One stop border post in December 2018.<sup>234</sup> The two stated that the engagement by border officials in receiving bribes limited the free movement of people and goods between the two countries.<sup>235</sup> Generally, high levels of corruption have been found to limit the benefits of bi-lateral trade.<sup>236</sup>

Border officials in the EAC are usually involved in smuggling of counterfeit goods across border countries.<sup>237</sup> Corruption at such border posts also take other forms such as bureaucratic obstacles, organized crime related to corruption, misappropriation and corruption, petty bribes and misappropriation.<sup>238</sup> The Increased likelihood of corruption at border posts is increased by factors such as the level of discretionary authority and autonomy that border officials usually have, complex regulatory frameworks, and high tariffs that encourage traders to pay bribes instead of complying or paying the taxes, the poor working conditions and inadequate salary of border officials, and the pressure from organized crime networks at borders.<sup>239</sup>

A study conducted in 2018 by Transparency International on cross border corruption in the EAC found that the incidence in corruption is high in the customs and valuation section of exporting goods. Kenya had the highest levels of corruption with a percentage index of 57.<sup>240</sup> Legally the EAC legislative council has made steps towards eliminating corruption in the region. This is through the enactment of the EAC Protocol on Combating Corruption.<sup>241</sup> In practice the enforcement of the Act is difficult due the lack of a joint anti- corruption institution to implement the Act.

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<sup>234</sup> Trade Mark East Africa Webpage: Uhuru Magufuli warn against corruption at border crossing available at [https://www.trademarka.com/news/kenya-news/uhuru-magufuli-warn-against-corruption-at-border-crossing/\(accessed](https://www.trademarka.com/news/kenya-news/uhuru-magufuli-warn-against-corruption-at-border-crossing/(accessed) on 5 August 2018)

<sup>235</sup> Trade Mark East Africa(n70)

<sup>236</sup> Anderson JE and Marcouiller, Insecurity and the pattern of trade: An empirical investigation review of economics and statistics, MIT press volume 84 No. 2 (2002)343

<sup>237</sup> N Ochunge and I Odanga, Uganda border points a safe haven for cunning smuggler, standard digital, 17 December 2017 at 3

<sup>238</sup> M Chene, Corruption at borders, Chr Michelsen Institute, U4 Helpdesk Answer 2018:3 available at [https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-at-borders-2018.pdf\(accessed](https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-at-borders-2018.pdf(accessed) on 6 August 2019)

<sup>239</sup> M Chene (n 73)

<sup>240</sup> Transparency International, Corruption Perceptions index 2018(23)

<sup>241</sup> The East African Bribery Trend Analysis(2010-2014) Transparency International Kenya 2015

### **3.2.7.1 Multiple police road blocs**

In the EAC there are two types of police road blocks; the unwarranted and the warranted. The difference between the two is that the latter seeks to regulate the movement of smuggled goods while the former does not. Police road blocks amount to non-tariff barriers when bribes are demanded by police at such points to let goods in transit to pass. EAC states have reduced roadblocks through the BlackBerry Information Communication Technology services. The system operates on reports of non-tariff barriers through a mobile application. However, to date there still exists about fifty road blocks between Mombasa and Malaba.<sup>242</sup>

### **3.2.8 Language barrier**

In order for trade to be effective, it must be facilitated by communication.<sup>243</sup> English is the official language in the East African Community. Despite this, Kiswahili is the most spoken language in the EAC. Efforts to promote the use of Kiswahili to facilitate regional integration have been made through the mobility program for the use of Kiswahili in EAC entities that are involved in development.<sup>244</sup>

The implementation of the program is administered by the East African Kiswahili Commission. Despite regional efforts being taken to integrate the use of Kiswahili in the EAC, some member states still maintain their local languages in their national jurisdictions. For example; Rwanda still maintains Kinyarwanda as its national language and majorly uses it in processing documents. The impact of language barriers on EAC trade has resulted in instances where Tanzanian authorities insist that goods being exported into the country from Kenya have Kiswahili labels.

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<sup>242</sup> G McLinden, E Fanta, D Widdowson, *Border Management Modernization* The International Bank for Reconstruction and Development/The World Bank(2014)9

<sup>243</sup> Edward Kafeero, Customs and trade facilitation in the East African Community(2016) World Customs Journal Vol 2 No.1

<sup>244</sup> East African Community, East African Kiswahili Commission: Mobility programme for entities involved in the development and use of Kiswahili in the East African Community

### **3.2.9 Existence of multiple weighbridges in the region**

Typically, a weighbridge is supposed to be used to prevent the smuggling of goods into a country by ascertaining that the goods cleared at the points of entry are still the same. However, the existence of many weighbridges in the Central and Northern corridors within the East African Community have resulted to them amounting to non-tariff barriers. Due to the high number of trucks ferrying containers, it takes hours, or even days before goods are cleared at weighbridges.<sup>245</sup>

In 2015, EAC Trade Minister resolved to put in place only two weigh bridges in their countries; one at the point of entry and the other one at the exit point. However, up to date, this has not been complied with by any of the EAC member states. For example, Kenya still maintains four weighbridges, while Tanzania has three (Nyakahura in the Kagera region, Vingwaza in the coastal region and Njuki in the Singida region).

#### Conclusion

This chapter has illustrated existing NTBs in the East African Community. It has focused on corruption, the existence of multiple weighbridges, language barrier, long customs and administrative procedures at border posts, non-existence of one stop border and SPS regulations. The chapter concludes that NTBs in the EAC exists as a result of regulation inadequacies.

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<sup>245</sup> Japan International Co-operation Agency, East African Trade and Transport Facilitation Project: *Study for the harmonization of vehicle overload control in the East African Community* (2011)21



## **CHAPTER FOUR**

### **THE REGULATION OF NON-TARIFF BARRIERS IN THE EAST AFRICAN COMMUNITY**

#### **4.1 Introduction**

This chapter seeks to analyze the legal and institutional framework on non-tariff barriers within the East African Community. The main legal frameworks that will be discussed include; the EAC Customs Union Protocol the 2017 Elimination of non-tariff barriers Act, the EAC Sanitary and Phytosanitary protocol and the 2015 EAC rules of origin among others. The Institutional framework that this chapter will address is the EAC's Time Bound Programme for the Elimination of Identified/Reported Non-tariff barriers. In analyzing the two frameworks, the chapter will highlight their inadequacy in eliminating NTBs in the EAC.

#### **4.2 Legal framework on non-tariff barriers in the EAC**

The East African Community legislative assembly is the legislative organ of the East African Community.<sup>246</sup> It is established under Article 9 of the Treaty for the East African Community. Apart from acting as a legislative organ, the East African Legislative Assembly performs other functions such as debating and approving the budget of the community, liaising with the national assemblies of the member states, and discussing matters relating to the community.<sup>247</sup> In terms of non-tariff barriers to trade in the EAC, the legislative assembly has the following Acts, rules and regulations.

##### **4.2.1 EAC Customs Union Protocol**

The Customs Union Protocol is furtherance to the provisions of Articles 2 and 5 of the EAC treaty. Under the latter Article, EAC member states recognize the importance of a customs union in facilitating integration in the community. The Protocol having been passed in 2004 came into force in 2005. It took another five years for the EAC customs union itself to start operating. The Customs union has, among other objectives to, promote economic development and diversification in industrialization in the community, liberalize intra-EAC trade, enhance cross border, foreign and domestic investment in the region, and promote production efficiency.<sup>248</sup>

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<sup>246</sup> East African Community Legislative Assembly Webpage available at <http://www.eala.org/assembly/category/overview> (accessed on 8 August 2019)

<sup>247</sup> EAC Legislative Assembly(n4)

<sup>248</sup> Protocol on the Establishment of the East African Customs Union, Article 3 herein: Customs Union Protocol

The jurisdiction of the Protocol extends to all activities taken by EAC member states that relate to trade and customs management.<sup>249</sup> The customs union is operationalized by a common external tariff among EAC members on goods originating from outside the union, the removal of customs duties and other tariffs and the removal of non-tariff barriers among the member states.<sup>250</sup> The protocol defines non-tariff barriers to mean laws, regulation, administrative and technical procedures other than tariffs whose effect is to hinder trade.<sup>251</sup>

Article 13 of the protocol speaks specifically to the elimination of non-tariff barriers. It requires EAC members to remove existing NTBs and to not create new ones. On trade facilitation, the Protocol obliges EAC member states to adopt common standards in relation to documentation, reduce the number of documents required to trade within the region, ensure adequate coordination of trade and transport within the community and establish joint programs on trade.<sup>252</sup>

#### **4.3.2 Elimination of Non-tariff barriers Act 2017**

The Act was first passed in 2015 but was subsequently reviewed and repealed in 2017.<sup>253</sup> It has the following three specific objectives: provision of a legal framework for the elimination of non-tariff barriers in the EAC, elimination of restrictions that make exportation or importation of goods in the EAC difficult or costly, and providing a mechanism for the identification and monitoring of the removal of non-tariff barriers within the EAC.<sup>254</sup> On the definition of NTBs, the Act adopts the same definition as that of the Customs Union Protocol.<sup>255</sup>

The Act obliges EAC member states not to engage in trade practices, custom procedures or any other measures that may constitute a non-tariff barrier to trade.<sup>256</sup> It subsequently lists example of non-tariff barriers such as; export subsidies, domestic assistance programs to companies, government monopoly in export and import trading, misinterpretation of the Rules of origin, anti-dumping duties, restrictive trade regulations not based on international standards,

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<sup>249</sup> Customs Union Protocol, Article 4

<sup>250</sup> Customs Union Protocol, Article 2

<sup>251</sup> Customs Union Protocol Article 1

<sup>252</sup> Customs Union Protocol, Article 6

<sup>253</sup> R Oira, B Owino and M Mendez-Parra, *Non-tariff barriers and complaints in the East African Community Reporting Process, CUTS International Policy Paper (2017) 2*

<sup>254</sup> The East African Community Elimination of Non-Tariff Barriers Act, 2017 Article 3 herein: EAC Non-tariff barriers Act

<sup>255</sup> EAC Non-Tariff Barriers Act Article 6

<sup>256</sup> EAC Non-Tariff Barriers Act, Article 5

quantitative restrictions, sanitary and phytosanitary measures, import licensing among others.<sup>257</sup> However, despite the express prohibition of such acts, governments are still allowed to impose temporary non-tariff barrier measures in order to protect public health, safety or defense.<sup>258</sup>

The Act provides three mechanisms for the resolution of non-tariff barriers. The first mechanism relies on mutual agreements among concerned partner states to eliminate reported NTBs.<sup>259</sup> The second mechanism involves the implementation of the EAC Time-Bound Programme for the Elimination of Identified/Reported NTBs.<sup>260</sup> The third mechanism utilizes regulations, directives, decisions or recommendations made by the EAC Council of Ministers.<sup>261</sup> The first mechanism, elimination of NTBs through mutual agreement is the preferred method. This is because the member states hold joint discussions in order to agree on a common strategy for the elimination of NTBs.<sup>262</sup> However, this approach also has a problem in that member states do not always agree on the best strategy to eliminate NTBs and discussions may take long to complete.

The Act regulates corruption and other practices that may be considered to be non-tariff barriers in the EAC. Article 6 lists seven conducts that are prohibited. As such, a public officer or an institution in the EAC shall not engage in activities which impose additional costs in doing business, cause wastage of time, amount to a corrupt practice, bans products from entering the market, restricts business transactions in the member states or refuses to acknowledge the EAC rules of origin which causes additional costs in terms of doing business.<sup>263</sup>

In terms of enforcement, the Act provides that a state whose officer or institution engages in a practice that is considered to be a non-tariff barrier is required to compensate the affected party. The appropriate compensation is to be determined by the EAC committee on Trade Remedies. Such compensation is to be made within thirty days. However, if the dispute is not resolved within the set thirty days, then the aggrieved party may launch a petition with the East African Court of Justice.<sup>264</sup>

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<sup>257</sup> EAC Non-Tariff Barriers Act, Schedule

<sup>258</sup> EAC Non-Tariff Barriers Act, Article 13

<sup>259</sup> EAC Non-Tariff Barriers Act Article 9(1)

<sup>260</sup> EAC Non-Tariff Barriers Act Article 9(2)

<sup>261</sup> EAC Non-Tariff Barriers Act Article 9(3)

<sup>262</sup> R Oira (n 11) 2

<sup>263</sup> EAC Non-Tariff Barriers Act Article 6

<sup>264</sup> EAC Non-Tariff Barriers Act, Article 6(3)

The 2017 EAC Elimination of Non-Tariff Barriers Act gives a greater leeway for countries to remove non-tariff barriers at their own pace. It only states that countries are not required to impose non-tariff barriers to trade in goods but lacks an effective enforcement mechanism.<sup>265</sup> The council is the only body with the mandate to impose sanctions against an EAC member state which does not comply with its directions. However, it being a political body no such sanctions have been imposed since the implementation of the non-tariff barriers Act.<sup>266</sup>

### **4.3.3 EAC Sanitary and Phytosanitary Protocol**

The EAC Sanitary and Phytosanitary Protocol defines an SPS measure to mean measures taken to protect animal, human or plant life and health, or those taken to prevent the spread of pests into the territory of the EAC partner states.<sup>267</sup> The Protocol seeks to promote trade in food and agricultural goods, strengthen co-operation and co-ordination of sanitary and phytosanitary measures, and promote the use of science in sanitary and phytosanitary measures.<sup>268</sup> It further encourages co-operation among the EAC member states to harmonize the inspection and certification of plant and plant products.<sup>269</sup>

In relation to food safety, the Protocol encourages the EAC member states to harmonize food inspection, certification and approval mechanisms, to set guidelines for the safe movement of foods, harmonize surveillance systems for food borne hazards in the EAC, promptly provide information on food borne hazards and harmonize and strengthen food traceability systems.<sup>270</sup> Implementation of the Protocol is done through a governing authority which is established by the EAC Council of Ministers.<sup>271</sup> Even though the protocol has been ratified by all the EAC member states except South Sudan, to date the governing authority has never established.

The EAST African Community SPS Protocol is also inadequate in terms of creating a collaborative approach in setting EAC SPS regulations. It only provides a general obligation on EAC members to collaborate in setting such standards. The lack of a centralized institution or body dealing with certification of the safety of food products also makes the Act inadequate. The

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<sup>265</sup> EAC Elimination of Non-Tariff Barriers Act 2017 Article 5

<sup>266</sup> OECD- WTO Establishing a Regional Non-Tariff Barriers Reporting and Monitoring Mechanism (2018)15 available at <http://search.oecd.org/aidfortrade/47407106.pdf> (accessed on 8 August 2019)

<sup>267</sup> East African Community Protocol on Sanitary and Phytosanitary Measures, Article 1

<sup>268</sup> East African Community Protocol on Sanitary and Phytosanitary Measures, Article 2

<sup>269</sup> East African Community Protocol on Sanitary and Phytosanitary Measures, Article 4

<sup>270</sup> East African Community Protocol on Sanitary and Phytosanitary Measures Article 6

<sup>271</sup> East African Community Protocol on Sanitary and Phytosanitary Measures Article 7

protocol has also not been ratified by majority of the EAC states including; Kenya, Burundi and Rwanda.<sup>272</sup>

#### **4.3.4 EAC 2015 Rules of Origin**

The East African Community Rules of Origin (RoO) are a furtherance of the provisions of Article 14 of the EAC Customs union Protocol. Article 14 provides that goods shall be entitled to the EAC custom tariff preferences if they originate from the member states.<sup>273</sup> The Rules of origin were also enacted to ensure that there is uniformity in the application of rules of origin among the EAC states and that there existed transparency, accountability, fairness and predictability in the rules of origin.<sup>274</sup>

As per the RoO, goods are considered to have originated from the East African Community when they have either been wholly produced in the EAC or produced in the EAC using materials from outside the EAC but have undergone significant transformation in the EAC.<sup>275</sup> Minerals, live animals born and raised in the EAC, products from such animals and products obtained from sea fishing are considered to be wholly produced in the EAC.<sup>276</sup> Section 6 of the East African Community ROO sets out the criteria for determining whether or not sufficient materials originating from outside the EAC have been put on a product.

Goods are also not considered to have originated from the EAC when they have undergone processes such as simple mixing, bottling, marking or labeling and simple painting.<sup>277</sup> The Rules of Origin provide for the issuance of a certificate of origin for goods originating within the EAC. An application for such a certificate is to be accompanied by documents proving the originating status of the material, and the process used by the exporter in obtaining the document.<sup>278</sup> In the event of loss or destruction of the certificate of origin, the exporter may re-apply to the authority that issued the original certificate of origin for issuance of a duplicate.<sup>279</sup>

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<sup>272</sup>HK Mutai, Compliance with International trade obligations among East African Community Members (2014) Kluwer Law International volume 11 at 27

<sup>273</sup> Protocol on the Establishment of the East African Customs Union, Article 14

<sup>274</sup> East African Community Customs Union Customs Union (Rules of Origin) Rules 2015, Rule 2 herein EAC Rules of Origin

<sup>275</sup> EAC Rules of Origin, Rule 4

<sup>276</sup> EAC Rules of Origin, Rule 5

<sup>277</sup> EAC Rules of Origin, Rule 7

<sup>278</sup> EAC Rules of Origin, Rule 17

<sup>279</sup> EAC Rules of Origin, Rule 18

In accordance with the EAC Customs Management Act, a certificate of origin is supposed to be submitted to the customs of the importing partner state.<sup>280</sup> The validity of such certificate of origin is six months.<sup>281</sup> Private goods below USD-500 are exempted from applying for a certificate of origin. In terms of enforcement, the committee on Trade Remedies is mandated to handle disputes.

The EAC rules of origin are very flexible in terms of placing tariffs on imports which are considered sensitive goods. The rules allow countries to impose tariffs on goods originating in the Customs Union on the basis of protecting infant industries. However, the Act does not define what goods may be considered sensitive and it is up to the state imposing the tariff to decide. There are also multiple instances where these rules have been misinterpreted by EAC states. In 2016, Tanzania denied access to motor vehicles assembled in Kenya from entering their market on grounds that they did not satisfy the rules of origin requirements.<sup>282</sup>

#### **4.3.5 EAC Customs Management Act**

The Act was enacted in December 2004 came into force in 2005. It has undergone revision and the latest version is the 2009 one. The Act regulates two non-tariff barriers in the EAC: anti-dumping and corruption by both customs officers and people bribing the officer. On corruption, the Act prescribes that an officer who takes or asks for a reward other than what he /she is lawfully entitled to shall be guilty of an offense whose punishment is imprisonment for a term not exceeding three years.<sup>283</sup> The same liability is also incurred by a person who offers such a bribe to a customs officers.<sup>284</sup>

Anti- dumping and countervailing duties are regulated under Article 137 of the Act. The Article posits that, upon the advice of the East African Community Committee on Trade Remedies, the Commissioner of the Directorate of Customs is mandated to impose an anti-dumping duty for goods which have been dumped and a countervailing duty in the case where a subsidy has been

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<sup>280</sup> EAC Rules of Origin, Rule 21

<sup>281</sup> EAC Rules of origin, Rule 21

<sup>282</sup> HK Mutai, Regional Trade Integration Strategies under SADC and the EAC, A comparative Analysis (2011) SADC Law Journal Volume 1 No 81

<sup>283</sup> East African Community Customs Management Act, Article 9(1)

<sup>284</sup> East African Community Customs Management Act, Article 9(2)

granted.<sup>285</sup> Such duties are to be included with any other duties imposed on products which are being imported into the EAC member states.<sup>286</sup>

The Act incorporates the use of information technology in customs management procedures. Article 187 provides that the commissioner to the Directorate of Customs is supposed to prescribe custom formalities and procedures that may be carried out by the use of information technology. An application to the Commissioner is supposed to be made by a person who wishes to be registered as a user of the customs computerized system.<sup>287</sup> Registration for the use of the system may be canceled by the commissioner if he is of the opinion that the user has misused the system.

Generally, the Act is administered by the Directorate of Customs which is established by the EAC Council of Ministers. The Directorate has the mandate to initiate policies on customs and trade matters within the EAC and coordination of such policies among the EAC member states.<sup>288</sup> Other functions of the Directorate include; enforcement of customs laws of the community, administration of the common external tariff, and the rules of origin, trade facilitation and conducting trainings in customs related matters.<sup>289</sup>

#### **4.3.6 The EAC one-stop border Act 2016**

The Act seeks to enhance trade within the EAC through the efficient movement of goods, people and services.<sup>290</sup> To this end, it obliges EAC member states to enter into bilateral agreements for the purposes of establishing one stop border posts at their common borders.<sup>291</sup> In operating the one stop border posts, the Act encourages EAC member states to co-ordinate exit and entry formalities for goods. Such formalities may be coordinated through carrying out of joint physical inspections and sampling of cargo for testing.<sup>292</sup>

In further facilitating trade within the EAC, the Act encourages the member states to utilize the single window system. A single window system in the border control context refers to a facility that allows parties involved in trade and transport to lodge standardized information and

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<sup>285</sup> East African Community Customs Management Act, Article 137

<sup>286</sup> East African Community Customs Management Act, Article 137(2)

<sup>287</sup> East African Community Customs Management Act, Article

<sup>288</sup> East African Community Customs Management Act, Article 3

<sup>289</sup> East African Community Customs Management Act, Article 4

<sup>290</sup> East African Community One Stop border posts Act, 2016 Article 3

<sup>291</sup> East African Community One Stop border posts Act, 2016 Article 4

<sup>292</sup> East African Community One Stop border posts Act, Article 12

documents with a single entry point to fulfill all import, export and transit related regulatory requirements.<sup>293</sup> The EAC Council of Ministers has the obligation to prescribe rules for the operation of single window systems among EAC states.

The Council of Ministers also has the mandate to encourage relevant institutions to: coordinate the establishment of one stop border posts in the region, monitor the establishment of one stop border posts, initiate policies for the improvement of existing one stop border posts and set up specific programs that enable the establishment of one stop border posts.<sup>294</sup> For the efficient operation of the one stop border concept, EAC states are encouraged to incorporate electronic systems and assist each other in obtaining telecommunication services.<sup>295</sup>

The Act also allows member states to take temporary measures in order to protect public order, safety, security or safeguarding defense interests.<sup>296</sup> However, the imposition of such temporary measures are required to not exceed a period of three months. In terms of disputes relating to the enforcement of the Act, the EAC Council of Ministers has the jurisdiction to address this matter at first instance. A further appeal on the matter can be referred to the East African Community Court of Justice.<sup>297</sup>

Proceeds of trade in the East African Community are reduced by corruption. Corruption causes a detrimental effect on the economic development of any country and the EAC as regional economic bloc is no exception.<sup>298</sup> The Customs Management Act, the 2016 One Stop-border post regulations among other EAC Acts make attempts in regulating the vice. However, the main challenge still stands at implementation. The East African Act on Corruption has been enacted by the EAC legislative Assembly. Despite the existence of the Act, it has not been ratified by any EAC states over concerns of giving the institution created in the Act prosecutorial powers.<sup>299</sup>

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<sup>293</sup> East African Community One Stop border posts Act, Article 1

<sup>294</sup> East African Community One Stop border posts Act,50

<sup>295</sup> East African Community One Stop border posts, Article 23

<sup>296</sup> East African Community One Stop border posts Acts, Article 52

<sup>297</sup> East African Community One Stop border posts Act, Article 54

<sup>298</sup> AFRIMAP, Effectiveness of Anti-Corruption Agencies in the East African Community (2015)

<sup>299</sup> AFRIMAP (n 60)



#### **4.3.7 The East African Community Standardization, Quality Assurance, Metrology and Testing Act**

The Act seeks to protect the environment, public health and to harmonize EAC standards in line with international standards.<sup>300</sup> Compliance of EAC standards with international standards is expected to reduce costs and enhance compliance. The Act defines standards to mean documents produced by a recognized body that seeks to outline guidelines, rules and characteristics of products and their related process and production methods.<sup>301</sup> The definition goes ahead and notes that with standards compliance is not mandatory.

Implementation of the Act is done through the East African Community Standards Committee. The committee has the mandate to develop and undertake activities related to standardization, prepare implementation programs with regard to standardization, metrology and conformity assessment activities, and submit standards, reports and recommendations to the EAC Council of Ministers. In carrying out their mandate, the Committee is also required to have regard to the WTO Agreement on Technical Barriers to Trade.

For proper co-ordination of product standards, each EAC member state is supposed to establish a national standards body. These national standardization bodies are responsible for developing and publishing national standards in line with internationally recognized procedures, liaising with the relevant international and regional bodies which deal with standardization, and promoting the use of standards as the basis for technical regulations.<sup>302</sup> Currently, the EAC has five national standards bodies: the Kenya Bureau of standards, the Burundi Bureau of Standards, the Tanzania Bureau of Standards, the Rwandan Bureau of Standards and the Uganda National Bureau of Standards.<sup>303</sup>

Apart from the national standardization bodies, the Act requires EAC members to establish national metrology institutes. Such institutes are responsible for maintaining national measurement standards according to public and private sector needs and the needs of international organizations, disseminating units of measurements, ensuring that national

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<sup>300</sup> East African Community Standardization, Quality Assurance, Metrology and Testing Act Article 1 herein: EAC Standards Act

<sup>301</sup> East African Community Standards Act, Article 1

<sup>302</sup> EM Nderitu and M Odongo, *A win for the private sector: Harmonizing standards for the East African Community International Finance Co-operation* (2017) 3

<sup>303</sup> East African Community Standards Act, Article 7

measurement capabilities are compliant with international mutual recognition arrangements and liaising with regional and international objectives which carry the same mandate.

#### **4.4 Institutional framework on non-tariff barriers in the EAC**

The EAC institutional framework on the elimination of non-tariff barriers is regulated under the 2017 EAC Elimination of Non-Tariff Barriers Act. The Act, in part III, establishes the National Monitoring Committees and National Focal Points. National Monitoring Committees are responsible for overseeing the elimination of non-tariff barriers process in the EAC, setting out the elimination of non-tariff barriers process, receiving complaints and reports from parties concerning the existence of non-tariff barriers in the EAC, submitting reports to the Council of Ministers, identifying on its own initiative the existence of a non-tariff barriers in an EAC member state and consequently making recommendations to the institutions and public bodies on ways to remove the identified non-tariff barrier.<sup>304</sup>

The composition of the national monitoring committees consists of representatives of government institutions and private sector representatives which the EAC members consider necessary. In relation to the national focal points, the Act provides that the member states minister for East African affairs shall be the national focal points for matters relating to non-tariff barriers.<sup>305</sup> The functions of such focal points shall be to coordinate the activities of the national monitoring committees, initiate strategies and policies on the elimination of non-tariff barriers in the East African Community, and facilitate the implementation of the East African Community National Time Bound Programme for the Elimination of Identified Non-tariff barriers.<sup>306</sup>

The National Time Bound Programme for the Elimination of Identified Non-tariff barriers was launched in 2009. Its objective is to improve trade in the region. The program's operation is facilitated through the national monitoring committee which receives complaints and reports of the existence of non-tariff barriers and works towards eliminating them through the National Time Bound Programme.<sup>307</sup> Under this programme, monitoring and reporting of NTBs is facilitated at both national and regional levels.

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<sup>304</sup> East African Community Elimination of Non-Tariff Barriers Act, 2017 Article 7

<sup>305</sup> East African Community Elimination of Non-Tariff Barriers Act, 2017 Article 8(1)

<sup>306</sup> East African Community Elimination of Non-Tariff Barriers Act, 2017, Article 8(2)

<sup>307</sup> East African Community Elimination of Non-Tariff Barriers Act, 2017 Article 11

The monitoring and reporting of NTBs process usually starts with companies identifying and reporting their experiences in Intra EAC to their relevant business associations.<sup>308</sup> The business associations then forward such reports to the National Monitoring Committees. The Committees regularly meet to discuss the reports and forward their recommendations to the ministers.

#### **4.4.1 The EAC Trade Remedies Committee**

This committee is established under the provisions of Article 24(1) of the EAC Customs Union Protocol. Its main mandate is to handle matters relating to anti-dumping measures, rules of origin, regulation relating to rules of origin and subsidies and countervailing measures. It also works with investigating authorities in terms of initiating and conducting investigations. Its relationship with the EAC Council of Ministers is that it makes positive or negative determinations on investigations, recommends provisional measures and reports to the Council of Ministers on matters referred to it.

#### **4.4.2 Insufficiency of the EAC institutional framework on non-tariff barriers**

Generally, institutions responsible for the management of international organizations usually face multifaceted challenges such as inadequate resources, non co-operation by states, under-developed infrastructure, bureaucracy and the slow implementation of recommendations and decisions that these institutions come up with.<sup>309</sup> However, despite the existence of such challenges, there exists integral institutional inadequacies that International Organizations institutions face and the East African Community institutions on NTBs are constrained by the following inadequacies.

##### a) Rwandan National Monitoring Committee(NMC) on NTBs

The NMC of Rwanda still depends on the good will of EAC member states in facilitating the removal of non-tariff barriers identified in their territories.<sup>310</sup> This contributes to slowing down the elimination of NTBs and compliance with time bound programme agreed upon by EAC states. Since many institutions are involved in the removal of NTBs in the EAC, it is also

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<sup>308</sup> R Oira *et al* *Non-Tariff Barriers and Complaints in the East African Community NTBs process* (2017)1

<sup>309</sup> WTK Kaahwa, *Institutional Framework of the East Africa Community in JE Ruhangisa, E Ugirashebuja et al., editors. East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017)74

<sup>310</sup> Rwanda Ministry of Trade and Industry, *Progress Report of Rwanda National Monitoring Committee on implementation of National Strategy for elimination of NTBs* (2016)13

difficult to effectively coordinate these institutions. The preparation and organization of meetings between these institutions is also a problem as they are located in the individual partner states.<sup>311</sup>

b) Uganda National Monitoring Committee on NTBs

The Ugandan NMC is hosted and coordinated by the Ministry of Trade, Industry and Co-operatives. The ministry is of the opinion that, although the elements of monitoring non-tariff barriers have been established, the information and dialogue in these structures are insufficient in achieving compliance on the elimination of non-tariff measures. The Uganda Ministry of Trade Industry and Co-operatives also views the EAC secretariat as lacking the mandate of investigating and making rulings on reported non-tariff measures.<sup>312</sup>

c) Kenya's National Monitoring Committee on NTBs

The Kenya's NMC was established in 2016. Just like the Uganda's NMC it is also under the Ministry of Trade and Industry.<sup>313</sup> In its 2016 report the Committee has also cited the lack of enforcement mechanisms after they have identified existing NTBs in other member states.<sup>314</sup> The lack of sufficient coordination among the National Monitoring Committees of EAC states was also cited as one of the setbacks in working towards the elimination of non-tariff barriers in the East African Community.<sup>315</sup>

d) Burundi National Monitoring Committee on NTBs

The NTBs national monitoring committee in Burundi is of the opinion that the lack of an integrated system contributes to the reduction of identification, reporting and management of NTBs in the East African Community.<sup>316</sup> It proposes that there should be an increase in the capacity of the National Monitoring Committees to advocate for NTBs through the development

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<sup>311</sup>Rwanda Ministry of Trade (n 63)

<sup>312</sup> Overview of the Uganda's Ministry of Trade Industry and Co-operatives National Response Strategy for the Elimination of NTBs (2016) available at <http://mtic.go.ug/2016/index.php?/pdf/The-Project/nrse-ntbs-project.pdf>(accessed on 14 August 2019)

<sup>313</sup> Overview of Uganda's Ministry of Trade Industry and Co-operatives (n71 )

<sup>314</sup> COMESA Report of the Twenty Ninth Meeting of the Trade and Customs Committee (2017) 25

<sup>315</sup> COMESA (n 66)

<sup>316</sup> Trade Mark East Africa Formative Evaluation of Trade Mark East Africa Projects on Non-Tariff Barriers to Trade (2016) 34

of mechanism to prioritize NTBs, improving the Tripartite online NTBs reporting system and strengthening regional NTBs dispute settlement systems.<sup>317</sup>

e) The EAC Committee on Trade Remedies Committee

The Committee's effective operation is limited by its inability to sanction member states that do not comply with their resolutions and recommendations.<sup>318</sup> As a result, the committee's compliance activities only extend to minor NTBs that can be resolved by agreements while major NTBs continue to receive referral and counter referrals to other country based institutions. This generally reduces enforcement mechanisms in terms of resolving NTBs.<sup>319</sup>

#### **4.5 Conclusion**

This chapter has analyzed the legal and institutional framework on NTBs in the East African Community. It has concluded that the prevalence of NTBs in the East African Community is a result of the insufficiency of the legal and institutional framework addressing NTBs. The chapter has focused on the 2017 Elimination of Non-Tariff Barriers Act and the East African Customs Management Act among others. The chapter has also concluded that there exists inadequate collaboration in relation institutions mandated to eliminate NTBs.

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<sup>317</sup> Trade Mark East Africa (n 67)

<sup>318</sup> W Mwanza, Optimizing the dispute resolution process for trade remedies in the East African Community, TRALAC (2015) available at <https://www.tralac.org/discussions/article/7222-optimising-the-dispute-resolution-process-for-trade-remedies-in-the-eac.html>(accessed on 8 August 2019-

<sup>319</sup> W Mwanza (n 77)1

## **CHAPTER FIVE**

### **RECOMMENDATIONS AND CONCLUSIONS**

#### **5.1 RECOMMENDATIONS**

Chapter three of this thesis highlighted the non-tariff barriers in the East African Community. It went on to name corruption, the lack of one stop border posts ,problems in the implementation of rules of origin among others as examples of non-tariff barriers in the EAC. Chapter four focused on the inadequacies of the EAC’s legal and institutional framework in addressing non-tariff barriers within the community. Therefore, this section provides recommendations to the legal and institutional problems highlighted in Chapter four.

##### **5.2.1 Establishment of sound enforcement mechanisms for State’s non-compliance with non-tariff barriers elimination obligations**

In relation to EAC bodies responsible for elimination of non-tariff barriers, a concern emerged that such bodies lacked the power to impose disciplinary sanctions on the other partner states for a failure to remove a particular NTB that has been reported before it. This study proposes amendment of EAC legislation governing the establishment of institutions to empower such institutions to issue binding recommendations beyond their territorial limits.

The EAC Council of Ministers is also affected by the same problem. It has power to urge partner states to remove existing non-tariff barriers with their countries. However, there is no set time limit for a country to comply with the recommendations of the Council of Ministers. For instance, the ban of Kenyan beef export to Uganda lasted ten years despite the council issuing various recommendations to both countries. To solve this, this study proposes that the EAC council of ministers should have powers to refer the non-compliance with its recommendations to the East African Court of Justice.

The 2017 EAC Elimination of Non-Tariff Barriers Act is the main regulation on NTBs in the East African Community. However, its compliance mechanism in not sufficient. Article 16 of the Act posits that the Council of Ministers is responsible for receiving annual reports on non-tariff barriers.<sup>320</sup>With these reports, it may further recommend to the Summit the imposition of sanctions on states that do not comply with requests to remove NTBs. Both the Council and the

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<sup>320</sup> East African Community Elimination of Non-Tariff Barriers Act 2017, Article 16

Summit are political bodies.<sup>321</sup> This prevents them from issuing such sanctions and this thesis therefore proposes that such authority should be channeled to the East African Community Court of Justice.

### **5.2.2 Establishment of an alternative approach on reporting NTB complaints**

Since the establishment of the Tripartite Free Trade Area (TFTA) among the three regional economic blocks: the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), the EAC monitors NTBs through the online Non-Tariff Barriers Reporting, Monitoring and Eliminating Mechanism. The mechanism operates through the creation of an online account and registration of a non-tariff complaint.<sup>322</sup> This thesis proposes that such a system may not be accessible to illiterate and small traders and therefore an alternative manual system should be set up to address the concerns of such traders.

### **5.2.3 Subjecting new and existing non-tariff barriers to the WTO Compliance Review Process**

This thesis proposes that all existing non-tariff barriers should be subjected to the WTO Compliance review. This is to ensure that NTB measures are non-discriminatory, transparent and make sure that their trade restrictiveness is also minimized. To effect this, the Council of Ministers should consider working towards setting up a transparent rule to the effect that in the event an NTB is found to be WTO -non-compliant, then the responsible state is required to abolish or review the NTB within twelve months. Since almost all the EAC partner states are WTO members (except South Sudan), compliance with such an obligation is in line with the provisions of Article V, VII and X of GATT 1994.

To ensure transparency, East Africa Community Member states should report any proposed legislation to the other EAC members and the secretariat. This is so as to allow for consultations and review before implementation. A further notification should also be made to the World Trade Organisation (WTO) for the benefit of non-EAC member states.

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<sup>321</sup> EAC Non-Tariff Barriers Act, Article 17

<sup>322</sup> Tripartite Free Trade Area Non-Tariff Barriers available at [https://www.tradebarriers.org/register\\_complaint](https://www.tradebarriers.org/register_complaint) (accessed on 18 August 2019)

#### **5.2.4 Enhancing the dispute settlement mechanism on NTBs**

The EAC Secretariat and members should ensure that a proper dispute settlement system is created for the resolution of disputes related to NTBs. Currently, the system is based on consultation and mutual recognition agreements. Such measures are not effective as they take long and are largely dependent on the states' good will. Instead, EAC should establish panels with quasi-judicial authority to resolve NTBs disputes. The Institutional framework of such panels can be included in the current East African Community Court of Justice framework. Such panels could, in the long run, save the cost of EAC member states in instituting trade disputes to the WTO dispute settlement body.

#### **5.6 Streamlining of the monitoring and elimination procedures and institutions**

As it is today, there are several country based or joint institutions dealing with NTBs in the East African Community. Such bodies consist of the EAC Secretariat, Council of Ministers and National Monitoring Committees among others. This creates a scenario where there are multiple bodies trying to resolve the elimination of NTBs with no chain of command. The effect of such is that there is duplication of roles and delays in the resolution of NTBs. To address this, this thesis proposes that these institutions should be merged so as to establish a proper chain of command in decision making.

#### **5.7 Other regional communities' approach to the elimination of non-tariff barriers**

##### **5.7.1 The European Union**

The European Union (EU) is an association of Western European nations which started as a coal and steel union.<sup>323</sup> The EU is a social economic and political union and currently its membership stands at twenty-eight.<sup>324</sup> This thesis is of the opinion that, since a customs union and a single market have been in operation in the EU since 1968 and 1986 respectively,<sup>325</sup> the East African Community can draw lessons from it in terms of techniques for elimination of non-tariff barriers.

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<sup>323</sup>S Hix, *The Political System of the European Union* (1999)5

<sup>324</sup> European Union Webpage, About the EU available at [https://europa.eu/european-union/index\\_en](https://europa.eu/european-union/index_en) (accessed on 18 August 2019)

<sup>325</sup> JM Grieco, *Co-operation among Nations: Europe, America and Non-tariff barriers to trade* (1993)15



Non-Tariff barriers in the European Union are prohibited. Article 34 of the treaty for the functioning of the European Union posits that quantitative restrictions and other measures having the same effect are not allowed between member states.<sup>326</sup> Such measures can only be allowed in instances where a state aims to protect public policy, morality and security. They must be proportional and have a direct effect on the protection of public interest.<sup>327</sup>

### Principle of mutual recognition

In terms of standards, the EU operates on the principle of mutual recognition. The principle essentially mandates EU member states to guarantee the introduction of goods which have been legally marketed in the other EU states into their territories<sup>328</sup>. The concept of mutual recognition is derived from European Union case law and the operation of the free movement of goods which is enshrined in European Union treaties.<sup>329</sup> In case a member needs to restrict market access, then it has to justify why it needs to take such an action.<sup>330</sup>

This thesis proposes the adoption of the mutual recognition principle in the EAC. In theory, the EAC has the customs union protocol that is supposed to facilitate the free movement of goods in the community.<sup>331</sup> However, in practice such movement is restricted by member states national standards. The adoption of this principle would save the cost of double certification by producers.

### **5.7.2 Southern African Development Co-operation**

The Southern African Development Community (SADC) is a regional economic community established in Windhoek in 1980.<sup>332</sup> Its current membership consists of sixteen countries; Angola, Botswana, South Africa, Lesotho, Madagascar, Malawi, Zambia, Zimbabwe, Namibia, Mauritius, Democratic Republic of Congo, Eswatini Comoros, Namibia, Seychelles, and United

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<sup>326</sup> M Szczepanski, Understanding Non-Tariff barriers in a Single Market European Parliamentary Research Service (2017)3

<sup>327</sup> M Szczepanski(n7)4

<sup>328</sup> S Weatherill, Free movement of goods (2006)The International and Comparative Law Quarterly Vol, 55 No 2 at 459

<sup>329</sup>S Weatherill(n9)

<sup>330</sup> Food Compliance webpage; New regulation reinforces the mutual recognition principle in the European Union April 6 2019 available at <http://www.foodcomplianceinternational.com/blog/2019/4/6/new-regulation-reinforces-the-mutual-recognition-principle>(accessed on 20 August 2019)

<sup>331</sup>LO Aloo, *Free Movement of goods in the East African Community in East African Community law* (2017)15

<sup>332</sup>OC Kuppel, The Southern African Development Community and its tribunals; Reflections from Regional Economic Communities' potential impact on human rights protection (2009) Law and Politics in Africa, Asia and Latin America Vol 42 No. at 33

Republic of Tanzania.<sup>333</sup> SADC seeks to achieve economic development, alleviate poverty, provide support to the regionally disadvantaged through regional integration, the establishment of common values, and to enhance the standards and quality of life among its citizens.<sup>334</sup>

The SADC Trade Protocol has facilitated the establishment of a Free Trade Area (FTA) in the region in 2000.<sup>335</sup> Under the FTA, members are committed to trade liberalization through the removal of both tariff and non-tariff barriers. The Protocol regulates tariffs and other measures which have the same effects as tariffs.<sup>336</sup> It also aims to achieve other non-tariff barriers related objectives such as improving cross border investment through liberalization of intra-regional trade, enhanced market access and non-discrimination.

Even though SADC has not been existence for as long as the East African Community, it has made significant progress in terms of reducing non-tariff barriers.<sup>337</sup> According to Vonesai Hove of TradeMark Southern Africa, the NTBs reporting, monitoring and eliminating mechanism which was a creation of the SADC Trade Protocol has achieved significant success since its upgrade in 2010. She noted that almost 60.7% of NTBs have been eliminated as a result of such. The success in elimination of NTBs can also be attributed to the effectiveness of the legal framework in eliminating them.<sup>338</sup>

This thesis takes the position that the EAC can borrow from the SADC's elimination of non-tariff barriers time frames. Article 3(1) of the SADC TP outlines that the elimination of tariff and non-tariff barriers shall be achieved within eight years from the date the protocol comes into operation. The EAC's legal framework on NTBs does have such a sunset clause on NTBs elimination.

### **5.7.3 Association of Southeast Asian Nations**

The Association of Southeast Asian Nations (ASEAN) is a ten-member state regional economic grouping comprising of Cambodia, Brunei, Malaysia, Singapore, Thailand, Myanmar, Laos,

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<sup>333</sup> Southern African Development Co-operation Webpage: Member states available at <https://sadc.int/> (accessed on 20 August 2019)

<sup>334</sup> OC Kuppel(n13) 34

<sup>335</sup> J Gathii, *African Regional Trade Agreements as Legal Regimes Cambridge International Trade and Economic Law* (2011)114

<sup>336</sup> J Gathii(n17)

<sup>337</sup> S Chauvin and G Gaulier, *Prospects of Increasing Trade among SADC Countries* (2014)6

<sup>338</sup> S Chauvin (n 16)

Vietnam, Indonesia and Philippines.<sup>339</sup> The Association has been existence since 1967 but its organization was formally incorporated into a charter in 2007. In terms of economic progression, the Charter seeks to alleviate poverty, create a single market and to establish a stable, competitive, economically integrated production base.<sup>340</sup> The group has promoted regional integration through the signing of six free trade area agreements.

This thesis proposes that the EAC should adopt ASEAN's approach of identifying and eliminating unjustifiable and unnecessary non-tariff barriers to trade. ASEAN's system is based on the red/amber/green box approach. According to this system, measures that are discriminatory in application, not transparent have not scientific basis and for which a less restrictive measure is available are to be eliminated immediately hence given the red box label.<sup>341</sup> Secondly, measures that are transparent but discriminatory in application or cannot be agreed upon whether they are trade distortive or not are subjected to negotiation, hence given the amber box label.<sup>342</sup>

Lastly, the only allowed measures allocated the green box label are those that are applied without discrimination, transparent, have a scientific basis and are also aimed towards the protection of public health, morality or environment.<sup>343</sup> This thesis sees the ASEAN's approach as more effective in labeling NTBs as it clearly outlines which ones are permissible, those that are not and even provides room for negotiation in cases where there is doubt between the two.

## **5.2 CONCLUSION**

This thesis has focused on existing non-tariff barriers in the East African Community. It has established that double certification of products, corruption at border posts, multiple weighbridges and police posts, inadequate infrastructure, ant-dumping and safeguard measures, quantitative restrictions, misinterpretation of the rules of origin and customs procedures are the existing non-tariff barriers in the East African Community.

In laying a basis on the study, the thesis went ahead to discuss the WTO classification of non-tariff barriers. This was for the reasons that the existence of the East African Community as a regional economic community is facilitated by the provisions of Article XXIV of GATT 1994.

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<sup>339</sup> CK Cheok and YC Chen, Assessing ASEAN's Relevance Journal of Southeast Economies (2019) Vol. 23 No.1 at 11

<sup>340</sup> Charter of the Association of Southeast Asian Nations, Article 1

<sup>341</sup> USAID Non-Tariff Barriers to Trade USAID Regional Development Mission to Asia (

<sup>342</sup> USAID (n 337)13

<sup>343</sup> USAID (n 337)14

This approach was necessary since the WTO has cases and the analytical index that expound on specific WTO regulation of non-tariff barriers. Such NTBs include quantitative restrictions, anti-dumping duties, sanitary and phytosanitary measures, technical barriers to trade among others.

The thesis has also found that the prevalence of non-tariff barriers is a result of the weak legal and institutional framework designed to address them. On the regulatory part, the study pointed out the insufficiency of EAC legislation, such as the 2017 EAC Elimination of Non-Tariff Barriers Act, the 2015 Rules of Origin, and the EAC Sanitary and Phytosanitary Protocol. The 2017 East African Community NTBs Act does not, for example, place enforceable obligations on states and only requires states to take ‘sufficient steps’ to remove NTBs. The time frames set for the elimination of NTBs are long and can also be re-negotiated upon.

The Rules of origin on other hand is also flexible in terms of allowing EAC member states to charge tariffs on goods originating from the EAC in order to protect sensitive domestic products. Even through the rules states that such protection should only last six months, it allows for an extension and does not define what sensitive goods are. The SPS Protocol does not facilitate cooperation between EAC states in terms of setting common SPS standards. It only requires a state seeking to impose an SPS measure to consult with the rest of the EAC states, but this is rarely adhered to. The study also focused on the inadequacy on the EAC institutional framework on the elimination of NTBs. Apart from the general problems faced by institutions in charge of international organisations, such institutions face a major problem of lack of collaboration among them.

Chapter two of the thesis answered the first research question by expounding on the concept of non-tariff barriers in international trade law. It also distinguished non-tariff barriers from tariff barriers. Chapter three addressed the second research question by highlighting existing non-tariff barriers in the East African Community. Chapter four answered the third research question by focusing on the legal and institutional framework on the elimination of non-tariff barriers in the East African Community. The thesis not only focused on the weaknesses of the legal and institutional framework on the elimination of NTBs but offered recommendations in Chapter five.

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