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PERISA Case Study **1** Private Sector

The Non-Tariff Barrier Monitoring Mechanism

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The persistence of non-tariff barriers (NTBs) has been the subject of much of the recent discourse on regional integration in Southern and East Africa. There has been a surfeit of recommended approaches to dealing with the regional NTB challenge, which is still unmatched by outcomes. One recent intervention, and the subject of this case study, is the NTB Monitoring Mechanism (NTB Mechanism) of the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC). The mechanism, whose features include an online reporting function, is a regional instrument for the monitoring, reporting, and elimination of NTBs within and across the three regional economic communities (RECs).

It is well acknowledged that in order for trade integration to work, the region must (among other things) find an efficacious approach to dealing with NTBs and their trade-inhibiting impacts. As the SADC, COMESA and EAC draw closer to the harmonisation of tariff regimes and expansion of a rules-based regional

trading arrangement, this case study considers the operation of the NTB Mechanism, and how it fits into the overall matrix for dealing with NTBs. The particular vantage point is the participation of the private sector within regional integration processes.

The multilateral experience has shown that a

rules-based system of trade is a valuable public good for participants in cross-border trade. Rules-based trading arrangements organise the conduct and interrelations of states that are party to them. Comprehensible and enforceable rules also have a particular value in enhancing security and predictability for economic operators. But in the East and Southern African regions hard rules infrastructure, and the possibility of legal censure, have been insufficient for dealing with the region's NTB challenge. The question has even been posited whether the region's trade regimes are in fact rules based.

African regional trading arrangements have been described as *de facto* flexible legal arrangements.¹ Such flexibility, it is argued, evolves from the historical shortcomings of prototypical first-generation arrangements that legislated trade integration *ex nihilo*. Gathii describes at least six defining (and structural) features that make them flexible legal arrangements, observing that these do not make them incompatible with the assumption of legally binding commitments. Another commentator, Erasmus, also noting the influence of structural constraints, accepts that regions' trade regimes remain rules-based.² Both agree that outcomes would be enhanced through integration models that are regionally appropriate, and accompanied by programmes and measures that complement the rules.

In the case of NTBs, the necessity for supplementary mechanisms has been acknowledged even at the multilateral level. This case study identifies the NTB Mechanism as one such supplementary mechanism. It considers how it acts both as a solution to the regional NTB challenge and buttresses the rules framework in the process. It also assesses its contribution to mainstreaming the participation of the private sector in regional integration processes.

CONTEXT

SADC and its contemporaries all have legal mechanisms for dealing with NTBs. In all three RECs, member states are directly obligated to eliminate existing NTBs, with

further proscriptions on the erection of new ones.³ Defined non-discrimination rules also regulate an assortment of domestic policy and regulatory measures in as far as they manifest discriminatorily against imports.⁴ These generic proscriptions are complemented by rules in specific areas where non-tariff style barriers commonly manifest.⁵

In spite of the rules, the region has favoured a 'moral suasion' approach to dealing with NTBs. This has been contrasted to more rules-driven approaches, involving active use of legal sanctions, which have proved successful in regions such as the EU.⁶ Seemingly, state-state trade dispute settlement is not favoured in the region. Several explanations have been propounded. These include an evolved preference for the co-operative elements of integration processes (for example, in SADC), and the avoidance of internal conflict (notably in the EAC). There has also been an observed circumspection by member states, particularly in SADC, of capitulation to regional institutions.

But the multilateral experience also shows that there are general (capacity) constraints that inhibit African countries' use of international trade dispute settlement systems. In the East and Southern African regions, these constraints could be compounded by the transactional costs of multiple memberships.

OVERVIEW OF THE NTB MECHANISM

Main actors

The NTB Mechanism is administered, in the main, by Trade Mark Southern Africa (TMSA) – an Aid for Trade initiative aimed at improving trade performance

1 Gathii JT, 2010.

2 Erasmus G, 2011.

3 SADC Trade Protocol, 1996, article 6; COMESA Treaty, 1994, article 49; EAC Treaty, 1999, article 75(5); EAC Customs Union Protocol, 2004, article 13.

4 National treatment obligations: SADC Trade Protocol, article 11; COMESA Treaty, article 57; EAC Customs Union Protocol, article 15.

5 Such as quantitative restrictions; customs procedures; sanitary and phytosanitary measures; technical barriers to trade; and certain trade remedies.

6 Gillson I & N Charalambides, 2012.

in SADC, COMESA and the EAC.⁷ The three REC Secretariats provide the de facto institutional point for implementation, with national government focal points providing the domestic contact. Through the mechanism of yearly meetings TMSA, the secretariats, and government and private-sector focal points from all 26 countries concretise and appraise the mechanism's implementation outcomes. As the domestic locus for the removal component of the NTB Mechanism, the country focal points are critical to the substantive output of the mechanism. The final main actors are the economic operators that utilise the mechanism, through logging complaints on its website (or via cellular short-messaging service).

It is reported that the yearly focal point meetings have produced some substantive outputs. In addition to appraising the operations of the mechanism, the meetings have adopted a high level of oversight over progress on the establishment and operation of National Monitoring Committees (NMCs) – domestic institutions that will eventually be institutionalised under the Tripartite Free Trade Area (TFTA) itself.⁸

The value of regional peer pressure

There is universal utility in a regional facility that reduces (or, as appropriate, eliminates) NTBs. It is widely accepted that NTBs increase the cost of doing business across African countries, and have had an adversative impact on increases in trade volumes that are expected to accompany tariff reductions. There is a particular value to be derived by small and medium enterprises (SMEs) from the existence of a mechanism such as this one. A COMESA Secretariat study finds that the impact of NTBs does not fall only upon existing economic operators, but goes all the way back to impeding the development of new enterprises – particularly SMEs.⁹ SADC research has also found that the impact of NTBs is proportionately more on SMMEs

than on large enterprises.¹⁰

At the same time, certain individual interests in the erection or maintenance of specific barriers within member states will subsist. These could be industry interests, government interests, or a combination of both. There is a particular value in regional peer pressure for counteracting these domestic pressures.

The co-ordination of NTB reduction through a regional mechanism does necessarily entail some transfer of sovereignty to regional institutions.¹¹ This could manifest in an attendant loss of policy space for members states. Experience with the NTB Mechanism so far has, however, been that member states have been willing to acquiesce in the case of NTBs.

Trend monitoring and research

The NTB Mechanism is also useful for trend monitoring and research purposes. It is increasingly referenced in academic research. Researchers have also begun to utilise data from the mechanism to quantify the pecuniary costs of NTBs within the region.¹²

THE MECHANICS OF THE NTB MECHANISM

The experience so far

The NTB Mechanism was launched in Johannesburg in 2009. As noted, it is a facility for the reporting, monitoring, and elimination of NTBs within and across the RECs. This distinguishes it from past (intra-REC) initiatives, whose functionality appeared to end at reporting and monitoring. The mechanism has also mainstreamed the participation of the private sector in regional NTB reduction processes. Each of the 26 country participants has both a government and a private-sector focal point attached to the mechanism. The focal points contemporaneously receive all complaints that are logged against their countries, with details of the nature of each complaint and by whom it has been logged. Private-sector focal points also attend

7 Funded by the UK's Department for International Development.

8 See TMSA, 2012.

9 COMESA, 2010.

10 Grant-Makokera C, Chapman G & L Wentworth, 2012; Bertelsmann-Scott T, 2012; Charalambides N, 2005.

11 *Ibid.*

12 See, for example, Gillson I & N Charalambides, 2012.

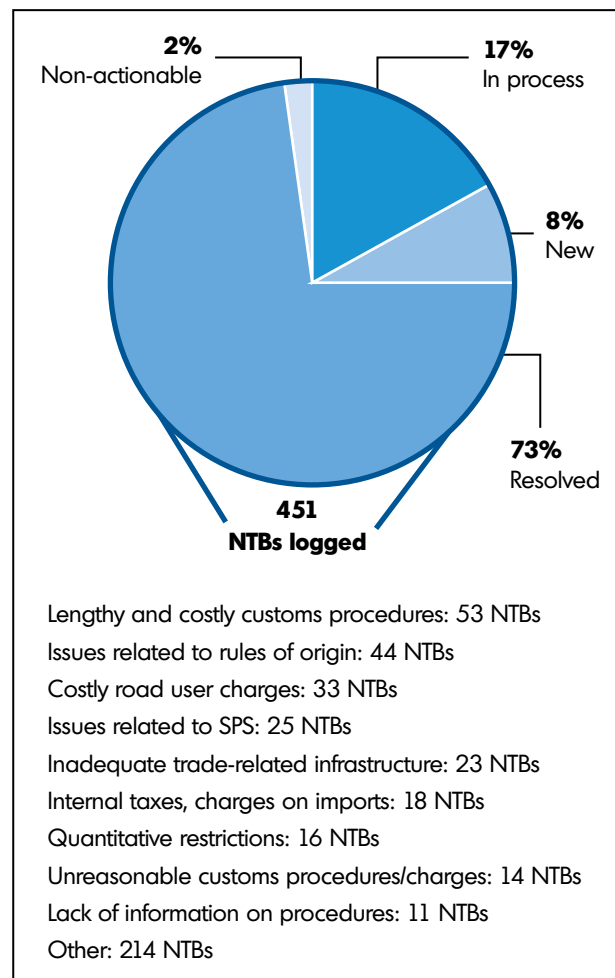
the yearly focal point meetings as part of their country delegations.

A private-sector respondent¹³ from South Africa reports that on the sidelines of meetings, space is created for country delegations to hold bilateral sessions with countries against which their reported NTBs are still unresolved. The respondent describes the opportunity for direct engagement with offending governments as a transparency achievement. And because it is a discipline under a number of rules dealing with non-tariff measures, transparency improvements operate to buttress the rules-based system.¹⁴

There is, however, circumspection regarding the utility of the private sector's participation for the mechanism's success in the actual elimination of NTBs. Another respondent deemed those results to be almost wholly dependent on the political will of governments, and which could only be judged in due course. Circumspection by the South African private sector is largely a remnant of cynicism of the previous SADC mechanism, which had limited success in eliminating barriers within the SADC.¹⁵ However, although private-sector respondents exhibited some scepticism regarding aspects of the process, evidence from activity within the NTB Mechanism is that there is buy-in from South African economic operators on the ground.

Varying degrees of reverence for regional consultation processes could also reflect domestic consultations cultures. The private-sector participants from the 26 countries come from disparate paradigms, ranging from weak consultation systems to institutionalised ones (for example, South Africa). One South African respondent conceded that the mechanism's value was probably comparatively higher for the former. For the South African private sector, where domestic consultations are robust, it might be the case that regional processes appear to dilute some of the gains made at home.¹⁶ But it is important that

Figure 1: Most frequent NTB types, April 2013



Source: TMSA, 'About the Tripartite NTB Mechanism', http://www.trademarksa.org/resources/newsletter_system?newsletter_id=13067&article_id=13070.

regional consultations processes are underpinned by robust domestic ones. The SADC's Regional Integration Strategic Development Programme notes that there is intrinsic value in member states considering it mandatory to consult domestically on policy, legislation and programmes that affect business. It further observes that countries that do so tend to have 'better regulated and developed [...] business environments [that are] more attractive to both internal and external investors'.¹⁷

The NTB Mechanism's NMCs can be seen as a contributor to both processes. NMCs foment

13 Based on personal interviews with respondents from the South African private sector, Sandton, Johannesburg, Monday 13 May and Tuesday 28 May 2013.

14 See Gillson I & N Charalambides, 2012, p. 239.

15 *Ibid.*

16 It is worth noting that complaints by South African economic operators have increased, indicating some buy-in from economic operators.

17 SADC, Regional Indicative Strategic Development Plan, 2003, p. 49.

consultations with the private sector in member states where these might not have previously been robust. In the process, they level out the quality of domestic consultations processes for the 26 members – at least in the case of NTBs. They also strengthen the domestic institutions that are ultimately responsible for operationalising the elimination component of the NTB Mechanism.

Ultimately, the resolution of specific NTBs remains dependent on the offending government removing the measures or ameliorating their trade restrictiveness. This can be done in a litigious manner – in which case domestic structures within which the private sector may lobby for a case to be initiated are important. In a region such as Southern and East Africa, where a co-operative approach to integration processes is a preferred model, a conduit for direct engagement at the regional level becomes as important.

The NTB mechanism as supplementary to the rules

Certain parallels can be drawn between the NTB Mechanism and the facilitative structure that has been proposed by a grouping representing 88 Members in World Trade Organization (WTO) discussions on NTBs.¹⁸ The group has proposed that NTBs be dealt with through a ‘conciliatory and non-adjudicatory’ mechanism. The so-called horizontal mechanism seeks to support the rules through promoting mutually agreed outcomes to NTBs, without necessary resort to dispute settlement. The litigious and facilitative approaches are not necessarily mutually exclusive. They are, in fact, complementary. According to its sponsors, the horizontal mechanism responds to the recognised need for expeditious resolutions to NTB matters, without purporting to affect existing rights and obligations under any of the covered agreements, nor replace regular dispute settlement.

There is evidence that the ambition in the region is now a hybrid between the facilitative approach and a litigious one. The latest draft annex on NTBs reportedly specifically legalises, and with a self-contained dispute settlement apparatus, the elimination of NTBs.¹⁹ The utility of additional rules – more especially, generic ones

– might be debatable, given that there will be national treatment rules and specific legal annexes that directly deal with the various manifestations of NTBs. It is also inconsistent with the stance the same countries have taken in the WTO discussions.²⁰

APPRAISAL OF OUTCOMES

Positive regional integration outcomes to date

According to the UK Aid for Trade report on the NTB Mechanism, its overarching expected outcomes are the following:

- Reduction of high costs of trading in the region brought about by NTBs.
- Removal of administrative, institutional, and structural constraints to allow free flow of goods and services.
- Creation of an enabling trading environment for small-scale cross-border traders.
- Promotion of growth in intraregional trade by eradicating behind-the-border and cross-border NTBs.²¹

These overarching objectives reflect the synergy of the NTB Mechanism with other prongs of the tripartite integration process, as they have evolved in the parallel substantive negotiations.²² The mechanism has used some of the lessons of the RECs to build a more regionally appropriate and co-operative process for trade integration. So far it has distinguished itself in a number of ways. Firstly, in dealing with NTBs contemporaneously with the tariff harmonisation and substantive negotiations, it forestalls a situation where NTBs recompense reductions in tariffs. Secondly, there is comparatively greater emphasis on the elimination aspect than in previous efforts. Thirdly, the private sector is a more mainstreamed participant in the

18 WTO, 2010.

19 See TMSA, 2010, p. 2; TMSA 2012, p. 10.

20 Excluding non-Member, Ethiopia.

21 OECD, 2011, p. 4.

22 Harmonisation of tariff regimes; free movement of business persons, joint implementation of regional infrastructure projects and programmes; and legal and institutional arrangements for regional co-operation.

process, and has become core to driving the process and its outcomes.

When it was launched in 2009 the expressed aspiration was that the NTB Mechanism would provide the ‘essential impetus for the establishment of a *sustainable framework for future cooperation* [on] NTB matters’.²³ In realising this, it has become clear that the mechanism should build on the successes of previous efforts, and avoid adopting some of their deficiencies. As it enters the fourth year since its launch, the NTB Mechanism’s sustainability and longevity seem guaranteed through its codification in the most recent draft legal text.

CONCLUSION

Since its establishment, the NTB Mechanism has met with occasional censure. Criticisms relate to, inter alia, its ‘soft’ approach to NTB reduction; the perception that it is a mere post box; the veracity of reported information; and its use of an identification (as opposed to an issues-based) approach. These are matters that this case study has identified as being addressed in various ways. In so far as it promotes constructive engagement towards possible improvements, criticism of the NTB Mechanism should be welcomed. On all indications, the mechanism and its structures will be codified in an annex of the final Tripartite Free Trade Agreement, and constructive recommendations for improvement will add value to the process.

The NTB Mechanism’s ultimate success will be judged on whether it deals with the regional NTB challenge, and strengthens the rule of law in reducing (or, as appropriate, eliminating) NTBs. In the end, it is individual governments that can remove the trade barriers they have erected. Their buy-in into the process is ultimately tied to their buy-in into the overarching integration project. Regional hegemony, such as South Africa, have managed to reap gains from trade integration. But the RECs also have several member states that have had little above-zero gains from existing integration arrangements. South Africa’s own Trade Policy Strategic Framework²⁴ notes the importance of distributional equity in enhancing the outcomes of

regional integration processes. It endorses a model to regional integration that focuses on parallel programmes that support member states’ productive capacities. This approach is also reflected in the report that establishes the TFTA. The report notes that programmes to support the real economy, productive capacities, and diversification are necessary to enhance the utility of the project for less-developed members.²⁵

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23 See TMSA, 2009.

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