The Role of Trade Facilitation in Addressing Non-Tariff Barriers in the African Continental Free Trade Area

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Abstract

The African continent is geared towards harnessing intra-continental trade partnerships even in the age of rising protectionism. Following a culmination of intense negotiations between the years 2012 and 2018, and the fulfilment of the prescribed ratification threshold, the AfCFTA entered into force on the 30th of May 2019. Intending to unify all 55 member States of the African Union, when it is ratified by all the member States the AfCFTA will stretch across a US$2.5 trillion market of 1.3 billion people, making it one of the world's largest free trade area since the establishment of the World Trade Organisation. It is generally agreed that free trade is one of the key drivers of sustainable economic development, especially for developing countries. However, Africa

only plays a marginal role in international trade due to the persistence of non-tariff barriers to intra-African trade. If fully and effectively implemented, the AfCFTA's policy reforms and trade facilitation measures will contribute to boosting the speed and minimising of the transactional costs of intra-African trade.

Introduction

Although, international trade is not a panacea, it can be a critical driver of economic growth in developing countries. To this end, there is vast and far-reaching research. Whilst the benefits of free and fair trade cannot be overstated, the shift in the balance of global economic power has resulted in more protectionism. Against this background, Africa continues to emphasise a desire to facilitate greater ease of trade thereby showcasing that trade liberalisation is a long-standing priority for policymakers on the African continent. Despite the organisational action taken by the member States of the African Union (AU) in 1991 when the Abuja Treaty was adopted, the African Continental Free Trade Area (AfCFTA) is emerging within the horizon of some unsuccessful attempts at achieving strengthened regional and continental economic integration.

Over the last two decades, intra-African trade has averaged at approximately 12% –14% of the continent's overall trade revenue – lower than other developing regions – and is concentrated in regional economic communities with most of the trade happening in the Southern African Development Community. This statistic is attributable to the 6.1% average on tariffs, non-tariff issues, underdeveloped trade-related infrastructure, weak manufacturing capacity, and poor implementation of trade commitments.

Non-tariff barriers (NTBs) are a major impediment to intra-African trade and international trade transactions in general. Empirical research shows that NTBs restrict the importation and exportation of goods (and services) more than customs duties, and other duties and charges. For instance, low levels of intra-regional trade in most African regional economic communities (RECs) are attributed to NTBs more than tariffs. The Southern African Development Community (SADC), has eliminated tariffs trade by 85 per cent on traded goods yet the intra-regional trade remains low at approximately 10%. NTBs, among

other barriers, pose additional direct or indirect costs and time for the import and export of goods, and constrain the competitiveness of traders. NTBs tend to hit harder on small and medium enterprises and developing countries as they often lack the appropriate resources to deal with NTBs. The ultimate financial consequences of NTBs will be borne by consumers.

The establishment of the AfCFTA is aimed at creating a single continental market with free movement of goods, services and capital. The AfCFTA has the potential to boost intra-Africa trade through the removal of tariff and non-tariff barriers to trade. The removal of NTBs under the AfCFTA has many benefits for the continent. Trade facilitation is one of the effective ways of addressing NTBs in the AfCFTA.

The success and effectiveness of trade liberalisation is largely dependent on how it is facilitated. Trade facilitation is aimed at improving trade and customs procedures as well as facilitating the relationship between businesses and government agencies at the border to reduce costs, while protecting the intended regulatory objectives. Trade facilitation could help in eliminating NTBs through the simplification, standardization, harmonization and modernization of trade and customs procedures. It can address trade and customs procedural obstacles by, simplifying paperwork, ensuring information on rules and procedures is well understood by exporters, and increasing access to accredited testing laboratories.

This article discusses the significant role of the role of trade facilitation in addressing NTBs in the AfCFTA. The article is divided into six parts. The first part outlines the various types of NTBs. The second part discusses trade facilitation. The third part discusses the trade facilitation and elimination of NTBs at the African regional level. The fourth provides an account of trade facilitation and removal of NTBs under the AfCFTA. Part five provides the concluding remarks. The sixth and last part offers some recommendations for the implementation of trade facilitation commitments under the AfCFTA Agreement with a view of effectively curbing NTBs in intra-Africa trade.

Trade Facilitation

The lack of transparency, simplification, harmonisation and standardisation of trade regulations and procedures limits the ease of international trade. Trade

facilitation has been identified as a tool for increased and smoother cross-border trade and at the same time reducing the cost of international trade. In general parlance, trade facilitation usually refers to greater efficiency in the administration, procedures, and transport facilitation at ports and customs, the resolution of non-tariff trade barriers and tackling bureaucratic corruption. Trade facilitation is anchored on four principles – transparency, simplification, harmonisation and standardisation.

The World Trade Organisation (WTO) defines trade facilitation as "the simplification and harmonisation of international trade procedures", with trade procedures being the "activities practices and formalities involved in the collecting presenting communicating and processing data required for the movement of goods in international trade". The scope of what constitutes trade facilitation is extensive, non-standard and has been the subject of the research output and policy focus of various international trade organisations. This definition refers to a wide range of trade reforms to both soft and hard trade infrastructure in line with Articles V, VIII and X of the WTO's General Agreement on Tariffs and Trade (GATT). It is designed to improve import and export procedures such as transport formalities at ports and customs, trade information and communications technology, import and export transactions and other financial requirements that are quite arduous and which place considerable strain on traders.

Within the WTO and the multilateral trading system, trade facilitation is propelled through the Trade Facilitation Agreement (TFA), which was adopted after ten years of negotiations. Section I of the TFA sets out 12 Articles which contain 36 trade facilitation measures and 238 notifiable article items. The provisions set out in the 12 Articles of Section I are to be implemented in accordance with the provisions under section II which is based on the modalities agreed upon in Annex D of the July 2004 Framework Agreement (WT/L/579) and in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC). Section II contains a provision on special and differential treatment, which allows member countries to designate the trade facilitation measures as Category A, B or C based on the capability to comply with said measures unilaterally and measures for which technical assistance and capacity from donor organisations and multilateral institutions would be required for implementation.

The TFA is a multilateral trade agreement of the WTO. Several African WTO members have ratified the TFA and are in the process of notifying or implementing their trade facilitation commitments. Prior to the TFA, African members had already adopted trade facilitation measures or programmes with a view of boosting trade within their regional economic communities (REC) or trading arrangements.

Types of NTBs to Intra-African Trade

NTBs generally include other unjustified or unnecessary bureaucratic or legal issues that could hinder trade.

Studies have compiled broad lists of what is considered to be the main types of NTBs based on the trends in international trade. Extended classifications further comprise macroeconomic policies impeding trade. A great deal of research has documented that NTBs vary from country, region and in both bilateral and multilateral trade agreements. Laird finds that the primary NTBs affecting developing countries market access to both emerging and industrialised markets are essentially the same, consisting primarily of: import/export permits; variable import levies/sliding-scale tariffs and production and export subsidies (especially in the agricultural and food security sectors); import and export quotas and local content and export balancing requirements; export subsidies to develop informal traders and State trading operations.

The NTBs plaguing intra-African trade are mostly regulatory. The lack of regulatory coherence, transparency, and the spaghetti-bowl effect of overlapping, incompatible, and sometimes contradictory trade policies, regimes, and laws, which are often compounded with other pre-existing economic and political issues pose some form of hinderance. There are many anecdotes of NTBs faced by businesses attempting to comply with cross-border regulations and procedures. Although, scholars have argued that the multiplicity in membership of RECs allows the sovereign States to take full advantage of the benefits that come with economic integration whilst at the same time minimising the loss by distributing risks, the majority view is that the overlapping membership to the RECs makes it challenging to address the NTB issue. Member States often belong to more than one trade regime, all with different regulatory requirements, therefore, hampering the ability to reconcile

the different requirements and achieving regulatory certainty. This is evident in the case of Intergovernmental Authority on Development (IGAD) in Eastern Africa. The bloc's progress in enhancing trade relations and promoting regional integration, is weak in comparison to the other blocks on the continent.

Likewise, trade relations in the AMU have been constrained by Algeria, Libya, Morocco, and Tunisia, listed among some of the bloc's most robust economies and their membership to the Greater Arab Free Trade Area (GAFTA). The truth of the matter is that member States benefit more from free trade and market access with the GAFTA of the Council of Arab Economic Unity compared to AMU, thus, making incentives for intra-AMU trade unlikely.

In addition to the overlapping membership to RECs, there has been a dilatory implementation of trade commitments undertaken, including the harmonisation of trade policies, procedures, and standards. The overlapping membership play a role in the slow implementation of measures related to trade facilitation. Some of the RECs on the continent have not made any progress with the establishment of a free trade agreement. Countries with memberships to AMU and CEN-SAD are yet to enjoy the benefits of free trade and even the benefits of overlapping memberships as both trade blocs are in their pre-FTA phase. As a consequence of the overlapping membership and the delayed implementation of intra-REC and intra-African trade commitments, there is a lack of trust and transparency.

Regulatory transparency and access to information are significant barriers to trade in Africa. In some instances, trade policies, regulations, or standards are altered without prior notice. Furthermore, some of the most economically advanced countries on the continent are doubtful of the standards and the quality of imported goods from less developed countries as such SPS and TBT requirements are made to be more stringent under the basis of public-health, sustainable development, measures to adapt to climate change, security, and peacekeeping.

Trade Facilitation and NTBs at African Regional Level

Trade facilitation and the elimination of NTBs agendas are being pursued at the regional levels in principle, through the implementation of various regional legal instruments and programmes. In the EAC, Article 2 of the Common Market

Protocol recognises the importance for trade facilitation and provides for the harmonizing and simplifying of customs and trade formalities and documentation, and dissemination of information. Likewise, the ECOWAS Treaty provides for harmonisation of trade policies and removal of technical barriers to trade in the region. In COMESA, trade facilitation is acknowledged in the founding treaty. Chapter 9 of the COMESA Treaty deals with the simplification and harmonisation of trade documents and procedures particularly trade documents, trade facilitation and standardisation of trade documents and information. Pursuant to this provision, COMESA is implementing several programmes to improve trade facilitation within the region including, inter alia, the harmonised road transit charges, COMESA carrier's license, harmonised axle loading and maximum dimensions, one-stop-border posts, the regional customs transit guarantee scheme, the yellow card, and the COMESA virtual trade facilitation system, among others.

The SADC Protocol on Trade provides for the harmonisation and simplification of the customs and trade procedures in the region. Annex II of the SADC Protocol on Trade deals with customs cooperation in the region. The Annex seeks to simplify and harmonize customs laws and procedures through providing for common measures through which member States shall undertake to comply in the formulation of their customs laws and procedures; and establishing appropriate institutional arrangements at regional and national levels.

At the regional level, member States of the EAC, COMESA, ECOWAS and SADC commit to the removal of the NTBs within their region. These commitments are constituted in legally binding instruments including regional founding treaties and other regional legal instruments. For instance, ECOWAS member States commit to remove NTBs and refrain from imposing any new NTBs to regional trade. However, Subsection three of the same provision states that member States may introduce or continue to execute restrictions or prohibition to trade in goods that may pose a threat to public security, environmental health and safety, and public morality.

The EAC member States have also 'agree[d] to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter to refrain from imposing any further

non-tariff barriers.' To give effect to the provisions on the elimination of NTBs in the EAC Treaty and the Customs Union Protocol, EAC member States adopted a comprehensive legal instrument for the removal of NTBs within EAC – the EAC Elimination of Non-Tariff Barriers Act of 2017. The EAC Elimination of NTBs Act establishes a legal and institutional framework for identifying and regulating the removal of NTBs in the EAC. The EAC member States further committed to formulate a mechanism for identifying and monitoring the removal of NTBs. COMESA member States undertook to remove NTBs to intra-regional trade and refrain from imposing any further restrictions or prohibitions. SADC member States committed to adopt policies and implement measures to eliminate all NTBs, and refrain from imposing any new ones.

The EAC, COMESA and SADC have subsequently adopted measures or legal mechanisms to give effect to the above said provisions on the removal of NTB. The three RECs' NTB elimination online mechanisms have subsequently merged into a single arrangement under the TFTA arrangement. Within the ECOWAS, the same web-based mechanism for the removal of NTB has been adopted. The same online mechanism for the elimination of NTBNs has been adopted under the AfCFTA which seeks to harmonise and build on what exists at the regional levels and establish a continental mechanism for the removal of NTBs. It must be noted that these web-based mechanisms are ad hoc systems and are important, but they do not provide legally binding and lasting solutions to the elimination of NTBs. They 'prioritise conciliatory and non-adjudicatory dispute settlement (with non-legally binding solutions) through regional organs, for example, the EAC Council of Ministers and Committee on Trade Remedies, and the ECOWAS Commission.'

Trade Facilitation and the Elimination of NTBs under the AfCFTA:

The African Union (AU) member States are in the process of establishing the African Continental Free Trade Area (AfCFTA) whose main objectives include, inter alia, creating a single market for goods, services and investments, promoting sustainable and industrial development, and enhancing the competitiveness of the economies of the African countries within the continent and the global market. Article 4 of the AfCFTA Agreement recognizes the significance of eliminating NTBs and the implementation of trade facilitation in realizing and fulfilling the general objectives of the AfCFTA. The United Nations

Economic for Africa (UNECA) projects that intra-Africa trade could double through enhanced trade facilitation and the reduction of NTBs in the AfCFTA. Similarly, the International Monetary Fund (IMF) estimates that the benefits of the AfCFTA will increase four-fold through the reduction of the NTBs. Equally, the United Nations Conference on Trade and Development (UNCTAD) estimates that if improved, trade facilitation would more than double intra-African trade under the AfCFTA.

The AfCFTA Agreement provides a legal framework with specific undertakings for trade facilitation and the elimination of barriers that impede trade through mechanisms other than the imposition of tariffs (NTBs). The Protocol on Trade in Goods of the AfCFTA Agreement contains three annexes related to trade: Annex 3 on Customs Co-operation and Mutual Administrative Assistance; Annex 4 on Trade Facilitation; and Annex 8 on Transit. Annex 3 deals with trade facilitation in customs administration. The Annex addresses trade facilitation in customs administration through the harmonization of customs tariffs and statistical nomenclature, valuation systems and practices, simplification and harmonisation of customs procedures, automation of customs operations, and the adoption of information requests and exchange measures.

Annex 4 deals with the trade facilitation in cross-border trade procedures. It provides for the simplification and harmonization of international trade procedures and logistics to expedite importation, exportation and transit processes. It aims to expedite the movement, clearance and release of goods including goods in transit across borders within State parties. The Annex requires the publication of trade and customs information and procedures, pre-arrival processing, electronic payment, expedited shipments, use of information technology, single window, freedom of transit, use of uniform import, export and transit procedures and documents, and implementation of measures in international trade facilitation instruments, recommendations and guidelines. Overall, Annex 4 provides for trade facilitation measures in line with the World Trade Organization Trade Facilitation Agreement.

Annex 8 deals with trade facilitation in transit. State parties undertake to commitments related to granting all transit traffic freedom to traverse their respective territories, licensing of transitors and carriers, transit procedures, exemption from customs examinations and charges, and liabilities of sureties,

among other things.

Annexes 3, 4 and 8 provide for the establishment of a Sub-Committee on Trade Facilitation, Customs Cooperation and Transit, and require State parties to establish/maintain National Trade Facilitation Committees to facilitate both domestic coordination and implementation of the provisions of this Annex. These Committees could be necessary in the effective implementation, compliance and enforcement of trade facilitation obligations.

Annex 5 of the AfCFTA Agreement Protocol in Trade in Goods provides a legal framework for the elimination of NTBs in AfCFTA. The Annex particularly provides for the establishment of an institutional framework for the elimination of NTBs in the AfCFTA, the categorisation of NTBs, reporting and monitoring tools as well as the facilitation of NTBs. The legal framework for Annex 5 is akin to that of Annex 14 of the TFTA. Annex 5 defines NTBs as merely 'barriers that impede trade through mechanisms other than the imposition of tariffs.' Similar to the World Trade Organisation, Appendix 1 of Annex 5 gives general categories of potential sources of NTBs including technical barriers to trade, sanitary and phytosanitary measures, government participation in trade and restrictive practices tolerated by governments, customs and administrative entry procedures; specific limitations, charges on imports, and transport, clearing and forwarding. Article 13 of Annex 5 requires governments to prepare national time bound matrix – their strategies for removing NTBs categorised by the Annex.

Annex 5 provides for the establishment of institutional structures to implement and enforce the AfCFTA legal framework for the elimination of NTBs including the Sub-Committee on NTBs, NTB Coordination Unit, National Monitoring Committees, and National Focal Points. Other institutions entrusted with the mandate to implement and enforce the NTB legal framework include the AfCFTA Secretariat, the Committee on Trade in Goods, and the RECs NTBs Units. Thus, there will be institutions established at the national, regional and continental levels for implementing Annex 5.

Article 12 of Annex 5 establishes the AfCFTA NTB online mechanism for identifying, reporting and monitoring NTBs to facilitate the elimination of NTBs within the AfCFTA. The AfCFTA online mechanism 'consist a prescribed format,

forms, online or any other information, communication and technology tools which will be subject to periodic review and shall be available on websites as designated by the NTBs Sub-Committee.' This is an ad hoc mechanism for the resolution of NTBs by national governments, businesses, RECs, academic researchers and interested parties. The mechanism is akin to the TFTA and Borderless Alliance systems.

Conclusion

Non-tariff barriers to trade inhibit trade more than customs tariffs and related charges do. NTB issues can be best addressed through trade facilitation. The implementation of trade facilitation measures and the reduction of NTBs is critical to the fulfilment and achievement of the objectives of the AfCFTA. Most of the benefits of the AfCFTA and intra-Africa trade will materialize through the implementation of trade facilitation measures and elimination of NTBs. It is against this background that we recommend African member States to take trade facilitation issues and the removal of NTBs in the AfCFTA more seriously than before. Trade facilitation and the elimination of NTBs have been on the agenda of the RECs for a long time. Some RECs, for example, the COMESA, EAC and SADC have made progress in the elimination of NTBs, but on the trade facilitation front, more still needs to be done to enhance intra-regional trade. We believe that the implementation of the trade facilitation and removal of NTBs provisions espoused in the AfCFTA legal instruments will significantly boost intra-Africa trade, promote the competitiveness of African business, and contribute towards poverty alleviation, inclusive and sustainable development in Africa.

Recommendations

Legally binding mechanisms.

Trade facilitation and the elimination for NTBs must be couched in legally binding and justiciable mechanisms. This provides cross-border businesses with certainty and predictability as well as remedies when NTBs are re-imposed. The existing online NTB mechanisms are essential for identifying and monitoring NTBs, but they are not enough in the elimination of NTBs. They do not provide lasting solutions to avoid recurring NTBs. The AfCFTA provides a robust legal and institutional framework for trade facilitation and removal of NTBs which

complements the national, regional and even international instruments and measures. Member States should not pay mere lip service to the legal framework. We also recommend member States to implement the international agreements related to trade facilitation particularly the WTO Trade Facilitation Agreement.

Coordination and Cooperation

Considering the interconnectedness of economies and the nature of cross-border trade, trade facilitation and the elimination of NTBs efforts require a continental and multi-stakeholder approach. One country cannot do this alone. Countries must also focus on facilitating trade and removing NTBs through national, regional and international trade arrangements. Key stakeholders such as national and regional governments, private sector, trade support institutions, and development partners have a critical role to play in the implementation of trade facilitation measures and removal of NTBs.

Technical and financial assistance

Trade facilitation issues, particularly customs administration and infrastructure related issues are technical and daunting . They demand adequate financial and human resources to be operationalized. Financial resources are needed to build necessary infrastructures and technical expertise of the enforcement agents. Development partners are vital in this regard.

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