The WTO Agreement on Technical Barriers to Trade: A Critical Appraisal of its implementation within the Southern African Development Community.

Submitted in fulfilment of the requirements for the degree of Master of Laws (LLM) in the Faculty of Law, University of Fort Hare

by

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Supervisor: PROFESSOR C. LUMINA

April 2017
Declaration

I, VONGAI CHIMERI do hereby declare that, except for the references as well as any other assistance duly indicated and acknowledged, this dissertation, “WTO The Agreement on Technical Barriers to Trade: A Critical Appraisal of its Implementation within the Southern African Development Community” is my own work that has never been previously submitted in part or in its entirety at any institution for degree purposes or otherwise.


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Candidate Signature    Supervisor Signature
Dedication

This dissertation is dedicated to my loving parents Morgan Chimeri and Agnes Mupakwa. This work is testimony to the fruits of your labour all the days of my life. I thank God for you always.
Acknowledgements

First, I would like to thank EBENEZER for taking me this far. My God, it is by your grace and love that I have managed to finish this research. I owe my whole being to you.

I would also like to thank my supervisor, Professor Cephas Lumina, who, with patience and guidance, selflessly mentored me throughout this research and nominated me for the supervisor-linked bursary provided by the University of Fort Hare. May the Lord who created heaven and earth bless you!

I am also indebted to the Govan Mbeki Research and Development Centre (GMRDC) for the financial and academic support provided throughout this research.

Special mention goes to my parents Morgan Chimeri and Agnes Mupakwa. Mum and Dad this dissertation is largely the fruits of your work. I would not have made it this far if it were not for your fervent prayers and love. I am forever indebted to you.

Finally, I am indebted to my brothers and sisters who have supported me financially and emotionally throughout this journey. Special mention goes to Onismo Chimeri, Alois Chimeri, Nyarai Chimeri, Tracy Chimeri, Audrey Chimeri, Francis Chimeri, Fadzai Chimeri, Eunice Zimucha, Lucy Zimucha, Lizzy Zimucha and Thulani Zimucha. Special thanks also to my friends, particularly Shelton Tapiwa Motamakore, for your constant encouragement and support throughout this research. May God bless you all.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AB</td>
<td>Appellate Body</td>
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<tr>
<td>APEC</td>
<td>Asia-Pacific Economic Cooperation</td>
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<td>BIPM</td>
<td>International Bureau of Weights and Measures</td>
</tr>
<tr>
<td>CAB</td>
<td>Conformity Assessment Body</td>
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<tr>
<td>CBCA</td>
<td>Consignment Based Conformity Assessment</td>
</tr>
<tr>
<td>CIMP</td>
<td>International Committee for Weights and Measures</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<tr>
<td>CU</td>
<td>Customs Union</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<tr>
<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EAC</td>
<td>East African Community</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>FTA</td>
<td>Free Trade Area</td>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>GPA</td>
<td>Agreement on Government Procurement</td>
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<tr>
<td>HRSP</td>
<td>Harmonised Seed Regulatory System</td>
</tr>
<tr>
<td>IAF</td>
<td>International Accreditation Forum</td>
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<tr>
<td>IEC</td>
<td>International Electro Technical Commission</td>
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<tr>
<td>ILAC</td>
<td>International Laboratory Accreditation Co-operation</td>
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ISO  International Organisation of Standardisation
MBS  Malawi Bureau of Standards
MoU  Memorandum of Understanding
MRA  Mutual Recognition Agreements
NPR-PPMs  Non-product related process and production methods
NTBs  Non-tariff barriers
OECD  Organisation for Economic Co-operation and Development
PPA  Protocol of Provisional Application
PPMs  Manufacturing Process and Production Methods
PVoC  Pre-Export Verification of Conformity
RIA  Regulatory Impact Assessment
SADC  Southern African Development Community
SADCA  SADC Cooperation in Accreditation
SADCMEL  SADC Cooperation in Legal Metrology
SADCMET  SADC Cooperation in Measurement Traceability
SADCSTAN  SADC Cooperation in Standardisation
SADCTBTSC  SADC TBT Stakeholders Committee
SADCTRLC  Southern African Development Community Technical Regulation Liaison Committee
SAZ  Standards Association of Zimbabwe
SME  Small and Medium-sized Enterprise
SPS Agreement  Agreement on Sanitary and Phytosanitary Measures
SQAM  Standardisation, Quality, Assurance and Metrology
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>SQAMEG</td>
<td>SQAM Expert Group</td>
</tr>
<tr>
<td>TBS</td>
<td>Tanzania Bureau of Standards</td>
</tr>
<tr>
<td>TBT Agreement</td>
<td>Agreement on Technical Barriers to Trade</td>
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<tr>
<td>TBT Committee</td>
<td>Committee on Technical Barriers to Trade</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>UNECA</td>
<td>United Nations Economic Commission for Africa</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>WB</td>
<td>World Bank</td>
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<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
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<td>ZIMRA</td>
<td>Zimbabwe Revenue Authority</td>
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Table of Instruments

**World Trade Organisation**

Agreement on Technical Barriers to Trade

Agreement on the Application of Sanitary and Phytosanitary Measures

General Agreement on Tariffs and Trade

General Agreement on Trade in Services

Revised Agreement on Government Procurement

**Southern African Development Community**

Protocol on Trade in the Southern African Development Community Region

Technical Barriers to Trade (TBT) Annex to the SADC Protocol on Trade

Treaty of the Southern African Development Community

Protocol on Trade in Southern African Development Community
Table of Cases

World Trade Organisation Dispute Settlement Body


United States Measures Concerning the Importation, marketing and sale of Tuna and Tuna products WT/DS381/AB/R (2012).


European Communities – Trade Description of Sardines WT/DS231/AB/R (2002).

Southern African Development Community Tribunal

Mike Campbell (PVT) and Others v Republic of Zimbabwe SADC (T) No. 2/2007

United States of America

Earth Island Institute v Hogarth, 494 F.3d 757 (9th Cir. 2007).
Abstract

The World Trade Organisation Agreement on Technical Barriers to Trade (TBT Agreement) was crafted with the aim of ensuring that technical regulations, standards and conformity assessment procedure do not constitute unnecessary obstacles to international trade. Southern African Development Community (SADC) countries have since ratified this Agreement and took a step further to incorporate its principles into the Technical Barriers to Trade Annex to the SADC Protocol on Trade. Despite this effort, SADC countries are still grappling with implementing the TBT Agreement in their domestic frameworks. Consequently, technical barriers to trade have become impediments to both regional and international trade.

It is in this context that this study aims to examine the implementation of the TBT Agreement within the SADC. The study answers the question what are the challenges facing SADC Member states to fully implement the TBT Agreement? The study demonstrates that SADC Member face challenges which include of lack adequate resources, technical expertise and enforcement mechanisms to effectively implement the TBT Agreement.

In the finality, the study recommends SADC Member states to deepen regional integration in order to collaborate on matters relating to technical barriers to trade within the region. Member states should also share information and learn from the experiences of other countries on how to effectively implement the TBT Agreement. Further, government officials should be educated on trade-friendly regulations that do not compromise on the principles of the TBT Agreement. To this end, regulatory impact assessments should be established in order to assess the trade effects of both new and old regulations. Effective enforcement mechanisms should also be introduced in order to coerce Member states to comply with their regional obligations. By effecting these recommendations, SADC states have the opportunity to eradicate technical barriers to trade thereby increasing both regional and international trade.

Keywords

Conformity assessment procedures, standards, technical regulations, technical barriers to trade, intra-regional trade, international trade, TBT Agreement, SADC, TBT Annex to the SADC Protocol on Trade, World Trade Organisation.
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Chapter One

Introduction and Overview of the Study

1.1 Introduction

Trade liberalisation is one of the major objectives of the World Trade Organisation (WTO).\(^1\) The WTO is premised upon the idea of international free flow of goods.\(^2\) In order to achieve this, the WTO Agreement commits member states to enter into reciprocal and mutually advantageous arrangements directed to the reduction of tariffs and non-tariff barriers to trade in the arena of international trade.\(^3\) Over the years, tariff barriers have substantially been reduced during successive General Agreement on Tariffs and Trade (GATT) and WTO negotiations.\(^4\) However, non-tariff barriers, in particular, technical barriers to trade, continue to present significant obstacles to trade liberalisation thereby impacting negatively on market access.\(^5\) The term “technical barriers to trade” refers to mandatory technical regulations, voluntary standards and related conformity assessment procedures.\(^6\)

As regulatory measures, technical regulations, standards and conformity assessments procedures aim to achieve legitimate public policy objectives, such as public health, safety and environmental protection.\(^7\) However, these measures can also discriminate against ...

\(^1\) Marrakesh Agreement establishing the World Trade Organisation, 15 April 1994.
\(^2\) See the Preamble of the World Trade Organisation Agreement which lays down the objectives of WTO as being to promote access to international markets, promoting economic development, reduction of poverty through trade and employment.
\(^3\) Michael Trebilcock and Robert Howse, *The Regulation of International Trade Law* (Routledge 2005) 12. See also article XXVIII of the GATT which provides that “members recognise that customs duties constitute serious obstacles to trade and that negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs are of great importance to the expansion of international trade.”
\(^5\) Ibid.
\(^7\) GATT Article XX on general exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to the protection of the environment: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health. See World Trade Organisation, ‘WTO Rules and Environmental Policies: GATT exceptions’ <https://www.wto.org/english/tratop_e/envt_rules_exceptions_e.htm> accessed 4 April 2015.
imports, unnecessarily restrict trade and introduce market distortions. This may occur when technical regulations and standards of an importing country are not well-targeted to the specific objective they aim to fulfil, are implemented arbitrarily or are enforced through testing and certification requirements that are unclear, not well-publicised or difficult or expensive for foreign manufacturers or producers to access. Thus, unlike other non-tariff barriers, technical barriers to trade may have both trade restriction and trade promotion effects.

Technical barriers to trade are governed by WTO the Agreement on Technical Barriers to Trade (TBT Agreement). This Agreement aims to ensure that technical regulations, standards, testing and certification procedures do not constitute unnecessary barriers to trade, by providing disciplines for the elaboration, application, notification and review of technical regulations, standards and conformity assessment procedures in WTO Members. Essentially, technical regulations and standards may vary from country to country, posing a challenge for producers and exporters. In promoting free trade, the TBT Agreement strongly encourages the use of international standards and aims to create a predictable trading environment through its transparency requirements. Thus, the TBT Agreement as a necessary tool of trade liberalisation has become an indispensable part of regional economic blocs which are currently being pursued by WTO Members.

11 The TBT Agreement entered into force on 1995 as one of the WTO agreements under annex 1A of the chief agreement establishing the WTO. See World Trade Organisation, ‘Technical Information on Technical Barriers to Trade.’ (n 6).
15 Lesser (n 4) 6.
One of the regional economic blocs that have been established by WTO Member states is the Southern African Development Community (SADC).\textsuperscript{16} One of the major objectives of SADC is to ‘achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.’\textsuperscript{17} In order to achieve economic integration, SADC Members have signed the SADC Protocol on Trade which aims to ‘further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by Protocols in other areas.’\textsuperscript{18} In pursuing this vision, Member states ratified the Technical Barriers to Trade Annex to the SADC Protocol on Trade (TBT Annex to the SADC Protocol on Trade). The main objective of this Annex is to eradicate technical barriers to trade in order to “establish a common technical regulation framework which is supported by appropriate regional TBT Cooperation structures.”\textsuperscript{19} The TBT Annex to the SADC Protocol on Trade reiterates the principles of non-discrimination, necessity, prevention of trade restrictiveness, proportionality, the use of equivalent and internationally harmonised measures, transparency and special and differential treatment which are contained within the TBT Agreement.\textsuperscript{20} With the view that SADC member states were going to implement these provisions and other agreements, Member states envisaged the creation of a Free Trade Area (FTA) in the region by 2008.\textsuperscript{21}

Although there has been a considerable improvement in removing tariff barriers within SADC, concerns have been raised that non-tariff barriers particularly technical barriers to trade are even worse obstacles to greater intra-regional trade.\textsuperscript{22} It has been noted that lack of coordination and uniformity in countries’ technical regulations, rules of origin, standards, and policies on licences and permits create extraordinary delays thus interfering with intra-

\textsuperscript{16} SADC has members 15 member states namely, Angola, Botswana, Democratic Republic of Congo, Lesotho Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
\textsuperscript{17} See Article 5.1 of the SADC Treaty.
\textsuperscript{18} See Article 2.1 of the Southern African Development Community Protocol on Trade.
\textsuperscript{19} See Article 2 of the TBT Annex to the SADC Protocol on Trade.
\textsuperscript{20} See Article 5.2 of the TBT Annex to the SADC Protocol on Trade.
\textsuperscript{21} The target to create a FTA by 2008 by SADC member states has not been met. Accordingly, SADC has been criticised for setting goals that are constantly not realised. Failure to realise the agreed targets may be attributed to lack of political will by some member states and sometimes lack of capacity from other member states. See Jephias Mapuva, “Unpacking Regional Economic Integration Challenges Bedevilling the SADC Regional Grouping: A Synopsis” (2013) 95.
regional trade within SADC.\textsuperscript{23} In spite of the preamble of the TBT Agreement which advocates for the use of international standards and avoidance of unnecessary obstacles to trade it seems SADC Member states are struggling to implement the provisions of the TBT Agreement within their domestic frameworks.\textsuperscript{24} The study therefore aims to examine the implementation of the TBT Agreement within the SADC region. In addition the study will address the challenges being faced by Member states to effectively implement the TBT Agreement.

1.2 Research Problem

Despite ratifying the TBT Agreement, SADC Member States are still grappling with the implementation of the Agreement within their legal frameworks. Poorly designed technical regulations and standards have been identified as significant barriers to deeper intra-regional trade.\textsuperscript{25} Accordingly, Gilson has observed that most SADC countries have no procedures by which technical regulations are assessed for consistency with public policy objectives, whether the private sector has the capacity to implement them, or regulatory impacts on trade or competitiveness.\textsuperscript{26} Lack of clearly defined principles for regulation, procedures and responsibilities which often leads to duplication across ministries and agencies is revealed by the need for different permits and licences which may be intended to achieve the same

\begin{itemize}
\item \textsuperscript{24} The preamble of the TBT Agreement states that, “members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”; and Article 2.2 states that “where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems”; See also Article 17 (1) of the SADC Protocol on Trade.
\item \textsuperscript{26} For example Malawi’s regulation on casual and fashion plastic shoes (MS 109) specifies the thickness of straps and bands of shoes that exporters should comply with before exporting to Malawi. Also, South Africa introduced the environmental levy on plastic bags which was meant to reduce litter problems but the regulation governing it ended up regulating issues not linked to litter such as the thickness of the plastic bag and the size of the text to be printed on the bag. These regulations are based more on design than a safety requirement requiring a technical regulation. They are thus clear examples of regulations that are being enforced by Member States that go beyond issues of public interests. See Ibid.
\end{itemize}
objectives. Businesses are therefore put at a disadvantage as they have to meet extra costs associated with acquiring these permits. These additional costs deter businesses particularly Small and Medium-sized Enterprises (SMEs) from conducting business within the region.

In trying to ensure that technical regulations, standards and conformity assessment procedures do not create barriers to intra-regional trade, SADC Member states adopted the TBT Annex to the SADC Protocol Trade which mirrors the TBT Agreement. However, implementation of the TBT Annex to the SADC Protocol on trade remains fragmented. As a result, technical barriers to trade have become impediments to both regional and international trade. The implementation of the TBT Agreement is important for the eradication of technical barriers to trade. By removing these barriers, SADC Member States have the opportunity of increasing both intra-regional and international trade. The study therefore examines the implementation of the provisions of the TBT Agreement within SADC with the aim of addressing the challenges being faced by Member States in their pursuit of implementing this Agreement.

1.3 Significance of the Research

The study is significant for a number of reasons. First, not much has been written on the implementation of TBT Agreement within SADC. The available literature offers a description of how SADC Member States have failed to implement the TBT Agreement without addressing the challenges of this implementation. This study is important because it aims to fill this gap. The implementation of the TBT Agreement is important for the removal of technical barriers to trade. By addressing the challenges hindering SADC to implement the TBT Agreement, Member States have the opportunity to boost both regional and international trade.

27 In South Africa, fixed telephone equipment such as fax machines have to comply not only with technical regulations for safety which is administered SABS but also overlapping specifications relating to electromagnetic interference and connectivity which is administered by the Independent Communications Authority. This leads to duplication across ministries and overlapping responsibilities. These divergent rules and procedures instead of providing predictability and clarity creates uncertainties and confusion for businesses as they will have to bear the cost of complying with different regulations that aim to regulate the same objective. See Trade and Industrial Policy Strategies, ‘Technical Regulations and Trade: Implications for Regional Integrations’ (2015) <http://www.tips.org.za/files/policy_brief_technical_regulations_march_2015.pdf> accessed 20 September 2015.


29 See paragraph 1.6 of the study.
international trade.\textsuperscript{30} By increasing trade SADC states may be able to meet its objectives of economic development spelled under Article 5 of the SADC Treaty.\textsuperscript{31} The study further generates knowledge that may be able to assist policy makers on how to overcome challenges in order to effectively TBT Agreement. Further, the research provides information to future academic researchers who are eager to see the increase of regional trade within SADC by eradicating technical barriers to trade.

\textbf{1.4 Research aims and objectives}

The study aims to critically analyse the implementation of the TBT Agreement within the SADC region. In particular, the study investigates whether SADC states are making sufficient effort to implement the TBT Agreement with a view of opening up trade. In pursuit of this aim, the study examines the key provisions of the TBT Agreement, how they have been interpreted by the WTO Dispute Settlement Body and evaluates the extent to which they have been incorporated in the legal frameworks of SADC states. The study further identify the challenges that SADC states are facing in trying to implement the TBT Agreement and the attempts that have been made in order to ensure that technical barriers to trade do not impede on trade.

\textbf{1.5 Research question}

The main research question for this study is:

\begin{itemize}
  \item What are the challenges being faced by SADC Member states in implementing the provisions of the TBT Agreement?
\end{itemize}

\textsuperscript{30} Article 5 (2) (d) of the SADC treaty provides that the organisation intends to meet its aims by “developing policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States”. See the Treaty of The Southern African Development Community <http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf> (accessed 26-08-2013); Freer trade promotes a mutually profitable division of labour, greatly enhances the potential and makes possible higher standards of living all over the globe. Consequently, countries that participate in free trade have demonstrated a higher level of output and income than countries that do not. See Anthony Cassimatis, \textit{Human Rights Related Trade Measures Under International Law} (Martinus Nijhoff Publishers, 2007) 124; Arvind Panagariya, ‘Miracles and Debacles: Do Free-trade Skeptics have a Case?’ (2003) 2 <http://www.columbia.edu/~ap2231/Policy%20Papers/miracles%20and%20debaclespanagariyarevMarch_04.pdf> accessed 20 November 2015.

\textsuperscript{31} Further the eradication of technical barriers to trade is in harmony with the aim of the WTO of reducing tariff and other barriers to trade. See the preamble of the Agreement establishing the WTO <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 17 October 2016.
1.6 Literature Review

Trade liberalisation lies at the core of the WTO. In order to achieve it, the WTO recognises the importance of the removal of technical barriers to trade.\footnote{World Trade Organisation, ‘Understanding the WTO’ (2015) 7 <https://www.wto.org/english/thewto_e/whatis_e/understanding_e.pdf> accessed 26 August 2015.} The preamble of the TBT Agreement explicitly states that one of the aims of the TBT Agreement is to ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade. However, the use of technical regulations and standards is becoming increasingly contentious as an implicit non-tariff barrier.\footnote{Maskus and others (n 8) 2.} The debate around technical barriers to trade revolves around the right of WTO Member states to regulate trade in order to protect plants, health, animal, national security and environment while simultaneously making sure that these do not become impediments to international trade.\footnote{Tapiwa Victor Warikandwa and Patrick Osode, ‘Managing the Trade-Public Health Linkage In Defence of Trade Liberalisation and National Sovereignty: An Appraisal of United States-Measures Affecting The Production and Sale of Clove Cigarettes?’ PER/PELJ 17 4 (2014) 1278 <www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727> accessed on 26 April 2016.}

Peet and Koch provide deep insight on how SMEs are affected by technical barriers to trade within the SADC region.\footnote{Michael Peet and Steven Koch, ‘Technical Barriers to Trade Faced by African SME’s’ (2012) 19 <http://repository.up.ac.za/handle/2263/4487> accessed 28 November 2015} They argue that technical barriers to trade hinder SMEs from exporting to other Member States as they increase cost of doing business within the region.\footnote{Ibid.} However, the analysis presented by Peet and Koch does not address the challenges that SADC Member States are facing to effectively implement the TBT Agreement. These challenges will be dealt with in the study. Although Peet and Koch do not present these challenges, their article is important for this study as it shows how businesses particularly SMEs are affected by technical barriers to trade. They suggest harmonisation of different technical regulations within the region as an effective way of helping SMEs meet these costs.\footnote{Ibid.}

However, Mayeda disputes harmonisation as a solution of boosting trade for SADC Member states.\footnote{Graham Mayeda, ‘Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonisation on Developing Countries’ (2004) 763 Journal of International Economic law 7 (4).} In evaluating the benefits of harmonisation within international trade, Mayeda asserts
that harmonisation is an ‘ineffective tool for dealing with developmental issues.\textsuperscript{39} He argues that ‘while it is important to develop institutional capacity in developing countries to deal with health, safety and technical standards, across-the board harmonisation fails to recognise the need for countries to adapt laws and legal institutions to domestic conditions.’\textsuperscript{40} However, Mayeda’s argument fails to consider that article 12.4 of the TBT Agreement permits developing countries to use indigenous technology and production methods and processes that are compatible with their development needs. In light of article 12.1, the study will examine whether SADC Member States have managed to make efforts to implement the TBT Agreement according to their developmental needs.

On the other hand, Stephenson argues that article 12.4 can be seen as segregating developing countries from participating in international trade.\textsuperscript{41} By adopting national regulations that contradict with international standards, developing countries risk producing goods that will not be accepted in the global market.\textsuperscript{42} Consequently, article 12.4 may have reduced the efficiency of production processes in developing countries which has remained isolated from developed countries.\textsuperscript{43} The argument presented by Stephenson is important for the present study as it points out the need for SADC countries to find ways of implementing the TBT Agreement in order for them to participate effectively in both regional and international trade.

The Centre for Applied Legal Research evaluated whether SADC Member states have implemented the SADC Harmonised Seed Regulatory System.\textsuperscript{44} They concluded that despite wide political endorsement from Member states, there is lack of implementation.\textsuperscript{45} However, the study did not address the challenges hindering SADC countries to implement the system. Nevertheless, the study is important because it gives an example of one of the many agreements that SADC Member states are entering without implementing. In this regard

\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{45} Centre for Applied Legal Research (n 44) 6.
Meyer and others postulated that there is a capacity gap in what SADC states commit themselves to do and what they can effectively implement.\textsuperscript{46}

Hoa and others examined the implementation of the TBT Agreement from a developing perspective and noted that the Agreement is not consistently implemented and its advantages are not realised.\textsuperscript{47} Although they are receiving technical assistance, developing countries are failing to implement the provisions of the TBT Agreement in their domestic frameworks.\textsuperscript{48} This view cannot be objectionable because in 2011, Zimbabwe received technical assistance which was aimed at drafting National Quality Infrastructure (NQI) Policy, a NQI Bill and a Road Map of TBT-related activities.\textsuperscript{49} Nonetheless, Zimbabwe has not been able to implement project final recommendations.\textsuperscript{50}

From the foregoing literature review, it can be noted that SADC Member states are struggling to adequately implement the TBT Agreement within their countries. There is a lot of literature that describes how SADC countries have failed to implement the TBT Agreement. However, no attempt has been made to look at the challenges preventing SADC Member states form implementing the TBT Agreement. This is the gap that this research intends to fill. The research further provides recommendations on how SADC Member states can overcome these challenges. If properly implemented these recommendations have the potential of increasing not only intra-regional trade but international trade as well.

\subsection*{1.7 Research Methodology}

The study is a qualitative research. Given that qualitative research is “heavily dependent on the researcher’s analytic and integrative skills,” this method is suitable for this study as it helps the researcher to critically examine the provisions of the TBT Agreement and investigate whether SADC countries have managed to implement these provisions within

\begin{footnotesize}
\begin{enumerate}
\item Meyer Nico and others, ‘Bilateral and Regional Trade Agreements and technical barriers to trade: An African perspective’ (2010) 5 <http://dx.doi.org/10.1787/5kmdbgfgrngv-en> accessed 17 March 2015\textsuperscript{46}
\item Ibid\textsuperscript{49}
\item See ‘Zimbabwe - Capacity Building and the enforcement of WTO/TBT Agreement’ (2013) <http://acp-eutbt.org/pageprojcycle.cfm?id=279CCCEF962BD5C4C68A92A1B9E70993D6FDE6F3EE88F96E10CEE2E507FC> accessed 22 June 2012.\textsuperscript{50}
\end{enumerate}
\end{footnotesize}
their domestic frameworks. This analysis will assist the researcher in identifying the challenges that SADC countries are facing in their quest to implement the TBT Agreement.

The study will use both primary and secondary sources of data. The TBT Agreement will be the used as the primary source of information. Moreover, WTO cases will be used in order to gain an insight on how the Dispute Settlement Body has interpreted the provisions of the TBT Agreement. These materials will be accessed from the WTO website. The research will further extract data from the SADC website, municipal laws such as statutes, official circulars, and publications by relevant government departments in order to see whether SADC Member states have been able to domesticate the TBT Agreement within their legal frameworks. Secondary sources which include textbooks, monographs, articles, journals, newspapers, magazines will be accessed from University of Fort Hare library. In order to avoid any biases from previous research in this area, the researcher aims to use multiple sources of data so that data may reinforce each other.

1.9 Limitations of the study

It is noteworthy that the TBT Agreement is a multilateral agreement and not a regional one. Therefore, the major limitation of this study is that it does not examine the implementation of the TBT Agreement in all WTO Members but instead, it focuses only on SADC countries only. This is because SADC stands as one of the impoverished regions in the world, and therefore unquestionably requires the dismantling of technical barriers through the implementation of TBT Agreement to increase intra-regional trade. SADC countries like any other developing countries may benefit from increased trade and augment the fight against poverty and unemployment.

1.8 Chapter Outline

This dissertation is organised as follows:

Chapter one provides a general context for the research. It outlines the background to the research, aims and objectives, research problem, significance, literature review and the structure of the dissertation.
Chapter two examines the history of the regulation of technical barriers to trade. It also discusses the scope and the key provisions of the TBT Agreement.

Chapter three analyses the interpretation of the provisions under the TBT Agreement by the WTO Dispute Settlement Body.

Chapter four critically examines the implementation of the TBT Agreement within the SADC region with a view of addressing the challenges being faced by Member states to effectively implement this Agreement.

1.10 Conclusion

Chapter one has laid the foundation of the study. In particular, the chapter has provided a brief background of the study and briefly explained the research problem, aims, objectives, and the research methodology of the study. In the next chapter the study will discuss the history of the TBT Agreement, its scope and substantive provisions.
Chapter Two

The regulation of technical barriers to trade: A historical perspective

2.1 Introduction

There has been a significant increase in the number of technical regulations, standards and conformity assessment procedures adopted by WTO Member countries. This increase can be associated with higher standards of living worldwide, which have increased consumers’ need for high quality and safe products that are environmentally friendly. Although it is a difficult task to provide an accurate estimate of the need to conform to different foreign technical regulations and standards on international trade, it is certain that it involves costs for both producers and exporters. These measures may also involve a mix of genuine safety measures and protectionist objectives which may be difficult to isolate. Without international trade law rules, technical barriers to trade could be adopted and used for the purposes of protecting domestic industries. Therefore, the major aim of the TBT Agreement is to ensure that technical barriers to trade do not create unnecessary impediments to international trade.

In order to understand the present construction of the TBT Agreement, it is important to turn to the past. This is so because the current TBT Agreement is the product of history emanating from the commitments which contracting parties negotiated at regular intervals over a period of time. The purpose of this chapter is therefore to examine the history of the regulation of technical barriers to trade from the GATT 1947 to the TBT Agreement. The essence of this analysis is to identify the reasons behind the TBT regulatory framework. Therefore, the chapter addresses the question why the use of technical barriers to trade needed to be

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51 Maskus and others (n 8) 1.
54 Maskus and others (n 8) 14.
regulated. It further aims to address the purpose of the TBT Agreement by examining its scope and its substantive provisions.

2.2 The Regulation of Technical Barriers to Trade: An Historical Overview

2.2.1 Technical barriers to trade under GATT 1947

The first multilateral trade agreement to be adopted after World War II was the General Agreement on Trade and Tariffs (GATT 1947). The GATT 1947 mainly concentrated on reducing the use of tariffs and quantitative restrictions in international trade. Despite focusing on tariffs and quantitative restrictions, the GATT 1947 also contained some general references to non-tariff barriers including technical barriers to trade. Articles III, XI and XX of GATT 1947 governed the use of technical regulations and standards. However, these provisions did not specify the main kinds of technical barriers to trade. Additionally, the provisions did not prescribe how technical measures were to be used in order to enhance the free flow of goods in international trade. For example, there were no transparency provisions

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56 By the 1930s, bilateral and multilateral trade agreements between many countries in international trade were in place. For example Anglo-French Commercial Treaty, Treaty of Nanking, Ouchy Convention, the Tripartite Agreement of 1936, Reciprocal Trade Agreements Act of 1934. Many of these agreements were cancelled as a result of World War II. After the end of the Second World War the international community was devastated by the results of the War hence they entered into negotiations that were aimed at creating a new international order. These negotiations led to the creation of the GATT 1947. The Agreement was concluded by 23 countries at Geneva, in 1947 as a provisional agreement to regulate international trade; See Craig Van Grasstek, ‘The History and Future of the World Trade Organisation’ (2013) 2 <https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf> accessed 13 May 2016; See also Douglas Irwin, ‘Multilateral and Bilateral Trade Policies in the World Trading System: A Historical Perspective’ (1937) 112-113 <http://www.dartmouth.edu/~dirwin/docs/Multilateral-Bilateral.pdf> accessed 4 December 2015.


58 Jeffrey Belson, Certification Marks (Sweet and Maxwell, 2002) 95.

59 Article III states that “the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.” Article XI dealt with the elimination of quantitative restrictions on importation and exportation. However, prohibitions or restrictions were allowed if they were “necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.” Article XX provides for general exceptions for measures imposed in violation of the relevant substitute obligations of the GATT in order to protect public morals, human, animal or plant life and health measures concerning the preservation of exhaustible natural resources.

60 Tracy Epps and Michael Trebilcock (eds), Research Handbook on the WTO and Technical Barriers to Trade (Edward Elgar, 2013) 20.
or any reference to international standards. Besides regulating technical barriers to trade in general, the GATT 1947 system also had a number of weaknesses that prevented it from functioning effectively.\textsuperscript{61}

First, the GATT 1947 was adopted by contracting parties provisionally through the Protocol of Provisional Application (PPA).\textsuperscript{62} According to the PPA, part II of GATT 1947 only applied to the extent it was not inconsistent with the existing legislation of the member states.\textsuperscript{63} This protocol therefore provided an escape for the use of technical barriers to trade and old trade restrictive regulations by the GATT Member states.\textsuperscript{64} It can be argued that this protocol did not work in favour of the GATT system as Member States had a way of resorting to protectionism through the use of technical barriers to trade and other non-tariff barriers.

Second, the requirement of positive consensus for the establishment and adoption of a panel made the enforcement of the GATT 1947 more difficult.\textsuperscript{65} Positive consensus meant that there had to be no objection from any member state including countries involved in a dispute to the decision to adopt a panel.\textsuperscript{66} It can be maintained that this requirement gave Member states license to defy the GATT rules as the enforcement mechanisms provided by the GATT 1947 were weak. Moreover, The GATT 1947 did not have an appeal mechanism that would ensure the uniform interpretation of the GATT rules by panels.\textsuperscript{67}

As a result of the preceding factors, concerns for stronger rules to govern the use of technical regulations and standards rose among GATT 1947 member states. These concerns led to discussions on additional rules aimed at ensuring that technical regulations, standards and conformity assessment procedures did not create unnecessary obstacles to international trade.
trade. The harmonisation of national regulations and standards based on international bodies through the cooperation of the interested states was seen as an effective tool for reducing the trade restrictive effects of technical barriers to trade. These discussions gave birth to the Agreement on Technical Barriers to Trade (Tokyo Standards Code), the first legal framework for regulating the use of technical barriers to trade.

2.2.2 The Tokyo Round Standards Code

The Tokyo Round of multilateral trade negotiations was concluded in April 1979. It marked the seventh round of multilateral reductions in international trade barriers negotiated under the GATT 1947 since World War II. The Code was binding on thirty-two of more than hundred contracting parties most of them being developed countries. By addressing, among other things, the preparation, adoption and application of technical regulations by central government and non-governmental bodies, the Code provided a framework, though a voluntary one, for reducing and removing technical barriers to trade. The Tokyo Standards Code can be seen as an important step towards the development of the regulation of technical barriers trade in international trade law history.

One of the principal aims of the Tokyo Standards Code were to encourage national treatment and non-discrimination for product testing and certification programmes. Adoption of standards or technical regulations by governments or other bodies for reasons of health, safety, environment protection or other purposes was to be permitted but without creating unnecessary obstacles to trade. Further, publication, notification and access to information

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68 Epps and Trebilcock (n 60) 23.
69 Ibid.
70 This Code was adopted at the Tokyo Round of multilateral trade negotiations in 1979.
73 Ibid.
74 Belson (n 58) 95.
75 See the Preamble to the Tokyo Standards Code which states that “recognising that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade”; World Trade Organisation, ‘The WTO Agreement series: Technical Barriers to Trade’ (2013) 6 <https://www.wto.org/english/res_e/publications_e/tbtotrade_e.pdf> accessed 12 November 2015.
76 See the Preamble to the Tokyo Standards Code.
with respect to the relevant documents were addressed by the Code. The Code also provided rules on harmonisation of technical regulations and standards and conformity assessment procedures based on international standards in an effort to encourage free trade. Included in the Code were also procedures for determination of conformity, dispute settlement procedures, systems of certification and conformity. Therefore, unlike the GATT 1947, the Tokyo Standards Code provided a broader and detailed framework for the regulation of technical barriers to trade.

After the Tokyo Standards Code was signed, there was a general increase in the use of technical regulations and standards, particularly in the field of food and agricultural imports. As a result of this increase, Member States discovered that the Code was inadequate to deal with the increasing use of technical barriers to trade. In particular, the administration and enforcement of the Tokyo Standards Code was difficult because it applied to a limited number of GATT member states. This weakened the effectiveness of the Code due to the fact that Member states not bound by the Code could use technical barriers to trade in order to protect domestic industries. Moreover, Member states discovered that the weaknesses in the GATT 1947 dispute settlement system made the implementation of the Code difficult. As a result of these weaknesses, there was an inevitable need for a stronger agreement that governed the use technical barriers to trade and an effective dispute settlement system that was able to enforce its rules.

### 2.2.4 Uruguay Round

The above weaknesses successfully paved way for another round of negotiations. The negotiations under the Uruguay round which began in 1986 and ended in 1994 were intended to tackle these problems. During the negotiations, sanitary and phytosanitary were widely

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77 See Articles 2.5.1, 2.5.2, 2.5.3 of the Tokyo Standards Code.
78 See Article 23 of the Tokyo Standard Code.
79 Systems of conformity where addressed by the Code under Articles 5 and 6, systems of certification were addressed under Articles 7, 8 and 9 and dispute settlement procedures were addressed under Article 13 and 14 of the Code.
81 Ibid.
84 Epps and Trebilcock (n 58) 23.
recognised to be one of the most problematic types of technical barriers to trade.\textsuperscript{85} Therefore, in the process of negotiations it was finally agreed to deal with sanitary and phytosanitary measures in a separate and more specific agreement.\textsuperscript{86} The Uruguay round negotiations were not meant to change the disciplines of the Tokyo Standards Code but to strengthen them.\textsuperscript{87} Therefore, it can be maintained that the Tokyo Standards Code laid a foundation for the Uruguay Round TBT Agreement.\textsuperscript{88}

\subsection*{2.2.5 The TBT Agreement}

The TBT Agreement was adopted in 1994, and it deals with technical regulations, standards and conformity assessment procedures.\textsuperscript{89} The Uruguay Round TBT Agreement managed to resolve most of the weaknesses that were presented in the GATT system.\textsuperscript{90} The TBT Agreement was adopted as a multilateral agreement binding all WTO members.\textsuperscript{91} Therefore all WTO Members were required to revise their existing measures as of the date of adoption of the TBT Agreement with respect to their consistency with the provisions of the TBT Agreement.\textsuperscript{92} A new TBT Agreement was therefore signed on 1 January 1995 under the single undertaking principle.\textsuperscript{93}

The core aim of the TBT Agreement is to strike a balance between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Member States right to regulate trade.\textsuperscript{94} According to Wijkstrom and McDaniel, this flexibility in the TBT Agreement is at the root of many trade problems.\textsuperscript{95}

\begin{thebibliography}{99}
\bibitem{85} Sanitary and Phytosanitary are measures targeted at the protection of human, animal or plant health or health from certain risks related to agricultural and food products. See the Agreement on the Application of Sanitary and Phytosanitary Measures.
\bibitem{86} Appleton (n 61) 5.
\bibitem{87} Ibid.
\bibitem{88} Ibid.
\bibitem{89} Epps and Trebilcock (n 60) 23.
\bibitem{90} Ibid.
\bibitem{91} World Trade Organisation, A handbook on the WTO Dispute Settlement (n 59) 13.
\bibitem{92} Ibid.
\bibitem{94} See the Preamble to the TBT Agreement; Vera Thorstensen and Andreia Costa Vieira, ‘TBT, SPS and PS: are the wolves of protectionism disguised under sheep skin?’ (2014) 10 <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/16351/TBT,%20SPS%20and%20PS,%20are,%20the,%20wolves,%20of,%20protectionism,%20disguised%20under%20sheep%20skin.pdf?sequence=1> accessed 22 September 2015.
\end{thebibliography}
Member states may use this flexibility as an escape to protect their domestic industries.\textsuperscript{96} However, cases exist where good faith efforts to restrict trade can lead to different levels of protection.\textsuperscript{97} It is in these instances that the application of the TBT Agreement becomes problematic, hence the need to examine the measures in detail in order to determine whether they were promulgated in line with the requirements of the TBT Agreement.

Although the TBT Agreement retained most of the provisions of Tokyo Standards Code, some substantive changes were made both in form and content \textsuperscript{98} The TBT Agreement strengthened and elucidated some of the provisions of the Tokyo Round Standards Code.\textsuperscript{99} The plurilateral approach in the Tokyo Standards Code was done away with and the TBT Agreement was entered into using the multilateral approach.\textsuperscript{100} This meant that when signing the WTO Agreement member states were automatically signing the TBT Agreement.\textsuperscript{101} Unlike the Tokyo Standards Code, the TBT Agreement does not regulate sanitary and phytosanitary measures.\textsuperscript{102} In addition the TBT Agreement introduces the Code of Good Practice which deals with the preparation, adoption and application of standards by government and non-governmental organisations.

Moreover, the positive consensus rule which crippled the 1947 GATT system was abandoned.\textsuperscript{103} The Dispute Settlement Understanding (DSU) under the WTO introduced the reverse consensus rule for the establishment of panels and adoption of reports.\textsuperscript{104} The DSU also created an Appellate Body (AB), a permanent appeal mechanism for decisions of the

\textsuperscript{96} Ibid.
\textsuperscript{97} See United States Measures Concerning the Importation, marketing and sale of Tuna and Tuna products WT/DS381/AB/R (2012) where in an effort to protect dolphins United States effected a measure that precluded tuna caught by setting on dolphins the dolphin-safe label. This label however was not compulsory for the importation or sale of tuna in United States. Although it was the decision of the consumers whether to purchase dolphin-safe products, the Appellate Body held that it was the measure that controlled access to the label and allowed consumers to express their preferences for dolphin safe tuna. Therefore an advantage was afforded to products eligible for the label in the form of access to the label. Accordingly the Appellate Body concluded that the US measure was inconsistent with Article 2.1 of the TBT Agreement.
\textsuperscript{99} Ibid.
\textsuperscript{100} Sherry Stephenson, Standards and Conformity Assessment as non-tariff barriers The World Bank Development Research group (1999) 38.
\textsuperscript{101} Ibid.
\textsuperscript{103} World Trade Organisation A handbook on the WTO Dispute Settlement (n 59) 13.
\textsuperscript{104} The reverse consensus rule means that the Panel or Appellate Body report is adopted in the absence of consensus against its adoption. See ibid.
The TBT Agreement further requires the central government to be responsible for the implementation of the TBT Agreement and application of its principles at any level of government or by any private sector body involved in the standards system.106 This responsibility on governments is meant to ensure consistency with the application of the TBT Agreement within the countries of Member states.

### 2.3 The Scope of the TBT Agreement

The TBT Agreement applies to technical regulations, standards and conformity assessment procedures. Rules applicable to each of these measures are treated in separate portions of the TBT Agreement.107 Article 1 of the TBT Agreement defines the key terms including technical regulations, standards and conformity assessment procedures. These definitions establish the general scope of the TBT Agreement.108 The TBT Agreement however, is not applicable to all technical regulations, standards and conformity assessment procedures.109 Certain provisions within the TBT Agreement and other WTO Agreements limit its scope. The TBT Agreement explicitly states in article 1.4 and 1.5 that the TBT Agreement does not apply to government procurement activities as well as to sanitary and phytosanitary measures. Moreover, the TBT Agreement only applies to goods hence services are not regulated by the TBT Agreement.110

Appleton noted that the definitions of standards and technical regulation within the TBT Agreement are vague as to whether technical barriers to trade include manufacturing process and production methods (PPMs).111 The issue becomes more problematic when the PPMs are not detected in the final product (non-product related process and production methods NPR-PPMs).112 It is however generally accepted that the TBT Agreement does not intend to relate to PPMs unless the PMM is product related.113 Nevertheless ambiguity still exists in the

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105 Ibid.
106 See Article 2 of the TBT Agreement.
107 Appleton (n 61) 13.
108 Ibid.
110 Ibid.
111 Ibid.
112 Ibid.
113 Ibid.
definitions of technical regulations and standards and it may though highly improbable be argued that the TBT Agreement may in peculiar circumstances be applied to NPR-PPMs.\textsuperscript{114}

2.3.1 Technical regulations

Annex 1 paragraph 1 of the TBT Agreement defines a technical regulation as

a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labelling requirements as they apply to a product, process or production method.

For any product or commodity to be accepted for trade by any importing country, a degree of confidence must exist that the imported product conforms to the regulatory requirements of that particular country.\textsuperscript{115} This is so because if not regulated these products or commodities might endanger the health of consumers or the safety of the importing country.\textsuperscript{116} In order to ensure health, safety and security governments interfere with trade by setting minimum standards, which become mandatory by legislation for the safety and protection of its country.\textsuperscript{117} However, these regulations can create unnecessary barriers to trade if they are not underpinned to the very purpose they intend to regulate.\textsuperscript{118} Member states may use technical regulations to protect domestic industries when they enforce regulations that are difficult for foreign companies to comply with. These regulations may sometimes come in guise of protecting public policy objectives, it is therefore important for the other member states and relevant stakeholders to scrutinise the regulations imposed in order to discern their genuine objective.\textsuperscript{119}

In interpreting the definition of technical regulations, the Appellate Body (AB) in EC-Asbestos\textsuperscript{120} developed a three tier test encompassing of three important requirements which must be met by a measure for it to qualify as a technical regulation within the meaning of the

\textsuperscript{114} Trade Law Center and others (n 109) 382.
\textsuperscript{116} Goppe (n 114) 66.
\textsuperscript{117} Ibid.
\textsuperscript{118} Lesser (n 4) 15.
\textsuperscript{119} See United States – Measures Affecting the Production and Sale of Clove Cigarette WT/DS406/AB/R (2012).
\textsuperscript{120} European Communities — Measures Affecting Asbestos and Products Containing Asbestos WT/DS135/AB/R (2001) (hereinafter referred to as EC-Asbestos).
TBT Agreement. First, the measure must be applicable to an identifiable group or products, second, the measure must lay down their product characteristics or their related process and lastly the measure must be mandatory. The AB further noted that in order to determine whether the three requirements are met, “the measures at issue must be examined as a whole and in light of the characteristics of the measure at issue and the circumstances of the case.” This interpretation thus gives the AB the necessary flexibility to determine whether a measure is a technical regulation on a case to case basis.

2.3.2 Standards

Annex 1 paragraph 2 of the TBT Agreement defines a standard as

a document, established by consensus and approved by a recognised body which provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.

Within the TBT Agreement context, standards refer to product characteristics, process requirements or production methods however unlike technical regulations they are not mandatory. Although not required by law, these standards might be requested by retailers or consumers. Producers and manufacturers are sometimes compelled to conform to these standards as non-adherence would exclude their products from the market. From a consumer’s perspective it can be concluded that standards can improve the effectiveness of buying goods in a marketplace by placing the same products that comply with the same

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122 See EC Asbestos (n 119) para 176.
123 Ibid.
standard in direct competition to another.\textsuperscript{127} It is thus imperative for these standards to be subject to international rules under the TBT Agreement.

The Code of Good Practice provides disciplines, including those related to transparency, for the preparation, adoption, and application of standards by central government, local government, non-governmental and regional standardising bodies.\textsuperscript{128} The Code is open for acceptance to any standardising body, whether central government, local government, or non-governmental and regional standardising.\textsuperscript{129} WTO member states are responsible for the acceptance and compliance with the Code of Good Practice by their central government standardising bodies.\textsuperscript{130} Furthermore, member states are mandated to take reasonable measures available to them to ensure that local government and non-governmental standardising bodies within their territories and regional standardising bodies of which they are members, accept and comply with the Code.\textsuperscript{131}

\textbf{2.3.3 Conformity Assessment Procedures}

Annex 1 paragraph 3 of the TBT Agreement defines a conformity assessment procedure “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.” The explanatory note states that “conformity assessment procedures include inter alia, procedures for sampling, testing and inspection, evaluation, verification and assurance of conformity registration, accreditation and approval as well as their combinations.”

The purpose of conformity assessment procedures under the TBT Agreement is to check whether products and commodities meet the requirements prescribed by technical regulations or standards.\textsuperscript{132} These procedures are important because they aim to ensure that goods imported from other countries are not harmful to health, environment, plants and national security. However, conformity assessment procedures can be used as impediments to trade if exporting companies are required to go through repeated testing to the same standards or

\textsuperscript{127} Loconto and Dankers (n 125) 15.
\textsuperscript{129} See Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards, paragraph B.
\textsuperscript{130} Ibid.
\textsuperscript{131} Ibid.
regulations and face long periods to get approval to sell in foreign markets. Moreover, when countries have distinct procedures for producers to follow in obtaining permission for their products, a duplication of effort is bound to exist across markets even though the conformity assessment procedures serve to regulate the same purpose. This usually results in costs and may result in losses for businesses particularly for SMEs. SMEs are sometimes forced to refrain from exporting to foreign markets due to costs involved in the conformity process.

2.4 The Relationship of the TBT Agreement with other WTO Agreements

2.4.1 The TBT Agreement and the GATT 1994

TBT Agreement intends to promote the objectives of the GATT 1994 through a specialised legal regime containing different and additional commitments to those stemming from the GATT 1994. The objectives of the TBT Agreement are reflected in Articles I, III, XI and XX of the GATT. Article XX and the preamble of the TBT Agreement tries to balance two competing interests that is trade liberalisation on one hand and on the other regulatory autonomy. In EC-Asbestos the panel stated that “in a case where both the GATT 1994 and the TBT Agreement appear to apply to a given measure, a panel must first examine whether the measure at issue is consistent with the TBT Agreement, since the TBT Agreement deals specifically and in detail with technical barriers to trade.” Furthermore, the relationship between the GATT 1994 and other multilateral agreements on trade in goods

134 Ibid.
135 Ibid.
138 Lester (n 136) 122.
139 See EC Asbestos (n 119) para 176.
140 Ibid.
is governed by the general interpretative note to Annex 1A to the WTO Agreement which settles the likelihood of any conflict between the two agreements.\(^{141}\)

### 2.4.2 The TBT Agreement and the Agreement on Sanitary and Phytosanitary

Article 1.5 of the TBT Agreement does not include sanitary and phytosanitary measures from its scope.\(^{142}\) This means that technical measures under the TBT Agreement cannot be SPS measures and vice versa.\(^{143}\) The SPS Agreement covers food safety, animal, plant and human health in detail.\(^{144}\) It imposes stronger principles relating to plant, animal and human health than the TBT Agreement.\(^{145}\) The SPS Agreement also differs from the TBT Agreement in that the SPS Agreement is based on risk assessment while the TBT Agreement does not have a similar provision.\(^{146}\) Moreover unlike the TBT Agreement that employs the most favoured nation and national treatment obligations, the SPS Agreement does not stipulate such non-discrimination in a conventional sense.\(^{147}\) Instead of imposing non-discrimination obligation based on like products, the SPS Agreement requires non-discrimination based on like situations.\(^{148}\)

In practice, the distinction between SPS measures and TBT measures is difficult to pin down.\(^{149}\) Governments frequently implement broad regulations that encompass requirements from both the TBT Agreement and SPS Agreement.\(^{150}\) For instance, a regulation on a fruit can formulate a requirement relating to the treatment of the fruit to avoid the spread of pests

\(^{141}\) “In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization the provision of the other agreement shall prevail to the extent of the conflict.” See Van den bosche (n 120) 809.


\(^{143}\) Dukgeun Ahn, ‘Comparative Analysis of the SPS and the TBT Agreements’ (2001) 4 <http://211.253.40.86/mille/service/PBH/10000/IMG/000000000446/w01-03.PDF> accessed 3 November 2015.

\(^{144}\) Ahn (n 143) 8.

\(^{145}\) Ibid.


\(^{147}\) Stoler (n 146) 7.

\(^{148}\) See article 2.3 of the SPS Agreement.

\(^{149}\) Stoler (n 146) 220.

\(^{150}\) Ahn (n 143) 8.
(sanitary and phytosanitary measures) and another set of requirements, concerning the 
labelling, quality and grading of the same fruit (technical measures).  

2.4.3 The TBT Agreement and the Agreement on Government Procurement

The TBT Agreement under Article 1.4 excludes government procurement activities from its 
coverage. It states that “Purchasing specifications prepared by governmental bodies for 
production or consumption requirements of governmental bodies are not subject to the 
provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.” Although the provisions of the TBT Agreement are 
not specifically applicable to government specifications of voluntary standards in relation to 
government procurement, the TBT Agreement and related jurisprudence may nevertheless 
have some relevance in terms of establishing accepted interpretations of common issues 
within the WTO.  

2.4.4 The TBT Agreement and the General Agreement on Trade in Services

Despite the fact that the GATS was negotiated separately from the goods agreements, it 
encompasses principles remarkably parallel to those of the TBT Agreement. The TBT 
Agreement and the GATS mandates governments and other participants in international trade 
to make use of international standards in the domestic regulation but in different ways.  
WTO member states are required by the TBT Agreement to base their technical regulations 
on relevant international standards unless they do not achieve the policy objectives 
pursued. In contrast, WTO member states are not required by GATS to base their domestic 
regulatory measures on international standards.  

151 Ibid.  
153 Okwenyu (n 137) 31.  
154 Ibid.  
155 See Article 2.4 of the TBT Agreement.  
156 See Article IV of GATS.
2.5 Substantive Provisions of the TBT Agreement

The TBT Agreement presents common principles that are applicable to all the three disciplines governed by the Agreement.\(^{157}\) The TBT Agreement specifically makes provision for the non-discrimination principle, prevention of unnecessary obstacles to trade, transparency, use of international standards, equivalence and mutual recognition. Apart from these provisions the TBT Agreement recognises the difficulties that developing countries may face in trying to implement the Agreement. Hence, it makes provision for technical assistance upon request to developing countries. Moreover the TBT Agreement gives developing countries special rights that allow developed countries to treat developing countries more favourable than other member states through the special and differential treatment.\(^{158}\)

2.5.1 Avoidance of Unnecessary Obstacles to Trade

The TBT Agreement acknowledges the existence of reasonable differences of geographical, taste, culture and other factors between countries.\(^{159}\) Consequently, it gives Member States flexibility in the preparation, adoption and application of their technical regulations, standards and conformity assessment procedures.\(^{160}\) Member States are free to take any measures necessary to ensure that products exported from other countries do not harm their health, animals, environment, plants and security.\(^{161}\) However this regulatory flexibility is permitted only to the extent that technical regulations, standards and conformity assessment procedures prepared or adopted do not create unnecessary obstacles to trade.\(^{162}\)

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\(^{157}\) Appleton (n 61) 19.  
\(^{160}\) See the sixth recital of preamble to the TBT Agreement which states that “recognising that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.”  
\(^{161}\) Nemoroff and Bao (n 159) 19.  
\(^{162}\) See the fifth recital to the preamble of the TBT Agreement.
Article 2.2, Annex 3E and Article 5.1.2 provides for the same obligation that, technical regulations, standards and conformity assessment procedures should not be prepared, adopted or applied in a way that creates unnecessary obstacles to trade.\textsuperscript{163} A regulation or standard is considered to create an obstacle to trade if it is more trade restrictive than necessary to achieve a particular policy objective, or when it does not fulfil a legitimate objective.\textsuperscript{164} Trebilcock and Epps maintains that a regulation is more trade restrictive than necessary when the objective pursued by that regulation can be attained through less stringent measures having less trading effects.\textsuperscript{165}

More stringent procedures than are necessary to check whether a product conforms to the domestic regulations of the importing country may create unnecessary obstacles to international trade.\textsuperscript{166} This suggests that when the conditions that led a country to implement technical regulations or standards are no longer in existence or have changed then the regulation should be removed.\textsuperscript{167} However, in practice, it is difficult to discern which regulations are no longer necessary as member states can insist that the measures are necessary when in actual fact they are no longer necessary. This practice is usually done in order to protect domestic industries. In trying to curb for this problem, the TBT Agreement encourages member states to use international standards, where an international standard is used, it is presumed that it does create unnecessary barriers to trade.\textsuperscript{168}

### 2.5.2 Principle of non-discrimination

\textsuperscript{163} Article 2.2 states that “members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, \textit{inter alia:} national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, \textit{inter alia:} available scientific and technical information related processing technology or intended end-uses of products”; Paragraph 3 of Annex 3 stipulates that “the standardising body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade”; Article 5.1.2 states that “conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, \textit{inter alia,} that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.”

\textsuperscript{164} Epps and Trebilcock (n 60) 17.
\textsuperscript{165} Ibid.
\textsuperscript{166} See Article 2.5 of the TBT Agreement; See also Marantis Demetros, ‘Report on technical barriers to trade’ (2013) 33 <https://ustr.gov/sites/default/files/2013%20TBT.pdf> accessed 16 September 2015.
\textsuperscript{167} Epps and Trebilcock (n 60) 17.
\textsuperscript{168} Ibid.
The principle of non-discrimination constitutes the ‘backbone’ of the multilateral trading system.169 The TBT Agreement applies the GATT principle of non-discrimination to technical barriers to trade.170 Although technical barriers to trade are essential for achieving such public goals as protecting health, animals, environment or security, such regulations or conformity procedures can act as barriers to trade when they are implemented in a discriminatory manner.171

The principle of non-discrimination under the TBT Agreement includes the most favoured nation and national treatment obligations in article 2.1, 5.1.1 and paragraph D of the Code of Good Practice.172 The TBT Agreement mandates Member States to prepare adopt and apply technical barriers to trade in a way that gives producers of like products from other countries the same opportunities and treatment given to domestic producers.173 A regulation which states that products from other countries must meet certain conditions whilst that regulation does exist for domestically produced goods would violate the non-discrimination principle.174 Moreover, a regulation that discriminates between member states violates the TBT Agreement.175

Conformity assessment systems are prohibited from creating unjustified distinctions for procedures to be followed by like products originating from different markets.176 This means that countries must not subject similar products to different tests based on their sources of supply.177 This may create an unfair advantage to domestic manufacturers over foreign

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171 Ibid.
172 Article 2.1 states that “members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”; Article 5.1.1 states that “conformity assessment procedures must be undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products”. paragraph D of the Code of Good Practice states that the “standardising body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade The standardising body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”
173 Motaal (n 169) 10.
174 Ibid.
175 Ibid.
177 Motaal (n 169) 10.
business as they do not have to pay revenues for their products to access market in that country.\textsuperscript{178} This practice is condemned by the TBT Agreement as it promotes unfair competition in the trading arena.

2.5.3 International standards

The TBT Agreement is cognisant of the importance of international standards for the improvement of production and facilitation of international trade.\textsuperscript{179} Thus it encourages Member states to use international standards when drafting national regulations.\textsuperscript{180} In order to ensure the effectiveness of international standards, the TBT Agreement promotes harmonisation of technical regulations and standards by Member states.\textsuperscript{181} Harmonisation reduces the trade restrictive effects of standards and technical regulations by minimising the variety of requirements that producers and exporters are supposed to meet in order to sell in foreign countries.\textsuperscript{182} It can therefore be concluded that the use of international standards helps to boost regulatory alignment on a global scale.\textsuperscript{183}

Article 2.4 of the TBT Agreement encourages governments to make use of relevant international standards as the basis for creating domestic regulations and to follow relevant international guides and recommendations when crafting their conformity assessment procedures. Moreover, governments are required to participate in the preparation of international standards and elaboration of international recommendations and guides of conformity assessment procedures by standardising bodies.\textsuperscript{184} Exceptions are allowed when international standards, guides or recommendations are not relevant to fulfil the state’s policy objective.\textsuperscript{185}

However, arguments have been raised against harmonisation of international standards. It has been argued that developed countries are concerned that harmonisation will coerce them to adjust to lesser standards of developing countries.\textsuperscript{186} On the other hand, developing countries are also of the concern that higher standards in developed countries will hinder developing

\textsuperscript{178} Motaal (n 169) 4.
\textsuperscript{179} See the preamble of the TBT Agreement.
\textsuperscript{180} Wijkström and McDaniels (n 95) 3.
\textsuperscript{181} Ibid.
\textsuperscript{182} Trade law center and others (n 109) 395.
\textsuperscript{183} Wijkström and McDaniels (n 95) 3.
\textsuperscript{184} See article 2.4 and 5.4 of the TBT Agreement.
\textsuperscript{185} See Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards, paragraph F.
\textsuperscript{186} Mayeda (n 38) 738.
countries’ to have access to global markets.\textsuperscript{187} Article 12.4 does not require developing countries to make use of international standards if they are not appropriate with their financial, development and trade needs. This provision can be seen as recognition by the TBT Agreement of the difficulties that developing countries might face in the implementation of international standards. On the other hand, this provision might isolate developing countries from the international trading arena. Developing countries due to their financial and developmental needs might end up producing substandard goods that are not accepted on international markets.

\textbf{2.5.4 Transparency}

The rationale for emphasis of transparency in the TBT Agreement lies in the most favoured nation and national treatment.\textsuperscript{188} This is so because transparency allows member countries to monitor each other’s compliance with relevant duties contained in the TBT Agreement.\textsuperscript{189} In the negotiations leading to the creation of the TBT Agreement member states foresaw that the high cost or unreliability of acquiring information could act as a barrier to trade, hence Article 5.1.2 specifies the need for transparency in the regulation of technical barriers to trade in order to avoid unnecessary obstacles to international trade.\textsuperscript{190}

Transparency requirements include publication at an early stage of a proposed measure and a notification to other Member states through the WTO Secretariat that provides an indication of the purpose of the new technical regulation, standard or conformity assessment procedures.\textsuperscript{191} The TBT Agreement further requires a Member state to give other states a chance to comment on a proposed technical regulation or standard before their enactment.\textsuperscript{192} The TBT Committee has recommended at least sixty days before the enactment.\textsuperscript{193} Moreover, the Code of Good Practice mandates standardising bodies to provide at least 60 days for

\textsuperscript{187} This argument makes clear the tension that exists between developing countries and developed countries regarding harmonisation. Developed countries are concerned with “adopting progressive precautionary regulatory measures” while developing countries are concerned with economic and technical hardships in implementing the standards created by developed countries; See Mayeda (n 35) 739.


\textsuperscript{189} Ibid.

\textsuperscript{190} Ibid.

\textsuperscript{191} See Article 2.9.1 and 2.9.2 of the TBT Agreement.

\textsuperscript{192} See Article 2.9.2 of the TBT Agreement.

comments to interested parties before a draft standard is made final. The TBT Agreement also allows regulations to be notified after enactment if urgent circumstances of health, safety of animals, environment and plants arise.

The TBT Agreement requires each country to make several notifications to ensure that other Member states are informed of a Member state’s technical regulations, standards and conformity assessment procedures as well as changes affecting these matters. In addition, members are required to notify Member states through the WTO Secretariat whenever an international standard, guide or recommendation does not exist or where the regulation of that country differ from a relevant international standard, guide or recommendation. Member states are also obliged to notify other states if the proposed regulation or procedure is likely to have a significant impact on their trade. Thus, if used properly the transparency provisions should benefit rather than hinder the free flow of goods into the marketplace because producers would be aware of the requirements they need to meet before manufacturing their goods.

Member states are further obliged to have necessary infrastructure for the implementation of their transparency obligation by obliging members to clearly designate the bodies responsible for notification, responses to queries and provision of relevant documentation. The TBT Agreement also requires that each country have a contact point registered with the WTO so that additional queries or questions can be addressed including those adopted technical regulations and standards, the location of notices and details of conformity assessment procedures. Transparency also enables regulatory learning among Member states. Member states can learn on how other members have adjusted their regulatory regimes in order to conform to the model for regulation reflected in the TBT Agreement. Wijkström and McDaniels noted that this is often a difficult and burdensome task especially for

194 See Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards paragraph L.
195 Local Governments at the level directly below central government are required to notify technical regulations and conformity assessment procedures which have not been previously notified by their central government authorities. See Article 3.2 and 7.2 of the TBT Agreement.
196 See Article 15.2 of the TBT Agreement.
197 See Articles 2.9 and 5.6 of the TBT Agreement.
198 Ibid.
199 See Article 10.10 of the TBT Agreement.
200 See article 10 of the TBT Agreement.
201 Epps and Trebilcock (n 60) 153.
202 Ibid.
developing and least developed countries as they do not have the necessary resources to keep on testing for a better model.203

2.5.5 Equivalence and Mutual recognition

The idea for the negotiations on equivalence and mutual recognition as trade facilitating tools is the point that technical barriers to trade may cause impediments to international trade.204 The TBT Agreement thus encourages members to accept foreign technical regulations as equivalent to their own technical regulations provided they aim to fulfill the same objectives.205 In addition Member states are encouraged to engage into negotiations for mutual recognition of conformity assessment systems through Mutual Recognition Agreements (MRA).206 This means that the countries involved in the negotiations accept each other’s results as equivalent to theirs.207 Therefore, it can be concluded that mutual recognition and equivalence reduces costs and saves time for businesses as they would not have to go through repeated testing for the same product. However, in order for MRAs to be successful, a degree of confidence in the conformity assessment systems of other countries may be needed.208

2.5.6 Technical Assistance

The TBT Agreement attempts to create a fair trade environment to avoid some member countries from being excluded from the trading arena because of their inability to set technical regulations standards and conformity assessment procedures.209 The TBT Agreement hence encourages Member states to provide other countries particularly developing countries with technical assistance if requested.210 Effective technical assistance
has thus the potential of increasing effectiveness in the implementation of the TBT Agreement by developing country members.\footnote{Page and Kleen (n 158) 7.}

Gujudhur argues that much of the technical assistance provided by WTO has not been effective in integrating developing countries into national activities.\footnote{Gujudhur (n 48).} African countries have been provided with considerable training on certification procedures but there are no resources to use this training for.\footnote{Ibid.} Gujudhur compared the situation to training a carpenter without giving him or her tools to work with.\footnote{Ibid.} Different domestic, social, institutional and economic situations in developing countries will mean different institutional needs.\footnote{Mayeda (n 38) 763.} Hence technical assistance should be problem based in order to address challenges being faced by developing countries in trying to implement the TBT Agreement.\footnote{Gujudhur (n 48).}

\subsection*{2.5.7 Special and differential Treatment}

Special and differential treatment provisions in the multilateral trading system emerged as a recognition of the specific problems that developing countries were facing in their effort to integrate with global markets for goods, services, capital and labour.\footnote{Ibid.} The TBT Agreement contains provisions affording special rights to developing countries. The special and differential provisions under Article 12 of the TBT Agreement allows developing and least developed countries to be treated favourably than other states by developed countries.

Article 12.4 of the TBT Agreement states that the application of international standards should also be applied while recognising the developmental and trade needs of developing country members. This provision has been justified on the basis that it allows developing countries to keep on using production methods that are in line with their development.\footnote{Stephenson (n 100) 41.} However, this provision might on the other hand be seen as segregating developing countries from globalisation. By adopting national regulations that contradict with international standards, developing countries risk producing goods that will not be accepted in the global
market. According to Stephenson this system has reduced the efficiency of production processes in developing countries which has remained isolated form developed countries. However, it can be noted that developing countries such as China, India, Brazil and South Korea have since increased their competitive edge in international trade thereby competing against some of the large firms in developed countries. However this progress has been noted as uneven across developing countries. Developing countries particularly in Middle East and Africa have remained isolated in global trade.

2.5.8 The TBT Committee

The TBT Agreement establishes a committee which is responsible for the administration of the TBT Agreement. Article 15.3 of the TBT Agreement mandates the TBT Committee to meet annually in order to review the implementation and the operation of the TBT Agreement. Moreover, Article 15.4 requires that “after every three years the TBT Committee must conduct a review of the implementation and operation of the TBT Agreement with a view of recommending adjustments of the rights and obligations of the Agreement where necessary.” The TBT Committee consists of members from each WTO Member states and all the members are entitled to participate. The TBT Committee has so far concluded seven triennial reviews in November 1997, November 2000, November 2003, November 2006, November 2009, November 2012 and December 2015. In each of these reviews covered implementation and administration of the agreement, good regulatory practice, conformity assessment procedures, transparency, technical assistance and special and differential treatment at national level.

2.5.8.1 First triennial review

In its first review, the TBT Committee examined the status of implementation of the TBT Agreement by Member states and evaluated the extent to which the TBT Agreement has

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219 Ibid.
220 Ibid.
222 Ibid.
223 See article 13 of the TBT Agreement.
facilitated trade in all Member states.\textsuperscript{224} In the first three years of operation, the TBT Committee found in overall that there was the capacity and potential of the Agreement to advance the objectives of GATT 1994, by ensuring that technical barriers to trade do not create unnecessary obstacles to international trade.\textsuperscript{225} However, the Committee discovered that difficulties existed in various areas regarding the operation and implementation of the Agreement.\textsuperscript{226}

The committee identified problems regarding the implementation and administration of the TBT Agreement by Member states under Article 15.2.\textsuperscript{227} The committee noted that only fifty-eight members had submitted their statements regarding the implementation of the TBT Agreement.\textsuperscript{228} Consequently, the committee was not satisfied with the status of implementation and pointed out two main problems namely, the submission of the statements, and the arrangements for the implementation and administration of the Agreement at a national level.\textsuperscript{229} In order to ensure effective implementation of the TBT Agreement, Member states were encouraged to exchange information, experience and technical assistance to Member states seeking it.\textsuperscript{230}

Furthermore, the committee was not satisfied with the implementation and operation of the Code of Good Practice for the Preparation, Adoption and Application of Standards by Standardising Bodies.\textsuperscript{231} Only eighty-four standardising bodies had notified their acceptance of the Code.\textsuperscript{232} It is important to point out that the first triennial review was conducted in 1997; three years after the TBT Agreement had come into force. It can therefore be concluded that Member states particularly developing countries were not yet fully acquainted with the provisions of the TBT Agreement hence the need for time to align their domestic regulations with the TBT Agreement.

\textsuperscript{224} Minutes of the Committee on Technical Barriers to Trade on the First triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade G/TBT/5 para 4 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/5.pdf> accessed on 29 June 2016.
\textsuperscript{225} Ibid.
\textsuperscript{226} Ibid.
\textsuperscript{227} Article 15.2 provides that ‘Each member shall, promptly after the date on which the Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of the Agreement.’
\textsuperscript{228} G/TBT/5 para 6.
\textsuperscript{229} Ibid.
\textsuperscript{230} Ibid.
\textsuperscript{231} G/TBT/5 para 3.
\textsuperscript{232} Ibid.
2.5.8.2 Second Triennial Review

The second triennial review was more focussed on developing countries and least developed countries. The TBT Committee acknowledged that difficulties faced by developing countries in implementing the TBT Agreement maybe similar, however the committee noted that needs and applicable solutions to solve the difficulties may vary from country to country. Accordingly, developing countries were encouraged to request for technical assistance which was useful and practical to address difficulties in their context.

The Committee also encouraged international cooperation and coordination of trade, technical regulations and conformity assessment procedures between domestic and international institutions. Cooperation was also encouraged at domestic level to increase awareness of the TBT requirements. It can therefore be suggested that cooperation between regional and domestic institutions is important as this can encourage good regulatory practice among Member states. This cooperation can be seen as an effective way of reducing different regulations that vary across the region. Consequently, costs are reduced for businesses thereby ensuring the effective implementation of the TBT Agreement.

The TBT Committee repeated the significance of the transparency provisions within the TBT Agreement particularly provisions relating to notifications of draft technical regulations and conformity assessment procedures and the establishment of enquiry points mandated by Articles 2.9.2, 2.10.1, 5.6.2, 5.7.1, 10.1 and 10.2 of the TBT Agreement. Notifications at this stage were increasing. The Committee encouraged Member states to be sympathetic to appeals that required an extension of the comment period beyond the prescribed sixty days especially when the notifications are of interest to developing countries. It can therefore be suggested in this regard that the TBT Committee is making an effort to recognise the difficulties that developing countries might face in the participation of the implementation of the TBT Agreement.

234 Ibid.
235 Ibid.
236 Ibid.
237 Ibid.
238 Ibid.
239 G/TBT/9 para 11.
240 Ibid.
In order for international standards to make a significant impact in the facilitation of trade, Member states were encouraged to participate in the elaboration and adoption of international standards. Consequently, the committee adopted guidelines concerning transparency, openness, impartiality and consensus, relevance, effectiveness and coherence, in order to improve the quality of international standards thereby ensuring the effective application of the TBT Agreement. Member states were encouraged to use voluntary international standards rather than separate domestic regulations. This practice may lessen the regulatory burden that might be faced by SMEs in trying to meet domestic regulatory requirements that may vary across markets.

2.5.8.3 Third triennial review

The Committee reviewed the operation and the implementation of the TBT Agreement focussing on regulatory practices, transparency, technical assistance, and Special and Differential treatment. The review highlighted technical assistance as an area of concern. Accordingly, the committee emphasised that efficient technical assistance may be resourceful in improving the implementation of the TBT Agreement. However, it was noted that lack of awareness, capacity and infrastructure hinders the implementation of the TBT Agreement. In order to make technical assistance effective, the TBT Committee agreed to develop a demand-driven technical cooperation programme. Criticisms have been advanced regarding the effectiveness of technical assistance. It might be the reason why the TBT committee had to focus on its effectiveness in the third triennial review. This effectiveness is however based on developing countries asking for assistance and implementing it.

241 G/TBT/9 para 20.
242 Ibid.
243 Ibid.
244 Minutes of the Committee on Technical Barriers to Trade on Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade’ G/TBT/13 para 42 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/13.pdf> accessed on 29 June 2016.
245 Ibid.
246 G/TBT/13 para 42.
247 Ibid.
248 Technical assistance has often been criticised as being supply-driven, expensive, poorly planned and integrated, and failing to promote country ownership. See Governance and Social Development Resource Centre, ‘Changing approaches to technical assistance’ (2009) 1 <http://www.gsdrc.org/docs/open/hd586.pdf> accessed 29 June 2016.
2.5.8.4 Fourth triennial review

The TBT Committee found good regulatory practices as a priority for Member states to further the facilitation of implementing the TBT Agreement.\textsuperscript{249} The committee reiterated the need for transparency, openness and accountability in the development and application of the TBT Agreement.\textsuperscript{250} According to the TBT Committee this environment can create a stable climate for businesses by maintaining a competitive environment that cuts unnecessary administrative costs which may deter small businesses from engaging in international trade.\textsuperscript{251}

The committee celebrated to the fact that regional and multilateral recognition arrangements have been reached between accreditation bodies.\textsuperscript{252} The Committee further noted that regional and international organisations have been developed with the aim of instituting networks of conformity assessment bodies whose effectiveness was and is still based upon the participation of all Member states.\textsuperscript{253} Thus it was concluded that effective international and regional MRAs can facilitate the acceptance of conformity assessment procedures.\textsuperscript{254} This can be noted as a remarkable improvement in the implementation of the TBT Agreement. This improvement might be attributed to the fact that Member states were increasingly realising the benefits of trade liberalisation in a globalised era hence the establishment of MRAs within Regional Trade Agreement (RTAs).

2.5.8.5 Fifth triennial review

The TBT Committee encouraged Member states to share experiences gained from regulatory practices for the effective implementation of the TBT Agreement.\textsuperscript{255} Furthermore, Member states were encouraged to participate in technical cooperation activities especially under

\textsuperscript{249} Minutes of the Committee on Technical Barriers to Trade on Fourth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade’ G/TBT/19 para 7 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/19.pdf> accessed on 29 June 2016.
\textsuperscript{250} Ibid.
\textsuperscript{251} G/TBT/19 para 32.
\textsuperscript{252} G/TBT/19 para 43.
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid.
\textsuperscript{255} Minutes of the Committee on Technical Barriers to Trade on Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade G/TBT/26 para 59 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/26.pdf> accessed on 29 June 2016.
conformity assessment procedures. Member states, regional and international organisations were encouraged to engage in capacity building activities which are aimed at improving technical infrastructure. The committee also encouraged the use outreach programmes in order to build awareness on the importance of standardisation activities. However it was noted that these outreach programmes should be priority based.

2.5.8.6 Sixth triennial review

The TBT Committee reiterated that good regulatory practice contributes to the successful implementation of the substantive provisions of the TBT Agreement. Furthermore it was noted that good regulatory practices play an important role in avoiding unnecessary obstacles to international trade that may be created by technical barriers to trade. In order to ensure good regulatory practices the Committee developed a non-exhaustive list of voluntary mechanisms and related principles of good regulatory practices. This non exhaustive list is meant to guide Member states in the effective implementation of the TBT Agreement.

The Committee emphasised the importance of exchanging information, the use of international standards and approaches that may be used to facilitate acceptance of conformity assessment results. The committee further encouraged Member states to ensure the effective application of the Code of Good Practice for the Preparation, Adoption and Application of Standards and Article 12 of the TBT Agreement.

2.5.8.7 Seventh triennial review

Ibid.
Ibid.
Ibid.
Ibid.

Minutes of the Committee on Technical Barriers to Trade on Sixth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade G/TBT/32 para 4 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/32.pdf> accessed on 29 June 2016.
Ibid.
Ibid.
Ibid.

The list included (i) transparency and public consultation mechanisms; (ii) mechanisms for assessing policy options, including the need to regulate; (iii) internal (domestic) coordination mechanisms; (iv) approaches to minimizing burdens on economic operators (v) implementation and enforcement mechanisms (vi) mechanisms for review of existing technical regulations and conformity assessment procedures and, (vii) mechanisms for taking account of the special development, financial and trade needs of developing Members in the preparation and application of measures, with a view to ensuring that they do not create unnecessary obstacles to exports from developing Members; See G/TBT/32 para 4.
Ibid.
G/TBT/32 para 7.
In this review the committee concentrated on exchanging information to enhance good regulatory practices. A number of Member states shared their experiences on transparency and consultation mechanisms. The purpose of exchanging information is to provide member states with an opportunity to share experiences and emerging regulatory concerns. This might provide other countries with solutions on how to deal with some of the challenges that other countries managed to deal with.

2.6 Conclusion

From the above historical background, it can be noted that the regulation of technical barriers trade became a necessity as a result of the frequent use of technical barriers to trade by WTO member states to further protectionist ends. The rationale for adopting trade protectionist policies was mainly driven by the desire to protect domestic industries. As a result the Tokyo Standards Code the first multilateral agreement regulating the use of technical barriers to trade was adopted. However, due to some weaknesses of the GATT 1947 the Code could not function effectively. There was therefore a need for stronger measures which came after the Uruguay Round through the TBT Agreement.

At the heart of the TBT Agreement are principles of transparency, non-discrimination, harmonisation, technical assistance, special and differential treatment, equivalence and mutual recognition. These principles support the overall objective of the TBT Agreement of ensuring that technical barriers to trade do not create unnecessary obstacles to international trade. The TBT Agreement therefore aims to strike a balance between, the desire to avoid creating unnecessary obstacles to international trade and, the recognition of member states right to regulate in order to protect health, plants, animals, environment and national security. The TBT Agreement also gives the TBT Committee the mandate of reviewing the implementation and the administration of the TBT Agreement. The TBT Committee has since conducted seven reviews and in each of these reviews the Committee aims to ensure the better implementation of the TBT Agreement.

After discussing the origins, scope and the content of the TBT Agreement, it is necessary to examine how the WTO Dispute Settlement Body (DSB) has interpreted the substantive

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266 Minutes of the Committee on Technical Barriers to Trade on the Seventh Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade G/TBT/37 para 2.2 <https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/225431/q/G/TBT/37.pdf> accessed on 29 June 2016.
provisions of the TBT Agreement. Therefore the next chapter presents a discussion on the interpretation of the TBT Agreement by the Dispute Settlement Body in *US - Tuna Dolphin II* and *US - Clove Cigarettes* and evaluate the extent to which the interpretations provide guidance for the implementation of the TBT Agreement by SADC member states.
Chapter Three

The interpretation of Agreement on Technical Barriers to Trade: Lessons from US - Tuna Dolphin II and US - Clove Cigarettes.

3.1 Introduction

In 2012, the DSB issued three important decisions under the TBT Agreement in US – Clove Cigarettes, US - Tuna II and US - COOL. This was the first opportunity that the Appellate Body (AB) had to interpret the implementation of the TBT Agreement. Accordingly, these three decisions gave a new life to the TBT Agreement, a WTO Agreement that had remained for long in the shadow of “hot topics” in international trade debate. In these disputes the DSB was faced with the task of clarifying the limits that exist under the TBT Agreement in the regulation of trade by Member states. Failure to clarify this limit might have undermined the prospects of WTO Member states to benefit from trade liberalisation due to the sometimes irresistible desire of Member states to protect their domestic industries by discriminating against foreign goods. Consequently valuable jurisprudence was created on how the TBT Agreement should be interpreted and applied in future disputes.

Despite most developing countries particularly those from Africa being absent in the dispute settlement forum, decisions made by the DSB are of great importance as they provide guidance for governments and relevant stakeholders in implementing the provisions of the TBT Agreement. Focusing on US – Clove Cigarettes and US – Tuna Dolphin II, this chapter aims to assess whether the DSB has managed to provide guidance for the interpretation and implementation of the TBT Agreement. The chapter will further assess whether the DSB has

271 Ibid.
managed to clarify the provisions of the TBT Agreement in a manner that balances trade liberalisation with sufficient regulatory autonomy.

3.2 United States Measures Concerning the Importation, marketing and sale of Tuna and Tuna products.

3.2.1 Factual background

Mexico challenged the United States Code, Title 16, Section 1385 of the Dolphin Protection Consumer Information Act (DPCI A), the United States (US) Code of Federal Regulations, Title 50, Section 216.91 and Section 216.92 and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*272 (hereinafter referred to as “the dolphin safe labelling provisions.”)

The dolphin safe labeling provisions set out the requirements relating to when tuna products sold in the US may be labelled as dolphin-safe.273 This label could only be given upon fulfillment of certain conditions which included documentary evidence that varied depending on the area where the tuna was harvested, the type of vessel used and the fishing method used to harvest the tuna or the tuna in the tuna product.274 Specifically, tuna caught by setting on dolphins did not qualify for a dolphin-safe label in the US, irrespective of whether the fishing method was used inside or outside the Eastern Tropical Pacific Ocean (ETP).275 As a result, Mexico claimed that these legal instruments were inconsistent with US obligations under Article 2 of the TBT Agreement and Articles I and III of the GATT 1994.276 However, this label was not compulsory for the importation or sale of tuna or tuna products in the US.277

In its report, the panel concluded that the dolphin safe labelling provisions constituted a technical regulation within the meaning of annex 1.1 to the TBT Agreement.278 Furthermore, the panel held that the provisions were not inconsistent with Article 2.1 because Mexico had failed to establish that the measure affords treatment less favourable to Mexican tuna

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272 United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).
273 Ibid.
274 Ibid.
275 Ibid.
277 Ibid.
278 Ibid.
products than to US tuna products and tuna products originating in other countries.\textsuperscript{279} With respect to the claim that the US measure was in violation of Article 2.2, the panel noted that the measure was more trade restrictive than necessary to fulfill the legitimate objective pursued.\textsuperscript{280} The panel further noted that the International Dolphin Conservation Program (AIDCP) is a relevant international standard in accordance with Article 2.4 of the TBT Agreement, but that Mexico had failed to prove that it was an effective and appropriate means to fulfill the US’ objectives at its chosen level of protection.\textsuperscript{281} Following this report both Mexico and US appealed against it.

### 3.2.2 Appellate Body Findings

#### 3.2.2.1 Interpretation of Technical Regulation

In its appeal, US requested the AB to reverse the Panel’s finding that the measure constituted a technical regulation within the meaning of annex 1.1 of the TBT Agreement.\textsuperscript{282} The US contended that compliance with the measure was not mandatory hence the measure could not be regarded as a technical regulation.\textsuperscript{283} According to the US, compliance with a requirement is obligatory only if the requirement to use the dolphin safe label is a condition to put the product on the market.\textsuperscript{284} This interpretation according to the US is in line with both the definition of both technical regulation under Annex 1.1 and the definition of a standard under Annex 1.2.\textsuperscript{285}

Furthermore, the US argued that the panel must not only consider that the document prescribes conditions for the use of a label, but must also consider whether these conditions are regulated in a binding way.\textsuperscript{286} Enforcement according to the US does not differentiate technical regulations from standards because labelling requirements can be enforced irrespective of whether they are set in a standard or technical regulation.\textsuperscript{287} Specifically, the US submitted that the Panel erred in relying on specific enforcement possibilities in order to

\textsuperscript{279} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 3.
\textsuperscript{280} Ibid.
\textsuperscript{281} Ibid.
\textsuperscript{282} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 11.
\textsuperscript{283} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 12.
\textsuperscript{284} Ibid.
\textsuperscript{285} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 12.
\textsuperscript{287} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 15.
distinguish the measure from a standard. This alone according to the US does not make compliance with a labelling requirement mandatory because declining access to a label for failure to satisfy the conditions required for that label is inherent in the term labelling requirement.

Before addressing on the definition of a technical regulation under Annex 1.1 of the TBT Agreement, the AB recalled the decisions in EC – Asbestos\textsuperscript{290} and EC – Sardines\textsuperscript{291} in which it was held that in order to fall under technical regulation, “a document must apply to an identifiable product or group of products, must lay down one or more characteristics of the product and compliance with the product characteristics must be mandatory.”\textsuperscript{292} The AB then proceeded to look at the definition of a technical regulation under Annex 1.1 of the TBT Agreement. In its examination, the AB noted that the second sentence to the definition of a technical regulation in Annex 1.1 is similar to the second sentence of the definition of a standard in Annex 1.2 of the TBT Agreement.\textsuperscript{293} However, the second sentence in each of these provisions does not specify whether a measure constitutes a technical regulation or a standard.\textsuperscript{294} Therefore terminology, symbols, packaging, marking and labelling requirements may be the subject-matter of either technical regulations or standards.\textsuperscript{295}

According to the AB the fact that labelling requirements may stipulate conditions that must be complied with in order to use a label does not automatically suggest that the measure is a technical regulation within the meaning of Annex 1.1.\textsuperscript{296} In order to discern whether a document is a standard or a technical regulation the AB noted that additional characteristics of that measure must be examined.\textsuperscript{297} These characteristics may include assessing whether the measure at issue is a law or a regulation, whether it prescribes or forbids specific conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure.\textsuperscript{298} Thus according to

\textsuperscript{288} Ibid.
\textsuperscript{289} Appellate Body Report, US-Tuna II (n 268 above) para 15.
\textsuperscript{292} Appellate Body Report, US-Tuna II (n 268) para 183.
\textsuperscript{293} Appellate Body Report, US-Tuna II (n 268) para 187.
\textsuperscript{294} Ibid.
\textsuperscript{295} Ibid.
\textsuperscript{296} Appellate Body Report, US-Tuna II (n 268 above) para 185.
\textsuperscript{297} Appellate Body Report, US-Tuna II (n 268 above) para 188.
\textsuperscript{298} Appellate Body Report, US-Tuna II (n 268 above) para 188.
the AB a determination of whether a measure constitutes a technical regulation must be made in the light of the features of the measure and the circumstances of the case.\textsuperscript{299}

In assessing whether the measure at issue was a technical regulation, the AB further noted that the measure was a law that was enacted by the US Congress.\textsuperscript{300} Moreover, regulations relating to the use of the dolphin-safe label were set out in the United States Code of Federal Regulations.\textsuperscript{301} Furthermore, it was noted that the use of the dolphin safe label was rested upon the availability of documentary evidence which differed depending on the area where the tuna product was harvested, the type of vessel used and the fishing method used to harvest the tuna.\textsuperscript{302} The US therefore prohibited any reference to dolphins, porpoises or marine mammals on the label for tuna products if the tuna in such products did not conform to the labelling conditions contained in the DPCIA.\textsuperscript{303} The US further provided specific enforcement mechanisms and imposed sanctions in case of wrong labelling.\textsuperscript{304} Accordingly, the AB concluded that the US measure covered the definition of what dolphin safe means in relation to tuna products in the US.\textsuperscript{305} Therefore, the measure was a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.\textsuperscript{306}

\textbf{2.2.2.2 Article 2.1 of the TBT Agreement}

In its appeal Mexico contended that the Panel erred in its interpretation and application of treatment no less favourable thereby reaching a faulty conclusion that the US dolphin-safe labelling provisions were not inconsistent with Article 2.1 of the TBT Agreement.\textsuperscript{307} According to Mexico a denial of an advantage can lead to a denial of competitive opportunities which then ultimately lead to a violation of Article 2.1.\textsuperscript{308} Mexico argued that the applicable test was to assess whether the US measure modified the conditions of competition in the US market to the detriment of Mexican imported tuna products.\textsuperscript{309}

\begin{footnotes}
\item[300] Title 50, Section 216, of the United States Code of Federal Regulations.
\item[303] Ibid.
\item[304] Ibid.
\item[305] Ibid.
\item[307] Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 82.
\item[308] Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 83.
\item[309] Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 84.
\end{footnotes}
However, for US, the emphasis should be on whether a measure modifies the conditions of competition based on the origin of the imported product.\textsuperscript{310}

The AB held that in deciding whether there has been a violation of Article 2.1 of the TBT Agreement, three elements must be present.\textsuperscript{311} Firstly, the measure at issue must constitute a technical regulation within the meaning of Annex 1.1.\textsuperscript{312} Secondly, the imported products and domestic products must be like products.\textsuperscript{313} Lastly, the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries.\textsuperscript{314} The AB emphasised that the determination of whether there has been a violation of Article 2.1 is not based on whether the imported products could get an advantage, but rather it includes an analysis of whether the contested measure modifies the conditions of competition to the detriment of imported products and whether any detrimental impact reflects discrimination against the Mexican tuna products.\textsuperscript{315} In particular, what should be examined is whether the US measure was even-handed in addressing the risks to dolphins arising from different fishing methods in different areas of the ocean.\textsuperscript{316}

In light of that analysis, the AB had to examine whether governmental intervention modified the conditions under which Mexican tuna products and the US tuna products competed in the US market.\textsuperscript{317} In answering this question the AB noted that it was the measure at issue that established the requirements under which a product can be labelled “dolphin-safe” in US.\textsuperscript{318} Moreover, while it was the decision of the consumers whether to purchase dolphin-safe products, the AB agreed with the Panel that it was the measure that controlled access to the label and allowed consumers to express their preferences for dolphin safe tuna.\textsuperscript{319} Therefore an advantage was afforded to products eligible for the label in the form of access to the label.\textsuperscript{320}

The AB therefore concluded that it was the government action in the form of adoption and application of the US “dolphin-safe” labelling provisions that has modified the conditions of

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\item \textsuperscript{310} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 209.
\item \textsuperscript{311} Appellate Body Report, \textit{US-Tuna II} (n 268 above) para 202.
\item \textsuperscript{312} Ibid.
\item \textsuperscript{313} Ibid.
\item \textsuperscript{314} Ibid.
\item \textsuperscript{315} Appellate Body Report, \textit{US-Tuna II} (n 268) para 221.
\item \textsuperscript{316} Appellate Body Report, \textit{US-Tuna II} (n 268) para 232.
\item \textsuperscript{317} Appellate Body Report, \textit{US-Tuna II} (n 268) para 237.
\item \textsuperscript{318} Ibid.
\item \textsuperscript{319} Appellate Body Report, \textit{US-Tuna II} (n 268) para 238.
\item \textsuperscript{320} Ibid.
\end{itemize}
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competition in the market to the detriment of Mexican tuna products, and that the detrimental impact followed from the measure at issue.\textsuperscript{321} The fact that the detrimental impact on Mexican tuna products involved some element of private choice did not negate US of its responsibility under the TBT Agreement, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.\textsuperscript{322}

Accordingly, the AB held that US failed to demonstrate that the detrimental impact of the US measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction.\textsuperscript{323} In particular the AB noted that the US measure addressed adequately the dolphin mortality rate resulting from setting on dolphins in the ETP thus failing to address mortality rate resulting from other fishing methods outside the ETP.\textsuperscript{324} The AB was thus not persuaded that US had demonstrated that the measure was even handed in the relevant respects.\textsuperscript{325} This led to the reversal of the Panel’s decision and hence the conclusion that the US dolphin safe labelling provisions were inconsistent with Article 2.1 of the TBT Agreement.\textsuperscript{326}

\textbf{3.2.2.3 Article 2.2 of the TBT Agreement}

US argued that the Panel erred its application of of Article 2.2 of the TBT Agreement when it held that the US “dolphin-safe” labelling provisions were more trade restrictive than necessary to fulfill their legitimate objectives.\textsuperscript{327} Furthermore, US contended that dolphin label provisions did not address the risks to dolphins outside the ETP since the label applied only to tuna caught inside the ETP.\textsuperscript{328} In addition US pointed out that that the AIDCP label would frustrate the dolphin protection objective because it allowed the practice of setting on dolphins to catch tuna which was harmful to dolphins.\textsuperscript{329} In response to US, Mexico argued that the Panel's finding was correct because the US’ objectives could be fulfilled with a less

\begin{footnotesize}
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\item Appellate Body Report, \textit{US-Tuna II} (n 268) para 239.
\item Ibid.
\item Ibid.
\item Appellate Body Report, \textit{US-Tuna II} (n 268) para 297.
\item Appellate Body Report, \textit{US-Tuna II} (n 268) para 297.
\item Ibid.
\item Ibid.
\item Appellate Body Report, \textit{US-Tuna II} (n 268) para 299.
\item Appellate Body Report, \textit{US-Tuna II} (n 268) para 324.
\item Ibid.
\item Ibid.
\end{enumerate}
\end{footnotesize}
trade-restrictive alternative measure, namely, allowing the AIDCP label and the US “dolphin-safe” label to coexist in the US market.\footnote{Ibid.}

The AB held that an assessment of whether a technical regulation is “more trade-restrictive than necessary” within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a three factors.\footnote{Ibid.} Firstly, the degree of contribution made by the measure to the legitimate objective at issue, the trade-restrictiveness of the measure, and lastly the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective pursued by the Member through the measure.\footnote{Appellate Body Report, *US-Tuna II* (n 268) para 322.} Moreover, the AB noted that there might be a need to compare the measure at issue and other alternative measures in particular the consideration of whether the alternative measure is less trade restrictive, make an equivalent contribution to the legitimate objective taking account of the risks non-fulfillment would create and whether it is reasonably available.\footnote{Ibid.}

In addressing the US appeal, the AB held that the Panel’s analysis was based on an improper comparison.\footnote{Ibid.} The AB noted that the Panel erred in comparing the AIDCP regime rather than the coexistence of the AIDCP rules with the US measure.\footnote{Appellate Body Report, *US-Tuna II* (n 268) para 328.} In particular the AB noted that the Panel should have examined whether the labelling of tuna products complying with the requirements of the AIDCP label would achieve the US’ objectives to an equivalent degree.\footnote{Ibid.} The US measure prohibited the method of “setting on dolphins” thereby making any tuna caught by other methods eligible for the dolphin safe label.\footnote{Appellate Body Report, *US-Tuna II* (n 268) para 330.} In contrast to the alternative measure provided by Mexico, tuna caught by setting on dolphins would be eligible for a dolphin-safe label if the requirements of the AIDCP label have been complied with.\footnote{Appellate Body Report, *US-Tuna II* (n 268) para 328.} The AB therefore reversed the Panel’s decision and found that the US measure was not inconsistent with Article 2.2 of the TBT Agreement.\footnote{Appellate Body Report, *US-Tuna II* (n 268) para 331.}
Article 3.2.2.4 of the TBT Agreement

The US and Mexico each appealed different elements of the Panel's findings under Article 2.4 of the TBT Agreement. In its appeal US contended that the Panel erred in finding that the AIDCP dolphin-safe definition and certification constituted a relevant international standard within the meaning of Article 2.4 of the TBT Agreement in particular the finding that the AIDCP constituted an international organisation under Article 2.4 of the TBT Agreement. US submitted that parties to the AIDCP are parties to an international agreement hence not a body or an organisation. Moreover US stated that the AIDCP did not have recognised activities in standardisation, and that it is not international within the meaning of the TBT Agreement because its membership was and still is not open to all WTO Members. Mexico argued that being invited to accede to the AIDCP is a formality hence membership is open to all members.

The AB noted that the TBT Agreement does not define an international standard, however, it only establishes the characteristics of an international standard under Article 1.2 which defines a standard and Article 1.4 which defines an international body or system. Consequently the AB noted that in order for a standard to qualify as an international standard, it must have been adopted by international standardising bodies that is, a body that has recognised activities in standardisation and whose membership is open to the relevant bodies of at least all Members.

In interpreting the definition of international body or system, the AB noted that “it is not sufficient for the body to be open, or have been open, at a particular point in time; rather, the body must be open at every stage of standards development.” The AB acknowledged that at their discretion the states parties to the AIDCP could invite a WTO Member to join, but it

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341 Ibid.
342 Ibid.
344 Ibid.
345 Annex 1.2 of the TBT Agreement defines a standard as “a document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” Annex 1.4 to the TBT Agreement defines an international body or system as a “body or system whose membership is open to the relevant bodies of at least all Members.” Appellate Body Report, US-Tuna II (n 258) para 351.
was not persuaded that such an invitation was a mere formality, such that it would automatically follow from a WTO Member’s expression of interest in becoming a member.\textsuperscript{348} In light of the provisions for accession to the AIDCP, the AB reversed the Panel’ findings and concluded that the AIDCP is not an international body for the purposes of the TBT Agreement because it is not open to all members.\textsuperscript{349} Moreover, the AB held that AIDCP dolphin-safe definition and certification is not a relevant international standard within the meaning of the TBT Agreement.\textsuperscript{350} The AB therefore agreed with the Panel for different reasons that the measure was not inconsistent with Article 2.4 of the TBT Agreement.\textsuperscript{351}

### 3.2.3 Lessons learnt from \textit{Tuna-Dolphin II}

The \textit{Tuna-Dolphin} case is a classic example of the clash that exists between trade liberalisation and domestic autonomy with respect to the use of domestic policy instruments.\textsuperscript{352} One of the greatest challenges the DSB face in adjudicating disputes is the need to strike a desirable balance between trade liberalisation and domestic regulatory autonomy. It can be submitted from the \textit{US-Tuna II} case that the AB managed to clarify some of the substantive provisions of the TBT Agreement thereby providing clarity on the implementation of the TBT Agreement.

In its examination of Article 2.1 the AB clarified that the test of less favourable treatment should involve an examination of both the effect and the aim of the measure.\textsuperscript{353} In situations where the measure at issue is said to pursue a non-protectionist objective, a panel or tribunal should investigate whether the measure imposes a disparate impact to imports in favour of like domestic goods.\textsuperscript{354} In addition, an examination should be made in order to determine whether this disparate impact arises from the pursuit of a non-protectionist objective.\textsuperscript{355} Therefore in order for trade policies passed by the governments or trade policy makers to pass the Article 2.1 test, they need not only comply with a standard that may seem origin-neutral, but must also be justified by non-protectionist policy aims.

\textsuperscript{348} Appellate Body Report, \textit{US-Tuna II} (n 268) para 385.  
\textsuperscript{349} Appellate Body Report, \textit{US-Tuna II} (n 268) para 399.  
\textsuperscript{350} Appellate Body Report, \textit{US-Tuna II} (n 268) para 399.  
\textsuperscript{351} Appellate Body Report, \textit{US-Tuna II} (n 268) para 401.  
\textsuperscript{353} Ibid.  
\textsuperscript{354} Appellate Body Report, \textit{US-Tuna II} (n 268) para 221.  
\textsuperscript{355} Ibid.
The analysis employed by the AB has further clarified the position under *Dominican Republic – Cigarettes*.356 This clarification according to Zhou should be welcomed because it would be problematic to apply the impossibility test when adjudicating de facto discrimination.357 A measure might therefore be origin-neutral designed in a way that does not make it impossible for imports to satisfy, however this measure may nonetheless impose discriminatory impacts on imports without serving any non-protectionist policy objectives.358 Ambiguity however still exists on how the evidence is to be assessed in relation to the measure’s structure and design in order to come to a conclusion that there is lack of evenhandedness.359

In interpreting the application of Article 2.2, the AB endorsed the view that an examination of whether a measure is in line with Article 2.2 principle necessitates an investigation of whether there is a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective and is reasonably available.360 The AB made it clear that the complainant has the onus of providing the possible alternative measure while the respondent has the burden of proving that the alternative measure provided does not fulfill the objective currently pursued.361

However, the analysis presented by the AB under Article 2.2 has been criticised as too narrow.362 This analysis has made it difficult for complainants to win claims stemming from Article 2.2 because of the emphasis on the “degree” to which an alternative meets a respondent’s objective.363 However, arguments have been made that the AB’s decision to make Article 2.2 difficult to prove while adding emphasis to Article 2.1 was meant to

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356 *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes* WT/DS302/AB/R (2005). The Appellate Body held in *US–Tuna II* that *Dominican Republic – Cigarettes* decision must not be interpreted in a way that implies an impossibility test in determining less favourable treatment under Article 2.1 of the TBT Agreement.

357 Ibid.

358 Ibid.


361 Ibid.


successfully protect regulatory autonomy of countries.\textsuperscript{364} One can suggest that the AB is more comfortable to assess claims under Article 2.1 than 2.2.\textsuperscript{365} It can be submitted that the AB managed to leave room for Member states to regulate trade thereby successfully balancing the interests of international trade and sufficient regulatory autonomy.

In articulating article 2.4 of the TBT Agreement the AB should be commended for elaborating a broader framework for understanding the meaning of international standards thereby offering useful guidance to future disputes.\textsuperscript{366} Moreover, the AB clarified that a standardising body does not need to have standardisation as its principal function, or even as one of its principal functions.\textsuperscript{367} Member states therefore must be aware or at least have reason to expect that the standardised body is engaged in standardisation.\textsuperscript{368} This finding is of important significance as it allows other standardisation activities to organisations which do not specialise in standardisation to qualify as an international standard within the meaning of article 2.4 of the TBT Agreement.\textsuperscript{369}

The AB further elucidated that the decision made by the TBT Committee is relevant in determining when a standardisation body could be recognised as international.\textsuperscript{370} The TBT Committee has noted that a standardisation body should not only be open at a particular stage, but, rather it must be open at every stage of standards development.\textsuperscript{371} The decision further sets out six principles that should be observed when developing international standards.\textsuperscript{372} This implies that wherever there is a claim on international standard a panel must investigate the extent to which the body in question meets the requirements of the six principles expounded in the TBT Committee decision.\textsuperscript{373} This decision has been described as the best soft law into a code of administrative procedure and practice for international standardisation.\textsuperscript{374}

However the decision of the AB is without criticism, it has been argued that the AB’s finding that the US labeling provisions consists of a technical regulation under the TBT Agreement is

\textsuperscript{364} Carlone (n 362) 138.
\textsuperscript{365} Ibid.
\textsuperscript{366} Crowley and Howse (n 359) 340.
\textsuperscript{367} Ibid.
\textsuperscript{368} See Appellate Body Report, \textit{US-Tuna II} (n 268) para 362.
\textsuperscript{369} Crowley and Howse (n 359) 341.
\textsuperscript{370} See Appellate Body Report, \textit{US-Tuna II} (n 268) para 372.
\textsuperscript{371} See Appellate Body Report, \textit{US-Tuna II} (n 268) para 374.
\textsuperscript{372} The six principles are transparency, openness, impartiality and consensus, effectiveness and relevance, coherence and developmental dimension; See Wijkström and McDaniels (n 95) 10.
\textsuperscript{373} Crowley and Howse (n 359) 341.
\textsuperscript{374} See Wijkström and McDaniels (n 95) 10.
The AB’s interpretation of the meaning of a technical regulation has been criticised as too broad thereby leaving a small room for a substantial definition of the term standard. This interpretation has been criticised as risking reducing standards to redundancy. In order to avoid this “redundancy” Mavroidis argues that the US measure should have been properly understood as standard and not as technical regulation.

Similarly, the Appellate Body has been criticised for answering the wrong question in the interpretation of article 2.1 of the TBT Agreement. It has been postulated that the question that the AB was supposed to answer was “has the US applied the dolphin-safe label in non-discriminatory manner across goods of different origin that meet the necessary regulatory requirements to have access to the label.” Accordingly, having found dolphin labelling safe provisions as a standard, Mavroidis argues that the US measure could have been found violating Article 2.1 because it was applied in a discriminatory manner by treating policy-like tuna products in a different way. The AB therefore arrived at the correct decision using flawed means. The problem however is unpredictability of coming to the same conclusion using the wrong methodology for future cases.

3.3 United States-Measures Affecting the Production and Sale of Clove Cigarettes

3.3.1 Factual Background

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375 Petros Mavroidis, ‘Driftin’ too far from shore – Why the test for compliance with the TBT Agreement developed by the WTO Appellate Body is wrong, and what should the AB have done instead,’ (2013) 528 World Trade Review 12 <http://journals.cambridge.org/abstract_S1474745613000013> accessed 6 May 2016.
377 Arcuri (n 270) 180.
378 “Measures conditioning market access of products upon satisfaction of certain product characteristics should be considered technical regulations; measures which allow the wider class of products to be marketed while if reserving say a label to a sub-part of the wider class should be considered a standard. Therefore, if only tuna that is dolphin-safe can be marketed in the US, then we are in presence of a technical regulation; if both tuna that is and is not considered dolphin-safe can be marketed in the US, then we are in presence of a standard.” See Mavroidis (n 375) 527.
379 Ibid.
380 Ibid.
381 Mavroidis (n 375) 528.
382 Ibid.
383 Mavroidis (n 375) 517; However, Jakir notes that this “kind of approach would completely miss the point of this dispute, in other words, the issue lies in determining whether the requirements imposed by the DPCIA for access to the label constitute a legitimate (non-discriminatory) environmental policy choice.” see Jakir (n 376) 157.
The dispute revolved around section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act (FFDA) which was amended by Family Smoking Prevention and Tobacco Control Act (FSPTCA) . This legislation created a prohibition on all flavoured cigarettes except for tobacco and menthol cigarette. The objectives of section 907(a)(1)(A) were set out in a report prepared by the House Energy and Commerce Committee (The House Report). The report stated that the objectives of the FSPTCA were to “protect public health and to reduce the number of individuals under the age of 18 who use tobacco products." In particular the House Report stated that the objective of Section 907(a)(1)(A) “is to prohibit the manufacture and sale of cigarettes with certain characterising flavors that appeal to youth.”

Before the Panel Indonesia challenged section 907(a)(1)(A) of the FFDCA and claimed that it was inconsistent with Articles 2.1, 2.2, 2.5, 2.8, 2.10, 2.12 and 12.3 of the TBT Agreement. The Panel found that section 907(a)(1)(A) violated article 2.1 of the TBT Agreement by banning clove cigarettes and exempting menthol cigarettes. In addition, the Panel held that the US violated Article 2.9.2 of the TBT Agreement by its failure to notify WTO Members, through the Secretariat, the products that were going to be covered by Section 907(a)(1)(A) of the FFDCA, together with an indication of its objective and rationale, at an early stage when amendments and comments were still possible. The Panel further found that the US acted inconsistently with Article 2.12 of the TBT Agreement by its failure to allow a period of not less than six months between the publication of section 907(a)(1)(A) and its entry into force.

On the contrary, the Panel rejected Indonesia’s claims under Articles 2.2, 2.5, 2.8, 2.9.3, 2.10, and 12.3 of the TBT Agreement. The Panel held that Indonesia failed to show that Section 907(a)(1)(A) more trade restrictive than necessary to fulfil the objective of reducing youth smoking, taking account of the risks non-fulfilment would create in accordance with Article

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384 Appellate Body Report, US – Clove Cigarettes (n 267) para 77.
385 See the US Family Smoking Prevention and Tobacco Control Act, Public Law No. 111-131, 2009 (FSPTCA).
386 Appellate Body Report, US – Clove Cigarettes (n 267) para 79.
389 Appellate Body Report, US – Clove Cigarettes (n 267) para 2.
390 Appellate Body Report, US – Clove Cigarettes (n 267) para 3.
392 Appellate Body Report, US – Clove Cigarettes (n 267) para 5.
393 Appellate Body Report, US – Clove Cigarettes (n 267) para 5.
2.2 of the TBT Agreement. According to the Panel Indonesia failed to demonstrate that US acted inconsistently with Article 2.5 of the TBT Agreement since Indonesia did not request the US to explain the rationale of Section 907(a)(1)(A) in terms of Articles 2.2 and 2.4 of the TBT Agreement. By the same token, the Panel found that Indonesia failed to demonstrate that it would be appropriate to formulate the technical regulation in Section 907(a) (1)(A) in terms of performance rather than design or descriptive characteristics, within the meaning of Article 2.8 of the TBT Agreement.

Furthermore, the Panel held that Indonesia failed to show that the US action was inconsistent with Article 2.9.3 of the TBT Agreement, by its failure to request US to provide copies of Section 907(a)(1)(A) while it was still in draft form. The Panel further concluded that Article 2.10 of the TBT Agreement was not applicable because of the absenteeism of any evidence that urgent problems of safety, health, environmental or national security arose or threatened to rise upon adoption of Section 907(a)(1)(A). Lastly, the Panel held that Indonesia failed to show that US violated Article 12.3 of the TBT Agreement by failing to take consideration of the special development, financial, and trade needs of Indonesia in the preparation and application of Section 907(a)(1)(A).

The US appealed the findings of the Panel to the AB arguing that the Panel erred in finding that the US acted inconsistently with Article 2.1 of the TBT Agreement. Specifically the US claimed that the Panel erred in finding that Indonesia’s clove cigarettes and menthol cigarettes were like products within the meaning of Article 2.1. The US further claimed that the Panel erred in finding that the US violated Article 2.12 of the TBT Agreement by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A).
3.3.1 Appellate Body Findings

3.3.1.1 Article 2.1 of the TBT Agreement

On appeal, the US claimed that the Panel erred in finding that section 907(a)(1)(A) violated Article 2.1 of the TBT Agreement. In particular, the US argued that the Panel erred in the interpretation and application of the term like products. According to the US, the Panel conducted an incomplete and flawed analysis with respect to two of the traditional likeness criteria, namely, end-uses and consumer tastes and habits. Furthermore, the US argued that the Panel failed to take into consideration the different end uses presented in particular satisfying an addiction to nicotine, and creating a pleasurable experience associated with the taste of the cigarette and aroma of the smoke. The US acknowledged that both clove and menthol cigarettes are used for smoking, however, according to the US the Panel limited its analysis to the common use while ignoring other relevant end uses.

The US further claimed that the Panel failed to conduct a complete analysis of consumer tastes and habits related to clove and menthol cigarettes. Specifically, the US contended that the Panel erred by disregarding how consumers perceive and use the product at issue. According to the US, the Panel limited the scope of consumer tastes and habits to one aspect of public health basis for Section 907(a)(1)(A) that is use by young people and failed to capture the use by adult smokers thus nullifying consumer tastes and habits as a meaningful criterion. Therefore, according to the US the particular flavour matters, in the sense that adult smokers seldom use clove-flavoured cigarettes and do not perceive them to be like menthol cigarettes.

The US further argued that a technical regulation under Article 2.1 of the TBT Agreement may impose costs to imported products as compared to like domestic products without according less favourable treatment to the imported product, where these costs are as a result

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403 Appellate Body Report, US – Clove Cigarettes (n 267) para.13.
404 Ibid.
405 Ibid.
407 Appellate Body Report, US – Clove Cigarettes (n 267) para 15.
408 Appellate Body Report, US – Clove Cigarettes (n 267) para 17.
409 Ibid.
410 Ibid.
411 Appellate Body Report, US – Clove Cigarettes (n 267) para 18.
412 Ibid.
of circumstances rather than the origin of the products.\footnote{412} Consequently according to the US, the Panel erred in not considering other arguments bearing upon other relevant factors other than origin that could have clarified the detriment to the competitive situation of imported clove cigarettes.\footnote{413}

The AB began its analysis by clarifying the three elements to be established in order for a violation of the national treatment under Article 2.1 to be established.\footnote{414} Firstly, the measure at issue must be a technical regulation, the imported and domestic products at issue must be like products and lastly the treatment accorded to imported products must be less favourable than that accorded to like domestic products.\footnote{415} Both parties agreed that the measure at issue was a technical regulation therefore the Panel had to decide whether the clove cigarettes and menthol cigarettes were like products and whether less favourable treatment was accorded to the imported products.\footnote{416}

In addressing the US’s appeal, the AB agreed with the Panel’s interpretation that the term like products in Article 2.1 of the TBT Agreement should start with the text of that provision in the light of the context provided by Article 2.1 itself, by other provisions of the TBT Agreement, and by the TBT Agreement as a whole.\footnote{417} However, the AB noted that this does not suggest that the interpretation of the term like products under Article 2.1 of the TBT Agreement cannot be approached from a competition oriented perspective.\footnote{418}

Drawing inspiration from \textit{EC Asbestos} the AB elucidated that “the concept of treatment no less favourable links the products to the marketplace, because it is only in the marketplace where it can be determined how the measure treats like imported and domestic products.”\footnote{419} Excluding products involved in a strong competition that are considered like on the basis of regulatory purposes would distort the less favourable treatment comparison because it would refer to a marketplace that include some like products and exclude others.\footnote{420} Therefore, the AB emphasised that the concept of like products works to define the scope of products to be
compared and to establish whether less favourable treatment is being given to imported products.\textsuperscript{421}

According to the AB the balance that the preamble of TBT Agreement tries to establish between the trade liberalisation on one hand and the right of member countries to regulate is not different from the balance that GATT 1994 tries to establish between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994.\textsuperscript{422} The AB further concluded that while the GATT 1994 establishes this balance by the national treatment obligation in Article III:4 as qualified by the exceptions in Article XX, the TBT Agreement also establishes this balance in Article 2.1 itself, read in the light of its context and of its object and purpose.\textsuperscript{423} Therefore according to the AB the interpretation of the term like products in Article 2.1 should be based on the text of that provision as read in the context of the TBT Agreement and of Article III:4 of the GATT 1994.\textsuperscript{424} Moreover the AB held that competitive relationship and regulatory objectives of the technical regulation in question may play a role in the determination of likeness.\textsuperscript{425}

According to the AB the analysis of end-use must be comprehensive and specific enough to give guidance as to whether the products in question are like products.\textsuperscript{426} The AB noted that the Panel’s finding that the end use of both clove and menthol cigarettes is to be smoked did not provide enough guidance to determine whether the products in question were like products within the meaning of Article 2.1 of the TBT Agreement.\textsuperscript{427}

The AB reasoned that the fact that various products may share the same end use does not mean that those products are like products.\textsuperscript{428} According to the AB what is important in determining the end use of a product is the capability of the product performing it, not the commonality of that end use.\textsuperscript{429} Consequently, the AB disagreed with the Panel’s analysis that the end use of cigarettes is simply to be smoked and agreed with the US that there are various end-uses of cigarettes which include “satisfying an addiction to nicotine” and “creating a pleasurable experience associated with the taste of the cigarette and the aroma of

\textsuperscript{421}Ibid.
\textsuperscript{422}Appellate Body Report, \textit{US – Clove Cigarettes} (n 267) para 109.
\textsuperscript{423}Ibid.
\textsuperscript{424}Appellate Body Report, \textit{US – Clove Cigarettes} (n 267) para 120.
\textsuperscript{425}Ibid.
\textsuperscript{426}Appellate Body Report, \textit{US – Clove Cigarettes} (n 267) para 129.
\textsuperscript{427}Ibid.
\textsuperscript{428}Appellate Body Report, \textit{US – Clove Cigarettes} (n 267) para 130.
\textsuperscript{429}Appellate Body Report, \textit{US – Clove Cigarettes} (n 267) para 131.
the smoke.” However the AB noted that the US’s argument supported the Panel’s finding that clove and menthol cigarettes are like products.

The AB held that the Panel’s consideration of consumer tastes and habits was too limited. Particularly, the Panel erred in restricting section 907(a)(1)(A) to consumer tastes and habits of young and potential young smokers. What is important according to the AB in considering whether products are like under Article 2.1 of the TBT Agreement is not to prove that the products can be substituted by all consumers but rather if the product in question can be substituted by some consumers and not for others. However, the AB held that the degree of competition and substitutability that the Panel found for young and potential young smokers is sufficiently high to support a finding of likeness under Article 2.1 of the TBT Agreement. For different reasons, the AB agreed with the Panel that clove cigarettes and menthol cigarettes are like products under Article 2.1 of the TBT Agreement.

Before considering the US appeal, the AB noted that the interpretation of Article 2.1 of the TBT Agreement does not prohibit less favourable treatment on imports that stems from a legitimate regulatory distinction. Article 2.1 of the TBT Agreement prohibits de jure and de facto discrimination against imported products. According to the AB when a Panel finds that a technical regulation does not de jure discriminate against imports, it must further examine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In its examination the Panel must analyse the particular circumstances of the case and whether the technical regulation is even-handed in its treatment of domestic and imported goods.

The AB further noted that Article 2.1 of the TBT Agreement requires a comparison of treatment accorded to products imported from any Member alleging a violation of Article 2.1,
and treatment accorded to like products of domestic and any other origin. In performing this comparison, it must be noted that the treatment no less favourable standard of Article 2.1 does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining Member is treated no less favourably than the group of domestic like products. In order to determine whether there has been treatment no less favourable, an objective assessment should be made on the basis of the nature and extent of the competitive relationship between products in the market of the regulating Member against like products imported from the complaining Member.

In applying Article 2.1 of the TBT Agreement to the case the AB was not convinced that the Panel erred in its finding that Section 907(a)(1)(A) was inconsistent with Article 2.1. The AB noted that by design, Section 907(a)(1)(A) prohibited cigarettes with characterising flavours other than tobacco or menthol. The AB referred to the Panel’s evidence and found that almost all clove cigarettes imported into the US three years before the ban came from Indonesia. Moreover it was found that the majority of clove cigarettes consumed in the US came from Indonesia.

Given the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A), the AB was not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes came from a legitimate regulatory distinction. Even though Section 907(a)(1)(A) did not expressly distinguish between treatment accorded to the imported and domestic like products, the AB found that it operated in a manner that reflected discrimination against the group of like products imported from Indonesia. Accordingly, by exempting menthol cigarettes from the ban on flavoured cigarettes, Section 907(a)(1)(A) accorded to clove cigarettes less favourable treatment than that accorded to domestic like products, within the meaning of Article 2.1 of the TBT Agreement.
The AB concluded that although Section 907(a)(1)(A) pursued the legitimate objective of reducing youth smoking by banning cigarettes containing flavours and ingredients that increase the attractiveness of tobacco to youth.\textsuperscript{451} However, it did so in a manner that was inconsistent with the national treatment obligation under Article 2.1 of the TBT Agreement by exempting menthol cigarettes, which also has flavours and ingredients that increase the attractiveness of tobacco to youth, from the ban on flavoured cigarettes.\textsuperscript{452}

3.3.1.2 Article 2.12 of the TBT Agreement

The US claimed that the Panel erred in its finding that it has violated Article 2.12 of the TBT Agreement by not allowing a period of not less than six months between the publication and the entry into force of Section 907(a)(1)(A).\textsuperscript{453} In particular, the US argued that the Panel incorrectly found that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT Agreement.\textsuperscript{454} According to the US, Indonesia did not establish that the three-month interval between the publication and entry into force of Section 907(a)(1)(A) of the FFDCA was unreasonable in the light of its impact on the ability of Indonesian producers to adapt to the requirements of that measure.\textsuperscript{455} On the other hand Indonesia argued that paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns defined the term “reasonable interval” in Article 2.12 of the TBT Agreement as at least six months and that this interpretation is legally binding pursuant to Article IX:2 of the WTO Agreement.\textsuperscript{456} Thus, according to Indonesia, by not allowing a reasonable interval of at least six months between the publication and the entry into force of Section 907(a)(1)(A), US acted inconsistently with its obligations under Article 2.12 of the TBT Agreement.\textsuperscript{457}

\textsuperscript{451} Appellate Body Report, US – Clove Cigarettes (n 267) para 236.
\textsuperscript{452} Appellate Body Report, US – Clove Cigarettes (n 267) para 236.
\textsuperscript{453} Appellate Body Report, US – Clove Cigarettes (n 267) para 276; Article 2.12 of the TBT Agreement provides that “except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.”
\textsuperscript{454} Appellate Body Report, US – Clove Cigarettes (n 267) para 276.
\textsuperscript{455} Ibid.
\textsuperscript{456} Paragraph 5.2 of the Doha Ministerial Decision provides that “subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase ‘reasonable interval’ shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.”; See Appellate Body Report in US – Clove Cigarettes (n 267) para 238.
\textsuperscript{457} Ibid.
The AB concurred with Indonesia and concluded that paragraph 5.2 of the Doha Ministerial Decision is a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the Vienna Convention. The AB further clarified that even though paragraph 5.2 must be read for the purpose of interpreting Article 2.12 of the TBT Agreement, it does not mean that paragraph 5.2 overrule the terms contained in Article 2.12. Instead, paragraph 5.2 of the Doha Ministerial Decision constitutes an interpretative clarification that must be taken into account in interpreting Article 2.12 of the TBT Agreement.

In examining the US appeal the AB noted the reason for allowing an interval between the publication and the entry into force of a technical regulation under Article 2.12 of the TBT Agreement “is to allow time for producers in exporting members, and particularly in developing country members, to adapt their products or methods of production to the requirements of the importing Member’s technical regulation.” The AB further noted that the obligation imposed on member states by Article 2.12 to provide a reasonable interval between the publication and the entry into force of their technical regulations cautiously balances the interests of the exporting member whose producers might be affected by a technical regulation and the importing member that wishes to pursue a legitimate objective through a technical regulation. However, according to the AB paragraph 5.2 of the Ministerial Decision clarifies Article 2.12 of the TBT Agreement by stating that an importing Member may depart from this obligation if the reasonable interval would be ineffective to fulfill the legitimate objectives pursued by the technical regulation.

According to the AB a prima facie case of inconsistency with Article 2.12 is established where it is shown that an importing Member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue. However, in order to rebut a prima facie case of inconsistency under Article 2.12 of the TBT Agreement, the member who has failed to allow an interval of six months between publication and entry into force of its technical regulation should submit evidence supporting that urgent circumstances referred to in Article 2.10 of the TBT Agreement existed before the

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458 Appellate Body Report, US – Clove Cigarettes (n 267) para 269.
459 Ibid.
460 Ibid.
461 Appellate Body Report, US – Clove Cigarettes (n 267) para 272.
462 Appellate Body Report, US – Clove Cigarettes (n 267) para 274.
463 Appellate Body Report, US – Clove Cigarettes (n 267) para 275.
464 Appellate Body Report, US – Clove Cigarettes (n 267) para 280.
adoption of the technical regulation at issue. Secondly, the responding member must establish that the complaining Member could have been able to adapt to the requirements of a technical regulation in less than six months. Lastly, it should be established that a period of not less than six months would have been ineffective to fulfil the legitimate objective pursued by the technical regulation.

In scrutinising whether urgent circumstances under Article 2.10 existed in the adoption of Section 907(a)(1)(A), the AB noted that the US failed to produce evidence that urgent problems of safety, health, environmental protection or national security forced the adoption of Section 907(a)(1)(A) before the Panel. Therefore the AB concluded that these urgent circumstances were absent. With regard to the question of whether producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) in less than six months, the AB concluded that the US failed to produce evidence that could establish Indonesia was able to adjust to the requirements of Section 907(a)(1)(A) in less than six months.

Lastly, the AB considered whether the US established that a period of at least six months between the publication and the entry into force of Section 907(a)(1)(A) was ineffective in fulfilling the legitimate objective pursued by Section 907(a)(1)(A). The AB noted that the US managed to explain the legitimate objective of Section 907(a)(1)(A), however the explanations failed to establish that allowing a period of not less than six months between the publication and entry into force of Section 907(a)(1)(A) was ineffective to fulfil the legitimate objective of Section 907(a)(1)(A). Consequently, the AB concluded that by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the US violated Article 2.12 of the TBT Agreement.

465 Ibid.
466 Ibid.
467 Appellate Body Report, US – Clove Cigarettes (n 267) para 283.
468 Appellate Body Report, US – Clove Cigarettes (n 267) para 293.
469 Ibid.
470 Appellate Body Report, US – Clove Cigarettes (n 267) para 294.
471 Appellate Body Report, US – Clove Cigarettes (n 267) para 295.
472 Ibid.
473 Appellate Body Report, US – Clove Cigarettes (n 267) para 297.
### 3.3.2 Lessons learnt from US - clove cigarettes

The *US-Clove Cigarettes* case is regarded as one of the most controversial health-related disputes ever to arise in WTO jurisprudence. The significance of this case lies in its provision of findings and rulings that should “help national trade law and policy makers to manage the public health and international trade interface.” The *US-clove cigarettes* provided an opportunity for the AB to address protectionism that may come under hidden legitimate health regulation. This case also presents a clear example of how Member states may manipulate the TBT Agreement in order to protect domestic industry.

In interpreting the provisions of Article 2.1, the AB managed to develop several methods that may be used in order to establish whether a disparate impact can be explained by a given non-protectionist objective. In examining a non-protectionist claim under the element of treatment less favourable in Article 2.1, the AB mandated WTO tribunals to examine the design, architecture and structure of an origin-neutral measure. The tribunals were further instructed to concentrate on whether the measure is designed such that imported and domestic goods are treated even-handedly in the pursuit of a given objective. This examination will help in finding whether a disparate impact arising from the measure stems exclusively from the pursuit of the objective. The conclusion thereof would lead to an outcome of whether the disparate impact is justified by its objective, and eventually, whether the measure violates the national treatment obligation under Article 2.1.

This clarification of the analytical framework of Article 2.1 has been regarded as the most important development in the *US – Clove Cigarettes*. This assertion is plausible considering that the AB managed to add another step which was absent from the traditional

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474 Warikandwa and Osode (n 34) 1278.
476 Zhou (n 351) 1110.
478 See Appellate Body Report, *US – Clove Cigarettes*, (n 267) para 224.
479 Ibid.
480 Voon (n 477) 756.
481 Ibid.
examination of Article 111:4 of the GATT. This step which includes an examination of whether the detrimental impact stems exclusively from a legitimate regulatory distinction is intended as a remedy for the lack of a GATT Article XX-type of exception in the TBT Agreement.\footnote{Jason Houston-McMillan, ‘A Critical Analysis of the Legitimate Regulatory Distinction Test as Conceived in US–Clove Cigarettes, US–Tuna II and US–COOL’ (2014) 17 <www.sielnet.org/resources/Houston-McMillan%20-%20winner.pdf> accessed on 12 May 2016.} This analysis affords Article 2.1 the opportunity to operate as a safe harbour for measures which discriminate for legitimate purposes.\footnote{Gruszczynski (n 482) 130.} This analysis also shows that measures found to be inconsistent with Article 2.1 cannot be saved under the GATT 1994 general exception.\footnote{Ibid.} Accordingly, Article 2.1 provides regulatory freedom equivalent to what is guaranteed by Articles III and XX of the GATT.\footnote{Joshua Meltzer and Amelia Porges, ‘Beyond discrimination? The WTO parses the TBT Agreement in US—Clove Cigarettes, US—Tuna II (Mexico) and US—COOL’ Melbourne Journal of International Law vol 14 (2013) 725 <www.austlii.edu.au/au/journals/MelbJIL/2013/22.pdf> accessed on 22 April 2016.} 

The AB decision further confirmed that the competition-oriented approach established under Article III:4 of GATT should respectively apply to the evaluation of product likeness under Article 2.1 of the TBT Agreement.\footnote{Ibid.} The approach that the AB has taken has therefore ruled out any prospects of using a formal assessment of regulatory purpose in order to determine the product likeness.\footnote{Zhou (n 352) 1110.} Therefore the decision of the AB further suggests that the consideration of the term ‘likeness’ is a threshold step which is simply used to examine whether products in question are in a relationship that the national treatment particularly treatment no less favourable seeks to protect.\footnote{Ibid.} The threshold analysis brought in by the AB can be contrasted from the previous analysis of treatment no less favourable which required the examination of substantive issues regarding the national treatment consistency of a measure.\footnote{Ibid.}

On the other hand, the additional step that the AB introduced in the analysis of Article 2.1 has been criticised as too narrow.\footnote{Ibid.} If the term “stems exclusively” is interpreted strictly; a number of measures enacted by Member States may fall short of this requirement.\footnote{Ibid.} In this...
regard, it can be submitted that the test used by the AB is too strict. A degree of flexibility with regard to this test is required in order to accommodate measures that may be motivated by various concerns. Instead of evoking these measures on the basis of violating Article 2.1, some form of balancing and weighing would be preferable. This balancing may include an examination of whether elements other than the legitimate regulatory distinction exist. If these elements do not impact on trade, the measure should be considered to comply with requirement spelled under Article 2.1 of the TBT Agreement. By doing so, other measures beside a legitimate regulatory distinction may be regarded as compatible with Article 2.1 requirements.

Moreover, questions have been raised on the correct order in which to read the substantive provisions of the TBT Agreement. Because of the fact that both Article 2.1 and 2.2 apply separately, the AB has not yet defined a specific order of application. Following the jurisprudence laid by the AB, it is likely that future analysis will proceed under the TBT Agreement as they had under Articles III and XX of the GATT. Following the GATT order, the determination of like products and less favourable treatment under Article 2.1 will likely come first and then an analysis of the availability of reasonable alternative measures under Article 2.2.

Warikandwa and Osode have also argued that “competitiveness largely determines trade gains.” Accordingly, the AB seemed to have paid little attention to this fact thereby dismissing Indonesia’s claims under Article 12.3 of the TBT Agreement on the grounds that the resulting risk of unemployment was not a special need. Accordingly, the AB should have proceeded to adopt a comprehensive approach that considers the developmental needs.

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493 Ibid.
494 Ibid.
495 Gruszczynski (n 482) 133
496 Ibid.
497 These various concerns may include the protection of domestic interest groups for example in US - Clove Cigarettes case the “initial proposal of the government was to ban all flavouring agents, including menthol. This was changed (at least in a part) as a consequence of pressure from not only US tobacco companies, but also other interest groups, including trade unions and number of African-Americans organisations” see Gruszczynski (n 482) 132.
499 Marceau (n 498) 29.
500 Mavroids (n 375) 10.
501 Mavroids (n 375) 11.
502 Warikandwa and Osode (n 34) 1281.
of Indonesia as a developing country. Warikandwa and Osode maintained that, in this respect, the Appellate Body should have considered the linkage between trade and social policies. However, this attitude can be explained by the fact that the AB had already ruled in favour of Indonesia under Article 2.1 therefore it was not necessary to examine the claims under Article 12.3 of the TBT Agreement. In this regard, judicial minimalism has been criticised on the basis that it is “hard to justify… Sometimes small steps increase the aggregate costs of decisions; sometimes they produce large errors, especially when they export decision-making burdens to fallible people.” This submission may be true considering the reluctance of the AB to robustly pronounce on a matter that may have future implications on developing countries that stand to gain from pro-developmental WTO policies and decisions.

3.4 Conclusion

From the above discussion it can be noted that the decisions handed down by the DSB under US-Clove Cigarettes and Tuna Dolphin II have re-ignited the debate on the WTO’s role in balancing the rights of the states to regulate trade in defending public policies such as health and environment, with the quest to maintain the sanctity international trade. To this end the DSB should be commended for maintaining the sanctity and the purpose of the TBT Agreement. In both the two decisions, the AB resisted protectionism that may come under the disguise of legitimate regulations. It can therefore be argued that the DSB managed to explain the limits placed on national governments and relevant stakeholders by the TBT Agreement when regulating trade. These clarifications should be welcomed as they can go a long way in assisting SADC states with interpreting and applying the provisions of the TBT Agreement thereby ensuring that technical barriers to trade may not become unnecessary impediments to intra-regional trade.

503 Ibid.
504 Ibid; See also Simon Lester, Bryan Mercurio and Arwel Davies, World Trade Law: Text, Materials and Commentary (Hart Oxford 2012) who states that “Whilst the trade debate in the nineteenth century was almost an economic issue … today, by contrast, the trade debate is intimately linked to a wide range of social policy issues. This change is a result of a number of factors, including: the expanded scope of trade agreements, which are no longer limited to reducing tariff duties; [and] the integration of poor countries into the trading system, which has resulted in trade between countries with different income levels…”
505 Warikandwa and Osode (n 34) 1282.
506 Ibid.
507 Warikandwa and Osode (n 34) 1282.
508 Ibid.
509 Warikandwa and Osode (n 34) 1280.
Furthermore, it can be noted that the DSB successfully defended the interests of developing countries. In defending these interests, the DSB made it clear that for US regulations to pass master of Article 2.1, they should be applied even-handedly. To this end the DSB has “developed an interpretation of the TBT’s non-discrimination obligations that is robust, replicable and meshes with the corpus of WTO non-discrimination law.” Moreover, the DSB made it clear that for a complaining party to win a claim under Article 2.2 of the TBT Agreement there is need to identify a possible alternative measure that is less trade restrictive, reasonably available and makes an equivalent contribution to the legitimate objective being pursued by the Member state.

On the other hand, the tests introduced under Article 2.1 and 2.2 of the TBT Agreement have been described as too narrow. The AB reports have been criticised for advancing trade liberalisation interests at the expense of public policy objectives. In reality, the AB did not find problems with the US measures but found problems with their discriminatory nature. Despite these criticisms, it is without doubt that the AB managed to maintain the sanctity of the multilateral system by thwarting protectionism. Therefore it can be submitted that the AB decisions assist in curbing sometimes the irresistible urge of protecting domestic industries from foreign penetration by member states. The US-Clove Cigarettes and the Tuna Dolphin II cases have therefore resulted in the development of valuable jurisprudence in the interpretation and application of the TBT Agreement.

Having providing guidance for the implementation of the TBT Agreement through the US - Tuna Dolphin II and US - Clove Cigarettes, it is necessary for the next chapter to evaluate the extent to which SADC countries have managed to implement the provisions of the TBT Agreement within their domestic institutions. The next chapter therefore examines whether SADC countries are implementing the provisions of the TBT Agreement in a way that is in line with its principles. The chapter further examines the challenges being faced by SADC states to implement the TBT Agreement.

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510 Meltzer and Porges (n 486) 724.
511 Gruszczynski (n 482) 132.
512 Jakir (n 376) 144.
513 Lester (n 475) 10.
514 Warikandwa and Osode (n 34) 1280.
515 Ibid.
516 Voon (n 477) 1.
Chapter Four

The Implementation of the TBT Agreement in SADC

“The lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away.”

4.1 Introduction

With the reduction of tariff barriers to both regional and international trade, the way in which technical regulations, standards and conformity assessment procedures are designed and implemented is playing an important role in trade outcomes. Technical regulations together with standards are meant to open markets for both importers and exporters in regional and global markets. Standards and technical regulations help to spread information on the requirements for market acceptability thereby reducing uncertainty for both suppliers and buyers. Effective TBT regulations therefore have the potential to benefit businesses, particularly SMEs that usually struggle to meet the costs associated with information about potential export markets. Therefore, the sound development and effective implementation of technical barriers to trade enable sustainable development, build welfare and facilitate trade within SADC.

Having regulations which govern the use of technical barriers to trade is one thing and implementing these regulations is another. Despite signing the TBT Agreement at international level and adopting the TBT Annex to the SADC Protocol on Trade at regional level, SADC countries appear to have difficulties in implementing these agreements seems.

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521 Peet and Steven Koch (n 35) 20.
523 Meyer and others (n 46) 4.
According to Osiemon, the high incidence of the regulation of technical barriers to trade and their harmful impact on intra-regional trade may be attributed to their application rather than their substance.\textsuperscript{524} Using SADC as a case study, this chapter aims to investigate the implementation of the TBT Agreement. In particular this chapter will address the question whether SADC member states are implementing the TBT Agreement in a way that fosters, rather than inhibits, intra-regional trade. In addressing this question, the chapter will first examine the nature and the rationale of regional integration in SADC. It will proceed to look at various structures that have been created by the TBT Annex to the SADC Protocol on Trade in its quest to eradicate technical barriers to trade within the region. The implementation of the substantive provisions of the TBT Agreement will further be examined together with challenges being faced by SADC member states in implementing these provisions.

4.2 Regional Integration in SADC

Although, SADC member states have managed to increase their trade with the rest of the world, intra-regional trade has only played a relatively small role.\textsuperscript{525} Compared to other regions, intra-regional trade in SADC is lagging behind.\textsuperscript{526} Regional integration is considered as a panacea for addressing impediments to intra-African trade by creating sustainable production systems and markets thereby increasing Africa’s competitiveness in the multilateral trading system.\textsuperscript{527} The SADC Treaty recognises that regional integration is a pre-condition for the achievement of economic growth, self-sustaining development and sustainable utilisation of natural resources.\textsuperscript{528}

Regardless of various commitments at both regional and international level to increase international trade, SADC continues to register the lowest percentage of intra-regional trade with the rest of the world.\textsuperscript{529}


\textsuperscript{526} It has been noted that intra-regional trade in Europe is around sixty percent of total trade, in North America it is forty percent, Asia’s trade on the other hand has increased to thirty percent whilst SADC’s trade is only10 percent. See ibid.


\textsuperscript{528} Article 5.1 of the SADC Treaty.
trade. In practice, regional integration in SADC is proving to be difficult. In this regard, Meyer and others have noted that there is a capacity gap in what African countries commit themselves to do and what they can effectively implement. This view has been supported by Mapuva who described SADC as having ambitious targets while dismally failing to implement them. Targets that have been set to be achieved over time have not been achieved. The constant missing of targets may also be shown by the failure of SADC states to meet Regional Indicative Strategic Development Plan (RIDSP) targets. In this regard, Hancock correctly observes that SADC has managed to forge ahead with setting goals but however has hardly made a dent into realising those goals with various targets being missed.

In order for the SADC region to enjoy the economic benefits of trade liberalisation, there is need for member states to implement the provisions of their commitments at both national and regional level. Given the challenges that are associated with implementing international agreements, SADC member states need to collaborate closely with each other in order to maximise on the benefits of regional integration. This collaboration will help SADC states to comply with various international agreements which they might not have resources for. Commitment, participation and willingness to share sovereignty are the prerequisites of deeper economic integration within SADC. The main reason for integration is therefore the

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530 Meyer and others (46) 4.
532 The RISDP provides SADC countries with a consistent and comprehensive programme of long-term economic and social policies to be implemented in three phases over a period of 15 years. This plan state the map for SADC’s regional integration and provides for the development of a free trade area by 2008, a customs union in 2010, a common market in 2015, monetary union in 2016 and the introduction of a single currency in 2018. See Regional Indicative Strategic Development Plan (RISDP) <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> accessed 12 August 2016.
534 Jephias Mapuva has noted that the SADC region “is ideal for regional economic integration given the fact that it is characterised by many countries with small economies, an environment which is ideal for interstate trade and forging of economic links. See Mapuva (n 531) 97.

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conviction “that there is strength in numbers and in unity, and that this strength can speed up the pace of development as well as enhance security.”

Regional integration has been recognised for exhibiting the potential to promote economic growth which reduces poverty through increased exports of domestic goods. On this note Panagariya has submitted that trade openness is a more reliable friend of poor countries than protectionism. Few countries have grown rapidly without a simultaneous rapid expansion of trade. In this regard, Bhagwati has alluded that trade barriers developing countries impose upon each other, are more significant restraints on their own development than those imposed by the developed countries. This observation came after a lot of criticisms have been put on developed countries’ regulations having protectionist ends. Accordingly, arguments have been advanced that developed countries put higher standards on products coming from developing and least developed countries.

However, while technical barriers imposed by the developed countries against developing and least developed countries have been largely criticised, little attention has been given to barriers that developing countries particularly African countries impose upon each other. These barriers may contribute to African countries’ underdeveloped as much as those barriers


537 Ibid.


539 Ibid.


541 Technical regulations of developed countries have been criticised for blocking developing countries and least developed countries’ access to developed countries' markets. Though special treatment in form of tariff reductions is sometimes given to least developed counties, regulatory barriers imposed by developed countries reduces the effectiveness of such preferential treatment. See Sungjoon Cho, ‘Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development’ Berkeley Journal of International Law Vol. 25 (3) (2010) 403 <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1345&context=bjil> accessed 22 May 2016.

542 Developed countries’ standards have been criticised as being more stringent than international standards, the constant revision of these standards by developed countries is taxing for developing countries as they cannot manage to comply with the “moving targets.” Moreover, the testing methods of developed countries have been criticised for being too sensitive not because any scientific requirement demands increased sensitivity of the conformity assessment procedure, but merely because more sophisticated testing technology and equipment is available. This exceedingly demanding testing requirement makes testing costs disproportionately high and even prohibitive to developing countries; See Ibid; See also Osiemo (n 524) 189.

543 Osiemo (n 524) 190.
that are being imposed by developed countries. Given the fact that intra-SADC trade is low, it may be argued that SADC’s underdevelopment can be attributed more to barriers from within the community than those imposed by other countries.\textsuperscript{544} It is therefore important for SADC countries to deepen regional integration in order to tackle some of the challenges that SADC face when trying to access regional and international markets.\textsuperscript{545} This may give the region a new life by boosting economic growth thus eradicating poverty, unemployment and other problems which the region is facing.\textsuperscript{546}

4.3 SADC TBT Annex to the SADC Protocol to trade

In pursuit of domesticating the TBT Agreement within the regional regulatory framework, SADC has adopted the SADC Protocol on Trade. The TBT Annex to the SADC Protocol on Trade tends to converge and support the multilateral trading system.\textsuperscript{547} Lesser noted that agreements that seek deeper economic integration and display WTO TBT regulations can further and complement the objectives of the TBT Agreement.\textsuperscript{548} Therefore, if the TBT Annex to the SADC Protocol on Trade is implemented effectively, it can facilitate regulatory cooperation among Member states thereby enabling them to achieve closer and faster co-ordination on standard-related measures than what would be feasible at the multilateral level.\textsuperscript{549} It is therefore important for Member states to take advantage of regional agreements in order to ensure faster compliance with their international obligations.

An assessment of the SADC TBT Annex to the Protocol on Trade provisions shows a number of rules that have been adopted directly from the TBT Agreement. The TBT Annex directly refers to the TBT Agreement, in particular the Code of Good Practice for the Preparation Adoption and Application of Standards.\textsuperscript{550} The region’s TBT Annex further adopted the

\begin{footnotes}
\item[547] Lesser (n 4) 50.
\item[548] Ibid.
\item[549] Ibid.
\item[550] Article 8.2 states that “Member States shall ensure that National Standards (and any other national institutions developing standards) meet the relevant provisions of the WTO TBT Agreement and in particular develop and publish national standards in accordance with Annex III: Code of Good Practice for the Preparation, Adoption and Application of Standards of the WTO TBT Agreement.”
\end{footnotes}
principles of harmonisation, equivalency, mutual recognition, transparency and the use of international standards from the TBT Agreement. It can therefore be submitted that SADC’s regional regulations on technical barriers to trade and its infrastructure support adherence to the TBT Agreement. Accordingly, Erasmus and others note that the SADC TBT Annex rules reinforce international best practices. This shows the willingness of member states to honour the TBT Agreement rather than undermining it.

Furthermore, SADC has managed to put in place an internationally recognised regional Standardisation, Quality, Assurance and Metrology (SQAM) infrastructure. The SQAM Programme includes SADC Cooperation in Standardisation (SADCSTAN), SADC Cooperation in Accreditation (SADCA), SADC Cooperation in Legal Metrology (SADCMEML), SADC Technical Regulations Liaison Committee (SADCTRLC), SADC TBT Stakeholders Committee (SADCTBTSC), SADC Cooperation in Measurement Traceability (SADCMEET), SADC and SQAM Expert Group (SQAMEG). The aim of the SADC’s SQAM programme is to eliminate progressively technical barriers to trade among member states and between SADC and other regional and international trading blocks, and the promotion of quality standards and quality standards infrastructure in the Member states.

4.3.1 SADCSTAN

SADCSTAN was established in 1997 in order to “promote regional cooperation in the development of harmonised standards, facilitate the exchange of information on existing standards and draft standards among member states and facilitate the adoption of harmonised standards as national standards by Member states.” In addition, the organisation coordinates with international standard setting bodies and administers compliance with TBT Agreement for the region. Accordingly, all members are required to participate in the

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551 See Article 5.2, 5.3 and 8.1 of the TBT Annex to the SADC Protocol on Trade.
554 See Article 13 of the TBT Annex to the SADC Protocol on Trade.
555 Ibid.
557 See Article 20.1 of the TBT Annex to the SADC Protocol on Trade.
development of regional standards.\textsuperscript{558} In this regard, all member states except Democratic Republic of Congo (DRC) have managed to put a legal framework that drafts and adopt standards.\textsuperscript{559} However, there is lack of capacity, quality infrastructure and skilled staff from the member states which sometimes hinder national participation.\textsuperscript{560} In addition to capacity constraints, there is no legal obligation to adopt and implement harmonised SADC standards.\textsuperscript{561} Lack of obligation to implement regional standards may be seen as an obstacle to the effectively functioning of the SADCSTAN. Member states may therefore habitually use national standards which are sometimes repressive and difficult for other countries to comply with without facing any form of penalty.

4.3.2 SADCMEL

SADCMEL was formed in 1996. Its main objective is to facilitate the harmonisation of the national legal metrology regulations of SADC countries and between SADC and other regional and international trading blocks.\textsuperscript{562} In addition, SADCMEL has been tasked with the mandate of identifying and removing technical and administrative barriers to trade in the field of measuring instruments and also promoting consistent interpretation of normative documents and propose actions to facilitate their implementation.\textsuperscript{563} SADCMEL had managed to harmonise only four regulations which include sale of units for measurement, accuracy of measurement, mechanical counter scales and beam scales.\textsuperscript{564} The effectiveness of this organisation may thus be question due to its ability to harmonise only four products in the space of 15 years.\textsuperscript{565} One of the major challenges faced by member states to participate SADCMCEL is language.\textsuperscript{566} The difference in languages between states creates problems for dissemination and analysis of the draft technical regulations produced. This situation therefore slows down the pace of the programme.

4.3.3 SADCA

\textsuperscript{558} Meyer and others (n 46) 21.
\textsuperscript{559} Ibid.
\textsuperscript{560} Ibid.
\textsuperscript{561} Ibid.
\textsuperscript{562} See Article 18.1 of the SADC TBT Annex to the SADC Protocol on Trade.
\textsuperscript{563} See Article 18.2 of the SADC TBT Annex to the SADC Protocol on Trade.
\textsuperscript{564} Meyer and others (n 46) 22.
\textsuperscript{565} Ibid.
\textsuperscript{566} Ibid.
SADCA was established in 1997 and its main aim is to facilitate the creation of a regional accreditation system which will assist in removing technical barriers to trade in both voluntary and regulatory areas.\textsuperscript{567} Accordingly, SADCA created the SADC Accreditation System (SADCAS) which offers a full scope of accreditation to testing and calibrating laboratories, certification bodies and inspection bodies. In this regard, SADCAS has managed to be accepted as a member of various international organisations which include International Laboratory Accreditation Cooperation (ILAC), Inter-American Accreditation Cooperation (IAAC) and African Accreditation Cooperation (AFRAC).\textsuperscript{568} However, due to lack of resources and qualified technical staff, some member states find it difficult to participate in SADCAS activities.\textsuperscript{569}

4.3.4 SADCMET

The TBT Annex to the SADC Protocol on trade gives SADCMET the powers to coordinate metrology activities and services in order to provide regional calibration and testing services.\textsuperscript{570} SADCMET is also involved in preparing projects to support the development of quality infrastructure related to metrology activities in Member states.\textsuperscript{571} In addition, SADCMET has been tasked with the responsibility of liaising with the International Bureau of Weights and Measures and other organisations concerned with measurement traceability.\textsuperscript{572} All members are required to participate, however participation for countries like Mozambique is limited due to the absence of metrological infrastructure, lack of expertise and inadequate financial support.\textsuperscript{573}

4.3.5 SQAMEG

SQAMEG has the responsibility of supporting the SADC Secretariat in an advisory capacity in SQAM matters that are not covered by the other SQAM structures and those of an overlapping nature in both the voluntary and regulatory domain.\textsuperscript{574} SQAMEG also provides

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{567} See Article 17.1 of the TBT Annex to the SADC Protocol on Trade.
\item \textsuperscript{568} See Meyer and others (n 46) 21.
\item \textsuperscript{569} Ibid.
\item \textsuperscript{570} See Article 19 (1) of the TBT Annex to the SADC Protocol on Trade.
\item \textsuperscript{571} Wilson and Abiola (556) 127.
\item \textsuperscript{572} Article 19 (3) of the TBT Annex to the SADC Protocol on Trade.
\item \textsuperscript{573} Wilson and Abiola (556) 127.
\item \textsuperscript{574} Article 21.1 of the TBT Annex to the SADC Protocol on Trade.
\end{itemize}
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recommendations to the SADC Secretariat on any issues that affect the operation of SQAM. This is a disadvantage to countries that do not speak English for example Mozambique. These countries are therefore left on the side-lines during discussions to adopt regional standards and regulations. Therefore language can be seen as an obstacle to the efficient functioning of this organisation.

4.3.6 SADCTRLC

SADCTRLC is responsible for facilitating implementation of the SADC technical regulation framework. In this regard SADCTRLC is responsible for making recommendations on SADC countries’ technical regulation policy issues, develop guidelines and tools to assist countries with implementation at national level. It can therefore be noted that SADCTRLC is analogous to the WTO TBT Committee except that SADCTRLC deals with regional issues while TBT Committee deals with international issues.

4.3.7 SADCTBTSC

The main function of the SADCTBTSC is to facilitate SADC stakeholder participation in SADC TBT matters in both the voluntary and regulatory domain. Accordingly, the SADCTBTSC is tasked with advising the SADCTRLC and SQAMEG on matters relating to the TBT Annex to the SADC Protocol trade. These matters include areas which the SADCTBTSC think might be included in the SQAM programme and any issues that may affect the efficient operation of the SQAM infrastructure.

575 Article 21.2 of the TBT Annex to the SADC Protocol on Trade.
576 Wilson and Abiola (556) 127.
577 Ibid.
578 Ibid.
579 See Article 15.1 of the TBT Annex to the SADC Protocol on Trade.
580 See Article 15.2 of the TBT Annex to the SADC Protocol on Trade.
581 See Article 16 (1) of the TBT Annex to the SADC Protocol on Trade.
582 See Article 16 (2) of the TBT Annex to the SADC Protocol on Trade.
583 Ibid.
4.4 The Implementation of the Substantive Provisions of the TBT Agreement

4.4.1 Unnecessary obstacles to trade

In promoting free trade, the TBT Agreement aims to ensure that technical barriers to trade do not become unnecessary obstacles to international trade. Technical barriers to trade should therefore be used to ensure core public policy objectives while at the same time minimising their impact on trade. However, when it comes to practice technical barriers to trade have been identified as one of the NTBs impeding trade in the region. In this regard, the World Bank (WB) in its report states that some SADC countries have a tendency of implementing technical regulations that are difficult to justify as to why protectionism is necessary. Inflexible TBT regulations place SMEs at a disadvantage as they lack the necessary capacity to meet extra costs that can be created by these regulations.

South Africa in 2015 announced an inspection advisory in accordance with the Agricultural Product Standards Act, No 119 of 1990. The advisory stated that, inspections for fresh fruit and vegetables, feed products and grain and grain products intended for export to African countries will be in effect as of 1 April 2015. The regulations does not discriminate against exports to different countries per se. However, what raises questions is the purpose of the inspection advisory being only applicable to exports to African countries. In addition, African exporters are required to pay the prescribed inspection fee determined by the

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584 See 5th recital of the preamble to the TBT Agreement.
585 Gilson (n 25) 94.
587 World Bank (n 518) 34.
589 These inspections are only applicable to consignments of 20 kilograms or more of fresh fruit, vegetables, feed products, grains and grain products and to consignments of 10 kilograms or more of ornamental foliage and flowers. See Media Advisory Department of Agriculture, Forestry and Fisheries (2015) <http://www.nda.agric.za/docs/media/INSPECTION%20ADVISORY.pdf> accessed 23 May 2016.
590 See Article 2 of the Agriculture Product Standards Act, No 119 of 1990.
Perishable Products Export Control Board. Consequently, these inspection fees place businesses exporting to African markets at a disadvantage as they are subjected to additional costs that companies exporting to other continents are not subjected to. As a result of these additional costs some businesses especially SMEs are deterred from doing business within the region.

In addition, the introduction of Consignment Based Conformity Assessment (CBCA) and Pre-Export Verification of Conformity (PVoC) by most SADC member states may have substantial impact on SMEs as these programmes also add to the cost of doing business in SADC. Tanzania, Botswana and Zimbabwe have in the recent years either reinforced or at least broadcasted their intention to take further action on CBCA/PVoC. These Member states have been criticised for choosing widely diverging, contradictory and inconsistent approaches that create legal uncertainty and create costs for exporters. This is because CBCA/PVoC permits governments to make a list of product standards compulsory without resorting to appropriate national legislative measures. This can be seen as a move of frustrating imports from other countries thereby protecting domestic industries from foreign exports. In supporting this assertion, Murevererwi submitted that many African countries have increasingly reverted to pre-shipment inspections to protect domestic manufacturers at great cost for exporters.

The legality of these programmes may further be questioned on the basis that they turn voluntary standards into technical regulations in which these regulations are imposed only on imported goods. Article 2.1, 5.1.1 of the TBT Agreement and paragraph D of the Code of

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592 See Media Advisory Department of Agriculture, Forestry and Fisheries (n 603).
593 CBCA/PVoC programmes are conformity assessment procedures which take place on a pre-shipment basis. Generally, CBCA/PVoC programmes are recognised as having the purpose of protecting “consumers from dangerous, substandard and counterfeit products, to protect domestic industry from unfair competition from non-compliant goods and to facilitate trade through the avoidance of consignment testing upon arrival or multiple testing requirements.” See Abrie du Plessis, ‘Consignment Based Conformity Assessment (CBCA) and Pre-export Verification of Conformity to Standards (PVoC) Programmes in SADC countries.’ (2015) <http://www.tralac.org/images/docs/8372/s15b112015-du-plessis-cbca-pvoc-programmes-in-sadc-countries-20151028-fin.pdf> accessed 22 May 2016.
594 Ibid.
595 Ibid.
596 Some of the product standards mandatory listed have been criticised as being unclear and vaguely described. See Du Plessis (n 593).
597 CBCA and PVoC programmes add costs to doing businesses as consignments have to be inspected before they depart for various destinations. Costs may therefore arise from inspection fees. See Brian Mureverwi, ‘Zimbabwe Introduces Consignment Based Conformity Assessment’ (2016) <https://www.tralac.org/discussions/article/9594-zimbabwe-introduces-consignment-based-conformity-assessment.html> accessed 20 May 2016.
598 Ibid.

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Good Practice contains the non-discrimination obligations. These obligations specifically require that member states must not accord favourable treatment to domestic products at the expense of foreign products. Thus, if Zimbabwe, Tanzania and Botswana’s CBCA/PVoC are being applied only to foreign products, their legality should be questioned based on the principle of non-discrimination. If not used according to the dictates of the TBT Agreement, it can be concluded that these measures may undermine the process of promoting free trade within the region.

In addition, several SADC countries tend to base their technical regulations on performance rather than design or descriptive characteristics. For example Malawi’s regulation on casual and fashion plastic shoes (MS 109) specifies the thickness of straps and bands of shoes that exporters should comply with before exporting to Malawi. Also, South Africa introduced the environmental levy on plastic bags which was meant to reduce litter problems but the regulation governing it ended up regulating issues not linked to litter such as the thickness of the plastic bag and the size of the text to be printed on the bag. These regulations are based more on design than a safety requirement requiring a technical regulation. They are thus clear examples of regulations that are being enforced by member states that go beyond issues of public interests. It can therefore be submitted that these provisions contravene Article 2.8 of the TBT Agreement.

The presence of provisions that contravene the TBT Agreement can be attributed to the absence of a regulatory reform office in SADC countries. Such an office helps to fulfil Article 2.5 of the TBT Agreement which requires member states to be able to justify the presence of both new and old technical regulations. The absence of a regulatory reform

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599 Osiemo (n 524) 192.
600 See World Bank, ‘Malawi Diagnostic Trade Integration Study (DTIS) Update: Reducing trade Costs to Promote Competitiveness and Inclusive Growth’ (2013) 59-60 <http://documents.worldbank.org/curated/en/685751468302481348/Malawi-Diagnostic-trade-integration-study-DTIS-update-reducing-trade-costs-to-promote-competitiveness-and-inclusive-growth> accessed on 28 June 2016; Moreover, in Mauritius the Chamber of Commerce proposed the development of a regulation to govern the quality of shoes that enter the country. Shoes have been denied entry into the country by the Quality Assurance Service Department for non-compliance with the requirements specifying the thickness of straps and bands. This regulation is not there to ensure public policy objectives but instead it is meant to limit imports. See World Bank (n 518) 33.
601 Ibid.
602 Article 2.8 specifies that “wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.” Article 2.5 states that “A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation.”
office has led some of the SADC countries to have regulations that are too old. For instance, a complaint has been lodged by the Federation of East and Southern Africa Road Transport Associations (FESARTA) against the application of out-dated overall vehicle width and overall vehicle height limits by Botswana. SADC recommends 2.6 metres width and 4.3 metres height; however by the time of the complaint, Botswana was using 2.5 width and 4.1 metres height. This regulation makes it difficult for producers to export to Botswana due to the fact that the required size by Botswana cannot be achieved without major structural adjustments. Ultimately, businesses are deterred from exporting to Botswana.

These restrictive regulations that are sometimes associated with repeated testing of products increases costs of doing business in the region. Costs of these regulations are sometimes further increased by time consuming administrative procedures that exist at the borders of SADC countries. Zimbabwean firms importing from South Africa have reported that up to nineteen different official approvals which can take up to 3 months to obtain are required for some imports. This has been largely caused by Zimbabwe Revenue Authority (ZIMRA) which has centralised the declaration system under which documents are no longer processed at border posts but in only three cities namely Harare, Bulawayo and Masvingo. In the same vein, Shoprite reported that it spends around R43 000 000.00 on import documentation when exporting to SADC countries. As a result of these costs it is not surprising that businesses are now considering using air cargo when transporting goods to other SADC countries. A study conducted by Dettmer and others showed that South Africa uses air cargo more often when transporting exports to its SADC partners (Zambia, Zimbabwe, and

606 Ibid.
607 Ibid.
611 Ibid.
612 Charalambides (n 605) 27.
Mozambique) than to developed countries (European Union, US and Japan).\textsuperscript{613} These results should be a cause for concern among SADC member states as it shows how difficult it is for producers to penetrate SADC markets. Therefore air cargo though expensive seems to be the only option for firms to overcome technical barriers within the region.

4.4.2 International standards

The TBT Agreement encourages the use of international standards as the basis for domestic regulations whenever possible and relevant.\textsuperscript{614} Compared to other regional economic blocs in Africa, SADC has managed to put in place an internationally recognised SQAM infrastructure which includes SQAMEG, SADCMET, SADCTBTSC, SADCTRLC, SADCMEL, SADCA and SADCSTAN. The aim of the SADC’s SQAM programme is to eliminate progressively technical barriers to trade among member states and between SADC and other regional and international trading blocks.\textsuperscript{615}

Of particular note is the successful implementation of the SADCSTAN which has managed to create seventy-eight regional standards.\textsuperscript{616} South Africa has been responsible for developing many of the regional standards.\textsuperscript{617} This might be attributed to the fact that SABS is internationally accredited and also participates in international bodies such as International Organization of Standardization (ISO) and the International Electro technical Commission (IEC).\textsuperscript{618} There has been also a notable improvement in presenting proposals for harmonisation from countries like Mauritius, Botswana and Zimbabwe.\textsuperscript{619} This can be seen as a big step by SADC member countries in ensuring that technical barriers to trade do not become impediments to trade within the region.

\textsuperscript{614} See Article 2.4 of the TBT Agreement.
\textsuperscript{615} See Article 13 of the TBT Annex to the SADC Protocol on Trade.
\textsuperscript{616} Gilson (n 25) 94.
\textsuperscript{617} Ibid.
\textsuperscript{619} World Bank (n 518) 47.
However, the implementation of the SQAM programme has been criticised as fragmented. A SADCSTAN workshop conducted in 2015 noted lack of adoption of harmonised standards as one of its major problems. Member States are therefore dominated by nationally developed standards and technical regulations. Differences in technical regulations and standards are not only shown between countries but also within the national regulatory frameworks of member states. For instance, South Africa has six different national regulations dealing with the transportation of dangerous chemicals. In addition, each municipality requires permits for the transportation of these chemicals passing through their jurisdiction. This situation reflects the difficulty that exists in transporting products from one country through another country to another. Potential benefits emanating from regional and international harmonisation of technical barriers to trade are automatically undermined. Considering lack of implementation of the agreed standards, it is submitted that the implementation of the TBT Agreement within SADC remains fragmented and TBT Agreement non-compliant.

Criticisms have also been advanced that some of regional standards being harmonised are without prioritisation and are unlikely to bring significant increases in regional trade. Among other products that have been harmonised by the region are frozen peas and dried apricots. Discussions on harmonising basic commodities that have greater impact on trade are becoming necessary in order to help create opportunities for lesser developed countries within the region. Private and public standards imposed on smaller producers usually deter them from participating in emerging trade opportunities arising from increased market

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622 Ibid.
623 World Bank (n 518) 34.
624 Ibid.
625 Ibid.
626 Ibid.
627 Ibid.
629 Gilson (n 25) 94.
access. It has therefore become a necessity for SADC governments to harmonise some of the standards and regulations not affecting the safety of environment, people or animals in order to encourage SMEs to engage in trade within the region.

In 2010 SADC States managed to sign a Memorandum of Understanding (MoU) for the implementation of the Harmonised Seed Regulatory System (HRSP). The HRSP consists of rules, standards and procedures that are necessary to facilitate the movement of seeds between Member States. The reasoning behind this system is the need to facilitate seed trade between Member States by removing national regulatory barriers. In order for this programme to be effective, Member States are required to harmonise their national seed regulations to the common standards, rules and procedures outlined in the HRSP. In spite of the overwhelming political endorsement by Member States, the harmonisation process has not been proceeding at the pace of the project. Lack of implementation of the programme by the Member States is slowing down the project. Accordingly, the HRSP can be seen as an example of the agreements that SADC countries manage to agree on paper whilst differing in practice.

4.4.3 Equivalence and Mutual Recognition

The rationale behind equivalence and mutual recognition lies in the fact that if international standards cannot be harmonised, member states can enter in agreements that are meant accept as equivalent technical regulations and conformity assessment procedures of other countries provided they fulfil the same policy objectives. MRAs are easier and less demanding to negotiate on as they can be negotiated by two or more countries who are involved in a trading relationship. Accordingly Keyser has postulated that MRAs are more effective in

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631 Ibid.
633 Ibid.
634 Ibid.
635 Centre for Applied Legal Research (n 44) 5.
636 Ibid.
637 Ibid.
facilitating trade in Africa than harmonisation of international standards. Despite these findings, the WB has noted that mutual recognition is far from being accepted in Southern Africa.

Malawi does not recognise certification marks from SADC and any other internationally accredited certification bodies. Consequently, mandatory IMQS requires all imports subject to technical regulations to be tested, including the products that had already been tested by internationally accredited firms prior to arrival in Malawi. The MBS receive and accept tests conducted in its own laboratories but it does not recognise results conducted form foreign laboratories. The results produced by the MBS have been suspected of not being reliable because of the weak infrastructure and shortages of basic resources to conduct the necessary procedures. Given these shortages, it would be easier and cheaper for Malawi to accept other countries results especially from countries with accredited facilities. Refusal to accept other countries’ results as equivalent to Malawi’s results may be seen as a move that is meant to frustrate foreign producers in order to protect domestic industries.

In addition, Zambia does not recognise other countries’ standards and requires all foreign vehicles to comply with the country’s regulations. Standards 371:2008 and 429-4:2008 require all foreign tankers either delivering a product or transiting through Zambia.


Ibid.

World Bank (n 518) 33.

This practice increases costs of doing business as producers have to go under repeated testing. For instance the requirement in the Salt Iodization Act to have salt tested for iodine levels at the entry border delays the distribution of the product since the product cannot be distributed until testing is done. Businesses therefore incur costs due to delays faced in order to have iodine tested. See Imani Development International, ‘An Inventory of SADC Region: Non-Tariff Barriers: Malawi’ (2007) 29 www.tradebarriers.org/octo_upload/attachments/download/4ccff5f0.../malawi.pdf accessed 13 August 2016.

The MBS is not accredited by either the SADC Accreditation Agency or either of the two international bodies (ILAC and IAF). While the MBS accepts test results from its own laboratories, it does not recognize test results from overseas accredited testing bodies. See World Bank ‘Malawi Diagnostic Trade Integration Study (DTIS) Update: Reducing trade Costs to Promote Competitiveness and Inclusive Growth (n 596) 56.

Ibid.

Ibid.


ZS 372: 2008 provides for operational requirements for road tank vehicles - codes for practice. It also outlines rules and procedures for the safe operations and handling of road vehicles that are used for the converging of petroleum products in excess of the exempt quantities on any road.

ZS 429 Part 1 gives recommendations for the materials, the methods of construction and the installation of equipment used in the handling, storage or distribution of liquefied petroleum gas in domestic, commercial and industrial installations that involve gas storage containers of individual water capacity not exceeding 500 litres and of a combined water capacity not exceeding 3 000 litres. Part 2 of ZS 429 covers recommendations for the layout, design and installation of butane, propane and liquefied petroleum gas
to comply with Zambian standards. Transporters are further required to obtain a permit that certifies that foreign tankers comply with these standards.\(^649\) This practice raises costs for business because not only do they have to comply with their country’s standards, but with Zambian standards as well. Consequently businesses enter into multiple testing in order to confirm that they comply with Zambian standards. In order to facilitate trade, Zambia should enter into MRAs with other countries in order to accept other countries’ standards as equivalent to theirs if they aim to fulfil the same objective. This would mean that Zambia will accept standards of foreign vehicles provided the transporters produce certificates to confirm that they comply with their countries’ standards.\(^650\) Alternatively, the non-acceptance of other countries’ standards as equivalent to Zambian standards could be due to lack of or low levels of trust among SADC states.

South Africa, on the other hand, through SABS accepts conformity results that have been issued by accredited Conformity Assessment Body (CAB) and whose accreditation body is a signatory to the IAF multilateral agreement.\(^651\) SABS would accept a transfer of registration from a foreign CAB on the condition that the foreign CAB is accredited by an International Accreditation Forum (IAF) signatory.\(^652\) However, many of the countries in the SADC region lack resources to participate in internationally accredited bodies.\(^653\) In addition most countries in SADC do not have internationally accredited infrastructure. Lack of adequate resources from other countries might be a reason why other countries like South Africa are reluctant to enter into MRAs with other states.\(^654\)

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\(^{650}\) Ibid.

\(^{651}\) Meyer and others (n 46) 19.


\(^{653}\) Hartzenberg n (525) 4.

\(^{654}\) Keyser (n 639) 3.
4.4.4 Transparency

One of the most important blocks for building a good regulatory system is transparency.\textsuperscript{655} Transparency in regulatory system is critical because it enables stakeholders from both foreign and domestic markets to have access to updated technical regulations and standards of a targeted market.\textsuperscript{656} In understanding the importance of transparency, the TBT Agreement is comprised of extensive transparency obligations which require member states to notify their draft regulations with sufficient time for comments from other member states.\textsuperscript{657} Accordingly, the notifying state is required to give other members sufficient time to adapt to the new regulations.\textsuperscript{658} Only in exceptional circumstances which include urgent health, safety or environmental problems are member states allowed to deviate from the notification obligations.\textsuperscript{659} However, concerns have been raised with regard to the implementation of these transparency provisions by SADC countries.\textsuperscript{660}

The World Bank has noted that in many Southern African countries there are no clearly defined rules for technical regulations, standards and conformity assessment procedures.\textsuperscript{661} Accordingly, some of the notifications that Member states submit provide insufficient information that can help other states to assess the implications of the draft regulation to their exports.\textsuperscript{662} In South Africa, access to information on existing and proposed technical regulations has been reported to be difficult as the system is unpredictable and unclear.\textsuperscript{663} There is no consistent national approach to consultation.\textsuperscript{664} Furthermore variations exist between departments in terms of how they notify technical regulations to the WTO and in terms of how the departments publish technical regulations.\textsuperscript{665}

\textsuperscript{656} Ibid.
\textsuperscript{658} Ibid.
\textsuperscript{659} See article 2.4 of the TBT Agreement.
\textsuperscript{660} World Bank (n 518) 35.
\textsuperscript{661} Ibid.
\textsuperscript{663} Ibid.
\textsuperscript{664} Steyn (n 9) 194.
\textsuperscript{665} Department of Trade and Industry (n 662) 14.
In addition, various departments are involved in regulating the same regulations. For instance, fixed telephone equipment such as fax machines have to comply not only with technical regulations for safety which is administered SABS but also overlapping specifications relating to electromagnetic interference and connectivity which is administered by the Independent Communications Authority. This leads to duplication across ministries and overlapping responsibilities. As a result firms are sometimes required to obtain different permits and licences from different institutions, all of which may be intended to achieve similar objectives. It can be submitted that these divergent rules and procedures instead of providing predictability and clarity creates uncertainties and confusion for businesses. In this regard, Koch has correctly observed that exporting to other continents such as Europe and North America is easier than exporting to the SADC region since the requirements are clear and stable.

The Democratic Republic of the Congo (DRC) does not have its own accreditation service. The Congolese Control Office has been tasked with the mandate of ensuring that DRC complies with the obligations under the TBT Agreement. However, the Congolese Control Office has not made any notifications concerning standards and technical regulations to the WTO. Tanzania on the other hand has managed to put a functioning Enquiry Point and Notification Authority, the Tanzania Bureau of Standards (TBS). Thompson noted that in order to operate efficiently, the TBS must have an up to date collection of all national regulations, standards, and information about conformity assessment procedures. Lack up to date regulations might be attributed to the fact that one person is responsible for the Enquiry Point at TBS. As a result of too much work, the person designated might not be able to update all the regulations on time. This clearly affects the reasonable time that the

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666 Steyn (n 9) 194.
667 World Bank (n 518) 35.
668 World Bank (n 518) 34.
669 Peet and Koch (n 35) 10
671 Ibid.
672 Ibid.
674 Ibid.
675 Thompson (n 669) 7.
676 Ibid.
TBT Agreement prescribe for other members to comment on the regulations thereby violating the transparency provisions of the TBT Agreement.

4.5 Implementation Challenges

4.5.1 Inadequate resources

Whilst some of the effects of TBT measures can be linked to trade disruption, other effects can be linked to lack of the necessary capacity to ensure the effective implementation of the TBT Agreement. In order to ensure the effective implementation, there is need for SADC countries to have resources that improve production processes, invest in new technology and efficient trade infrastructure.\(^{677}\) This requires economic and financial stability which most of the developing and least developed countries do not have.\(^{678}\) Lack of adequate resources is therefore an obstacle to the implementation of the TBT Agreement to SADC countries.\(^{679}\)

A national quality infrastructure is important in order to break down technical barriers to trade.\(^{680}\) It is also a vital component required for deeper integration of SADC countries into the international trading arena.\(^{681}\) A report compiled by United Nations Economic Commission for Africa (UNECA) showed that there are a number of factors that contribute to lack of domestication of international Agreements in Sub-Saharan Africa.\(^{682}\) These factors include:

- lack of resources; shortage of manpower capacity to cope with and implement the diverse range of regional integration activities and programmes; poor coordination of programmes at national level; and

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\(^{679}\) International Trade Centre (n 522) 1.

\(^{680}\) Ulrich Harmes-Liedtke, ‘The Relevance of Quality Infrastructure to Promote Innovation Systems in Developing Countries’ (2010) 10 <https://www.ptb.de/cms/fileadmin/internet/fachabteilungen/abteilung_q/q_5_technische_zusammenarbeit/q_5_publikationen/303_Discussion_3_Innovation/PTB_Q5_Discussion3_Innovation_EN.pdf> accessed 22 July 2016; The weakness in the country’s infrastructure includes poor transportation services, breakdowns in communication and utility services such as electricity, telephones and water. The non-availability of serviced industrial parks, industrial estates, industrial shells and warehousing is also a weakness of a country’s infrastructure. See Imani Development International (n 638) 28

\(^{681}\) Will (n 608) 37.

limited consultations among stakeholders on a number of agreed decisions and protocols relating to regional integration.\textsuperscript{683}

These constraints also limit the ability of SADC countries to participate effectively in both the regional and multilateral trading system.\textsuperscript{684} A number of developing countries given their current capacity and infrastructure simply cannot afford to comply with sophisticated and demanding technical regulations imposed on their imports by developed countries.\textsuperscript{685} This structural problem tends to deteriorate developing countries’ terms of trade and prevents them from competing with developed countries on a level-playing field.\textsuperscript{686} Consequently, Kalenga has noted that while there is a wide reference to international standards by regional and international instruments, it is evident that most SADC states do not have the necessary capacity and sophistication for the development of international standards.\textsuperscript{687}

In Zimbabwe, SQAM National infrastructure is implemented through an ad hoc subcommittee chaired by the Standard Association of Zimbabwe (SAZ).\textsuperscript{688} Despite the existing institutional framework, the involvement of stakeholders in TBT issues is limited and there is a poor compliance with national obligations related to regional agreements.\textsuperscript{689} In addition there is a lack of accredited organisations for proficiency testing of water and foods.\textsuperscript{690} These are some of the basic necessities that states needs to implement the TBT Agreement. Lack of these basic necessities automatically hinders the country’s potential to implement the TBT Agreement.

In an attempt to help Zimbabwe to implement the TBT Agreement, In 2011, Trade Committee supported a technical assistance aiming at drafting National Quality Infrastructure (NQI) Policy, a NQI Bill and a Road Map of TBT-related activities.\textsuperscript{691} However due to internal capacity constraints, project final recommendations have not yet been

\textsuperscript{683} Ibid.
\textsuperscript{686} Ibid.
\textsuperscript{687} Kalenga (n 678) 14.
\textsuperscript{689} Ibid.
\textsuperscript{690} Ibid.
\textsuperscript{691} Ibid.
implemented.\textsuperscript{692} It can therefore be postulated that to some extent the technical assistance that is being given to developing and least developed countries is not adequate to support these countries with implementing technical provisions. It does not help to give technical assistance to countries that do not have the necessary capacity to implement the assistance.\textsuperscript{693} Accordingly Gujudhur asserts that much of the technical assistance provided by WTO has not been effectively integrated into national activities.\textsuperscript{694} Developing and least developed countries are being provided with considerable training on certification procedures but without being provided with the necessary resources to use this training for.\textsuperscript{695} Gujudhur compared the situation to training a carpenter but that carpenter having no tools or timber to actually work with.\textsuperscript{696}

Also, it has been noted that Tanzania is lagging behind in complying with the TBT Agreement because of lack inadequate technical know-how, competent human and financial resources and facilities.\textsuperscript{697} Musonda and Mbowe noted that the budget that is given to the Ministry of Trade and Industry (MOIT) in Tanzania is not enough to cater for technical resources and bridge the gaps that exist within the technical regulatory system.\textsuperscript{698} As a result of these constraints, Andrew Temu and John McGrath noted that the motivation to implement the multilateral trading agreements is lost in many African countries.\textsuperscript{699} In order to help countries like Tanzania to implement the TBT Agreement, technical assistance should be

\textsuperscript{692} Ibid.


\textsuperscript{694} Shyam Gujudhur (n 48).

\textsuperscript{695} Ibid.

\textsuperscript{696} Ibid.


\textsuperscript{698} Andrew Temu and John McGrath, ‘Study on Danish Support to Trade Related Capacity Building in Tanzania’ (2012) 22 <www.um.dk/...studies/Trade%20related%20capacity%20building%20in%20Tanzania.pdf> accessed 12 April 2016; In addition an evaluation conducted on laboratory facilities in Malawi showed that the laboratories lack funds for materials, maintenance and service of instruments. Moreover it was found that the country lacks basic commodities such as reliable infrastructure and acceptable water quality. Critical factors for accreditation such as service quality and laboratory management have been evaluated as poor. Consequently producers have to wait for eight weeks for results which maybe doubted due to out-dated materials. See World Bank (n 600) 629.

\textsuperscript{699} Ibid.
directed to help with the actual costs of implementation.\textsuperscript{700} This kind of assistance might help SADC countries to eliminate some of the technical barriers within the region.

South Africa is the only member within the region that has managed to put up the necessary infrastructure for managing technical barriers to trade.\textsuperscript{701} South Africa is the only member within the region that is the member of the International Bureau of Weights and Measures (BIPM) and participates in the mutual recognition arrangement of the International Committee for Weights and Measures (CIPM).\textsuperscript{702} The South African National Accreditation System and the National Metrology Institute of South Africa were established in terms of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, No. 19 of 2006 and the National Measurement Standards and Measurement Units Act, No. 18 of 2006 on 1 May 2007. The South African Bureau of Standards was also re-established in terms of the Standards Act, No. 8 of 2008. It can therefore be noted that South Africa is ahead in terms of implementation of the TBT Agreement compared to other states within the region.

4.5.2 Lack of Expertise

Despite having the resources available, the regulatory system of South Africa remains fragmented as there is lack of effective participation by the government due to lack of capacity stemming from the fact that few people are responsible for much work.\textsuperscript{703} Lack of adequate manpower in technical regulatory systems can be linked to lack of experts in areas of standardisation, metrology and accreditation. In this regard, Osiemo argued that lack of knowledge among relevant stakeholders is one of the major difficulties in the implementation of standards and technical regulations on the domestic level in Southern Africa.\textsuperscript{704} Very few people are able to negotiate, analyse, interpret and implement trade agreements.\textsuperscript{705} Therefore,
lack of expertise within SADC states cannot be over-emphasised as a contributory factor in the weak implementation of the TBT regulations.\textsuperscript{706}

4.5.3 Lack of legal enforcement mechanisms

Currently, the SADC Tribunal is not in operation.\textsuperscript{707} This was as a result of the SADC Summit’s failure to renew the contracts for the sitting judges.\textsuperscript{708} This factor coupled with the instruction by the SADC Summit to the SADC tribunal not to take any case during the review process effectively suspended the work of the Tribunal.\textsuperscript{709} According to Ruppel and Bangamwabo, one of the most important components for the economic integration process is the legitimacy and effectiveness of the dispute settlement mechanisms.\textsuperscript{710} Dispute settlement mechanisms are crucial in an active trading environment because it improves Member States’ compliance with treaty obligations and boost business confidence.\textsuperscript{711} Without a functional legal enforcement body it can be concluded that SADC countries may habitually use technical barriers to trade in order to protect domestic industries form foreign goods.

In addition, to lack of a dispute settlement forum, SADC agreements do not contain a binding obligation to domesticate the relevant instruments and to make them part of the national legal systems in member states.\textsuperscript{712} None of the agreements include provisions on enforcement and

\textsuperscript{706} Osiemon (n 524) 193.

\textsuperscript{707} The SADC Tribunal was suspended in August 2010 when the Summit ordered a review on the role, function and terms of reference of the Tribunal to be completed within a period of six month. In May 2011 the Summit extended this suspension for another year, while further determining that the Tribunal will not hear any more cases, whether new or existing. The Summit also mandated the SADC ministers of justice and attorneys-general to begin the process of amending the Protocol on the Tribunal and submit a progress report in 2011, with the final report to be delivered in August 2012. On 18 August 2012 the Summit suspended the work of the Tribunal indefinitely and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to inter-State disputes. See Erika de Wet, ‘The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa’ (2013) 3 <http://www.repository.up.ac.za/bitstream/handle/2263/21831/DeWet_Rise_2013.pdf?sequence=1> accessed 26 July 2016; Nathan Laurie, ‘The Disbanding of the SADC Tribunal: A Cautionary Tale’ (2013) 3 <http://repository.up.ac.za/bitstream/handle/2263/42461/Nathan_Disbanding_2013.pdf?sequence=1> accessed on 26 August 2016.


\textsuperscript{709} Ibid.


\textsuperscript{711} Kamau (n 586) 48.

\textsuperscript{712} Meyer and others (n 46) 17.
dispute settlement specific to technical regulations and other TBT matters.\textsuperscript{713} Accordingly, the failure by member states to comply with their regional obligations does not appear to have consequences.\textsuperscript{714} The reluctance towards establishing a dispute settlement mechanism within SADC is as a result of the resistance of member states towards interference with their sovereignty.\textsuperscript{715} Kamau has submitted that economic integration entails an inevitable loss of autonomy over some of the internal matters.\textsuperscript{716} Lack of political will to comply with judicial decisions creates an enforcement gap and is an obstacle to the positive role which dispute settlement plays in the economic integration process.\textsuperscript{717} Thus in order for economic integration to be successful, Member states should expect a degree of loss of sovereignty.\textsuperscript{718}

\textbf{4.5.4 Overlapping Membership}

One of the major difficulties being faced by SADC is overlapping membership.\textsuperscript{719} The majority of SADC countries belong to other Regional Trade Agreements (RTAs). Tanzania is a member of SADC it is also a member of EAC.\textsuperscript{720} Swaziland, Botswana, Lesotho, Namibia and South Africa are members of SACU and DRC, Malawi, Zambia, Zimbabwe, Madagascar, Mauritius and Seychelles are members of COMESA.\textsuperscript{721} Kuyum notes that the “existence of multiple integration schemes and overlapping membership and the continuing negotiations with countries outside the SADC region could significantly alter the nature of integration in Southern Africa”.\textsuperscript{722} This makes it complex for the region to negotiate and

\begin{itemize}
\item Ibd.\textsuperscript{713}
\item Meyer and others (n 46) 17.\textsuperscript{714}
\item Ibd.\textsuperscript{715}
\item Ibd.\textsuperscript{716}
\item Ibd.\textsuperscript{717}
\item The refusal of Zimbabwe to comply with the tribunal’s decision alleging the invalidity of the Tribunal Protocol serves as an example of how member states are not willing to respect and comply with the tribunal decisions. This unwillingness is further showed by the reaction of the summit when the tribunal referred the non-compliance of Zimbabwe to the summit. The summit did not take any action against Zimbabwe but it took an action against the tribunal. See Mike Campbell (PVT) and Others v Republic of Zimbabwe (2009).\textsuperscript{718}
\item Ibd.\textsuperscript{719}
\item Ibd.\textsuperscript{722}
\end{itemize}
implement some policies as other members will be pursuing conflicting policies which may be irrelevant to another regional group.723

SADC’s vision agenda indicated the creation of a Free Trade Area (FTA) by 2012 while COMESA on the other hand had planned the creation of a Customs Union (CU) by 2004.724 A practical example of a country which was caught up in an overlapping quagmire is Zambia which holds membership of both SADC and COMESA.725 Zambia agreed to reduce tariffs to SADC Member States to zero in accordance with the SADC Trade Protocol. South Africa being a member of SADC was entitled to reduce tariffs to zero. On the other hand, under COMESA, Zambia had agreed to a common external tariff for countries that are not members of COMESA. Since South Africa is not a member of COMESA, this did not apply to South Africa. This situation would mean that Zambia had agreed to reduce tariffs with South Africa in accordance to SADC obligations but at the same time maintaining tariffs with South Africa under COMESA obligations.726 It can thus be noted that these overlaps slows the pace and depth of the integration process in the region since they absorb human resources and limited financial resources. It can therefore be submitted that a regional agreement with minimum overlapping membership has the capacity to yield more success thereby making it easier to implement regional and sometimes international goals.

4.6 Conclusion

Although the rules of the TBT Agreement are incorporated in SADC’s TBT annex, effective implementation of these provisions remains problematic.727 As a regional economic bloc, SADC has managed to establish a framework that aims to implement the TBT Agreement. Nevertheless, implementation remains ad hoc at both regional and national level. Lack of implementation may be attributed to protectionist sentiments among member states or genuine lack of resources and expertise among relevant enforcement agencies.728 Despite entering into regional and international agreements that aim to eradicate the unnecessary use of technical barriers to trade, these agreements seem to get overwhelming political

725 See Mapuva (n 531) 96.
726 Ibid.
727 Ibid.
728 Ibid.
endorsement on paper yet in practice it is a different issue. There is an evident dichotomy between what is agreed upon and what happens in practice. Meyer and others therefore correctly postulated that “the overall impression is that African countries still have a long way to go in taking on the challenge of reducing technical barriers to trade.”\textsuperscript{729}

Chapter four has concluded that SADC countries have not been able to implement satisfactorily the provisions of the TBT Agreement in their domestic institutions. This is evidenced by technical barriers that are impeding on trade within the region.

\textsuperscript{729} Meyer and others (n 46) 5.
Chapter Five

Conclusion and Recommendations

5.1 Summary of argument

The purpose of this study has been to critically examine how far SADC countries have gone in implementing the provisions of the TBT Agreement in their domestic institutions. Chapter one of the study served as an introductory chapter and has set out the goals and objectives envisaged by this study. The chapter further illustrates the research problem and the theoretical framework of the study. Furthermore, the chapter lays down the research questions which were answered during the course of the study. The significance of the study was further justified. Finally, the chapter presented the organisation of the chapters and if there are any ethical considerations perceived during the study. The study noted that there are no ethical issues involved.

Chapter two showed that the regulation of technical barriers to trade has always been of concern to regulators as early as the GATT 1947. The GATT 1947 system was however not effective enough to deal with the use technical barriers to trade. The 1970s saw the establishment of the first agreement to regulate technical barriers to trade which became known as the Tokyo Standards Code. The Code was however not efficient enough to deal with the proliferation use of technical barriers to trade due to the weaknesses of the GATT 1947 system. Therefore, Member states entered into negotiations that were meant to rectify the weaknesses of the GATT system. These negotiations gave birth to the TBT Agreement which came into force in 1995. Chapter two further examined the regulatory framework of the TBT Agreement by examining its scope and substantive provisions. Chapter 2 established that the TBT Agreement only covers technical regulations, standards and conformity

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730 Epps and Trebilcock (n 60) 23.
732 Epps and Trebilcock (n 60) 23.
assessment procedures. The key provisions of the TBT Agreement and how they can be used to either promote or disrupt trade were also examined.

Chapter three focused on contentious cases which saw the DSB interpreting some of the provisions of the TBT Agreement. In particular the chapter examined *US - Tuna II* and *US – Clove Cigarettes* in order to see whether the DSB has managed to provide guidance for the interpretation and application of the TBT Agreement to governments and relevant stakeholders. The chapter has revealed that the DSB has managed to give guidelines to governments and relevant stakeholders on how the TBT Agreement should be interpreted and applied. The chapter further examined whether the DSB has managed to clarify the provisions of the TBT Agreement in a manner that balances trade liberalisation with sufficient regulatory autonomy. The chapter answers this question affirmatively and noted that DSB is not against the protection of environment, security, plants, health or animals but that this protection must be done in accordance to the rules prescribed by the TBT Agreement.

Chapter four analysed whether SADC Member states have implemented the TBT Agreement as interpreted by the DSB. The chapter answers this question in the negative and noted that technical barriers to trade are one of the non-tariff barriers that are hindering intra-regional trade. The chapter further revealed some of the challenges that are being faced by member states to implement the TBT Agreement at both national and regional level. It has been noted that most SADC countries lack the necessary resources and infrastructure required to implement the TBT Agreement. South Africa has been noted as the only country that has the necessary capacity and resources to implement the TBT Agreement.

The chapter has further noted some of the efforts that have been made by SADC countries to ensure the implementation of the TBT Agreement. It has been discovered that SADC countries managed to put up SADCA, SADCMEL, SADCMET, SADCTBTSC, SQAMEG SADCTRLC and SADCSTAN under the SADC SQAM programme through the TBT Annex to the SADC Protocol on Trade. The successful implementation of the SADC SQAM programme demands that governments align their national regulatory frameworks with the

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735 *US-Tuna II* (n 268).
736 *Clove Cigarettes* (n 267).
737 See World Bank (n 518) 33.
SQAM objectives and the SADC TBT Annex.\textsuperscript{738} However implementation by member states is not progressing at the pace of the programme. In particular “national policy, legislative and administrative processes are not adequate to facilitate full implementation of the TBT Annex”.\textsuperscript{739} Accordingly, it has been concluded that the SADC region is ahead in terms of making goals, but when it comes to implementation these goals are not realised.\textsuperscript{740} Consequently, the chapter has concluded that technical barriers to trade are impediments to regional trade.

5.3 The main findings

The study has noted that the TBT Agreement establishes legally binding rules which help trade to flow as freely as possible. The TBT Agreement establishes its roots from the Tokyo Round negotiations and the Uruguay Round negotiations.\textsuperscript{741} Essentially, the TBT Agreement encourages trade liberalisation through the removal of unnecessary technical barriers to trade.\textsuperscript{742} In reinforcing the rules under the TBT Agreement, SADC has managed to agree on TBT Annex to the SADC Protocol on trade which is further aimed at reducing technical barriers within the region.\textsuperscript{743} However, implementation of both the TBT Agreement and the TBT Annex suggests that TBT regulations development and implementation remains ad hoc, fragmented, inefficient and TBT Agreement non-compliant.\textsuperscript{744} Specifically, national policy, legislative and administrative processes are not adequate to support the full implementation of the TBT Agreement.\textsuperscript{745}

The DSB in \textit{US - Tuna II}\textsuperscript{746} and \textit{US – Clove Cigarettes}\textsuperscript{747} highlighted the importance of drawing a line between legitimate and disguised protectionism. The TBT Agreement specifically states that countries should base their national regulations on international standards unless the international standards are ineffective to fulfill the objective being

\textsuperscript{740} See also Hanock (n 533) 13.
\textsuperscript{741} Kotschwar (n 730) 143.
\textsuperscript{742} See the Preamble to the TBT Agreement.
\textsuperscript{743} The TBT Annex to the SADC Protocol on Trade reinforces the principles of principles of harmonisation, equivalency, mutual recognition and transparency and removal of unnecessary barriers to trade.
\textsuperscript{744} Kalenga, (n 678) 14.
\textsuperscript{745} Nsingo and Steyn (n 651) 223.
\textsuperscript{746} \textit{US-Tuna II} (n 268).
\textsuperscript{747} \textit{US-Clove Cigarettes} (n 267).
pursued. Instead, SADC’s regulations are mostly dominated by national regulations most of which go beyond issues of public interest. In addition, members are enforcing difficult regulations that are difficult to justify as to why protectionism is necessary. These regulations are obstacles to international trade as they deter businesses from accessing markets of those countries.

The study has further established that despite wide reference to international standards by both the TBT Agreement and the SADC Protocol on Trade, it is apparent that SADC countries lack the necessary capacity and sophistication for the elaboration of international standards in their domestic regulatory frameworks. There seems to be a wide gap between what SADC governments negotiate on and what they are effectively able to implement.

Instead of collaborating closely in order to assist each other meet international standards, nationally developed regulations dominate in SADC countries. These regulations and standards may deter businesses particularly SMEs from doing business in other countries as they cannot afford the costs of meeting different standards of different nations. Some of these standards are deliberately put in place to protect domestic industries. Protectionism is detrimental to SADC countries as development and prosperity in the twentieth-first century lies in trade liberalisation. Consequently, the sound development and effective implementation of technical barriers to trade has the ability to enable sustainable development, build welfare and facilitate trade within SADC member countries.

Unlike other regional integration arrangements in Africa, SADC should be commended for putting up the SQAM infrastructure which is intended to eradicate the use of unnecessary technical barriers to trade. However, it has been noted that implementation of this programme by member states is not moving at the pace of the programme because of the fact that

748 See Article 2.4 of the TBT Agreement.
749 Gilson (n 25) 2.
750 Ibid.
751 Kalenga (n 674) 41.
752 Meyer (n 46) 5.
755 International Trade Center (n 522) 1.
technical regulations of SADC Member States differ from country to country. The success of this programme depends highly on member states using international standards and acceptance of conformity results from other states.

MRAs may also be used as alternatives to harmonisation. MRAs are more effective in facilitating trade in Africa than harmonisation of international standards as they are cheaper and easier because they can be entered by two countries or more countries involved in a trading relationship. However, countries like Malawi are far from accepting conformity assessment results from other countries even if the results are coming from international accredited organisations. Goods are therefore subjected to unnecessary, time consuming and repeated testing to which governments might not have resources for. Consequently costs of doing business are increased. It is important that SADC countries enter into MRAs amongst themselves in order to help small countries that sometimes struggle with costs of participating and meeting international standards.

Transparency lies at the heart of a good regulatory system. Despite emphasis on the transparency obligations under the TBT Agreement, most of SADC countries’ regulatory systems are unpredictable and not clear. The TBT Agreement mandate member states to notify the WTO both proposed and enforced technical regulations. However countries like DRC have never made any notifications concerning standards and technical regulations to the WTO. In addition countries like South Africa do not have a uniform national approach when notifying the WTO. This is as a result of overlapping responsibilities that exist in various national departments. Two or more departments are sometimes responsible for regulating the same TBT measure. This practice creates confusion and uncertainties for business as to which regulations to comply with.

757 Keyser (n 639) 3.
758 Ibid.
759 See World bank (n 518) 33.
760 Ibid.
761 Thompson (n 669) 1.
762 Steyn (n 9) 185.
763 See 2.9 Article of the TBT Agreement.
765 Steyn (n 9) 194.
766 Steyn (n 9) 185.
767 See World Bank (518) 34-35.
The study has further found that SADC countries are facing various challenges to effectively implement the TBT Agreement. Some of the Member States do not have the necessary resources that are needed to implement the TBT Agreement. In this regard, most of SADC countries lack infrastructure and basic resources in order to domesticate the provisions of the TBT Agreement. Moreover, Member States do not have the technical expertise that is needed to analyse, interpret and implement the TBT Agreement. As a result, there are staff shortages in some government departments of Member States.

The study further found that there are no binding obligations that force Member states to domesticate their regional agreements. Lack of implementation of the agreed regulations does not seem to have consequences. SADC currently does not have a functional dispute settlement mechanism as the SADC Tribunal was suspended. Dispute settlement mechanisms are crucial in an active trading environment because it improves Member states’ compliance with treaty obligations and boost business confidence. Without a functional legal enforcement body SADC states have a chance to use technical barriers to trade for in order to protect domestic industries

Lastly, the involvement of SADC Member States in multiple regional agreements slows down the pace of implementing the TBT regulations. It is therefore difficult for the region to negotiate and agree on regional policies as other Members might be pursuing different policies with other regional blocs. These overlaps slow the pace and depth of the integration process in the region since they absorb human resources and limited financial resources. Consequently, a regional trading bloc that has minimum membership has the ability to yield more success than the one that does not.

5.4 Recommendations

5.4.1 Deepen Regional Integration

As noted from the above discussion, there is a capacity gap in what African countries commit themselves to do and what they can effectively implement. To this end SADC has been criticised for having ambitious targets while dismally failing to implement them. This may be largely attributed to the fact that most SADC countries do not have adequate resources to effectively implement the TBT Agreement. In order to tackle this challenge, SADC Member

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766 Kamau (n 586) 48.
769 Meyer and others (46) 4.
States need to collaborate closely with each other and deepen regional integration on technical related matters.\textsuperscript{770} In order to achieve this, instead of relying on national regulatory infrastructure that is underdeveloped and not funded, SADC countries should rely on fewer regulatory agencies and accredited regional providers of testing, inspection and certification of goods that are within the region.\textsuperscript{771} This will assist businesses particularly SMEs to comply with the provisions of the TBT Agreement without being subjected to extra costs emanating from multiple testing requirements and different regulations and standards. The main reason for deepening regional integration is the conviction “that there is strength in numbers and in unity, and that this strength can speed up the pace of development as well as enhance security.”\textsuperscript{772} Deepening regional integration may therefore help smaller countries that often struggle with meeting the costs of implementing the TBT Agreement.

5.4.2 Education

As noted from the above discussion, SADC Member states are not familiar with the TBT Agreement. As a result, the TBT Agreement is not consistently being implemented and its advantages are not realised. Accordingly, government departments responsible for drafting technical regulations should also be educated on trade-friendly regulations that do not compromise the objectives of the TBT Agreement. In addition, SADC Member states should exchange information and share experiences gained from good regulatory practices. This might provide other states with solutions on how to deal with some of the challenges that other countries managed to overcome. In this regard Hoa and others also maintained that ‘international policy learning, searching international experience for transferable best practice and identifying common trends and pressures that affect other systems, would be an avenue toward amending domestic policy to facilitate compliance with the TBT Agreement.’\textsuperscript{773}

5.4.3 Introduce enforcement mechanisms

\textsuperscript{770} Jephias Mapuva has noted that the SADC region “is ideal for regional economic integration given the fact that it is characterised by many countries with small economies, an environment which is ideal for interstate trade and forging of economic links. See Mapuva (n 531) 97.
\textsuperscript{771} Gilson (n 25) 33.
\textsuperscript{773} Ho and others (n 47) 1.
One of the major challenges facing deeper regional integration in SADC is lack of enforcement mechanisms. This study recommends that SADC countries should establish a functional dispute settlement system. The importance of a dispute settlement system lies in its ability to settle trade disputes between Member States.\textsuperscript{774} Since the liquidation of the SADC Tribunal was prompted by SADC’s desire to guard against the tribunal’s intrusion in to state sovereignty, it is best that the Protocol on the Tribunal in the Southern African Development Community be amended to clearly state the powers and function of the SADC Tribunal. In addition strict enforcement mechanisms should be introduced in order to force Member States to comply with the decisions made by the Tribunal.

\textbf{5.4.4 Introduce Regulatory Impact Assessment}

A key omission in the SADC legal framework for the elimination of unnecessary technical barriers to trade is the lack of systematic application of Regulatory Impact Assessments.\textsuperscript{775} SADC countries should create systematic assessment of the impacts of both existing and proposed technical regulations. Accordingly regulatory review committees should be created in order to conduct assessments which include cost and benefit analysis, investigation of less trade restrictive measures to the proposed technical regulation and an analysis of the effect of such a regulation on trade, investment and on SMEs. Guidelines and checklists for policymakers on impact assessments should therefore be created in order to avoid situations where countries create restrictive, rigid and difficult guidelines for the policymakers. Moreover, principles of transparency, proportional, necessity, non-discriminatory and the use of appropriate internationally harmonised measures principles should be incorporated into the regulatory systems. It can therefore be submitted that efficient RIAs are effective in meeting public policy objectives while at the same time ensuring that regulations are not trade distorting.\textsuperscript{776}

\textbf{5.5 Concluding remarks}

From the preceding discussion, it can be argued that SADC countries have not been able to effectively implement the TBT Agreement within their domestic frameworks. Consequently

\textsuperscript{774} Kamau (n 586) 48.
\textsuperscript{775} Osiemo (n 524) 134.
\textsuperscript{776} Osiemo (n 524) 134.
technical barriers to trade have become significant barriers to regional trade. Various challenges are facing SADC states to effectively implement the TBT Agreement. As discussed above, SADC states lack adequate resources and knowledge to fully implement the TBT Agreement. Additionally, the study found that SADC states currently do not have a functional dispute settlement system that can solve disputes involving the illegal employment of technical barriers to trade. Further SADC states are involved in multiple regional trade agreements. This as evidenced above makes it difficult for the region to implement regional policies as some of the policies will be in conflict with other regional agreements.

In order to tackle the problem of the implementation of technical barriers to trade demonstrated above, the study recommended SADC Member states to exchange information on good regulatory practices. This will provide an opportunity for Member states to share and learn from the experiences of others on how to effectively implement the TBT Agreement. Additionally government stakeholders should be educated on trade-friendly regulations that do not compromise on the principles of the TBT Agreement. To this end, RIAs should be established in order to assess the trade effects of both proposed and existing regulations. In order to thwart protectionism that may come under legitimate regulations, SADC Member states should introduce effective enforcement mechanisms. The re-establishment of the SADC Tribunal may be seen as a step towards enforcing the TBT Annex to the SADC Protocol on Trade and other regional agreements. By effecting these recommendations, SADC states have the opportunity to eradicate technical barriers to trade thereby increasing both regional and international trade.
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