PREVENTING REGULATORY ABUSE FOR PROTECTIONIST ENDS: AN ASSESSMENT OF THE WORLD TRADE ORGANISATION'S AGREEMENT ON TECHNICAL BARRIERS TO TRADE FROM A DEVELOPING COUNTRIES PERSPECTIVE

A DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE MASTER OF LAWS (LLM) DEGREE AT THE UNIVERSITY OF FORT HARE.

SUBMITTED BY: THABANG NKOMO

(200909990)

FACULTY OF LAW

SUPERVISOR: PROFESSOR PC OSODE

DECLARATION

I, Thabang Nkomo, do hereby declare that, except for references specifically indicated in the text, and other help I have acknowledged, this dissertation is wholly a product of my own academic research and analysis. It is hereby further certified that this dissertation has not previously been submitted to another University for purposes of fulfilment of the requirements of a degree.

.....Nkomo.....

East London

DEDICATION

To my late Father Mr Norman Nkomo

University of Fort Hare

Together in Excellence

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I would like to thank my family and friends for all the support and encouragement throughout the course of this study. I would not have come this far without you. Particular mention is directed to:

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LIST OF ABBREVIATIONS

AASHTO	American Association of State Highway Officials
AB	Appellate Body
CODEX	CodexAlimentarius Commission
DSB	Dispute Settlement Body
EC	European Communities
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
IAF	International Accreditation Forum
IBRD	International Bank for Reconstruction and Development
ITO	International Trade Organisation
IMF	International Monetary Fund
IECEE	Worldwide System for Conformity Testing and Certification of Electrical Equipment
ILAC	International Laboratory Accreditation Cooperation
MFN	Most-favoured-nation
NIST	National Institute of Standards and Technology
NT	National Treatment
NPR-PPMS	Non-product-related processes and production methods
NTBs	Non-tariff barriers

NTMs	Non-tariff Measures
PPMs	Production and Process Methods
SPS	Sanitary and Phytosanitary
SPS A	The Agreement on Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TBT A	Technical Barriers to Trade Agreement
TBT IMS	The Technical Barriers to Trade Information Management System
UK	United Kingdom
US	United States of America
USDA	United States Department of Agricu
WTO	World Trade Organisation

TABLE OF CONTENTS

CHAPTER THREE

The Interpretation of the Agreement on the Application of Technical Barriers to Trade Measures

CHAPTER FOUR

WTO Jurisprudence on Technical Regulations and Standards: Lessons from the case of European Communities-Trade Description of Sardines (*EC-Sardines*)

CHAPTER FIVE

WTO Jurisprudence on Technical regulations: Lessons from the cases of United States-Certain Country of Origin Labelling Requirements – *(US-COOL)*

CHAPTER SIX

Conclusions and Recommendations

SUMMARY

The reduction of tariffs and quotas has shifted the attention of the international trading community to less noticeable trade barriers. Technical barriers to trade (TBT) measures have significantly been used to protect domestic markets. Although TBT measures were designed for legitimate regulatory purposes they swiftly became protectionist tools. The TBT issue was brought unto the GATT agenda during the Tokyo Round of multilateral trade negotiations. The concern was that TBT measures could undermine the market access benefits gained from the tariffs and quota reductions. The Agreement on Technical Barriers to Trade (TBT Agreement) was adopted by the World Trade Organization (WTO) to prevent the use of TBT measures for protectionist ends. Accordingly, the principal objective of the Agreement is to prevent the use of domestic technical regulations as unjustified technical barriers to trade.

It is also the aim of the TBT Agreement to enable the beneficial participation of all members in the global trading system. It gives special attention to developing countries that generally face challenges in accessing the international market. Exports are of great importance to developing countries and sustain the economies of most of these countries. Nonetheless the value of exports to developing countries can only be maximised if they can consistently comply with the TBT regulations and standards that are prescribed in the desired export target markets. This points to the need for an effective TBT Agreement capable of protecting developing countries from illegal TBT measures. Thus the application and interpretation of the TBT Agreement should be designed to accommodate the special interests of developing countries.

The objective of this study to scrutinise the TBT Agreement with the view to identifying the gaps/loopholes in its framework, interpretation and implementation from the perspective of developing countries. It seeks to establish whether the Agreement encourages non-protectionist trade from the perspective of developing countries. The study concludes that developing countries need a TBT regulatory system that will reduce TBT-related protectionist measures and meaningfully take into account their technical and resource constraints in meeting the requirements of the Agreement.

Key words: TBT measures; technical barriers to trade; market access and developing countries

CHAPTER ONE

Introduction and background to the study

1 1 BACKGROUND OF THE STUDY

The World Trade Organization (WTO)[1] is founded on the idea of free trade being the mechanism which every country's opportunity to prosper is maximised.[2] It thrives on reducing trade barriers and eliminating discriminatory treatment in international trade relations.[3] This in turn would allow international trade to become smooth, fair, free and predictable. Overall the elimination of trade barriers would then raise living standards and promote development all around the world [4] which is one of the main goals of the WTO.

As at-the-border restrictions on trade (such as tariffs and quotas) have been reduced through successive rounds of multilateral trade negotiations, behind-the-border measures resulting from different domestic regulations across countries have emerged as new obstacles to trade.[5] Domestic regulations can take the form of technical barriers to trade (TBT).[6] The phrase "technical barrier to trade" refers to "the use of domestic regulatory processes or instruments as a means of protecting domestic producers."[7]

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[1] The World Trade Organization is the successor of the General Agreement on Tariffs and Trade. It was established in 1994. At present the WTO has 159 Members of world trade of which 75% are developing countries. The WTO headquarters is based in Geneva, Switzerland and is headed by a Director General. The basic theme of the WTO is to promote free trade and it is based upon the principle of comparative advantages that is to utilise the available global resources in the best possible manner. See "World Trade Organization Understanding the WTO: Organization and members" available at http://www.wto.org/English/thewto_e/whatis_e/org6_e.htm (accessed at 05-06-2013).

[2] Van den Bossche *The Law and Policy of the WTO: Text, Cases and Materials* (2005) 86.

[3] *Ibid.*

[4] The potential role of international trade as "an engine for development" is emphasised by the Monterrey Consensus, which asserts that a fair, open and rule-based multilateral trading system and trade liberalisation can significantly "stimulate development worldwide benefiting countries of all stages of development". See Trade and Development Report for the UN Conference on Trade and development 2006 UNCTAD/TDR/2006 75.

[5] Ayik "The Removal of Technical Barriers to Trade between Turkey and the European Union" 2003 available at www.ekonomi.gov.tr/upload/BF09AE98-D8 D3-8566.../devran ayik.pdf (accessed 20-03-2013).

[6] Dispute Settlement: World Trade Organisation United Nations Conference on Trade and Development 2003 available at http://unctad.org/en/Docs/edmmisc 232add22_en.pdf. (accessed at 06-04-2013).

[7] *Ibid.*

TBT measures are regulated by the Technical Barriers to Trade Agreement (TBT Agreement).[8] The Agreement seeks to ensure that mandatory product regulations,[9] voluntary regulations[10] and conformity assessment procedures[11] do not become unnecessary obstacles to international trade and are not employed to obstruct trade.[12]

The TBT Agreement pursues "to balance two competing policy objectives which are the prevention of trade protectionism and the right of a WTO member to enact product regulations for legitimate public policy purposes."[13] Technical regulations imposed on traded goods affect trade patterns and the ability of producers to enter new export markets as well as consumer costs.[14] Such regulations include specific performance requirements and also involve testing, certification, laboratory accreditation and related labeling requirements for products.[15] These regulations have confronted and posed challenges for developing countries as they seek to enter the export market. This reality is contrary to the aims of the TBT Agreement which also seeks to help developing countries to successfully engage in international trade and to ensure that these regulations do not impede trade flows.[16] In its Preamble the TBT Agreement mentions the fact

[8] The WTO Agreement on Technical Barriers to Trade which entered into force in 1995 is a multilateral successor to the Standards Code signed by 32 GATT contracting parties at the conclusion of the 1979 Tokyo Round of Trade Negotiations. The purpose of the Agreement is to ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary barriers to International trade while leaving Members adequate regulatory discretion to protect, human, animal and plant life, health, national security, environment and other policy interests. Dispute Settlement: World Trade Organisation United Nations Conference on Trade and Development 2003 available at http://unctad.org/en/Docs/edmmisisc232add22_en.pdf. (accessed at 06-04-2013).

[9] The WTO Agreement on TBT defines a mandatory product regulation (also known as 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. These regulations include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to product, process or production method."

[10] The WTO Agreement on TBT defines a voluntary regulation (also known as Standard) as a "Document approved by a recognized body, that provide, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, in which compliance is not mandatory. These regulations include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."

[11] The WTO Agreement on TBT defines conformity assessment procedures as "any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled."

[12] Dispute Settlement: World Trade Organisation United Nations Conference on Trade and Development 2003 available at http://unctad.org/en/Docs/edmmmisc232add 22_en.pdf. (accessed at 06-04-2013).

[13] *Ibid.*

[14] Maskus *et al* "Quantifying the Impact of Technical Barriers to Trade: A Framework Analysis" Policy Research Working Paper No WPS 2512 2002 available at http://www//citeseerx.ist.psu.edu/viewdoc/download?/doi=10.1.17.4449 (accessed at 04-05-2013).

[15] *Ibid.*

[16] WTO "Technical Barriers to Trade in the WTO" 2012 available at http://etraining.wto.org/5A013783D-4OE6-4989-9496-IDC9696EE2 (accessed at 10-04-2013).

that developing countries may encounter problems and difficulties in the application of technical regulations and standards and declares its desire to assist them.[17]This has led to criticism of both the WTO and the TBT Agreement as they seem to have failed to protect developing countries in their endeavors to enter international markets.[18] The TBT Agreement was designed to regulate technical barriers that might perpetuate protectionist tendencies. It has a mandate to assist developing countries to participate and benefit from trading with developed countries.[19] Part of its mandate is the duty to improve the chances of developing countries in respect of market access.[20] It is from this premise that the TBT Agreement should be scrutinised to establish whether its regulatory framework, interpretation and implementation strives to promote the interests of developing countries.

This study endeavors to critically examine the TBT Agreement to establish whether the Agreement effectively accommodates developing countries' interest as stated in its Preamble and particular provisions. It will also isolate the Agreement's gaps in terms of its interpretation and application. The primary aim of the study is to identify the potential loopholes of the TBT Agreement that may cause hindrances to developing countries' access to the global market.

1 2 RESEARCH PROBLEM

The danger of standards, technical regulations and conformity assessments acting as technical barriers to trade has proved to be of great concern among developing countries. Lack of adequate infrastructure, capital and sophistication to maintain and satisfy international standards and conformity assessments seem to burden and hinder developing countries from penetrating the international market. As such the TBT Agreement seems beneficial to developed nations while failing the developing ones.

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[17] In the Preamble of the TBT Agreement it is written that "Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavors in this regard..."

[18] WTO "Technical Barriers to Trade in the WTO" 2012 available at http://etraining.wto.org/5A013783D-4OE6-4989-9496-IDC9696EE2 (accessed at 10-04-2013)

[19] WTO "Building Trade Capacity" available at http://www.wto.org/english/tratop-e/devel--e/buildi-tr-capa-e.htm (accessed at 26-04-2013).

[20] *Ibid.*

The mandate of the TBT Agreement is to regulate against countries using standards and technical regulations as a means of protecting their domestic markets from foreign competition by discriminating against foreign suppliers. It should advance market access for all WTO members in particular developing countries as they seem to lag behind in global trade participation. Despite the promises to protect, promote and assist developing countries made in the Agreement, developing countries are still lagging behind in the international trading system.

The research problem to be addressed is whether the TBT Agreement effectively protects developing countries from TBT-related illegitimate practices. Provisions of the Agreement that seek to protect developing countries will be analysed in the light of their consistency in ensuring protection for developing countries. Thus the study examines the gaps in the relevant provisions and the impact these may have on developing countries.

The research problems pursued can be broken down as follows:

- What is the exact nature and content of the TBT Agreement provisions designed to prevent the use of TBTs for protectionist ends?
- What are the gaps/loopholes in the said Agreement that permit the undermining of developing countries' interests?
- Are the special needs and interests of developing countries addressed by the TBT Agreement?
- How has recent WTO jurisprudence contributed in providing clarity on the interpretation of the relevant TBT Agreement obligations?

1 3 RESEARCH AIMS/OBJECTIVES

The objective of the study is to identify the nature and content of the TBT Agreement's anti-protectionist provisions and what they entail. The study also seeks to establish the TBT related challenges that developing countries encounter in their endeavor to access the international market. It aims to analyse the TBT Agreement with the view to identify its gaps/loopholes that

may pave the way for discrimination against developing countries. It aims to ascertain whether the interpretation of the Agreement promotes a non-protectionist trade system. Furthermore the study will analyse the Agreement from a developing country's viewpoints thereby highlighting the concerns of developing countries regarding the protectionist tendencies amongst WTO member states.

1 4 SIGNIFICANCE OF THE STUDY

There can be no international trade for a country without access to the domestic markets of other countries.[21] Access to the markets of other countries ensures higher standards of living, full employment, growth and sustainable economic development for WTO Member countries.[22] However such success is dependent on the ability of Member states to participate in the global market. The rapid growth of technical regulations, standards and conformity assessment procedures has proven to be a hindrance for developing countries to access that market.[23] The continually changing national standards and technical regulations amongst member states have become factors that inhibit developing countries from participating in the global market.[24] The positions of developing countries as "standard takers than standard makers" clearly show that developing countries will continue to encounter challenges in the global market.[25] Developing countries who seek to export to developed countries will have to satisfy the stringent TBT measures of those countries regardless of their inadequacies.

[21] Van Den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2008) 401.

[22] The Preamble to the Marrakesh Agreement Establishing the WTO provides that "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services..."

[23] Developing countries face constraints in dealing with technical regulations, standards and conformity assessment procedures. The lacks of human and financial resources, scientific infrastructure for laboratory testing and certification have created challenges for developing countries in accessing the market. See Clarke "Technical Barriers to Trade" available at http://www.rogerclarke.org.uk/sitebuildercontent/...technicalbarrierstotrade.pdf (accessed 13-03-2013).

[24] Estimated effects of changes in European aflatoxin legislation on African exports of cereals, dried fruits and nuts would reduce African exports in those products by 64% or $670 million. See Otsuki *et al* "Saving Two in billion: A case study to quantify the Trade effects of European Food Safety Standards on African exports" 2001 Food Policy 26 495-514 available at www.siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/afla (accessed 11-05-2013); Maskus *et al* "The Cost of Compliance with Product Standards for Firms in Developing Countries: An Economic Study World Bank Working Paper # 3590 2007 available at http://www.colorado.edu/ids/puds/pec/pe2004-0004.pdf (accessed 31-03-2013).

[25] Maskus *et al* "Quantifying the Impact of Technical Barriers to Trade: A Framework Analysis" 2005 Policy Research Working Paper WPS 2512 available at http://www//citeseerx.ist.psu.edu/viewdoc/download?/doi=10.1.17.4449 (accessed 22-03-2013).

It is crucial for developing country members of the WTO to know the nature and content of the global trading system's regulatory framework that is capable of addressing their developmental needs or interests. This study's significance lies in its endeavor to establish whether the TBT Agreement is effective in protecting, promoting and assisting developing countries in their efforts to access the international market.

1 5 LITERATURE REVIEW

A significant amount of literature has been produced about the negative impacts of the TBT Agreement on developing countries. The literature reveals the challenges developing countries face in complying with the Agreement and how the potential gaps in the Agreement could be the source of these challenges.

Maskus *et al*[26] in their article focus on product standards as technical barriers to trade. Their study shows that there has been a rising use of technical regulations as instruments of commercial policy in the context of multilateral, regional and global trade. The article reveals that many developing countries express frustration with TBT regulations that vary across their export markets, require duplicative conformity procedures and are continually revised to exclude imports.[27]

The article by Agarwal and Daya[28] focuses on India as a developing country and assesses how its exports were affected by technical regulations in developed countries. It explores reasons why the TBT Agreement is a burden to India. The article exposes the problems developing countries have with the implementation of the TBT Agreement. Given that this dissertation aims to evaluate the loopholes/gaps of the TBT Agreement the study by Agarwal and Daya will be relevant as it focuses on the impact of the Agreement on a specific developing country.

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[27]Maskus *et al* Policy Research Working Paper 2005 No WPS 2512 3.
[28]Agarwal and Dayal "Implications of WTO-TBT Agreement on Exports" 2003 Vol VI No.1 available at www.dsir.gov.in/pubs/te/te200303/pdf (accessed 25-05-2013).

Wilson and Otsuki[29] explore the effects of TBT measures on seventeen developing countries' firms and exports. The research reveals that factors restraining the firms' ability to penetrate major destination markets like the EU, the US, Australia, Canada and Japan include low demand and the costs of developing and testing compliance procedures. Their study is relevant to this research as it points out that TBT regulations impede developing countries' exports to lucrative international markets.

Essaji[30] in his study examines the effects of technical regulations on developing countries and suggests that there is need for vigilance against the blatantly protectionist use of technical regulations. The study reveals that technical regulations substantially impinge on poor countries' exports and their weaker capacities to satisfy technical regulations force them to specialise away from sectors with regulatory burdens.[31] Specifically the study suggests that initiatives to encourage trade from developing countries need to focus heavily on fostering their abilities to meet technical regulations.[32]

Stephenson[33] in her study recognises that developing countries have not been heavily involved in the development of international and regional standards. Hence her emphasis on the need for developing countries to be pro-active in the relevant multilateral and regional bodies in order for them to have influence on the standards which are adopted. She found that TBT measures can be an obstruction to developing nation's exports and thus suggests policy options which developing countries have to ensure that standards and conformity assessment procedures do not act as technical barriers to trade.

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[29] Wilson and Otsuki "Standards and Technical Regulations and Firms in Developing Countries" 2004 available at http://siteresources.worldbank.org/INTRANETTRADE/RESOURCES. (accessed 20-05-2013).
[30] Essaji "Technical Regulations and Specialization in International Trade" *Journal of International Economics* 2008 available at www.sef.hku.hk~larryqui/Papers/TBT-TradeR4R)111218.pdf. (accessed 22-03-2013).
[31] *Ibid.*
[32] Essaji "Technical Regulations and Specialization in International Trade" *Journal of International Economics* 2008 available at www.sef.hku.hk~larryqui/Papers/TBT-TradeR4R)111218.pdf. (accessed 22-03-2013).
[33] Stephenson "Standards, Conformity Assessment and developing Countries" available at http://www-wds.worldbank.org/5AOB783D-40E6-4989-9496-IDC (accessed 04-05-2013).

Clarke[34] argues that although the TBT Agreement provides for technical assistance to developing countries there is a need to develop the assistance further so that the countries are enabled to participate in and share in the benefits of market access. He points out that developing countries face constraints in dealing with technical regulations, standards and conformity assessment procedures and highlights how the lack of human and financial resources, scientific infrastructure for laboratory testing and certification have created challenges for these countries.

The article by Ayic[35] reveals that the regulatory harmonisation approach emphasised by the TBT Agreement poses greater challenges for developing countries more than it does for developed countries. This is evident in the article which focuses on the standards harmonisation process between Turkey and the European Union (EU). The article brings to the fore the problems that developing countries might face when entering into harmonisation processes with developed countries. Given that this study seeks to evaluate the shortcomings of the TBT Agreement, Ayic's article is relevant as it points out that the [illegible] offered by the Agreement to do away with discrimination tendencies adversely affects developing countries.

Earley and Kneale[36] in their article show that it is difficult for developing country producers to meet the requirements of eco-labeling[37] programs in comparison to their competitors in developed countries. The study reveals that procedural issues such as testing and certification hinder exports from developing countries from entering the global market. It points out that developing countries are most likely to confront hardships in complying with TBT measures as they lack financial resources to meet the required standards. Their study also identifies the significance of TBT regulations in international trade.

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[34]Clarke "Technical Barriers to Trade" available at www.rogerclarke.org.uk/sitebuildercontent/...technicalbarrierstotrade.pdf (accessed 13-05-2013).

[35]Ayic "The Removal of Technical Barriers to Trade between Turkey and the European Union" 2003 available at www.ekonomi.gov.tr/upload/BF09AE98-D8 D3-8566.../devran ayik.pdf (accessed 23-04-2013).

[36] Earley and Kneale "Developing-Country Access to Developed-Country Markets Under Selected Eco-labeling Programmes" 2003 available at www.oecd.org/.../0,2546,en-2649-201185-24744092-1-1-1-37429,0.pdf (accessed 10-04-2013).

[37] Eco-labeling is a voluntary method of environmental performance certification and labeling that is practiced around the world. An eco-label is a label which identifies proven environmental preference of a product.

Motaal[38] in his article explores the TBT Agreement. The study sought to bring out the extent to which eco-labeling schemes are covered by and are consistent with the provisions of the Agreement. It identifies problems that are faced by developing countries in their efforts to access the global market and proves that eco-labeling schemes could open the way for barriers to trade particularly for developing countries.

Baldwin[39] identifies the shortcomings in the regulatory framework of the TBT Agreement in its efforts to use mutual recognition as a non-protectionist tool. He points out that mutual recognition (two nations agreeing in advance to recognise each other's testing results or product norms) has been discriminatory and requires high levels of trust in a nation's governance capacity that few developing nations are likely able to muster. The author highlights that consequently developing nations would be discriminated against as they would lack the required level of trust. The study suggests that the WTO should endeavor to address the potentially discriminatory aspects of TBT Agreement liberal[illegible]atives.

1 6 RESEARCH METHODOLOGY

The research methodology is mainly based on a study of literature. This largely includes library research, internet sources and case law. The WTO's TBT Agreement and other instruments administered by the WTO will be the primary sources of regulatory information.

The secondary sources will consist of research papers, reports, journals, articles and books from which additional arguments and references will be derived. The research papers and journals that explore the relevant provisions for this study will be examined. The study will employ scholarly works which scrutinise the possible gaps in the TBT Agreement's regulatory framework. To enrich the analysis, academic works which support the regulatory framework of the Agreement will also be used.

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[38] Motaal "The Agreement on Technical Barriers to Trade, The Committee on Trade and Environment, and Eco-Labelling" in Sampson and Chambers (ed) *Trade, Environment and the Millennium* (2002) 127.

[39] Baldwin "Regulatory Protectionism, Developing Nations and a Two –Tier World Trade System" 2000 CEPR Discussion Paper No 2574 available at http://graduateinstitute.ch/webdav/site/xtei/shared/ICTI/Baldwin (accessed 14-04-2013).

Case law from the WTO will be used as the main source from which the interpretations and applications of the relevant TBT Agreement provisions will be examined.

1 7 OUTLINE OF CHAPTERS

Chapter one is an overview of the study. It outlines the aims, objectives, problem statement, significance, limitations of the research and the methodology.

Chapter two discusses the historical and socio-economic background of the TBT Agreement. It looks into its negotiating history and also explores the historical origins of the use and regulation of TBT measures.

Chapter three discusses the key elements of the TBT Agreement. It then focuses on and isolates the most problematic provisions for developing countries. It explores the relevant provisions for possible deficiencies or gaps in their wording, application, interpretation and / or implementation.

Chapter four examines a WTO TBT dispute mainly dealing with technical and standards related measures. It queries whether the interpretations adopted by the DSB accommodate the developmental needs of developing countries.

Chapter five discusses a WTO TBT dispute that dealt with Technical regulations. The interpretations of the Panel and the Appellate Body are also analysed.

Chapter six of the study presents the conclusions and the recommendations of the study. This is focused on whether the current TBT system adequately caters for the developmental needs of developing countries.

1 8 LIMITATIONS OF THE STUDY

The major limitation of this study is that it does not focus on the entire TBT Agreement's regulatory framework. Instead it examines some of the most relevant and problematic provisions of the Agreement. The provisions designed to prevent protectionism and ensure participation of developing countries will be particularly scrutinised.

The study will mainly examine justification provisions, as these are major provisions of the Agreement which try to prevent TBT measures from being used as a protectionist tools. It will also consider how these justifications have been successfully challenged on the basis of the TBT Agreement. The study also examines the provisions for special and differential treatment and that of technical assistance because these were specifically designed to assist developing countries in complying with the TBT Agreement and integrating them into global trade.

1 9 REFERENCING STYLE

The referencing style employed is that of Speculum *Juris*, an accredited online Law journal published by the Nelson R. Mandela School of Law, University of Fort Hare.

CHAPTER TWO

The Agreement on Technical Barriers to Trade: A Historical and Socio-Economic Background

2 1 INTRODUCTION

As obvious trade barriers have diminished, many governments have discovered that they can continue to reap political gains from less noticeable trade barriers while remaining in compliance with their international obligations under the GATT.[40] Such trade barriers embrace TBT measures[41] which have become increasingly common. TBT's include such measures as regulations governing *inter alia* the health, safety or environmental characteristics of products, product content and production labeling.[42] In theory, the purpose of these types of regulations is to protect consumers and producers from unsafe or undependable products whether produced domestically or imported.[43]

Nonetheless, regulations may be drafted in ways that not only accomplish the prime purpose, but also efficiently protect domestic producers from foreign competition.[44] This realisation inspired the adoption of the TBT Agreement in 1994, to function as a preventive instrument to ensure that such measures do not result in discrimination or arbitrary restrictions on international trade. The Agreement ensures that measures are not prepared, adopted and applied in an overly trade-restrictive manner in trying to fulfill a legitimate objective.[45]The Agreement contains principles that are also in the GATT 1994, such as: the most favored nation treatment obligation, the national treatment obligation and the obligation to refrain from creating unnecessary obstacles to

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[40] Kotschwar *et al* "Industry Note Law Governing the Use of Technical Standards as Barriers to Trade: The Case of Trade in Livestock Products" available at http://www.onlinelibrary.wiley.com>...Agribusiness>vol9Issue1 (accessed 07-06-2013).

[41] TBT measures stands for Technical Barriers to Trade measures.

[42] Kotschwar *et al* "Industry Note Law Governing the Use of Technical Standards as Barriers to Trade: The Case of Trade in Livestock Products" available at http://www.onlinelibrary.wiley.com>...Agribusiness>vol9Issue1 (accessed 07-06-2013).

[43] *Ibid*. See also Appendix: Discussion of Previous Work NE-165 Project Proposal available at http://www.umass.edu/ne165/prop-app.html (accessed-07-06-2013).

[44] Ming Du "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org (accessed 06-06-2013).

[45] Article 2 of the TBT Agreement.

international trade.[46]It sets out the rights, obligations and rules for member countries to abide by. Disputes involving the Agreement are settled through the Dispute Settlement mechanism established by the WTO.[47] A Committee on Technical Barriers was established with the objective of evaluating the implementation and operation of the Agreement as well as providing a forum for its revision. The provisions of the Agreement require obligatory compliance by all member countries of the organisation; that is to say, all the countries that make up the WTO are obliged to accept it, when they join.

In recent years, the amounts of technical regulations and standards adopted by countries have become excessive.[48] Stringent regulatory policies are prompted by higher standards of living worldwide. High standards of living have resulted in knowledgeable consumers who demand safe, high quality goods and environmentally friendly products.[49]Examples include consumer boycotts of certain species and most significantly, a rise in the demand for more specific information about the environmental attributes of seafood.[50] Public demand for standards set specifically to address environmental issues have risen, for example, the Dolphin – Safe labels dispute over US ban on tuna and tuna products where the tuna was not caught in compliance with US environmental standards.[51]Consequently environmental protection and consumer information has become a major concern amongst developed countries. Manufacturers in developed countries have come to recognise that environmental concerns may be translated into

[46] Lester *et al World Trade Law: Text, Materials and Commentary* (2012) 600.
[47] *Ibid*.
[48] In 1972 the US enacted the Marine Mammal Protection Act (MMPA) in an effort to reduce the incidental kill (known as the 'take') or serious injury of marine mammals in the course of commercial fishing to significant levels approaching zero. Before the enactment of the Act a tuna fishing technology based on 'purse-seine' was used by fishermen to catch tuna. This method allowed the encirclement of dolphins with purse-seine nets in an effort to catch schools of underwater tuna found on the ocean surface. Through the MMPA the US banned imports of commercial yellow fin tuna and yellow fin tuna products harvested with purse-seine nets in the Eastern Tropical Pacific Ocean (ETP). The ban affected Mexico as it had no program regulating the taking of marine mammals that was comparable to that of the United States. Consequently the ban led to the *Tuna-Dolphin* disputes. Further, the1990 Dolphin Protection Consumer Information Act required that all tuna caught in the ETP and labeled dolphin-safe must be verified as not having been caught in association with dolphins. In 1992 the International Dolphin Conservation Act amended the MMPA with the creation of Tithle 111, which called for the establishment of a global moratorium prohibiting tuna harvested using the purse-sine method. See Panel Report *United States – Restriction on Imports of Tuna*, 3 September 1991, unadopted, DS21/R- 39S/155 paras 2 - 2.12.
[49]Stoler "TBT and SPS Measures in Practice" available at http://www.sitesources.worldbank.org/INTRANETTRADE/Resources/c11.pdf (accessed 08-09-2013).
[50] Fisheries Eco-labelling: Opportunities for developing countries available at http://www.rural121.com/uploads/media/ELR_Fisheries_Ecolabelling_0205.pdf.(accessed 08-09-2013).
[51] Panel Report *United States – Restriction on Imports of Tuna*, 3 September 1991, unadopted, DS21/R- 39S/155.

market advantage for certain products and goods.[52] Thus various environmental declarations, claims and labels have emerged on products in these countries.[53]

With the international increase in environmental awareness and protection there is concern that these TBT measures may disrupt trade and limit market access for exports. For example, it is estimated that over 85% of international trade consists of products that can potentially be affected by environmental trade barriers.[54] Such environmental protection occurs mostly in respect of food items, plants, bulbs and cut flowers; 90% of these products in these categories were adversely affected by measures covered by the TBT Agreement.[55] These account for about 13% of world trade.[56] However, there is a growing concern internationally for the potential impacts of environmental protection demands on market access of products especially products originating from developing countries.

Countries such as Columbia which have had their access to international markets limited by stringent environmental protection requirements are of the view that "eco-protectionist trade policies are adopted with the sole objective of forcing environmental policy goals of the importing country on companies in exporting countries."[57] International standards are always too strict for developing countries, as they lack resources to undertake costly testing, verification, plant inspection, and certification procedures required for compliance with the requirements.[58] According to a study carried out in India by Piotrowski and Kratz, the costs of testing for compliance with environmental protection requirements for footwear could lead to a cost increase of up to 50%.[59]

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[52]Hollingworth "Trade Hot Topics Common Wealth Eco- Labeling and economic Trade" available at http://www.docstoc.com/docs/73153001/information-Relevant-to-the-consideration-of-the-Market-Access-Effects-of-Eco-labelling (accessed 07-02-2013).
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58]Discussion Paper Eco-labels: Trade Barriers or Trade Facilitators? available at http://www.cuts-citee.org/pdf/Discussion_Papers-Eco-labels.pdf (accessed 07-02-2013).
[59]Piotrowski and Kratz 1999 "Eco- labeling in the Globalized Economy", IPG 4/994 30 http://www.fes.de/ipg4_99/ARTP10TROTROWSKI-KRATZ.PDF (accessed 04-03-2013).

The largest part of technical barriers to trade occurs during the conformity assessment, verifying whether the requirements of the applicable standards and regulations are met. In this phase, the general tendency is that the authorities of the importing countries refuse to recognise tests performed by exporting firms or their public authorities and decline their conformity declarations.[60] Compliance costs can provide an advantage to large firms, which can bear the differentiated costs while creating challenges for developing countries that lag behind developed countries in their capacities for effective certification and accreditation of testing facilities.[61] Approval and testing procedures in importing nations which are often costly and lengthy in duration may create trade restrictions for developing countries.[62] For example, meeting the EU's tests for telecommunications equipment was estimated to take six to eight weeks, reducing product value by five to ten percent.[63]

It has been shown that environmental protection affect developing countries' exports as they lack adequate infrastructure and finances to comply with their developed counterpart's standards. The market access conditions in the North largely determine the performance of developing countries' exports, because it is the major destination for most of their exports.[64]It is evident that TBT measures have severe implications for developing countries. To overcome such technicalities producers in developing countries will need to be innovative in the strategic positioning of their products in international markets regardless of their financial positions. More attention should therefore be drawn to the limitations of TBT Agreement as a vehicle for promoting developing countries' interests and the development of all states.

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[60] *Ibid.*

[61] Stephenson "Standards, Conformity Assessment and Developing Countries" 1997 available at http://www-wds.worldbank.org/.../IBI.../102502322-20041117162503pdf. (accessed 02-03-2013).

[62] *Ibid.* See also Maskus *et al* "Quantifying the Impact of Technical Barriers To Trade: Can it be Done?" available at https://books.google.com/books?isbu=0472112473(accessed 02-03-2013).

[63] Yilmaz "Elimination of trade barriers between Turkey and European Union and its effects on Turkey" 2002 available at http://www.ekonomi.gov.tr/upload/BF09ae98-D8D3-8566-4529B0D124E5614D/cetin-yilmaz.pdf (accessed 05-08-2013).

[64] Trade and Development Report UNCTAD/TDR/2006 75.

2 2 EMERGENCE OF TECHNICAL AND STANDARD REGULATIONS

> "The lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snag and stumps of non-tariff barriers that still have to be cleared."[65]

Dealing with non-tariff barriers to trade in the international trading system does not have a long history. Until recently tariffs and quotas were the dominant and more visible trade barriers.[66]Wallner considered this phenomenon as a "law of constant protection, referring to perfect substitutability between tariff and non-tariff barriers in maintaining a degree of desired domestic protection."[67] Thus, TBT's have been used (or misused) to substitute for tariffs and other non-tariff barriers to trade.[68] The Technical Barriers to Trade issue was brought into GATT agenda during the 1973-1979 Tokyo Round, after substantial reduction of tariffs and quotas.[69]

2 2 1 The origins of standardisation: A Brief description.

The creation of the calendar is one of the earliest examples of standardisation which extends back thousands of years to Egypt of the Pharoahs, Arabia and Mesopotamia.[70] King Henry I of England made attempts towards standardization.[71] In 1120 he ordered that "the ell, the ancient yard, should be the exact length of his forearm, and that it be used as the standard unit of length

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[65] Bao and Qin "Quantifying the trade effect of Technical Barriers to Trade: Evidence from China" 2009 available at http://economics.ca/2009/papers/0283.pdf (accessed 04-08-2013).
[66] *Ibid.*
[67] Wallner "Mutual Recognition and Strategic Use of International Standard", SSE/EFT Working Paper No 254, Stockholm School of Economics, 1998 available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.121.6990&rep=rep1&type=pdf .(accessed 09 – 09 -13).
[68]Bao and Qin "Do technical barriers promote or restrict trade: Evidence from China" available at http://www.sef.Uku.hk/~larryqui/papers/03_Qin.pdf (accessed 05-08-2013).
[69] *Ibid.*
[70]Breitenberg "The ABC's of Standards Activities" 2009 available at http://www.eastwestcenter.org/fileadmin/stored/pdfs/econwp117.pdf. (accessed 01-09-2013).
[71]Tekelko "Origins of Ship Safety requirements Formulated by International Maritime Organization" 2012 International Symposium on Safety Science Technology available at http://202.114.89.60/resource/pdf/7380.pdf (accessed 28-02-2015).

in his kingdom."[72] In 1689, the Boston city passed a law that made it a civic crime to manufacture bricks in any size other than 9x4x4 inches.[73]

Eli Whitney also known as the "Father of Standards" recognised the need for standardisation when he signed a contract with the United States of America Vice President under which ten thousand rifles which were similar to those invented in France in 1763 were to be delivered within two years.[74]Regardless of the fact that interchangeable parts of rifles had become common,[75] Whitney introduced the concept to the USA. He managed to do this "by dividing the manufacturing process into individual steps and placing different groups to work on each step of the process."[76] Standardized rifles were interchangeable and could be easily assembled.[77]Standardisation permitted for mass production and high productivity which set the groundwork for the streamlined production later.[78]

The significance of standards in the USA was brought about through the Baltimore blaze of 1904.[79]Baltimore city was under fire for more than thirty hours resulting in the destruction of more than 1526 buildings[80]and power facilities. New York's efforts to battle the blaze were unsuccessful as their hose couplings did not fit the Baltimore hydrants.[81] In 1927, the American Association of State Highway Officials (AASHTO), the National Bureau of Standards (now the National Institute of Standards and Technology or NIST) and the National Safety Council

[72]Breitenberg "The ABC's of Standards Activities" 2009 available at http://www.eastwestcenter.org/fileadmin/stored/pdfs/econwp117.pdf. (accessed 01-09-2013).
[73] *Ibid.*
[74] Ping "A Brief History of Standards and Standardization Organisation: A Chinese Perspective" 2011 Economic Series available at http://www.itssd.org/NIST%202009%20Rpt%20The%20%ABC's%20ofstandards%20Activities%20-%20cites%20Lkogan%NFTC%20Whitepaper20%-%20 (accessed 01-09-2013). See also Breitenberg "The ABC's of Standards Activities" 2009 available at http://www.eastwestcenter.org/fileadmin/stored/pdfs/econwp117.pdf. (accessed 01-09-2013).
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.* See also Breitenberg "The ABC's of Standards Activities" 2009 available at http://www.eastwestcenter.org/fileadmin/stored/pdfs/econwp117.pdf. (accessed 01-09-2013).
[78] *Ibid.*
[79] *Ibid.*
[80]Petersen "The Great Baltimore Fire of 1904" available at http://www.firemuseummd.org/thegreatbaltimorefire1904 (accessed 01-09-2013).
[81] *Ibid.*

established a national code for colors.[82] This dealt with the chaos of interpreting traffic signals which were read differently in every state.

By 1886 the railroad track gauge had become the US Standard.[83] This standard enabled railroad rolling stock to cross the country.[84] The standard gauge was first used in "the coalfields of northern England" and "rutted roads marked by chariot wheels have been associated with the Roman Empire."[85]Nonetheless, "the demands of World War II called for the harmonisation of standards at the international level as incompatibility of tools, replacement parts and equipment among allied supplies and facilities were being delayed."[86]During the war the U.S and British failed to exchange screws as the screws were made differently which resulted in the immobilizing of a significant numbers of vehicles at dangerous times as they could not be fixed.[87]In 1948 international screw thread standard were adopted.[88] Since World War II, the significance of standards has intensified speedily at both the national and international levels.[89]

2 2 2 A brief background of Technical regulations

The shift from tariff to non-tariff barriers illustrates that regulations can be put in place and enforced by governments in order to address societal interests where unregulated markets are not yielding the desired outcome.[90] Hidden protectionism through sanitary regulations increased

[82]Transport Research Board "Manual on Uniform Traffic Control Devices" available at http://mutcd.fhwa.dot.gov/pdf/2003r1r2/mutcd&2003r1r2complet.pdf (accessed 02-09-2013).
[83]Can New Letter "The History of Standardization and CAN in a nutshell" available at http://www.can-cia.org/fileadmin/cia/files/Newsletter-02-13/2-13--p3-the-history-of-standards-and-a-can-in-a-nutshell.pdf (accessed 02-09-2013).
[84]Breitenberg "The ABC's of Standards- Related Activities in the United States" 1987 available at http://www.strategicstandards.com/files/USStandards.pdf. (accessed 01-09-2013).
[85] *Ibid.*
[86]Breitenberg "The ABC's of Standards- Related Activities in the United States" 1987 available at http://www.strategicstandards.com/files/USStandards.pdf. (accessed 01-09-2013).
[87]Can News Letter "The History of Standardization and CAN in a nutshell" available at http://www.can-cia.org/fileadmin/cia/files/Newsletter-02-13/2-13--p3-the-history-of-standards-and-a-can-in-a-nutshell.pdf (accessed 02-09-2013).
[88]Breitenberg "The ABC's of Standards- Related Activities in the United States" 1987 available at http://www.strategicstandards.com/files/USStandards.pdf. (accessed 01-09-2013).
[89] *Ibid.*
[90] Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2001) 186.

particularly in the 19th century.[91] For example the German Reinheitsgebot ("purity law") for beer in 1516 set rules that described how a product meant for human consumption had to be produced in order for it to enter the market.[92]The Reinheitsgebot was partly motivated by concerns about food safety, assuring that the right ingredients were used[93] but it has been said that the restrictions went too far.[94]

Additionally, Germany restricted live animal imports for health reasons and by 1889 the government had closed the border to such imports.[95]Also in 1892, the French government imposed a ban on imports of cattle in the name of preventing infections.[96] The UK also introduced the 'Animal Disease Act' which prohibited the import of live animals undercover of safety rules; while it allowed frozen meat imports.[97]

The 1970's saw the proliferation of eco-labeling and certification schemes and their effects on international trade.[98]In 1977 Germany introduced the Blue Angel eco-labeling programme. Although the main purpose of the programs was to provide consumers with information on the environmental burdens of products[99] it functioned as a protectionist tool which hindered all products from competitive nations. The use of TBT in global trade almost doubled, from 32% to 59% between 1994 and 2004.[100] Furthermore applications to the DSB on grounds of violation of

[91]Swinnen "The Growth of Agricultural Protection in Europe in the 19th and 20th Centuries" available at http://kisi.deu.edu.tr/sedef.akgungor/Ag%20Analysis/evolution%20of%20european%20ag%20policies.pdf. (accessed 07 – 08 - 2013).
[92]Tongereu *et al* "A Cost Benefit Framework for the Assessment of non- tariff measures in agro-food trade" available at http://www.oecd.org/trade/agricultural-trade/45013630.pdf (accessed 06-08-2013).
[93] Another motivation was to restrict the use of wheat in beer brewing so as to divert wheat into bread production. Next to the brewing ingredients (barley, hop and water) the law also regulated the sales of beer in terms of packaging requirements and pricing. Bavaria insisted on national acceptance of the Reinheitsgebot as a precondition for German unification under Otto von Bismarck in 1871. It became a Germany-wide law only in 1907. See Tongereu *et al* "A Cost Benefit Framework for the Assessment of non- tariff measures in agro-food trade" available at http://www.oecd.org/trade/agricultural-trade/45013630.pdf (accessed 06-08-2013).
[94] *Ibid.*
[95] *Ibid.*
[96]Law "History of food and Drug regulation in the United States" available at http://eh.net/encyclopedia/article/Law.Food.and.dRUD.Regulation (accessed 01-08-2013).
[97]Swinnen "The Growth of Agricultural Protection in Europe in the 19th and 20th Centuries" available at http://kisi.deu.edu.tr/sedef.akgungor/Ag%20Analysis/evolution%20of%20european%20ag%20policies.pdf. (accessed 07 – 08 - 2013).
[98]Abe *et al* "Eco-labelling, Environment and international trade" available at http://www2.en-tokyo.ac.jp/~seido/output/Ishikawa/01.pdf (accessed 09-08-2013).
[99] *Ibid.*
[100] *Ibid.*

the provisions of the TBT have increased since 1995.[101] As of October 2000, the DSB had considered a total of 27 disputes that referred to the TBT Agreement[102]and in 2008 the number of disputes reached 1,251.[103]

However the history of technical regulations proves that their main function is the protection of human and animal health, food safety and consumers by governments. Such protection is one of the oldest functions of governments and definitely one of its earliest regulatory functions.[104] Early public health regulations can be traced back to the 13th Century. For instance by 1202 in Europe the first food law was enacted by King John which prohibited the adulteration of bread.[105]"Adulteration" refers to "mixing of other matter of an inferior and sometimes harmful quality with food intended to be sold."[106] One of the reasons behind the adulterated of food is to increase the quantity and make more profit.[107] For example chalk powder has often been mixed with flour, Chicory added to Coffee and brick powder added to Chilly-powder.[108] Thus, regulations governing food production have historically been used to protect consumers from unsafe food and drug products.[109]

In 1641 the Massachusetts introduced its first food adulteration law.[110] The law required the official inspection of beef, pork and fish.[111]This was followed by the 1650s legislation which

[101]Beghin "Non-tariff Barriers" Working Paper 06-WP-438 2006 available at http://www.econ.astate.edu/research/webpapers/paper_12703.pdf (accessed 06-06-2013).

[102]Yilmaz "Elimination of Technical Barriers to Trade between Turkey and European Union and its Trade Effects on Turkey" 2002 available at http://www.ekonomi.gov.tr/upload/BF09ae98-D8D3-8566-4529B0D124E5614D/cetin-yilmaz.pdf (accessed 05-08-2013).

[103]Bao and Xin "Do Technical Barriers to Trade Promote or Restrict Trade? Evidence from China" available at http://www.sef.uku.uk/wlarryqui/papers/REI-TBT.pdf. (accessed 05-04-2013).

[104] US Food and Drug Administration (FDA) "Milestones in US Food and Drug Law History" available at www.fda.gov/AboutFDA/WhatWeDo/History/Milestaones/defaults.htm (accessed 04-08-2013).

[105]Kinney "The evolution of public health regulation" available at www.academicudayton.edu/health/syllabi/Bioterrorism/4PHealth/PHLaw (accessed 06-08-2013).

[106] Engine Adulteration in Food available at http://www.slideshare.net/moocsengine/aldulteration-in-foods (accessed 28-02-2015).

[107]Laskshmi *et al* "Food Adulteration" International Journal of Science Inventions Today IJSIT, 2012 1 (2) 106-113 available at http://www.IJSIT.com/admin/Ijsit-files/FOOD%20ADULTARATION-1.2.4.PDF. (accessed 28-02-2015).

[108]*Ibid.*

[109]Randell "Codex Alimentarius how it all began" available at http://www.fao.org/docrep/v7700t/v7700t/v7700t09.htm (accessed 01-08-2013).

[110] "The Massachusetts Meat and Fish inspection law of 1641 dealt with meat destined for exports to ensure that the colony produced and exported only high quality food products." See DeWaal *et al* "The Legal Basis for Food Safety

regulated the quality of bread.[112]In 1694 the Netherlands prohibited the addition of annatto, or other products, to butter to prevent very pale, yellow, stable butter being sold as May Butter to protect the consumers from fraudulent products.[113]

The 19th century saw the beginning of the Industrial Revolution, which was a time of tremendous expansion in many fields.[114] It had a particular bearing on food production, food regulations, and food control services. The availability of transport due to the invention of steamships in 1810 and the railway in 1830 increased international trade.[115] The period created many public health problems, particularly in the industrialised centers, which were ill prepared to accommodate the masses that flocked to them.[116] Legislation and other means to control the composition of various foods appeared during this period. In 1858 a municipal service was set up in Amsterdam for the control of foodstuffs and beverages, which was followed in England by the enactment of the first comprehensive modern food law in the world.[117] This was an Act of 1860 for preventing the adulteration of food and drink.[118] In addition to [illegible] first Act, it provided for a scientific approach to food problems by the appointment of an analyst whose sole duty in terms of the Act, was to examine the purity of articles of food and drink.[119]

Regulation in the USA and EU" in Morris and Pottot (eds) Foodborne Infections and Intoxications (2013) USA available at https://books.google.co.za/books?isbn=0123914760 (accessed 28-02-15).

[111]Lasztity "History of Food Quality Standards" available at http://rubingulaboski.synthasite.com/resources/istorija%20na%20stndardi%20za%20kvalit (accessed 01-08-2013).

[112] During this period Virginia also passed laws that stopped the sales of adulterated wines. See also Schiff "Some Thoughts on Current Good Manufacturing Practices" available athttp://www.google.co.za/ur/=http://.www.raps.org/workArea/DownloadAsset.aspx%3Fid%3D4262&rct=j&frm=18q=8esrc=84s9=u&ei=pw-zvPrqJm7xaPceg (accessed 28-02-2015). Further, in 1906 the US government took measures to protect consumers from adulterated foods. It enacted the Food and Drug Act and the Meat Inspection Act. The Food and Drug Act prohibited interstate commerce in misbranded and adulterated foods, drinks and drugs. See Cornell University Law School "Food and Drug Law" available at https://www.law.coenell.edu/wex/food-anddrug-law (accessed 28-02-2015).

[113] Law "History of food and Drug regulation in the United States" available at http://eh.net/encyclopedia/article/Law.Food.and.dRUD.Regulation (accessed 01-08-2013).

[114] *Ibid.*

[115]Esroy *et al* "International Sanitary Conferences from the Ottoman perspective" available at http://www.deltaomega.org/ChadwickClassic.pdf (accessed 04-05-2013).

[116]Law "History of food and Drug regulation in the United States" available at http://eh.net/encyclopedia/article/Law.Food.and.dRUD.Regulation (accessed 01-08-2013).

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.*

The invention of canning and the refrigerator saw the expansion of international trade and created an opportunity for the exportation of fresh foods.[120]This called for greater protection for public consumers and animals. In 1897 the Meat Inspection Act mandated the inspection of all live cattle intended for export as well as for all live cattle that were to be slaughtered and the meat exported.[121] In 1897 the Tea Importation Act was passed which required customs inspection of tea imports to the United States.

Attempts to protect public health were made during the sanitary conference in 1851 following the 1830 cholera outbreak in Turkey. The aim of the conference was to control and prevent epidemics from flowing from one state to the other and to prevent damage to international trade. By 1903 four conferences had been held with the 1903 conference establishing the d' Hygie 'ne Publique of 1907.[122]The bureau was created to report epidemiological information and coordinate quarantine measures. However such efforts were interrupted by the First World War until 1926.The period of the war greatly affected [illegible] of international trade and its recovery afterwards was very slow. Efforts to resuscitate international trade were slowed down by the 1929 global recession. This period led to the abandoning of free trade systems that had proliferated before the war. For example the Smoot-Hawley Tariff Act of 1930 by the USA increased tariff to an average of 60% provoking retaliatory measures and leaving no hope for free trade. Trade barriers boomed for example the US Tariff Act of 1930 prohibited imports from countries with rinderpest and foot and mouth diseases,[123] and the English Carcasses Order of 1926 restricted importation of pigs, cattle and sheep into Great Britain.[124] These led to World War II and attempts to protect public health and trade were abandoned.

[120] Epps International Trade and Health Protection: A critical Assessment of the WTO SPS Agreement (2008) 9.
[121] Meat Inspection Act prohibited the sale of adulterated or misbranded livestock and ensured that livestock were slaughtered and processed under sanitary conditions. See Cornell University Law School "Food and Drug Law" available at https://www.law.coenell.edu/wex/food-anddrug-law (accessed 28-02-2015).
[122] Geneva Foundation for Medical Education Research Origins and development of international cooperation for health Steps towards the constitution of the World Health Organisation available at www.gfmer.ch/TMCAM/WHO_Minelli/P1-1.htm (accessed 09-07-2013).
[123] Murkomen "Making Sanitary and Phytosanitary Agreement work in developing countries of Sub –Saharan Africa" 2006 bepress Legal Series 11.
[124] *Ibid.*

2 3 POST 1947

The regulatory framework for the TBTs began after World War II. Post-war planners united in 1944 at the Bretton Woods conference, which established the charter for the International Monetary Fund, the World Bank- the International Bank for Reconstruction and Development (IBRD) and the International Trade Organisation (ITO) charter. Western leaders wanted to reverse the mistakes of economic isolationism that characterised the pre-war years, believing that freer international trade would in the long run be mutually advantageous for economic and security reasons.[125] The period before the war had been flawed with protective measures that slowed down international trade.

The World Bank- the International Bank for Reconstruction and Development was given the task of providing assistance in the form of long-term loans for reconstruction after the war.[126] Another of its tasks was to strengthen the economic and social development of poor countries. The International Monetary Fund (IMF) was given the task of creating a stable international payments system with convertible currencies and fixed exchange rates in order to facilitate world trade.[127]

The ITO negotiations never materialised. The ITO was too ambitious for the times and it lacked support from the US which was concerned that it would encroach on its sovereignty.[128] The GATT thereby became the de facto foundation of the post-war trading system until the WTO came into being in 1995.[129] Originally, GATT made no distinction between developed countries and developing countries. However, over time developing countries became eligible for "positive" special treatment.[130] For example, developing countries are not expected to liberalise their trade at the same rate and to the same extent as developed countries.

GATT lays down a number of basic principles and rules for cross-border trade in goods. Its utmost aim is to counteract protectionism and discrimination in world trade and to guarantee that

[125] Lester *et al* World *Trade Law: Text, Materials and Commentary* (2008) 66.
[126] *Ibid.*
[127] *Ibid.*
[128] Van Den Bosshe The Law and Policy of the WTO: Text, Cases and Materials (2008) 80.
[129] Trebilcock and Howse *The Regulation of International Trade* (2005) 23.
[130] *Ibid.*

trading conditions are reasonably stable and predictable.[131] Its most essential principle is formulated in Article I, that of equal treatment of all parties to the agreement. This principle is known as the "most favoured nation" (MFN) principle. Nonetheless, its content is equal treatment. Discriminatory treatment based on the origin of goods is not permitted.[132]

The second basic principle in GATT is Article 111, that of national treatment. National treatment means that imported goods must be treated on equally favourable terms as domestic goods. All discriminatory treatment must cease once the goods have crossed the border. This principle applies to both domestic regulations (for example, in respect of product safety and labeling) and taxes (for example, value-added taxes). However, GATT also contains Article XX (b) of the general exceptions clause which gives each country the right to set the level of protection that it deems appropriate to protect certain social values such as public moral standards, exhaustible natural resources and the health of humans, animals and plants.[133] However, the exceptions are not unconditional. Arbitrary discrimination agai[illegible]s not accepted except the measure is necessary. The Asbestos report emphasises that a measure is "necessary" if no alternative GATT consistent measure or less GATT inconsistent measure is reasonably available.[134]The trouble that came with this provision is that it places a burdensome onus on the complaining party. The party must prove that the measure is not necessary, which is difficult, given that there is no given criterion for demonstrating such fact.[135]

During GATT's first 25 years, negotiations brought the developed countries' tariff barriers for industrial goods down from an average of 40% to approximately 5%.[136] However, important products from developing countries' namely agricultural products and textiles were largely

[131] Van den Bossche and ZdoucThe Law and Policy of the World Trade Organization: Text, Cases and Materials (2013) 851.
[132] See Text of GATT available at http://www.wto.org/english/docs_e/legal_e-gatt47_02-e.htm#articleXX (accessed 08-09-2013).
[133]Shahin "Trade and Environment: How Real Is the Debate : WTO Law and Developing Country Implications" in Sampson and Chambers (ed) *Trade, Environment, and the Millennium* (2002) 53. Also see Text of the GATT available at http://www.wto.org/english/docs_e/legal_e-gatt47_02_e.htm#articleXX (accessed 08-08-2013).
[134]Appellate Body Report *EC-Asbestos* para 170 – 171.
[135]Shahin "Trade and Environment: How Real Is the Debate: WTO Law and Developing Country Implications" in Sampson and Chambers (ed) *Trade, Environment, and the Millennium* (2002) 53.
[136]Iacavone "Analysis of and Impact of Sanitary and Phytosanitary measures" 2005 Integration and Trade 100.

excluded from those negotiations.[137] During the latter part of the GATT era, the focus was shifted from tariffs to so called non-tariff trade barriers. Many developing countries chose not to participate in these agreements, which instead took the form of voluntary side agreements.[138] There have been eight rounds of trade negotiations since 1947. The first five rounds were of relatively short duration and dealt mainly with tariff reductions. The sixth, the Kennedy Round (1963-67), achieved deeper and wider tariff cuts, especially in industrial tariffs, and brought developing country concerns to the fore.[139] The seventh, the Tokyo Round, which lasted six years (1973 - 1979), cut tariffs substantially but also introduced a series of codes on non-tariff barriers (NTBs).[140]

2 3 1 The Tokyo Round

The Tokyo Round expanded the agenda away from purely tariff issues to address the growing incidence of non-tariff barriers (NTBs), an issue which had been examined in the Kennedy round but with very limited success.[141] Technical barriers to trade appeared as a separate issue of international trade negotiation at the Tokyo Round Agreement. The first notifications about different national standards and their enormous variety were made by the contracting parties. This increasing multiplicity of standards was recognised as at the Kennedy Round as a potential barrier to trade.[142] It was suggested that disciplines were needed to ensure that standards are not applied so as "to afford protection to the domestic production."[143] In conclusion to this Round of negotiations it was agreed that a special code on national regulations and standards should be negotiated in the nearest future.[144] It was also stated that this future code should "in no way

[137] Institute of Developmental Studies "Harnessing trade for development: Benefiting from market access opportunities" available at http://www.eldis.org/vfile/upload/1/document/1103/id21%20insight%2059.pdf (accessed 02-07-2013).
[138] *Ibid.*
[139] *Ibid.*
[140] Objectives and Organisations of the WTO available at http://sansad.org.in/pdf.WTOREPORTENGLISH.pdf (accessed 02-07-2013).
[141] Evans "The General Agreement on Tariffs and Trade": International Organisations (1968) 72; Briefing Paper: Developing Country Participation in the GATT: A Reassessment available at http://www.ak_sophiabooks.org/Af42-2.htm (accessed 28-07-2013).
[142] *Ibid.*
[143] Murkomen " Making Sanitary and Phytosanitary Agreement work in developing countries of Sub-Saharan Africa" 2006 *bepress Legal* series 12-13.
[144] *Ibid.*

interfere with responsibility of governments for safety, health and welfare of their people or for the protection of the environment in which they live, but merely seek to minimise the effects of such actions on international trade."[145]

It was in the Tokyo Round that the Standards Codes were discussed and finalised.[146] Contracting Parties were committed to the "progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade."[147] This came after the realisation that tariffs were not the only factor influencing international trade.[148]

Nearly thirty developing countries participated in this round.[149] Hence the negotiating parties committed to the "the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and to promote economic development."[150] This need was a follow up on the Haberler Report were a Declaration on the Promotion of Trade of Less Developed Coun[illegible]dopted.[151]The Declaration called for more attention to be given to programmes of technical assistance from developed countries to developing countries for improvements in production and marketing methods, and the expansion of trade among developing countries themselves.[152]The report led to the adoption of Part V1 of the GATT which later created a preferential trading system that favoured developing countries.[153]Similarly the Generalised System of Preferences (GSP) granting preferential tariff rates to exports from developing countries into the markets of the industrialised countries without any need for reciprocal treatment[154] was also established.

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[145] World *Trade Report 2007 "Sixty years of the Multilateral Trading System*: Achievements and challenges" available at http://www.eto.org/english/res_e/booksp_e/aurep_e/wtr07-2d_e.pdf. (accessed 04-04-2013).
[146] *Ibid.*
[147] World Trade Report 2007"Sixty years of the Multilateral Trading System: Achievements and challenges" available at http://www.eto.org/enlish/res_e/booksp_e/aurep_e/wtr07-2d_e.pdf. (accessed 04-04-2013).
[148] *Ibid.*
[149] *Ibid.*
[150]Michalopoulos "Trade and development in GATT and WTO: The role of special and differential treatment for developing countries" *2000 World Bank Policy Research Working Paper No. 2388 4.*
[151] World *Trade Report 2007"Sixty years of the Multilateral Trading System*: Achievements and challenges" available at http://www.eto.org/enlish/res_e/booksp_e/aurep_e/wtr07-2d_e.pdf. (accessed 04-04-2013).
[152] *Ibid.*
[153]Murkomen 2006 *bepress Legal Series 13-14.*
[154]Nguyen "The generalized system of preferences" available at http://internationalecon.com/student/JNguyen.pdf (accessed 10/06/13).

The GSP was beneficial to developing countries. It promoted exports of low-income countries to industrialised countries in order to support their economic growth and development and offered a reduced or zero tariff rates for selected products. Additionally, least developed countries received further preferential treatment for a wide range of products. However it has been said that GSPs tend to "foster developing countries' exports in the short-run, but hampers them in the long-run."[155]

The Code (known as the Standards Code) was finally signed in 1979 during the Tokyo round.[156] Its scope covered mandatory and voluntary technical specifications, regulations and standards for both industrial and agricultural goods. The main provisions of the Code emphasised the prohibition of discrimination and the protection of domestic production through technical regulations and standards.[157] Disguised regulatory measures, which were designed to be more restrictive than necessary were also prohibited. The Code also encouraged contracting members to base their national measures on international standards and to collaborate and cooperate towards harmonisation of such national norms.[158]

However, the Standards Code of 1979 had many shortcomings, the most serious of which was its voluntary nature and its lack of membership.[159] Originally it was signed by 32 parties and at the end of 1993 it had only 46 signatories most of them being developed countries. It followed the usual practice of GATT to conclude plurilateral agreements, binding only on the signatories. This had negative influence on implementation of the Standards Code because a low number of signatories prevented the Agreement from being widely accepted within international trade

[155] GSP receiving countries might have difficulties to exploit economies of scale and lack the necessary investments in their competitive industries. As a consequence, these GSP restrictions can cause distortion in the economic structure and trading patterns of GSP receiving countries in the long-run. See Nguyen "The generalized system of preferences" available at http://internationalecon.com/student/jNguyen.pdf (accessed 01-02-2013).

[156] Khudina "Technical Barriers to Trade and Standardization Policy": Study Paper 4/12 2011 available at http://www.europa-kolleg-hamburg.de/fileadmin/user-upload/documents/study-Papers/sp-12-4-khudina.pdf. (accessed 06-07-2013).

[157] *Ibid.*

[158] *Ibid.*

[159] Stephenson *Standards and Conformity Assessment AS Non-tariff Barriers to Trade* (1997) available at http://books.google.co.za/books?id=pLzci4exwf (accessed 06-07-2013).

contracts and contributed to the widening confrontation between developed and developing countries.[160]

Furthermore, the original Standards Code was weakened by the existence of a general requirement of consensus to establish a Panel and to adopt a Panel report, which prevented signatory parties of the Code from using the dispute settlement procedures of GATT so that all conflicts remained discussed only on bilateral level.[161] It has been stated that the Standards Code failed to prevent the disruption of trade by proliferating technical measures.[162]

Additionally, the Tokyo Round has been criticised for reducing preference margins that developing countries enjoyed under the GSP and also failing to tackle some non-tariff measures in areas of interest to developing countries.[163] It left intact the Non-tariff Measures (NTMs) on imports of agricultural goods and foodstuffs, textiles and clothing products, iron and steel products, consumer electronics, and shipbuild[164] [illegible]se barriers were substantial in the majority of developed countries and impeded considerably the exports of developing countries.[165]Deardorff and Stern came to the conclusion that the Tokyo Round was only of limited significance to developing countries.[166]

Not only was the outcome on NTMs disappointing but also frustrating to developing countries. It has been said that "it was difficult for the developing countries to determine what additional benefits were obtained in the negotiations, since the results did not correspond to their

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[160] *Ibid.*

[161] Institute of Developmental Studies "Harnessing trade for development: Benefiting from market access opportunities" available at http://www.eldis.org/vfile/upload/1/document/1103/id21%20insight%2059.pdf (accessed 02-07-2013).

[162] *Ibid.*

[163] For example on the imports of the EEC, Japan, and the United States from beneficiaries of their respective preferential schemes, which amounted to $19.4 billion in 1976, the trade-weighted average preference margin declined from 9.2 to 6.7 per cent (UNCTAD, 1982). See World Trade Report 2007 Sixty Years of the Multilateral Trading System available at www.wto.org/english/res-e/booksp-e/anrep-e/wtr7-2d-e.pdf(accessed 10/06/13).

[164] *Ibid.*

[165] Nguyen "The generalized system of preferences" available at http://internationalecon.com/student/JNguyen.pdf (accessed 10/06/13).

[166] World Trade Report 2007 "Sixty years of the Multilateral Trading System: Achievements and challenges" available at http://www.eto.org/enlish/res_e/booksp_e/aurep_e/wtr07-2d_e.pdf. (accessed 04-04-2013).

aspirations as expressed in the Tokyo Declaration."[167] The increased concern about TBTs made them an important agenda point for the Uruguay Round of Multilateral Trade Negotiations.

2 3 2 The Uruguay Round

The seeds of the Uruguay Round were sown in November 1982 at a ministerial meeting of GATT Members in Geneva.[168] Though the meeting never materialised to anything, its work programme that was agreed on formed the basis for what was to become the Uruguay Round negotiating agenda. The Round was then launched in September 1986, in Punta del Este.[169]

The Uruguay Round had a number of goals in respect of strengthening of contra-TBT measures of the international trade regime. Its first goal was to have the TBT measures apply universally, not plurilateraly.[170] It also sought to increase the number of signatories of multilateral agreements covering the TBT's regulations. Furthermore, it wanted to distinguish between measures relating to standards and technical barriers to trade for goods and measures relating to standards on animal, plant and human health. Additionally, the round sought to add to the Standards Code stronger disciplines on Sanitary and Phytosanitary (SPS) measures. SPS measures are used to ensure that food is safe and to guard against the spread of diseases and pests amongst plants and animals.[172] Thus negotiators preferred not to incorporate provisions on SPS measures into the agreement regulating technical barriers to trade.

Two major proposals which later became part of the TBT Agreement were made in the Round. One was made by the European Community (EC) and the other by the US. The European Community proposed to "expand" the reach of the Standards Code more effectively by making

[167] *Ibid.*
[168] WTO Report "Understanding the WTO: Uruguay Round" available at http://www.wto.org/english/the_wto-e/whais-e/tif-e/fact5-e.htm (accessed 08-08-2013).
[169] Kleen "So Alike and yet so different: A comparison of Uruguay Round and the Doha Round" available athttp://www.ecipe.org/media/publication_pdf-alike-and-yet-so-diffent-a-comparison-of-uruguay-round-and-the-doha-round.pdf. (accessed 08-08-2013).
[170] Sixty years of the Multilateral Trading System: Achievements and challenges available at http://www.eto.org/enlish/res_e/booksp_e/aurep_e/wtr07-2d_e.pdf. (accessed 04-04-2013).
[171] *Ibid.*
[172] Henson and Loader "Barriers to agricultural exports from developing countries: The role of the SPS requirements" 2001 World Development Journal.

central governments more responsible to ensure that local governments carried out the Code's requirements.[173] With respect to non-governmental standardising bodies, the EC proposed a "Code of Good Practice," in which the main obligations of the Standards Code NT and MFN treatment and use of international standards and transparency were translated into operational guidelines that would be submitted to these bodies for acceptance.[174] This was to improve the Code which left standards setting, application and enforcement to non-governmental bodies or to local governments.[175] The US proposed greater "transparency" requirements on bilateral or regional standards activities. They also suggested that outsiders should be allowed to comment in good time before proposed new standards were introduced.[176]

Furthermore the Uruguay Round resulted in the conclusion of the Marrakesh Agreement establishing the World Trade Organisation (WTO), which introduced the principle of the WTO as a 'single undertaking'. This undertaking meant that a party which entered into the WTO enters into all agreements existing in the WTO framew[illegible]eously. Another benefit was that the Uruguay Round gave the opportunity to negotiate directly with developing countries that were not signatories to the Code.

The Uruguay Round also concluded the Agreement on Technical Barriers to Trade which was a multilateral agreement negotiated to regulate technical barriers. This Agreement was binding on all members and was an extension of the Standards Code of 1979.The Standards Code rules were extended from solely governmental to non-governmental or private standards organisations.[177]It also increased the national treatment and non- discrimination obligations from technical regulations and standards to all forms of conformity assessment.[178]It included a Code of Good Practice for the Preparation, Adoption and Application of standards, which outlines for the first time general principles for development and application of voluntary standards worked out by

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[173] *Ibid.*
[174]Kommerskollegium "Consequences of the WTO agreement for Developing countries" available at http://www.opentradegate-se/upload/Publikantion%20&%20Rapporter/Report%20Consequences%20WTO%20 (accessed 09-09-2013).
[175] *Ibid.*
[176] *Ibid.*
[177]Khudina Technical Barriers to Trade and Standardization Policy: Study Paper No 4/12 2011 available at www.europa-kolleg-hamburg.de/.../SP_12_4_Khudina.pdf (accessed 02-08-2013).
[178] *Ibid.*

non-governmental organisations.[179]Through the TBT Agreement the WTO finally established an internationally binding legal order which sets universal rules for dealing with technical regulations and standards and their impact on international trade.

2 4 THE VALUE OF TRADE EXPORTS IN DEVELOPING COUNTRIES

It is believed that export is the engine for growth, a potent strategy for mutual enters-dependence among nations and an instrument for industrial emancipation.[180] Export growth is important because of its effects on Gross Domestic Product (GDP) and economic stability. International trade is the powerful engine that drives global economic growth. Morton and Tulloch state that "International trade brings gains to a nation, whether rich or poor and acts as a stimulus to growth."[181]The Monterrey Consensus identifies international trade as an engine for development of both developed and developing countries.[182] It asserts that commitments by both developed countries and developing countries towards an open, non-discriminatory and equitable multilateral trading system would promote economic growth, employment and development worldwide.[183]

However current studies by the World Bank show that trade liberalisation rules and policies have led to increased poverty and inequality and have eroded democratic principles with a disproportionately large negative effect on the poorest countries. The result of the studies show that the world's poorest countries share of world trade has declined by more than 40 % since 1980 to a mere 0.4 %.[184] This has been a cause for concern among developing countries with regard to the possible gains from global trade.[185]

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[179] *Ibid.*

[180] Monterrey Consensus on Financing for Development 2002 available at www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf(accessed 06-07-2013).

[181] Morton and Tulloch Trade and Developing Countries available at http://books.google.co.za/books?id=wbBIrPs4bqcc&pg=PTI3&Q=morton+and+tulloch:international (accessed 07-07-2013).

[182] Monterrey Consensus on Financing for Development 2002 available at www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf (accessed 20-06-2013).

[183] *Ibid.*

[184] UNCTAD Conference on Least Developed Countries 1999.

[185] *Ibid*, In 1980-1996 only 33 of 130 developing countries increased growth by more than 3% per capita, while the GNP per capita of 59 countries declined.Around1, 6 billion people are economically worse of today than 15 years ago. Furthermore the richest fifth have 80% of the world's income and the poorest fifth has 1%. This gap has doubled between 1960 and 2000.United Nations Human Development Report 1999 3.

Despite all these pessimistic views, a more recent World Bank study reported that roughly half of global economic benefit from free trade (goods only) would be enjoyed by developing countries.[186] The estimates for the increase in developing countries' annual income by 2015 are: Static measurement - $142 billion of $287 billion (49%) and Dynamic measurement - $259 billion of $461 billion (56%).[187] Furthermore it also shows that, the annual income gain to developing countries from the elimination of goods trade barriers alone is $142 billion, conservatively measured. This amount exceeds the $80 billion in foreign economic assistance by the G-7 countries in 2005 and the current proposal of $42.5 billion for developing country debt relief combined.[188]

A study by the International Institute of Economics estimates that global free trade could lift as many as 500 million people out of poverty and inject $200 billion annually into the economies of developing countries.[189] Also the Monterrey Co[illegible]ws that since 2002 most developing countries have experienced high and sustained levels of economic growth and trade has been an important engine for this growth.[190] The value of estimated trade benefits by developing countries was 7.2 % GDP growth from 2002 to 2007.[191]

In developing countries agriculture and food exports are of particular importance. For example, between 1980 and 1997, agricultural and food products typically accounted for over 25% of total merchandise exports from Sub-Saharan Africa. Further, agriculture is of great economic importance, both macro economically and in terms of the livelihoods of the rural population. Agriculture accounts for 61% of employment and 14% of GDP in developing countries, and 85%

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[186] *Ibid.*
[187] Trade Facts "The Benefits of Trade for Developing Countries" 2008 available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/.../ (accessed 05-07-2013).
[188] *Ibid.*
[189] *Ibid.*
[190] Monterrey Consensus on Financing for Development 2002 available at www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf (accessed 20-06-2013).
[191] *Ibid.*

of employment and 36% of GDP in least developed countries.[192] Major agricultural products exported from developing countries include fruit and vegetables, oilseeds, coffee and cocoa.[193]

In Kenya exports are dominated by the agricultural sector. This sector contributes around 25% of GDP, employs roughly 75% of the labour force, provides nearly all of Kenya's food requirements and is a major foreign exchange earner.[194] Key export crops include tea, coffee, sugar, cotton, horticulture, pyrethrum, and oil crops. Similarly in India, tobacco has gained commercial importance because of the employment it provides and the revenue it generates for the economy, specifically through exports.[195]Also the International Coffee Organisation (ICO) has shown that coffee plays a vital role in Uganda's economy contributing about 20 – 30% of the foreign exchange earnings and employing over 3.5 million households.[196] In 2010 Malawi's total exports were valued at US$849 million and they constitutes 79.7% of the economy's total merchandise exports.[197] The agricultural sector contributes approximately 64% to the total income for the rural population, 65% of the manufacturing sector's raw materials, and approximately 87% of total employment.[198]This shows the significance of agricultural exports to the developing countries' economies.

Though agriculture is of vital importance in developing countries' economies it is not the only sector with high export values. For example exports of frozen shrimp by Bangladesh amounted to US$ 322.4 million in 2001.[199] Its importance is highlighted by the fact that it constitutes more than 70% of the export of primary products from Bangladesh. The share of exports as a share of

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[192] *Ibid.*

[193] Henson and Loader "Barriers to Agricultural Exports from developing countries: The Role of Sanitary and Phytosanitary Requirements" World Development Vol 29 No 1 http://elmu.umm.ac.id/file.php/1/journal/uvw/world%20Development/vol29.Issue1.2001/1091.pdf. (accessed 19-06-2013).

[194] Nyangito Agricultural Trade Reforms in Kenya under the World Trade Organisation Framework Discussion Paper No. 25 2003 available at www.cabi.org/GARA/ShowPDF.aspx?PAN=20083298151 (accessed 12-08-2013).

[195]Kumaresan Tobacco Exports The Untapped Potential available at http://www.efymag.com/admin/issuepdf/tobacco-jan10pdf(accessed 09-0-/2013).

[196] The coffee year book 2011/12: Uganda's leading exporter of quality certified coffee, Uganda coffee Federation publication available at www.ugandacoffeetrade.com/.../UgandacoffeeYearbook.../ (accessed 10-08-2013).

[197] WTO international trade statistics available at www.wto.org/english/res_e/statis_e/its2010_e/its10_toc_e.htm (accessed 20-05-2013).

[198] Malawi: Economy available at http://globaledge.msu.edu/countries/malawi/economy(accessed 05-07-2013).

[199] Rahman EU Ban on Shrimp Imports from Bangladesh. A case Study on Market Access Problems Faced by LDC's available at http:/ www.Ro.unctad.org/....ade_env/test1/meetings/standard (accessed 04-04-2013).

GDP in Bangladesh also rose over the period, from 5.8% in 1989 to 14.3% in 2002.[200]Shrimp exports have clearly made a substantial contribution to the country's foreign exchange earnings, and has increased the employment rate.[201]

Export growth promotes capital accumulation and accumulation of foreign exchange and thus enables the importation of capital and intermediate inputs necessary in the production of goods for export.[202] Secondly, exports may affect productivity through encouraging better allocation of resources driven by specialisation and increase deficiency, which in turn generate dynamic comparative advantages via reduction in costs for a country that facilitates exports.[203] Trade creates employment opportunities by boosting economic sectors that create stable jobs and higher incomes, thus improving livelihoods.[204]Trade plays a role in the improvement of quality, labour and environmental standards through increased competition and the exchange of best practices between trade partners, building capacity in industry and product standards.[205]

A World Bank report states that one of the most important developments in world trade over the past thirty years has been the growing participation of developing countries.[206]While the value ofglobal merchandise trade expanded on average by 10% per year from 1970 to 1999, outpacing the growth of output, developing countries' exports grew at 12% per year and their share of total trade expanded from about one-quarter to one-third.[207]Chakraborty has stated that the ratio of the developing country's export of manufactured goods in the total world export of manufactured goods increased from 5% in 1955 to 28.1% in 2002.[208] From the figures, it is evident that the developing countries have become a major player in the world trade of manufactured goods,

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[200] *Ibid.*
[201] *Ibid.*
[202] Hmed *et al* "The Role of Exports, FDI and Imports in Development: New Evidence from Sub-Saharan African Countries" available at http://vuir.vu.edu.au/15904/1/15904.pdf (accessed 07-09-2013).
[203]10 Benefits of tradehttp://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_148991.pdf (accessed 01-08-2013).
[204]Hmed *et al* "The Role of Exports, FDI and Imports in Development: New Evidence from Sub-Saharan African Countries" available at http://vuir.vu.edu.au/15904/1/15904.pdf (accessed 07-09-2013).
[205]*Ibid.*
[206] World Trade Report 2013 Developing Countries likely to outpace developed countries in terms of exports and GDP growth available at http://www.phdcci.in/admin-logged/banner-images/... (accessed 04-06-2013).
[207] *Ibid.*
[208]Chakraborty "Manufacture exports of developing countries and their terms of trade vis-à-vis the developed countries" Is Industrialisation of developing countries an "escape route from prebish-singer hypothesis" available at http://courses.umass.edu/econ797a-rpollin/Manf-Manf-Tbt.pdf (accessed 02-08-2013).

especially since the mid-1970s.[209]The World Trade Report 2013 has states that developing countries are likely to outpace developed countries in terms of exports; between 1980 and 2011, developing economies raised their share in world exports to 47% from 34%.[210]

2 4 1 The impact of the TBT Agreement on export goods from developing countries

The challenges of international competitiveness have moved beyond price and basic quality constraints to more emphasis on food safety and agricultural health concerns.[211] This has triggered the increased stringency of food safety which have become a source of concern among developing countries.[212] The standards are viewed as barriers to the continued success of these countries' exports of high-value agro food products which include fish, horticulture, fresh vegetables, fruits and meat products.[213]This is because developing countries lack the technical and administrative capacities needed for compliance or because these standards are from time to time applied in a discriminatory or protectionist manner.

Agricultural and food exports are of great importance to developing countries and are a source of livelihood and employment. These can only be beneficial to developing countries if they can conform to TBT regulations and standards that are recognised in their desired export target markets. Major export destinations for developing countries' exports are the European Union, USA and Japan. The rate of notifications of technical measures to GATT/WTO between 1981 and 1998 shows that TBT measures can act, either explicitly or implicitly, as a barrier to trade in a similar manner to tariffs.[215]Most of these notifications were submitted by the USA, EU, Japan

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[209] *Ibid.*

[210] World Trade Report 2013 "*Developing Countries Likely to Outpace Developed* Countries in Terms of Exports and GDP Growth" available at http://www.phdcci.in/admin-logged/banner-images/... (accessed 04-06-2013).

[211] Jaffe and Henson "*Standards and Agro-Foods Exports from Developing Countries: Rebalancing the Debate*" World Bank Policy Research Paper 3348 2004 available at http://www.webalice.it/audrea.marescotti/Material/3-1-standards/2004-Henson-Jaffee-Standardssex (accessed 07-06-2013).

[212] Jaffe et al "Agro-Food Export from Developing Countries: The Challenges posed by Standards" available at http://hubrural.org/IMG/pdf/jaffee-henson-2004.pdf. (accessed 07-06-2013).

[213] *Ibid.*

[214] *Ibid.*

[215] Notifications of technical measures to GATT/WTO over 1981-98 show an increase from 1 notification in 1981 to almost 2800 notifications in 1998.The Total number of notifications reached 1 251 in 2008 See Bao and Qin Quantifying the effect of Technical Barriers to Trade : Evidence from China 2009 http://www.sef.hku.hk/wlarryqui/Papers/RIE-TBT.pdf (accessed 07-07-2013).

and Canada.[216]Developing countries will have to comply with these standards in order to be competitive in the global market or be able to have access into the markets of their preferred destinations.[217]

TBT measures have been extensively recognised as potential barriers to trade. Essaji points out those technical regulations substantially impinge on developing countries' exports in their efforts to enter the global market.[218] The impact of TBTs on trade can be classified in three ways. Firstly, TBT measures can hinder trade by way of import bans or very high production and market costs.[219] Secondly, they can do so through technical specifications, including product and process standards which can be costly for prospective suppliers.[220] Thirdly supplying information such as packaging and labeling requirements can be discriminatory across suppliers.[221]

The data collected on the prevalence of detention or rejection of exports on agricultural and food products following border inspection proves that TBT regulations significantly affect developing countries. Reasons for the rejection were on the basis of problems associated with quality, safety, labeling or other technical issues.[222] With regard to both the United States and European Union there has been a very large increase in the number of detentions in the past several years.[223] In the European Union, for example, the number of notifications or alerts increased more than six fold between 1998 (230 cases) and 2002 (1520).[224] This increased incidence of rejections reflects a combination of factors including the tightening or harmonisation of standards, application of

[216] Otsuki *et al* "Saving two in a billion: A case study to qualify the trade effect of European food safety standards on African exports" available at www.siteresources.worldbank.org/INTRANETTRADE/Resources/Topic/afla (accessed 01-05-2013).
[217] *Ibid.*
[218] Essaji Technical Regulations and Specialisation in International Trade "Journal of International Economics" 2008 available at www.sef.hku.uk/~/Papers/TBT-TradeR4R111218.pdf (accessed 22-03-2013).
[219] Jaffee and Henson "Standards and Agro- Food Exports from Developing Countries: Rebalancing the Debate" World Bank Policy Research Paper 3348 2004 available at http://www.webalice.it/audrea.marescotti/Material/3-1-standards/2004-Henson-Jaffee-Standardssex (accessed 07-06-2013).
[220] *Ibid.*
[221] Jaffe *et al* "Agro-Food Export from Developing Countries: The Challenges posed by Standards" available at http://hubrural.org/IMG/pdf/jaffee-henson-2004.pdf. (accessed 07-06-2013).
[222] Scheneerman *Normative Conditions to Make WTO Law More Responsive to the Needs of Developing Countries* available at http://books.google.co.za/books?id=S9soOnfn2kQC&pg=PA217&1PG-PA217&DQ (accessed 22-03-2013).
[223] Jaffee and Henson "Standards and Agro- Food Exports from Developing Countries: Rebalancing the Debate" World Bank Policy Research Paper 3348 2004 available at http://www.webalice.it/audrea.marescotti/Material/3-1-standards/2004-Henson-Jaffee-Standardssex (accessed 07-06-2013).
[224] *Ibid.*

new standards for hazards formerly unregulated and substantially increased capacities for inspection or enforcement.[225]

Developing countries accounted for the bulk of rejections.[226] Most of the rejections were from countries which have been large or dominant suppliers of 'sensitive' products for many years, for example, Brazil, Thailand, Mexico and Turkey, or newly emerging large exporters of such products, for example, China, Vietnam and India.[227] The data reveals that developing countries are frustrated by TBT regulations which require substantial technical expertise, a scarce resource in many developing countries.[228] Developed countries apply more sophisticated conformity assessment procedures, standards and technical regulations than developing countries reflecting their technological, economic, institutional and social conditions.[229] This complicates international trade flows by increasing the costs of complying with the norms of these countries. Despite the fact that developing countries are financially challenged they are still expected to meet the requirements set by developed countries. Failure to satisfy the required standards would result in the elimination of their exports from their targeted destinations. Since developing countries are on the whole "standards takers" rather than "standards makers" their best choice, both from a cost and an efficiency point of view, is the adoption of those standards used in the markets of their major trading partners rather than the elaboration of their own indigenous standards.[230]

A study by Otsuki *et al* estimated the impact of changes in the EU standard on maximum aflatoxin levels in food using trade and regulatory survey data for 15 European countries and nine African countries between 1989 and 1998. The results show that implementation of TBT measures would reduce African exports of cereals, dried fruits, and nuts to Europe by 64% or

[225] Jaffe *et al* "Agro-Food Export from Developing Countries: The Challenges posed by Standards" available at http://hubrural.org/IMG/pdf/jaffee-henson-2004.pdf. (accessed 07-06-2013).
[226] *Ibid.*
[227] Aksoy Global Agricultural Trade and Developing Countries available at http://books.google.co.za/books?id=fm3bqfbxiec&pg(accessed 07-06-2013).
[228] Essaji "Technical Regulations and Specialization in International Trade" Journal of International Economics 2008.
[229] Clarke "Technical Barriers to Trade" available at www.rogerclarke.org.uk/sitebuildercontent/.../technicalbarrierstotrade.pdf(accessed 13-05-2013).
[230] Stephenson "Standards, Conformity Assessment and Developing Countries" 1997 available at http://www.wds.worldbank.org/.../IBI.../102502322-20041117162503pdf. (accessed 03-02-2013).

US$ 670 million.[231] According to Wilson and Otsuki's study on the impact of pesticide standards on banana trade, a 10% increase in regulatory stringency, and tighter restrictions on the pesticide chlorpyrifos would lead to a decrease in banana imports of 14.8 percent.[232] In another study Wilson *et al*[233] addressed the question of whether cross country standards for maximum tetracycline affected beef trade. The results suggested that a 10% more stringent regulation on tetracycline use would cause a decrease in beef imports by 6.2 percent.[234]

One of the most detailed analysis of the impact of TBT regulations on developing countries' exports was undertaken on Kenyan, Tanzanian and Ugandan exports of Nile perch to the European Union. In the 1990s, these countries encountered restrictions from the EU. In 1996, a number of shipments of Nile perch from Kenya, Tanzania and Uganda were found contaminated with high levels of bacteria (including *Salmonella*) causing Spain and Italy to issue an import ban on fishery products from the three countries.[235] In April 1997, the EU imposed a mandatory test for salmonella on fish imports from the three [illegible] In December 1997, due to a cholera outbreak in East Africa, the EU banned imports of fresh fish from the three countries and ordered a test of frozen fish for *Salmonella* and *Vibrio cholera*.[236] The three countries incurred substantial costs to undertake the adjustments. In Uganda, investments to upgrade processing plants amounted to about US$10-13 million with several more millions spent on inspection systems and landing sites.[237] The above statistics prove that TBT regulations affect exports from developing countries.

[231] Otsuki *et al* "Saving two in a billion: A case study to qualify the trade effect of European food safety standards on African exports" available at www.siteresources.worldbank.org/INTRANETTRADE/Resources/Topic/afla (accessed 01-05-2013).
[232] *Ibid*.
[233] Wilson *et al* "The Cost of Complying with Foreign Product Standards for firms in Developing Countries : An Economic Study" 2004 available at http://www.colorado.edu/ibs/pubs/pec/pec2004-0004.pdf (accessed 03-06-2013).
[234] *Ibid*.
[235] Jaffee and Henson "Standards and Agro- Food Exports from Developing Countries: Rebalancing the Debate" World Bank Policy Research Paper 3348 2004.
[236] *Ibid*.
[237] *Ibid*.

2 5 CONCLUSION

The aim of this chapter was to trace the development of TBT measures and their evolution into what they have become today. The chapter also sought to show the fundamental role and economic impact of TBT measures in the world economy. It is suggested that the way in which TBT measures will be handled will determine the position and participation of developing countries in global trade.

However the history of international trade shows that existing concerns prompted by TBT measures mimic those that were in existence in the nineteenth century.[238] The continuous need to protect the public from unsafe foods and the public's awareness of health protection is leading to the growth of protectionist tendencies. These protectionist tendencies are causing tension in world trade and are hindering developing countries from reaching the global market. This points to the need for new strategies that will protect developing countries from the TBT measures that are hindering them from benefiting in the global market.

Furthermore history shows that governments have always resorted to non-visible barriers to protect their domestic markets. For example the 1892 French government ban on imports of all cattle in the name of preventing infections regardless of precautions which were being taken by exporters. A multilateral trading system that ensures that governments do not abuse health protection concerns in their effort to protect domestic markets is necessary.

The value of exports in developing countries is apparent hence the need for a multilateral trading system that will regulate the growth of TBT measures and assist developing countries in their endeavor to access the global market.

[238] Musonda and Mbowe "The Impact of Implimenting SPS and TBT Agreements : The case of fish exports to European Union" available at http://www.tzonline.org/pdf/theimpactofirmimplematatingsandtbt.pdf (accessed 11-04-2013).

CHAPTER THREE

The Interpretation of the Agreement on the Application of Technical Barriers to Trade Measures

3 1 INTRODUCTION

The objectives of the Technical Barriers to Trade (TBT) Agreement can be fulfilled only if technical regulations, standards, and conformity assessment procedures are effectively prevented from becoming an obstruction to international trade.[239] It is a key aim of the Agreement to ensure that while the World Trade Organisation (WTO) members apply and adopt measures that are necessary, for example to protect the environment or the life and health of humans, animals or plants, or to prevent deceptive practices (that is measures that fulfill legitimate objectives according to the TBT Agreement), they should not become measures which negatively impact on trade especially for developing countries.[240] TBT [illegible] that are not put in place for legitimate reasons can work as protectionist tools and due to technical complications, can be very burdensome to overcome.

Essential to these goals is the acknowledgement that developing countries are likely to encounter challenges in their endeavor to conform to TBT measures.[241] Consequently the WTO under the

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[239] Van den Bossche and Zdour*The World Trade Organization: Text, Cases and Materials* (2013) 891.

[240]Hoekman and Kostecki "*The Political Economy of the World Trading System": The WTO and Beyond (*2009) 188. "It has been observed that the danger of technical regulations standards and conformity assessment procedures acting as technical barriers to trade is an increasing concern among developing countries." See Ali "Contribution of Standards and Conformity Assessment to the National Economy" available at http://www.mbam.org.my/mbam/images/MBJ4QO69pdf (accessed 06 -10 -2013).The World Trade Report 2005: "Exploring the Links between Trade, Standards and the World Trade Organization (WTO)" noted that "[i]n a world of reduced tariff protection and multilateral trade rules that limit the ability of governments arbitrarily to increase taxes and quantitative restrictions on trade, it is not surprising that they are sometimes tempted to use other means to restrict imports. This is a perennial issue in international trade relations." See World Trade Report 2005: "Exploring the links between trade, standards and the World Trade Organisation" available at http://www.sarph.org/documents/d0001395 (accessed 07-09-2013). See also Van den Bossche and Zdour*The World Trade Organization: Text, Cases and Materials* (2013) 852.

[241] In the Preamble of the TBT Agreement WTO members recognise that "developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desire to assist them in their endeavors in this regard."

TBT Agreement should make significant efforts to ensure that developing countries receive the support that they need for attainment of the objectives of the Agreement.[242]

It is beyond dispute that the intentions of the TBT Agreement are *inter alia* to further the interests of developing countries but the wording or text of the Agreement seems to undermine this particular objective.[243] The problem with the Agreement is that it may have loopholes that may lead to interpretations that favour developing countries being sidelined. Such loopholes have the potential to hinder developing countries from playing an active role in the international trading system and from gaining the prospective benefits which can be obtained from the TBT Agreement. It is therefore suggested that, for developing countries to benefit from the Agreement a TBT – related multilateral regulatory framework that is without shortcomings which can be abused by protectionists must be implemented.[244]

This chapter undertakes an analysis of the WTO TBT regulatory framework. After this introduction, Part 2 will look at what is and what constitutes a TBT measure. Part 3 will examine the harmonisation provisions of the Agreement. Part 4 analyses the transparency provisions of the Agreement. Part 5 will focus on the principles of equivalence and mutual recognition set out for members in the Agreement. Part 6 examines the principle of Non – Discrimination which is emphasised in the Agreement. Part 7 will focus on the Prevention of obstacles to international trade. Part 8 will explore on the special provisions put in place for developing countries, that is, Articles 11 and 12 of the TBT Agreement. The discussion in this chapter shows how some of the provisions are vulnerable to abuse by member states in furtherance of protectionist goals. Part 9 will conclude the chapter.

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[242] *Ibid.*

[243] Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements" available available at http://www.google.com/url?url=http://www.wto.org/english/tratop_e/devel_e/sem01_e/kessie_e.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=OJl8VIKjLMXV7Qax04H4BA&ved=0CBQQFjAA&sig2=TSG8ikeqiLZralXO-zXZPg&usg=AFQjCNGSIbwS_CU-siqSx0pb9ghu7Q8myw (accessed 22 – 10 – 2013).

[244] *Ibid.*

3 2 WHAT IS AND WHAT CONSTITUTES A TBT MEASURE?

The TBT Agreement applies: technical regulations, standards and procedures adopted by governments related to the assessment of conformity with technical regulations and standards.[245] Annex 1 of the TBT Agreement defines these measures.[246] The definitions lay out the scope of the agreement.[247]

321 Technical Regulation

As stated in Annex 1.1 of the TBT Agreement a "technical regulation" is 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, marking or labeling requirements as they apply to a product, process or production method."

The ruling in *EC –Sardines*[248] was rooted in *EC- Asbestos*[249] where a three-tier test for determining whether a measure is a "technical regulation" was established as follows:

1) the measure must apply to an identifiable product or group of products;
2) the measure must lay down one or more product characteristics; and
3)compliance with these characteristics must be mandatory .[250]

For example a law requiring that all fertilisers should be sold in plastic containers is a technical regulation. Also a law requiring that the production of pharmaceutical products meet certain

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[245] Lester *et al World Trade Law: Text, Materials and Commentary* (2012) 600.
[246] Annex 1 of the TBT Agreement.
[247] Lester *et al World Trade Law: Text, Materials and Commentary* (2012) 600.
[248] Panel Report *European Communities – Measures Affecting Asbestos-Containing Products (EC–Asbestos),* WT/DS135/AB/R, adopted 5 April 2001, paras.66-70.
[249]Appellate Body Report *European Communities–Trade Description of Sardines* (*EC –Sardines*) WT/DS231/AB/R, adopted 23 October 2002, paras. 189-195.
[250] Appellate Body Report *EC – Sardines*, para 176. See also Van Den Bossche and Zdour *The World Trade Organization Text, Cases and Materials* (2013) 857.

requirements regarding plant cleanliness falls within the scope of application of the TBT Agreement.[251]

32 2 Standards

According to Annex 1.2 of the TBT Agreement a "standard" is a:

> "Document approved by a recognised 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."

Although compliance with standards is not mandatory, companies conform to these standards as non-adherence would eliminate their products from the market.[253] A lack of uniform recognised standards may have a significant impact on trade; consequently it is important that standards also conform to international disciplines.[254] A guideline enforced by a government which states that all eggs weighing 50 grams or more are to be labeled "Grade C" is regarded as a standard if those eggs weighing less may still be sold.[255]Also standards for television sets or computers are standards that fall within the scope of the TBT Agreement.[256]

[251] Van Den Bossche and Zdour*The World Trade Organization Text, Cases and Materials* (2013) 853.
[252] Standards are voluntary in nature, generally being defined by industry or non-governmental standardization bodies such as the American National Standards Institute, the British Standards Institute and the Association Francaise de Normalisation. A major player in this field is the International Organisation for Standardization (ISO) based in Switzerland. See Hoekman and Kostecki "*The Political Economy of the World Trading System:* The WTO and Beyond" (2009) 186.
[253] "Firms desiring to export to or sell in a market have strong incentives to satisfy prevailing standards, be it to ensure compatibility or to signal that products meet minimum quality norms." See Hoekman and Kostecki "*The Political Economy of the World Trading System*: The WTO and the World Beyond" (2009) 186.
[254] *Ibid.*
[255] United Nations Conference on Trade and Development: "Dispute Settlement: Technical Barriers to Trade (WTO)" available at http://unctad.org/en/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).
[256] Van Den Bossche and Zdour *The World Trade Organization Text, Cases and Materials* (2013) 850.

32 3 Conformity Assessment Procedures

According to Annex 1.3 of the TBT Agreement a "Conformity Assessment Procedure" is:

> "Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled."

Examples of 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.[257]

3 3 THE PURPOSE OF THE MEASURE

The TBT Agreement does not cover all measures aimed at protecting human, animal and plant life or health; it only applies to a clearly confined [illegible] measures. Significant to note is that the Agreement "seeks to balance two competing policy objectives which are the prevention of protectionism and the right of a WTO member to enact product regulations for approved (legitimate) public policy purposes."[258] On the one hand the TBT Agreement establishes rules and disciplines designed to prevent mandatory technical regulations, voluntary standards, and conformity assessment procedures from becoming unnecessary barriers to international trade and on the other it "seeks to leave members with sufficient domestic policy autonomy to pursue legitimate regulatory objectives."[259]

The Agreement recognises that domestic regulations can achieve legitimate purposes that are not linked to protectionism. For example, domestic regulations can serve as a means of protecting consumer health and safety, the environment and national security as envisaged in Article 2.2 of

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[257] TBT Agreement Annex 3.1 Explanatory Notes.

[258] Dispute Settlement: World Trade Organisation United Nations Conference on Trade and Development 2003 available at http://unctad.org/en/Docs/edmmisc 232add22_en.pdf. (accessed at 06-04-2013).See also Van den Bossche and Zdouc *The World Trade Organization: Text, Cases and Materials* (2013) 852.

[259] *Ibid.* See also Ming Du "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org (accessed 04-06-2014).

the Agreement.[260] However the Agreement also recognises that the effective reduction of traditional barriers to trade in the WTO framework has left member countries seeking for other means to protect their domestic markets.[261] These 'other' means of protection may be in the form of regulatory measures. Technical regulations, standards and conformity assessment procedures are all potential regulatory measures that can be abused by WTO member states.[262]

3 4 QUESTIONS SURROUNDING THE SCOPE OF APPLICATION OF THE TBT AGREEMENT

With respect to the scope of application of the TBT Agreement, this section examines the relationship between the TBT Agreement and the GATT 1994.[263] It also addresses the subject whether the processes and production methods to which the TBT Agreement applies include the non-product-related processes and production methods (NPR-PPMS).[264] Further this section addresses the question whether the TBT Agreement applies to technical regulations which were already in force on 1 January 1995 (the date on which the TBT Agreement entered into force).[265]

3 4 1 TBT measures and the GATT 1994

The relationship between the TBT Agreement and the GATT is close and can be controversial where both apply to a given measure.[266] It has often been said that the TBT Agreement

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[260] Article 2.2 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. For this purpose, technical regulations shall not be more trade – restrictive than necessary to fulfill a legitimate objective, taking into account the risks non – fulfillment would create. Such legitimate objectives are, 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..."

[261] Jackson "*The World Trading System: Law and Policy of International Economic Relations*" (1997) 222.

[262] Internal health, safety and technical regulations governing areas such as food inspection, product labelling, or safety guidelines have the potential to raise the costs of foreign firms relative to domestic firms, thereby conferring an advantage on domestic firms. See Trebilcock and Fishbein "International Trade: Barriers to Trade" in Guzman and Sykes (eds) *Research Handbook on International Economic Law* (2007) 37.

[263] Dispute Settlement: World Trade Organisation United Nations Conference on Trade and Development 2003 available at http://unctad.org/en/Docs/edmmisc 232add22_en.pdf. (accessed at 06-04-2013).

[264] *Ibid.*

[265] Panel Report *European Communities–Trade Description of Sardines* (*EC –Sardines*) WT/DS231/AB/R, adopted 29 May 2002 para 417.

[266] Ming Du "Domestic Regulation Autonomy under the TBT Agreement: From non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org/content/6/2/269.full.pdf (accessed 02-12-2013).

"further[s] the objectives of GATT 1994."[267] In this sense, the non-discrimination obligations and policy justifications addressed in both agreements should be interpreted harmoniously.[268] In *EC –Asbestos* it was stated that in situations where both the TBT Agreement and the GATT apply it must first be determined whether the measure is consistent with the TBT Agreement.[269]Nonetheless if the measure is found to comply with the TBT Agreement it is essential to scrutinise whether the measure is also consistent with the GATT 1994.[270]

Regardless of great similarities between the GATT and the TBT Agreement, there are a few differences to be noted between them.[271] For example the scope of the TBT Agreement is broader as compared with that of the GATT.[272] Unlike the TBT Agreement the GATT only applies to mandatory government regulations and to products but does not cover production and process methods (PPMs).[273]It is therefore evident that the TBT Agreement has enlarged the objectives of the GATT.[274]

3 4 2 Non-Product-Related Processes and Production Methods (NPR-PPMs)

The TBT Agreement does not clarify whether NPR-PPMs fall within its scope or not. NPR-PPMs refer to processes and production methods that do not affect the characteristics of the final product on the market.[275] However, the definition of technical barriers and standards seems to

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[267]Trachtman The International Economic Law Revolution and the Right to Regulate available at http://books.google.co.za/books?isbn=1905017200 (accessed 03-04-2013) See also Mavroidis "The Relationship between GATT and the TBT Agreement Non- Discrimination Obligations" available at http://worldtradelaw.typepad.com/ie/pblog/2013/07/the-realtionship-between-the-gatt-and-the-tbt-non-discrimination-obligations.html (accessed 02-02-2014).

[268] *Ibid.*

[269] In the case of *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, (*EC-Bananas*) WT/DS27/AB/R, adopted 17 November 1997 it was stated that "when the GATT 1994 and another Agreement in Annex 1A appear a priori to apply to the measure in question, the latter should be examined on the basis of the Agreement that deals "specifically, and in detail, with such measures."

[270] Panel Report *European Communities – Measures Affecting Asbestos-Containing Products*, (*EC –Asbestos*) WT/DS135/AB/R, adopted 5 April 2001.

[271] Ming Du "Domestic Regulation Autonomy under the TBT Agreement: From non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org/content/6/2/269.full.pdf (accessed 02-12-2013).

[272] *Ibid.*

[273] *Ibid.*

[274] *Ibid.*

[275] If a PPM causes a change detectable in the product itself, it is classified as "product related." If a PPM cannot be identified in the product itself, it is said to be "non-product related" (NPR-PPM) or unincorporated. See Appleton

exclude NPR-PPMs from the scope of the Agreement. Seemingly the TBT Agreement was not intended to apply to PPMs.

Though the Agreement is uncertain about NPR-PPMs, it is however clear that labeling requirements relating to NPR-PPMs are TBT measures which fall within the scope of the Agreement.[276] This is evident in the definitions of technical regulations and standards which embrace procedures that are concerned with "terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."[277] In *EC-Sardines* the Appellate Body concluded that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product…"[278] It is clear that the Appellate Body considered labeling requirements as TBT measures hence the conclusion that NPR-PPMs fall within the scope of the TBT Agreement.

Whereas labelling schemes provide a means of informing consumers when production methods do not meet particular criteria they also provide a means of permitting consumers to discriminate against goods based on NPR-PPMs.[279] This has aroused concerns among developing country members of the WTO as they lack the technical capacity and capital to meet the stringent production standards that exist in developed countries.[280] Further the Agreement does not provide protection for developing countries that wish to export their goods to the developed countries but are hindered by the sophisticated labelling requirements.

"Environmental Labelling Schemes Revisited: WTO Law and Developing Country Implications" in Sampson and Chambers (eds) *Trade, Environment, and the Millennium* (1999) 239.

[276] *Ibid.*

[277] Van den Bossche and Zdour*The World Trade Organization: Text, Cases and Materials* (2013) 854.

[278] Appellate Body *Report European Communities – Trade Description of Sardines* (*EC–Sardines*) WT/DS231/AB/R, adopted 23 October 2002 para 189.

[279] Appleton "Environmental Labelling Schemes Revisited: WTO Law and Developing Country Implications" in Sampson and Chambers (eds) *Trade, Environment, and the Millennium* (1999) 239.

[280] *Ibid.*

3 4 3 Application of the TBT Agreement to measures adopted prior to 1 January 1995

The TBT Agreement also applies to the TBT measures that were applied on or before 1 January 1995.[281] This includes measures which remained in force after that date.[282] In *EC-Sardines*, the Appellate Body held that the TBT Agreement applied to measures adopted prior to the entry into force of the WTO Agreement provided that the trade measure at issue has not ceased to exist.[283] In making this decision the Appellate Body considered the centrality of the harmonisation provision of the TBT Agreement and the obligation of members to participate in standards development for products for which they have already adopted domestic measures.[284] Excluding existing measures from such a key provision would create a division between the old and the new measures, a consequence which WTO negotiators could not have intended.[285]

The Appellate Body also referred to Article 28 of the Vienna Convection on the Law of Treaties, which states the general principle that a treaty shall not be applied retroactively:

> "... Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceases to exist before the date of entry into force of the treaty with respect to that party."[286]

Taking into consideration the provision of the treaty law, it was settled that while the EC regulation was adopted before 1 January 1995, it was still in force and could not be considered a situation which has ceased to exist.[287] Furthermore the Appellate Body stated that the language of Article 2.4 of the TBT Agreement which says "where technical regulations are required" covers technical regulations that are already in existence as it is entirely possible that a technical

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[281] Appellate Body Report *European Communities – Trade Description of Sardines* (*EC–Sardines*) WT/DS231/AB/R, adopted 23 October 2002 para 216.
[282] *Ibid.*
[283] *Ibid.*
[284] McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation_international_standards_and_technical_barriers_to_trade (accessed 07-11-2013).
[285] *Ibid.*
[286] Article 28 of the Vienna Convection on the Law of Treaties.
[287] Van den Bossche and Zdour *The World Trade Organization: Text, Cases and Materials* (2013) 861.

regulation that was already in existence could continue to be required.[288]It further stated that the word "imminent", is not intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted.[289] Reasonably, the use of the word "imminent" means that members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations."[290]

Moreover the Appellate Body in the *EC Sardines* case referred to Article XVI: 4 of the Marrakesh Agreement Establishing the World Trade Organisation which reads:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[291]

Seemingly existing legislation can be deemed to be exempted from WTO law only if a provision in one of the Agreements specifically provides for such an exemption.[292] There is a clear responsibility for all WTO members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements.[293]

[288]Appellate Body *Report European Communities – Trade Description of Sardines* (*EC–Sardines*) WT/DS231/AB/R, adopted 23 October 2002 para 205-208.The equivalent harmonization provision of the SPSA was considered in the *Hormones* dispute. In *Hormones* the Appellate Body stated that "… if the negotiators had wanted to exempt the very large group of SPS Measures in existence before 1 January 1995… it appears reasonable to us to expect that they would have said so explicitly…" the Appellate Body relied on the similarities in the language of the two agreements. See Howse "A new Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards" available at http:// www.probus-sigma.com/wp-content/uploads/downloads/2012/02/WTO-Legal.pdf (accessed 13-12-2013).

[289] Appellate Body Report *European Communities – Trade Description of Sardines* (*EC–Sardines*) para 204. Also see Panel Body Report *European Communities – Trade Description of Sardines* (*EC–Sardines*) WT/DS231/R, adopted 29 May 2002 para 7.74. Article 2.4 of the TBT Agreement 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 fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

[290]Appellate Body Report *European Communities – Trade Description of Sardines* (*EC–Sardines*) para 204

[291]Article XVI: 4 of the Marrakesh Agreement Establishing the World Trade Organization, April 15,1994: The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 4 (1999) 1867 U.N.T.S. 154, reprinted in (1994) 33 ILM 1144-52.

[292] Howse "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards" available at http://www.probus-sigma.com/wp-content/uploads/downloads/2012/02/WTO-Legal.pdf (accessed 13-12-2013).

[293] Article XVI: 4 of the Marrakesh Agreement Establishing the World Trade Organization, April 15,1994: The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 4 (1999) 1867 U.N.T.S. 154, reprinted in (1994) 33 ILM 1144-52.Also see United Nations Conference on Trade and Development: "Dispute Settlement: Technical Barriers to Trade (WTO)" available a: http://unctad.org/en/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).

3 5 HARMONISATION

Harmonisation[294] is a vital pillar of the TBT Agreement. The objective of harmonisation is homogeneity of trade measures on an international basis.[295]In theory it would eliminate the costs of adjusting to numerous regulations and the trading environments would be the same for all firms irrespective of nationality.[296]The TBT Agreement underlines that the approved international standards should be recognised by all members and be part of the domestic technical regulations and standards.[297]The call for harmonisation is intended to avoid the emergence of excessive product requirements and assessment procedures, and to encourage the use of the ones that have been developed with the approval of the international community.[298] The TBT Agreement comprises of provisions that are linked to harmonisation and practices based on international standards.

Article 2.4 of the TBT Agreement requires "members to use international standards as a basis for technical regulations where such a standard exists,[299] . . . in order to avoid unnecessary obstacles to trade and to inspire harmonisation. Members are also encouraged to "contribute within the limits of their resources in the preparation of international standards by appropriate international

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[294] Harmonization has no fixed meaning. Leebron defines it broadly as "making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar". See McDonald "Domestic Regulation, Harmonization, and Technical Barriers to Trade" available http://iit.adelaide.edu.au/docs/jan%20McDonald.pdf (accessed 12-09-2013).

[295] Harmonisation may involve unilateral adoption by one country of another's set of rules, or negotiation of common set of disciplines. Many developing countries use technical regulations and standards regimes developed in Europe or United States, often maintaining systems inherited from a colonial past or military occupation. See Hoekman and Kostecki "*The Political Economy of the World Trading System*: The WTO and the World Beyond" (2009) 191.

[296] Veggel and Elvestand "Equivalence and mutual recognition in Trade Arrangements: Relevance of the WTO and the Codex Alimentarius Commission NILF-Report 2004" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_S.pdf (accessed 04- 10 -2013).Streamlining the process for ensuring that products meet required standards can substantially reduce costs and time to market for such products. Further accreditation can halve the time needed for a product to reach the market, and slash associated costs by 80%. See WTO 2013 News items- Members grapple with certifying products, and certifying the certifiers available at http://www.wto.org/english/news13_e/tbt_29oct13_e.htm (accessed 04 – 11-2013).

[297] *Ibid.*

[298]Hoekman and Kostecki *The Political Economy of the World Trading System*: The WTO and Beyond (2009) 192.

[299]Article 2.4 of the TBT Agreement 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…"

standardizing bodies."[300] It has been pointed out that this provision contradicts the TBT Agreement's key harmonisation requirements because developing countries lack the resources to participate.[301] In relation to standards Annex 3.F of the TBT Agreement requires standardising bodies to use existing international standards as a basis for the standards they develop.[302] Also members are to be involved in the preparation of international standards by international standardising bodies so as to encourage harmonisation of standards.[303]

In relation to conformity assessment procedures the TBT Agreement stipulates that members must ensure that their central governments or their relevant parts use relevant guides or recommendations issued by international standardising bodies where assurance that products conform to technical regulations and standards is required except where they are inappropriate.[304]Similar to technical regulations and standards Article 5.5 of the TBT Agreement obliges members to partake in the preparation of guides and recommendations for conformity assessment procedures by international standardi[305]

[300] Article 2.6 of the Technical Barriers to Trade Agreement states that "With the view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation for appropriate international standards for products for which they either have adopted, or expected to adopt, technical regulations."

[301]McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation_international_standards_and_technical_barriers_to_trade (accessed 07-11-2013).

[302] Annex 3.F of the TBT Agreement states that "Where international standards exists or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems."

[303] Article 3G of the TBT Agreement states that "With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding the subject matter for which it either has adopted, or expect to adopt, standards. For standardizing bodies within the territory of a member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expects to adopt, standards for the subject matter to which the international standardization activity relates."

[304] Article 5.4 of the TBT Agreement states that: "In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them except where they are inappropriate for the Members concerned, for, *inter alia*, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems."

[305] Article 5.5 of the TBT Agreement states that "With a view to harmonizing conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by

The above provisions show that the harmonisation of domestic technical regulations and standards in relation to international standards significantly facilitates the conduct of international trade.[306]However the harmonising provisions of the TBT Agreement have been criticised for being imprecise and non-binding.[307] In particular Article 2.4 contains an "escape clause" [308]which weakens the principle of harmonisation as it can be used by members to justify their actions against harmonisation.[309] Furthermore, the Agreement does not define what is considered "ineffective or inappropriate" which contributes to the ineffectiveness and unreliability of the harmonisation provision.[310]

Chen and Mattoo in their investigations of European Union (EU) standards' harmonisation find that harmonisation tends to increase trade between specific countries but not essentially with the rest of the world.[311] They further point out that among the excluded countries, developing countries may be the worst sufferers as their firms may not be equipped enough to comply with the required standards.[312] Furthermore Czubala *et al* in their analysis of the EU standards for textiles suggest that European standards tend to hold back African exports as capacity constraints in Africa can make it difficult for firms to adapt their products to meet multiple standards.[313] Despite all the negative views, it is suggested that harmonisation of standards is the answer to the

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appropriate international standardizing bodies of guides and recommendations for conformity assessment procedures."

[306] Lester *et al World Trade Law: Text, Materials and Commentary* (2012) 631.

[307]Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of 2011* Legal and Economic Analysis (2013) 218.

[308] The language used in Article 2.4 of the TBT Agreement is unfortunately not very strong. Article 2.4 contains an "escape clause" which states that international standards are not required to be used "as the basis" for technical regulations when they would be "an ineffective or inappropriate" means for the "fulfillment of the legitimate objectives pursued." However what is considered ineffective or inappropriate is not defined in the Agreement. See McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation_international_standards_and_technical_barriers_to_trade (accessed 07-11-2013).

[309] Veggel and Elvestand "Equivalence and mutual recognition in Trade Arrangements" Relevance of the WTO and the Codex Alimentarius Commission NILF-Report 2004-9 available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_S.pdf (accessed 04- 10 -2013).

[310] *Ibid.*

[311]Sherpard "Standards, Harmonization, and Trade: New Empirical Evidence" available http://siteresources.worldbank.org/DEC/Resources/84797-1154354760266/2807421-11943691000631/4361465-1209126984937/standards-harmonization-and-trade-new-empirical-evidence-pdf (accessed 05-09-2013).

[312] *Ibid.*

[313] *Ibid.*

difficulties of complying with the different TBT measures of WTO members. In the WTO TBT Committee Formal Meeting on 29 – 31 October 2013 it was stated that "the key to harmonisation is to have products certified before they leave the exporting country according to agreed standards and by accredited bodies, and even more so if the certification is recognized internationally."[314] This was summed up in the slogans of two related organisations that provide certification arrangements, the International Accreditation Forum (IAF) and the International Laboratory Accreditation Cooperation (ILAC), which says "Certified Once Accepted Everywhere."[315]

3 5 1 Use of international standards

The use of international standards can facilitate harmonisation of technical regulations and standards among member states which in turn would eradicate several international trade restrictions. Accordingly the Preamble of the TBT Agreement recognises the important role that international standards play in improving efficiency of production and facilitating trade.[316] It also recognises the contribution of International standardization to technology transfer to developing countries.[317] International standards are used to regulate global trade and to avoid unnecessary barriers to trade. If used effectively international standards can be a weapon to regulate alignment on a global scale and create harmony of technical regulations and standards among members.[318] It is therefore imperative to examine the content of the provisions of Article 2.4 of the TBT Agreement.

[314] WTO 2013 News items – "Members grapple with certifying products, and certifying the certifiers" available at http://www.wto.org/english/news_e/news13_e/tbt_29oct13_e.htm. (accessed 04 – 11- 2013).
[315] *Ibid.*
[316] The Preamble of the TBT Agreement states that "Recognizing the important contribution that international standards ... can make... by improving efficiency of production and facilitating the conduct of international trade."
[317] The Preamble of the TBT Agreement states that "Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries."
[318] Wijkstrom and McDaniels "International Standards and the WTO TBT Agreement: Improving Governance for Regulatory Alignment 2013" available at www.wto.org>resources>researchandanalysis>workingpapers. (accessed 09 – 09 -2013).

3 5 1 1 The use of "Relevant international standard"

3 5 1 2 "International Standard"

In determining whether a standard is an international standard the Appellate Body in *US-Tuna* stated that the subject matter of a standard is not material. What qualifies the standard as an international standard is primarily the characteristics of the approving entity.[319] In simpler terms a standard is an international standard if it is approved by an international standardising body.[320] It is however the weakness of the TBT Agreement that it nowhere defines international standards, nor does it attempt to list the international regimes that promulgate international standards (within the meaning of Article 2.4).[321] Consequently a few of these standards are a creation of nongovernmental bodies or private/ public partnerships where industry is the driving force.[322] This leads to a broad range of normative materials including privately generated norms from developed countries being converted into international legal obligations.[323] Such a gap in the TBT Agreement has the potential to cause developing countries to be sidelined as they lack the capacity to generate norms that can be transformed into legal obligations nor have the status to be recognised as "standard setters."[324]

However, the Appellate Body ruling in *United States - Measures concerning the Importation, Markerting and Sale of Tuna and Tuna Products*[325] has now established some judicially invented criteria to determine which international regimes qualify under Article 2.4.[326] Also the WTO TBT Committee decision of November 2000 clarified that for a standardising body to be an international standardising body within the meaning of Article 2.4, its membership should be open on a non- discriminatory basis to relevant bodies of all WTO members.[327] The body must

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[319] Lowenfeld *International Economic Law* (2008) 85.
[320] *Ibid.*
[321] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of2011* Legal and Economic Analysis (2013) 219.
[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*
[325] Appellate Body Report, *United States - Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products, (US-Tuna)*WT/DS381R, adopted 13 June 2012 para 366.
[326] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of2011* Legal and Economic Analysis (2013) 219.
[327] *Ibid.*

be open at every stage of standards development, have "recognized activities in standardization", have evidence of recognition by WTO members and also evidence of recognition by national standardising bodies.[328] The emphasis on openness and non-discrimination suggests that an international standardising body should be willing to harmonise its standards with other relevant bodies and should represent the interests of all members of the WTO.

3 5 1 3 Meaning of "relevant" under Article 2.4

The *EC–Sardines* case provides guidelines as to the meaning of the term "relevant". The Appellate Body supported the Panel's reference to the ordinary meaning of the term "relevant" as: "bearing upon or relating to the matter in hand; pertinent."[329] The Panel reasoned that, to be a "relevant international standard", the standard at issue in the dispute -Codex Stan 94 - would have to "bear upon, relate to, or be pertinent to the EC Regulation."[330]

The Panel also concluded that even if not adopted by consensus, an international standard can constitute a "relevant international standard."[331] In support of its view the Panel referred to the Explanatory Note which states that the TBT Agreement also covers documents that are not based on consensus.[332] Thus, an international standard not adopted by consensus can still constitute a relevant international standard for the purposes of Article 2.4 of the Agreement.[333] However it has been suggested that "non-consensual decision making might create risks of capture by concentrated interests, thus making it inappropriate to have such international standards legally binding."[334] Further, non-consensual measures undermine the principle of transparency which is one of the main pillars of the of the TBT Agreement.[335] Also developing countries contend that relevant international standards should be based on multilaterally agreed guidelines with

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[328] *Ibid.*
[329] Appellate Body Report *EC- Sardines* para 231.
[330] *Ibid.* Also see WTO Analysis Index: "Technical Barriers Agreement on Technical Barriers to Trade" available at http://www.wto.org/english/res_e/bookssp_e/analytic_index_e/tbt_01_e.htm. (accessed 14 – 10 – 2013).
[331] Panel Report *EC- Sardines* para 7.90.
[332] TBT Agreement Annex 1-2 Explanatory Note states that "Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus."
[333] *Ibid.*
[334] Howse "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards" available at www//.probus-sigma.com/wp-content/uploads/downloads/2012/02/WTO-Legal.pdf (accessed 13-12-2013).
[335] *Ibid.*

numerous countries (particularly developing countries) being consulted so that the problems they experience in adapting to these standards could be considered.[336]

3 5 1 4 Requirement of international standards "as a basis"

Members are required to use relevant international standards "as a basis for" their technical regulations. It is a weakness of the TBT Agreement that the term "as a basis for" is not defined.[337] In *EC–Sardines* the Appellate Body "merely stated that if the technical regulation and the international standard contradict each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation."[338] In simpler terms the Appellate Body observed that "the domestic regulation cannot be in actual contradiction with the international standard."[339] This suggests that "a very strong and substantial" relationship may be required between domestic regulations and international standards" to satisfy the obligation under Article 2.4 that relevant international standards must take priority.[340] The implied close relationship may be a potential hindrance to developing countries as they may fail to satisfy the requirements of that relationship.[341]

3 5 1 5 "Ineffectiveness and Inappropriateness" under Article 2.4

In the case of *EC Sardines* the Panel began by examining the meaning of the terms 'ineffective' and 'inappropriate'.[342] It pointed out that the term 'ineffective' 'refers to something which is not having the function of accomplishing', 'having a result", or "brought to bear', whereas the term "inappropriate" refers to something which is not specially suitable, proper, or fitting.[343]

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[336] Motaal "The Agreement on Technical Barriers To Trade, The Committee on Trade and Environment, and Eco-labelling" in Sampson and Chambers (eds) *Trade, Environment, and the Millennium* (1999) 280.
[337] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of2011* Legal and Economic Analysis (2013) 218.
[338] *Ibid.*
[339] Trebilcock and Howse *The Regulation of International Trade* (2005) 219.
[340] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of2011* Legal and Economic Analysis (2013) 218.
[341] *Ibid.*
[342] Panel Report *EC-Sardines* para 7.116.
[343] *Ibid.*

In the context of Article 2.4, an ineffective means is a means which does not have the purpose of achieving the legitimate objective being pursued, while an inappropriate means is a means which is not particularly suitable for the fulfillment of the legitimate objective being pursued.[344] An inappropriate means will not necessarily be an ineffective means.[345] However, regardless of its 'unsuitability' it may nonetheless be effective in fulfilling that objective.[346] Equally, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means.[347] It was therefore concluded in *EC - Sardines*, that the terms 'ineffective' and 'inappropriate' have different meanings, and 'that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.'[348]

3 51 6 Meaning of "legitimate objectives pursued" under Article 2.4

In *EC -Sardines* the Panel examined the meaning of the phrase 'legitimate objectives pursued'. It stated that the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2 which provides an illustrative, open list of objectives considered 'legitimate'.[349]The Panel also pointed out that Article 2.4 of the TBT Agreement requires an examination and a determination whether the objectives of the measure at issue are 'legitimate'.

Two implications flow from the Panel's interpretation. First, the term 'legitimate objectives' in Article 2.4 "must include the objectives stated in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."[350]Second, with regards to the term '*inter alia*' in

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[344] Van den Bossche and Zdour*The World Trade Organization: Text, Cases and Materials* (2013) 881.
[345] *Ibid.*
[346] *Ibid.*
[347] In *US – COOL* it was stated that Codex Stan 1 – 1985 did not have the capacity of accomplishing the objective of providing information about the countries in which an animal was born, raised and slaughtered, because the international standard conferred origin exclusively on the country of slaughter or other substantial transformation. It was concluded that Codex Stan 1 – 1985 was neither an effective nor an appropriate means to fulfill the legitimate objective of the technical regulation at issue. See Panel Report, *US –COOL* (2012) para 7.735.
[348] WTO Analysis Index: "Technical Barriers Agreement on Technical Barriers to Trade" available at http://www.wto.org/english/res_e/bookssp_e/analytic_index_e/tbt_01_e.htm.(accessed 14 – 10 – 2013).
[349] Article 2.2 of the TBT Agreement states that "...Such legitimate objectives are, *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..."
[350] WTO Analysis Index: "Technical Barriers Agreement on Technical Barriers to Trade" available at http://www.wto.org/english/res_e/bookssp_e/analytic_index_e/tbt_01_e.htm. (accessed 14 – 10 – 2013).

Article 2.2, "the objectives covered by the term 'legitimate objectives' in Article 2.4 extend beyond the list of the objectives precisely stated in Article 2.2."[351] In terms of Article 2.5[352] of the Agreement a "technical regulation which is implemented with the intention of achieving a legitimate objective clearly enumerated in Article 2.2 and consistent with relevant international standards, shall be presumed not to create an unnecessary obstacle to trade."[353] For this reason such technical regulation shall be presumed to be consistent with Article 2.2. [354]

3 6 TRANSPARENCY

Transparency is another central principle of the TBT Agreement. It aims to facilitate access to information on domestic regulatory processes.[355] Transparency obligations are found throughout the Agreement. Article 2.9 of the Agreement states that, wherever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on the trade of other members, Members shall:

- Publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties and other Members to become acquainted with it;

- Notify other members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. The notification must be done at an early appropriate stage, when amendments can still be introduced and comments taken into account;

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[351] *Ibid.*
[352] Article 2.5 states that "a Member preparing, adopting or applying a technical regulation which may have significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Wherever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with the relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."
[353] Lowenfeld *International Economic Law* (2008) 85.
[354] *Ibid.*
[355] *Ibid.*

- Provide to other Members particulars or copies of the proposed technical regulation, and whenever possible, identify the parts which in substance deviate from the relevant international standards; and

- Allow reasonable time for other Members to make comments in writing, discuss their comments upon request, and take the written comments and the results of the discussions into account.

The TBT Committee has stated that for the purposes of Articles 2.9 and 5.6, the concept of "significant effect on trade of other Members" may refer to the effect on trade:

(a) of one technical regulation or procedure for assessment of conformity only, or of various technical regulations or procedures for assessment of conformity in combination;

(b) on a specific product, group of products or products in general; and

(c) between two or more Members.[356]

When assessing the significance of the effect on trade of technical regulations,

> "the member concerned should take into consideration such elements as the value or other importance of imports in respect of the importing and/or exporting members concerned, whether from other members individually or collectively, the potential growth of such imports, and difficulties for producers in other members to comply with the proposed technical regulations."[357]

The concept of a significant effect on trade of other members should include both import-enhancing and import reducing effects on the trade of other members, as long as such effects are significant.[358]

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[356]Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision/TBT/1/Rev.8,dated 23 May 2002.
[357]*Ibid.*
[358]*Ibid.*

The TBT Agreement also comprises of related provisions concerning notification standards[359] and conformity assessment procedures.[360] For standards, Annex 3 J imposes more duties upon standardisation bodies. These bodies have an obligation to "publish at least once every six months all work programme and progress concerning the preparation and adoption of standards."[361] To safeguard the transparency obligation among members, the TBT Committee has made efforts to provide guidelines and recommended formats of notifications.[362]

The applicability of the transparency and notification requirements of the TBT Agreement can be seen in the Colombian labelling regulations on natural rubber condoms which were challenged by Malaysia.[363] The Colombian Ministry of Social Welfare had recommended new requirements for labelling natural latex condoms. The notification stated that each condom in the individual container shall bear at least the statement that the condom is made of natural rubber latex that can cause irritation.[364] Malaysia objected to the notification and contended that the recommended regulation was without legitimate objectiveand constituted an indirect violation of Article 2.2 of the TBT Agreement, since there is no scientific proof that natural rubber can cause allergies.[365] Furthermore it stated that "the recommendations went over and above the requirements of Article 2.4 of the Agreement which encouraged members to use international standards which were already applied."[366] Malaysia's objections against Colombia's recommendations were deliberated upon by the Committee on Technical Barriers to Trade where comments from

[359] For standards: See Annex 3(J) (Q) (Code of Good Practice) and Article 10.
[360] For conformity assessment procedures: See Articles 5.5 and 10.
[361] Van den Bocsshe *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 2008 825.
[362] Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision, G/TBT/1/Rev.8,dated 23 May 2002.
[363] Mansor *et al* "Malaysia: Labeling Regulations on Natural Rubber Condoms and the WTO TBT Agreement" available at http://www.wto.oeg/english/res_e/boosp-e/casestudies_e/case24_e.htm (accessed 12 -11- 2013).
[364] Similar requirements have also been recently proposed by Turkey on alcoholic drink containers. It requires exporters supplying alcoholic drinks to the Turkish market to place the message "Alcohol is not your friend" on their products, and to indicate the amount of residual alcohol in the inner package of non – alcoholic beverages, or to place the message "Alcohol was fully removed." Canada, United States, Mexico and the European Union argue that the requirements have no legitimate objective and would be costly and complex for exporters. See WTO 2013 News items – "Members grapple with certifying products and certifying the certifiers" available at http://www.wto.org/english/news_e/news13_e/tbt_29oct13_e.htm (accessed 04 - 11- 2013).
[365] Van Den Bossche *The Law and Policy of the World Trade Organisation Text, Cases and Materials* (2008) 287.
[366] Mansor *et al* "Malaysia: Labeling Regulations on Natural Rubber Condoms and the WTO TBT Agreement" available at http://www.wto.oeg/english/res_e/boosp-e/casestudies_e/case24_e.htm (accessed 12 -11- 2013).

Colombia were expected.[367] No comments were received from Colombia and it was therefore assumed that as a result of the actions taken by Malaysia to affirm its rights under the TBT Agreement Colombia had withdrawn its decree.[368]

Pursuant to Article 10 of the Agreement, members must establish "enquiry points" to address reasonable inquiries from, and provide relevant documents to, members and other interested parties concerning technical regulations, standards and conformity assessment procedures.[369] Enquiry points have an obligation to make available information about a member's participation in regional and international standardisation and conformity assessment bodies.[370]Additionally, enquiry points must supply information regarding the undertakings of non-governmental standardization organisations.[371]Article 10.7 states that if an agreement is entered into between countries concerning technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one member must notify other WTO members.[372]To strengthen the application of transparency, the WTO Secretariat has since established a database, The Technical Barriers to Trade Information Management System (TBT IMS) containing statistics provided by WTO members with regards to technical regulations, standards and conformity assessment procedures.[373] It has been suggested that transparency hinders the implementation of domestic laws and is unfair especially to developing countries

[367] *Ibid. See also* Van Den Bossche *The Law and Policy of the World Trade Organisation Text, Cases and Materials* (2008) 287.

[368] Mansor *et al* "Malaysia: Labeling Regulations on Natural Rubber Condoms and the WTO TBT Agreement" available at http://www.wto.oeg/english/res_e/boosp-e/casestudies_e/case24_e.htm.pdf. (accessed 12 -11- 2013). See also Van Den Bossche *The Law and Policy of the World Trade Organisation Text, Cases and Materials* (2008) 288.

[369] Article 10 of the TBT Agreement.

[370] *Ibid.*

[371] *Ibid.*

[372] Article 10.7 of the TBT Agreement states that "Wherever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreement."

[373] Van den Bossche and Zdouc *The Law and Policy of The World Trade Organization* 2013 886 .In order to improve the way members share information, the Secretariat has launched an online system – the TBT Notification Submission System – designed to speed up the process. See WTO 2013 News items –"Members grapple with certifying products, and certifying the certifiers" available at http://www.wto.org/english/news_e/news13_e/tbt_29oct13_e.htm (accessed 04 -11 -2013).

who lack resources to match the standards that are required by developed countries.[374] However, transparency also underpins domestic regulations in the fields of consumer safety and environmental health.[375]

3 6 1 Derogations from transparency in the event of urgent problems

Article 2.10[376] of the TBT Agreement states that in the event of urgent problems relating to safety, health, and environmental protection or national security, members may bypass the transparency obligations in Article 2.9. Nevertheless members still have an obligation to notify the WTO of measures enacted, provide members with copies of technical regulations, allow them to comment in writing and also take such comments into consideration.[377]

Additionally, Article 2.12 provides an exception to Article 2.11 which requires members to ensure prompt publication of all technical regulations which have been adopted to enable concerned parties to become acquainted with them. Article 2.12 states that in the event of urgent circumstances members must 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, to adapt their products or methods of production to the requirements of the importing members.[378] However in *US – Clove Cigarettes* the Appellate Body stated that an importing member may depart from the obligation imposed in Article 2.12 of the Agreement if the interval 'would be ineffective to fulfill the legitimate objectives pursued' by the technical regulation.[379]Pursuant to paragraph 5.2 of the Doha Decision on Implementation Related Issues

[374]McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation_international_standards_and_technical_barriers_to_trade (accessed 07-11-2013).

[375] *Ibid.*

[376] Article 2.10 of the TBT Agreement states that "…,where urgent problems of safety, health, environmental protection or animal security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary,…"

[377] For standards see Annex 3, (L) (Code of Good Practice) and for conformity assessment procedures see Article 5.7 of the TBT Agreement.

[378] The TBT Committee clarified the meaning of the term "reasonable interval" to mean a period of not less than 6 months except when this would be ineffective in fulfilling the legitimate objectives pursued. See Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision/TBT/1/Rev.8, dated 23 May 2002.

[379] In *US – Clove Cigarettes* the interval between the publication of the technical regulation at issue and its entry into force was three months. A prima facie case of inconsistency had been made by Indonesia establishing that there was

and Concerns on Reasonable Intervals of 14 November 2001, such reasonable intervals are particularly important for producers in exporting developing country members.[380]

3 7 EQUIVALENCE AND MUTUAL RECOGNITION

The TBT Agreement uses equivalence[381] and mutual recognition[382] as a tool to facilitate trade. The key rationale for applying equivalence and mutual recognition is to reduce trade barriers caused by differences in regulatory systems.[383] It has also been observed that trade arrangements involving equivalence and mutual recognition can also lead to harmonisation processes between members of the WTO.[384]Article 2.7 of the TBT Agreement encourages members to accept foreign technical regulations as equivalent to theirs even when the regulations are different from theirs provided they satisfy similar objectives.[385]

Members are also required to accept foreign conformity procedures' results provided they are satisfied that those procedures offer an assurance of conformity with applicable technical

no interval of at least six months between the publication and the entry into force of the technical regulation at issue and that United States had failed to rebut this prima facie case of inconsistency, since it did not show that allowing a period of less than six months would have been ineffective to fulfill the legitimate objective of the technical regulation at issue. The Appellate Body concluded that the United States had acted inconsistently with Article 2.12 of the TBT Agreement. See Appellate Body Report, *US – Clove Cigarettes* para 275.

[380] Paragraph 5.2 of the Doha Ministerial Decision on Implementation – Related Issues and Concerns of 14 November 2001 states 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 Ministerial Decision of 14 November 2001 on implementation – Related Issues and Concerns, WT/MIN (01)/17, dated 20 November 2001, para 5.2.

[381] The TBT Agreement stipulates that WTO Members must give positive consideration to recognizing other Members' technical regulations as equivalent to their own, even when they differ from theirs, provided they are satisfied that they adequately fulfill their objectives. This reduces obstacles to trade until full- fledged international harmonization becomes possible. See Elverstand and Veggeland "International Trade and Guideline on Equivalence and Mutual Recognition" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf-rapport-2004-9-s.pdf.(accessed 05 -08 – 2013).

[382] Mutual Recognition can simply mean that two or more parties mutually accept each other's rules. Such acceptance is used in situations where differences in national regulatory measures and objectives are considered to be of no such nature as to allow for trade restrictions. See Elverstand and Veggeland "International Trade and Guideline on Equivalence and Mutual Recognition" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf-rapport-2004-9-s.pdf. (accessed 05 -08 – 2013).

[383] *Ibid.*

[384] *Ibid.*

[385] Article 2.7 of the TBT Agreement states that "Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations."

regulations or standards equivalent to their own.[386] Equivalence of conformity assessment procedures means members accepting that different procedures can be used for compliance checks achieving the same level of conformity assurance. This would also eliminate/ reduce barriers for developing countries seeking access into markets. Although the principle of equivalence is not specified in the Code of Good Practice,[387] it is embraced in Article 6.1of the Agreement.[388]Additionally, Article 6.3 of Agreement requires members to enter into negotiations for agreements of mutual recognition of the results of conformity assessment procedures.[389]Approval of other members' conformity procedures would reduce costs for testing and less time would be lost.

In terms of Article 9 members are encouraged to participate in international and regional bodies such as the International Accreditation Forum (IAF) and the Worldwide System for Conformity Testing and Certification of Electrical Equipment (IECEE). The goal of the systems is to facilitate collaboration between national certific[illegible] of members. However, the process of negotiating equivalence and mutual recognition between regulatory systems has been criticised for being less accommodative of developing countries who seem unable to benefit from this opportunity as they lack administrative resources and have weak technical infrastructure.[390] This has resulted in developing countries perceiving the requirements from developed countries more as demands for "sameness" of measures instead of acceptance of "alternative measures."[391] Further, it has been observed that developed countries are generally

[386] Article 6.1 of the TBT Agreement provides that "... Members shall ensure that, whenever possible, results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations and standards equivalent to their own procedures..."

[387] The Code of Good Practice is found in Annex 3 of the TBT Agreement. It applies to the preparation, adoption and application of voluntary standards and is open to acceptance by any standardizing body located in the territory of any WTO Member including governmental and non-governmental bodies. See Elverstand and Veggeland "International Trade and Guideline on Equivalence and Mutual Recognition" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf-rapport-2004-9-s.pdf. (accessed 05 -08 – 2013).

[388] *Ibid.*

[389] Article 6.3 of the TBT Agreement stipulates that "Members are encouraged, at the request of other Members to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures..."

[390] United Nations Conference on Trade and Development: "Dispute Settlement: Technical Barriers to Trade (WTO)" available at http://unctad.org/en/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).

[391]Elverstand and Veggeland "International Trade and Guidelines on Equivalence and Mutual Recognition" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf-rapport-2004-9-s.pdf.(accessed 05 -08 – 2013).

unwilling to accept what they consider to be inferior alternative measures from developing countries.[392] Hence the WTO should start with making sure that developing countries have the appropriate facilities while establishing these principles.

3 8 NON-DISCRIMINATION

Non–discrimination is a fundamental principle of the WTO. In its Preamble members express their desire to eliminate discriminatory treatment in international trade relations.[393] Member states are expected to uphold this principle in order to comply with their WTO obligations.[394] The concept of non-discrimination is also embodied in the GATT 1994 which outlaws discrimination between imported and domestically produced like products (National Treatment Clause)[395] and between like goods imported from different sources (Most favoured Nation Clause).[396] The National treatment obligation (NT) and the Most Favoured Nation treatment obligation (MFN) constitute the backbone of the international trading system and are mirrored in the TBT Agreement.

In terms of Article 2.1 of the TBT Agreement technical regulations are subject to a national treatment obligation and most favoured nation treatment obligation.[397] Members are required to provide equal treatment to goods imported from different countries. Similar requirements are laid down for standards in Annex 3D of the TBT Agreement.[398] Further, Article 5.1.1 of the TBT

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[392] *Ibid.*

[393] In the Preamble of the WTO Agreement it is stated that "Members should not be prevented from taking measures necessary to ensure the quality of exports, or for the protection of human, animal or plant life or health, of the environment, or 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."

[394] *Ibid.*

[395] An example of NT: State X has an obligation not to favour domestic cars (products) over cars imported from States Z and Y.

[396] An example of MFN: State X manufactures cars and also buys the same cars from states Z and Y. Both are WTO members. Assuming the cars are like products, State X has an obligation to apply the same regulatory treatment to cars imported from states Z and Y.

[397] Article 2.1 of the TBT Agreement 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."

[398] Annex 3D of the TBT Agreement states that "In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country."

Agreement provides that members must not subject imported goods to stricter tests than like products of national origin or those originating in any other country.[399] These two principles are critically important rules of international trade. Without them the multilateral trading system would cease to exist.[400]

The concept of "like products" was discussed in the case of *Japan – Alcoholic Beverages II*. The Appellate Body noted in its interpretation of Article III: 2 of the GATT 1994, that the concept is similar to an accordion which stretches and squeezes in different places as various provisions of the WTO Agreement are applied.[401] It further stated that "the width of the accordion in any one of those places must be determined by the context and the circumstances that prevail in any given case to which that provision may apply."[402]

The *Japan – Alcoholic Beverages11*case demonstrates that the notion of "like products" changes meanings depending on the context in which [403] It therefore likely that a TBT dispute concerning treatment of ""like products' arises, guidance will be sought from the GATT 1947 and WTO decisions interpreting likeness within the context of the non-discrimination obligations in the GATT, Article I (MFN) and Article III (national treatment)."[404]

3 9 PREVENTION OF UNNECESSARY OBSTACLES TO INTERNATIONAL TRADE

The TBT Agreement requires members to prepare, adopt and apply technical regulations, standards and conformity assessment procedures in a way that would not create unnecessary

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[399] Article 5.1.1 of the TBT Agreement provides that "Conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system."

[400] *Ibid.*

[401] Appellate Body Report *Japan – Taxes on Alcoholic Beverages* (*Japan – Alcoholic Beverages II*), WT/DS8/AB/R, adopted 1 November 1996, DSR 1996: 114.

[402] *Ibid.*

[403] United Nations Conference on Trade and Development: "Dispute Settlement: Technical Barriers to Trade (WTO)" available at http://unctad.org/en/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).

[404] *Ibid.*

obstacles to trade.[405] This suggests that members are "obliged to design their regulations and procedures in the least trade-restrictive way possible making them proportional to the objective that they are trying to achieve."[406] The requirement to prevent unnecessary obstacles to international trade is embodied in various provisions of the TBT Agreement.[407]

Article 2.2 of the TBT Agreement provides that members must ensure that technical regulations are not designed with the intention to create preventable impediments to global trade.[408] Further, technical regulations must not be more trade-restrictive than necessary to fulfill a legitimate objective taking account the risks non-fulfillment would create.[409] Similar provisions for standards are laid down in Annex 3E which states that "standardizing bodies 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."[410] For Conformity Assessment Procedures, Article 5.1.2 of the TBT Agreement stipulates 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."[411]

3 9 1 "Legitimate Objectives" under Article 2.2

In terms of Article 2.2 technical regulations must fulfill a legitimate objective for them to be justified as permissible trade obstacles. A list of justifiable legitimate obstacles is contained in Article 2.2.The list includes:

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[405] Article 2.2 of the TBT Agreement stipulates 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 fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *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 *inter alia*: available scientific and technical information, related processing technology or intended end – uses of products."

[406] Khudina Technical Barriers to Trade and Standardization Policy available at http://enropa-kolleg-hambug.de./fileadmin/userpdf/diss_dallimore.PDF. (accessed 09-08-2013).

[407] *Ibid.*

[408] Article 2.2 of the TBT Agreement.

[409] *Ibid.*

[410] Annex 3E of the TBT Agreement.

[411] Article 5.1.2 of the TBT Agreement.

- national security;
- the prevention of deceptive practices;
- the protection of human health and safety, animal or plant life or health;
- the protection of the environment: and
- Other undefined objectives.

The list is not an exhaustive one and therefore requires the Panels and the Appellate Body to consider whether policy objectives other than those listed such as animal or labour management practices are in a certain case legitimate policy objectives within the scope of Article 2.2.[412] There is no explicit jurisdictional limitation in terms of Article 2.2.[413]

3 9 2 Meaning of "Necessity" under Article 2.2

Article 2.2 of the TBT Agreement provides that technical regulations cannot be more trade restrictive than necessary to achieve the relevant policy objectives.[414] In the *Thailand – Cigarettes* case, a GATT panel concluded that:

> "a measure could be considered to be 'necessary' in terms of Article XX (b) of the GATT 1947 only if there was no alternative measure consistent with the GATT, or less inconsistent with it, which a contracting party could 'reasonably' be expected to employ to achieve its regulatory (health policy) objective."[415]

The above test was referred to in defining the term 'necessity' in Article 2.2.[416] An 'assessment' of the risks of non-attainment of the legitimate objective is carried out with regards to technical regulations and standards.[417] In assessing such risks, elements that can be considered are *inter*

[412] Van den Bossche and Zdouc *The Law and Policy of The World Trade Organisation* (2013) 873.
[413] *Ibid.*
[414] Article 2.2 of the TBT Agreement.
[415] Panel Report *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, (Thailand – Cigarettes)* adopted 7 November 1990 DS10/R - 37S/200, paras. 74-75.
[416] United Nations Conference on Trade and Development: "Dispute Settlement: Technical Barriers to Trade (WTO)" available at http://unctad.org/en/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).
[417] *Ibid.*

alia: available scientific and technical information related to processing technology or intended end use of products.[418]

3 9 3 Meaning of "Changed Circumstances"

Unnecessary obstacles to international trade can be avoided if the requirements of Article 2.3 of the TBT Agreement are followed. That Article provides that:

> "Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner."

This requires members to constantly evaluate the necessity of their technical regulations and to remove the more restrictive trade measures if and when they have served their purpose.[419] It also means that the legitimate policy objective will not be safeguarded as justified after its purpose has been fulfilled.[420] Article 5.2.7 demonstrates the notion of changed circumstances with regards to standards. It states that in the event that product specifications are changed conformity assessment procedures should be limited to confirmation that a standard is met.[421] Furthermore Article 5.2.7 also states that:

> "if product specifications are changed after the determination of their conformity to the applicable standards, the conformity assessment procedure for the modified products should be limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned."[422]

This would allow unnecessary obstacles to international trade to be avoided.

[418] Article 2.2 of the TBT Agreement.
[419] McDonald "Domestic regulation, international standards and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation_international_standards_and_technical_barriers_to_trade (accessed 07-11-2013).
[420] *Ibid.*
[421] Article 5.2.7 of the TBT Agreement.
[422] *Ibid.*

3 10 SPECIAL PROVISIONS FOR DEVELOPING COUNTRY MEMBERS

All provisions in the TBT Agreement apply equally to developing country members. However special rules have been created to ensure that the TBT Agreement accommodates the special needs of developing countries in their pursuit of market access. The Agreement acknowledges that developing-country members may encounter problems in complying with its obligations.[423]It also takes into consideration that, even if the purpose of an Agreement is good, it risks becoming a financial burden for countries with limited resources.[424]Hence such rules seek to give space to developing states to develop their policies and to gradually improve without being discriminated against in the international market.[425] This effort is pursued in the provisions for technical assistance and those of special and differential treatment embodied in Articles 11 and 12 of the TBT Agreement. The provisions have to be scrutinised to determine whether enforceable duties can be derived from them.

3 10 1 Technical assistance for developing countries

The TBT Agreement requires members to provide advice and technical assistance to developing countries to enable them comply with their obligations under the Agreements and also to assist them participate effectively in the trading system.[426] The advice and technical assistance referred to in Article 11 of the Agreement relates to assistance in establishing institutions or legal frameworks dealing with the preparation of technical regulations and standards and the development of conformity assessment procedures.[427] Requested members are to assist the requesting members in their participation in international standardisation bodies, meeting their

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[423] Van den Bossche and Zdouc The *Law and Policy of The World Trade Organisation* (2013) 886.

[424]Kommerskollegium "Consequences of the WTO Agreement for Developing Countries" available at http://www.opentradegate.se/upload/Publikationer%20&%20Rapporter/Report%20Consequences%20WTO%20eng.pdf. (accessed 14 – 09 – 2013).

[425] *Ibid.*

[426] At the Technical Barriers to Trade formal meeting on 29 – 31 October 2013 it was stated that "developing countries face difficulties in meeting the standards required for their goods to be certified, and for their laboratories and inspection services to be credited as having sufficient technical competence and thus technical assistance is crucial to help them catch up in these areas." See WTO 2013 News items –"Members grapple with certifying products, and certifying the certifiers" available at http://www.wto.org/english/news_e/news13_e/tbt_29oct13_e.htm (accessed 04 - 11 -2013).

[427] Van den Bossche and Zdouc*The Law and Policy of The World Trade Organisation* (2013) 889.

technical regulations, accessing their systems of conformity assessment and becoming members of international systems for conformity assessment.

Article 11 further urges developed members to provide financial and technical assistance to support least-developed country members to meet the requirements of any newly introduced TBT measures that may have a major negative trade effect.[428] Additionally, the TBT Committee has approved a decision that technical assistance requests and donor programs could be sent directly to members without passing through the Secretariat.[429] The Committee has also decided that technical assistance should be a standing agenda item for all its meetings.[430]

The technical assistance provision was made attractive to developing countries through its focus on their developmental needs and its endeavor to integrate them into the trading system. However developing countries have since pointed out that the technical assistance provisions fail to take into consideration the significant differences between the developing countries as it only knows two categories of countries: the least developed countries and the developing countries.[431] It is suggested that such classification has caused developed country members not to give special attention to specific assistance that each developing country needs.[432] As a result the developing countries still enter the global market through the eye of a needle.[433] Needless to say that the emphasis given in the Doha Ministerial Conference to expedite effective participation of developing country members in the development of international standards is still far from reality.[434]

Furthermore, Kessie has opined that though the technical assistance provision is an obligatory provision, its use of the word "shall" lacks the obligatory function to compel developed member

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[428] *Ibid.*
[429] *Ibid.*
[430] *Ibid.*
[431] Irish "Special and Differential Treatment, Trade and Sustainable Development" available at http://www./awanddevelopment.net/img/irish.pdf.(accessed 10 – 09 -2013).
[432] *Ibid.*
[433] *Ibid.*
[434] Ministerial Conference, Doha Decision on Implementation-Related Issues and Concerns, WT/MIN(01)/17, dated 20 November 2001, para 5.3.

countries to provide assistance to developing countries.[435]It is for such reasons that developing countries have suggested that their legal obligations in the TBT Agreement be balanced with legal commitments of the developed countries to fund the assistance required to comply with them.[436]

3 10 2 Special and differential Treatment

Article 12 of the TBT Agreement provides for special and differential treatment for developing countries in the implementation of the TBT agreement. Article 12.8[437] of the Agreement recognises the challenges that developing countries may face in their endeavor to fulfill their duties under the Agreement. For such reasons, pursuant to Article 12.1 of the Agreement, "Members should provide differential and more favorable treatment" to developing country members. In line with Article 12.2[438] and 12.3[439] of the Agreement developed country members are required to take into account the special [illegible]ent, financial and trade needs of developing country members in the implementation of the Agreement and also in the preparation

[435]Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements" available at http://www.google.com/url?url=http://www.wto.org/english/tratop_e/devel_e/sem01_e/kessie_e.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=OJl8VIKjLMXV7Qax04H4BA&ved=0CBQQFjAA&sig2=TSG8ikeqiLZralXO-zXZPg&usg=AFQjCNGSIbwS_CU-siqSx0pb9ghu7Q8myw (accessed 22 – 10 – 2013).

[436]Mechalopoulous "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" available at http://www.acp-eu-trade.org/library/files/Michalopoulos%20and%20Differential%20Treatment%20for%/Deve.pdf. (accessed 10 – 10 - 2013).

[437] In Article 12.8 of the TBT Agreement WTO members "recognize that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. Members further recognized that special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under the Agreement. The Committee shall, in particular, take into account the special problems of the least – developed country Members."

[438] Article 12.2 provides that "Members shall give particular attention to the provisions of the Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements."

[439] Article 12.3 stipulates that "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."

and application of technical regulations, standards and conformity assessment procedures. Article 12.6[440] encourages members to "take such reasonable measures as are available to them" to ensure that the international standardising bodies, upon the request of developing country Members, examine the possibility of developing international standards concerning products of special interest to developing country members.

The Special and Differential Treatment provision prescribes advantageous treatment to developing countries by taking into consideration the differences in capacity across different levels of development.[441] However, the provision has been criticised for only imposing a duty on developed country members to consider what the impact of their measures would be on developing country members.[442] It does not stipulate that developed members ought to refrain from applying or withdraw their measures when it has been demonstrated by a developing country member that the measures would harm its trade interests.[443] It is therefore suggested that a duty to consider something does not constitute a mandatory obligation to accept it hence developed country members have the discretion to accept or not to accept it.

In *United States – Certain Country of Origin Labelling (COOL) Requirements,*[444]Mexico argued that the United States had failed to comply with its obligations in terms of Article 12.3 of the Agreement by failing to take into account its special development, financial and trade needs when preparing and applying the measure at issue. In this case Panel made the following remarks:

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[440] Article 12.6 states that "Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members."

[441] At the Technical Barriers to Trade Formal Meeting on 29 – 31 October 2005 a proposal was made on setting up new guidelines for developed country Members to give special treatment, such as allowing developing countries additional time to comment on importing countries' proposed new regulations or to comply with new requirements. See WTO 2013 News items –"Members grapple with certifying products, and certifying the certifiers" available at http://www.wto.org/english/news_e/news13_e/tbt_29oct13_e.htm (accessed 04 - 11- 2013).

[442]Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements" available at http://www.google.com/url?url=http://www.wto.org/english/tratop_e/devel_e/sem01_e/kessie_e.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=OJl8VIKjLMXV7Qax04H4BA&ved=0CBQQFjAA&sig2=TSG8ikeqiLZralXO-zXZPg&usg=AFQjCNGSIbwS_CU-siqSx0pb9ghu7Q8myw (accessed 22 – 10 – 2013).

[443] *Ibid.*

[444] Panel Report, *United States– Certain Country of Origin Labelling (COOL) Requirements* (2012), (*US –COOL*) para 7.790.

"[W]e do not consider that the United States had an explicit obligation, enforceable in the WTO dispute settlement, to reach out and collect Mexico's views during the preparation and application of the COOL measure. The United States is merely required under Article 12.3 to take account of [Mexico's] special development, financial and trade needs' 'in the preparation and application of the [COOL measure]'this means giving active and meaningful consideration to such needs."[445]

In *United States –Measures Affecting the Production and Sale of Clove Cigarettes*, the developing country complainant, Indonesia, also invoked Article 12.3 against the United States.[446] The Panel arrived at the same decision as that of *US – Cool*.[447] The findings by the panels in both cases demonstrate the "limited value" which some of the special and differential treatment provisions of Article 12 of the Agreement have for developing countries.[448]

Furthermore Kessie has pointed out that the language used in Article 12.3 seems not to be hortatory, and that it is doubtful if a successful action can be commenced against a developed country which proclaims that it took into account the interests of developing countries in the preparation of its standards and technical regulations.[449] It is suggested that the major problem facing developing countries in implementing the TBT Agreement could be dealt with if the special and differential treatment obligation were legally enforceable.[450] Developing countries are of the view that since special and differential treatment provisions are an essential part of the

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[445] *Ibid.*

[446] Panel Report *United States–Measures Affecting the Production and Sale of Clove Cigarettes, (US-Clove)* WT/DS384/R, adopted 23 July 2012.

[447] Similarly in *EC – Approval and Marketing of Biotech Products* (*EC – Biotech*) Argentina relied on Article 10.1 of the SPS Agreement to argue that the EC had an obligation to consider the special needs of Argentina in the preparation and application of its SPS measure. The Panel held that the obligation to "take account of "developing states needs merely requires members to consider along with other measures their needs in making a decision. See Panel Report *European Communities – Measures affecting the Approval and Marketing of Biotech products* WT/ DS293/R, 29 September 2006 para 7.1607.

[448] Van den BosscheThe *Law and Policy of the World Trade Organization Text, Cases and Materials* (2008) 887.

[449]Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements" available at http://www.google.com/url?url=http://www.wto.org/english/tratop_e/devel_e/sem01_e/kessie_e.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=OJl8VIKjLMXV7Qax04H4BA&ved=0CBQQFjAA&sig2=TSG8ikeqiLZralXO-zXZPg&usg=AFQjCNGSIbwS_CU-siqSx0pb9ghu7Q8myw (accessed 22 – 10 – 2013).

[450] *Ibid.*

WTO Agreements, they must have the force of law and not be considered as "best endeavors"[451] clauses which can be flouted at will by developed country members.[452]

It appears the language used in the special and differential treatment provision implies a weak mandatory commitment. It is suggested that, the "shall" formulation, which is theoretically mandatory, can be limited in its binding character since it allows considerable flexibility in its implementation.[453] Furthermore, most problems challenging developing countries in implementing the TBT Agreement could be avoided if the process of drafting and application of TBT measures was done with special consideration for developmental interests.[454]

3 9 CONCLUSION

Evaluation of the TBT Agreement should address its weakness in attaining its goals. The main aim of the Agreement is to permit members the regulatory autonomy to protect legitimate interests and assuring that their regulations, standards and procedures do not become unnecessary hindrances to international trade.[455] The difficulty is that if the "Agreement is applied too strictly, the legitimate policy interests of members will be thwarted and if the TBT Agreement is applied too laxly, technical regulations may be used for protectionist purposes".[456]

TBT issues require some sensitivity especially when it comes to its application to developing countries. Developing countries are of the view that trade measures theoretically taken by

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[451] Best endeavor provisions are provisions that are drafted with vague language, where the rights and obligations are not clearly defined. They contain language such as "taking into consideration the concerns of developing countries," that allows for discretionary measures. See Tortora "Special Differential Treatment and Development *Issues in the Multilateral Trade Negotiations*": The Skeleton in the Closet" available at http://unctad.org/Sections/comdip/docs/webcdpbkgd16_en.pdf (accessed 11 - 11 – 2013).

[452] Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements" available at http://www.google.com/url?url=http://www.wto.org/english/tratop_e/devel_e/sem01_e/kessie_e.doc&rct=j&frm=1&q=&esrc=s&sa=U&ei=OJl8VIKjLMXV7Qax04H4BA&ved=0CBQQFjAA&sig2=TSG8ikeqiLZralXO-zXZPg&usg=AFQjCNGSIbwS_CU-siqSx0pb9ghu7Q8myw (accessed 22 – 10 – 2013).

[453] Kasteng "Differentiation between Developing Countries in the WTO" available at http://www2.jordbruksverket.se/webdav/files/sjv/trycksaker/.../ra04_14e.pdf. (accessed 24 – 10 – 2013).

[454] *Ibid.*

[455] United Nations Conference on Trade and Development "Dispute Settlement: Technical Barriers to Trade (WTO)" available at http://unctad.org/en/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).

[456] *Ibid.*

developed countries for social policy goals may be actually designed to be protectionist tools.[457] Contrary to this view is the developed countries' notion that efforts to protect developing countries from unnecessary barriers to trade might cause the TBT Agreement to be applied too strictly leading to the sticking down of trade measures designed to pursue legitimate social policy objectives .[458] The uncertainties are very crucial and a balance between them must be struck.[459]

The balance is difficult considering that developing countries have different needs and capacities relative to the more developed world, which can more easily adopt sophisticated mechanisms within a short period.[460]The difference in levels of economic growth poses problems for international trade flows. The typical nature of developing countries as "standard takers" makes them dependent on developed countries for their economic growth.[461] A sensible evaluation of the TBT Agreement must show whether the Agreement takes sufficient account of the different levels of economic development and whether it has effective mechanisms in place to ensure that all members benefit from its disciplines.[462] In order for the developing states to successfully benefit from the Agreement it is vital for developed states to meet the implementation costs.[463] As such, the rules on technical assistance and differential treatment in the TBT Agreement must be effectively implemented, that is they need to be tightened to enable full participation of developing countries. Presently the lack of mandatory provisions for assistance to developing states is one of the main legal weaknesses of this Agreement.

A further concern relates to international harmonisation of standards. Agreement on common standards can lead to efficiency gains through network externalities.[464] This could be beneficial

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[457] *Ibid.*
[458] *Ibid.*
[459] McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation_international_standards_and_technical_barriers_to_trade (accessed 07-11-2013).
[460]Irish "Special and Differential Treatment, Trade and Sustainable Development" available at http://www./awanddevelopment.net/img/irish.pdf. (accessed 07-11-2013).
[461]Ahmand Tajuddin Ali "Contributions of Standards and Conformity Assessment to the National Economy" available at http://www.mbam.org.my/mbam/images/MBJ4Q06(pdf) (accessed 06 – 10 -2013).
[462] United Nations Conference on Trade and Development : "Dispute Settlement: Technical Barriers to Trade (WTO)" available at http://unctad.orglen/Docs/edmmics232add22_en.pdf (accessed 04 -10- 2013).
[463]Henson and Loader "Impact of sanitary and phytosanitary standards on developing countries and the role of the SPS Agreement" 1999 *Agribusiness* 355 360.
[464] Macrory *et al* "The World Trade Organisation: Legal, Economic and Political Analysis" http:www.//people.brandeis.edu/~rmccullo//wp/environmentWTO2005.pdf (accessed 04 –10 - 2013).

especially to developing countries that lack the relevant facilities and finances to implement their own standards.[465] Nonetheless the lack of active participation of developing countries has been a course of concern. Unless this problem is resolved the efficiency of harmonisation of standards will continue to be uncertain.[466] Furthermore the issue of transparency also requires the participation of developing countries. Until developing countries get involved, the successful implementation of the principle of transparency will be undermined.[467]

Another area of significance relates to equivalence and mutual recognition which is emphasised in the Agreement. Equivalence and Mutual Recognition could hold real benefits especially for developing countries that lack administrative resources and have weak technical infrastructure. Until the WTO sets aside funds to assist developing countries to build appropriate facilities alternative measures originating from developing countries will be undermined and sidelined by developed countries. Further, the principle of non-discrimination envisages a free and fair market access to all member countries. If only the Agreement could provide a definition for the term 'like products' then it would be easy to determine when member states are discriminating against imported goods. With regards to the prevention of unnecessary obstacles to international trade the TBT Agreement still needs to implement rules that strictly restrain members from crafting regulations and procedures that seek to limit international trade. Regardless of the number of years that the Agreement has been in operation it is evident that there are areas and issues that still need to be reconsidered and addressed.

[465] *Ibid.*
[466] *Ibid.*
[467] *Ibid.*

CHAPTER FOUR

WTO Jurisprudence on Technical Regulations and Standards: Lessons from the case of European Communities-Trade Description of Sardines (*EC-Sardines*)[468]

4 1 INTRODUCTION

This chapter focuses on a dispute that shows the significance of a relevant international standard under the Technical Barriers to Trade Agreement (TBT Agreement).[469] The dispute involved a marking and labelling standard adopted by a WTO member which contradicted an international standard.[470] Although the TBT Agreement requires harmonisation of standards, transparency and non-discrimination among other things, questions may be raised as to how it relates to a standard predominantly recognised as a "voluntary standard".[471] This explains the controversy that surrounds the prominent international regulatory role that seems to have been assigned to international standardising entities by WTO adjudicators.[472]

It is significant to note that what characterises these international standardising bodies is the opposite of the TBT Agreement's emphasis. While international standardising bodies are private international organisations, with membership made up of national standard bodies, these bodies ultimately represent the interests of their home states in a form of delegated activity.[473] On the other hand the TBT Agreement represents the interests of all WTO member states and was designed to benefit all of them. Questions could thus be raised as to why the WTO Panel and

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[468] Appellate Body Report *European Communities-Trade Descriptions of Sardines* WT/DS231/R, 23 October 2002.
[469] McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation-international_standards_and-technical-barriers_to-trade (accessed 07-06-2014).
[470] The standards at issue were the EC regulation which maintained that only *Sardina pilcahards Walbaum* could be marketed as 'sardines' and an international standard Codex Stan 94 which permitted other similar species to use the same marketing name provided that a modifying phrase precedes the designation, specifying 'country, a geographic area, the species or the common name.
[471] This case had a major impact in converting what was thought by many to be 'voluntary' into something 'obligatory'. See Mathis "International Social and Environmental Production Standards: Should Corporate Social Responsibility Get a Slice of the WTO Pie?" Available at http://dare.uva.nl/documents/2/102352 (accessed 02-03-2014).
[472] *Ibid.*
[473] Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and the World Beyond* (2009) 186.

Appellate Body based its findings in the case of *EC-Sardines* on an international standard as opposed to a domestic regulation when in actual fact both standards in dispute represented interests of private organisations.[474]

The controversy surrounding the regulatory function allocated to international bodies is closely linked to the prevention of unnecessary barriers to trade which is the core objective of the TBT Agreement. This necessitates a Dispute Settlement Body capable of ensuring that international standards are not employed or designed to protect domestic markets or to interfere with domestic regulatory autonomy.[475] It is also essential to make sure that international standardising bodies are consulted in the setting of guidelines for international standards.[476] Thus it is vital that the WTO Dispute Settlement Body strikes a balance between these expectations.[477]

This chapter will show how the WTO Panel and Appellate Body have interpreted the relevant provisions of the TBT Agreement in order to protect free global market access for all Members especially developing countries. The Panel and Appellate Body's findings will also be scrutinised to assess whether justice was done to the case.

4 2 THE CASE OF *EC- SARDINES*

4 2 1 Factual background

In 2002, Peru challenged European Council Regulation EEC No.2136/86 which prescribed that only the species Sardina pilchardus Walbaum ("*Sardina pilchardus*") could be marketed in the European Communities (EC) under the name 'Sardines'. The measure was aimed at "keeping

[474] According to Ming Du "even if international standards have neither protection intention nor effect, they may still be trade impediments." See "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization" Available at http://chinesejil.oxfordjournals.org (accessed 06-06-2014).
[475] Toma-Bianov "Codex Alimentatius Commission and the World Trade Organisation Legal Order" available at http://wwbbut.unctbv.ro/bulletin/series%20V111/BULETIN%20V11&20V11%20PDF32%20Toma-Bianov.pdf (accessed 13-04-2014).
[476] McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation-international_standards_and-technical-barriers_to-trade (accessed 07-06-2014).
[477] *Ibid.*

products of unsatisfactory quality off the market"[478] through the employment of a labeling requirement for sardines. The regulation prohibited the marketing of fish under the name 'Sardines', unless it was the species common to Sardinia[479] and found in the Atlantic Ocean and Mediterranean Sea (*Sardina Pilchardus*). Consequently similar fish species such as Sardinops sagax sagax("*Sardinops sagax*")[480] could no longer be marketed as sardines but by their technical names.[481] It is significant to note that such similar fish species could still be sold as sardines in the rest of the world.[482]

By the time the regulation come into force in 1999, Peru had established a market in Germany for its "*Sardinops sagax*" marketed under the label "Pacific Sardines."[483] Clearly the required change would make it harder to sell the product.[484] Important to note is that Codex Alimentarius[485] had adopted an international standard (Codex Stan 94) which allowed a large group of related fish species to be sold and marketed as sardines provided they were identified by country or region. Codex Stan 94 extended the nam[illegible]es to 20 species[486] including *Sardina pilchardus* and *Sardinops sagax*. Evidently the EC Regulation contradicted the international standard.

[478] Peru First written submission to the WTO Panel in *EC-Sardines* 2001 para 9.
[479] *Ibid.*
[480] *Sardinop ssagax*is found mainly in the Eastern Pacific along the coasts of Peru and Chile.
[481] Similar fish species had to be called by their technical names for example 'sardinops sagax' instead of Pacific Sardines. See Lester *et al Word Trade Law Text, Material and Commentary* (2012) 622.
[482] Shaffer "The E-C Sardines Case: How North-South NGO-Government Links Benefited Peru" available at http://www.SSRN-id847264.pdf. (accessed 02-04-2014).
[483] A Germany company bought Peruvian sardines of the species Sardinops sagax and marketed them under the label Pazifische Sardinen (Pacific sardines) with an indication of the country of origin and species of sardines from which it was produced. See Peru First written submission to the WTO Panel of the World Trade Organisation on *European Communities-Trade Description of Sardines* 2001.
[484] Lester *et al Word Trade Law Text, Material and Commentary* (2012) 622.
[485] The Codex Alimentarius is a collection of internationally recognised standard, codes of practice, and other recommendations relating to food, food production, and food safety. The codes are developed and maintained by the Codex Alimentarius Commission, an intergovernmental organization with headquarters in Rome, established in 1963 by the Food and Agriculture Organization and the World Health Organisation. See Lowenfeld *International Economic Law* (2008) 84.
[486] Article 2.1.1 of Codex Stan 94 lists the species as: Sardinapilchardus, Sardinopsmelanostictus, S. neopilchardus, S. ocellatus, S. sagax, S. caeruleus, Sardinellaaurita, S. brasiliensis, S.maderensis, S.longiceps, S.gibbosa, Clupeaharengus, Sprattus sprattus, Hyperlophusvittatus, Nematalosavlaminghi, Etrumeusteres, Ethmidiummaculatum, Engraulisanchoita, E. mordax, E.ringens, Opisthonemaoglinum.

Regardless of Peru's efforts to reach a negotiated settlement through offering to label the species Pacific Sardines or Peruvian Sardines the EC would not compromise on its position that the product name 'sardines' must be reserved exclusively for European species. Instead the EC suggested that the species should be marketed as 'pilchards' or 'sprats' in order to protect consumers and avoid confusion.[487] Peru declared that this was a disguised effort by the EC to protect its local fishers.[488] Unable to reach an agreement Peru requested establishment of a Panel to assess whether the EC Regulation was consistent with the WTO regulations. Peru was incited by the fact that it had been a major exporter to the EC and that its *Sardinopssagax* had been sold in Germany as Pacific sardines until the European Commission challenged that practice under the EC Regulation.[489]

4 2 2 Measure at issue

The measure at issue in this dispute is the provision set out in Article 2 of the Council Regulation No. 2136/89 to market preserved fish of the species *Sardinopssagax* originating in Peru. Article 2 read as follows:

"Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from the fish of the species "*Sardinapilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container; and
- they must be sterilized by appropriate treatment."[490]

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[487] Odell *"Negotiating Trade: Developing Countries in the WTO and NAFTA"* available at http://books.google.co.za/books?id=1139451006pdf. (accessed 25-04-2014).

[488] *Ibid.*

[489] Peru's First written submission to the WTO Panel in *EC-Sardines* 2001 para 5.

[490] The EC regulation No. 2136/89 layed down common marketing standards for preserved sardines and was adopted on 21 June 1989. Article 2 of this regulation provides that only products prepared from fish of the species *Sardinapilchardus* may be marketed as preserved sardines.

This measure was challenged by Peru basing its argument on the Codex Stan 94 as an international standard for canned sardines and sardine type-products. Article 1 of the Codex Stan 94 provides that this standard relates to canned sardines or sardine-type products packed in water or oil or other suitable packing medium.[491] Article 6 of Codex Stan 94 sets out specific labeling provisions for these products, as follows:

6.1 NAME OF THE FOOD

The name of the products shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer".

4 3 ARGUMENTS OF THE PARTIES

Peru relied on Article 2.4 of the TBT Agreement which requires member states to use existing international standards as a basis for their technical regulations.[492] Peru argued that by imposing the EC measure on species other than *Sardina pilchardus* (Walbaum), the EC violated its obligation to use Codex Stan 94a 'relevant' international standard 'as a basis for' its regulation as required by Article 2.4.[493]Additionally Peru contended that Codex Stan 94 is a relevant international standard that could effectively and appropriately fulfil the legitimate objective pursued by the EC regulation of ensuring market transparency, consumer protection and fair

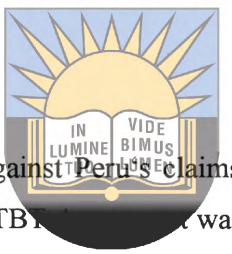
[491] Article 1 of Codex Stan 94 provides that this standard applies to canned sardines and sardine-type products packed in water or oil or other suitable packing medium and that it does not apply to specialty products were fish content constitutes less than 50% m/m of the net contents of the can.

[492]Article 2.4 of the TBT Agreement provides that "where technical regulations are required and relevant international standards exists 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 Panel Report *EC-Sardines* para 4.1.

[493]Panel Report *EC-Sardines* para 4.1.

competition.[494] Peru referred to Article 2.4 to claim that the EC regulation was a barrier to trade.[495]

Article 2.2 of the TBT Agreement provides that member states must not use technical regulations that are more trade restrictive than necessary to fulfil the legitimate objective pursued.[496] Peru argued that the EC regulation significantly restricted trade by limiting the name sardines only to *Sardina pilchardus* (Walbaum).[497] Further, the measure had more impact on trade than on fulfilling the transparent regulatory objective that the EC claimed to be pursuing.[498] Thus Peru requested the Panel to base its assessment on Article 2.2 if its claim under Article 2.4 was rejected.[499]



Further, on condition that the Panel ruled against Peru's claims under Article 2.4 and 2.2, an alternative claim based on Article 2.1 of the TBT Agreement was presented by Peru.[500] In terms of Article 2.1 members are obliged not to treat imported products less favourably than like products of national origin.[501] Peru argued that the EC measure restricting the use of the name 'sardines' to *Sardina pilchardus* accorded less favourable treatment to imported species than that accorded to like domestic species thus violating the Article 2.1 obligation.[502]

Peru further requested the Panel to base its ruling on Article III: 4 of the GATT 1994[503] if its claims under the TBT Agreement were rejected.[504] Article III: 4 of the GATT is identically

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[494] Panel Report *EC- Sardines* para 3.1.
[495] Panel Report *EC- Sardines* para 4.1.
[496] Article 2.2 of the TBT Agreement.
[497] Panel Report *EC- Sardines* para 4.1.
[498] Panel Report *EC-Sardines* para 3.1.
[499] Panel Report *EC- Sardines* para 4.1.
[500] Panel Report *EC- Sardines* para 3.1.
[501] Article 2.1 of the TBT Agreement provides 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 country."
[502] Panel Report *EC- Sardines* para 3.1.
[503] Article III: 4 of the GATT 1994 provides that "The products of the territory of any [Member of the WTO] imported into the territory of any other [Member of the WTO] 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."
[504] Panel Report *EC- Sardines* para 3.1.

worded with Article 2.1[505] of the TBT Agreement thus Peru's argument on the less favourable treatment of imported products as compared to like domestic products applied equally to Article III: 4.[506] According to Peru the EC regulation was also inconsistent with Article III: 4 of the GATT.[507] The finding of the Panel under Article III:4 was required only if the Panel was to conclude that the EC regulation is not a technical regulation and therefore does not fall under the national treatment obligation in terms of Article 2.1.[508] Further, Peru requested the Panel to recommend that the European Communities permit it to market its sardines in accordance with a naming standard consistent with the TBT Agreement.[509]

The EC rejected Peru's claim under Article 2.4 of the TBT Agreement arguing that Codex Stan 94 was not a 'relevant international standard' as its product coverage was different from that of the impugned EC regulation.[510] It pointed out that the EC regulation focused only on *Sardina pilchardus* while Codex Stan 94 covered canned fish that were sardine-type. Further, the EC claimed that the obligation to use 'relevant international standards' contemplated in Article 2.4 is applicable where they 'exist or their completion is imminent'.[511] For this reason it contended that Codex Stan 94 was not a 'relevant' international standard as it did not exist and its adoption was not imminent by the time the EC regulation was adopted.[512]

The EU further claimed that the international standard was 'inappropriate and ineffective' for meeting the regulation's goals of consumer protection against deceptive practices, market transparency, and fair competition.[513] It argued that its consumers anticipated that products of the same nature and characteristics have the same trade description and that consumers in most EC member states have always associated sardines exclusively with *Sardina pilchardus*.[514]

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[505] Article 2.1 of the TBT Agreement .See also Panel Report *EC- Sardines* para 3.1.
[506] Panel Report *EC- Sardines* para 3.1.
[507] *Ibid.*
[508] Peru's First written submission to the WTO Panel in *EC-Sardines* 2001.
[509] Panel Report *EC- Sardines* para 3.1.
[510] Panel Report *EC-Sardines* para 4.30.
[511] Panel Report *EC-Sardines* para 4.31.
[512] Panel Report *EC- Sardines* para 4.31.
[513] Panel Report *EC-Sardines* para 7.113.
[514] *Ibid.*

The EC also argued that Codex Stan 94 was used 'as a basis for' the EC regulation because under paragraph 6.1.1 (ii) of the Codex Stan 94, each country where the product is sold has the option of choosing between 'X sardines' and a common name of the species.[515] It contended that the 'common name of the species in accordance with the law and customs of the country in which the product is sold' is intended to be a self-standing option independent of the formula 'X sardines'.[516] Thus it rejected the claim that the EC regulation was contrary to Codex Stan 94.

Furthermore, the EC rejected Peru's claim under Article 2.2 on the basis that Peru failed to prove that it could sell more of its products or get a better price for them under the name sardines. The EC contended that Peru's belief that the name sardines would promote its products was unfounded and could not be accepted as proof.[517] Also, the EC stated that for a member to establish that the EC regulation violated Article 2.2 it would have to demonstrate the trade restrictive effects, identify correctly the legitimate objectives pursued and establish that these restrictive effects are more trade restrictive than necessary, taking into account the benefits expected from the realisation of the legitimate objective.[518] The EC claimed that none of these requirements were met by Peru.

The EC similarly rejected Peru's claims under Article 2.1 of the TBT Agreement and Article III: 4of the GATT maintaining that with regard to living organisms, different species cannot be regarded as 'like' products for the purposes of being granted the same name. It also stated that it has been scientifically proven that the only genus Sardina is the *Sardina pilchardus* and that *Sardinops sagax* belongs to the genus *Sardinops.*[519]

[515]Panel Report *EC-Sardines* para 4.45.
[516]*Ibid.*
[517] Odell *"Negotiating Trade: Developing Countries in the WTO and NAFTA"* available at http://books.google.co.za/books?id=1139451006pdf. (accessed 25-04-2014).
[518]Panel Body Report *EC- Sardines* para 4.92.
[519]Panel Body Report *EC- Sardines* para 7.34.

4 4 THE PANEL AND APPELLATE BODY FINDINGS AND CONCLUSIONS

4 4 1 What constitutes a 'technical regulation'

The Appellate Body had to deal with the question raised by the EC in its appeal, whether the Panel erred by finding that the EC Regulation is a 'technical Regulation' for the purposes of the TBT Agreement. According to the Panel the measure at issue was the EC regulation which prohibited the use of the name 'sardines' on species other than *Sardina pilchardus Walbrum.* The Panel found the EC regulation and the import prohibition to be the same thing. The Panel's view was that the EC regulation would result in discrimination against imported products and that products not named sardines would lose their market share in the European Communities.

Peru had identified the measure at issue as a technical regulation which fell within the scope of the TBT Agreement.[520] Before the Appellate B[illegible]C contended that the Panel erred in finding that the EC regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provision mandatory.[521] According to the EC the product coverage of the EC regulation only focuses on preserved *Sardina pilchardus.*[522] It further argued that the *Sardinops sagax* is not an identifiable product under the EC regulation as it does not regulate preserved fish made from *Sardinops sagax* or from any other species and that its coverage was only limited to preserved *Sardina pilchardus.*[523] In support of its argument the EC invoked the decision in *EC- Measures Affecting Asbestos and Asbestos-Containing Products* (*EC-Asbestos*)[524] where the Appellate Body stated that a technical regulation must apply to identifiable products.[525] For this reason the EC concluded that the regulation in question was not a technical regulation for *Sardinops sagax.*

[520] Panel Body Report *EC- Sardines* para 7.35.
[521] Appellate Body Report *EC- Sardines* para173.
[522] *Ibid.*
[523] Panel Body Report *EC- Sardines* para 7.43.
[524] Appellate Body Report *EC- Sardines* 173.
[525] *Ibid.*

However the Appellate Body held that preserved *Sardinops sagax* was an identifiable product for the purposes of the EC regulation.[526] It shared the Panel's opinion that the EC regulation was applicable to an identified product which is preserved sardines.[527] In support of this conclusion the Appellate Body cited the EC regulation entitled Council Regulation (EEC) 2136/89 of 21 June 1989 Laying down Common Marketing Standards for Preserved Sardines.[528] Further the Appellate Body referred to Article 1 of the EC regulation which states that "this regulation defines the standards governing the marketing of preserved sardines in the community."[529] The Appellate Body also referred to Article 2 of the EC regulation which states that "only products meeting the following requirements may be marketed as preserved sardines."[530]

Citing the *EC- Asbestos* case, the Appellate Body held that a product need not be expressly identified in the document for it to be identifiable.[531] According to the Appellate Body even if it were accepted that the term 'preserved sardines' in the EC regulation exclusively referred to preserved *Sardina pilchardus,* the regulation would be applicable to a range of identifiable products beyond *Sardina pilchardus.*[532] the reason being that preserved products made of *Sardinops sagax* were prohibited from being identified and marketed under an appellation including the term 'sardines' by the EC regulation.[533]

The Appellate Body further referred to the *EC-Asbestos* case where it was stated that the "requirement that a technical regulation be applicable to identifiable products relates to aspects of compliance and enforcement as it would be impossible to comply with or enforce a technical regulation without knowing to what products the regulation applied."[534] It stated that the fact that the EC regulation has been enforced against preserved fish products imported into Germany containing *Sardinops sagax* confirms the applicability of the regulation to preserved *Sardinops sagax* and demonstrates that preserved *Sardinops sagax* is an identifiable product for the

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[526] Appellate Body Report *EC-Sardines* para 182.
[527] *Ibid.*
[528] *Ibid.*
[529] *Ibid.*
[530] *Ibid.*
[531] Appellate Body Report *EC-Sardines* para 183. Also see Appellate Body Report *EC- Asbestos* para 70.
[532] Appellate Body Report *EC-Sardines* para 185.
[533] Appellate Body Report *EC- Sardines* para185.
[534] Appellate Body Report *EC-Sardines* para 185.See also Panel Body Report European *Communities-Measures Affecting Asbestos-Containing Products* (*EC-Asbestos)* WT/DS135/R, adopted as modified 5 April 2001 para 70.

purposes of the EC Regulation.[535] Thus the Appellate Body rejected the EC's contention that preserved *Sardinops sagax* products are not an identifiable product under the EC regulation.[536]

The other contention was that the EC regulation was not a technical regulation because it dealt with naming rather than labeling of a product.[537] The Panel understood the ordinary meaning of the term 'label' as the same as 'name' and vice versa.[538] The Panel also referred to the *EC-Asbestos* case where the Appellate Body referred to 'terminology, symbols, packaging, marking or labeling requirements as constituting the means of identification, the presentation and the appearance of a product'.[539] The EC had argued that, although the definition of technical regulation in the TBT Agreement covers labeling requirements, it does not extend to 'naming' rules.[540]

The Appellate Body agreed with the Panel's opinion that a finding to the effect that the EC regulation does not contain a related product cha[illegible] the form of a labeling requirement does not negate the existence of other product characteristics set out in the EC regulation.[541] The Appellate Body cited the *EC-Asbestos* case where it was stated that 'product characteristics' include not only features and qualities intrinsic to the product itself but also related 'characteristics such as the means of identification'.[542]

The Appellate Body referred to Article 2 of the EC regulation which prescribed that to be marketed as 'preserved sardines' products must be prepared exclusively from fish of the species, *Sardina pilchardus*.[543] The Appellate Body ruled that the requirement that the products should be prepared exclusively from fish of the species *Sardina pilchardus* was a product characteristic

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[535] *Ibid.*
[536] Appellate Body Report *EC- Sardines* para186.
[537] Panel Report *EC- Sardines* para 7.40.
[538] *Ibid.*
[539] *Ibid.*
[540] *Ibid.*
[541] Appellate Body Report *EC- Sardines* para188. According to Partiti the Appellate Body in the *US-Tuna II* recognised that assessing whether a particular measure constitutes a technical regulation is a difficult exercise that depended on its characteristics and on the circumstances of the case. See Partiti The Appellate Body Report in *US-Tuna II* and Its Impact on Eco-Labelling and Standardization 2013 Legal Issues of Economic Integration 73-94. Also see Appellate Body Report *United States- Measures Concerning the Importation,* Marketing *and Sale of Tuna and Tuna Products* (*Mexico*) ("*US-Tuna*") WT/DS381/AB/R, adopted 16 May 2012 para 188.
[542] *Ibid.*
[543] Appellate Body Report *EC- Sardines* para190.

intrinsic to preserved sardines laid down by the EC regulation.[544] Furthermore, the Appellate Body agreed with the Panel that the requirement to use *Sardina pilchardus* exclusively is a product characteristic as its objectives define features and qualities of preserved sardines for the purposes of their marketing as such. It cited the *EC-Asbestos* case where it was stated that a 'means of identification' is a product characteristic.[545] In support of this view the Appellate Body referred to the argument by the EC before the Panel that a name plays an important 'means of identification' and that the objective pursued by the EC through the EC regulation was to provide precise information to avoid misleading the consumer.[546]

According to the Appellate Body the fact that the EC did not contest that compliance with the EC regulation was mandatory satisfied the final criterion that a document must fulfil in order to meet the definition of 'technical regulation' in the TBT Agreement.[547] Consequently the Appellate Body upheld the Panel's ruling that the EC regulation was a technical regulation for the purposes of the TBT Agreement as it satisfi[illegible] criteria set out in the *EC-Asbestos* case as necessary to fall within the definition of a 'technical regulation' under the TBT Agreement.[548]

4 5 The Temporal Scope of Application of Article 2.4 of the TBT Agreement

The EC appealed the Panel's findings that Article 2.4 of the TBT Agreement applies to existing technical regulations. It argued that the EC regulation came into effect before the entry into force of the TBT Agreement on 1 January 1995.[549] The EC based its argument on Article 28 (Non-retroactivity of Treaties) of the Vienna Convention of the law of Treaties (Vienna Convention) [550] which provides that, unless a different intention appears from the Treaty or is otherwise

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[544] *Ibid.*
[545] *Ibid.*
[546] Appellate Body Report *EC- Sardines*191.
[547] Appellate Body Report *EC- Sardines*195. In *EC-Asbestos* case a three-tier test to determine whether a measure is a technical regulation was established as: the measure must apply to identifiable product or group of products, lay down one or more product characteristics and compliance with these characteristics must be mandatory. See Panel Report *European Communities-Measures Affecting Asbestos-Containing Products* (*EC-Asbestos*) para 66-70.
[548] *Ibid.*
[549] Panel Report *EC-Sardines* para 7.60.
[550] Vienna Convention of the law of Treaties (Vienna Convection), done at Vienna, 23 May 1969. See also Panel Report *EC-Sardines* para 7.53. In the *United States- Standards for Reformulated and Conventional Gasoline* (*US-Gasoline*) case the Appellate Body stated that the fundamental rule of treaty interpretation set out in the Vienna

established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.[551] Thus the EC asserted that Article 2.4 is not applicable as there is no contrary intention expressed in the TBT Agreement.[552]

The Panel opined that the EC regulation is a 'situation or measure that did not cease to exist' and that the TBT Agreement does not reveal a contrary intention to limit the temporal application of the TBT Agreement to measures adopted after 1 January 1995.[553] In the Panel's view Article 2.4 of the TBT Agreement was applicable to measures that were adopted before 1 January 1995 which did not cease to exist.[554] The Panel referred to the *Brazil-Desiccated Coconut*[555]case where it was stated that the principle embodied in Article 28 of the Vienna Convention is that absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.[556] According to the Panel although the EC regulation was adopted prior to the exist[illegible] TBT Agreement it did not cease to exist after its date of entry into force and thus it was a situation which had continued to exist.[557]

In support of its view the Panel further stated that Articles 2.2,[558] 2.3[559] and 2.6 [560] of the TBT Agreement confirmed that the TBT Agreement applied to technical regulations that were adopted

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Convention on the Law of Treaties had attained the status of a rule of customary or general international law and forms part of the customary rules of interpretation of public law. Hence if the meaning of a treaty becomes ambiguous the interpreter may have recourse to the Vienna Convention. See *United States- Standards for Reformulated and Conventional Gasoline* (*US-Gasoline*) adopted May 1996, DSR 1996 para 104.

[551] Panel Report *EC-Sardines* para 7.53.

[552] *Ibid.*

[553] Panel Report *EC-Sardines* para 7.56.

[554] *Ibid.* "Most technical regulations were developed and adopted by developed nations on the basis of their own determined standards. Thus if these technical regulations were to be kept outside the purview of the TBT Agreement, the developed nations would exploit these technical regulations to erect non-trade barriers for the products of developing nations." See CUTS Centre for International trade, Economics and Environmental Research Report "Dealing with Protectionist Standard Setting" available at http://www.cut-citee.org/pdf/RREROTO03-06.pdf (accessed 03-06-2014).

[555] Appellate Body Report *Brazil-Desiccated Coconut (Brazil-Desiccated Coconut)* WT/DS22/AB/R.

[556] Panel Report *EC-Sardines* para 7.56.

[557] *Ibid.*

[558] Article 2.2 of the TBT Agreement states that "Members shall ensure that technical regulations are not prepared, adopted or applied with the view to or with the effect of creating unnecessary obstacles to international trade."

[559] Article 2.3 of the TBT Agreement provides that "technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exists…"

before its entry into force. Citing the *EC-Hormones* case which dealt with Articles 5.1 and 5.5 of the SPS Agreement the Panel noted that the Appellate Body held that under Article 28 of the Vienna Convention, the SPS Agreement applies to SPS measures that were enacted before its entry into force.[561]

The EC contended that the preparation and adoption of the EC regulation were both acts that 'ceased to exist' in that they were completed before the date of the entry into force of the TBT Agreement.[562] According to the EC Article 2.4 was limited to the preparation and adoption of technical regulations.[563] The EC corroborated its argument by claiming that the terms 'where technical regulations are required', 'exist', 'imminent,' 'use' and 'as a basis for' in the text of Article 2.4 were of a time limited nature and that there was an absence of the words 'maintain' or 'apply' in the text.[564]

The Appellate Body agreed with the Panel's view [illegible]se of the present tense in the text of Article 2.4 suggests a continuing obligation for existing measures and not one limited to regulations prepared and adopted after 1995.[565] Similarly the Appellate Body referred to the *EC-Hormones* case and stated that the EC regulation was an existing regulation that had not 'ceased to exist'.[566] It ruled that Article 2.4 was a central provision similar to Articles 5.1 and 5.5 of the SPS Agreement and thus could not be assumed that such a central provision does not apply to existing measures.[567] It followed the *EC- Hormones* reasoning that "if the negotiators had wanted to exempt this very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 they would have said so explicitly."[568]

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[560] Article 2.6 of the TBT Agreement states that "Members preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall... explain justification for that technical regulation."
[561] Panel Report *EC-Sardines* para 7.58.
[562] Appellate Body Report *EC- Sardines* para 201.
[563] Appellate Body Report *EC- Sardines* para 203.
[564] *Ibid.*
[565] Appellate Body Report *EC- Sardines* para 205.
[566] Appellate Body Report *EC- Sardines* para 207.
[567] Appellate Body Report *EC- Sardines* para 208.
[568] *Ibid.*

According to the EC the "*EC-Hormones* case was not relevant to Article 2.4 as the Appellate Body focused not only on Articles 5.1 and 5.5 but also Articles 2.2, 2.3, 3.3 and 5.6 of the SPS Agreement which apply to existing measures despite the absence of the word 'maintain'."[569] In response the Appellate Body opined that the Appellate Body in *EC-Hormones* referred to provisions such as Articles 5.1 and 5.5 of the SPS Agreement which apply to existing measures despite the absence of the word 'maintain'.[570] Additionally the Appellate Body referred to Article XVI: 4 of the Marrakesh Agreement Establishing the World Trade Organization which provides that "Members must ensure that their existing laws, regulations and administrative procedures conform with its obligations as provided in the covered agreements."[571] This was an apparent requirement for all members to ensure that their existing laws, regulations and administrative procedures are in line with the covered agreements.[572]

The Appellate Body further emphasised that several provisions of the TBT Agreement recognise the significant role that international standards p[illegible]oting harmonisation and facilitation of trade, especially Article 2.5[573] of the TBT Agreement which establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade.[574] Further Article 2.6 encourages members to participate in international standardising bodies with the view to harmonising technical regulations on as wide a basis as possible.[575] Significantly, the Appellate Body also referred to the eighth recital of the Preamble of the TBT Agreement which recognises the role

[569] Appellate Body Report *EC- Sardines* para 209.
[570] Appellate Body Report *EC- Sardines* para 209.
[571] Appellate Body Report *EC- Sardines* para 213. Also see Article XV1:4 of the Marrakesh Agreement Establishing the World Trade Organization.
[572] Appellate Body Report *EC- Sardines* para 213.
[573] Article 2.5 of the TBT Agreement provides that "a Member preparing, adopting or applying a technical regulation which may have a significant effect on trade or other Members shall, upon the request of another Member, explain the justification for that technical regulation... Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives... and is in accordance with relevant international standards, it shall be rebuttably presumes not to create unnecessary obstacle to international trade."
[574] Appellate Body Report *EC- Sardines* para 208.
[574] *Ibid.*
[574] Appellate Body Report *EC- Sardines* para 209.
[574] Appellate Body Report *EC- Sardines* para 209.
[574] Appellate Body Report *EC- Sardines* para 213. Also see Article XV1:4 of the Marrakesh Agreement Establishing the World Trade Organization.
[574] Appellate Body Report *EC- Sardines* para 213.
[574] Appellate Body Report *EC-Sardines* para 214.
[575] *Ibid.*

that international standardisation can have in the transfer of technology to developing countries.[576] According to the Appellate Body excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the significant role of international standards in furthering these objectives of the TBT Agreement.[577] Thus it upheld the Panel's findings that Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which had not ceased to exist such as the EC regulation.

4 6 The relevance of Codex Stan 94 as an international standard

The EC argued that Codex Stan 94 was not a relevant international standard as its existence and adoption were not imminent when the EC regulation was adopted.[578] Further it argued that Codex Stan 94 was not a relevant international standard as it was not adopted in accordance with the principle of consensus.[579]

The WTO Panel began by clarifying whether Codex Stan 94 qualifies as a standard. It referred to Annex 1 of the TBT Agreement which states that a 'standard provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods', that compliance is not mandatory, and that it is approved by a 'recognized body'.[580]According to the Panel Codex Stan 94 was a standard within the meaning of Annex 1 of the TBT Agreement. The Panel also established that Codex Stan 94 was an international standard as it satisfied the requirement laid down in Annex 1.4 of the TBT Agreement that it must be developed by a body or system whose membership is open to the relevant bodies of at least all

[576]Appellate Body Report *EC- Sardines* para 215.
[577] The Appellate Body recalled that one the main objectives of the TBT Agreement is to harmonise national standards as widely as possible, and that excluding existing product standards would establish grandfather rights for these measures, a consequence which WTO negotiators could not have intended. See Appellate Body Report para 208-215.
[578]Appellate Body Report *EC- Sardines* para 216.
[579]*Ibid.*
[580] Panel Report *EC-Sardines* para 7.65. The Appellate Body in the *US-Tuna 11* clarified the requirements that an International Standardizing Body has to fulfill to be recognised as such. It found that the definition of the term 'recognition' falls along a spectrum that ranges from a factual end (acknowledgement of the existence of something) to a normative end (acknowledgement of the validity or legality of something). Also the TBT Committee Decision on Principles for the Development of International Standards addresses the principles that member states have to adhere to in order to be accorded the status of 'International Standardizing Body'. The aim of the principles is to maintain transparency, openness, impartiality and coherence, and to address the concerns of developing countries. See Partiti The Appellate Body Report in *US-Tuna 11* and Its Impact on Eco-Labelling and Standardization 2013 Legal Issues of Economic Integration 73-94.

WTO members.[581] Rule 1 of the Statutes and Rules procedures of the Codex Alimentarius Commission states that membership of the joint FAO/WHO Codex Alimentarius Commission "…is open to all member Nations."[582]

The Panel then ruled that the term 'relevant' meant to 'bear upon', 'relate to' or 'be pertinent to'.[583] The Panel took the view that Codex Stan 94 related to the EC regulation as the title of Codex Stan 94 was Codex Standard for Canned Sardines and Sardine type Products and the EC regulation laid down common marketing standards for preserved sardines.[584] In the Panel's view the EC regulation was an extension of Codex Stan 94.[585] Further the Panel noted that the scope of Codex Stan 94 and that of the EC regulation comprised of similar requests which both included a section on labeling requirements.[586] With regards to the EC claim that standards must be based on consensus, the Panel referred to paragraph 2 of Annex 1[587] of the TBT Agreement and its Explanatory Note[588] which provides that "…Standards prepared by the international standardization community are based on consens… This Agreement covers also documents that are not based on consensus."[589] According to the Panel this provisions confirmed that even if not

[581] Panel Report *EC-Sardines* para 7.66. The term 'open' is defined as "accessible or available without hindrance, not confined or limited to a few, generally accessible or available" See Appellate Body Report in *US-Tuna 11* para 364. The Appellate Body in *US-Tuna 11* stated that the Agreement on the International Dolphin Conversation Program (AIDCP) rules was not an "International Standardizing Body" for the purposes of the TBT Agreement as its application was limited to the Eastern Tropical Pacific (ETP) and was therefore not open to all WTO members. See Mcgivern "WTO Appellate Body Report: United States-Tuna11" 2012 available at http://www.whitecase.com/files/Publication/ob4586d6-8dd1-4a8d-95c3-ccoe37aaf4c4/Presenatation/PublicationAttachment/d53bfe6f-56a6-4992-8e2e-ce7e670c8f16/article-WTO-Appellate-Body -Report-US-Tuna-11.PDF (accessed 28-02-2015).

[582] *Ibid.*

[583] Panel Report *EC-Sardines* para7.68.

[584] Panel Report *EC-Sardines* para7.69.

[585] *Ibid.*

[586] *Ibid.*

[587] Annex 1 of the TBT Agreement states that "standards are documents 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 labelling requirements as they apply to a product, process or production method."

[588] The TBT Agreement Annex 1 Explanatory Note states that "…Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus."

[589] The Panel clarified the two sentences as follows: "The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however acknowledges that consensus may not always be achieved and that international standards that were not adopted are within the scope of the TBT Agreement. This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a 'relevant international standard'." See Panel Report *EC-Sardines*para 7.90.

adopted by consensus, an international standard can constitute a relevant international standard.[590] Thus the Panel concluded that Codex Stan 94 was a relevant international standard.

Before the Appellate Body, the EC argued that only standards adopted by international bodies by consensus were 'relevant international standards' under Article 2.4 of the TBT Agreement. It also argued that Codex Stan 94 was not a relevant international standard because its product coverage was different from that of the EC regulation.[591] It contended that the EC regulation covered only preserved sardines, while Codex Stan 94 covered preserved sardines and other 'sardine type products'.[592]

The Appellate Body referred to the TBT Agreement Annex 1.2 Explanatory Note which supports the Panel's findings that consensus is not required for standards adopted by the international standardising community. According to the Appellate Body the last sentence of the Explanatory Note which provides that documents not ba[illegible]sensus can constitute a relevant international standard is a continuation of the preceding sentence which emphasises the significance of a consensus in the preparation of standards.[593] The Appellate Body also referred to the ISO/IEC Guides 2.1:1991 which provides that standards are documents established by consensus and approved by a recognised body.[594] According to the Appellate Body this definition emphasises the requirement of consensus. Thus in its view the omission of a consensus requirement in the definition of a standard in Annex 1.2 of the TBT Agreement was a deliberate choice on the part of the drafters of the TBT Agreement and that the last sentence of the Explanatory Note was included to give effect to this choice.[595] The Appellate Body therefore upheld the Panel's finding that the definition of a 'standard' in Annex 1.2 to the TBT Agreement

[590] Panel Report *EC-Sardines* para 7.90.
[591] Appellate Body Report *EC-Sardines* para 218.
[592] Appellate Body Report *EC-Sardines* para 218.
[593] Appellate Body Report *EC-Sardines* para 223.
[594] Appellate Body Report *EC-Sardines* para 225.
[595] The Appellate Body asserted that "...the definition of 'standard' in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the omission of a consensus requirement in the definition of a 'standard' in Annex 1.2 of the TBT Agreement was a deliberate choice on the part of the drafters of the TBT Agreement, and that the last two phases of the explanatory note were included to give effect to this choice." See Appellate Body Report *EC-Sardines* para 225.

does not require approval consensus for standards adopted by a recognised body of the international standardisation community.[596]

In response to the EC claim that Codex Stan 94 was not a relevant international standard as its product coverage was different from that of the EC regulation the Appellate Body agreed with the Panel that to be a relevant international standard Codex Stan 94 would have to 'bear upon', 'relate to' or 'be pertinent to' the EC regulation.[597] The Appellate Body held that even if it were accepted that the EC regulation related only to *Sardina pilchardus,* Codex Stan 94 also related to *Sardina pilchardus.*[598] Thus the Appellate Body concluded that Codex Stan 94 could be said to 'bear upon', 'relate to' or be pertinent to the EC regulation as both referred to preserved *Sardina pilchardus.*[599] In support of this the Appellate Body stated that the EC regulation has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax.*[600] As a result, it concluded that Codex Stan 94 'bears upon', 'relates to', or is pertinent to the EC regulation.

4 7 Whether Codex Standard 94 was used as a basis for the EC regulation

Peru argued that under paragraph 6.1.1(ii) of Codex Stan 94, species other than *Sardina pilchardus* may be marketed as 'X sardines' where X represented a country, a geographic area, the species or the common name of the species.[601] Peru contended that the common name of the species was not a stand-alone option for naming but one of the qualifiers for naming sardines that

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[596] Appellate Body Report *EC-Sardines* para 227. According to Howse "the Appellate Body's ruling implied that an international standard devised by a regime in which only a small minority of WTO Members were active participants would acquire normative force through Article 2.4." See Howse "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards" available at http://www.probus-sigma.com/wp-content/uploads/downloads/2021/02/WTO-Legal.pdf (accessed 13-06-2014). It is worth noting that this conclusion has ramifications for international governance and democratic accountability. That is, states may find that standards that they did not accept, that they in fact rejected, are required to be taken into account and have other legal significance under Article 2.4. See Bermann *et al Trade and Human Health and Safety* available at http://books.google.co.za/books?id=abmiQcWcEdoC&pg=PA38&dq=Trade+Human+Health+and+Safety207pdf(accessed 20-03-2014).

[597] Appellate Body Report *EC-Sardines para*2.31.

[598] Appellate Body Report *EC-Sardines* para 231.

[599] Appellate Body Report *EC-Sardines* para 230.

[600] Appellate Body Report *EC-Sardines* para 231.

[601] Panel Report *EC-Sardines* para 7.112.

are not *Sardina pilchardus.*[602] The EC argued that in terms of paragraph 6.1.1 (ii) each country had an option of choosing between 'X sardines' and the common name of the species. It asserted that the 'common name of the species in accordance with the law and customs of the country in which the product is sold' is intended to be a self-standing option independent of the formula 'X sardines'.[603] Thus according to the EC Codex Stan 94 was used as a basis for the EC regulation.[604]

According to the Panel the term 'basis' meant to the 'principal constituent of anything, the fundamental principle or theory, as of a system of knowledge'.[605] It found that paragraph 6.1.1 (ii) of Codex Stan 94 established 'four alternatives for labelling species other than *Sardina pilchardus'*, that all require the use of the term 'sardines' with a qualification' and contrary to Codex Stan 94 the EC regulation stipulated that species such as '*Sardinops sagax'* could not be named 'sardines' even with a qualification.[606] Thus according to the Panel Codex Stan 94 was not used as a constituent, fundamental principle o[illegible] knowledge for the EC regulation.

On appeal the EC stated that the term 'as a basis' should involve a consideration of the text as a whole, examining the basic structure of the domestic measure and deciding whether the international standard has been used in the preparation and adoption.[607] It added that in order to determine whether a relevant international standard, or a part of it, is used as a basis for a technical regulation, the criteria to apply is whether there is a 'rational relationship' between the standard and the technical regulation.[608] The Appellate Body ruled that 'as a basis' requires a 'strong and very close relationship' between the two, such that the international standard is the 'principal constituent', 'fundamental principle' or the 'determining principle' of a technical

[602] Panel Report *EC- Sardines* para 7.112.
[603] According to the EC, this interpretation was evidenced by the fact that the phrase "the common name of the species in accordance with the law and customs of the country in which the product is sold" is found between commas, whereas there is no comma between 'species' and 'in accordance with', and there is a comma before 'and in a manner not to mislead the consumer'. See Panel Report *EC- Sardines* para 7.101.
[604] *Ibid.*
[605] Panel Report *EC- Sardines* para 7.110.
[606] Panel Report *EC- Sardines* para 7.112.
[607] Appellate Body Report *EC- Sardines* para 241.
[608] *Ibid.*

regulation.[609] Thus the Appellate Body rejected the EC claim that 'as a basis for' means a 'rational relationship' between an international standard and technical regulation.[610] Significant to note is that the Appellate Body never clarified as to why it rejected the 'rational relationship' interpretation.[611] It held that the technical regulation cannot be in contradiction with an international standard.[612]

The Appellate Body further held that something cannot be considered a 'basis' for something else if the two are contradictory.[613] It opined that under Article 2.4 if the technical regulation and the international standard are contradictory, it cannot be concluded that the international standard has been used as 'a basis' for the technical regulation.[614] The EC had argued that the examination as to whether Codex Stan 94 has been used as a basis for the EC regulation must be limited to paragraph 6.1.1 (i).[615] The Appellate Body ruled that in terms of Article 2.4 members must use relevant international standards or the relevant parts of them as a basis for their technical regulation.[616] According to the Appellate Body the phrase 'relevant parts of them' meant that the assessment to determine such should be limited to those parts of the relevant international standard that relate to the subject matter of the challenged requirement.[617] It held that those parts included not only paragraph 6.1.1 (i) and 6.1.1(ii) but also paragraph 2.1.1 of Codex Stan 94 which outlined the various species that may be given the names contemplated under paragraph 6.1.1(i) and 6.1.1(ii).[618] Thus according to the Appellate Body 'the basis for'

[609] Appellate Body Report *EC- Sardines* para 245. The Appellate Body referred to the *EC-Hormones* case where it was stated that "as regards national SPS measures, 'based on' an international standard does not mean the same thing as conform to. It is sufficient if an SPS measure was founded or built upon or supported by the international standard." According to Howse "by opinioning that a very strong and substantial relationship may be required between domestic regulations and international standards under TBT 2.4, the Appellate Body has clearly suggested that international standards have considerable, automatic legal force in the WTO." See Howse "A New Device For Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and International Standards" available at http://www.probus-sigma.com/wp-content/uploads/downloads/2021/02/WTO-Legal.pdf (accessed 13-06-2014).

[610] Appellate Body Report *EC- Sardines* para 248.

[611] It has been pointed out that the Appellate Body intentionally avoided this interpretative issue. See Trebilcock and Feishbein "International trade: Barriers to trade" in Guzman and Sykes (eds) *Research Handbooks in International Economic Law* (2002) 56.

[612] Appellate Body Report *EC- Sardines* para 248.

[613] *Ibid.*

[614] *Ibid.*

[615] Appellate Body Report *EC- Sardines* para 251.

[616] *Ibid.*

[617] *Ibid.*

[618] *Ibid.*

analysis cannot be restricted to paragraph 6.1.1(i) but must also involve paragraph 6.1.1(ii) and paragraph 2.1.1 of Codex Stan 94.[619]

In determining whether there was a contradiction between the EC regulation and the international standard Codex Stan 94, the Appellate Body stated that the comparison of sections 6.1.1(ii) and 2.1.1 of Codex Stan 94 and Article 2 of the EC regulation led to the conclusion that a contradiction existed between the provisions.[620] It found that the effect of the EC regulation was to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchards* from being marketed as sardines even with a qualification.[621] In contrast Codex Stan 94 allowed the use of the term sardines with one of the qualifiers to be marketed as 'sardines'.[622] Thus the Appellate Body concluded that the EC regulation contradicted the international standard Codex Stan 94.

4 8 Whether Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation

4 8 1 Whether the EC Regulation fulfils a legitimate objective

The EC argued that the objectives pursued by Article 2 of the Regulation where consumer protection, market transparency and fair competition.[623] According to the EC the legitimate objectives of the entire EC regulation were to keep products of unsatisfactory quality off the market, facilitate trade relations based on fair competition, ensure transparency of the market, good market presentation of the product and provide appropriate information to consumers.[624]

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[619] Appellate Body Report *EC- Sardines* para 254.
[620] Appellate Body Report EC- *Sardines* para 256.
[621] Appellate Body Report *EC- Sardines* para 257.
[622] *Ibid.*
[623] Panel Report *EC-Sardines* para 4.60.
[624] "The EC argued that its Regulation must be examined in the framework of its own system of rules concerning labelling of foodstuffs. The objectives of the EC Directive 2000/13 are to protect consumers and prevent distortions of the competition. These objectives are fulfilled by laying down detailed and precise requirements as to how products should be labelled. The EC pointed out that the EC Directive stated that labelling must not mislead purchasers and establishes the principle that there should be a single correct name for a given foodstuff. It further stated that the hierarchy of the rules for determining the correct name for a foodstuff is: the name laid down in EC regulation, the name provided for in the laws, regulations and administrative provisions applicable in the Member States in which the product is sold, and the description of the foodstuff, and if necessary, of its own use which is

Further the EC referred to the WTO principle which provides that members must be presumed to act in good faith.[625] As such it asserted that all regulatory objectives of WTO members can therefore be presumed to be legitimate.[626] It further added that the principle implied that if the objective is legitimate, WTO members have the right to choose the level of protection they consider appropriate as is also recognised in the Preamble to the TBT Agreement. The EC referred to the *EC-Hormones* case where the Appellate Body stated that "this right of a member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right."[627]

Furthermore the EC argued that there was a "rational connection" between the legitimate objective of market transparency and the need to ensure that products are sold under their correct trade descriptions.[628] According to the EC the provisions of its regulation laying down minimum quality standards, harmonising the ways in which the product may be presented and regulating the indications to be contained on the label, all served to facilitate comparisons between competing products and that this is particularly true of the name.[629]

The EC asserted that Peru misinterpreted the second recital of the Preamble to the EC Regulation. It pointed out that while the objectives of the regulation were expressed in clear terms by using the expression "in order to..." the second recital simply indicates what the legislator thought could be one of the consequences of the regulation ("...is likely to..."). [630] According to the EC it seemed obvious that as regards preserved sardine products, a law that ensures market transparency and fair competition, that guarantees the quality of the product and

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clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused." See Panel Report *EC-Sardines* para 4.62.

[625] See Panel Report *EC-Sardines* para 4.61.

[626] 'Legitimate Objective' is not defined in the TBT Agreement, but Article 2.2 of the Agreement contains an illustrative list, including national security requirements; the prevention of deceptive practices; and protection of human health or safety, animal or plant life or health, or the environment. See Lowenfeld International Economic Law (2008) 84.

[627] Panel Report *EC-Sardines* para 4.61.The Appellate Body made similar comments in *EC-Asbestos*, *Korea-Various Measures on Beef* and *Australia-Salmon.*

[628] "Peru argued that there was rational connection between the objective of ensuring market transparency and the monopolization of the name 'sardines' for fish of a species found mainly off the coasts of the European Communities and Morocco." See Panel Report *EC-Sardines* para 4.70.

[629] Panel Report *EC-Sardines* para 4.71.

[630] Panel Report *EC-Sardines* para 4.72.

that appropriately informs the consumer of this, will most likely result in an improvement of the profitability of sardine production in the European Community.[631]

The Panel stated that the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2 which provides an illustrative, open list of objectives considered 'legitimate'.[632] It also pointed out that Article 2.4 of the TBT Agreement requires an examination and a determination whether the objectives of the measure at issue are 'legitimate'.[633] It is significant to note that two implications flow from the Panel's interpretation.[634] The first one being that the term 'legitimate objectives' in Article 2.4 must include the objectives stated in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."[635] Second, with regards to the term '*inter alia*' in Article 2.2, the objectives covered by the term 'legitimate objectives' in Article 2.4 extend beyond the list of the objectives precisely stated in Article 2.2.[636]The Appellate Body acknowledged [illegible] 'legitimate objectives' in Article 2.4 extended beyond the list of objectives specified in Article 2.2 of the TBT Agreement.[637] However, the Appellate Body affirmed the Panel's conclusion that "it has not been established that consumers in most member states of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*."[638]

4 8 2 Whether Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objective

The EC argued that Codex Stan 94 would be inappropriate to fulfil the legitimate objective pursued by its regulation. According to the EC the ban on the term 'sardines' was a necessity as

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[631] *Ibid.*
[632] Article 2.2 of the TBT Agreement states that "...Such legitimate objectives are, *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..." See also Panel Report *EC-Sardines* para 7.118.
[633] *Ibid.*
[634] WTO Analysis Index: "Technical Barriers Agreement on Technical Barriers to Trade" available at http://www.wto.org/english/res_e/bookssp_e/analytic_index_e/tbt_01_e.htm. (accessed 14 – 10 – 2013).
[635] *Ibid.*
[636] *Ibid.*
[637] Appellate Body Report *EC-Sardines* para 286.
[638] Appellate Body Report *EC-Sardines* para 290.

it permitted various products to be distinguished. To corroborate its claim the EC referred to the Article 2.2 of the TBT Agreement which identifies the prevention of deceptive practices as one of its legitimate objectives. The EC also pointed out that the need to prevent deceptive practices was one of the objectives of the Codex Stan 94.[639] Thus the EC argued that permitting the term 'X sardines' where the 'X' specified the name of the country or geographic area would not achieve its legitimate objectives in the European Communities as the use of the term 'sardines' would suggest to the consumer that the products were alike but originated from different countries or geographic areas.[640]

According to the EC its consumers expect that products of the same nature and characteristics will always have the same trade description and that consumers in most member states of the EC have for at least 13 years associated 'sardines' exclusively with *Sardina pilchardus*.[641] To this effect the EC submitted evidence from four member states which showed that the common name 'sardines' has been associated with *Sardina pil* e EC produced copies of pre-1989 Spanish and French regulations prescribing the common name 'sardines' for products made from *Sardina pilchardus*.[642] It also submitted copies of the 1981 and 1996 United Kingdom Food Labelling Regulations and a copy of the 2000 German *Lebensmittelbuch* which prescribe the common name 'sardines' for *Sardina pilchardus*.[643] It further argued that Peru should not have taken advantage of the reputation associated with the term 'sardines' but should rather develop its own reputation, name and persuade consumers to appreciate the product with its own characteristics.[644]

The Panel began by defining the terms 'ineffective and inappropriate'. It defined 'ineffective' as something which is not 'having the function to accomplishing', 'having a result' or 'brought to bear' and inappropriate as something which is not 'specially suitable', 'proper' or 'fitting'.[645]The

[639] The Codex Stan 94 stipulated that "whichever formula is used for sardine-type products, it has to be drafted in such a way so as not to mislead the consumer."
[640] Panel Report *EC-Sardines* para 4.74. The EC opined that 'requiring precise names for food stuffs also ensured that certain reputation can be associated with each particular name and that this is an important element for maintaining high quality and product diversity."
[641] *Ibid.*
[642] Panel Report *EC-Sardines* para 7.128.
[643] *Ibid.*
[644] Panel Report *EC-Sardines* para 7.113.
[645] Panel Report*EC-Sardines* para 7.116.

Panel opined that under Article 2.4 an 'ineffective means' is a means which does not have the function of accomplishing the legitimate objective pursued and an inappropriate means is a means which is not specifically suitable for the fulfilment of the legitimate objective pursued.[646] It further opined that when an international standard is 'ineffective' it should not be taken to mean that it is also 'inappropriate'.[647]

In response the EC's claim that the EC regulation was an endeavour to clarify the confusion among its consumers who associated the name 'sardines' with *Sardinop spilhardus* in some parts and with *Sprattus sprattus* in the other parts of the European Communities, the Panel found that the EC regulation created the confusion.[648] According to the Panel if a WTO member can 'create' consumer expectation and thereafter find justification for the trade-restrictive measure which created those consumer expectations, it would be endorsing the permissibility of 'self-justifying' regulatory trade barriers.[649]

The Panel referred to the evidence provided by Peru which demonstrated that European consumers do not associate 'sardines' exclusively with *Sardina pilchardus*. According to Peru the term 'sardines' either by itself or combined with the name of a country or a geographic area is a common name for *Sardinopssagax* in the European Communities.[650] Peru referred to the Multilingual Illustrated Dictionary[651] published in the European Community which lists the common name of *Sardinops sagax* in nine European languages as 'sardines' or the equivalent thereof in the national language combined with a country or geographic area of origin.[652] Peru also brought forth a definition from an electronic publication 'Fish Base', produced with the support of the European Commission,[653] which indicates that a common name for *Sardinops sagax* in Italy, Netherlands, Germany, France, Sweden and Spain is 'sardines'. It also relied on the Multilingual Dictionary of Fish and Fish products prepared by the Organisation for

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[646] *Ibid.*
[647] Panel Report *EC- Sardines* para7.119.The Panel stated that a measure can be inappropriate but still effective. It further stated that the question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed. See Panel Report *EC- Sardines* para 7.116.
[648] Panel Report *EC-Sardines* para 7.127.
[649] *Ibid.*
[650] Panel Report *EC-Sardines* para 7.131.
[651] *Ibid.*
[652] *Ibid.*
[653] *Ibid.*

Economic Cooperation and Development (OECD) which indicates that a common name for *Sardinops sagax* was 'sardines' either by itself or combined with the name of a country or geographic area.[654] In support of this view Canada submitted evidence showing that a Canadian company exported *Clupeaharengusharengus* under the trade description 'Canadian sardines' to the Netherlands for thirty years until 1989.[655]

The principle behind the Panel's findings is that members must utilise international standards unless they have a valid justification for not doing so.[656] This is in line with Article 2.5 of the TBT Agreement which provides additional rules for harmonisation around international standards. Article 2.5 encourages members to prepare, adopt and apply technical regulations in accordance with relevant international standards.[657] It also corroborates Article 2.6 which encourages members to participate in the preparation of international standards for products for which they either have adopted, or expect to adopt domestic regulations.[658] Thus the Panel's findings are in line with the harmonisation provisions of the TBT Agreement. [659]

4 8 3 The Burden of Proof

According to the Panel the party asserting the affirmative of a particular defence had the burden of proving the applicability of the second part of Article 2.4.[660] It therefore ruled that the EC had the burden to prove that the regulation was ineffective and inappropriate to fulfil the legitimate objective pursued by the EC regulation. The Panel referred to the case of *US- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*[661] where it was stated that the burden of proof rests on the party, whether complaining or defending, who asserts the affirmative of a

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[654] *Ibid.*
[655] Panel Report *EC-Sardines* para 7.132.
[656] Lester *et al Word Trade Law: Text, Material and Commentary* (2012) 629.
[657] Article 2.5 of the TBT Agreement.
[658] Article 2.6 of the TBT Agreement.
[659] Lester *et al Word Trade Law: Text, Material and Commentary* (2012) 630.
[660] Panel Report *EC-Sardines* para 7.50. The second part of the TBT Agreement Article 2.4 is the exceptional clause which permits Members not to use international standards or their relevant parts as a basis for their technical regulations if they would be an ineffective and inappropriate means for the fulfilment of the legitimate objectives pursued.
[661] Appellate Body Report *United States-Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US-Wool Shirts and Blouses*") WT/DS33/AB/R..

particular claim or defence.[662] The ruling in the *EC-Hormones* case which held that characterising a treaty provision as an 'exception' does not by itself, place the burden of proof on the respondent was mentioned but according to the Panel it did not have a direct bearing on the matter.[663]

According to the Appellate Body the *EC- Hormones* case was relevant to the matter. It stated that there were 'strong conceptual similarities' between the SPS Agreement Articles 3.1 and 3.3 and TBT Agreement Article 2.4. According to the Appellate Body the heart of both the SPS Articles 3.1 and 3.3 and Article 2.4 of the TBT Agreement was that the measure should be based on international standards, although the requirement was not absolute.[664] The Appellate Body ruled that the Panel should have relied on the principle articulated in the *EC-Hormones* case to determine the allocation of the burden of proof under Article 2.4 of the TBT Agreement as it is closely related to Articles 3.1 and 3.3 of the SPS Agreement.

The Appellate Body further held that it was for the party seeking a ruling on inconsistency with Article 2.4 of the TBT Agreement of the measure applied by the European Community to prove this claim. It opined that the burden involves establishing that Codex Stan 94 had not been used as 'a basis for' the EC regulation and establishing that Codex Stan 94 is effective and appropriate to fulfil the legitimate objectives pursued by the European Communities through the EC regulation.[665] According to the Appellate Body complainants have means to obtain information on the objectives of each technical regulation or the specific considerations that may be relevant to the assessment of their appropriateness.[666] It held that such options include the mechanism of Article 2.5 of the TBT Agreement, the TBT enquiry points provided for in Article 10.1[667] of the TBT Agreement and the process of consultations which precedes the establishment of a

[662] Panel Report *EC-Sardines* para 7.48.
[663] Panel Report *EC-Sardines* para 7.50.
[664] Hoffman "International *and Foreign Legal Research: A Course Book"* available at http://book.google?id=LIS-KZbLlmlc&pg=pa140&dq=problems+with+ec+sardines=decisions&sources=b1&ots=gyaf7(accessed 24-04-2014).
[665] Appellate Body Report *EC- Sardines* para 275.
[666] Appellate Body Report *EC- Sardines* para 277-280.
[667] Article 10.1 of the TBT Agreement provides that "Each Member shall ensure that an inquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding any technical regulations adopted or proposed within its territory by central or local bodies..."

Panel.[668]Thus the Appellate Body reversed the Panel's findings that the burden rested with the EC to demonstrate that Codex Stan 94 is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the European Communities through the EC regulation.[669]

4 9 ANALYSIS AND COMMENTARY

The findings and decisions in the *EC-Sardines* case are commendable for establishing that Codex standards are relevant as foundations for assessing whether or not WTO member states fulfil their obligations. They further show that the judicial bodies of the WTO are willing to go far in assessing whether or not national regulations are based on Codex standards.[670] The case also assures that international standards and technical regulations are beneficial to both producers and consumers and that they facilitate secure and predictable access to markets ensuring that health regulations do not create unnecessary obstacles to trade.[671] Importantly, international standards may benefit developing countries by preventing conflicts with other jurisdictions about the requirements of a standard.[672]

However the findings and rulings are not without weaknesses. It has been asserted that international standards may cause trade barriers to developing countries as they lack the resources and infrastructure to satisfy the sophisticated standards requirements.[673] Further developing countries lack the capacity to engage in the important decision making processes of

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[668] *Ibid.*

[669]Appellate Body Report *EC-Sardines* para 282. For those concerned about restrictions on domestic regulatory prerogatives pursuant to the TBT Agreement, this allocation of the burden of proof will provide some comfort. See Bermann *et al* "Trade and Human Health and Safety" available at http://books.google.co.za/books?id=abmiQcWcEdoC&pg=PA38&dq=Trade+Human+Health+and+Safety207pdf(accessed 20-03-2014).

[670]Toma-Bianov "Codex Alimentarius Commission and the World Trade Organisation Legal Order" available at http://wwbbut.unctbv.ro/bulletin/series%20V111/BULETIN%20V11&20V11%20PDF32%20Toma-Bianov.pdf (accessed 13-04-2014). In *US-Tuna 11* the "Appellate Body's ruling has been criticised by a number of groups, which view the decision as evidence of the WTO's hostility to conservation or environmental objectives." See Mcgivern "WTO Appellate Body Report: United States-Tuna11" available at http://www.whitecase.com/files/Publication/ob4586d6-8dd1-4a8d-95c3-ccoe37aaf4c4/Presenatation/PublicationAttachment/d53bfe6f-56a6-4992-8e2e-ce7e670c8f16/article-WTO-Appellate-Body -Report-US-Tuna-11.PDF (accessed 28-02-2015).

[671]*Ibid.*

[672]Charnovitz "International Standards and the WTO" Paper No 133 available at http://papers.ssrn.com/so13/paper.cfm?abstract_id=694346 (accessed 06-05-2014).

[673]Stephenson "Standards, Conformity Assessment and Developing Countries" 1997 available at http://www-wds.worldbank.org/.../IBI.../102502322-2004111716250pdf. (accessed 02-05-2014).

by international standardisation bodies.[674] Suffice to say that developing countries will always have to comply with the stringent requirements set by developed countries. According to Trebilcock and Fishbein "without some measure of reciprocity in trade negotiations, developing countries become largely dependent on the goodwill and generosity of developed countries."[675] Hence the Appellate Body in *EC-Sardines* should have considered the effects of international standards on developing countries before it conferred binding power on them.[676]

Furthermore, to support its finding that the burden of proof rests on the party which asserts the affirmative, the Panel stated that complainants are not in a position to establish the legitimate objectives pursued by the defendant.[677] Noteworthy is that the Panel later concluded that even though the burden of proof with respect to the second part of Article 2.4 was on the EC, Peru had provided sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC regulation.[678] Such a conclusion undermined the earlier point that the burden of proof under the second part of Article 2.4 should be allocated to defendants because complainants are not in a position to establish the conditions laid out in the provision.[679] This raises doubts as to the credibility of the Panel's findings.[680]

Furthermore in making its assessment the Appellate Body acknowledged that the Codex standards are to be recognised as 'relevant international standards' to be used by states 'as a basis' for their technical regulations and that such standards may be adopted without consensus.[681] With regards to this view the Appellate Body is said to have contributed to the

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[674] *Ibid.*
[675] Trebilcock and Feishbein "International trade: Barriers to trade" in Guzman and Sykes (eds) *Research Handbooks in International Economic Law* (2002) 56.
[676] Mitchell *Conflict of laws: Challenges and Prospects for the WTO* available at http://books.google.co.za/books?id=t7nazkeelcC&pg=PA165&1PG=PA165&DQ=WTO+EC-Sardines+decision&source=bl&ots=xlf8vwy4rd&si(accessed 25-04-2014).
[677] Panel Report *EC- Sardines* para 7.51.
[678] Grado *"Evidence, Proof, and Fact Finding in the WTO Dispute Settlement"* available at http://books.google.co.za/books?=DeWEnLKaBbAC&pg=pa159&1pg=PA159&dq=Evidence+Proof+and+Fact+Finding+inthe+WTO+Dispute+Settlement&pdf(accessed 27-02-2014). See also Panel Report para *EC- Sardines* 7.114.
[679] *Ibid.*
[680] Horn and Weiler "European Communities–Trade Descriptions of Sardines: Textualism and its Discontent" available at http://www.ali.org/doc/wto/wto2002/Sardines/pdf. (accessed 05-05-2014).
[681] Appellate Body Report *EC-Sardines* para 223.

politicization of the Codex decision making process and standard setting procedures, as adoption of standards without consensus approval implies the possibility that member states will be required to conform to standards they have not supported with a vote.[682] According to Howse and Weiler the decision of the Appellate Body would accord 'bindingness' to non-consensual international decisions in circumstances where the international bodies do not ascribe the same 'bindingness' to their own decisions.[683]

The Appellate Body is criticised in finding that a technical regulation adopted by the European Communities was invalid because it was not in conformity with an explicitly nonbinding international standard since the Codex standards are not directly legally binding on member states.[684] This means that states have no obligation to impose such standards through domestic regulations.[685] It is argued that the Appellate Body gave more binding force to an international standard than that international standard itself purported to possess.[686] Nonetheless since WTO Agreements are binding on all WTO members it [illegible] member states have a duty to abide by the provisions related to Codex standards.[687]

Magnuson has argued that the Appellate Body failed to realise the importance of the *EC-Sardines* case in the development of international trade law.[688] In his view the Appellate Body focused mainly on self-evident interpretations of treaty text and dictionary definitions in making

[682]Toma-Bianov "Codex Alimentarius Commission and the World Trade Organisation Legal Order" available at http://wwbbut.unctbv.ro/bulletin/series%20V111/BULETIN%20V11&20V11%20PDF32%20Toma-Bianov.pdf (accessed 13-04-2014). It has been suggested that "since standards serve important social objectives, the standard-setting power should remain with the jurisdiction of domestic regulatory control. Thus the decision making power should be kept under domestic regulatory control. Further that such power is necessary for democratic and accountable government and actually goes to the social and political heart of a Member's sovereignty." See Ming Du "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org (accessed 06-06-2014).

[683] Horn and Weiler "European Communities –Trade Descriptions of Sardines: Textualism and its Discontent" available at http://www.ali.org/doc/wto/wto2002/Sardines/pdf. (accessed 05-05-2014).

[684]Grado*Evidence, Proof, and Fact Finding in the WTO Dispute Settlement* available at http://books.google.co.za/books?=DeWEnLKaBbAC&pg=pa159&1pg=PA159&dq=Evidence+Proof+and+Fact+Finding+inthe+WTO+Dispute+Settlement&pdf (accessed 27-02-2014).

[685]Toma-Bianov "Codex Alimentarius Commission and the World Trade Organisation Legal Order" available at http://wwbbut.unctbv.ro/bulletin/series%20V111/BULETIN%20V11&20V11%20PDF32%20Toma-Bianov.pdf (accessed 13-04-2014).

[686]*Ibid.*

[687]*Ibid.*

[688] Magnuson "WTO Jurisprudence & Its Critiques: The Appellate Body's Anti-Constitutional Resistance" available at http://www.harvardilj.org/articles/Magnuson.pdf (accessed 20-03-2014).

its judgment instead of giving a contextual meaning to the text.[689] In defining a technical regulation the Appellate Body stated that the document must (1) apply to an identifiable product, (2) lay down characteristics of the product and (3) make compliance with the product characteristics mandatory.[690] According to Magnuson this is a regurgitation of the actual text of the TBT Agreement which states that a technical regulation is a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory."[691] In Magnuson's view this was not an interpretation at all but a rephrased version of the actual text of the TBT Agreement.[692] Nonetheless, the Appellate Body can be commended for its consistency in the interpretation of the TBT Agreement as it did not add any alteration to its meaning.[693] Such consistency allows for predictability and certainty in the application of law at the international level.[694] Furthermore, this consistency will assist developing countries in making their arguments when advocating for change or prohibition of domestic regulations that are designed to hinder trade.[695]

Regardless of the benefits associated with the Appellate Body's consistency approach Magnuson insists that each matter should be viewed in its own light. He further points out that in dealing with the question whether the EC had used the Codex Alimentarius as 'a basis for' its regulation, the Appellate Body referred to a variety of dictionaries to find the meaning of the term 'basis' instead of giving a contextual meaning to the word.[696] According to Magnuson the Appellate Body failed to provide a meaning that was related to the matter at hand. He opined that the methodology used by the Appellate Body did not fulfil the expectation of providing further guidance to member states on the actual meaning of the text.[697]

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[689] *Ibid.*
[690] *Ibid.* See also Appellate Body Report *EC-Sardines* para 172.
[691] Magnuson "WTO Jurisprudence and its Critiques: The Appellate Body's Anti-Constitutional Resistance" available at http://www.harvardilj.org/articles/Magnuson.pdf(accessed 20-03-2014).
[692] *Ibid.*
[693]Toma-Bianov "Codex Alimentarius Commission and the World Trade Organisation Legal Order" available at http://wwbbut.unctbv.ro/bulletin/series%20V111/BULETIN%20V11&20V11%20PDF32%20Toma-Bianov.pdf (accessed 13-04-2014).
[694] *Ibid.*
[695] *Ibid.*
[696] Magnuson "WTO Jurisprudence and its Critiques: The Appellate Body's Anti-Constitutional Resistance" available at http://www.harvardilj.org/articles/Magnuson.pdf(accessed 20-03-2014).
[697]*Ibid.*

According to Howse the Appellate Body erred in finding that "as a basis" requires a 'strong and very close relationship'. He argues that there must be a 'reasonable relationship' between an international standard and a domestic regulation.[698] A 'reasonable relationship' would "allow judgments to be made about the relative legitimacy of the different kinds of standards or their suitability for shaping domestic regulations."[699] He further criticised the Appellate Body's view that it needed not examine the issue of how close the relationship was required to be under Article 2.4 since the EC regulation contradicted the international standard.[700] He points out that a domestic regulation that contradicts an international standard may have a rational relationship to that standard.[701]

Mitchell has argued that the Appellate Body's decision to reverse the Panel's finding and allocate the burden of proof to Peru was not justified based on the text and context of Article 2.4 of the TBT Agreement.[702] According to him by [illegible] the burden the Appellate Body reversed the language of Article 2.4 in order to require Peru to carry the impossible burden of proving a negative which is an allocation of burden of proof that the Appellate Body itself had found inappropriate in the past.[703] He further points out that the second part of Article 2.4 which allows members to depart from international standards under certain circumstances is not expressed in positive terms.[704] In Mitchell's view Article 2.4 does not require members to use

[698] Howse "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards" available at http://www.probus-sigma.com/wp-content/uploads/downloads/2021/02/WTO-Legal.pdf (accessed 13-06-2014).
[699] *Ibid.*
[700] *Ibid.* According to Van den Bossche it would seem that in the absence of a 'contradiction' between the domestic regulation and the international standard, the domestic regulation can be considered to be based on the international standard. See Van den Bossche and ZdoucThe *Law and Policy of The World Trade Organization* (2013) 881.
[701] For example an international standard may provide a default norm or specification while at the same time indicating that this norm or specification is only for use where a regulating authority does not see the need to adopt its own specification. Howse "A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards" available at http://www.probus-sigma.com/wp-content/uploads/downloads/2021/02/WTO-Legal.pdf (accessed 13-06-2014).
[702] Mitchell *Conflict of laws: Challenges and Prospects for the WTO* available at http://books.google.co.za/books?id=t7nazkee1cC&pg=PA165&1PG=PA165&DQ=WTO+EC-Sardines+decision&source=bl&ots=xlf8vwy4rd&si(accessed 25-04-2014).
[703] *Ibid.* It has been suggested that in allocating the burden of proof to complaining parties the Appellate Body failed to consider developing countries who lack the capacity to satisfy such requirements. See Baldwin "Regulatory Protectionism, Developing Nations and a Two –Tier World Trade System" 2000 CEPR Discussion Paper No 2574 available at http://graduateinstitute.ch/webdav/site/xtei/shared/ICTI/Baldwin (accessed 14-04-2014).
[704] *Ibid.*

international standards as a basis for their technical regulations if such standards are ineffective or inappropriate. Instead Article 2.4 requires members to use such standards as a basis of their technical regulations except when they would be ineffective or inappropriate. Mitchell contends that the wording of Article 2.4 suggests that members are required to use international standards as a basis for their technical regulations and only if they can show that such standards would be ineffective or inappropriate are they permitted to deviate from them substantially.[705]

4 10 CONCLUSION

The case of *EC-Sardines* dealt with a regulation that was designed to protect against consumer fraud. The Appellate Body took the opportunity to confirm the significance of relevant international standards. It found that the obligations created by Article 2.4 of the TBT Agreement are relevant to existing technical regulations.[706] The Appellate Body also made it clear that relevant international standards could be adopted even without consensus.[707] It is significant to note that such findings may have a significant bearing on the domestic autonomy of member States as member states are expected to comply with international standards that may not be suitable for their markets.[708] In as much as the rulings were in favour of a developing country, serious questions could thus be raised as to whether developing countries are in a position to satisfy all the requirements imposed by these international standards.[709] If only the TBT Agreement were specific on international standards that are regarded as mandatory then it would be easy for member states to design their domestic regulations in a way that would not contradict them.[710] The TBT therefore Agreement needs additional rules on the enactment of international standards in order to fill the gap between the non-consensus adoption of international standards principle and the protection of domestic autonomy of member states.[711]

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[705] *Ibid.*
[706] Appellate Body Report *EC-Sardines* para 231.
[707] Appellate Body Report *EC-Sardines* para 227.
[708] See Ming Du "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org (accessed 06-06-2014).
[709] Baldwin "Regulatory Protectionism, Developing Nations and a Two –Tier World Trade System" 2000 CEPR Discussion Paper No 2574 available at http://graduateinstitute.ch/webdav/site/xtei/shared/ICTI/Baldwin (accessed 14-04-2014).
[710] McDonald "Domestic regulation, international standards, and technical barriers to trade" available at http://www.researchgate.net/publication/4738390_Domestic_regulation-international_standards_and-technical-barriers_to-trade (accessed 07-06-2014).
[711] *Ibid.*

CHAPTER FIVE

WTO Jurisprudence on Technical regulations: Lessons from the cases of United States- Certain Country of Origin Labelling Requirements – *(US-COOL)*[712]

5 1 INTRODUCTION

This chapter will examine a dispute concerning the controversial Technical Barriers to trade Agreement (TBT Agreement) provisions, revealing the conditions within which TBT law has been developed since the decisions in the *EC-Sardines*[713] case. It will show how member States have resorted to less obvious means of trade protectionism such as domestic technical regulations designed to protect their domestic markets. Such technical regulations include labeling and packaging requirements that must be satisfied to enable a member to export its products in to the markets of particular member States. These trade conditions have become a hindrance to international trade in particular to developing countries as they raise the cost of business for producers.[714] Consequently developing countries struggle to export to their targeted markets as they lack the finances to meet the requirements.[715]

It is the aim of this case law discussion to show whether the Application of the TBT Agreement is consistent with the interests of exporting developing countries. Potential loopholes and gaps in the application and interpretation of the TBT Agreement will be highlighted. The discussion will also highlight how the Panel and the Appellate Body have interpreted some of the most significant provisions of the TBT Agreement linked to the challenges of developing countries. Even though the factual scenario in the case law occurred in an environment different from that of developing countries, it is significant in assessing whether the Agreement fulfills its obligation to protect and promote developing members in their efforts to engage in global trade.

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[712] Appellate Body Report *United States - Certain Country of* Origin *Labelling Requirements* (*US-COOL*) WT/DS384/AB/R adopted 29 June 2012.

[713] Appellate Body Report *European Communities – Trade Description of Sardines,* WT/DS231/AB/R.

[714] Shepard "Standards, Harmonization, and Trade: New Empirical Evidence" available at http://siteresources.worldbank.org/DEC/Resources/84797-1154354760266/2807421-1194369100631/4361465-1209126984937/Standards_Harmonization_and_Trade.pdf. (accessed 05-09-2013).

[715] *Ibid.*

The case law analysis will also demonstrate that the Panel and Appellate Body are biased towards the elimination of protectionist policies.[716] It is such institutional efforts that have caused most developed countries to desist from imposing measures that have the potential to hinder international trade. It has been argued that some of the trade measures adopted in pursuit of free trade by developed countries are discriminatory and questions have been asked as to how such measures can be justified especially where they are employed against products originating from developing countries.[717] However, the case law will show that to some extent the TBT Agreement has been successful in its efforts to protect developing countries from illegal trade restrictions as the final decisions in the dispute were in favour of the developing states.

5 2 THE CASE OF UNITED STATES – COOL

5 2 1 Background to the US-COOL dispute

Through the 2008 Farm Bill,[718] the United States (US) government adopted legislation which required country of origin labeling for certain products, all known as the COOL measure. The measure was aimed at informing consumers about the origin of meat products, through the employment of a series of labels applicable to different situations. Important to note is that in 2002 the US government adopted new country of origin labeling provisions for beef, lamb, pork, seafood, fresh fruits, vegetables and peanuts through the Farm Security and Rural Investment Act.[719] However, after the US Department of Agriculture (USDA) estimated that implementation costs might reach $3,9 billion, enactment of the legislation was postponed until 2008 [720] when the 2008 Food, Conservation, and Energy Act incorporated mandatory COOL requirements. The legislation extended COOL to goat meat, chicken, macadamia nuts, peanuts and ginseng.[721] In an

[716] Jurenas *et al* "Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling 2013" available at http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS22955.pdf (accessed 04 - 03- 2014).
[717] Voon *American Society of International Law Insights* (2012) 16.
[718] Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill").
[719] Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill").
[720] Meltzer *et al* "Beyond Discrimination? The WTO Parses the TBT Agreement in US – Clove Cigarettes, US – Tuna 11 (Mexico) and US – COOL" available at http://www.lawuninel.edu.au/file/dmfile/11MeltzerPorges-Depaginated.pdf. (accessed 03 – 03 – 2014).
[721] Jurenas *et al* "Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling 2013" available athttp://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS22955.pdf (accessed 04 - 03- 2014).

effort to ease compliance costs, commingling of meat of different origins, and reduced record-keeping requirements were permitted by legislation.[722]

The COOL measure imposed requirements that distinguished four categories of meat products. Category A was specifically for meat products derived from animals exclusively born, raised and slaughtered in the US.[723] Category B consisted of meat products originating in more than one country (Multiple Countries of Origin).[724] An example of Category B products are animals that were in different countries during different stages, for example born in the US and raised in Mexico. Category C comprised of meat products from animals that were in the US only at the stage of slaughter[725] and Category D consisted of meat products derived from animals which were in a particular foreign country at all stages.[726]

Important to note is that the COOL measure allo[illegible]n labeling of meat products as well as commingling.[727] A common label would be used where animals from different categories were commingled in feedlots or slaughterhouses on a single day.[728] Thus Category B meat products could be sold under Category C labels where commingling took place. Questions could thus be raised as to why a legislation imposing labeling requirements was adopted when the same legislation permitted common labels. Evidently common labels would confuse consumers and deceive them into believing that they are buying a particular category of meat when in actual fact they were not. Due diligence in this regard should have been given to the fact that common labels undermined the whole purpose of the COOL measure.[729]

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[722] Panel Report *US – COOL* para 7.284.
[723] Panel Report *US – COOL* para 7.284.
[724] *Ibid.*
[725] *Ibid.*
[726] *Ibid.*
[727] Commingling is the practice of affixing a single label to meat that was processed on the same day in the same slaughterhouse. See Keller and Heckman "A Brief History and Overview of Country of Origin Labelling Requirements available at http://www.khlaw.com/A-BRIEF-HISTORY-AND-OVERVIEW-OF-LABELLING-REQUIREMENTS(accessed 09-02-2014).
[728] Panel Report *US – COOL* para 7.96.
[729] Vergano "Trade Perspectives" available at http://www.fratinivergano.en/Trade%20perspectives%202011/issue%20no%2022.pdf (accessed 04-01-2014).

The COOL measure prompted Mexico and Canada to request the establishment of a Panel to determine whether the US measure was inconsistent with its obligations as a member state of the WTO. The two complainants were driven by the fact that before the measure, they had been major exporters of livestock and meat products to the US. Mexico and Canada thus challenged the US measure requiring the country of origin labeling.

5 3 ARGUMENTS OF THE PARTIES

Mexico and Canada argued that by imposing the Cool measure on imported livestock, the US accorded less favourable treatment to imported livestock than that accorded to like domestic livestock and therefore violated its obligation to treat imported products equally with domestic products.[730] Further, the complainants argued that the COOL measure requirements led to higher segregation costs for imported livestock, which in turn adversely affected the competitive conditions for imported livestock in the US mar[illegible].[731] [illegible] also argued that in terms of Article 2.1 of the TBT Agreement, focus should be on how the measure modifies the conditions of competition in the relevant market to the detriment of imported products by addressing whether the measure gives domestic products a competitive advantage in the market over imported like products.[732]

After assessing the evidence provided by the complainants, that major US slaughterhouses apply a considerable COOL discount of [US$] 40-60 per head for domestic livestock and not to imported livestock the Panel accepted that the least costly way to comply with the COOL measure was to focus on exclusively domestic livestock rather than imported livestock.[733] This in itself suffices to raise doubt regarding the legitimacy of the US measure as doing so would frustrate the whole purpose of the TBT Agreement's less favourable treatment principle.

[730] Panel Report *US – COOL* para 7.143.
[731] Appellate Body Report *US – COOL* para 7.302.
[732] Panel Report *US – COOL* para 7.302.
[733] Panel Report *US – COOL* para 7.356.

Article 2.2 of the TBT Agreement provides that technical regulations should not be adopted with the effect of creating unnecessary obstacles to international trade. Mexico and Canada, argued that the US measure restricted international trade by reducing the possibility of livestock born in Canada and Mexico being exported to the US.[734] Further, Mexico argued that the trade restrictive effect of the measure was also reflected in the reduction of competitive opportunities for imported meat products in the US.[735]

The complainants further claimed that the COOL labelling scheme violated Article 2.2 of the TBT Agreement in that it did not serve to fulfill the objective of providing clear and accurate information to consumers.[736] They maintained that the labeling scheme merely provided the likely[737]range of countries where the animal could have been at some stage and nothing about the actual country the animal was in at every stage and for which period.[738] This issue again raised doubts about the legitimacy of the US COOL measure. Separately, Mexico argued that the COOL measure was inconsistent with Article 2.4 because the US failed to base its regulation on the General Standard for the Labelling of Prepackaged Foods (CODEX-STAN 1-1985"), which Mexico claims is an international standard that is an effective and appropriate means for the fulfilment of the legitimate objective pursued by the United States.

Mexico also argued that the COOL measure violated Articles 12.3 of the TBT Agreement. Article 12.3 emphasises that members should take into account the special development, financial and trade needs of developing country members when preparing and applying their technical regulations.[739] According to Mexico the US did not take into account Mexico's special needs as a developing country when it prepared and applied the COOL measure.[740] Mexico grounded its claim on Article 2.2 of the TBT Agreement which prohibits the creation of unnecessary barriers to international trade, in that the COOL measure created trade restrictions on Mexico's cattle exports to the US. Mexico validated its argument through statistics which

[734] Panel Report *US – COOL* para 3.1.
[735] Panel Report *US – COOL* para 7.561.
[736] Panel Report *US – COOL* para 7.580.
[737] Panel Report *US – COOL* para 7.5.
[738] *Ibid.*
[739] Panel Report *US – COOL* para 7.737.
[740] Panel Report *US – COOL* para 7.738.

proved that Mexico's economy significantly depended on livestock production. According to the statistics 56% of the Mexico's territory was used for cattle production.[741] Further, of the approximately 30million head of Mexican domestic cattle inventory 1,2 million were destined for exports to the US.[742] Also noteworthy, is that over one million Mexicans were directly employed in cattle production and over two million had indirect jobs in the field.[743] Consequently not only was the COOL measure violating Article 12.3 of the TBT Agreement, it also threatened the Mexican economy as well as the livelihood and survival of Mexican workers.

The US rejected the complainant's claim that the COOL measure was inconsistent with Article 2.1 of the TBT Agreement, claiming that Canada and Mexico failed to show that the measure provided less favourable treatment to the imported products at issue.[744] It referred to the *EC-Trademark and Geographical Indications* case, where it was stated that "the starting point when analysing issues regarding less favourable treatment is whether the measure accords any difference in treatment."[745] The US argued that the COOL measure treated beef, pork and livestock identically regardless of origin, as it did not require that imported commodities be treated less favourably than domestic ones.[746] It also claimed that the COOL measures were neutral as they required meat to be labelled with origin information regardless of the origin of the livestock from which the meat was derived.[747]

The US rejected the complainants' claim that the COOL measure was contrary to Article 2.2 of the TBT Agreement. It stated that the objective pursued through the measure was to provide consumer information about origin and that human health and safety were not part of the objectives pursued by the measure. It further stated that Article 2.2 contained a non-exhaustive list of legitimate objectives hence the prevention of consumer confusion through the provision of

[741] Panel Report *US – COOL* para 7.739.
[742] Panel Report *US – COOL* para 7.739.
[743] *Ibid.*
[744] Panel Report *US – COOL* para 7.263.
[745] Panel Report *EC-Trademark and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R para 7.463.
[746] *Ibid.*
[747] *Ibid.*

consumer information could also be regarded as legitimate.[748] It based its argument on the prevention of deceptive practices which is one of the objectives listed in Article 2.2.

In response to Mexico's claim under Article 12.3 the US argued that the term 'take account of' in Article 12.3 of the TBT Agreement does not require a member to 'accept every recommendation presented by the developing country member'.[749] Further, a developed country member in formulating a regulation is not obliged to balance developing country considerations against the views of other interested parties such as consumers and retailers.[750] It also stated that Mexico failed to show sufficient evidence that it communicated its special needs to the US or that the US did not 'take account of' these needs in the preparation and application of the COOL measure.[751]

5 4 WTO PANEL DECISION

The parties did not dispute that the COOL measure was a technical regulation governed by Article 2.1 of the TBT Agreement as it imposed requirements that were mandatory. The Panel viewed the COOL statute as legally enforceable requirements governing the labelling of meat products offered for sale.[752] Further, the Panel found that Canadian cattle and US cattle, and Mexican cattle and US cattle were like products.[753] It also found that Canadian hogs and US hogs were also like products.[754] According to the Panel the COOL measure modified the conditions of competition in the US market to the detriment of imported livestock due to the resulting high costs for handling imported livestock.[755] It further stated that the COOL

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[748] *Ibid.*
[749] Panel Report *US – COOL* para 7.748.
[750] *Ibid.*
[751] Panel Report *US – COOL* para 7.747.
[752] Panel Report *US – COOL* para 7.246.
[753] Appellate Body Report US – *COOL* para 7.256.
[754] *Ibid.*
[755] Panel Report *US – COOL* para 7.373. In *US-Tuna* the Appellate Body asserted that in assessing a claim of less favourable treatment for imports under TBT Agreement Article 2.1, a panel should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like products originating in any other country. Thus the Appellate Body clarified that where governments adopt measures to pursue regulatory objectives such as health, safety, or environmental protection the same approach may be applied. See Mcgivern "WTO Appellate Body Report: United States–Tuna 11" available at http://www.whitecase.com/files/Publication/ob4586d6-8dd1-4a8d-95c3-ccoe37aaf4c4/Presenatation/PublicationAttachment/d53bfe6f-56a6-4992-8e2e-ce7e670c8f16/article-WTO-Appellate-Body -Report-US-Tuna-11.PDF (accessed 28-02-2015).

regulations created an incentive to process exclusively domestic livestock and reduces the competitive opportunities for the imported livestock.[756]

The Panel took the view that Category A comprising of meat exclusively from livestock born, raised and slaughtered in the US, was the only category flexible enough to carry Category B and C labels under the commingling system.[757] It further ruled that the same commingling system did not permit Category B and C products that are meat derived from imported livestock, to carry Category A labels. According to the Panel the different categories of meat products stimulated differences in treatment in the market.

The Panel further considered that the COOL measure required accurate information on where each muscle cut of livestock had been processed and its country of origin. Obtaining such information required the involvement of the meat supply chain or rather upstream livestock.[758] According to the Panel's understanding the COOL measure could only be adhered to only if an unbroken chain of reliable country of origin information with regard to every animal and muscle cut had been maintained.[759] It reasoned that the COOL measure could only be practiced under segregatory conditions where meat and livestock are segregated according to their origin.[760] Hence the COOL measure enforced a difference in treatment of livestock from different origins.

The Panel also assessed whether the compliance costs caused by the COOL measure permitted an incentive for the processing of domestic livestock and reduced the competitive opportunities for imported livestock. Its assessment involved five business scenarios developed under the COOL measure.[761] It determined that the least costly way to comply with the COOL measure was to rely on exclusively domestic livestock rather than imported livestock. It based its conclusion on the evidence given by Mexico and Canada that major slaughter houses discriminated against imported livestock by applying a significant COOL discount for domestic

[756] Panel Report *US-COOL* para 7.381.
[757] Panel Report *US – COOL* para 7.287.
[758] Panel Report *US – COOL* para 7.416.
[759] Panel Report *US – COOL* para 7.317.
[760] Panel Report *US – COOL* para 7.327.
[761] Panel Report *US – COOL* para 7.333.

livestock.[762] Consequently the discounts permitted an incentive for the processing of domestic livestock and not for imported livestock. The evidence also showed that most processing plants preferred domestic livestock to imported livestock in an effort to escape the ever increasing price differences between imported and domestic livestock.[763]Additionally, suppliers suffered rejection from financial institutions that provided credit and loans. Moreover the evidence showed that imported cattle were being excluded from lucrative premium beef programs such as the Certified Angus Beef programme.[764] Hence the Panel concluded that the COOL measure created an incentive to opt for domestic livestock and a disincentive to handle imported livestock.

The Panel also referred to the two economic studies (Informa and Sumner Reports) which were provided by Canada.[765] The two studies were used to determine whether there was an existence of a "statically significant relationship between the COOL measure and the competitive opportunities facing imported livestock relative to US livestock."[766] The Informa study[767] "emphasised the implementation costs of supply chain and the Sumner report was "based on the willingness of operators along the supply chain to pay for mixed origin beef."[768]

With regards to the Informa study the Panel took the view that it failed to bring about enough information on which a reliable assessment can be based as it lacked clarity on the methodology used and the sample on which its conclusions were founded.[769] However, the Panel emphasised that the Informa study demonstrated that the COOL measure caused high compliance costs for Canadian livestock in comparison to US livestock. It pointed out that the costs emanated from the adaptations which the operators had to make in order to comply with the COOL measure.[770] Further, it found that the costs depended *inter alia*, on the decision to process only US origin or

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[762] Panel Report *US – COOL* para 7.356.
[763] *Ibid.*
[764] Panel Report *US – COOL* para 7.380.
[765] Panel Report *US – COOL* para 7.488.
[766] 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" available at http://academiccommons.colombia.edu/download/fedora_content/download/ac:162439/CONTENT/FINAL_JULY_2013.pdf. (accessed 03 – 02 – 2014).
[767] *Ibid.* See also Panel Report *US – COOL* para 7.489.
[768] *Ibid.* See also Panel Report *US – COOL* para 7.500.
[769] Panel Report *US – COOL* para 7.499.
[770] Panel Report *US – COOL* para 7.489.

mixed origin products as well as the size of the firm and the geographical location of operators and the time of the year.[771] Ultimately the Informa study pointed out that operators preferred to associate with US origin hogs so as to reduce segregation costs hence reducing competitive opportunities for Canadian livestock.[772] However the US disagreed with the conclusions of the informa report stating that it exaggerated the costs of compliance with the COOL requirements.[773]

With respect to the Sumner Report, the Panel concluded that mixed origin goods are costlier due to the COOL measure compared to the goods of US origin. It identified that though mixed origin goods were faced with the extra costs of the labeling requirements they still have to price their goods equally or lower than goods originating from a single country.[774] Further, if mixed goods opted to pass the additional costs to consumers this would leave them with no other choice but to buy goods from single country origin which carry no extra costs.[775] Thus due to the additional costs faced by the operators in processing mixed origin meat their goods tend to be costlier hence reducing the willingness of operators along the supply chain to pay for mixed origin beef.

The Panel also made an assessment of the econometric analysis provided by Canada and the US. The study made efforts in analysing the COOL measure's effects on prices and shares of imported livestock. According to the US, the economic recession was the main determinant in the decline of import shares and prices of imported livestock.[776] It also claimed that the decline in Canadian hog inventories which began before the implementation of the COOL measure was the significant cause in the reduction of the Canadian imports.[777] The Panel took the view that the US econometric study was not robust. It stated that the effects of the economic recession were only influential and relevant in a limited number of products.[778] The Panel agreed with Canada's study which proved that transport costs, the BSE import ban and economic recession

[771] Panel Report *US – COOL* para 7.498.
[772] Panel Report *US – COOL* para 7.495.
[773] Panel Report *US – COOL* para 7.496.
[774] Panel Report *US – COOL* para 7.501.
[775] Appellate Body Report *US – COOL* 7.501.
[776] Panel Report *US – COOL* para 7.518.
[777] Panel report *US – COOL* para 7.518.
[778] Panel report *US – COOL* para 7.543.

were the primary cause of the reduction in import shares and prices of imported livestock.[779] The study concluded that the COOL measure had a negative and significant impact on Canadian meat imports shares and prices.[780] Consequently the Panel found that the US study failed to rebut the evidence provided by Canada that the COOL measure impacted on imported goods' market shares and prices.

With regards to the complainants claim that the COOL measure was more trade restrictive than necessary the Panel based its meaning of the term "restrictive" on the Panel decision in *India-Quantitative Restrictions* where it was said that in the context of Article X1 of the GATT 1994 the scope of the term restriction includes a limitation in action, a limiting condition or regulation.[781] It was further decided that a measure's restrictiveness could be based on its impact on the competitive opportunities it offers to imported products.[782] Based on this decision the Panel ruled that "trade-restrictiveness under provisions of the GATT 1994 need not be demonstrated by an actual trade effect as the focus is on the competitive opportunities made available to imported products."[783] Further, the Panel agreed with the complainants that the measure did not serve the US objective of providing consumers with clear and accurate information concerning the national origin of the products at issue.[784] It stated that the "interchangeable use of Labels B and C for all categories of meat based on commingling does not contribute in a meaningful way to providing consumers with accurate information on the origin of meat products."[785] The measure only ensures meaningful information on Label A where commingling does not exist.[786] Therefore the Panel concluded that the COOL measure does not fulfill the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers.

[779] Panel Report *US – COOL* para 7.543.
[780] Panel Report *US – COOL* para 7.541.
[781] Panel Report *US – COOL* para 7.570.
[782] Panel Report *US – COOL* para 7.572.
[783] Panel Report *US – COOL* para7 572.
[784] Panel Report *US – COOL* para 7.575.
[785] Panel Report *US – COOL* para 7.718.
[786] *Ibid.*

With regards to Mexico's claim under Article 2.4 that the relevant international standard was appropriate and effective to fulfill the legitimate objectives pursued, the Panel referred to the *EC-Sardines* case where it was established that in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfillment of the legitimate objective pursued.[787] The Panel stated that Codex- Stan 1-1985 would be effective if it had the capacity to accomplish the objective and would be appropriate if it were suitable for the fulfillment of the objective.[788] It ruled that Codex-stan-1-1985 did not have the function or capacity of accomplishing the objective of providing information to consumers about the country in which an animal was born, raised and slaughtered.[789] The reason given was that the standards confer origin exclusively to the country where the processing of food took place. This meant that only one country could claim origin under Codex-Stan-1-1985.[790] As a result the information that the US wanted to convey to consumers could not be provided through Codex - Stan 1-1985.[791] Thus the Panel concluded that Codex Stan was a[illegible]ate means for the fulfillment of the objective and could not provide the required information to consumers.

Further, the Panel had to establish whether or not the US acted inconsistent with Article 12.3 of the TBT Agreement, by failing to take account of the special development, financial and trade needs of Mexico as a developing country member and in ensuring that the measure did not create an unnecessary obstacle to Mexico's cattle exports as a developing country. In its analysis the Panel referred to the case of *EC- Approval and Marking of Biotech Products*[792] where the Panel earlier ruled that various paragraphs of Article 12 contain a number of separate and different obligations and that Article 12.3 has a specific obligation to take account of developing country needs in the implementation of the TBT Agreement at a national level.[793] Thus the Panel disagreed with Mexico's claim that Article 12.3 contains only two obligations.

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[787] Panel Report *US – COOL* para 7.730.
[788] Panel Report *US – COOL* para 7.729.
[789] Panel Report *US – COOL* para 7.734.
[790] Panel Report *US – COOL* para 7.734.
[791] *Ibid.*
[792] Appellate Body Report *EC – Approval and Marketing of Biotech Products (EC- Biotech)* WT/DS291/R.
[793] Panel Report *US – COOL* para 7.759.

Further, the Panel referred to the *US-Continued Suspension* case where it was said that taking available scientific evidence into account does not require that members conform their actions to a specific conclusion in a particular scientific study.[794] The Panel stated that the *US- Continued Suspension* case confirmed that to "take account of" and to "take into account" mean to consider, but not necessarily to act in line with the specific need, view or position under consideration.[795] Furthermore the Panel referred to the case of *EC- Approval and Marketing of Biotech Products* where it was stated that

> "the dictionary defines the 'expression take account of' as to consider along with other factors before reaching a decision and that Article 10.1 of the SPS which is an equivalent of Article 12.3, does not require that the importing member must invariably accord special and differential treatment in a case where a measure has lead or may led, to a decrease or a slower increase, in developing country exports."[796]

Based on the approach or conclusions in the cases of *EC- Biotech*[797] *and US Continued Suspension,*[798] the Panel ruled that Article 12.3 of the TBT Agreement does not require WTO members to conform their actions to the special needs of developing countries but to merely give consideration to such needs along with other factors before reaching a decision.[799] The Panel thus concluded that Mexico, failed to demonstrate that the US acted inconsistently with Article 12.3 of the TBT Agreement.

5 5 APPELLATE BODY DECISION

In assessing the Panel's finding of unfavourable treatment of the meat products, the Appellate Body criticised the incompleteness of the Panel's analysis stating that it failed to consider whether or not the detrimental impact on imports stemmed exclusively from a legitimate regulatory distinction, which is consistent with the TBT Agreement.[800] However, the Appellate

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[794] Panel Report, *US – Continued Suspension of Obligations,* para. 7.480. See also Panel Report *US – COOL* para 7.777.
[795] Panel Report *US – COOL* para 7.781.
[796] Appellate Body Report *EC – Approval and Marketing of Biotech Products (EC- Biotech)* WT/DS291/R.
[797] *Ibid.*
[798] Panel Report *US – COOL* para 7799.
[799] *Ibid.*
[800] Appellate Body Report *US – COOL* para 491.

Body concurred with the Panel's findings that the COOL measure was inconsistent with Article 2.1 of the TBT Agreement but for different reasons. Accordingly, the Appellate Body affirmed the Panel's finding that while the COOL measure did not require segregating livestock by origin, where private actors are induced or encouraged to take certain decisions because of the incentives created by the measure, those decisions are not independent of that measure.[801] This led the Appellate Body to conclude that it was the COOL measure that modified the conditions of competition in the US market to the detriment of imported livestock.

Further the Appellate Body found that the relevant regulatory distinctions were the distinctions between the birth, raising and slaughter of livestock and between the four labels for muscle cuts of beef and pork.[802] The rules required livestock and meat producers to track the place of birth, raising and slaughter of each animal and piece of meat, transmit the information to the next processing stage; and keep records in case of USDA audit.[803] The Appellate Body pointed out that the required consumer labels for muscle cuts used relatively little of the information, were confusing and the record keeping requirements applied even when the meat produced was exempted from labeling.[804] According to the Appellate Body the gap between the producer record-keeping and verification requirements and the limited information on consumer labels was of central importance. The Appellate Body ruled that the regulatory distinctions imposed by the COOL measure amounted to arbitrary and unjustifiable discrimination against imported livestock as they could not be said to be applied in an even-handed manner.[805] It stated that as the information collected through the record-keeping verification requirements was not put into effective use when it came to conveying information to consumers, the detrimental impact of these requirements could not be explained by the need to provide origin information to consumers.[806] Hence the Appellate Body concluded that the detrimental impact caused by the labeling requirements constituted discrimination and afforded less favourable treatment to imported products which is inconsistent with Article 2.1.

[801] Appellate Body Report *US –COOL* para 349.
[802] *Ibid.*
[803] *Ibid.*
[804] Appellate Body Report *US –COOL* para 349.
[805] *Ibid.*
[806] *Ibid.*

In assessing the Panel's ruling that the COOL measure does not fulfil the objective of providing consumers with meaningful information on the origin of meats, the Appellate Body criticised the two-part approach that the Panel used to determine whether COOL was consistent with TBT's Article 2.2.[807] According to the Panel's approach the starting point was to assess whether the COOL measure achieves a legitimate policy objective. If the answer was in the affirmative the second step would be to examine whether the COOL measure was more trade restrictive than necessary compared to less trade-restrictive measures that could achieve the same policy objective. With regards to the first step the Panel stated that the scope of the term "trade-restrictive" under Article 2.2 was very broad and that its demonstration should focus on the competitive opportunities available to imported products. The Panel concluded that the complainants had demonstrated that the COOL measure is "trade-restrictive" within the meaning of Article 2.2 basing its conclusion on its earlier finding that the COOL measure "negatively affects imported livestock's conditions of competition in the US market in relation to like domestic livestock by imposing higher segregation costs on imported livestock".[808] Regarding the second part of the approach, the Panel found it unnecessary to proceed to analyse whether the COOL measure is "more trade-restrictive than necessary after determining that "the COOL measure does not fulfill the identified objective within the meaning of Article 2.2".[809] Before the Appellate Body the U.S. claimed that the approach used by the Panel was erroneous stating that its focus should only have been on whether the COOL measure is more trade-restrictive than necessary.[810] According to the US the Panel went beyond the scope of Article 2.2 to make an "intrusive and far-ranging judgment" on whether the COOL measure "is effective public policy."[811]

Though the Appellate Body agreed with the Panel that the COOL measure's objective is to provide consumers with information on product origin and that this is a legitimate objective, it

[807] Appellate Body Report *US – COOL* para 396.
[808] Panel Report *US – COOL* para 7.720.
[809] Appellate Body Report *US – COOL* para 459.
[810] Appellate Body Report *US – COOL* para 3.83.
[811] *Ibid.*

viewed the Panel's finding as too narrow.[812] It stated that the Panel's assessment should have concentrated on the actual contribution made by the measure towards achieving its objectives. According to the Appellate Body focus should be on ascertaining the degree of contribution achieved by the measure, rather than on answering the questions of whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective.[813] It further stated that the Panel erred in focusing on whether the COOL measure achieves complete fulfillment of its objective.

It stated that in order to make an objective and independent assessment of the regulatory objective that a member seeks to achieve, the Panel must take account of all the evidence placed before it in this regard, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the technical regulation at issue.[814] The Appellate Body further stated that the Panel may not simply rely on the defending party's submissions, but must make its own evaluation taking the evidence into account.[815] Though Canada argued that the structure and coverage of the COOL measure made no sense for a consumer information objective, the Appellate Body found that it is not unusual for regulations to have exceptions for practical reasons that may not necessarily involve protectionist intent and that individual statements by legislators or interest groups are not necessarily probative of a measure's objective.[816]

Also in determining whether an objective is legitimate, the Appellate Body found that the starting point for the Panel is to determine whether the objective is among the legitimate objectives listed in Article 2.2. Additionally, the Panel should have taken into account that the list in Article 2.2 is open-ended.[817] Further, additional objectives should be sought in other provisions of the Agreement in question such as the Preamble of the TBT Agreement, which provides that, subject to certain qualifications, a member shall not be prevented from taking

[812] Appellate Body Report *US – COOL* para 468.
[813] *Ibid.*
[814] Appellate Body Report *US – COOL* para 371.
[815] Appellate Body Report *US – COOL* para 399.
[816] Appellate Body Report *US – COOL* para 420.
[817] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Mexico)* (*US-Tuna)* WT/DS381/AB/R para 3.13.

measures necessary to achieve its legitimate objectives "at the levels it considers appropriate".[818] The Appellate Body also referred to the case of *US – Tuna II (Mexico)* where it ruled that, the word "fulfil" as used in Article 2.2 is concerned with the degree of contribution that the technical regulation makes towards the achievement of the legitimate objective.[819] In reaching its decision the Appellate Body stated that the level of contribution of a technical regulation to its objective is something that is revealed through the measure itself.[820] If the objective is not listed in Article 2.2, the Panel must evaluate the measure's level of contribution from the design, structure, and operation of the technical regulation as well as from evidence relating to its application in determining whether the objective is legitimate.[821] Further, the complainants had the burden of proving that relevant objective is not within the scope of Article 2.2.[822]

In assessing whether a technical regulation is more trade restrictive than necessary, in the context of Article 2.2, the Appellate Body made reference to the *US – Tuna case* where the factors to be considered in making a rational analysis were formulated. These include the trade-restrictiveness of the technical regulation; the degree of contribution that it makes to the achievement of a legitimate objective; and the risks that non-fulfillment would create.[823] The US contended that the interpretation of Article 2.2 should mimic that of Article 5.6 of the SPS Agreement.[824] In a footnote to Article 5.6 it is noted that a measure is more trade restrictive if another measure which is technically and economically viable is "reasonably available."[825] Despite the US argument, the Appellate Body followed the "weighing and balancing" approach which has been

[818] The Preamble to the Technical Barriers to Trade Agreement.
[819] Appellate Body Report *US – COOL* para 3.73.
[820] In *US-Tuna* the Appellate Body stated that the "mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot per se provide a sufficient basis to conclude that the objective that is being pursued is not a legitimate objective within the meaning of Article 2.2. See Appellate Body Report, *US-Tuna* 11 (Mexico)para 338.
[821] Appellate Body Report *US – COOL* para 372.
[822] Appellate Body Report *US – COOL* para 442.
[823] Appellate Body Report, *US- Tuna* 11 (Mexico) WT/DS384/AB/R para 318.
[824] Article 5.6 of the SPS Agreement states that "… when establishing or maintain sanitary or phytosanitary measures to achieve the appropriate level of sanitary and phytosanitary protection, Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."
[825] A three pronged test was identified by the Panel in the Australia – Salmon case based on this footnote. The Panel stated that an inconsistency with Article 5.6 of the *SPS Agreement* will be demonstrated when "there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested."

used to assess Article XX jurisprudence.[826] The Appellate Body further clarified that the reference in Article 2.2 to "unnecessary obstacles" implied that "some" trade-restrictiveness is allowed and, further, that what is actually prohibited are those restrictions on international trade that "exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective".[827]

In assessing the fulfillment of regulatory objectives under Article 2.2, the Appellate Body applied the "weighing and balancing" approach.[828] It stated that a comparison of the challenged measure with a possible alternative measure was to be made "in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfillment of the legitimate objective." It further stated that emphasis should be on the actual degree of contribution that a measure makes towards its objectives and not the contribution it should have made or whether the measure completely fulfills or satisfies some minimum level of fulfillment of that objective.[829] The Appellate Body added [illegible]el in making its decision failed to consider its earlier findings on the degree of contribution made by the COOL measure to its objective of providing consumers with information on product origin.[830] It stated that in making its conclusions the Panel ignored its findings that the labels "provided additional country of origin information that was not available prior to the COOL measure" and that the labeling requirements under the COOL measure "may have reduced consumer confusion that existed under the pre-COOL measure.[831] The Appellate Body further concluded that Label A ensured "meaningful information for consumers by preventing meat derived from animals of non-US origin from carrying a US-origin label under any circumstances.[832]Also that even with respect to Labels B and C, the COOL measure contributes to providing information with regard to the possible countries in which the livestock from which meat is derived were born, raised, and slaughtered.[833] For these reasons the Appellate Body reversed the Panel's finding that the COOL

[826] The Appellate Body referred to Article XX of the GATT 1994 and Article XIV of the GATS, where "necessity" was determined on the basis of "weighing and balancing" a number of factors.
[827] Appellate Body Report *US- COOL* para 3.75.
[828] *Ibid.*
[829] Appellate Body Report *US – COOL* para 461.
[830] *Ibid.*
[831] *Ibid.*
[832] *Ibid.*
[833] *Ibid.*

measure is inconsistent with Article 2.2. In an effort to complete the 'weighing and balancing' approach, the Appellate Body declined to make an assessment whether the measure was more trade restrictive than necessary as there were no factual findings made by the Panel[834] which never examined the four alternative measures suggested by Mexico.[835].

5 6 EVALUATION OF THE WTO PANEL AND APPELLATE BODY DECISIONS

Critics of this decision have expressed concerns about the Appellate Body's finding of the violation of Article 2.1 which upholds the principle of non-discrimination and the failure to find the measure more trade restrictive than necessary pursuant to Article 2.2. According to Pauwelyn, the Appellate Body's findings that providing consumers with information on country of origin was a legitimate goal would in itself lead to imported meat being processed and labeled differently.[836] This in turn would force retailers to opt for domestic meat over imported meat.[837]She further points out that an analysis of the Appellate Body's reasoning suggests that the problem with the COOL measure was not one of discrimination (TBT Agreement Article 2.1) but rather whether the labeling requirements were trade restrictive than necessary (TBT Agreement Article 2.2) as its effects would lead to retailers sideling imported meat. Additionally Pauwelyn, points out that the Appellate Body's decision was not founded on origin-based discrimination but on the disproportionality between the information requirements imposed on upstream producers and the level of information communicated to consumers through the mandatory requirements.[838]In her view the Appellate Body put too much into Article 2.1 including elements that one would have expected to be analysed under Article 2.2.[839]

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[834]Appellate Body Report *US – COOL* para 481.

[835] These alternatives are: (i) a voluntary country of origin labeling requirement; (ii) a mandatory country of origin labelling requirement based on the criterion of substantial transformation; (iii) a voluntary country of origin labelling regime combined with a mandatory country of origin labelling requirement based on substantial transformation; and (iv) a trace-back regime. See Appellate Body Report *US – COOL* para 480.

[836]Pauwelyn "COOL...but what is left now for TBT Art 22?" *International Economic law and Policy Blog* available at http://worldtradelaw.typepad.com/ielpblog/2012/07/cool-but-what-is-left-now-of-tbt-art22.html?utm_source_feedburne&utm_medium=feed&htm_campaign=Feed%3Atielpblog+%28International+Economic+Law+and+Policy+Blog%29 (accessed 09-04-2014).

[837] *Ibid*.

[838] The Appellate Body stated that the disproportionality was "not even handed and created arbitrary and unjustifiable discrimination." See Appellate Body Report US- COOL para 3.49.

[839]Pauwelyn "COOL...but what is left now for TBT Art 22?" *International Economic law and Policy Blog* available at http://worldtradelaw.typepad.com/ielpblog/2012/07/cool-but-what-is-left-now-of-tbt-art22.html?utm_source_feedburne&utm_medium=feed&htm_campaign=Feed%3Atielpblog+%28International+Eco

Meltzer states that the finding that the requirement of even-handedness is not satisfied when the measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination reflects the exceptions provision in the GATT Article XX Chapeau.[840] Similarly Marvroidis opines that the application of the GATT XX Chapeau to the TBT Agreement was the heart of the problem in the Appellate Body's conclusions.[841] He asserts that the fact that the preamble of the TBT Agreement mentions all Article XX grounds that are relevant to it shows that it framers had in mind a construction of the TBT Agreement where no recourse to Article XX GATT would be would be possible.[842] Further, the applications of the Chapeau directed the Appellate Body to ask the wrong questions. According to Marvroidis, the Appellate Body should have asked whether the COOL measure was a necessary measure and whether it was applied in a non-discriminatory manner instead of using the 'weighing and balancing' test.[843] It has been suggested that the absence of the exceptions provision in the TBT Agreement led the Appellate Body to seek for solutions in the GATT.[844]

However, despite all the negative criticisms, McGrady asserts that the GATT Article XX exceptions clause contemplates a reasonable balance between protecting marketing-access

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nomic+Law+and+Policy+Blog%29 (accessed 09-04-2014). Carlon equally states: The Appellate Body's preference for finding violations under Article 2.1 as opposed to Article 2.2 is significant because the Appellate Body's analysis will be applied to future TBT disputes and provide needed context for interpreting the TBT Agreement. More importantly it will influence how domestic regulations are designed. See Carlone "An Added Exception to the TBT *Agreement after CLOVE, TUNA 11, and the* COOL" available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1707&context=iclr (accessed 05-03-2014).

[840] Meltzer "The WTO Ruling on US Country of Origin Labelling "COOL." Vol 16 available at http://www.asil.org/insights/volume/16/issue/23/wto-ruling-us-country-origin-labelling-%e2%80%9D. (accessed 05-04- 2014).

[841] 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" available at http://academiccommons.colombia.edu/download/fedora_content/download/ac:162439/CONTENT/FINAL_JULY_2013.pdf. (accessed 03 – 02 – 2014).

[842] According to Marvroidis "Article 2.1 and Article 2.2 of the TBT Agreement are a substitute for and not a complement to Article 111 and XX of the GATT." See 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" available at http://academiccommons.colombia.edu/download/fedora_content/download/ac:162439/CONTENT/FINAL_JULY_2013.pdf. (accessed 03 – 02 – 2014).

[843] *Ibid.*

[844] Meltzer "The WTO Ruling on US Country of Origin Labelling "COOL." Vol 16 available at http://www.asil.org/insights/volume/16/issue/23/wto-ruling-us-country-origin-labelling-%e2%80%9D. (accessed 05-04- 2014).

commitments and preserving the regulatory autonomy of member states.[845] He opines that if the Appellate Body had interpreted Article 2.2 differently constraints in the regulatory authority of the WTO would have been caused as the autonomy of the U.S would have been interfered with.[846]

Further the Appellate Body findings that the more onerous reporting requirements applied to the B and C categories pushed traders to segregate and favour US beef[847] have been criticised for being based solely on the Panel's opinion as there was no proper market analysis conducted.[848]Additionally, in the case of *Korea-Various Measures on Beef*[849]it was stated that it cannot be that segregation in and of itself amounts to violation of the TBT Agreement. Also in the case of *Dominican Republic-Import and Sale of Cigarettes*,[850] the Appellate Body held that adverse trade impact does not amount to less favourable treatment if it is the result of a legitimate regulatory distinction. In this regard the Appellate Body's findings have been said to be too thin to hold the claim that the reporting [illegible] applied on the B and C categories would lead traders to favour US beef.[851]

[845]McGrady "Review of the Trade and Public Health: The WTO Tobacco, Alcohol and Diet" Vol 31 available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1445&context=bjil. (accessed 04 – 04- 2014).

[846]*Ibid*. Free trade and regulatory autonomy are often at odds with one another. The distinction between a protectionist measure-condemned for imposing discriminatory or unjustifiable costs and a non-protectionist measure restricting trade incidentally is difficult to make. See Marceau *et al* "The TBT Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods" available athttp://www//.kluwerlawonline.com/abstract.php?id=TRAD2014013&PHPSESSID=b4dks5adj84bgu2s0oa8mncgd0. (accessed 05 -04- 2014).

[847]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" available at http://academiccommons.colombia.edu/download/fedora_content/download/ac:162439/CONTENT/FINAL_JULY_2013.pdf. (accessed 03 – 02 – 2014).

[848] Save for the Panel's opinion that traders would prefer US beef because of the geographic proximity the Appellate Body had nothing to suggest that segregation would lead to preference for US beef. See Marvroidis *et al* "What is not so cool about US COOL regulations? A critical Analysis of the Appellate Body's ruling on DS384 (US versus Canada) and DS 386 (US versus Mexico)" available at https://my.vanderbilt.edu/kamalsaggi/files/2011/08/MAVSAG-05-27-13.pdf (accessed 02-09-2013).

[849] Appellate Body Report *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161/AB/R.

[850] Appellate Body Report Dominican *Republic-Import and Sale of Cigarettes* WT/DS302/AB/R.

[851]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" available at http://academiccommons.colombia.edu/download/fedora_content/download/ac:162439/CONTENT/FINAL_JULY_2013.pdf. (accessed 03 – 02 – 2014).

Also significant is that the Panel in the COOL case emphasised that a member's measure must achieve a legitimate objective to the greatest extent possible under Article 2.2. Yet in the *Brazil-Measures Affecting Imports of Retreaded Tyres* case it was stated that under Article XX a measure must be in relation to an objective covered by the treaty provision, must make material contribution to that objective, and must be least trade restrictive in the sense that there is no reasonably available alternative measure that achieves the level of protection sought by the regulatory measure.[852] This implies that there is no requirement that a measure achieve the objective sought to the greatest extent possible.[853] Further, the Appellate Body in *United States – Measures Affecting the Production and Sale of Clove Cigarettes* [854]affirmed that such a requirement would be inconsistent with the right under the TBT Agreement of a member to choose its level of protection.[855] The fundamental obligation of least-trade-restrictiveness does not require that a measure achieve a member's level of protection, it only requires that there be no alternative reasonably available alternative measure that makes an equal contribution to the achievement of that level of protection.[856] In this [illegible] Panel appears not to have taken into consideration the WTO jurisprudence developed by its predecessors.

Further, the Panel found that a meat producer that desired to be able to sell some of its meat under the US origin label would if it also wanted to produce meat products from imported livestock, be faced with regulatory costs in segregating the imported livestock from the domestic livestock at any stage of production taking place in the United States.[857] As a result of this additional regulatory cost, the Panel reasoned that imported livestock would be less attractive at the margin than US livestock, thus leading to less favourable treatment of the imported livestock.[858] In this regard the Panel did not compare the group of like imported products with

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[852] Appellate Body Report *Brazil-Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R.
[853] Bown and Mavroidis*The WTO Case Law of 2011 Legal and Economic Analysis* (2013) 236.
[854] Appellate Body Report *United States –Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R.
[855] Bown and Mavroidis*The WTO Case Law of 2011 Legal and Economic Analysis* (2013) 237.
[856] *Ibid.*
[857] 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" available at http://academiccommons.colombia.edu/download/fedora_content/download/ac:162439/CONTENT/FINAL_JULY_2013.pdf. (accessed 03 – 02 – 2014).
[858] *Ibid.*

the group of like domestic products as it ought to have.[859] In that process it failed to realise that meat producers who found it highly profitable to process foreign origin meat using US livestock as well, might not do so because of the regulatory costs of segregation involved in using US livestock in addition to foreign livestock.[860]

Further, the Panel found that the goal of providing consumer information was legitimate and that country of origin was one type of information that could legitimately be required but the COOL measure was illegitimate in practice because it failed to convey meaningful origin information.[861] Seemingly the Panel did not understand the costs and benefits of permitting such a regulation.[862] From an economic perspective the satisfaction of consumers who might be curious about the origin of meat products is not worth the costs since consumers tend not to trust the voluntary self-disclosure by sellers but rather rely on private sources.[863] In this regard the Panel is criticised for its failure to engage in the analysis of the role of government in providing consumer information relative to other actors.[864]

International trade is the back bone of most developing countries. In dismissing Mexico's claim under Article 12.3 both the Panel failed to consider the significance of trade to developing countries. International trade is not only linked to economic development but to livelihood and survival of many in developing countries. Watson and James have observed that compliance costs may disadvantage countries as they cannot afford the technology.[865] Thus the Panel's ruling that developed countries should consider the special needs of developing countries along with other factors demonstrates that developing countries will continue to struggle in their efforts to compete with their western counterparts in the global market. Also the means of survival in these countries will continue to be a challenge.[866] Nonetheless the Panel could have significantly taken

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[859] Bown and Mavroidis*The WTO Case Law of 2011 Legal and Economic Analysis* (2013) 203.
[860] *Ibid.*
[861] *Ibid* 215.
[862] *Ibid.*
[863] *Ibid.*
[864] *Ibid.*
[865] Watson *et al* "Regulatory Protectionism A Hidden Threat to Free Trade" available at http://www.cato.org/sites/cato.org/files/pubs/pdf/p9723.pdf. (accessed 03-04-2014).
[866] A world Trade study of the firms in selected developing countries estimated that one percent increase in compliance cost increases variable production costs by between 0.06 and 0.3 percent. See Watson *et al* "Regulatory

into consideration the disadvantaged position of Mexico and its progressive needs[867] in making its decision.

5 7 CONCLUSION

The US COOL measure evidently violated Article 2.1 of the TBT Agreement by according less favourable treatment to imported products, in that, it requested more information from producers than it provided to consumers which led to segregation resulting in the high costs of providing documentation on multi-origin beef, than it was to provide information for beef which was exclusively of US origin. In the view of the Panel and the Appellate Body this was enough to satisfy the less favourable treatment test. Furthermore, while the US COOL measure was aimed at informing consumers about the origin of meat products through the employment of labels the Panel and the Appellate Body agreed that the measure was discriminatory in that the gap between producer record-keeping and verification requirements and the limited information on consumers labels caused a detrimental impact on imported products which reflected discrimination.[868]

However, regardless of the foregoing, by choosing not to complete the legal analysis under Article 2.2 of the TBT Agreement due to the lack of sufficient undisputed facts on the Panel's record, the Appellate Body missed an opportunity to address the question of necessity which was critical in this case.[869] If the WTO is to develop a reliable and significant test for a measure's consistency with the TBT Agreement the issue of necessity should be clarified in order to correctly assess the objectives of the measure and its impact on international

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Protectionism A Hidden Threat to Free Trade" available at http://www.cato.org/sites/cato.org/files/pubs/pdf/p9723.pdf. (accessed 03-04-2014).

[867] On the contrary it has been said that the WTO has become more than a multilateral trading system as it takes into consideration social needs of Members which have nothing to do with trade. Joel Joseph, the General Counsel of a group that promotes products manufactured in the U.S remarked that "Right now, the US has become a punching bag for smaller nations…They are using the WTO for all kinds of things for what it was not intended to do." See Watson *et al* "Regulatory Protectionism A Hidden Threat to Free Trade" available at http://www.cato.org/sites/cato.org/files/pubs/pdf/p9723.pdf. (accessed 03-04-2014).

[868] Marvroidis *et al* "What is not so cool about US COOL regulations? A critical Analysis of the Appellate Body's ruling on DS384 (US versus Canada) and DS 386 (US versus Mexico)" available at https://my.vanderbilt.edu/kamalsaggi/files/2011/08/MAVSAG-05-27-13.pdf. (accessed 02-09-2013).

[869] *Ibid.*

trade.[870]Furthermore, the Panel and Appellate Body also failed to address developing countries' needs in the US COOL case. Seemingly, the disadvantaged position of developing countries was not taken into consideration in that developing countries were viewed in the same light as developed countries.

[870] *Ibid.*

CHAPTER SIX

Conclusions and Recommendations

6 1 INTRODUCTION

The World Trade Organisation (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT), have been extraordinarily successful at reducing tariffs, quotas and other traditional instruments of protection.[871] The regulation of the TBT measures[872] has caused concerns amongst WTO members as they have the potential to offset or undermine the market access benefits gained from the negotiated tariff reductions.[873] TBT measures have significant effects on global trade as the protection of human health and safety, environment, consumer welfare, and the prevention of deceptive practices may cause hindrances to international trade.[874]These regulatory measures have posed challenges for developing countries in their endeavor to enter the global market.[875] It is significant to note that developing countries' economies are deeply dependent on their export markets.[876] Consequently developing countries have suffered the most from the negative effects of the TBT measures.[877]

There is no doubt that the Technical Barriers to Trade Agreement (TBT Agreement) and its interpretation will affect market access.[878] Thus this study ascertains whether the TBT Agreement promotes non-protectionist trade from a developing country's perspective. Notably, the study does not examine all the provisions of the TBT Agreement. Its main focus was on the provisions that are expressly designed for the benefit of developing countries and some of the

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[871] Mavroidis*The General Agreement on Tariffs and Trade* (2005) 9.
[872] TBT measures stands for Technical Barriers to Trade measures.
[873] Meltzer *et al* "Beyond Discrimination? The WTO Parses the TBT Agreement in the US-Clove Cigarettes, US-TUNA II (MEXICO) AND US-COOL" available at http://www.law.uninelb.edu.au/files/dmfile//Melterporges-Depginated.pdf. (accessed 02-03-2014).
[874] *Jaffee et al* "Agro-Food Export from Developing Countries: The Challenges posed by Standards" available at http://hubrural.org/IMG/pdf/jaffee-henson-2004.pdf. (accessed 07-03-2014).
[875] *Ibid.*
[876] Essaji Technical Regulations and Specialisation in International Trade "Journal of International Economics" 2008 available at www.sef.hku.uk/~/Papers/TBT-TradeR4R111218.pdf (accessed 22-03-2014).
[877] *Ibid.*
[878] Van den Bossche and ZdoucThe *Law and Policy of The World Trade Organization* (2013) 852.

controversial provisions of the TBT Agreement. Further the study scrutinises the TBT Agreement with the view to identifying the gaps/loopholes in its framework and implementation. It also explores whether such gaps/loopholes will possibly pave way for discriminatory tendencies amongst member states which in turn impinge on its effectiveness in promoting free market access more specifically for developing countries.

Chapter one of the study is an introductory chapter which establishes the aims and objectives pursued by this study. Chapter 2 sets out the historical and socio-economic background of the use of the TBT measures. In this chapter the development of TBT measures is outlined. The chapter established that the TBT issues were brought into GATT agenda during the Tokyo Round, after substantial reduction of tariffs and quotas.[879] The need to protect the public from unsafe foods and the public's awareness of health protection particularly in the 19th century led to the growth of such protectionist tendencies.[880] The chapter also sought to show the fundamental role and economic impact of TBT measures in the world economy. It was also established that developing countries' economies greatly depend on exports to developed countries.[881] Significantly developing countries have to comply with the TBT Agreement in order to benefit and participate in the global market.[882] Thus the way in which TBT measures will be handled will determine the position and participation of developing countries in global trade.

Chapter 3 focused on the regulatory framework of the TBT Agreement. It assessed whether particular provisions of the TBT Agreement have loopholes and short comings that are detrimental to developing countries. It also discusses the issue whether the special provisions designed for developing countries are effective.

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[879] Bao and Qin "Do technical barriers promote or restrict trade: Evidence from China" available at http://www.sef.Uku.hk/~larryqui/papers/03_Qin.pdf (accessed 05-08-2014).
[880] Tongereu *et al* "A Cost Benefit Framework for the Assessment of non- tariff measures in agro-food trade" available at http://www.oecd.org/trade/agricultural-trade/45013630.pdf (accessed 06-08-2014)
[881] Essaji Technical Regulations and Specialisation in International Trade "Journal of International Economics" 2008 available at www.sef.hku.uk/~/Papers/TBT-TradeR4R111218.pdf (accessed 22-06-2014).
[882] *Ibid.*

Chapters 4 and 5 examined WTO case law which have dealt with selected provisions of the TBT Agreement. Chapter 4 focused on the *EC-Sardines* case[883] which mainly dealt with technical standards. In that chapter it was assessed whether the Panel and Appellate Body's interpretations of international standards and the standardisation process are supportive of developing countries in their endeavor to enter the global market. Chapter 5 scrutinised the *US-COOL* case[884] which mainly focused on technical regulations. In that chapter the interpretations adopted by the Panel and Appellate Body were analysed in an effort to bring out the gaps and shortcomings in the regulatory framework of the TBT Agreement and establish whether the interpretations accommodate the special needs of developing countries.

6 2 RECOMMENDATIONS

TBT Agreement issues require some sensitivity especially when it comes to the Agreement's application to developing countries. It is beyond [illegible] at the application of the Agreement has the potential to side line developing countries in the global market as it seems to favour developed countries that have the capacity to satisfy the required standards and also participate in standardisation processes.[885] For developing countries to fully benefit from the TBT Agreement, the Agreement should be structured in a manner that accommodates their financial and capacity constraints. The submission of this study is that while the Agreement takes into account the interests of the developing countries, loopholes and gaps in the TBT structure continue to undermine such efforts.

The Preamble of the TBT Agreement outlines its main objectives. The Agreement intends to balance two competing policy objectives which are the prevention of trade protectionism and the right of WTO members to enact product regulations for legitimate public policy purposes. As such it recognises that behind the product regulations lie important social values: human health

[883] *European Communities-Trade Descriptions of Sardines* WT/DS231/R, 23 October 2002.
[884] *United States - Certain Country of Origin Labelling Requirements* (*US-COOL*) WT/DS384/AB/R, 29 June 2012.
[885] Stephenson "Standards, Conformity Assessment and Developing Countries" 1997 available at http://www-wds.worldbank.org/.../IBI.../102502322-2004111716250pdf. (accessed 02-03-2014).

and safety, environmental protection, consumer welfare or even national security.[886] At the same time it endeavours to prevent the use of such legitimate domestic policies as barriers to international trade or as tools to protect domestic markets. Hence the Agreement emphasises five principles: harmonisation, transparency, non-discrimination, avoidance of unnecessary obstacles to trade, equivalence and mutual recognition. The Agreement also acknowledges that developing countries may encounter challenges in complying with the Agreement hence its incorporation of technical assistance and special and differential treatment provisions.

6 2 1 Gaps in the harmonisation provision

Chapter 3 of this study reveals that the harmonisation provision has gaps and loopholes in the process of adopting international standards and facilitating the conduct of international trade.[887] The objective of harmonisation is to bring into accord all trade regulations on an international basis. Harmonisation is intended to avoid the emergence of excessive product requirements and assessment procedures, and to encourage the use of norms that have been developed with the approval of the international community.[888] If used effectively it has the potential to eliminate the costs of adjusting to numerous regulations and trading environments.[889] It can also foster less trade disruptions as internationally agreed standards would be in use.[890]

Nevertheless, the shortcomings of the harmonisation provision are that its definitions are imprecise and that it lacks a binding effect or force.[891] It is significant to note that essential terms regarding harmonisation under the TBT Agreement lack proper and meaningful

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[886] Ming Du "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization" available at http://chinesejil.oxfordjournals.org (accessed 04-06-2014).

[887] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of 2011* Legal and Economic Analysis (2013) 218.

[888] Veggel and Elvestand "Equivalence and mutual recognition in Trade Arrangements: Relevance of the WTO and the Codex Alimentarius Commission NILF-Report 2004" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_S.pdf (accessed 04- 10 -2014).

[889] Hoekman and Kostecki *The Political Economy of the World Trading System*: The WTO and Beyond (2009) 192.

[890] *Ibid.*

[891] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of 2011* Legal and Economic Analysis (2013) 218.

definitions[892]which leaves room for members to manipulate the Agreement and further justify their actions against harmonisation.[893] For example the Agreement does not define what is considered 'ineffective or inappropriate'.[894] Such shortcomings make the harmonisation provision unreliable and ineffective with regards to achieving its set goals.

Further, the TBT Agreement does not define what it terms as 'international standards.' [895] Such a gap undermines the whole concept of harmonisation as that which is being harmonised is not identified.[896] Also, the international standards are mostly of a voluntary nature and do not result in binding treaty commitments.[897] Surely, the harmonisation provision should have compulsory requirements if it is to be taken seriously by member states or if it is to function as expected.[898]

Developing countries have raised doubts as to the efficiency and reliability of the harmonisation provision as they struggle to meet or satisfy the standards that are set by developed countries.[899] In the end developing countries are forced to rely on standards that are formulated by developed countries so as to access the international market.[900] It is noteworthy that developing countries do not have an opportunity to be standard setters as they lack the capacity and the resources to formulate standards that could be internationally recognised.[901] Because of the harmonisation provision developing countries will have to adjust their standards to suit those of their target

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[892] *Ibid.*
[893] *Ibid.*
[894] Veggel and Elvestand "Equivalence and mutual recognition in Trade Arrangements: Relevance of the WTO and the Codex Alimentarius Commission NILF-Report 2004" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_S.pdf (accessed 04-10-2014).
[895] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of2011* Legal and Economic Analysis (2013) 218.
[896] *Ibid.*
[897] *Ibid.*
[898] Veggel and Elvestand "Equivalence and mutual recognition in Trade Arrangements: Relevance of the WTO and the Codex Alimentarius Commission NILF-Report 2004" available at http://www.regjeringen.no/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_S.pdf (accessed 04-10-2014).
[899] *Ibid.*
[900] Sherpard "Standards Harmonization and Trade: New Empirical Evidence" available http://siteresources.worldbank.org/DEC/Resources/84797-1154354760266/2807421-11943691000631/4361465-1209126984937/standards-harmonization-and-trade-new-empirical-evidence-pdf (accessed 05-10-2014).
[901] Stephenson "Standards, Conformity Assessment and Developing Countries" 1997 available at http://www-wds.worldbank.org/.../IBI.../102502322-2004111716250pdf. (accessed 02-03-2014).

markets.[902] Needless to say that a proper regulatory policy in respect of the harmonisation provision should be designed and adopted by the WTO in order to empower developing countries in becoming standard setters.[903]

Further, for as long as developing countries lack the capacity to formulate and develop internationally recognised standards the interest of developed countries will always be pursued under the TBT Agreement.[904] Thus the participation of developing countries as standard setters should be improved in order to avoid the dominance of developed countries' interests in global trade.[905] The whole purpose of the TBT Agreement's harmonisation provision could be hindered or defeated if the interests of developing country members are not represented.

Harmonisation is a significant pillar of both the TBT Agreement and international trade.[906] Thus the TBT Agreement emphasises that all WTO members should recognise all international standards and base their domestic technical regulations and standards on them.[907] Hence members who base their technical regulations and standards on international standards greatly benefit from this provision.[908] With regards to developing countries their lack of resources and capacity to initiate standards may mean that they cannot fully benefit from the harmonisation provision.[909] Hence the developing countries should be assisted in order to enable them

[902] Macrory *et al* "The World Trade Organisation: Legal, Economic and Political Analysis" http://people.brandeis.edu/~rmccullo//wp/environmentWTO2005.pdf.(accessed 04 -10 -2013).
[903] *Ibid.*
[904] *Ibid.*
[905] Appleton 'Environmental Labelling Schemes Revisited: WTO Law and Developing Countries" in Sampson and Chambers (eds) *Trade, Environment, and the Millennium* (1999) 259.

[906] McDonald "Domestic Regulation, Harmonization, and Technical Barriers to Trade" available http://iit.adelaide.edu.au/docs/jan%20McDonald.pdf (accessed 12-09-2014).
[907] Article 2.4 of the TBT Agreement 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 fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."
[908] Essaji Technical Regulations and Specialisation in International Trade "Journal of International Economics" 2008 available at www.sef.hku.uk/~/Papers/TBT-TradeR4R111218.pdf (accessed 22-06-2014).
[909] Sampson and Chambers (eds) *Developing Countries and the WTO: Policy Approaches* (2008) available at http://www.unu.edu/unupress/sample-chapters/developing_countries_and_the_WTO_web.pdf. (accessed 25-04-2014).

participate in the development of international standards. Further, international standards should be based on the consensus of all members to ensure that their interests are represented.

6 2 2 The use of relevant international standards

International standards are a vital part of the TBT Agreement. The Preamble to the Agreement recognises the value of international standards for improving the efficiency of production and facilitating international trade, and also encourages the development of these standards.[910] International standards can be used to regulate global trade and to avoid unnecessary barriers to trade. If used effectively international standards can be a weapon for alignment on a global scale and for creation of harmony of technical regulations and standards among members.[911]

However, chapter 5 of this study reveals that although international standards are core to the TBT Agreement it nowhere defines these standards. The lack of a definition for international standards in the Agreement leaves a degree of flexibility with respect to the choice of standards, and their manner of use.[912] This flexibility has given rise to WTO disputes in particular the *EC-Sardines* case[913] discussed in chapter 5 of this study. Such flexibility is evident in Article 2.4 which emphasises that members should use relevant international standards as a basis for their technical regulations. This leaves room for a WTO member to argue that an international standard is not relevant in a particular policy situation.[914] Also members only have an obligation to use the relevant standard as a basis for their regulations which in turn creates a gap in terms of application as the standards do not necessarily have to be applied word-for-word.[915]

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[910] The Preamble of the TBT Agreement states that "Recognizing the important contribution that international standards... can make in this regard by improving efficiency of production and facilitating the conduct of international trade."

[911] Wijkstrom and McDaniels "International Standards and the WTO TBT Agreement: Improving Governance for Regulatory Alignment 2013" available at www.wto.org>resources>researchandanalysis>workingpapers. (accessed 09 – 09 -2014).

[912] The Preamble of the TBT Agreement states that "Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries."

[913] United Nations "Reflections On A Future Trade Facilitation Agreement: Implementation of WTO obligations A comparison of existing WTO provisions" available at http://unctad.org/en/PublicationsLibrary/dtltlb20102-en.pdf. (accessed 05-05-2014).

[914] *Ibid.*

[915] *Ibid.*

Also significant to note is that international standards are mostly of voluntary nature and do not result in binding treaty obligations. As such a few of these standards are a creation of nongovernmental bodies or private/public partnerships where industry is the driving force.[916] This leads to a broad range of normative material, including privately generated norms from developed countries, being converted into international legal obligations.[917] Such a gap in the TBT Agreement has the potential to cause developing countries to be sidelined as they lack the capacity to generate norms that can be transformed into legal obligations nor have the status to be recognised as "standard setters."[918]

Furthermore developing countries worry about the non-consensus based approach used in the formulation of international standards. As such developing countries have stated that greater transparency is necessary with regards to the application of international standards and that attempts should be made to ensure that the standardisation process represents the interests of all members.[919] Such outcome can only be achieved if the capacity of developing countries to participate in the standardisation process is enhanced.[920]

Further the TBT Agreement does not attempt to list the international regimes that promulgate international standards (within the meaning of Article 2.4).[921] This is problematic in that it leaves room for member states to choose as to which bodies set the international standards that are relevant for the purposes of the TBT Agreement.[922] Needless to say that members tend to disagree on the bodies that set the standards as was the case in *EC-Sardines* where the parties disagreed as to whether the Codex Stan 94 established by the CODEX Alimentarius Commission

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[916] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of 2011* Legal and Economic Analysis (2013) 219.
[917] *Ibid.*
[918] *Ibid.*
[919] Motaal "The Agreement on Technical Barriers to Trade, the Committee on Trade and Environment, and Eco-Labelling" in Sampson and Chambers (eds) *Trade, Environment, and the Millennium* (1999) 279.
[920] Appleton "Environmental Labelling Schemes Revisited: WTO Law and Developing Countries" in Sampson and Chambers (eds) *Trade, Environment, and the Millennium* (1999) 259.
[921] Howse and Levy "The TBT Panel: US-Clove, US-Tuna, US-Cool" in Bown and Mavroidis (eds) *The WTO Case Law of 2011* Legal and Economic Analysis (2013) 219.
[922] United Nations "Reflections On A Future Trade Facilitation Agreement: Implementation of WTO obligations. A comparison of existing WTO provisions" available at http://unctad.org/en/PublicationsLibrary/dtltlb20102-en.pdf. (accessed 05-05-2014).

was a relevant international standard for the resolution of the dispute.[923] If such TBT Agreement loopholes are not dealt with conflicts among member states will continue to arise as members have different opinions regarding the choice of international regimes that should set international standards.[924] Perhaps the WTO TBT regulatory bodies should ensure that international standardising bodies are identified in the TBT Agreement to avoid future disputes.

6 2 3 The Appellate Body's preference of Article 2.1 over Article 2.2 of the TBT Agreement

Chapter 4 of this study reveals the Appellate Body's preference to resolve TBT disputes under Article 2.1 which upholds the principle of non-discrimination instead of ruling under Article 2.2 which states that a measure should not be more trade restrictive than necessary.[925] A complaining party faced with the burden of proving that the objective of a measure is protectionism is likely to also bring a claim under Article 2.1. Seemingly the Appellate Body in the *US-COOL* case provided Panels with the tools to resolve cases under Article 2.1 instead of ruling under Article 2.2.

In a discussion of the *US-COOL* case in chapter 4, this study dealt with the question whether the measure at issue violated the TBT Agreement's national treatment obligation in Article 2.1. To establish this fact the WTO Panel had to examine amongst other things whether the measure treated Canadian and Mexican products less favorably than products from the US.[926] The Appellate Body on appeal held that the measure modified the conditions of competition to the detriment of the imports.[927] It stated that the detrimental impact was due to arbitrary and unjustifiable discrimination because it could not be explained by a legitimate regulatory distinction.[928] Accordingly, because the Appellate Body found the regulatory distinctions to be arbitrary and the disproportionate burden imposed on upstream producers and processors to be

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[923] *Ibid.*
[924] *Ibid.*
[925] Appellate Body Report *United States - Certain Country of Origin Labelling Requirements* (*US-COOL*) WT/DS384/AB/R *para* 468.
[926] Panel Report *United States - Certain Country of Origin Labelling Requirements* (*US-COOL)* WT/DS384/R para 7.302.
[927] Appellate Body Report *US – COOL* para 349-350.
[928] Appellate Body Report *US – COOL* para347-350.

unjustifiable, it ruled that the COOL measure treated imported livestock less favorably than domestic livestock, and was thus inconsistent with Article 2.1.[929] Needless to say that the Appellate Body's findings implied that the COOL measure was more trade restrictive than necessary to fulfill its objective and thus contrary to Article 2.2.

Also significant to note is that the Appellate Body in the *US-COOL* case rejected the complainants' claim under Article 2.2 when in actual fact it affirmed it under its assessment of Article 2.1. In order to prevail against a technical regulation under Article 2.2, a complaining party would need to identify the regulation's legitimate objectives; demonstrate how little the regulation actually fulfills them and how much it restricts trade; identify alternatives and demonstrate that the alternatives would be less trade-restrictive.[930] The Appellate Body decisions indicate that it will be very difficult for complaining countries especially developing countries to succeed with Article 2.2 claims as a case of this sort may be very demanding and costly.[931]

According to Pauwelyn if it were assumed that providing consumers with information on country of origin was a legitimate goal as the Appellate Body found, this would lead to the side lining of imported meat as such meat would be processed and labelled differently and retailers would be forced to opt for domestic meat.[932] In this regard she states that the problem with the COOL measure would not so much be one of discrimination (TBT Art. 2.1) but rather whether the labelling requirements are more trade restrictive than necessary (TBT Art. 2.2).[933] Hence according to Pauwelyn the Appellate Body put too much into Art. 2.1, including elements that one would have expected to be analysed under Art. 2.2.[934] As such this ruling sets an unjust precedent for future TBT Agreement disputes. TBT adjudicating bodies are now forced to

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[929] Appellate Body Report *US – COOL* para 347-350.

[930] Meltzer *et al* "Beyond Discrimination? The WTO Parses the TBT Agreement in US – Clove Cigarettes, US – Tuna II (Mexico) and US – COOL" available at http://www.lawuninel.edu.au/file/dmfile/11MeltzerPorges-Depaginated.pdf (accessed 08-04-2014).

[931] *Ibid.*

[932] Pauwelyn "*COOL..but what is left now for TBT Art. 22?*" *International Economic law and Policy Blog* available at http://worldtradelaw.typepad.com/ielpblog/2012/07/cool-but-what-is-left-now-of-tbt-art22.html?utm_source_feedburne&utm_medium=feed&htm_campaign=Feed%3Atielpblog+%28International+Economic+Law+and+Policy+Blog%29(accessed 09-04-2014).

[933] *Ibid.*

[934] Pauwelyn "*COOL..but what is left now for TBT Art. 22?*" *International Economic law and Policy Blog* available at http://worldtradelaw.typepad.com/ielpblog/2012/07/cool-but-what-is-left-now-of-tbt-art22.html?utm_source_feedburne&utm_medium=feed&htm_campaign=Feed%3Atielpblog+%28International+Economic+Law+and+Policy+Blog%29(accessed 09-04-2014).

consider the Appellate Body's findings when faced with a similar dispute.[935] Furthermore, such findings tend to undermine the regulatory power of the WTO and its aim to facilitate international trade in a free, fair and transparent manner.[936] The TBT Agreement should therefore be made more clear and accurate when it comes to the difference between Article 2.1 and Article 2.2 so as to avoid such a controversy in future.

6 2 4 Strengthening of the special provisions for developing countries

For developing countries to benefit substantially from the TBT Agreement there is a need for developed countries to support them in their pursuit of market access. The aim of the special provisions for developing countries in the TBT Agreement is to assist these countries to fully participate in international trade and also benefit from it.[937] The provisions acknowledge both the special problems and the special needs of developing countries with regards to the implementation of the TBT Agreement and the [illegible]tion and application of technical regulations, standards and conformity assessment procedures.[938] The Agreement also recognises that developing countries may encounter [illegible] in conforming to international standards and regulations, hence the technical assistance provision and those of special and differential treatment embodied in Articles 11 and 12 of the TBT Agreement.[939] These were designed to ensure that such challenges are minimized to the greatest extent possible in order for developing countries to fully engage in international trade without fear or discrimination.[940]

However the strength of these provisions is based on their enforceability. The discussion of the provisions in Chapter 3 indicates the lack of obligatory force to compel developed countries to provide assistance to developing countries. This study has shown that these provisions are not

[935] Meltzer *et al* "Beyond Discrimination? The WTO Parses the TBT Agreement in US – Clove Cigarettes, US – Tuna 11 (Mexico) and US – COOL" available at http://www.lawuninel.edu.au/file/dmfile/11MeltzerPorges-Depaginated.pdf (accessed 09-04-2014).
[936] *Ibid.*
[937] Michalopous Special and Differential Treatment: The need for a different approach in Sampson and Chambers (eds) *Developing Countries and the WTO: Policy Approaches* (2008) available at http://www.unu.edu/unupress/sample-chapters/developing_countries_and_the_WTO_web.pdf. (accessed 25-04-2014).
[938] *Ibid.*
[939] *Ibid.*
[940] WTO 2013 News items –"Members grapple with certifying products, and certifying the certifiers" available at http://www.wto.org/english/news_e/news13_e/tbt_29oct13_e.htm (accessed 02-04- 2014).

legally binding and developing countries have raised concerns as to their reliability.[941] It has been suggested that legal obligations in the TBT Agreement should be balanced with legal commitments of developed countries to fund assistance to developing countries.[942]

Further, developing countries have raised concerns about the language used in these provisions. According to these countries the language used is only theoretically mandatory and allows considerable flexibility in its implementation.[943] It has also been suggested that the soft language used in the provisions significantly contributes to their non-binding nature.[944] Worth mentioning here is the use of the term 'shall' in the provisions which sounds mandatory but lacks legal enforceability regarding implementation. The effective formulation and implementation of these provisions would enable developing countries to significantly benefit from international trade. Hence special attention should be given to these provisions with regards to tightening the gaps that permit developed countries to escape their obligations.

The effects of the nature of the special and differential treatment provisions were revealed in the discussion of the *US-COOL* case in chapter 4. The WTO Panel failed to promote and protect the efficacy of the special and differential needs provisions.[945] No improvement was made or advancement added to the interpretation of the provisions in this case. Mexico had argued that its special development, financial and trade needs as a developing country were not taken into account in ensuring that the US measure did not create unnecessary obstacles to its exports and thus violated Article 12.3 of the TBT Agreement.[946] Mexico further argued that the provisions required that developing countries' special needs be prioritised.[947] The Panel held that various

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[941] The provision does not specify, how WTO member have to take account of the special needs of developing countries in implementing the TBT Agreement. See United Nations "Reflections On The Future Trade Facilitation Agreement: Implementation of WTO Obligation; A Comparison of existing WTO provisions" available at http://unctad.org/en/PublicationsLibrary/dtltlb2010-en.pdf. (accessed 24-04-2014).

[942] *Ibid.*

[943] Kasteng "Differentiation between Developing Countries in the WTO" available at http://www2.jordbriksverket.se/webdav/files/sjv/trycksaker/.../ra04_14e.pdf. (accessed 24 – 10 – 2014).

[944] United Nations "Reflections On The Future Trade Facilitation Agreement: Implementation of WTO Obligation: A Comparison of existing WTO provisions" available at http://unctad.org/en/PublicationsLibrary/dtltlb2010-en.pdf. (accessed 24-04-2014).

[945] Panel Report *US – COOL* para 7.799.

[946] Panel Report *US – COOL* para 7.737.

[947] *Ibid.*

paragraphs of Article 12 contain a number of separate and different obligations and that Article 12.3 creates a specific obligation to take account of developing country needs in the implementation of the TBT Agreement at a national level.[948]

The WTO Panel further stated that 'taking account of' and 'taking into account' of the special needs of developing countries meant to consider but not necessarily to act in line with the specific need, view or position under consideration.[949] The Panel ruled that the expression 'take account of' meant to consider along with other factors before reaching a decision and thus Article 12.3 does not require members to conform their actions to the special needs of developing countries but to merely give consideration to such needs along with other factors before reaching a decision.[950] Thus the fact that Mexico was not granted special and differential treatment does not mean that its developmental needs were not taken into consideration.[951] Undoubtedly the approach adopted by the Panel in making its assessment greatly undermined the importance of the special and differential treatment provisions. The Panel's approach was to the disadvantage of the developing countries and certainly made the future appear bleak for developing countries with regards to their participation in international trade. This study's analysis of the *US-COOL* case reveals the non-binding nature of the special provisions and their flexible nature which allows developed countries to use them against developing countries.

Additionally, the special provisions fail to take into consideration the significant differences between the developing countries through its 'one size fits all' approach.[952] As such special attention to the specific assistance that each developing country needs is not provided. In this respect mechanisms to provide specific technical assistance tailored to the special and differential needs of each developing country should be designed. Special and differential needs

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[948] Panel Report *US – COOL* para 7.759.
[949] Panel Report *US – COOL* para 7.781.
[950] Panel Report *US – COOL* para 7.799.
[951] *Ibid.*
[952] Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreement" available at http://www://.google.com/ur/?sa=t&tct=j&q=8esrc=s&frm=1&source=web&cd=2&ved=OCDMQFJAB&URF=http%3A%2Fwww.wto.org%2Fenglish%2trato (accessed 03 – 04 – 2014).

assistance would be more effective when tailored to specific needs.[953] This would enable developing countries to significantly benefit more from global trade.

6 3 CONCLUSION

The study demonstrates that developing countries face greater challenges in entering the global market as compared to their counterparts from developed countries. Such challenges emanate from their disadvantaged economies that lack resources and finances to meet required technical standards. In the end developing countries are forced to adapt to stringent technical regulations, standards and conformity assessment procedures in order to be able to participate in the global market.[954] Thus the special provisions designed for developing countries are fundamental to their beneficial participation in global trade. However, for these provisions to benefit developing countries their enforceability must be enhanced. The success of developing countries in the trading system depends on the implementation of special provisions that will not only help them to comply with their WTO obligations, but also facilitate their effective participation in the multilateral trading system.[955]

This study also reveals that these special provisions are often interpreted in a strict manner. The strict interpretation of the provisions is judged on the interpretation adopted by the WTO Panel in the *US-COOL* case. For developing countries the application of strict interpretations of the provisions unlocks doors for protectionist tendencies which in the long run impede their access to the global market.[956] The accommodation of developing countries' interests in the TBT Agreement is crucial if it is to be recognised as a tool for opening up that market.

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[953] United Nations "Reflections On The Future Trade Facilitation Agreement: Implementation of WTO Obligation: A Comparison of existing WTO provisions" available at http://unctad.org/en/PublicationsLibrary/dtltlb2010-en.pdf. (accessed 24-04-2014).

[954] Kessie "Enforceability of Legal Provisions Relating to Special and Differential Treatment under the WTO Agreement" available at http://www://.google.com/ur/?sa=t&tct=j&q=8esrc=s&frm=1&source=web&cd=2&ved=OCDMQFJAB&URF=http%3A%2Fwww.wto.org%2Fenglish%2tratop_e. (accessed 03 – 04 – 2014).

[955] *Ibid.*

[956] Michalopous Special and Differential Treatment: The need for a different approach in Sampson and Chambers (eds) *Developing Countries and the WTO: Policy Approaches* (2008) available at http://www.unu.edu/unupress/sample-chapters/developing_countries_and_the_WTO_web.pdf. (accessed 25-04-2014).

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