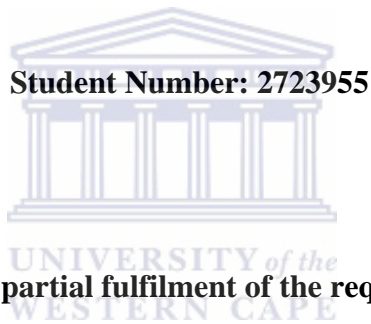


An Analysis of the Law, Practice and Policy of the WTO Agreement on Technical Barriers to Trade in relation to International Standards and the International Organization for Standardization: Implications for Least Developed Countries in Africa

Tonny Okwenye



**A mini-thesis submitted in partial fulfilment of the requirements for the degree of
Magister Legum in the Faculty of Law, University of the Western Cape**

Supervisor: Mr. John Edward Hunt

October 2007

Abstract

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A mini-thesis submitted in partial fulfilment of the requirements for the degree of Magister Legum in the Faculty of Law, University of the Western Cape.

This study examines the legal and policy objectives of the World Trade Organisation (WTO) Agreement on Technical Barriers to Trade (TBT) with specific reference to international standards and the International Organisation for Standardisation (ISO). The study sets out the history and development of the TBT Agreement and the relationship between the TBT Agreement and selected WTO Agreements. The study also explores the application and interpretation of the TBT Agreement under the WTO dispute settlement system. More importantly, the study addresses the legal, policy and practical implications of the TBT Agreement for Least Developed Countries (LDCs) in Africa. A central argument put forward in this study is that, albeit international standards have been recognised as an important tool for LDCs in Africa to gain access to foreign markets, there is no significant 'political will' and commitment from the key players in standardisation work, that is, the national governments, the private sector and the ISO. At the same time, some developed and developing countries tend to use their influence and involvement in the activities of the ISO as a means of promoting the use and adoption of their homegrown standards. The study proposes, among others, that a more participatory approach which encompasses representatives from consumer groups, the private sector and non-governmental organisations (NGOs) from these LDCs in Africa, should be adopted.

October 2007

Keywords

Africa
Developed Countries
Dispute Settlement
International Organisation for Standardisation
International Standards
Least Developed Countries
Standards
Technical Barriers to Trade
TBT Agreement
World Trade Organisation



Declaration

I declare that *An Analysis of the Law, Practice and Policy of the WTO Agreement on Technical Barriers to Trade in relation to International Standards and the International Organisation for Standardization. Implications for Least Developed Countries in Africa* is my work, that it has not been submitted before for any degree or examination in any other university and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Tonny Okwenye

Signed



October 2007

Dedication

To my family: Whose love, patience and trust have inspired me; whose support, encouragement and counsel have motivated me; and whose smiles and laughs I shall always remember.

Tonny



Acknowledgements

It is a great pleasure to thank the special people who made this thesis a possibility.

I'm grateful to my lecturer and supervisor, Mr. John E. Hunt. With his enthusiasm and inspiration, he introduced me to WTO law; a 'new area of law with a rich history.' Throughout the writing of the thesis, he provided me with encouragement, advice and insight. I would not have completed it without him.

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I also thank Mr. Patrick Rata, Mrs. Una Flanagan and Ms. Kerry Allbeury of the WTO for sending me the background papers and presentations of the WTO workshop held in Botswana. I also extend my appreciation to Mr. John Okumu of the UNBS for his useful comments.

I'm indebted to my dear friends in South Africa for providing a stimulating and exciting environment in which to learn and grow. I'm also grateful to my friends in Kampala and overseas for keeping in touch. I'm thankful to the family of Dr. Chris Kirunda and Dr. Rebecca Kirunda for introducing me to the University of the Western Cape.

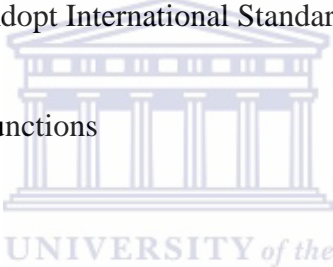
Lastly, and most importantly, I wish to thank my parents for their support, advice, encouragement and enormous contribution towards the successful completion of this work and throughout my academic career.

May the almighty God bless you.

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Abbreviations and Acronyms

ACWL	Advisory Centre on WTO Law
AB	Appellate Body
ARSO	African Regional Organization for Standardization
CAC	Codex Alimentarius Commission
COMESA	Common Market for Eastern and Southern Africa
DDA	Doha Development Agenda
DIS	Draft International Standard
DSB	Dispute Settlement Body
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes
EAC	East African Community
EC	European Communities
EU	European Union
FAO	Food and Agriculture Organization
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
ICTSD	International Centre for Trade and Sustainable Development
IEC	International Electro technical Commission
ISO	International Organization for Standardization
ITU	International Telecommunication Union
LDCs	Least-Developed Countries
MEAs	Multilateral Environmental Agreements
MFN	Most-Favoured-Nation
MLA	Multilateral Mutual Recognition Agreement/Arrangement
MRA	Mutual Recognition Agreement/Arrangement
MTAs	Multilateral Trading Agreements

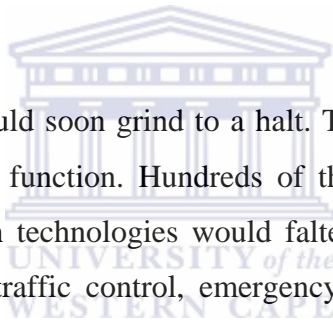
NEP	National Enquiry Point
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organization
NT	National Treatment
NTBs	Non-Tariff Barriers
OECD	Organization of Economic Cooperation and Development
PPMs	Process and Production Methods
RBS	Rwanda Bureau of Standards
SADC	Southern African Development Community
S&D Treatment	Special and Differential Treatment
SPS	Sanitary and Phytosanitary Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBS	Tanzania Bureau of Standards
TBT	Technical Barriers to Trade
TBT Agreement	Agreement on Technical Barriers to Trade
TBT Committee	WTO Committee on Technical Barriers to Trade
TC	Technical Committee
TCBDB	Trade-Related Technical Assistance Capacity Building Database
UN	United Nations
UNBS	Uganda National Bureau of Standards
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WAPI	Wireless Authentication and Privacy Infrastructure
WLAN	Wireless Local Area Network
WTO	World Trade Organisation

Quotes

“Following several rounds of multilateral trade negotiations, quantitative restrictions have basically been abolished and tariff levels of countries have been gradually reduced... Today's and tomorrow's barriers to trade are and will be more in the area of standards...”

Mr. Pascal Lamy,
Director-General of the WTO
Speech in Kuala Lumpur, Malaysia on 17 August 2007.

“A world without standards would soon grind to a halt. Transport and trade would seize up. The Internet would simply not function. Hundreds of thousands of systems dependent on information and communication technologies would falter or fail — from government and banking to healthcare and air traffic control, emergency services, disaster relief and even international diplomacy.”



Mr. Renzo Tani, President of the IEC,
Mr. Hakan Murby, President of the ISO, and
Dr. Hamadoun Touré, Secretary-General of the ITU.

Message for the 38th World Standards Day, 14 October 2007

Under the theme ‘Standards and the Citizen: Contributing to Society’

CHAPTER ONE: INTRODUCTION

1.1 Introduction

Since the inception of the General Agreement on Tariffs and Trade (GATT) in 1947, multilateral trading agreements (MTAs) have led to an increased reduction in tariffs, thereby expanding trade.¹ There have, however, been increased concerns about the use of non-tariff barriers (NTBs), especially the proliferation of national and international standards as disguised barriers to trade.² As a result, multiple and divergent national standards have become prevalent despite the existence of the 1979 Tokyo Round “Standards Code” and the successor to that Code, the Uruguay Round Agreement on Technical Barriers to Trade (TBT) (hereafter referred to as the TBT Agreement).³ At the same time, international standards which do not suit the trade needs, development plans and technological infrastructure in the Least Developed Countries (LDCs) in Africa continue to play a pivotal role in world trade.⁴

¹ Rose (2004) 99; Wilson (2002) 428; Bhala (2001) 499; The GATT entered into force on 1 January 1948 as a provisional agreement and remained so until it was superseded by the World Trade Organization (WTO) framework on 1 January 1995 (Goode (2003) 150). WTO (2005) 29; See WTO official website < http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm > [accessed on 20 April 2007]. The WTO’s main objective is to improve the welfare of the people of the Member countries by expanding the production of, and trade in goods and services. The WTO established some fundamental principles to ensure that its Members support the expansion of trade through standards development.

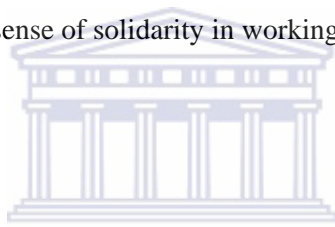
² Marceau and Trachtman (2004) 278; A “standard” is defined as a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory (TBT Agreement, Annex 1 para 2). This definition was interpreted and applied in *European Communities – Trade Description of Sardines*, (hereafter referred to as *EC-Sardines*) WT/DS/231/R, 29 May 2002, Report of the panel WT/ DS 231/ AB/R 26 September 2002, Report of the Appellate Body (AB) in which the AB noted that the definition of the term “standard” in the ISO/IEC Guide includes a consensus requirement and found that “Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a “recognized body” of the international standardization community.” (*EC-Sardines* AB *supra* at para 227). Whereas firms must comply with a technical regulation, they may choose not to comply with a standard (Maskus and Wilson (2000) 15). The TBT Agreement is reproduced in Annexure A.

³ WTO (1999) 121; The “Standards Code”, a plurilateral agreement on TBT was signed at the conclusion of the Tokyo Round in 1979 by thirty two (32) Contracting Parties to the GATT (WTO (2005) 29). The “Standards Code” covered mandatory and voluntary technical specifications, mandatory technical regulations and voluntary standards for industrial and agricultural goods (Marceau and Trachtman *loc cit*). In contrast, the Uruguay Round TBT Agreement covers standards drafted as process or production methods (PPMs) if product related. It contains provisions for the harmonization, reduction and elimination of such barriers (TBT Agreement, Preamble, Articles 1 to 15 and Annexes 1 to 3).

⁴ In this thesis, LDCs in Africa refer to those countries which have been designated as such by the United Nations and are Members of the WTO. These are: Angola, Benin, Burkina Faso, Burundi, Central African Republic,

Some Member countries have exploited the “claw back provisions” relating to international standards under the TBT Agreement as a means of limiting imports into their territories and at the same time promoting their homegrown standards within the framework of International Organization for Standardization (ISO),⁵ a leading international standardization body.⁶ These methods have not only been seen as an abuse of international obligations but also as an obstacle to international trade with dire consequences to developing countries and most particularly the LDCs in Africa.⁷ Yet, international standards have been, and shall remain, an important and necessary means of addressing global issues, some of which shall be the focus of this thesis.⁸ As Prof. Masami Tanaka, the former President of the ISO, rightly observed:

“...International standards have the power to connect the world’s peoples in coordinated activities addressing global issues.... In the end, all we produce are “documents”, strings of words and symbols in print and electronic files. But documents can change the world, giving people the chance to form a sense of solidarity in working to solve global problems...”⁹



Chad, Congo, Democratic Republic of Djibouti, Gambia, Guinea, Guinea Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda and Zambia. See WTO official website

< http://www.wto.org/English/thewto_e/whatis_e/tif_e/org7_e.htm > [accessed on 20 April 2007]. For purposes of a detailed analysis of the topic, however, the thesis focuses on Rwanda, Tanzania and Uganda. A list of these LDCs is reproduced in Annexure C.

⁵ Claw back provisions in this context refer to those provisions under the TBT Agreement which permit a member to limit the application of voluntary standards, such as paras 6 and 7 of the Preamble, Articles 2.2, 2.10, 5.4, 5.7 and para F of Annex 3 of the TBT Agreement. Countries which have used these “claw back provisions” include: the European Communities (all Member states of the EU), the United States of America (US), Belgium, India, Japan, Netherlands and China (Minutes of the TBT Committee, 31 July 2006 G/TBT/M/39. See WTO official website < <http://docsonline.wto.org/...> > [accessed on 20 April 2007]).

⁶ The ISO is a “standard-setting” body composed of representatives from national standards bodies and was founded on 23 February 1947 as a Non-Governmental Organization (NGO) with the aim of producing world-wide industrial and commercial standards (See ISO official website

< <http://www.iso.org/iso/en/aboutiso/introduction/index.html#two> > [accessed on 20 April 2007]. The ISO has published over fourteen thousand nine hundred (14,900) international standards (WTO (2005) 29); Other internationally recognized standards groups are: Codex Alimentarius Commission (CAC), International Electro technical Commission (IEC), and International Telecommunication Union (ITU), *inter alia*. This study will, however, focus on the activities of the ISO.

⁷ Charnovitz (2002a) 1; WTO (2005) 29; See also Mutume, G ‘Africa: EU Uses Safety Standards to Lock Out Africa Exports’ The East African 21 February 2007

< <http://allafrica.com/stories/200602210959.html> > [accessed on 20 April 2007].

⁸ Some of the issues to be addressed include sustainable development, free trade and market access.

⁹Address under Agenda Item 1.1 of the 29th ISO General Assembly, Ottawa, Canada, 13 September 2006.

While the use of international standards aims at harmonizing standards, international standards can also be significant barriers to trade.¹⁰ In fact, at the Uruguay Round the Members of the WTO agreed, within the context of the TBT Agreement, that in circumstances where technical regulations do not exist, international standards should be used as the basis of technical regulations.¹¹

For the LDCs in Africa which lack the skilled personnel, resources and infrastructure to deal with these challenges, the concerns relative to multiple and divergent standards still remain, despite the technical assistance, and special and differential (S&D) treatment accorded to them by the WTO. These TBT have been identified as a major issue by international institutions.¹² According to the World Bank,¹³ these concerns are multi-faceted and stem from:

- a) The “suspicion that important standards and technical regulations can, and will, be used as a trade protection measure and be applied in a discriminatory manner”;
- b) The contention that these LDCs “lack the administrative, technical and other capacities to comply with the emerging requirements”; and
- c) The “proposition that such institutional weaknesses and rising compliance costs will serve to marginalize weaker economic players” such as small enterprises and small-scale farmers in these countries.¹⁴

¹⁰ In this thesis, “technical barriers to trade”, refer to the use of standards as a means of protecting domestic producers, with the objective of promoting local industry (UNCTAD (2003) 3); TBT also extend to “invisible barriers to trade”, which are defined as, “government regulations that do not directly restrict trade, but indirectly impede free trade by imposing excessive or obscure requirements on goods sold within a country, especially imported goods.... Examples include labeling requirements...size or measurement standards.” (Hinkelman (2002) 107).

¹¹ TBT Agreement, Article 2.4.

¹² These international institutions include: the World Bank, United Nations Conference on Trade and Development (UNCTAD) and the Organization of Economic Cooperation and Development (OECD); Fontage, L *et al.* ‘Estimating the Impact of Environmental SPS and TBT on International Trade’ 2
< http://team.univ-paris1.fr/teamperso/fontagne/papers/LFMMJMP_A_publi.pdf > [accessed on 20 April 2007].

¹³ The World Bank consisting of the International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) offers financial and technical assistance to developing countries around the world. See World Bank official website < <http://web.worldbank.org/...> > [accessed on 20 April 2007].

¹⁴ See World Bank official website < <http://go.worldbank.org/NNH7VQY1Z0> > [accessed on 20 April 2007].

Despite these concerns, however, in *EC-Sardines*,¹⁵ the AB differed from the panel's ruling and found that:

“... the burden of proof rests with Peru to demonstrate that Codex Stan 94 is an effective and appropriate means to fulfill those “legitimate objectives”... of the EC regulation.”¹⁶

This finding implies that the complaining party would have to speculate on the legitimacy of the objectives pursued by the responding party, since the complaining party lacks reliable and adequate information about the measure or regulation imposed by the responding party.¹⁷ The lack of adequate information and technical expertise and the intricacies which surround bringing a case before the WTO dispute settlement body (DSB), would therefore make it difficult for a LDC in Africa to challenge such a regulation.

In the same matter, the AB rejected the European Communities' (EC) argument regarding the interpretation of Article 2.4 of the TBT Agreement on the use of “relevant international standards” as a basis for their technical regulations. The AB made it clear that a Member could not ignore relevant international standards and must therefore use international measures “as a basis” for domestic measures.¹⁸ The AB also found that the obligation to use international

¹⁵ In that dispute Peru challenged Council Regulation (EEC) No.2136/89 (the EC Regulation), which laid down marketing standards for preserved sardines. The EC Regulation stipulated that only one species of fish – *Sardine Pilchardus Walbaum*, could be named “sardines”. Thus, *Sardinopus Sagax*, which inhabited the coastal waters of Peru and Chile, could not be identified in the European Market as - “*Sardines*”. Canada, Chile, Colombia, Ecuador, the United States and Venezuela participated in the panel proceedings as third parties (*EC-Sardines* panel *supra* at para 2.1 to 6.1; See also McDonald (2005) 253ff.

¹⁶ *EC-Sardines* AB *supra* at para 315(g). Though, Peru, a small developing country prevailed over the EC, the analysis and findings of the AB regarding the shifting of the burden of proof and the increasing influence of international standard setting bodies pose difficult questions for developing countries that export their products (Shaffer, G and Mosoti, V ‘*EC Sardines: A New Model for Collaboration in Dispute Settlement? Bridges Comment*, 16

< http://www.trade-environment.org/page/ictsd/Bridges_Monthly/sardines_case_10_02.pdf > [accessed on 25 April 2007]).

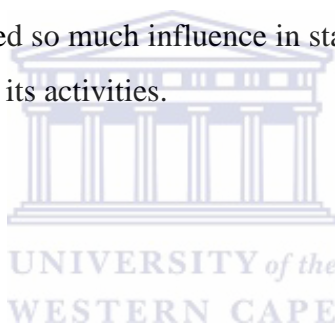
¹⁷ Horn and Weiler (2004) 21.

¹⁸ *EC-Sardines* AB *supra* at para 258; McDonald *op cit* 254ff.

standards is qualified in certain important respects.¹⁹ The AB's findings were therefore not in agreement with the EC' submissions to the panel that:

“...there is no obligation to review and amend existing technical regulations whenever an international standard is adopted or amended and that such obligation would turn standardization bodies virtually into “world legislators”...”²⁰ [Emphasis added]

A central argument put forward in this thesis is that the participation of national standardization bodies of the LDCs in Africa (as Member, correspondent and subscriber Member bodies of the ISO),²¹ in the activities of the ISO, is limited by, among others, lack of resources and qualified personnel.²² In contrast, countries which are able to develop their own standards, like the US and China, always strive to increase their influence in the ISO.²³ To this end, these countries have used the ISO to impose their homegrown standards onto the rest of the world.²⁴ The ISO has acquired so much influence in standardization work and yet LDCs in Africa do not fully participate in its activities.



¹⁹ For example, when such international standards or relevant parts would be ineffective or inappropriate means for the fulfillment of legitimate objectives pursued. The AB also agreed with the panel that legitimate objectives referred to under Article 2.4 should be interpreted in the context of Article 2.2 namely; national security requirements, the prevention of deceptive practices, protection of human health, or the environment. Further, given the use of the term, “*inter alia*” (as used in Article 2.2 of the TBT Agreement), the objectives covered by the term, “legitimate objectives,” in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2 (*EC-Sardines AB supra* at para 286).

²⁰ *EC- Sardines* panel *supra* at para 7.77; McDonald *op cit* 259.

²¹ A correspondent Member is defined by the ISO as a Member usually an organization in a country which does not yet have a fully developed national standards activity. Correspondent Members do not therefore play an active role in standardization work but are usually informed about the work of interest to them. In contrast, a subscriber member, usually small economies, pay reduced membership fees which allow them to maintain contact with international standardization (See ISO official website < <http://www.iso.org/iso/en/aboutiso/isomembers/index.html> > [accessed on 20 April 2007]).

²² The WTO encourages its Members to participate in the activities of the ISO. See Olanyo, J ‘Uganda Cannot Meet WTO Requirements’ *Financial Times*, 31 March 2006 < <http://web.lexis-nexis.com/professional/...> > [accessed on 15 May 2007].

²³ Velikov, V ‘Incorporation of High Level Regional and International Standards into National Standardization Systems – A model for Global Administration Law?’ < <http://www.cdams.kobe-u.ac.jp/archive/dp07-5.pdf> > [accessed on 15 June 2007].

²⁴ See Lovelace Consulting ‘China Adopts Homegrown DTV Standard’ *Digital TV News* 11 September 2006 < <http://www.dtg.org.uk/news/news.php?id=1923> > [accessed on 15 April 2007]; Velikov *op cit* 17.

Although standards development is of great importance for LDCs in Africa to gain access to EU and US markets,²⁵ the standardization bodies in these countries are inadequately funded by their national governments.²⁶ At the same time, these LDCs mostly rely on donations and grants from developed countries, which are sometimes unreliable. Thus, most LDCs do not get the opportunity to acquire technological know-how directly and to influence the technical content of standards which are of importance. Furthermore, delegates from these countries do not gain adequate hands-on experience in standardization work that can be put to use in building up their own national infrastructures.

In view of the above, standards development in LDCs would therefore require more time and stronger commitment towards technical assistance from the developed countries. Michalopoulos argues that the problem lies with the weaknesses in the institutional capacity of these LDCs and that extending time limits for implementation may not be the solution.²⁷ Instead, the benefits of S&D treatment in the WTO should be targeted only to low income developing countries.²⁸ In support of this view Michalopoulos argues that, in some cases, the time limits for the extensions have already passed, and there is little evidence that these countries have made sufficient progress in institution building to permit them to implement their obligations fully.²⁹ Although targeting only low income developing countries would be a viable option, one should consider that some of these countries are affected by corrupt

²⁵ The WTO panel's decision in *EC-Sardines* demonstrated how standards can be of great importance for LDCs to gain access to EC and US markets, especially where the developed countries have lowered their tariffs in goods, but adopted other technical methods to foreclose market access (Shaffer and Mosoti *op cit* 15). These countries cannot, however, afford to send their delegates to attend conferences and meetings from time to time (Morikawa, M and Morrison, J 'Who develops ISO Standards? A Survey of Participation in ISO's International Standards Development Processes'

< http://www.pacinst.org/reports/iso_participation/iso_participation_study.pdf > [accessed on 25 April 2007]).

²⁶ For example, in Uganda, the Uganda National Bureau of Standards (UNBS) requires a budget of Ugshs. 12 billion and yet it currently operates on a budget of Ugshs. 4.8 billion (See Obore, C 'Producers, Dealers in Fake Goods Exposed' Daily Monitor 6 August 2007

< <http://www.monitor.co.ug/news/news08062.php> > [accessed on 24 August 2007]).

²⁷ Michalopoulos, C 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization' *World Bank Policy Research Working Paper No. 2388*. See World Bank official website < <http://www.wds-worldbank.org/...> > [accessed on 25 April 2007].

²⁸ Michalopoulos *ibid*.

²⁹ Michalopoulos *ibid*.

practices.³⁰ In addition, one must have regard to the levels of “political will” and commitment in support of the national standardization bodies which exist in some of these LDCs.³¹

Meanwhile, some of the products from these countries cannot gain access to foreign markets because they do not comply with the required international standards set by international standardization bodies.³² Even those products which meet such standards and have access face stringent time consuming conformity tests.³³

The following is a synopsis of this dilemma:

Dilemma: Company “X”

Domestic Constraints

Company “X”, a local fish company in Uganda (a LDC) wishes to export its products to the EU and US markets.³⁴ To ensure that its products are “ISO Certified”, the company would have to employ an expert familiar with the relevant national and international standards. In addition, the company would have to purchase very expensive laboratory equipment. This would inevitably increase its production costs to unprecedented levels.³⁵ The UNBS, a government body charged with the duty of ensuring compliance to standards and quality, does not have proper structures and institutions in place for standards development. In fact, 70 percent of its standards are

³⁰ The 2007 Transparency International Corruption Perceptions Index (CPI) results show that whereas some African countries such as Namibia, South Africa, Seychelles and Swaziland had high scores, there was a significant drop in perceived levels of some other African countries, particularly the LDCs. An indication that corruption is still a serious challenge for most developing countries in Africa. For more details, see Transparency International official website

< http://www.transparency.org/policy_research ...> [accessed on 1 October 2007].

³¹ For instance, Uganda’s current Poverty Eradication Action Plan (PEAP) does not adequately address the trade issues which arise from the WTO (Rudaheranwa, N and Atingi-Ego, V B, ‘Uganda’s Participation in WTO Negotiations’ WTO official website

< http://www.wto.org/english/res_e/booksp_e/casestudies_e/case41_e.htm > [accessed on 13 June 2007]); John Okumu, a senior materials engineer and standards officer of the UNBS also suggests that the Government of Uganda should provide sufficient funding to the UNBS (Communication Between the Author and John Okumu, 28 June 2007 to 24 July 2007 – Available on file with the Author).

³² Wilson *op cit* 432.

³³ Wilson *ibid*.

³⁴ On 1st January 1995, Uganda, as a state party to the Marrakesh Agreement Establishing the WTO entered into the TBT Agreement as part of the single undertaking principle.

³⁵ The findings of the OECD show that the costs of meeting differing standards and technical regulations in its Member nations, along with the costs of testing and certification, can amount to between 2 and 10 percent of overall product costs (Wilson *op cit* 431).

international standards.³⁶ Consequently, the UNBS has to base its standards on international standards. The UNBS' participation in the Technical Committee (TC) of the ISO is limited because the Government of Uganda cannot afford to send delegates to all meetings and conferences of the ISO.³⁷ The UNBS also cannot influence the development of the international standards within the Technical Committees of the ISO because it does not have any voting rights. These domestic constraints therefore make it difficult for company "X" to obtain international certification of its products for export to foreign markets.

International Constraints

If Company "X" manages to overcome the domestic hurdle, these fish products would also have to be subjected to lengthy conformity assessment procedures and differing national standards at the various foreign country entry points. In case the company's fish products are rejected by the EU, the US or any other country, the Government of Uganda will have to adduce evidence that the policy objectives of the prohibition are not legitimate, and that the international standards are capable of fulfilling the objectives pursued.³⁸ The ability to do so, however, will also depend on its capacity to enter into negotiations and to bring the case before the DSB.³⁹

In regard to the TBT Agreement enforcement mechanisms within the WTO, there have been very few decided cases involving the interpretation of the TBT Agreement since its inception compared to the more recent Agreement on the Application of Sanitary and Phytosanitary Measures (hereafter referred to as the SPS Agreement), and yet the salient provisions of the TBT Agreement are an issue of much concern, particularly for LDCs.⁴⁰ Macdonald suggests that one of the reasons for this is that the TBT Agreement does not particularly address politically sensitive issues.⁴¹ The complaints before the WTO Committee on Technical Barriers to Trade (hereafter referred to as the TBT Committee), however, show that developed countries seemingly have a lot of interest in this area, and yet the issues raised are not political

³⁶ See UNBS official website < www.unbs.org.> [accessed on 13 April 2007].

³⁷ A survey conducted in 2004 on the participation of ISO Members in ISO's international standards development process shows that Africa's participation in technical committee is only 4 percent and yet the African region represents 30 percent of ISO Membership (Morikawa and Morrison *op cit* 9).

³⁸ McDonald *op cit* 264.

³⁹ Wilson *op cit* 436.

⁴⁰ The *EC- Sardines* matter in 2002 was the first dispute to fully subject the salient provisions of the TBT Agreement to legal interpretation.

⁴¹ McDonald *op cit* 250.

but economic.⁴² It is therefore apparent that LDCs have not fully exploited all their available options under the TBT Agreement and yet standardization (as a potential barrier to trade) continues to affect the development and expansion of trade in those countries. In addition to the above issues, this study will address the question of whether or not LDCs have failed to exercise their rights and obligations embedded in the TBT Agreement.⁴³

The emergence of social, labour and environment standards which are not explicitly covered by the TBT disciplines has also posed difficult questions for LDCs.⁴⁴ These standards aim at encouraging social responsibility, corporate governance and sustainable development.⁴⁵ Although these standards fall outside the TBT Agreement but are within the WTO framework, they have acted as TBT as some countries do not readily accept products and services from countries which do not meet these standards. Hence there is a real need to extend the TBT Agreement to non-product related PPM standards.

1.2 Statement of the Problem

The Contracting Parties to the GATT, and subsequently WTO Members, through the TBT Agreement and its predecessor the “Standards Code” chose to delegate the duty of setting standards.⁴⁶ Several international organizations have therefore been established for this purpose.⁴⁷ In a bid to participate in these international standardization bodies, LDCs in Africa

⁴² Developed countries include: the EC, US and Canada. In respect to the *EC-Sardines* matter, the involvement of the developing countries - Morocco, Ecuador, Chile, Colombia and Venezuela should also not be ignored.

⁴³ Maskus and Wilson argue that standards advanced by developed countries are typically voluntary but could have exclusionary effect when set by a small set of national and industry interests and propose that developing countries should play a greater role in standard setting (Maskus and Wilson *op cit* 20).

⁴⁴ These standards are non-product related PPMs and yet the TBT Agreement covers only PPMs (TBT Agreement, Annex 1 paras 1 and 2).

⁴⁵ Leipzinger (2003) 13.

⁴⁶ Address by the Director-General of the WTO, Pascal Lamy at the 29th ISO General Assembly, WTO News 13 September 2006 WTO official website

< http://www.wto.org/english/news_e/sppl_e/sppl34_e.htm > [accessed on 1 April 2007].


⁴⁷ Internationally recognized standards groups which have been established include: *inter alia*, ISO, CAC, IEC, ITU, United Nations Economic Commission for Europe (UNECE). Some formal standardizers whose standards are used internationally but without a network of national, one per country Member bodies include: American Society for Testing of Materials (ASTM), American Petroleum Institute (API), American Society of Mechanical Engineering (ASME) and Federal Aviation Administration (FAA) (OECD (1999) 25ff). As noted earlier, this work focuses on the ISO.

became Members of the ISO through their national bodies.⁴⁸ They have, however, played a “standard taking” role rather than that of “standard setting”. With the advent of new standards due to technological and climatic changes (such as environmental, technological and social standards) the implementation of the TBT Agreement has become a major concern for LDCs, as many of these countries lack the skilled personnel, resources and infrastructure to deal with these new challenges.⁴⁹

This study investigates the impact of standardization as applied by the ISO, upon progressive liberalization of international trade in Africa, and assesses the impact of the TBT Agreement in selected LDCs in Africa. Most importantly, this study aims to review the ongoing Doha Development Agenda (DDA) and the implementation of the TBT Agreement relative to the position of LDCs. Recommendations and proposals for reform will be made particularly in view of the findings set out in the *EC-Sardines* matter.

1.3 Purpose

The purpose of this thesis is:

- 
- a) To explore the history, growth and development of the TBT Agreement and its relationship with other WTO Agreements.
 - b) To analyze the salient provisions of the TBT Agreement relating to international standards as interpreted by the DSB.
 - c) To explore the role of standardization bodies with special emphasis upon the ISO and its new role in the facilitation and liberalization of international trade in LDCs in Africa.
 - d) To assess the implications of the TBT Agreement in relation to international standards and of the ISO on LDCs in Africa.

⁴⁸ As of this writing, ten (10) national standardization bodies - representatives of LDCs in Africa are correspondent Members. Two (2) are subscriber Members and only two (2) are Member bodies (See ISO official website < <http://www.iso.org/iso/en/aboutiso/isomembers/MemberCountryList.Member> > [accessed on 1 April 2007]).

⁴⁹ See Bonaglia, F and Fukasaku, K ‘Trading Competitively: Trade Capacity Building in Sub-Saharan Africa’ OECD official website < www.oecd.org/dev > [accessed on 1 April 2007].

- e) To investigate whether the needs of these countries have been dealt with in light of the recent developments in the area of standards development and to set out proposals for the way forward.

1.4 Methodology

This study relies heavily on primary sources but also considers secondary sources for up to date information. Thus, data for this thesis has been obtained from the TBT Agreement, WTO case authority, discussion papers, ISO publications, reports, books, journals, and the Internet.

1.5 Scope of the Study

This study covers the following:

- a) The TBT Agreement.
- b) International Standards.
- c) The ISO and the WTO.
- d) Selected LDCs in Africa.



1.6 Overview of Chapters

This study is divided into six chapters, as follows:

- a) Chapter 1 contains the background, purpose and contents of the study.
- b) Chapter 2 focuses on the development of the TBT Agreement and the relationship between it and the GATT, SPS, Agreement on Government Procurement (GPA),⁵⁰ and the General Agreement on Trade in Services (GATS).⁵¹
- c) Chapter 3 explores the key principles relating to international standards and the ISO as contained in the TBT Agreement

⁵⁰ WTO (1999) 383.

⁵¹ WTO (1999) 284.

- d) Chapter 4 examines the interpretation of the provisions relating to international standards under the TBT Agreement by the WTO Dispute Settlement Body, and addresses selected concerns.
- e) Chapter 5 investigates the implications of the TBT Agreement for international standards relative to the position of LDCs.
- f) Chapter 6 contains the conclusion, recommendations and possible solutions.

CHAPTER TWO: THE DEVELOPMENT OF THE TBT AGREEMENT

2.1 Introduction

The emergence of the TBT Agreement was as a result of the need to eliminate NTBs and to balance two conflicting policy objectives, that is, trade liberalization and protectionism.⁵² NTBs in the form of multiple and divergent national standards within the multilateral trading system posed difficult questions for WTO Members.⁵³ The TBT Agreement therefore aimed at striking a fine balance between trade liberalization and protectionism in the area of international standards. In this respect the TBT Agreement covers technical regulations, standards and conformity assessment procedures in relation to goods and PPMs.⁵⁴

The TBT Agreement does not, however, explicitly cover environmental, labour and social standards, since they are not clearly related to PPMs.⁵⁵ There is therefore debate as to whether or not social, labour and environmental standards fall within the TBT Agreement and the WTO system. This work, however, is not an extension of the debate, but rather examines

⁵² Declaration of Ministers Approved in Tokyo on 14 September 1973, Min (73) 1, para 3 (b).

⁵³ Marceau and Trachtman *loc cit*.

⁵⁴ TBT Agreement, Article 1 and Annex 1.

⁵⁵ Environmental standards include Eco-labels. Eco-labeling is a concept which was introduced in 1977 and endorsed in 1992 by 156 countries that were signatories to Agenda 21, at the Earth Summit, United Nations Conference on Environment and Development in Rio Janeiro. Eco-labeling programs are aimed at conserving the environment through, among others, promoting consumer awareness, creating markets for green goods (Melser and Robertson (2005) 50); These non-product related PPMs, unlike PPMs, do not affect the good or service being traded (WTO (2005) 35).

selected issues which relate to international standards under the TBT Agreement. Thus it remains to be seen whether greater provisions should be developed within the TBT Agreement or whether a new agreement will be developed by the TBT Committee as was the case for sanitary and phytosanitary measures.

As a WTO multilateral agreement, the TBT Agreement is also closely linked to other WTO Agreements, such as the GATT, SPS Agreement, GPA and the GATS. In the application of certain barriers to trade, in areas of sanitary measures, services and government procurement, reference is usually made to the TBT Agreement.

Today new forms of international standards have emerged and at the same time the influence of the ISO has grown tremendously.⁵⁶ The ISO has extended its traditional role of promoting the standardization of products, services, processes, materials and systems to developing standards which address most aspects of human activity.⁵⁷ The need to address the flaws in the existing TBT Agreement therefore remains a challenge for WTO Member countries. Stronger commitments by developed country Members on technical assistance ought to be made and the S&D treatment provisions need to be strengthened. These developments would enhance the growth and development of the TBT Agreement and at the same time ensure that its provisions are relevant to LDCs.

This chapter focuses on the history, scope and application of the TBT Agreement and its relationship with other WTO agreements.

2.2 TBT Agreement

The TBT Agreement is the multilateral agreement on TBT, which entered into force on 1 January 1995.⁵⁸ On the one hand, the TBT Agreement ensures that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to trade,

⁵⁶ New forms of standards include environmental, labour, social, and technology standards.

⁵⁷ See Patir, Z 'Participating in the Future International Standard ISO 26000 on Social Responsibility' ISO official website < [http://isotc.iso.org/...](http://isotc.iso.org/) > [accessed on 30 May 2007].

⁵⁸ Marrakesh Agreement Establishing the WTO, Annex 1A (WTO (1999) 4).

and on, the other hand, it allows Members to protect human, animal and plant life, national security and other policy interests. The TBT Agreement therefore lays down a general framework for WTO Member countries to use standards, technical regulations and conformity assessment systems as a means of “improving efficiency of production and facilitating international trade.”⁵⁹ Simultaneously, it also ensures that these “technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards, do not create unnecessary obstacles to international trade.”⁶⁰

With respect to standards, the TBT Agreement recognizes that voluntary international standards may constitute an important source of NTBs to trade, and yet it also provides that no country should be prevented from taking measures necessary to ensure the quality of its exports, protecting human, animal, plant life, health and environment, preventing deceptive practices and preserving essential security.⁶¹

A central element of the TBT Agreement in relation to international standards is the obligation to use relevant international standards as a basis for technical regulations.⁶² Although the TBT Agreement provides for situations whereby a Member may not use relevant international standards, there has been a growing move towards having no more than one international standard for each area of standardization.⁶³ Yet, many developing countries, and particularly LDCs, do not play a full part in leadership, standard development and the proceedings of the ISO.⁶⁴

To this end, the TBT Agreement recognizes that developing countries may encounter special difficulties in the formulation and application of standards, and makes provisions to assist

⁵⁹ See TBT Agreement, Preamble para 3.

⁶⁰ See TBT Agreement, Preamble para 5.

⁶¹ TBT Agreement, Preamble paras 5, 6 and 7.

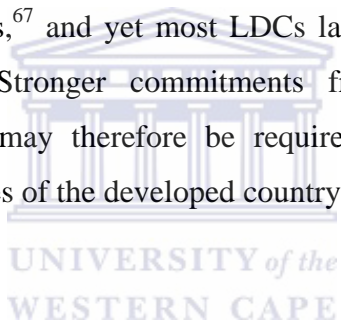
⁶² TBT Agreement, Article 2.4.

⁶³ Schawamm, H ‘Reducing Technical Barriers to Trade: Second Triennial Review of the WTO Agreement on Technical Barriers to Trade (TBT) – Results and Scope’ ISO Bulletin February 2001
< <http://www.iso.ch/iso/en/commcentre/pdf/WTOTBT0102.pdf>> [accessed on 4 June 2007].

⁶⁴ Morikawa and Morrison *op cit* 15.

them in their endeavours.⁶⁵ The Agreement, however, encourages WTO Member countries and standardizing bodies to participate meaningfully, within the limits of their resources, in the development of international standards for products for which they have already adopted or intend to adopt domestic standards or regulations.⁶⁶

Most notable, though, is that the TBT Agreement “gives with the one hand and then takes with the other”; and yet, as one of the more technical agreements of the WTO, it is often interpreted with caution. The provisions relating to technical assistance and S&D treatment are, however, explicit and do not require significant elaboration. While these provisions give developing country Members an opportunity to reap the benefits of the TBT Agreement, given the level of technological advancement in these countries, it is increasingly difficult for LDCs to compete favourably with the developed country Members. The area of standardization is one which requires experts and technicians,⁶⁷ and yet most LDCs lack qualified experts in the field of international standardization. Stronger commitments from developed countries to the developing country Members may therefore be required, but this should, however, not compromise the policy objectives of the developed country Members of the WTO.



2.2.1 Standards

There is no universally accepted definition of the term “standards.”⁶⁸ In the context of world trade, however, standards for products have been defined as, “a specification or set of specifications that relates to some characteristic of a product or its manufacture.”⁶⁹ Process standards are those that “specify the manufacturing or quality control measures to be taken to ensure that product quality is maintained.”⁷⁰ These specifications may relate to size,

⁶⁵ TBT Agreement, Preamble para 9.

⁶⁶ TBT Agreement, Article 2.6. Decision of the TBT Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement (G/TBT/9, Annex 4). This decision is reproduced in Annexure B of the thesis.

⁶⁷ Borraz (2007) 61.

⁶⁸ Stephenson, S M ‘Standards, Conformity Assessment and Developing Countries’, (1997) *World Bank Policy Working Paper No.1826* World Bank official website < <http://www-wds.worldbank.org/...> > [accessed on 30 May 2007].

⁶⁹ Stephenson *ibid*; WTO (2005) 29.

⁷⁰ Wilson *op cit* 428; WTO (2005) 34.

dimensions, weight, design, function, components, or any number of other product attributes.⁷¹ In addition to specifications, standards may also be classified in terms of target and performance.⁷² Standards may also extend to services, materials, management systems and non-product related PPMs.⁷³

When a particular set of product or process specifications acquires a sufficient market share and international recognition, it is considered as a “*de facto*” standard.⁷⁴ But even standards, which are not widespread, but developed by a national or international organization, have been often recognized as international standards. Therefore, whether “standards” are termed product standards or non-product and process standards, the underlying notion is that standards are voluntary, since standards arise through, “common usage” or through “voluntary consensus.”⁷⁵ Standards (as voluntary specifications) therefore emanate from the market.⁷⁶

The TBT Agreement, however, defines, the term “standard” as a

“Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”⁷⁷ [Emphasis added]

⁷¹ Stephenson *loc cit*.

⁷² Krajewski (2003) 23ff. See also TBT Agreement, Annex 3 which provides the same preference for standards based on product requirements in terms of performance (Bossche, P *et al*, ‘WTO Rules on Technical Barriers to Trade’ *Maastricht Faculty of Law Working Paper 2005/6*, 22 < <http://ssrn.com/abstract=978167> > [accessed on 30 May 2007].

⁷³ WTO ‘Service Standards for Open Global Markets’ WTO News 14 September 1998 < http://www.wto.org/english/news_e/news98_e/iso.htm > [accessed on 3 July 2007] See also Eco-labels (Melser and Robertson *op cit* 49-62).

⁷⁴ In this context, a “*de facto*” standard means a standard without formal commercial sponsorship, but established simply through widespread usage (Stephenson *loc cit*); See also Borraz (2007) 58.

⁷⁵ Stephenson *op cit* 6.

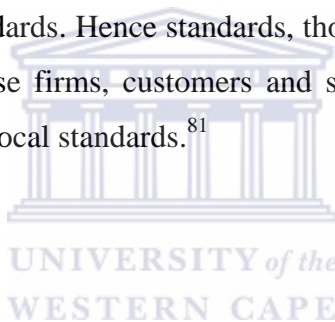
⁷⁶ Egan (2002) 52.

⁷⁷ TBT Agreement, Annex 1.2; The explanatory note to this definition is to the effect that standards only relate to products, or PPMs, and that standards are voluntary. Further, standards prepared by the international standardization community, whether based on consensus or not, are recognized (TBT Agreement, Annex 1.2).

Charnovitz argues that the definition of the term “standard” is insufficient for three reasons:⁷⁸ (i) although voluntary standards are important, the mandatory standards, such as those in multilateral environmental agreements (MEAs), are a central part of the trade, environment and development debate; (ii) TBT definition only addresses product standards and their “related” processes and production methods; and (iii) the TBT definition only deals with “recognized” bodies, which excludes the new unrecognized bodies.

The requirement that standards must be voluntary and not mandatory distinguishes standards from technical regulations.⁷⁹ A standard may, however, be mandatory for an exporter if a Member insists that non-compliance would cause fundamental climatic, geographical and technological problems.⁸⁰ This is especially so if there are no technical regulations in place in the importing country, since in such cases the Members often insist on the exporter’s conformity to international standards. Hence standards, though lacking the force of law, may be hindrances to commerce because firms, customers and suppliers will not accept products or services that do not conform to local standards.⁸¹

2.2.2 International Standards



International standards are not defined under the TBT Agreement. This uncertainty has therefore caused confusion in international trading.⁸² Charnovitz defines an international standard as a norm for market based activity, presented or recommended by an international institution set up for that purpose.⁸³ The explanatory note to the definition of the term, “standard”, as contained in Annex 1, paragraph 2, of the TBT Agreement, however, provides that:

⁷⁸ Charnovitz suggests, that since the word “related” in the TBT Agreement definition of “technical regulations” and “standards” has not yet been adjudicated upon, panels could adopt a broad definition of related to embrace all sustainability standards” (Charnovitz (2002a) 5).

⁷⁹ Technical regulations are those whose compliance is mandatory (TBT Agreement, Annex 1.1).

⁸⁰ TBT Agreement, Article 2.4.

⁸¹ Egan *loc cit.*

⁸² Schawamm *op cit* 6.

⁸³ International “in the sense that it involves participation of individuals from more than two countries.” (Charnovitz (2002a) 2).

“...[s]tandards prepared by international standardization community are based on consensus. This agreement covers also documents that are not by consensus.”⁸⁴

Annex 1, paragraph 4 of the TBT Agreement also defines an international body or system as a body or system whose membership is open to the relevant bodies of at least all Members. Although this does not define the term, “international standards”, it has been interpreted to mean that international standards are those prepared on the basis of consensus,⁸⁵ which implies that international standards have two elements: (i) international standards must be prepared by an international standardizing body, whose membership is open to the relevant bodies of at least all Members, and (ii) international standards need not be adopted by consensus.

It is worth noting that international standards which are not adopted by consensus are also within the scope of the TBT Agreement. Therefore, international standards adopted, whether by consensus or not, constitute relevant international standards since the approval of consensus is not a strict requirement of the TBT Agreement. Thus in *EC-Sardines*, the AB went on to emphasize that:

“...[T]he fact that we find that the TBT Agreement does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.”⁸⁶ [Emphasis added]

In a bid to encourage the use of international standards, the TBT Agreement invites signatory Members to ensure that the standardizing bodies in their countries accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards (hereafter referred to as the Code of Good Practice).⁸⁷ In accepting the Code of Good Practice of the

⁸⁴TBT Agreement, Annex 1 para 2; The ISO/IEC Guide 2 defines an international standard, as “a standard that is adopted by an international standardising/ standards organisation and made available to the public.”

⁸⁵ *EC- Sardines AB supra* at para 223.

⁸⁶ *EC-Sardines AB supra* at para 227; Further, a “standard” is relevant if it bears upon, relates to or is pertinent to the situation (*EC-Sardines AB supra* at para 232).

⁸⁷ TBT Agreement, Annex 3; UNCTAD (2001) 16.

TBT Agreement, the WTO Members agree to the rules and procedures relating to the adoption of international standards.

2.3 A Historical Overview of the TBT Agreement

Standards, as barriers to trade in the multilateral trading system stem from the GATT 1947. The GATT 1947 did not, however, provide a framework for the enforcement and regulation of TBT. Consequently, the GATT provisions were often abused, which prompted the need for more specific and comprehensive principles than those provided for thereunder.⁸⁸ In addition, the application of the GATT principles of liberalization through reciprocal concessions in negotiations is practically difficult to implement in the area of standards.⁸⁹

After the Kennedy Round, however, there was a growing momentum towards the need for an agreement to regulate non-tariff measures. The Tokyo Round TBT Agreement therefore aimed to reduce or eliminate non-tariff measures (as potential barriers to trade) and to bring these measures under more effective international disciplines.⁹⁰



2.3.1 Standards Code

The Tokyo Round was aimed at, among others, reducing or eliminating non-tariff measures (as potential barriers to trade) and bringing these measures under more effective international disciplines.⁹¹ Paragraph 4 of the Ministerial Declaration provided that:

“The negotiations shall cover tariffs, non-tariff barriers and other measures which impede or distort international trade in both industrial and agricultural products, including tropical products and raw materials, whether in primary form or at any stage of processing including in particular products of export interest to developing countries and measures affecting their exports.”⁹²

⁸⁸ Trachtman, J P ‘Lessons for the GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation’, (2002) < <http://ssrn.com/abstract=298760...> > [accessed on 30 May 2007].

⁸⁹ Stephenson *op cit* 39.

⁹⁰ Declaration of Ministers Approved in Tokyo on 14 September 1973, Min (73) 1, para 3 (b).

⁹¹ Declaration of Ministers Approved in Tokyo on 14 September 1973, Min (73) 1, para 3 (b).

⁹² Declaration of Ministers Approved in Tokyo on 14 September 1973, Min (73) 1, para 4.

At the conclusion of the Tokyo Round in 1979, the first agreement on TBT (signed by only thirty two GATT Contracting Parties) was concluded.⁹³ This agreement, often referred to as the “Standards Code”, however, served as the legal basis for TBT and was an important tool in regulating NTBs, specifically multiple and divergent national standards. The Standards Code was terminated on 1 January 1996.⁹⁴

2.3.2 Uruguay Round TBT Agreement

Although the Standards Code had laid down specific principles relating to NTBs, it was ineffective in curbing agricultural protectionism and was also limited in scope.⁹⁵ The Contracting Parties to the GATT therefore agreed to enter into negotiations in order to introduce greater disciplines for agricultural products.⁹⁶ In addition, the Standards Code only applied to all products, including industrial and agricultural products.⁹⁷ The rules relating to non-governmental or private standards organizations were also inadequate.⁹⁸ The Standards Code also contained weak provisions relating to dispute settlement, which were remedied by the Uruguay Round Dispute Settlement Understanding.⁹⁹

With the objective of reducing and eliminating non-tariff measures and obstacles to world trade, and determined to halt and reverse protectionism, at the same time removing distortions to trade, the GATT Contracting Parties at Punta del Este in 1986 declared, among others, that:

⁹³ WTO (2005) 29.

⁹⁴ Decision on the Termination of the Tokyo Round TBT Agreement, Adopted on 20 October 1995 (TBT/M/50). WTO (2003) 598; See also WTO official website < http://www.wto.int/gatt_docs/... > [accessed on 30 May 2007].

⁹⁵ Marceau and Trachtman *loc cit*.

⁹⁶ Ministerial Declaration on the Uruguay Round, GATT/1396, 25 September 1986, 2/3.

⁹⁷ Standards Code, Article 1.3; The TBT Agreement extended to PPMs and manufactured products (TBT Agreement, Annex 1 Definitions).

⁹⁸ See Standards Code, Articles 2.3, 2.9, 2.10, 10, 11.2 and 12.6. The Uruguay Round TBT Agreement, however, extended the rules to non – governmental organizations and central governments (TBT Agreement, Article 3).

⁹⁹ Marceau and Trachtman *loc cit*.

“Negotiations shall aim to improve, clarify, or expand as appropriate agreements and arrangements negotiated in the Tokyo Round of Multilateral Negotiations.”¹⁰⁰

At the conclusion of the Uruguay Round and in furtherance of the objectives of the GATT, a new TBT Agreement was signed on 1 January 1995 under the single undertaking principle. The Agreement extended to PPMs and manufactured products and also included a Code of Good Practice.¹⁰¹

2.3.3 Reviews

Article 15.3 of the TBT Agreement is to the effect that the TBT Committee shall review annually the implementation and operation of the TBT Agreement, taking into account the objectives thereof. Article 15.4 of the TBT Agreement also provides that:

“Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, *inter alia*, to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.”¹⁰²

In essence, the reviews provide answers to why the TBT Agreement was set up and how it has functioned.¹⁰³ Further, the triennial reviews serve the purpose of recommending adjustments to the rights and obligations of the Agreement, and at the same time ensuring mutual economic advantage as well as balancing of these rights and obligations.¹⁰⁴ Standardization bodies, such as the ISO, IEC, United Nations Economic Commission of Europe (UN’ECE) and the OECD

¹⁰⁰ Ministerial Declaration on the Uruguay Round, GATT/1396 25 September 1986, 8.

¹⁰¹ TBT Agreement, Article 4 and Annex 3.

¹⁰² TBT Agreement, Article 15.4.

¹⁰³ Schawamm *op cit* 5.

¹⁰⁴ Schawamm *ibid*.

are also given the opportunity to participate in the activities of the TBT Committee. The review also serves the purpose of assessing the technical assistance and S&D treatment given to developing countries and LDCs.

2.3.3.1 First Triennial Review

The First Triennial Review of the TBT Agreement was concluded on 13 November 1997 and adopted on 19 November 1997.¹⁰⁵ The TBT Committee examined the provisions relating to technical assistance and S&D treatment to developing countries in respect of developing countries, the role of international intergovernmental organizations.¹⁰⁶ The TBT Committee re-iterated the important contribution that international standards can make to improve efficiency of production in order to facilitate the conduct of international trade. The Committee, however, noted the difficulties faced by WTO Member countries, for example, the absence of international standards, and the potential trade effects arising from international standards. In particular, the TBT Committee noted the concerns raised by developing countries, relating to the participation in the discussions, elaboration and adoption of international standards. The TBT Committee agreed, among others, to explore ways and means of improving the implementation of Articles 2.6, 5.5 11.2 and 12.5 and paragraph G of the Code of Good Practice with a view to enhancing Members awareness of, and participation in the work of international standardization bodies.

As regards technical assistance, the committee agreed that Members that require technical assistance are invited to inform the committee of any difficulties they encounter in the implementation and operation of the Agreement, and of the kind of technical assistance they might need.

2.3.3.2 Second Triennial Review

¹⁰⁵ See WTO official website < http://www.wto.org/english/tratop_e/tbt_e/tbt5.htm > [accessed on 4 June 2007].

¹⁰⁶ TBT Agreement, Articles 11 and 12.

International standards represented the key issues in the Second Triennial Review of the TBT Agreement held in November 2000.¹⁰⁷ Most remarkably, the TBT Committee reviewed the principles and procedures relating to the development of international standards and made recommendations in relation to Articles 2, 5 and Annex 3 of the TBT Agreement. The purpose of the decision of the TBT Committee on the principles for the development of international standards was to ensure transparency, openness, impartiality, consensus, effectiveness, relevance and coherence as well as to address the concerns of the developing countries. As regards transparency, it was agreed that all information on current work programmes should be made accessible to all interested parties in all WTO Members.¹⁰⁸ The TBT Committee also agreed that for developing countries, which may not be able to effectively communicate via the internet, hard copies of such documents should be availed upon request. A central element of the Second Triennial Review was the re-iteration of the need to have standardization bodies whose membership is open on a non-discriminatory basis to relevant bodies of all WTO Member countries.¹⁰⁹ This would entail technical discussions, submission of comments on drafts, reviewing standards, voting and adoption of standards, and dissemination of adopted standards.¹¹⁰

In respect to participation, the TBT Committee decided that all relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of international standards.¹¹¹ Impartiality in participation includes, among others, access to participation in work, submission of comments on drafts, decision-making through consensus, and obtaining of information and documents.¹¹²

2.3.3.3 Third Triennial Review

¹⁰⁷ Minutes of the TBT Committee Meeting (G/TBT/9/Corr.1) WTO official website < [http://docsonline.wto.org/...](http://docsonline.wto.org/) > [accessed on 4 June 2007]. See also ISO official website < <http://www.iso.org/iso/en/commcentre/isobulletin/articles/2002/pdf/codeofpractice02-10.pdf> > [accessed on 4 June 2007].

¹⁰⁸ Decision of the TBT Committee on Principles for the Development of International Standards and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement (G/TBT/9, Annex 4 para 3).

¹⁰⁹ G/TBT/9, Annex 4 para 6.

¹¹⁰ Schawamm *op cit* 7.

¹¹¹ G/TBT/9, Annex 4 para 8.

¹¹² G/TBT/9, Annex 4 para 9.

The Third Triennial Review was concluded on 7 November 2003.¹¹³ The issues discussed included: implementation, regulatory practices, transparency, technical assistance, and S&D treatment.¹¹⁴ The review highlighted technical assistance as an area of special concern.¹¹⁵ The TBT Committee also recognized that the lack of awareness of the TBT Agreement, lack of capacity, lack of infrastructure inhibits the implementation of the TBT Agreement.¹¹⁶ The TBT Committee therefore recommended that the developed country Members should provide more than the required 60 days for comments in order to improve developing countries ability to comment.¹¹⁷

2.3.3.4 Fourth Triennial Review

On 9 November 2006 the TBT Committee adopted its Fourth Triennial Review report. The report provides an overview of the TBT Committee's work since the inception of the TBT Agreement and sets out an agenda for the future.¹¹⁸ The report considered, among others, the implementation and administration of the TBT Agreement, transparency, technical assistance, and S&D treatment.

Regarding international standards and the ISO, the TBT Committee agreed to encourage standardizing bodies that communicate their work programmes via the internet to specify the exact web pages where the information on work programmes is located under the item "Publication" of the notification form, and with regard to the acceptance of the Code of Good Practice by regional standardizing bodies. The TBT Committee also agreed to encourage regional standardizing bodies to accept the Code of Good Practice and to notify their

¹¹³ See Bridges Weekly Trade News Digest, 13 November 2003, Vol. 7(38), International Centre for Trade and Sustainable Development (ICTSD) official website < <http://www.ictsd.org/weekly/03-11-13/story4.htm> > [accessed on 4 June 2007].

¹¹⁴ Minutes of the TBT Committee Meeting (G/TBT/13) WTO official website < <http://docsonline.wto.org/...> > [accessed on 4 June 2007].

¹¹⁵ G/TBT/13 para 42.

¹¹⁶ G/TBT/13 para 51.

¹¹⁷ G/TBT/13 para 26.

¹¹⁸ Minutes of the TBT Committee (See G/TBT/19) WTO official website < <http://docsonline.wto.org/...> > [accessed on 4 June 2007]; See also WTO official website < http://www.wto.org/english/tratop_e/tbt_e/meeting_nov06_e.htm > [accessed on 4 June 2007].

acceptance of the Code to the ISO/IEC Information Centre. At the same meeting, China raised issues of the Intellectual Property Rights (IPRs) issues in standardization.¹¹⁹ China argued that IPR issues in preparing and adopting international standards had become an obstacle for Members to adopt international standards and facilitate international trade.

Further, the TBT Committee considered the aspect of technical assistance as contained in Article 11 of the TBT Agreement and agreed, among others, to review, in 2007, the use of the format for the voluntary notification of specific technical assistance needs and responses, including the possible further development of the demand-driven technical co-operation mechanism; and to exchange experiences in respect of the delivery and receipt of technical assistance with a view to identifying good practices in this regard.¹²⁰

2.4 Scope and Application of the TBT Agreement

The TBT Agreement applies to all products, industrial and agricultural but does not apply to purchasing specifications prepared by government bodies and sanitary and phytosanitary (SPS) measures.¹²¹ The SPS measures, which are not covered by the TBT Agreement, include those to protect, animal or plant life, human or health and to prevent or limit their damage within the territory of a Member from the entry, establishment or spread of pests as defined under Annex A to the SPS Agreement.¹²²

Although Annex 1 of the TBT Agreement would seem to indicate that non-product related PPMs are not covered under the TBT Agreement, there has been debate as to whether or not

¹¹⁹ Background Paper for Chinese Submission to WTO on Intellectual Property Rights in Standardization (G/TBT/W/251) WTO official website < [http://docsonline.wto.org/...](http://docsonline.wto.org/) > [accessed on 4 June 2007].

¹²⁰ G/TBT/19 para 78.

¹²¹ TBT Agreement, Article 1.5; In *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products* (Hereafter referred to as *EC-Asbestos AB*) WT/DS/135/R1 2 March 2001 Report of the AB, the AB, in reversing the findings of the panel that “part of the measure at issue” were not within the scope of the TBT Agreement found that the “measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.” And therefore, found that the TBT Agreement was applicable to the dispute (*EC-Asbestos AB supra* at para 64); WTO (2003) 598.

¹²² In *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998 Report of the AB para 165 (*Hormones*), the complainants (United States and Canada) claimed that measures taken by the EC were inconsistent with: (i) GATT Articles III or XI; (ii) Articles 2, 3 and 5 of the SPS Agreement; (iii) Article 2 of the TBT Agreement; and (iv) Article 4 of the Agreement on Agriculture. The panel, referring to Article 1(5) of the TBT Agreement, found that, since the measures at issue were sanitary measures, the TBT Agreement was not applicable to the dispute.

these non-process methods fall within the TBT Agreement.¹²³ The discussion on whether or not PPMs include non-product related PPMs did not result in consensus during the negotiations of the TBT Agreement during the Uruguay Round.¹²⁴

In the context of international standards, there is need to consider the extent to which domestic regulations should be adopted in cases where international standards exist.¹²⁵ In considering this issue, the panel in *EC-Sardines* found that Article 2.4 of the TBT Agreement applies not only to the preparation and adoption of technical regulations, but also to the application of existing measures adopted prior to the establishment of the WTO.¹²⁶

The TBT Agreement also imposes an ongoing obligation on Members to reassess their existing standards.¹²⁷ This obligation is four-fold. Firstly the obligation applies only where technical regulations are required. Second, the obligation exists only to the extent that the international standard is relevant for the existing technical regulation. Third, if it is determined that a technical obligation is required and the international standard is relevant, Members are to use that international standard as a basis. Finally, Members are not obliged to use the relevant international standard if such international standard is ineffective or inappropriate to fulfil a legitimate objective pursued by the technical regulation.¹²⁸

If a Member does not enact technical regulations or determines that the technical regulation is no longer required, that Member need not consider the international standard. Yet, to use an international standard “as a basis of”, does not mean that Members must conform to or comply

¹²³ Bossche *et al op cit* 7.

¹²⁴ Bossche *et al ibid*.

¹²⁵ Horn and Weiler *op cit* 13.

¹²⁶ *EC-Sardines* panel *supra* at para 7.85; The EC had argued that, “...“the predecessor standard” to Codex Stan 94 should have been invoked because Codex Stan 94 is not the relevant international standard as it did not exist and its adoption was not imminent when the EC regulation was adopted...” (*EC - Sardines* panel *supra* at para 7.83). On appeal it relied on the general principle of treaty interpretation against retroactivity, claiming that the preparation and adoption of its regulation was an act which took place before the entry into force of the TBT Agreement (*EC-Sardines* AB *supra* at para 30) It based this on Article 28 of the Vienna Convention on the Law of Treaties that provides that such measures cannot be affected without express treaty language creating retroactive operation. In its findings the AB upheld the findings of the panel that, “... Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995, but which have not “ceased to exist” and that Article 2.4 of the TBT Agreement applies to existing technical regulations, including the EC regulation.” (*EC-Sardines* AB *supra* at para 315 (d)).

¹²⁷ TBT Agreement, Article 2.4; See also *EC-Sardines* panel *supra* at para 7.78.

¹²⁸ *EC-Sardines* panel *supra* at para 7.78.

with the relevant international standard.¹²⁹ This gives an opportunity to a Member wishing to enact a regulation which is not in conformity with the relevant international standard.

Further, the TBT Agreement applies to central governments, local governments and non-government bodies.¹³⁰ The TBT Agreement imposes an obligation on Members to take measures in order to ensure compliance with the TBT Agreement by local government bodies and non-governmental bodies.¹³¹ At the same time, the TBT Agreement requires Members to refrain from taking measures that could encourage actions by other bodies that are inconsistent with the provisions of the TBT Agreement.

The scope of the TBT Agreement, therefore, defines the area which the Members intended to regulate, that is, products and related process, production methods and manufactured products. Those products and services which fall outside the TBT Agreement may, however, be covered under the WTO legal framework. It is also worth noting that the scope and application of the GATT is often applied on a case by case basis.

2.5 Relationship with Selected WTO Agreements

The area of international standards is one which cannot be treated in isolation since standard regulatory practices often overlap into the other aspects of WTO law. As a WTO multilateral agreement on trade in goods, the TBT Agreement therefore contains provisions similar to those in other WTO agreements. In the application and interpretation of the TBT Agreement, reference is usually made to the general provisions of the GATT. The TBT Agreement is also often cited together with the SPS Agreement, especially in relation to measures affecting human health and safety although the SPS Agreement provides stricter provisions than those provided for under the TBT Agreement. In addition, the TBT Agreement does not apply to purchasing specifications covered under the GPA. Most notable, though, is the exclusion of the TBT Agreement in the area of service trade.

¹²⁹ *EC-Sardines* panel *supra* at para 7.78; This position was confirmed by the AB in *EC- Sardines*, where in referring to its earlier finding in *EC-Hormones*, it found that, “based on” does not mean the same thing as, “conform to”.

¹³⁰ *Bossche et al op cit* 11.

¹³¹ *Bossche et al op cit* 12.

The relationship between the TBT Agreement and the above mentioned agreements therefore provides a clear understanding of the TBT Agreement. At the same time, this relationship provides an analysis of the conditions for the application of each agreement and the potential conflict and overlap among these agreements.¹³²

2.5.1 The GATT and the TBT Agreement

Since the TBT Agreement forms part of a single treaty it is often interpreted together with the GATT.¹³³ Article XX of the GATT allows governments to act on trade in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism.¹³⁴ The objectives of the TBT Agreement are reflected in Articles I, III, XI and XX of the GATT.¹³⁵ More specifically, Article XX of the GATT provides:

“Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...”¹³⁶

In view of paragraph 2 of the Preamble to the TBT Agreement, which is to the effect that the TBT Agreement was made to further the objectives of GATT,¹³⁷ it would mean that international standards are usually applied in relation to the most favoured nation (MFN) and national treatment (NT) principles of the WTO. It is also noteworthy that the GATT does not specifically require the use of international standards at all although the least trade restrictive requirements in Article XX are aimed at maintaining a “balance between the right of the

¹³² Marceau and Trachtman *op cit* 276.

¹³³ Marceau and Trachtman *op cit* 278; The TBT Agreement and its predecessor the, “1979 Standards Code”, however, provide more specific disciplines on national technical regulations and non-binding standards than those provided under the GATT.

¹³⁴ GATT 1947, Article XX.

¹³⁵ The main objective the TBT Agreement is to encourage the use of technical regulations and standards to facilitate trade. This, however, should not create unnecessary obstacles to trade.

¹³⁶ GATT 1947, Article XX.

¹³⁷ TBT Agreement, Preamble para 2.

Member to invoke one of the exceptions in Article XX and the substantive rights of the other Members under the GATT rules”.¹³⁸

In *EC-Asbestos* the panel also found that in a case where both the GATT 1994 and the TBT Agreement appear to apply to a given measure, a panel must first examine whether the measure at issue is consistent with the TBT Agreement, since the TBT Agreement deals specifically and in detail with TBT.¹³⁹ This means that in cases where there is a conflict between the GATT 1994 and the TBT Agreement,¹⁴⁰ the TBT Agreement would prevail. Professor Van den Bossche also notes that the relationship between the GATT 1994 and other multilateral agreements on trade in goods (in this case, being the TBT Agreement) is governed by the general interpretative note to Annex 1A to the WTO Agreement which settles the likelihood of any conflict between the two agreements.¹⁴¹ The general interpretative note to Annex 1A to the WTO Agreement provides that:

“In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.”

2.5.2 The SPS Agreement and the TBT Agreement

The TBT Agreement and the SPS Agreement both have their origins in the “1979 Tokyo Round Standards Code.” Unlike the TBT Agreement, the SPS Agreement specifically covers food safety, and animal, plant and human health.¹⁴² The SPS Agreement therefore imposes stronger principles relating to plant, animal and human health than the TBT Agreement,

¹³⁸ Marceau and Trachtman *op cit* 292; Trachtman *op cit* 25.

¹³⁹ *European Communities – Measures affecting Asbestos – Containing Products*, WT/DS 135/R 18 September 2000 Report of the panel para 8.16.

¹⁴⁰ The GATT 1994 consists of, among others, provisions of the GATT 1994, “as rectified, amended or modified by the terms of legal instruments which have entered into force of the WTO Agreement.” (GATT 1994, Article 1). The GATT1994 is, however, legally distinct from the GATT 1947 (Marrakesh Agreement Establishing the WTO, Article 4).

¹⁴¹ Bossche *et al op cit* 14; See also Petersmann (1999) 200ff.

¹⁴² SPS Agreement, Article 1.1 and 1.4.

because it was perceived that SPS standards “were used more frequently for protectionist purposes.”¹⁴³ The SPS Agreement therefore provides for a special category of rules relating to TBT, while the TBT Agreement provides for the general category.¹⁴⁴

In respect to international standards, Article 3.1 of the SPS Agreement provides that:

“Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except, as otherwise provided for in this agreement, and in paragraph 3.”¹⁴⁵

Further, Article 3.2 is to the effect that SPS measures of the WTO Members that are in conformity with international standards, guidelines or recommendations shall be presumed to be consistent with the relevant provisions of SPS Agreement. In *EC- Hormones*, the AB found that the term, “based on” means simply derived from, and provides greater flexibility to Members.¹⁴⁶ This interpretation was later adopted in *EC-Sardines*.¹⁴⁷

The SPS Agreement, however, differs from the TBT Agreement in certain important respects: (i) the SPS Agreement requires a risk assessment to be carried out; the TBT Agreement does not have a similar provision.¹⁴⁸ (ii) the TBT Agreement requires that product standards should be applied on a MFN basis; the SPS Agreement permits standards to be applied on a discriminatory basis provided that they do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.¹⁴⁹ This is based on the premise that, since there are different climatic conditions in different parts of the world, it is not appropriate to impose the same sanitary and phytosanitary standards on animal and plant products; and (iii) the SPS Agreement provides greater flexibility for countries to deviate from international standards than is permitted under the TBT Agreement.¹⁵⁰ Article 5 of the SPS Agreement is to the effect that a country may introduce or maintain a SPS measure resulting in a higher level

¹⁴³ Trachtman *op cit* 3.

¹⁴⁴ Bossche *et al op cit* 4.

¹⁴⁵ SPS Agreement, Article 3.1.

¹⁴⁶ *EC-Hormones* AB *supra* at para 165.

¹⁴⁷ *EC-Sardines* *supra* at para 243.

¹⁴⁸ See SPS Agreement, Article 5.1, Annex A para 1 and 4 and Annex B para 3(c).

¹⁴⁹ International Trade Centre *et al* (1995) 125.

¹⁵⁰ International Trade Centre *et al ibid*.

of SPS protection than that achieved by an international standard if there is scientific justification thereof.¹⁵¹

2.5.3 The GPA and the TBT Agreement

Article 1.4 of the TBT Agreement states:

“...that purchasing specifications prepared by governmental bodies for production or consumption requirements... are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement [GPA], according to its coverage.”¹⁵²

This therefore means that the government purchasing specifications in the procurement of military hardware would not be covered under the TBT Agreement. The relevance of the TBT Agreement to the GPA would, however, be in relation to technical regulations, which are government specification requirements within a country's jurisdiction.¹⁵³ Government procurement is an area that is still closed to competition because not all the Members of the WTO have acceded to the GPA. Since government procurement practices are not covered by the TBT Agreement, some government standards, which violate the non-discrimination principles, relevant to fair employment, protection of the environment, labour standards and encouraging local industries in poor communities are seen as potential barriers to trade. That aside, the GPA also lacks clear provisions relating to transparency and market access which are key elements in curbing TBT.

2.5.4 The GATS and the TBT Agreement

The GATS covers trade in services, except bilateral air traffic rights and services purchased or supplied in the exercise of the government authority, that is, government procurement.¹⁵⁴

¹⁵¹ SPS Agreement, Article 5.

¹⁵² TBT Agreement, Article 1.4.

¹⁵³ See ISEAL Alliance and CIEL, 'Referencing International Standards in Government Procurement' RO52 – Legal Opinion Summary, July 2006
< http://www.ciel.org/Publications/ISEALCIEL_Legal%20OpinionGPAR052_Jul06.pdf > [accessed on 9 August 2007].

¹⁵⁴ Annex 1B of the Marrakesh Agreement, Article I. There have been, however, mixed views regarding the GATS. Although, it is believed to be the most viable document governing trade in services, Professor Waincyer

Although the “GATS was negotiated separately from the goods agreements,”¹⁵⁵ it contains principles remarkably parallel to those of the TBT Agreement. Article VI.4 of the GATS provides as follows:

“With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines....”¹⁵⁶ [Emphasis added]

The requirement that technical standards should not constitute unnecessary barriers to trade is a central element of the TBT Agreement. It is, however, noteworthy that the GATS, like the GATT, does not lay down specific guidelines for the application and preparation of standards in service trade. In fact, a further reading of Article VI.4 suggests that the negotiators intended to develop greater disciplines relating to service trade in future.

Further, Article VI.5 of the GATS,¹⁵⁷ which requires a Member to take into account international standards developed by international standardization organisations, is similar to Article 2.6 of the TBT Agreement which provides:

“With a 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 by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.”¹⁵⁸

Mattoo, however, argues that the TBT Agreement disciplines are stronger than those of the GATS since they go further to impose additional disciplines on non-discriminatory measures.¹⁵⁹ Specifically, Article 2.2 of the TBT Agreement is to the effect that technical

considers the GATS as a “primitive” document both in detail and in coverage (Goode *op cit* 149). The GATS, however, contains the new concept of market access, a concept that does not feature in the TBT Agreement.

¹⁵⁵ Trachtman *op cit* 3 .

¹⁵⁶ GATS, Article VI.4.

¹⁵⁷ GATS, Article 6.5 (b); The term “relevant international organisation” is defined under foot note 3 thereof and refers to international bodies whose membership is open to the relevant bodies of at least all Members.

¹⁵⁸ TBT Agreement, Article 2.6.

¹⁵⁹ Mattoo (2000) 76.

regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective.¹⁶⁰ Be that as it may, Article VI of the GATS is temporary and is indicative that greater disciplines shall be developed in future.

Therefore, international standards *vis- a- vis* domestic regulation are not only relevant to trade in goods but also to trade in services. In *EC-Bananas*, the AB also found that the GATT 1994 and the GATS may overlap in application to a particular measure.¹⁶¹

2.6 Current Status and Future Development

TBT are an issue for discussion on the ongoing DDA trade negotiations, and Member countries are yet to agree on issues of mutual interest. Most notable are the proposals by the Africa Group regarding technical assistance and S&D treatment.¹⁶²

As noted earlier, the development of the TBT Agreement remains an issue of enormous interest among the Members of the WTO. The definition of the terms and the scope of the TBT Agreement are areas which need to be addressed in light of the ongoing changes. There is an increasing shift from TBT in goods to TBT in services. A “service” TBT Agreement similar to the current “goods” TBT Agreement or an extension or revision of the TBT Agreement, seems imminent. The adoption of the GATS and the ISO’s strategic objectives for 2005 to 2010 also point to the fact that there is an urgent need for the amendment of the TBT Agreement.¹⁶³ Thus the apparent need to devise disciplines which will regulate standardization in the area of services. In addition, following the Kyoto Protocol on Sustainable

¹⁶⁰ *Mattoo ibid.*

¹⁶¹ *European Communities – Regime for the Import and sale of Bananas*, (hereafter referred to as *EC-Bananas*) WT/DS27/AB/R, 9 September 1997 Report of the AB para 222.

¹⁶² The Africa Group is a grouping at the WTO composed of African countries. This group consists of forty one (41) countries including: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Congo (Democratic Republic), Cote d’Ivoire, Djibouti, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe. See WTO official website < http://www.wto.org/English/tratop_e/agric_e/negs_bkgrnd04_groups_e.htm > [accessed on 14 June 2007].

¹⁶³ See Bryden, A ‘Report to the 29th ISO General Assembly under Agenda Item 4’ September 2006 ISO official website < <http://www.iso.org/iso/...> > [Accessed on 14 June 2007].

Development,¹⁶⁴ there has been significant environmental awareness and the need for environmental standards, and yet these standards do not explicitly fall within the scope of the TBT Agreement. Brack and Gray argue that “trade restrictions for social economic or cultural considerations, or labeling schemes for the purpose of providing information to the customer would fall under the requirements of the TBT Agreement.”¹⁶⁵ At the same time, the intellectual property rights (IPRs) issues in standardization which were raised by China during the Fourth Triennial Review have also not been fully resolved.

2.7 Conclusion

Standards usually reflect the trade interests of a particular community, country or group of persons during a specific period of time.¹⁶⁶ During the late 1940's, the period during which the GATT and the ISO were founded, there existed standards for industrial and agricultural products. The standards developed during that time were all related to industrial and agricultural products. Consequently the first TBT Agreement covered only industrial and agricultural products. The second TBT Agreement negotiated at the Uruguay Round extended to PPMs and manufactured products; it also included a Code of Good Practice. During the Second Triennial Review of the TBT Agreement, a decision regarding the principles for the development of international standards, guides and recommendations was made. This decision strengthened the provisions relating to transparency, openness, impartiality, effectiveness, coherence and standards development under the TBT Agreement.

Today the concerns over the environment and sustainable development have triggered the wide use of eco-labels. The need for good corporate governance has also led to the development of management systems standards, while the need to regulate trade in the area of services has also led to the development of standards in accounting systems, education and other services.

¹⁶⁴ See Food and Agriculture Organization (FAO) News ‘Kyoto Protocol – Important Tool for Sustainable Development’ FAO official website

< <http://www.fao.org/newsroom/en/news/2005/89781/index.html> > [accessed on 14 June 2007]. The Kyoto protocol was followed by the Cartagena Protocol and the Stockholm and Rotterdam Conventions.

¹⁶⁵ Brack and Gray (2003) 23.

¹⁶⁶ WTO (2005) 31.

Additionally, although the TBT Agreement specifically covers TBT, some trade barriers are covered under other WTO Agreements, such as, the SPS Agreement, GPA and GATS. While the SPS Agreement provides stricter provisions than those provided for under the TBT Agreement, the GATS merely states that, “the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines.” The measures covered under these agreements, though, are expressly excluded from the scope of the TBT Agreement provide an understanding of the strengths and weaknesses of the TBT Agreement and also point to areas for its revision. As noted above, the need for national and international standards always arises when there is a need to protect national interests or a particular industry and at the same time to regulate the quality of products or service. Thus as WTO Member countries continue to address their peculiar national interests, the importance of standards development becomes apparent.

Lastly, in light of the ISO strategic vision for 2005-2010, and with the development of the GATS, it is evident that the development of the TBT Agreement to regulate these new areas of trade will be high on the agenda of the WTO and the ISO in years to come.



CHAPTER THREE: KEY PRINCIPLES RELATING TO INTERNATIONAL STANDARDS AND THE ISO UNDER THE TBT AGREEMENT

3.1 Introduction

Although the TBT Agreement makes provision for technical regulations, standards and conformity assessment procedures, the provisions relating to international standards, the ISO and LDCs under the TBT Agreement are not elaborate.¹⁶⁷ The Code of Good Practice, nonetheless, sets out some procedures for the adoption and preparation of standards.

WTO Member countries are under an obligation to adhere to the GATT fundamental principles of non-discrimination embedded in the TBT Agreement. In addition, the TBT Agreement specifically makes provision for the prevention of unnecessary obstacles to trade, transparency, mutual recognition, use of relevant international standards, and harmonisation, among others. In practice, however, these key principles, due to the uncertainty regarding the meaning of some key terms and concepts, have not been adhered to.

Apart from non-discrimination, harmonization and transparency provisions, provisions relating to technical assistance and S&D treatment have not been fully implemented. The participation of LDCs in the activities of the ISO has also been limited and the standards developed by the ISO do not reflect the development needs of these LDCs.

The TBT Agreement also recognises the special needs and challenges faced by the LDCs in meeting their obligations under the Agreement and the important contribution played by the international standards setting organizations, such as the ISO, in relation to standardization work. Although provisions relating to technical assistance and S&D treatment have been in existence, the institutional framework in these LDCs in relation to standardization work is still weak.

This chapter therefore focuses on some key principles which relate to international standards and the ISO as provided for under the TBT Agreement.

¹⁶⁷ As noted in the previous chapter, the term “international standards” is not clearly defined. This lack of clarity has therefore led to confusion in the application and interpretation of the Code of Good Practice.

3.2 Non-Discrimination Principle

The TBT Agreement is hinged on the WTO fundamental principle of non-discrimination, which encompasses the MFN and NT.¹⁶⁸ Thus, a requirement that imported goods must meet certain standards and yet no such requirement exists for domestically produced goods, would constitute a violation of the non-discrimination principle. More specifically, paragraph D of the Code of Good Practice provides that:

“In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other 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.”¹⁶⁹ [Emphasis added]

The concept of “like products” has not been defined in the context of the TBT Agreement, and yet it would appear that products of the same specifications, that is to say, products of the same standard, are “like.”¹⁷⁰ The concept of likeness, however, goes beyond the physical characteristics of a product. In *Japan – Taxes on Alcoholic Beverages II* (hereafter referred to as *Japan – Alcoholic Beverages II*),¹⁷¹ the AB in interpreting the term “likeness” as used under Article III of the GATT 1994,¹⁷² noted as follows:

“The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the

¹⁶⁸ In the context of the TBT Agreement, MFN means that a Member should not discriminate between “like products” imported from different WTO Members. Whereas, NT means that a Member should not discriminate between domestic and imported “like products.” Article 2.1 of the TBT Agreement requires: “...treatment no less favourable than that accorded to like products originating in another country.” The main MFN provision in the GATT is Article I.1.

¹⁶⁹ TBT Agreement, Annex 3 para D.

¹⁷⁰ In fact, in *EC-Sardines*, the panel and AB did not address Peru’s claims concerning the violation of GATT Article III.4 which involved discrimination against “like products” (Shaffer and Mosoti *op cit* 15)

¹⁷¹ *Japan – Alcoholic Beverages II* WT/DS11/AB/R, 1 November 1996 Report of the AB at 114.

¹⁷² Article III.4 specifically provides: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...”

context and the circumstances that prevail in any given case to which that provision may apply.”¹⁷³

The interpretation of the AB implies that the concept of “likeness” is dependent upon the peculiar circumstances of each case and the WTO Agreement in question.¹⁷⁴ Therefore, the four general criteria applied in examining “likeness” under the GATT 1994 would also apply to the TBT Agreement.¹⁷⁵ The Working Report on Border Tax Adjustments, in respect to “like or similar products,” also provides that the interpretation of the term should be examined on a case by case basis, which would allow a fair assessment in each case of different elements that constitute a “similar product”.¹⁷⁶ Davey and Pauwelyn argue, however, that the interpretation of “likeness” by the AB is not always clear since the WTO/GATT case law accords considerable discretion to Members in subdividing products into different tariff categories for purposes of Article II without fear of violating Article I.1 of the GATT.¹⁷⁷ Hudec suggests that the like product concept should be given a broader interpretation by defining it in terms of competitive relationships between the products in question.¹⁷⁸ Consequently, there has been no agreement on the precise definition of the term “likeness.”¹⁷⁹ Qin also argues that the criteria for determining “likeness” or “similarity” must be conducive to or necessary for the rule in question.¹⁸⁰ And that not having a clear understanding of the relationship between the purpose of the rule and the basis for determining likeness or similarity would lead to an insufficient result.¹⁸¹

¹⁷³ *Japan - Alcoholic Beverages II AB supra* at 114.

¹⁷⁴ Davey and Pauwelyn (2000) 27.

¹⁷⁵ The four general criteria are: (i) physical characteristics; (ii) tariffs classification; (iii) consumers’ tastes and habits; and (iv) product end users (*EC-Asbestos AB supra* at para 101).

¹⁷⁶ Working Paper Report on Border Tax Adjustments, Adopted on 2 December 1970, BISD 18S/97, para 18.

¹⁷⁷ Davey and Pauwelyn *op cit* 31.

¹⁷⁸ Hudec (2000)112.

¹⁷⁹ Mavroidis (2000)125.

¹⁸⁰ Qin (2005) 295.

¹⁸¹ Qin *ibid*.

In determining, however, whether or not there is an international standard for the product in dispute, the physical characteristics, tariffs classifications, consumers' tastes, product end users and the competitiveness of the product would have to be considered.¹⁸²

3.3 Prevention of Unnecessary Obstacles to International Trade

An important aspect of the TBT Agreement is the prevention of unnecessary obstacles to international trade. Paragraph E of the Code of Good Practice requires standardizing bodies to prepare, adopt and apply standards in a way that does not create unnecessary obstacles to international trade.¹⁸³ Unnecessary obstacles are, however, not defined under the TBT Agreement, but the Agreement makes provision for legitimate objectives,¹⁸⁴ which are often raised by countries seeking to protect their industries against foreign competition. In fact, Article 2.5 of the TBT Agreement presumes that if a Member bases a domestic regulation on an international standard, that domestic regulation is presumed not to create an unnecessary obstacle to international trade. A Member must therefore prove that the objective pursued is necessary and reasonable in the circumstances.¹⁸⁵ This means that a Member would have to prove that there is no alternative measure consistent with the GATT which a Member could reasonably be expected to employ to achieve its regulatory objective.¹⁸⁶

Although what is reasonable has not been defined for TBT Agreement purposes, it could be established if: (i) there is no alternative measure consistent with the GATT which the Member could reasonably be expected to achieve by employing its regulatory objective;¹⁸⁷ (ii) upon an assessment being made, it is proved that the alternative measure contributes to the realization of the end pursued; (iii) the common interests or values pursued are of great importance; and

¹⁸² In *Korea – Taxes on Alcoholic Beverages*, the AB found that: “Like products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all directly competitive or substitutable products are like.” (*Korea – Taxes on Alcoholic Beverages*, WT/DS84/AB/R 18 January 1999 Report of the AB para 118). See also Mavroidis *op cit* 128.

¹⁸³ TBT Agreement, Annex 3 para E.

¹⁸⁴ Legitimate objectives include national security requirements, prevention of deceptive practices, protection of human health or safety, protection of animal life or health, protection of the environment and other undefined objectives (TBT Agreement, Article 2.2).

¹⁸⁵ UNCTAD (2003) 24; WTO (2006) 151.

¹⁸⁶ UNCTAD (2003) 23.

¹⁸⁷ See *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-375/200 7 November 1990 Report of the panel para 74 -75.

(iv) despite the administrative difficulties faced by a Member, the measure remains the best alternative.¹⁸⁸

3.4 Harmonization

Another central tenet of the TBT Agreement is harmonization.¹⁸⁹ Harmonization is based on the understanding that domestic policies and laws can hinder the benefits of trade policies, and that the WTO must reach beyond border measures.¹⁹⁰ In addition, the emphasis on harmonization is based on the view that: (i) trade is disrupted less if Members use internationally agreed standards as a basis for domestic regulations and standards; and (ii) producers and consumers benefit from the degree of harmonization.¹⁹¹ Harmonization of national standards around international standards greatly facilitates the conduct of international trade by minimizing the variety of requirements exporters have to meet in their export markets.¹⁹² Harmonization is therefore often seen as a remedy for curing market failures.¹⁹³ The TBT Agreement does not, however, require regulatory harmonization in the form of a single international standard.¹⁹⁴ An important aspect of the TBT Agreement is the need to balance trade liberalization and domestic regulatory objectives.¹⁹⁵ In this regard it sets out rules relating to (i) adoption of international standards; (ii) participation in international standardizing bodies;¹⁹⁶ and (iii) procedure for preparation, adoption and application of standards.¹⁹⁷ Thus, paragraph F of the Code of Good Practice provides:

“Where international standards exist 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

¹⁸⁸ TBT Agreement, Article 2.2; UNCTAD (2003) 24.

¹⁸⁹ Mayeda defines harmonization as, “the process of making different domestic laws, regulations, principles and governmental policies substantially or effectively the same or similar” (Mayeda (2004) 740).

¹⁹⁰ McDonald *op cit* 251.

¹⁹¹ UNCTAD (2003) 25.

¹⁹² Bossche (2005) 460.

¹⁹³ Chen, M X and Matoo, A ‘Regionalism in Standards: Good or Bad for Trade’ (2004)

< <http://ssrn.com/abstract=963210...> > [accessed on 20 June 2007].

¹⁹⁴ McDonald *op cit* 251.

¹⁹⁵ McDonald *ibid*.

¹⁹⁶ TBT Agreement, Annex 3 para G.

¹⁹⁷ McDonald *op cit* 251.

instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.”¹⁹⁸

The obligation to adopt international standards and to participate in the activities of standardizing bodies is further strengthened by paragraph G of the Code of Good Practice, which requires standardizing bodies to participate fully within the limit of their resources in the preparation of international standards. While standardization bodies play an important role in harmonizing standards, it is noteworthy that the participation of LDCs in Africa in these standardizing bodies is limited by, among others, lack of resources and infrastructure. Mayeda argues that harmonization is not an effective tool for dealing with development issues.¹⁹⁹ Mayeda suggests: (i) increasing capacity of developing countries, to engage in national regulation; (ii) increasing the scope for national regulation; (iii) increasing capacity for developing countries participation; and (iv) removing barriers that compound problems of market access.²⁰⁰

3.5 Equivalence and Mutual Recognition

Although the concepts of equivalence and mutual recognition do not extend to standards under the TBT Agreement, the Agreement requires WTO Members to consider accepting the technical regulations and conformity assessments procedures of other Members.²⁰¹ The basis of the concept of equivalence (originally developed by the European Community),²⁰² is that technical barriers to international trade are lengthy and costly to prepare and implement. Thus, instead of adopting different technical regulations to fulfil the same policy objective, two or more countries may agree that their technical regulations in respect to a particular protective measure are equivalent. This would also apply, in the same way, to mutual recognition where

¹⁹⁸ TBT Agreement, Annex 3 para F.

¹⁹⁹ Mayeda *op cit* 761.

²⁰⁰ Mayeda *op cit* 762.

²⁰¹ See TBT Agreement, Articles 2.7, 6.1 and 9.

²⁰² The mutual recognition principle arose from the Cassis de Dijon Judgment of the European Court of Justice in 1979 (Chen and Matoo *op cit* 6); TBT Agreement, Article 2.7.

WTO Members are encouraged to enter into negotiations with other Members for the mutual acceptance of conformity assessment results.²⁰³

Chen and Matoo argue that regional agreements on standards lead to a significant increase in trade between participating countries.²⁰⁴ Unlike the traditional agreements on tariffs, Mutual Recognition Agreements (MRAs) on standards are not simple to negotiate because the objective of these MRAs is not trade protection but the enhancement of welfare by remedying market failures.²⁰⁵ Chen and Matoo further argue that if restrictive rules of origin are imposed, then MRAs between countries can be expected to increase at the expense of imports from the non-contracting countries.²⁰⁶ Although mutual recognition of existing standards may appear to be the simplest and most effective way to deal with varied national standards, it does not favour circumstances where countries are at different levels of economic development.²⁰⁷ For example, mutual recognition of standards may not be possible between the US and Uganda since Uganda might lack equivalent protectionist measures. Consequently, the trend has been towards the harmonisation of standards, MRAs on conformity assessment procedures and the use of the supplier's declaration of conformity where applicable.

3.6 Use of Relevant International Standards

The TBT Agreement encourages Members to use relevant international standards in cases where technical regulations are required. Article 2.4 of the TBT Agreement provides that:

“Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”²⁰⁸

²⁰³ TBT Agreement, Article 6.3.

²⁰⁴ Chen and Matoo *op cit* 22.

²⁰⁵ Chen and Matoo *op cit* 2.

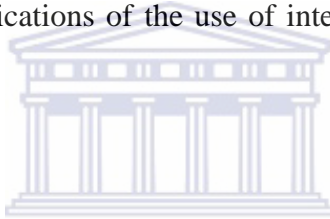
²⁰⁶ Chen and Matoo *op cit* 3.

²⁰⁷ Chen and Matoo *op cit* 5ff.

²⁰⁸ The TBT Agreement, Article 2.4; Article 2.4 of the TBT Agreement was first interpreted by the panel and AB in *EC-Asbestos*, in which the AB found that the French decree was inconsistent with Article 2.4 of the TBT

Although the use of international standards is aimed at harmonizing standards, this provision poses difficult questions for law and policy makers,²⁰⁹ in relation to: (i) how and when to draw the line between national sovereignty and international commitments; (ii) the presumption that if a technical regulation is made pursuant to the legitimate objectives mentioned in Article 2.2 of the TBT Agreement, it is not an obstacle to international trade;²¹⁰ and (iii) challenging WTO consistency with the TBT Agreement and proving that a particular international standard is effective and appropriate to fulfil the legitimate objective at issue.²¹¹

A reading of *EC-Sardines* suggests that a complaining party bears a high burden of proof, and yet many LDCs have poor capacity building programmes. Thus, there is need to review the policy considerations behind the use of international standards. Chapter Four examines in detail the legal and policy implications of the use of international standards where technical regulations do not exist.



3.7 Transparency

The preparation, adoption and application of standards also depend on a Member's ability to communicate, distribute and explain a particular standard. Thus, Article 10.1 of the TBT Agreement is to the effect that each Member shall ensure that an enquiry point exists, which is able to answer all reasonable enquiries from other Members and interested parties in other Members.

Further, paragraph J of the Code of Good Practice requires that:

“At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. ... No later than at the time of publication of its work

Agreement, since the international standards identified by Canada were neither relevant to, nor an effective or appropriate means of, achieving France's public health objective (*EC-Asbestos AB supra* at para 47). This Article is discussed further in chapter four of this thesis.

²⁰⁹ Horn and Weiler *op cit* 13.

²¹⁰ TBT Agreement, Article 2.5.

²¹¹ *EC-Sardines AB supra* at paras 289 and 315 (g).

programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.”²¹²

Standardisation bodies are therefore under an obligation to provide information to the TBT Committee on the status of notifications of the existence of a work programme regarding the standards which are being prepared. The standardisation bodies should, however, give sixty days notice to the other Members to allow them to make comments,²¹³ and once the standard has been adopted, it shall be promptly published.²¹⁴ It is noteworthy that “to publish” and “to make publicly available” do not mean the same thing. “To publish” means to make generally available through an appropriate medium rather than simply making publicly available.²¹⁵ Complaints and queries relating to standards are covered under paragraph Q of the Code of Good Practice, which provides that:

“The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.”²¹⁶

In a nutshell, a Member seeking to adopt a standard is required to provide drafts of the standard and to allow other Members to give their comments. Thereafter the standard would be published and a notice given to the secretariat. The enquiry points would also be in position to provide relevant information and documents relating to the standard.

3.8 Special Provisions

Apart from the above provisions, there are also other provisions in the TBT Agreement which cover emergency situations, technical assistance and S&D treatment.

²¹² TBT Agreement, Annex 3.

²¹³ TBT Agreement, Annex 3 para L. The sixty day requirement gives the private actors a right to comment (Charnovitz (2002b) 42).

²¹⁴ TBT Agreement, Annex 3 para O.

²¹⁵ See *Chile – Price Band System and Safeguard Measures relating to Certain Agricultural Products*, WT/DS207/R 3 May 2002 Report of the panel para 7.128.

²¹⁶ TBT Agreement, Annex 3 para Q.

3.8.1 Emergency Situations

Matters relating to safety, health and the environment may sometimes require urgent attention. The TBT Agreement therefore makes provision for waiving the sixty-day rule allowed for comment.²¹⁷ Thus, paragraph L of the Code of Good Practice provides that:

“Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise...”²¹⁸

3.8.2 Technical Assistance

The TBT Agreement makes provision for technical assistance to WTO developing country Members.²¹⁹ These provisions require developed countries to provide technical and expert assistance to developing countries in relation to the establishment of national standardization bodies and participation in international standardization bodies. Special attention is accorded to LDC Members since these countries face a lot of difficulty in complying with the TBT Agreement. Several commitments have been made by developed country Members. In practice, however, very few of these developed countries have assisted developing country Members by way of providing technical and expert assistance.

3.8.3 S&D Treatment

²¹⁷ TBT Agreement, Annex 3 para L.

²¹⁸ TBT Agreement, Annex 3 para L.

²¹⁹ TBT Agreement, Articles 11 and 12.

The TBT Agreement contains provisions relating to S&D treatment. S&D treatment is an exception to the MFN principle of the WTO since S&D treatment provisions under the TBT Agreement require a developing country Member to accord a developing country and a LDC Member more favourable treatment. The application of international standards should also be applied while recognizing the developmental and trade needs of developing country Members, and at the same time ensuring that indigenous technology and production methods in LDCs are preserved.

Therefore, LDCs are not expected to use international standards which are not appropriate to their development, financial, or trade needs as a basis for their standards.²²⁰ International standardizing bodies are encouraged also to take into account the needs of LDCs in developing standards, which are within the interest of developing country Members.²²¹ The TBT Agreement requires developing countries with infrastructure and institutional problems, to be given consideration by the TBT Committee, upon their request, for specified and time limited exceptions in whole or in part from their obligations under the TBT Agreement.

In practice, however, the S&D treatment provisions have to a large extent not been effective in meeting the trade needs of LDCs, since products from LDCs are not accorded any special treatment at import ports. It is also worth noting that despite the S&D treatment accorded to LDCs, there has been no significant improvement in the infrastructure and institutional set up of the standardizing bodies in these countries. At the same time, despite the participation of these LDCs in some key sectors, there have been very few complaints raised in the TBT Committee.

3.9 ISO

Although the TBT Agreement does not explicitly mandate the ISO as an international standard setting body, its contribution towards harmonization of standards cannot be ignored. A standardizing body within the territory of any Member of the WTO wishing to accept or

²²⁰ TBT Agreement, Article 12.4.

²²¹ TBT Agreement, Article 12.5.

withdraw from the Code of Good Practice is required to notify the ISO/IEC.²²² In addition, most of the definitions under Annex 1 of the TBT Agreement are taken from ISO documents.²²³

The ISO is a leading network of the national standards institutes of 157 countries and consists of at least one Member per country.²²⁴ Since the ISO is a NGO, its Members are not only representatives of national governments but are also representative of the private sector.²²⁵ These structures enable the ISO to play a greater role than the WTO, since public and private bodies are involved in ISO work.²²⁶ Paragraph G of the Code of Good Practice requires standardization bodies to play a full part within the limit of their resources in the preparation and adoption of standards.²²⁷ In this regard, the ISO encourages consensus agreements between national delegations representing all the economic stakeholders concerned, suppliers, users, government regulators, and other interest groups.²²⁸ These international standards, therefore, provide a “reference framework” or “common technological language” between suppliers and consumers which facilitates international trade.²²⁹

The TBT Agreement, therefore, ensures that country Members encourage these efforts. Some countries, however, have used this as a means of promoting their domestic standards by way of increasing their participation in the ISO standards development activities. These international standards can also be used by governments to block imports.²³⁰ In effect, LDCs are faced with a challenge of adopting and enforcing international standards which do not meet their own development needs since non-compliance to international standards would lead to a decrease in exports.

3.10 Conclusion

²²² TBT Agreement, Annex 3; Decision on Review of the ISO/IEC Information Centre Publication (WTO (1999) 396);

²²³ OECD (1999) 12.

²²⁴ See ISO official website < [http://www.iso.org/iso/...](http://www.iso.org/iso/) > [accessed on 3 July 2007].

²²⁵ See ISO official website < [http://www.iso.org/iso/...](http://www.iso.org/iso/) > [accessed on 3 July 2007].

²²⁶ OECD (1999) 12.

²²⁷ TBT Agreement, Annex 3 para G.

²²⁸ See ISO official website < [http://www.iso.org/iso/en/aboutiso/...](http://www.iso.org/iso/en/aboutiso/) > [accessed on 3 July 2007].

²²⁹ See ISO official website < [http://www.iso.org/iso/en/aboutiso/...](http://www.iso.org/iso/en/aboutiso/) > [accessed on 3 July 2007].

²³⁰ Wilson *op cit* 429.

As noted above, there is still uncertainty as to the meaning of some GATT key principles for purposes of the TBT Agreement. This uncertainty would lead to different interpretations depending on the facts of a particular case. The TBT Agreement nonetheless is a true reflection of the objectives and aims of the WTO.

Although the impact of standards on economic development in LDCs has been noted by several international organisations,²³¹ the mechanisms for regulating international standards under the TBT Agreement have not been very effective and should be reviewed. This can be achieved through encouraging greater participation by LDCs in the activities of the ISO, and at the same time encouraging efforts towards building infrastructure and capacity in these LDCs.

CHAPTER FOUR: DISPUTE SETTLEMENT, INTERNATIONAL STANDARDS AND SELECTED CONCERNS



4.1 Introduction

Standards and regulations are increasingly at the forefront of trade disputes.²³² The TBT Agreement, the key agreement regulating standards, has, however, not been frequently subjected to the legal interpretation of the DSB.²³³ In fact, there have been only six AB and panel compliance reports adopted which relate to the interpretation of the provisions of the TBT Agreement (see Table 1, p. 107).²³⁴ Yet, it is only the *EC-Sardines* matter, which fully addressed the intricate issues contained in the TBT Agreement. In *EC-Asbestos*, (a case which considered the applicability of the TBT Agreement) it was found by the panel that the TBT

²³¹ These international organizations include: the World Bank, International Monetary Fund (IMF), WTO and the ISO.

²³² Egan *op cit* 52.

²³³ Dillon (2002) 130.

²³⁴ See WTO official website

< http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_02_e.htm > [accessed on 12 July 2007].

Agreement was not applicable to an import ban such as the measure at issue in the dispute,²³⁵ and yet, on appeal, the AB found that the TBT Agreement was applicable.²³⁶

It would, however, be wrong to suggest that there have been no other disputes involving the TBT Agreement. On the contrary, many of the disputes have been resolved at the committee level through the TBT Committee, which meets regularly to discuss and address matters of mutual interest while some cases are still pending. Those standards and domestic regulations which are found to be inconsistent with the provisions of the TBT Agreement are usually reviewed to conform to the TBT Agreement without recourse to adjudication. In that regard, the mechanisms for dispute settlement provided for under the TBT Agreement have to a certain extent been effective in curbing the use of domestic regulations as protectionist means.

With the emergence of increased consumer awareness and safety, however, there have been measures put in place by some countries to protect consumers and producers. Although these measures reflect the policy objectives of the Member country, they are in certain respects a violation of the underlying principles of the TBT Agreement. Put differently, measures which are necessary may be unreasonable. In addition, the TBT Agreement does not cover standards for products that may arise in the future.²³⁷ Thus, the dispute settlement procedures help to remedy the incompleteness of the TBT Agreement.²³⁸ Trade disputes and concerns relating to the TBT Agreement are also driving demands for a deeper understanding of the relationship between standards in trade and the harmonization of standards.²³⁹ Consequently, some of these concerns relating to the adoption of international standards which have been raised at national, regional and international level through the various standardization bodies remain unresolved. An interpretation and clarification of the key concepts contained in the TBT Agreement would therefore address some of these discrepancies.

²³⁵ *European Communities – Measures affecting Asbestos-Containing Products* WT/DS/135/R, 18 September 2000 Report of the panel para 9.1 (a).

²³⁶ *EC- Asbestos* AB *supra* at para 192(a).

²³⁷ Battigalli, P and Maggi, G, 'International Agreements on Product Standards: An Incomplete Contracting Theory' (2003) 1 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=379340... > [accessed on 13 August 2007].

²³⁸ Battigalli and Maggi *op cit* 2.

²³⁹ Egan *op cit* 51.

This chapter examines the interpretation and application of the provisions relating to international standards under the TBT Agreement by the DSB and also explores selected concerns.

4.2 WTO Dispute Settlement System

The two central facets of the DSB are security and predictability.²⁴⁰ In the settlement of disputes, Members are required to abide by the rules and procedures of the DSU through the multilateral adjudication process of the panel and the AB.²⁴¹ In doing so, however, Members must also have regard to other methods of reaching a settlement such as consultations, negotiations, good offices, conciliation and mediation.²⁴² There have therefore been a significant number of disputes which have been settled through negotiations at the consultation stage.²⁴³ The procedures stipulated under the DSU therefore ensure that the rights and obligations of Members are preserved. Settlement of disputes through the DSU also clarifies the existing provisions of the covered agreements.²⁴⁴

One of the shortcomings of the DSB, however, is that although either party can appeal against the panel's report to the AB, a consensus among all WTO Members is required to overturn the AB's decision.²⁴⁵ In addition, the GATT system of negotiation and compromise has been replaced by the adversarial system which is too costly for LDCs in Africa since the negotiation and litigation process requires experts who can be costly to acquire.²⁴⁶ Therefore, this move towards the adversarial system has clearly not benefited LDCs but has instead favoured the rich industrialized Member countries of the WTO.

4.2.1 A Historical Overview of the Dispute Settlement System

²⁴⁰ Understanding on the Rules and Procedures Governing the Settlement of Disputes (hereafter referred to as DSU), Article 3.2.

²⁴¹ DSU, Article 23 paras 1 and 2.

²⁴² DSU, Article 3.7; See also Bossche *op cit* 185; Members are required to act in good faith in an effort to resolve the dispute (DSU, Article 3.10).

²⁴³ Bossche *op cit* 184.

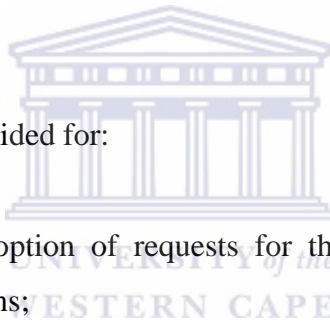
²⁴⁴ Bossche *ibid*.

²⁴⁵ Srinivasan, T N 'Developing Countries and the Multilateral Trading System after Doha' (2002)

< <http://papers.ssrn.com/abstract=301394...> > [accessed on 27 July 2007].

²⁴⁶ Srinivasan *op cit* 14.

The GATT 1947, Articles XXII and XXIII, did not provide for a clearly defined dispute settlement system.²⁴⁷ Consequently, this caused a lot of uncertainty and confusion in the early years of the GATT since consensus among all Contracting Parties was required for the adoption of the panel's report.²⁴⁸ With the emergence of NTBs after the Kennedy Round, however, there was a move towards revisiting the dispute settlement system.²⁴⁹ Thus, in the context of the Tokyo Round of trade negotiations in the late 1970s the Contracting Parties codified the emerging dispute settlement procedures.²⁵⁰ Even then, some key elements such as: (i) the establishment and composition of the panel; (ii) the adoption of a panel report; and (iii) the authorization of concessions, still remained contentious.²⁵¹ At the Uruguay Round, however, agreement was reached on the DSU, which provides an elaborate dispute settlement system.



Most significantly the DSU provided for:

- a) The quasi-automatic adoption of requests for the establishment of panels and the suspension of concessions;
- b) The strict timeframes for various stages of the dispute settlement process; and
- c) The appellate review of panel reports.²⁵²

In principle, therefore, the DSU is based on rules and in circumstances where the rules of the DSU conflict with the rules of any other agreement, the special and additional rules contained in the DSU prevail.²⁵³

²⁴⁷ Bossche *op cit* 176.

²⁴⁸ Srinivasan *loc cit*; Bossche *op cit* 177.

²⁴⁹ Bossche *ibid*.

²⁵⁰ Bossche *op cit* 178.

²⁵¹ Bossche *op cit* 180.

²⁵² Bossche *op cit* 181.

²⁵³ DSU, Article 1.2.

At the on-going DDA trade negotiations, agreement is yet to be reached on provisions relating to third party rights, strictly confidential information, measures under review, post retaliation, transparency, remand and issues relating to S&D treatment.²⁵⁴

4.2.2 Dispute Settlement and LDCs

The dispute settlement system provides for special rules for developing country Members, particularly the LDCs.²⁵⁵ These special rules which follow from the decision of 5 April 1966 of the GATT Contracting Parties have, however, not been used much to date.²⁵⁶ Most specifically, Article 24.1 of the DSU provides:

“At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.”²⁵⁷

The DSU therefore recognizes the difficulties and challenges faced by LDCs in dispute settlement.²⁵⁸ To this end, Article 27.2 of the DSU requires the WTO secretariat to make qualified legal experts available to help any LDC that so requests.²⁵⁹ The legal experts may not, however, act on behalf of the LDC in a dispute with another Member for reasons of impartiality.²⁶⁰ As a result, the advice and assistance rendered is only limited to the preliminary phases of the dispute.²⁶¹

²⁵⁴ WTO (2007) 48.

²⁵⁵ DSU, Articles 3.12, 4.10, 8.10, 12.10, 12.11, 24 and 27; Alavi (2007) 27; WTO (2004) 113.

²⁵⁶ Bossche *op cit* 226.

²⁵⁷ DSU, Article 24.1.

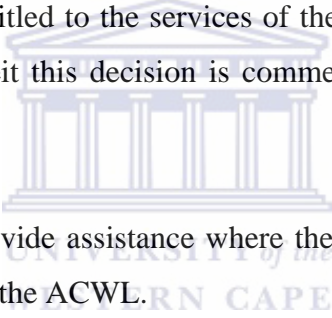
²⁵⁸ Bossche *loc cit*.

²⁵⁹ Bossche *op cit* 227.

²⁶⁰ Bossche *ibid*.

²⁶¹ Bossche *ibid*.

A significant development in dispute settlement in relation to LDCs was the establishment of the Advisory Centre on WTO Law (ACWL) in July 2001.²⁶² The ACWL was established as an independent body to provide legal services and training exclusively to its Members and the LDCs free of charge up to a maximum number of hours determined by the management board.²⁶³ On 15 June 2007, however, through the decision by the ACWL General Assembly, the nominal fees which were previously charged were scrapped.²⁶⁴ Currently, a LDC Member which has reserved its right to participate in a WTO panel proceeding as a third party may now request that the ACWL provide its services in connection with that proceeding and any subsequent AB proceeding free of charge.²⁶⁵ The rationale behind the adoption of the decision was to encourage capacity building efforts in the LDCs and also help these countries to gain practical experience in WTO dispute settlement proceedings. Although none of the LDCs in Africa is a Member of the ACWL,²⁶⁶ all WTO Members that have been designated by the United Nations as LDCs are entitled to the services of the ACWL without having to become Members of the Centre.²⁶⁷ Albeit this decision is commendable, it has a few shortcomings. These are:

- 
- a) The ACWL may not provide assistance where the support would cause financial and operational problems for the ACWL.
 - b) The ACWL only provides training to delegates based in Geneva.

Since lowering the fees charged by the ACWL did not have any impact in the involvement of LDCs in Africa in WTO disputes, it is unlikely that scrapping the fees charged will have any

²⁶² See ACWL official website < http://www.acwl.ch/e/about/about_e.aspx > [accessed on 12 July 2007].

²⁶³ See Schedule of fees set out in Annex IX of the Agreement Establishing the Advisory Centre on WTO Law, ACWL official website < http://www.acwl.ch/e/pdf/annex_4_e.pdf > [accessed on 31 August 2007].

²⁶⁴ See ACWL official website < <http://www.acwl.ch/e/tools/news...> > [accessed on 31 August 2007].

²⁶⁵ See ACWL official website *ibid.*

²⁶⁶ As of 31 August 2007, Ten (10) Developed country Members, including: Canada, Denmark, Finland, Ireland, Italy, Netherlands, Norway, Sweden, United Kingdom and Switzerland. Twenty seven (27) Developing country Members, including: Bolivia, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Honduras, Hong Kong (China), India, Kenya, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Tunisia, Uruguay, Venezuela, Jordan, Oman, Mauritius, Turkey, El Salvador, Indonesia and Chinese Taipei, were entitled to the services of the ACWL. And two (2) Members including: Costa Rica and Georgia were in the process of accession to the ACWL (ACWL official website < http://www.acwl.ch/e/members/members_e.aspx > [accessed on 31 August 2007]).

²⁶⁷ See ACWL official website < http://www.acwl.ch/e/members/members_e.aspx > [accessed on 31 August 2007].

significant impact. To this end, one must have regard to the LDCs shares and patterns of trade, and the retaliation opportunities that these provide.²⁶⁸ Training legal personnel and building capacity is still vital for LDCs in Africa to effectively participate in the WTO dispute settlement system.

There are efforts to increase legal capacity on the African continent which include: the training of trade lawyers through Trade Law Centre for Southern Africa (known as “tralac”),²⁶⁹ the legal capacity building initiative of the University of Pretoria²⁷⁰ and the New Partnership for Africa’s Development (NEPAD).²⁷¹ In addition, the Africa Group has made proposals for the amendment of the DSU, in particular the proposals for the amendment of Article 10 of the DSU to allow developing countries without a trade or economic interest in the matter to be admitted as third parties at any time of the dispute.²⁷² These steps could, however, be misdirected. A closer network between African governments, the private export sector and trade lawyers should be established.²⁷³ Shaffer points out that a “central part of any dispute settlement process is the identification of potential legal claims – naming and blaming.”²⁷⁴ Thus, LDCs should focus on mechanisms aimed at identifying and reporting trade barriers.²⁷⁵

4.3 Dispute Settlement Under the TBT Agreement

²⁶⁸ Alavi *loc cit*.

²⁶⁹ Tralac was established in February 2002 with the objective of building trade law capacity in the Southern Africa region; in governments, the private sector and civil society (See tralac official website < <http://www.tralac.org/scripts/content.php?id=2862> > [accessed on 31 August 2007]).

²⁷⁰ The legal capacity building initiative for international trade and investment was begun in 2002 with assistance for the Carnegie Corporation (New York), World Bank, Rockefeller, Australian Government Aid and Africa Caribbean Pacific – European Union, in conjunction with the University of Western Cape, University of Pretoria, American University (Washington), University of Amsterdam and Erasmus University (See Centre for Human Rights of the Faculty of Law, University of Pretoria < http://www.chr.up.ac.za/academic_pro/llm2/llm2.html > [accessed on 31 August 2007]).

²⁷¹ NEPAD is an initiative of African governments which aims at providing a homegrown response to Africa’s development challenges in the new globalizing environment (NEPAD official website < <http://www.nepad.org/2005/files/home.php> > [accessed on 31 August 2007]).

²⁷² See Africa Group proposal TN/DS/W/15. Other proposals are contained in TN/DN/W/17 and TN/DS/W/42 (Alavi *op cit* 30).

²⁷³ Shaffer (2006) 4.

²⁷⁴ Shaffer *op cit* 7.

²⁷⁵ Shaffer *ibid*.

The TBT Agreement constitutes an integral part of the WTO Agreement, and as a “covered agreement,” the TBT Agreement is subject to the DSU.²⁷⁶ In interpreting the provisions of the TBT Agreement, the DSB follows the fundamental rules of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention.²⁷⁷ The rules and procedures of the DSU are also applied subject to the special rules and procedures on dispute settlement contained in the TBT Agreement, and where there is a conflict, the special and additional rules set forth in Appendix 2 of the DSU prevail.²⁷⁸

Article 14.1 of the TBT Agreement provides that:

“Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.”²⁷⁹

The TBT Agreement sets out the criteria for the selection of a technical expert group, establishes the authority of experts to seek information and advice, protects confidential information and allows parties and third parties to comment on the draft report developed by the technical expert group.²⁸⁰ In the event of non-compliance with international standards, a Member may commence DSU proceedings.²⁸¹

The following section explores the key elements in the interpretation of Article 2.4 of the TBT Agreement which specifically provides for the use of international standards.

²⁷⁶ DSU, Article 1.1. Appendix 1 lists the agreements covered by the DSU and in *Guatemala – Cement I*, the AB was of the view that, “...[a]rticle 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU (covered agreements). The DSU is a coherent system of rules and procedures for dispute settlement provisions of the covered agreements.” (*Guatemala – Anti Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, Report of the AB para 64).

²⁷⁷ Vienna Convention on the Law of Treaties, 23 May 1969. These rules were clarified in *US-Gasoline, inter alia*, that it is the duty of the treaty interpreter to determine the meaning of a term in accordance with the ordinary meaning to be given to the term in its context and in light of the object and purpose of the treaty (*United States-Standards for Reformatted and Conventional Gasoline*, WT/DS2/AB/R Report of the AB at 18).

²⁷⁸ DSU, Article 1.2. In *Guatemala – Cement I*, the AB, in interpreting Article 2.2 stated that special and additional rules within the meaning of Article 1.2 of the DSU apply only in the case of inconsistency or the difference between these rules and the provisions of the DSU (*Guatemala – Cement I supra* at paras 65 and 66).

²⁷⁹ TBT Agreement, Article 14.1.

²⁸⁰ TBT Agreement, Article 14.2 and Annex 2.

²⁸¹ TBT Agreement, Article 14.4.

4.3.1 Burden of Proof

It is a settled principle of law that, “he who alleges must prove.”²⁸² The burden of leading evidence is an obligation that shifts between parties over the course of the hearing in certain respects.²⁸³ The rules on burden of proof under the WTO jurisprudence were summed up in *Turkey – Textiles*²⁸⁴ as follows:

- a) It is for the complaining party to establish the violation it alleges;
- b) It is for the complaining party invoking an exception or an affirmative defence to prove that the conditions contained therein are met; and
- c) It is for the party asserting a fact to prove it.

Further, the issue of burden of proof and when it shifts was considered more exhaustively by the AB in *US – Wool Shirts and Blouses*.²⁸⁵ In that matter the AB found that:

“...if that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.”²⁸⁶

The burden of proof for purposes of the TBT Agreement was considered in *EC-Sardines*. In that case, the panel ruled that the burden of proof under Article 2.4 should be borne by the respondents. The panel was of the view that the TBT Agreement created a general rule in favour of international standards and provided an exception to that rule.²⁸⁷ This approach placed the burden of proving the exception on the EC.²⁸⁸ The AB, however, held that the burden of proof should be borne by the complaining Member seeking a ruling of inconsistency

²⁸² The burden of proof is the duty of a party to litigation to prove a fact or issue (Martin and Law (2006) 66).

²⁸³ In cases where the other party pleads an exception to the general rule or makes an assertion or affirmation.

²⁸⁴ *Turkey – Restrictions on imports of Textile and Clothing Products* WT/DS34/R, 31 May 1999 Report of the panel para 9.57.

²⁸⁵ *United States – Measure affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the AB 25 April 1997 (hereafter referred to as *US-Wool Shirts and Blouses*)

²⁸⁶ *US - Wool Shirts and Blouses* AB *supra* at 14.

²⁸⁷ *EC-Sardines* panel *supra* at para 7.50.

²⁸⁸ McDonald *op cit* 263.

with Article 2.4 of the TBT Agreement.²⁸⁹ Specifically, the AB stated, in relation with Articles 3.1 and 3.3 of the SPS Agreement, that there is no “general rule-exception” relationship between the first and second parts of Article 2.4 of the TBT Agreement.²⁹⁰ The AB was of the view that:

“[T]here are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally opposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is the requirement that Members use international standards as a basis for their technical regulations. Neither these requirements in these two agreements is absolute....the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is “no general rule-exception” relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru-as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities-- to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used “as a basis for the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the “legitimate objectives” pursued by the European Communities through the EC Regulation.”²⁹¹

Horn and Weiler have argued that it is normally better to put the burden of proof on the more informed party.²⁹² Horn and Weiler further argue that the complaining party should simply establish a prima facie case, as it is difficult for a Member to obtain information at the enquiry point for purposes of legal assessment.²⁹³ McDonald also argues that the AB’s rejection of the general rule exception relationship in respect to international standards accords a greater

²⁸⁹ *EC - Sardines AB supra* at para 275. This interpretation has been contended for on the basis of Article 31 of the Vienna Convention which provides that words have to be interpreted in their context and in light of the object and purpose of the instrument in question, Vienna Convention on the Law of Treaties, 23 May 1969 (Horn and Weiler *op cit* 27).

²⁹⁰ *EC - Sardines AB supra* at para 274.

²⁹¹ *EC-Sardines AB ibid*.

²⁹² Horn and Weiler *op cit* 20

²⁹³ Horn and Weiler *op cit* 21.

degree of deference to sovereign policy and will make it easier for Members to maintain more severe domestic measures.²⁹⁴

Article 6.2 of the DSU also provides a better understanding of the effect of putting the burden of proof on the complaining party. Article 6.2 provides that the request for the establishment of the panel must be: (i) in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.²⁹⁵ Ingredients (iii) and (iv) are the main concern here. The panel is required to identify the specific measure at issue: in the case of the TBT Agreement, the panel would identify the measures that have been taken by the responding party in view of the complaint. On top of this requirement, the panel would provide a “legal” basis for the complaint sufficient to present the problem clearly. This procedure assists the panel in drawing the terms of reference, which fulfil an important due process objective and establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.²⁹⁶

True, the dispute settlement process provides opportunities for the complainant to obtain the necessary information to build the case,²⁹⁷ but the responding party may withhold information at the consultation and at the panel phase.²⁹⁸ The information obtained at the enquiry point

²⁹⁴ McDonald *op cit* 264.

²⁹⁵ DSU, Article 6.2; Article 6.2 was considered in *Korea – Definitive Safeguard Measure on Imports of certain Dairy Products* (Hereafter referred to *Korea – Dairy*) WT/DS98/AB/R 14 December 1999 Report of the AB para 120. In that case, the AB quoting its earlier findings in *EC-Bananas*, emphasised that the request for the establishment of the panel must be examined, “...very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons. First, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU and, second, it informs the defending party and the third party of the legal basis of the complaint...” (*Korea – Dairy AB supra* at para 122). Further, it went on to find that, “...if we were in fact attempting to construct such a rule in that case, there would have been little point to our enjoining panels to examine a request for a panel “very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.” (*Korea – Dairy AB supra* at para 123)

²⁹⁶ *Brazil – Measures affecting Desiccated Coconut*, WT/DS22/AB/R 21 February 1997 Report of the AB 22.

²⁹⁷ DSU, Article 13.1 and 2.

²⁹⁸ The AB in *EC-Sardines* found that, “... the dispute settlement process itself also provides opportunities for the complainant to obtain the necessary information to build the case. Information can be exchanged during the consultation phase and additional information may well become available during the panel phase itself.” (*EC - Sardines AB para 280*).

may, therefore, not be sufficient to establish more than a prima facie case and more so to establish that the “standard” is effective and appropriate to fulfil the legitimate objective pursued.

Thus, the ground may not be levelled to enable the complaining party to present its case clearly. Further, transaction costs would be high for a financially constrained complaining party if the complaining party bears the burden of proof.²⁹⁹ This therefore makes it difficult for a LDC in Africa during consultations and at the presentation of the case before the DSB.

In addition, the AB relied on its findings in *EC-Hormones* and the similarities between Article 3.1 of the SPS Agreement and Article 2.4 of the TBT Agreement to conclude that there was no general rule exception relationship.³⁰⁰ The AB did not focus on the inherent differences between the two Agreements.

As discussed above,³⁰¹ although the TBT Agreement and the SPS Agreement share a common history, the growth, importance and development of these two Agreements differs in certain important respects. The SPS Agreement imposes more stringent measures as compared to the TBT Agreement. Specifically, Article 3.1 of the SPS Agreement provides greater flexibility for countries to deviate from international standards than is permitted under the TBT Agreement. Article 2.4 of the TBT Agreement only allows a country to deviate from international standards, if this is necessitated by fundamental climatic or geographical factors or fundamental technological problems.³⁰²

One could therefore conclude that the panel’s finding on the burden of proof was sound in logic as it addresses the practical difficulties and challenges faced by a complaining party especially if the other party is invoking the exception under Article 2.4 of the TBT Agreement. Such a finding would encourage financially constrained countries like LDCs in Africa to enforce their rights and obligations under the TBT Agreement. In contrast, the findings of the AB were, borrowing the words of Horn and Weiler, “...without any meaningful analysis or

²⁹⁹ Horn and Weiler *op cit* 27.

³⁰⁰ McDonald *op cit* 263.

³⁰¹ See Chapter Two: Relationship between the SPS Agreement and the TBT Agreement.

³⁰² TBT Agreement, Article 2.4; International Trade Centre *op cit* 125

even indication of an awareness of the deeper policy issues and consequences that are at stake.”³⁰³

4.3.2 Relevant International Standard

In the context of the TBT Agreement, international standards are those adopted by an international body.³⁰⁴ The AB in *EC-Sardines* upheld the panel’s conclusion that even if not adopted by consensus, an international standard can constitute a “relevant international standard.”³⁰⁵ In *EC-Sardines*, the AB had this to say:

“...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 “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.”³⁰⁶

This means that international standards could be prepared on the basis of consensus.³⁰⁷ Yet international standards that are not adopted by consensus are also within the scope of the TBT Agreement.

Although it is beyond the AB’s powers to delve into the activities of the international standardization bodies, a reading of Annex 1 of the TBT Agreement suggests that Members are under an obligation to use international standards (including those not derived through consensus) as a basis for their technical regulations. Of course, some standardization bodies, like the ISO, do not adopt international standards by consensus. Instead the adoption of international standards is done through a voting process. This raises issues of whether or not there is effective representation or participation of most WTO Member countries in these

³⁰³ Horn and Weiler *op cit* 33.

³⁰⁴ Horn and Weiler *op cit* 8.

³⁰⁵ *EC-Sardines* AB *supra* at para 227.

³⁰⁶ *EC-Sardines* AB *supra* at para 225; The ISO/IEC Guide 2 defines an international standard as “a standard that is adopted by an international standardising/ standards organisation and made available to the public.”

³⁰⁷ *EC- Sardines* AB *supra* at para 223.

international standardization bodies. And if there was effective participation, would a national standardization body be willing to adopt a standard it voted against. Is consensus really necessary? Horn and Weiler argue that the decision of the “AB on the requirement of consensus may or may not be correct in terms of substance. But the hermeneutics behind the outcome of the decision does not give credibility to the outcome.”³⁰⁸ This contention is also true in view of the fact that the AB often departs from its textual strictness in matters where its legal powers are being threatened or challenged.³⁰⁹ McDonald argues, however, that the AB’s decision sought to enhance the effectiveness of the TBT Agreement’s harmonization objectives by ensuring that its mechanisms, including bodies to which standard-setting functions are delegated, are best adapted to achieve their designated roles.³¹⁰ Although this could have been the objective, in its findings the AB clearly avoided to dwell on the requirement of consensus and its effect on harmonization and merely stated its jurisdictional competence.³¹¹

A key consideration in regard to international standards is the delegation of regulatory power from the WTO to the standardization bodies.³¹² Yet, in determining the disputes before the DSB, the AB is not mandated to seek the input of the standardization bodies. McDonald argues that as a matter of principle, the WTO panel should determine unilaterally the application of international instruments created outside the WTO system.³¹³ This does not, however, mean that the DSB is completely locked in its own cage. Article 13 of the DSU gives the panels discretion to seek additional information.³¹⁴ McDonald suggests that in instances where the interpretation of international standards is concerned the panel should invite experts rather than rely on factual information to interpret particular standards. McDonald also suggests that greater disciplines allowing experts from the international standardization bodies to actively participate should be developed within the DSU.³¹⁵

³⁰⁸ Horn and Weiler *op cit* 11.

³⁰⁹ Horn and Weiler *op cit* 10.

³¹⁰ McDonald *op cit* 261.

³¹¹ McDonald *ibid.*

³¹² McDonald *op cit* 262.

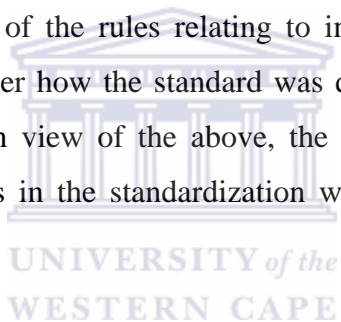
³¹³ McDonald *ibid.*

³¹⁴ McDonald *ibid.*

³¹⁵ McDonald *op cit* 263.

A step towards greater involvement of the international standardization bodies in dispute settlement would, however, be a way of usurping the duties of the DSB and the main objectives of the WTO. This move would be turning international standardization bodies into “world legislators”.³¹⁶ Unlike the ISO, the WTO is based on a system of rules, rights and obligations and there is no classification of Members. Participation of LDCs in the activities of the WTO may be limited by financial constraints, but participation in the ISO, in addition to financial constraints, is limited by the fact that most LDCs are not participating Members. Therefore, involving standardization bodies in dispute settlement would not be representative of the LDCs.

It is also noteworthy that the WTO does not develop standards but only deals with issues which arise from the violation of the rules relating to international standards. As a result, WTO does not therefore consider how the standard was developed but aims at harmonizing these international standards. In view of the above, the requirement of consensus and full participation of WTO Members in the standardization work of the ISO are the real issues which should be addressed.



4.3.3 Basis for

Article 2.4 of the TBT Agreement provides on the one hand that:

“...Members shall use them [relevant international standards], or the relevant parts of them, as a basis for their technical regulations...”³¹⁷ [Emphasis added]

and on the other hand:

“...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.”³¹⁸

³¹⁶ *EC-Sardines* panel *supra* at para 7.77.

³¹⁷ TBT Agreement, Article 2.4.

In regard to the first part, in *EC-Sardines*, the AB opined that an international standard could not be considered as a basis for a technical regulation if the two are contradictory.³¹⁹ The AB's finding that "basis for" does not mean, "to conform to", however, gives room for developed countries to reluctantly use international standards as a litmus test for their domestic regulations.³²⁰ Horn and Weiler, in explaining the differences in the jurisprudence of the panel and the AB, considered the procedural and substantive approaches to the issue of the use of the term, "as a basis for".³²¹ Horn and Weiler argue that procedurally (in the context of international standards), an international standard could serve "as a basis for" a technical regulation and yet the technical regulation could, after deliberation be different from the international standard due to the decisional rules of parliament.³²² As a result, the international standard and the technical regulation will not be the same. Considering the substantive approach, Horn and Weiler argue that the main concern is whether the technical regulation conforms to the international standard.³²³ The approach taken by the panel and the AB in *EC-Sardines*, however, imposes a substantive obligation to employ or apply the international standard as a principal element for the purpose of enacting the technical regulation.³²⁴

The second part, however, affords a Member an opportunity not to conform to the international standard. Although this exception provides a compromise, the national regulator is able to articulate objectives, to assess means, and to rationalize results but be less concerned with the eventual substantive compliance.³²⁵ The second part is further considered below.

4.3.4 Ineffective or Inappropriate Means

³¹⁸ TBT Agreement, Article 2.4.

³¹⁹ *EC-Sardines* AB *supra* at para 248.

³²⁰ *EC-Sardines* AB *supra* at para 242.

³²¹ Horn and Weiler *op cit* 11.

³²² Horn and Weiler *ibid*.

³²³ Horn and Weiler *ibid*.

³²⁴ Bossche *op cit* 460 ; *EC-Sardines* panel *supra* at para 7.110 and *EC-Sardines* AB *supra* at para 249.

³²⁵ Horn and Weiler *op cit* 12.

In circumstances where an international standard is inappropriate and ineffective, TBT disciplines permit a Member not to base their measures on the international standard.³²⁶

In *EC-Sardines*, the AB defined “ineffective or inappropriate means” as:

“...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 fulfilment of the legitimate objective pursued.”³²⁷

It is, however, possible to have a measure which is effective but inappropriate, or appropriate but ineffective.³²⁸ Professor van den Bossche explains that an international standard would be effective if it had the capacity to accomplish all objectives pursued and would be appropriate if it were suitable for the fulfilment of all objectives.³²⁹ As the panel put it:

“[W]hen a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. 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.”³³⁰

The complaining party is therefore under an obligation to prove these two elements. As the AB found, Peru had indeed discharged its duty to demonstrate that the international standard met the legal requirements of effectiveness and appropriateness.³³¹

4.3.5 Legitimate Objectives

Although legitimate objectives are not elaborated under Article 2.4 of the TBT Agreement, in the context of international standards, legitimate objectives would cover the objectives explicitly mentioned in Article 2.2 of the TBT Agreement, namely: national security requirements, prevention of deceptive practices, protection of human health and safety, animal

³²⁶ TBT Agreement, Article 2.4; Horn and Weiler *op cit* 31.

³²⁷ *EC-Sardines* AB *supra* at para 261.

³²⁸ *EC-Sardines* AB *supra* at para 289.

³²⁹ Bossche *op cit* 461.

³³⁰ *EC-Sardines* panel *supra* at para 7.116.

³³¹ *EC-Sardines* AB *supra* at para 290.

or plant life or health or the environment.³³² These objectives, however, go beyond those stated because of the use of the words, “*inter alia*”, which are derived from the Latin word, “*inter*” which means, “among” and “*alia*” which means, “other, another or something else”.³³³ These “other” objectives must, however, be subjected to scrutiny and examination in order to determine the legitimacy of the objectives of the measure.³³⁴

The issue of whether or not legitimate objectives apply to standards has not been addressed by the DSB.³³⁵ It would, however, appear that the objectives enumerated for technical regulations would equally apply to standards. In respect to international standards, therefore, a Member country is allowed to deviate from a particular international standard if that standard does not fulfil any of its legitimate objectives. If a Member, however, bases a domestic regulation on an international standard, and that domestic regulation is for one of the legitimate objectives mentioned in Article 2.2 of the TBT Agreement, it is rebuttably presumed not to create an unnecessary obstacle to international trade.³³⁶

4.4 To Adopt or Not to Adopt International Standards

Although international standards are seen as barriers to trade, standards play an important role in increasing economic efficiency and dealing with market failures.³³⁷ The WTO disciplines do not require that Members should have product standards. The main focus of the WTO, however, is to ensure that technical regulations, voluntary standards, testing and certification of products do not constitute unnecessary barriers to trade.³³⁸ “Adopting international standards has an enormous potential for promoting efficiency and economic growth”; however, “the asymmetries of participation can lead to imbalanced results.”³³⁹ Where no

³³² See UNCTAD (2003) 23.

³³³ Latin-English Dictionary < <http://humanum.arts.cuhk.edu.hk/Lexis/Latin/> > [accessed on 16 June 2007].

³³⁴ *EC-Sardines AB supra* at para 286.

³³⁵ See UNCTAD (2003) *loc cit*.

³³⁶ See UNCTAD (2003) *ibid*.

³³⁷ WTO (2005) 29.

³³⁸ See TBT Agreement, Articles 2.4 and 2.2; Wilson *op cit* 432; Although the TBT Agreement does not mandate harmonisation of standards, it provides strong incentives for the adoption of international standards (McDonald *op cit* 257).

³³⁹ Charnovitz (2002a) 30.

international standard has been established, Members may adopt their own measures.³⁴⁰ It is also presumed that technical regulations that accord with international standards are consistent with the TBT Agreement's obligation to avoid unnecessary obstacles to trade.³⁴¹

In light of the *EC- Sardines* decision, a Member may choose to adopt or not to adopt international standards as long as that Member can show that the product requirements are based on, or adapted to suit, international standards.³⁴² In addition, if an existing international standard cannot fulfil a legitimate objective, a WTO Member has the right to adopt its own standard.

4.5 Selected Concerns

As noted earlier, there have been several concerns relating to the application and implementation of the TBT Agreement. These concerns arise from the voluntary private standards which become mandatory and the proliferation of standards which are set without proper consultation. As a result, a supplier who does not conform is usually excluded from the market. The use of international standards is a serious challenge for LDCs in Africa since countries in Europe, Asia and America have focused their efforts on the ISO by way of providing more financial support to their own standardization bodies.³⁴³ Although some of these concerns have been settled through the TBT Committee, which meets regularly to address issues that arise from the implementation of the TBT Agreement, there are cases of excessive protectionism which have not been resolved and yet continue to raise important issues in the standards debate. A study carried out by the OECD found that there is increasing pressure for standard adoption in industry in order to respond to requirements in regard to security and protection of health and the environment from governments in order to satisfy an

³⁴⁰ McDonald *op cit* 257.

³⁴¹ TBT Agreement, Article 2.5; This provision was considered in *EC-Sardines*, in which Peru argued that the EC regulation prohibited the Peruvian *sardinops sagax* as "pacific sardines", and that this was inconsistent with Codex Stan 94 as a relevant international standard. Thus, the EC regulation was inconsistent with Article 2.4 of the TBT Agreement (*EC-Sardines* panel *supra* at para 7.97).

³⁴² McDonald *op cit* 266.

³⁴³ Marks, R B 'Government Approaches to Standardization in World Trade'

< http://emarks.net/mediaviewstds/MediaViewStd2003_04E.pdf > [accessed on 13 June 2007].

“emerging demand for higher quality standards expressed by consumers and, more generally, the civil society.”³⁴⁴ An aspect which has posed serious questions for policy makers as a potential barrier to trade is the issue of intellectual property rights in standardization. The section below examines the Chinese technology policy, a controversial aspect in relation to the international standards debate.

4.5.1 China – WAPI Functions

As a result of long talks and negotiations, China acceded to the WTO on 10 November 2001.³⁴⁵ China’s accession to the WTO was seen as an opportunity for the rest of the world to trade freely with China’s billion population, and at the same time as a means of regulating China’s aggressive trade policy within the world trade system. In 2003, however, the Chinese government announced that all the Wireless Local Area Network (WLAN)³⁴⁶ equipment sold within China would have to comply with Wireless Authentication and Privacy Infrastructure (WAPI).³⁴⁷ The Chinese authorities argue that, although the WLAN is similar to the existing ISO standard published as ISO 8802:11:1999 (*Wi-Fi*),³⁴⁸ it uses a different security protocol called WAPI.³⁴⁹ Foreign firms were required to acquire a licence through negotiations with any one of the firms designated by the Chinese government.³⁵⁰ The US and other governments reacted strongly and urged China to reconsider its WAPI policy, noting that the directions would appear to be inconsistent with China’s WTO commitments.³⁵¹ In addition, this requirement would constrain efforts directed towards market access and harmonization.³⁵²

³⁴⁴ OECD (2007) 54.

³⁴⁵ See WTO official website < http://www.wto.org/english/news_e/pres01_e/pr252_e.htm > [accessed on 13 June 2007].

³⁴⁶ Cromer, Z K ‘China’s WAPI Policy: Security Measure or Trade Protectionism?’ < <http://www.law.duke.edu/journals/dltr/articles/pdf/2005dltr0018.pdf> > [accessed on 13 June 2007].

³⁴⁷ Cromer *op cit* para 3.

³⁴⁸ *Wi-Fi*, also known as Wireless Fidelity, is a wireless technology brand owned by the *Wi-Fi* alliance intended to advance the interoperability of WLAN products. See Wikipedia, *The Free Encyclopedia* < <http://en.wikipedia.org/wiki/Wi-Fi> .> [accessed on 13 June 2007].

³⁴⁹ Gibson, C S ‘Technology Standards – New Technical Barriers to Trade?’ < <http://ssrn.com/abstract=960059...> > [accessed on 13 June 2007].

³⁵⁰ Cromer *op cit* para 4.

³⁵¹ Cromer *op cit* para 7.

³⁵² Gibson *op cit* 4.

In the heat of this debate, however, China raised Intellectual Property Rights (IPR) issues in standardization at the TBT Committee in 2006.³⁵³ China argued that IPR issues in preparing and adopting international standards had become an obstacle for Members to adopt international standards and facilitate international trade. Further, China proposed that it is necessary for the WTO to consider negative impacts of this issue on multilateral trade and explore appropriate trade policies to resolve difficulties arising from IPR issues in standardization.³⁵⁴ Earlier China had submitted the WAPI standard for consideration as an international standard to the ISO.³⁵⁵ In March 2006, however, the ISO Committee voted against the WAPI standard and instead voted in favour for the adoption of the Institute of Electrical and Electronics Engineers (IEEE) proposed 802.11i security specification.³⁵⁶

Yet, China did not completely withdraw from the move towards developing mandatory domestic technology standards based on Chinese technology. China has sought to increase its role in international standardization bodies rather than adopt existing industry or international technical standards and to require license fees for non-Chinese technology. At the Fourth Triennial Review of the TBT Agreement in 2006, the representative of the EC sought clarification on the scope of application of the Wireless Authentication and Privacy Infrastructure (WAPI). In particular, the European representative stressed that:

“...a unilateral decision by China to adopt mandatory specific encryption requirements in the area where an international standard was being prepared would be inconsistent with Article 2.4 of the TBT Agreement, which stated that, where international standards existed or their completion was imminent, Members should use them as a basis for their technical regulation.”³⁵⁷

In response, the Chinese representative noted the concerns raised but recalled that WAPI standards were developed to protect national information safety and that the Chinese

³⁵³ Background Paper for Chinese Submission to WTO on Intellectual Property Right Issues in Standardization (G/TBT/W/251) WTO official website < <http://docsonline.wto...> > [accessed on 13 June 2007].

³⁵⁴ G/TBT/W/251 *ibid.*

³⁵⁵ Gibson *loc cit.*

³⁵⁶ Gibson *ibid.*

³⁵⁷ Minutes of the TBT Committee Meeting (G/TBT/M/39), para 64 WTO official website < <http://docsonline.wto.org/...> > [accessed on 12 June 2007].

authorities were working closely with the ISO and IEC.³⁵⁸ Although steps have been made to harmonize these standards, China has made no commitment that it will change its position but rather its focus is on increasing its participation and influence in the ISO. For China, it does not matter much whether other countries follow Chinese standards as China is a large market which the rest of the world cannot give up.³⁵⁹ China's position has been that when international standards cannot fulfil a legitimate objective, a WTO Member has the right to adopt its own standard.³⁶⁰ As part of its long term standards strategy, China launched a standards program to accomplish the following goals:

- a) To form a new voluntary technical standards system and enhance the market adaptability of technical standards by 2010;
- b) To complete and perfect the technical standards system and raise the level of Chinese technical standards development by 2020; and
- c) To ensure Chinese technical standards hold a prominent international status by 2050.³⁶¹

Barradough, however, argues that in the long run, China will lose out since the domestic market will be full, as happened in Japan.³⁶² It is, however, unlikely that China will fall into the same predicament, since unlike Japan; China is now playing an increasing role in international standardization by ensuring that her homegrown standards are recognized by the ISO. In effect, all countries which intend to develop standards will have to use these Chinese standards as a basis for their technical regulations. Therefore, unless these issues are addressed within the context of the TBT Agreement, other countries may follow the same trend in other areas.

³⁵⁸ G/TBT/M/39 *ibid.*

³⁵⁹ Barradough, E 'Winning the IP Standards Game: The Chinese Government says it is Tired of Seeing Companies Paying Royalties Abroad and Wants to Develop Some Technology Standards of its Own. Should the Rest of the World be Worried?' 1 July 2005 *Gale Group, Inc.* < <http://web.lexis-nexis.com/professional/...> > [accessed on 12 June 2007].

³⁶⁰ Gibson *op cit* 5.

³⁶¹ Gibson *op cit* 6.

³⁶² Barradough *loc cit.*

4.6 Conclusion

Within the context of the TBT Agreement, there is on the one hand, a need to protect local industries and on the other hand, an obligation to use international standards where they exist. The findings of the AB that the burden of proof is on the complaining party to prove its claim in light of the different elements of Article 2.4 of the TBT Agreement is seemingly problematic.³⁶³ Although the AB relied on its earlier findings regarding a similar provision,³⁶⁴ Article 3.1 of the SPS Agreement, Article 2.4 of the TBT Agreement and Article 3.1 of the SPS Agreement differ, in that Article 3.1 of the SPS Agreement provides greater flexibility.

A central issue addressed in this chapter is whether or not the AB in arriving at its findings addressed the policy considerations behind the TBT Agreement and practical difficulties faced by a complaining party. As noted, the constraints faced by a complaining party were overlooked by the AB. In light of the recent concerns, however, developed countries, like the US, Canada and the UK which have invested heavily in information technology, are becoming particularly affected by China's move towards promoting its homegrown standards. The burden of proof, as found in *EC-Sardines*, is therefore placed on any WTO Member country to prove that the *Wi-Fi* international standard is effective and appropriate to fulfil legitimate objectives pursued by China through the WAPI functions requirement. This would be a difficult task since China alleges that this requirement has an objective of protecting her security interests. Product standards have been aspects of many trade agreements, but China's rise as a market for leading exporters has forced renewed focus on the use of standards as TBT.³⁶⁵ In contrast, LDCs in Africa which do not have the capacity to develop their own standards are therefore at a disadvantage since they are at the "receiving end" of the standards game. The next chapter examines the implications of adopting international standards for these LDCs.

³⁶³ The two elements are: (i) a general rule which requires the use of international standards; and (ii) an exception, which may be invoked by a country seeking not to use the international standard.

³⁶⁴ WTO (2006) 336.

³⁶⁵ Gluksman, D I 'Standards Go Abroad' 1 July 2005 *Washington Watch, Gale Group, Inc*
< <http://web.lexis-nexis.com/professional/...> > [accessed on 12 June 2007].

CHAPTER FIVE: IMPLICATIONS FOR LDCs IN AFRICA

5.1 Introduction

As part of the single undertaking principle of the WTO, LDCs in Africa (that are Members of the WTO) are signatories to the TBT Agreement.³⁶⁶ Therefore the rights and obligations which accrue to the developed country Members extend, to the same extent, to LDCs in Africa relative to the “enabling clause”,³⁶⁷ the S&D treatment provisions in the TBT Agreement,³⁶⁸ and the ministerial declarations and decisions which favour LDCs.³⁶⁹

The existence of product standards is vital for international trade and business since parties to the transaction must be assured of the nature and quality of products.³⁷⁰ There are, however, differing domestic regulations among WTO Member countries due to differing consumer tastes and preferences. As a result of these differing consumer tastes and preferences, government assessment of risks among countries leads to the adoption of differing product standards which increases the cost of exporting goods from LDCs to the developing and developed countries.³⁷¹ In a bid to address these differing domestic regulations some standardization bodies in these LDCs became Members of the ISO.³⁷²

³⁶⁶ LDCs in Africa which have signed the WTO Agreement are: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Congo, Democratic Republic of Djibouti, Gambia, Guinea, Guinea Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda and Zambia. See UNCTAD (2007) iii.

³⁶⁷ The enabling clause, as it is commonly referred to, is the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries adopted in 1979.

³⁶⁸ TBT Agreement, Articles 11.8 and 12.

³⁶⁹ These include, among others, the Decision on Measures in Favour of Least-Developed Countries (1993), the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (1993), the Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization (1993), the Decision on Trade and Environment (1993), the Singapore Ministerial Declaration (1996), the Comprehensive and Integrated WTO Plan of Action for the Least Developing Countries (1996), the Geneva Ministerial Declaration (1998) and the Doha Ministerial Declaration (2001).

³⁷⁰ See WTO (2005) 31.

³⁷¹ WTO (2005) *ibid.*

³⁷² These standardization bodies include: Angolan Institute of Standards and Quality (IANORQ), Benin Centre of Standardization and Quality (CEBENOR), Burkina Faso National Standards Organization (FASONORM), Burundi Bureau of Standards (BBN), Lesotho Standards and Quality Assurance Section (LSQAS), Madagascar Bureau of Standards (BNM), Malawi Bureau of Standards (MBS), Mozambique Institute of Standards and Quality (INNOQ), Rwanda Bureau of Standards (Rwanda), Senegal Standardization Association (ASN),

These national standardization bodies do not, however, play a significant role in standardization work since most of them are correspondent and subscriber Members. Although these standardization bodies have attained a level which would enable them to develop standards for their national markets, greater participation in the ISO would assist in producing “documents” which are relevant to their domestic needs. Of course, regard has to be had to the financial difficulties these countries face and their share in world trading. In addition, one should also consider the poor application of standards and the lack of capacity to test products.³⁷³

A central argument set forth in this chapter, in the context of the TBT Agreement, is that, in addition to the need for S&D treatment and technical assistance, there is need to address other key issues namely: (i) the implications of the application and interpretation of international standards provided under the TBT Agreement on poor African economies; (ii) the participation of LDCs in Africa in the activities of the ISO relative to the “political will” and commitment towards standardization work in these countries; and (iii) whether or not the provisions relating to technical assistance and S& D treatment are meaningful and effective.

Furthermore, standards issues in some LDCs are usually left exclusively to governments, and yet there is limited capacity to deal with these issues in terms of technical experts and infrastructure. The role played by the private sector, producers, consumers, and NGOs in creating relevant standards and bringing complaints to the attention of their home governments is highlighted.

This chapter therefore addresses the implication of the use of international standards for LDCs in Africa.

5.2 Standards Development in Selected LDCs in Africa

Tanzania Bureau of Standards (TBS), Uganda National Bureau of Standards (UNBS), Zambia Bureau of Standards (ZABS), among others.

³⁷³ Communication between the Author and John Okumu, 28 June 2007 to 24 July 2007 – Available on file with the Author.

National standards in Rwanda, Tanzania and Uganda are developed by their respective government bodies. These standards are mainly based on the standards set by international standard setting bodies, which include, among others, ISO, British Standards Institute (BSI), South African Bureau of Standards (SABS) and Kenya Bureau of Standards (KEBS).³⁷⁴ With particular reference to the ISO, international standards are developed through TCs of the ISO, through which these countries are able to participate. Additionally, Rwanda and Uganda (being correspondent Members), do not have any voting rights accorded to them, and as such do not play a significant role in the ISO. Even Tanzania which participates as a Member body is limited by her own institutional weaknesses. Yet compliance with international standards is an important step for goods and services from these LDCs to gain access to international markets and at the same time meet their international trade obligations.

In addition, some of these national standardization bodies of these LDCs have weak links to markets, since only a few major producers are involved in standardization work. Consumers and NGOs also do not play a significant role in the setting of standards, since the consumer groups in these countries are so weak. Below is an overview of three selected LDCs in Africa in relation to standardization work and the ISO.

Country One: Rwanda

Rwanda has been a Member of WTO since 22 May 1996. The Rwanda Bureau of Standards (RBS) is a public institution which was established by Rwanda Government Legislation No. 03/2002 of 19 January 2002, to undertake all activities pertaining to the development of Rwanda's standards, quality assurance and metrology.³⁷⁵ The RBS is also the only body in the country with powers to define, adopt and possess national standards at the national level.³⁷⁶ Rwanda is a correspondent Member of the ISO. The RBS has not participated in any TC of the ISO.³⁷⁷

Country Two: Tanzania

³⁷⁴ Communication between the Author and John Okumu, 28 June 2007 to 24 July 2007 – Available on file with the Author.

³⁷⁵ RBS official website < <http://www.rwanda-standards.org/about-rbs.html> > [accessed on 19 June 2007].

³⁷⁶ RBS official website *ibid.*

³⁷⁷ See ISO official website < http://www.iso.org/iso/about/iso_members.htm > [accessed on 6 September 2007].

Tanzania became a Member of the WTO on 1 January 1995.³⁷⁸ Standards development in Tanzania is carried out by the Tanzania Bureau of Standards (TBS) whose mission is to develop and promote standardization and quality assurance work in industry and commerce.³⁷⁹ TBS, unlike RBS and UNBS, is a Member body of the ISO and has participated in one hundred and forty two (142) TCs of the ISO.³⁸⁰

Country Three: Uganda

Uganda has been a Member of the WTO since 1 January 1995. Standards development in Uganda is carried out by the UNBS, a government body which ensures the harmonization of standards.³⁸¹ Uganda standards are carried out by national technical committees, which consist of consumers, traders, academicians, manufacturers, government and other stakeholders.³⁸² Currently there are eleven (11) national technical committees, which have been established to deliberate on standards. The UNBS is also the National Enquiry Point (NEP) for the implementation of the TBT Agreement. As a correspondent Member of the ISO, the UNBS does not have any voting rights in the ISO. The UNBS has, however, participated in only two (2) TCs of the ISO.³⁸³

5.3 Bearing the Burden of Proof

The key issues which need to be addressed in the context of bearing the burden of proof are:

- a) Whether or not LDCs in Africa can easily access reliable and adequate information at enquiry points in view of the institutional challenges they face.
- b) Whether the rights of LDCs are fully covered under the DSU.

³⁷⁸ Tanzania has been a third party in three (3) disputes namely: (i) *European Communities – Export Subsidies on Sugar* (Australia) WT/DS265/AB/R 28 April 2005, Report of the AB; (ii) *European Communities – Export Subsidies on Sugar* (Brazil) WT/DS266/AB/R 28 April 2005 Report of the AB, and (iii) *European Communities – Export Subsidies on Sugar* (Thailand) WT/DS283/AB/R 28 April 2005. See WTO official website < http://www.wto.org/english/thewto_e/countries_e/tanzania_e.htm > [accessed on 6 September 2007].

³⁷⁹ See Tanzania Government official website < <http://www.tanzania.go.tz/tbs.htm> > [accessed on 6 September 2007]; TBS was established by an Act of Parliament No. 3 of 1975 under the Ministry of Trade and Industry and became operational in April 1976.

³⁸⁰ See ISO official website < http://www.iso.org/iso/about/iso_members.htm > [accessed on 6 September 2007].

³⁸¹ The UNBS was established by an act of parliament and became operational in 1989. The UNBS has its headquarters in Kampala, with regional offices in only four districts (See UNBS official website < <http://www.unbs.go.ug/index.php> > [accessed on 30 July 2007]).

³⁸² A Uganda standard is defined as a document declared as such by the National Standards Council (See UNBS official website < <http://www.unbs.go.ug/main.php?menuid=20> > [accessed on 30 July 2007]).

³⁸³ See ISO official website < http://www.iso.org/iso/about/iso_members.htm > [accessed on 6 September 2007].

c) Whether the legal capacity in these countries is adequate and effective

As noted earlier, the integration of LDCs in the world trading system is constrained by their own institutional weaknesses which will require additional time and technical assistance.³⁸⁴ Yet integration into the world trading system is crucial for economic development in these countries. Although Article 12.8 of the TBT Agreement allows LDCs to request an extension of time in regard to the fulfillment of their obligations,³⁸⁵ it should not be used as an “escape provision”. Wilson argues, that if “developing countries lack resources to access information on international standards or to participate in their development, a key link between the rule of law as specified in the WTO system, developing countries” ability to fulfil their obligations and defend their rights is called into question.”³⁸⁶ In addition, Alavi argues, that “whereas the development objectives are institutionalized in the preparatory work for many trade agreements and even written into their preambles, decisions made by panels and the AB appear to sideline these objectives and refer to other principles entirely.”³⁸⁷

The negative implication of bearing the burden of proof is that, since there are no proper institutions in place to collect adequate information in these LDCs, their participation in the dispute settlement system is greatly restrained. Yet the AB in *EC-Sardines*, in allocating the burden of proof, did not address the difficulties a complaining party may face in bearing the burden of proof and development objectives of the WTO.

5.3.1 Institutional Challenges

Most of the LDCs lack the resources to implement international standards and technical regulations of other countries. Regulations in other countries are also very stringent, and it may not be easy for a poor exporting country in Africa, to export effectively. As such, LDCs have to upgrade their systems in order to comply with the demands of the international

³⁸⁴ Michalopoulos *op cit* 24.

³⁸⁵ TBT Agreement, Article 12.8.

³⁸⁶ Wilson *op cit* 437.

³⁸⁷ Alavi *op cit* 37. For a fuller discussion on development objectives in relation to the GATT and the enabling clause See *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/AB/R, 7 April 2004 Report of the AB.

standards, and to even include standards that are not covered by the TBT Agreement.³⁸⁸ For example, in 1998, fish products from Kenya, Mozambique, Tanzania and Uganda were rejected in the EC markets because of the use of pesticides, and yet the fish products had met these countries' national standards.³⁸⁹ In addition, some producers are not aware of the international standards which should be fulfilled.³⁹⁰

Be that as it may, disputes brought before the dispute settlement mechanism are usually assessed on their merits in regard to the evidence that has been obtained. The lack of pre-case assistance to LDCs is therefore a disadvantage.³⁹¹ There have been efforts by the Africa Group during the ongoing Doha Round trade negotiations to address this institutional challenge, and many others. Alavi argues, however, that the Africa Group proposals do not clearly address this aspect.³⁹² Instead, the group suggests that the dispute settlement mechanism should provide assistance in the form of a pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and the expenses incurred, among others.³⁹³ Alavi suggests, that the African countries should use the dispute settlement system (i) to highlight broadly the negative effects of WTO rules in their economies and development ambitions; and (ii) to use the ongoing review process to try, through negotiations, to raise their concerns and amend the existing rules.³⁹⁴ Although trying to amend the existing rules is important, a strong link between the industry and the African governments is crucial in addressing some of the institutional challenges faced by these LDCs.

5.3.2 Lack of Capacity

³⁸⁸ Some standards which have been recognized as barriers to trade like the environmental standards and social standards have been accepted in some developed countries. Issues of implementation have, however, become a problem in these countries since they are not subject to the TBT Agreement disciplines and do not also fall within the SPS agreement. Further, advocates of PPM labels have proposed that a labelling system should be established to let the consumers know what processes have been used in the production of a good (Goode *op cit* 282).

³⁸⁹ The ban was still in effect in July 2000. The action caused considerable losses in the fish industry in these countries (Wilson *op cit* 430).

³⁹⁰ For example, Uganda honey (contained in plastic bottles) was rejected by Japanese authorities because Japan only imports honey in glass bottles. See Muwanga, D 'Exports Can Fetch Revenue' New Vision 27 September 2007 < <http://www.newvision.co.ug/detail.php?mainNews...> > [accessed on 27 September 2007]. See also Muwanga (2007) 8.

³⁹¹ Alavi *op cit* 32.

³⁹² Alavi *ibid*.

³⁹³ Alavi *ibid*.

³⁹⁴ Alavi *op cit* 40.

At the ongoing DDA negotiations, the Africa Group proposals in regard to the DSB identified three principal obstacles: (i) entry barriers to using the dispute settlement mechanism; (ii) the inadequate and appropriate nature of retaliatory mechanism, and; (iii) the lack of a development orientation in the WTO dispute settlement mechanism.³⁹⁵ These obstacles highlight the lack of capacity in terms of qualified personnel, technical experts and resources. There are regional capacity building efforts within the East African Community (EAC),³⁹⁶ Common Market for Eastern and Southern Africa (COMESA) and Southern Africa Development Community (SADC). These efforts have, however, focused on lack of technology, establishing regional accreditation services and strengthening regional cooperation. As noted earlier, these efforts may not address the negative effects of the WTO rules on LDCs, and that these countries should focus on mechanisms aimed at identifying and reporting trade barriers.³⁹⁷ A key link between industry and government bodies within an institutional and legal framework would therefore encourage greater participation.

5.4 Meeting International Standards

The Code of Good Practice requires Members to ensure that their central government standardizing bodies accept and comply with the Code. In addition, Article 4.1 of the TBT Agreement requires Members to take reasonable measures to ensure that local and non-governmental standardization bodies comply with the Code. Acceptance of the Code must be communicated to the ISO/IEC information centre. And acceptance of the Code is an acknowledgement of complying with the principles of the TBT Agreement.³⁹⁸

When a new international standard has been approved and published, the national standardization body may either adopt the standard as is, or develop a national standard which reflects the trade needs and interests of the country. Since most of the LDCs have weak

³⁹⁵ Alavi *op cit* 31.

³⁹⁶ For example, the trade capacity building project funded by Norwegian Agency for Development (NORAD) and implemented by United Nations Agency for Industrial Development (UNIDO) in the EAC launched in December 2006. See Uganda Trade Ministry official website < <http://www.mtti.go.ug/docs/EAC%20TCB%20PROJECT.pdf> > [accessed on 6 September 2007].

³⁹⁷ Shaffer *op cit* 7.

³⁹⁸ TBT Agreement, Article 4.2.

infrastructure, adopting the international standard may be the only viable option. The industry which, of course, did not participate in the standard development process has no other option but to adjust to the new requirements. This process can be so costly for local producers. Yet the flexibility offered to these LDCs does not contribute to meeting their long term trade and development objectives, that is to say, to promote trade and investment. Those firms in these countries which do not meet the required international standards are forced to focus on the domestic market.

5.4.1 A Challenge for Exporting Firms

In recent times there has been increased standardization activity due to, among others, consumer demand for high quality products and services, technological innovations and expansion of global commerce.³⁹⁹ Since standards are voluntary specifications emanating from market forces,⁴⁰⁰ market standard setting tends to favour large, influential producers.⁴⁰¹ This market approach also favours firms that are innovative, as it eliminates the need to obtain institutional support for new technologies. These large multinational corporations, through their national standardization bodies, play a significant role in the ISO. As a result, decisions on the preparation and adoption of international standards made by the ISO are generally influenced by large multinational corporations and developed countries.

In view of the above, exporters in LDCs (mainly small medium private enterprises and subsidiaries of multinational firms) often make strategic decisions to adopt international standards as a means of entering foreign markets. These firms, however, incur huge compliance costs, in terms of additional equipment and technical personnel to ensure quality assurance. Chen *et al*, basing their conclusions on the findings of the World Bank TBT Survey, have found that standards in developed countries affect firms' propensity to export in

³⁹⁹ WTO (2005) 29; Mutasa, M 'ISOs Role as an International Standards Setting Organization' Presentation at the WTO Regional Workshop on TBT for English Speaking African Countries Held at Gaborone, Botswana Between 19 to 21 June 2007 Slide 4 – Available on file with the Author.

⁴⁰⁰ Egan *op cit* 52.

⁴⁰¹ Abbot, K W and Snidal, D 'International Standards and International Governance' (2000)

< http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_00_18.pdf ... > [accessed on 13 June 2007].

developing countries.⁴⁰² In addition, the difference in standards across foreign countries causes disharmony of scale for firms, and affects decisions whether to enter export markets.⁴⁰³

Small firms in LDCs which intend to export their products to foreign markets are therefore discouraged from exporting their products and adopting international standards. Consequently, this non-compliance with international standards affects these firms' propensity to export their products, and therefore affects international trade and commerce in a negative way.

5.4.2 Complying with the Code of Good Practice

The TBT Agreement holds central governments accountable for the standards developed by local government and non-governmental bodies in their countries, and yet there are no proper institutions in place to regulate these bodies.⁴⁰⁴ Although the Code of Good Practice lays down some fundamental rules regarding the development of standards at both the national and international level, its application in LDCs in Africa is greatly constrained since the national standardization bodies are inadequately funded by their national governments.⁴⁰⁵ Standardization work in these countries is mainly carried out by a central body. In fact, NGOs and consumers are not encouraged to participate in standardization work, since standards are perceived as a means of regulating business and protecting the public through Acts and regulations of parliament. This centralized system therefore inhibits the important contribution that consumers, the private sector and non-government organizations could play in standardization work since these countries face a serious problem of lack of funds, personnel and other resources. Of course, the potential shortcomings of encouraging NGOs and consumer groups in standardization work should also not be underestimated.

⁴⁰² Chen, M X *et al*, 'Do Standards Matter for Export Success?' (2006) *World Bank Policy Research Working Paper No. 3809*, 24 World Bank official website < <http://www-wds.worldbank.org/...> > [accessed on 27 June 2007].

⁴⁰³ Chen *et al* *ibid*.

⁴⁰⁴ TBT Agreement, Article 4.1.

⁴⁰⁵ For example, in Uganda, the UNBS requires a budget of Ugshs. 12 billion and yet it currently operates on a budget of Ugshs. 4.8 billion (See Obore, C 'Producers, Dealers in Fake Goods Exposed' *Daily Monitor* 6 August 2007 < <http://www.monitor.co.ug/news/news08062.php> > [accessed on 24 August 2007]).

As a result, national standardizing bodies have to adopt international standards which do not reflect the needs of their market since it is cheaper and time saving. Complying with the Code of Good Practice is therefore still a problem for LDCs.

5.4.3 Non - Product Related PPMs

As noted earlier,⁴⁰⁶ there is still debate as to whether or not the TBT Agreement covers environmental, labour and social standards. Trade, business and investment in most LDCs in Africa have exposed the environment to risks of damage and degradation. In addition, globalization of trade through e-commerce has led to new barriers to trade which have the potential to distort trade in LDC markets. As a result, although the relevance of unincorporated PPMs for trade policy is still unclear, consumers and governments in the importing country may care about the way in which the imported good is produced.⁴⁰⁷ The primary concern for LDCs therefore is the application of non-product related PPMs requirements by importing countries, and whether LDCs should also adopt these methods. The market trends suggest a move towards the adoption of social, environmental and labour standards. Of course these standards may also be used for purposes of gaining competitive advantage since some consumers may not buy a particular product or service, if it is “environmentally unfriendly”, from a country which does not meet labour standards, or if it has been produced by a company that does not have any social responsibility. An international standard which fulfils any of these requirements would be easily adopted. These standards therefore have the potential of acting as barriers to trade if products from these countries are rejected at the various entry points or if it causes unreasonably high expense to the producer in terms of conformity and compliance costs.

5.5 Participation in Standardization Work

⁴⁰⁶ See Chapters One, Two and Three.

⁴⁰⁷ WTO (2005) 35.

The TBT Agreement's Code of Good Practice "seeks to supervise how standard-setting bodies at the national level participate at the international level."⁴⁰⁸ All bodies in a territory interested in a particular subject matter are required to participate through one delegation at the international body.⁴⁰⁹ The requirement to participate in international standardizing bodies therefore ensures that LDCs play a significant role in the standards development. In practice, however, the provisions regarding participation have not been effective since the majority of these LDCs do not have any voting rights.⁴¹⁰ As a result, the standards which are developed do not often reflect the trade interests of these LDCs.

As noted earlier, the ISO has been recognized by the WTO as a leading international standardizing body, and most of the definitions in Annex 1 of the TBT Agreement are taken from the ISO documents. The participation of LDCs in activities of the ISO has, however, been insignificant. Apart from the national standardization bodies in Congo and Tanzania, several national standardizing bodies in LDCs are only correspondent, and subscriber Members, and some other countries are not represented at all (see Table 3, p. 109).⁴¹¹

Additionally, the composition and decision making organs and standard setting procedures of the ISO or other international standardizing body have also not been subjected to the TBT Agreement disciplines. In fact, as seen in *EC-Sardines*, the AB did not delve into the affairs of CAC.⁴¹²

Hamilton argues that some of these organizations are not competent to handle standards development as they do not have fair and transparent systems in place.⁴¹³ The basis of this argument stems from the fact that some of these standards are not consensual. Consensus is an important aspect in so far as acceptability, relevance and implementation of standards are

⁴⁰⁸ Charnovitz (2002a) 9.

⁴⁰⁹ TBT Agreement, Annex 3 para G.

⁴¹⁰ As of this writing, only two LDCs in Africa, that is, Congo and Tanzania, have voting rights in the ISO.

⁴¹¹ See ISO official website < <http://www.iso.org/iso/en/aboutiso/isomembers...> > [accessed on 23 August 2007].

⁴¹² *EC-Sardines* AB *supra* at para 227.

⁴¹³ Hamilton, P 'Debate Begins on Standards for International Trade'

< <http://search.epnet.com/login.aspx?direct=true&db=aph&an=9706082700> > [accessed on 27 June 2007].

concerned. Thus, it has made it increasingly difficult for some countries to accept the standards set by the ISO.⁴¹⁴

Although the participation of LDCs has been recognized by the ISO, there has been no significant improvement in participation.⁴¹⁵ Morikawa and Morrison also note that developed countries send more experts to TCs of the ISO than others, while some countries send no delegates at all.⁴¹⁶ Further, developed countries hold more leadership positions within these TCs. The negative implication that follows from this predicament is that LDCs are left out of standards development, and yet non-compliance with international standards is fatal to their economic growth and development. International standard setting organs should be subjected to TBT Agreement disciplines, though, this should not be done to undermine their independence. Alternatively, the DSB should consult these organs whenever a particular standard needs interpretation. Since the WTO delegated the duty of standard setting, it should, therefore, leave the duty of interpreting and analyzing a particular standard to the international standard setting body. But again, this would be turning them into “world legislators”. A compromise therefore has to be reached between eliminating protectionist tendencies and trade liberalization, and at the same time encouraging participation of WTO Members in standardization work.

5.5.1 ISO’s Standard Development Process

The first step is when a particular industry notifies the national Member of the ISO in regard to the need for a standard (see Table 2, p.108).⁴¹⁷ The national Member then notifies the ISO. At this stage the Members take a vote as to whether a standard is required. If it is approved,

⁴¹⁴ As the case for China and *Wi-Fi* standards. See chapter four of the thesis.

⁴¹⁵ Morikawa and Morrison *loc cit*. In 1967, the ISO created DEVCO, its policy committee on developing country matters. DEVCO’s mandate was to identify the needs and requirements of developing countries in the field of standardization and related activities. ISO also established the Developing Countries Task Force (DCFT), which developed a program of action in 2003 to further deal with the under representation challenge. The establishment of these committees has, however, not improved the participation of LDCs (Morikawa and Morrison *op cit* 13).

⁴¹⁶ Morikawa and Morrison *op cit* 10.

⁴¹⁷ ISO official website <http://www.iso.org/iso/standards_development/processes...> [accessed on 25 August 2007].

the TCs are then set up to develop a working draft. These TCs develop the standard and forward it to the working group's parent committee for the consensus building phase. Upon completion of the first committee draft standard, it is registered by the ISO central secretariat and distributed for comment in relation to its technical content. This draft international standard (DIS) is then circulated to all ISO Member bodies by the ISO central secretariat for voting and comments. After five months, the final DIS is circulated to all ISO Member bodies for a final "yes" or "no" vote within a period of two months. The text is approved as an international standard if a two thirds majority of participating Members of the TC is in favour, and not more than one-quarter of the total number of votes cast are negative. Upon approval, the final text is sent to the ISO central secretariat which publishes the international standard.

As noted above, the voting starts at an early stage. Therefore, ensuring that a particular standard is approved and not rejected at the earliest stage would require a lot of lobbying and resources. This puts LDCs at a disadvantage since they do not have the necessary financial and human resources to cope easily with the rapid technological innovation taking place. Yet the standards development process should not be delayed, as new international standards are always required to address issues of market failures. This explains why there are time frames within which a Member is required to cast a vote. In practice, and in view of the institutional challenges in these LDCs, it may not be possible for all the stakeholders, i.e. producers, consumers and NGOs, to adequately comment on the DIS. For those LDCs that are not participating Members, this process is of course not relevant since they do not have any voting rights.

5.5.2 LDC Representation in the ISO

LDCs are poorly represented in the ISO (see, Table 3, p.109). This has been due to factors not limited to financial constraints and lack of technical personnel. A large number of the standardization bodies in LDCs are correspondent and subscriber Members.⁴¹⁸ Some countries are not represented at all. This therefore limits their participation in the ISO. For meaningful participation to occur, these countries would have to foster and encourage greater

⁴¹⁸ See ISO official website < <http://www.iso.org/iso/en/aboutiso/isomembers...> > [accessed on 23 August 2007].

representation in the ISO. This, however, remains a challenge for these LDCs given the level of commitment towards standardization work in these countries.

5.6 Options for LDCs

LDCs in Africa experience, among others, low levels of income per capita, limited exports, weak infrastructure, and unemployment. Trade liberalization, however, offers new opportunities for governments, individuals and firms in these LDCs to export their products, which in turn fosters economic development. Yet international standards and labelling requirements are increasing the costs of trading. A study carried out by the OECD in relation to the role played by standardization bodies in its Member countries found that:

“If the world of standardisation were dominated by a few players, with established procedures embodying a large number of common principles and definitions; in which exceptions are either rare or generally unimportant; and in which co-ordination with regulatory authorities and industry is managed through non-governmental national standards bodies, then, in order to improve continuously and meet the changing needs of international trade development, it should identify the ways in which that uniform model can be adapted, or fine-tuned.

However, the world of standardisation covers a diverse mixture of organisations, in which alternative models of participation for industry and government exist. The variety evident in the structures used in standardisation, both at sectoral level or in multi-sectoral regional/global programmes, suggests a need for closer analysis of exactly how they operate. Is there an “optimum” model? Can circumstances be defined where industry leadership is more important than government leadership, or vice versa, if standards are to play an effective role in trade liberalisation?”⁴¹⁹

The OECD study emphasized the need for accurate, transparent information about what goes on in the standardization field.⁴²⁰ LDCs should therefore focus on mechanisms which suit their development needs and industry and only adopt international standards which do not cause fundamental technological problems.

⁴¹⁹ OECD (1999) 17.

⁴²⁰ OECD *ibid.*

5.6.1 Harmonization or Equivalence

One should consider whether the international standards set by the ISO are in fact relevant to the prevailing circumstances in these LDCs, since these countries have not attained a level of development which would accelerate the implementation of international standards. Harmonizing standards proposed by LDCs with those set by developed countries is a difficult process, since these LDCs do not have voting rights in the ISO.

In addition, unlike in developed countries, the enforcement mechanisms in LDCs are so weak, and there is also lack of consumer awareness and ignorance among consumers and small medium enterprises.⁴²¹ Standardization is also not an issue of great concern in some of these LDCs.

Another impediment to harmonization is the language barrier among countries. For example, it is reported that only 50 standards have so far been harmonized among the SADC Member states as opposed to the over 700 standards which have been harmonized under the EAC.⁴²² During the Second Triennial Review, the TBT Committee recognized equivalency of standards as an interim measure in the facilitation of international trade.⁴²³ Chen *et al* also suggest, that negotiating on testing procedures towards mutual recognition with importing countries could stimulate exports.⁴²⁴ Therefore, mutual recognition, though, it is not a key principle of the TBT Agreement in relation to standards, could be an effective means in reducing the existing trade barriers.

5.6.2 Alternative Approaches to Standardization

⁴²¹ Communication between the Author and John Okumu, 28 June 2007 to 24 July 2007 – Available on file with the Author.

⁴²² Gumbo, P ‘Standards Bureau Decries Lack of National Accreditation Body’ IPP Media /Guardian News 30 August 2007 < <http://www.ippmedia.com/ipp/guardian/2007/08/30/97354.html> > [accessed on 31 August 2007].

⁴²³ Minutes of the Second Triennial Review of the Operation and Implementation of the TBT Agreement (G/TBT/9), para 23 < [http://docsonline.wto.org/...](http://docsonline.wto.org/) > [accessed on 31 August 2007].

⁴²⁴ Chen *et al op cit* 24.

Since the interpretation of Article 2.4 of the TBT allows countries to deviate from international standards where they are not applicable,⁴²⁵ LDCs should also consider developing standards which are relevant to their trade needs. Like China, these countries could focus on promoting their homegrown standards. The problem, however, is that it will be so costly for the government. But with the support of the private sector and NGOs it may be possible to develop their own standards. Stephenson notes that there is no single process worldwide for creating and adopting national standards, and that it is up to each country to choose a system which it finds appropriate.⁴²⁶ In doing so, however, a country should consider: (i) the size and concentration of the industry; (ii) the dominance of specific suppliers or buyers; (iii) the level of speed of technological advance; and (iv) the public interests.⁴²⁷

Stephenson considers four (4) types of approaches to standards development (see Table 4, p.110).⁴²⁸ The first type involves a government agency and accredited developers; the second type involves a private sector organization; the third type involves national coordination organization and accredited developers; and the fourth type involves both the government body and the private sector coordination organization.

Rwanda, Tanzania and Uganda use a government agency, with a limited involvement of the private sector. This approach has, however, not been very successful. This rather centralized system should instead be replaced with a system involving the greater private sector, local governments and NGOs but with the over all supervision of the central government body. This would ensure that the interests of the public are catered for, and at the same time the infrastructural and technological difficulties facing the national standardizing bodies are addressed.

5.6.3 Regional Integration Arrangements and Other Partnerships

⁴²⁵ See Chapter Four: To Adopt or Not to Adopt International Standards.

⁴²⁶ Stephenson *op cit* 23.

⁴²⁷ Stephenson *ibid*.

⁴²⁸ Stephenson *ibid*.

Hufbauer *et al* suggest that regionalization of technical experts and methods reduce on operation costs.⁴²⁹ There are efforts within the EAC, COMESA and SADC to harmonize standards and to establish a joint legal framework, infrastructure and public awareness.⁴³⁰ The Treaty for the establishment of the EAC recognizes the need to co-operate in the area of standardization, quality assurance, metrology and testing (SQMT) in order to facilitate sustainable modernization in the Community.⁴³¹ Since the launch of the East Africa Standardization Committee in 1998 there are over 700 standards which have been harmonized.⁴³² There is a need for a regional accreditation body since most of the testing laboratories do not have accreditation facilities and have to seek accreditation elsewhere, particularly in South Africa.⁴³³ Chen *et al*, in relation to exporting firms in developing countries, also suggest that facilitating information exchange with importing countries on standards and technical regulations could also stimulate firms' propensity to export.⁴³⁴

Additionally, LDCs which are not yet full Members of the ISO should take steps to becoming full Members of the ISO. It is through full participation that they will be able to influence the technical content of standards.



5.6.4 Increased Private Sector and Consumer Participation

As noted earlier, the need for a standard begins at the industry level. Industry consists of several key players, among others, suppliers, producers, distributors, and consumers. The participation of consumer groups has, however, been very limited in the selected LDCs. In addition, there is low consumer awareness in relation to standardization work.⁴³⁵ Yet producers, consumers and NGOs can play a significant role in fostering the development of, and adherence to, international standards. It has also been recognized that the participation of

⁴²⁹ Hufbauer *et al* (2002) 1014.

⁴³⁰ The establishment of the East African Quality and Metrology Centre. EAC- Quality official website < <http://www.eac-quality.net/>> [accessed on 31 August 2007]. SADCSTAN (SADC Cooperation in Standardization) official website < www.sadcstan.co.za/overview.html > [accessed on 31 August 2007].

⁴³¹ Treaty for the Establishment of the EAC, Chapter 13, Article 81.

⁴³² Gumbo *loc cit*.

⁴³³ Gumbo *ibid*.

⁴³⁴ Chen *loc cit*.

⁴³⁵ Gumbo *op cit*.

all stakeholders in the development of international standards is important to ensure confidence in technical regulations based on these standards.⁴³⁶ Public awareness should therefore be directed towards the participation of all stakeholders in the industry, and not towards punishing those who do not comply with the required standards.

5.6.5 Privatisation

National standardisation bodies in LDCs in Africa should consider licensing private companies to take over some of the non-core duties and responsibilities. This would allow the national standardisation body to concentrate on purely standard development work.⁴³⁷

5.6.6 Capacity Building Efforts

Lack of capacity has been identified as one of the reasons deterring the participation of LDCs in both the WTO⁴³⁸ and the ISO. There are already efforts to increase capacity in these LDCs, but these capacity building efforts must be supported by the manufacturing and service industries. Increasing capacity alone without sensitizing the producers in these countries would not be fruitful. The private sector in LDCs has typically viewed WTO dispute settlement as the government's business.⁴³⁹ Yet information regarding the effect of a given measure and its impact on trade cannot be assessed by the government alone, given the weak administrative systems in these countries. Public-private partnership would therefore go a long way in re-enforcing the capacity building efforts. There is also need for further training and strengthening of LDCs NEPs, updating to accommodate rather dynamic market driven and mandatory standards.

As regards the lack of legal and technical experts: LDCs should initiate capacity building efforts at the national level by way of training, or supporting efforts towards increasing

⁴³⁶ OECD (2000) 3.

⁴³⁷ Privatization of quality testing services is to be done in Kenya to allow the national standards body, KEBS, to concentrate on creating and developing standards. See Mugambi, K 'Kenya: Standards Bureau May Privatize Services' The Nation 10 August 2007 < <http://allafrica.com/stories/200708091005.html> > [accessed on 23 August 2007].

⁴³⁸ The trade ministers at the Doha Ministerial Conference pledged to continue efforts geared towards capacity building (Ministerial Declaration, WT/MIN (01) Dec/1 20 November 2001, paras 2, 16, 20, 21, 33, 36, 38, 42.

⁴³⁹ Shaffer *op cit* 7.

learners, in WTO law. In the meantime, LDCs should utilize the services of the ACWL at Geneva. The Centre's rates vary, depending on a country's membership status, share of world trade and per capita income.⁴⁴⁰ These rates are low compared to those charged by other international trade lawyers and private law firms. Those LDCs which wish to appear as third parties are also offered free legal services.⁴⁴¹ In addition, links to markets should be established to ensure accurate, adequate and reliable information on the effect and impact of the measures imposed by the trading partners.

5.6.7 Technical Assistance

Standards development is a highly technical area which requires experts, technicians and persons familiar with standardization work. Yet LDCs in Africa do not have the required infrastructure in place to assure adequate development of standards, dissemination of information and notification of standards. Technical assistance is also essential for meaningful progress.⁴⁴²

There were proposals, during the ongoing DDA trade negotiations, for mandatory and preferential technical assistance for developing countries to meet technical standards.⁴⁴³ Developed countries opposed the Africa Group's requests for a new fund to provide technical assistance specifically for TBT obligations, and for impact assessments of technical standards on developing countries before implementation.⁴⁴⁴ Switzerland, Canada and the EU, however, argued that these matters were better taken up in the TBT Committee.⁴⁴⁵

⁴⁴⁰ LDCs are charged US\$ 25 per hour during the WTO dispute settlement proceedings and are given free legal advice, subject to a maximum of hours determined by the management board (Schedule of Fees set out in Annex IV of the Agreement Establishing the ACWL). < http://www.acwl.ch/e/pdf/annex_4_e.pdf > [accessed on 31 August 2007].

⁴⁴¹ See ACWL official website < <http://www.acwl.ch/e/tools/news...> > [accessed on 31 August 2007].

⁴⁴² OECD (2001) 21.

⁴⁴³ Bridges Weekly Trade News Digest, 24 October 2002, Vol. 6 (36) ICTSD official website < <http://www.ictsd.org/weekly/02-10-24/story2.htm> > [accessed on 10 August 2007].

⁴⁴⁴ Bridges *ibid.*

⁴⁴⁵ Bridges *ibid.*

One could argue that technical assistance is a rather controversial topic which may not be accomplished within the TBT Committee. A commitment towards providing technical assistance is a bigger issue which would best be addressed through trade negotiations. In this regard, concessions have to be made and agreements have to be reached at a higher level. Trade liberalization in LDCs would also require the identification of standards-related technical assistance as part of an overall development strategy which is demand-driven and coupled with a country-owned process undertaken in partnership with aid agencies.⁴⁴⁶

As Srinivasan quotes:

“...And they [developed countries] have promised technical assistance to enhance the capacity of developing countries to participate in the WTO and in trade. So many promises - and such little action. The record of industrialized countries in the area of trade policy is one of heroic underachievement. They have collectively reneged on every commitment made.”⁴⁴⁷ [Emphasis added].

The need for developed countries to honour their commitments, and to provide technical assistance, to LDCs, has therefore been a topic of interest. To this end the trade ministers at Paris resolved as follows:

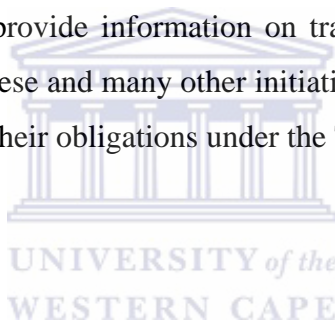
“We, Ministers of developed and developing countries responsible for promoting development and Heads of multilateral and bilateral development institutions, meeting in Paris on 2 March 2005, resolve to take far-reaching and monitorable actions to reform the ways we deliver and manage aid...”⁴⁴⁸

⁴⁴⁶ Finger, M J and Wilson, J S ‘Implementing a WTO Agreement on Trade Facilitation: What Makes Sense?’ *World Bank Policy Research Working Paper No. 3971* World Bank official website < [http://www-wds.worldbank.org/...](http://www-wds.worldbank.org/) > [accessed on 10 August 2007].

⁴⁴⁷ Srinivasan *op cit* 4. See also Oxfam ‘Eight Broken Promises: Why the WTO Isn’t Working for the World’s Poor’, (2001), *Briefing Paper 9*, 1 Oxfam official website < www.oxfam.org.uk/policy/papers... > [accessed on 27 July 2007].

⁴⁴⁸ Paris Declaration on Aid Effectiveness, Meeting in Paris on 2 March 2005, para 1.

In the past less emphasis was placed on the level of commitment and “political will” for trade and development in these countries, and whether or not there are proper institutions in place in these countries in support of technical assistance, relative to the levels of corrupt practices which are prevalent in some of these countries and the mechanisms in place to fight them.⁴⁴⁹ Yet mismanagement, corruption and poor co-ordination of activities characterized and continues to affect the institutional structures in these countries. The Paris Declaration, however, as it has been suggested, may make a significant difference for three (3) reasons: (i) the Paris Declaration goes beyond previous agreements since it lays down a practical and action oriented road map; (ii) the declaration lays down indicators to monitor progress in achieving results; and (iii) the Paris Declaration promotes a model of partnership that improves transparency and accountability in the use of development resources.⁴⁵⁰ In addition, there are also efforts within the WTO, through a joint DDA Trade Capacity Building Database (TCBDB) with the OECD, to provide information on trade-related technical assistance and capacity building projects.⁴⁵¹ These and many other initiatives are likely to improve the way in which LDCs respond and fulfil their obligations under the TBT Agreement.



5.6.8 S&D Treatment

LDCs in Africa are given S&D treatment in regard to the implementation of the TBT Agreement.⁴⁵² The factors which are put into consideration are the special development, financial and trade needs of the developing country Members. The rationale behind the S&D treatment, in relation to standards, is that standards should not create unnecessary obstacles to exports from developing countries. In practice, however, international standards which are primarily set by developed country Members have acted as significant barriers to trade, since

⁴⁴⁹ The prosecution of standards officers in Rwanda and the institution of a separate corruption court in Uganda are, in this context, seen as a step in the right direction. In Rwanda, two senior officials of the RBS were convicted after pleading guilty to offences relating to corruption, embezzlement and misuse of office (Agaba, G ‘Migabo Acquitted’ The New Times 10 October 2007

< <http://www.newtimes.co.rw/index.php?issue=1314&article=1526> > [accessed on 24 October 2007]. See Xinhua, ‘Uganda Government to Set Up Anti-Corruption Court’ People’s Daily 28 April 2007

< <http://english.peopledaily.com.cn/90001/90777/6239740.html> > [accessed 10 September 2007].

⁴⁵⁰ See OECD official website < <http://www.oecd.org/...> > [accessed on 10 September 2007].

⁴⁵¹ See TCBDB official website < <http://tcbdb.wto.org/index.aspx> > [accessed on 10 September 2007].

⁴⁵² TBT Agreement, Article 12.3.

the development needs of LDCs are not considered in the preparation and adoption of international standards. Setting the international standard and complying with that standard are two different things. Even standards developed and set by standardization bodies in LDCs are not adhered to by some producers. One should, however, consider the effectiveness and future relevance of S&D treatment in developing and promoting trade in LDCs, and whether these provisions are necessary.⁴⁵³

Mayeda argues that S&D treatment has not been effective in improving the productivity of developing nations.⁴⁵⁴ Mayeda gives three reasons for this: (i) developing countries have a limited ability to take advantage of preferential market access; (ii) since conventional liberalization measures already cover much of the field, there is little need for improvements under S&D treatment; and (iii) non-reciprocity harms economic growth.⁴⁵⁵ Mayeda suggests that developing countries should focus on institutional and capacity building.⁴⁵⁶ This contention is true, in view of the fact that, despite the numerous declarations in favour of LDCs, there has not been a significant impact of S&D provisions in fostering trade in these countries. Similarly, the emphasis of the TBT Committee has been towards technical assistance rather than S&D treatment.⁴⁵⁷ In addition, LDCs should consider the GATS formulation of S&D treatment provisions, since these provisions allow flexibility for the incorporation of development objectives.⁴⁵⁸ In respect to the TBT Agreement, market access and national treatment would therefore be negotiated in areas and sectors which require liberalization.⁴⁵⁹

5.7 Beyond Doha

On the question whether or not NTBs would cease, Professor Jackson noted:

⁴⁵³ OECD (2001) 25.

⁴⁵⁴ Mayeda *op cit* 748.

⁴⁵⁵ Mayeda *ibid.*

⁴⁵⁶ Mayeda *ibid.*

⁴⁵⁷ Rata, P 'Technical Assistance and S&D Treatment' Presentation at the WTO Regional Workshop on TBT for English Speaking African Countries Held at Gaborone, Botswana Between 19 to 21 June 2007 Slide 12 – Available on file with the Author.

⁴⁵⁸ OECD (2001) 14.

⁴⁵⁹ OECD *ibid.*

“The ingenuity of man to devise various subtle as well as explicit ways to inhibit the importation of competing goods is so great that any inventory of such measures quickly becomes quite large. In addition, it is clear that this ingenuity will never cease: like ways to avoid income tax, human invention of non-tariff barriers will undoubtedly go on forever. The international and national institutions designed to cope with this problem must recognize this as part of the circumstances that they must contend with.”⁴⁶⁰

National governments and standardization bodies in the LDCs in Africa do not, however, have adequate systems in place, to deal with the negative effects of the use, formulation and adoption of international standards.

At the onset of the Doha Ministerial Conference in 2001, the trade ministers called upon developed country Members to provide, to the extent possible, the financial and technical assistance necessary to enable LDCs to respond adequately to the introduction of any new TBT measures which may have significant negative effects on their trade. In addition, the trade ministers noted the actions taken by the Director-General of the WTO to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard setting organizations.⁴⁶¹

In October 2006 the General Council of the WTO agreed to recommendations and understandings adopted by the Dedicated Session regarding measures to assist small economies in meeting their obligations under the TBT Agreement, as a means of enabling their fuller integration into the multilateral trading system.⁴⁶² The Doha Development Agenda (DDA) negotiations, which had collapsed, resumed in February 2007. There has, however, not been any breakthrough in most of the areas, particularly issues pertaining to LDCs. In light of the recent developments, i.e. the Paris Declaration, and the establishment of the TCBDB, however, there is optimism that LDCs are likely to make significant achievements in the areas of technical assistance and S&D treatment.

⁴⁶⁰ Jackson (1997) 154.

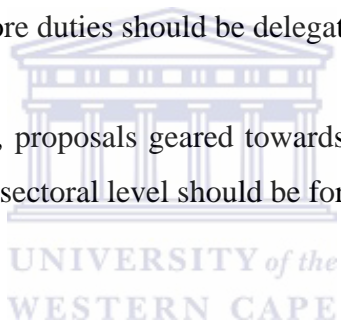
⁴⁶¹ Decision on Implementation of Related Issues and Concerns, Doha Ministerial Conference, 9 to 14 November 2001, WTO/MIN (01)17, 4.

⁴⁶² WTO (2007) 9.

5.8 Conclusion

As noted above, the participation of LDCs in the activities of the ISO is constrained by both internal and external factors. Although there have been efforts to address these factors at the international level, a lot has to be done at the national level. LDCs still lack the necessary resources necessary for standard development work, and as a result have to adopt international standards which do not suit their development needs, in a bid to compete with foreign firms. Making firms in LDCs competitive will require a concerted effort by the government, consumer groups, NGOs and producers. This should, however, be done within an institutional and legal framework which will encourage complaints and trade concerns to be identified. Regional integration arrangements and partnerships currently in place should also be encouraged. In order to allow LDC national standardization bodies to focus on purely standardization work, the non-core duties should be delegated.

Within the context of the DDA, proposals geared towards allowing LDCs to gather, process and prioritize information at the sectoral level should be formulated.



CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

International standards play a significant role in the liberalisation and facilitation of international trade around the world. Following the reduction of tariff levels of countries, standards have, however, been used as a means of protectionism. On the one hand, there is the need to promote domestic industries, technical changes and consumer safety, but then, on the other hand, there is also a desire to expand trade and improve market access. The TBT Agreement tries to balance these two conflicting interests by ensuring that international standards do not create unnecessary obstacles to trade by being trade restrictive. At the same time, the TBT Agreement seeks to promote the efficacy and legitimacy of international

standards relative to domestic laws. In practice, however, some WTO Member countries continue to use standards as a means of promoting their domestic industries. China, for example, has adopted a policy aimed at encouraging the development of its homegrown technology standards, and increasing its influence within the ISO. Countries in Europe and America are also focusing on increasing their financial support for their national and regional standardising bodies. Although these methods are permitted under the TBT Agreement, they act as significant barriers to trade, especially for the LDCs in Africa which have to comply with the standards developed by the ISO, for them to effectively integrate into the world trading system.

The development of new standards, such as social, labour and environment standards which do not explicitly fall under the TBT Agreement, is another area which has attracted enormous debate. The language of the TBT Agreement suggests that it is not applicable to non-product related PPMs, and yet these standards are of particular concern to LDCs in Africa which support sustainable development and good governance. These countries very often need to strike a balance between trade expansion and the protection of the environment. At the same time, the service industry has grown tremendously over the years, and yet services are not covered by the TBT Agreement. With the adoption of the GATS and the ISO strategic vision for 2005-2010, these non-product related PPMs standards could be incorporated into the TBT Agreement.

As regards the interpretation of the TBT Agreement, the DSB ensures that countries observe and adhere to their commitments and obligations under the TBT Agreement. In the context of the TBT Agreement and the DSB, there is a policy obligation to ensure that standards do not create unnecessary obstacles to trade. At the same time, a Member country is obliged to protect its citizens against harmful products. The AB decision in *EC-Sardines* is, however, not a true reflection of the policy considerations behind the TBT Agreement as well as the practical difficulties faced by LDCs in Africa. In practice, LDCs do not have solid infrastructure, technical personnel and legal mechanisms to enable them to meet their obligations under the TBT Agreement. Thus, it would be necessary to promote a greater

coherence between the objectives, policy and implementation of the TBT Agreement. In addition, LDCs would need to monitor the development of the WTO dispute settlement mechanism, assert their own interests and train their own legal personnel to handle these matters.

Further, the TBT Agreement encourages countries to use international standards where such standards already exist. The majority of these international standards are set by NGOs which represent consumer groups and national standardisation bodies. This has placed the ISO at the forefront of standards development and yet the participation of LDCs in Africa in this standardisation body is limited. The outcome is that the standards developed by the ISO do not suit the development needs of these LDCs, and thus the need to adopt these standards *mutatis mutandis*. This, however, requires building expertise and devoting additional resources to modern technology, technical personnel and management. In this regard LDCs in Africa would have to influence the development of international standards through the use of global information technology networks which already exist. The WTO, World Bank and the ISO would also have to continue with their efforts to provide technical assistance and specialists to these countries, and by encouraging LDCs to play an increased role in standardization work. On the other hand, LDCs should also devote resources towards: (i) increasing participation in standardization work of the ISO; (ii) mutual recognition of standards, where applicable; (iii) considering the developments of standards which reflect their trade needs; (iv) regional integration arrangement and partnerships; (v) increased producer and consumer participation; and (vi) increasing capacity at the sectoral level.

Lastly, despite the S&D treatment afforded to LDCs, there has been no significant impact of conforming to, and complying with, international standards in these countries. These countries continue to face institutional challenges and will require the concerted effort of all the stakeholders. Extending the time frames for compliance by the LDCs without providing the necessary financial and technical assistance may therefore not be the most appropriate remedy; but rather, the development of technical infrastructure and capacity building as well as ensuring that the little resources are not misappropriated or embezzled. In this regard the private sector and NGO's could play a greater role in ensuring that product testing and

conformity procedures are in place so as to promote free trade. In addition, these efforts should be supported by a legal framework which encourages adequate reporting and collection of information in regard to trade concerns in these countries.

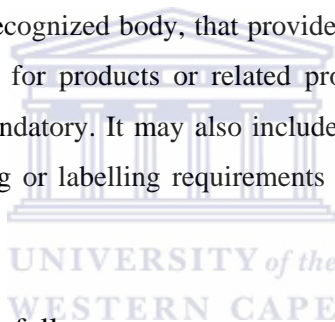
6.2 Recommendations

In light of the foregoing analysis, the following recommendations are made.

6.2.1 Standard

Annex 1.2 of the TBT Agreement defines the term “standard” as follows:

“Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”



Annex 1.2 should be amended as follows:

“Document approved by a recognized body or system, that provides, for common and repeated use, rules, guidelines or characteristics for products, process and services, 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 and service. This Agreement covers also non-product and process methods.”

This would clarify the position with regard to non-product and process methods now in place and the services which are not covered under the TBT Agreement.

6.2.2 Explanatory Note to the Term “Standard”

The explanatory note to the term “standard” provides as follows:

“The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.”

Instead, it should be amended to provide as follows:

“This Agreement deals with technical regulations, standards and conformity assessment procedures related to products or processes and services. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus.”

This amendment would clarify on the requirement of consensus in relation to the formulation and adoption of international standards.

6.2.3 International Body or System

Annex 1.4 of the TBT Agreement which defines an “International body or system” as a “Body or system whose membership is open to the relevant bodies of at least all Members” should be amended to emphasize participation of Members in standardization work as follows:

“Body or system to which the relevant bodies of all Members are full Members”

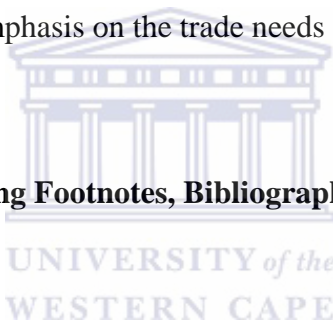
6.2.4 Mutual Recognition Agreements

In recent times, Mutual Recognition Agreements (MRAs) have been negotiated between industrialised nations, for example, those between the US and the EU. These agreements identify and establish common platforms for product testing methods and conformity

procedures between countries. These agreements have significantly reduced the effects of TBT. These agreements, however, only cover technical regulations and conformity assessment procedures. Similar agreements should be entered into in regard to voluntary standards. Thus, LDCs should enter into these agreements with their trading partners.

6.2.5 Capacity Building Efforts and Dispute Settlement

In addition to utilising the services of the AWCL, LDCs should build their own capacity in terms of identifying and collecting information regarding trade concerns at a sectoral level. This would involve encouraging efforts towards the establishment of a Centre on WTO law, as well as offer training to members of the private sector, NGOs and lawyers in these LDCs. At the same time, there is a need to build research institutions training lawyers and economists within their universities, with emphasis on the trade needs of their countries.



Word Count: 25, 949 (Excluding Footnotes, Bibliography, Tables and Annexures)

BIBLIOGRAPHY

Books

- Bhala, R (2001) *International Trade Law: Theory and Practice* (2 ed) Matthew Bender.
- Bossche, P (2005) *The Law and Policy of the World Trade Organization* Cambridge University Press.
- Cottier, T and Mavroidis, P S (eds) (2000) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* The World Trade Forum Vol. 2, University of Michigan Press.

- Dillon, S (2002) *International Trade and Economic Law and the European Union* Hart Publishing.
- Goode, W (2003) *Dictionary of Trade Policy Terms* (4 ed) Centre for International Economic Studies/ World Trade Organization: Cambridge University Press.
- Hinkelman, E G (2002) *Dictionary of International Trade: Handbook of the Global Trade Community* (6 ed), World Trade Press.
- International Trade Centre *et al* (1995) *Business Guide to the Uruguay Round* Commonwealth Secretariat.
- Jackson, J H (1997) *The World Trading System: The Law and Policy of International Economic Relations* (2 ed) Massachusetts Institute of Technology.
- Krajewski, M (2003) *National Regulation and Trade Liberalization in Services. The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* Klumer Law International.
- Leipzinger, D (2003) *The Corporate Responsibility Code Book* Greenleaf Publishing.
- Martin, E A and Law, J (eds) (2006) *A Dictionary of Law* (6 ed) Oxford University Press.
- Ortino, F and Petersmann, E (eds) (2004) *The WTO Dispute Settlement System 1995-2003*, Klumer Law International – Netherlands.
- Petersmann, E (1999) *The GATT'WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* Martinus Nijhoff Publishers.
- WTO (1999) *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* Cambridge University Press.
- WTO (2003) *WTO Analytical Index: Guide to WTO Law and Practice* (1 ed) Vol.1 WTO/Bernan.
- WTO (2004) *A Handbook on the WTO Dispute Settlement System* Cambridge University Press.
- WTO (2006) *The WTO at Ten: The Contribution of the Dispute Settlement System* Cambridge University Press.

Articles/ Reports

- Abbot, K W and Snidal, D ‘International Standards and International Governance’ (2000)
< http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_00_18.pdf ... >.
- Agaba, G ‘Migabo Acquitted’ The New Times 10 October 2007
< <http://www.newtimes.co.rw/index.php?issue=1314&article=1526> >.
- Alavi, A ‘African Countries and the WTO’s Dispute Settlement Mechanism (2007) 25 *Development Policy Review* 25-42.
- Barradough, E ‘Winning the IP Standards Game: The Chinese Government says it is Tired of Seeing Companies Paying Royalties Abroad and Wants to Develop Some Technology Standards of its Own. Should the Rest of the World be Worried?’ 1 July 2005 *Gale Group, Inc.* < <http://web.lexis-nexis.com/professional/...>>.
- Battigalli, P and Maggi, G, ‘International Agreements on Product Standards: An Incomplete Contracting Theory’ (2003)
< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=379340... >.
- Bonaglia, F and Fukasaku, K ‘Trading Competitively: Trade Capacity Building in Sub-Saharan Africa’ OECD official website < www.oecd.org/dev >.
- Borraz, O ‘Governing Standards: The Rise of Standardization Processes in France and in the EU’ (2007) 20 *Governance* 57-84.
- Bossche, P *et al*, ‘WTO Rules on Technical Barriers to Trade’ *Maastricht Faculty of Law Working Paper 2005/6, 7* < <http://ssrn.com/abstract=978167...> >.
- Brack, D and Gray, K ‘Multilateral Environmental Agreements and the WTO (2003)
<<http://www.iucn.org/themes/pbia/themes/trade/training/Multilateral%20Env%20Agreements%20and%20the%20WTO.pdf>>.
- Bridges Weekly Trade News Digest, 13 November 2003, Vol. 7(38), ICTSD official website < <http://www.ictsd.org/weekly/03-11-13/story4.htm> >.
- Bryden, A ‘Report to the 29th ISO General Assembly under Agenda Item 4’ September 2006 ISO official website < <http://www.iso.org/iso/...>>.
- Charnovitz, S ‘International Standards and the WTO’ (2002a) *The George Washington Law School Public Law and Legal Theory Working Paper No.133*
< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=694346...>.

- Charnovitz, S 'Triangulating the World Trade Organization' (2002b) 96 *The American Journal of International Law* 28-55.
- Chen, M X *et al*, 'Do Standards Matter for Export Success?' (2006) *World Bank Policy Research Working Paper No. 3809*, 24 World Bank official website
< <http://www-wds.worldbank.org/...>>.
- Chen, M X and Matoo, A 'Regionalism in Standards: Good or Bad for Trade' (2004) < <http://ssrn.com/abstract=963210...> >.
- Cromer, Z K 'China's WAPI Policy: Security Measure or Trade Protectionism?' < <http://www.law.duke.edu/journals/dltr/articles/pdf/2005dltr0018.pdf> >.
- Davey, W J and Pauwelyn, J 'MFN Unconditionality: A Legal Analysis of the Concept in view of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of 'Like Product' in Cottier, T and Mavroidis, P S (eds) (2000) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, The World Trade Forum, Vol. 2, University of Michigan Press.
- Egan, M 'Setting Standards: Strategic Advantages in International Trade' (2002) 13 *Business Strategy Review* 51-64.
- FAO News 'Kyoto Protocol – Important Tool for Sustainable Development' FAO official website
< <http://www.fao.org/newsroom/en/news/2005/89781/index.html> >.
- Finger, M J and Wilson, J S 'Implementing A WTO Agreement on Trade Facilitation: What Makes Sense?' (2006) *World Bank Policy Research Working Paper No. 3971* < <http://www-wds.worldbank.org/...>>.
- Fontage, L *et al*. 'Estimating The Impact of Environmental SPS and TBT on International Trade'
<http://team.univ-paris1.fr/teamperso/fontagne/papers/LFMMJMP_A_publi.pdf>
- Gibson, C S 'Technology Standards – New Technical Barriers to Trade?'
< <http://ssrn.com/abstract=960059...>>.
- Glusksman, D I 'Standards Go Abroad' 1 July 2005 *Washington Watch*, Gale Group, Inc
< <http://web.lexis-nexis.com/professional/...>>.

- Gumbo, P ‘Standards Bureau Decries Lack of National Accreditation Body’ IPP Media /Guardian News 30 August 2007
< <http://www.ippmedia.com/ipp/guardian/2007/08/30/97354.html> >.
- Hamilton, P ‘Debate Begins on Standards for International Trade’
< <http://search.epnet.com/login.aspx?direct=true&db=aph&an=9706082700> >.
- Hufbauer *et al.*, ‘Trade and Standards: A Look at Central America’ (2002) *Institute for International Economics and the World Bank*.
- Hudec, R E ‘Like Product’: The Difference in Meaning in GATT Articles I and III’ in Cottier, T and Mavroidis, P S (eds) (2000) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, The World Trade Forum, Vol. 2, University of Michigan Press.
- Horn, H and Weiler J H H ‘European Communities – Trade Description of Sardines: Textualism and its Discontent’ (2004) *American Law Institute*.
- ISEAL Alliance and CIEL, ‘Referencing International Standards in Government Procurement’ RO52 – Legal Opinion Summary, July 2006
< http://www.ciel.org/Publications/ISEALCIEL_Legal%20OpinionGPAR052_Jul06.pdf >.
- Lovelace Consulting ‘China Adopts Homegrown DTV Standard’ Digital TV News 11 September 2006 < <http://www.dtg.org.uk/news/news.php?id=1923> >.
- Marceau, G and Trachtman, J P ‘GATT, TBT and SPS: A Map of WTO Law of Domestic Regulation of Goods’, in Ortino and Petersman (eds) (2004) *The WTO Dispute Settlement System 1995-2003*, Klumer Law International – Netherlands.
- Marks, R B ‘Government Approaches to Standardization in World Trade’
< http://emarks.net/mediaviewstds/MediaViewStd2003_04E.pdf >.
- Maskus, K E and Wilson, J S ‘Quantifying the Impact of Technical Barriers to Trade: A Review of Past Attempts and the New Policy Context’ (2000) *World Bank*.
- Mattoo, A ‘MFN and the GATS’ in Cottier, T and Mavroidis, P S (eds) (2000) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, The World Trade Forum, Vol. 2, University of Michigan Press.

- Mayeda, G ‘Developing disharmony? The SPS and TBT Agreements and the Impact of Harmonization in Developing Countries’ (2004) 7 *Journal of International Economic Law* 737-764.
- Mavroidis, P C ‘ ‘Like Products’: Some thoughts at the Positive and Normative Level’ in Cottier, T and Mavroidis, P S (eds) (2000) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, The World Trade Forum, Vol. 2, University of Michigan Press.
- McDonald, J ‘Domestic Regulation, International Standards and Technical Barriers to Trade’ (2005) 4 *World Trade Review* 249-274.
- Melsner, D and Robertson, P E, ‘Eco-labelling and the Trade-Environment Debate’ (2005) 28 *The World Economy* 49-62.
- Michalopoulos, C ‘The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization’ *World Bank Policy Research Working Paper No. 2388*. See World Bank official website < <http://www.wds-worldbank.org/...> >.
- Morikawa, M and Morrison J ‘Who Develops ISO Standards? A Survey of Participation in ISO’s International Standards Development Processes’ < http://www.pacinst.org/reports/iso_participation/iso_participation_study.pdf >
- Mugambi, K ‘Kenya: Standards Bureau May Privatize Services’ *The Nation* 10 August 2007 < <http://allafrica.com/stories/200708091005.html> >.
- Mutasa, M ‘ISOs Role as an International Standards Setting Organization’ Presentation at the WTO Regional Workshop on TBT for English Speaking African Countries Held at Gaborone, Botswana Between 19 to 21 June 2007 – Available on file with the Author.
- Mutume, G ‘Africa: EU Uses Safety Standards to Lock Out Africa Exports’ *The East African* 21 February 2007 < <http://allafrica.com/stories/200602210959.html> >.
- Muwanga, D ‘Exports Can Fetch Revenue’ *New Vision* 27 September 2007 < <http://www.newvision.co.ug/detail.php?mainNews...> >.
- Muwanga, M K ‘Exporters on Adjustment to Private Standards in Key Export Markets: A Case of East Africa’ Presented at the UNCTAD-WTO informal workshop

held on 25 June 2007 WTO official website

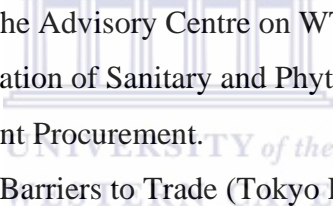
<http://www.wto.org/english/tratop_e/sps_e/private_standards_june07_e/muwanga_e.ppt#276,14, Thank you >.

- Obore, C ‘Producers, Dealers in Fake Goods Exposed’ Daily Monitor 6 August 2007 < <http://www.monitor.co.ug/news/news08062.php> >.
- OECD (1999) ‘Regulatory Reform and International Standardization’ TD/TC/WP (98) 36/Final < <http://www.oecd.org/ech/tradedoc.htm/>>.
- OECD (2000) ‘Special Meeting on Technical Barriers to Trade: Summary Report of the Secretariat’ TD/TC/WP/RD (2000) 1/ Final < <http://www.oecd.org/ech...>>.
- OECD (2001) ‘The Role of Special and Differential Treatment at the Trade, Competition and Development Interface’ COM/TD/DAFFE/CLP (2001) 21/Final < <http://www.oecd.org/ech> >.
- OECD (2007) ‘Enhancing the Role of SME’s in Global Value Chains’ OECD Background Report – Global Conference in Tokyo < <http://www.oecd.org/dataoecd/27/43/38900592.pdf> >.
- Olanyo, J ‘Uganda Cannot Meet WTO Requirements’ Financial Times 31 March 2006 < <http://web.lexis-nexis.com/professional/...>>.
- Oxfam ‘Eight Broken Promises: Why the WTO isn’t Working for the World’s Poor’, (2001), *Briefing Paper 9*, 1 Oxfam official website < www.oxfam.org.uk/policy/papers... >.
- Patir, Z ‘Participating in the Future International Standard ISO 26000 on Social Responsibility’ ISO official website < <http://isotc.iso.org/...> >.
- Qin, J Y ‘Defining Non-Discrimination Under the Law of the World Trade Organization’ (2005) 23 *Boston University International Law Journal* 216-277.
- Rata, P ‘Technical Assistance and S&D Treatment’ Presentation at the WTO Regional Workshop on TBT for English Speaking African Countries Held at Gaborone, Botswana Between 19 to 21 June 2007 – Available on file with the Author.
- Rose, A K ‘Does The WTO Really Increase Trade?’ (2004) 94 *The American Economic Review* 98-114.
- Rudaheranwa, N and Atingi-Ego, V B ‘Uganda’s Participation in WTO Negotiations’ < http://www.wto.org/english/res_e/booksp_e/casestudies_e/case41_e.htm >.

- Schawamm, H 'Reducing Technical Barriers To Trade: Second Triennial Review of the WTO Agreement on Technical Barriers To Trade (TBT) – Results and Scope, ISO Bulletin February 2001,
< <http://www.iso.ch/iso/en/commcentre/pdf/WTOTBT0102.pdf> >.
- Shaffer, G 'The Challenge of WTO Law: Strategies for Developing Country Adaptation' (2006) < <http://www.worldtradelaw.net/articles/...> >.
- Shaffer, G and Mosoti, V 'EC Sardines: A New Model for Collaboration in Dispute Settlement? Bridges Comment See < [http://www.trade-environment.org/page/ictsd/Bridges Monthly/sardines case 10 02.pdf](http://www.trade-environment.org/page/ictsd/Bridges%20Monthly/sardines%20case%2010%2002.pdf) >.
- Srinivasan, T N 'Developing Countries and the Multilateral Trading System after Doha' (2002) < <http://papers.ssrn.com/abstract=301394...> >.
- Stephenson, S M 'Standards, Conformity Assessment and Developing Countries' (1997) *World Bank Policy Working Paper No.1826* World Bank official website < <http://www-wds.worldbank.org/...> >.
- Trachtman, J P 'Lessons for the GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation' (2002)
< <http://ssrn.com/abstract=298760...> >.
- UNCTAD (2001) 'Food Quality Standards: Definitions and Role in International Trade' 2 December 2001, UNCTAD/DITC/COM/34, UNCTAD official website
< http://www.unctad.org/en/docs/ditccom34_en.pdf >.
- UNCTAD (2003), World Trade Organization, 3.10 Technical Barriers to Trade, Course on Dispute Settlement in International Trade, Investment and Intellectual Property, UNCTAD/EDM/Misc.232/Add.22, UNCTAD official website
< http://www.unctad.org/en/docs/edmmisc232add22_en.pdf >.
- UNCTAD (2007) 'Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development.' UNCTAD official website
< http://www.unctad.org/en/docs/lcd2007_en.pdf >.
- Velikov, V 'Incorporation of High Level Regional and International Standards into National Standardization Systems – A Model for Global Administration Law? (2007) *CDAMS Discussion Paper*
< <http://www.cdams.kobe-u.ac.jp/archive/dp07-5.pdf> >.

- Wilson, J S ‘Standards, Regulation and Trade’ in Hoekman, B *et al.* (eds) (2002) *Development, Trade and the WTO*, International Bank for Construction and Development/World Bank.
- WTO (2005) ‘World Trade Report: Exploring the Links between Trade, Standards and the WTO.’ WTO official website
< http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf >.
- WTO (2007) Annual Report. WTO official website
< http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep07_e.pdf >.
- WTO News ‘Service Standards for Open Global Markets’ 14 September 1998,
< http://www.wto.org/english/news_e/news98_e/iso.htm >.

Legal Texts and Instruments

- 
- Agreement Establishing the Advisory Centre on WTO Law.
 - Agreement on the Application of Sanitary and Phytosanitary Measures.
 - Agreement on Government Procurement.
 - Agreement on Technical Barriers to Trade (Tokyo Round Standards Code).
 - Agreement on Technical Barriers to Trade (Uruguay Round).
 - General Agreement on Trade in Services.
 - General Agreement on Tariffs and Trade 1947.
 - General Agreement on Tariffs and Trade 1994.
 - Marrakesh Agreement Establishing the WTO.
 - Treaty Establishing the East African Community.
 - Understanding on the Rules and Procedures Governing the Settlement of Disputes.
 - Vienna Convention on the Law of Treaties, 23 May 1969.

WTO Case Authority

- *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 21 February 1997 Report of the AB.

- *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, 3 May 2002 Report of the panel.
- *European Communities – Export Subsidies on Sugar (Australia)* WT/DS265/AB/R, 28 April 2005 Report of the AB.
- *European Communities – Export Subsidies on Sugar (Brazil)* WT/DS266/AB/R, 28 April 2005 Report of the AB.
- *European Communities – Export Subsidies on Sugar (Thailand)* WT/DS283/AB/R, 28 April 2005 Report of the AB.
- *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/AB/R, 7 April 2004 Report of the AB.
- *European Communities – Measures Affecting Asbestos – Containing Products*, WT/DS/135/R, 18 September 2000 Report of the panel.
- *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products* WT/DS/135/R1 2 March 2001 Report of the AB.
- *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998 Report of the AB.
- *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R 25 September 1997 Report of the AB.
- *European Communities – Trade Description of Sardines*, WT/DS/231/R, 29 May 2002, Report of the panel.
- *European Communities – Trade Description of Sardines*, WT/DS231/R, WT/DS231/AB, 26 September 2002 Report of the AB.
- *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R 2 November 1998 Report of the AB.
- *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)* WT/DS11/AB/R, 1 November 1996 Report of the AB.
- *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 Report of the AB.
- *Korea – Taxes on Alcoholic Beverages*, WT/DS84/R, 17 September 1998 Report of the panel.

- *Korea – Taxes on Alcoholic Beverages*, WT/DS84/AB/R, 18 January 1999 Report of the AB.
- *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-375/200, 7 November 1990 Report of the panel.
- *Turkey – Restrictions in Imports of Textiles and Clothing Products*, WT/DS34/R, 31 May 1999 Report of the panel.
- *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997 Report of the AB.
- *United States – Standards for Reformatted and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996 Report of the AB.

Minutes, Decisions and Ministerial Declarations

- Background Paper for Chinese Submission to WTO on Intellectual Property Rights in Standardization (G/TBT/W/251).
- Decision on Implementation of Related Issues and Concerns, Doha Ministerial Conference, 9-14 November 2001, WTO/MIN (01)17.
- Decision of the TBT Committee on Principles for the Development of International Standards and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement (G/TBT/9, Annex 4).
- Decision on Review of the ISO/IEC Information Centre Publication.
- Decision on the Termination of the Tokyo Round TBT Agreement, Adopted on 20 October 1995 TBT/M/50.
- Declaration of Ministers Approved at Tokyo on 14 September 1973, Min (73) 1.
- Ministerial Declaration on the Uruguay Round, 25 September 1986 GATT/1396.
- Minutes of the Meeting of the TBT Committee, 31 July 2006 G/TBT/M/39.
- Minutes of the TBT Committee at the First Triennial Review of the Operation and Implementation of the TBT Agreement, 19 November 1997 (G/TBT/5).
- Minutes of the TBT Committee at the Second Triennial Review of the Operation and Implementation of the TBT Agreement, 16 November 2000 (G/TBT/9/Corr.1).

- Minutes of the TBT Committee at the Third Triennial Review of the Operation and Implementation of the TBT Agreement, 11 November 2003 (G/TBT/13).
- Minutes of the TBT Committee at the Fourth Triennial Review of the Operation and Implementation of the TBT Agreement under Article 15.4, 14 November 2006 (G/TBT/19).
- Paris Declaration on Aid Effectiveness, meeting in Paris on 2 March 2005.

TABLES

Table 1: Cases

Case Name	Case Number	Invoked Articles	Status
<i>EC - Wine</i>	WT/DS263	Articles 2,12	Consultations Requested – No panel or Settlement
<i>Argentina – Pharmaceutical Products</i>	WT/DS233	Articles 2.2,5.1,5.2,12	Consultations Requested – No panel or Settlement
<i>Mexico - Swine</i>	WT/DS203	Articles 2,5	Consultations Requested – No panel or Settlement
<i>US - Cattle, Swine and Grain</i>	WT/DS144	Articles 2,3,5,7	Consultations Requested – No panel or Settlement
<i>EC - Wood of Conifers</i>	WT/DS137	Articles 2	Consultations Requested – No panel or Settlement
<i>EC - Rice</i>	WT/DS134	Article 2	Consultations Requested – No panel or Settlement
<i>US - Poultry</i>	WT/DS100	Articles 2,5	Consultations Requested – No panel or Settlement
<i>US - Shrimp (Philippines)</i>	WT/DS61	Article 2	Consultations Requested – No panel or Settlement
<i>Korea – Agricultural Products II</i>	WT/DS41	Articles 2,5,6	Consultations Requested – No panel or Settlement
<i>Korea – Agricultural Products I</i>	WTDS3	Article 5,6	Consultations Requested – No panel or Settlement
<i>EC – Biotech</i>	WTDS291, WTDS292, WTDS293	Articles 2.1,2.2.2.8,5.1,5.2,12	Completed panel and AB Review
<i>EC - Sardines</i>	WT/DS231	Articles 2.1, 2.2, 2.4	Report of the panel and AB Adopted
<i>EC - Trademarks</i>	WT/DS174, WT/DS290	Article 2	Report of the panel Adopted
<i>US - Gasoline</i>	WT/DS2	Articles 2.1, 2.2	Report of the panel and AB Adopted
<i>EC - Asbestos</i>	WT/DS135	Articles 2.1,2.2, 2.4,	Report of the panel and

	2.8	AB Adopted
<i>Argentina - Textiles and Apparel</i>	WT/DS56	Articles 2.1, 2.2
<i>EC - Hormones (Canada)</i>	WT/DS48	Articles 2.1, 2.2
<i>EC - Hormones (US)</i>	WT/DS26	Articles 2.1, 2.2
<i>US – Textiles and Apparel</i>	WT/DS151	Article 2
<i>US – Textiles and Apparel</i>	WT/DS85	Article 2
<i>EC – Butter</i>	WT/DS72	Article 2
<i>Korea – Bottled Water</i>	WT/DS20	Article 2
<i>EC - Scallops</i>	WT/DS7, WTDS12,W TDS14	Article 2
<i>Korea – Shelf Life</i>	WT/DS5	Article 2
<i>Mexico - Matches</i>	WT/DS232	Articles 1,2,5

Source: WTO official website⁴⁶³

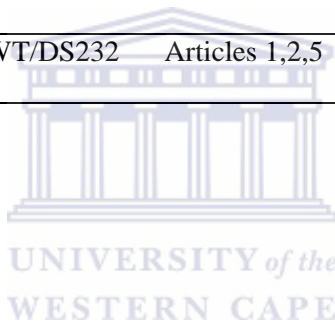


Table 2: ISO’s Standard Development Process

Stages	Process	Action by
Stage 1	Proposal	Industry Sector
Stage 2	Preparatory	Working Group of Experts
Stage 3	Committee	Working Group’s Parent Committee
Stage 4	Enquiry	Participating Members of the TCs
Stage 5	Approval	Participating Members of the TCs
Stage 6	Publication	ISO Central Secretariat

⁴⁶³ See Update of WTO Dispute Settlement Cases, WT/DS/OV/31 22 August 2007 WTO official website <[http://dosconline.wto.org/...](http://dosconline.wto.org/)> [accessed on 1 September 2007]; See also WTO official website <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_02_e.htm> [accessed on 12 July 2007].

Source: ISO official website⁴⁶⁴

Table 3: Current LDC Representation in the ISO


Country	Organization	Status
Angola	IANORQ	Correspondent
Benin	CEBENOR	Correspondent
Burkina Faso	FASONORM	Correspondent
Burundi	BBN	Subscriber
Central African Republic		-
Chad		-
Congo	OCC	Member Body
Djibouti		-
Gambia		-
Guinea		-
Guinea Bissau		-
Lesotho	LSQAS	Subscriber
Madagascar	BNM	Correspondent
Malawi	MBS	Correspondent
Mali		-
Mauritania		-
Mozambique	INNOQ	Correspondent
Niger		-
Rwanda	RBS	Correspondent
Senegal	ASN	Correspondent
Sierra Leone		-
Tanzania	TBS	Member Body
Togo	CSN	Correspondent
Uganda	UNBS	Correspondent
Zambia	ZABS	Correspondent

⁴⁶⁴ ISO official website

< http://www.iso.org/iso/standards_development/processes_and_procedures/stages_description.htm > [accessed on 25 August 2007].

Source: ISO official website⁴⁶⁵

Table 4: Alternative Approaches to Standards Development



Types	Organization	Technical	Standard
Type 1	Government Agency	Committees, Accredited Developers and Bureaus	Mandatory and Voluntary Standards
Type 2	Private Sector	Committees and Bureaus	Voluntary Standards (Mandatory when adopted by Government)
Type 3	National Coordination Organization	Accredited Developers – Private and Government	Mandatory and Voluntary Standards
Type 4a	Government Agency	Government Agency	Mandatory Standards
Type 4b	Private Sector	Accredited Developers	Voluntary Standards

Source: Stephenson⁴⁶⁶

Note:

⁴⁶⁵ See ISO official website < <http://www.iso.org/iso/en/aboutiso/isomembers...> > [accessed on 23 August 2007].

⁴⁶⁶ Stephenson *op cit* 24.

The above tables are based on the author's research and findings.

ANNEXURE A: TBT AGREEMENT



Members,

Having regard to the Uruguay Round of Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

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 endeavours in this regard;

Hereby *agree* as follows:

Article 1

General Provisions

1.1 General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

TECHNICAL REGULATIONS AND STANDARDS

Article 2

Preparation, Adoption and Application of Technical Regulations

by Central Government Bodies

With respect to their central government bodies:

2.1 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.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *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.

2.3 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.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member,

explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a 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 by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 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 fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever 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 trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 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. Such notifications shall take

place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

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

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national 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, provided that the Member, upon adoption of a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.10.2 upon request, provide other Members with copies of the technical regulation;

2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Article 3

Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.



4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 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;

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that

products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

- 5.2 When implementing the provisions of paragraph 1, Members shall ensure that:
- 5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;
 - 5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
 - 5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;
 - 5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;

- 5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;
- 5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;
- 5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;
- 5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.

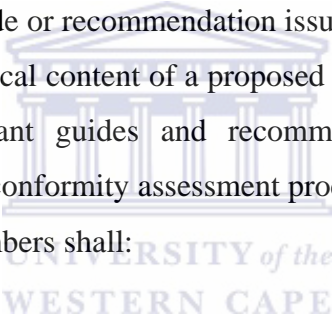
5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.

5.4 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, as a basis for their conformity

assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts 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.

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

5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

- 
- 5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;
- 5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- 5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in

substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;

5.7.2 upon request, provide other Members with copies of the rules of the procedure;

5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity

assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Article 6

Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that 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 or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:

- 6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;
- 6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 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. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.



Article 7

UNIVERSITY of the

Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.

7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.



Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

Article 9

International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

INFORMATION AND ASSISTANCE

Article 10

Information About Technical Regulations, Standards and Conformity Assessment Procedures

10.1 Each Member shall ensure that an enquiry 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:

- 10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;
- 10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;
- 10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;
- 10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;
- 10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and
- 10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In

addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals⁴⁶⁷ of the Member concerned or of any other Member.

⁴⁶⁷ "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10.7 Whenever 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 agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

Article 11

Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

- 11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this 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.

12.3 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.

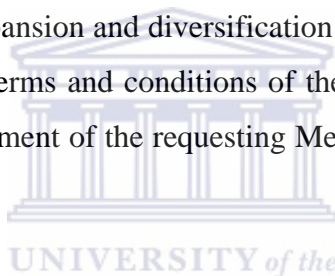
12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are

organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 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.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.



12.8 It is recognized 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. It is further recognized that the 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, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under 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 this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.



INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

Article 13
UNIVERSITY of the
WESTERN CAPE

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.

13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

Article 14

Consultation and Dispute Settlement

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

FINAL PROVISIONS

Article 15

Final Provisions

Reservations

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.

15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, *inter alia*, to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

Annexes

15.5 The annexes to this Agreement constitute an integral part thereof.

ANNEX 1

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. *Technical regulation*

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 labelling requirements as they apply to a product, process or production method.

Explanatory note

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. *Standard*

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. *Conformity assessment procedures*

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

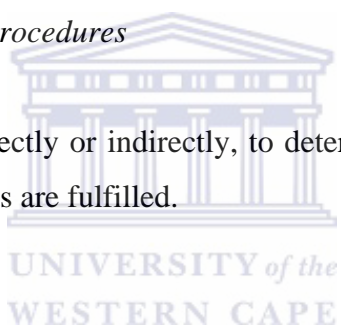
Explanatory note

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.

4. *International body or system*

Body or system whose membership is open to the relevant bodies of at least all Members.

5. *Regional body or system*



Body or system whose membership is open to the relevant bodies of only some of the Members.

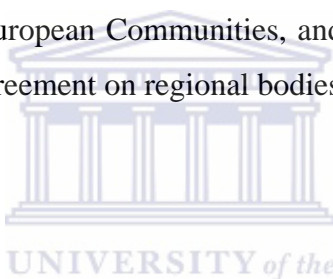
6. *Central government body*

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. *Local government body*



Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. *Non-governmental body*

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

TECHNICAL EXPERT GROUPS

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.
2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.
3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.
4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.
5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the

government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

ANNEX 3

CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS



General Provisions

- A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.
- B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").
- C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization

activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

SUBSTANTIVE PROVISIONS

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other 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.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist 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.

G. 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 subject matter for which it either has adopted, or expects 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 expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.



ANNEXURE B: DECISION OF THE TBT COMMITTEE ON PRINCIPLES FOR THE DEVELOPMENT OF INTERNATIONAL STANDARDS, GUIDES AND RECOMMENDATIONS WITH RELATION TO ARTICLES 2, 5 AND ANNEX 3 OF THE TBT AGREEMENT (G/TBT/9, Annex 4)

1. The following principles and procedures should be observed, when international standards, guides and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the TBT Agreement for the preparation of mandatory technical regulations, conformity assessment procedures and voluntary standards) are elaborated, to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries.

2. The same principles should also be observed when technical work or a part of the international standard development is delegated under agreements or contracts by international standardizing bodies to other relevant organizations, including regional bodies.

B. TRANSPARENCY

3. All essential information regarding current work programmes, as well as on proposals for standards, guides and recommendations under consideration and on the final results should be made easily accessible to at least all interested parties in the territories of at least all WTO Members. Procedures should be established so that adequate time and opportunities are provided for written comments. The information on these procedures should be effectively disseminated.

4. In providing the essential information, the transparency procedures should, at a minimum, include:

- The publication of a notice at an early appropriate stage, in such a manner as to enable interested parties to become acquainted with it, that the international standardizing body proposes to develop a particular standard;
- the notification or other communication through established mechanisms to members of the international standardizing body, providing a brief description of the scope of the draft standard, including its objective and rationale. Such communications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- upon request, the prompt provision to members of the international standardizing body of the text of the draft standard;
- the provision of an adequate period of time for interested parties in the territory of at least all members of the international standardizing body to make comments in writing and take these written comments into account in the further consideration of the standard;
- the prompt publication of a standard upon adoption; and
- to publish periodically a work programme containing information on the standards currently being prepared and adopted.

5. It is recognized that the publication and communication of notices, notifications, draft standards, comments, adopted standards or work programmes electronically, via the internet, where feasible, can provide a useful means of ensuring the timely provision of information. At the same time, it is also recognized that the requisite technical means may not be available in some cases, particularly with regard to developing countries. Accordingly, it is important that procedures are in place to enable hard copies of such documents to be made available upon request.

C. OPENNESS

6. Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness without

discrimination with respect to the participation at the policy development level and at every stage of standards development, such as the:

- proposal and acceptance of new work items;
- technical discussion on proposals;
- submission of comments on drafts in order that they can be taken into account;
- reviewing existing standards;
- voting and adoption of standards; and
- dissemination of the adopted standards.

7. Any interested member of the international standardizing body, including especially developing country members, with an interest in a specific standardization activity should be provided with meaningful opportunities to participate at all stages of standard development. It is noted that with respect to standardizing bodies within the territory of a WTO Member that have accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards by Standardizing Bodies (Annex 3 of the TBT Agreement) participation in a particular international standardization activity takes place, wherever possible, through one delegation representing all standardizing bodies in the territory that have adopted, or expected to adopt, standards for the subject-matter to which the international standardization activity relates. This is illustrative of the importance of participation in the international standardizing process accommodating all relevant interests

D. IMPARTIALITY AND CONSENSUS

8. All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s. Consensus procedures should be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.

9. Impartiality should be accorded throughout all the standards development process with respect to, among other things:

- access to participation in work;
- submission of comments on drafts;
- consideration of views expressed and comments made;
- decision-making through consensus;
- obtaining of information and documents;
- dissemination of the international standard;
- fees charged for documents;
- right to transpose the international standard into a regional or national standard; and
- revision of the international standard.



D. EFFECTIVENESS AND RELEVANCE

10. In order to serve the interests of the WTO membership in facilitating international trade and preventing unnecessary trade barriers, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. They should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development. In addition, they should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions. Whenever possible, international standards should be performance based rather than based on design or descriptive characteristics.

11. Accordingly, it is important that international standardizing bodies:

- take account of relevant regulatory or market needs, as feasible and appropriate, as well as scientific and technological developments in the elaboration of standards;
- put in place procedures aimed at identifying and reviewing standards that have become obsolete, inappropriate or ineffective for various reasons; and
- put in place procedures aimed at improving communication with the World Trade Organization.

E. COHERENCE

12. In order to avoid the development of conflicting international standards, it is important that international standardizing bodies avoid duplication of, or overlap with, the work of other international standardizing bodies. In this respect, cooperation and coordination with other relevant international bodies is essential.

E. DEVELOPMENT DIMENSION

13. Constraints on developing countries, in particular, to effectively participate in standards development, should be taken into consideration in the standards development process. Tangible ways of facilitating developing countries participation in international standards development should be sought. The impartiality and openness of any international standardization process requires that developing countries are not excluded de facto from the process. With respect to improving participation by developing countries, it may be appropriate to use technical assistance, in line with Article 11 of the TBT Agreement. Provisions for capacity building and technical assistance within international standardizing bodies are important in this context.



ANNEXURE C: LIST OF LDC MEMBERS OF THE WTO

Angola
Benin
Burkina Faso
Burundi
Central African Republic
Chad
Congo
Democratic Republic of Djibouti
Gambia
Guinea
Guinea Bissau
Lesotho
Madagascar
Malawi

Mali
Mauritania
Mozambique
Niger
Rwanda
Senegal
Sierra Leone
Tanzania
Togo
Uganda
Zambia

