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SCHOOL OF LAW

UNIVERSITY OF THE WITWATERSRAND

THE LEGALITY OF QUANTITATIVE RESTRICTIONS, SANITARY AND PHTOSANITARY MEASURES IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

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Submitted in fulfillment of the requirements for the degree of Doctor of Philosophy (Phd) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg.

DECLARATION

I, Hilda Thopacu declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (Phd) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

……

Hilda Thopacu

School of Law, University of the Witwatersrand, Johannesburg

.....day of…….2017

ACKNOWLEDGEMENTS

Writing this thesis has truly tested my patience, resilience and tenacity. I could not have come this far without the power, love, grace and mercy of God of Major 1, and to Him, I give all the glory, praise and honour.

Special thanks to my supervisor, Dr.Fola Adeleke whose firm and gentle approach in guiding me made the writing journey much easier. When I seemed to be getting out of track, he was professional in the way he guided me back. His flexibility and professionalism is much appreciated. His kindheartedness and concern for my academic progress is commendable, and for that, I am truly grateful. May God continue to favour him.

I would also like to thank Prof. Engela C Schlemmer who gave me the necessary professional insights during the early stages of the thesis writing process. May God richly bless her.

A special appreciation to my husband Mr.Alfred Gidaga who believes in me and lovingly challenges me to be a successful career woman. No words are good enough to express my gratitude to my sons Ivan, Samuel, Joshua and Asher who have had to miss many precious moments with me during this study. I am thankful for all the love and support from close family members and friends particularly my mom and dad Mr and Mrs Topacho, my brothers in law Dr.Geoffrey Oyath Gidaga and Mr.Geoffrey Onega Gidaga, my uncles Prof. George Piwang and Mr. Jerolam Omach, aunt Seraphine Awacango and siblings Eric and Rhoda Topacho. I appreciate our nephew Mr.Bella Angomoko for his humility, readiness and willingness to support my husband and I during this demanding time of studies. My sisters in Christ Jesus Mrs. Dorothy Kermit, Mrs.Winnie Kabiri, Mrs.Akello Sarah Akomo, Mrs.Anying Jacinta Simplicous,

Mrs Anne Ajulu Okungu and my friends at Wits including Constance, Sayuri and Bob have really been a strong pillar of support and strength. May God richly bless them all.

ABSTRACT

Among the trade restrictions that are prevalent in the Southern African Development Community (SADC) are quantitative restrictions, sanitary and phytosanitary measures (SPS measures). When SADC members adopted the SADC Protocol on trade (Protocol) as the key legal instrument to regulate the liberalisation of intra-SADC trade in goods, it meant that SADC members should open up their borders to free trade in goods. This would also mean that trade restrictions appearing in the form of quantitative restrictions and SPS measures had to be removed, and for those that should be maintained, they must be consistent with the terms of the Protocol. The possibility of achieving this goal may be difficult due to specific gaps and inadequacies in some of the rules relating to the application and removal of quantitative restrictions. In addition, the SPS Annex to the Protocol has not been domesticated. Another challenge is the failure by SADC to effectively implement the requirements of transparency under the WTO SPS agreement. There is also the foreseeable challenge of failing to effectively fulfill the requirement to base SPS measures on scientific evidence due to lack of financial and technical resources. Even more, specific fundamental rules on harmonisation of SPS measures under the Protocol and SPS Annex are so mixed up that the nature and extent of SADC members' commitment to harmonise SPS measures is uncertain. This mixture also creates a complex regime which could raise difficult challenges during implementation of the SPS Annex, should it finally enter into force. The fact that the development integration approach prioritises socio-economic development may even make the achievement of economic integration harder since divergent national interests' takes precedence and overshadows effective leadership and decision making processes. Coupled with lack of political will, lack of strong leadership, and differences in culture and ideologies it is difficult to foresee how the legality of quantitative restrictions and SPS measures can be effectively determined within such a legal and political economy.

That notwithstanding, it is possible to determine the legality of quantitative restrictions and SPS measures if there is a paradigm shift in the regulation of quantitative restrictions and a deliberate

concerted effort to jointly meet the terms of the SPS Annex especially for generic and prevalent health and life threatening risks in SADC. Again, SADC states need to be willing to respect their regional commitments, surrender even part of their sovereignty so that the legislative inadequacies in the fundamental provisions of the Protocol can be addressed in order to establish a broad set of rules that regulates NTBs and NTMs and also meets the peculiar trading conditions in the SADC region.

ACCRONYMS

AEC-African Economic Community

AILP-Agreement on Import Licensing Procedures

ASEAN- Association of South East Asian Nations

CASP-Comprehensive Agricultural Support Programme

COMESA-Common Market for Eastern and Southern Africa

DAFF-Department of Agriculture, Forestry and Fisheries

EAC-East African Community

EACJ-East African Court of Justice

EPA-Economic Partnership Agreement

EU-European Union

GATT-General Agreement on Tariffs and Trade

HSRS-Harmonised Seed Regulatory System

LDC-Least Developed Country

NEP-National Enquiry Points

NNP-National Notification Point

NTB-Non-tariff Barrier

NTM-Non-tariff Measure

OECD-Organisation for Economic Cooperation and Development

RISDP- Regional Indicative Strategic Development Plan

REC-Regional Economic Community

SADC-Southern African Development Community

SADCC-Southern African Development Coordinating Conference

SPS-Sanitary and Phytosanitary Measures

TBT-Technical Barriers to Trade agreement

TFA-Trade Facilitation Agreement

UNCTAD-United Nation Conference for Trade and Development

USAID-United States Agency for Aid and Development

USA-United States of America

VCLT-Vienna Convention on the Law of Treaties

WTO-World Trade Organisation

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CHAPTER ONE

INTRODUCTION

1 Introduction

The Southern African Development Community (SADC) is recognised by the World Trade Organisation (WTO)[1] and the African Union as a regional economic community desirous of establishing a single integrated regional market.[2] In pursuit of this goal, intra-SADC trade has been singled out as the steering wheel under the guidance of the 1996 SADC Protocol on Trade.[3] Trade liberalisation was chosen due to the perceived benefits it was likely to generate having been seen as a strategy that would encourage 'new types of investments in more productive and competitive industries, producing goods and services for regional and international markets'.[4] In that context, SADC members agreed to address the problem of any obstacles against the smooth conduct of intra-SADC trade in goods.[5] These obstacles can be enforced through measures such as quantitative restrictions, sanitary and phytosanitary measures (SPS measures).[6] A quantitative restriction means 'prohibitions or restrictions on imports into, or exports from a member state whether made effective through quotas, import licences, foreign exchange allocation practices or

[1] By notifying the organisation (SADC) with the WTO, SADC members affirmed their rights and obligations at the WTO. See, World Trade Organisation "South African Development Community" available at http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45, also http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=948 (accessed on 8 March 2017).

[2] Articles 6(1)(2)*(a)* of the African Economic Community Treaty, Richard Frimpong Oppong *Legal Aspects of Economic Integration In Africa* (2011)19. United Nations Economic Commission for Africa *Assessing Regional Economic Integration in Africa II*:*Rationalising Regional Economic Communities* (2006) 2.

[3] Article 3 SADC Protocol on Trade 1996; Southern Africa Development Community *Regional Indicative Strategic Development Plan* (2003) 24.

[4] Southern African Development Community *Toward a Southern African Development Community A Declaration by the Heads of State or Government of Southern African States in* SADC Southern African Development Community *Declaration and Treaty of the Southern African Development Community* (1993)7 available at http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (accessed 8 March 2017); Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 125.

[5] Article 5(2)*(b)* SADC Treaty, articles 3 and 6(1) SADC Protocol on Trade 1996.

[6] Kalenga Paul *Regional Integration in SADC: Retreating or Forging Ahead?* (2012) 9-12 Tralac Working Paper No.D12WP08/2012 available at https://www.tralac.org/publications/article/4209-regional-integration-in-sadc-retreating-or-forging-ahead.html (accessed 8 March 2017); https://www.tralac.org/images/docs/4209/d12wp082012-kalenga-regional-integration-in-sadc-retreating-or-forging-ahead-20120919.pdf (accessed 8 March 2017).

other measures and requirements restricting imports or exports'.[7] When it is defined in terms of its effects on trade, quantitative restrictions are measures that limit the volume of products that may be imported or exported.[8] SPS measures are defined as 'relevant laws, decrees, regulations, requirements and procedures including testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety practices or other measures and requirements restricting imports or exports'.[9] As much as the application of these restrictions must be addressed to pave way for smooth flow of trade, SADC states have continued to apply them for development purposes[10] and also to protect humans, plants and animals from any risks to their life and health. The enforcement of these reasons run contrary to the goals of trade liberalisation as explained below.

The enforcement of various national development-health protection policies is an embodiment of not only state regulatory sovereignty, but, a creation of regulatory divergence as shall be explained later in this thesis. Some other disadvantages associated with the application of these trade restrictions include increased costs of doing business and loss of earnings;[11] limited volumes of products on the domestic market;[12] reduced competition;[13] and a hike in domestic prices of agricultural goods.[14] As a result, the level of trade among SADC members has not

[7] Article 1 SADC Protocol on Trade 1996.

[8]Peter Van der Bossche *The Law and Policy of the World Trade Organisation: Texts, Cases and Materials* (2008), 444; article 1 SADC Protocol on trade.

[9] Article 16 of the Sanitary and Phytosanitary Annex to the SADC Protocol on trade (SPS Annex).

[10] Article 3, 9 and 21 SADC Protocol of Trade.

[11] Byo24News "Zimbabwe chicken ban hits South African company exports" *Bulawayo 24 News* 27 January 2011 available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed 8 March 2017).

[12] Dumisani Ndlela "Fears of price hikes as chicken shortages emerge" *The Financial Gazette* 30 July 2010 available at http://www.financialgazette.co.zw/fears-of-price-hikes-as-chicken-shortages-emerge/ (accessed 8 March 2017).

[13] Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation and Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 30.

[14] Dumisani Ndlela "Fears of price hikes as chicken shortages emerge" *The Financial Gazette* 30 July.2010 available at http://www.financialgazette.co.zw/fears-of-price-hikes-as-chicken-shortages-emerge/ (accessed 8 March 2017).

increased significantly.[15] With a low level of intra-SADC trade, it is difficult to foresee how the latter can effectively drive the regional economic integration process forward.

One of the main causes of this status quo is the weakness in specific substantive and procedural provisions of the SADC Protocol on Trade. This does not mean that the existence of these weaknesses will make it impossible to integrate economically,[16] but, it will delay the speed at which integration may be achieved. Even then, the examination of the legal issues in this thesis will not cover all legal problems arising from the SADC Protocol on Trade considering that some studies on other legal problems have been done.[17] In that regard, I have identified specific provisions which have not been extensively analysed by previous scholars though they are significant in moving forward with the regional economic integration agenda. It is this knowledge gap that I intend to fill through a critical examination of the strength, scope and nature of specific substantive and procedural trade rules in the SADC Protocol on Trade regarding the application of, and the removal of quantitative restrictions and SPS measures.

The substantive rules of interest in this study include the rules that regulate the application and removal of quantitative restrictions, the enforcement and harmonisation of SPS measures. On the

[15]Kalaba Mmatlou *Zambia Moving Ahead: Private Sector Space, Barriers to Agriculture & Trade* (2012)2(4) section 5.3; Southern African Development Community *A Case Study on Tristan Export Company* (2012) 2; Frank Flatters *Technical Report: Trade & Food Security in SADC* (2011) 19; World Bank *Harnessing Regional Integration for Trade and Growth in Southern Africa* (2011) 12-13.

[16] Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 126.

[17] Precious Nonhlanhla Ndlovu 'The state of trade liberalisation in goods in SADC' (2012) 2(2) *SADC Law Journal* 187; Saurombe A 'The Southern African Development Community trade legal instruments *compl*iance with certain criteria of GATT article XXIV'(2011) 14(4) *PER/PELJ* 287; Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012) XLV *CILSA* 64*;* Clement Ngo'ng'ola 'The reconstitution of the Southern African Development Community: some international trade law perspectives' (2000) 117 *South African Law Journal* 256; Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 123; Erasmus Gerhard 'Is the SADC trade regime a rules based system' (2011) 1 *Southern African Development Community Law Journal* 17; Henry Mutai Kibet 'Regional integration strategies under SADC and the EAC: a comparative analysis' (2011) 1 *Southern African Development Community Law Journal* 81; Jephias Mapuva & Loveness Muyengwa-Mapuva 'The SADC regional bloc: what challenges and prospects for regional integration?' (2014) 18 *Law Democracy & Development* 22; Jephias Mapuva 'Unpacking regional economic integration challenges bedeviling the SADC regional grouping: a synopsis' (2013) 3(13) *Developing Country Studies* 93; John-Mark Iyi 'The legal framework for sub-regional humanitarian intervention in Africa: a comparative analysis of ECOWAS and SADC regimes' (2012) 2(2) *SADC Law Journal* 281; Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(3) *Italian Journal of Food Safety* 5114; Maliwich LL, Pfumayaramba TK & Katlego T 'An analysis of constraints that affect small holder farmers in the production of tomatoes in Ga-Mphahlele, Lepelle Nkumbi Municipality Limpopo Province' (2014) 47(3) *Journal of Human Ecology* 269; Mark Chingono & Steve Nakana 'The challenges of regional integration in Southern Africa' *(*2009) 3(10) *African Journal of Political Science and International Relations* 396.

procedural part, the thesis examines the strength of rules on consensus as a form of decision making in SADC and the process for considering requests for derogation from commitments to trade liberalisation. In addition to this, I also critically examine specific terms of the SADC Protocol on Trade if any, for addressing disputes or complaints that may arise from the application of quantitative restrictions and SPS measures. As I analyse these rules, I examine the impact of the lack of a strong SADC political leadership and political will on the decision making processes, rule development, enforcement, and settlement of complaints arising from the application of quantitative restrictions and SPS measures.

In some parts of the thesis, the analysis of the legality of quantitative restrictions and SPS measures is examined in light of specific characteristics associated with the concepts of non-tariff barriers (NTBs) and non-tariff measures (NTMs). This particular legal analysis is meant to identify the possible differences between these concepts on the assumption that the distinctive elements between an NTM and an NTB could be relevant for regulators and legislators in their evaluation of how a quantitative restriction or an SPS measure may be a legally justified measure in the context of whether it is an NTB or an NTM. This finding is crucial in light of limited legal information and understanding of how SPS measures can become NTBs.[18]

It is important to point out that legality in this thesis is looked at with special emphasis on the law as the foundation of legal actions or omissions. This kind of emphasis is meant to highlight the significance of the law (be it substantive or procedural) as a foundational basis for regional or state actions (or omissions) and its significance toward the achievement of the regional economic integration agenda. Thus, consideration of non-legal factors such as lack of political will, administrative challenges and domestic pressures within this thesis is specifically meant to highlight their role on the determination of legality of quantitative restrictions and SPS measures. This relationship is also meant to highlight the need to give due attention to such factors when developing and enforcing the law for SADC's regional integration agenda,[19] because law does not operate in vacuum.

[18] United Nations Conference on Trade and Development *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) UNCTAD/DITC/TAB/2014/5, 9.
[19] Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 126.

Against that background on legality, it is imperative to state it that it is not the primary focus of this thesis to analyse the legal framework of the World Trade Organisation (WTO) or any other regime on quantitative restrictions and SPS measures. Consequently, references to the WTO regime or any regimes of any other economic organisation on quantitative restrictions and SPS measures are largely justified by the lack of SADC jurisprudence on such measures. Another reason for such reference is to provide a contextual legal basis for critical insight into the legality of quantitative restrictions and SPS measures in SADC. Again, for purposes of limiting the scope of this study, the WTO concept of special and differential treatment for developing countries is not part of this study despite the presence of developing countries and Least Developing Countries (LDCs) within SADC. In addition to that, I recognise that there are other areas within the SADC integration agenda such as law and security, defence and human rights that could be examined.[20] However, the scope of this thesis does not extend to any of these fields, leaving it for other future research and scholarly publications. That said, this study critically examines the legality of quantitative restrictions and SPS measures in light of the research questions, and objectives outlined below.

1.2 Research questions

1) Whether NTMs have been defined and provided for within the SADC Protocol on trade?

2) Is there a distinction between an NTB and NTM?

3) To what extent do specific rules in the SADC Protocol on Trade advance the development agenda of SADC members in a manner that promotes co-existence and balance between the need to address the problems related to the application of quantitative restrictions and SPS measures? What is the impact of non-legal factors, the existing rules, on the development of rules in SADC, their application and enforcement?

[20] Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 128.

4) Whether the legal frameworks and initiatives in place effectively promote the harmonisation of SPS measures in SADC?

5) To what extent can the SADC members effectively fulfill the legal requirement that SPS measures must be based on scientific evidence?

6) What legal measures can be instituted to address the problem of NTBs in the SADC?

1.3 Objectives of the study

The main objective of this study is to examine the legal basis and the requirements for the application and removal of quantitative restrictions, and SPS measures with the view to distinguish NTMs from NTBs, for better regulation of such measures. The analysis is guided by the set of research questions outlined above which will be addressed against a backdrop of specific provisions of the SADC Protocol on Trade, legal frameworks of the WTO, the Association of South East Asian Nations (ASEAN), the East African Community (EAC) and the tripartite agreement between Common Market for Eastern and Southern Africa-East African Community-SADC (COMESA-EAC-SADC).

The specific objectives of this thesis are as follows:

1. The thesis provides a theoretical legal analysis on NTMs and NTBs within the context of specific provisions of specific covered agreements of the WTO, ASEAN trade in goods agreement and the SADC Protocol on Trade. In this regard, the study examines the meaning, nature, and scope of the concept of NTMs and NTBs. This analysis also identifies specific elements or factors that distinguish an NTB from an NTM to the extent that I have used some of these elements to determine the legality of quantitative restrictions in chapter two. The distinctive elements identified in this chapter can also be used to examine whether or not any other trade restriction is an NTM or an NTB. On the whole, the analysis in chapter two examines the efficacy of specific rules of the SADC Protocol on Trade for regulating the use of quantitative restrictions against the backdrop of specific WTO and ASEAN trade rules (within the context of the concept of NTMs);

2. Examine the extent to which the SADC Protocol on Trade advances the SADC development agenda in a way that promotes a balanced approach in the regulation of trade restrictions and the pursuit of national development goals. Along this line of argument, it examines the nature and strength of specific substantive and procedural rules of the SADC Protocol on Trade and how the development of such rules, application and enforcement can promote that balance. This brings into the discussion, an analysis of the likely implication of the interface between trade liberalisation and national development needs, and the role of non-legal factors in developing strong rules, application and enforcement;
3. Examine the legal implication of the relationship between the WTO and SADC regime that requires that SPS measures must be based on international standards. The aim of this analysis is to examine the implication of this legal relationship on the commitments and progress on harmonisation of SPS measures in SADC;
4. Examine the scope and legal implication of SADC trade rules that SPS measures must be based on scientific evidence. Within this context, the study examines the extent to which the jurisprudence permits the admissibility of evidence of risks obtained outside a science laboratory in determining the legality of SPS measures. This analysis essentially aims to examine the possibility of SADC members' ability to fulfil the scientific evidence requirement for SPS measures through inter-disciplinary collaborative risk assessments;
5. Examine possible mechanisms (including trade facilitation to improve transparency) through which SADC members can effectively address the legal issues arising from the application and removal of quantitative restrictions and SPS measures.

Due to paucity of legal information, the WTO agreement and the jurisprudence developed within the WTO has been used as the main legal framework for contextual legal analysis within this thesis. Against that background, the discussion that is provided immediately below explains the relationship between economic integration at the regional and international level.

1.4 Economic integration: from global to regional

It is the WTO[21] that has the mandate to provide direction and oversight on how trade should be conducted at the international level after it assumed its duties in 1995 from the General Agreement on Tariffs and Trade 1947 (GATT 1947). The GATT 1947 was not an institutional framework per se, but 'it successfully transformed itself over the years into a de facto international institution'[22] that succeeded in regulating the reduction of tariffs[23] and provided the code of conduct to regulate government measures (such as quantitative restrictions and government subsidies) deemed restrictive to the conduct of multilateral trade.[24]

Since the assumption of duty in 1995, the WTO has continued to function as the institutional oversight and platform for promoting the proper conduct of multilateral trade.[25] For it to perform its duty, it is guided by trade rules and principles embedded in the covered agreements annexed to the Marrakesh Agreement.[26] Particular mention of GATT 1994 is important in terms of the relationship between global and regional integration because article XXIV of GATT 1994 permits WTO members to establish free trade areas and customs unions. Consequently, when the SADC Protocol on Trade entered into force in 2000, it was notified and registered with the WTO under GATT article XXIV(7)*(a)*.[27] The significance of the notification and registration for

[21] Established by article I of the Marrakesh Agreement. The end of the Uruguay Round of trade negotiations marked the beginning of a new trading regime with the establishment of the WTO by the Marrakesh Agreement of 1994. Annexed to the Marrakesh Agreement are the Multilateral Agreements for regulating multilateral trade in goods, General Agreement for Trade in Services, Agreement on Trade Related Aspects of Intellectual Property Rights, Understanding on Rules and Procedures Governing the Settlement of Disputes, Trade Policy Review Mechanism and Plurilateral Trade Agreements; Article I and III of the Marrakesh Agreement Establishing the WTO 1994 established the WTO in 1995

[22] United Nations Conference on Trade and Development *Dispute Settlement: World Trade Organisation* (2003)4.

[23] United Nations Conference on Trade and Development *Dispute Settlement: World Trade Organisation* (2003) 4.

[24] Robert Hudec E in Joel Trachtman P (ed) *Developing Countries in the GATT/WTO Legal System* (1987) 16.

[25] Article III(1) of the Marrakesh Agreement requires the WTO to 'facilitate the implementation, administration and operation and further the objectives', of the Marrakesh Agreement 'and of the Multilateral Trade Agreements...'

[26] The Trade Review Policy Mechanism under article III(4) of the Marrakesh Agreement, allows the WTO to evaluate the trade policies, rules and measures of its members.

[27]World Trade Organisation *Factual Presentation: Protocol on Trade in the Southern African Development Community (SADC)* (2007) WT/REG176/4/6 Report by the Secretariat available at https://www.docsonline.wto.org (accessed 23 November 2017); World Trade Organisation "South African Development Community (SADC) Accession of Seychelles" available at http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=948 (accessed on 8 March 2017).

purposes of trade regulation and liberalization is that a legal relationship between the WTO and SADC regime was established upon that registration. That relationship is a vertical or hierarchical one, with international law, including WTO trade laws being superior to national and regional trade laws (SADC laws).[28] Accordingly, the signatories to the SADC Protocol on Trade are bound by the terms of the WTO trade rules. This means that while regulating export and import trade at a national or regional level, SADC members (which are WTO members) must comply with their obligations under the WTO covered agreements.[29] This also means that SADC members must remove all forms of trade barriers (such as tariffs and NTBs) and open up their markets to foreign competition[30] because the WTO envisions that the successful market integration of such economic organisations will provide the building blocks upon which global market unification can be built.[31] In that context, the discussion that follows explains the linkage between the realisation of the goals of regional economic integration and trade liberalisation, specifically in light of SADC as a regional economic organisation.

2 The Southern African Development Community (SADC)

SADC was established in 1992 through the SADC Treaty, which was signed in Windhoek, Namibia on 17th August, 1992 by only ten members at the time.[32] The membership has now increased to fifteen states. In terms of economic development, the constitution of SADC's membership can be divided into three groups, namely: most advanced economic state, developing countries and LDCs. In the first category there is only South Africa,[33] whereas

[28] Article 26 and 27 of the Vienna Convention on the Law of Treaties 1969.

[29] Article 19(1) and 21(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes 1995, the WTO members should comply with their obligations under the agreements, without impairing the benefits and rights of other members. Non compliance or violation thereof requires immediate remedy to bring it in conformity with the terms of the agreement.

[30] GATT 1994 article XXIV(8)*(b);* World Trade Organisation "Understanding the WTO: what we stand for" available at http://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm (accessed on 8 March 2017).

[31] Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* (2011) 19.

[32] Clement Ng'ong'ola 'The reconstitution of the Southern Africa Development Community: some international trade law perspectives' (2000) 117 *South African Law Journal* 269.

[33] As much as Mills Soko points out in 'Thrown in at the deep end: South Africa and the Uruguay round of multilateral trade negotiations 1986-1994' (2010) 29 (2) *Politeia Journal* 8-10, 44 that the WTO classifies South Africa as a developed member because during the apartheid regime of South Africa, the World Bank classified it as a developed country having conformed to the developed country per capita income at the time. Accordingly, South Africa participated in the Uruguay round of trade negotiations as a developed country, and conformed to the

Botswana, Mauritius, Namibia, Seychelles, Swaziland, and Zimbabwe are developing states and the remaining seven states of Angola, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Tanzania, Zambia are LDCs[34]. For a community with such diversity in economic strength to agree to cooperate, it means that the members have envisaged and comprehended the likely benefits to arise from such cooperation.

It is possible to rationalise the formation of such regional economic organisations in light of the ease with which states can conclude negotiations for the establishment of regional economic organisations due to favourable factors such as geographical proximity, common political ideologies, similar cultures, socio-economic and historical backgrounds underpin such cooperation among neighbouring states.[35] Within such a community, the assumption is that trade agreements will offer an opportunity for small and weaker states to easily access the regional markets and earn export revenue.[36] Thus, it is possible to argue that certain fundamental commonalities and access to free markets are some of the driving forces that facilitate the formation and integration of states within a specific geographical location because of the ease with which such states can conclude negotiations for the establishment of regional economic organisations. Whether or not some of the situation in SADC enables the easy access to the regional market in SADC will be revealed later in the course of this thesis. But first, in trying to link the goals of regional economic integration and trade liberalisation, I examine some of the theories that underpin specific approaches to economic integration in order to rationalise the kind of approach that SADC has adopted to promote its economic integration. This discussion also lays a background on the fundamental legal issues of economic integration that are within the scope of this study.

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rules on negotiations for developed countries, also Mataywa Busieka *The SADC Trade Protocol: A Jurisprudential Assessment* (2010) African Institute of South Africa Occasional Paper No.29 also confirms that WTO classifies South Africa as a developed country. I will consider South Africa as an economy which is the most advanced in the region, without necessarily categorising it as a developed or developing country.

[34] Derived from the United Nations' list of LDCs as stated in article XI(2) of the Marrakesh Agreement (WTO Agreement) 1994.

[35] Matsushita Matsuo & Lee Yong-Shik 'Free trade agreements: WTO disciplines and development perspectives' in Lee Yong-Shik, Horlick Gary N, Choi Won-Mog & Broude Tomer's (eds) *Law and Development on International Trade Law* (2011)247.

[36] Colin .McCarthy L 'Regional integration of developing countries at different levels of economic development' (1994) 1(4) *Transnational Law and Contemporary Problems* 7.

2.1 The linkage between regional economic integration and trade liberalisation

There is a substantial amount of research that aim to understand regional economic integration, and rationalise its proliferation by associating theories of regional integration with successful practices[37] as the discussion below reveals.

According to Bela Balassa, economic integration is a process that passes through five stages commencing with the establishment of a free trade area, followed by a customs union, then a common market, economic union and finally a complete economic integration.[38] This approach progresses in a linear process. Within this process, each stage is characterised by peculiar features to which the members of the economic organisation must ascribe. For example, in the first three stages of integration (free trade area-customs union-common market) there is the removal of discriminatory policies. A similar view is given by Orantes, who points out that regional integration can be seen in situations where there are no discriminatory tendencies among national economies.[39] This form of integration has been referred to as a negative form of integration because of the restrictions which are imposed upon the members against the use of discretionary policies.[40] At a higher level of the integration process, national economic rules and policies are monitored and scrutinised by a supranational body to promote regional economic interdependence and cooperation.[41] This theory by Bela Balassa has been critiqued by authors such as Colin McCarthy and Constantine Viatsos V who are of the view that he does not take into account other factors that play a role in the integration process. An overview of their critique is presented below:

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[37] Mokate Renosi *Theories of Regional Integration and Cooperation and Third World Development: the Case of Southern Africa* (Unpublished Phd Thesis University of Delaware 1986) 17-18.

[38]Bella Bassa *The Theory of Economic Integration* (1962) restated by Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011).

[39] Mokate Renosi *Theories of Regional Integration and Cooperation and Third World Development: the Case of Southern Africa* (Unpublished Phd Thesis University of Delaware 1986) 17-18, 19.

[40] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 6-7.

[41] Jacques Pelkmans 'The institutional economics of European integration through law' in Cappelliti M, Seccombe M, & Weiler J (eds) *Europe and the American Federal Experience* (1986) 3(1).

To begin with, Constantine Viatsos V is of the view that regional integration goes beyond the instruments of integration such as 'policy harmonisation, free trade and unified markets'.[42] To him, it is vital to take into account the objectives and conditions that may be pursued in the process of integration and the suitability of the corresponding instruments.[43] He further argues that it is necessary to consider the interactions among specific networks found in these dimensions: power, exchange, information and knowledge.[44] In his view, such an analysis will consider 'not only the mechanism of integration but also the fundamental question of who integrates, for whose benefit and the context within which integration is occurring'.[45] Essentially, he argues for a broad and holistic approach on regional integration. An approach which takes into account all the internal dynamics and forces involved in the integration process having been inspired by the state of economic interactions and forces at play at the time.[46] His views provide an invaluable insight into factors that need to be borne in mind when opting for regional economic integration.

Colin McCarthy assesses Bela Balassa's linear model of integration from an economic point of view and concludes that it is not suitable to meet the development needs of African countries. Because, there are supply side constraints and technical problems associated with the application of the model, which makes it difficult for states in Africa to progress through the stages.[47] One of the challenges with the model is that in the first two stages of integration (from a free trade area to a customs union) the main focus is placed on the liberalisation of trade in goods in exclusion of services' trade despite the latter's significance in enhancing socio-economic advancement.[48]

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[42] Constantine Vaitsos V 'Crisis in regional economic cooperation (integration) among developing countries : a survey' (1978) 6 *World Development* 720.

[43] Constantine Vaitsos V 'Crisis in regional economic cooperation (integration) among developing countries : a survey' (1978) 6 *World Development* 720.

[44] Constantine Vaitsos V 'Crisis in regional economic cooperation (integration) among developing countries : a survey' (1978) 6 *World Development* 720.

Constantine Vaitsos V 'Crisis in regional economic cooperation (integration) among developing countries : a survey' (1978) 6 *World Development* 720.

[46] Constantine Vaitsos V 'Crisis in regional economic cooperation (integration) among developing countries : a survey' (1978) 6 *World Development* 721-736.

[47] Colin McCarthy 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' (2007)7 *Monitoring Regional Integration in Southern Africa Year Book* 33.

[48] Colin McCarthy 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' (2007)7 *Monitoring Regional Integration in Southern Africa Year Book* 36.

Secondly, it places greater emphasis on the need to address tariff barriers instead of NTBs[49] Yet, NTBs such as poor physical infrastructure and cumbersome customs procedures do not necessarily need to be remedied through a formal regional agreement.[50]

Despite Colin McCarthy's comments, he is cautious to criticise the linear model in absolute terms. So, he rationalises the failure of integration to promote development in light of other factors. In that regard, he argues that past integration processes failed to achieve development in Southern Africa because of the weaknesses of the post independent governments. According to him, these governments failed to effectively implement the trade rules on import substitution and the protection of infant industries.[51] This means that McCarthy does not disregard integration as a tool for development, provided the adopted model embraces and promotes the achievement of the developmental needs of that community.[52] Essentially, he is bringing in the idea of taking an integration approach that embraces and promotes the development plans and policies of the African countries. That is, the development integration approach which is another mechanism for integration.

The main aim of a development integration approach is to accelerate socio-economic development.[53] This approach offers an opportunity to diffuse the imbalance in economic welfare and trade diversion likely to arise from a purely market oriented integration approach.[54] This is achieved through the objective of the integration, the distribution of costs and benefits of the cooperation, the timing and level of binding commitments.[55] In fact, the integration process is directed toward 'the optimisation of economic policy as a whole'.[56] Accordingly, the protection

[49] Colin McCarthy 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' (2007)7 *Monitoring Regional Integration in Southern Africa Year Book* 38.
[50] Colin McCarthy 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' (2007)7 *Monitoring Regional Integration in Southern Africa Year Book* 38.
[51] Colin McCarthy 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' (2007)7 *Monitoring Regional Integration in Southern Africa Year Book* 32.
[52] Colin McCarthy 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' (2007)7 *Monitoring Regional Integration in Southern Africa Year Book* 38.
[53] Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 30.
[54] Oriantes Isaac & Rosenthal Gert 'Reflections on the conceptual framework of Central American economic integration' 1977 (1) *CEEPAL Review* (Sandiego) 26 cited in Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 30.
[55] Oriantes Isaac & Rosenthal Gert 'Reflections on the conceptual framework of Central American economic integration' 1977 (1) *CEEPAL Review* (Sandiego) 26 cited in Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 30.
[56] Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 30.

of the market through state intervention is part and parcel of the integration process with industrialisation being an integral part of it as well.[57] The disadvantage with such intervention is the lack of fixed rules on the mechanisms for state intervention[58] which raises the concern as to the extent to which such state intervention can go, leaving it up to the members of the regional block to determine how best, in the circumstances, their objectives can be met.[59] This is a reflection of a system with an unrestricted limit on discretionary power. The effect of such power on the progress of integration especially, on the decision making processes and generally, on the regulation of the application of trade restrictions should be explored further. More on this will be explored later in this thesis.

The foregoing discussion has highlighted that as much as a purely market integration approach is advocated for as a mechanism for regional economic integration, it is not suitable at all times, especially, where the members of a regional block are highly focused on promoting national and regional socio-economic development. This calls for a shift in the integration approach from a purely market integrated to one which embraces and promotes development as well. In light of these theories, I have identified three fundamental elements that play a considerable role in the choice and process of integration, namely:

a) A purely trade led market integration which requires the removal of trade barriers is a complex process. But for it to be achieved, the surrender of state regulatory sovereignty is indispensible;

b) It is important to clearly determine mutually acceptable and beneficial ways of addressing the problems of NTBs; and

c) At the same time, critically consider the objectives and the divergent interests at play.

Each of these aspects is discussed in the next three subsections below as background information for further discussion on their impacts on the progress with economic integration. Particularly, their impact on the regulation of the application of quantitative restrictions and SPS measures in SADC.

[57] Bela Balassa *The Theory of Economic Integration* (1961) 10.

2.1.1 The need for partial surrender of state sovereignty to address unnecessary trade restrictions

For a state to be sovereign, it means it has the legal status to govern its own territory without the control and or direction from another state or states.[60] This is the context within which the principle of state sovereignty is founded. With this principle comes 'a unique legal status of state hood accompanied by independence[61] parallel to the idea that foreign law is binding and enforceable on a state.[62] That notwithstanding, article 26 of the Vienna Convention on the Law of Treaties imposes a duty on all member states to fulfill their obligations under a treaty to which they are signatories.[63] Accordingly, all the members of the Southern African Development Community that have ratified the SADC Protocol on Trade are bound by the obligations regarding the application of trade restrictions. Because of this, it is necessary that states surrender their independence at the international level,[64] be it partially and legitimise the surrender at the national level, through the national legal system.[65] Consequently, regional unification in itself is not sufficient for the legitimisation of international instruments in the national sphere. Therefore, it is important for states which are desirous of integrating their economies to take measures that should promote the enforcement of international decisions at the domestic level.[66]

In this thesis, decisions by some SADC members to enforce unnecessary trade restrictions, or openly disregard binding decisions[67] is an indication that some states are still reluctant to

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[58] Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 31.
[59] Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 31.
[60] Ian Brownlie *Principles of Public International Law* (2008) 105
[61] Ian Brownlie *Principles of Public International Law* (2008) 106.
[62] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 88-89.
[63] Article 26 Vienna Convention on the Law of Treaties, 1969, entered into force on 27 January, 1980.
[64] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011)89; Mark Chingono & Steve Nakana 'The challenges of regional integration in Southern Africa' (2009)3 *African Journal of Political Science and International Relations* 402.
[65] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 89.
[66] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 89.
[67] Of particular interest is Zimbabwe's refusal to abide by the decision of the suspended SADC Tribunal in *Mike Campbell & Others V Zimbabwe*, Case no SADCT: 2/07, (2007) 45-53 where the tribunal concluded that the enforcement process of the land reform programme in Zimbabwe was racially discriminative and arbitrarily applied. Thereafter, the SADC Summit suspended the SADC Tribunal.

surrender even part of that sovereignty.[68] The critical issue at this point is to examine the legal implication of the approaches for promoting harmonisation or cooperation in a manner that can engender acceptance and political buy in by all SADC states. One incentive for garnering support for surrender of state sovereignty in a regional community with diverse constituents is to adopt laws, policies and approaches that are mutually beneficial to all. This may be an option to explore toward SADC's integration as briefly explained below.

2.1.2 Developing mutually acceptable and beneficial legal rules and policies

Since the development integrated approach is flexible, it accommodates the diversity in culture,[69] economic power[70] and political ideologies[71] that exists within SADC. The flexibility in the approach permits members to accommodate such diversities as those states that are lagging behind in economic development can derogate from trade liberalisation commitments.[72] The

[68] Saurombe A 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *PER/PELJ* 460 while discussing the role of the SADC summit in the integration process notes that there is generally lack of political will of the leaders which does not match the ambitious commitments with the integration target deadlines because, they have failed to surrender their sovereignty for the good of the region. If the Summit which is the most politically powerful SADC institution reflects such lack of enthusiasm in the integration agenda, it is difficult for the lower institutions to be more committed to the integration agenda. Also, SPS Annex to the SADC Protocol on Trade has not been domesticated in most SADC countries, which denies it the status of a legally binding instrument for lack of the pre-requisite two thirds majority as required by the SADC Treaty.

[69] Southern African Regional Universities Association *Perspectives on Regional Identity and the Role of Higher Education in Southern Africa* (2012) 15-16.

[70] Zimbabwe, Namibia, Angola, South Africa, & Botswana depend largely on the mining sector whereas Mozambique, Tanzania and Malawi depend on agriculture, Seychelles, was once agrarian but now it is depending on tourism refer to Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007)134; Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation and Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29 indicate that there is high dependence on primary exports mainly agricultural products and minerals. Also, the agricultural sector accounts for 37 % of the employment of labour; SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1.

[71] Mark Chingono & Steve Nakana 'The challenges of regional integration in southern Africa' (2009)3 *African Journal of Political Science and International Relations* 402.

[72] Wolff-Christian Peters *The Quest for an African Economic Community: Regional Integration and its Role in Achieving African Unity-the Case of SADC* (2010) 147-148; SAANA Consulting, UK Aid & European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa: An evidence-based, forward looking study on regional trade and integration in the Tripartite region, focusing primarily on Southern Africa* Final Report (2014) 30; Amos Saurombe 'Flexible integration: a viable technique for the process of deeper integration in the Southern African development community (SADC)' (2012) XLV *CILSA* 97 notes that even if flexibility is allowed, most SADC states did not opt out of the Protocol but went ahead to take on honerous responsibilities, as a result, not all signatories managed to implement its terms. Which brings to mind, whether or not SADC states were even ready to move on to customs union in 2010?

flexibility also means that they can apply to deviate from the general norms against trade restrictions through legally acceptable exceptional conditions or circumstances.[73] The flexibility also helps to alleviate the general fear that the economically weaker states will lose and be domineered by the stronger ones.[74] Accordingly, since the regulation of trade restrictions is the focus of this thesis and the promotion of development is SADC's priority, I argue that there is need to attain balance between these two interests. To do so, it is vital to adopt and enforce mutually acceptable and beneficial programmes, policies and legal regimes. This in my view begins with the development of a strong, clear, unambiguous legal regime that outlines and explains (where necessary) the restrictions, categories of such restrictions, and the specific conditions or terms under which the application of such restrictions are permissible. The possible terms or conditions are considered and anlaysed in chapter two. Another option for mutually beneficial cooperation is explored in chapter six of this thesis.

2.1.3 Dynamics of economic integration among developing countries

Generally, the agriculture sector is significant in most economies in SADC as a source of food, employment and income.[75] For most states, the sector is a major export revenue earner, contributing 'about 66% to the value of intra-regional trade'.[76] This is because the majority of the SADC economies are agrarian in nature largely depending on primary products mainly from agriculture as their major source of export income.[77] Consequently, only a few of them are dependent on tourism,[78] mining and manufacturing industry[79] as their dominant economic

[73] Article 3(1)*(c)*, 9 & 21 SADC Protocol on trade 1996.
[74] Colin McCarthy L 'Regional integration of developing countries at different levels of economic development' (1994)1(4) *Transnational Law and Contemporary Problems* 7.
[75] SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1.
[76] SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1.
[77] Mozambique, Tanzania and Malawi depend on agriculture see Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007)134; Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation and Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29 indicate that there is high dependence on primary exports mainly agricultural products and minerals. Also, the agricultural sector accounts for 37 % of the employment of labour.
[78] Seychelles, was once agrarian but now it is depending on tourism refer to Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007) 134.
[79] Zimbabwe, Namibia, Angola, South Africa, & Botswana depend largely on the mining sector. Dani Venter & Ernst Neuland *Regional integration: economic partnership agreements for eastern and Southern Africa* (2007)134; Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation and Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29.

activities. With this type of economies, most of them are exporters of primary products,[80] and South Africa dominates the share of imports into other SADC countries, causing an imbalance in the trade pattern.[81] With such a trend, coupled with a great need for nation development within the region[82] it is difficult to envisage easy access to regional domestic markets as each state tries to pursue its own national interests as opposed to emphasis on regional cooperation. More on this is discussed below.

2.2 The progress with trade liberalisation under a development integration approach in SADC

The apparent low level of development within the region (South Africa is the only most economically advanced economy),[83] the heterogeneous nature of SADC's constituents,[84] and the dire need for national development of the SADC countries,[85] necessitated the promotion of socio-economic development as the topmost priority within the region's economic integration

[80]United States Agency for International Development *Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade* (2011)11; Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation and Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29 Institute for Global Dialogue 29-30.

[81] United States Agency for International Development *Technical Report: Impact of Derogations from Implementation of the SADC FTA Obligations on Intra-SADC Trade* (2011) 14; SAANA Consulting, United Kingdom Aid & European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa: An evidence-based, forward looking study on regional trade and integration in the Tripartite region, focusing primarily on Southern Africa* Final Report (2014) 9-10.

[82] Tsitsi Effie Mutambara 'Asymmetric tariff reduction within the SADC protocol on trade and its implications for industrial development within member states'(2007)3(1) *Journal of Development Perspectives* 55; Colin McCarthy L 'Regional integration of developing countries at different levels of economic development-problems and prospects' (1994)4(1) *Transnational Law. & Contemporary Problems* 10; Anna Morner 'Regional integration and trade liberalisation in Southern Africa: an overview' (1998)3 *Year Book of International Finance & Economic Law* 552.

[83] Mills Soko points out in 'Thrown in at the deep end: South Africa and the Uruguay round of multilateral trade negotiations 1986-1994' (2010) 29(2) *Politeia Journal* 8-10, 44 that the WTO classifies South Africa as a developed member. One other reasons for this classification was based on the World Bank's classification (during the apartheid regime) of South Africa as a developed country having conformed to the developed country per capita income. Accordingly, South Africa participated in the Uruguay round of trade negotiations as a developed country, and conformed to the rules on negotiations for developed countries. Mataywa *Busieka The SADC Trade Protocol: A jurisprudential Assessment* (2010) African Institute of South Africa Occasional Paper No.29 also confirms that WTO classifies South Africa as a developed country 44.

[84] Tsitsi Effie Mutambara 'Asymmetric tariff reduction within the SADC protocol on trade and its implications for industrial development within member states' (2007) 3(1) *Journal of Development Perspectives* 55; Colin McCarthy L 'Regional integration of developing countries at different levels of economic development-problems and prospects' (1994) 4(1) *Transnational Law. & Contemporary Problems* 10; Anna Morner 'Regional integration and trade liberalisation in Southern Africa: an overview' (1998) 3 *Year Book of International Finance & Economic Law* 552.

agenda.[86] Accordingly, the region adopted the development integrated approach.[87] With its flexibility, this system offers the opportunity for each state to engage in the liberalisation of its domestic market at a time, and within a time frame that is suitable to its development plans and policies.[88] That flexibility also means that there is legal protection for SADC members' development oriented measures' necessary to address the negative effects of removing trade barriers.[89] In that context, SADC permitted Zimbabwe, and Tanzania to derogate from their tariff phase down commitments until two or three years later. Tanzania's request was submitted ex-post after it had already raised its tariffs on sugar and certain categories of paper.[90] In Zimbabwe's case, it requested to derogate for two years from tariff reduction on sensitive products due to the dire economic prevailing conditions at the time[91] and its application was granted.

In addition to the above actions, there have also been allegations of other actions by some SADC states that act as restrictions to market access such as stricter health standards on agricultural products by the South African government.[92] Zimbabwe enforced a ban on poultry imports on health grounds, but there were reports that the ban had been enforced without scientific justification requirement.[93] Arguments against this ban indicate that such measures were arbitrary and unjustified under the law.[94] There is also the argument that the ban was prompted by intensive lobbying from domestic poultry producers, so the government imposed the ban to

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[85] SADC *Regional Indicative Strategic Development Plan* (2003) 54-60.
[86] Article 5(1)*(a)* SADC Treaty.
[87] SADC *Regional Indicative Strategic Development Plan* (2003) 54-60.
[88] The timing of the integration activities must be favourable to the development priorities of the states. See, Oriantes Isaac & Rosenthal Gert 'Reflections on the conceptual framework of Central American economic integration' 1977 (1) *CEEPAL Review* (Sandiego) 26 cited in Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 30; Consequently, States such as Angola and DRC are not opted out of the Protocol until an appropriate time.
[89] SADC *Regional Indicative Strategic Development Plan* (2003) 3 Jens Haarlov *Regional Cooperation and Integration within Industry and Trade in Southern Africa* (1997) 30.
[90] USAID *Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade* (2011) 20-21.
[91] USAID *Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade* (2011) 21.
[92] Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation and Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 30; Sylvester Mpandeli & Phokele Maponya 'Constraints & challenges facing the small scale famers in Limpopo province in South Africa'(2014) 6(4) *Journal of Agricultural Science* 138-139 reports that small scale farmers in specific locations in Limpopo province experience challenges accessing high value markets since they produce low quality products.
[93] Byo24News "Zimbabwe chicken ban hits South African company exports" *Bulawayo 24 News* 27 January 2011 available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed 8 March 2017).

protect domestic producers against very competitive South African chicken.[95] A South African company, Country Bird Holdings, which is an exporter of chicken, lost sales of 600 tons of chicken as a result of the ban.[96] Coupled with a limited domestic supply of chicken, the ban led to a reduction in the volume of these products in the Zimbabwean market.[97] This is just a reflection of some of the trade restrictions that SADC members enforce against their regional counterparts. But on the whole, SADC members impose more trade restrictions on their counterparts within the region than on their trade with the rest of the world.[98] This may not be a good phenomenon for effective growth in intra-SADC trade in agricultural products.

It is important to mention that this state of affairs exists even after SADC members have affirmed their rights at the WTO[99] and set specific targets and deadlines leading to the establishment of a monetary union.[100] To attain this mile stone, the process commenced with the establishment of a Free Trade Area (FTA) in 2008, with the view that a customs union would have been established by 2010, common market by 2015 and a monetary union by 2025. It is vital to mention at this point that except for the launch of the FTA in 2008, SADC failed to launch a customs union in 2010 as agreed.[101] Yet again, no new deadlines were set after these apparent failures.[102] These failures reveal that it is not so much the economic issues which are the binding force for the success of the integration agenda but, political will.[103]

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[94] Ibid. The ban is considered to be arbitrary for lack of evidence on the health risks associated with the chicken and poultry products.

[95] Trade Mark Southern Africa "Poultry farmers slam import ban" available at http://www.trademarksa.org/news/poultry-producers-slam-zim-import-ban (accessed on 8 March 2017).

[96] Byo24News "Zimbabwe chicken ban hits South African company exports" *Bulawayo 24 News* 27 January 2011 available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed 8 March 2017).

[97] Dumisani Ndlela "Fears of price hikes as chicken shortages emerge" *The Financial Gazette* 30 July 2010 available at http://www.financialgazette.co.zw/fears-of-price-hikes-as-chicken-shortages-emerge/ (accessed 8 March 2017).

[98] World Bank *Harnessing Regional Economic Integration for Trade and Growth in Southern Africa* (2011) 13.

[99] By registering the organisation with the WTO, SADC members affirmed their rights and obligations at the WTO. See, World Trade Organisation "South African Development Community" available at http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45, also http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=948 (accessed on 8 March 2017).

[100] SADC *Regional Indicative Strategic Development Plan* (2003) 60.

[101] Trade Law Centre *The Regional Indicative Strategic Development Plan: SADC's Trade-Led Integration Agenda. How Is SADC Doing?* (2012) 7.

[102] Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 126.

[103] Clement Ng'ong'ola 'SADC law: building towards regional integration' (2012) 2(2) *SADC Law Journal* 126.

Consequently, where there is limited political will, the boundless flexibility within the development integration approach is ammunition for enforcing development oriented measures as well as a shield against efforts of trade liberalisation. Equipped with such an opportunity, it is difficult to witness enthusiastic and radical compliance with binding norms within the region where there is general lack of political will. As such, even the specific deadlines remain effective, only in principle. Such a regulatory environment creates a lot of skepticism about the success of the initiatives toward free intra-SADC trade.

This situation is exacerbated further by the fact that some major loopholes and inadequacies exist within the SADC Protocol on Trade, including, substantive gaps on the conditions for derogations in article three, lack of a specific provision on NTMs; also a lack of a distinction between NTMs and NTBs despite the general position that a significant difference exists between these two concepts[104] and the limited legal information and understanding of how a measure such as an SPS measure can become an NTB.[105] Another gap in the SADC Protocol on Trade is the generalised regulation of trade restrictions against agricultural products trade.[106] Because, as much as article 16 on the harmonisation of SPS measures is specific to agricultural products trade and implemented in the context of the SPS Annex to the SADC Protocol on Trade in 2008 (as revised in 2014)[107] certain apparent inconsistencies exist on the legal force of specific rules for harmonising SPS measures. The legal implication of this inconsistency will be examined in chapter three of this thesis. Another legal challenge with the regulation of SPS measures is that the centrality of science in the whole process of determining the legality of SPS measures is a difficult requirement for most SADC states to meet. A detailed explanation on this challenge is provided in sub-heading 3.5 below.

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[104] Nick Charalambides *What Shoprite and Woolworths Can Tell Us about Non-Tariff Barriers* (2013)14 Occasional Paper South African Institute of International Affairs 9, Micheal Jensen F & Wusheng Yu *Regional Trade Integration in Africa: Status and Prospects* (2012) 25-26; Olivier Cadot, Mariem Malouche, & Sebastián Sáez *Streamlining Non-Tariff Measures: A Tool Kit For Policy Makers* (2012) 4; Tracy Epps and Michael Trebilock J 'Import safety regulation and international trade' in Cary Coglianes, Adam Finkel M & David Zaring (eds) *Import Safety: Regulatory Governance in the Global Economy'* (2006) 71-72.

[105] United Nations Conference on Trade and Development *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) UNCTAD/DITC/TAB/2014/5, 9.

[106] Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007)134.

[107] Preamble to the SPS Annex to the SADC Protocol on Trade 1996.

From the discussion above, it can be said that the interface between trade liberalisation and national development in SADC faces specific problems. These problems are:

a) The law that defines and categorises unnecessary trade restrictions in the SADC Protocol on Trade is inadequate;

b) There is a conflict between the fundamental provisions in the SADC Protocol on Trade that deal with the harmonisation of SPS measures;

c) The right for SADC states to intervene in the market is paramount;

d) There is a general lack of transparency in the regulation of the application of SPS measures within the region; and

e) Enforcing science as a central factor in determining food safety standards and phytosanitary contrary to the reality of limited technical resources.

A detailed explanation of each of the five issues outlined above is provided under the next heading.

3 Research Problems

An overview of the problems that justify this study is provided below.

3.1 Inadequate definition and categorisation of unnecessary trade restrictions in the SADC Protocol on trade

This thesis proceeds on the assumption that in order to effectively address the problem of quantitative restrictions and SPS measures, it is necessary to address specific fundamental substantive and procedural gaps that exist within the SADC trade rules on these measures. The gaps that are of interest to this study are as follows: The SADC Protocol on Trade considers that trade restrictive measures other than tariffs are NTBs.[108] Article 6 which is the leading provision

[108] Article 1 of the SADC Protocol on Trade 1996.

for addressing such measures refers to them as NTBs.[109] Throughout the SADC Protocol on Trade, such measures are referred to as NTBs. There is no mention or definition of the phrase NTMs in any provision in the SADC Protocol on Trade. In addition to that, there is no specific provision(s) that clearly elaborates on the types of NTMs and the respective obligations toward their elimination. Yet, Keane, Cali & Kennan, indicate that NTMs and NTBs are distinct, in the sense that NTMs refers to all trade policies other than tariffs while NTBs form part of the NTMs that unnecessarily restrict trade.[110] To some extent, Cadot, Malouche & Saez also suggest that NTBs and NTMs are different concepts.[111] This possibly means that a distinction exists between the two concepts.[112] With that in mind, I argue that since the SADC Protocol on Trade focuses on the obligation to address the application of NTBs without any mention of NTMs implies that the SADC has opted for a regulatory approach which is narrow because it regulates only NTBs.

[109] Article 1 of the SADC Protocol on Trade 1996 refers to trade restrictive measures other than tariffs as NTBs. In light of these views, it appears that there may be a distinction and correlation between an NTM and an NTB: the phrase NTM is a broad concept that encompasses all forms of measures other than tariffs, whether prohibited or not, whereas an NTB is the prohibited component of NTMs. Since the WTO refers to measures other than tariffs as NTMs, it means that it has recognized that there is need to regulate all these forms of measures, regardless. Therefore, it adopted a broad and comprehensive approach in addressing these trade restrictions. Whereas, in the SADC, the Protocol in Art. 1 refers to trade restrictive measures other than tariffs as NTBs. Throughout the Protocol, such measures are referred to as NTBs, which in accordance to the views expressed by the texts above, is only a component of NTMs. That said, it means that the scope of application of the Protocol is limited to only such measures, contrary to the holistic approach adopted by the WTO.

[110] Jodie Keane, Massimiliano Calì & Jane Kennan *Impediments To Intra-Regional Trade in Sub-Saharan Africa* (2010) vi available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7482.pdf (accessed 8 March 2017).

[111] Olivier Cadot, Mariem Malouche, & Sebastián Sáez *Streamlining Non-Tariff Measures: a Tool Kit for Policy Makers* (2012)4 note that 'trade economists and lawyers have tried to get around the conceptual definition of NTMs by drawing on the distinction between NTMs and NTBs. The latter are the evil form of the former, where in trade restrictiveness whether deliberate or not exceeds what is needed for the measures' non-trade objectives....what matters on the ground typically has more to do with how measures are applied and what measures are applied'.

[112] In light of these views, it appears that there may be a distinction and correlation between an NTM and an NTB: the phrase NTM is a broad concept that encompasses all forms of measures other than tariffs, whether prohibited or not, whereas a NTB is the prohibited component of non-tariff measures. Since the WTO refers to measures other than tariffs as NTMs, it means that it has recognised that there is need to regulate all these forms of measures, regardless. Therefore, it adopted a broad and comprehensive approach in addressing these trade restrictions. Whereas, in the SADC, the Protocol in article 1 refers to trade restrictive measures other than tariffs as NTBs. Throughout the Protocol, such measures are referred to as NTBs, which in accordance to the views expressed by the texts above, is only a component of NTMs. That said, it means that the scope of application of the Protocol is limited to only such measures, contrary to the holistic approach adopted by the WTO. This thesis assumes that this limited scope will not effectively regulate the application of NTMs. For that matter, I assume that a holistic approach as adopted by the WTO sets a good example for regulating NTMs. Accordingly, I will explore the possibility of introducing the WTO approach into the SADC regime for trade in goods. For purposes of this study, references to NTMs should be assumed to refer to the concept as understood from the WTO perspective; whereas NTBs will refer to a sub-set of NTMs.

This means that it only regulates a sub-set of NTMs. Such specific reference also indicates that there is a limited scope of application of the SADC Protocol on Trade as far as the regulation of trade restrictions is concerned. On the whole, there is ambiguity on the relationship between the concept of NTMs and NTBs. In the absence of regulatory clarity in the SADC Protocol on Trade on the meaning and scope of each of these concepts, and the relationship between them, it is difficult to effectively regulate the application of measures that affect the free flow of goods across the borders of SADC countries. This thesis further assumes that a limited scope will not effectively regulate the application of NTMs. In that context, it is important to establish, first and foremost, the meaning and scope of such measures and then examine a holistic approach for dealing with their regulation and application. Accordingly, I will explore the possibility of introducing an approach into the SADC regime that promotes a broad and all inclusive scope.

3.2 Conflicting terms of fundamental provisions in the SADC Protocol on Trade that deal with the harmonisation of SPS measures

It is argued in this thesis that there are inconsistent rights and obligations between the Protocol and the SPS Annex to the SADC Protocol on Trade regarding the circumstances under which SPS measures can be imposed. Briefly, the inconsistencies are as follows: Article 5(1) of the SPS Annex to the SADC Protocol on Trade imports article 3 of the WTO SPS agreement. This means that the terms of this article can apply to SPS matters that are affecting intra-SADC trade. Article 3(1) of the SPS agreement states that WTO members shall base their SPS measures on international standards where they exist. On the other hand, article 16 of the SADC Protocol on Trade states that SADC members shall base their SPS measures on international standards. In my view, this implies a mandatory obligation as will be analysed in detail in chapter three. Yet, in article 5(2) of the SPS Annex, the right of SADC members to enforce their own level of protection supersedes any other rights and obligations in the SADC Protocol on Trade. On the face of it (an analysis is conducted in chapter three), this means that these rights are absolute just like it is under article 3(3) of the WTO SPS agreement. Even if they must comply with the

scientific evidence requirement in order to legalise SPS measures,[113] it seems that this right in article 5(2) of the SPS Annex supersedes the obligation in article 16 of the SADC Protocol on Trade. Meanwhile, a different legal force can be seen in light of article 6 of the SPS Annex, because of the flexibility associated with harmonisation of SPS measures considering that this provision merely encourages cooperation toward harmonisation of SPS measures *where appropriate*.

A detailed legal analysis of these provisions and their implication on harmonisation of SPS measures is provided in chapter three, but I can generally argue that on the face of it, these provisions reveal a regime of mixed rules and principles associated with ambiguity especially in the absence of any commentary in the SADC Protocol on Trade to clarify the fundamental variations that I briefly highlighted above. I argue also that this kind of regime could set in varying standards which could promote regulatory divergence.

How then can SADC members be motivated to harmonise SPS measures within a legal environment which is not only tainted with inconsistencies, but also in strong support of unilateralism? It is the interface of these rules in light of the requirements in article 16 of the SADC Protocol on Trade that raises concerns about the actual intentions of the SADC members, and the possibility of whether or not these legislative differences can be reconciled? An analysis of the implications of the legal problems that could arise from inconsistent rules will be examined in chapter three of the thesis.

3.3 Legal implication of the right of SADC member states to intervene in the market on decision making processes and development of rules on NTMs

The mixed constitution of SADC membership creates a community of diverse interests as each of them has the right to pursue development programmes in their own right, and also, from a regional point of view,[114] protect infant industries,[115] promote a healthy society[116] and access

[113]Articles 2, 3 & 5 WTO SPS agreement, also, Dunoff Jeffrey L 'Lotus eaters: reflections on the varietals dispute, the SPS agreement & WTO dispute resolution' in Bermann George A & Mavroidis Petros C *Trade & Human Health & Safety* (2006)166.
[114] Article 5(1) SADC Treaty 1992, article 3(1)*(c)* SADC Protocol on Trade 1996.
[115] Article 21 SADC Protocol on Trade 1996.
[116] Under the WTO SPS Agreement and the SPS Annex to the SADC Protocol on Trade 1996.

other external regional markets.[117] With such varying interests there is the possibility of clashes among states as each state endeavours to fulfill its own national goals. With such differences, it is a question of whether or not SADC exudes that strong leadership that can take charge of the decision making processes in a community where procedural rules on consensus is weak. A related cause for concern is whether or not the various conflicting interests will have any significant impact on processes for the development of rules on NTMs, and their regulation? These issues are examined in chapter five of the thesis.

3.4 Lack of transparency

Transparency has its benefits as shown in chapter four of the thesis. However, as chapter four shall reveal, the reality in SADC is that there is a general lack of transparency with SPS measures and the requirements for their application, despite the commitments under the WTO, the SADC Protocol on Trade and the existing efforts to improve transparency. The point of contention in chapter four is that the lack of transparency in itself is a case of non-compliance with the WTO commitments. Therefore, if members can exhibit such limited political will to transparency under the WTO, is it necessary to proceed with the domestication of the SPS Annex to the SADC Protocol on Trade? On the other hand, is it possible for the SADC region to pursue the accession to the recently adopted WTO trade facilitation agreement with the view of enjoying some of the benefits that such accession may bring for transparency? In simple terms, the analysis in chapter four examines the status of the domestication and implementation of the WTO and SADC SPS rules on transparency in SADC in specific SADC states. This examination aims to rationalise the lack of transparency with the requirements on SPS measures in light of a limited political will among specific SADC members and then advocate for solution.

3.5 Financial, technical and physical infrastructural challenges associated with the fulfillment of the scientific evidence requirement to enforce SPS measures

[117] As provided in the SADC Protocol on Trade 1996.

The main emphasis of the SPS Annex is to ensure that the goods traded within the intra-SADC region are not harmful to human, plant and animal life and health.[118] This mandate is founded on the principle that science is the key determinant of the safety of such products. As such, the SPS Annex requires compliance with the scientific evidence requirement.[119] This necessitates the application of food safety control and phytosanitary measures.[120] As much as these measures are meant for the good of the public, their successful implementation within the SADC may be difficult for the following reasons. In the case of food safety, particularly food from animals, there is the limited number of official scientific laboratories with accredited analytical methods for assessment of the microbiological or chemical residue levels in food.[121] There is also the limitation of accredited laboratories for determining the levels of cross species in adulterated animal foods.[122] In fact, the 2013 report of adulterated meat in South African supermarkets[123] is cause for concern about the safety of South African meat for human consumption.[124] Even for the laboratories that are in existence in some of the SADC countries, only a few of them are able to conduct scientific tests regarding highly contagious diseases such as highly pathogenic Avian

[118] Paragraph 1 and 3 of the preamble to the 2014 version of the SPS Annex to the SADC Protocol on Trade states the objective of the Annex as follows: The SADC Member States, emphasising the importance of human, animal and plant life or health in the SADC region and specifically their importance in relation to trade; and recognising the importance of establishing and maintaining confidence in the sanitary and phytosanitary measures of SADC Member States; Articles 2, 3 & 5 WTO SPS agreement, also, Dunoff Jeffrey L 'Lotus eaters: reflections on the varietals dispute, the SPS agreement & WTO dispute resolution' in Bermann George A & Mavroidis Petros C *Trade & Human Health & Safety* (2006)166.

[119] Articles 2, 3 & 5 WTO SPS agreement; also, Dunoff Jeffrey L 'Lotus Eaters reflections on the varietals dispute, the SPS agreement & WTO dispute resolution' in Bermann George A & Mavroidis Petros C *Trade & Human Health & Safety* (2006)166.

[120] These include development of specific legal and policy frameworks, labeling, sampling, inspection, laboratory tests etc. Derived from the list of SPS measures in article 17 of the SPS Annex to the Protocol; on food safety control measures refer to Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108.

[121] Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108-110.

[122] Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108-110.

[123] Donna-Maree Cawthorn, Harris Steinman A & Lourens Hoffman C 'A high incidence of species substitution and mislabeling detected in meat products sold in South Africa' (2013)32 *Food Control* 448; Mandy de Waal 'The great meat fraud SA edition' *Daily Maverick* 27 February 2013, available at http://www.dailymaverick.co.za/article/2013-02-27-(accesed 7 September, 2016); Staff Reporter & Sapa 'Major supermarkets exposed in meat label scandal' *Mail & Guardian* 14 April 2013 available at http://mg.co.za/article/2013-04-14- (accessed 7 September 2016).

[124] Karen Horsburgh "Meat species substitution: when what you see is not what you get" available at http://www.scienceinafrica.com/insight-opinion/meat-species-substitution-when-what-you-see-not-wht-you-get accessed 24 March 2017.

Influenza, and foot and mouth diseases.[125] These challenges, coupled with a fragmented regulatory framework on food safety control and SPS measures in general[126] leaves a lot to be desired as far as intra-SADC trade in safe livestock, and animal products is concerned. It is important to mention that these challenges exist despite the considerable investments by donor partners such as World Animal Health Organisation, Food and Agricultural Organisation, and the European Union in the field.[127] Accordingly, I argue that the fact that efforts are being made to promote product safety, the prevailing challenges may be a contributory factor to the low level of intra-SADC trade in animals and animal products[128]

Another issue concerning the risks to life and health is that of food borne diseases especially among the many poor people of SADC,[129] and consumption of raw or semi-processed grown with unsafe irrigated water.[130] The lack of safety with such products may have an impact on vegetable and fruit trade between South Africa and other countries of SADC. Any adverse effect on trade on such products may also be devastating for small and medium scale agricultural (especially vegetable and fruit) farmers in South Africa.[131]

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[125] Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 12 & 26-27.

[126] Govender Reuben & Tendai Charles Katsande 'ISO/IEC 17020 accreditation of Gauteng veterinary services: a systems approach towards managing food safety in South Africa' (2011) 4(2/3/4) *International Journal of Food Safety, Nutrition and Public Health* 192*;* Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108, 111; Kamau Nancy Washinga *The Regulation of Trade Barriers under the SADC and EAC: Assessing the Effectiveness of their Legal Framework* (Unpublished Master of Laws Thesis, University of Cape Town 2014)42; Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 12,15 & 32.

[127] Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 29.

[128] Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 10-11.

[129] Jonathan Crush, Bruce Frayne & Milla McLachlan 'Rapid urbanisation and the nutrition transition in Southern Africa' (2011)7 *Urban Food Security Studies* 27-31.

[130] University of Stellenbosch *Faculty of Agri Sciences Annual Report* (2013) 76-77.

[131] According to the South African National Development Plan 2030, the vegetable industry presents a viable opportunity for contributing to job creation and improvement of livelihood-adopted from Rathebe Jennifer M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practices and Experiences in Malawi, South Africa and Zambia* (2015) 21; Joshua Keneth Baloyi *An Analysis of Constraints Facing Small Holder Farmers in the Agribusiness Value Chain: A Case Study of Farmers in Limpopo Province* (Unpublished Master of Science Dissertation University of Pretoria 1-3); Maliwindi LL, Pfumayaramba TK & Katlego T 'An analysis of constraints that affect small holder farmers in the production of tomatoes in Ga-Mphahlele, Lepelle Nkumbi Municipality, Limpopo Province' (2014) 47(3) *Journal of Human Ecology* 269.

On another note, the problem of limited scientific research is also prevalent in the SADC as a result of limited funding[132] except for the South African government which has prioritised scientific research.[133] I am of the view that this limitation has implications for the ability of the other SADC states to unilaterally determine the risks of products to life and health. In that regard, I argue that there is need for an integrated and collaborative approach in conducting scientific assessment of risks in food.[134] It is along these concerns that chapter six puts forward an argument for an integrated risk assessment. Particular emphasis in chapter six is to advance the need for international collaborative interdisciplinary research[135] among natural and social scientists in SADC countries for long lasting generic solutions to regionally prevalent risks to health and life.

4 Methodology

The methodology used in this thesis is a textual interpretative approach coupled with a comparative analysis of legal frameworks and implementation approaches. In this method, I examine specific provisions of the SADC Protocol on Trade on NTBs by comparing it, substantially with specific provisions on quantitative restrictions in specific covered agreements annexed to the WTO Agreement. I also make reference to specific legal provisions of the East African Community (EAC) Treaty and the Association of South East Asian Nations (ASEAN)

[132] John Mugabe *Knowledge and Innovation for Africa's Development: Priorities, Policies & Programmes* (2009) World Bank Institute at 15, he reports on the limited funding for research and development; Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108.

[133] John Mugabe *Knowledge and Innovation for Africa's Development: Priorities, Policies & Programmes* (2009) World Bank Institute 16-17; Michael Khan J 'Developing mechanisms to promote south-south research in science and technology: the case of the Southern African Development Community' (2005) 5(1) *Africa Sociological Review* 18.

[134] Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 110; John Frean J, Perovic O, Fensham V, McCarthy K, Von Gottberg A, De Gouveai I, Poonsamy B, Dini I, Rossouw J, Keddy K, Alemu W, Yahaya A, Pierson A, Dolmazzon V, Cognat S, Ndihokubwayo JB 'External quality assessment of national public health laboratories in Africa 2002-2009 (2012)' 90 *Bulletin* World Health Organisation 195-196.

[135] Collaboration hereafter refers to research conducted either among same disciplines or different disciplines across borders. Interdisciplinary collaboration in this case is a form of research which generally brings in researches from the various disciplines that combine their knowledge in a way that creates synergies for better results-Refer to MC de Lange 'Exploring interdisciplinary: a theoretical consideration of bioethics at the interface between theology, philosophy and life sciences' (2009) 5(2) *TD The Journal for Transdisciplinary Research in Southern Africa* 191.

trade in goods agreement because these two regional economic organisations are more or less at the same level of integration with the SADC, with the development agenda as topmost priority just like in the SADC. In addition, the ASEAN intra-regional trade in goods rules presents a regulatory regime that specifically sets out rules for the application and removal of NTMs and NTBs. From the EAC point of view, the jurisprudential development regarding the rule on consensus provides insights on how to deal with the challenges that arise with consensus as a form of decision making procedure.

Collectively, I analyse specific legal provisions of the EAC treaty and ASEAN trade in goods agreement on quantitative restrictions and SPS measures to obtain significant insights for strengthening the SADC trade law that deals with matters pertaining to the application and removal of such measures. I conduct a desk review of multilateral and regional treaties and decided cases on the legality of NTMs and NTBs as well as academic commentaries and other publications relating to the issues under consideration within this study.

5 Significance of the study

This thesis aims to enhance the development and application of the legal framework on NTMs, in the SADC. This is achieved by recommending a better, broad and comprehensive definition of NTMs which will inform the judicial bodies and policy makers when they are specifically determining the legality of quantitative restrictions and SPS measures, or NTMs in general. In a nutshell, I advocate for a paradigm shift in the regulation for the application and removal of quantitative restrictions and SPS measures.

Again, the study brings into the limelight, the significance of a holistic approach in the cooperation toward harmonisation of SPS measures and enforcement of regional legal commitments. Thus, the study advocates for a collective response toward regional trade liberalisation as members take into account diversities in financial, technical capacities and national desires for socio-economic development. Accordingly, any state centered trade restriction not only hurts the spirit of regional unification but also defeats the need to pursue policies in a manner that mutually benefits other members as well. In that context, the study

argues that SADC needs to develop strong rules that engender a balance between state sovereignty and trade liberalisation.

The experience during the writing of this thesis has revealed the paucity of information on this section (specific legal exposition of the law on NTBs and NTMs in SADC) at public domains, or most of the easily accessible resource forums data bases. Accordingly, the outcome of the legal analysis from this thesis presents valuable information for future legal studies on the actual legalisation and categorisation of NTBs and NTMs. Further studies on the concept of NTMs and NTBs within the legal field is necessary to establish other dimensions of these measures and how the problems associated with their application and removal can be solved within the context of the law.

6 Scope of the study

I have placed special emphasis of the study on examining specific trade rules on NTBs and NTMs that regulate the regional trade in agricultural products due to the significance of export earnings from agricultural products for most SADC countries.[136] Despite the significance of sugar productivity and intra-SADC trade in this product, the study does not specifically focus on the regulation of sugar trade. Instead, I examine specific provisions of the SADC Protocol on Trade that regulate trade in agricultural products generally without focus on a particular product only.

The examination of specific provisions of the SADC Protocol on Trade does not include an examination of rules on customs union or common markets except where reference is made to them for insights and critical analysis. In that context, the scope of the thesis does not extend to the analysis of the terms of GATT article XXIV in any way.

[136]Mozambique, Tanzania and Malawi depend on agriculture see Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007)134; SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1; Garth le Pere & Elling Tjonneland N *Which Way SADC? Advancing Co-operation* and *Integration in Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29.

Reference to NTMs and NTBs in this thesis, should be understood in terms of the description of what should constitute an NTM or an NTB in light of the discussion in chapter two of this thesis.

From now on, any reference to 'Protocol' in this thesis means SADC Protocol on Trade.

7 Structure of the study

The study consists of seven chapters as follows:

Chapter one provides an introduction to the study, giving the general overview of the issues to be discussed in the thesis.

Chapter two examines a theoretical legal analysis on the meaning, nature and scope of quantitative restrictions under the WTO law and ASEAN trade in goods agreement. This exposition provides the contextual legal framework to distinguish NTMs from the concept of NTBs. Accordingly the analysis provides the legal foundation for a contextual legal analysis of SADC trade rules and regulation of quantitative restrictions in this chapter and the subsequent chapters as well.

The scope of analysis in chapter three focuses on examining the meaning of article 16 of the Protocol, articles 5 and 6 of the SPS Annex and legal implication of the relationship between these terms regarding the commitment to harmonise SPS measures in the SADC. This particular analysis is founded on the argument that there are fundamental conflicts between the terms of the three provisions mentioned above. Therefore, the rules dealing with treaty interpretation in the Vienna Convention on the Law of Treaties, is used to guide the interpretation of these articles and establish the inconsistencies and its impact on the commitment to harmonise SPS measures in SDC.

In chapter four, the analysis examines the level of transparency with SPS measures in specific SADC countries. This analysis aims to establish the extent to which SADC member states have complied with the transparency rules under the WTO's SPS agreement. The chapter analysis does not focus on examining the status of implementation of transparency rules of the SPS Annex because it has not been domesticated yet. As a result, efforts by SADC states to comply

with issues to do with transparency over SPS measures are largely founded on the WTO SPS agreement. Along that line, the chapter considers whether or not SADC members should proceed with the domestication of the SPS Annex. In addition, it examines the possibility of increasing the efforts toward trade facilitation including the opportunity to accede to the WTO trade facilitation agreement.

Chapter five has a development oriented dimension whereby the analysis considers the extent to which the Protocol embraces the need for enforcement of development policies and actions, and trade liberalisation in a balanced manner. Accordingly, the analysis in this chapter examines certain substantive and procedural rules that specifically promote enforcement of trade restrictions such as quantitative restrictions and SPS measures for development purposes yet at the same time also expect that the commitments to trade liberalisation should also be fulfilled. Since law does not operate in a vacuum, this chapter also analyses the extent to which other factors such as lack of strong political will and strong single leadership in SADC, together with other non-legal issues affect the status quo in the regime, the development of strong and broad SADC trade rules for regulating the application and removal of NTMs, the implementation and enforcement of such rules.

Chapter six highlights an alternative approach through which SADC states can fulfill the scientific evidence requirements through an integrated international interdisciplinary collaborative research. In that regard, the chapter explores the legal position on the possibilities of non-scientific evidence being admitted in support of an SPS measure. With that, the analysis considers the possibility of joint or integrated interdisciplinary international research work between natural and social sciences for prevalent risks that cut across many SADC states.

Chapter seven provides a summary of, and conclusion on the main legal issues in each chapter, with recommendations on the way forward.

CHAPTER TWO

DISTINCTION BETWEEN NON-TARIFF MEASURES AND NON-TARIFF BARRIERS IN THE CONTEXT OF TRADE RULES REGULATING THE APPLICATION OF QUANTITTIVE RESTRICTIONS

1 Introduction

Quantitative restrictions are defined as 'prohibitions or restrictions on imports into, or exports from a member state whether made effective through quotas, import licences, foreign exchange allocation practices or other measures and requirements restricting imports or exports'.[1] Their application is a common phenomenon in SADC manifesting inform of bans, stringent import or export requirements, and quotas[2] with a negative influence on intra-SADC trade flows.[3] I am of the view that this phenomenon is being perpetuated also by some of the weaknesses which appear in the Protocol, especially in the provisions that specifically regulate the application and removal of quantitative restrictions. More on this is analysed in this chapter.

Another problem associated with the regulation of quantitative restrictions is the ambiguity that surrounds the legal relationship between quantitative restrictions, and the concepts of NTBs and NTMs. I say so because even if the Protocol may regulate the usage of quantitative restrictions as bans, quotas and licenses in articles 7[4], 8[5] and 9[6], the Protocol neither refers to these restrictions

[1] Article 1 SADC Protocol on Trade 1996.

[2] Paul Kalenga *Regional Integration in SADC: Retreating or Forging Ahead?* (2012) 9-12 Tralac Working Paper No.D12WP08/2012 available at http://www.tralac.org/files/2012/09/D12WP082012-Kalenga-Regional-integration-in-SADC-retreating-or-forging-ahead-20120919.pdf (accessed 19 January 2017); World Bank 'Harnessing regional integration for trade and growth in Southern Africa' (2011) 12-13 available at http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1239120299171/5998577-1254498644362/6461208-1300202947570/SA_Regional_Integration.pdf (accessed 19 January 2017).

[3] World Bank 'Harnessing regional integration for trade and growth in Southern Africa' (2011) 12-13 available at http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1239120299171/5998577-1254498644362/6461208-1300202947570/SA_Regional_Integration.pdf (accessed 19 January 2017).

[4] Article 7(1) states that member states shall not apply any new quantitative restrictions and shall in accordance with Article 3, phase out the existing restrictions on the import of goods originating in member states, except where otherwise provided for in this Protocol.

as NTBs nor does it expressly link these restrictions to the rules against the use of NTBs in article 6 of the Protocol.[7] Yet, certain public documents or reports regarding trade restrictions in SADC also refer to such measures as NTBs.[8] Similarly, measures such as bans, quotas and licenses are also sometimes referred to as NTMs.[9] Again, the Protocol does not mention or refer to the concept of NTMs within its framework. There is also no clarity in the Protocol as to whether or not a relationship exists between NTMs and NTBs, as well as between NTMs, NTBs and quantitative restrictions. In addition to all this, article 6 of the Protocol does not give any indication of what would make quantitative restrictions become NTBs or even NTMs for that matter.

Under those circumstances, it may seem that the obligations in articles 7, 8, 9 and 6 of the Protocol are independent of each other. In that regard, it is uncertain whether a quantitative

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(2) that notwithstanding the provisions of paragraph 1 of this article, member states may apply a quota system provided that the tariff rate under such a quote system is more favourable than the rate applied under this Protocol.

[5]Article 8(1) states that member states shall not apply any quantitative restrictions on exports to any other member state, except where otherwise provided for in this Protocol.
(2) Member states may take such measures as are necessary to prevent erosion of any prohibitions or restrictions which apply to exports outside the Community, provided that no less favourable treatment is granted to member states than to third countries.

[6]Article 9 provides general exceptions to the prohibition against the use of quantitative restrictions provided the restrictions are allowed under the following conditions: a) Necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) Necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO; (d) Necessary to protect intellectual property rights, or to prevent deceptive trade practices; (e) Relating to transfer of gold, silver, precious and semi-precious stones, including precious and strategic metals; (f) Imposed for the protection of national treasures of artistic, historic or archaeological value; (g) Necessary to prevent or relieve critical shortages of foodstuffs in any exporting Member State; (h) Relating to the conservation of exhaustible natural resources and the environment; or (i) Necessary to ensure compliance with existing obligations under international agreements.

[7] The SADC Protocol on Trade 1996 defines NTBs as any barrier to trade other than tariffs-see article 1 of the Protocol. Article 6 of this Protocol requires their elimination.

[8]Imani Development *Inventory of Regional Non-Tariff Barriers: Synthesis Report Final Report* (2007)5, Trade Mark Southern Africa *Establishing a Regional Non-Tariff Barrier Reporting and Monitoring Mechanism* (January 2011) 1-2 mentions import measures such as licenses, quotas and other quality control measures as NTBs in the Tripartite region (of which SADC is a member); Michael Jensen F & Wusheng Yu *Regional Trade Integration in Africa: Status and Prospects* (2012)37-38 referring to the NTBs commonly reported in SADC as follows: import bans, import and export quotas, restrictive charges (not import or export duties), export licensing and import licensing as forms of import licensing.

[9] United Nations Conference on Trade and Development *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) UNCTAD/DITC/TAB/2014/5; Mmatlou Kalaba & Johann Kirsten *Estimating the Quantity Effects of Non-Tariff Measures on SADC Meat and Milk* (2012) 6-7; Mmatlou Kalaba *Non-Tariff Measures along the Beira Corridor: Impact on Cross-Border Trade Barriers to Agriculture and Trade* (2012) 2(5) see section 5 on the types of NTMs.

restriction is an NTB in the context of article 6 of the Protocol. Yet, time and again, the concept of NTB and NTM is being associated with quantitative restrictions such as bans, quotas, restrictive licensing systems as noted above. Accordingly, when article 6 of the Protocol requires elimination of NTBs, I take it that there is uncertainty around its specific meaning and scope. The interchangeable and sometimes simultaneous usage of NTMs and NTBs in reference to quantitative restrictions in SADC without any specific clarity in the Protocol may be a source of ambiguity for trade regulators and policy makers.

Another legal problem under the Protocol specifically relates to the scope of article 9 where the use of quantitative restrictions is permitted but the provision is devoid of an elaborate specific process of verification of the general exceptions.[10] Such a criterion is essential because the Protocol is meant to be the main legal framework to regulate the process of trade liberalisation within SADC. The lack of an elaborate specific process of verification gives wide latitude for SADC members to enforce any quantitative restrictions in a manner that they themselves deem to be within the parameters of the provision. This makes it difficult to regulate the application and removal of quantitative restrictions.

One mechanism through which these legal problems may be solved is to adopt a new approach for regulating the usage of quantitative restrictions as discussed at length in this chapter. In this approach, I identify and examine specific legal parameters which may possibly establish a quantitative restriction either as an NTM or an NTB and determine its legality along the same lines. It is along those lines that this chapter provides a theoretical legal analysis of specific provisions of the ASEAN trade in goods agreement as well as specific provisions of WTO covered agreements on quantitative restrictions and the respective WTO jurisprudence. The analysis of the provisions of the respective WTO covered agreements is meant to highlight the elements that should possibly distinguish a quantitative restriction as an NTM or NTB and also establish the possible relationship between the two concepts. The analysis of ASEAN trade in goods agreement also proceeds on the same line of thought. On a general note, I need mention that I am referring to these legal frameworks and jurisprudence because of limited SADC

[10] USAID *Technical Report: Audit of the Implementation of the SADC Protocol on Trade* (2011) 22.

jurisprudence and information on such matters.[11] Specific reference to the WTO regime is also meant to promote consistency between the latter and SADC rules on such measures.[12]

2 Defining non-tariff measures

There is no legal definition of NTMs in the WTO Agreement. Consequently, any idea or explanation hereafter on the meaning and nature of NTMs in terms of the WTO should generally be understood as concepts defined or described by secondary sources such as the World Trade Report, and a WTO E-Learning material and not from any WTO legal text. In that regard, the World Trade Report of 2012 defined NTMs as 'policy measures, other than tariffs, that can potentially affect trade in goods'.[13] In another report emanating from the WTO, it was stated that 'there is no agreed definition in the WTO of what constitutes an NTM or an NTB'.[14] This reflects a divided opinion of the WTO on the same subject, despite the fact that these reports were produced within the same year. It also implies that the WTO does not have a definite conclusive legal position on the definition of NTMs or NTBs. Perhaps, an analysis of each of the preceding views in the context within which they were stated could rationalise the specific opinions on the definition, or lack of a conclusive legal definition of NTMs or NTBs. But that is not within the scope of this study. For research and development purposes though, the lack of a conclusive legal definition on these concepts at that level creates a legislative gap that necessitates a study on the possibility of defining and distinguishing NTMs from NTBs. This is the main purpose of this chapter as it examines specific views, or definitions as well as rules on

[11] United Nations Conference on Trade and Development *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) UNCTAD/DITC/TAB/2014/5, 9. This report also generally and specifically highlights the lack of information or reported data on matters pertaining to NTMs in SADC.

[12] The SADC Protocol on Trade 1996 was formed and notified to the WTO under GATT article XXIV World Trade Organisation 'South African Development Community' available at http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45 (accessed 8 March 2017) also, the fact that SADC Protocol on Trade 1996 is subservient to the WTO regime means that it must be in line with the WTO framework, see Saurombe A 'The Southern African development community trade legal instruments compliance with certain criteria of GATT Article XXIV' (2011) 4(4) *PER/PEJL* 290.

[13] World Trade Organisation *Trade and Public Policies: A Closer Look at Non-Tariff Measures In the 21st Century* (2012) World Trade Report 38.

[14] WTO *E-Learning, Market Access for Goods and Non-Agricultural Market Access* (NAMA) Negotiations (2012) 209, *available at* http://etraining.wto.org/admin/files/Course_258/CourseContents/NAMA-EPrint2 (accessed 10 January 2017).

quantitative restrictions and suggests the possibility of incorporating the relevant principles into the respective SADC legal framework.

Against that background, there are several views regarding the meaning of NTMs. For Charalambides, NTMs are measures other than tariffs that 'cause trade distortions'.[15] By implication, Michael and Wusheng define an NTM as a policy measure other than tariffs which affect trade but whose application is justified under the WTO law.[16] In the definition provided by the WTO, Michael, Wusheng and Charalambides, the term 'measure' is common to all. The fact that this term cuts across all these definitions implies that the term plays a crucial role in determining a definition that could be generally and possibly accepted by policy makers and regulators alike. Another significant feature of these definitions is the selective usage of the word 'policy'. The WTO, Michael and Wusheng insert 'policy' immediately before the term 'measures' whereas Charalambides omits the term 'policy' in its definition. Another feature of these definitions is the apparent relationship between NTMs and the nature of trade flows. For the WTO, NTMs have the 'potential' to affect trade, whereas Charalambides, Michael and Wusheng conclude that they actually 'cause trade distortions' or 'affect trade'. In the next paragraphs, I explore the significance of the terms 'measure', 'policy', 'potential to affect trade' and 'affect or distort trade' in order to possibly determine a comprehensive definition of NTMs.

A measure was defined in *US—Corrosion-Resistant Steel Sunset Review* as follows: 'in principle, any act or omission attributable to a WTO member can be a measure of that member for purposes of dispute settlement proceedings'.[17] The GATT 1947 Panel in *Japanese—Trade in Semi—Conductors*, was of the view that a measure need not necessarily have to be of a legal character.[18] In ordinary terms, a measure is a means of achieving a purpose.[19] Meanwhile, a policy is defined as a 'course or principle of action proposed or adopted by an organisation or

[15] Nick Charalambides *What Shoprite and Woolworths Can Tell Us About Non-Tariff Barriers* Occasional Paper No. 14, (2013) South African Institute of International Affairs (SAIIA) 9.

[16] They defined an NTB as a policy measure other than tariffs which affect trade but whose application is unjustified under the WTO law. That is why I have derived an implied definition of an NTM from what they consider to be an NTB. Refer to Micheal Jensen F & Wusheng Yu *Regional Trade Integration in Africa: Status and Prospects* (2012) 25-26.

[17] *US—Corrosion Resistant Steel Sunset Review* Appellate Body report para 81.

[18] *Japanese—Trade in Semi-Conductors* Report of the panel adopted on 4 May, 1988 (L/6309-35S/116) para 106.

[19] Oxford Concise South African Dictionary 2010 New 2nd Edition.

individual'.[20] With regards to the phrase 'affect trade', a conclusion by the panel on the meaning of 'affecting' in *India—Measures Affecting the Automotive Sector*[21] could shed some light on its meaning:

> 'Affecting' ....implies a measure that has 'an effect on' and this indicates a broad scope of application. This term therefore goes beyond laws and regulations which *directly* govern the conditions of sale or purchase to cover also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products'.[22]

Therefore, for a measure to 'affect trade', it means it has an effect on trade.

For something to have the 'potential to', it means it has the 'possibility to develop into something in the future' or the 'possibility of something happening'.[23] In other words, 'possibility' and 'potential' mean the same thing. This implies that for a measure to have the 'potential to affect trade', it means that it has the possibility to have an effect on trade. This could mean that it can adversely modify the conditions of competitions in the future. In terms of proof, the 'possibility' of something happening requires a lower degree or threshold.[24] Consequently, there is no need to submit a large amount of evidence strong enough to show that the policy measure has or will produce a negative effect on trade. In such a case, I could argue that a justified projection of such an effect on trade would be sufficient evidence.

Likewise, in *Japan—Leathers*, a GATT 1947 panel while relying on an earlier GATT panel decision,[25] concluded that there is no need to prove the actual effect[26] of a measure on trade to establish whether or not that measure is GATT consistent because trade restrictions were

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[20] Oxford Concise South African Dictionary (2012) New 2nd Edition.
[21] *India—Measures Affecting the Automotive Sector* WT/DS146/R, WT/DS175/R Report of the panel 21 December 2001.
[22] *India—Measures Affecting the Automotive Sector* para.7.196.
[23] Oxford South African Concise Dictionary 2010 New 2nd Ed.
[24] *EC—Measures Concerning Meat and Meat Products (EC—Hormones)*, Appellate body report WT/DS26/AB/R, WT/DS48/AB/R paras184-185.
[25] *European Economic Community-Payments and Subsidies Paid to Processors and Producers of Oil Seeds and Related Animal-Feed Proteins*, Report of the panel, L/6627-37S/86 paras 144, 150; It confirmed an earlier decision in *US—Taxes on Petroleum and Certain Imported Substances*, Report of the panel 17th June 1987 (BISD 34S/160).
[26] *Japanese—Panel on Japanese—Measures on Imports of Leather* Report of the panel adopted on 15/16 May 1984 (l/5623 - 31s/94).

prohibited by the GATT 1947 in order to protect the competitive advantage in the market.[27] As a result, it was sufficient to show that the restrictions would affect the competitive advantage without any proof of the actual effects of a restriction on the volume of trade flows. Essentially, this also means that a complainant need not postpone a dispute due to lack of statistical evidence of adverse reduction in the volume of trade. A justified explanation of how the competitive advantage is affected or will be affected will be sufficient.

In that regard, when a measure is treated as one that has the potential to affect trade, it means that it has the possibility to adversely affect the competitive advantage in the market. This should not be necessarily associated with the actual effects of its enforcement on trade volumes at all times. On the other hand, a measure which affects or distorts trade is a measure which actually affects trade volumes. With this, statistical figures may be required to prove the actual adverse effects of the measure on trade volumes. Here, the burden is a higher on WTO members. The converse is true of a measure which has the potential to affect trade, where the burden of proof is lesser.

From the anlaysis on each of the terms and phrases above, it is possible to develop a definition of NTMs that embraces a wide dimension of measures for a more effective way of regulating trade restrictions. In that definition, it may be necessary to leave out the phrase 'measure' to avoid the ambiguity that may arise from trying to rationalise its linkage with 'barriers' as used under the concept of NTBs. Along that line, I propose that NTMs should be defined as a proposal to act,[28] an action or omission (whether of a legally binding character or not) other than tariffs by any authorised person with the potential to affect trade flows.

Having explored the possibility of defining a NTM, I now consider another approach that could possibly give clarity to the meaning and scope of NTMs by analysing the manner in which NTMs should be categorised. Staiger is of the view that NTMs can be classified in two

[27] *European Economic Community—Payments and Subsidies Paid to Processors and Producers of oil Seeds and Related Animal-Feed Proteins,* Report of the panel, L/6627-37S/86 paras 144, 150; It confirmed an earlier decision in *US—Taxes on Petroleum and Certain Imported Substances*, Report of the panel 17th June 1987 (BISD 34S/160).

[28] A proposal to act or omit may be an NTM when its effect causes fears and withdrawals or affects the predictability of the business environment. In fact, In *Japan—Leathers*, it was clear that it was not necessary to prove the actual effect of a measure on trade, because according to the panel in *ECC—Oil Seeds* Report of the Panel adopted on 25th January, 1990 (L/6627-37S/86) paras 144 that the main purpose of the GATT rules against trade restrictions is to protect the competitive advantage.

categories, namely: border and behind the border (internal) measures.[29] The former consists of quantitative restrictions on imports and exports.[30] Whereas behind the border measures are internal measures including measures such as domestic subsidies, health or technical or environmental standards, internal taxes and other charges or regulatory measures.[31] Despite the categorisation of NTMs by Staiger, this thesis takes a different approach in the categorisation of NTMs. This approach intends to establish a possibly easier way of categorising NTMs not in terms of the name of the measure but, its qualities, features or characteristics. Accordingly, later in this chapter I identify, examine and establish specific features or characteristics of quantitative restrictions as the baseline factors for the categorisation of NTMs. Next in line is an overview of the possible definition of NTBs.

3 Defining non-tariff barriers

For Michael and Wusheng an NTB is a group of NTMs that are not justified by the WTO law.[32] This means that NTBs are a form of NTMs that violate any of the substantive and procedural legal commitments assumed under the WTO agreement. For Charalambides, an NTB is a subset of an NTM.[33] Tracy Epps (in the context of health protection measures) is of the view that not all SPS measures are NTMs, but they become NTBs when they are trade restrictive.[34] In her opinion, NTMs can be transformed into NTBs if they prohibit importation, introduce unnecessary costs for foreign importers and discriminate against foreign traders.[35] Keane, Cali & Kennan also argue that NTBs form part of the NTMs that unnecessarily restrict trade.[36] Mmatlou Kalaba & Kirsten Johann state that an element that distinguishes an NTB from an NTM is that

[29] Staiger Robert W *Non-Tariff Measures and the WTO* WTO Staff Working Paper ERSD (2012)(1) 2.
[30] World Trade Organisation *Trade and Public Policies: a Closer Look at Non-Tariff Measures in the 21st Century* (2012) World Trade Report 52.
[31] World Trade Organisation *Trade and Public Policies: a Closer Look at Non-Tariff Measures in the 21st Century* (2012) World Trade Report.
[32] Micheal Jensen F & Wusheng Yu *Regional Trade Integration in Africa: Status and Prospects* (2012) 25-26.
[33] Nick Charalambides *What Shoprite and Woolworths Can tell us About Non-Tariff barriers* Occasional Paper No. 14, (2013) South African Institute of International Affairs (SAIIA) 9
[34]Tracy Epps *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement* (2008) 12.
[35]Tracy Epps *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement* (2008) 12.
[36]Jodie Keane, Massimiliano Calì & Jane Kennan *Impediments to Intra-Regional Trade in Sub-Saharan Africa* (2010) vi.

the former has protectionist intent.[37] According to UNCTAD, a measure is treated as an NTB when it is purposely designed to protect domestic products through discriminatory policies.[38]

Sudip Ranjan Basu et al had this to say 'in times of economic crises and in view of national policy challenges, a danger of NTMs is that *they can be abused for protectionist purposes* as political emotions outweigh past experiences and the intellectual foundations of trade policy measures (emphasis added).[39] This excerpt highlights something peculiar about the relationship between NTMs and protectionist measures. That is, the ability of NTMs to transform or change from a measure initially meant to achieve a legitimate purpose, to a protectionist one. In that sense, I argue it is that moment where the purpose of the measure changes or transforms from good to protectionist that such an NTM transforms into an NTB. This also actually means that an NTM can be transformed into an NTB if it is designed to protect national interests.[40] The contrary is also true in the sense that NTMs can be legitimately adopted and enforced, especially where political leaders act in a rational and objective manner.[41]

Accordingly, instead of referring to NTBs as a group of NTMs, I am of the view that they should be referred to as a form of NTM with protectionist intent or an NTM that has been transformed into an NTB. This kind of definition accommodates also NTMs that are not necessarily NTBs by virtue of the fact that their intent or design is consistent with the respective trade law except for the manner they may have been enforced. Along that line and from a practical point of view, quantitative restrictions should first and foremost be treated as NTMs, then whether or not it is consistent with the respective trade law should be examined in terms of the respective legal parameters for their regulation. In that context, legal parameters such as the motives of quantitative restrictions, the discriminatory practices associated with their enforcement, and their

[37] Mmatlou Kalaba & Kirsten Johann *Estimating the Quantity Effects of Non-Tariff Measures on SADC Meat and Milk Trade* (2012) 7.

[38]United Nations Conference on Trade and Development *Non-Tariff Measures to Trade*: *Economic and Policy Issues for Developing Countries, Developing Countries in International Trade Studies* (2012) 2.

[39] Sudip Ranjan Basu, Hiroaki Kuwahara & Fabien Dumesnil *Evolution of Non-Tariff Measures: Emerging Cases from Selected Developing Countries* (2012) Policy Issues in International Trade and Commodities Study Series No.52 UNCTAD 1.

[40] Mmatlou Kalaba & Johann Kirsten *Estimating the Quantity Effects on Non-Tariff Measures on SADC Meat and Milk Trade* 7.

arbitrariness should provide the benchmarks for categorisation. It is upon such an analysis that it may be possible to establish whether or not this quantitative restriction is indeed a barrier.[42]

In light of all the definition and explanations on NTBs above, I choose to expand the definition of an NTB from a group of NTMs to something that is seen as a form of NTM that unnecessarily restricts trade because it does not have any legal basis under any of the legal commitments assumed by WTO members or any regional trade law. For those reasons, an NTB may be designed purposefully to protect domestic goods from foreign competition. In other instances, it may be adopted to achieve a legitimate purpose but, its enforcement mechanism could transform it into an NTB. These enforcement mechanisms may be associated with things such as discriminatory practices, lack of transparency, and lack of scientific evidence.[43] In some instances, such procedural inconsistencies may be dictated by the dire economic conditions of an economy to the extent that they cloud the decision making process in a way that affects objectivity and rationality. If NTBs are seen in that light, their categorisation should be much easier without having to generally categorise them either as quantitative restriction or SPS measure. Instead, legal parameters such as discrimination, transparency and scientific evidence requirements should be the guiding principles to determine whether or not a measure is designed to protect and unnecessarily restrict trade.

Accordingly, when the conditions under which a quantitative restriction is applied or the aim it seeks to fulfill does not find any basis in the law, it is an NTB. In the alternative, a quantitative restriction which meets the substantive legal conditions under which it may be enforced, but, its enforcement is done in a discriminatory manner, or causes unnecessary restriction to trade, then this quantitative restriction, which was an NTM (because its aims falls within any of the established legal parametres), becomes an NTB. Below is a theoretical perspective on the meaning of, and distinction between NTBs and NTMs.

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[41] In another situation, the Appellate Body also indicated in *EC—Hormones* Appellate body report para 194 that governments can be objective sometimes.

[42] Nick Charalambides *What Shoprite and Woolworths Can tell us About Non-Tariff Barriers* (2013) 14 Occasional Paper South African Institute of International Affairs (SAIIA) 10. He mentions factors such as discriminatory practises, lack of transparency, and lack of scientific evidence or international standards to support an SPS measure all of which are legal parameters.

[43] Nick Charalambides *What Shoprite and Woolworths Can tell us About Non-Tariff barriers* (2013) 14 Occasional Paper South African Institute of International Affairs (SAIIA) 10.

4 Theorising the distinction between non-tariff measures and non-tariff barriers

Despite the preceding efforts to define and distinguish NTMs from NTBs, there are those that argue that there is no distinction and any attempt to provide that distinction ends in futility.[44] Bijit Bora, Aki Kuwahara & Sam Laird argue that reference to NTMs or NTBs depends on the context within which it is used. The former is the most commonly used term under GATT and UNCTAD whereas textbooks prefer the term barriers or distortions.[45] To them, it seems the usage of these concepts is a mere question of semantics, and there is nothing material about their distinctive phraseology.

For others, it is possible to distinguish them, and they have gone ahead and distinguished the two concepts.[46] Cadot, Malouche & Saez have this to say about the distinctions between NTBs and NTMs: 'trade economists and lawyers have tried to get around the conceptual definition of NTMs by drawing on the distinction between NTMs and NTBs; the latter are the evil form of the former, wherein trade restrictiveness whether deliberate or not exceeds what is needed for the measures' non-trade objectives....'[47] They further state that 'what matters on the ground typically has more to do with how measures are applied and what measures are applied'.[48] The latter further argue that even though attempts have been made to provide distinctions between these two concepts, it is immaterial to define it in light of what is evil or good about a measure. Instead, the distinction if any should be considered in the context of two defining elements, namely: the manner in which the measures are applied and the nature of the measures. It is these two elements that provide that basis for an in-depth analysis of specific elements that could be possibly used to categorise quantitative restrictions as NTMs or NTBs within the legal parameters of the trade regimes and jurisprudence under examination in this chapter.

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[44] Bijit Bora, Aki Kuwahara & Sam Laird *Quantification of Non-Tariff Measures* (2002) 18 UNCTAD Policy Issues in International Trade and Commodities Study Series 2.
[45] Bijit Bora, Aki Kuwahara & Sam Laird *Quantification of Non-Tariff Measures* (2002) 18 UNCTAD Policy Issues in International Trade and Commodities Study Series 2.
[46] Cadot Oliver, Malouche Mariem, & Saez Sebastian *Streamlining Non-Tariff Measures: a Tool Kit For Policy Makers* (2012)4.
[47] *Streamlining Non-Tariff Measures: A Tool Kit For Policy Makers* (2012) 4.
[48] *Streamlining Non-Tariff Measures: A Tool Kit For Policy Makers* (2012) 4.

5 Factors for distinguishing non-tariff barriers from non-tariff measures

The distinction between an NTM and NTB is examined in the context of first, the WTO law and jurisprudence and then later, the ASEAN trade in goods agreement.

5.1 World trade organisation rules on non-tariff measures

Before the WTO came into existence, there was no organisational framework to regulate international trade. Through-out the GATT years, the GATT 1947 acted as the de facto institution that provided oversight over the conduct of international trade.[49] During the GATT years, there was preference for trade restrictions to be referred to as NTBs.[50] However, as time progressed, it became apparent that trade restrictions were not now seen as NTBs only but as NTMs as well. Consequently, by the time the Marrakesh Agreement Establishing the World Trade Organisation (commonly referred to as the WTO Agreement) was adopted, the GATT 1947 continued to progressively regulate the application of trade restrictions in the context of a more accommodative and broad concept of NTMs. Since GATT 1947 continued to regulate trade during the transitional period,[51] it did so until 1 January 1995 when the WTO Agreement entered into force.[52] The latter, an integral part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations[53] continued with the preference for the concept of NTMs to NTBs as it came into being to regulate new disciplines regarding trade.[54] Such

[49] United Nations Conference on Trade and Development *Dispute Settlement: World Trade Organisation* (2003)4.

[50] Preamble to the GATT (which was adopted in 1947) mentions NTBs. There is no mention of NTMs in this land mark legal text.

[51] Preparatory Committee for the World Trade Organisation agreed and adopted the decision to permit a transitional coexistence of the GATT 1947 and the Marrakesh Agreement Establishing the World Trade Organisation, Minutes of Meeting PC/M/10. Para 17 & 18 available at http://www.wto.org/gatt_docs/English/SULPDF/91840159.pdf (accessed 23 March, 2017).

[52] Preparatory Committee for the WTO confirmed 1 January 1995 as the date of entry into force of the Marrakesh Agreement Establishing the World Trade Organisation, Minutes of Meeting PC/M/10. Para 4 & 5 available at http://www.wto.org/gatt_docs/English/SULPDF/91840159.pdf (accessed 23 March, 2017). This confirmation was made in respect of the procedural requirements stipulated in paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and article XIV(1) of the Marrakesh Agreement Establishing the WTO 1994. Simply referred to as the GATT years in this article, representing the period from 1947-1994.

[53] Article 1 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 1994.

[54] The multilateral agreements on trade in goods Annex 1A general agreement on trade in services (Annex 1B), agreement on trade-related aspects of intellectual property rights (Annex 1C). Annex 2 is the understanding on rules and procedures governing the settlement of disputes. Annex 3 trade policy review mechanism. Annex 4 consists of four plurilateral trade agreements.

disciplines are found in the agreement on agriculture and the SPS agreement.[55] It also incorporated the legal practice and interpretations under the GATT 1947 into the newly borne agreement.[56] As a result, rules and principles derived from GATT 1947 became part of the WTO legal framework in the context of GATT 1994.[57] The incorporation of the GATT 1947 rules into the WTO Agreement means that general rules on trade restrictions in GATT 1994 must be carefully understood and applied bearing in mind that specific provisions of GATT 1947 may have been modified by specific agreements such as the agreement on agriculture and the SPS agreement.[58]

Against that background, the next paragraphs particularly examine the meaning and scope of GATT article X(1) on quantitative restrictions. GATT article XI is the general provision regulating the application of quantitative restrictions within WTO/GATT. An examination of this provision should be able to guide the assessment of SADC trade rules on the usage and removal of quantitative restrictions as well. Accordingly, I have identified specific parameters derived from GATT article XI and the jurisprudence developed from its application as the factors that could be relied on to determine the legality of quantitative restriction, and the distinction between NTM or NTB. That said, GATT article XI(1) states as follows:

> 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product of the territory of any other [Member]'.

[55] Footnote 1 to article 4(2) of the agreement on agriculture refers to trade restrictions as non-tariff measures. The agreement on agriculture is a legal framework that was developed during and adopted at the end of the conclusion of the Uruguay round of trade negotiations.

[56] Article XVI(1) of the WTO Agreement. Article 1*(b)(iv)* of the Multilateral Agreement incorporates GATT 1994 into the WTO Agreement.

[57] Article 1*(a)* of GATT 1994 incorporates GATT 1947 into its framework. The GATT 1994 has been accepted, ratified and recognised by all members of the WTO as an internationally binding treaty, accordingly, the terms of the GATT 1947 are binding on WTO members.

[58] In this case, provisions of specific agreements take precedence over the general agreement on tariffs and trade 1994.

This provision is understood by Bin GU as one which prohibits quotas and licenses.[59] Jason Potts argues that the prohibition targets two main instruments, namely: trade quotas and bans.[60] Meanwhile, Kevin Kennedy refers to quantitative restrictions as quotas.[61] On the other hand, Baris Karapinar is of the view that the provision requires the elimination of prohibitions and quantitative restrictions.[62] By using the conjunction 'and', he creates the impression that prohibitions *and* quantitative restrictions are different instruments of trade regulations. From the preceding views, I conclude that quantitative restrictions appear in various forms such as bans, quotas or licenses; the scope of GATT article XI(1) extends to quantitative restrictions and prohibitions which is a bit ambiguous because it is not clear whether or not the scope of the article applies to quantitative restrictions or prohibitions or both. Perhaps the drafting history of this provision could give clarity.

The GATT 1947 drafting history on GATT article XI(1) states that 'it was not the intention that the use of licenses be prohibited by article XI(1) of GATT 1947, except when they are used to enforce restrictions or prohibitions'.[63] This statement means that the legality of licenses is settled. That is, the use of licences as a tool for regulating trade is acceptable. The only circumstance under which they will not be legally accepted is when they are used as restrictions or prohibitions. It is important to mention that this historical excerpt relates to the legality of licenses, and not quotas or bans. The legal position on quotas and bans was finally settled when the GATT was adopted (on 30th October, 1947) due to the adverse influence these measures had had on trade flows in the past.[64] That explains the general prohibition in GATT article XI(1) and

[59] Bin GU 'Mineral export restraints and sustainable development—are rare earths testing the WTO's loopholes?' (2011) 14(4) *Journal of International Economic Law* 784.

[60] Jason Potts *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy* International Institute for Sustainable Development (2008) 11.

[61] Kevin Kennedy C 'The GATT-WTO system at fifty' (1998) 16 *Wisconsin International Law Journal* 7-8.;

[62] Baris Karapinar 'Defining the legal boundaries of export restrictions: a case law analysis' (2012) *Journal of International Economic Law* 4.

[63] United Nations Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, *Verbatim Report of the Sub-committee of Committee II on Quantitative Restrictions and Exchange Control*, Document No. E/PCT/C.II/QR/PV/1,11th November, (1946) 18.

[64] After World War 1, restrictions were imposed through 'higher tariffs, import quotas, licensing requirements, and foreign exchange controls (refer to Irwin 'The GATT in historical perspective' (1995) 85(2) *The American Economic Review* 323). The Smoot-Hawley Tariff Act was enacted by the United States in 1930 to protect jobs against foreign competition (refer to Brown Bartram 'Developing countries in the international trade order' (1994) *Northern Illinois University Law Review* 350-351). This decision by the United States precipitated counter protectionist measures by other industrialised states such as the United Kingdom(refer to Padideh Alai'i

the exceptions in GATT article XI(2).[65] In fact, by virtue of that prohibition, GATT contracting parties would only rely on the exceptions as a defence mechanism against an allegation of violations of the terms of GATT article XI(1)[66] and other GATT rules.

I need mention that despite the prohibition in GATT article XI(1) since 1947, the usage and prevalence of trade restrictions such as quotas and bans has continued.[67] This indicates that the provision has neither halted nor deterred the use of such measures. This raises concerns about the strength of this provision, the regulatory approach or the general commitment of WTO members to comply with these rules. For these reasons, I am suggesting a paradigm shift in the regulation of quantitative restrictions. This approach is a departure from the current regime which generally prohibits the use of quantitative restrictions to a form of regulation which specifically targets specific identifiable characteristics or features of quantitative restrictions or the conditions or circumstances under which a quantitative restriction (such as ban, quotas) may be legally accepted or unprotected. This means that the law should clearly spell out identifiable features of quantitative restrictions which will not be acceptable, for being inconsistent with the trade law.

'Introduction' (2005) 20(6) *American University International Law Review* 1128) as they hoped to promote economic development and ensure national reconstruction. As a result of such protections, there was a great decline in the volume of trade. In the absence of a legal regime or an institutional framework specifically set to address the impact of restrictions on trade, it was difficult to tackle these problems. All these events were happening in the absence of a legal and institutional framework for regulating trade. As a result of this gap it became a pressing concern for the World powers such as the United States and the United Kingdom to devise a strategy for international trade regulation (refer to Irwin Douglas 'The GATT in historical perspective' (1995) 85(2) *The American Economic Review* 323-325, World Trade Organisation *Trade and Public Policies: a Closer Look at Non-Tariff Measures in the 21st Century* (2012) World Trade Report 40. Against this background, the GATT was adopted[64] to regulate the conduct of multilateral trade among its Contracting Parties (Dated 30 October 1947, Art.1(a) General Agreement on Tariffs and Trade 1994).

[65] Dealt with under section 5.4 of this chapter.

[66] *United States—Standards for Reformulated and Conventional Gasoline* Appellate body report WT/DS2/AB/R 29 April 1996 p20 the appellate body set a two tier test to determine whether a measure falls within the scope of article XX. The appellate body stated: 'In order that the justifying protection of GATT article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions-paragraphs *(a)* to *(j)* – listed under article XX; it must also satisfy the requirements imposed by the opening clauses of article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of the characterisation of the measure under *(g)*; second, further appraisal of the same measure under the introductory clauses of article XX'; in relation to GATT article XI *Japan—Restrictions on Imports of Certain Agricultural Products* Report of the panel adopted on 2 February 1988, L/6253 - 35S/163, para 5.1.3.7 the GATT panel made it clear that the burden of proof is on the member invoking an exception to prove that the requirements of the exception have been fulfilled.

[67] In 2012, the WTO provided a detailed exposition and status of the usage of trade restrictions such as quantitative restrictions in *Trade and Public Policies: a Closer Look at Non-Tariff Measures in the 21st Century* (2012) World Trade Report.

Along the same line, the law should also identify and establish illustrative characteristics and conditions under which a quantitative restriction is acceptable.

This new regulatory regime will no longer operate in terms of prohibition versus exceptions, or defenses but, in terms of the conditions or circumstances under which a quantitative restriction may or may not be applied. Along this line of thought, the discussion below examines specific factors which could possibly guide the determination of legality of quantitative restrictions. This same consideration is meant to guide the possibility of establishing the distinctions between NTBs and NTMs.

The proceeding analysis considers specific interpretations, findings and conclusions by GATT working parties, GATT panels, WTO panels and the appellate body to determine the meaning and scope of GATT article XI(1). I state it again that this particular analysis aims to establish the elements that determine the legality of quantitative restrictions in terms of the conditions or circumstances under which a quantitative restriction may or may not be applied. In that context, the discussion considers either the manner in which quantitative restrictions are applied or the nature in which they appear. It is within these two main parameters that the following specific features are examined: the protectionist aim of a measure, the negative effect of a measure, and certain trade restrictive elements such as lack of transparency and predictability, discretionary and discriminatory licensing systems. Proceeding in that order, the discussion under the next sub-heading commences with the two trade restrictive elements that may manifest upon the enforcement of a quota (as a form of quantitative restriction), namely: protectionist aim and a negative effect of the measure.

This analysis is subject to specific caveats as it mainly reflects on the WTO/GATT law and jurisprudence on GATT article X1. In that context, this analysis does not extend to the elements of GATT article XXIV under which SADC was notified and registered at the WTO since the provision has received substantial consideration.[68] Therefore, reference to other WTO covered

[68] McCarthy Colin 'Is African economic integration in need of paradigm change? thinking out of the box on African integration' in Anton Bosl, Willie Breytenbach, Trudi Hartzenberg, Colin McCarthy & Klaus Shade (2007) 7 *Monitoring Regional Integration in Southern Africa Year Book*; Clement Ng'ong'ola 'The reconstitution of the

agreements is for emphasis and critical analysis of the specific application of provisions on quantitative restrictions. For that matter, a more robust and detailed analysis of these issues from a specific WTO covered agreement, may be worthwhile for the development of information on NTBs and NTMs within that context. Even more, periodic updates are necessary to capture and present any future legal developments under any specific WTO covered agreement on the relationships between quantitative restrictions and the concepts of NTBs and NTMs.

5.2 The regulation of quotas as non-tariff measures or non-tariff barriers

A quota is a measure that ensures that only a specific mandated volume of goods is exported or imported.[69] The legality of a quota is examined under this sub-section in the context of two elements, namely: protectionist aim and the negative effect its application is likely to have on trade. This analysis will later guide the determination the legality of a quota either as an NTB or an NTM.

5.2.1 Protectionist aim of the measure

The aim of a measure may indicate whether or not it serves the purpose which it professes to serve, or it is aimed to protect local products against foreign competition.[70] A case in point can be seen in the case of *Japanese—Measures on Imports of Leather (Japan—Leather)*, where the Japanese government had imposed import restrictions in the form of quotas and licensing

Southern Africa Development Community: some international trade law perspectives' (2000) 117 *South African Law Journal*: Kerry Chase 'Multilateralism compromised: the mysterious origins of GATT Article XXIV' (2006) 5(1) *World Trade Review*; Mitsuo Matsushita 'Legal aspects of free trade agreements: in the context of article XXIV of the GATT 1994' in Mitsuo Matsushita and Dukgeun Ahm's (eds) *WTO and East Asia : New Perspectives* (2004); James Scott 'Developing countries in the ITO and GATT negotiations' (2010) 9(1) *Journal of international Trade Law and Policy*; Sungjoon Cho 'Breaking the barrier between regionalism and multilateralism: a new perspective on trade regionalism' (2001) 42(2) *Harvard International Law Journal*; Cosmas Milton Obote Ochieng 'The EU-ACP EPA and 'development question': constraints and opportunities posed by article XXIV and special and differential treatment provisions of the WTO' (2007) 10(2) *Journal of International Economic Law* (2007).

[69] Matsushita Mitsuo, Thomas Schoenbaum J & Mavroids Petros C in *The World Trade Organisation: Law, Practise and Policy* (2006) 269.

[70] World Trade Organisation *Trade and Public Policies: a Closer Look at Non-Tariff Measures in the 21st Century* (2012) World Trade Report 31-52.

requirements[71] as per the requirements specified in the Japanese law on cross border trade. Particularly, the Foreign Exchange and Foreign Trade Control Law No. 228 of 1949 (as amended) of Japan required importers of certain leather products under the import quota system to obtain licenses for such products.[72] These measures were challenged by the United States as being contrary to the obligations in GATT article XI.[73] It further argued that since the main aim of the Japanese quotas and restrictive licensing system was to address a specific and peculiar domestic policy, the latter could not be entertained under the GATT system for lack of a legal basis under any of the paragraphs in GATT article XI(2)*(c)*[74] or any other provisions of the GATT.[75] In response, the Japanese government argued that its quotas and licensing system was necessary to sustain the socio-economically disadvantaged Dowa people who substantially depended on a less competitive leather tanning industry.[76] To emphasise the significance of the policy to national development, Japan argued that if the restrictions were removed at the time 'the industry would collapse with immeasurable social, regional economic and political problems'.[77] The panel did not accept this argument finding it insufficient for legal protection under the GATT regime because it was clear from the onset that the Japanese government had the intention to restrict the entry of leather products.[78]

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[71] *Panel on Japanese—Measures on Imports of Leather* Report of the panel adopted on 15/16 May 1984 (l/5623 - 31s/94) para 8 mentions article 52 of the Foreign Exchange and Foreign Trade Control Law No. 228 of 1949, as amended), Import Trade Control Order (Cabinet Order No. 414 of 1949) and Import Trade Control Regulation (MITI Ordinance No. 77 of 1949).

[72] Panel on *Japanese—Measures on Imports of Leather* Report of the panel adopted on 15/16 May 1984 (L/5623 - 31S/94) paras 8 & 9, 20.

[73] *Japan—Leather* Panel report para 16.

[74] *Japan—Leather* para 15 GATT 1994 paragraph XI(2)*(*c*)* states as follows: Import restrictions on any agricultural or fisheries product, in any form, necessary to enforce governmental measures that:

i. 'Restrict the marketing or production of like domestic product (or a directly substitutable product if there is no substantial production of the like product);
ii. Remove a temporary surplus of a like domestic product (or a directly substitutable product if there is no substantial production of the like product) by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
iii. Restrict the production of any animal product that is directly dependent on the imported commodity, if the domestic production of that commodity is relatively negligible'.

The exceptions in GATT article XI(2)*(c)* is subject to other conditions including: the duty to give a public notice of the total notice of the quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value.

[75] *Japan—Leather* para 20 it argued further that if such restrictions were permitted, it would set in a very bad precedent into the system.

[76] *Japan—Leather* panel report paras 21 & 22.

[77] *Japan—Leather* panel report para 22.

[78] *Japan—Leather* panel report para 53.

I am of the view that this intention of the Japanese government had a strong bearing on the panel's finding against the quota because, the use of quotas and other trade restrictions were deeply rooted in matters that extended beyond the commercial field.[79] For that reason, even the specific efforts which had been put in place by Japan to increase quotas and address the procedural challenges would not be sufficient to produce the changes desired by United States.[80] Thus, as long as the Japanese government sustained its quotas to particularly protect the leather industry, no amount of quota increases could satisfactorily do away with the inherently protective nature of the measure. As a result, even the fact that Japan had carried out reforms which had produced 'notable considerable increases in percentage terms and absolute figures in the base period'[81] could not persuade the panel to arrive at a different conclusion. Accordingly, the panel was convinced by the protective intention to the extent that it impliedly disregarded the significant positive impacts of the relaxation of quotas and other trade restrictions on trade.[82] Consequently, the other factors for determining legality[83] only strengthened the view that the quotas and other quantitative restrictions were GATT inconsistent by virtue of it being inherently trade restrictive in nature.

In another scenario, when the United States government' desired to protect the domestic production levels of dairy products,[84] the government was permitted to do so by section 104 of the United States' Defence Protection Act, as amended.[85] In that regard, the United States'

[79] *Japan—Leather* panel report para 34.
[80] *Japan—Leather* panel report paras 33 & 34.
[81] *Japan—Leather* panel report para 43.
[82] *Japan—Leather* panel report para 53. In para 43, it also noted that the Japanese government had continued to pursue a policy of expanding quotas over an extended period of time. However, this fact could also not over rule the protective aim behind the quota and other restrictions.
[83] Factors such as the lack of a legal basis of the Japanese quotas and the adverse effect of the restrictions on the entry of exports into Japan refer to *Japanese—Measures on Imports of Leather (Japan—Leather)* Report of the Panel adopted on 15/16 May 1984 (L/5623 - 31S/94) paras 44 & 54.
[84] General Agreement on Tariffs and Trade, *United States—Restrictions on Diary Products*, Document No. L/119 9th September (1953)1. The restrictions were also intended to preserve the orderly marketing process, and avoid increase with orderly marketing, or store or increase expenditures under any price-support programmes.
[85] General Agreement on Tariffs and Trade, *United States Restrictions on Diary Products*, 9th September, 1953 Document No. L/119.

imposed quantitative restrictions on dairy products through quotas and bans,[86] which were challenged in the case of *US—Restrictions on Diary Products.* These restrictions were found to be contrary to GATT 1947 provisions because the quota aimed to protect the domestic diary production levels[87]

Those are some examples of instances where trade protectionist quotas were found to be inconsistent with the general prohibition against quantitative restrictions in GATT article XI. For a more specific perspective, the decision of the panel in *Turkey—Measures Affecting the Importation of Rice*[88] highlights the legality of quotas in light of article 4(2) of the agreement on agriculture.[89] When the United States challenged the Turkish authority's decision to temporarily suspend the importation of rice under article 4(2) of the agreement on agriculture, the panel concluded that the decision was inconsistent with article 4(2)[90] because, the measure aimed to promote the absorption of locally produced rice and limit the volume of imported rice.[91]

From the panel conclusions above, a quota will be prohibited if it is used to enforce the primary aim of shielding or protecting domestic producers or products from foreign competition. Thus, it will be a WTO/GATT inconsistent measure if its main aim is that of market or product protection just as reflected in the three examples cited above.

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[86] General Agreement on Tariffs and Trade, *United States Restrictions on Diary Products*, 9th September, 1953 Document No. L/119.

[87] General Agreement on Tariffs and Trade, *Netherlands Action under article XXIII*(2) *to Suspend Obligations to the United States*, Report adopted by the Contracting Party on 8th Nov 1952 (L/61).

[88] *Turkey—Measures Affecting the Importation of Rice (Turkey—Rice)* WTDS334/R September 2007 Panel report.

[89] The article provides that 'Members shall not maintain, resort to or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as provided in article 5 and annex 5' The measures of the kind are listed in footnote 1 of the agreement on agriculture as follows: 'quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947'.

[90] *Turkey—Measures Affecting the Importation of Rice (Turkey—Rice)* WTDS334/R September 2007 Panel report para 7.118; foot note 1 of article 4(2) of the WTO agreement on agriculture lists measures which are prohibited by this article as 'quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947'.

[91] *Turkey—Rice* Panel report para 7.113.

5.2.2 Negative effect of the measure

The WTO considers that the effect of a measure on trade can influence the determination of whether it is a legitimate measure or not.[92] A GATT report of 9 May, 1970 concluded that global quotas which severely restricted the importation of Jam and chocolate into Spain's customs territory could not be protected under GATT article XI.[93] Likewise, in *Japan—Leather*, the GATT panel concluded that a quota was a de facto prohibition because it limited the United States ability to export more leather products than it was prepared to.[94] It is appropriate to state that a quota is a numerical restriction on imports or exports[95] with the result that volumes of imports or exports can be reduced.[96] It is such a result that possibly disqualifies a quota as a legally justifiable measure within the WTO/GATT jurisprudence. To conclude the analysis on rules for the regulation of quotas, quotas will not be legally protected if the aim is trade protectionist in nature and if it adversely affects trade flows. That aside, further analysis on the legality of quantitative restrictions continues below within the context of the WTO/GATT rules on licensing procedures.

5.3 The rules on import licensing systems

This analysis also aims to highlight the possible parameters that could establish a licensing system as an NTB or an NTM. I take note of the fact that GATT article XI does not provide an elaborate set of rules for regulating the use of licensing as a tool for trade regulation.[97]

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[92] World Trade Organisation *Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century* (2012) World Trade Report 30.

[93] General Agreement on Tariff and Trade Agriculture Committee, Working Group 2 Import Restrictions Notifications Concerning Countries other than those Considered by the Joint Working Group, Document No.COM.AG/W/54, 9 May (1970) 127.

[94] *Japan—Leather* panel report para 54.

[95] Rudiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr (eds) *WTO*: *Technical Barriers and SPS Measures* (2007) 51.

[96] Matsushita Mitsuo, Thomas Schoenbaum J & Mavroids Petros C *The World Trade Organisation: Law, Practise and Policy* (2006) 269.

[97] Later, in 1950, attempts were made to establish principles for acceptable licensing practises. One of these initiatives was the adoption of the standard practises for quantitative and exchange restrictions. It took the form of a code, referred to as Code of Standard Practices for Export and Import Restrictions and Exchange Control. Refer to General Agreement on Tariffs and Trade Contracting Parties List of Decisions and Other Actions Taken by the Contracting Parties GATT/CP 116 16th May 1951, General Agreement on Tariffs and Trade Contracting Parties GATT/CP.5/30 Rev 1, adopted 30 November 1950, 94-95, General Agreement on Tariffs and Trade Contracting Parties Report of Working Party 'G' on Standard Practices for Export and Import Restrictions and Exchange

Consequently, I examine licensing procedures in terms of general provisions on quantitative restrictions of GATT article XI(I) and for a specific and in-depth analysis of the issues at hand, reference is made to specific rules from the WTO agreement on import licensing procedures and agreement on agriculture.

5.3.1 Licensing as a restriction under the GATT/WTO

GATT 1947 drafting history on article XI(1) indicates that it was not the intention of the drafters of GATT 1947 to prohibit the use of licenses by article XI(1) of GATT 1947, except when they are used to enforce restrictions or prohibitions.[98] However, no provision in the GATT 1947 categorised or established the forms of prohibited licensing systems. This created a gap as to the exact extent of the prohibition against licensing under GATT article XI(1). Subsequent practices and legislative endorsements during the GATT years led to the conclusion that certain licensing systems had unnecessarily trade restrictive characteristics which would justify their treatment as GATT inconsistent measures.

Particular reference is made to the case of *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*[99] where the panel questioned the legality of India's import licensing regime. Briefly, the facts are as follows: India instituted an import regime which maintained a negative list of items categorised in three sections: prohibited items, restricted items and canalised items.[100] Part II of the negative list contained restricted items that could only be imported upon a grant of a special import license.[101] In addition, such import licenses were granted only to actual users who were to import the product for their own use or for industrial purposes.[102] This would restrict the transfer of items imported by actual users to other users

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Control (Refer to paragraph 4 of the Annex to this Report); then in 1980, an agreement on import licensing was adopted, but it was later superceded by the WTO agreement on import licensing procedures.

[98] United Nations Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, *Verbatim Report of the Sub-committee of Committee II on Quantitative Restrictions and Exchange Control*, Document No. E/PCT/C.II/QR/PV/1,11th November, (1946) 18.

[99] *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* Report of the panel, WT/DS90/R 6 April 1999.

[100] *India—Quantitative Restrictions* Report of the panel para 2.20.

[101] *India—Quantitative Restrictions* Report of the panel para 2.20.

[102] *India—Quantitative Restrictions* Report of the panel para 2.24.

except with permission[103] or after expiration of two years from the date of importation.[104] The United States challenged this policy for being an arbitrary, non-transparent and discretionary import licensing system[105] because of the selective manner in which applications were granted.[106] In defense, India argued that its licensing system was transparent and rules based[107] because it was a requirement to provide a written explanation to support a rejected application and applicants had a right of appeal.[108] India's licensing system was found to be GATT inconsistent because it depended a lot on the exercise of discretion and lacked a merits list that impeded the proper exercise of discretion.[109]

Still on the legality of licensing systems, according to a 1950 report of a GATT Working Party,[110] there was a Haitian legal requirement that government authorities should exercise their discretion when granting licenses on tobacco, cigars and cigarettes.[111] The exercise of discretionary power constituted an element of restriction.[112] Five years later, the Haitian measure was re-examined and found to be consistent with GATT 1947 article XI when it was established that there was no more exercise of discretion. Instead, the law required that the licenses be issued to the full extent of the demand.[113] The decisions on the Haitian measure reveal that the exercise of discretionary power is a restriction that cannot be legally acceptable because, as noted in *India—Quantitative Restrictions* it causes discrimination. Thus, a licensing system which denies an application without any legally defined justifiable cause is a restriction according to GATT article XI(1).

[103]*India—Quantitative Restrictions* Report of the panel para 2.24.
[104]*India—Quantitative Restrictions* Report of the panel para 2.24.
[105] *India—Quantitative Restrictions* Report of the panel para *5.125.*
[106]*India—Quantitative Restrictions* Report of the panel para *5.125.*
[107] *India—Quantitative Restrictions* Report of the panel para *5.125.*
[108] *India—Quantitative Restrictions* Report of the panel para 5.126.
[109] *India—Quantitative Restrictions* Report of the panel para 5.130.
[110] WTO Analytical Index: Guide to GATT Law and Practise (1995) 1 Geneva 319.
[111]GATT/CP.5/25, adopted on 27 November 1950, II/87.
[112]GATT/CP.5/25, adopted on 27 November 1950, II/87.
[113] Working Party Report on The Haitian Tobacco Monopoly, L/454, adopted on 22 November 1955, BISD 4S/38, 40, para. 11.

In *Turkey—Measures Affecting the Importation of Rice (Turkey—Rice*)[114] the Turkish government failed to produce the necessary proof to justify the decision to refuse or deny concessions[115] and the panel could not protect a discretionary import licensing system which was associated with practices relating to abuse of discretionary power[116] in order to maintain the integrity of the agricultural trading system.[117]

All these cases above reflect the fact that the use of discretion during licensing is not WTO/GATT consistent.

5.3.2 Additional attributes of licensing as a restriction

Another element that would make a licensing system to be prohibited can be seen in the context of a system associated with unreasonable delay. Unreasonable delay in a licensing process is a restriction which is inconsistent with the WTO law. Article 3(5)*(f)* of the agreement on import licensing procedures states that:

> 'The period for processing applications shall, except when not possible for reasons outside the control of the member, not be longer than 30 days if applications are considered as and when received, i.e. on a first come first served basis, and no longer than 60 days if all applications are considered simultaneously. In the latter case, the period for processing applications shall be considered to begin on the day following the closing date of the announced application period'.

This provision sets the time limit of not more than 60 days within which applications under a non-automatic licensing system must be approved. In *Japan—Trade in Semiconductors,* licensing practices that led to up to three months of delay constituted restrictions contrary to GATT article XI.[118] On the contrary, an import license issued within five working days from the date of

[114] WT/DS334/R 21 Panel report September 2007.
[115] *Turkey—Rice* panel report paras 7.133-7.134.
[116] *Turkey—Rice* panel report paras 7.133-7.134.
[117] *Turkey—Rice* panel report para 7.130 by citing the appellate body reasoning in *Chile—Price Band System* Appellate body report para 234. The object and purpose of article 4 of the Agreement on Agriculture 'to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties.
[118] *Japan—Trade in Semi-Conductors* Report of the panel adopted on 4 May 1988 (L/6309-35S/116) para 118.

submission of the application was found to be consistent with GATT article XI(1).[119] Thus, a delay of more than 60 days (more than two months) is an unreasonable delay and such a licensing system is a restriction which can be categorised as an NTB.

Another factor that can justify the categorisation of a licensing system as a quantitative restriction, and NTB is lack of transparency because it limits the transmission of international prices into the domestic market[120] and discourages market access[121] due to unpredictability of the market conditions.[122] For such reasons, it is possible to argue that lack of transparency and predictability alone[123] would justify a finding of a measure being inconsistent with GATT article XI.[124]

From these decisions, it is clear that the WTO is very keen on challenging any licensing system that is tainted with lack of transparency, unpredictability associated with the exercise of discretionary power, unreasonableness, and unreasonably long approval processes without any legally justifiable reasons. Such circumstances should provide the parameters or characteristics for labeling a licensing system as an NTB.

Before I proceed to another section of this study, I generally conclude here that whether or not quantitative restrictions are NTBs or NTMs could be approached from two main dimensions, namely: the manner in which it is enforced and the nature in which it appears. These dimensions may be broken further into other tenets such as the aim of the measure (is it protectionist or not), effects of its enforcement, lack of transparency, abuse of discretionary power, unpredictability, and unreasonableness in its application. I further argue that it is under such conditions that quantitative restrictions may be seen as NTBs, and undeserving of legal protection. I need to state it also that the tenets or elements identified here are only for illustrative purposes and not

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[119] *Japan—Trade in Semi-Conductors* para 118, WTO Analytical Index: Guide to GATT Law and Practise, (1995) 1 Geneva 319, in light of the 1978 *Panel Report on EEC—Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables* L/4687 Adopted on 18 October 1978, 25S/68, 95 para 4.1.
[120] *Chile—Price Band System* Appellate Body report para 234.
[121] *Chile—Price Band System* Appellate Body report para 234.
[122] *Chile—Price Band System* Appellate Body report para 234.
[123] *Turkey—Rice* panel report para 7.120.
[124] *Turkey—Rice* panel report para 7.121.

conclusive. This therefore necessitates further legal studies for a broader scope and perhaps more specific analysis in light of specific WTO covered agreements.

That said, the next sub-section considers the grounds upon which a quantitative restriction should be seen as legitimate, and deserving of legal protection as an NTM in light of GATT articles XI(2) and the general exceptions in GATT article XX .

5.4 Permission to apply measures such as quotas and licensing systems

GATT 1994 article XI(2)[125] establishes specific aims and conditions for which measures such as quotas and licensing systems are held to be legitimate in the eyes of those that negotiated this provision.[126] These legitimate terms and conditions appear in the form of exceptions as outlined below:

a) A temporary prohibition or restriction on export is permitted to relieve critical shortages of food stuffs or other products essential to the ...exporting country;[127] The two main conditions here are that the export prohibition or restriction is temporary and the product is essential to the exporting country.

b) Import or export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;[128] the main condition in this exception is that of necessity. The measure must be necessary to ensure that the acceptable standards or technical regulations are complied with.

c) Import restrictions on any agricultural or fisheries product, in any form, necessary to enforce governmental measures that:

    i. restrict the marketing or production of like domestic product (or a directly substitutable product if there is no substantial production of the like product);

    ii. remove a temporary surplus of a like domestic product (or a directly substitutable product if there is no substantial production of the like product) by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

[125] Article XI(2) of GATT 1994 is the exception to the prohibition in article XI(1).
[126] During the negotiations that led to the development and adoption of the GATT 1947, some developing and least developed countries vehemently advocated for exceptions to the prohibition in GATT article XI(1) in order to be able to carry on with development related trade restrictions. Other industrialised states such as France also desired exceptions in order to be able to reconstruct their economies.
[127] Article XI(2)*(a)* GATT 1994.
[128] Article XI(2)*(b)* GATT 1994.

iii. restrict the production of any animal product that is directly dependent on the imported commodity, if the domestic production of that commodity is relatively negligible.

The terms of GATT article XI(2)*(c)* which is cited above is subject to other conditions including: the duty to give a public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value.

Each of the paragraphs *(a)-(c)* is distinct in the terms they set. Paragraph *(a)*, permits prohibitions or restrictions only on exports, which means that the exception can only be invoked by an exporting country on any export product. Paragraph *(b)*, permits prohibitions or restrictions with respect to imports or exports, and paragraph *(c)*, permits restrictions on imports of agricultural or fisheries products specifically. Of the three paragraphs, paragraph *(c)* is the most restrictive in its application since a member has to apply only restrictions, as opposed to paragraphs *(a)* and *(b)* which permit prohibitions or restrictions.[129] Paragraph *(c)* is also more restrictive because permission is granted to restrict a specific category of products, that is, agricultural or fisheries products as opposed to paragraph *(a)* and *(b)* requirements that apply to any product. In *Japan—Restrictions on Imports of Certain Agricultural Products*, the GATT panel made it clear that the burden of proof is on the member invoking an exception to prove that the requirements of the exception have been fulfilled.[130] Consequently, the member invoking article XI(2) exception must prove that it has complied with its requirements. In that regard, when tools such as quotas and licenses are used to enforce these aims or the enforcement meets these conditions, they will be legally protected. This legitimacy, if proved, in my view, would mean that such a measure is an NTM. This argument may be understood in light of *Canadian Import Quotas on Eggs*[131] (*Canada—Quotas on Eggs).*

In that dispute, the United States contested the quotas which Canada had imposed on imported eggs. The GATT working party had to determine, whether the contested quotas were consistent

[129] *Japan—Restrictions on Imports of Certain Agricultural Products*, para 5.1.3.1 in GATT article XI(2)*(*a*)* and *(*b*)* the words prohibitions and restrictions are used while in article XI(2)*(c)* mention is only made of restrictions. For that reason, import prohibitions are not justified under GATT article XI(2)*(c*).

[130] *Japan—Restrictions on Imports of Certain Agricultural Products* Report of the panel adopted on 2 February 1988 (L/6253 - 35S/163) para 5.1.3.7.

[131] Report of the Working Party adopted on 17 February 1976 (L/4279 - 23S/91).

with GATT article XI. It concluded that the quotas were consistent with GATT article XI.[132] It simply means that Canada had discharged the burden of proof by satisfying[133] the respective conditions in paragraph 2 of GATT article XI. A quantitative restriction will be GATT inconsistent for failing to fulfill any of the conditions in paragraph 2 of GATT article XI. This was the case in *Japan—Restrictions on Imports of Certain Agricultural Products*, where Japan failed to satisfy the conditions in sub-paragraph *(c)(i)* under which it had sought protection.[134] As a result, the Japanese quotas could not find protection under GATT 1947 article XI(2). Had Japan successfully justified its measures in any of the paragraphs within article X1(2), such measures, even if trade restrictive, would have been found to be legitimate, and worthy of legal protection. The fact that the quotas satisfied the conditions in paragraph 2 of article XI would mean that much as the quota is trade restrictive, it is lawful. This makes it an NTM whereas lack of sufficient proof makes it an NTB.

I need to mention that quantitative restrictions such as quotas can be applied in the context of GATT article XX as well. The relevant parts of this provision states that:

> 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 any measures:
>
> *a)* 'Necessary to protect public morals;
>
> *b)* Ncessary to protect human, animal or plant life or health'.

Generally, for a member to invoke article XX GATT protection, it must satisfy two tests. In *United States—Standards for Reformulated and Conventional Gasoline,*[135] the appellate body set a two tier test to determine whether a measure falls within the scope of article XX. The appellate body stated:

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[132]The working party report was adopted by the Council, therefore binding.

[133]The panel in *Japan—Restrictions on Imports of Certain Agricultural Products*, Report of the panel adopted on 2 February 1988 (L/6253 - 35S/163) Para 5.1.3.7 made it clear that the burden of proof is on the member invoking an exception to prove that the requirements of the exception have been fulfilled.

[134] *Japan—Restrictions on Imports of Certain Agricultural Products* Report of the panel adopted on 2 February 1988 (l/6253 - 35s/163) paras 5.1.2. & 6.3-6.8.

> 'In order that the justifying protection of article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions-paragraphs *(a)* to *(j)* – listed under article XX; it must also satisfy the requirements imposed by the opening clauses of article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of the characterisation of the measure under *(g)*; second, further appraisal of the same measure under the introductory clauses of article XX'.[136]

Accordingly, for the measure to enjoy the protection under article XX GATT, there are two tests it must satisfy:

a) 'The requirements of any of the paragraphs *(a)* to *(j)* of article XX; and

b) The requirements of the introductory clause of article XX, commonly referred to as the *chapeau'*.

A member who invokes any of the provisions of article XX exception must therefore satisfy these two tests. In other words, a member's right to use an otherwise WTO/GATT inconsistent measure is not an absolute right.

I recognise the WTO legal position on the prohibition against the use of trade restrictions in GATT article XI. I also recognise that the exceptions in GATT article XI(2) and GATT article XX are defenses to measures which are considered to be contrary to the GATT rules against trade restrictions. However, the analysis and conclusions on the legality of quantitative restrictions in this chapter took a different approach which deviated from the preceding WTO/GATT legal position against the prohibition having noted at the beginning of this chapter that the prohibition has not deterred or halted the use of quantitative restrictions. Thus, the main argument has been that the examination of the legality of quotas and licensing procedures should be determined in light of the circumstances under which it is legally acceptable, and the terms under which it is not. The same legal parameters could be used to establish a possible distinction between an NTM and an NTB.

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[135] *United States —Standards for Reformulated and Conventional Gasoline* Appellate body report WT/DS2/AB/R 29 April 1996.
[136] *United States —Gasoline* at p20.

In summary, to the extent that quotas and licensing systems exhibit restrictive or prohibitive aims, effects or their enforcement is adversely trade restrictive, they became a prohibition or restriction and NTBs. To the extent that these restrictions fail to meet the specific terms or conditions specified in the exception, they become NTBs. It need be mentioned here too that the elements that have been identified under this section for differentiating or categorising a quantitative restriction as an NTB or an NTM are not in any way exhaustive of all the elements of what makes a measure an NTB or an NTM, but an illustrative guide for future attempts at categorisation of trade restrictions from a legal point of view. Consequently, it is vital that these elements are understood within the context of the study, and any other measures which are not within the scope of this study, and particularly, this chapter, should be examined on their own facts and relevant laws.

Having completed consideration of the legality of quantitative restrictions under specific GATT/WTO law and jurisprudence, and examined the elements through which this measure can be categorised either as an NTB or an NTM, the discussion in the next section also addresses similar legal issues, but in light of the ASEAN trade in goods agreement.

6 The distinction between a non-tariff measure and a non-tariff barrier in light of ASEAN trade in goods agreement

Under this section, I critically analyse specific articles on NTMs and NTBs of the ASEAN trade in goods agreement on quantitative restrictions and NTBs in the SADC Protocol. The significance of the ASEAN for SADC is derived from the following facts: ASEAN is a regional economic community with the common objective of removing trade restrictions just like SADC. Also, both the ASEAN and SADC members share the common goal of advancing development of national economies.[137] Again, most members of these two regional economic communities face common problems arising from the application of NTBs[138] and integration among

[137]World Trade Organisation 'Understanding the WTO: Least Developed Countries' http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (accessed 17/4/2014).

[138] ECOWAS and ASEAN also face the problem of non-tariff barriers, Mmatlou Kalaba and Mbofholowo Tsedu, *Implementation of the SADC Trade Protocol and the Intra-SADC Trade Performance*, (2008) 17-22.

developing states.[139] Other than that, a difference exists in their trade flow patterns as these facts reveal. Three years after the ASEAN was established,[140] the share of intra-regional trade increased from 20 to 25 per cent from 1996 to 2003.[141] Similarly, three years after the implementation of the SADC Protocol on trade began (in September, 2000), the region witnessed an 11 per cent growth in trade.[142] These impressive statistics above on SADC did not last long as the region generally witnessed a decline in the share of intra-regional export trade flows from 2000 to 2006 by 2 per cent.[143] On the contrary, intra-ASEAN trade exports expanded by 2 per cent within the same baseline period.[144] In other words, during the same period, SADC witnessed a decline in trade volumes; while it was the opposite for ASEAN. Apart from the similarities, the differences in the trade patterns above draw my attention to the issue whether the rules on the application of quantitative restrictions play a specific role in that regard. That said, the following discussion examines the relationship between NTBs and NTMs under the ASEAN trade in goods agreement.

To begin with, chapter four of the ASEAN trade in goods agreement has been dedicated to address the application and removal of NTMs. According to article 40(1) of this agreement, ASEAN members must not adopt or maintain any NTM. As much as this provision does not define NTMs, the agreement allocates a whole chapter specifically for regulating the application of NTMs. An analysis of specific provisions on NTMs under this chapter is presented below.

In a way to link NTBs and NTMs, the ASEAN trade in goods agreement has included specific rules for the regulation of NTBs within the same chapter on NTMs. Accordingly, articles 41-42

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[139] Linda Low *ASEAN Economic Co-operation and Challenges* (2004) 23; Colin .L. McCarthy argues in 'Polarised development in a SADC free trade area' (1999)67(4) *South African Journal of Economics* 212-214 that integration among states at different levels of development produces unequal benefits, with the most advanced state benefiting from the integration process as opposed to the les developed.

[140]Kaka Mulqueeny K 'Regionalism, economic integration, legalisation in ASEAN: what space for environmental sustainability' (2004) 8(1)&(2) *Asia Pacific Journal of Environmental Law* 7-8, 32-33 initially established in 1967 to promote a regional political agenda of promoting peace, security and stability of the region. However, the organisation has extended its agenda over the years to include, economic integration; Lim Yew Nghee 'A case for harmonisation of ASEAN contract laws' (1996) 17 *Singapore Law Review* 375-376.

[141] Linda Low *ASEAN Economic Co-operation and Challenges* (2004) 24.

[142] SADC Secretariat Press Briefing: Trade, Industry, Finance and Investment Directorate, 20 August 2003.

[143]Kalaba Mmatlou and MbofholowoTsedu, *Implementation of the SADC Trade Protocol and the Intra-SADC Trade Performance*, (2008) 9-10.

[144]Kalaba Mmatlou & MbofholowoTsedu, *Implementation of the SADC Trade Protocol and the Intra-SADC Trade Performance*, (2008) 9-10.

which relate to NTBs form part and parcel of chapter four on NTMs. That being the case, it means that the ASEAN members have categorically established that NTBs are a form of NTMs. Even the definition of NTBs recognises them as *measures* (as opposed to 'barriers') other than tariffs which effectively prohibit or restrict imports or exports within member states.[145]

Taking into account that the title of chapter four of this agreement is NTMs, yet within this same chapter, provisions on NTBs exist, it means that there is indeed a relationship between the two concepts. First, an NTM is a broad concept that consists of various measures. Such a measure can be transformed into an NTB, because article 42(4) mandates the coordinating committee in charge of the implementation of this agreement to determine whether a measure which has been notified as an NTM constitutes an NTB.[146] If the measure is found to be a quantitative restriction, its application is automatically unwarranted, and it must be eliminated.[147] In my view, this clearly means that a quantitative restriction is a form of an NTB. In that context, a notification of an NTM by a member is not an absolute conclusion that such measure is indeed what it has been stated to be.[148] Secondly, ASEAN members are permitted to enforce NTMs provided they are not unnecessarily trade restrictive. Some of the factors through which a measure may be found not to be unnecessarily trade restrictive are if it is applied in a transparent manner, and if the aim is not trade protectionist in nature.[149] Accordingly, the obligation in article 40(1) that members must not maintain NTMs applies to any measure which is unnecessarily trade restrictive.

In light of what has been discussed above, the ASEAN trade in goods agreement is significant for SADC's regulatory system in the sense that the formers accords a whole chapter for the regulation of NTMs which is exemplary for SADC's regulatory framework. As much as the ASEAN trade in goods agreement does not define an NTM, it is clear that the latter is regulated by this regime. This is not the case with the Protocol. The fact that the ASEAN trade in goods agreement indicates that a measure that has been notified as an NTM could actually be an NTB is also significant because it implies that there is indeed a relationship between the two concepts. Such a relationship does not exist in the Protocol. The ASEAN trade in goods agreement also

[145]Article 2(1)*(k)* of the ASEAN Trade in Goods Agreement 2009.
[146]Article 42(4) ASEAN Trade in Goods Agreement 2009.
[147] Article 41(1) ASEAN Trade in Goods Agreement 2009.
[148]Article 42(4) ASEAN Trade in Goods Agreement 2009.
[149]Article 40(2) of the ASEAN Trade in Goods Agreement.

highlights certain factors that may guide the determination of whether or not a measure is an NTM or an NTB. Such factors include lack of transparency, trade restrictive aims or effects of such measures. In addition to this, since quantitative restrictions are out rightly categorised as an NTB, it means the application of quantitative restrictions is prohibited. This is the kind of regulatory approach for which I suggested a paradigm shift in light of the reasons explained earlier.

Based on the analysis under this section of this chapter, the analysis in the next section examines the scope of article 6 of the Protocol on quantitative restrictions within the context of NTBs and NTMs.

7 NTMS and NTBs in the SADC protocol on trade

The main provisions that deal with the application of quantitative restrictions are articles seven, eight and nine of the Protocol. Having analysed the relationship between these three provisions at the beginning of this chapter, this section of the study primarily focuses on examining the scope of article six. This is the key provision of the Protocol that regulates the application of NTBs. It states that:

> 'Except as provided for in this Protocol, Member States shall, in relation to intra-SADC trade:
> a. Adopt policies and implement measures to eliminate all existing forms of NTBs.
> b. Refrain from imposing any new NTBs'.

Essentially, it requires SADC member states to eliminate existing forms of NTMs and implores them to refrain from imposing new NTBs. This is an indication of 'SADC's objective of "deep integration" which addresses regulatory barriers' against intra-SADC trade.[150] It is in that spirit that I examine whether the obligations in article 6 of the Protocol effectively regulate the removal of quantitative restrictions in the context of NTBs and NTMs. This analysis is based on the conclusions derived from the analysis made earlier in this chapter within the context of the WTO regime and ASEAN trade in goods agreement.

[150] Paul Kalenga *Regional Integration In SADC: Retreating or Forging Ahead* (2012) 9 Tralac Working paper No.D12WP08/2012.

As noted earlier, the scope of NTMs under the WTO legal regime is broad and NTBs are forms of NTMs.[151] Yet, as the key regional legal framework on trade liberalisation, the provision fails to mention the concept of NTMs in article 6 of the Protocol or any other part of the Protocol. Even when the WTO Secretariat made a factual presentation on the status of trade in SADC when there was need by WTO members to examine the Protocol, it was clear that the concept of NTMs was not part of the regulatory framework of SADC since it did not make mention of it in this report.[152] Instead, it pointed out the obligation to remove all existing NTBs under article 7 (current article 6 of the Protocol).[153] Clearly, the WTO Secretariat could only state the law as is for accurate and effective examination of the same. In essence, that law (the Protocol) regulates the application of NTBs which it defines as any barrier to trade other than import and export duties.[154] This is different from the definition of NTBs under the ASEAN trade in goods agreement that refers to them as measures other than tariffs as opposed to barriers other than tariffs. This means that ASEAN considers NTBs to be a form of NTMs. On that note, the fact that article 6 of the Protocol regulates NTBs, it implies that its scope is only limited to a form of NTMs. This is far different from the approach in the ASEAN trade in goods agreement.

On another note, article 4(2) of WTO agreement on agriculture which regulates the removal of trade restrictions refers to them as 'measures'[155] as opposed to 'barriers'. I am of the view that to the extent that the provision regulates the application of 'measures' as opposed to 'barriers', it embraces a broad scope of measures. In addition, the fact that commentary 1[156] to this article mentions not only 'measures' but also, 'NTMs' implies that the provision embraces a broader

[151] Refer to the discussion under section 5 of this chapter.

[152] World Trade Organisation *Factual Presentation: Protocol on Trade in the Southern African Development Community(SADC)* (2007) WT/REG176/4/6 Report by the Secretariat 6 available at https://docsonline.wto.org (accessed 23 November 2017) 6 .

[153] World Trade Organisation *Factual Presentation: Protocol on Trade in the Southern African Development Community(SADC)* (2007) WT/REG176/4/6 Report by the Secretariat 6.

[154] Article 1 SADC Protocol on Trade 1996.

[155] Refer to article 4(2) and Raj Bhala & David Gantz A 'Part 2: discussion of 2002 case law' (2003) 20 *Arizona Journal of International and Comparative Law* 238.

[156]Footnote 1 states, in the relevant parts as follows: '....these **measures** include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, **non-tariff measures** maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the **measures** are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement'.

scope of measures. Conversely, article 6 of the Protocol regulates the use on 'barriers' and not 'measures'. I am of the view that the term 'barriers' in the Protocol is very strong and 'condemning' from the onset. It gives the impression that anything that is a restriction against trade is a barrier as opposed to the more flexible and broader concept of a 'measure'.[157] Under these circumstances, I am of the view that NTB in article six should substituted with NTMs.[158]

Again, the Protocol does not expressly establish illustrative factors and characteristics that define a quantitative restriction as an NTB or NTM. Yet, as pointed above, the ASEAN trade in goods agreement provides guidance on the factors and features that could possibly characterise a quantitative restriction as an NTB or an NTM. Even the discussion under the WTO/GATT regime has indicated that it is possible to regulate quantitative restrictions within specific parameters or conditions. Such a regulatory system needs to identify certain illustrative conditions under which a quantitative restriction may be accepted or not. It may be progressive for the Protocol to specifically include such factors within its framework for a better regulatory process.

8 Conclusion

The SADC protocol on trade regulates the application of quantitative restrictions in terms that are not detailed and strong enough to deter their misuse. This may be a contributory factor to the prevalence of these restrictions. At the same time, the SADC members do indicate that they want to remove trade restrictions, yet the main provisions in article 6 and 9 of the Protocol contain fundamental legislative gaps in terms of depth and scope. With the narrow approach in article 6 of the Protocol that focuses on NTBs as opposed to NTMs, it is difficult to envisage how the SADC regulators can effectively pursue the liberalisation of the regional trade in agricultural goods. This legal problem needs to be addressed. Again, the interchangeable and sometimes simultaneous reference to quantitative restrictions as NTBs or NTMs in SADC causes ambiguity. These issues need clarification.

[157] *Japan—Semi Conductors* report of the panel para 106.

[158] The SADC Committee of Trade Ministers had suggested sometime in late 2014 that the usage of the term non-tariff barriers in the Protocol must be reconsidered.

The analysis on the law on quantitative restrictions from the WTO regime and ASEAN trade in goods agreement offer insights into the legality of quantitative restrictions, their regulation and categorisation as NTMs and NTBs. The analysis also reveals that there is a progressive move to refer to trade restrictions in terms of the broader concept of NTMs instead of the NTBs. In that context, and for purposes of consistency, it may be necessary for SADC to move from the traditionally narrow concept of NTBs. It is also advantageous for SADC to follow suit in order to establish the relationship between these two concepts and then create certainty about their scope. In addition to that, the insights on NTMs and NTBs from the WTO and ASEAN angle is significant for SADC's regime in terms of how the rules on quantitative restrictions can be reviewed for a stronger and a more effective regime. The insights also highlight the possibility of expanding the scope of the Protocol to regulate NTMs as well as NTBs in a manner that makes it easier for the legality of such measures to be determined so that the legality of quantitative restrictions should be guided by specific conditions. It may be relevant for such conditions to be peculiar to the SADC region.

In addition, it may also be vital to clearly indicate the fact that a certain degree of trade restriction is acceptable, but not one which is adverse or significant in nature. The Protocol should provide commentary on what is adverse or significant in nature. Under those circumstances, the SADC regime need not generally prohibit the application of quantitative restrictions in articles 7 and 8 of the Protocol but specifically spell out certain illustrative conditions or terms under which their application can be permitted or not because a generalised prohibition has not deterred the prevalence of such restrictions either. As such, the generalised exceptions in article 9 of the Protocol do not suffice, especially in a region where litigation is not a common practice and the terms of this provision are almost a replica of the terms of GATT article XX which may not add any significant value for the regulatory framework in SADC. If anything, it complicates regulation especially in the absence of a functioning tribunal.[159] Accordingly, article 9 of the Protocol should be reviewed with the view of establishing a more region specific set of illustrative conditions that embrace and accommodate the prevalent conditions peculiar to the region.

[159] Gerhard Erasmus 'Is the SADC trade regime a rules based system' (2011)1 *Southern African Development Community Law Journal* 31.

In terms of the concept of NTBs and NTMs, the Protocol needs to expressly establish a legal relationship between the two concepts. In that context, the circumstances under which an NTM can be transformed into an NTB, needs to be clearly spelt out, so that the determination of the legality of quantitative restrictions may be effectively done. In that case, factors such as the protectionist aims of a measure, a lack of transparency, abuse of discretionary power, adverse effects need to be clearly stated within the Protocol as possible features for establishing the legality of a measure in the context of whether it is an NTM or an NTB. Consequently, any law against the use of NTBs means that such a law specifically applies to the negative aim, the adverse effects of any measure (be it quotas or licensing systems or other measures) or the manner in which the measure is applied. These benchmarks can be used to reconsider the terms of the Protocol on trade that regulate NTBs.

The only caution here is for SADC members to take into account the peculiarities of the socio-economic dynamics prevalent in the SADC region when reviewing the Protocol so that the specifics that should be added into the legal framework should embrace regional issues in a manner that generates mutual benefits. It is argued here that if the distinctive elements are clearly outlined and defined within the Protocol, it is possible for regulators and policy makers to regulate the application of NTMs with ease. Such clarity would also be significant for regulators in determining whether a quantitative restriction is an NTM or an NTB. It may also guide the evaluation of the stage at which a quantitative restriction takes the form of an NTM and then transforms into an NTB.[160] With such clarity, it is possible for disgruntled SADC states also to demand compliance where there is a perceived breach or non-compliance.

Having established the strength and the scope of the Protocol on the regulation of NTMs and NTBs, the analysis in the next chapter continues with the examination of specific rules of the Protocol on the harmonisation of SPS measures to determine the extent to which the regime promotes cooperation among SADC members as they move toward the establishment of a single regional economic community.

[160] United Nations Conference on Trade and Development *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) UNCTAD/DITC/TAB/2014/5, 9.

CHAPTER THREE

HARMONISATION OF SPS MEASURES: CONFLICTING RULES ON HARMONISATION AS CONTRIBUTORY IMPEDIMENT TO MOVING FORWARD

1 Introduction

SPS measures are defined in the Sanitary and Phytosanitary (SPS) Annex to the SADC Protocol on trade as 'relevant laws, decrees, regulations, requirements and procedures including, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety practices or other measures and requirements restricting imports or exports' in order to protect the life or health of human, plants and animals.[1] This is a very broad list indeed and the fact that they are meant to ensure food and product safety in order to protect the life and health of humans, plants and animals[2] means that they play a vital role in the regulation of agricultural products trade in SADC.

[1] Under article 1of the SPS Annex to the SADC Protocol on trade.

[2] SPS Annex to the SADC Protocol on Trade 1996 article 16 provides the purposes of SPS measures as follows: '"Sanitary or phytosanitary measure" – any measure applied:

(a) to protect animal or plant life or health within the territory of the Member State from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) To protect human or animal life or health within the territory of the Member State form risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) To protect human life or health within the territory of the Member State from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) To prevent or limit other damage within the territory of the Member State from the entry, establishment or spread of pests'.

This is a very important issue for SADC because most of its members depend on agriculture for export[3] and their ability to access external markets is an opportunity to raise revenue for better standards of living of its people.[4] But, the sector faces numerous restrictions such as stringent SPS requirements and other regulations,[5] stringent standards and quality assurance testing requirements[6] and health protectionist bans as disguised restrictions to trade.[7] The need to protect the health and life of humans, plants and animals is the main reason given for such measures.[8] Good as the intentions may be, their enforcement under the respective national laws create an environment of fragmented legislative framework for regulating health and safety of goods.[9]

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[3]SADC countries such as Mozambique, Tanzania and Malawi depend on agriculture see Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007) 134; Garth le Pere & Elling N Tjonneland *Which Way SADC? Advancing Co-Operation and Integration In Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29 indicate that there is high dependence on primary exports mainly agricultural products and minerals. Also, the agricultural sector accounts for 37 % of the employment of labour; SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1.

[4]Mozambique, Tanzania and Malawi depend on agriculture see Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007) 134; Garth le Pere & Elling N Tjonneland *Which Way SADC? Advancing Co-Operation and Integration In Southern Africa* (2005) Occasional Paper 2, Institute for Global Dialogue 29 indicate that there is high dependence on primary exports mainly agricultural products and minerals. Also, the agricultural sector accounts for 37 % of the employment of labour; SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1.

[5] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (2015) World Bank 6.

[6]On the 10th of June, 2016, the South African Department of Agriculture, Forestry and Fisheries published revised import requirements for cattle, sheep, and goats from Botswana, Lesotho, Namibia and Swaziland in *Government Gazette* No.40060, Government Notice No.714. Reports indicate that Namibian government and farmers find this regulation to be unreasonably strict and tool that will restrict the exportation of many animals to South Africa- refer to Annalie Coleman "Livestock imports from Namibia No threat to SA" *Farmer's Weekly* 10 September 2016 available at http://farmersweekly.co.z/aticle.aspx?id=62487&h=livestock-imports-from-Namibia-no-threat-to-SA (accessed on 9 March 2016); Deon Schlechter "Revealed-SA's new livestock import rules" *New Era* 27 June 2016 available at https://www.newera.com.na/2016/06/27/revealed-sas-livestock-import-rules/ (accessed 9 March 2017); Luqman Cloete "South Africa closes door on Namibian livestock" *All Africa* 20 June 2016 available at http://allafrica.com/stroies/201606201189.html (accessed 9March 2017).

[7] Byo24News "Zimbabwe chicken ban hits South African Company exports" *Bulawayo 24 News* 27 January 2011 available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed 8 March 2017).

[8]Speech by the South African Minister of Agriculture, forestry and fisheries at the consumer business council business dinner, Sandton 1 October, (2011) 3-4, Government Notice No.714, Government Gazette No.40060; Byo24News "Zimbabwe chicken ban hits South African company exports" *Bulawayo 24 News* 27 January 2011 available at available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed 8 March 2017).

[9]Kamau Nancy Washinga *The Regulation of Trade Barriers Under the SADC and EAC: Assessing the Effectiveness of their Legal Framework* (Unpublished Master of Laws Thesis, University of Cape Town 2014) 42; Govender Reuben & Tendai Charles Katsande 'ISO/IEC 17020 accreditation of Gauteng veterinary services: a systems approach towards managing food safety in South Africa' (2011)4(2/3/4) *International Journal of Food Safety, Nutrition and Public Health* 192; Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015)(4)(5114) *Italian*

There are several reasons that could explain the preferences for SPS measures founded on national legislation: the lack of trust in the capabilities of the countries to effectively test and certify that the items are safe for importation,[10] the co-existence of various regulatory requirements;[11] the need to generate revenue[12] and the pressure to meet national demands.[13] Such divergences is not without any negative consequences, including the duplication and delay in the provision of services,[14] additional costs to traders,[15] reduction in the volumes of products in the domestic market, and an increase in the price of products in the domestic export market.[16]

One way of addressing these problems is through harmonisation of the legal framework. Harmonisation 'can be broadly defined as the process of making different domestic laws, regulations, principles and government policies substantially or effectively the same or similar'.[17] This can be achieved through participation in international standard setting activities,

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Journal of Food Safety 108, 111; Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 12,15 & 32.

[10] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (March 2015) World Bank 6.

[11] CTA and ECDPM *Agricultural Trade Adjustments: Lessons from SADC Experiences* (2010) Discussion Paper No. 95 Aid for Trade and Agricultural Series 8.

[12] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (March 2015) World Bank 6.

[13] When Zimbabwe enforced its ban against genetically modified organisms' injected poultry, the outcry against it indicated that the government had been pressured by the local producers to protect their domestic market. Refer to Byo24News "Zimbabwe chicken ban hits South African Company exports" *Bulawayo 24 News* 27 January 2011 available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html" (accessed 8 March 2017). Dumisani Ndlela "Fears of price hikes as chicken shortages emerge" *The Financial Gazette* 30 July 2010 available at http://www.financialgazette.co.zw/fears-of-price-hikes-as-chicken-shortages-emerge/ (accessed 8 March 2017).

[14] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (March 2015) World Bank 6.

[15] Deon Schlechter "Revealed-SA's new livestock import rules" *New Era* 27 June 2016 available at https://www.newera.com.na/2016/06/27/revealed-sas-livestock-import-rules/ (accessed 9 March 2017) traders in Namibia fear that the revised livestock import regulations by the South African government creates the potential for it to cause a fall in the volume of livestock export into South Africa; Luqman Cloete "South Africa closes door on Namibian livestock" *All Africa* 20 June 2016 available at http://allafrica.com/stroies/201606201189.html (accessed 9 March 2017).

[16] Byo24News "Zimbabwe chicken ban hits South African company exports" *Bulawayo 24 News* 27 January 2011 available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed on 8 March 2017). Dumisani Ndlela "Fears of price hikes as chicken shortages emerge" *The Financial Gazette* 30 July 2010 available at http://www.financialgazette.co.zw/fears-of-price-hikes-as-chicken-shortages-emerge/ (accessed 8 March 2017).

[17] Graham Mayeda 'Developing disharmony? the SPS and TBT agreements and the impact of harmonisation on developing countries' (2004) 7(4) *Journal of International Economic Law* 740.

equivalence agreements[18] and mutual recognition agreements.[19] For purposes of this study, the focus is on harmonisation as determined in accordance with international standard setting organisations recognised by the WTO SPS agreement.

Without being oblivious of the arguments against harmonisation,[20] the latter is a strategy for unification which encourages transparency and similarity of laws.[21] This makes it a significant element for economic integration process,[22] without which integration may not be easily attained.[23]

2 Harmonisation of SPS measures as a strategy for achieving regional regulatory convergence

SADC members committed themselves under the SADC Treaty that they would use harmonisation of socio-economic policies as one of the strategies for economic integration.[24] As much as harmonisation has not been included into the list of the areas of cooperation,[25] members committed themselves under the Protocol and SPS Annex to harmonise their SPS measures.[26] Despite this regional political endorsement, the SPS Annex has not yet been domesticated within

[18] Equivalence agreements are agreements that the WTO SPS agreement and the SPS Annex to the protocol encourage WTO and SADC members, respectively, to the extent practicable to enter into consultations, and agreements that ensure the recognition of SPS measures of their counterparts as equivalent to their own.

[19] Lori Wallach M 'Accountability governance in the era of globalisation: the WTO, NAFTA and international harmonisation of standards' (2001-2002) 50 *University of Kansas Law Review* 832-835.

[20] Those against harmonisation argue that diversity of policies is good for government competitiveness, provided a national priority is not a disguised restriction, it is a legitimate exercise of sovereignty; some developed states use international standard setting institutions to advance their own national standards to the disadvantage of the developing states. For more detail, please refer to page 739 and footnote 9 of Graham Mayeda's article 'Developing disharmony? the SPS and TBT agreements and the impact of harmonisation on developing countries' (2004) 7(4) *Journal of International Economic Law*; Marie Denise Prévost reports in *Balancing Trade and Health in the SPS Agreement: the Development Dimension* (Degree of Doctor Dissertation Maastricht University 2009) 318-322 that the process of developing international standards is tainted with so many imperfections such as industrial capture by pressure groups from industrialized countries, which force their representatives to advance their own interests though these standards.
the imperfections surrounding the standard setting at the international levels

[21] Graham Mayeda 'Developing disharmony? The SPS and TBT agreements and the impact of harmonisation on developing countries' (2004) 7(4) *Journal of International Economic Law* 742.

[22] Article 5(2)*(*a*)* SADC Treaty, article 16 of the SADC Protocol on Trade 1996.

[23] Muna Ndulo 'The need for harmonisation of trade laws in the Southern African Development Community (SADC)' (1996) 4 *African Yearbook of International Law* 211-212.

[24] Article 5(2)*(*b*)* SADC Treaty.

[25] Article 21 SADC Treaty.

the respective national regulatory frameworks.[27] This delay in implementation contradicts their commitment to give regional rules the force of law[28] and an indication of limited political will[29] which makes it hard to agree with the argument that the new SPS measures' disciplines were only adopted as recently as 2014.[30] The lack of domestication is also evidence of non-compliance because the SADC states have failed to ratify or implement this particular international law.[31]

Even if this failure may not be deliberate,[32] it cannot be ignored that the mere fact of non-compliance is in itself a strong barrier against implementation of the SPS Annex.[33] One of the contributory factors for such a failure is the weak legal frameworks on harmonisation, considering that most SADC Protocols are not binding in nature.[34] Instead, they are best endeavours which do not make it a rules-based system, with the resulting consequence of non-compliance.[35] Consequently, the law which is supposed to be the foundation for positive action indirectly becomes the loop hole through which states rationalise their inaction or violation.[36] Under these circumstances, the pertinent question is, are the Protocol and the SPS Annex in a position to promote harmonisation of SPS measures toward deeper regional integration?

To address the preceding question, this chapter specifically examines specific rules from the Protocol and SPS Annex on harmonisation of SPS measures, to determine the nature of the mandate of SADC members with regards to harmonisation of SPS measures, the implication of each of the selected rules toward the harmonisation agenda and the relational problems likely to arise in the process of implementing these rules. Relational problems in this context refers to the

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[26] Article 16 of the SADC Protocol on Trade 1996 and the SPS Annex.
[27] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 3.
[28] Article 6(5) SADC Treaty. Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012)XLV *CILSA* 69.
[29] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56)10.
[30] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56)10.
[31] Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012)XLV *CILSA* 70.
[32] Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012)XLV *CILSA* 70.
[33] Paul Kalenga *Regional Integration in SADC: Retreating or Forging Ahead?* Tralac Working Paper (2012/No.8) 2.
[34] Paul Kalenga *Regional Integration in SADC: Retreating or Forging Ahead?* Tralac Working Paper (2012/No.8) 2.
[35] Trudy Hartzenberg & Paul Kalenga *National Policies and regional integration in the South African Development Community* WIDER Working Paper (2015/56) 3.
[36] Paul Kalenga *Regional Integration in SADC: Retreating or Forging Ahead?* Tralac Working Paper (2012/No.8) 2.

legal complexities and inconsistencies arising from the interface between article 16 in the Protocol, articles five and six of the SPS annex regarding the harmonisation of SPS measures. In terms of theoretical legal context, the analysis in this chapter largely relies on the WTO jurisprudence regarding the harmonisation of SPS measures because of limited jurisprudence on the same matter within the SADC regime and the general lack of pertinent information on the progress with the implementation of the SPS Annex. Along those lines, the following analysis begins with the examination of specific rules in the Protocol and the SPS Annex.

2.1 Legal framework and the dynamics of harmonisation of SPS measures in SADC

When the SADC Regional Indicative Strategic Development Plan (RISDP) was adopted in 2003, it set the road map for the achievement of regional integration. Toward that goal, a strategy such as the harmonisation of legal and regulatory frameworks was mentioned in the RISDP as one of the priority intervention areas.[37] Harmonisation was seen as a vehicle that could facilitate the free movement of all factors of production.[38] With the RISDP in place, it meant that any policies and laws adopted should embrace the spirit and plan of this policy framework. Consequently, the SPS Annex which was adopted in 2008 and later revised in 2014 had to reflect the possible ways in which it would promote the spirit of the RISDP. It is along that line of argument that the following analysis examines whether the SADC law on harmonisation of SPS measures is able to engender the establishment of a harmonised regulatory system for SPS measures.

2.2 Binding legal obligations on harmonisation of SPS measures

Article 16 of the Protocol is the parent legal provision on harmonisation of SPS measures. It states as follows:

> 'Member states *shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations*, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production (emphasis added)'.

[37] SADC *Regional Indicative Strategic Development Plan* (2003) 66.
[38] SADC *Regional Indicative Strategic Development Plan* (2003) 66.

The force of law in this provision is largely dependent on the meaning that can be accorded to 'shall' in light of the object, purpose and context within which it is used in the treaty.[39] It is unfortunate that the Protocol as a whole, or any provision thereof, has not been legally tested or interpreted within the SADC court.[40] Thus, the contextual legal meaning of 'shall' as used generally in the Protocol or specifically in article 16 of the Protocol cannot be determined from the SADC jurisprudence. The same argument applies to the interpretation of 'shall' in light of the object and purpose of the Protocol. That being the case, I make reference to other sources of interpretation, such as the WTO jurisprudence. However, there is no information as well that indicates that where 'shall' appears in the WTO SPS agreement has ever been specifically interpreted by the WTO panel or Appellate Body. Accordingly, I opt for an ordinary definition where 'shall' is understood to create a binding obligation on the subjects of a particular law.[41] For that matter, 'shall' in article 16 of the Protocol represents a binding obligation on SADC members. Its binding nature makes it a very fundamental provision in the Protocol because of the legal implications likely to arise with its implementation as analysed below in light of specific terms of the SPS Annex which was adopted to implement the terms of article 16 of the Protocol.[42]

2.3 Pursuing harmonisation in light of the right to a higher standard

In order to understand the manner in which article 16 of the Protocol has been implemented through SADC's legislative frameworks, one needs to look at it in terms of the provisions of the SPS Annex to the Protocol. Particular emphasis in this case is made to the terms of article 5 of the SPS Annex where the:

(1) 'Members affirm their existing rights and obligations under the WTO agreement on the application of sanitary and phytosanitary measures and agree also that

[39] Article 31(1) Vienna Convention on the Law of Treaties.

[40] The SADC Tribunal was suspended; a new Protocol was adopted by the SADC Summit to usher in a new Tribunal. Even during the life of the previous Tribunal, no dispute on the Protocol was ever adjudicated over by that Tribunal.

[41] Larry Eig M & Yule Kim *Statutory Construction: General Principles and Trends* (2009) 9.Congressional Research Series.

[42] Preamble to the SPS Annex affirms the objective of the Annex to implement the terms of article 16 of the Protocol.

(2) Nothing in this Annex shall prevent a member state from adopting or maintaining, in accordance, with its international rights and obligations any measure necessary to achieve its appropriate level of sanitary or phytosanitary protection'.

I understand this affirmation in article 5(1) above to mean that SADC members agree with their obligations and rights under the WTO SPS agreement. Since there is no commentary to the affirmation in article 5(1) of the SPS Annex to the Protocol, I take it that this provision imports the rights and obligations of the WTO SPS agreement into the SADC regime on SPS measures. By virtue of this importation, a legal relationship has been established between the SADC and WTO regimes on SPS measures. Accordingly, the rules that are developed to implement the terms of the Protocol must take cognisance of[43] that legal relationship since regional law is subservient to international law.[44] This legally means that regional rules, including SADC trade rules on SPS measures should be consistent with the WTO SPS agreement. That should explain the similarity between the terms of article 16 of the Protocol and article 3(1) of the WTO SPS agreement. That is why the analysis below examines the legal implications of article 16 of Protocol, but, in light of the WTO jurisprudence on the meaning of article 3(1) of the WTO SPS agreement.

[43] This resonates with the statement in the preamble of the SADC Protocol on trade that the members are mindful of the conclusions made under the Uruguay trade negotiations. The WTO SPS agreement is one of the results of that multilateral trade negotiation.

[44] Articles 26, 27 & 41(1) Vienna Convention on the Law of Treaties; Cottier Thomas & Krista Nadakavukaren Schefer in 'The relationship between World Trade Organisation law, national and regional law' (1998) 1(1) *Journal of International Economic Law* 84 argue that this hierarchy is a legally settled status in light of the general principle of *pacta sunt servanda* (stated in article 26 of the Vienna Convention on the Law of treaties). This principle creates a relationship between international and regional law. As a result, regional legislators and regulators are obliged to perform the obligations they have undertaken under the WTO SPS agreement. See Cottier Thomas & Krista Nadakavukaren Schefer 'The relationship between World Trade Organisation law, national and regional law' (1998)1(1) *Journal of International Economic Law* (84-85); also refer to Saurombe A 'The Southern African Development Community trade legal instruments compliance with criteria of GATT article XXIV' (2011) 14(4) *Potchefstroom Electronic Law Journal* 290.

2.4 Legal implication of SPS measures 'based on' international standards

The analysis in this sub-section examines the legal implication of the terms of article 16 of the Protocol[45] in light of the WTO jurisprudence on article 3(1) of the WTO SPS agreement.[46] This analysis is meant to provide a critical insight into the meaning of article 16 of the Protocol and the mandate it places upon SADC members in terms of harmonisation of SPS measures by examining the legal implication of the simultaneous use of 'shall' and 'base on' in article 16 of the Protocol and article 3(1) of the WTO SPS agreement. For purposes of comparison and for avoidance of doubt, article 16 of the Protocol states as follows:

> 'Member states *shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations*, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production' (emphasis added); and

Article 3(1) of the WTO SPS agreement provides that:

> 'To harmonise sanitary and phytosanitary measures on as wide a basis as possible, 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 particular in paragraph 3'.

The WTO panel and Appellate Body's interpretation in *EC—Measures Concerning Meat and Meat Products* provides insight on the meaning and legal implication of article 3(1) of the WTO SPS agreement. This is what the Appellate Body said about the objects and purpose of this provision:

> '…..the harmonisation of SPS measures of members on the basis of international standards in the agreement is projected *as a goal*, yet to be realized *in the future*. To read article 3(1) as requiring members to harmonise their SPS measures by *conforming those measures with international standards,* guidelines and recommendations, in the *here and now*, is, in effect, to vest such international

[45]This provision states that member states shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production.

[46] Article 3 of the WTO SPS agreement is the main provision on harmonisation of SPS measures in this agreement.

> standards, guidelines and recommendations….with obligatory force and effect….the SPS agreement itself sets out no indication of any intent on the part of the members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such far-reaching treaty interpretation, far more specific and compelling than that found in article 3 of the SPS agreement would be necessary'[47] (emphasis added).

From this excerpt, the Appellate Body is of the view that the WTO SPS agreement does not envisage harmonisation as an obligatory mandate. That explains its reasoning that 'based on' cannot mean 'conform to' as is 'currently drafted and accepted'.[48] The Appellate Body's conclusion means that the provision was never meant to subject states to a mandatory norm so as to respect their national regulatory space. I choose to disagree with that reasoning because in as much as the Appellate Body asserted the need to respect the discretionary power of states, it did so without taking into account the legal implication and significance of 'shall' which appears immediately before 'base' in article 3(1) of the WTO SPS agreement. In my view, to the extent that 'shall' is used in article 3(1) of the WTO SPS agreement means that the first obligation and emphasis upon the WTO member states is for them to make reference to international standards, if they exist. In simple terms, this 'shall' imposes an initial duty to refer to international standards, as a first point of reference, if a member opts to proceed under article 3(1) of the WTO SPS agreement. This argument is consistent with the conclusion on the legal effect of article 16 of the Protocol under sub-heading section 2.2 above. Whether or not that duty to refer to international standards also means that they are bound by the terms of those international standards is a different issue which is explored further below. At this point, the concern is what course of action should WTO members take once they have made reference to an international standard in terms of article 3(1) of the WTO SPS agreement?

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[47] *EC—Measures Concerning Meat and Meat Products (EC—Hormones),* Appellate Body report WT/DS26/AB/R, WT/DS48/AB/R para 165.

[48] *EC—Hormones* Appellate Body report para 163, 'Thomas R.D 'Where's the beef? mad cows and the blight of the SPS agreement' (1999) 32 *Vanderbilt Journal of Transnational Law* 509.

According to the panel, 'to base on' was equivalent to 'conform to'.[49] This means that 'base on and conform to' have the same meaning. The Appellate Body disagreed on the ground that these phrases did not mean one and the same thing.[50] For it, 'a thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter'.[51] Essentially, this means that when an SPS measure is 'based on' international standards, a member is not under any duty to comply with all the elements of international standards as opposed to 'conform to' which connotes an obligatory norm.[52] Thus, a member has the benefit of choosing which of the elements of an international standard, it can rely on.[53] It also means that they are not bound to apply all the elements because the appellate body sees it as more of a recommendation than a model on which the measures must be based.[54] Consequently, if states depart from particular provisions or elements of the international standards, they are still deemed to have been based on those international standards.[55]

As much as I concluded earlier that a state is obliged to refer to an international standard under article 3(1) of the WTO SPS agreement, it is clear from the Appellate Body's interpretation in the preceding paragraph that there is no corresponding duty on a state to enforce all terms of that international standard to which it has made reference. This is advantageous for LDCs because, all they will need to do in this context is to ensure consistency of any SPS measure with any of the element(s) of an international standard to which it has made reference.[56] In other words, it need not leave out any of the terms or requirements of the element it has chosen to base its SPS

[49] *EC—Measures Concerning Meat and Meat Products,* Complaint by the United States, Report of the Panel, WT/DS26/R/USA (August 18, 1997) para. 8.18.

[50] *EC—Measures Concerning Meat and Meat Products,* Appellate Body report WT/DS26/AB/R, WT/DS48/AB/R Para 177.

[51] This statement was made in the context of article 3(1) of the SPS agreement. Refer to *EC—Measures Concerning Meat and Meat Products* Appellate Body report para 163.

[52] *EC—Measures Concerning Meat and Meat Products (EC—Hormones),* Appellate Body report WT/DS26/AB/R, WT/DS48/AB/R paras 163, 177.

[53] *EC—Measures Concerning Meat and Meat Products (Hormones),* Appellate Body report WT/DS26/AB/R, WT/DS48/AB/R paras 163, 177.

[54] Thomas R.D 'Where's the beef? mad cows and the blight of the SPS agreement' (1999) 32 *Vanderbilt Journal of Transnational Law* 508.

[55] Jeffery Atik 'Trade and health' in Daniel Bethlehem, Donald McRae Rodney, Neufeld Isabelle Van Damme (eds) *The Oxford Handbook of International Trade Law* (2007)601.

[56] Jeffery Atik 'Trade and health' in Daniel Bethlehem, Donald McRae Rodney Neufeld Isabelle Van Damme (eds) *the Oxford Handbook of International Trade Law* (2007)601; see also the interpretation of article 2(4) of the TBT

measure on. The disadvantage with this procedure is that a state will not enjoy the presumption of consistency.[57] Consequently, by choosing this option, a member subjects itself to the strict interpretation of the agreement.[58]

Another disadvantage with this option is that the provision falls short of providing the parameters that should guide the extent to which a member can depart from the international standard. As such, the possibility of mixing the element of an international standard with a particularly higher national standard exists. Yet, a mixed set of standards is not regulated by article 3(1) of the WTO SPS agreement or article 3 of the WTO SPS agreement in general. In fact, article 3(1) of the WTO SPS agreement does not even provide whether or not a risk assessment[59] should be carried out when a state proceeds partially under article 3(1) of the WTO SPS agreement and at the same time, enforces a standard aimed at promoting a higher level of protection. In the absence of such rules, states are at liberty to refer to, and apply higher standards without the checks and balances that a risk assessment is meant to promote. Another difficulty likely to arise from such a regime is that of failure to achieve consistency on the levels of protection if the element of an international standard which has been adopted plays a very minor role in the whole process of the enforcement of that SPS measure.[60]

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agreement in *EC—Sardines* para 258 where the appellate body concluded that a technical regulation that contradicts an international standard would have failed to meet the requirement to base on international standard.

[57] *EC—Hormones* Appellate Body report para. 171.

[58] Joost Pauwelyn 'The WTO agreement on sanitary and phytosanitary (SPS) measures as applied in the first three SPS disputes *EC—Hormones, Australia—Salmon* and *Japan—Varietals'* (1999) 2(4) *Journal of Intentional Economic Law* 656.

[59] Robyn Briese 'Precaution and cooperation in the world trade organisation: an environmental perspective'(2002)22 *Australian Year Book of International Law*. Article 3(3) of the WTO SPS agreement provides that members may introduce or maintain sanitary and phytosantary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of article 5. *Notwithstanding the above, all measures which result in a level of sanitary or phyotsanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this agreement*.

[60] To achieve consistency, article 5(6) of the WTO SPS Agreement requires that each member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or disguised restriction on international trade.

According to Thomas RD, the Appellate Body took away the 'teeth' of article 3(1) of the WTO SPS agreement to encourage the use of international standards.[61] He argues further that the strength of article 3(1) of the WTO SPS agreement has been weakened by the conclusion that the rights in article 3(3) of the WTO SPS agreement[62] are not an exception to article 3(1) of the WTO SPS agreement but an autonomous one.[63] This means that WTO members have the absolute right to opt out of the terms of article 3(1) of the WTO SPS agreement.

Against that background, and in light of the fact that article 16[64] of the Protocol is similar to that of article 3(1) of the WTO SPS agreement, and for purposes of consistency, the legal implications derived from the interpretation of article 3(1) of the WTO SPS agreement above should apply in the context of the harmonisation processes under article 16 of the Protocol. In that regard, as much as SADC members have the duty to refer to international standards, they have very wide discretionary power as to how they can enforce the terms of that standard. The impact of such discretionary power on the process of harmonisation deserves further analysis.

Another area of concern with regards to article 16 of the Protocol is the issue of what constitutes international standards under the SPS Annex. A report released in 2010 reveals that SADC members base their SPS measures on international standards.[65] This is a positive effort toward the harmonisation of SPS measures. However, this report reveals that there is a large share of

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[61] Thomas RD 'Where's the beef? mad cows and the blight of the SPS agreement' (1999) 32 *Vanderbilt Journal of Transnational Law* 509-510.

[62] Article 3(3) WTO SPS agreement provides that members may introduce or maintain sanitary and phytosantary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of article 5. *Notwithstanding the above, all measures which result in a level of sanitary or phyotsanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this agreement*.

[63] *EC—Hormones* Appellate Body report para 165, Thomas R D 'Where's the beef? mad cows and the blight of the SPS agreement' (1999) 32 *Vanderbilt Journal of Transnational Law* 510.

[64] Member States *shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations*, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production (emphasis added).

[65] Dermot Cassidy *Assessment of the Status of Implementation of the SPS Annex to the SADC Protocol on Trade* (2010) USAID/Southern Africa, 23.

trade between SADC countries and the EU.[66] Could it be that the international standards being referred to are EU standards? This report does not provide such clarification. Again, there is no clarification on the relationship between EU standards and the international standards that are being referred to by SADC states. Toward a progressive move on harmonisation of SPS measures, it is necessary that SADC members provide clear guidelines in the Protocol on what they consider to be 'international standards'. Such standards, in coordination with the WTO could be extended to other accredited and reputable organisations as well.

2.5 The dichotomy between binding obligations and discretionary power on harmonisation of SPS measures in SADC

The focus of the study under this sub-heading is to analyse the nature of the relationship between article 16 of the Protocol, and articles 5 and 6 of the SPS Annex. It also analyses the implication of this relationship on the goal of harmonisation of SPS measures in SADC. Since article 16 of the Protocol was already cited at section 2.4 above, it will not be cited here. But, article 6 of the SPS Annex states as follows:

> *'Where appropriate, they will work towards* harmonisation of their respective mandatory requirements taking into account relevant international standards, guidelines and recommendations in accordance with their international rights and obligations'.[67]

The intention of SADC members in this provision should be derived from the terminology they have used in this text.[68] Of particular significance is the phrase 'where appropriate'. The dictionary meaning of 'appropriate' is 'suitable or proper'.[69] Accordingly, when the SADC members agree that 'where appropriate, they will work towards harmonisation…' they indicate that they will work toward harmonisation only when it is 'suitable or proper' (appropriate). This language represents a flexible, hortatory, or a 'soft' and non-binding legislative provision which retains the right of the SADC members to determine the conditions and time under which they

[66] Dermot Cassidy *Assessment of the Status of Implementation of the SPS Annex to the SADC Protocol on Trade* (2010) 23; Vincent Itai Tanyanyiwa & Constance Hakuna 'The feasibility of movement to a customs union (cu) in the Southern African Development Community (SADC)' *International Journal of Innovation and Applied Studies* (2015)10(2) 749.
[67] Article 6 SPS Annex to the Protocol.
[68] Article 31(1) VCLT.
[69] Oxford Concise South Africa Dictionary (2010) New 2nd ed.

can cooperate. The down side of such flexibility is the limited potential of states to respect the terms of the provisions.[70] On the other hand, flexibility under economic law is a common phenomenon because of the ever changing socio-economic conditions.[71]

Indeed, conditions keep changing as the years go by. This is particular true in the SADC context where, the SPS Annex to the Protocol was first adopted in 2008, which is about 8 years after the Protocol was adopted. This time lag is sufficient to re-evaluate regional commitments so that any course of action which a SADC state commits to must not be detrimental to national development plans.[72] This kind of flexibility is not novel. Historical evidence reveals that the European Union used trade as an engine for development by, enforcing restrictive trade policies under the common agricultural policy.[73] Consequently, this means that for trade and development to co-exist, a certain degree of flexibility is acceptable.

Considering the conclusion under sub-section 2.4 that SADC members have the discretion to decide how they can enforce international standards, such a mandate is as good as a flexible approach in harmonisation. Together with the conclusions on articles 5 and 6 of the SPS Annex, it is clear that the SADC regime on harmonisation of SPS measure is a flexible one. This flexibility can be seen in light of the following observations: There is an obligation to refer to international standards, but within this leg of the regime, SADC members have the discretion to decide on the element(s) of international standard upon which they would wish to base their SPS measure. However, in light of article 6 of the SPS Annex, they do have the discretion to evaluate the prevailing circumstances and timing to establish whether it is appropriate or suitable, for

[70] Abdulqawi Yusuf *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law* (1982)70-71; since these rules are non-binding, it becomes difficult to even envisage the potential for respect for them by SADC members since there is no consequence upon them for failure to comply with their regional obligations-refer to Trudy Hartzenberg & Paul Kalenga in *National Policies And Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 3.

[71] Abdulqawi Yusuf *Legal Aspects of Trade Preferences for Developing States: a Study in the Influence of Development Needs on the Evolution of International Law* (1982)70.

[72] Moses Tekere 'Introduction' in Moses Tekere *Regional Trade Integration, Economic Growth and Poverty Reduction in Southern Africa* (2012)11 that the impact of trade on poverty reduction depends to a large extent on the national policies.

[73] Moses Tekere 'Foundation for analysing the impact of regional trade liberalisation on economic growth and poverty reduction' in Moses Tekere *Regional Trade Integration, Economic Growth and Poverty Reduction in Southern Africa* (2012)22.

them to harmonise. Again, within the same regime is the absolute right to enforce a measure[74] which will ensure that they attain a higher level of protection. A regime of this kind creates confusion as to which course of action is preferable for the regional integration agenda especially, when much of the effort is left to national discretionary power. Perhaps a different approach may engender more cooperation as the discussion below explains.

3. Efforts at harmonisation of SPS measures in SADC

Seed is a key input in the agricultural sector, playing a fundamental role in promoting productivity.[75] Despite its significance, the seed sector in Southern Africa faces problems such as inadequate implementation of seed policies, international and regional agreements;[76] the problem of fragmented legal frameworks regarding the standards of seeds.[77] Another challenge is that many SADC countries have rigid seed variety release requirements and seed certification standards, which end up as risks and barriers to trade of local seeds, both locally and across borders.[78] To address such problems, a harmonised regulatory system was adopted.

The process for setting up that system commenced sometime in 1987[79] and in 2007, the Harmonised Seed Regulatory System (HSRS) was approved by the SADC Ministers of agriculture.[80] In 2009, the Memorandum of Understanding (MoU) for the implementation of the HSRS was approved and in 2010, it was signed by ten member states. Then in 2013, the MoU entered into force.[81] Accordingly, the MoU acts as the policy framework document for seed trade

[74] *EC—Hormones* Appellate Body report para 177.
[75] USAID *Performance Work Statement: Harmonised Seed Regulations in the SADC Region* (2015) 1.
[76] USAID *Performance Work Statement: Harmonised Seed Regulations in the SADC Region* (2015) 1.
[77] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012) establish the different laws applicable in the pilot countries in Malawi, Zambia, Zimbabwe, Mozambique and Swaziland.
[78] USAID South Africa *Performance Work Statement: Harmonised Seed Regulations in the SADC Region* (2015) 1.
[79] Katrin Kuhlmann *Harmonisation Seed Regulations in Sub-Saharan Africa: A Comparative Assessment* (2015)40; Nick Goble *Pannar Seed Cross-Border Seed Exports- Case Study* (2016).
[80] SADC Seed Centre "Who we are, and what we do" available at http://www.sadcseedcentre.org (accessed 9 March 2017); USAID *Performance Work Statement: Harmonised Seed Regulations in the SADC Region* (2015) 2; Katrin Kuhlmann *Harmonisation Seed Regulations in SUB-Saharan Africa: A Comparative Assessment* (2015)38; Tjelele E The Progress on the Implementation of the Harmonised Seed Regulations in SADC Region (2015).
[81] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012) 5; Katrin Kuhlmann

in SADC. The success registered with the implementation of the MoU is explained below in the context of the pilot seed harmonisation project in five SADC countries.

An assessment of the progress with the policy alignment within five pilot SADC countries of Zambia, Zimbabwe, Mozambique, Malawi and Angola, reveals varying but significant responses: in Swaziland and Mozambique, the progress was generally faster.[82] For all the five pilot countries, the process was slower with regard to quarantine and phytosanitary measures[83] due to a lack of political buy-in. Other than in the case of Zimbabwe,[84] the lack of buy -in did not mean a rejection of the project but the lack of strong government lead in the initiative in Malawi, Zambia, and Zimbabwe since the policy alignment task team opted to proceed independently.[85] The participation of the governments came only at a later stage. This was contrary to the established procedure where buy-in must be obtained from the start of the process. On the whole, even though the speed with which the policy alignment is proceeding is slow,[86] the project has registered some success through the development of a list of pests that require control when seed is being traded between SADC member states, and seeds coming into the region from third countries.[87] The success that has been registered so with the implementation of this pilot project is significant for the processes of harmonising SPS measures in SADC.

That significance can be seen in light of the approach at harmonisation and the resulting successes with that approach. From a regulatory point of view, the MoU is not a protocol but subsidiary to a protocol, which raises the concern about its legal force. According to the SADC treaty, only decisions adopted and signed by the SADC Summit such as the treaty and protocols are legally binding.[88] However, a memorandum which takes the nature of a soft law under

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Harmonisation Seed Regulations in SUB-Saharan Africa: A Comparative Assessment (2015)38; Nick Goble *Pannar Seed Cross-Border Seed Exports- Case Study* (2016).

[82] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012)20-22, 35, 39.

[83] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012) 20-22, 35, 39.

[84] The Zimbabwean government had not even signed the memorandum of understanding.

[85] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012)20-22, 35,41.

[86] Katrin Kuhlmann *Harmonisation Seed Regulations in Sub-Saharan Africa: A Comparative Assessment* (2015)39.

[87] Katrin Kuhlmann *Harmonisation Seed Regulations in Sub-Saharan Africa: A Comparative Assessment* (2015)40.

[88] Articles 10 and 22(2) of the SADC Treaty.

international law is not binding, but, of persuasive value.[89] The fact that it lacks the force of the law means that it does not oblige the signatories to domesticate it; when they do, it is out of their own voluntary will.[90] Yet, despite its hortatory nature, the implementation of the pilot project in the five SADC counties reveals a successes story. This success indicates the willingness by SADC states to domesticate the standards, rules and procedures under the HSRS. A possible reason for the successes under this project is the flexibility that makes the system more sustainable[91] and the more regionally adaptable SPS seed standards.[92] On the contrary, the legally binding standard for SPS measures in the EAC[93] has not received much support from the traders,[94] because the EAC standards have incorporated international standards, which are foreign and complex to the regional producers and consumers.[95] Accordingly, traders preferred a non-binding standard so that they were at liberty to determine their own standards.[96] Under these circumstances, it seems right to argue that compliance with the terms of a specific regional document largely depends on the political buy-in. The fact that implementation of the MoU is ongoing in the region,[97] implies that even though technical, institutional and financial challenges

[89] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012) 12-13; Katrin Kuhlmann *Harmonisation Seed Regulations in SUB-Saharan Africa: A Comparative Assessment* (2015)38; John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 14-15.

[90] Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012) 12-13; Katrin Kuhlmann *Harmonisation Seed Regulations in Sub-Saharan Africa: A Comparative Assessment* (2015)38; John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 14-15.

[91] John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 10.

[92] John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 10.

[93] Katrin Kuhlmann *Harmonisation Seed Regulations in Sub-Saharan Africa: A Comparative Assessment* (2015)54.

[94] John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 10.

[95] John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 10.

[96] John Keyser *Regional Quality Standards for Food Staples in Africa: Harmonisation Not Always Appropriate* (2012) No.12 Trade Policy Notes 7.

[97] In Zimbabwe, quarantine and phytosanitary measures for seed have been aligned to the SADC HSRS in draft legislation; in Swaziland, the Plant Protection Act 2013 Aligns with the HSRS; in Zambia, the two SADC Pest lists were added as the 10th Order in the Plant Pest and Diseases Act, Cap 233-refer to Katrin Kuhlmann *Harmonisation Seed Regulations in Sub-Saharan Africa: A Comparative Assessment* (2015)55.

may exist,[98] a lot depends on the political will and commitment of the signatories. Accordingly, compliance may have little to do with the legally binding status of the document. These successes with the implementation of HSRS and the challenges with the legally binding standards in the EAC also implies that successful harmonisation of SPS measures need not necessarily require that states refer to international standards per se, but, they can adapt regionally applicable standards as well.

In light of the discussion above, it is appropriate to conclude that there is no blue print as to the suitable approach in the harmonisation process of SPS measures. A non-binding norm can also promote harmonisation provided there is political will. Again, legally binding frameworks can also lead to harmonisation, if there is political will and the rules are strong and consistent.

4 Conclusion

With the concept of state sovereignty, states retain a certain degree of autonomy to govern their own territory without the control and or direction from another state or states.[99] With this principle comes 'a unique legal status of statehood accompanied by independence[100] parallel to the idea that foreign law is binding and enforceable on a state.[101] It is argued that in order to succeed at harmonisation of regulatory frameworks and the eventual integration of economies, states must surrender their independence at the international level,[102] be it partially or fully and legitimise the surrender at the national level, through the national legal system.[103] Regional unification in itself is not sufficient for the legitimisation of international instruments in the national sphere. National authorities need to show commitment to domesticating any commitments undertaken at the regional level. The challenge facing the domestication of regional laws such as the SPS Annex is the fact that the disciplines extend into the deep and

[98]Centre for Applied Legal Research (CALR) *The SADC Harmonised Seed Regulatory System: A Review of National Seed Policy Alignment Processes in HaSSP Project Countries* (2012) 21, 26, 35.
[99] Ian Brownlie *Principles of Public International Law* (2008) 105.
[100] Ian Brownlie *Principles of Public International Law* (2008) 105 (2008) 106.
[101] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 88-89.
[102] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 89; Mark Chingono & Steve Nakana 'The challenges of regional integration in southern Africa' *(*2009) 3(10) *African Journal of Political Science and International Relations* 402.
[103] Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011) 89.

actual integration process which necessitate the application within the national regulatory frameworks.[104] Yet, within the SADC legal framework is the lack of a binding nature upon the members to implement the regional law.[105] Coupled with limited technical and financial resources, SADC may find it hard to promote domestication of regional rules.[106] The absence of enough political will also makes it difficult to enforce regional commitments.

To move forward, SADC states need to pool more resources, source more international funding, seriously address the issues of 'the best endeavours approach', and the 'sensitivities to national regulatory space' which at the moment reflect a relaxed attitude toward moving forward with regional economic integration.[107] They could also conclude mutually beneficial memorandums of understanding.

A fundamental aspect for the effectiveness of all these initiatives is the need for SADC members to continuously bear in mind the overall object and purpose of the development oriented approach to regional integration. Again, SADC members must remember that they committed themselves not to do anything that would jeopardise the achievement of the objectives of the treaty.[108] Since the region is comprised of states at different levels of development, this is the opportunity to vigorously pursue harmonisation. With a harmonious legal framework, the developing states will present a favourable legal environment for the least developed states dependent on agriculture and livestock trade. In return, the more advanced states such as South Africa will also have the confidence, and find legitimacy to trade with such states in other goods. Consequently, even though their economies may be at variance with regard to their development status, harmonious SPS measures could foster interdependence. In that context, the fear of

[104] Trudy Hartzenberg & Paul Kalenga in *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 9.
[105] Article 6 SADC Treaty; United Nations Conference on Trade and Development *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries, Developing Countries* International Trade Studies (2012) 24.
[106] Trudy Hartzenberg & Paul Kalenga in *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 9;
[107] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 4.
[108] Article 6(1) of SADC Treaty.

political domination by advanced states[109] should not inhibit the possibility of harmonisation. Along the same line, they should use harmonisation to garner the trust and confidence of the private sector considering that they are the strongest stakeholder in promoting the successful integration of the region economically.[110] Together with the diversity of economies, a regime with harmonised rules on SPS measures will create a favourable platform for complimentarity in trade.[111] This is the more reason why, harmonisation should neither be a secondary matter nor must SPS measures be erected without legally justifiable ground(s).[112] Otherwise, these actions will only engender equivalent, if not, more trade restrictive measures.

In that context, provisions with implications such as those in articles 5 and 6 of the SPS Annex to the Protocol will only encourage regulatory diversity. This statement does not in any way disregard the significance of national regulatory sovereignty but the latter must not be used to stand in the way of cooperation, mutual benefit, regional development and unity. Otherwise, an over bearing emphasis on national interest will only entrench the differences, and further protect the fragmentation of SPS measures.

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[109] South Africa, the most advanced state in the SADC has a better bargaining power. This status quo makes it an unequal partner within the region-refer to Vickers B 'Between a rock and a hard place: small states in the EU-SADC EPA negotiations' (2011) *The Round Table: The Commonwealth Journal of International Affairs* 183. To others, South Africa has exploited this asymmetry in the regional economic power to its advantage by flaunting the law and getting away with it-refer to Jephias Mapuva & Loveness Muyengwa-Mapuva 'The SADC regional bloc: what challenges and prospects for regional integration?' (2014)18 *Law Democracy & Development* 26; On the other hand, some scholars consider that South Africa could still use its advanced status to take on the leadership role in the regional economic integration process. However, it has failed to do so-refer to Mark Chingono & Steve Nakana 'The challenges of regional integration in southern Africa' (2009) 3(10) *African Journal of Political Science and International Relations* 399; Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (2015) World Bank 6-8; These mixed views on South Africa's role as the potential leader creates fear as whether any state can emerge as the strongest and effective leader on the regional economic integration agenda. Perhaps, through harmonisation, such fears can be diffused as the less advanced states begin to enjoy the fruits of more business opportunities, competition and the resultant growth that may be derived through efficiency brought by competition.

[110] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (March 2015) 3 World Bank.

[111] Sopie Chauvin Guilaume Gaulier *Prospects for Increasing Trade among SADC Countries* (2002) 9-11 Trade and Industrial Policy Strategies.

[112] In July 2013, Zambeef products, a Zambian company banned the importation of beef, in order to give special support to local farmers. Accordingly, it demonstrated its refusal to sell imported beef by publicly disposing them off "Zambeef products ban imported beef in Zambia" *TVC News* 24 July 2013 available at http://africa.tvnews.tv/2013/07/24/zambeef-products-ban-imported-beef-zambia/ (accessed 9 March 2017).

Another step forward is to opt for regionally specific regulatory and policy frameworks like the one adopted under the HRSR. In that respect, they should take advantage of the flexibility that exists in the *modus operandi* of the WTO's regional trade agreements committee[113] and adopt policies and rules that accommodate their special local interest.

Having noted the complexities surrounding the rules, processes and enforcement of the rules and policies for harmonisation of SPS measures, the next chapter examines the extent to which SADC members have implemented the requirements on transparency with SPS measures.

[113] The flexibility stems from the fact that the institutional set up at the WTO is not very active in ensuring that the requirements of article XXIV are fully complied with. Accordingly, even notifications about the formation of RTAs are in some cases, not reported within the stated time frame, which makes it difficult for the WTO committee on regional trade Agreements; refer to Saurombe A 'The southern African development community trade legal instruments compliance with criteria of GATT article xxiv' (2011) 14(4) *Potchefstroom Electronic Law Journal* 291-295; C O'Neal Taylor 'Regionalism: the second best option' (2008-2009) 28 *St. Luois University Public Law Review* 159.

CHAPTER FOUR

TRANSPARENCY ON SPS REQUIREMENTS IN SADC: MORE NEEDS TO BE DONE

1 Introduction

The participation of the private sector[1] is considered as one of the fundamental keys to successful regional economic integration.[2] They are significant because they contribute toward the achievement of socio-economic development and eradication of poverty through employment and income generation.[3] This explains the SADC's commitment to include them in the integration process.[4] It is argued here that one way of creating an enabling environment for the private sector to easily trade in agricultural products is to establish a transparent SADC trading regime. Such rules appear in the SPS Annex to the SADC Protocol on trade. Article 10 of the SPS Annex states as follows:

1. 'Member States shall notify laws, regulations, procedures and requirements and any changes in their sanitary or phytosanitary measures to the SADC Secretariat.
2. Member States shall provide all required notifications and information under paragraph 1 of this Article in accordance with Appendix A to this Annex. Each Member State shall notify details of their Enquiry points and their National Committee to the SADC Secretariat.
3. The SADC Secretariat shall circulate all notifications to the SADC sanitary and phytosanitary coordinating committee and the national inquiry points'.

[1] In this chapter, unless it is specifically mentioned, reference to the private sector is limited to small and medium scale producers, traders and farmers only.

[2] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (March 2015) World Bank 6.

[3] Article 5(1)*(a)* SADC Treaty has placed socio-economic development and poverty eradication as topmost priority; SADC *Regional Guideline for the Regulation of Food Safety in SADC Member States* (2011) 1; Mozambique, Tanzania and Malawi depend on agriculture see Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern Africa* (2007) 134; Garth le Pere & Elling Tjonneland N Which Way SADC? Advancing Co-operation and Integration in Southern Africa (2005) Occasional Paper 2, Institute for Global Dialogue 29 indicate that there is high dependence on primary exports mainly agricultural products and minerals. Also, the agricultural sector accounts for 37 % of the employment of labour.

[4] Article 5(2)(a*)* SADC Treaty.

Although this thesis hoped to examine the progress with the implementation of this provision in SADC, it is imperative to point out that the SPS Annex to the SADC Protocol 2014 (a revised version of the one first adopted in 2008) is not yet in operation.[5] There is limited information to the public on the status of such ratifications and domestications[6] making it difficult to determine how far it has been ratified. One possible reason is that, there are no ratifications due to lack of political will or enthusiasm by the SADC members.[7] Another possible reason for the delay or non-ratification is the fact that SADC members are overwhelmed by the fact that they have committed themselves to many other similar trade rules, including the WTO SPS agreement and the Annex to the COMESA-SADC-EAC agreement. Accordingly, the domestication of such rules requires careful consideration. For these reasons, it will be premature to examine the status of compliance with the SPS Annex.

Against that background, the examination of the status of transparency regarding SPS requirements in SADC has been determined in this chapter in light of SADC members' implementation of transparency rules in the WTO SPS agreement. Article 7 of the WTO SPS agreement provides that:

> 'Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B'.[8]

In the case of Annex B to the SPS agreement,[9] the provision is a very detailed one regarding the rights and obligations for the establishment and operations of national notification and enquiry points. For a better understanding of its terms, a copy of Annex B has been attached in the bibliography as an appendix. One advantage of examining the extent to which SADC members have complied with the WTO SPS rules on transparency is that the insights will offer guidance

[5] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56)10.

[6] The only publicly available information is that of South Africa's ratification of the 2008 version of the SPS Annex.

[7] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56)10.

[8] SADC did not develop its own special rules, but chose to replicate the WTO SPS rules in article 7 of the WTO SPS agreement, more or less *verbatim* in Article 10 of the SPS Annex of the SADC Protocol.

[9] Available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#annB (accessed 9 March 2017).S ee Appendix A.

for future policy considerations on the principle of transparency under the SPS Annex. Along this line, the chapter also considers whether the SPS Annex should really be a part of the SADC legal system on trade or not.

It is imperative to mention at this point that the scope of the analysis is limited in the sense that it examines the extent to which SADC members have complied with the WTO SPS rules on transparency and contributory factors for their level of compliance. In line with that view, this chapter does not attempt in any way to evaluate the fulfillment of the right to access information under national laws. It also does not attempt to discuss other problems affecting agricultural market access except for those that are associated with transparency of SPS measures. With that in mind, the following discussion commences with an overview of the requirement by the WTO SPS agreement for WTO members to be transparent, followed by an overview of the status of compliance with transparency requirements by South Africa, Malawi, Mozambique and Zambia; thereafter, the discussion examines for the possibility of addressing the problem of lack of transparency, through, a critical analysis of a specific approach that was implemented in Thailand and Vietnam within the Association of South East Asian Nations region (ASEAN).

2 Overview on WTO requirement on transparency with SPS matters

Transparency as used in the WTO SPS agreement is not specifically defined, but it is associated with the notion of notifications[10] of SPS measures in article 7 (transparency) and Annex B (transparency of sanitary and phytosanitary regulations). The duty to be transparent in article 7 has two elements: first, to notify changes in SPS measures; and secondly, to provide information on SPS measures in accordance with the terms of Annex B.[11] Of particular interest here is the terms of the *proviso* in Annex B(5)[12] which, in summary, require that the WTO member that has a proposal to make changes to its SPS measures, must determine whether or not, an international

[10] *World Trade Organisation How to Apply the Transparency Provisions of the SPS Agreement: A Handbook* (2002) 6.

[11] Refer to appendix A annexed to this thesis.

[12] The proviso states that 'Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other members, members shall'.

standard for such proposed measure does not exist or whether the content of its proposed SPS regulation is not substantially the same as the content of an international standard; and if the SPS regulation may have a significant effect on the trade of other members.

According to the panel in *Japan—Apples* this essentially requires the officers working at the national notification points to determine whether all the conditions have been met.[13] These conditions are: first, determine whether or not an international standard on the proposed SPS regulation exists. Secondly, if it exists, conduct a weighing test to establish whether or not its content defers substantially from the existing international standard. On this duty, the WTO Secretariat states that 'even if the health objective, or level of protection achieved, is the same as that delivered by the standard, if the measures required are not substantially the same as those in the international standard it still has to be notified'.[14] The third action is for the notifying member to conduct another weighing test to establish whether or not there will be a significant effect of the proposed regulation on trade of other members. This means that notifying WTO members must determine both the negative and positive effects of the proposed measure on trade.[15] To be able to meet these conditions, it is important for a WTO member to take into account a number of factors such as: the extent to which a particular import or export is valuable to the other countries concerned, the potential for such values to develop in the future, and the difficulties, countries may face in trying to comply with the proposed regulations.[16] They must also bear in mind the need to give reasonable time of at least 6 months to the other WTO members to submit their comments.[17] Another significant element with the duty to notify is the need to use the most efficient means of communication, preferably email, fax, internet, if the resources permit.[18]

[13] *Japan — Apples* on the duty to establish that the cumulative conditions have been met.
[14] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: a Handbook* (2002) 14.
[15] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: a Handbook* (2002) 14.
[16] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: a Handbook* (2002) 14.
[17] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement:* aHandbook (2002) 11.
[18] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: a Handbook* (2002) 9-10, 31.

Against that background, I argue that operating a notification and enquiry point in most cases is an enormous duty which involves management and exchange of information between the officers that manage the enquiry points, and all those stakeholders that make enquiries. It also involves exchange of information between the country proposing the changes to an SPS regulation and other countries.[19] According to the panel in *Japan—Agricultural Products II*, and *Japan—Apples* the requirement to notify regulations extends to notification of documents that are not legally binding in nature since the list in the footnote 5 is not an exhaustive list.[20] This implies that the nature and volume of information on such database can be enormous. For a WTO member to effectively and efficiently run a notification database, it needs adequate financial, technical and human resource so as to maintain, perform and sustain the database. With such resources, it can maintain a centre which can be suitably called a single window where all the information for trade in each member state is made available.[21]

A WTO member that has the pre-requisite resources to maintain such a huge database, alongside the technical and human resources would be fulfilling the WTO mandate to operate and establish a transparent regime founded on clarity, certainty and predictability.[22] Along that line, a transparent trading regime would mean that first, the rules, procedure or other information is made available; secondly, they are clear and unambiguous so that the relevant stakeholder is well informed. The advantage with such a system is not only for the WTO members *per se*, but for

[19] The duty to submit a notification to the WTO Secretariat arises 'when a new measure is proposed or a measure is changed'; discuss comments if requested by the WTO member filing such comments; consider these comments in the decision making process; give a feed back to the country which submitted comment(s) on 'how it plans to take the comments into account; where appropriate, provide additional relevant information on the proposed SPS measure concerned; provide the submitting country with a copy of the text of the corresponding SPS regulations as adopted, or information that no corresponding SPS measure will be put into force for the time being' refer to World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: a Handbook* (September 2002) 11, 30-31.

[20] *Japan—Agricultural Products II*, *Japan—Apples* on the non-exhaustive nature of the list in footnote 5 of article 7.

[21] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO*'* (2015)21(2) *Journal of World Affairs* 122.

[22] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: a Handbook* (2002) 6; in *Chile—Price Band System* the appellate body reasoned that exporters are discouraged from exporting to a market destination where they are uncertain about the trading environment.

other stakeholders as well, such as the traders and producers who are the actual beneficiaries of a transparent trading regime.[23]

The advantages of a transparent system are immeasurable, since stakeholders will be able to make objective decisions and take the necessary actions as and when they are supposed to. Again, producers and farmers will waste less time seeking relevant information and instead be able to raise profits through such savings.[24] With such information, traders become aware beforehand of any changes in any SPS import or export regulations which they can rely on to make the necessary changes.[25] Thus, the more transparent a system is, the more the economic gain for the private sector as the compliance costs relating to acquisition, production, processing of required information and documents are reduced.[26] It is in line with such benefits that the WTO SPS agreement requires WTO members to notify its SPS measures. It remains to be seen whether or not the SADC is in a position to fulfill the requirements of a transparent SPS regime.

3 Compliance with transparency requirements by some SADC members

In this section, I examine the availability of SPS requirements by the national notification and enquiry points of South Africa, Malawi, Mozambique and Zambia. Out of the 15 SADC member states, the analysis has focused on these four countries for the following reasons: first of all, South Africa, Malawi, Mozambique and Zambia are WTO as well as SADC members; which means that their compliance or non-compliance with the WTO laws gives insights as to whether or not they will be able to effectively comply with the terms of equivalent SPS rules of SADC. Secondly, the disparity in economic conditions between SADC countries justifies the choice of three LDCs (Zambia, Malawi and Mozambique) and one economically stronger South Africa.

[23] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO (2015)21(2) *Journal of World Affairs* 124.

[24] Amal Nagah Elbeshbishi *Trade Facilitation and Single Window for Enhanced Regional Economic Cooperation Trade Facilitation in Africa: Challenges, Opportunities and Progress* Organisation of Islamic Cooperation (OIC) High Level Forum Casablanca- Morocco, 25- 26 February 2013, 5.

[25] Sijie Chen 'China's compliance with WTO transparency requirements: institution related impediments' (2012) 4(4) *Amsterdam Law Forum* 26.

[26] Amal Nagah Elbeshbishi *Trade Facilitation and Single Window for Enhanced Regional Economic Cooperation Trade Facilitation in Africa: Challenges, Opportunities and Progress* Organisation of Islamic Cooperation (OIC) High Level Forum Casablanca- Morocco, (25- 26 February 2013), 5.

This disparity is significant in providing the contextual outlook on how each of these countries responds to transparency requirements. The underlying conditions for the level of compliance by Zambia, Malawi and Mozambique are not necessarily indicative or representative of economic conditions in any other LDC in SADC. However, they generally highlight the possibility of such factors being prevalent in such other SADC countries. With these considerations in mind, the proceeding discussions commences with the examination of the private sector experience with access to SPS information in Malawi, followed by Zambia, Mozambique, and then South Africa.

3.1 Small holder-producer-exporter experience with access to SPS information in Malawi

In order to comply with the institutional requirement regarding transparency, the Malawian government established a national notification authority within the ministry of industry and trade.[27] For enquiry points, government opted for three different offices. The one for food safety is found in the Malawi Bureau of Standards, animal health in the department of animal health and livestock development, and plant health in the Chitedze agricultural research station.[28]

Regarding transparency with SPS measures, information obtained from some small scale holders (some of whom produce ground nuts for exports) reveal lack of readily available information on export and import requirements for ground nuts, fruits and vegetables that they have to physically travel long distances before they can obtain the information.[29] Even though the Malawi Bureau of standards contains SPS related information for importers and exporters, such information is available only in hard copy because of lack of internet and lack of funds.[30] The challenge is further exacerbated by the spread of SPS information in different offices, which makes it even more costly for the new exporters to access such information.[31] Again, there is a general lack of publication of information and awareness creation on SPS matters by the

[27] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)10.
[28] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)10.
[29] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)15.
[30] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)16.

government of Malawi.[32] There is also the problem of information being unreliable.[33] The fact that Malawi has had only one notification to the WTO in 2001[34] reflects a non-progressive system with little emphasis on compliance with the WTO transparency requirement. On the whole, lack of readily available SPS information increases the costs of conducting trade.[35]

3.2 Mozambique

In Mozambique, a national notification authority and national enquiry point has been established in light of the WTO SPS agreement.[36] Although there is adequate human resource in these offices, there is a lack of computers, internet access, and lack of efficiency in communication and exchange of SPS related information.[37]

I compare the preceding status quo with the Mozambican government's response in creating international awareness when it detected the '*Fusarium oxysporum* f. sp. *Cubense'* tropical race 4 (Foc TR4), a pathogen of quarantine importance threatening the banana industry in Africa'.[38] When the pathogen was detected, the Mozambican national plant protection organisation reported the issue on the international plant protection convention portal without delay.[39] Its rapid response enabled the SADC, together with the sister regional economic communities and

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[31] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)16.

[32] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)16.

[33] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)15 & 16.

[34] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)10.

[35] USAID *Enhancing Economic Growth and Food Security through Trade* (2015)1.

[36] USAID & SPEED *Sanitary and Phytosanitary Measures: Assessment of the Status of Implementation of the WTO Agreement in Mozambique* (2016) 26.

[37] USAID & SPEED *Sanitary and Phytosanitary Measures: Assessment of the Status of Implementation of the WTO Agreement in Mozambique* (2016) 26.

[38] COMESA, SADC, EAC, IITA, ASARECA, Biodiversity Africa, Stellenbosch University & FAO *Development of a Strategy to Address the Threat of Foc TR4 in Africa* (22-23 April, 2014) Workshop Report Stellenbosch South Africa 2 & 3.

[39] COMESA, SADC, EAC, IITA, ASARECA, Biodiversity Africa, Stellenbosch University & FAO *Development of a Strategy to Address the Threat of Foc TR4 in Africa* (22-23 April, 2014) Workshop Report Stellenbosch South Africa 2.

international cooperating partners to collaborate and cooperate in 'containing and managing the incursion of Foc TR4 in the northern region of Mozambique'.[40]

Summarily, these two scenarios reveal two contrasting conditions: on one hand, an efficient and transparent system and the other, lack of transparency. First, from the report on Foc TR4, it seems that provision of information on SPS issues through the internet is very efficient. Yet, this may not be the actual day to day reality especially if this was an *ad hoc* initiative to create immediate awareness about this dangerous pathogen. An in-depth analysis of the status of transparency from both reports[41] implies that the availability of reliable internet is either on *an ad hoc* basis or as and when the circumstance justifies it. This is implied from the expression of gratitude by the SADC representative[42] on the timely response of Mozambique in creating awareness about the invasion. Other than that, the general implication is that there is limited or no information on SPS measures available online.

3.3 Lack of information and issues of unreliability of SPS information in Zambia

Trade in agricultural products such as maize exports and meat imports are an important economic activity in Zambia.[43] In terms of the WTO SPS agreement, the Zambian government has established a national notification authority in the ministry of trade, commerce and health.[44] As for enquiry points, the ministry of health is in charge of food safety, and the two separate departments in the ministry of agriculture and livestock are assigned to handle enquiries on

[40] COMESA, SADC, EAC, IITA, ASARECA, Biodiversity Africa, Stellenbosch University & FAO *Development of a strategy to address the threat of Foc TR4 in Africa* (22-23 April, 2014) Workshop Report Stellenbosch South Africa 2.

[41] COMESA, SADC, EAC, IITA, ASARECA, Biodiversity Africa, Stellenbosch University & FAO *Development of a strategy to address the threat of Foc TR4 in Africa* (22-23 April, 2014) Workshop Report Stellenbosch South Africa; Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)27.

[42] COMESA, SADC, EAC, IITA, ASARECA, Biodiversity Africa, Stellenbosch University & FAO *Development of a strategy to address the threat of Foc TR4 in Africa* (22-23 April, 2014) Workshop Report Stellenbosch South Africa 3.

[43] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 32-33.

[44] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 33.

animal and plant health issues.[45] There is contention between the private and public sector on the accuracy of SPS information and ease of access. The private sector argued in the negative whereas the private sector was in the affirmative.[46]

Zambia submitted only four notifications as of 14th July 2015 with the previous one submitted in 2000.[47] This raises considerations for future references regarding its efforts to comply with transparency requirements. The cost of accessing SPS information in Zambia is higher for traders due to lack of easily accessible information on the relevant websites (for lack of upgrades); as such, traders need to contact the competent officials for information.[48] Again, the necessary SPS information is spread in various offices making it harder to obtain information within the shortest time because of the bureaucratic hurdles.[49]

3.4 Small holder farmers access to SPS information (quality and food safety requirements) in South Africa

The South African department of agriculture, forestry and fisheries (DAFF) is the overall institution in charge of providing guidance and oversight on food safety and health of humans, plant and animals. Within this department, the directorate of international trade has been designated as national notification point (NNP) and national enquiry points (NEP)[50] to share and exchange such information with interested stakeholders within South Africa, and other countries.[51] These duties are posted on the DAFF website and a search for general information on the programmes, brief SPS newsletters, branches of the South African department of agriculture, forestry and fisheries, and vacancies can be obtained from the website.

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[45] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 33.

[46] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 35.

[47] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 33.

[48] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 37.

[49] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 37.

[50] Available at https://www.daff.gov.za/daff.gov.za/daffweb3/Branches/Agricultural-Production-Health-Food-Safety/Food-Import-Export-Standards/WTO-SPS-Co-odination (accessed 9 March 2017).

[51] Available at https://www.daff.gov.za/daff.gov.za/daffweb3/Branches/Agricultural-Production-Health-Food-Safety/Food-Import-Export-Standards/WTO-SPS-Co-odination (accessed 9 March 2017).

However, for a researcher looking for in-depth specific information on the conditions of trade between South Africa and any SADC country, the data on the website is inadequate. For example, several months back, publicly available reports established that there were trade wars between South Africa and Zambia over the standards and quality assessment techniques (radiation of Zambian organic honey as a form of risk assessment) by the South African government.[52] Months later, reports also revealed that the two countries had entered into arrangements to improve their trading relations.[53] For purposes of trade expansion, this is great news except for the fact that the source of information is a secondary one. This news is not available on the DAFF website which makes it difficult to verify the reports and establish the terms of their future trade relations. In my view, such information would form part of the information that should be made available on the websites of the notification authority and or enquiry points so as to inform the general public, and researchers alike, of the manner in which the sensitive scientific evidence requirement was dealt with. Again, it is in the interest of future trade negotiations, especially in relation to the way the two countries dealt with the scientific evidence or risk assessment issue that such information should be made readily accessible. This is even more crucial in the SADC where there is limited jurisprudential development on SADC trade rules within the SADC trading regime.

Along the same line, it is vital to mention that access to SPS related information is problematic for importers of fresh fruits in South Africa.[54] According to Joshua Kenneth Baloyi, small holder farmers in Limpopo province lack information about product quality requirements.[55] The inability to access such information is also limited by lack of technological devices to readily access such information.[56] Maliwich L L, Pfumayaramba T K & Katlego T state that the small holder farmers lack information on marketing of their tomatoes which has made it difficult for

[52] National Board of Trade *A Case of Zambian Honey Export* (2009) 4-9; *Implications of Standards And Technical Regulations on Export Competitiveness* (2007) *AERC Working Paper,* 11; Kalaba Mmatlou *Zambia Moving Ahead: Private Sector Space, Barriers to Agriculture & Trade* (2012) Vol.2 No.4, section 5.3.

[53] Available at www.sanews.gov.za/africa/sa-zambia-trade-relations (access 9 March 2017); www.dti.gov.za (access 9 March 2017); www.dfa.gove.za/foreign/bilateral/zambia.html (access 9 March 2017).

[54] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)27.

[55] Joshua Kenneth Baloyi *An Analysis of Constraints Facing Small Holder Farmers in the Agribusiness Value Chain: A Case Study of Farmers in the Limpopo Province* (Unpublished Thesis University of Pretoria 2010) 25.

[56] Kenneth Baloyi *An Analysis of Constraints Facing Small Holder Farmers in the Agribusiness Value Chain: A Case Study of Farmers in the Limpopo Province* (Unpublished Thesis University of Pretoria 2010) 27.

them to access high quality markets.[57] However, for importers who are members of producer organisations and are knowledgeable about internet usage, they have the opportunity to obtain SPS information from their organisations and websites such as that of DAFF.[58]

But again, the DAFF officials who are obliged to provide information, especially the information regarding time frames for conducting and concluding pest risk on fruits and vegetables, do not ensure that it is readily available, which causes unnecessary and costly delays to producers.[59] Another cause of unnecessary delays is the fact that some producers and exporters prefer to directly contact the DAFF in Pretoria whenever they need SPS related information instead of contacting extension workers situated in the provinces.[60] The problem with some of the extension workers operating under the Comprehensive Agricultural Support Programme (CASP) in Limpopo is that of incompetence.[61] In some other areas, the information they provide are inadequate leaving certain smallholder farmers unsatisfied.[62] In such circumstances, small holder farmers and small scale producers are faced with the option to either bypass the extension workers or tolerate the situation. The end result is unnecessary delays, costs and the inability to access high value markets.

4 General Lack of Information on SPS Requirements

The experience by small scale producers and farmers highlighted in sub-section 3 of this chapter raise a set of issues summarised as follows: the general lack of readily available information on SPS measures in hard copy; the existence of inadequate information on certain government

[57] Maliwich L L, Pfumayaramba T K & Katlego T 'An analysis of constraints that affect small holder farmers in the production of tomatoes in Ga-Mphahlele, Lepelle Nkumbi Municipality Limpopo Province' (2014) 47(3) *Journal of Human Ecology* 273 (starts from 269-274).

[58] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)27.

[59] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)27.

[60] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015)27.

[61] Joshua Kenneth Baloyi *An Analysis of Constraints Facing Small Holder Farmers in the Agribusiness Value Chain: A Case Study of Farmers in the Limpopo Province* (Unpublished Thesis University of Pretoria 2010) 32-33.

websites; outdated online information; unreliable information on SPS requirements; general emphasis on the use of internet for dissemination of SPS requirements despite the fact that most of the rural producers and farmers lack access to internet. Such a status quo is not an encouraging one. This argument does not necessarily mean that all SADC countries are experiencing the same problems. However, the results give an overview of the realities with the implementation of the requirements of the rules on transparency with SPS measures by developing and least developed SADC members. Accordingly, even if states are signatories to regional agreements, to the private sector, it is not just about such signatures, setting up national enquiry and notification points, but, making positive social and economic impacts through such policies or initiatives.[63]

Therefore, when a state fails to readily provide adequate and reliable information to all stakeholders, it shifts its responsibilities and costs to the private sector.[64] This limitation has the effect of increasing the cost of trade.[65] In that context, the fact that some SADC states are still not able to properly fulfill the transparency terms of the WTO SPS agreement which they signed over 20 years ago in 1995, is equivalent to non-compliance.

It has been argued that it is difficult to sanction non-compliance with transparency provisions because the common practice is for adjudicators to request states to provide the information *ex poste*.[66] In some instances, the adjudicators do little to address the problem of lack of transparency on grounds of judicial economy. [67] This implies that as far as transparency is concerned, sanctions may not be an effective tool. Instead, to engender compliance, it may be right to examine the underlying reasons for non-compliance. Consequently, the partial or complete non-compliance by Zambia, Malawi, Mozambique and South Africa discussed above[68]

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[62] Maliwich L L, Pfumayaramba T K & Katlego T 'An analysis of constraints that affect small holder farmers in the production of tomatoes in Ga-Mphahlele, Lepelle Nkumbi municipality Limpopo province' (2014) 47(3) *Journal of Human Ecology* 274.

[63] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015) 21(2) *Journal of World Affairs* 124.

[64] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015) 21(2) *Journal of World Affairs* 125.

[65] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015) 21(2) *Journal of World Affairs* 124.

[66] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015) 21(2) *Journal of World Affairs* 124.

[67] Padideh Alai'i 'Transparency and the expansion of the WTO mandate' (2011) 26(4) *The American University International Law Review* 1009.

[68] See sub-sections 3.1.1-3.1.4.

needs to be rationalised by taking into account the possible underlying reasons for such behaviour. On that note, Neyer and Wolfe suggest two phases for determining the form of non-compliance: is it initial non-compliance or a compliance crisis.[69] Compliance crisis applies in a situation where there is deliberate refusal to comply, even with a decision of an international or regional institution.[70] On the other hand, initial non-compliance applies to situations where factors such as lack of the necessary resources, be it financial and or human capital to implement regulations and directives makes it difficult to comply.[71] Such factors could also make it difficult to effectively monitor the implementation of regional rules or directives.[72] In the case of Zambia, and Malawi they have failed to comply due to financial challenges,[73] whereas the South African situation is perhaps due to the financial constrains upon its reserves as it battles the need to meet the high domestic demands for increasing the employment rate and protection of national industries.[74] Due to these financial challenges, it is imperative to look for solutions that will engender compliance in a manner that imposes less financial strain on the already overburdened economies. Such mechanisms include seeking help from international partners' to boost financial and human capacity of the member states.[75] Another way of promoting compliance is by involving the private sector.[76] This is because, the participation of the latter is said to be one of the catalysts for successful regional economic integration[77] as they participate in the decision making processes, they take ownership of the programmes, and could be able to provide

[69] Neyer Jurgen & Wolf Dieter 'Analysis of compliance with international rules' in Zurn Michael & Joerges Christian (eds) *Law and Governance in Post National Europe: Compliance Beyond the Nation-State* (2005) 45.

[70] Neyer Jurgen & Wolf Dieter 'Analysis of compliance with international rules' in Zurn Michael & Joerges Christian (eds) *Law and Governance in Post National Europe: Compliance Beyond the Nation-State* (2005) 45-46.

[71] Neyer Jurgen & Wolf Dieter 'Analysis of compliance with international rules' in Zurn Michael & Joerges Christian (eds) *Law and Governance in Post National Europe: Compliance Beyond the Nation-State* (2005) 45.

[72] Neyer Jurgen & Wolf Dieter 'Analysis of compliance with international rules' in Zurn Michael & Joerges Christian (eds) *Law and Governance in Post National Europe: Compliance Beyond the Nation-State* (2005) 45-46.

[73] Jennifer Rathebe M *The Implementation of SPS Measures to Facilitate Safe Trade: Selected Practises and Experiences in Malawi, South Africa & Zambia* (2015) 16 & 33.

[74] Mark Chingono & Steve Nakana 'The challenges of regional integration in Southern Africa' *(*2009) 3(10) *African Journal of Political Science and International Relations* 399; SAANA Consulting *Advancing Regional Integration in Southern Africa: An Evidence-Based, Forward Looking Study on Regional Trade and Integration in the Tripartite Region, Focusing Primarily on Southern Africa* Final Report (2014) 19-20.

[75] Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012) XLV *CILSA* 71.

[76] Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012)XLV *CILSA* 71.

[77] Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (March 2015) World Bank 6.

technical support and monitoring compliance as well.[78] In a nutshell, it calls for a concerted effort to address the issue of lack of transparency through initiatives that facilitate trade.

5 Addressing the problem of transparency through trade facilitation

SADC has been able to facilitate trade through certain activities that improve the issue of transparency, with the view that these activities will reduce the cost of trade. The list of the activities highlighted below is not an exhaustive one in any way. Rather, it is an indication that the SADC, together with its partners, is taking steps to improve the trading environment by making it easier for some traders to access information on, and fulfill SPS requirements. By so doing, the examination also highlights the significance of these activities for future efforts, should there be need to replicate them in dealing with transparency issues.

Article 14 of the Protocol states that 'Member States shall as provided for in Annex III of this Protocol, take such measures as are necessary to facilitate the simplification and harmonisation of trade documentation and procedures'. Trade facilitation is a concept which is considered to operate within three elements relating to cross border trade. The first is simplification which reduces the number of documents and procedures associated with goods clearance, harmonisation (through use of international standards other than national ones), and transparency where the border regulations must be clear, and consistent at all border posts.[79] According to June O'Keffe & Elina Viilup, trade facilitation involves the simplification, modernisation, harmonisation of imports, exports, or transit and procedures, and most importantly, customs requirements, all intended to ease trade flows.[80] These definitions establish three elements of trade facilitation, namely simplification, harmonisation and transparency. However, for purposes of this study, emphasis has been placed on transparency only. Again, from these definitions, it seems clear that trade facilitation is associated most importantly, with customs clearance. Yet, as article 14 of the SADC Protocol on trade and annex III to this establish, trade facilitation does

[78] Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012) XLV *CILSA* 71.
[79] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation.
[80] June O'Keffe & Elina Viilup *Trade Facilitation Agreement: Reducing Bureaucracy at the Border* (2012).

not only relate to improvement in customs procedure. To look at it largely from a custom's procedure's point of view only, has been said to be a narrow approach.[81] Thus, for a holistic solution to transparency, this chapter considers trade facilitation in the broad sense which embraces actions to address all forms of NTBs, including behind the border costs associated with transparency, information and communication technology.[82] With that in mind, the next sub-section explains certain projects that have been undertaken by SADC to improve transparency at the border. Thereafter, it also examines some of the new initiatives in place to generally address transparency issues.

5.1 Simplification with transparency at customs

The SADC Protocol on trade in Annex II provides the rules on trade facilitation with regard to streamlining, harmonising and modernising customs procedures. In terms of improving the customs procedures, SADC has succeeded in establishing national and regional single windows in Botswana, Malawi, Namibia, Mozambique & South Africa.[83] These are designed to integrate customs declaration and other processes by enabling parties' engaged in trade or transport activities to lodge all standardised information and documentation relevant to import, export or transit related requirements with single entry.[84] The Trans-Kalahari corridor regional single window utilises cloud computing technology to automate processes of customs and authorities in Botswana, Namibia, South Africa and facilitate communication between their respective systems.[85] Certain steps such as the creation of national and regional single windows in Botswana, Malawi, Namibia, Mozambique and South Africa have been set up to enable single

[81] Amal Nagah Elbeshbishi *Trade Facilitation and Single Window for Enhanced Regional Economic Cooperation Trade Facilitation in Africa: Challenges, Opportunities and Progress* Organisation of Islamic Cooperation (OIC) High Level Forum Casablanca- Morocco, (25- 26 February 2013), 5.

[82] Amal Nagah Elbeshbishi *Trade Facilitation and Single Window for Enhanced Regional Economic Cooperation Trade Facilitation in Africa: Challenges, Opportunities and Progress* Organization of Islamic Cooperation (OIC) High Level Forum Casablanca- Morocco, 25- 26 February 2013, 5.

[83] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 6.

[84] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 6.

[85] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 6.

entry of customs related documents.[86] According to Willie Shumba, the SADC has been able to achieve certain goals toward trade facilitation such as making available trade information through websites and trade portals.[87] From these reports, it is clear that the SADC is emphasising the use of information technology and internet as the main medium for document simplification and communication for improving customs procedures.

Despite some of these achievements, the effects are limited because most of the projects are new, as a result, it is difficult to effectively and properly assess their effects.[88] In this context, it has been argued that despite the presence of a strong policy framework, (at least at the regional level) and considerable intent to improve trade facilitation in SADC, the challenge is that of implementation.[89] Whatever has been put on paper needs to be translated into reality, and one step toward this is through convergence of regional policies.[90] This effort will require that states put more emphasis on regional cooperation as opposed to the nationally focused efforts in the development of border posts.[91]

5.2 Comprehensive trade facilitation programme by USAID Southern Africa Trade Hub

In November 2015, the USAID Southern Africa Trade Hub reported that it had also initiated developments of single windows in Namibia, Malawi and South Africa.[92] The national single window is a single electronic database containing all trade related information required for smooth conduct of trade across borders. This initiative aims at reducing the costs of doing

[86] Joe Amoako-Tuffour, Neil Bachin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (March 2016) Africa Transformation Forum 6.
[87] Willie Shumba *Trade Facilitation Initiatives in SADC* (August 2015) Southern Africa Business Forum, TIFI (Trade Industry Finance Investment) 11.
[88] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 6.
[89] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 7.
[90] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 8.
[91] Joe Amoako-Tuffour, Neil Balchin, Linda Calabrese & Max Mendez-Parra *Trade Facilitation and Economic Transformation in Africa* (2016), Africa Transformation Forum, African Centre for Economic Transformation 8.
[92] USAID *Enhancing Economic Growth and Food Security through Trade* (2015) 1.

trade.[93] In July 2015, the Trade Hub launched a trade repository in Namibia to serve as a consolidated resource for importers and exporters to obtain all information required to comply with regulatory obligations in multiple trade agencies.[94] In February 2014, the national single window programme was adopted through a Cabinet Memorandum in Malawi, and laws are being reviewed to embrace this initiative.[95] The initiatives are in the early stages of their development therefore, it is difficult to examine its impact on transparency. Another challenge with this report is that it does not establish whether the national single window will address behind the border challenges of accessing information on SPS measures. Considering that this programme permits SADC members and donor partners to identify areas upon which they can obtain support under pillars of transparency, predictability, simplification and documentation,[96] SADC should consider the issue of improving the availability of information on SPS requirements, so that they are made readily available for all stakeholders.

The development and functioning of the national single windows needs to accommodate the small scale producers and entrepreneurs because, in most cases they lack the prerequisite knowledge to interpret and comprehend the trade related information, which are in most cases, sophisticated and best understood by lawyers.[97] It is in this context that information on trade matters need to be produced in a form that is easily understood by such information seekers,[98] they should be in a user friendly form,[99] and if resources permit, have them translated into local languages. This of course necessitates the establishment of computer centres in communities, availing computers, and reliable internet in these centres, together with basic (yet fundamental) training on computer and internet usage. These ideas could be implemented through partnerships with international donors.

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[93] USAID *Enhancing Economic Growth and Food Security through Trade* (2015) 1.
[94] USAID *Enhancing Economic Growth and Food Security through Trade* (2015) 1.
[95] USAID *Enhancing Economic Growth and Food Security through Trade* (2015) 1.
[96] USAID *Enhancing Economic Growth and Food Security through Trade* (2015) 1.
[97] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015)21(2) *Journal of World Affairs* 124.
[98] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015)21(2) *Journal of World Affairs* 126.
[99] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO' (2015)21(2) *Journal of World Affairs* 124.

5.3 Considerations on more international funding partnership to improve compliance with SPS transparency rules

SADC members do agree that they will cooperate in sourcing for international cooperation and funding.[100] The SADC has done so in the past with agencies such as Standard and Trade Development Facility. On another note, the SADC is currently in partnership with EU under the trade related facility programme. It is in light of such co-operations that the following discussion endeavours to examine how these partnerships can be utilised to improve transparency regarding SPS measures. This analysis begins with a discourse on the funding partnership between the EU and SADC under the trade related facility.

5.4 SADC trade related facility

This programme has two segments, namely, the part that deals with EU-SADC EPA[101] and the other which deals with EU-SADC. The latter is meant to provide technical and financial support to specific SADC members so that they can implement the SADC Protocol on trade. The specific areas with which they need assistance include SPS measures, and trade facilitation.[102] The facility became operational in January 2015 when the staff in the facility support unit were mobilised.[103] To benefit from this support, a SADC member must be a fully paid up member, signed and ratified the SADC protocol on trade.[104] This is an opportunity where the SADC can explore the specific areas where support is needed, and since there have been challenges with

[100] Preamble to the SADC Protocol on Trade 1996.

[101] The Partnership also has another segment that relates to EU support with regard to EU-SADC Economic Partnership Agreement.

[102] SADC Trade related trade facility (EU-SADC) available at https://sadc.int/sadc/sadc-secretariat/directorates/ofice-deputy-executive-secretary-regional-integration/trade-industry-finace-investment/sadc-trade-related-facility-trf/ (accessed 23 March 2017).

[103] SADC Trade related trade facility (EU-SADC) available at https://sadc.int/sadc/sadc-secretariat/directorates/ofice-deputy-executive-secretary-regional-integration/trade-industry-finace-investment/sadc-trade-related-facility-trf/ (accessed 23 March 2017).

[104] SADC Trade related trade facility (EU-SADC) available at https://sadc.int/sadc/sadc-secretariat/directorates/ofice-deputy-executive-secretary-regional-integration/trade-industry-finace-investment/sadc-trade-related-facility-trf/ (accessed 23 March 2017).

compliance with transparency provisions relating to SPS measures, such an area is a viable section for which support is crucial.[105]

In addition to the preceding funding opportunities, the SADC also has the option of seeking technical and financial support from Standards in Trade Development Facility and also signing the WTO TFA. This will open the doors for the WTO to come in to support the SADC in very specific areas regarding the SADC members' commitment on transparency with regards to SPS requirements.

5.5 Signing and ratification of the WTO Trade facilitation agreement

In December 2013, the WTO members adopted the Trade Facilitation Agreement (TFA) during the 9th Ministerial Conference in Bali. The text of this agreement was subsequently reviewed to be part of the wider 'Bali Package'; and on 27th November, 2014, they adopted a Protocol of Amendment[106] in order to incorporate the Trade Facilitation Agreement into Annex 1A of the WTO Agreement.[107]

In order to become legally binding on all SADC members, there must be two thirds majority deposits of signatures from member states. As of 12 July 2017, Lesotho, Malawi, Mauritius, Mozambique, Swaziland, Madagascar, Lesotho, Botswana, Seychelles and Zambia had ratified the agreement[108] and as of 22nd February, 2017 the TFA became legally binding on WTO member states that had ratified it, after the required majority ratification documents had been deposited with the WTO.[109] That notwithstanding, there are mixed reactions to the perceived benefits to be derived from participating under the TFA. Christian Wolff is of the view that any

[105] Tralac "The SADC trade related facility: implementation issues" 29 June 2016 *Tralac News* 8 available at http://.tralac.org/news/article/7625-the-sadc-trade-related-facility-implementation-issues.html (accessed 23 March, 2017).

[106] WTO "Trade facilitation: agreement: members accepting the protocol of amendment to insert the WTO trade facilitation agreement into annex 1a of the WTO agreement" available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm (accessed 23 March, 2017)

[107] WTO "Trade facilitation: agreement: members accepting the protocol of amendment to insert the WTO trade facilitation agreement into annex 1a of the WTO agreement" available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm (accessed 23 March, 2017)

[108] World Trade Organisation Trade Facilitation Agreement Database Ratifications https://www.tfadatabase.org/ratifications (accessed 15 November, 2017). Only Angola, Namibia, South Africa and DRC that have not yet accepted the agreement.

state that accedes to the agreement will be subjecting itself to SPS plus provisions such as article 1, 3, 5, and 6 regarding publication.[110] In other words, a state will be subjecting itself to more onerous SPS obligations. On the other hand, Yinguo Dong, argues that there are numerous advantages for signing the TFA.[111] For the Organisation for Economic Cooperation and Development (OECD), middle and low income countries will be able to reduce their cost of trade when they sign and participate under the TFA.[112] In fact, since developing countries can implement it gradually, they have the advantage of taking it slow. For better results, Yinguo Dong argues that developing countries first needs to reform their institutional systems, cut unnecessary additional units, adjust their resources and make the customs system transparent and highly efficient.[113] I disagree with this suggestion because, such reforms, in my view, should be the focus of the support from the WTO under the TFA. On the contrary, if developing countries were to first address these issues, it is uncertain as to how the TFA would serve its purpose. At the same time, SADC members need to properly evaluate their conditions so that they can make the right decisions as to which aspects of their regime need facilitation.

6 Conclusion

The issue of transparency is a very crucial element in the administration of trade due to the benefits it generates in terms of reducing costs of doing trade. Accordingly, when SADC members committed themselves to be transparent under the SPS Annex to the SADC Trade

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[109]World Trade Organisation "WTO's trade facilitation agreement enters into force" available at www.wto.org/english/news_e/news (accessed 28 November 2017)

[110] Christian Wolff *Trade Facilitation in the Context of the SPS Agreement* IICA Forum.

[111] According to Yinguo Dong "How can trade facilitation help LDC's cut SPS barriers" *Trade Facilitation/Bridges Africa* Vol. 3 No.3, 9 April 2014 http://www.ictsd.org/bridges-news/bridges-africa/news/how-can-trade-facilitation-help-ldcs-cut-sps-barriers (accessed 23 March 2017), trade facilitation is a means to increase trade revenues, he also argues that the agreement will decrease SPS barriers through the adoption of e-documents, cutting down multiple inspections, improve cooperation among SPS authorities and producers in the supply chain, increase transparency of information and expedite clearance of goods; it is also stated by OECD 2013 that the aavailability of trade related information such as SPS requirements reduce costs for low and middle income countries. *Refer to OECD 2013.*

[112] OECD Implementation of the WTO Trade Facilitation Agreement: The Potential Impact on Trade Costs (June 2015) 1; Yinguo Dong "How can trade facilitation help LDC's cut SPS barriers" *Trade Facilitation/Bridges Africa* Vol. 3 No.3, 9 April 2014 http://www.ictsd.org/bridges-news/bridges-africa/news/how-can-trade-facilitation-help-ldcs-cut-sps-barriers (accessed 23 March 2017).

Protocol, they envisaged a trading regime that would be clear, unambiguous, predictable and certain. Unfortunately, they have not shown commitment in domesticating it. As a result, it is premature to assess the success or failure with the implementation of this Annex. That being the case, since the SADC members also committed themselves under similar rules in the WTO SPS agreement, the examination in this chapter has revealed that there is a problem with the availability and access to information on SPS matters due to largely financial, technical and structural matters. Despite the effort at simplifying the use and access to information, the emphasis on e-data base has exacerbated the access to information problem due to limited internet connectivity. With that in mind, it may not be a very good idea to place great emphasis on internet usage for SADC rural producers and or small scale farmers and exporters. In the alternative, a different approach is required in disseminating information in addition to the use of broadband connectivity such as the empowerment of extension workers through regular training. They can also be effective if they are adequately financed and both soft and physical infrastructure is adequately maintained. Such an initiative will help in boosting the confidence of the local, and rural stakeholders involved in the trade of agricultural products. It will also improve the relationship between these stakeholders.

From a legal point of view, the failure by SADC members to comply with their obligation to be transparent is equivalent to non-compliance with requirements. Again, since a quantitative restriction can be any measure that restricts imports or exports,[114] lack of transparency can be categorised as a quantitative restriction due to the lack of predictability and uncertainty associated with it. Such negative features are a discouragement to potential exporters to the extent that it may affect the flow of goods into that market. With this in mind, together with the views of Cadot et al, a lack of transparency is not only a quantitative restriction but, an NTB as well because of its nature.[115]

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[113] Yinguo Dong "How can trade facilitation help LDC's cut SPS barriers" *Trade Facilitation/Bridges Africa* Vol. 3 No.3, 9 April 2014 http://www.ictsd.org/bridges-news/bridges-africa/news/how-can-trade-facilitation-help-ldcs-cut-sps-barriers (accessed 9 March 2017).

[114] Article 1 SADC Protocol on trade 1996.

[115] Cadot Oliver, Malouche Mariem, & Saez Sebastian *Streamlining Non-Tariff Measures: A Toolkit for Policy Makers* (2012)4.

Coupled with the non-legal challenges faced by SADC in relation to maintaining a transparent regime, it is questionable whether the actual domestication of the SPS annex will take place in the short term. Be that may, perhaps the domestication process should take a bottom up approach in cooperation with national executives and decision makers within SADC states so that the practice of transparency can be included in the national systems.[116] In terms of substantive provisions, the framework of the SPS Annex should reflect the terms of the WTO SPS agreement as much as possible to promote regulatory consistency with the latter regime. Such a regime will contribute to the establishment of an enabling environment which is necessary for encouraging foreign investors desirous of investing in the SADC region.

[116] UNCTAD *Non-Tariff Measures and Regional Integration in the Southern African Development Community* (2015) 24.

CHAPTER FIVE

PROMOTING SOCIO-ECONOMIC DEVELOPMENT OF SADC MEMBERS ALONGSIDE THE APPLICATION OF NON-TARIFF MEASURES

1 Introduction

When SADC member decided to economically integrate the region, they hoped that through this cooperation, they would promote socio-economic development[1] with trade liberalisation as the main tool for achieving such objectives.[2] The need to develop is undeniable because the SADC is constituted by mostly developing and least developing countries (LDCs)[3] which means that initiatives to liberalise intra-SADC trade should proceed alongside socio-economic development plans and programmes. Under such circumstances, restrictions are permissible for development purposes.[4] However, the enforcement of these rights must be in line with the respective rules so that members do not lose focus of the economic integration agenda.[5] This literally means that there are two main interests that are being pursued within the economic integration process, namely: socio-economic development and trade liberalisation.[6] Therefore, it is important to regulate the use of NTMs in a manner that engenders progress toward regional economic integration. This necessitates regulation of development and trade liberalisation in a balanced

[1] Preamble and article 5(1)*(*a*)*of the SADC Treaty, Muna Ndulo 'African integration schemes: a case study of the Southern African Development Community' (1999)7 *African Year Book of International Law* 6.

[2] Article 5(2)*(d)* SADC Treaty 1992, articles 3 & 6 of the SADC Protocol on Trade 1996 advocate for the removal of trade restrictions.

[3]United Nations Committee for Development Policy *List of Least Developed Countries* (as of May, 2016) lists the following countries as LDCs: Angola, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mozambique, United Republic of Tanzania, and Zambia available at http://www.un.org/en/development/desa/policy/cdp/ldc_list.pdf (accessed 9 March 2017).

[4] Article 21 of the SADC Protocol on Trade 1996 on infant industry protection.

[5] Article 21 and article 3(1)*(*c*)* sets some procedural rules.

[6] This argument does not in any way mean that there are no other important interests of pursuit in the SADC integration process. Therefore, the relationship and significance of the relationship between development and trade liberalisation is emphasised here because the study is focusing on trade liberalsation trade liberalisation is narrowly used in this context to mean the liberalisation of trade in agricultural products. This narrow approach does not in any way mean that trade liberalisation in the region only focuses on liberalising the agricultural trade. The narrow consideration is only specific to this study.

manner. In that regard, the rules in the Protocol, the processes of their development and enforcement should promote such a balance.

However, the discussion in chapter two indicates that there are special gaps in key provisions of the Protocol on quantitative restrictions. Also, chapter three has indicated that there are apparent inconsistencies in pertinent rules on harmonisation of SPS measures, which is likely to adversely affect the enforcement of the commitment to harmonise SPS measures under the SPS Annex. Chapter four has also established that there is a general lack of implementation of transparency provisions. Yet, at the same time, chapter one has clearly confirmed the priority of development in SADC. Under these circumstances, is it possible to promote balance within such a regulatory environment? In other words, how can development be pursued without losing sight of the need to liberalise intra-regional trade and the overall goal of regional economic integration? It is these concerns that this chapter endeavours to address by examining the strength of specific key provisions of the Protocol which permit enforcement of trade restrictions for development purposes with a view to determine whether or not they promote a regulatory balance. In addition to that, the analysis also examines the legal implications of the rule on consensus for promoting balance. Since law does not operate in a vacuum, the analysis tries to rationalise the legal status quo by linking the impact of non-legal factors on the strength and nature of these provisions, their application and enforcement.

Particular attention is placed on analysing instances where domestic needs cloud the decision making processes in a manner that limits objectivity;[7] the effect of the gap in the procedural rules on consensus[8] on legislative development and regulation. When there is lack of consensus, do the SADC rules make it possible for aggrieved states to access the necessary dispute settlement avenues to determine the legality of quantitative restrictions and SPS measures? In light of these issues, it remains to be seen how the SADC regime on trade restrictions has managed to regulate the interface between development and trade liberalisation.

[7]After the SADC Tribunal (the suspended tribunal) ruled against Zimbabwe in the case of *Mike Campbell & Another v Republic of Zimbabwe* SADC Tribunal decision, Case no SADCT: 2/07, (2007) para 45-55, the government of Zimbabwe refused to be bound by the decision. The implication of Zimbabwe's refusal for regional cooperation toward trade liberalisation and development discussed in this chapter.

[8]This argument relates specifically to the issues concerning the rules regarding consensus decision making process as discussed in section 3 of this chapter. The lack of clarity could open the door for those states, coupled with limited political will, to violate the rules against unnecessary trade restrictions.

2 Historical background and the pursuit of a development agenda alongside trade liberalisation

The establishment of SADC dates back to its predecessor the Southern African Development Coordinating Conference (SADCC).[9] The SADCC was established by the Lusaka Declaration, which was signed in 1980 with the objective to promote economic independence from white minority rule in South Africa at the time.[10] It was also hoped that through this cooperation, the members would jointly mobilise resources necessary to integrate the region.[11] Years later, SADCC was substituted with the SADC through the SADC Treaty which was signed by ten members in Windhoek, Namibia on 17th August, 1992.[12] The membership of the SADC has grown to 15 marked by apparent disparity in terms of GDP, the share of agricultural sector in the national GDP, and levels of development.[13] In terms of economic development status, the region comprises of South Africa as the most economically advanced country,[14] six developing

[9]SADCC was signed by 9 member states of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe, Saurombe A 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012)15(2) *PER/PELJ* 456-457; Clement Ng'ong'ola 'The reconstitution of the Southern Africa development community: some international trade law perspectives' (2000) 117 *South African Law Journal* 266-269.

[10] Saurombe A 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *PER / PELJ* 456-457; Clement Ng'ong'ola 'The reconstitution of the Southern Africa Development Community: some international trade law perspectives' (2000) 117 *South African Law Journal* 266-269.

[11]Ahmed AK *An Analysis of the Regional Integration in Southern Africa: A South African Perspective* (2008) Tralac 2.

[12] Clement Ng'ong'ola 'The reconstitution of the Southern Africa development community: some international trade law perspectives' (2000) 117 *South African Law Journal* 269.

[13] 'Members range from high income countries such Mauritius, South Africa and Botswana, with a GDP per capita of between US$ 5,352 and US $7,694 to low income countries such as Malawi, Mozambique, with a GDP per capita of US $ 264 to US $ 369. From agriculture dependent economies such as Tanzania, the Democratic Republic of the Congo (DRC) and Malawi (between 34.3% and 45.3% of GDP) to economies such as those of South Africa and Botswana, where agriculture accounts for 1.7% and 2.8% of GDP respectively. They range from a small island economy such as Mauritius, with limited land resources, to land rich Mozambique, Zambia and Angola; from agro-environmentally constrained economies like Namibia and Botswana to sub-tropical, bio-diverse Madagascar, from countries with sophisticated and modern agro-food supply chains such as those in South Africa, to infrastructure constrained Malawi and Tanzania and economically dysfunctional Zimbabwe' in CTA and ECDPM *Agricultural Trade Adjustments: Lessons from SADC Experiences* (May 2010) No. 95 Discussion Paper Aid for Trade & Agriculture Series; Economic and Social Research Foundation *Poverty in The Region, Promoting Regional Integration, and Increasing Economic Growth And Welfare. Trade Policies And Agricultural Trade In The SADC Region: Challenges and Implications* Regional Synthesis Report (March, 2003) 15.

[14] Mills Soko 'Thrown in at the deep end: South Africa and the Uruguay round of multilateral trade negotiations 1986-1994' (2010)29(2) *Politeia Journal* 44 argues that South Africa is a developed nation. But for the purposes of this study, South Africa is treated as the most economically advanced SADC nation.

countries[15] and seven LDCs with majority of them being agrarian in nature.[16] This composition reflects a diverse community, marked by an imbalance in economic power. Coupled with the high level of regional poverty, the need for socio-economic advancement of SADC states cannot be underestimated.

Accordingly, article 5(a) of the SADC Treaty places the promotion of development and poverty reduction at the top of the objectives' list. This prioritisation provides the foundation (from a regional point of view) to pursue national development goals. This implies that even the rules that promote trade liberalisation should embrace the development agenda as well. This calls for effective legal frameworks, strong and committed leadership, including but not limited to a single state taking a dominant leadership role.[17] This a daunting task. It remains to be seen in the remaining parts of this chapter whether or not the rules on the use or removal of quantitative restrictions and SPS measures, their application and enforcement promote development in a manner that promotes balance between trade liberalisation and the pursuit of development programmes.

3 Special considerations for development purposes under the SADC protocol on trade

The fact that some of the members of the SADC are developing states[18] means that national development is crucial. That explains why the promotion of socio-economic development, eradication of poverty and improvement of the standard and quality of life throughout the

[15]Botswana, Mauritius, Namibia, Seychelles, Swaziland, Zimbabwe.

[16]Derived from the United Nations List of LDCs as recognised in the context of article XI(2) of the Marrakesh Agreement 1994.

[17]Paul Brenton & Barak Hoffman *Political Economy of Regional Integration in Sub-Saharan Africa* (2015) World Bank 5-7 argue that the presence of a strong leader is vital for successful regional economic integration.

[18] Botswana, Mauritius, Namibia, Seychelles, Swaziland, Zimbabwe; With the exception of South Africa see Mills Soko points out in 'Thrown in at the deep end: South Africa and the Uruguay round of multilateral trade negotiations 1986-1994' (2010) 29(2) *Politeia Journal* 8-10, 44 that the WTO classifies South Africa as a developed member. One other reasons for this classification was based on the World Bank's classification (during the apartheid regime) of South Africa as a developed country having conformed to the developed country per capita income. Accordingly, South Africa participated in the Uruguay round of trade negotiations as a developed country, and conformed to the rules on negotiations for developed countries. Matayawa Busieka 'The SADC trade protocol: a jurisprudential assessment' (2010) *African Institute of South Africa Occasional Paper* (No.29) 44 also confirms that WTO classifies South Africa as a developed country. But for the purposes of this study, South Africa is treated as the most economically advanced SADC nation.

Southern African region is the most important objective.[19] This prioritisation is justifiable due to the low standards and poor quality of life of its people caused by long term deprivation from socio-economic empowerment.[20] For that reason, SADC members are pursuing integration under the principle of variable geometry to allow a state that is not ready to proceed with integration to derogate.[21] The need for development also justifies certain specific exceptions such as the permission to enforce measures to promote development of infant industries.[22] These clearly show that development has really been given utmost priority in SADC, but how this is embraced in a region that seeks to integrate into a single community is crucial. More on this issue is discussed below, beginning with an analysis of specific SADC trade rules for regulating derogation from commitments to trade liberalisation.

3.1 Embracing the need to advance national development goals

When SADC members decided in 1996 that they would need to regulate the removal and or continuous usage of trade restrictions such as tariffs and NTBs through legislation, they ensured that the Protocol provided for such an intention. In that regard, article 3 of the Protocol (as it then was) mandated the committee of trade ministers to regulate the process of derogation in article 3(1)(*c*) of the Protocol as follows:

> 'Member states which consider they may be or have been adversely affected, by removal of tariffs and non-tariff barriers (NTBs) to trade may, upon application to Committee of Ministers of Trade (CMT), be granted a grace period to afford them additional time for the elimination of tariffs and (NTBs). CMT shall elaborate appropriate criteria for the consideration of such applications'.

[19] Article 5(1)*(a)* SADC Treaty.

[20] John-Mark Iyi 'The legal framework for sub-regional humanitarian intervention in Africa: a comparative analysis of ECOWAS and SADC regimes' (2012) 2(2) *SADC Law Journal* 291.

[21] Article 3(1)*(c)* which permits derogation is an example of the application the principle of variable geometry in SADC.

[22] Article 21 of the Protocol on Trade 1996 on protection of infant industries states as follows:

1. 'Notwithstanding the provisions of Article 4 of this Protocol, upon the application by a Member State, the CMT may as a temporary measure in order to promote an infant industry, and subject to WTO provisions, authorize a Member State to suspend certain obligations of this
Protocol in respect of like goods imported from the other Member States.
2. The Committee of Ministers responsible for Trade (CMT) may, in taking decisions under paragraph 1 of this Article, impose terms and conditions to which such authorization shall be subject, for the purposes of preventing or minimizing excessive disadvantages as those which may result in trade imbalances.
3. The CMT shall regularly review the protection of infant industries by a Member State applied in accordance with paragraph 1 of this Article'.

It is my argument that article 3(1)*(c)* of the Protocol permits SADC members to derogate from commitments to remove tariff and non-tariff barriers in accordance with the terms and conditions established by the CMT. Literally, this means that SADC members can be permitted by the CMT to deviate from their market liberalisation commitments. In fact, SADC states such as Tanzania and Zimbabwe have already exercised their rights under article 3(1)*(c)* of the Protocol. It is vital to point out that Tanzania submitted is request for derogation, ex-post, after it had already raised its tariffs on sugar and certain categories of paper.[23] That notwithstanding, the request was granted. In the case of Zimbabwe, its request for a two year derogation period was granted in light of the dire economic prevailing conditions at the time.[24] The fact that SADC states can apply for permission to derogate reflects a flexible regime. It is so flexible that Tanzania managed to derogate, before an approval had been granted by the CMT as the article requires. With such freedom, SADC members have the policy space to derogate in order to address any emergency economic situation. However, in the Tanzanian case, there was no indication of any evidence that there were any prevalent emergency conditions in Tanzania at the time. It is not also possible to determine from the available reports whether or not the CMT either strongly reprimanded (loosely used) Tanzania for such a practice or demanded a reasonable explanation for such failure. This kind of flexibility can be detrimental to the integration process should such a practice spread across the region. Strong and effective leadership would necessitate the CMT to clearly and strongly pronounce its position on such practices so as to guard the competitive advantage they have secured.[25]

Article 3 of the Protocol was amended through a formal agreement amending article 3(1)*(c)* of the Southern African Development Community in late 2016.[26] According to its preamble, it was vital to amend this provision so as

[23]USAID *Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade* (2011) 20-21.
[24] USAID *Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade* (2011) 21.
[25] *Argentina—Measures Affecting the Export of Hides & Imports of Finished Leather* Panel report WT/DS155/R (19 December 2000) paras 11.20-11.21, *Japan—Taxes on Alcoholic Beverages* II WT/DS8/R, WT/DS10/R, WT/D11/R,1996 p16, *Korea—Taxes on Alcoholic Beverages* Appellate Body report WT/DS75/A/B/R, WT/DS84/A/B/R (18 January 1999) paras 119-120, 127.

> ‘to remove the reference to Non-Tariff Barriers(NTBs) in Article 3 and to provide for the criteria for consideration of applications for a grace period by state parties that are adversely affected by the removal of tariffs and require additional time for their elimination’.

Paragraph 1*(c)* of article 3 of the Protocol is amended to read as follows:

> ‘That Member States which consider **that** they may be, or have been adversely affected by removal of tariffs to trade may, upon application to CMT, be granted a grace period to afford them additional time for the elimination of tariffs. The Criteria for the consideration of such applications is provided for in Annex X (Concerning Criteria for consideration of Applications under Article 3(c) of this Protocol’.

The amendment only removes the application for derogation from commitments on NTBs. However, SADC states still retain the rights under article 3(1)(c) of the SADC Protocol to apply for derogations from tariff phase down schedules. Literally, it simply means that before article 3 was amended, it actually permitted application by SADC member states for derogation from NTB removal commitments. Considering that the 2016 amendment removed (from its scope) the application for derogation from commitments on NTBs, it is clear that any matters dealing with the removal of NTBs or derogation therefrom, can only be dealt with in accordance with the stand still terms of article 6 of the Protocol.

My concern here is that despite the existence and operation of this standstill provision since the year 2000 (when the SADC Protocol entered into force), there has been an increasing usage of NTBs in SADC over the years as established in chapter 1 of this thesis. This means that the stand still provision has not been effective in addressing the problems associated with the usage and removal of NTBs. In its current terms, the possibility of the prevalence of NTBs rising is even higher. In that context, the amendment of article 3(1)*(c)* of the Protocol may not be able to fulfill its objective in the absence of specific rules for promoting a balance between national development and trade liberalization and if no other steps are taken to develop and strengthen the terms of article 6 of the Protocol. Accordingly, the situation deserves calls for a regime that can accommodate some of the underlying causes for which the use of NTMs (including NTBs) may be acceptable. It is in light of this consideration that I am of the view that rather than depend on a

stand still provision in the current terms, the provision should provide bench marks that stipulate the circumstances under which a state can be held to have failed to meet the terms of this provision. In the region such as the ASEAN, the traffic light rules' approach is being used to promote compliance by using the green, orange and red lights for guidance.[27] Perhaps SADC can pilot such a practice for a given set of products and period of time toward an effective implementation of the standstill terms of article 6 of the Protocol.

In the alternative, SADC could amend the standstill provision in such a way that it accommodates derogation in the terms and conditions analysed below. This analysis takes place within the context of the considerations and conclusions in *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (*United States—Cloves Cigarette).*[28]

3.2 Insight into possible modalities for derogating from the obligation to remove NTBs

The considerations and conclusions in *United States—Cloves Cigarette* may provide insights on the modalities that the CMT may rely on to consider whether or not to grant a request for derogation from commitments to remove NTBs. It should be mentioned from the onset that the claim in *US—Cloves Cigarette* focuses on the interpretation of certain terms of the WTO Technical Barriers to Trade agreement (TBT). The scope of this agreement applies to matters concerning technical barriers to trade, which is not within the scope of this study. However, the case is relevant to this particular sub-section of the study because certain principles enunciated by the panel and Appellate Body on article 2(12) of this agreement and the insights that can be drawn from such interpretation may be of relevance to the CMT's role under article 6 of the Protocol. Particularly, on the need for states to respect the time frames and any related conditions that the CMT may set with respect to a particular application. That said, the discussion below commences with an overview of the facts in *US—Cloves Cigarette.*

Briefly, in this case, Indonesia challenged the adoption and entry into force of the United States' Section 907(a)(1)(A) of the *Federal Food, Drug and Cosmetic Act* (FFDCA). Section

[27] Keane Jodie, Kali Massimiliano & Kennan Jane *Impediments To Intra Regional Trade In Sub Saharan Africa* (2010).

907(a)(1)(A) of the FFDCA was added to the FFDCA by Section 101(b) of the *Family Smoking Prevention and Tobacco Control Act* (FSPTCA).[29] Essentially, section 907(a)(1)(A) of the FFDCA prohibited the addition of certain flavours[30] into cigarettes. As a result of this prohibition, only 'cigarettes with characterising flavours, other than tobacco or menthol' were permitted into the United States' domestic market.[31] The provision was meant 'to protect the public health and to reduce the number of individuals under 18 years of age who use tobacco products'.[32] The FSPTCA became law in the United States on 22 June 2009[33] and in light of Section 907(a)(1)(A), it entered into force on 22 September 2009, just three months after its enactment.[34]

Indonesia challenged[35] the three month interval for being inconsistent with article 2(12) of the TBT Agreement. Article 2(12) of the TBT Agreement reads as follows:

> '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,

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[28] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* Report of the panel WT/DS406/R 2.

[29] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the Panel para 2.4.

[30] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the Panel para 2.4, Section 907(a)(1)(A) stated as follows: 'SPECIAL RULE FOR CIGARETTES—Beginning 3 months after the date of enactment of the Family Smoking Prevention and Tobacco Control Act, a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavour (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavour of the tobacco product or tobacco smoke. Nothing in this subparagraph shall be construed to limit the Secretary's authority to take action under this section or other sections of this Act applicable to menthol or any artificial or natural flavor, herb, or spice not specified in this subparagraph'.

[31] *US—Clove Cigarettes* Panel report para 2.1.

[32] *US—Clove Cigarettes* para 2.6 .

[33] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the Panel report para 2.5.

[34] Refer to the terms of Section 907(a)(1)(A) to the effect that 'SPECIAL RULE FOR CIGARETTES—Beginning 3 months after the date of enactment of the Family Smoking Prevention and Tobacco Control Act....'.

[35] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the Panel report paras 7.596-7.601 that the United States had failed to take account of its special financial, economic and development needs while developing this technical regulation as required by Article 12(3) TBT agreement provides that Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

> and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member'(emphasis added)'.

Indonesia argued that as an LDC, article 2(12) of the TBT gave it the right to enjoy a reasonable time before the law entered into force. The United States defended its decision and argued that it was not obliged to give a six months interval because this obligation had been qualified by the term 'normally' in paragraph 5(2) of the WTO Doha Ministerial Declaration.[36] Consequently, it argued that whether or not it had complied with the reasonable interval requirement had to be examined on a case by case basis and not across the board.[37] The panel agreed with the United States' argument that the 'the length of the interval' had indeed been qualified by the term 'normally' in paragraph 5(2) of the WTO Doha Ministerial Declaration[38] to the extent that a period shorter or longer than the six months interval is permissible. According to this interpretation, it means that any country that is developing a technical regulation need not give a reasonable interval of six months at all times. Depending on the circumstances, it can grant an interval which is shorter or longer than six months. Under such circumstances, it means that the concerns raised by a developing state during the development of this regulation may not necessarily be given priority especially, when a state decides to grant a shorter time interval.[39]

On the issue whether or not the United States had given reasonable interval for Indonesia, the panel concluded that it had failed to discharge that burden of proof.[40] The United States disagreed with this conclusion and filed an appeal. It argued that the panel had erred in its finding that it had not discharged the presumption of a prima facie case of inconsistency with

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[36] Paragraph 5(2) of the Doha Ministerial Declaration states as follows: 'Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean 'normally' a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued'; *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the Panel para 7.579.

[37] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the panel para 7.579.

[38] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R 2 September 2011 Report of the panel para 7.580.

[39] In *EC—Chicken Cuts (Article 21(3)(c)*Brazil failed to persuade the arbitrator for its status as a developing country to be considered in determining of reasonable time. In *US-Gambling (Article 21(3)(c))* where the United States successfully countered the argument by Antigua for a shorter period of time in favour of Antigua's developing country rules.

[40] *United States—Measures Affecting the Production and Sale of Clove Cigarettes* Report of the panel para 7.582-7.595

article 2(12) of the TBT agreement obligation because it was not obliged to provide the minimum six months interval. To resolve this particular issue, the appellate body set up three non-cumulative conditions to permit deviation from the reasonable interval requirement: there must be proof that there was an urgent circumstance; that the producers in the exporting country had the ability to meet the terms of the technical regulation; or proof that if the six months interval had been given, it would be impossible to fulfil the objectives of the regulation.[41] In that context, the appellate body concluded that the United States did not discharge that burden because it failed to satisfy any of these conditions.[42]

Regarding the requirement for reasonable time interval, the appellate body indicated that there was a justifiable cause for this requirement under the TBT agreement. Mainly, a reasonable interval is meant to give sufficient time for producers, particularly developing country producers to adjust to the terms of any new technical regulation.[43] It went on further to state that the interpretative clarification of this concept by the Doha Ministerial Decision in paragraph 5(2) made it a rule that producers in exporting member countries shall be given at least six months to adapt to the new technical regulations.[44] Through this interpretation, the Declaration gave the reasonable interval requirement a legally binding status.[45] By upholding the legality of the provision, the Appellate Body confirms the certainty of the terms of the provision on time intervals and enhances the strength of the decision in favour of developing countries by giving the decision a mandatory, rather than hortatory power.[46] This legality further enhances the degree of certainty of the reasonableness.[47]

The concern here is, of what significance for the SADC CMT are these findings from the *US—Clove Cigarette*? Significance should neither be narrowly nor strictly interpreted in the context of the TBT agreement only. But, it should be broadly interpreted so that the principles and findings in this case can be applied to other matters of trade regulation that do not strictly fall within the scope of the TBT agreement. In that context, significance of this case for the SADC

[41] *US—Clove Cigarette* Appellate Body report paras 282-283.
[42] *US—Clove Cigarette* Appellate Body report paras 293-296.
[43] *US—Clove Cigarette* Appellate Body report paras 287 & 289.
[44] *US—Clove Cigarette* Appellate Body report para 288.
[45] *US—Clove Cigarette* Appellate Body report paras 264-269, specifically para 267.
[46] *US—Clove Cigarette* Appellate Body report para 267.

CMT should be seen in light of how the CMT could rely or take into account any of the principles enunciated by the Appellate Body in promoting regulatory balance between economically advanced South Africa[48] and other SADC states which are still struggling to advance.

Bearing that in mind, the CMT should consider the requests for derogation in a manner and under circumstances that will not make it difficult to achieve the terms of the SADC treaty.[49] In that regard, it may be possibly significant for the CMT to: first, determine the reasonable time within which derogation may be permitted to be in force. Reasonable time may be a minimum of six or more months depending on the circumstances of each case. Secondly, it is necessary to set certain conditions that can ensure that the period it has granted for the legality of the derogation is respected and complied with. Thirdly, upon the expiration of this period, the respective SADC member must submit a report to the CMT within 30 days from the date of the expiration of such period. Should a SADC member desire an extension of the period of derogation, such an application should be filed within this 30 days period before expiration of the existing period, with justifiable reasons for such extension. In the event of an emergency, a SADC state should be permitted to derogate immediately. However, such a state must submit an ex-post application in that regard. Proof of such emergencies must be provided as well.

Any SADC member that chooses to deviate from the conditions set by the CMT must justify such deviations. In my view, this burden on the responding member is a high one. As a result, it may be insufficient for a SADC member state to deviate without a legally acceptable cause.[50] This means that any SADC member that seeks to enforce a particular measure contrary to these rules must provide sufficient proof. In fact, if a regulation or a measure is intended to be enforced in a manner that does not favour the developing country members, it is a measure that

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[47] *US—Clove Cigarette* Appellate Body report para 288.
[48] With a very progressive legal system where laws are constantly revised.
[49] Article 6(1) SADC Treaty states that the SADC members will not act in a manner that will undermine the terms of the treaty.
[50] *US—Clove Cigarette* Appellate Body report paras 295-296 the appellate body was not convinced with United States' argument that the technical regulation was meant to protect health. This argument was insufficient to entertain a deviation from the obligation to give a reasonable interval.

should not be tolerated unless sufficient explanation is provided.[51] From a development point of view, this particular conclusion recognises that least developed states[52] could be adversely affected by certain decisions or actions. Accordingly, just like in *Chile—Alcoholic Beverages*, a country's position as a developing country should be taken into account when decisions are being made.[53]

Such reasoning, coupled with the proactive approach of the Appellate Body in *US—Clove Cigarettes* sets the bar higher for any state that seeks to disregard the time frames within which a specific action ought to be performed. Such judicial proactiveness works in favour of the economically weaker states. The CMT needs such proactiveness to counter their political affiliations and biases that could possibly affect the performance of their duties. Within such a liberalised environment, SADC states can also initiate review of measures for the mutual benefit of all SADC members. These could possibly give the least developing states of SADC the opportunity to explore the possibility of engendering a balanced approach in dealing with requests and review of derogations and any incidental matters. Whether or not the application of these principles may be effective in reality necessitates an analysis of its impact on the operations of the CMT.

4 Consensus as a mode of decision making in WTO/GATT and SADC

The proceeding discussion briefly examines the rules on consensus at the WTO/GATT to provide the contextual legal position to which SADC subscribes and also highlight any possible aspects that SADC can maintain or adopt or deviate from in favour of an effective decision making process through consensus.

[51] In fact, the argument by the United States that the Indonesian producers had failed to adjust their production methods within sixteen months, also fell short of the required standard to discharge the burden. For the appellate body, the fact that producers in developing states could not adapt even after a period of sixteen months meant that the Indonesian producers needed a longer period within which they should adjust *US—Clove Cigarette* Appellate Body report para 294.

[52] As noted earlier, I am aware of the concept of special and differential treatment in the WTO regime. However, this concept is not part and parcel of this study.

[53] *Chile—Taxes on Alcoholic Beverages—Arbitration under Article 21(3)(c)* of DSU WT/DS87/15, WT/DS110/14 May 23, 2000 Panel report para 44.

4.1 WTO decision-making through consensus

Article IX(1) of the Marrakesh Agreement establishes the mode of decision-making at the WTO as follows:

> 'The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement'.

This provision indicates that consensus is the preferred form of decision-making, unless the Marrakesh Agreement states otherwise. For an explanation on what constitutes consensus, footnote 1 to article IX(1) of the Marrakesh Agreement states that a WTO decision is deemed to have been reached by consensus 'if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'. Through this process, consideration is given to the 'no objection' option as opposed to the 'all must agree' option, with the former being applied by default.[54]

Article IX(1) of the Marrakesh Agreement reproduced above provides for voting as a remedy in the event of failure to reach consensus. By providing for voting, on a one member one vote, the WTO creates an opportunity to promote effective decision making in situations where a deadlock or impasse becomes a stumbling block to progress. Thus, an objection by a member to a proposal should not derail the decision-making process. That notwithstanding, the WTO rarely decides matters through voting.[55] This implies two things: On one hand, the members may have an honest preference for consensus as a means of decision-making to voting particularly in light of the fact that it is seen as a system which generates the highest level of legitimacy because it

[54] Patrick Low *WTO Decision-Making for the Future* (2011) Staff Working Paper ERSD (No.5), 5.

[55] Saurombe A & Nkabinde HIV 'Reforming the multilateral decision-making mechanism of the WTO: what is the role of emerging economies (2013) 16(5) *PER/PELG* 436; Jaime Tijmes LHL 'Consensus and majority voting in the WTO' (2009) *World Trade Review* 422.

accords to the principle of sovereign equality of states.[56] On the other hand, it could also imply that the WTO members have devised modalities or strategies for breaking an impasse or deadlock during any decision making process. Past experience during GATT years revealed the use of either coalition by developing states to push for the inclusion of pro-development initiatives in forthcoming trade rounds.[57] In some instances, coercion and asymmetrical bargaining could be used to engender skewed decisions in favour of powerful or economically powerful member states.[58] For fear of retaliation or isolation, the weaker or smaller states hardly object to a proposal.[59] This imbalance in power and its consequential effect on weak and small states denies the decision making process of what should be a truly transparent and democratic system.[60]

A fundamental gap in article IX(1) of the Marrakesh Agreement is the lack of benchmarks to create certainty on how consensus can be attained.[61] Consequently, it also becomes difficult to determine or identify circumstances that warrant a conclusive position that indeed there was an 'absence of opposition'.[62] Along that line, it is not clear whether non-attendance could be another expression of disagreement.[63]

Considering that the Protocol was registered with the WTO, its rules need to reflect the fundamental WTO principles. In that regard, the main point of concern is whether the Protocol sets clear and strong provisions that could engender efficient development and adoption of rules

[56] Richard Steinberg H 'In the shadow of law or power? consensus-based bargaining and outcomes in the GATT/WTO' (2002) 56(2) *International Organisation* 361.
[57] Richard Steinberg H 'In the shadow of law or power? consensus-based bargaining and outcomes in the GATT/WTO' (2002) 56(2) *International Organisation* 350-351
[58] Saurombe A & Nkabinde HIV 'Reforming the multilateral decision-making mechanism of the WTO: what is the role of emerging economies (2013) 16(5) *PER/PELG* 435-436.
[59] Rajesh Babu R 'Decision making in the WTO: from negotiated law-making to judicial law making in Julien Chaisse & Tsai-Yu Lin *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (2016) 493; Jaime Tijmes LHL 'Consensus and majority voting in the WTO' (2009) *World Trade Review* 422..
[60] Rajesh Babu R 'Decision making in the WTO: from negotiated law-making to judicial law making in Julien Chaisse & Tsai-Yu Lin *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (2016) 493.
[61] Saurombe A & Nkabinde HIV 'Reforming the multilateral decision-making mechanism of the WTO: what is the role of emerging economies (2013) 16(5) *PER/PELG* 436.
[62] Saurombe A & Nkabinde HIV 'Reforming the multilateral decision-making mechanism of the WTO: what is the role of emerging economies (2013) 16(5) *PER/PELG* 437.
[63] Patrick Low *WTO Decision-Making for the Future* (2011) Staff Working Paper ERSD (No.5), 5.

that promote effective regulation of the use of NTMs. It is this concern that is examined under sub-section 4.2 below.

4.2 Consensus under the SPS annex to the SADC protocol on trade

The application of SPS measures in the SADC is regulated by the coordinating committee in terms of the SPS Annex to the SADC Protocol on trade. This committee is constituted by two representatives of each national committee on SPS measures.[64] In terms of decision making, the coordinating committee together with the SADC institutions such as the summit and the standing committee all make decisions through consensus.[65] All these institutions play a significant role at their various ranks within the SADC leadership. For the SADC regime to prescribe decision making by consensus implies that it is a fundamental aspect of the integration process. It is the emphasis on consensus, even under the SPS annex that is a point of interest in this section of this chapter. For that matter, the analysis within this section examines whether the procedural rules on consensus either promotes a rational, objective approach to issues that exemplifies a balance in the regulatory process. This analysis does not necessarily focus on the activities or decision making processes of the SPS coordinating committee per se due to lack of information in that regard. Accordingly, the rules on consensus is examined generally, but with the view that the insights drawn from this analysis could possibly give an indication of the procedural challenges (within the context of consensus) the SPS coordinating committee may face while regulating the application of SPS measures. For that matter, the factual situations explained below relate to matters beyond state actions or deliberations regarding SPS measures alone due to the lack of information on the activities of the SPS coordinating committee.

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[64] Article 14(1) of the SPS Annex.

[65] Article 14(1) of the SPS Annex to the SADC Treaty states that the SADC sanitary and phytosanitary coordinating committee shall meet as often as required, and shall reach all its decision by consensus; article 19 of the SADC Treaty states that except as otherwise provided in this Treaty, decisions of SADC institutions shall be carried by consensus; Article 10(8) subjects the decision by the Summit to the procedural requirements of SADC Treaty article 8(4) which states that the admission of any state to membership of SADC shall be effected by a *unanimous decision* of the summit; article 11(3)(6) SADC Treaty requires the council to make decision through consensus, article 13(7) SADC treaty states that the decision of the standing committee shall be taken by consensus; article 14(7) of the SPS Annex to the SADC Protocol on trade states that The SADC Sanitary and Phytosanitary Coordinating Committee shall meet as often as required, and *shall reach all its decision by consensus*.

A case in point is the refusal by the government of Zimbabwe to abide by the decision of the defunct SADC tribunal in *Mike Campbell & Another v Republic of Zimbabwe* [66] when the tribunal found that its actions against white farmers were arbitrary and racially discriminative.[67] Zimbabwe refused to respect the decision of the tribunal because the latter lacked the pre-requisite authority to make legally binding decisions.[68] This was subsequently followed by the suspension of the tribunal by the SADC Summit.[69]

On another note, an allegation was raised against Zimbabwe that it had imposed a ban against the importation of poultry products from South Africa without any scientific basis.[70] The WTO SPS agreement requires that any health protection measure should be based on scientific evidence.[71] However, for this case, it was indicated that the ban was precipitated by domestic pressure against foreign imports and for the protection against South African imports.[72] On a similar note, Zambia is also reported to have given in to domestic pressure to ban the importation of milk and exportation of maize at some point in time.[73] These scenarios indicate the strong effects that domestic demands may have on government decisions to impose restrictions against imports.

It may seem appropriate to argue that the promotion of national interests plays a significant role in determining whether or not a state will comply with its regional commitments. Yet, deliberate non-compliance with the pre-requisite rules creates the impression that SADC states do not take seriously, the legally binding obligations which they have undertaken. This kind of behavior makes it appear that there is a consensus in the region that SADC members can violate these

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[66] *Mike Campbell & Another v Republic of Zimbabwe* SADC Tribunal decision, Case no SADCT: 2/07, (2007).

[67] *Mike Campbell & Another v Republic of Zimbabwe* SADC Tribunal decision, Case no SADCT: 2/07, (2007) para 45-55.

[68]Frederick Cowell 'Death of the Southern African development community tribunal's human rights jurisdiction' (2013)1 *Human Rights Law Review* 7, Human Rights Watch "SADC: Q & A on the tribunal, regional courts future hangs in the balance" available at https://www.hrw.org/news/2011/08/11/sadc-qa-tribunal (accessed 6 March 2017).

[69]Southern Africa Development Community at http://www.sadc.int/about-sadc/sadc-instituions/tribun/; Erasmus Gerhard *Another Chapter in the SADC Tribunal Saga: South African Confirms the Tribunal's Order*, Tralac Working Paper S12W09/2012, 1.

[70]Byo24News "Zimbabwe chicken ban hits South African Company exports" *Bulawayu 24 News* available at http://bulawayo24.com/index-id-news-sc-national-byo-967.html (accessed 16 March 2017).

[71] Article 2 and 5 of the WTO SPS Agreement.

[72] http://www.africa-agri.com/sa-poultry-producers-slam-zimbabwean-import-ban/ (accessed 22 March 2017).

[73] Kalaba Mmatlou *Zambia Moving Ahead: Private Sector Space, Barriers to Agriculture & Trade* (2012) Vol.2 No.4, section 5.3.

obligations at their own will.[74] Such perceptions do not create a favourable environment for successful cooperation in regulating the use and removal of SPS measures. Do the rules of the Protocol regarding consensus[75] permit win-win decision making processes? This is explored below.

4.3 Lack of clarity regarding the process of consensus

As much as consensus is the main decision making procedure,[76] nowhere in the SADC Treaty or SPS Annex are there any specific definitive features of consensus. In general terms, consensus can be ordinarily defined as a 'general agreement'.[77] This is a generalised meaning of this term and in the absence of any commentary in the SPS Annex on the modalities of how consensus should be carried out, this creates room for any non-compliant SADC member to veto any policy which is not favourable to it.[78] Such a legal environment would not be favourable for establishing a united forum for regulating the use of NTMs. The situation is even made worse by the fact that the provisions on consensus have been clouded in vague language with wide discretions which entrench legal uncertainty.[79] This makes it easy for a member state to frustrate the 'achievement of the required consensus'[80] since there is no provision that could help break an

[74]Tapiwa Shumba 'Revisiting legal harmonisation under the southern African development community treaty: the need to amend the treaty' (2015)19 *Law, Democracy and Development* 143 (starts from pp 127-147).

[75] Article 3 & 6 of the SADC protocol on trade gives powers for the leaders as well as members to address the problem of non-tariff barriers. In making these decisions, article 19 of the SADC Treaty requires that they proceed by way of consensus unless otherwise. Even in article 14(7) of the SPS Annex to the SADC Protocol on trade requires the coordinating committee to decide by way of consensus.

[76] Article 14(1) of the SPS Annex, articles 19, 10(8), 8(4), 11(3)(6), 13(7) of the SADC all relate to the use of consensus. Refer to footnote 62.

[77] 2nd (ed) (2010).

[78] Erasmus G *What has Happened to the Protection of Rights in SADC?* Tralac (2012) 3.

[79] Erasmus G 'Is the SADC trade regime a rules-based system?' (2011) *SADC Law Journal* 17-34; article 33 (1)(a)&(b) of the SADC Treaty states that sanctions may be imposed against any member state that persistently fails without good reason, to fulfil obligations assumed under the Treaty; implements policies which undermines the principles and objectives of SADC. 'May' in the preceding provision gives immense discretion to the SADC leadership when assessing issues of this kind. It is questionable as to why, the SADC leadership would even have the discretion not to enforce a sanction against a member that has persistently failed to comply. Again, the SADC leadership seems to be applying double standards when confronted with issues surrounding enforcement of policies that undermine the principles and objectives of the Treaty. A case in point is the way in which failed to sanction the refusal by Zimbabwe to abide by the then, SADC Tribunal's decision, and yet previous to that, the leadership had suspended Zanzibar from SADC membership on political grounds. The requirement for a *unanimous decision* of the Summit by article 8(4) of the SADC Treaty is vague because it is not clear whether or not this means consensus.

[80] Erasmus G *What has Happened to the Protection of Rights in SADC?* Tralac (2012) 3.

impasse during decision making.[81] It is in such moments that a reflection of strong leadership is expected, with either the chairperson of the SADC or the most powerful state taking the lead to break the impasse.[82] There are mixed views regarding the leadership role of advanced South Africa in SADC.[83] Some have said that it is a failure because it did not condemn Zimbabwe's objection to the decision of the SADC Tribunal (the suspended tribunal).[84] With the lack of strong leadership, coupled with fears of economic losses[85] and limited political will,[86] it is not certain whether SADC members can break an impasse or reach a consensus without it being vetoed.

Within this legislative gap, it is difficult to understand how a consensus may be attained As much as it is possible to establish the intentions and scope of this form of procedure in terms of article 31(1) of the VCLT, it is a lacuna in the regime for the members to have left out the details on the elements of a legally binding decision by consensus. This is a very serious error in light of the fact that SADC states are governed by different ideologies and consensus is a central

[81] Saurombe A 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) (15)2 *PER/PERL* 461.

[82]Saurombe A 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012)(15)2 *PER / PELJ* 462-462 also argues that the process for selecting a SADC chairperson is not very straight forward as a result of the weaknesses in consensus as a form of decision making. As a result, it is not always the best qualified candidate that gets chosen for the position of a chairperson. Such a procedure impacts on the process of integration either positively or negatively.

[83]Saurombe Amos 'The role of South Africa in SADC regional integration: the making or breaking of the organisation' (2010)5(3) *Journal of International Commercial Law and Technology* 125-127, 128.

[84]Peter Fabricius "Selfish JZ allowed Mugabe to kill SADC tribunal" *iol* 3 March 2013 available at http://www.sadc.int/files/3613/5341/5517/SADC_Jubilee_Summit_Communique.pdf.pdf (accessed 22 March 2016); Sapa "Zuma suggests alternative SADC tribunal" *the Citizen* 6 November 2013 available at http://www.citizen.co.za/81071/zuma-suggests-alternative-sadc-tribunal (accessed 22 March 2017).

[85] Integration is seen by some states as a means for extending political control. From an economic point of view, it is seen by the less economically advanced economies as a means of polarisation as resources and development move toward the most advanced states. See Paul-Henri Bischoff 'Regionalism & regional co-operation in africa: new century challenges and prospects' in John Mukum Mbaku, & Suresh Ch *Africa at Crossroads-Between Regionalism and Globalisation* (2004) 132; according to Colin McCarthy 'Is African economic integration in need of a paradigm change? thinking out of the box on African integration' the linear model of integration from FTA to Customs Union through to a Common market, and onwards leads to polarisation, leaving the initially smaller and less developed countries with less development as services and industrial investments move to the economies with bigger markets and facilities.

decision making procedure.[87] To move forward, I am of the view that the uncertainty in the procedural rules needs to be addressed through a more specific description of consensus, with details on the principles on how it should be carried out.[88] Its improvement is likely to make a positive contribution to effective regulation of SPS measures alongside the promotion of development. To this effect, SADC can learn from the East African Community's Court of Justice's (EACJ) advisory opinion on how to interpret and apply the law on consensus. Below is a brief on the advisory opinion of the EACJ to the EAC.

4.4 Addressing the dilemma associated with unclear rules on consensus: the EAC case study

The EAC is a regional economic community comprised of five states[89] operating with a common market. It was during the negotiation for the establishment of a common market[90] that EAC members faced a dilemma on the meaning of consensus *vis a vis* the application of variable geometry.[91] Apparently, the uncertainty surrounding the term 'consensus' was really slowing down the integration process in the EAC, it was therefore pertinent for the court to give clarity.[92] Therefore, the EAC Secretariat was tasked to seek an advisory opinion from the EACJ in the *Matter of a Request by the Council of Minister of the East African Community for an Advisory Opinion*.[93] The relevant issues to this discussion were: whether the requirement on consensus implies unanimity of the partner states;[94] whether it involves two thirds majority or a simple majority.[95]

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[87] Articles 11(6), 13(6) & 19 of The SADC Treaty establish the use of consensus as the procedure for decision making unless otherwise provided for in the treaty. I still consider that the procedure is a fundamental part of the decision making in the integration process. Therefore, a commentary should have been provided for clarity.

[88] Mark Chingono & Steve Nakana 'The challenges of regional integration in southern Africa' *(*2009) 3(10) *African Journal of Political Science and International Relations* 396.Within South Africa both capitalist and communist ideologies exist; in Tanzania, the ideals of socialism are still strong in many communities.

[89] Uganda, Kenya, Tanzania, Rwanda & Burundi.

[90] Article 76 of the Treaty for the Establishment of the East African Community, the Treaty was signed on the 20th November, 2009 available at http://eabc.info/node/410 (accessed 15 March 2017).

[91] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No. 1 of 2008.

[92] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp6-17.

[93] Application No.1 of 2008.

[94] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No. 1 of (2008) pp12 & 20,

In addressing these issues, the EACJ pointed out that the EAC Treaty did not define consensus in terms of whether it means unanimous, absolute, qualified or simple majority.[96] It further pointed out that this lacuna has been filled with the association of consensus with unanimity[97] despite the fact that these two concepts did not mean the same thing.[98] Since the association of consensus with unanimity had no basis in the EAC Treaty, there was no need to treat the two concepts as meaning the same thing.[99]

The EACJ then recommended that the relevant instruments should be amended. Frimpong wonders why the EACJ referred the matter back to the EAC legislative assembly, instead of providing the guidance as had been sought.[100] Perhaps, the Court did not want to usurp the rule making power of the EAC legislature. But, by honouring that mandate, the EACJ could not give a conclusive position regarding the meaning of consensus. Nevertheless, it made it clear that any concepts, perceptions and practice that had no foundation in the Treaty should not be associated with 'consensus'.[101] It would mean that any commentary or interpretation of 'consensus' in EAC had to be understood in terms of the objectives and purpose of the EAC treaty. With this, the mantle was given back to the EAC legislature to clarify the meaning of 'consensus' so that from that date onwards, regional practices involving consensus would have to be in line with the existing regional rules on economic integration. This advisory opinion is not in any way binding on SADC members, but persuasive on the issues that SADC legislators can look out for when addressing the gaps in the rules on consensus.

Frimpong Oppong Richard in *Legal Aspects of Economic Integration* in Africa (2011) 132 summarises them into two questions.

[95] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp16-17.

[96] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp38.

[97] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp37-38.

[98] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp37-38.

[99] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp37-39.

[100] Frimpong Richard Oppong *Legal Aspects of Regional Economic Integration in Africa* (2011) 132.

[101] *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion* in the East African Court of Justice at Arusha First Instance Division Application No.1 of 2008 pp37-38.

In addition to the preceding insights, other secondary sources of information may also provide additional insights for determining a more suitable meaning of consensus for SADC. As Mirja puts it, there are certain factors which should be taken into consideration when defining consensus. First, during the meeting of the member states, all members present must be given a legitimate opportunity to present their case;[102] secondly, such members must be listened to; thirdly, there must be unanimity; and fourthly, if a small number of the states which are present in the meeting dissent, that position should not stop the vast majority from adopting the decision.[103] What is not clear here is the standard measurement of the 'small number of members' present' and 'vast majority'. In addition, the argument in favour of unanimity differs from the WTO approach which relies on the option of 'no objection option' as opposed to unanimity.[104] These gaps still leave space for uncertainty as to suitable rules and procedure for consensus in SADC.

For a more effective decision making system through consensus in SADC, it may also be important for consensus to be defined and described in clearly specified terms in the SADC context, without losing sight of the WTO approach. For region specific set of rules and procedure on consensus, it may be necessary for SADC to consider whether consensus should be associated with simple and substantial majority. In that regard, it should also clearly explain in statistical terms what would constitute a simple or substantial majority.[105] Considering that the SADC is constituted by an odd number of 15, simple majority can be agreed at 8 out of 15 members and a substantial majority at 13 out of 15. This essentially means that where a policy has been proposed for adoption, provided 8 members supported the proposal or the policy, consensus would have been reached. The same principle can apply to instances where 13 out of 15 members agreed with the decision. Approval and rejection of a policy or proposal must be

[102] Mirja Hanson P *Clues to Achieving Consensus: A Leader's Guide to Navigating Collaborative Problem Solving* (2005)2.
[103] Mirja Hanson P *Clues to Achieving Consensus: A Leader's Guide to Navigating Collaborative Problem Solving* (2005)2.
[104] Patrick Low *WTO Decision-Making for the Future* (2011) Staff Working Paper ERSD (No.5), 5.
[105] In light of limited access to official or secondary communication on such procedures, the views expressed under this sub-section are theoretical than factual.

explicit.[106] Absentee member(s), would be bound by the outcome of the decision making processes only when they have expressly indicated so. As a matter of caution, these statistical figures are mere proposals but the underlying principles related to the use of figures may be relevant for SADC SPS coordinating committee.

To simplify the process even further, consensus should be limited to the core SADC SPS policy issues only.[107] The difficulty with this lies in the ability to effectively distinguish the core from the periphery.[108] To deal with this, it is advisable for the proposed amendments to identify and categorise agricultural export earning products of each SADC member in a hierarchical order with the top export earner for each country at the top of the list. With this, the highest export earner, which is the subject of an unnecessary SPS measure, becomes part of the core policy issues, subject to consensus. Accordingly, SPS measures relating to other insignificant export earners can be categorised as matters at the periphery. These can be left out of consensus. The coordinating committee should be tasked to request and obtain each SADC member country's main export earning agricultural product.

In conclusion, it is clear that consensus is the main procedure for making decisions in SADC, even under the SPS Annex. However, the challenge with this procedure lies in the uncertainty that surrounds its meaning and terms of procedure. This uncertainty makes the system vulnerable to veto or opposition of policies or decisions which may not be particularly favourable. Coupled with the lack of a strong political will especially from the economically powerful states, it is uncertain whether the region can develop stronger rules for regulating the application and removal of SPS measures. With these procedural challenges, it is difficult to foresee how the least developing SADC states can effectively win the support of their stronger counter parts during deliberations on very contentious and sensitive issues affecting the usage of SPS

[106] Thanh Nguyen, Quynh Nguyen & Phong Pham 'Decision making by consensus in the WTO' (2012) 6 who notes that in the WTO, silence does not amount to rejection of a decision.

[107] Teresa Thorp 'The rule of law and the implementation of an economic acquis communautaire in Sub-Saharan africa: legal challenges for east African community' in Christoph Hermann & Jorg Philipp Terhechte (eds) (2012) *European Year Book of International Economic Law,* 521.

[108] Teresa Thorp 'The rule of law and the implementation of an economic acquis communautaire in Sub-Saharan Africa: legal challenges for east African community' in Christoph Hermann & Jorg Philipp Terhechte (eds) (2012) *European Year Book of International Economic Law,* 521.

measures. It may also make it difficult to address the development related trade restrictions and the enforcement of rules pertaining to SPS measures in a balanced manner. Apart from these challenges related to the use of consensus, there are also other non-legal factors which may affect the establishment of a balanced regulatory system when regulating the use of quantitative restrictions and SPS measures.

5 Administrative challenges and advancement of national interests

The explanation below indicates the extent to which certain national domestic needs and challenges may sometimes affect the regulation of quantitative restrictions and SPS measures. The analysis mainly considers specific licensing procedures and their effects on trade. I have chosen to examine matters pertaining to licensing procedures because they are a form of quantitative restrictions under GATT article XI as well as the Protocol. This analysis aims to illustrate the challenges of regulating trade at a time and place where the need to pursue national interests is a pressing concern.

In 2012, the South African Tristan Export Company indicated that it faced significant hurdles in obtaining licenses from the South African authorities for exporting fish to its business partners in other SADC countries.[109] The South African coastal management (Department of Agriculture, Fisheries and Forestry) required that exporters obtain an export permit for each fish species for each export consignment.[110] Tristan found this requirement to be very costly due to the fact that its consignments usually consisted of many fish species and yet they were required to pay R200 for each species.[111] Apart from these monetary costs, the whole approval process was said to be

[109] South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export* (2012) 2 SADC Business Case Studies available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 March 2017).

[110] South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export* (2012) 2 SADC Business Case Studies (2012) 2 available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 March 2017).

[111] South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export* (2012) 2 SADC Business Case Studies available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 March 2017).

slow because a permit 'took a week to be issued'.[112] In the company's view, the whole process was inefficient and in the event that there was a need for immediate delivery, the delay amounted to a trade restriction.[113] As much as this licensing requirement was introduced to protect domestic supply[114] the delays were considered unreasonable by this export company.

Since SADC members affirm their rights and obligations in the WTO agreement,[115] they are bound by the terms in the WTO covered agreements, including the WTO agreement on import licensing procedures. The latter requires immediate issue of licenses under an automatic licensing system but in any event, not exceeding 10 working days' period.[116] For the case of Tristan Export, a seven day approval process should ordinarily be consistent with the preceding rules. Accordingly, the delay should not be an NTB since the permits were being issued within less than the 10 days' period set by the WTO law on licensing. However, since the seven day approval process was set up purposely to protect the South African domestic market, it is clear that, from a legal point of view, this aim was protectionist in nature. It would be right to refer to such a procedure as an NTB. But, from a SADC point of view, especially in light of the domestic challenges in South Africa, whether or not a trade restriction enforced under such circumstances is consistent or otherwise is uncertain. It could be in the interest of SADC members to include a specific provision that accommodates such situations.

On a similar note, another report also indicates that it took about three years before the Zambian authorities issue an export permit to a South African exporter of 'processed beef and pork from South Africa' into Zambia.[117] The WTO agreement on import licensing procedures also indicates

[112] South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export* (2012) 2 SADC Business Case Studies available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 March 2017).
[113] South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export* (2012) 2 SADC Business Case Studies available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 March 2017).
[114] South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export* (2012) 2 SADC Business Case Studies available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 March 2017).
[115] Preamble to the Protocol.
[116] Article 2(2)*(a)(iii)* of the agreement on import licensing requires that the approval of applications must be granted immediately, but in any case not exceeding ten days from the date of submission of application
[117] Gillson Ian *Deepening Regional Integration to Eliminate the Fragmented Good Market in Southern Africa* (2010) Trade Policy Notes. No.9.

that in the case of non-automatic licensing system, a period of not more than 60 working days' maximum is legally acceptable as a period within which an application may be under consideration, to accommodate administrative challenges that WTO members may face during the approval process. For that matter, a delay of three years by the Zambian authority is over and above the 60 days limitation timeframe within which administrative challenges would be excusable.[118] As much as the unreasonably long period of approval was caused by administrative challenges, it is still a trade restriction, which adversely affected trade by denying any import opportunities of that product. The WTO regime on licensing would find it to be a GATT inconsistent measure unless clearly justified.

Going by the analysis in chapter two, the restrictions such as those enforced by South Africa and Zambia above should fall in the categories of NTBs because such measures may not be justified by any WTO/GATT provision by virtue of the aim and the manner in which they are enforced. Yet, from a development oriented point of view, particularly from the SADC point of view, it may be difficult and contrary to rules of equity to condemn such measures as NTB, without due consideration of the underlying factors. Regulatory balance would necessitate that the regulation of such matters should not be exclusively evaluated from a purely legal point of view. In that regard, it may be necessary to revise the terms of specific provisions of the Protocol such as articles six, seven, eight, and nine so that they explicitly indicate specific illustrative conditions or circumstances under which a restriction is an NTB or an NTM. In addition, the revised rules should particularly and explicitly provide terms that suit the exceptional and peculiar socio-economic conditions which are prevalent in SADC.

Having analysed the implications of the interface between the legal and non-legal factors in advancing development goals alongside trade liberalisation, the discussion in section six below examines whether the SADC rules for settling complaints relating to NTMs offer an effective procedural avenue for determining the legality of NTMs in a balanced manner.

[118] Article 3(5)*(f)* Agreement on import licensing procedure.

6 The effect of trade dispute settlement mechanisms in SADC on the regulation of non-tariff measures

Respect for institutional functions and power is very important for the development of strong and effective regional economic institutions.[119] In the case of SADC, the Protocol has established specific institutions to ensure successful co-operation amongst the SADC members. Such institutions include the dispute settlement panel and the tribunal[120] to resolve trade disputes in a manner that promotes peaceful cooperation.[121] Accordingly, SADC members have been called upon to settle trade disputes amicably, but, if need be, a panel of trade experts will be established to resolve the dispute through adjudication.[122] A detailed explanation on the establishment and functioning of the panels is provided in Annex VI to the Protocol on Trade. But, these aspects are not analysed here since they do not fall within the scope of this thesis.

Against that background, the following analysis examines specific rules on the scope of jurisdiction and the procedure for addressing complaints arising from NTMs in the Protocol.

Article 1 of Annex VI to Protocol provides that the rules and procedures in the Annex 'shall apply to settlement of disputes between the member states concerning their rights and obligations under' the Protocol. This means that the Panel has the power to handle disputes arising within the context of the Protocol. When Annex VI was amended in 2007, article 1*bis* was inserted that 'once a member has invoked the provisions of the Annex or any other international dispute settlement rules with respect to any matter, that member is not permitted to invoke any other dispute settlement mechanism on the matter'. For Clement, this amendment limits forum shopping so that as soon as a choice on forum has been made, that mechanism is irrevocable or irreversible.[123] He continues to say that the provision also implies that a state has the option to

[119] Gerhard Erasmus "Is the SADC trade regime a rules based system" (2011) 1 *Southern African Development Community Law Journal* 31.
[120] A new Protocol has been adopted for the establishment of a new Tribunal.
[121] Article 4*(c)* & *(e)* SADC Treaty provides some of the principles upon which the organisation is founded: rule of law, and peaceful settlement of disputes.
[122] Article 32(1)(2)(3)(4)(5) SADC Protocol on trade 1996.
[123] Clement Ng'ong'ola 'Replication of WTO dispute settlement procedures in SADC' (2011) 1 *SADC Law Journal* 52.

choose other forums over SADC dispute settlement.[124] This is ambiguous[125] because on one hand, it is permitting flexibility on the choice of forum, yet, at the same time, it is restricting forum shopping. In fact, the restriction against forum shopping is inconsistent with article 23 of the DSU which permits WTO members to invoke the rules of the DSU for settling disputes.[126]

The restriction against forum shopping also means that once a SADC member has opted to settle a dispute involving an NTM under the SADC NTB monitoring mechanism;[127] it cannot seek legal redress under any other forum. This is discouraging to the private sector since the SADC NTB monitoring mechanism scheme is merely an administrative system that has not been incorporated into the Protocol. Whether or not SADC has adopted specific rules which should regulate settlement of complaints of this nature is uncertain. This possibly means that the decisions that emanate from it are not legally binding on the parties. This places the success of the system at the mercy of national political will. The discussion on the implementation through consensus already indicates that political will has a way of tilting the balance against efforts to liberalise trade. Perhaps the rules on dispute settlement under Tripartite Free Trade Agreement (TFTA) may provide significant insights on how the SADC regime can be improved. In that regard, the analysis in section seven below examines the extent to which the rules could effectively regulate the settlement of complaints arising from the application of NTMs.

7 Brief overview of the tripartite free trade agreement (TFTA)

Generally, disputes arising in the context of any provision of the TFTA must be settled in accordance with its terms. These rules are provided in annex 13 of the TFTA. Annex article 3(3) of this Annex states that subject to any special or additional provisions on dispute settlement, this Annex shall apply to dispute resolution under this agreement. This means that as far as the TFTA

[124] Clement Ng'ong'ola 'Replication of WTO dispute settlement procedures in SADC' (2011) 1 *SADC Law Journal* 52.
[125] Clement Ng'ong'ola 'Replication of WTO dispute settlement procedures in SADC' (2011) 1 *SADC Law Journal* 52.
[126] Clement Ng'ong'ola 'Replication of WTO dispute settlement procedures in SADC' (2011) 1 *SADC Law Journal* 52.
[127] UNCTAD *Non-Tariff Measures and Regional Integration in the Southern African Development Community* (2014) 12-13.

is concerned, disputes arising from the enforcement of the TFTA will be dealt with in accordance with the TFTA. It further means that as a matter of priority, the first point of reference for settling such disputes is the dispute settlement mechanism under the TFTA. The only moment when the TFTA will not apply is if any special or additional provision states otherwise. There is no commentary in the TFTA on the meaning of 'special or additional provision'. By implication, a special or additional provision can be a provision in an agreement between members of the TFTA to simultaneously apply rules from other regimes when faced with a dispute. It could also refer a provision in an agreement between members of the TFTA to opt out of the dispute settlement mechanism under the TFTA. This literally means that SADC members can opt to proceed under the SADC regime or any other forum,[128] and not the one under the TFTA. Clearly, it is arguable that the TFTA does not restrict its signatories to refer disputes to TFTA dispute settlement mechanism alone. This approach has certain legal implications for regulating complaints on NTMs as examined below.

The TFTA procedural rules for the settlement of complaints arising from the application of NTMs are provided in Annex 14. Article 11 of this Annex establishes an administrative procedure which is divided in two stages. In the first stage, an aggrieved member (requesting member) of the Tripartite FTA is required to submit a request in writing to another Tripartite member.[129] This request must explain the measure at issue, describe the form in which it appears, and then explain its effects on trade. This request should be sent to the secretariat.[130] Upon receipt of the complaint, the responding member (the recipient of the request) is required to respond in 10 days.[131] This response must provide all the information required and be able to clarify all the issues raised in the complaint.[132] Again, at this point, the Secretariat is not involved. In fact, if the response provided by the responding member is satisfactory at this point, then the matter stands resolved. However, when the two parties fail to resolve the matter, the secretariat is required to convene a meeting with the parties to resolve any outstanding issues.[133]

[128] In article 3(4) of this Annex, the TFTA invokes the provision of the WTO DSU.
[129] Article 11*(a)* Annex 14 to the TFTA.
[130] Article 11*(a)* Annex 14 to the TFTA.
[131] In article 11*(b)* Annex 14 to the TFTA.
[132] Article 11*(b)* Annex 14 to the TFTA.
[133] Article 11 *(*c*)* Annex 14 to the TFTA.

In the event that any of the parties is dissatisfied with the conclusion of the matter at the administrative level, they can move to the second stage of the process. Once the complaint reaches stage II, a facilitator will be appointed.[134] Assuming that the parties fail to reach a satisfactory settlement at this point, the members are permitted to resort to the dispute settlement procedures provided under the agreement.[135]

From the explanation above, the mechanism for settling of complaints that arise from the application of NTMs under the TFTA is close to a three tier system, which commences from stage one, two to the judicial (three) system. 'Tier' is not used the strictest sense of the word, but for descriptive purposes only because the process will not necessarily go through steps one, two and three in all disputes should the matter be satisfactorily satisfied at any of the first two stages. Another significant aspect about the TFTA dispute settlement rules mentioned above is that it gives the SADC members the opportunity to refer disputes arising under the TFTA to any other forum of their choice, without any restriction against reference to the dispute settlement mechanism under the TFTA. In terms of settlement of NTM related issues, the administrative procedure in Annex 14 is flexible, creates certainty and predictability in the NTM complaints settlement process.

When the preceding rules for handling complaints regarding NTMs are compared with the terms of Annex VI on dispute settlement, the difference is very clear: the procedural rules under the TFTA offer more specific, flexible, non-adversarial dispute settlement mechanism than Annex VI because the latter does not incorporate the procedural elements for dealing with complaints arising from the application of NTMs.[136] Despite the apparent strength of this legal framework, it is a newly established framework, therefore, it is premature to make an absolute conclusion of its success in settlement of disputes arising from the use of NTMs and NTBs. Accordingly, for a region specific set of rules for settling such complaints, it is vital for SADC members to re-develop its dispute settlement rules in light of other models, including but not limited to any specific regional or international regime.

[134] Article 11(2) Annex 14 Cooperation in the elimination of NTBs.
[135] Article 11(11) Annex 14 Cooperation in the elimination of NTBs.
[136] If they exist at all, their existence is not apparent on the SADC trade regime.

8 Conclusion

The SADC Treaty recognises the asymmetry in the levels of development of its members. Accordingly, it has permitted an integration process which permits derogation from the integration process until such a time as the designated committee deems it fit. However, the procedure and conditions for such derogations are uncertain, and generally unknown to the public. There are also rules in place to guide the enforcement of NTMs for development and protection of health purposes but, there are specific gaps within the substantive and procedural rules which make the attainment of this goal difficult. It is even harder due to the underlying challenge of lack of common values, over bearing nationalistic tendencies, and the fear of losing even just a part of state sovereignty.[137] With such challenges, it is uncertain whether states can be able to reconcile these conflicting regional and national interests, formulate mutually benefitual rules for determining the legality of quantitative restrictions and SPS measures, and address other legal issues that relate to the application of such measures in a balanced manner. These challenges may be a contributory factor to the way in which specific rules have been paraphrased in mostly soft, hortatory terms. In some cases, they are a replication of WTO rules instead of region specific terms. These challenges could also explain the lack of detail and weakness in some of the legal provisions on quantitative restrictions and SPS measures.

Another problem that deserves specific mention relates to the rule on consensus, which occupies a central place in the decision making process in SADC. Despite its centrality, the rule on consensus is phrased in generalised terms without any specifics on the intricate elements for a valid decision through consensus. As a result, the circumstances under which consensus can be validly attained is uncertain. Even when there is an impasse, there are no rules in the SADC Treaty or Protocol on how an impasse can be broken. Accordingly, the gaps in the rules create opportunity for veto, willful violation and ambiguity on the circumstances under which a decision may be validly arrived at through consensus. Considering the lack of strong political leadership, coupled with differences in ideology, it is difficult to foresee the SADC leadership

[137] Mark Chingono & Steve Nakana 'The challenges of regional integration in southern Africa' *(*2009) 3(10) *African Journal of Political Science and International Relations* 402.

effectively deciding on NTM issues especially in a region where an effective dispute settlement mechanism on NTMs is inadequate.

For a holistic and balanced regulatory process, it would be important to re-consider the functional ideology which underlies the development integration approach, due to limited institutional, technical and financial capacities. At the moment, it is difficult to foresee how the determination and emphasis of the legality of quantitative restrictions and SPS measures can be effectively balanced alongside national development. Accordingly, the advancement of special needs of developing countries, especially the LDCs in SADC should be a concerted effort by all key stakeholders alike by strengthening non-legal issues as well as the law. Another way of cooperation to solve SADC compliance issues is examined in chapter six below.

CHAPTER SIX

MEETING THE SCIENTIFIC EVIDENCE REQUIREMENT THROUGH INTEGRATED RISK ASSESSMENT PROCESSES

1 Introduction

The recently adopted SPS Annex to the SADC Protocol on Trade stands on the principle that SPS measures must be based on scientific evidence.[1] With this, science is the core of this Annex which is the same fundamental principle upon which the WTO SPS agreement is based. The SPS Annex requires that the decision upon which a protective (SPS) measure will be taken must be based on science. For that matter, an SPS measure based on international standard is sufficient.[2] Other than that, an SPS measure can also be justified by scientific evidence obtained from a risk assessment conducted by the state enforcing the measure.[3] Essentially, this requires that the government takes the necessary steps to ensure that human beings, animals, and plants are protected from any risks to their life and health.[4] Such measures are very important in SADC because of the potential risks to the life and health of human beings from the consumption of adulterated meat sold from South Africa.[5] There is also the risk of human beings consuming disease causing organisms from South African raw or semi-processed foods that have been

[1] SPS Annex to the WTO 5(1) & 8(1)&(2) indicate that member states affirm their existing rights and obligations under the WTO agreement on the application of sanitary and phytosanitary measures. One of these international rights and obligations is found in article 2(2) & 5 of the WTO SPS agreement to the effect that a member can enforce SPS measures for purposes of protecting the life and health of humans, plants and animals. With this comes the obligation to base the measure on scientific evidence.

[2] Discussed in chapter 4.

[3] Article 5(2) SPS Annex and Article 3(3) of the WTO SPS Agreement-Refer to chapter 3.

[4] Such measures include development of specific legal and policy frameworks, labeling, sampling, inspection, laboratory tests etc. Derived from the list of SPS measures in article 17 of the SPS Annex to the Protocol; on food safety control measures refer to Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108.

[5] Donna-Maree Cawthorn, Harris Steinman A & Lourens Hoffman C 'A high incidence of species substitution and mislabeling detected in meat products sold in South Africa' (2013) 32 *Food Control* 448; Mandy de Waal "The great meat fraud SA edition" *Daily Maverick* 27 February 2013, available at http://www.dailymaverick.co.za/article/2013-02-27-(accesed 7 September 2016); Staff Reporter & Sapa "Major supermarkets exposed in meat label scandal" *Mail & Guardian* 14 April 2013 available at http://mg.co.za/article/2013-04-14- (accessed 7 September 2016).

farmed using unsafe irrigation water.[6] For such results to be achieved, specific laboratory tests are required as was the case with the adulterated meat and unsafe irrigation water in South Africa just mentioned. However, there are limited scientific accredited and functioning laboratories within SADC, with only five of them in the region which are able to test for contagious diseases.[7] As much as scientific proof is the core of the SPS Annex, the ability of most SADC countries to conduct scientific research is limited due to lack of funds[8] except for South Africa.[9] In addition to these issues, is the problem of fragmented legislation for promoting the safety of food, plants and animals.[10] These facts reveal some of the challenges that SADC members have to address in their bid for increased intra-regional trade in safe food, plants and animals. Harmonisation of regulatory policies and regulatory frameworks is one way of addressing these challenges.[11] The other means of resolving these issues is through the establishment of regionally integrated scientific laboratories for risks prevalent in most or the entire region.[12] I am of the view that one way of succeeding with this integration is to conduct joint research so as to address

[6]University of Stellenbosch *Faculty of Agri Sciences Annual Report* (2013) 76-77. This has its negative implications on the future of cross border trade and the South Africa's vision for reduction poverty. The South African National Development Plan 2030 foresees the vegetable industry as a viable opportunity for contributing to job creation and improvement of livelihood.

[7] SADC *Food and Nutrition Security Strategy 2015-2025* (2014) 13; Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108-110; Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 12, 26-27.

[8]Southern African Regional Universities Association *Science and Technology: A Baseline Study on Science and Technology and Higher Education in the SADC Region* (2007) Study Series 32-35; John Mugabe *Knowledge and Innovation for Africa's Development: Priorities, Policies & Programmes* (2009) World Bank Institute 15, reported that there was limited funding for research and development 15.

[9] Sooryamoorthy Radhamany Scientific research in the natural sciences in South Africa (2013) 109(7/8) *South African Journal of Science* 1; John Mugabe *Knowledge and Innovation for Africa's Development: Priorities, Policies & Programmes* (2009) World Bank Institute 16-17.

[10]Govender Reuben & Tendai Charles Katsande 'ISO/IEC 17020 accreditation of Gauteng veterinary services: a systems approach towards managing food safety in South Africa' (2011)4(2/3/4) *International Journal of Food Safety, Nutrition and Public Health* 192; Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108, 111; Kamau Nancy Washinga *The Regulation of Trade Barriers under the SADC and EAC: Assessing the Effectiveness of their Legal Framework* (Unpublished Master of Laws Thesis, University of Cape Town 2014) 42; Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 12,15 & 32.

[11] Discussed in chapter 3.

[12]Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108.

the problem of duplication of services[13] and promote effective use of meager financial resources.[14] It is particularly relevant also because it can provide an avenue through which SADC can address the problem of food borne risks which is rampant in the region due to poor standard and quality of life in most parts of the region.[15]

Despite the possible advantages that could be derived from integrated research, this form of research is limited or non-existent.[16] Instead, joint researches are carried out in collaboration[17] mostly between SADC member states and developed countries.[18] Therefore, I argue in this chapter that there is need to encourage intra-regional collaborative research in order to harness the various resources within the respective SADC members. In that regard, this chapter examines the possibility of extending this collaboration or integrated research beyond the natural sciences to the social sciences to assess other risks connected with risks which can be assessed in a science laboratory. The extension would only be applicable to cases where such results are needed for definitive conclusion for a holistic resolution of the problem. Under this concept, I suggest that SADC states with limited resources for laboratory research should provide the resources for the risk assessments relating to social factors. The main concern is whether, in light of the prominence of the requirement for scientific evidence, research results or risk assessments from social scientists can be admissible to validate an SPS measure. This issue is analysed in the proceeding discussion.

[13]Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 107.

[14]World Health Organiation indicates that because the cost of establishing and sustaining scientific or public health laboratories is enormous, many developing countries in Africa cannot meet the required standards.

[15] Jonathan Crush, Bruce Frayne & Milla McLachlan *Rapid Urbanisation and the Nutrition Transition in Southern Africa* (2011) Urban Food Security Series 27-30.

[16] Michael Khan J 'Developing mechanisms to promote south-south research in science and technology: the case of the Southern African development community' (2005)5(1) *Africa Sociological Review* 18.

[17] Collaboration and integration may be interchangeably used in this chapter.

[18] Michael Khan J 'Developing mechanisms to promote south-south research in science and technology: the case of the Southern African development community' (2005)5(1) *Africa Sociological Review* 18.

2 Scientific evidence as the pre-requisite for enforcement of an SPS measure

SPS measures are health protection measures such as laws, regulations, requirements, and procedures.[19] The law expects that when an SPS measure is enforced, its main purpose is to protect the life and health of humans, plants and animals.[20] In order to do so, the SPS measure must be based on sufficient scientific evidence.[21] In that context, the proceeding analysis examines this concept commencing with the examination of specific elements of the scientific evidence requirement in the WTO SPS agreement. This examination aims to explore the possibility of international collaboration in scientific research on SPS matters across SADC borders. It is vital to mention that the analysis is primarily based on WTO jurisprudence because there is no evidence of implementation of the SPS Annex by the SADC members.[22] In addition to that, there is a lack of SADC jurisprudence that interprets this issue from a legal point of view. Accordingly, the analysis is based on the WTO jurisprudence regarding the fulfilment of the provisions on scientific evidence requirement.

2.1 Sufficient scientific evidence

The sufficient evidence requirement appears in article 2(2) of the WTO SPS agreement where it requires that, WTO members shall ensure that SPS measures are based on sufficient scientific

[19] Annex A to the Agreement on the Application of Sanitary and Phytosanitary measures as follows: Sanitary or Phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures, including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for the survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements, directly related to food safety

[20] Art.2(1)& Annex A paragraph 1 SPS Agreement states in detail the purposes of the SPS measures to applied:

(a) 'To protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuff;

(c) to protect animal or plant life or health within the territory of the Member from risks arising from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread or pests'.

[21] Article 2(2) of the SPS agreement.

[22] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56)10.

evidence.[23] This duty contains two elements: first, the need to rely on scientific evidence. Scientific evidence has been defined as 'evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method.[24] Scientific evidence also requires that any hypothesis made must be substantiated.[25] In *Japan—Apples*, the Panel noted that for 'evidence' to be 'scientific', it had to be collected through scientific methods, and substantiated with proof.[26]

The second requirement is for the evidence to be sufficient. The Appellate Body in *Canada—Continued Suspension of Obligations in the EC Hormones Dispute*[27] pointed out that for scientific evidence to be sufficient:[28] it must emanate from a respected and qualified source; must have undergone scientific and methodological rigour; and must fall within the standards of the scientific community from which such evidence emanates and is accepted by such community as legitimate.[29] This is discussed in more detail below.

2.2 Concept of scientific and methodological rigour

Scientific and methodological rigour refers to an objective, systematic process of examination or evaluation of facts according to scientific principles in a thorough and careful manner in order to prove a specific hypothesis.[30] With it comes the requirement to comply with scientific procedure which has also been provided for in article 5 of the WTO SPS agreement in the form of risk

[23] Articles 2(2), 3(3), and 5(1) of the WTO SPS agreement.

[24] *Japan—Measures Affecting the Importation of Apples* WT/DS245/R adopted 10 December 2003 Report of the panel para 8.92.

[25] *Japan—Measures Affecting the Importation of Apples* WT/DS245/R adopted 10 December 2003 Report of the Panel paras 8.92-8.93.

[26] *Japan—Apples* Report of the Panel paras 8.92, 8.93 & 8.98.

[27] *Canada—Continued Suspension of Obligations in the EC Hormones Dispute* WT/DS321/AB/R 16 October 2014 Appellate Body report. The Panel in *Japan—Apples* concluded that 'the ordinary meaning of 'sufficient' is of a quantity, extent, or scope adequate to a certain purpose or object.[27] From this, we conclude that 'sufficiency' is a relational concept. There must be a relation between the SPS measure and the scientific evidence relied upon.'[27]

[28] *Canada—Continued Suspension of Obligations in the EC Hormones Dispute* WT/DS321/AB/R 16 October 2014 Appellate Body Report para 591, *Australia—Measures Affecting the Importation of Apples from New Zealand* WT/DS367/AB/R 29 November 2010 Appellate Body report para 214.

[29] *Australian—Apples* Appellate Body report para 214.

[30] Scientific means 'having or appearing to have an exact, objective, factual, systematic or methodological basis and relating to, or exhibiting the methods or principles of science'.[30] The ordinary meaning of rigour is to be 'thorough and careful' as defined by Oxford South African Concise Dictionary (2010) New 2nd Ed.

assessment. According to the appellate body, when such a risk assessment has been conducted, a WTO member would have fulfilled the aspirations of the SPS agreement on scientific requirement in article 2(2) of the WTO SPS agreement.[31] For a legal interpretation of the extant of this rigour during risk assessment, the Appellate Body's conclusion in *EC—Hormones* dispute in light of the terms of article 5(2) of the SPS agreement is relevant for this section of the study.

The complaint, in *EC—Measures Concerning Meat and Meat Products (Hormones) Complaint by the United* States[32] was filed by the United States against EC measures in directives 81/602/EEC, 88/146/EEC and 88/299/EEC.[33] These Council Directives prohibited the injection of farm animals with substances that contained oestrogenic, androgenic or gestagenic action; the sale of farm animals to which substances containing these hormones was also prohibited; they were neither to be slaughtered, nor their meat sold; again, their meat was not to be processed and such meat products were not to be sold in the market.[34] The importation of animals upon which any of these substances were administered was also prohibited.[35] In a subsequent EC Council Directive 96/22/EC, replaced Directives 81/602/EEC, 88/146/EEC and 88/299/EEC permitting the sale, processing, and importation of animals, meat or meat products to which the use of hormones was specifically meant to promote growth.[36]

In defense of its ban, the EC argued that it had banned the substances in issue because of risks including the problems related to detection, control, administration and use of hormones.[37] In this regard, it argued that there was a potential for the health of humans to be adversely affected due to the abuses in the administration of authorised substances from cheaper black market products

[31] Article 5(1) SPS Agreement, *EC-Hormones* Appellate Body report paras 180, 212, 238 and 250 where the appellate body pointed out that article 2 and 5 should always be read together.
[32] WT/DS26/R/USA Report of the Panel.
[33] *EC—Measures Concerning Meat and Meat Products (Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para II.1.
[34] *EC—Measures Concerning Meat and Meat Products (Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para II.1-5.
[35] *ECMeasures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para II.3.
[36] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para II.5.
[37] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.139.

or the additional injections of substances in undefined parts of the animal.[38] The EC further argued that the potential for abuses in the administration of these substances would not be analytically detectable and difficult to control.[39] This meant that if it did not ban these animals or meat products, more so, it would be subjecting its consumers to undefined quantities of risks to their health.[40] Even more, all the conferences and expert reviews concluded that hormones were safe provided they had complied with certain conditions, including good veterinary practice.[41] In addition to that, the methods for detection and surveillance such as radio and screening were inadequate to identify the animals to which the three natural hormones had been administered.[42]

The United States disagreed with the EC's argument and argued instead that the EC contravened specific provisions of the WTO SPS agreement, including articles 2(2) of the WTO SPS agreement on the need for scientific basis of an SPS measure and 5(1) of the WTO SPS agreement on risk assessment.[43] It argued further that the EC had never performed an appropriate assessment of the alleged risks to health of these substances, and in any event, not relied on, nor put forward, any assessment of these risks that could serve as a basis for the EC ban.[44]

To resolve the matter regarding the risks mentioned above, the panel concluded as follows: with regards to the risk of the potential of abuse of the hormones when they are used for growth purposes, the Panel ruled that EC had only relied on scientific evidence which had revealed that the safety of these hormones were conditional on good veterinary practice.[45] However, it ought to have produced evidence to prove that if there was non-compliance with good veterinary

[38] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para IV.194.
[39] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para IV.194.
[40] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para IV.194.
[41] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para IV.194.
[42] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para IV.178.
[43] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel paras III.1-2, 8.16.
[44] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.140.
[45] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.143.

practice, there was a potential of adverse effect to humans.[46] Regarding the categories of factors that can be taken into account during risk assessments, the panel first gave an open ended response to the effect that the list in article 5(2)[47] of the WTO SPS agreement was not exhaustive, therefore even factors which had not been listed therein, may be taken into account.[48]

However, it qualified its conclusion, when it stated that the nature of the risk assessments related to the use of the substances in issue did not have connection with social or economic non-scientific factors. Therefore, these factors could not be taken into account in the assessment of risks of this nature.[49] Consequently, non-scientific factors could only be taken into account in risk management and not risk assessment.[50] The panel gave a restrictive outlook on the process of risk assessment, to the extent that if the assessment involved substances of this nature, non-scientific factors could not be taken into account. This is a restrictive approach in looking at scientific evidence. The implications of such restrictions are worthy of mention, since sufficient scientific evidence must also emanate from respected and qualified sources.

In terms of the sources of scientific evidence, article 3 and paragraph 3 Annex A of the WTO SPS agreement provides a list of institutional frameworks, from which scientific evidence is acceptable, namely: Codex Alimentarius Commission, the International Office of Epizootics, and the offices operating under the International Plant Protection Convention. These bodies produce international standards that are acceptable under the SPS agreement. In *EC—Hormones* the Appellate Body held that when an SPS measure is founded on an international standard completely, for practical purposes, it becomes a municipal standard.[51] This is subject to the rebuttable presumption that all the relevant provisions of the WTO SPS agreement and the

[46] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.143.

[47] Article 5(2) SPS agreement states as follows: In the assessment of risks, members *shall take into account* available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest or disease free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

[48] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.105.

[49] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.146.

[50] *EC—Measures Concerning Meat and Meat* Products *(Hormones) Complaint by the United* States WT/DS26/R/USA, 18 August 1997 Report of the panel para 8.146.

GATT 1994 have been complied with.[52] According to this conclusion, international standards automatically transforms into national standards without undergoing municipal processes of incorporating such standards within the legal system of a given country. Although this transformation is for practical purposes, the appellate body is essentially, emphasising the unquestionable credit and value attached to international standards. Joost Pauwlyn notes that this presumption only stands as long as all disciplines in the WTO SPS agreement including the requirement of sufficient scientific evidence have been met.[53] Apparently, no WTO member has ever challenged the authenticity of standards established by any of the three bodies mentioned above.

2.3 Challenges surrounding the admissibility of evidence from respected and qualified source

Other than the three authenticated sources mentioned in the preceding sub-section, there are no other lists of respected and qualified sources in the SPS agreement. In addition to that, there is no explanation on the elements of 'respected and qualified sources'. Coupled with the limited skills and funding[54] for scientific research, it is uncertain if developing SADC countries are in a position to meet the conditions on scientific evidence. This concern arises from the fact that WTO SADC members have the right, under article 3(3) of the WTO SPS agreement, to choose their own level of protection.[55] That means that they are not bound to base their SPS measures on

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[51] *EC—Hormones* Appellate Body report, para 170.

[52] *EC—Hormones* Appellate Body report, para 170.

[53] Joost Pauwlyn 'The WTO agreement on sanitary and phytosanitary (SPS) measures as applied in the first three SPS disputes: *EC —hormones, Australia — salmon and Japan — varietals'* (1999) 2 *Journal of Intentional Economic Law* 655.

[54] John Mugabe *Knowledge and Innovation for Africa's Development: Priorities, Policies & Programmes* (2009) World Bank Institute 15, reported that there was limited funding for research and development 15; Dunoff Jeffrey L 'Lotus eaters: reflections on the varietals dispute, the SPS agreement & WTO dispute resolution' in Bermann A George & Mavroidis C Petros *Trade & Human Health & Safety* (2006) 166; Lorna Zach & Vicki Bier 'Risk based regulation for import safety' in Cary Coglianese, Adam Finkel M & David Zaring *Import Safety Regulatory Governance in the Global Economy* (2009)163.

[55] 3(3) WTO SPS agreement provides that members may introduce or maintain sanitary and phytosantary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on th relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of article 5. *Notwithstanding the above, all measures which result in a level of sanitary or phyotsanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this agreement.*

international standards, even if these standards existed. Therefore, once they have exercised this option, article 3(3) of the WTO SPS agreement requires that they must ensure that the measure is based on scientific evidence. This means that they will rely on their own sources of scientific evidence, which, as pointed earlier, must be from qualified and respected sources. The veracity of such a source may be put to the test.

As much as the panel *EC– Approval and Marketing of Biotech Products* implicitly indicated that a WTO member can base its SPS measure on the risk assessment conducted by another member,[56] if it disagrees with it, it can challenge it, carry its own assessment for a divergent view and must provide proof for such deviation.[57] This is quite an onerous duty to perform. The Appellate Body put it this way:

> 'We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the 'mainstream' of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community…..…. In most cases, responsible and representative governments tend to base their legislative and administrative measures on 'mainstream' scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment; especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety. Determination of the presence or absence of that relationship can only be done on a case-to-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects'.[58]

In other words, a liberal approach is acceptable where both mainstream and minority views can be accepted. The practicality of this conclusion is the main concern. In the SADC community where the level of scientific research is asymmetrical in favour of South Africa, it is uncertain how other SADC members with limited technical scientific capacity can effectively identify whether a view is a minority or a divergent one. Again, considering that the evidence must be direct, a speculative opinion will be rejected. By

[56] *EC—Approval and Marketing of Biotech Products*, Panel report, para. 7.3062.
[57] *EC— Approval and Marketing of Biotech Products*, Panel report, para. 7.3062.

analogy, when the Appellate Body rejected Dr. Lucien's opinion on grounds that it had not specifically conducted the research in relation to the risk of the substances in issue,[59] it rejected it not because of his qualification, but because it lacked direct nexus with the substance in issue. With limited financial resources, it may be impossible to conduct research or risk assessment for every form of risk.

Jaqueline Peel argues that emphasis on direct evidence may not be feasible in the real sense when WTO members rely on minority scientific opinion,[60] because in most cases, minority or divergent scientific opinions are based on what is suggestive rather than definitive scientific opinions.[61] This argument also works in favour of a member with limited research facilities, where scientific research is or could be carried out on an *ad hoc* basis, especially in emergency situations. The challenge for a state relying on such evidence is to successfully defend a conclusion(s) from such a source. This could be achieved, except that the high standard of proof coupled with the peer review process among the members of the scientific community, may be immensely difficult for the minority opinion to receive great support from its scientific community.[62] In that context, the admissibility of such evidence could be a problem on the ground that it failed to meet the test of being scientific evidence.

That notwithstanding, Peel argues that regulators, faced with imminent threat to life and health may be faced with a situation that may necessitate immediate action.[63] It is in such moments when, as the Appellate Body put it, a member can rely on a divergent opinion.[64] This means that in such situations, the standard of proof may be relaxed. Yet, it is not also certain whether a speculative opinion during these moments will suffice.

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[58] *EC—Hormones* Appellate Body report para 194.
[59] *EC—Hormones* Appellate Body report para 198.
[60] Jacqueline Peel *Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick?* (2004)(2) Jean Monnet Working Paper 71.
[61] Jacqueline Peel *Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick?* (2004)(2) Jean Monnet Working Paper 71.
[62] Jacqueline Peel *Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick?* (2004)(2) Jean Monnet Working Paper 72.

In a nutshell, there is immense research involved during risk assessments, including a balancing and weighing exercise that necessitates the employment of qualified scientists. This is possible in a state with the resources. However, in a community where the technical resource is limited, it may be necessary to explore whether it is possible to adopt another approach in conducting scientific research so that instead of individualistic assessments, states can pool resources and work together, especially, for solving problems associated with prevalent, persistent, recurrent region-specific risks to life and health of humans, plants, and animals. It is in line with this suggestion that the next subsection explores the Appellate Body conclusion on the admissibility of non-scientific factors during risk assessments. This is intended to highlight the possibility of non-scientists in other SADC countries playing a contributory role during risk assessments.

2.4 A flexible approach in conducting risk assessments

While considering the issue regarding the factors to consider in risk assessments, the Appellate Body had this to say:

> '….to the extent that the Panel purports to exclude from the scope of a risk assessment in the sense of Article 5(1), all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, we believe that the Panel is in error. Some of the kinds of factors listed in Article 5(2) such as "relevant processes and production methods" and "relevant inspection, sampling and testing methods" are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology. Furthermore, there is *nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5(1) is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die'.*[65] (emphasis added).

From this excerpt, the appellate body highlights two fundamental aspects on risk assessment that are of interest to this study, namely, that the list of factors appearing in paragraph 2 of article 5 above do not necessarily have to be obtained within a scientific laboratory. Also, the list of the WTO SPS agreement enumerated in the provision is not a closed list. Accordingly, it can be

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[63] Jacqueline Peel *Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick?*(2004)(2) Jean Monnet Working Paper 72.

[64] *EC—Hormones* Appellate Body report para 194.

extended to any other factors as and when a regulator deems fit. In that regard, it is interesting to examine whether social and economic factors can be admitted during risk assessment. With this, the main concern is whether the WTO DSB accepts evidence obtained outside a scientific laboratory. Will non-scientific factors be admitted in evidence to justify an SPS measure? What is the significance of an affirmative conclusion on these issues for SADC in light of the SPS agreement? These issues are addressed in the proceeding analysis.

2.5 Value and weight of scientific versus non-scientific evidence

Some natural scientists classify scientific research into a hierarchical tier with natural science at the top and social science as its subordinate. The rationale for this is that tests conducted in a laboratory would be acceptable due to their accuracy and conclusiveness as opposed to the less accurate ones produced by social scientists.[66] Further, the tests from scientific laboratory's results are absolute.[67] Consequently, such scientists accord negligible credit to results from studies by social scientists considering their biases against evidence from social sciences. Unfortunately, these biased perceptions still exist as recent studies in 2015 on certain biomedical and clinical scientists confirm that natural science is superior to social sciences since the former is conducted within a laboratory under the observation of a scientist.[68] Again, it is superior because the results from such tests are derived through objectivity, which ensures that the same results can be reproduced at a later stage in time.[69] Lukasz Gruszczynski argues that the supremacy of scientific evidence cannot be questioned and for that matter, it will always be paramount.[70]

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[65] *EC—Hormones* Appellate Body report para 187.

[66] Thompson David A 'Notes and comments: should reliable scientific evidence be conclusive and binding on jury' (1971) 48 *Chi-Kent Law Review* 41-42.

[67] Thompson David A 'Notes and comments: should reliable scientific evidence be conclusive and binding on jury' (1971) 48 *Chi-Kent Law Review* 41-42.

[68]Mathew Albert, Suzanne Laberge & Brian Hodges D 'Who wants to collaborate with social scientists? biomedical and clinical scientists perceptions of social science' in Bert Penders, Niki Vermeulen & John Parker N (eds) *Collaboration Across Health Research & Medical Care: Healthy Collaboration* 68.

[69]Mathew Albert, Suzanne Laberge & Brian Hodges D 'Who wants to collaborate with social scientists? biomedical and clinical scientists perceptions of social science' in Bert Penders, Niki Vermeulen & John Parker N (eds) *Collaboration Across Health Research & Medical Care: Healthy Collaboration* 68.

From a legal point of view, as much as the panel in *Australia—Apples* did not point out the role economic effects play in the overall conclusion that an assessment was not based on scientific evidence, it also failed to establish the weight that could be accorded to evidence of economic effects. Again in *Australia—Salmon*, no evaluation of the likelihood of biological and *economic consequences* was conducted.[71] The panel merely assumed that this requirement was satisfied without any analysis.[72] Therefore, in both *Australia—Apples* and *Australia—Salmon*, the panel did little or no analysis at all of economic factors *vis a vis* the sufficient scientific evidence requirement. This is probably because of the inclination to focus primarily on the proof of scientific evidence from natural sciences. In addition, the unwritten rule here may also be that non-scientific evidence should be credited with a lower weight than that of pure scientific evidence. Without any clear legal position on the respective weights, it is difficult to determine the weight the WTO would accord non-scientific evidence. If scientific evidence is given more weight, value, and superiority without due regard to non-scientific factors, then, countries with limited or lack of such facilities cannot effectively conduct their own risk assessment.[73]

2.6 Acceptability of risk assessments conducted outside a scientific laboratory

There are varying views on the admissibility of non-scientific evidence as reflected in the views highlighted below. Matsuo Matsushita, Thomas Schoenbaum J & Petros Mavroidis C disagreed with the Appellate Body's conclusion above. For them, scientific evidence is normally obtained in laboratories, therefore, by concluding in the terms it did, the Appellate Body created an ambiguity in the meaning of article 5(2) of the WTO SPS agreement.[74] In other words, the emphasis this provision put forward is that of risk assessment within a scientific laboratory. As a result, it does not in any way permit admissibility of evidence other than that which is obtained within a scientific laboratory. Their argument re-echoes the views of some natural scientists who consider that scientific evidence is only derived from tests conducted within a scientific

[70] Lukasz Gruszczynski 'Science in the process of risk regulation under the WTO agreement on sanitary and phytosanitary measures (2006) 7 (4) *German Law Journal* 384-385.
[71] *Australia—Salmon* Appellate Body report paras 127-131.
[72] *Australia—Salmon* Panel report paras 8.82-8.83.
[73] This does not disregard the fact that the WTO has indicated that a country need not necessarily conduct a risk assessment itself. It can rely on assessment by other bodies. This is good but it is advantageous for a state to conduct its own assessment for the results can be very local and specific to its conditions.

laboratory.[75] These arguments are rigid and mainly focus on scientific evidence from natural scientists, making such admissibility so absolute.

Yet, Rudiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr take a liberal approach and argue that the admissibility of non-scientific factors is a debatable issue.[76] If it is debatable, there is a possibility that non-scientific factors can be admitted since WTO members have a legal obligation to *take into* account socio-economic factors during risk assessment.[77] This duty means that they are to 'consider other factors before reaching a decision'.[78] This necessitates a flexible approach when examining the evidence from the scientific laboratory[79] by cconsidering also, any exogenous factors that may have affected or interfered with the experimental process. Again, that flexibility can also be applied with regards to admissibility of evidence obtained outside a laboratory. Accordingly, risks arising from things such as difficulties experienced during monitoring, supervision and control can be admitted as evidence of risk.[80]

Regine Neugebauer argues that the process for risk assessment gives policy space to consider cultural preferences and societal values.[81] To others, political factors have a bearing on the

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[74]Matsuo Matsushita, Thomas Schoenbaum J & Petros Mavroidis C *The World Trade Organisation: Law, Practice and Policy* (2006) 511.

[75]Mathew Albert, Suzanne Laberge & Brian D Hodges 'Who wants to collaborate with social scientists? Biomedical and clinical scientists perceptions of social science' in Bert Penders, Niki Vermeulen & John N Parker (eds) *Collaboration Across Health Research & Medical Care: Healthy Collaboration* 68.; Thompson David A 'Notes and comments: should reliable scientific evidence be conclusive and binding on jury' (1971) 48 *Chi-Kent Law Review* 41-42.

[76] Rudiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr *WTO: Technical Barriers and SPS Measures* (2007) 100.

[77] Article 5(2) of the WTO SPS agreement states as follows: In the assessment of risks, members *shall take into account* available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest or disease free areas; relevant ecological and environmental conditions; and quarantine or other treatment. *Shall* is a mandatory term in any legal instrument as opposed to *may* which is discretionary (Dictionary definition). Therefore, when the appellate body used *may* instead of *shall* in para 206 of *EC-Hormones* it altered the seriousness of the mandate in this provision.

[78] *EC – Approval and Marketing of Biotech Products*, Panel report, para.7.1620.

[79] Joane Scott *The WTO Agreement on Sanitary and Phytosanitary Measures* (2007) 100.
Matsuo Matsushita, Thomas Schoenbaum J & Petros Mavroidis C *The World Trade Organisation: Law, Practice and Policy* (2006) 511-512.

[80] *EC—Hormones* Appellate Body report para 206.

[81] Regine Neugebauer, 'Fine-tuning WTO jurisprudence and the SPS agreement: lessons from the beef hormone case' (2000) 31 *Law & Policy Int'l Bus.* 1255, 1267, David Winickoff, Sheila Jasanoff, Lawrence Busch, Robin Grove-White, & Brian Wynne 'Adjudicating the GM food wars: science, risk, and democracy in world trade law' (2005) 30 *The Yale Journal of International Law* 93 argue that politics and cultural affiliations also

decisions taken by risk assessors.[82] With this, the consideration of non-scientific elements into the risk assessment process is inevitable since the SPS agreement in article 5(2) of WTO SPS agreement requires so.[83] This is so true because in the definition of assessment of risks, the evaluation of biological and economic consequences has been included[84] which makes it rather difficult to ignore such factors, especially where they are so glaringly evident.

Part 1 of paragraph 4 Annex A of the WTO SPS agreement on risk assessment permits proof of economic consequences of entry, establishment or spread of pests or diseases is required. Lukasz is cautious to add that the consideration of non-scientific factors is not a one size fits all rule for all risk assessments. Therefore, such factors can only be admitted on a case by case basis.[85] As such, when Australia's risk assessment was contested in *Australia—Apples*, it submitted evidence of economic effects [86] on its international trade, industry, and costs of eradication.[87] However, the panel found the economic evidence to be insufficient after expert opinion established that Australia had exaggerated its estimations of the impacts.[88] Relying on this opinion and without any other consideration on the economic evidence, the panel concluded that the risk assessment had not been founded on scientific evidence.[89] This actually means that non-scientific evidence can contribute to a finding of whether or not the scientific evidence is sufficient or not. Consequently, the fact that the panel rejected the economic evidence should

play a role in the decision making processes during risk assessment. On page 96, they caution against the association of risk assessment with risk management since the appellate body in *EC—Hormones* overruled such a linkage.

[82] David Winickoff, Sheila Jasanoff, Lawrence Busch, Robin Grove-White, & Brian Wynne 'Adjudicating the GM food wars: science, risk, and democracy in world trade law' (2005) 30 *The Yale Journal of International Law* 93-98. On page 96, they argue that risk assessment should not be assisted with risk management since the appellate body in *EC—Hormones* did not find a demarcation between the two concepts, refer to *EC-Hormones* appellate body report para 181.

[83] The article states as follows: 'in the assessment of risks, members ***shall take into account*** available scientific evidence; relevant processes and production methods; relevant inspection, sampling, and testing methods; relevant ecological and environmental conditions.....'

[84] Annex A paragraph 4 of the WTO SPS agreement defines risk assessment as 'the evaluation of the likelihood of entry, establishment or spread of a pest or disease within the tertiary of an importing Member according to the sanitary or phytosanotary measures which might be applied, and of the associated potential biological and economic consequences;…..'

[85] Lukasz Gruszczynski 'Science in the process of risk regulation under the WTO agreement on sanitary and phytosanitary measures' (2006) 7(4) *German Law Journal* 385.

[86] *Australia—Apples* Panel report paras 7.466-7.467.

[87] *Australia—Apples* Panel report para 7.460.

[88] *Australia—Apples* Panel report para 7.469.

[89] *Australia—Apples* Panel report para 7.470.

neither be treated as the general rule nor justify disregard of economic evidence at all times because in this case, the economic evidence was discredited by the expert opinion as insufficient.

Another support for the admissibility of non-scientific evidence comes from some natural scientists who disagree with the notion that natural scientific research methods of controlled experiments are superior to social sciences methodology.[90] To them, there is no blue print on the hierarchy of research fields. Instead, it is the research question which plays a central role in determining the methodology that a researcher must choose.[91] In fact, if the research is meant to address issues involving food safety issues and its effect on the health of the consumers and society as a whole, an integrated assessment of risk may be the right procedure to take.[92] This form of research provides an avenue for SADC members to jointly address all forms of risks to life and health. This is particularly relevant to address food borne risks which is rampant in SADC due to poor standard and quality of life in most parts of the region.[93]

3 Conclusion

The discussion in this subsection has focused primarily on the legal implication of the fundamental requirement of basing an SPS measure on sufficient scientific evidence. It has revealed that such evidence must be derived from a respected and qualified source. Unfortunately, there is a limited outline on the respected sources apart from the three sources that have been mentioned and recognised in the SPS agreement. It appears also that the standard of proof is very high, because of the requirement for the evidence to be direct. As a result, speculation can never be admissible. This necessitates that a country gets involved in intensive

[90]Mathew Albert, Suzanne Laberge & Brian Hodges D 'Who wants to collaborate with social scientists? biomedical and clinical scientists perceptions of social science' in Bert Penders, Niki Vermeulen & John N Parker (eds) *Collaboration Across Health Research and Medical Care: Healthy Collaboration* (2015).

[91]Mathew Albert, Suzanne Laberge & Brian Hodges D 'Who wants to collaborate with social scientists? Biomedical and clinical scientists perceptions of social science' in Bert Penders, Niki Vermeulen & John N Parker (eds) *Collaboration Across Health Research and Medical Care: Healthy Collaboration* (2015).

[92] Peyraube Alain says that 'Humanities researchers today are engaged in collaboration with researchers in life sciences and medicine, in ICT, in earth sciences and even physics and chemistry' in New Horizons for Research in the Humanities (December 2005) 3 Paper Presented at Social Sciences and Humanities in European: New Challenges, New Opportunities, European Commission, Brussels.

[93] Jonathan Crush, Bruce Frayne & Milla McLachlan *Rapid Urbanisation and the Nutrition Transition in Southern Africa* (2011) Urban Food Security Series 21-27.

continuous research activities, if the resources (both technical and financial) permit. As it is, most developing countries including some SADC members already have problems fulfilling this requirement.

For a flexible approach in dealing with such requirements, the Appellate Body in *EC—Hormones* has indicated that a country need not conduct its own risk assessment. This is an idea that benefits any country in dire financial problems. Yet, the benefit of conducting a specific risk assessment should not be underestimated in determining solutions that are tailor made to suit peculiar risks to life and health. But, with limited skills, finances and physical structures, it is difficult for each state to conduct its own risk assessment.[94] It is at this juncture that it becomes necessary to explore options of whether states can cooperate in conducting scientific research through interdisciplinary collaboration. This essentially means that the interested states will pool their resources together, each identifying its own strength and weakness for better results. Along this line, the appellate body in *EC—Hormones* has given insights on the possibility of integrated research.

In that regard, article 5(2) of the WTO SPS agreement permits the admissibility of non-scientific evidence, which, in the view of the Appellate Body, also means that risk assessments can be conducted outside a science laboratory. With this, even collaboration between natural and social sciences is possible so that questions that cannot be answered through a scientific laboratory test, can be addressed through social research, within the communities where people actually live. This could be relevant for SADC members' collective effort at regulating and determining the legality of SPS measures.[95] With the productive employment and use of the resources within the region, they would surely be able to generate research benefits from their collective efforts.[96] Since SADC members are already cooperating in securing regional peace and disaster management,[97] it is possible to state that to a certain degree, a spirit of oneness does exist in the

[94] Lorna Zach & Vicki Bier 'Risk based regulation for import safety' in Cary Coglianese, Adam Finkel M & David Zaring *Import Safety Regulatory Governance in the Global Economy* (2009) 163.
[95] Article 5(1)(d) SADC Treaty;
[96] Article 5(1)*(f)* SADC Treaty;
[97] Southern African Development Community *SADC @35 Success Stories* (2015)(1) 12-13, 21-23; Tapiwa Shumba 'Revisiting legal harmonisation under the southern African development community treaty: the need to amend the treaty' (2015) 19 *Law, Democracy & Development* 143.

region. Whether or not they are willing to extend that level of cooperation to economic matters is a question of political will.

The fact that SADC members see the SPS Annex as a very fundamental instrument[98] to 'provide a regional forum for addressing sanitary and phytosanitary matters'[99] and resolve trade related sanitary or phytosanitary issues,[100] SADC members should not have a problem of garnering the much needed political support. Accordingly, integrated research or risk analysis is also one way through which SADC members can tilt the asymmetrical research outlook in SADC into a more balanced one. Perhaps, it could be one way of diffusing the fears of political and economic dominance that other members have against South Africa.

To that end, the regional trade rules may need to be amended, guidelines and memorandum of understandings adopted so as to incorporate the legal and policy issues regarding interdisciplinary cross border risk assessments under the SPS Annex. This may be the opportunity for SADC to exercise its power to determine the meaning of 'qualified and respected source' and notify it to the WTO. In doing this, it is perhaps a good step forward to identify the qualifications and respected institutions as well.

[98] Article 2*(a)* SPS Annex states that the SPS agreement is meant to 'to facilitate the protection of human, animal or plant life or health in the territory of the Member States'
[99] Article 2*(d)* SPS Annex.
[100] Article 2*(e)* SPS Annex.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

From the onset, this thesis progressed on the view that regional integration within SADC has been endorsed because it promotes access to larger regional market, collective action, and improvement in the welfare of the population in the region.[1] However, for the members to enjoy those benefits, specific strategies and actions need to be taken, including, the effective regulation of trade restrictions such as quantitative restrictions, as well as sanitary and phytosanitary measures that are prevalent in the SADC.[2] In that regard, the chapter revealed that as much as SADC members have agreed to integrate economically, they have opted for a development oriented approach,[3] and not the linear market process of integration.[4] Accordingly, they have a flexible regime that enables members to enforce restrictions for the advancement of legitimate state interests.[5]

This thesis has revealed that this flexibility has faced the challenge of mixed attitude with some states misusing their sovereign rights to enforce quantitative restrictions, sanitary and phytosanitary measures in ways that contradict the rules. In as much as states have sovereign rights, the prevalence of unnecessary trade restrictions is also caused by factors such as a weak legal framework on regional trade rules, divergent and fragmented rules, lack of strong political leadership, administrative hurdles, limited financial and technical resources. This chapter lays the background theme that law provides the foundation for taking actions or omission to perform

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[1] Dani Venter & Ernst Neuland *Regional Integration: Economic Partnership Agreements for Eastern and Southern* (2007) 23, Mokate Renosi *Theories of Regional integration and Cooperation and Third World Development: the Case of Southern Africa* (Unpublished Phd Thesis University of Delaware 1986) 17-18 (hereinafter Mokate Renosi (1986)); Annar Morner 'Regional integration and trade liberalisation in southern africa: an overview' (1998) 3 *Year Book Financial and Economic Law* 554; Colin L.McCarthy 'Regional Integration of Developing Countries at Different Levels of Economic Development' (1994)1(4) *Transnational Law and Contemporary Problems* 7.

[2] Presented in chapter 1.

[3] Oriantes Isaac & Rosenthal Gert 'Reflections on the conceptual framework of central American economic integration' 1977 (1) *CEEPAL Review* (Sandiego) 26 cited in Jens Haarlov *Regional Cooperation and Integration in Industry and Trade in Southern Africa* (2007) 30.

[4] Bella Bassa *The Theory of Economic Integration* (1962) 10. Restated by Frimpong Richard Oppong *Legal Aspects of Economic Integration in Africa* (2011)6-7.

[5] Bela Balassa *The Theory of Economic Integration* (1961) 10.

specific actions. Consequently, law becomes the initial yardstick for determining whether an SPS measure or quantitative restriction is legally justified or not. Furthermore, even the failure by a SADC state to enforce a particular rule (such as transparency) establishes the failure as omission which is an inconsistent measure. Along the same line, the enforcement of a measure in a manner contrary to the rules establishes this manner as an inconsistent measure.

As much as there is no specific reference to NTMs or NTBs in the WTO legal framework, this thesis has established that policy documents and progress in jurisprudential development has led to the adoption and usage of these two concepts. Based on specific WTO legal texts and their interpretation thereof by the GATT/WTO panels and Appellate Body, this thesis has established and concluded that there is a distinction between these two concepts.[6] This distinction has been derived through the lens of rules on quantitative restrictions and interpretation thereof to the extent that, the points of distinction between NTMs and NTBs lie in the fact that an NTM is generally justified, or legally supported or protected by the law. In addition, the concept of NTMs is a broad one embracing NTB as well. For clarity, a measure may on the face of it be an NTM (meant for good), but only until this veil is lifted. In the absence of the veil, if the rationale for the measure, the manner in which it is enforced or the effect it achieves defeats the purpose of the trade rule, then, that measure transforms from an NTM to an NTB. In that context, a measure which should have been, or was meant to be an NTM becomes an NTB if for one reason or the other such measure cannot be protected under the WTO trade law.

Although SADC members have politically endorsed the opening of their domestic market, they have also reserved the right to enforce trade restrictions to promote national development.[7] This flexibility is strategically guarded within the SADC legal framework.[8] It is the interface of these two interests that pose a challenge for the advancement of SADC regional economic integration, particularly in the case of inefficiencies caused by weak administrative systems;[9] the need to advance particular state interests;[10] the absence of strong political leadership from strong

[6] Refer to the conclusion in chapter two of this thesis.
[7] Articles 3(1)*(c)*, 21, SADC Protocol on Trade.
[8] Article 5(1)(a) SADC Treaty, article 3(1)(c) SADC Protocol on Trade.
[9] Gillson Ian *Deepening Regional Integration to Eliminate the Fragmented Goods Market in Southern Africa* (2010) World Bank Africa Trade Policy Notes No.9.
[10] Kalaba Mmatlou *Zambia Moving Ahead: Private Sector Space, Barriers to Agriculture & Trade* (2012) Vol.2 No.4, section 5.3; South African Institute of International Affairs Trade Beat *A Case Study on Tristan Export*

economies such as South Africa;[11] and a legal framework that limits a unified approach during decision making[12] as well as a lack of a functioning trade dispute settlement forum.[13] With these issues at hand, it becomes difficult to engender a balanced approach in the integration process as rules are sometimes violated with impunity. Within such an environment, even the failure by the SADC members to meet some of the regional economic integration deadlines[14] is not surprising at all. Some of the explanations given to justify these failures[15] only confirm that the members are neither enthusiastic nor are they generally committed to achieving their targets any time soon.[16] That notwithstanding, a measure enforced contrary to any substantive or procedural regional trade rule makes it an inconsistent measure, and it seems right for it to be referred to as an NTB. If this measure is a quantitative restriction or an SPS measure, such measure is inconsistent with the law and an NTB. I am not in any way disregarding national development programmes, the argument is for the SADC members to enforce such programmes within the

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(2012) 2 SADC Business Case Studies available at http://www.thetradebeat.com/sadc-business-case-studies/tristan-export (accessed 7 July 2016).

[11] Ngaundje Doris Leno, *Development of a Commercial Law Structure in SADC with Specific Reference to OHADA* (Unpublished Phd Thesis University of Pretoria 2013) 179; Tapiwa Shumba 'Revisiting legal harmonisation under the Southern African development community treaty: the need to amend the treaty' (2015) 19 *Law Democracy & Development* 143 argues that the single incident relating to SADC's response to Zimbabwe's refusal to abide by the decision of the defunct Tribunal is not enough to conclude that there is no political will as they have cooperated well on ensuing political security within the region.

[12] Discussion in chapter 5 relating to consensus.

[13] Even with the defunct SADC Tribunal, it looked like a barking dog that could not bite when the SADC political leadership suspended the Tribunal's operations after the latter made a ruling against Zimbabwe in *Mike Campbell & Others Vs Zimbabwe*(2010); Jephias Mapuva & Loveness Muyengwa-Mapuva 'The SADC regional bloc: what challenges and prospects for regional integration'? (2014) 18 *Law Democracy & Development* 32-33.

[14] They failed to establish the SADC Customs Union by 2010. This delay definitely delayed the achievement of other targets such as the establishment of a common market 2015, monetary union in 2016 and common currency in 2018. Refer to the Southern African Development Community Regional Indicative Strategic Development Plan (2003); Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 3; Jephias Mapuva & Loveness Muyengwa-Mapuva 'The SADC regional bloc: what challenges and prospects for regional integration'? (2014) 18 *Law Democracy & Development* 26; Jephias Mapuva 'Unpacking regional economic integration challenges bedeviling the SADC regional grouping: a synopsis (2013) 3(13) *Developing Country Studies* 95; Paul Kalenga *Regional Integration in SADC: Retreating or Forging Ahead?* Tralac Working Paper (2012/No.8) 14.

[15] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56) 3; Paul Kalenga in *Regional Integration in SADC: Retreating or Forging ahead?* Tralac Working Paper (2012/No.8) 14 state the challenges as follows: diversity in development status of SADC members, differences in their trade and industrial policies, and the fear of loss of revenue since most SADC members heavily depend on customs revenue; Jephias Mapuva & Loveness Muyengwa-Mapuva 'The SADC regional bloc: what challenges and prospects for regional integration'? (2014) 18 *Law Democracy & Development* 26 reiterates the SADC political leaders' statement that they need to go back to the drawing table and discuss the

[16] Trudy Hartzenberg & Paul Kalenga *National Policies and Regional Integration in the South African Development Community* WIDER Working Paper (2015/56)4.

parameters of the regional trade law which they have ratified and domesticated within their national jurisdictions.

Since the SADC members agreed to harmonise their SPS measures, it becomes a question of whether their intention is clearly stated in the law. In the case of SADC, the provisions on harmonisation in article 16 of the Protocol, articles 5 and 6 of the SPS Annex to the Protocol are conflicting in their rights and obligations. In some instances, they commit themselves to binding norms[17] then at another stage, they retain their absolute right to regulatory space.[18] Then again, they establish a more relaxed legal environment through hortatory terms.[19] The verbatim importation of WTO rights and obligations into the SPS Annex, further complicates the legal relationships between the rules as they fail to embrace specific conditions of the region. As much as national regulatory space is crucial, there is a need to balance national interests with the regional one. This starts with the surrender of some state sovereignty. The surrender is happening under the harmonised seed regulatory system, where the pilot project for the implementation of a non-legally binding MOU has generally received political buy-in from some SADC states. This same spirit is needed to ensure the domestication of the SPS Annex.

The actual impact of trade rules is experienced by the members of the private sector such as small-scale farmers and producers of agricultural products who are involved in the day to day conduct of trade.[20] One of these trade rules is that of transparency which appear in the WTO SPS agreement and the SPS Annex to which SADC members are signatories. However, since the domestication of the SPS annex within SADC states is going on at a slow pace, this thesis has assessed SADC members' compliance with transparency rules in the WTO SPS agreement. The results show that despite the advantages of a transparent system,[21] some of the SADC members have lagged behind in establishing a transparent trading regime.[22] The failure by states to be

[17] Article 16 of the SADC Protoocol on Trade 1996 and article 5(1) SPS Annex.
[18] Article 5(2) of the SPS Annex.
[19] Article 6 of the SPS Annex.
[20] Petros Mavroidis C & Robert Wolfe 'From sunshine to common agent: the evolving understanding of transparency in the WTO (2015) 21(2) *Journal of World Affairs* 124.
[21] World Trade Organisation *How to Apply the Transparency Provisions of the SPS Agreement: A Handbook* (September 2002) 6; Amal Nagah Elbeshbishi *Trade Facilitation and Single Window for Enhanced Regional Economic Cooperation Trade Facilitation in Africa: Challenges, Opportunities and Progress* Organisation of Islamic Cooperation (OIC) High Level Forum Casablanca- Morocco (25- 26 February 2013) 5.
[22] Chapter 4.

transparent is in itself an act which contravenes the legal requirement. Without prejudice to the non-legal issues behind such failure, lack of transparency is in itself, an NTB. Considering the challenges experienced by SADC members with enforcing transparency rules under the WTO SPS agreement, it is inconceivable how the SADC members can effectively enforce the terms of the SPS Annex. Coupled with a limited political will reflected in the slow domestication of this Annex, the successful implementation of the SPS Annex is uncertain but possible.

Since agriculture plays a fundamental role in the lives of most SADC member states, SADC's food agriculture and natural resources directorate takes on responsibilities that are meant to promote the production of good quality and adequate quantity of goods.[23] For a healthy population, they also adopted the SADC Protocol on health[24] which encourages cooperation among the members in order to address communicable and non-communicable disease, as well as all other health related problems. Within this health protocol is the policy framework which guides the formulation of policies and strategies in relating to matters or health, research on health matters and surveillance. Considering that SADC states are involved in cross border trade in agricultural products, the need for food, plant and animal safety cannot be denied. As a result, the WTO SPS agreement and the SPS Annex are in place to promote the safety and health of all humans, plants and animals within the region. However, despite these frameworks, the issue of food, animal and plant safety is still unsatisfactory with reports indicating that adulterated food,[25] food borne diseases especially among the many poor people of SADC,[26] and limited functioning accredited laboratories exist within SADC countries.[27] These problems exist despite the support

[23] Southern Africa Development Community "Food agriculture and natural resources" http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/food-agriculture-natural-resources/ (accessed 22 January 2017).

[24] Approved by SADC heads of state in August 1999 and it entered into force in 2004.

[25] Donna-Maree Cawthorn, Harris A Steinman & Lourens C Hoffman 'A high incidence of species substitution and mislabeling detected in meat products sold in South Africa' (2013) 32 *Food Control* 448; Mandy de Waal "The Great Meat Fraud SA Edition" *Daily Maverick* 27 February 2013, available at http://www.dailymaverick.co.za/article/2013-02-27-accesed 7 September 2016; Staff Reporter & Sapa "Major Supermarkets Exposed in Meat Label Scandal" *Mail & Guardian* 14 April 2013 available at http://mg.co.za/article/2013-04-14- (accessed 7 September 2016).

[26] Jonathan Crush, Bruce Frayne and Milla McLachlan *Rapid Urbanisation and the Nutrition Transition in Southern Africa* (2011) Urban Food Security Series (No.7) 27-31.

[27] John Mugabe *Knowledge and Innovation for Africa's Development: Priorities, Policies & Programmes* (2009) World Bank Institute 15, reported that there was limited funding for research and development 15; Kudakwashe Magwedere, Tembile Songabe & Francis Dziva 'Challenges of sanitary compliance related to trade in products of animal origin in Southern Africa' (2015) (4)(5114) *Italian Journal of Food Safety* 108 also mention the challenge

toward their resolution,[28] which to some extent implies a lack of political will, and a contradiction of the SADC member states' commitments or endorsements at the regional level.

Coupled with limited regionally integrated scientific research and national funding,[29] the thesis has examined the possibility of joint research efforts to address regionally prevalent risks to health and life that relate to both physical sciences and social factors. Although some authors do not support the admissibility of social factors under the SPS agreement (consequently, the SPS Annex), I argued that WTO jurisprudence, as developed by the WTO Appellate Body in *EC—Hormones* case justifies the admissibility of such evidence. Accordingly, results from a joint research or risk assessment between physical and social scientists will be admissible as sufficient evidence to support an SPS measure.

The legality of quantitative restrictions and SPS measures in SADC is complex in light of the dynamics involved in the integration process within a regional economic community associated with different ideologies, cultures and aspirations. Because these underlying conflicts exist, to some extent, they influence the rule making processes. Again, those conflicts also act as the driving force for regionally (as well as nationally) inspired development programmes in a way that limit the effective regulation of quantitative restrictions and SPS measures. Accordingly, even the law which is meant to regulate these restrictions has become inadequate in one way or the other. Such gaps are the open doors for virulent nationalistic trade restrictions. Yet on the other hand where the law is clear, non-legal factors have rationalised the prevalence of NTBs. This goes to establish that the functionalist philosophy that underlies the development approach greatly affects the nature of the law, and the will to surrender some sovereign rights and regulation of quantitative restrictions and SPS measures.

Against those considerations, the development oriented regional integration approach plays a significant role in engendering a less rule based system. Such a system can be seen in the

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of there is also lack of political will, which may also be a contributory power to limited allocation of funding to this sector.

[28] Dermot Cassidy *Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region* (2010) AECOM International Development 29.

[29] Michael Khan J 'Developing mechanisms to promote south-south research in science and technology: the case of the Southern African Development Community' (2005)5(1) *Africa Sociological Review* 18; Jonathan Crush, Bruce Frayne & Milla McLachlan *Rapid Urbanisation and the Nutrition Transition in Southern Africa* (2011) Urban Food Security Series 27-30.

registered successes (so far) in the pursuit of administratively guided SADC NTB complaints processes and certain non-binding harmonisation systems. That notwithstanding, the SADC members should not dispense with the significance of the law as a founding framework upon which regional and national actions can be based, and evaluated. To that effect, the determination of the legality of quantitative restrictions and SPS measures need a strong legal regime, a strong political will to domesticate and apply the rules, as well as the establishment and sustenance of effective regulatory systems as explained below.

In light of the conclusion above and SADC members' ambitious commitment to remove trade restrictions, it would be important for certain legal provisions to be reconsidered. In that regard, the Protocol on trade should formerly embrace the broad concept of non-tariff measure, and clearly distinguish it from the concept of NTBs. Also, the usage of the concept of NTM or NTB interchangeably should be avoided to eliminate the ambiguity and confusion that arises from such usage. Accordingly, a definition of an NTM should clearly state that this concept relates to a measure which is enforced in tandem with the regional law on trade. In that context, any measure that does not have a basis in the regional law on trade is a non-tariff barrier. For clarity, the Protocol should also provide an illustrative list of the factors that transform a measure into or establish it as an NTB. In that context, the generalised consideration and treatment of quantitative restrictions and SPS measures as NTBs should be avoided. Instead, their characterisation as an NTM or NTB should be determined by the preceding considerations or propositions. The rules regulating the application and removal of quantitative restrictions need to be reconsidered as well so that the terms under which they can be applied or rejected are clearly spelt out, instead of a generalised prohibition that has proved ineffective to deter the usage of such restrictions. Rules that should provide linkage between NTMs and NTBs with measures such as quantitative restrictions must be provided.

With respect to the gap in the dispute resolution process, it is necessary to reconsider the rules for dispute settlement by inserting the SADC NTB complaints and monitoring system within the legal framework on dispute settlement. With that in mind, it should also permit members of the private sector to lodge complaints arising from the application of non-tariff barriers. Mindful of the proposed restriction against the *locus standi* of individuals before the newly established

SADC tribunal, the rules should place a cap on the nature and extent of the remedies that a complainant can seek from the state. Any remedies that are very sensitive to a state's interest must be carefully evaluated by the judicial officers. All these issues need to be grounded within a legal framework.

As much as the legal framework is fundamental, the successful progress with trade liberalisation and regional economic integration largely depends on the political will of the SADC members.[30] This will is needed also in the revision and effective enforcement of the rule in consensus. In that context, it is important that clearly defined terms on decision making through consensus should be established. The following suggestions should guide the reconsideration of the rules necessary to attain consensus: insertion of benchmarks such as simple and substantial majority with a clear explanation in statistical terms on what constitutes a simple or substantial majority. This should be something achievable in light of the odd number of 15 SADC members. In that regard, I suggest that a simple majority should be agreed at 8 out of 15 members and a substantial majority at 13 out of 15. In practical terms, this means that where a policy has been proposed for adoption, provided 8 members supported the proposal or the policy, consensus would have been attained. Again, the same principle can apply to instances where 13 out of 15 members have given their approval for a particular decision. For clarity, approval must be expressly indicated. Accordingly, rejection must be explicit.[31] In that case, an absentee member(s), would be bound by the outcome of the decision making process. To engender support for such a proposal, it necessary to strongly advocate for trade-offs which will be beneficial to a state in the event that it supported a decision liberalise trade on any one of its sensitive export products.

To simplify the process even further, consensus should be limited to the core SADC policy issues only.[32] The difficulty with this lies in the ability to effectively distinguish the core from

[30] Southern African Regional Universities Association *Perspectives on Regional Identity and the Role of Higher Education in Southern Africa* (2012)14.

[31] Thanh Nguyen, Quynh Nguyen & Phong Pham *Decision Making by Consensus in the WTO* (2012) 6 who notes that in the WTO, silence does not amount to rejection of a decision.

[32] Teresa Thorp 'The rule of law and the implementation of an economic acquis communautaire in Sub-Saharan Africa: legal challenges for East African Community' (2012) *European Year Book of International Economic Law*, 521.

the periphery.[33] To deal with this, it is advisable for the proposed amendments to identify and categorise agricultural export earning products of each SADC member. Thereafter, these products should be listed and ranked in a hierarchical order with the highest export earner for each country at the top of the list. With this, the highest export earner which is the subject of an unnecessary SPS measure becomes part of the core policy issues, subject to consensus. Accordingly, SPS measures relating to other insignificant export earners can be categorised as matters at the periphery. These can be left out of consensus. The coordinating committee should be tasked to request and obtain each SADC member country's main export earning agricultural product.

In terms of the domestication of the SPS Annex, SADC should carefully approach the matter at the national level by working hand in hand with national officials through a bottom-up approach so that the latter can appreciate the value of this regime. Again, the terms of the SPS Annex should be reconsidered and strengthened in light of the terms of the WTO SPS agreement and arguments made in chapter three of the thesis.

[33] Teresa Thorp 'The rule of law and the implementation of an economic acquis communautaire in Sub-Saharan Africa: legal challenges for East African Community' (2012) *European Year Book of International Economic Law*, 521.

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Appendix A

Annex B: Transparency of sanitary and phytosanitary regulations[34]

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations(**5**) which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

(*footnote original*) **5** Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;

(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;

(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;

(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

[34] Available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#annB (accessed 28 July 2016).

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals(**6**) of the Member concerned.

(*footnote original*) **6** When "nationals" are referred to in this Agreement, the term 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.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

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

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provides, upon request, copies of the regulation to other Members;

(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

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

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

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or

(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.