

**The Regulation and Impact of Non-Tariff Barriers to Trade in SADC Free
Trade Area**

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Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of *Legum Magister* (LL.M) in Trade and Investment at International Development Law Unit, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Ephraim Mukucha

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I thank the Almighty God for life.

I dedicate this work to my parents Mr and Mrs Mukucha.

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Acronyms

COMESA	Common Market of Eastern and Southern Africa
DDA	Doha Development Agenda
EAC	East Africa Community
EU	European Union
FESARTA	Federation of East and Southern African Road Transport Associations
GATT	General Agreement on Tariff and Trade
NTBs	Non-Tariff Barriers
SADC	Southern Africa Development Community
SPS	Sanitary Phytosanitary Standards
WTO	World Trade Organization
TBT	Technical Barriers to Trade
TP	Trade Protocol
UNCTAD	United Nations Conference on Trade and Development
NAMA	Non-agricultural market access
MMTZ	Mozambique, Malawi, Tanzania and Zambia

Directory of Cases

Argentina Hides and Leather WT/DS155/R

Japan Panel Report BISD 35S/163

Turkey Textiles WT/DS34/AB/R

List of Treaties and Instruments

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

Agreement on Technical Barriers to Trade (TBT Agreement)

SADC Protocol on Trade of 1996

General Agreement on Tariff and Trade (GATT) of 1994

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Abstract

This paper critically evaluate the effectiveness of the non -tariff barriers legal framework under the SADC Protocol on Trade. In the same vein it identifies and discuss a list of non-tariff barriers to trade that are still prevalent in the SADC region despite the prohibition for their use under the Protocol. The list of these NTBs is made up of quantitative restrictions, customs procedures and administrative requirements, technical standards, sanitary and phytosanitary measures, government participation in trade, lack of infrastructure, restrictive rules of origin and anti-dumping measures. Their impact is also addressed using some case studies based on the experience of businesses and people trading in the region. The paper concluded that the widespread and continued existence of NTBs in the region is as a result of a weak regulatory framework aimed at addressing them. To this end the paper single out the provisions relating to the granting of derogations from complying with the Protocol, the rules of origin, antidumping provisions and rules relating to the protection of infant industries as some of the weak points in the Protocol. To assess the compatibility of the rules regulating NTBs under the Protocol with the WTO rules one of the chapter is dedicated to a discussion on the WTO legal framework for NTBs. The paper also gives the reader an opportunity to have a grasp of the progress made in the SADC Free Trade Area by providing a section which focuses on the NTBs Monitoring and Elimination Mechanism. Problems associated with the mechanism are also clearly laid down in this paper. Recommendations are made at the end of the paper as way of providing solutions to some of the issues identified as weaknesses on the NTBs legal framework.

Chapter One

1. Introduction

The incredible success of the World Trade Organization and the SADC Trade Protocol in reducing tariffs has shifted the battle for market access in the twenty-first century. Now countries that seek to protect their markets resort to NTBs whose trade distortive effect is similar to tariffs. Therefore addressing these NTBs at national and regional level becomes crucial through setting up a strong legal framework committing Member States to their removal. In addition, such a legal framework must be supported with appropriate regional and national institutions to enforce and monitor the implementation of instruments and programs targeting the elimination of NTBs. It is sad to note that the NTBs legal framework provided for under the SADC Trade Protocol contains many flaws that have serious implications on the widespread of NTBs in the region. For instance the Protocol contains too many exceptions and allows countries to derogate from their obligations to eliminate NTBs. As a result whereas majority of SADC Members States have been able to reduce a significant proportion of tariffs on intra-SADC trade, there has been very limited progress in addressing trade restrictive NTBs. Surprisingly ,while the East African Community¹ and the European Union pursued a legally binding approach to address NTBs with sanctions to enforce compliance, SADC has chosen moral suasion through establishing committees and other institutional structures such as technical expert groups requiring dialogue, and the exchange of information as a way to address NTBs.² Unfortunately this mechanism is not working and will never work in future due to the lack of political will by governments in Member States to eliminate NTBs at national level

This paper focus on the effectiveness of legal framework regulating NTBs in SADC FTA whilst at the same time assesses their impact on intra- SADC trade. Its main focus will be on those NTBs that are found to be more pervasive in the region which include, but not necessarily limited to quantitative restrictions, strict rules of origins, poor infrastructure, customs procedures and administrative requirements, technical standards, sanitary and phytosanitary measures, government participation in trade and dumping and safeguard measures. The analysis draws evidence from the growing body of literature on NTBs pertaining to regional trade in Southern

¹ Hereafter referred to as EAC.

² R Kirk, *Africa Trade Policy Notes- Addressing Trade Restrictive Non Tariff Measures on Goods in the East African Community* (2010) 2.

Africa as well as interviews with officials from the private sector and non-profit making organizations advocating regional trade and integration.

The first section of this paper addresses various types of NTBs hindering trade in SADC and assesses costs attached to their prevalence using case studies on the implications of NTBs for intra-SADC trade. This will be followed by chapter three which is mainly based on a general overview of WTO rules that prohibit the use of NTBs. Specifically; the discussion on this chapter is limited to those WTO rules with a direct effect on all types of NTBs found to be most prevalent in the SADC region. The rationale behind the discussion being to show how the SADC Trade Protocol sometimes deviated from the spirit and letter of the WTO rules

The fourth section represents the most important part of this paper and it deals with the issue of how NTBs are regulated in SADC region. It first gives a brief background of the SADC Free Trade Area and a general overview of the SADC Trade Protocol as well as its rules relating to NTBs. Secondly, it tackles the main issue to be addressed in this paper namely, the effectiveness of SADC's NTBs legal framework whilst at the same time addressing the critical question whether the NTBs regulatory framework provided for under the SADC Trade Protocol is compatible with the WTO rules that prohibit use of NTBs. Challenges faced in the process of removing these NTBs will form part of chapter four as well. In the final chapter a summary on the findings of this paper will be provided, followed by the conclusion and the recommendations. Among the recommendations will be that SADC must adopt the approach used in the EAC in order to address the prevalence of NTBs in the region. This entails the adoption of a legally binding agreement on NTBs and move away from the current framework based on political pressure.

1.1 Background to the research

The Southern Africa Development Community³ has been a free trade area since 2009. While all members have been able to reduce a significant proportion of tariffs on intra-SADC trade, there has been very limited progress in addressing trade restrictive non-tariff barriers⁴ which are used in this study interchangeably with non-tariff measures.⁵ This is despite that the SADC Trade Protocol⁶ clearly makes specific reference to the need to eliminate NTBs and to refrain from imposing new ones. Such elimination and reduction were to be effected under the principle of asymmetry, and should have been completed within a period of eight years after the Protocol came into effect. Accordingly, this goal should have been achieved in 2008.⁷ Regrettably, Member States missed the deadline despite the increasing consensus among African policy circles that trade is a powerful engine for economic growth and development through the removal of interregional trade restrictive measures such as NTBs.⁸

The main objective of this study is to make a deep analysis on the regulation and impact of NTBs⁹ in Southern Africa Development Community Free Trade Area. Specifically, the research is pillared on the proposition that the current legal framework for NTBs under the SADC Trade Protocol does not effectively address the elimination of NTBs in the region. The paper will advance the argument that due to a poor and toothless legal framework Member States habitually make use of NTBs thereby inhibiting intra-regional trade. This is despite that such practices are contrary to their obligations under the World Trade Organization¹⁰ rules that call for the removal of all trade barriers.

³ Hereafter referred to as SADC.

⁴ Hereafter referred to as NTBs.

⁵ In as much as all NTBs can also be NTMs it is worth to point that not all NTMs are NTBs. NTMs can include measures that promote exports, which are not barriers to trade at all. In practice it is very difficult to decide which NTMs are also NTBs. The intent of the policy instrument is important but there are regulations whose intent cannot be determined without a difficulty and potentially inconclusive investigation of their nature and actual operation.

⁶ Hereafter referred to as the TP or Protocol.

⁷ HK Mutai 'Regional Integration Strategies under SADC and the EAC: A Comparative Analysis' (2011) 1 *SADC Law Journal* 85.

⁸ P Kalenga *Making the FTA work* (2011) 1.

⁹ These NTBs are put into four broad groups. The first is the health safety and environmental measures in the form of sanitary and phytosanitary requirements, and standards and conformance requirements. The second group is related to trade policy regulations comprised of a wide range of regulations that are in place for a variety of reasons. The third category is more administrative. The fourth category relates to poor infrastructural development specifically in the transport system.

¹⁰ Hereafter referred to as the WTO.

1.2 Research Problem

Trade in goods in SADC free trade area is not only restricted by customs duties and other duties and charges, but also by NTBs. Generally, tariffs have been reduced to the lowest levels but trade is still being impeded by NTBs. While the SADC Trade Protocol contains provisions for the elimination of NTBs, there are problems with these provisions. The main problem is that the current NTBs regulatory framework is not effective. It is flawed in many ways and as a result free flow of goods within SADC is being severely impeded by existence of NTBs even though considerable progress has been achieved as far as reduction of tariffs is concerned.

A number of goods and sectors are excluded from the agreement aimed at eliminating NTBs. There are explicit provisions in the Protocol for continuation of infant industry protection in Article 21 of the Protocol. Anti-dumping and safeguard measures are permitted with no limitations beyond those contained in the WTO rules.¹¹ Rules of origin in many sectors are highly restrictive and explicitly designed to protect rather than liberalize regional industries. The Protocol also permits members to derogate from their obligations in certain cases but without giving guidelines and timeframe for the derogation.¹² This will raise production costs and reduce international competitiveness of affected industries, many of which are central to regional development.

As a result, there is little evidence of progress on further deepening of trade liberalization and facilitation. To this end, there is a need for serious focus on the best ways to address these NTBs otherwise the cost of doing business across borders in SADC will be unnecessarily high and thus scares away the much needed investment in the region. Again these NTBs will militate against the formation of tripartite free trade area if not immediately addressed.

¹¹ F Flatters *The SADC Trade Protocol: Impacts, Issues and the Way Ahead*, SAID/RCSA SADC Trade Protocol Project (2011) 4.

¹² Article 3 (1) (c) allows Member States to derogate from their obligation to eliminate NTBs in situations where they feel that they may be or have been adversely affected, by removal of tariffs and NTBs. Upon application to the Council of Ministers of Trade, they may be granted a grace period to afford them additional time for the elimination of tariffs and NTBs.

1.3 Hypothesis and Research Questions

The hypothesis of this research is pillared on the proposition that the current NTBs legal framework under the SADC Trade Protocol does not effectively address the elimination of NTBs. It will be argued in the study that as a result of a weak NTBs legal framework, SADC Member States are a step behind other regional economic groups as far as the regulation and process of eliminating NTBs is concerned.¹³ This will logically raise the following critical questions that will be acting as standard guidelines for this work:

1. What are the obligations of SADC members under the WTO rules and SADC Protocol on Trade with regard to elimination of NTBs?
2. Does SADC as a free trade area meet its WTO obligations with regard to elimination of NTBs and what problems or challenges are encountered in the process of removing NTBs?
3. How effective is SADC's current NTBs regulatory framework and implications for the existence of NTBs in SADC for intra- regional trade?

1.4 Significance of the study

While there is a great deal of scholarly writing on NTBs in general aspects of regional integration in SADC, there is a shortfall of legal writing on how they are regulated. This paper seeks to fill such an important gap and is consequently laudable and appropriate. The research will add value to the present literature debate on NTBs and expand the scope of the debate to cover the question whether SADC's NTBs regulatory framework is effective enough to address the removal of NTBs. It will make contributions on possible ways that can assist the processing of eliminating NTBs.

¹³ The 2007 World Bank (WB) cost of doing business indicators and the 2006 Global Competitiveness Report (DNA 2006) found trade facilitation barriers to be substantially higher in SADC than in all other regions. For example, it noted that to comply with import and export procedures takes on average 49, 5 and 41 days respectively in SADC (and more than 60 days in five SADC member countries). It revealed that the best performing economy is Mauritius where complying with all export and import requirements takes only 16 days (DNA 2006). Compliance takes on average 91 days for intra-SADC trade, compared to 53–60 days for trade between SADC and OECD. In addition, transportation costs in the SADC region are higher than in other regions, and compared to the world average port and air infrastructure is relatively poor in most SADC member states.

Individual traders are set to benefit from this study because the information provided in this study will assist them to make informed decisions about trade restrictive measures that they may face in the course of trade. The research will also identify areas which need special reforms as far as the law regulating NTBs is concerned. Finally the research will strive to provide clarity on the impact of NTBs on intra-regional trade in SADC since there are conflicting views from authors concerning this subject matter.

1.5 Literature Review

As regional integration initiatives begin to address NTBs, they are faced with the practical challenge of agreeing on the establishment of a sound legal framework as well as the working definition of NTBs. As result it is inevitable for deep divisions to emerge among scholars in their effort to define what NTBs are and on the proper legal mechanism to address them. This section examines literature that deals with the regulation of NTBs and their impact on trade in SADC.

It is crucial to state that despite substantial literature on NTBs, there are no scholarly writings addressing the issue about the effectiveness of the NTB legal framework under the SADC Trade Protocol. Joseph Karugia and others correctly noted that a great deal of literature has focused on individual types of NTBs and only in exceptional instances is sophisticated empirical analyses of their economic and social effect are provided without any effort to look at the effectiveness of legal framework set to address them.¹⁴

According to the *Technical Report on 2011 Audit of the Implementation of the SADC Protocol on Trade*, while progress has been made in further development of the system and the resolution of NTBs through the online mechanism over the last years, some concerns remain particularly with the prioritization of NTBs, the clarification of exceptions to the elimination of such measures and the development of national level mechanisms to address the elimination of NTBs systematically.¹⁵ Lack of mandatory obligations on the part of Member States to put in place laws that are aimed at eliminating NTBs is a reflection of a major weakness on the part of the TP.

¹⁴ J Karugia et al *The Impact of Non-tariff Barriers on Maize and Beef Trade in East Africa*, RESAKSS Working Paper No. 29 (2009) www.eca.resakss.org (accessed on 10 September 2011).

¹⁵ Technical Report: '2011 Audit on the Implementation of the SADC Protocol on Trade. Submitted by AECOM International Development' (2011) 4.

One school of thought is of the view that most SADC countries have considerably reduced trade policy related to NTBs such as quantitative restrictions on imports. According to Vonesai Hove of Trade Mark Southern Africa¹⁶, the NTBs reporting, monitoring and eliminating mechanism which is a creature of the SADC Trade Protocol has enjoyed great success since its upgrade in 2010. She noted that 60.7% of NTBs reported have been resolved.¹⁷ She argued that the success achieved by eliminating NTBs is evidence that the NTB legal framework is effectively addressing their prevalence.

However the observation and argument by Hove on the success of the legal framework for NTBs was contradicted by Nora Dihela a specialist in trade economics at the World Bank. Nora submitted that as far as trade in goods is concerned, there are big opportunities for SADC firms to increase regional trade but still there are many obstacles in the form of NTBs that impede trade in Southern Africa. She identified import bans, quotas and levies, and the requirement of import permits as most notorious forms of NTBs with a substantial negative impact on the agriculture sector in many SADC countries.¹⁸ Her argument is fortified by the World Bank research which indicated that only 10% of total trade in Southern Africa is regional. This is compared to 60% regional trade within the European Union (EU) trade bloc, 40% for North America and 30% in Asia.¹⁹ There is no doubt that the poor performance on intra-SADC trade compared to other regional trade blocs is mainly due NTBs in the region as a result of a toothless legal framework since tariffs are now very low in the region.

Sophie Chauvin and Guillaume Gaulier²⁰ argued that a significant number of NTBs still exist, and remain the most critical obstacles to trade between SADC members. The two authors argued that quantitative restrictions on certain imports such as agricultural and automatic import licensing

¹⁶ Mrs Vonesai Hove is an expert on NTBs and for further details visit www.trademarksa.org (information obtained during a personal interview with her on 07 February 2012).

¹⁷ In support of her argument she referred to one of the resolved dispute where the Zambezi River Authority and the Ministry of Transport (Zimbabwe) imposed a 3 tone gross vehicle mass limit on vehicles crossing the Kariba dam wall. This forced cross-border buses, and some small-scale cross-border traders between Zambia and Zimbabwe, to use the more expensive Chirundu border crossing. National Monitoring Council consultations facilitated a meeting between the Zambezi River Authority and other concerned parties which revealed that the engineer's specifications for the dam wall accommodated an 11 tone gross vehicle mass. Based on these findings the maxim gross vehicle mass was adjusted and buses of up to 11 tons are now allowed to cross the dam wall, thus resolving the NTB.

¹⁸ 'Southern African trade hammered by poor policy' *Moneyweb* 8 June 2011.

¹⁹ R Malcom, *Southern Africa Trade Hammered by Poor Policy*, www.tralac.org/category (accessed on 23 September 2011).

²⁰ S Chauvin & G Gaulier *Prospects for Increasing Trade among SADC Countries* (200) 16.

system are still maintained. Other NTBs linked to surcharges on imports, customs documentation and related procedures, border related controls and transportation of goods and persons, and clearance and settlement systems have been identified as major obstacles to trade in SADC region. This again is clear evidence that the legal framework is not properly addressing the question of NTBs.

Mengesha Yayo Negasi²¹ submitted that even though the Trade Protocol provides for the elimination of all existing NTBs and refraining from introducing new ones, in practice it does appear that NTBs measures are widespread, increasing and are a real obstacle to intra-regional trade expansion. The author went on to point out that some SADC Member States continue to introduce NTBs such as periodic ban on imports, imposition of additional import levies and other forms of import controls, often as protectionist devices. Consequently, undermining the credibility of the Trade Protocol and makes it irrelevant in the eyes of traders, investors and consumers at large.

Article 3(1) (c) of the Protocol contains one of the controversial provisions as far as elimination of NTBs is concerned. It allows Member States to derogate from their obligations to eliminate tariffs and NTBs. It exonerates Member states who feel threatened by the removal of NTBs and tariffs from complying with the obligation set in article 6 of the same Protocol. This position is further fortified in Article 21 of the Protocol which allows Member States to protect infant industries without defining what constitute an infant industry. As a result decades down the line after the Protocol came into force some industries are still treated as infant despite a long time of their establishment. In this case the provisions contradict each other thereby raising the question whether there is a real commitment to remove NTBs on the part of Member States.

Finally, the anti-dumping provisions in Article 18 also reflect how poor the legal framework is because it lacks detailed information on how anti-dumping duties can be applied. The granting of unlimited derogations on the obligation to eliminate NTBs weakens the TP further because evidence has shown that in many instances Member States abuse these provisions for unjustified reasons.

²¹ M Y Negasi *Trade Effects of Regional Economic Integration in Africa: The Case of SADC* (2009) 21.

1.6 Research Methodology

The approach in this study will be descriptive, analytical, comparative and prescriptive. The descriptive approach will be utilized to make a general overview of the WTO legal text²² and SADC²³ legal text that regulate NTBs. An analytical approach will be employed to evaluate the effects of NTBs on cross border trade among the SADC Member States.

To have an insight on the effects of NTBs on other regional trade blocs in Africa, a comparative approach is instrumental and hence it is adopted. In this case the regulation of NTBs in the EAC and in SADC will be made in a comparative manner. This is done to see if there are any lessons that SADC can draw from the EAC as far as regulation of NTBs is concerned. The choice of these two regional economic communities is appropriate in that the Member States from these two groups share the same level of development and are both still developing countries.

In addition, a secondary research will be heavily relied upon which involves the assessment of information from published and non-published sources. Although this method relies on documented and existing data, instead of primary sources of information, it is a valuable tool to provide an overview of the current information available on the application of NTBs and how they are regulated in SADC FTA. This approach will provide in general an overview and background to the application of existing NTB in regional markets of a few selected SADC countries. Challenges facing exporters and technical and policy consideration can also be identified. The research also entails visiting relevant organisation such as department of International Trade in Zimbabwe and South Africa respectively to conduct some interviews with trade experts. Non profit making organisations specialising on trade research like Trade Mark Southern Africa will also be visited to get more information on NTBs.

Lastly a prescriptive approach is applied at the end in the form of recommendations which may be useful for SADC members to implement in order to strengthen its NTB legal framework thereby eventually reduce or eliminate their impact in the region.

²² GATT Articles II, VII, X, and XXVIII.

²³ SADC Protocol on Trade of 1996.

1.7 Delineations and Limitations

The concept of NTBs is very broad to cover any trade restrictive measures which are not as a result of tariffs.²⁴ There are conflicting views of the definition of NTBs. The SADC working definition of NTBs is contained in Article 1 of the Protocol on Trade which defined NTBs as ‘any barrier to trade other than import and export duties’.²⁵ This definition is different from the one provided for in the EAC Protocol which has adopted a broad guideline to define NTBs as ‘quantitative restrictions and specific limitations that act as obstacles to trade’.²⁶ However, for the purpose of this study NTBs shall be defined as any measure other than tariffs by government or private person that restrict trade flows.²⁷ This definition is more appropriate because it covers a wide range of barriers from health and safety barriers through a suite of regulation associated with trade and general matters such as transport costs, customs and administrative procedures that may not be directly under the control of the government but certainly under its influence.²⁸

In this study an examination these NTBs is done by placing them into categories and at the same time identifying those NTBs that raises more concern in SADC. This study has attempted to consolidate and limit them into four admittedly sometimes arbitrary broad groups.

The first grouping is those measures that are put in place to protect the health and safety of both consumers and the environment in importing countries. Such measures are often viewed as inhibiting trade when viewed from the exporter’s perspective. This category is the health safety and environmental measures including import and export bans, sanitary and phytosanitary²⁹ requirements, and standards and conformance requirements.³⁰

²⁴ There is a distinction between tariffs and non-tariff barriers and hence the two should not be confused. A tariff is technically a tax duty levied on the imports as products cross a national boundary whereas non-tariff barriers refers to restrictions that result from prohibitions, conditions or specific market requirements that makes the importation and exportation of products difficult and costly. They cover unjustified use of non-tariff measures such as sanitary and phytosanitary measures and other technical barriers to trade. A non-tariff barrier differs from a tariff in that it is often a side effect or consequence of policy instruments and procedure. However, non-tariff barriers may have similar effects to tariffs in the sense that they can increase domestic prices and impede trade to protect selected producers at the expense of other economic agents.

²⁵ The SADC Trade Protocol of 1996.

²⁶ L Okomu & J.C Okuku Nyankori *Non –Tariff Barriers in the EAC Customs Union: Implications for Trade between Uganda and Other EAC Countries*. Economic Research Centre (2011)11.

²⁷ R Sandrey *Non-Tariff Measures: The Bigger Picture for South and Southern Africa* (2003) 1.

²⁸ M Kalaba *et al* ‘Regional Integration in Southern Africa’ Volume 6 (2006)129.

²⁹ Hereafter referred to as SPS.

³⁰ R Sandrey *Non-Tariff Measures (NTMs) Facing Exports from South and Southern Africa* (2003) 10.

The second group is related to trade policy regulations comprised of a wide range of regulations that are in place for a variety of reasons. This category covers broader policy measures including import licenses, import quotas, production subsidies, state trading and import monopolies, trade remedies practices in the form of anti-dumping, safeguard, and countervailing duty measures.³¹

The third category is not generally regulations *per se*, but rather a wide grouping of procedures and factors that operate in a manner that generally inhibit trade flows. This category is more administrative in nature and encompasses customs clearance delays, lack of transparency and consistency in customs procedures, overly bureaucratic and often arbitrary processing and documentation requirements for consignments.³²

The fourth category relates to poor infrastructural development such as transport, energy and telecommunications that are essential to move goods, services, people and information between countries.³³

To have an insight on what is causing the continued existence of the different categories of NTBs cited above in the SADC FTA; this research will evaluate the effectiveness of the legal framework provided for by the SADC Trade Protocol.³⁴

The inherent limitation of this study is that a research aimed at arriving at a more complete and updated analysis of NTBs and their impact on trade faces serious gaps. Current knowledge of such barriers, both empirical and conceptual, is rather limited and hampered by the lack of common methodologies and the inadequate quality of available data and updated information.³⁵

So far the United Nations Conference on Trade and Development's Trade Analysis and Information System (TRAINS) is among the most complete sets of data on NTBs. Other sources include various dispute cases filed with the WTO, notifications of NTBs made to the WTO during the Doha Round's Non Agriculture Market Access negotiations, NTBs reported by industries to various governments annual and barriers reported to various regional trade bodies.

³¹ Sandrey (note 30 above) 10.

³² Sandrey (note 30 above) 10.

³³ Sandrey (note 30 above) 10.

³⁴ LA Grimett 'Protectionism and Compliance with GATT Article XXIV in selected regional trade arrangements' published LLM Thesis Rhodes University (1999) 208.

³⁵ Note by the UNCTAD Secretariat *Methodologies, Classifications, Quantifications and Development Impacts of Non-Tariff Barriers* TD/B/COM.1/EM.27/ (2005) 1.

However as usual, the main issue with many data sources is that they present one side either of an exporter or importer and not necessarily the full picture.³⁶

1.8 Outline of chapters

Chapter two

Chapter two addresses various types of NTBs hindering trade in SADC and assesses costs that are attached to their prevalence using case studies on the implications of NTBs for intra-SADC trade.

Chapter Three

In chapter three the focus is on a general overview of WTO rules that prohibit the use of NTBs. Specifically the discussion is limited to those WTO rules with a direct bearing on all types of NTBs found to be most prevalent in the SADC region. This will enable the reader to check whether all rules relating to NTBs as espoused in the SADC Trade Protocol are compatible to the WTO rules on NTBs.

Chapter four

Chapter four represents the most important part of this paper and it deals with the issue of how NTBs are regulated in SADC region. It first gives a brief background of the SADC Free Trade Area and a general overview of the SADC Trade Protocol as well as its rules relating to NTBs. Secondly, it tackles the main issue to be addressed in this paper namely, the effectiveness of SADC's NTBs legal framework whilst at the same time addressing the critical question whether the NTBs regulatory framework provided for under the SADC Trade Protocol is compatible with the WTO rules that prohibit use of NTBs. Challenges faced in the process of removing these NTBs will form part of chapter four as well.

³⁶ B Fisher *Preference Erosion, Government Revenues and Non-tariff Trade Barriers* (2006) 1389.

Chapter five

This chapter is dedicated to a summary of findings and conclusions reached by this research paper. Again this part will provide recommendations based on the problems identified as contributing to the continued existence and prevalence of NTBs.

Chapter Two

2 What are the Main Categories of Non-Tariff Barriers Existing in SADC Free Trade Area?

2.1 Introduction

Non-tariff barriers are increasingly acting as blockages to international trade and economic growth and development. They are capable of restricting trade; they are unpredictable, persistent and influence trade patterns across countries. A review of literature on intra-SADC trade is suggestive of the fact that as tariffs have been lowered, demands for protectionism have induced a new form of protectionism in the form of NTBs.³⁷ Therefore; there is a need to eliminate these NTBs because removal of tariffs alone is not enough to open up markets. Their prevalence may also be a drawback on the establishment of a COMESA-EAC -SADC Tripartite Free Trade Area.

The purpose of this chapter is to identify and discuss various NTBs hindering trade in SADC and assess costs attached to their prevalence. These NTBs covers quantitative restrictions, customs procedures and administrative requirements, technical standards, sanitary and phytosanitary measures, government participation in trade, lack of infrastructure, restrictive rules of origin and anti-dumping measures.³⁸ The scale of their problem will be demonstrated by reference to NTBs faced by companies trading in SADC Free Trade Area based on recently released studies on NTBs. On the same note, the discussion will pay special attention to the fact that whereas some of NTBs are purely illegal under the WTO and SADC Trade Protocol rules, exceptional cases exists where other measures are considered to be legitimate. For instance measures aimed at protecting human, animal or plant life or health in the form of sanitary and phytosanitary are permissible as long as they do not unnecessarily inhibit trade.

³⁷ I Gillson *Deepening Regional Integration to eliminate the Fragmented Goods Market in Southern Africa, Africa Trade Policy Notes* (2010) 3.

³⁸ W Viljoen, 'Non-Tariff Barriers Affecting Trade in COMESA-EAC-SADC Tripartite Free Trade Agreement' (2011) 15.

2.1.1 Types of Non-Tariff Barriers in SADC Free Trade Area

2.1.2 Quantitative restrictions as NTBs

A quantitative restriction refers to a ban on imports or exports after a determined quantity (the quota) has entered the territory of another Member State and there are different types of quantitative restrictions.³⁹ Pursuant to Article XI: 1 of GATT WTO Members including all SADC Member States who are all WTO contracting parties are generally prohibited from maintaining quantitative restrictions.⁴⁰ Accordingly, the only protective barriers that WTO Members can institute or maintain are duties, taxes or other charges compatible with the GATT rules. Consequently, quantitative restrictions, whether quotas, import or export charges or other measures, are a violation of the rule in Article XI: 1. Evidence however shows that in spite of the prohibitions under WTO rules, most SADC Member States impose import quotas aimed at directly limiting the quantity of goods that can be imported. The need to protect the local industry seems to be the major force behind the use of quantitative restrictions.⁴¹ For instance, the Zambian Minister of Agriculture justified the frequent restrictions on exports of maize and maize products as a strategy that is essential until Zambia is able to consistently produce exportable surplus.⁴²

In addition, to encourage local slaughtering of small stock in Namibia, the Namibian government unilaterally imposed quantitative export restriction coupled with a discretionary permit system on live sheep exports to South Africa. The negative impact of the unilateral ban on the sheep value chain, and more specifically on the abattoirs situated in the Northern and Western Cape has been substantial. Between July 2004 and May 2008 exports of live sheep to South Africa from Namibia decreased dramatically by 84% according to a study commissioned by South African National Agricultural Marketing Council. The report estimated that a potential of 975 full-time job opportunities could be lost in South Africa due to the scheme. Therefore in so far as the

³⁹ P Van den Bosche *The Law and Policy of the World Trade Organization, Text, Cases and Materials* (2005) 441.

⁴⁰ The WTO Legal Texts '*The Results of the Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariff and Trade*' (1999) 437.

⁴¹ Most recently a Zimbabwean online newspaper reported that the South African government had imposed an import ban on all Zimbabwean exports. The move by the South African government had a negative impact on the Zimbabwean exports given that South Africa remained then biggest trading partner with Zimbabwe. See <http://www.newzimbabwe.com> (accessed on 15/01/2012).

⁴² 2007 *Survey of Non-Tariff Barriers to Trade: Zambia*, Imani Development International Limited (2007) 23.

scheme imposed quantitative export restrictions with or without discretionary permits it violates both the WTO and SADC Protocol rules.⁴³

In Botswana, the Minister is authorized to impose tax on any livestock products produced under the Botswana Cattle Export Levy Amendment Act⁴⁴ and in terms of the Livestock and Meat Industries Act⁴⁵. In terms of the two Acts importers are obliged to apply for imports permits which specify the exact quantities that will be imported.⁴⁶ Zimbabwe has through Statutory Instrument 156 of 2011 introduced a surtax of 25 percent on a number of commodities at the beginning of the year 2012 aimed at protecting local industry against what the government called extensive imports.⁴⁷ It follows that instead of the SADC Member States to enact legislation that are aimed at facilitating free flow of goods as mandated by the WTO and SADC Trade Protocol rules, they are doing the opposite by implementing laws that impede trade in violation of rules prohibiting imposition of quantitative restrictions.

2.1.3 Rules of origin as NTBs

The SADC rules of origin are classified as the most complicated set of rules under the WTO. This is because they have specific requirements such as the use of regional inputs, specified processes or a combination of the two or more criteria and requirements. Members States often use rules of origin as NTBs. This is contrary to the theoretical understanding that the rules of origin would promote regional development through import substitution achieved by forcing the producers to source inputs in the region.⁴⁸

For years ,SADC countries have been accused of using rules of origin for other purpose that are not in the interest of promoting regional trade and industrial competitiveness. These purposes include protection against antidumping, enforcement of consumer safety standards and protection of the environment.⁴⁹ For example, South Africa tightened its rules of origin so as to govern trade within SADC. The tight rules of origin are meant to prevent SADC countries from repackaging imported goods and trading them in the region on behalf of 'fly-by-night'

⁴³ N Charalambides *Addressing NTBs in regional goods trade among Southern African Countries* (2010) 20.

⁴⁴ Botswana Cattle Export Levy Amendment Act of 2005.

⁴⁵ Livestock and Meat Industries Act of 2006.

⁴⁶ Viljoen (note 38 above) 16.

⁴⁷ The Zimbabwe Herald Wednesday, 28 March 2012.

⁴⁸ S Madzvova *Rules of origin: Issues of Concern, Prospects and How to Capitalize Them?* (2002) 3.

⁴⁹ Madzvova (note 48 above) 16.

operations.⁵⁰ It has to be clearly stated that this action and several more related to this are often used by the South African trade negotiators, to protect the so-called sensitive industries from competition by potentially competitive industries in the region. These include motor vehicle, chemical and plastic industries.⁵¹

Evidently, in the textile and clothing industry, South Africa has rejected the proposal which was made for it to change its position on "double transformation" requirement for Zimbabwe and Mauritius. Yet an agreement has already been concluded between the MMTZ (least developed countries of the SADC region - Mozambique, Malawi, Tanzania and Zambia) and Southern African Customs Union (SACU) on the derogation of using "single transformation." Its refusal to budge on this issue is a big concern to these least developing countries given the comparative advantage that the industries in the respective countries have over South Africa.⁵²

The other major concern is that restrictive rules of origin are not only a barrier to international competitiveness but also costly in terms of ensuring conformity. These costs arise from the administrative requirements for certificates of origin, which can account for nearly half the value of the duty preference. It has been reported that Shoprite spends US\$5.8 million per year in dealing with red tape measures such as filing certificates and obtaining import permits to secure US\$13.6 million in duty savings under SADC. Woolworths does not use SADC preferences at all in sending regionally produced consignments of food and clothing to its franchise stores in non-SACU SADC markets. Instead it simply pays full tariffs because it currently deems the process of administering rules of origin documentation to be too costly.⁵³ The situation is further complicated by the fact that most of the SADC Member States have membership to a multiple and varied trade agreements, especially when such rules are not harmonized as with the case of many SADC Member States.⁵⁴ This creates confusion in deciding on the rules of origin to apply.

⁵⁰ Madzvova (note 48 above) 16.

⁵¹ Madzvova (note 48 above) 3.

⁵² Madzvova (note 48 above) 4.

⁵³ Ian Gillson PART II Removing Non-Tariff Barriers to Trade -Deepening Regional Integration to Eliminate the Fragmented Goods Market in Southern Africa (accessed at <http://siteresources.worldbank.org> (accessed on 28 February 2012).

⁵⁴ Kalenga (note 8 above) 6.

2.1.4 Customs procedures and administrative requirements as NTBs

In 2007 a research was carried out to identify some NTBs of trade policy kind to trade between Botswana and South Africa. The research was devoted to focus on administrative NTBs and their cost to the supply chains operating between South Africa and Botswana. Citing toll fees and delays, the research concluded that toll charges on the motorways connecting Botswana and South Africa constitute an important NTB to trade between these two countries.⁵⁵

The research highlighted that the current impact of toll charges on supply chain costs for the affected companies. At the time when the research was published, trucks driving between Durban and Gaborone had to pay R727 in toll fees each way while in South Africa, plus P325 an amount equivalent to R464 on the Botswana side. The study estimated that an additional R455 was incurred each way in fuel consumption costs due to deceleration, while a further 45 minutes and R364 were added by stops at each toll booth. According to these calculations, in late 2007, a truck making a round trip between *Durban* and *Gaborone* incurred about R3, 556 in user fees. That added up to billions of rands paid annually by transporters as a whole and obviously impacted negatively on the supply chains operating between *South Africa* and *Botswana*.⁵⁶ The introduction of the *e-tolling system* in South Africa's major roads will compound the situation and increase the cost of doing business in the region since its ports are important to land locked countries.

With respect to trade between South Africa and Zimbabwe evidence showed that another administrative NTB exist in the form of lengthy border delays. Even though it is irrefutable that *Beit Bridge* border post between *South Africa* and *Zimbabwe* is SADC's busiest border post, little is being done to improve the free flow of goods through the same border. In 2005-2006 the *Federation of East and Southern African Road Transport Associations (FESARTA)* commissioned a research to determine precisely how long trucks were taking to clear the border crossing including the *Beit-Bridge*. The study revealed that consolidated multiple entry trucks travelling north from *South Africa* to *Zimbabwe* took on an average of more than two days to clear at the *Beit-Bridge* border crossing. Break bulk single entry loads fared better, generally

⁵⁵G Mthembu *Trade Performance Review 2007: Chapter 6: Non-tariff Barriers in SADC* (2007)137.

⁵⁶Mthembu (note 55 above) 138.

taking around a day to clear the crossing, while refrigerated goods and oil tankers passed through much quicker.⁵⁷

Prolonged formalities, lengthy procedure, duplication of clearance procedures and limited capacity all contribute to high costs of doing business in SADC Member States. These administrative complexity procedures are problematic for transparency and efficiency in the clearance of goods.⁵⁸ Under these circumstances corruption by customs officials which is classified as form an NTB is inevitable. It also remains a significant problem in Zimbabwe, with the country ranked 146th out of 180 countries by Transparency International's most recent *Corruption Perception Index*.⁵⁹ For example on the *Zimbabwean* side of the *Beit-Bridge* border post customs official demand bribes from cross border traders. It is extremely hard for transport operators to pass through the border quickly without paying bribes to the customs officials.⁶⁰

In addition to poor administrative services at the border post, there are other challenges and difficulties to be negotiated by traders and transporters. Zimbabwe companies importing from South Africa and elsewhere are facing time consuming and costly administrative NTBs relating to how their imports are classified. Some Zimbabwe companies reported that up to 19 approvals which can take up to three month to acquire are required for some imports.⁶¹ *Zimbabwe* authorities are also accused of classifying some imports as a service and subjected them to 20% withholding tax instead of treating them as goods that generally attract a lower tax. In this case the government replaced a tariff with an NTB in order to preserve its revenue flow.⁶² Such practices are a violation of WTO rules on transparent laws and regulations.

⁵⁷ Mthembu (note 55 above) 140.

⁵⁸ Viljoen (note 38 above) 14.

⁵⁹ See: http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table.

⁶⁰ This evidence comes directly from my own personal observations on my way to Zimbabwe from South Africa since 2007. Bus and truck drivers are sometimes forced to pay huge amounts of money to customs officials for them to be given preference to pass through the border post. Waiting for a normal clearance procedure may take several hours and in some instances it take days. At times passengers are required to contribute R20 or more each so that the money will be paid to the customs officials. Once such payment is made instead of people to declare their goods and searched nothing of that sort will take place. Ultimately the government will lose billions of dollars to corruption.

⁶¹ Due to the relatively large number of documents required for importing into and exporting from Zimbabwe, as well as the significant costs and time involved, the World Bank, in its *Doing Business 2010* publication, ranks Zimbabwe 167th out of 183 countries in terms of trading across borders (World Bank 2010).

⁶² Mthembu (note 55 above) 141.

It has been also noted that northbound trucks travelling from *South Africa* to *Zambia* and the *DRC* are increasingly avoiding *Beit-Bridge* despite recent reforms and an overall shorter journey distance, opting to pass through Botswana instead. The main reason motivating this decision is that transporters reckoned the time and distance disadvantages were outweighed by the cost of sending their goods through Zimbabwe.⁶³ In acknowledgement of the poor administration at the border post *Zimbabwe's* State Enterprises and Parastatals Minister warned that poor administration at *Beit-Bridge* border post risks driving off commercial traffic to *Kazungula* as international transporters are getting frustrated by the delays at the border due to poor administration.⁶⁴ The Minister's comments are a clear indication that there is a lot of work that need to be done to improve the flow of goods in the region through addressing NTBs.

The *South African* authorities, as part of the effort to protect *South Africa's* domestic motor industry, imposed a ban on second-hand vehicles from travelling on South African roads if they are imported via *Durban* from the *Middle* and *Far East* and intended for destinations north of the *South African* border. In terms of the *South African* law, the vehicles must instead travel on either carrier trucks or cargo trains. It is alleged that the ban is necessary for protecting the road network and making it more difficult for these vehicles to be smuggled into *South Africa*.⁶⁵

It is however clear, that the main reason behind the prohibition is because these imported second-hand vehicles sell for less than half the going rate for *South African*-manufactured second-hand vehicles. Accordingly, the ban is mainly imposed to protect local car dealers and manufactures from competition. This is so because people prefer to buy cheap Japanese second hand cars than the extremely expensive *South African* manufactured vehicles. For this reason transporting the imported vehicles from South Africa to Zimbabwe or beyond by carrier truck now cost an additional US\$700 to the cost of the vehicle making it very difficult for those in car dealership business throughout SADC region to remain in business.⁶⁶

⁶³ Mthembu (note 55 above) 141.

⁶⁴ *The Standard*, Saturday 24 September 2011. www.thestandard.co.zw (accessed on 20 September 2011).

⁶⁵ Mthembu (note 55 above) 141.

⁶⁶ Mthembu (note 55 above) 143.

The literature further revealed that trade between *South Africa* and *Zambia* is seriously impeded by NTBs. Trade facilitation issues such as inefficient customs administration, border delays, high transport costs, poor physical infrastructure and a lack of knowledge among customs officers, insufficient dissemination of relevant information and corruption are also significant barriers to *Zambian* importers. According to the World Bank (2010) Report, *Zambia* ranks 153rd out of 183 countries or territories in terms of ease of trading across borders. This poor performance relates largely to the high number of documents required and long processing times. *Zambia* is also ranked 99th out of 180 countries on Transparency International's 2009 *Corruption Perception Index*, 34 reaffirming a belief within the country that corruption is a major problem for *Zambia's* business environment.⁶⁷ It is reported that Shoprite lose as much as US\$20 000 per week on imports permit to trade meat, milk and plant based products in its shops in *Zambia*. The report went on to point out that it may take 3 to 4 years for another retailer to obtain authorization to export beef and pork products from *South Africa* to *Zambia*.⁶⁸

2.1.5 Poor infrastructure as an NTB

Cross-border infrastructure such as transport, energy and telecommunications are essential to move goods, services, people and information between countries. Such linkages expand market access, reduce economic distance and facilitate trade, investment and labor mobility. However; SADC's poor transport and communications infrastructure and unreliable power raise trade costs and undermine competitiveness and the region's ability to integrate.⁶⁹ In the Democratic Republic of Congo for example, evidence showed that transporting copper from the Copper belt takes on an average of 2 to 3 weeks to reach the port of Durban whereas the same distance in Europe would be covered in 2 days.⁷⁰

In addition police roadblocks in SADC FTA causes serious time delays for products being transported by road which can have significant impact on the quality of agricultural products available in the region. In Zimbabwe police checkpoints stop all commercial vehicles at various

⁶⁷ Determining the Scope and Nature of Non-Tariff Measures in Selected international Markets Report Prepared by TRALAC (2010) 44.

⁶⁸ Villjoen (note 38 above) 14-15.

⁶⁹ V Arncharaz 'Impediments to Regional Trade Integration in Africa' (2011) 2 *Africa Economic Brief* 2.

⁷⁰ Arncharaz (note 69 above) 2.

points on all major highways causing time delays and encouraging bribery and corruption.⁷¹ At times police road blocks are found at every five or ten kilometers on the main high way from *Beit bridge* border post to Harare. The delays are further caused by a poor road network which links *Zimbabwe* and *South Africa* specifically on the *Zimbabwean* side. The road is too narrow and full of pot holes hence it cannot cope up with a large volume of traffic. It therefore follows that poor transport infrastructure within SADC is a big challenge and it constitutes an NTB. The delay caused by poor road networks and police road blocks means more costs are incurred by transporters of goods and this has a negative impact on business operations.

2.1.6 Technical Standards as NTBs

Countries often have an interest in making sure that imported products meet certain technical standards. In order to ensure that such standards are met, countries adopt technical regulations.⁷² In order to prevent unnecessary technical barriers to trade, the Protocol in *Article 17* and the *Annex on Technical Barriers to Trade* encourage SADC Member States to use international standards whenever technical regulations are considered necessary.⁷³

Sadly, technical regulations standard regimes in SADC are classified as being over-reliant on mandatory inspection and certifications. It is reported that in most Southern African countries there are no procedures by which technical regulations are assessed in terms of their consistency with public policy objectives, whether countries and the private sector have the capacity to implement them or their impact to trade and competitiveness. In particular the lack of ‘Office of Regulatory Reform’ in all Southern African countries to review the justification for both new and existing technical regulations is raised as a big concern. Such absence of regulatory impact assessment causes problems and raises costs.⁷⁴

⁷¹ Viljoen (note 38 above) 16.

⁷² For example South Africa enacted The Foodstuffs, Cosmetics and Disinfectants Act of 1972 which governs the labelling and advertising of foodstuffs, and its regulations have been in place for many years. They are very specific on such matters as the name of the foodstuff, size of lettering, prohibited statements, ingredients, nutritive value claims, and nutrition information format. Any pre-packaged foodstuff imported into or consigned to any place in South Africa must bear a label carrying the particulars specifically required by the Act or its regulations. Failure to comply with the Act may result in the attachment of the products by state agents.

⁷³ B Chilala *Guide to the SADC Protocol on Trade* (2009) 17-18.

⁷⁴ Gillson (note 53 above) 94.

The environmental levy on plastic bags in *South Africa* was introduced to reduce problems associated with litter, but the technical regulation governing it also affects unrelated issues such as the minimum thickness of the plastic to be used as well as the size of the text that could be printed on the bags. In addition, all coffee exports from *Zambia* to *South Africa* are restricted based on the level of *Ochratoxin* in the coffee.⁷⁵ While regional efforts to harmonize standards in SADC are under way, application remains lacking.⁷⁶ Only *Namibia* and *Swaziland* have adopted all the 78 of SADC-defined harmonized standards for the region, of which some have been developed without any real sense of prioritization and so are unlikely to bring significant increases in regional trade.⁷⁷

In Malawi imported food products are required to meet MS 19: general standards on pre packed foods requirements. This is a mandatory standard that requires any pre- packed foods to have its nutritional value declared on the pack. Any imports of pre-packed food products are inspected and samples taken for verification of the declared nutritional value. The consignment cannot be distributed for sale unless verification is done. Procedural delays for receiving the certificates are an issue faced by companies.⁷⁸ Consequently companies lose a lot of business during the period they wait to obtain the certificates.

Another problem is the delay faced due technical procedures is the requirement for Iodization of salt backed by Salt Iodization Act. Requirements to have salt tested for iodine verification at the entry border and consequent testing for iodine levels in salt delays the distribution of the product since the product cannot be distributed until testing is done. The survey by *Imani Development* revealed that companies are faced with delays in receiving certificate of approval, which delays the distribution of the product and at times wastage of a perishable item.⁷⁹

⁷⁵ Imani Development International, *Survey of Non-Tariff Barriers to trade: Zambia* (2007) 20.

⁷⁶ Viljoen (note 38 above) 16-17.

⁷⁷ Gillson (note 53 above) 94.

⁷⁸ Imani Development International Ltd, 2007 Update Survey of Non Tariff Barriers to Trade in Malawi: An Inventory of SADC Region: Non Tariff Barriers (NTBS): Malawi (2007) 28.

⁷⁹ Imani (note 78 above) 28.

2.1.7 Sanitary and Phytosanitary Measures as NTBs

Article 16 of the SADC Protocol on Trade and the Annex on Sanitary and Phytosanitary authorizes Member States to regulate the importation of food products in order to protect consumers, plants and animals from contaminants, toxins, pests and diseases. These regulations are called sanitary and phytosanitary measures. Sanitary refers to regulations on human and animal products, while phytosanitary refers to regulations on plant products. Thus, SPS measures concern the safe handling and production of food for animals and humans and plant products.⁸⁰

In order to make trade easier and minimize the burden of regulation, while at the same time protecting the health and welfare of citizens, the Protocol requires Member States to adopt SPS measures that are in harmony with international standards. The SADC Protocol on Trade forbids the creation of SPS measures for the purpose of reducing trade and competition. Therefore SPS measures should have a scientific basis and only be adopted for health and safety reasons.⁸¹ However in practice the demands of the Trade Protocol are neglected as various Member States require cumbersome pre-shipment inspections and stringent SPS certification requirements for the importation of different agricultural products.

Namibia has very stringent SPS requirement for the importation of live animals and meat products.⁸² South Africa's *Trade Review Policy* revealed the uncoordinated manner in which some standards and technical regulations are created and implemented. It also mentions that some quality and technical standards are particularly stringent for those products of export significance for *South Africa* and these subsequently constitute NTBs for other SADC members should they become the *de facto* standard of choice.⁸³ For example all agriculture products can only be imported into *South Africa* by a permit holder. The permit is issued by the relevant government authority. At *Beit- Bridge* border post *South African* customs official and their counterparts from health department confiscate and destroy all agriculture products destined to *South Africa* unless a valid permit is produced.

⁸⁰ Chilala (note 73 above) 17.

⁸¹ Chilala (note 73 above) 17.

⁸² Viljoen (note 38 above) 16-17.

⁸³ JK Massimiliano & J Kennan 'Impediments to Intra- Regional Trade in Sub- Saharan' –Prepared for the Commonwealth Secretariat (2010) 29.

There are also complains that SPS regulations relating to the importation of agricultural goods into *Zambia* lack transparent and there is an overall lack of available information regarding phytosanitary requirements. There is also little information regarding quarantine pests and regulated pests for importers and potential importers. In the national health and agricultural plans there are no specific policies pertaining to food safety and food safety standards. The Food and Drug Act⁸⁴ plus additional and regulations provide a foundation for food safety standards to be implemented, but current food laws are not adequately enforced.⁸⁵ The Plant Pest and Disease Act (Cap 233) and other regulations govern SPS requirements and import permits for the importation of various agricultural products into *Zambia*. In general, the importation of fruit and vegetables is restricted due to the requirement of an import permit from the Plant Quarantine and Phytosanitary Service, phytosanitary certificates from the *Zambian* Department of Agriculture and the exporting country, as well as the inspection of goods prior to entry.⁸⁶

2.1.8 State Trading Enterprises as NTBs

There are numerous ways in which governments can engage in practices which restrict imports or exports. Instruments they can use include state trading enterprises, state sanctioned monopolies, procurement policies which discriminate against foreign goods and services, and industrial policies which subsidise domestic firms. Governments can also use macroeconomic, competition, fiscal, immigration or investment policy tools to distort trade in desired ways.⁸⁷

Government procurement provisions generally restrict the purchasing of certain products by government agencies in some ways towards domestic products rather than foreign products. This type of preference implies protection for local manufacturers and thus creates an obstacle to foreign producers.⁸⁸ Participation of national governments, parastatals and monopolies in the trading system is prevalent in SADC. This extends to the government operation of borders and ports. In *Zambia* for instance, the exportation of maize is done through one channel marketing. This is done not by only procuring maize from domestic farmers, but also through running a state

⁸⁴ The Food and Drug Act of 2001.

⁸⁵ TRALAC 'Determining the Scope and Nature of Non-Tariff Measures in Selected international Markets Report' (2010) 43.

⁸⁶ Tralac (note 85 above) 43.

⁸⁷ Tralac (note 85 above) 15.

⁸⁸ W Soontiens, 'The Relevance of Non-Tariff Barriers to Regional Trade: Experiences of South African Exporters' *Global Business Review* (2003) 2.

trading enterprise which it occasionally supports with import and export quotas.⁸⁹ In the case of Zimbabwe the importation of maize is done via state trading government monopolies.⁹⁰ As a result only the Grain Marketing Board of *Zimbabwe* is authorized to import or export maize.

2.1.9 Dumping and Safeguards Measures as NTBs

One of the most utilized forms of NTB in recent decades by the industrialized countries and increasingly so by developing countries, especially the larger ones like South Africa has been the imposition of anti-dumping or counter-veiling duties on imports. In as much as not all SADC countries are neither the targets nor the initiators of anti-dumping measures, they still represent a veiled threat to their exports. Anti-dumping and countervailing measures are permitted to be taken by the WTO Agreements and the Protocol in specified situations to protect the domestic industry from serious injury arising from dumped or subsidized imports. The way these measures are used entails heavy costs for the foreign firms targeted by this policy and certainly for consumers in the country applying antidumping legislation. If used as protectionist measures, they may act as some of the most effective NTBs. In Southern and Eastern African regions for example, several least developing countries have complained about firms from a more advanced developing country for allegedly dumping goods on their markets to the detriment of local industries, while keeping their own markets off-limits through a labyrinth of tariff and NTBs measures.⁹¹

In accordance with other international trade agreements, and especially the provisions of the WTO, the Protocol provides for suspension of trade liberalizing measures in order to protect domestic producers from harmful effects of dumping by other SADC exporters to provide safeguards against damaging surges of imports into the domestic market. While such measures are provided for under the WTO, there is increasing recognition that they can be and often are used as a form of disguised protection, and that standard techniques for determining the need for anti-dumping and safeguard measures are heavily biased in favour of narrow producer interests

⁸⁹ The Food Reserve Agency acts as a state-trader of wheat, exporting in years of surplus and importing when domestic harvests are poor. The FRA's imports are sometimes backed up by government administered quotas for the cross-border trade of maize.

⁹⁰ Viljoen (note 38 above) 18.

⁹¹ A Mold 'Non-Tariff Barriers their Prevalence and Relevance for African Countries' ATPC Work in Progress No. 25 (2005) 19.

and against the broader national interests of users and consumers of importable goods.⁹² This argument is supported by the fact that usually not every investigation results in the finding of dumping or injury to the domestic industry causing severe damage on the exports of the country under investigation.

Among economists anti-dumping is often regarded as a form of protectionism and its impact on trade is acknowledged. They view anti-dumping as form of inherent protectionism and therefore should be thought of in the same ways of any forms of protection aimed at assisting domestic industries against competition from imports.⁹³ There is also a growing recognition that true dumping, in the economic sense, is just one type of anti-competitive behaviour that should be dealt with as part of broader domestic policies to ensure competition and smooth and efficient working of domestic markets. In SADC context, the claim of “dumping” is often used by producers seeking continued protection of non-competitive domestic industries. Some SADC members have been among the heaviest users of WTO anti-dumping provisions in recent years, and this has been a great hindrance to the achievement of many of the promised economic benefits of international economic integration.⁹⁴

2.2 Concluding Remarks

In summary this chapter identified a list of NTBs that are being maintained by SADC Member States in the form of cumbersome customs documentation and procedures, cumbersome import and export permits, import and export quotas, sanitary and phytosanitary measures, technical barriers to trade, strict rules of origin and anti-dumping laws. It went further to highlight that these non-tariff barriers to trade are still maintained by most SADC countries despite the clear prohibitions under the WTO and SADC Trade Protocol rules. The chapter highlighted that by maintaining NTBs Member States’ actions are contrary to their commitments and obligation to remove all forms of non-tariff barriers to trade and to refrain from introducing new once.

It is also highlighted in the study that as a result of NTBs, the cost of doing business in the region is unreasonably high as compared to other regions. This support the views of economists who

⁹² Flatters (note 11 above) 5.

⁹³ LL Ng’oma A Critical Analysis on the use of Anti-Dumping Regulation in Southern African Customs Union(SACU) Case of Botswana, LLM Published Thesis ,University of Pretoria, 2010 14.

⁹⁴ Ng’oma (note 93 above) 14.

believes that where NTBs are imposed for the purpose of protecting domestic industries from competition of foreign products they will impose costs that will outweigh the benefits for both the exporting and the import countries. The quantitative restrictions undermine trade and economic efficiency more than tariffs. For the above stated reasons there are more economic opportunities that are being lost by SADC members due to use of NTBs. It is therefore necessary for the SADC member states to make an informed choice and start to work towards the reduction and eventually elimination of all forms of NTBs. Speed implementation and observing the timeframe for eliminating NTBs under the Tripartite Agreement is one but not the sole solution to reduce the impact of NTBs in the region.

Chapter Three

3 The Regulation of Non-Tariff Barriers to Trade Under the WTO

3.1 Introduction

The previous chapter identified and discussed eighty main types of NTBs that are substantially impeding SADC trade by unreasonably increasing the cost of trade. All the NTBs existing in the region are regulated through the General Agreement on Tariffs and Trade and a number of side agreements.⁹⁵ Only in 1994 at the Singapore Ministerial Conference did the WTO received a mandate to look seriously on the matter of NTBs under the banner of trade facilitation in order to assess the scope of WTO rules in this area. An overall framework of definitions, rules and disciplines were necessary and hence were developed to curb the effects of NTBs. Accordingly, after WTO realised that NTBs are rapidly overtaking tariffs as main obstacle to trade, it came up with unique instruments that could be used to address these measures.⁹⁶ The WTO Agreements which are outcome of the 1986- 1994 Uruguay Round of multilateral trade negotiations introduced disciplines on a wider range of trade issues and testify to the wider and deeper commitment to trade liberalization.⁹⁷

The scope of these Agreements goes beyond the traditional trade issues which primarily addressed reducing tariffs and quotas as barriers to trade on goods at country borders but was extended to cover other forms of NTBs. At present, a number of NTBs are now subjected to a number of multilateral and legally binding WTO rules and Agreements. The Agreements regulate technical, bureaucratic measures and legal issue that may impede free flow of goods in trade or be used as instruments for restrictive and discriminative trade policies. They cover Agreements on Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Import Licensing Procedures, Customs Valuation and Rules of Origins among other Agreements.⁹⁸

This chapter provides a thorough grounding in the fourth of the four pillars of the GATT-WTO legal infrastructure, namely the requirement of transparency and the removal of NTBs such as

⁹⁵ H Van Houtte *The Law of International Trade* (1995) 76-77.

⁹⁶ A Mc Carty *Vietnam's Integration with ASEAN: Survey of Non-Tariff Measures Affecting Trade* (199) 28.

⁹⁷ O Gurler 'WTO Agreements on Non-Tariff Barriers to Trade & Implications for OIC Member States' (2002) 23 *Journal of Economic Cooperation* 62-63.

⁹⁸ Gurler (note 97 above) 62-63.

quantitative restrictions. That pillar is embodied in GATT, Articles X and XI respectively. It will make a general overview of WTO rules that prohibit the use of NTBs. Specifically the discussion is limited to those WTO rules on NTBs with a direct link on the types of NTBs found in the SADC region. It will also be highlighted that some WTO instruments and laws on NTBs provide for some exceptions whereby measures that are *prima facie* illegal are permissible in certain cases mainly based on four reasons namely (a) safeguarding health, safety and security of human beings, plants and animals and against environmental pollution (b) safeguarding national security (c) safeguarding revenue loss (d) protecting home industries and consumer.⁹⁹

3.2 The Regulation of Quantitative Restrictions under the GATT

The General Agreement contains a number of articles dealing with quantitative restrictions, for example Articles XI, XII, XIV, XVIII, XIX, XX and XXI. Certain other GATT instruments also deal directly or indirectly with quantitative restrictions, for example the Protocol of Provisional Application, Protocols of Accession, some waivers and the Arrangement Regarding International Trade in Textiles. This section does not attempt to review each of these provisions in detail but special attention will be given to Article XI.

Article XI¹⁰⁰ of GATT is one of the most important instruments regulating use of NTBs by Members. Its objective is to prohibit contracting parties from implementing quotas and non-tariff barriers and other measures that are intended to have the effect of restricting imports and exports to and from the territory of other WTO members. Despite the clear prohibition some WTO contracting parties still apply quantitative restriction. Therefore, ever since the enactment of GATT a string of disputes arising from NTBs have come forward before the WTO dispute settlement body for adjudication. One of such cases is the *Japan*¹⁰¹ case where the Panel was called to interpret the meaning of Article XI: 1. The panel noted that the wording of Article XI: 1 was comprehensive and as such it applied to all measures instituted or maintained by a

⁹⁹ L Okomu & J.C O Nyankori *Non –Tariff Barriers in the EAC Customs Union: Implications for Trade between Uganda and Other EAC Countries*. Economic Research Centre (2011) 11.

¹⁰⁰ Provides that “no prohibitions or restrictions other than duties, taxes or other charges whether made effective through quotas, imports or exports license or other measures shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting part or on the exportation or sale for export of any product destined for the territory of any other contracting part”.

¹⁰¹ *Panel Report BIS D 35S/163*.

contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.

In addition, the Panel in *Turkey – Textiles* stated that the prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. It went on to state that unlike other GATT provisions, Article XI refers not to laws or regulations only but more broadly to measures. Thus any measure instituted or maintained by a Member which restricts imports or exports is covered by Article XI, irrespective of the legal status of the measure. In *Japan – Semi-Conductors*, the Panel therefore ruled that non-mandatory measures of the Japanese Government, restricting the export of certain semiconductors at below-cost price, were nevertheless ‘restrictions’ within the meaning of Article XI: 1.¹⁰²

One reason for this prohibition is that quantitative restrictions are considered to have a greater protective effect than do tariff measures, and are more likely to distort the free flow of trade. When a trading partner uses tariffs to restrict imports, it is still possible to increase exports as long as foreign products become price-competitive enough to overcome the barriers created by the tariff. When a trading partner uses quantitative restrictions, however, it is impossible to export in excess of the quota no matter how price competitive foreign products may be. Thus, quantitative restrictions are considered to have such a distortional effect on trade that their prohibition is one of the fundamental principles of the GATT.¹⁰³

GATT Article XI: 1 does not only cover *de jure* prohibition on restrictions but extend to cover restrictions of a *de facto* nature. In *Argentina – Hides and Leather*, the panel was seized with the issue whether Argentina violated Article XI: 1 by authorising the presence of domestic tanners’ representatives in the customs inspection procedures for hides destined for export operations. According to the complainant (the European Communities), such action by Argentina constituted a *de facto* restriction on the exportation of hides inconsistent with Article XI: 1. The Panel ruled in favour of the complainant and advanced that the disciplines of Article XI: 1 extend to restrictions of a *de facto* nature.¹⁰⁴

¹⁰² Van den Bosche (note 39 above) 446.

¹⁰³ Van den Bosche (note 39 above) 447.

¹⁰⁴ Van den Bosche (note 39 above) 446.

Acknowledging the fact that contracting parties may have genuine reasons to restrict imports and exports for different reasons, the GATT does provide for exceptions on the general prohibitions. These exceptions permit the imposition of quantitative measures under limited conditions, and only if they are taken on policy grounds justifiable under the GATT, such as when a waiver has been granted under Article XXV:5 of the original GATT¹⁰⁵, when a member faces critical shortages of foodstuffs in terms of Article XI:2 or for balance of payment problems under Article XVIII:B.¹⁰⁶ As long as these exceptions are invoked formally in accordance with GATT provisions, they cannot be criticized as unfair trade measures. It follows that anything that goes beyond the permissible exceptions is illegal under GATT and the affected members are entitled to institute action against the offender.

3.3 The Regulation of Antidumping duties and Countervailing Measures under the GATT

The use of anti-dumping measures has increased dramatically in recent years. With the reduction of other trade barriers, many governments and domestic companies view anti-dumping measures and other trade remedies as the most attractive WTO-consistent way of protecting domestic markets.¹⁰⁷ Article VI of GATT contains general provisions governing the application of anti-dumping and countervailing measures. The first paragraph of the article condemns the export sales below normal value when they cause or threaten material injury to an established industry in the territory of the contracting party or materially retard the establishment of a domestic industry.¹⁰⁸

In addition, the Article provides for the basis for determining when sales are below normal value, when export price is less than the comparable price in the ordinary course of trade for product when destined for consumption in the exporting country. The Agreement on the Implementation

¹⁰⁵ Article XXV:5 of the original GATT (referred to as the “GATT 1947” in the WTO Agreement) permitted a waiver of obligations with the consent of the other contracting parties. Once a waiver was obtained, the contracting party was allowed to impose import restrictions. Waivers granted under the GATT 1947 and still in effect when the WTO Agreement became effective could be extended under the WTO Agreement provided that necessary procedural steps were taken before 31 December 1996. Waivers are also allowed under the WTO Agreement when certain conditions are met.

¹⁰⁶ Under Articles XII or XVIII:B of the GATT, a WTO Member may restrict imports in order to safeguard its balance-of-payments if the International Monetary Fund finds that the country is experiencing BOP difficulties.

¹⁰⁷ J P Durling ‘WTO Review of Anti-dumping Measures’ (2003) 6 *Journal of International Economic Law* volume 127.

¹⁰⁸ Trebilock & Howse *The Regulation of International Trade* (1999) 167.

of Article VI of GATT set out the rules of interpretation that must be followed by all contracting parties when implementing Article VI. Once such a requirement is satisfied, the importing country is entitled to levy an anti-dumping duty equal to the difference between the normal value and the export price.¹⁰⁹

3.4 The Regulation of Technical Standards under the GATT

Technical regulations and industrial standards are important, but they can vary from country to country. If the standards are set arbitrarily, they could be used as an excuse for protectionism. The Agreement on Technical Barriers to Trade which was negotiated during the Uruguay Round ensures that regulations, standards, testing and certification procedures do not create unnecessary obstacles.

The original GATT as adopted in 1947 does not contain provisions that directly restrict the contracting parties' freedom to adopt environmental, health and safety standards as long as the standards do not discriminate against imports in favour of domestic products.¹¹⁰ This led to the use of trade restrictive measures by Contracting Parties. In response to the crisis posed by the old GATT which was not adequately dealing with the growing problem of trade distortions as a result of national regulation, an Agreement on Technical Barriers to Trade was adopted during the Tokyo Round of multilateral trade negotiations. It reiterated the National Treatment principle obligations of the contracting parties and ensured that technical regulations were not adopted with the view of creating obstacles to international trade.¹¹¹

Under the Agreement on Technical Barriers to Trade all contracting parties are obliged to adopt standards that are in conformity to international standards. In the event that a contracting party choose to adopt standards that are not compatible to the international standard yet there is a possibility of such standard affecting trade, notification is required through the GATT Secretariat.¹¹² The Agreement also obliges contracting parties to treat imported products in no less favourable conditions than afforded to like domestic products. Mutual recognition policies

¹⁰⁹ Trebilock & Howse (note 108 above) 167.

¹¹⁰ Trebilock & Howse (note 108 above) 205.

¹¹¹ Trebilock & Howse (note 108 above) 206.

¹¹² Trebilock & Howse (note 108 above) 206

between parties are encouraged in the agreement. It clearly provides that standards which unnecessarily create obstacles to international trade are not permitted.¹¹³

3.5 The Regulation of Sanitary and Phytosanitary Measures Under the GATT

All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, sanitary and phytosanitary measures sometimes go beyond what is needed for health protection and could be used to shield domestic producers from economic competition.¹¹⁴ The Agreement on Sanitary and Phytosanitary Measures was negotiated during the Uruguay Round. It is a separate agreement covering the basic rules on food safety, as well as animal and plant health standards. The SPS Agreement was modelled on the TBT Agreement, which was initially negotiated under the GATT during the Tokyo Round negotiations (1973-1979) which included both technical barriers to trade and sanitary and phytosanitary measures.¹¹⁵

The SPS Agreement was intended to address measures designed to protect human, animal and plant life and health and is used as a tool to regulate SPS measures as NTBs. SPS measures are a highly controversial area of regulation as they concern the most part the safety of a nation's food. Issue of scientific justification and allowable risk within the context of SPS are difficulty to arbitrate since they fall within the province of government's sovereignty.¹¹⁶ WTO members are obliged to use international standards, guidelines and recommendations where they exist. However, members may use measures which result in higher standards if there is scientific justification. Members may also set higher standards based on appropriate assessment of risks so long as the approach is consistent and not arbitrary. Article 5.7 of the SPS Agreement allows temporary "precautionary" measures. Members may also set higher standards based on appropriate assessment of risks.¹¹⁷

The SPS Agreement further contains rules, in Article 3, encouraging, but not obliging, Members to harmonise their SPS measures around international standards. In *EC – Hormones* the Appellate Body submitted that the object and purpose of Article 3 is to promote the

¹¹³ Trebilock & Howse (note 117 above) 206

¹¹⁴ Trebilock & Howse (note 117 above) 207.

¹¹⁵ Trebilock & Howse (note 117 above) 206

¹¹⁶ Van den Bosche (note 39 above) 462.

¹¹⁷ Van den Bosche (note 39 above) 462.

harmonization of the SPS measures of Members on a wide basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people.¹¹⁸ This means Members still reserves the rights to decide whether to harmonise their SPS standards or not. In the interest of facilitating trade, it is advisable for members to harmonise their policies to avoid confusion and trade restrictive effects that SPS standards may have in certain instances.

3.6 The Regulation of Import Licensing Procedures under the GATT

Import licensing procedures is subject to WTO disciplines. Article 1 of the Agreement on Import Licensing Procedures provides for the definition of import licensing procedure.¹¹⁹ The present Agreement seeks to prevent unnecessary restrictions on international trade through import licensing procedures. It obliges the contracting parties to apply import procedures neutrally and administer them in a fair and equitable manner.¹²⁰ In this, case Members are required to publish all information concerning the application for the import license including eligibility of the applicants and the administrative bodies tasked with issuance of the licenses and a list of products that are subjected to import license.¹²¹ Article 1.6 of the Agreement simplifies the procedure for making the application by stating that application documents must not exceed ten and that administrative bodies must not exceed three.

3.7 The Regulation of State Owned Enterprises under the GATT

The most important GATT rules for NTBs concern state trading enterprises which mainly operate in countries with a state economy as provided for in Article XVII. It was agreed during the Uruguay Round to inform the GATT Secretariat about all enterprises that answered the description of state trading enterprises. The surveillance of these enterprises is increased through stricter notification and review procedures. The Agreement on government procurement also known as GATT procurement code contains substantial and procedural rules. The code applies to statutory provisions as well as to administrative practices for public procurement of goods for

¹¹⁸ Van den Bosche (note 39 above) 466.

¹¹⁹ It is an administrative procedures used for the operation of import licenses requiring the submission of an application or other documentation other than those required for the purposes of customs to the relevant administrative authority as a pre-condition for importation into the customs territory of the importing member country.

¹²⁰ Gurler (note 97 above) 78.

¹²¹ Gurler (note 97 above) 78.

above a certain amount. The main principle behind this public procurement is the national treatment which prohibits discrimination of goods on the basis of nationality.¹²² However, it is necessary to point out that all of these disciplines and rules only apply to the twenty-six Members which are party to the Agreement on Government Procurement.¹²³

3.8 The Regulation of Rules of Origins under the GATT

As intra-regional trade expands because of the trade liberalization process eliminating tariffs and NTBs, administered protection becomes directed towards imports of non-members. Such protectionist measures take the form of rules of origin and trade remedies.¹²⁴ Rules of origin are criteria used to determine the national origin of a product. By definition, each product can only have one territory. However, in today's world where products are made up of different components from different countries, defining the origin of a product presents a difficult task.¹²⁵ Establishment of regional economic groupings such as SADC in various parts of the world also contributed to the intensified use of rules of origin as a tool of trade diversion and trade policy. A rule of origin principle is implemented to prevent the circumvention of the trade agreements by third parties through free riding.¹²⁶

The purpose and effect of rules of origin is that it subjects certain imported products to discriminatory policies and measures depending on their origin. In order to prevent and minimise the use of rules of origin, the WTO came up with an Agreement on Rules of Origin to regulate the determination of the national origin of goods in international commerce.¹²⁷ The objective of the Agreement is to ensure that rules of origin are not abused and implemented to restrict trade. In addition, it seeks to secure transparency of laws, regulations and practices regarding rules of origin and to harmonise rules of origin in order to facilitate trade. A Committee on Rules of Origin constituted by representatives of Member States was established and given the mandate to monitor the implementation of the Agreement on Rules of Origin.¹²⁸

¹²² Hans Van Houtte (note 95 above) 77-78.

¹²³ Hans Van Houtte (note 95 above) 77.

¹²⁴ JT Gathii *African Regional Trade Agreements as Legal Regimes*, *Cambridge International Trade and Economic Law* (2011) 114.

¹²⁵ Gurler (note 97 above) 73.

¹²⁶ James Thuo Gathii, (note 124 above) 114.

¹²⁷ Gurler (note 97 above) 74.

¹²⁸ Gurler (note 97 above) 74.

Until the completion of the harmonization programme, WTO members are expected to ensure that their rules of origin are transparent; that they do not have restrictive or distorting effects on international trade.¹²⁹

3.9 Concluding Remarks

In short this chapter acknowledged the fact that a quite number of World Trade Organization provisions exist to address the issue of NTBs. However, the chapter only concentrated on those provisions with a direct or indirect effect to those NTBs that have been found to be most troublesome in SADC Free Trade Area. These cover customs procedures and administrative requirements, technical standards, sanitary and phytosanitary measures, government participation in trade, lack of infrastructure, restrictive rules of origin and anti-dumping measures that cause time delays and unreasonably increase cost of intra-regional trade.

It further demonstrated that addressing NTBs is a significant part of the on-going WTO agenda. To this end multilateral agreement regulating measures which have the potential to be used as NTBs are already in place to achieve this important goal of the World Trade Organization. These include the Sanitary and Phytosanitary Agreement, the Technical Barriers to Trade Agreement, and various other agreements covering issues such as subsidies and countervailing measures, antidumping and rules of origin. At the same time the study noted that significant work still needs to be done to examine the economic impact of NTBs, as current empirical and conceptual knowledge of these barriers remains somewhat sketchy. In particular, this knowledge is hampered by a lack of common methodologies, adequate data and up-to-date information. Establishing a unified method for quantifying NTBs also remains a significant challenge.

¹²⁹ WTO ,Non –Tariff Barriers :Red Tape etc available at www.wto.org/english/thewto-e/whati-e/tif-/agrm9-htm#origin

Chapter Four

4 Regulation of Non-Tariff Barriers to Trade in SADC Free Trade Area

4.1 Introduction

The results of the previous chapter highlighted that the World Trade Organization has instruments in place to discipline NTBs and impose obligations to all WTO members to eliminate NTBs and refrain from imposing new ones. Given that all SADC Member States are WTO contracting parties they are duty bound to comply with its rules on NTBs. Surprisingly, results of the previous chapter suggest that a proliferation array of NTBs are still existing and have created serious impediments to intra- SADC trade.¹³⁰ In light of these results, initiatives aimed at tackling NTBs and their impact on trade at national and regional level become even more important. It is also important that mechanisms put in place to tackle these NTBs must adequately address their elimination.

This chapter first gives a brief background of the SADC Free Trade Area and a general overview of the SADC Trade Protocol and its rules relating to NTBs. Secondly, it assesses the effectiveness of SADC's NTBs legal framework. Thirdly, the chapter will address the critical question whether the NTBs regulatory framework provided for under the SADC Trade Protocol is compatible with the WTO rules that prohibit use of NTBs. The final part will identify difficulties encountered by SADC and the EAC in their effort to eliminate NTBs.

¹³⁰ A study carried by *Southern Africa Institute for International Affairs* (SAIIA) through Interviews with businesses operating in the SADC region confirmed that NTBs were a big hurdle to trading in SADC and a good number of the complaints on NTBs relate to SPS and TBT measures. Such requirements are supposed to be used to protect human, animal and plant health and life but are perceived as veiled attempts to protect certain local industries. For example, Zambia demands that imported sugar be fortified with vitamin A, by 45%, for the purpose of bridging a deficiency of the mineral among children. This measure was widely criticized because it did not target other products, such as maize meal or wheat flour, and was deemed to favor sugar producers in the country at the expense of other producers in the region such as Zimbabwe. Zimbabwe on its part has been known to lock out Zambian milk products from its market on the grounds that the milk packets were not labeled in the local Ndebele language, which has nothing to do with safety or health requirements.

4.2 Background to the SADC Free Trade Area

The Southern Africa Development Community is an association of fifteen states promoting economic integration.¹³¹ The main goals of SADC are to form common political interests and support greater trade and investment flows between Member States. The SADC Free Trade Area is a key to achieving these goals. By January 2008 twelve, of the fourteen SADC Member States established an FTA. The FTA has an ambitious regional integration agenda that includes the establishment of a customs union by 2012.¹³² As far as tariffs are concerned, a long distance has been travelled since then and substantial reduction in tariffs has been achieved in the successive rounds of trade negotiations and through bilateral agreements. It is however difficult to argue that the same success has been achieved in the area of NTBs.

As a result, there are on-going negotiations on the issue of NTBs at regional level by SADC Ministers of trade with more time devoted to the NTBs rather than to tariffs. This highlights how NTBs are becoming a pertinent issue in the context of trade and hence their prevalence and effects demand immediate solution.¹³³ To this end, elimination of NTBs has been listed as one of the key objectives in the Tripartite Draft Agreement by SADC, Common Market of Eastern and Southern Africa and East Africa Community.¹³⁴ Sadly, there is evidence to prove that majority of Member States are still maintaining NTBs.

The SADC FTA creates a regional market worth US\$360 billion with a total population of 170 million and includes economies growing by up to 7% a year. Angola and the Democratic Republic of Congo are set to join the FTA adding a further US\$71 billion and 77 million people to the SADC market.¹³⁵ Under the FTA Member States committed to liberalize trade through removing tariffs and other NTBs. The FTA also includes measures directly aimed at facilitating trade by reducing red tape and paperwork at the borders and providing a framework for improving the movement of goods throughout the region. These are key barriers to trade in

¹³¹ Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

¹³² A Boslet *at Monitoring Regional in Integration Sothern Africa 2010 Year Book* (2011) 1.

¹³³ L Wasescha *World Trade Organization Negotiations on Market Access on Non Agriculture Products (NAMA)* TN/MA/W/103/Rev.3/Add.1 21 April 2011.

¹³⁴ Viljoen (note 38 above) 15.

¹³⁵ SADC Free Trade Area Handbook (2008) 2.

SADC – as identified by a survey of over 600 businesses and other non-State actors undertaken throughout the region.¹³⁶

4.3 A General Overview of the SADC Trade Protocol and its rules relating to NTBs

The SADC Trade Protocol was signed in 1996 and the implementation of the SADC FTA began in 2000.¹³⁷ The drafters of the SADC Trade Protocol anticipated the possibility that the Member States might try to compensate the abolition of tariffs and other duties by other trade distorting instruments such as NTBs. Therefore, they agreed to put in place rules to regulate any measures that have effects equivalent to those of tariffs. To date the Trade Protocol¹³⁸ is arguably the most important legal instrument of SADC that seeks to increase trade through elimination of NTBs.

It provides for the typical objectives of improved market access and non-discrimination and aims to enhance cross-border investment by liberalising intra-regional trade.¹³⁹ It set out the obligations Member States need to observe in order for the regional arrangement to be compatible with WTO rules.¹⁴⁰ The Protocol clearly states in its provisions that when dealing with intra-SADC trade, Member States should adopt policies and implement measures which will lead to the elimination of all existing forms of NTBs. In the same vein, Member States are enjoined to refrain from imposing new NTBs except where the Trade Protocol provides otherwise¹⁴¹.

In addition, the Trade Protocol provides guidelines on how the process of eliminating NTBs is to be achieved and pursued. To this end the Committee of Ministers responsible for trade matters is charged with determining the process and manner in which the elimination of tariffs and NTBs is

¹³⁶ www.sadc.int

¹³⁷ Gathii (note 124 above) 213.

¹³⁸ When it was negotiated by the Members the SADC Protocol on Trade, as amended, envisages the establishment of a Free Trade Area in the region by 2008 and its objectives covers to further liberalize intra-regional trade in goods and services, ensure efficient production, contribute towards improvement of the climate for domestic, cross-border and foreign investment; and enhance economic development, diversification and industrialization of the region. However members failed to meet the deadline.

¹³⁹ Gathii (note 124 above) 213.

¹⁴⁰ G. Erasmus 'Developing Institutional Capacity of SADC Tribunal, Final Report Addendum 2' (December) 32.

¹⁴¹ Article 6 of the Trade Protocol which addresses the issue of non-tariff barriers to trade clearly provides that except as provided for in the Protocol, Member States shall, in relation to intra-SADC trade adopt policies and implement measures to eliminate all existing forms of NTBs and refrain from imposing any new NTBs.

to be phased out.¹⁴² According to Article 3 of the Trade Protocol, the process of eliminating NTBs and other restrictive measures is done by referring to the existing preferential trade arrangements between Member States. Also to be taken note of was the 8-year time frame within which the barriers should have been eliminated. A period of grace was granted to afford additional time to those Member States who think they may be adversely affected by the removal of tariffs and NTBs upon timely application to the Committee of Ministers of Trade.¹⁴³

4.4 Is SADC's non-tariff barriers legal framework effective?

There is ample evidence to support the argument that some of the provisions in the SADC Trade Protocol generally failed to deal with the issue of NTBs in a comprehensive way. While the Protocol includes commitments on the elimination of NTBs such as import quotas, customs procedures and export subsidies, it excluded such non-tariff measures as local content requirements, levies and other border charges and import and export licensing arrangements, from the process of removal of NTBs, hence providing the trade distorting effects.¹⁴⁴ This left the most sensitive issues relating to the removal of NTBs on intra-SADC trade to be dealt with in the context of work of the SADC Trade Negotiations Forum.¹⁴⁵

The SADC TP of 1996 in Article 3.1 (b) sets the crucial deadline which eventually influenced all other planning schedules for the trade-led regional integration in SADC. It provides that the elimination of tariffs and barriers to trade shall be achieved within a timeframe of eight years after the Protocol becomes operational. However, even though it was the main stated objective of the Protocol to phase out tariffs and NTBs over eight years, lack of more detailed

¹⁴² Article 3 of SADC Trade Protocol which calls for the elimination of non-tariff barriers to trade on intra-SADC trade stipulates that the Committee of Ministers responsible for trade matters (CMT) will determine the process and manner for the phased elimination of tariffs and non-tariff barriers by: (a) referring to the existing preferential trade arrangements between and amongst Member States; (b) taking note of the eight-year time frame within which the barriers should be eliminated; (c) granting a period of grace to afford additional time to those Member States who think they may be or have been adversely affected by the removal of tariffs and non-tariff barriers, upon timely application to the CMT and (d) recognizing that different tariff lines may be applied within the agreed time frame for different products in the process of eliminating tariffs and non-tariff barriers.

¹⁴³ Gathii (note 124 above) 213.

¹⁴⁴ Kalenga (note 8 above) 36.

¹⁴⁵ The unfortunate part of this approach is that the positive outcome of negotiations is based on commitment and will. Commenting on the approach of SADC trade negotiations Frank Flatters correctly pointed out that the negotiating process itself encourages a protectionist attitudes among participants. The language and behavior of many participants in the negotiating process seems to be based on the view that the benefits of trade liberalization by any Member State are enjoyed principally by other members, and that the "costs" of granting market access are borne primarily by the liberalizing country. As result, negotiators feel it is their job to resist making concessions that reduce barriers to imports in their own markets.

implementation strategies and schedules made it impossible for Member States to meet the deadline.¹⁴⁶ For this reason business people are still faced with a lot of NTBs in the course of trade.

Article 3(1) (c) of the Protocol contains controversial provisions as far as elimination of NTBs is concerned. It allows Member States to derogate from their obligations as far as the elimination of tariffs and NTBs is concerned. It exonerates Member states who feel threatened by the removal of NTBs and tariffs from complying with the obligation set in article 6 of the same Protocol. In this case the two provisions contradict each other thereby raising the question whether there is a real commitment to remove NTBs on the part of Member States. Surely this provision is unnecessary and is a draw back on regional integration agenda given that to date SADC has yet to design clear rules and procedures for approving derogations.

The year 2000 amended version of the Protocol failed to fully address some of these shortcomings of the 1996 Protocol. It partially addressed the problem by stating that the members shall deposit instruments of implementation indicating the date upon which the member intends to implement the Protocol and the Amended Protocol.¹⁴⁷ The weakness of the Protocol in this case stems from the fact that it gives Member States discretion to decide when to implement the inspirations of the Protocol. The absence of a legal obligation in this case is perhaps the main reason why Member States failed to meet the deadline for eliminating all tariffs and NTBs within the eight year timeframe as mandated by the Protocol because there is no sense of obligation to implement the Protocol.

A further flaw in the Trade Protocol is that it does not go far enough in framing concrete measures to eliminate NTBs. Article 6 of the protocol merely exhorts Member States to adopt policies and implement measures to eliminate all types of NTBs and not to impose any new ones. It is silent on what will happen in cases where Member States are in breach of their obligations. Again it is silent on specific commitments and a timetable for the tariffication of NTBs. The Protocol's undue emphasis on tariff barriers and its failure to address the elimination of NTBs in

¹⁴⁶ C Peters *Monitoring Regional Integration in Southern Africa Year Book 2010*, Chapter 8 “*Is SADC loosing track?*” (2011) 145.

¹⁴⁷ Article 9 of the SADC Trade Protocol of 2000.

the region are likely to frustrate its objective of removing impediments to intraregional trade to increase such trade flows.¹⁴⁸

Rules of origin are an inherent feature of the SADC Protocol on Trade as a means of determining whether goods are eligible for preferential treatment in the importing country and to prevent “trade deflection”. Initially the SADC Protocol on Trade provided for simple and less restrictive rules of origin where products could qualify if they underwent a single change of tariff heading or if they contained a minimum of 35% regional value-added or if they included not more than 60% of non-SADC imported materials of the value of total inputs used.¹⁴⁹

However, the current regime of rules of origin goes beyond their function of preventing transshipment of products from third countries. Instead they are too restrictive and prone to abuse for the purpose of protecting existing industries from increased intra-regional competition.¹⁵⁰ As a result, instead of facilitating development through trade, the SADC Trade Protocol through Article 12 and its annexure 1 replaces transparent and declining tariff barriers in important sectors with complex and more restrictive input sourcing requirements that will diminish trade, increase transactions costs, reduce flexibility of producers and make the region a less attractive place to invest.¹⁵¹ In this case the rules of origin constitute an NTB on intra-regional trade instead of acting as a trade facilitating instrument.

For instance, with regards to the character of the rules of origin under the Protocol, restrictive rules of origin remain on wheat flour and wheat millers are required to start the milling process with wheat from the region to establish SADC origin. This is impractical as all the countries in the region are net importers of wheat. Further, like other members of SADC’s MMTZ Agreement, Mozambique has a special quota to allow assembly of garments from imported fabrics but it has not filled that quota because SADC rules of origin require double

¹⁴⁸ M J Mayer & H Thomas *Trade integration in the Southern African development community: Prospects and problems, Development Southern Africa* (1997) 347.

¹⁴⁹ The Service Group, *Audit of the Implementation of the SADC Protocol on Trade* (2007) 28.

¹⁵⁰ The Mauritius Minister of Foreign Affairs, International Trade and Cooperation, during a workshop on SADC Rules of Origin and Non-Tariff Barriers, pointed out that, despite considerable efforts made by SADC members to reduce tariffs, the full benefits of the Trade Protocol have not been realized due to the prevalence of Non-Tariff barriers and stringent Rules of Origins. The minister called for a review of SADC’s Rules of Origin so as to allow member States to expand their production base and export capacities. The minister noted that, the SADC Rules of Origin are, by international standards, relatively complex and restrictive.

¹⁵¹ P Brenton et al ‘*Rules of Origin and SADC: The Case for Change in the Mid Term Review of the Trade Protocol*’ Africa Region Working Paper Series No.83 June (2005) 2.

transformation-essentially from yarn to garment when most fabric in the region is imported a requirement which many apparel manufacturers cannot meet.¹⁵²

The situation is further compounded by administrative challenges faced when one wishes to acquire certificates of origin. A Zambian exporter with interests in agriculture and motor vehicle parts reported that in his company had run into too many customs officials that could not classify his goods correctly. The redundancy of the rules also captured by Woolworth's experience, which despite having a significant presence in the region does not use SADC preferences in non-SACU SADC markets because it finds the process of administering and acquiring certificates of origin to be too costly relative to the benefit of the preference gained under the FTA.¹⁵³

For the above stated reason, SADC's rules of origin remain a thorn in the flesh for many business players in the region and are reported to be restricting trade under the FTA. In fact, in many cases the rules of origin are so strict that some producers and retailers in the region cannot be bothered to satisfy them therefore preferences are not granted and the FTA has no impact. The challenge with rules of origin stems from their character, which is built into the Trade Protocol and the administrative difficulty of adhering to them. Therefore, it follows that in this regard, instead of the TP to provide a framework for elimination of NTBs it is actually entrenching the application of NTBs through its strict rules of origin criteria. It is also a violation of Article 24 of GATT which calls for the elimination of all restrictive measures for the purpose of establishing a WTO compatible FTA.

Article 17 of the Protocol regulates the use of standards and technical regulations on trade. It enjoins the SADC Member States to make use of international standards as a basis for its standards-related measures, except where such standards would be an ineffective or inappropriate means to fulfil its legitimate objectives. Although the Article states that members 'shall use' international standards, in practical terms, this requirement does not translate into an obligation for the Members to show that the regulation, standard or conformity assessment procedure is in line with the international standards. In addition, the Article requires the Member to refer to an international standard and to use the least trade-restrictive conformity assessment

¹⁵² South African Institute of International Affairs (SAIIA) Private Sector Views of the Implementation of the SADC FTA 5.

¹⁵³ SAIIA (note 152 above) 5.

method when regulating, but nothing obliges a Member to motivate its decision when not doing so. The other weakness of this provision is that it creates a room for Member States to raise the defence that international standards do not conform to its legitimate objectives that are in most cases subjective and difficult to disprove.

Anti-dumping and safeguard measures are permitted with no limitations beyond those contained in the WTO rules under Article 18 of the Trade Protocol. Unlike the case with the EAC Protocol which has a detailed annex on dumping, the SADC Trade Protocol's Article 18 provisions regarding anti-dumping measures are brief and only require members to comply with WTO provisions in applying such measures without providing further details on the procedure to be followed.¹⁵⁴ While such measures are provided for under the WTO, there is increasing recognition that they can be and often are used as a form of disguised protection, and that standard techniques for determining the need for anti-dumping and safeguard measures are heavily biased in favour of narrow producer interests and against the broader national interests of users and consumers of importable goods.

In the SADC context, the claim of “dumping” is often used by producers seeking continued protection of non-competitive domestic industries. Some SADC members have been among the heaviest users of WTO anti-dumping provisions in recent years, and this has been a great hindrance to the achievement of many of the promised economic benefits of international economic integration.¹⁵⁵ There is also concern that already weak WTO criteria for anti-dumping and safeguard measures will be weakened much further when implemented in the SADC context.

Another potentially dangerous exception provided by the Protocol is found in Article 21, which allows for the possibility of temporary measures to promote infant industries by suspending trade liberalization obligations under the Protocol. Such measures must be approved by the Committee of Ministers responsible for trade matters and are supposed to be “subject to WTO provisions”. Given all the other measures provided by the Protocol, especially with respect to transitional provisions dumping, safeguards and rules of origin, the infant industry provision is a potentially dangerous, if not merely redundant, deviation from the free trade objectives of the agreement.¹⁵⁶

¹⁵⁴ Mutai (note 7 above) 91.

¹⁵⁵ Flatters (note 11 above) 5.

¹⁵⁶ Flatters (note 11 above) 5.

Studies carried to examine the empirical relevance of the infant industry argument on Turkish data found that there is no evidence that more protected industries in Turkey experienced a higher rate of cost decline than less protected industries, which would be true if trade protection were based on infant-industry considerations. In the literature, economists have often cited the fact that high levels of protection have persisted for long periods as evidence that protection in developing countries generally has not been justified on infant-industry grounds.¹⁵⁷ Again at present there appears to be a policy void in the infant industry protection provisions in the sense that there is no definition of what constitute an infant industry in the Protocol. Article 25 of the Tripartite Draft Agreement can be used as a model in this case.

Unlike the GATT which does not provide for any exceptions to the abolition requirement, the SADC Trade Protocol has made provisions for exceptions under several circumstances. It subjected the limitation of quantitative import and export restrictions between Member States to a general exceptions clause. Although the general exceptions clause contains a proviso which aims to prevent protectionism between contracting Member States, the fact that it provides for the application of these quantitative restrictions between Member States at all, could be interpreted as an infringement of Articles XI: 1 and XXIV (8) (b) of GATT which calls for the total abolition of all trade restrictive measures.¹⁵⁸

In the light of the above, one may be justified to state that some of the Trade Protocol provisions targeting elimination of NTBs in the region are not effective. This is due to either ambiguity, too many exceptions or lack of detailed information on what should be done in application of some trade remedy measures which can constitute NTBs depending on the manner in which they are implemented.

4.5 How is the SADC FTA's Non-Tariff Barriers Elimination Mechanism being enforced?

It is crucial to point out that initially, COMESA, EAC and SADC had, in the past, developed different mechanisms to identify report and monitor elimination of NTBs and resolve disputes. These mechanisms have to a greater extent identified all the common NTBs encountered in the region and the frequency at which they occur and attempted to facilitate resolution of the same

¹⁵⁷ Bin Xu ,Infant industry and Political Economy of Trade Protection *Pacific Economic Review* (2006) 363.

¹⁵⁸ LA Grimett (note 34 above) 221-222.

through resolution at the Council of Ministers level and other consultative processes.¹⁵⁹ The existing mechanisms that are in place were the starting points for the design of the on-line mechanism. However, it is worthy to mention that ever since the establishment of the tripartite arrangement which established a joint online NTBs Monitoring and Elimination Mechanism, mechanism existing in individual regional economic communities are slowly being superseded by the Tripartite Mechanism.¹⁶⁰

Consequently, the monitoring and elimination of NTBs by SADC has to some extent been superseded by regional initiatives such as the Tripartite Arrangement between it, COMESA and EAC. The arrangement paved way for the establishment of a Non-Tariff Barriers Monitoring Mechanism which supports the integration of COMESA, EAC and SADC economies. To this end, the process of monitoring and elimination of NTBs in SADC is now mainly being done at tripartite¹⁶¹ level. Article 10 of the December 2010 Draft Tripartite Agreement calls for the elimination of NTBs among all Tripartite members and the establishment of a common mechanism for the elimination, reporting and monitoring of NTBs in the Tripartite territory in terms of Annex 14 to the Draft Agreement.¹⁶²

The Annex requires the Tripartite Member States to establish National Monitoring Committees and Focal Points as part of the National institutional structures to eliminate NTBs. These institutions must then work with the Tripartite Non-Tariff Barriers Monitoring Unit to coordinate the elimination of NTBs. In order to eliminate NTBs within the Tripartite Territory there are two main mechanisms available to traders to report an NTB in any other Tripartite Member States. This can be done either through the online Non-Tariff Barriers Reporting, Monitoring and Eliminating Mechanism or by a written notification to the National Focal Point of the Member States in which the complainant is located.¹⁶³

The online mechanism¹⁶⁴ enables stakeholders to report and monitor NTBs which have been encountered in SADC, COMESA and the EAC in a transparent and easy to follow-up manner.

¹⁵⁹ Speech by Mike Pearson a Trade Law Expert during *Trade Law Centre for Southern Africa* Annual Conference on the 19th of April 2012 in Cape Town.

¹⁶⁰ Hove (note 16 above).

¹⁶¹ Parties to the Tripartite Arrangement are *EAC-COMESA-SADC*.

¹⁶² Viljoen (note 38 above) 18.

¹⁶³ Viljoen (note 38 above) 18.

¹⁶⁴ www.tradebarriers.org

Members of the public including economic operators and academic researchers can register as users on the website to submit and track complaints. After a complaint is submitted it is reviewed by the System Administrator which will either accept or reject the complaint as a valid NTB. If the complaint is valid the National Focal Point is assigned to resolve the complaint through bilateral consultations with the Member State against which the complaint was reported.¹⁶⁵

Traders in the different Member States, public and private sector, can also submit a written complaint to the National Focal Point of that Member State. Most Member States have a public and private sector focal point, although some only have a national focal point responsible for receiving complaints from both the public and private sector. Traders in South Africa for instance, can forward their complaint notification forms to either the Department of Trade and Industry (public sector focal point) or Business Unity South Africa (private sector focal point) depending on which sector the trader belongs to. The Member States will then address the complaint through bilateral consultations.¹⁶⁶

If the parties fail to resolve the complaint through bilateral consultations a facilitator, the Tripartite Secretariat, will be appointed to assist the parties to resolve the matter through further consultations. If no amicable solution is found the dispute must be resolved in accordance with the Tripartite Dispute Settlement Mechanism in Annex 13 to the Draft Agreement. As a last resort the dispute will be referred to the Dispute Settlement Panel which will make recommendations to the Tripartite Council, responsible for the final determination.¹⁶⁷

Even though the current NTB and elimination mechanism constitute a big step towards eliminating NTBs, critics argued that the mechanism is not adequate. Their argument is that the mechanism appears to address only those NTBs that affect those companies from different countries within the region which are in direct competition with each other. Therefore it turned a blind eye to a whole range of NTBs within the region such as infrastructural constraints and other *ad hoc* import bans which need to be disciplined. Despite these concerns, the monitoring of

¹⁶⁵ Viljoen (note 38 above) 18.

¹⁶⁶ Viljoen (note 38 above) 18.

¹⁶⁷ Viljoen (note 38 above) 18.

NTBs and responding to private sector concerns about them constitutes one step towards reducing them.¹⁶⁸

The other problem noted by Mrs. V.Hove is that there is lack of a well established dispute settlement body for the resolution of disputes. In most case the resolution of disputes arising from the NTBs is done through consultations between government officials in parties concerned without the participation of the private sector. This has failed to address the problem since the two governments may be more worried about protecting their diplomatic relationships than addressing the problem. It is only when a dispute arise when a panel of experts is appointed to resolve the matter.¹⁶⁹ This implies that the dispute settlement process operate on an *ad hoc* basis. The unfortunate part of this kind of arrangement is that there is a possibility of unskilled people being appointed to resolve the matter in cases where it may be difficult to get skilled people who might be committed with their own personal businesses.

Nevertheless despite the criticism, the establishment of the Non-Tariff Barriers Monitoring and Elimination Mechanism by the Regional Economic Communities such as SADC, COMESA and EAC is laudable since it constitute a big step in the process of dealing with NTBs. It act as a repository of all reported NTBs in English, French and Portuguese allowing information disseminating to all stakeholders and more importantly an interactive process for monitoring resolution of barriers by Tripartite Member States. It enhances transparency and easy follow-up of reported and identified NTBs. The mechanism is accessible to economic operators, government functionaries, secretariat experts, academic researchers and other interested parties and is administered by Trade Mark Southern Africa, COMESA, and SADC NTB Units and National NTB focal points that have been allocated access passwords providing different levels of access into the system according to their responsibilities. The onus rests on the individual member states and the members of the private sector to utilize the mechanism so that the full benefits of free trade and regional integration are realized.

¹⁶⁸ Mthembu (note 55 above) 136.

¹⁶⁹ Non-Tariff Barriers Expert at Trade Mark Southern Africa.

4.6 Problems encountered in the process of removing NTBs in SADC Free Trade Area

Challenges in removing NTBs within the regional trading arrangements often relate to gaps in the regional legal framework for the removal of NTBs and gaps in regional policy implementation at the national level, as Member States weigh the costs of implementation against immediate gains thereof and take their time to put in place legislation necessary to facilitate implementation of regional commitments to address NTBs.¹⁷⁰

A *Report of The 1ST Joint COMESA-EAC-SADC NTBs*¹⁷¹ attributed the challenges which were commonly encountered by the three regional economic communities namely COMESA, EAC and SADC in the process of eliminating NTBs to lack of timely response to NTB complaints from Member States, imposition of new trade requirements outside the Treaty and relevant protocols, delayed establishment of NMCs, lack of elaborate dispute resolution mechanism, implementation of the Road Map for the elimination and relaxation of NTBs, utilization of reporting tool for NTBs, insufficient budgetary allocation for trade coordination units at country level, disharmonized inter-regional co-operation on NTB elimination, delayed submission and circulation of notification of resolved NTBs by Member States. The report alleged that the resolution processes are lengthy because communication goes back and forth between focal points, REC NTB units and the reporting stakeholder.

The other challenge relates to the decisions and recommendations on a particular course of action towards resolution of an identified NTB. It has been pointed out that they are often bureaucratic as they need to be referred to a meeting of the REC policy organs like the Council of Ministers before they can be implemented. What it means therefore is that if there is a delay on the part of the Council of Ministers to convene a meeting and approve the implementation, the NTBs which give rise to a complaint will be persisting and causing further harm to the complainant.¹⁷²

Again, the removal of import and export restrictions has proved to be the main challenge as it is complicated by the fact that often NTBs result from policies that are not intended to restrict imports. For example, an outbreak of Foot and Mouth Disease will result in restrictions on the

¹⁷⁰ Trademark Southern Africa *Establishing a Regional Non-Tariff Barrier Reporting and Monitoring Mechanism* (2011) 7.

¹⁷¹ Report of 'The 1ST Joint COMESA-EAC-SADC NTBs Meeting Held in Johannesburg –South Africa' 9-10 MARCH (2009)8-9.

¹⁷² Hove (note 16 above).

export of animals, meat and meat products from the area affected. But these restrictions are necessary to ensure food safety and limit the spread of the disease.¹⁷³ The other challenge relates to lack of commitment by Member States to prioritise the elimination of NTBs even though it is generally recognised that the removal of these trade barriers would benefit the regional economy.

The problem of lack of capacity is not new in the field of trade within the context of developing countries. Resources are very scarce such that there is little available to be channelled towards the elimination of NTBs. The other problem relate to the incapacity in the sense of lack of expert knowledge about NTBs and their effects on trade.¹⁷⁴

Finally, the biggest challenge which is common to all regional economic communities relates to the nature of the NTBs themselves. They can present themselves in different forms such that the monitoring and elimination mechanisms may not be adapting quickly to deal with new NTBs since they can take different forms and nature. Countries are good at inventing new NTBs to replace those that might have been noted. In essence NTBs will be always ahead of the eliminating mechanism put in place hence making it very difficult to deal with the matter completely.

4.7 Concluding remarks

This chapter discussed the regulation of NTBs focusing on the SADC Free Trade Area. The first part gives a brief background of the SADC Free Trade Area showing how the free trade area is being created. It critically analysed the provisions of the SADC Trade Protocol which directly and indirectly provide for the elimination of NTBs and for the phasing out of quantitative restrictions on imports and exports originating in and destined for other SADC Member States. It reached the conclusion that the legal framework which was established targeting the elimination of NTBs to trade under the Protocol does not effectively address this issue.

The conclusion was motivated by the fact that a multiplicity of NTBs still exist hence representing a true reflection of poor performance and ineffectiveness of the SADC Trade Protocol. Again, it is a reflection of poor enforcement of the elimination mechanism in the region due to lack of political will to do so from governments. This has been underscored by the 2007

¹⁷³ SADC FTA *Growth, Development and Wealth Creation Handbook* (2008) 8.

¹⁷⁴ Hove (note 16 above).

audit which assessed the state of compliance with the Trade Protocol by SADC Member States. The audit concluded that, after eight years of implementation, the Trade Protocol lacked a significant impact on intra-regional trade flows and the ease of exporting in the region.

Provisions relating to rules of origins were criticised in the study for being too restrictive on trade thereby increasing unnecessary costs. Anti-dumping provisions in the SADC Trade Protocol were found to be less effective due to the lack of detailed guidelines on the procedures which Member States should follow before applying anti-dumping duties. This created a gap which can be abused to restrict trade. The discussion also noted that the inclusion of some exceptions on the abolishment of NTBs under the SADC Protocol on Trade is a big issue since there is a danger for such exceptions to be abused by members for unjustified reasons to the detriment of trade.

The final part made a brief discussion on the NTBs Monitoring and Elimination Mechanisms of individual regional economic communities. It noted that the mechanisms of individual regional economic communities have been overtaken by the joint tripartite based Monitoring and Elimination Mechanism. The new mechanism has been commended for its success in lowering the amount of NTBs that exist in the region even though it fails to address a whole range of NTBs. Challenges faced during the monitoring and elimination were also addressed and a conclusion was reached that despite some huddles faced by the mechanism, it constitute a big step towards the removal of all NTBs to increase intra-regional trade.

Chapter 5

Final Conclusions

i. Summary of the findings

In summary this research paper identified a list of NTBs that are being maintained by SADC Member States in the form of cumbersome customs documentation and procedures, cumbersome import and export permits, import and export quotas, sanitary and phytosanitary measures, technical barriers to trade, strict rules of origin and anti-dumping laws. It went further to highlight that these non-tariff barriers to trade are still maintained by most SADC countries despite the clear prohibitions under the WTO and SADC Trade Protocol rules. It advanced the argument that by maintaining NTBs Member States' actions are contrary to their commitments and obligation to remove all forms of non-tariff barriers to trade and to refrain from introducing new ones. The paper further illustrated how the WTO rules relating to NTBs are implemented and concluded that some of the rules on NTBs under the SADC Protocol on Trade are not compatible to the WTO rules. For instance the provisions dealing with rules of origins were found to be too restrictive beyond what is permissible under the WTO rules of origin. With regard to the effectiveness of NTBs legal framework under the SADC Protocol on Trade this paper found that in as much as most of the provisions under the Protocol are couched in WTO terms, some are just too weak to address the prevalence of NTBs in the region. Rules relating to infant industry protection, rules of origin, the dispute settlement mechanism among other issues discussed herein were found to be not enough for the purpose of addressing NTBs.

ii. Conclusions

Concluding a paper dealing with complex issues relating to NTBs will never be an easy task. This paper reached a conclusion that NTBs are still prevalent in SADC region because the legal framework set to address their elimination under the SADC Protocol is too weak. It has been highlighted that the provisions dealing with the granting of derogations to Member States for the purpose of protecting infant industries are unnecessary and prone to abuse. This is due to the lack of definition of what constitute an infant industry for the purpose of applying for derogation is another problem. Rules of origins provisions under the Protocol are too restrictive as compared

to world standards. A provision regulating anti-dumping measures lacks detailed information therefore open for manipulation by Member States and used as NTBs. In the final analysis the paper also concluded that the continued existence of NTBs is also due to lack of political will to implement NTBs elimination measures at domestic level by Member States.

iii. Recommendations

In the light of the problems identified in the paragraphs above the following recommendations are made:

Increase the Powers of the Trade Secretariat: One of the key steps to take is to design an effective non-tariff barriers legal framework and mechanisms for identifying and verifying information about non-tariff barrier, and prioritising and ensuring their elimination. This will require giving the SADC Secretariat the mandate to compel individual countries to eliminate any identified non-tariff barriers and to ensure that no new ones are created. There is also a need to incorporate provisions in the Protocol to penalise those who breached their obligation to eliminate non-tariff barriers. In this case legally binding NTBs regulatory and elimination mechanism is appropriate given that the current one is based on political pressure. In this case SADC can learn a lot from the EAC where the Member States agreed to establish a legally binding mechanism on NTBs. The incorporated provisions or the proposed new tripartite draft legal framework on NTBs must provide sanctions that can be applied against those directly involved in clearing goods for cross-border trade such as customs agencies.

Derogations: In response to problems posed by several exception and derogations in the Protocol it is strongly recommended that SADC Member States undertake a review of its derogation procedures. The review may entail a study that examines the possibility of establishing general rules and criteria for approval of derogations from the SADC FTA. These must provide for the establishment of a maximum time threshold for the duration of derogations and conditions under which extensions of derogations can be granted, put the percentage value of rise in imports that can be qualified as an ‘import surge’ and other criteria for granting a derogation, a minimum time (in years or months) of a continuous rise in imports after which a derogation can be granted and clarify required documents to be presented to the CMT along with an application for derogation.

Use of bilateral agreements: Member States are also recommended to make use of bilateral trade agreements to eliminate existing NTBs. For example there is an Agreement on the Abolition of Non-Tariff Barriers between the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania whereby the three states clearly indicated their objectives of removing all NTBs inhibiting trade between them.¹⁷⁵ Chances of full implementation and abiding by such undertakings are higher than at regional level where a lot of parties are involved.

Reforming anti-dumping rules: There is a need to reform the current anti-dumping rules by way of putting more detailed information in the Protocol on the procedure to be followed before applying them. The other option available for SADC members is to abolish all anti-dumping duties with respect to intra- regional trade and replace them with competition laws which bind all Member States and their citizens.¹⁷⁶ For instance all SADC members can sign a Protocol whereby they agree on a certain date upon which all antidumping duties should be terminated and harmonise competition law in various member states pertaining to abuse of dominance. They should also incorporate provisions in the Protocol to give a complainant located in one Member State to complain of abusive behaviour by a firm or firms located in the other country. This model has been adopted by Canada and Chile under their Free Trade Agreement. This means antidumping actions will be turned into private actions for cross border predation with duties rather than damages as available remedy. By so doing one of the major new form of protectionism will be radically constrained while legitimate concerns about domestic impacts of surges in low priced imports would be dealt with through well conceived multilateral safeguards regime and domestic adjustment programmes.¹⁷⁷

Investing in conformity infrastructure. It is recommended that Member States must invest more in infrastructure development for the purpose of trade facilitation. Limited testing infrastructure constrains the ability of members to sign mutual recognition agreements with regional partners and instead the fall-back position becomes the standards of the most dominant trading partner, which may themselves constitute NTBs for lesser developed regional partners. The fact that so many countries in the region are landlocked also means that efforts to reduce the

¹⁷⁵ Accessible at <http://wits.worldbank.org/GPTAD/PDF/archive/BAFTA-NonTariff.pdf>.

¹⁷⁶ C Macario et al *Antidumping in the Americas* (2001) 17.

¹⁷⁷ Trebilock & Howse (note 108 above) 189.

cost of cross-border trade through trade facilitation and transport infrastructure, as well as regional integration are essential.¹⁷⁸

Harmonising infant industry protection: Article 21 of the SADC Protocol on the Protection of Infant Industries permits the suspension of certain obligations of the Protocol, but it also specifies that terms and conditions should be imposed. However, at present there appears to be a policy void. There is a need to clearly state in the Protocol what constitute an infant industry and at the same time spell the actual time that the protection must take to avoid the abuse of the provisions.¹⁷⁹ Another option is to abolish this provision since its relevance is overdue because Member States whose industries are uncompetitive must allow those with comparative advantage to do the production.

Incorporating Regional Trade Laws in the Domestic Legal Framework: The SADC Member States must ensure that the legal framework governing the elimination of NTBs and regional integration process are properly enshrined in their national laws, and clearly understood and compiled by all agencies responsible for the enforcement of trade regulatory and administrative requirements. This is important so that such agencies do not introduce laws, regulations, practices and procedures that may contradict aspirations of the SADC Trade Protocol as far as the elimination of NTBs is concerned. In addition Protocol must be amended to incorporate provisions obliging each Member States to establish or maintain institutions for impartial judicial, quasi-judicial, or administrative review of final administrative decisions relating to all trade matters and conformity assessment procedures.

Reforming Rules of origins: Rules of origins in the SADC FTA are too restrictive to market access hence causing unnecessary transaction costs as businesses are obliged to find their way around different trade regimes.¹⁸⁰ Therefore harmonising the existing rules origins in the territories of Member States is the only way forward. There is also an urgent need to redesign the

¹⁷⁸ Mobilizing Aid for Trade: Focus Africa: Report and Recommendations Prepared by the United Nations Economic Commission for Africa (UNECA), the African Development Bank (AFDB), and the World Trade Organization (WTO) (2007) 6.

¹⁷⁹ Mobilizing Aid for Trade (note 179 above) 6.

¹⁸⁰ South African Institute of International Affairs (SAIIA) *Private Sector Views of the Implementation of the SADC FTA*. A paper written by the South African Institute of International Affairs (SAIIA) on behalf of the Southern African Development Community (SADC) private sector.⁷

current restrictive rules of origins so that they can meet international standards.¹⁸¹ Returning the old rules of origin that were applicable before the new ones were introduced is another option. Since majority of SADC Member States have overlapping membership in COMESA it is recommended that they should adopt the COMESA rules of origin that are more flexible than those applicable in SADC Free Trade Area.

Harmonizing SPS and TBT Measures: The harmonisation process of technical regulations, standards, SPS and other constraining measures is essential for increasing intra-SADC trade. It should be accelerated as there are benefits for neighbouring countries to be part of one system rather than developing their own regulations, testing systems and standards.¹⁸² SADC Member States must introduce international best practice with respect to national technical regulatory frameworks, which includes the adoption of the principles that have emerged as concepts employed in the multilateral trading system, and alluded to in the WTO TBT agreement, as the principles of the national technical regulatory framework namely non-discrimination, necessity, prevention of trade restrictiveness, proportionality, the use of equivalent and internationally harmonised measures and transparency.¹⁸³

Mandatory Publication of Administrative Rules: To help build confidence of small-scale cross border traders, in particular, in the valuation of imports from the SADC countries, there is a need to put in place mandatory laws to ensure that all rules that may have effect on trade are published in time. The publications must also incorporate rules on how the relevant duties and taxes on different goods are worked out. This is important to reduce delays, remove suspicion and prevent the reported high occurrence of bribery and corruption at the ports of entry. Improved confidence in the valuation of goods for duty and tax purposes would also discourage smuggling, which is not only risky but costly.

Improving Capacity of Less Developed Countries: While the SADC had developed its non-tariff barriers monitoring and elimination mechanism, its application has been hampered by lack

¹⁸¹In addition governments would assist businesses immensely if they could improve the administrative capacities of customs officials that issue or check certificates of origin as well as by offering informational programmes or material to the private sector on the matter. Another approach, that would tackle the problem at its roots, is to adopt economically sensible rules of origin and harmonize rules of origin under the Tripartite Free Trade Agreement (between COMESA, SADC and EAC) in the direction of the less restrictive rules of origin used in COMESA.

¹⁸² South African Institute of International Affairs (note 152 above) 8.

¹⁸³ T Matona *Government Strategy towards an Effective National Technical Regulatory Framework for South Africa* (2006) 13.

of capacity by the coordinating ministries. This is because while the responsible ministries may have the goodwill to apply the mechanism, their staffing capacity is only sufficient to deal with daily operational issues, which leaves little room to handle cross-border and behind-border obstacles in a structured manner as proposed under the NTBs monitoring and elimination mechanism. It is therefore imperative that the partner states source for technical assistance from development partners to enable them to kick-start application of the mechanism. This initiative could be facilitated by the SADC Secretariat. To this end the Protocol must include provisions obliging more advanced countries to offer technical support to least developed countries on matters related to elimination of NTBs.

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