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Towards regulatory integration in Africa: An analysis of the regulation of technical barriers to trade under the African Continental Free Trade Area

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ABSTRACT

The African Continental Free Trade Area (AfCFTA) is the largest free trade area after the World Trade Organization. Among other aims, the AfCFTA seeks to achieve deeper economic integration by creating a single market among African states through trade liberalisation via the elimination of tariff and non-tariff barriers to trade. Non-tariff barriers, particularly technical barriers to trade, have long been considered the biggest obstacles to intra-African trade. To this end, multilateral and regional legal instruments that seek to regulate technical barriers to trade in Africa have been concluded. The recently adopted AfCFTA adds an important normative layer to the regulation of technical barriers to trade in Africa. This article, through the examination of the regulatory framework of technical barriers to trade in Africa, argues that it is not the conclusion of harmonised frameworks per se which is important, but the implementation of these frameworks in the domestic legal systems of African states, as this can help boost intra-African trade and achieve the objectives of the AfCFTA. The article thus provides recommendations for the successful implementation of rules governing technical barriers to trade under the AfCFTA. It posits that the elimination of technical barriers to trade should remain a priority for the successful implementation of the AfCFTA.

Keywords: trade liberalisation; intra-African trade; non-tariff barriers; technical barriers to trade; AfCFTA

1 INTRODUCTION

The African Continental Free Trade Agreement (AfCFTA) is lauded as the largest free trade area since the formation of the World Trade Organization (WTO).[1] At its core, the it seeks to create a single market which is facilitated by the creation of a liberalised market for goods and services.[2] With the vision that intra-African trade becomes instrumental to Africa's economic development, the AfCFTA seeks to continually improve market access through the progressive elimination of both tariff and non-tariff barriers to trade.[3]

Non-tariff barriers, particularly technical barriers to trade, are among the biggest obstacles to achieving the objectives of the AfCFTA and deepening integration in Africa.[4] Technical barriers to trade in Africa are regulated by a complex, fragmented, and heterogeneous network of regional and multilateral legal instruments. More precisely, that regulatory regime consists of the World Trade Organization, Technical Barriers to Trade Agreement ("WTO TBT Agreement") concluded under the multilateral trade system of the WTO, as well as bilateral free trade treaties entered into between African countries and various rules enshrined in regional trade agreements. The recently concluded AfCFTA adds a crucial layer to the regulatory framework governing technical barriers to trade in Africa.

This article examines the regulation of technical barriers in Africa through multilateral, regional and continental trade agreements. It identifies challenges in the implementation of legal instruments pertaining to technical barriers to trade and makes recommendations for a strengthened continental approach to the regulation of these barriers under the AfCFTA. The article argues that it is not the conclusion of harmonised frameworks per se which is important, but the implementation of these frameworks in the domestic legal systems of African states: it is this that can help boost intra-African trade and achieve the objectives of the AfCFTA.

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1 African Union "Operational phase of the African Continental Free Trade Area launched" (7 July 2019) *African Union* available at https://au.int/en/pressreleases/20190707/operational-phase-african-continental-free-trade-area-launched-niger-summit (accessed 14 February 2024).

2 Article 3 of the Agreement Establishing the African Continental Free Trade Area.

3 Article 4 of the Agreement Establishing the African Continental Free Trade Area.

4 Erasmus G "Does the AfCFTA have a formula to tackle Africa's non-tariff barriers?" (28 July 2020) *Tralac* available at https://www.tralac.org/blog/article/14801-does-the-afcfta-have-a-formula-to-tackle-africa-s-non-tariff-barriers.html (accessed 22 February 2024).

2 DEFINING TECHNICAL BARRIERS TO TRADE

Technical barriers to trade are a form of non-tariff barrier consisting of technical regulations, standards and conformity assessment procedures that arise as a result of government policies, regulations or restrictions aimed at protecting health, security, safety and the environment.[5] A technical regulation is defined as "a technical specification, including the applicable administrative provisions, with which compliance is mandatory".[6] A standard is defined as "a technical specification approved by a recognised standardising body for repeated or continuous application, with which compliance is not mandatory".[7] Although they may appear similar, standards, unlike technical regulations, are not obligatory; rather, they may voluntarily be requested by retailers or consumers.[8] Producers and manufacturers are sometimes compelled to conform to these standards inasmuch as non-adherence would exclude their products from the market.[9] Conformity assessment procedures, on the other hand, are defined as "any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled".[10] These procedures are important, as they ensure compliance with the obligations of the importing country.

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5 Erasmus (28 July 2020).

6 The World Trade Organization Agreement on Technical Barriers to Trade (WTO TBT Agreement) defines a technical specification as "a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labelling requirements as they apply to a product, process or production method." See Annex 1 paragraph 1 of the WTO TBT Agreement.

7 Annex 1 paragraph 2 of the WTO TBT Agreement.

8 Loconto A & Dankers C *Impact of international voluntary standards on smallholder market participation in developing countries: A review of the literature* Rome: Food and Agriculture Organization of the United Nations (2014) available at http://www.fao.org/3/a-i3682e.pdf (accessed 12 February 2024) at 15.

9 Liu P "Private standards in international trade: Issues and opportunities" Rome: Food and Agriculture Organization of the United Nations (2009) available at https://www.fao.org/fileadmin/user_upload/livestockgov/documents/Trade%20standards%20Liu%20WTO%20wkshp.pdf (accessed 18 February 2024) at 1.

10 The explanatory note states that conformity assessment procedures include procedures for sampling, testing inspection, evaluation, verification and assurance of conformity registration, accreditation and approval, as well as their combinations. See Annex 1 paragraph 3 of the WTO TBT Agreement.

3 ADDRESSING TECHNICAL BARRIERS TO TRADE IN AFRICA

In general, technical barriers to trade seek to achieve legitimate public policy objectives such as environmental protection, national security, or health and safety.[11] Although such regulations increase consumer confidence by assuring the safety and health of consumers, they can sometimes constitute unnecessary trade barriers.[12] Countries may use these regulatory measures to protect domestic industries from foreign competition.[13] This can occur when technical regulations or standards are not "well-targeted to the specific objective they aim to fulfil, are implemented arbitrarily or are enforced through testing and certification requirements that are unclear, not well-publicised, difficult or expensive for foreign manufacturers to access".[14] Thus, unlike other trade measures, technical barriers trade can either promote or hinder trade.[15]

In Africa, technical barriers are one of many factors hindering the expansion of intra-African trade.[16] The average *ad valorem* equivalent costs of technical barriers in Africa's agri-food sector, according to the United Nations Trade and Development (UNCTAD), is 12.8 per cent, which is significant and several times higher than other tariff barriers.[17] Although the incidence of technical barriers in the manufacturing industries is lower than in the agri-food sector, their average cost when they do arise is 5.4 per cent.[18] Given the impact that technical barriers have on trade, it is pertinent for African countries to address them so as to create the liberalised market for goods and services envisaged under the AfCFTA.[19]

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[11] United Nations Conference on Trade and Development (UNCTAD) *Technical barriers to trade* New York & Geneva: United Nations (2003) available at https://unctad.org/system/files/official-document/edmmisc232add22_en.pdf (accessed 22 February 2024).

[12] UNCTAD (2003).

[13] Erasmus (28 July 2020).

[14] World Trade Organization "Technical information on technical barriers to trade" (2024) *World Trade Organization* available at https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm (accessed 28 June 2024).

[15] Bao X & Qui LD "Do technical barriers to trade promote or restrict trade? Evidence from China" (2010) 17(3) *Asia-Pacific Journal of Accounting and Economics* 253.

[16] ElGanainy A et al. *Trade integration in Africa: Unleashing the continent's potential in a changing world* Washington, DC: International Monetary Fund (2023) at 9.

[17] UNCTAD *Non-tariff measures and deep regulatory integration in the African Continental Free Trade Area: Technical and statistical report* UNCTAD/DITC/TAB/2024/4 (2024) New York: UNCTAD.

[18] UNCTAD (2024) at 21.

[19] See article 3 of the Agreement Establishing the African Continental Free Trade Area.

Due to the fact that technical barriers to trade are imperative to protect the environment, national security, and health and safety, their total elimination in Africa's trade is not desirable.[20] However, fragmented and divergent national approaches to technical barriers trade can increase the cost of conducting business, thereby negatively affecting the expansion of intra-African trade.[21] Regulatory convergence in Africa is crucial, as it can reduce the trade costs that businesses face when trying to meet the specific requirements for each African export market.[22] According to the UNCTAD, intra-African regulatory reform and convergence in technical barriers could reduce trade costs from 12.8 to 7.7 per cent in agri-food and from 1.8 to 1.2 per cent in manufacturing industry.[23] By addressing technical barriers to trade, Africa has the potential to boost its economy by USD 7.1 billion.[24]

Technical barriers to trade in Africa are regulated under various multilateral, continental and regional legal instruments that generally seek to strike a balance between, on the one hand, the desire to eliminate unnecessary obstacles to international trade and, on the other, the recognition of member states' right to regulate trade to protect legitimate interests. At the multilateral level, technical barriers to trade are governed by the WTO TBT Agreement.[25] As a multilateral trade instrument binding on all WTO member states, the WTO TBT Agreement sets the basic principles for the eradication of technical barriers to trade in global trade. Pursuant to the WTO TBT Agreement, various African regional economic communities (RECs) have adopted different legal instruments that govern technical barriers to trade in their respective regions. Annex 6 of the AfCFTA Protocol on Trade in Goods adds an important layer to the regulation of technical barriers to trade in Africa.

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[20] UNCTAD (2024) at 22.

[21] UNCTAD (2024) at 22.

[22] UNCTAD (2024) at 22.

[23] UNCTAD (2024) at 22.

[24] UNCTAD "New app boosts fight against trade barriers in Africa" (9 October 2024) *UNCTAD* available at https://unctad.org/news/new-app-boosts-fight-against-trade-barriers-africa (accessed 28 November 2024).

[25] The TBT Agreement entered into force on 1995 as one of the WTO agreements under annex 1A of the Agreement Establishing the World Trade Organization.

4 REGULATING TECHNICAL BARRIERS TO TRADE UNDER THE WTO

The WTO is a multilateral trade agreement that came into force in 1995. The major aim of the WTO is to "reduce tariffs and other barriers to trade and to eliminate discriminatory treatment in international trade relations".[26] The WTO TBT Agreement was adopted as one of the multilateral trade agreements binding all WTO member states, including African countries that are part of the WTO.[27] The main aim of the WTO TBT Agreement is to ensure that technical barriers to trade do not constitute unnecessary obstacles to international trade.[28] To this end, it provides rules for the elaboration, application, notification, and review of technical regulations, standards, and conformity assessment procedures for WTO members.

The WTO TBT Agreement presents common principles that are applicable to all the three disciplines, namely, technical regulations, standards, and conformity assessment procedures governed by the legal instrument. The preamble emphasises the need to avoid unnecessary obstacles to international trade.[29] Although member states are given the regulatory flexibility to ensure that foreign products do not harm health, animals, the environment, plants and security, this flexibility is permitted only to the extent that the regulations adopted do not constitute unnecessary obstacles to trade.[30]

In this regard, Trebilcock and Epps maintain that a regulation can create unnecessary obstacles to international trade "if it is more trade restrictive than necessary to achieve a particular policy objective, or when it does not fulfil a legitimate objective".[31] In *United States Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* ("*US Tuna II"*),[32] the Appellate Body held that an assessment of whether a technical regulation is more trade restrictive than necessary within the meaning of article 2.2 of the TBT Agreement involves an evaluation of a three factors.[33] These factors are the

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[26] See the preamble of the Agreement Establishing the World Trade Organization.

[27] Due to their membership, members of the African Union are bound by WTO's multilateral trading rules.

[28] See the preamble of the WTO TBT Agreement.

[29] See the fifth recital to the preamble of the TBT Agreement.

[30] See article 2.2, Annex 3E, article 5.1.2 and the preamble of the WTO TBT Agreement.

[31] Epps T & Trebilcock M (eds) *Research handbook on the WTO and technical barriers to trade* Massachusetts: Edward Elgar (2013) at 17.

[32] United States – Measures concerning the importation, marketing and sale of tuna and tuna products WT/DS381/AB/R (2012).

[33] Appellate Body Report, US-Tuna II at para 324.

degree of contribution made by the measure to the legitimate objective at issue; the trade-restrictiveness of the measure; and the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment.[34]

The WTO TBT Agreement also makes provision for the non-discrimination principle, which emphasises the need for member states to treat products originating from other countries in the same way as those manufactured domestically.[35] Consequently, a technical regulation that requires foreign products to meet conditions which do not exist for domestically produced goods violates the non-discrimination principle under the WTO TBT Agreement. The application of this principle was a subject of contention in *US Tuna II,* where Mexico challenged Title 16, section 1385 of the Dolphin Protection Consumer Information Act, the United States (US) Code of Federal Regulations, Title 50, section 216.91 and section 216.92 ("the dolphin safe labelling provisions").[36] The dolphin safe labelling provisions set out the requirements relating to when tuna products sold in the US may be labelled as dolphin safe.[37] However, this label was not compulsory for the importation or sale of tuna or tuna products in the US. According to Mexico, a denial of an advantage can lead to a denial of competitive opportunities, which then ultimately leads to a violation of article 2.1.[38]

In determining whether there was a violation article 2.1 of the WTO TBT Agreement, the Appellate Body held that the determination of whether there has been a violation of article 2.1 is not based on whether the imported products could gain an advantage; rather, it includes an analysis of whether the contested measure modifies the conditions of competition to the detriment of imported products and whether any detrimental impact reflects discrimination against the Mexican tuna products.[39] In the light of that analysis, the Appellate Body concluded that an advantage which is inconsistent with article 2.1 of

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[34] Appellate Body Report, US-Tuna II at para 322.

[35] See article 2.1 of the WTO TBT Agreement.

[36] Title 16, section 1385 of the Dolphin Protection Consumer Information Act, the United States (US) Code of Federal Regulations, Title 50, section 216.91 and section 216.92 and a ruling by a US federal appeals court in *Earth Island Institute v Hogart*.

[37] This label could be given only upon fulfilment of certain conditions, which included documentary evidence that varied depending on the area where the tuna was harvested, the type of vessel used, and the fishing method used to harvest the tuna or the tuna in the tuna product.

[38] Appellate Body Report, US-Tuna II at para 83.

[39] Appellate Body Report, US-Tuna II at para 221.

WTO Agreement was afforded to products eligible for the label in the form of access to the label.[40]

The WTO TBT Agreement further acknowledges that insufficient or unreliable information can act as unnecessary obstacles to trade, and hence it specifies the need for transparency in the development and enforcement of technical regulations, standards or conformity assessment procedures.[41] Member states are required, at an early stage, to publish proposed regulations through the WTO Secretariat to enable interested parties to become acquainted with the regulations.[42] Except in urgent circumstances, members are required to

> allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting member states to adapt their products or methods of production to the requirements of the importing Member.[43]

In interpreting the transparency provisions, the Appellate Body in *United States-Measures Affecting the Production and Sale of Clove Cigarettes* ("*US-Clove Cigarettes"*)[44] clarified that the *prima facie* case of inconsistency with article 2.12 is established where it is shown that an importing member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue.[45] However, in order to rebut a *prima facie* case of inconsistency under article 2.12 of the TBT Agreement, the member who has failed to allow an interval of six months between publication and entry into force of its technical regulation should submit evidence supporting that urgent circumstances referred to in article 2.10 of the TBT Agreement existed before the adoption of the technical regulation at issue.[46]

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[40] Appellate Body Report, US-Tuna II at para 299.

[41] See articles 2.5 and 7.3 of the WTO TBT Agreement.

[42] See article 2.5.1 of the WTO TBT Agreement.

[43] Article 2.12 of the WTO TBT Agreement

[44] United States – Measures affecting the production and sale of clove cigarette WT/DS406/AB/R (2012).

[45] Appellate Body Report, US – Clove cigarettes (n 267) at para 280.

[46] Appellate Body Report, US – Clove cigarettes at para 280.

The WTO TBT Agreement also reiterates the importance of equivalence and mutual recognition in international trade.[47] Consequently, member states are encouraged to accept foreign technical regulations as equivalent to domestic regulations if they fulfil the same objectives. Further, member states are encouraged to enter into mutual recognition agreements, which have the general purpose of accepting a member state's conformity results as equivalent to domestic results.[48] These agreements are helpful particularly to small to medium enterprises that often struggle to meet costs associated with repeated and multiple testing in different jurisdictions. The WTO TBT Agreement further encourages member states, including African countries, to use international standards when developing technical regulations or conformity assessment procedures.[49] To this end, the WTO TBT Agreement promotes the harmonisation of technical regulations and standards by member states. Harmonisation of technical regulations is pertinent, as it reduces the trade-restrictive effects of technical barriers by minimising the cost that comes with complying with the differing requirements of different countries.

Lastly, the WTO TBT Agreement recognises the difficulties that developing countries may face in trying to implement it; hence, it makes provision for technical assistance[50] and allows developed countries to treat developing countries more favourably than other member states through the provision of special and differential treatment.[51][52] In terms of articles 5, 7 and 10 of the WTO TBT Agreement, the obligation is on governments to ensure the implementation of the legal instrument.[53]

5 AFRICA'S OBLIGATIONS TO ELIMINATE TECHNICAL TRADE BARRIERS

Besides the obligations to eliminate technical barriers to trade under the WTO, African states have concluded various regional trade agreements that seek to eliminate technical barriers to trade in their respective regions. The AfCFTA does not render regional

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47 See article 6 of the WTO TBT Agreement.

48 See article 6.3 of the WTO TBT Agreement.

49 See articles 2.4 and 5.4 of the WTO TBT Agreement.

50 Article 11 of the WTO TBT Agreement.

51 Article 12 of the WTO TBT Agreement.

52 See articles 5, 7 and 10 of the WTO TBT Agreement.

53 Wijkstrom E & McDaniels D "International standards and the WTO TBT Agreement: Improving governance for regulatory alignment" WTO Staff Working Paper No. ERSD-2013-06 Geneva: World Trade Organization (2013).

obligations irrelevant, but rather provides that "Member States that are part of other regional trading arrangements that have attained higher levels of regional integration shall maintain such higher levels amongst themselves".[54] Accordingly, African countries are still bound by legal obligations under regional trade agreements to the extent that these obligations are not inconsistent with the AfCFTA.[55] This section examines the regulation of technical barriers to trade in three African RECs: the Southern African Development Community (SADC), East African Community (EAC), and Economic Community of West African States (ECOWAS).

5.1 SADC and regulation of technical barriers to trade

The predecessor of SADC, the Southern African Development Coordination Conference (SADCC), was formed with the aim of advancing independence among Southern African states and reducing their reliance on the then apartheid state of South Africa.[56] The transformation from the SADCC to SADC saw the aims of the regional body revised to focus more strongly on economic and political issues affecting the region in the post-colonial era.[57] Article 5 of the Treaty of the Southern African Development Community ("SADC Treaty") outlines SADC's objectives. Among other aims, SADC seeks to

> promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.[58]

To achieve its aims of regional integration, SADC stresses the importance of increased regional trade through the elimination of intra-regional barriers to trade and the

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[54] See article 19.2 of the Agreement Establishing the African Continental Free Trade Area.

[55] Article 19.1 of the Agreement Establishing the African Continental Free Trade Area.

[56] Osode P "The Southern African Development Community in legal historical perspective" (2003) 28 (3) *Journal for Juridical Science* 1 at 3. See also Southern African Development Community "History and treaty" (2022) *Southern African Development Community* available at https://www.sadc.int/pages/history-and-treaty (accessed 17 January 2024).

[57] Mapuva J & Muyengwa-Mapuva L "The SADC regional bloc: What challenges and prospects for regional integration?" (2014) 18 *Law, Democracy & Development* 22 at 24.

[58] See article 5 of the SADC Treaty.

harmonisation of the economic policies of member states.[59] To achieve these goals in the area of technical barriers to trade, SADC adopted the SADC Technical Barriers to Trade Annex ("SADC TBT Annex") as part of the SADC Protocol on Trade. The objective of this Annex is to eradicate technical barriers to trade in order to establish a common technical regulation framework which is supported by regional TBT cooperation structures.[60]

An assessment of the SADC TBT Annex shows that the legal instrument and its infrastructure facilitate adherence to the WTO TBT Agreement. It reiterates the principles of harmonisation, equivalency, mutual recognition, transparency, and the use of international standards found in the WTO TBT Agreement. Furthermore, the SADC TBT Annex establishes the Standardisation, Quality Assurance, Accreditation and Metrology (SQAM) framework, which seeks to progressively eradicate technical barriers to trade among member states and between SADC and other regional trading blocs.[61]

Although the establishment of a legal framework and institutions that seek to eliminate technical barriers to trade in SADC is commendable, SADC countries are still grappling with the implementation of the SADC TBT Annex in their domestic legal systems.[62] According to the World Bank, many countries within SADC have no clearly defined rules for technical regulations, standards, or conformity assessment procedures.[63] There seems to be little understanding of issues pertaining to the use and

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[59] See article 4 of the SADC Protocol on Trade which provides that "there shall be a phased reduction and eventual elimination of import duties, in accordance with article 3 of this Protocol, on goods originating in Member States".

[60] See article 2 of SADC TBT Annex.

[61] The SQAM Programme establishes various institutions which are instrumental in implementing the SADC TBT Annex: the SADC Cooperation in Standardisation (SADCSTAN); SADC Cooperation in Accreditation (SADCA); SADC Cooperation in Legal Metrology (SADCMEL); SADC Technical Regulations Liaison Committee (SADCTRLC); SADC TBT Stakeholders Committee (SADCTBTSC); SADC Cooperation in Measurement Traceability (SADCMET); and SADC and SQAM Expert Group (SQAMEG). See article 11 of the SADC TBT Annex.

[62] Gilson I "Deepening regional integration to eliminate the fragmented goods market in Southern Africa" Africa Trade Policy Notes Note No. 9 (2010) *World Bank* available at https://documents1.worldbank.org/curated/en/251341468194328603/pdf/601100BRI0Afri1IntegrationREDESIGN3.pdf (accessed 12 January 2015); Viljoen W "Non-tariff barriers frustrating South African agricultural exports" (2015) *Tralac* 1 available at https://www.tralac.org/discussions/article/8224-non-tariff-barriers-frustrating-south-african-agricultural-exports.html (accessed 23 February 2024).

[63] World Bank *Harnessing regional integration for trade and growth in Southern Africa* (2011) available at https://saiia.org.za/wp-content/uploads/2011/06/report_harnessing_regional_integration-sa.pdf (accessed 2 March 2024).

purpose of technical barriers to trade.[64] Accordingly, notifications that have been submitted by member states to the SADC Secretariat in accordance with the SADC TBT Annex sometimes provide little information that can help businesses from other countries assess the implications of the submitted regulations for their exports.[65] Furthermore, some member states tend to base their technical regulations and standards on performance rather than design or descriptive characteristics.[66] This raises the cost of doing business in the region and deters small to medium enterprises from engaging in cross-border trade. Accordingly, it can be submitted that the implementation of the SADC TBT Annex remains fragmented across the region.

5.2 ECOWAS and regulation of technical barriers to trade

ECOWAS was established with the signing of the ECOWAS Treaty on 28 May 1975 in Lagos, Nigeria.[67] Among other aims, the ECOWAS Treaty affirms the economic integration of West African states, given that it seeks to promote regional integration through the adoption of a common market, an economic union, and a monetary union.[68] In order to achieve its objectives, ECOWAS endeavours to harmonise member states' economic policies and liberalise regional trade through the removal of both tariff and non-tariff barriers to trade.[69] The ECOWAS Quality (ECOQUAL) policy is the main instrument regulating technical barriers to trade in the region.[70] ECOQUAL's overall aim is to

> establish a framework for the development and functioning of quality, suitable, relevant and efficient infrastructure, in order to facilitate intra-regional and international trade, protect the consumer and the environment and promote sustainable economic development.[71]

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64 World Bank (2011) at 32.

65 World Bank (2011) at 32.

66 Republic of Malawi *Malawi diagnostic trade integration study (DTIS) update: Reducing trade costs to promote competitiveness and inclusive growth* Report No: ACS7534 Washington, DC: World Bank (25 March 2014) at 59–60.

67 ECOWAS "History" (2024) *ECOWAS Cedeao* https://ecowas.int/about-ecowas/history/ (accessed 28 February 2024).

68 See article 3 of the ECOWAS Treaty.

69 Article 3(2)(a) of the ECOWAS Treaty.

70 Supplementary Act A/SA.1/02/13 adopted the ECOQUAL and its Implementation Framework.

71 See the objectives of the ECOQUAL.

To achieve this aim, member states are required to harmonise their national quality policies with the ECOQUAL.[72] The ECOWAS Commission has been tasked with the responsibility of coordinating, monitoring and evaluating all activities associated with the implementation of the quality policy.[73] A regional policy infrastructure was also established,[74] together with the adoption of a document on the Model and Principles of Harmonisation of Standards (ECOSHAM), which reiterates principles such as openness, mutual recognition, equivalence, transparency, impartiality and effectiveness.[75] ECOSHAM further lays down the procedure that the ECOWAS Technical Harmonisation Committees (THCS), ECOWAS Commission, and ECOWAS member states are to follow when harmonising technical barriers to trade.[76] Yet although the regional infrastructure has managed to develop regional standards, particularly in the area of food and agriculture, some member states have not yet implemented them in their domestic legal frameworks and are not applying the principles of mutual recognition or equivalence to member states.[77]

Accordingly, businesses are facing challenges in obtaining export permits, quality certificates and other technical documents from member states in order to process cross-border transactions within the region.[78] The UNCTAD accordingly submitted that intra-regional trade in ECOWAS is low due to the technical and other non-tariff barriers that member states erect against each other.[79]

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[72] See article 4 of Supplementary Act A/SA.1/02/13 Adopting the ECOWAS Quality Policy (ECOQUAL) and its Implementation Framework.

[73] See paragraph 7 of the ECOQUAL.

[74] UNCTAD *Regional integration and non-tariff measures in the Economic Community of West African States (ECOWAS)* New York & Geneva: United Nations (2018) available at https://unctad.org/system/files/official-document/ditctab2018d1_en.pdf (accessed 14 February 2024).

[75] UNCTAD (2018).

[76] UNCTAD (2018).

[77] UNCTAD (2018).

[78] Khitome D "The AfCFTA, the benefits, the TBTs challenges, the opportunities and the role of ARSO" (2019) *ARSO* available at https://www.arso-oran.org/?p=5326 (accessed 14 January 2024).

[79] UNCTAD (2018).

5.3 The EAC and regulation of technical barriers to trade

The EAC was formed in 1999 as a second attempt at regionalism in East Africa after the first EAC (formed in 1967) collapsed in 1977 after only a decade of existence.[80] The Treaty Establishing the East African Community ("EAC Treaty") came in force in force on 7 July 2000 after it was ratified by three partner states (Kenya, Tanzania and Uganda).[81] Among other objectives, the EAC seeks to develop policies and programmes that widen and deepen cooperation among member states in economic, political, social, cultural and other areas for mutual benefit.[82] Consequently, articles 5, 47 and 126 of the EAC Treaty call for the harmonisation of member states' national laws and policies.

In the area of technical barriers to trade, the EAC adopted the East African Protocol on Standardisation, Quality Assurance, Metrology and Testing ("EAC SQAM Protocol"), which aims, among other things, to harmonise technical barriers to trade among partner states.[83] To ensure the effective implementation of the EAC SQAM Protocol, partner states adopted the East African Standardisation, Quality Assurance, Metrology and Testing Act ("EAC SQAM Act"), which emphasise the need for cooperation among member states to eliminate technical barriers to trade within the region.[84] To this end, various institutions – such as the EAC Standards Committee,[85] Liaison Office,[86] East African Accreditation Board,[87] EAC Council of Ministers,[88] and EAC Court of Justice[89] – have been tasked with the development, implementation and enforcement of the region's legal instruments on technical barriers to trade. To ensure conformity with international standards, the SQAM

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[80] Kamanga K "An enquiry into the achievements and challenges of East African regional integration" (2016) 43(1) *African Review* 51.

[81] See the EAC Treaty.

[82] See article 5(1) of the EAC Treaty, which states that "the objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence security and legal and judicial affairs, for their mutual benefit".

[83] See the preamble of the EAC SQAM Protocol.

[84] See article 3 of the EAC SQAM Act.

[85] See article 4 of the EAC SQAM Act.

[86] Article 5 of the EAC SQAM Act.

[87] Article 11 of the EAC SQAM Act.

[88] Article 4 of the EAC SQAM Act.

[89] Article 26 of the EAC SQAM Act.

Act emphasises the need for the EAC Standards Committee to have due regard to the requirements and obligations of the WTO TBT Agreement.[90]

Despite these efforts, technical barriers to trade are among the most outstanding non-tariff barriers in the EAC.[91] Partner states continue to charge discriminatory fees even from goods originating from other partner states; furthermore, there is no mutual recognition of conformity certificates amongst partner states.[92] Consequently, businesses in Kenya find it much easier to export to developed countries such as Japan and Singapore than to other partner states due to unnecessary and burdensome regulations that increase the cost of doing business within the region.[93] Ultimately, these unfriendly trade practices contribute to the reduction of intra-regional trade and deter investment.[94]

6 REGULATION UNDER ANNEX 6 ON TECHNICAL BARRIERS TO TRADE

As mentioned, the AfCFTA, the brainchild of the African Union (AU), was approved by the 18th ordinary Session of the Assembly of Heads of State and Government, held in Addis Ababa, Ethiopia, in January 2012; the Agreement, which establishes the AfCFTA, was signed on 21 March 2018 and came into force on 30 May 2019.[95] Among other objectives, the AfCFTA seek to eradicate tariff barriers and reduce non-tariff barriers in order to promote free trade and deepen integration among African countries.[96] To achieve these objectives, the Agreement establishing the AfCFTA contains protocols that regulate different areas of cooperation.[97] Annex 6 of the Trade of the Protocol on Trade in Goods

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[90] See article 4(3) of the EAC SQAM Act

[91] Aid for Trade "Case story template" (2017) *Organisation for Economic Co-operation and Development* available at https://www.oecd.org/aidfortrade/casestories/casestories-2017/CS-72-TMEA-Elimination-of-non-tariff-barriers-to-trade-in-East-Africa.pdf (accessed 22 February 2024).

[92] "How non-tariff barriers affect trade in the EAC" (19 August 2022) *Trademark Africa* available at https://trademarkafrica.com/how-non-tariff-barriers-affect-trade-in-the-eac/ (accessed 15 February 2024).

[93] Khitome (2019).

[94] Eurallyah A "Non-tariff barriers and related dispute resolution: Is the East African Community all hat and no cattle?" (2021) *Tralac* https://www.tralac.org/blog/article/15069-non-tariff-barriers-and-related-dispute-resolution-is-the-east-african-community-all-hat-and-no-cattle.html (accessed 22 February 20124).

[95] African Union "African Continental Free Trade Agreement" available at https://au.int/en/african-continental-free-trade-area (accessed 14 February 2024).

[96] See article 3 of the Agreement Establishing the African Continental Free Trade Area.

[97] The Protocol on Trade in Goods; the Protocol on Trade in Services; the Protocol on Rules and Procedure on the Settlement of Disputes; the Protocol Investment; the Protocol on Intellectual Property Rights; the

on Technical Barriers to Trade ("Annex 6 on Technical Barriers to Trade") regulates technical barriers to trade in the free trade. According to article 4, Annex 6 on Technical Barriers to Trade seeks to:

(a) facilitate trade through cooperation in the areas of standards, technical regulation, conformity assessment, accreditation and metrology;

(b) facilitate trade by the elimination of unnecessary and unjustifiable technical barriers to trade through:

(i) reinforcing international best practices in regulation and standards setting;

(ii) promoting the use of relevant international standards as a basis for technical regulations; and

(iii) identifying and assessing instruments for trade facilitation such as harmonisation of standards, equivalence of technical regulations, metrology, accreditation and conformity assessment.

(c) strengthen cooperation and identify priority areas;

(d) develop and implement capacity building programmes to support the implementation of this Annex;

(e) establish mechanisms and structures to enhance transparency in the development and implementation of standards, technical regulations, metrology, accreditation and conformity assessment procedures; and

(f) promote mutual recognition of results of conformity assessment.[98]

With the aim of ensuring cooperation in the elimination of technical barriers to trade within Africa, Annex 6 on Technical Barriers to Trade generally promotes compliance with the WTO TBT Agreement and encourages the use of international standards as well as the adoption of harmonised standards developed by accredited institutions such as the

Protocol on Competition Policy; and the Protocol on Digital Trade. See the Agreement Establishing the AfCFTA.

[98] See of article 4 of Annex 6.

African Organisation for Standardisation (ARSO)[99] and the African Electrotechnical Standardisation Commission (AFSEC).[100] Furthermore, Annex 6 on Technical Barriers to Trade encourages mutual acceptance of the conformity assessment results of bodies recognised under appropriate multilateral agreements.[101] However, compared to the WTO TBT Agreement, which focuses on technical regulations, standards, and conformity assessment procedures, Annex 6 on Technical Barriers to Trade goes further to provide some provisions on accreditation and metrology.[102] It is important to note that Annex 6 on Technical Barriers to Trade does not create a new structure that deals with accreditation; rather, it promotes the utilisation of existing accreditation structures[103] and encourages participation in existing institutions such as the African Accreditation Cooperation (AFRAC).[104]

In the area of metrology, article 10 encourages the use of the International System of Units as the basis for the harmonisation of legal, industrial and scientific metrology activities.[105] Annex 6 on Technical Barriers to Trade reiterates the importance of transparency, clarity, predictability and trust in the development and implementation of technical regulations, standards and conformity assessment procedures.[106] In this regard, it encourages member states to comply with the transparency obligations of the WTO TBT Agreement and notification procedures that have been developed over time.[107] Member states are further encouraged to seek and provide technical assistance and capacity-building to address technical barriers to trade across the continent.[108]

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[99] ARSO was formed in 1977 with the principal mandate to harmonise African Standards, Conformity Assessment Procedures in order to reduce technical barriers to trade and therefore promote intra-African and international trade, as well as enhance the industrialisation of Africa. See the African Organization for Standardisation "The history of ARSO" (n. d.) available at https://www.arso-oran.org/the-history-of-arso/ (accessed 18 February 2024).

[100] AFSEC was established in 2008 as a subsidiary body of the African Energy Commission to promote electro-technical standardisation and thereby support the industrialisation of Africa. See AFSEC "About AFSEC" *AFSEC* available at https://afsec-africa.org/ABOUT_AFSEC.aspx (accessed 18 February 2024).

[101] Article 8 of Annex 6 on Technical Barriers to Trade.

[102] See articles 9 and 10 of Annex 6 on Technical Barriers to Trade.

[103] See article 9 of Annex 6 on Technical Barriers to Trade.

[104] See article 9(e) of Annex 6 on Technical Barriers to Trade.

[105] See article 10 of Annex 6 on Technical Barriers to Trade.

[106] Article 11 of Annex 6 on Technical Barriers to Trade.

[107] See article 11 of Annex 6 on Technical Barriers to Trade.

[108] Article 12 of Annex 6 on Technical Barriers to Trade.

In terms of the implementation of Annex 6 on Technical Barriers to Trade, Annex 5 of the Protocol on Trade on Non-Tariff Barriers ("Annex 5 on non-tariff barriers") provides "mechanisms for the identification, categorisation and progressive elimination of non-tariff barriers within the AfCFTA".[109] Subsequently, RECs in Africa are required to "establish or strengthen non-tariff barriers monitoring mechanisms that will track and monitor non-tariff barriers affecting intra-African trade and update regional and national plans for the elimination of non-tariff barriers".[110] To this end, RECs Non-Tariff Barriers Units and National Focal Points have been tasked with the responsibility of ensuring the timely and effective resolution of identified non-tariff barriers.[111]

According to Annex 5 on non-tariff barriers, a complaint regarding non-tariff barriers that may be lodged has to first exhaust non-tariff elimination channels at the regional level before being escalated to the AfCFTA.[112] Although this mechanism presents an opportunity for highlighting the non-tariff barriers, particularly technical barriers to trade, that are presenting obstacles to intra-African trade, this mechanism is bound to face challenges given that it requires policy changes that address corruption as well as inadequate infrastructure and implementation of regional commitments in African countries.[113] As discussed above, many African countries have not yet managed to effectively implement regional obligations on technical barriers to trade, in view of the fact that technical barriers to trade continue to hamper African trade.[114]

Without the actual implementation of these commitments and the development of adequate infrastructure that supports adherence to regional obligations, businesses may be discouraged from using these procedures.[115] Furthermore, business and other non-state parties cannot escalate these matters to the AfCFTA's dispute settlement system of

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[109] Article 2 of Annex 5 on non-tariff barriers.

[110] See article 10 of Annex 5 on non-tariff barriers.

[111] See article 10.2 of Annex 5 on non-tariff barriers.

[112] See Appendix 2 of Annex 5 to the Protocol on Trade in Goods on Procedure for Elimination and Co-operation in the Elimination of Non-Tariff Barriers.

[113] Viljoen W "The intra-Africa non-tariff barrier dilemma: The challenges facing the AfCFTA approach" (2019) *Tralac* available at https://www.tralac.org/documents/events/tralac/2739-tralac-brief-the-intra-africa-ntb-dilemma-the-challenges-facing-the-afcfta-approach-march-2019/file.html (accessed 22 February 2024).

[114] Viljoen W "Non-tariff barriers affecting trade in the COMESA-EAC-SADC Tripartite Free Trade Agreement" (2011) Tralac Working Paper No. IIWPO7/2011 at 16.

[115] Erasmus (28 July 2020).

given that the Protocol on Rules and Procedures on the Settlement of Disputes limits the application of the Protocol to interstate disputes.[116] In particular, this exclusion limits the ability of non-state parties to address trade-related grievances related to technical barriers to trade, thereby impeding the AfCFTA's ability to realise its objectives of economic integration; elimination of tariffs and non-tariff barriers; sustainable and inclusive development; and enhancement of Africa's global competitiveness.[117]

7 CHALLENGES IN IMPLEMENTING ANNEX 6

This section discusses the challenges that confront African countries in implementing the AfCFTA Annex 6 on Technical Barriers to Trade. The challenges include limited capacity, limited knowledge, institutional weaknesses, ineffective enforcement mechanisms, overlapping membership, and lack of political will.

7.1 Inadequate infrastructure

Although some technical barriers to trade that have implemented by African states can be linked to trade disruptions, other effects may be linked to Africa's lack of capacity to implement regional agreements effectively.[118] Many countries in Africa do not have the capacity and infrastructure needed to implement sophisticated multilateral, continental and regional agreements in their domestic legal frameworks.[119] Arthur identifies "lack of cold chain facilities, food and other physical infrastructure as clear gaps that affect the overall food safety system in Africa".[120] He notes that where they are available, infrastructural capacities and resources in Africa are at varying stages of development, which automatically limits harmonisation from the outset.[121] For example, Liberia has a long way to go in meeting ECOWAS standards in the seed sector due mainly to inadequate

[116] See article 3 of the Protocol on Rules and Procedures on the Settlement of Disputes.

[117] Viljoen (2019).

[118] Kareem F "What drives Africa's inability to comply with EU standards? Insights from Africa's institution and trade facilitation measures" (2023) 35 *European Journal of Development Research* 938.

[119] UNCTAD *Non-tariff measures to trade: Economic and policy issues for developing countries* New York & Geneva: United Nations (2013) 28 available at https://unctad.org/system/files/official-document/ditctab20121_en.pdf (accessed 12 February 2024).

[120] Arthur H "Harmonisation in Africa: Quality assurance and safety of crops & foods" (2019) 11 (7) 613 at 618.

[121] Arthur (2019) at 618.

resources and poor infrastructure.[122] Nigeria's National Fertilizer Development Centre, which serves as a reference laboratory for assessing whether products comply with standards set by the Standards Organisation of Nigeria, has operational challenges due to lack of resources.[123]

In Southern Africa, the functioning of the Malawi Bureau of Standards (MBS), a body responsible for promoting standardisation and quality assurance in regard to commodities in manufacturing, production and processing, is inhibited by weak infrastructure.[124] The MBS lacks adequate laboratory equipment for implementing regional and multilateral legal instruments effectively.[125] Kandiero points out that it "is in desperate need of an effective modern information technology system for effective communication, storage and retrieval of information and reproduction of documents".[126] Furthermore, transport and custom infrastructure has been identified as a significant challenge impeding market access in the EAC.[127] Chipanda and Cilliers note that transport costs in some East African countries are estimated to be five times more than in European countries and North America.[128] Inadequate infrastructure reduces the competitiveness of businesses and results in low levels of intra-African trade, thereby undermining the effective implementation of the Annex 6 on Technical Barriers to Trade.[129]

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[122] Keysera J et al. "Towards an integrated market for seeds and fertilisers in West Africa" (January 2015) *World Bank* available at https://documents1.worldbank.org/curated/en/886471468119063004/pdf/936300REVISED00REVISED0FINAL0TO0DC.pdf (accessed 28 June 2024).

[123] Keysera et al. (January 2013).

[124] See the Malawi Bureau of Standards available at https://mbsmw.org/organization-profile/ (accessed 20 November 2024).

[125] Kandiero T "Malawi in the multilateral trading system" (2024) *World Trade Organization* https://www.wto.org/english/res_e/booksp_e/casestudies_e/case23_e.htm#outcome (accessed 20 November 2024).

[126] Kandiero (2024).

[127] "Poor infrastructure among major trade barriers in EAC" (2021) *Trademark Africa* available at https://www.trademarkafrica.com/news/poor-infrastructure-among-major-trade-barriers-in-eac (accessed 22 November 2024); Dovi EA "Infrastructure key to intra-African trade: West African traders demand investments in roads, rails and telecom" (2018) 32(2) *Africa Renewal* 9.

[128] Chipanda B & Cilliers J "The AfCFTA: The need for connecting infrastructure" (2024) *ISS African Futures* available at https://futures.issafrica.org/thematic/08-afcfta/ (accessed 23 November 2024).

[129] Deloitte "Addressing Africa's infrastructure challenges" *Deloitte* available at https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Energy-and-Resources/dttl-er-power-addressing-africas-infrastructure-challenges.pdf (accessed 23 November 2024).

7.2 Limited knowledge

Lack of adequate knowledge about the use, purpose and implementation of technical barriers to trade is one of the significant obstacles inhibiting effective implementation of the AfCFTA.[130] For instance, Malawi lacks trained personnel to address technical barriers to trade and comply with multilateral instruments.[131] As Osiemo finds, lack of knowledge among relevant stakeholders is one of the major difficulties in the implementation of standards and technical regulations at the domestic level in Africa.[132]

Lack of relevant knowledge and expertise by policy-makers and relevant authorities in various departments leads to the promulgation of poor regulations that are not linked to the purpose they seek to achieve.[133] For instance, South Africa introduced an environmental levy on plastic bags that was meant to reduce litter problems but the regulation governing it ended up regulating issues unrelated to litter, such as the thickness of the plastic bag and the size of the text printed on the bag.[134] These regulations relate to design rather than a safety requirement requiring technical regulation.[135] They are thus clear examples of regulations that are being enforced by member states but which go beyond issues of public interest.[136] Accordingly, it is submitted that limited awareness among stakeholders is one of the major difficulties in the implementation of Annex 6 on Technical Barriers to Trade.

7.3 Institutional weaknesses

The implementation of Annex 6 is further inhibited by institutional duplication and overlapping mandates within and across African states, all which compounds regulatory asymmetries.[137] For instance, three agencies in Nigeria – the Federal Fertilizer Department, the National Agency for Food and Drug Administration, and the Standards

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[130] Osiemo O "The last frontier: Sanitary and phytosanitary standards and technical regulations as non-tariff barriers in intra-African trade" (2015) 23(1) *African Journal of International and Comparative Law* 174 at 177.

[131] Kandiero (2024).

[132] Osiemo (2015) at 192

[133] World Bank (2011).

[134] World Bank (2011) at 34.

[135] World Bank (2011) at 34.

[136] World Bank (2011) at 34.

[137] Arthur (2019) at 617.

Organisation of Nigeria – claim responsibility for different and sometimes overlapping aspects of fertilizer control.[138] This increases the cost of doing business, as businesses often have to obtain licences and comply with a host of regulations that were presumably designed to achieve much the same objectives.[139]

Likewise, in South Africa, fixed telephony equipment such as fax machines have to comply not only with regulations for safety (administered by the South African Bureau of Standards) but with overlapping specifications to do with electromagnetic interference and connectivity (administered by the Independent Communications Authority of South Africa).[140] Muir argues in this regard that "harmonisation is made possible by the existence of both domestic and international standards-setting institutions that work together to achieve uniformity in the global marketplace".[141] However, in Africa, the existence of a multitude of institutions, rather being a strength, is often a major sign of institutional weakness.[142]

7.4 Ineffective enforcement mechanisms

Africa does not have effective institutions to enforce regional commitments. In ECOWAS, the ECOWAS Court of Justice plays an important role in "eliminating obstacles to the realisation of Community objectives and accelerating the integration process".[143] The Court of Justice has the authority to adjudicate on any legal dispute instituted by member states, businesses or natural persons.[144] This authority includes settling legal disputes emanating from the application, interpretation or enforcement of regional texts in the domestic legal systems of member states.[145] Yet despite its responsibility of ensuring ECOWAS's effective functioning, in reality the Court of Justice plays but a minor role in

[138] Arthur (2019) at 617.

[139] World Bank (2011) at 34.

[140] World Bank (2011) at 34.

[141] Muir A "The race to safety: How private lawmaking and voluntary-standard adoption can inspire a global regime that strengthens and harmonizes product safety standards" (2016) 23(1) *Indiana Journal of Global Legal Studies* 323 at 340.

[142] Arthur (2019) at 617.

[143] UNCTAD (2018).

[144] Supplementary Protocol A/SP.1/01/05 amending the Preamble and article 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice.

[145] See article 3 of the Supplementary Protocol A/SP.1/01/05 amending the Preamble and article 1,2,9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice.

regional integration in West Africa.[146] This is mainly because the relevant mechanisms under the 2005 Supplementary Protocol are too weak to enforce the court's decisions.[147] The enforcement of regional decisions in ECOWAS requires goodwill and commitment that go beyond the political will of most member states.[148]

Similarly, the EAC Court of Justice, which has jurisdiction to interpret disputes arising from the region's legal texts, has inherent weaknesses that inhibit its ability to function effectively.[149] In spite of the existence of a robust legal regime on trade, the EAC still lacks an enforcement mechanism for its court and a functional regulatory body on trade disputes.[150] This is mainly due Uganda and Burundi's delay in ratifying an enforcement mechanism which was approved by heads of state in 2013.[151] Furthermore, the EAC Committee on Trade Remedies, a body designed to address trade disputes, remains non-operational to date.[152]

In SADC, the SADC Tribunal, which was established to interpret regional instruments and adjudicate disputes referred to it, is not in operation.[153] During the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*[154] between 2007 and 2010, SADC member states showed their unwillingness to be bound by the decisions of the Tribunal and surrender their national sovereignty for the betterment of the region.[155] Indeed, the

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[146] UNCTAD (2018) at 27.

[147] UNCTAD (2018) at 27.

[148] UNCTAD (2018) at 27.

[149] Chidede T & Gitinywa L "Dispute settlement in the East African Community (EAC)" (1 October 2018) *Tralac* available at https://www.tralac.org/blog/article/13528-dispute-settlement-in-the-east-african-community-eac.html (accessed 28 November 2024).

[150] Anami L "Uganda, Burundi delay protocol to give EACJ teeth" (2024) *The Eastern African* available at https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-burundi-delay-protocol-to-give-eacj-teeth-4565940 (accessed 25 November 2024).

[151] Anami (2024).

[152] Anami (2024).

[153] See article 16(1) of the SADC Treaty.

[154] This case involved a group of white Zimbabwean farmers who petitioned the SADC Tribunal for relief over the government's land reform programme which saw farms confiscated without compensation. The Tribunal concluded that Zimbabwe violated the provisions of the SADC Treaty and that it should pay the farmers compensation for their expropriated land. In 2009, the farmers went before the Tribunal seeking a declaration that the government was in breach of the Tribunal's order. However, Zimbabwe refused to take part in the proceedings and in the same year withdrew from the Tribunal jurisdiction. See *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2.

[155] Nathan L "The disbanding of the SADC Tribunal: A cautionary tale" (2013) 35(4) *Human Rights Quarterly* 870 at 874.

case above led to the suspension of the Tribunal.[156] Although a revised protocol was developed to limit the court's jurisdiction to interstate disputes, it is not yet in force as it has not been ratified by the required number of states.[157]

7.5 Overlapping membership

The existence of a variety of frameworks creates a complex, fragmented and diverse network of regional, continental and multilateral legal instruments. This is complicated by the fact that most African countries belong to more than one REC. For instance, while Tanzania and the Democratic Republic of Congo (DRC) are members of SADC, they are also members of the EAC.[158] Multiple integration schemes and overlapping memberships create policy challenges due to competing and overlapping obligations, a situation that in turn breeds unpredictability and raises the cost of doing business in Africa.[159] The Agreement establishing the AfCFTA does not address this issue; instead, it provides remedy only in cases where regional obligations are in conflict or inconsistent with the AfCFTA.[160] Such a situation not only increases the burden of commitments on member states, but also produces further hindrances to intra-regional trade.

7.6 Lack of political will

Although Africa has made significant progress in adopting regional instruments, the implementation of these at the national level is slow, leading to discrepancies between regional regulation and national legislation.[161] In countries that follow the dualist approach in international law, regional and international legal instruments may be

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[156] Cowell F "The death of the Southern African Development Community Tribunal's human rights jurisdiction" (2013) 13(1) *Human Rights Law Review* 153 at 158.

[157] Erasmus G "The new protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law" (2015) *Tralac* available at https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html (accessed 28 November 2024).

[158] Swaziland, Botswana, Lesotho, Namibia and South Africa are members of SADC and the Southern African Customs Union (SACU); the DRC, Malawi, Zambia, Zimbabwe, Madagascar, Mauritius and Seychelles are members of SADC and Common Market for Eastern and Southern Africa.

[159] Hailu M "Regional economic integration in Africa: Challenges and prospects" (2015) 8(2) *Mizan Law Review* 299 at 319; Mengistu M "Multiplicity of African regional economic communities and overlapping memberships: A challenge for African integration" (2015) 3(5) *International Journal of Economics, Finance and Management Sciences* 417 at 423.

[160] Article 19.1 of the Agreement Establishing the AfCFTA states that "[i]n the event of any conflict and inconsistency between this agreement and any other regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement".

[161] Arthur (2019) at 618.

implemented in domestic legal systems only after their domestication in national frameworks.[162] Thus, despite a plenitude of multilateral, continental and regional instruments on technical barriers to trade, they are effectively redundant if they are not domesticated by African countries.

Lack of domestication of legal instruments may be attributed to a lack of political will by African states to implement regional obligations and ensure collective integration.[163] According to Thusi et al., "political will informs development, [and] it allows for processes linked to economic growth to take place and prosper; however when such will is lacking, it becomes impossible to consolidate coherent developmental policies".[164] Due to lack of political will, there seem in some instances to be deliberate efforts to disregard regional instruments. For instance, within ECOWAS, Ghana – a member state – requires businesses that imports seeds in the country to submit physical samples to the local seed authority for testing, a requirement which is in contradiction to ECOWAS provisions that promote the mutual recognition of regional seed certificates.[165] Similarly, in Mali, there are clear differences between national and regional fertilizer law on the maximum variations in nutrient and heavy metal content.[166]

In the EAC, Tanzania and Kenya have reportedly engaged in a trade war over the inspection of goods at their border posts.[167] Although both countries are members of the EAC, Tanzanian authorities held Kenyan goods for more than seven days, citing reasons such as collecting samples for inspection.[168] Tanzania argued that this action came as retaliation after Kenya had held its tiles and spirits for the same reason.[169] According to the Tanzania Bureau of Standards, Kenya's subjection of Tanzanian products to quality

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[162] Barnard M "Legal reception in the AU against the backdrop of the monist/dualist dichotomy" (2015) 48(1) *Comparative and International Law Journal of Southern Africa* 144 at 155.

[163] Thusi X, Mlambo VH & Mkhize N "Challenges of implementing the Africa Agenda 2063: A synopsis" (2024) 8(1) *Prizen Social Science Journal* 58 at 63.

[164] Thusi, Mlambo & Mkhize (2024) at 63.

[165] Arthur (2019) at 618.

[166] Arthur (2019) at 618.

[167] "Tanzania, Kenya now row over border screening" (9 March 2019) *The East African* available at https://www.theeastafrican.co.ke/tea/business-tech/tanzania-kenya-now-row-over-border-screening-1413914 (accessed 26 November 2024).

[168] The East African (2019).

[169] The East African (2019).

verification before entering its territory went against the EAC's Mutual Recognition Agreement on standards.[170]

In SADC, cargo control measures instituted by Zimbabwe at the Beitbridge border, one of the busiest borders in Southern Africa, are straining the movement of supply chains into Zimbabwe.[171] These measures result in cargo transporters waiting up to 80 hours to clear the crossing.[172] Regulatory differences like these increase the cost of doing business in the region and create a legally unpredictable environment that restricts rather than promotes intra-regional trade.[173] In the absence of political will to implement regional agreements in member states' domestic legal frameworks, technical barriers to trade will continue to impede trade within the African continent.

8 TOWARDS THE IMPLEMENTATION OF ANNEX 6

While the AfCFTA offers an opportunity for deeper economic integration in Africa by removing technical barriers to trade, the earlier discussion on RECs highlights a gap between what African states commit to and what they are able to implement effectively. Many African countries, as noted, face challenges that include inadequate infrastructure, limited knowledge, institutional weakness, ineffective enforcement mechanisms, overlapping REC membership, and lack of political will to implement regional obligations in their domestic legal frameworks.

With all of this borne in mind, the next section provides recommendations that can assist African countries in overcoming the challenges above and effectively implementing Annex 6 on Technical Barriers to Trade in such a way that deepens Africa's economic integration as envisaged under the AfCFTA. The section recommends strengthened collaboration among African countries; education on the importance and purpose of technical barriers to trade; the adoption of effective enforcement mechanisms; and improved political will among African leaders to domesticate regional and international obligations. These recommendations are discussed in more detail below.

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[170] The East African (2019).

[171] Goddard E "Excessive cargo scanning slows trade through Beitbridge" (2024) *Freight News* available at https://www.freightnews.co.za/article/excessive-cargo-scanning-slows-trade-through-beitbridge (accessed 28 November 2024

[172] Goddard (2024).

[173] UNCTAD (2024) at 22.

8.1 Strengthened collaboration

As discussed, technical institutions in most African countries are superficial and ineffective since they are not equipped with the capacity to fulfil their mandates.[174] Instead of relying on national regulatory infrastructure, which is in most instances poor, African countries should rely on regional and continental accredited infrastructure. However, to function efficiently and compete with other international bodies, African countries need to capacitate and support regional and continental infrastructure. The integration agenda under the AfCFTA must therefore be adequately financed by member states.[175]

The effective functioning of regional and continental infrastructure is pertinent because it facilitates the use of harmonised international standards, thereby thwarting the fragmented national regulation and competing regional obligations that breed unpredictability in business transactions. In this regard, Annex 6 on Technical Barriers to Trade emphasises the need for member states to use international standards and other accredited continental bodies such as ARSO, AFRAC and AFSEC.[176] Supporting and using these international bodies would reduce the cost of doing business in the continent, thereby assisting businesses, particularly small to medium enterprises, which often struggle with costs arising from multiple testing requirements and fragmented technical regulations and standards across the continent.

8.2 Education

To ensure the effective implementation of the AfCFTA, it is imperative for policy-makers and relevant government authorities across the continent to be educated on the purpose and need for trade-friendly regulations that do not impede trade. Furthermore, capacity-building workshops that help in educating and sharing experiences should be held periodically by the AfCFTA Secretariat at both the continental and regional level. Accordingly, learning from international policy and sharing international experience to

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[174] Nzewi O & Zakwe L *Democratising regional integration in Southern Africa: SADC national committees as platforms for participatory policy-making* Johannesburg: Centre for Policy Studies (2019) at 10.

[175] Fundira T "Can reducing non-tariff trade costs in Africa be the gamechanger for the African Continental Free Trade Area?" (2023) *Tralac* available at https://www.tralac.org/blog/article/15963-can-reducing-non-tariff-trade-costs-in-africa-be-the-gamechanger-for-the-african-continental-free-trade-area.html (accessed 14 February 2024).

[176] Article 6 of the Annex 6 on Technical Barriers to Trade.

transfer best practices would assist policy-makers in amending domestic policy and complying with their obligations under AfCFTA.

8.3 Effective enforcement mechanisms

The purpose of Annex 5 on Technical Barriers to Trade is to provide mechanisms that identify, categorise, and eliminate NTBs within the AfCFTA. Complaints or trade concerns may be addressed at the AfCFTA only after the parties have failed to reach an agreement at the regional level. However, this mechanism is bound run into problems due to enforcement challenges and the absence of effective dispute settlement mechanisms in the RECs.[177] It is thus pertinent for the AfCFTA to adopt legally binding and justiciable mechanisms that enforce and uphold Africa's regional instruments.[178] This would increase business confidence, expand trade, and promote investment in the region.[179]

Also, as discussed above, businesses and other non-state parties have been excluded from AfCFTA's dispute settlement system.[180] An inclusive dispute resolution system is pertinent for successful economic integration in Africa, as it would boost business confidence and improve member states' compliance with regional and continental obligations.[181] It is thus important that the Protocol on Rules and Procedures on the Settlement of Disputes be amended to include non-state parties.[182] Accordingly, businesses with trade concerns relating to technical barriers to trade should be permitted to use dispute settlement procedures of the AfCFTA.

8.4 The AfCFTA and political will

As demonstrated in the discussion above, African countries within their respective RECs have adopted various legal instruments addressing technical barriers to trade. However, despite these instruments, many states lack the political will to incorporate and

[177] Viljoen (2019).

[178] Ojok F "The efficiency of the AfCFTA dispute resolution mechanism: An in-depth analysis" (11 July 2023) *Kluwer Arbitration Blog* https://arbitrationblog.kluwerarbitration.com/2023/07/11/the-efficiency-of-the-afcfta-dispute-resolution-mechanism-an-in-depth-analysis (accessed 27 February 2023).

[179] Ojok (2023).

[180] See article 3 of the Protocol on Rules and Procedures on the Settlement of Disputes.

[181] Ojok (2023).

[182] Ojok (2023).

implement the agreed-upon decisions in their national legal frameworks.[183] For the AfCFTA to realise its objectives, it is imperative that countries have the necessary political will to implement the agreed decision. Without the political will to implement continental obligations, harmonisation legal frameworks become largely superfluous.

Lack of political will to implement harmonised legal frameworks under the AfCFTA has been linked to the reluctance of member states to relinquish aspects of their sovereignty on trade policy.[184] However, due to globalisation, the idea of state sovereignty has undoubtedly shifted.[185] This is because technology and international trade have intertwined the world into a single economic, political and social place that makes physical boundaries transparent.[186] A reduction of sovereignty therefore seems inevitable.[187] Lack of political will to honour regional or continental obligations may result in further isolation and the widening of the economic divide between African countries and developed (as well as other developing) countries. In this regard, a report by Sutherland et al. argues that

> [a]cceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally, this is exactly why "sovereign nations" agree to such treaties. They realise that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise.[188]

It is therefore imperative for African countries to have the political will to implement AfCFTA in their domestic legal framework and reap the benefits of economic integration in a globalised world.[189]

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[183] Saurombe A "Regional integration agenda for SADC 'caught in the winds of change': Problems and prospects" (2009) 4 (2) *Journal of International Commercial Law and Technology* 100 at 101.

[184] Saurombe (2009) at 101.

[185] Moeh H & Abdullah K "State sovereignty in the age of globalisation" (2016) (2)2 *International Journal of Management and Applied Science* 10.

[186] Grinin L "State sovereignty in the age of globalisation: Will it survive?" (2012) *Globalistics and Globalisation Studies* 211 at 214.

[187] Grinin (2012) at 214.

[188] Sutherland P et al. *The future of the WTO: Addressing institutional challenges in the new millennium* Geneva: World Trade Organization (2004).

[189] Saurombe (2009) at 105.

9 CONCLUSION

In conclusion, the article has demonstrated that technical barriers to trade continue to hamper trade within Africa. Successful integration as envisaged under the AfCFTA requires the effective implementation of Annex 6 on Technical Barriers to Trade in the domestic legal systems of member states; however, African countries face challenges such as limited capacity, limited knowledge, institutional weaknesses, ineffective enforcement mechanisms, overlapping REC membership and lack of political will to effectively implement regional international instruments. With this in mind, the article has highlighted the need for strengthened collaboration among African states to effectively implement Annex 6 on Technical Barriers to Trade. In particular, member states should capacitate and support continental and regional infrastructure on technical barriers to trade. Also, government officials and policy-makers should be educated on the importance of trade-friendly regulations that do not constitute unnecessary obstacles to trade. Furthermore, the Protocol on Rules and Procedures on the Settlement of Disputes should be amended to include non-state parties in the continent's dispute settlement system. Ultimately, improved political will and effective leadership is crucial for ensuring effective implementation Annex 6 on Technical Barriers to Trade.

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