

**Accessing International Markets Through
Sustainable Application of Standards**

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DECLARATION

I Margaret Wangui Njoroge do hereby declare that this is my original work and that I have not submitted it before and that the work is not currently being submitted for a degree in another University.

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SIGNED

This Thesis is submitted for examination with my approval as University Supervisor.

SUPERVISOR: PROFESSOR MIGAI AKECH

SIGNED.....

DEDICATION

This project is dedicated to my mother who ensured that I enrolled in school early in my life and for encouraging me to hold on there in spite of the many challenges of life; and to my daughter: it is tough being a woman but you can make it if you put on just a little more effort, all things are possible to those who believe in the great God and in their God- given abilities, don't let the world dictate who you are but fulfill your God given mission and purpose in life.

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LIST OF ACCRONYMNS

ARSO	-	African Regional Organisation for Standardization
ACA	-	Anti-Counterfeit Agency
ACP	-	African, Caribbean and Pacific
COMESA	-	Common Markets for East and Central Africa
CAC	-	Codex Alimentarius Commission
DSU	-	Dispute Settlement Understanding
DTA	-	Double Taxation Agreement
EAC	-	East Africa Community
EACSQMT-		East Africa Community Standards Quality Assurance Metrology Testing
EPZ	-	Export Processing Zone
EU	-	European Union
FAO	-	Food and Agriculture Organisation
FDI	-	Foreign Direct Investment
FTA	-	Free Trade Area
GATT	-	General Agreements on Tariffs and Trade
GATS	-	General Agreement on Trade in Services
GDP	-	Gross Domestic Produce
ICT	-	Information and Communication Technology
IPT	-	Industrial Property Tribunal
IGAD	-	Intergovernmental Authority on Development
IEC	-	International Electro technical Commission
ISO	-	International Organisation for Standardization
ITU	-	International Telecommunication Union
IPPC	-	International Plant Protection Convention

ILAC	-	International Laboratory Accreditation Cooperation
IMF	-	International Monetary Fund
KAM	-	Kenya Association of Manufacturers
KEBS	-	Kenya Bureau of Standards
KENAS	-	Kenya Accreditation Services
KEPHIS	-	Kenya Plant Health Inspectorate Services
MRAs	-	Mutual Recognition Agreements
NEMA	-	National Environmental Management Authority
NTB	-	Non-Tariff Barriers
NQI	-	National Quality Institute
NQRI	-	National Quality Regulatory Infrastructure
OIE	-	World Organisation for Animal Health
PTA	-	Preferential Trade Agreement
SABS	-	South Africa Bureau of Standards
SADC	-	Southern African Development Community
SAPs	-	Structural Adjustment Programmes
SEI	-	Institute of Standards Engineers
SME	-	Small and Micro Enterprise
SPS	-	Sanitary and Phytosanitary Measures
TBT	-	Technical Barrier to Trade
RTA	-	Regional Trade Agreement
TRIPS	-	Trade Related Aspects of Intellectual Property Rights
UNDP	-	United Nations Development Programme
WTO	-	World Trade Organisation

ABSTRACT

The objective of the study was to explore whether the implementation of a comprehensive quality regulatory infrastructure would lead to the production of quality goods and services in Kenya, which would improve the country's competitiveness in the regional and international markets and hence lead to greater economic development for Kenya. The research design was descriptive qualitative research design. The population of the study was all the quality infrastructure institutions in Kenya. The target institutions were six. Data was collected through the analysis of various legal instruments and policies, books, journals, papers, group discussions and internet resources. The main theories guiding the study were the Law and Development theories of Neoclassical Counter Revolution and Endogenous or the New Growth Model. The study analysed the international legal regime of WTO-TBT/SPS measures, the regional regimes of the COMESA Treaty and the EAC Common Market Protocol and various local legal instruments which regulate quality in Kenya. The research found out that whereas the international and regional quality regulatory framework are in place, the quality regulatory framework in Kenya has not been updated to be in tandem with these regional and international legal régimes. Consequently the Kenyan quality regulatory system is in disarray and the various quality regulatory institutions have overlapping mandates causing bureaucracy to producers and exporters in the country. This leads to inability to access international markets by Kenyan goods and services and hence to slow economic development of the country. The study found out that Kenya as a developing country faces unique challenges in the quality regulatory infrastructure. The study therefore proposed solutions to overcoming these challenges. The study established that law is important in economic development; also that Standardization plays an important role in enhancing competitiveness of goods and services in regional and international markets; and that a harmonized and strengthened quality regulatory framework leads to an efficient and effective national quality infrastructure that supports regional and international markets.

CHAPTER ONE

1.0 Introduction

The globalization of trade calls for a strong National Quality Regulatory Infrastructure (NQRI) to support industry, trade, environment and consumer's health and safety.¹ This will facilitate trade and enhance exports.² It will also accelerate economic development, reduce poverty and lead to the attainment of the UN Millennium Development Goals.³ In the context of trade, globalization is "the process by which businesses or other organisations develop international influence or start operating on an international scale".⁴

Globalization according to Oman is "the accelerated growth, of economic activity across national and regional political boundaries. It finds expression in the increased movement of tangible and intangible goods and services, including ownership rights, via trade and investment, usually in pursuit of profit."⁵ This increased globalization of the international markets⁶ has caused more and more governments to reconsider the overall arrangement of their NQRI.

In particular enterprises in the developing world are likely to face big challenges in accessing markets in the more developed economies.⁷ Such enterprises need a supportive quality regulatory infrastructure which will provide an independent attestation of product or service quality and thereby enable them to access markets in

¹ M Kellerman 'Thoughts on National Quality policy' (2011) Discussion Paper

4.Physikalisch,Technische Physikalisch- Bundesanstalt, 6,accessed, 6th May 2012.

² ISO/ITC 'Building Linkages for Export Success',(2010)<International Organization for Standardization(ISO) and International Trade Centre (ITC) © ISO/ITC, www.intracen.org>:accessed 27th January 2014.

³ ISO'Metrology, Standardization and Conformity Assessment, Building an Infrastructure for Sustainable Development' [2006-02/3 000] , <www.jcdcmas.net, ISO Central Secretariat International Organization for Standardization, www.iso.org ISO, := accessed 27th January 2014.

⁴ <www.oxforddictionaries.com/definition/english/globalization> last accessed on 30th October,2012

⁵ C Oman 'The policy Challenges of Globalization and Regionalization;OECD Development Centre policy brief no.11, 1990 5 cited in Roydhan N.R.F "Definitions of Globalisation: A comprehensive Overview and a Proposed Defination.June 19,2006,www.gcsp.ch.accessed 18th September 2014.

⁶ T Levitt, cited in D walker and others ' *Doing Business Internationally; The Guide to Cross Culture Success* (2nd Edition, McGraw Hill 2003)248.

⁷ ISO 'Conformity Assessment', Building Trust',(2010)02/3 000, 12 ISO Central Secretariat < www.iso.org> accessed 27th January 2014.

developed states.⁸The concepts of “quality” and “innovation” feature prominently in such challenges. Quality has many dimensions beyond compliance with stated requirements or established standards.⁹It can encompass performance of primary characteristics, including inferred quality or reputation, the probability of malfunction, and the amount of use before the product deteriorates.¹⁰

Consequently, a quality regulatory infrastructure can be described as the totality of the institutional framework which is required for establishing and implementing Standardization, metrology, and accreditation and conformity assessment services.¹¹ It provides acceptable evidence that products and services have met defined quality requirements. Such a regulatory framework may be demanded by authorities, for instance inform of technical regulations or sanitary and phyto-sanitary measures; or could be demanded by the market place, that is to say, contractually or inferred.¹² Such a NQRI may be provided by public institutions or private institutions or both public and private institutions.

The broad argument which this research sets to support is that where goods and services conform to such a quality regulatory infrastructure, they will be able to access the international markets and thus bring in foreign exchange and attract investments and consequently lead to an improvement on the country’s Gross Domestic Produce (GDP) and hence to the overall economic development.

An effective quality regulatory infrastructure should be the kind that is embedded on the World Trade Organisation’s Technical Barriers to Trade Agreement and Sanitary and Phytosanitary (WTO-TBT and SPS) Agreement.¹³ These agreements contain measures

⁸ M Kellerman ‘Thoughts on National Quality policy’ (2011)Discussion Paper 4. Physikalisch,Technische Physikalisch- Bundesanstalt 7 accessed May 2012.

⁹ ISO/ITC ,’ Building Linkages for Export Success’ [2010] ISO/ITC< International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org>17 accessed 27th January 2014.

¹⁰ Ibid, 19.

¹¹ Ibid,5; also found at ‘Conformity Assessment, Building Trust,’ 2010-02/3000< www.iso.org ©ISO>, 6 accessed 27th January 2014.

¹² Ibid, 5.

¹³ ISO/ITC ,’ Building Linkages for Export Success’, [2010] ISO/ITC< International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org>18.accessed 27th January 2014.

that prohibit the creation of barriers to trade through technical regulations or standards¹⁴ and WTO Member States are required to comply with these requirements of the trading regime.¹⁵ WTO disciplines in using standards as the basis for regulatory measures demand that “International Standards” be developed by designated organisations in the case of the SPS Agreement¹⁶ or according to Principles for International Standards development in the case of the TBT Agreement.¹⁷ A distinction is made between international standards prepared using the principles set out in the WTO Agreements¹⁸ and disciplines established through the *Code of Good Practice for the Preparation, Adoption and Application of Standards*¹⁹ and other “ private ” standards that do not adhere to these principles and disciplines.

However in the developing economies, including Kenya, the quality regulatory infrastructure is usually in disarray containing massive overlaps among various regulatory agencies.²⁰ These agencies are meant to control the integrity of products entering the international and local markets but they create bureaucratic instability for suppliers and traders due to their overlapping mandates. This leads to a perception that there is an ineffective quality regulatory system in the country and as such constitutes major non tariff barriers to trade.

Non tariff barriers to trade are restrictions that result from prohibitions, conditions, or specific markets requirements that make importation or exportation of products difficult and costly. These could also arise out of improper application of non tariff measures

¹⁴ Article 2 of the TBT Agreement and Article 2(3) of the SPS Agreement respectively.

¹⁵ A Cassese, *International Law* (Second Edition, Oxford University press 2005. United States of America) 501.

¹⁶ The SPS Agreement specifically names the Codex Alimentarius Commission (CAC) ; the World Organization for Animal Health (OIE) ; and the International Plant Protection Convention (IPPC) as organizations that produce “international standards ” regarding food safety, animal health, and plant health respectively.

¹⁷ Formal international standards, such as those from ISO and the International Electrotechnical Commission (IEC), are prepared following such principles.

¹⁸ Annex 4 on “ *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement* ” contained in the Second Triennial Review of the TBT Agreement
at <<http://docsonline.wto.org/DDFDocuments/t/G/TBT/9.doc>>

¹⁹ See < http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#annexIII>

²⁰ M Kellerman ‘Thoughts on National Quality policy’ [2011] Discussion Paper 4/. Physikalisch, Technische Physikalisch- Bundesanstalt 6, accessed May 2012.

such as TBT or SPS measures.²¹ Kenya Association of Manufacturers has posited that as regulatory agencies facilitate trade, they also create conditions which generate non-tariff barriers to trade thus hindering trade due to the high cost of doing business. This leads to shifting of businesses to other countries where the cost of production is cheaper.²²

For instance, in Kenya various governmental organisations facilitate trade. Such agencies are found in several border points of the country and must give clearance to goods before they enter or leave the market. These include, Kenya Revenue Authority (KRA) for revenue collection, Kenya Bureau of Standards (KEBS) to ensure compliance with quality requirements, Kenya Plant Health Inspectorate Service (KEPHIS) to ensure compliance with SPS measures, Ministry of Agriculture to ensure quality produce in the agriculture exports, National Environmental Management Authority (NEMA) to ensure protection of the environment and Ministry of Health to ensure control of the quality of drugs and chemicals etc.²³This lowers the competitiveness of products produced in Kenya because of lack of a coordinated regulatory quality system. Furthermore, importers may take long to access the raw materials which are required in production of goods for the export market. Investors consequently lack confidence in such an ineffective system and are, thereby reluctant to invest in the country.

In the region the EAC Common Market Protocol provides opportunities for free movement of persons, goods, services, labour capital and the rights of establishing business and residence.²⁴The objective of this is realisation of accelerated economic growth and development in the region;²⁵ East Africans are benefiting from the protocol due to the removal of Non-Tariff Barriers (NTBs) legal and administrative measures.²⁶Furthermore, under the East Africa Community Standards Quality Assurance Metrology and Testing Act (EAC SQMT), 2006 suppliers of products in all the partner

²¹ KAM, 'The Study on Trade Hindrances/Non Tariff Barriers by Kenya's Main Regulatory Bodies/Agencies and their Impact on Manufacturing Sector and Business'(2012 Kenya Association of Manufacturers (KAM) Nairobi)1.

²² Ibid, 1.

²³ This is the situation at the Mombasa port, Namanga border post between Kenya and Tanzania and at Malaba border post between Kenya and Uganda. However there are efforts to put in place a one stop Inspection unit.

²⁴ The Preamble to the Protocol on the Establishment of the East African Community Common Market.

²⁵ Ibid Article 4 (2a)

²⁶ Ibid,Article 5(2a)

states must procure conformity assessment services in compliance with East Africa community (EAC) standards, from the registered national conformity assessment service providers. This is meant to contribute greatly to the facilitation of trade within the region.²⁷

Kellerman has argued that an effective and efficient quality regulatory infrastructure can promote the rule of law at the technology level; help in the fight against corruption; simplify bureaucratic processes; and enhance macro-economic stability.²⁸ Accordingly governments pursue the rule of law through good governance in order to integrate with the international community in a better way. Such rule of law leads to the establishment of policy frameworks conducive to social, ecological and market-economic development.²⁹ Such policy frameworks may be established through a NQRI in a country.

The International Organisation for Standardization (ISO) has posited that standards increase efficiency.³⁰ Efficiency is the ability to achieve organisational objectives through the implementation of processes in production or services that facilitate provision of safe, functional and quality products with minimal waste, expense, or unnecessary effort; Efficiency helps organisations achieve their goals as they maximize profits.³¹ Therefore when the country has put in place an effective quality regulatory infrastructure its organisations will be able to work more efficiently through the application of Standardization, metrology, and accreditation and conformity assessment services and hence lead to more exports and hence an increase in GDP for the country.³²

Standardization has been described as the consistent application of guidelines, codes of practice, specifications and validated methods of testing. It leads to acceptance of goods

²⁷ J W Wepukulu, 'Facilitating Trade in EAC Through Promoting Quality Products'(2012) 15 The Benchmark, Kenya Bureau of Standards, 6.

²⁸ M Kellerman 'Thoughts on National Quality policy' (2011) Discussion Paper 4. Physikalisch, Technische Physikalisch- Bundesanstalt, 6, accessed May 2012.

²⁹ Ibid

³⁰ ISO, 'Metrology, Standardization and Conformity Assessment' (2006) 02/3 000 International Organization for Standardization, Switzerland, < www.iso.org > accessed 27th January 2014.

³¹ L Ikonya, 'KEBS' Role in the implementation of the WTO TBT Agreement'(2012) 14 The Benchmark Kenya Bureau of Standards 8.

³² Ibid.

and services and lowers the cost of production or service delivery. It also ensures a safe environment and protection of human health.³³ On the other hand conformity assessment covers all the services needed to provide evidence that a product or service complies with a standard or a technical regulation.³⁴ Conformity assessment can be provided by independent third parties, or by the supplier, depending on the purchaser or regulatory authority requirements. Conformity assessment includes inspection, testing, product or system certification, or any relevant combination of these. Metrology and accreditation are part of conformity assessment. These three, together with standards, are so fundamental and without them any conformity assessment regime lacks credibility.³⁵

Levitt has argued that Standardization of products and services supports globalization. This is because the world is becoming a common market place in which people desire similar products and lifestyles.³⁶ He believes that the business community can deal with cultural diversity between markets through global Standardization.³⁷ However, according to Walker, some people are against global Standardization but argue for adaptation of products and services to the local context of the country instead.³⁸ But Levitt further in support of standardization, posits that awareness of the importance of Standardization is a key ingredient for compliance. He points out that awareness is particularly important for the dissemination of technology, improvement of the quality of goods and services; and the promotion of good business and management practices.³⁹ This is because where there is raised level of awareness on the importance of Standardization in all sectors of the community there is improved quality of production of goods and services in a country. The research argues that the raising of the levels of awareness of importance of

³³ KEBS, Editorial (2012 Worlds Standards Day Brochure).

³⁴ ISO/ITC, 'Building Linkages for Export Success', (2010) < International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org>17 accessed 27th January 2014.

³⁵ Ibid,13

³⁶ T Levitt, cited in D Walker and others 'Doing Business Internationally; The Guide to Cross Culture Success' (2nd edition, McGraw hill 2003) 248.

³⁷ Ibid, 248.

³⁸ Ibid, 249.

³⁹ ISO/ITC, ' Building Linkages for Export Success' (2010) < International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org>19 accessed 27th January 2014.

standardization and hence their compliance can be achieved where the country implements a comprehensive NQRI.

1.1. Background of the Study

Hill and Jain describe globalization of markets as the merging of national markets into one huge global market place. This is facilitated by removing barriers to cross-border trade thus making it easier to sell internationally.⁴⁰ They argue that as markets globalize and an increasing proportion of business activity transcends national borders, there is a need to create institutions to help manage, regulate and police the global market place.⁴¹ Institutions such as the General Agreement on Tariffs and Trade (the GATT), and its successor WTO; the International Monetary Fund (IMF), the World Bank (WB), and the United Nations (UN) have hence been created to regulate the global market place.⁴²

The institution of WTO facilitates the world trading system. It has been responsible for lowering cross-border barriers to trade and investment. Through international trade firms exports goods or services to consumers in another country. But in the 1920's and 30's, many states erected great barriers to international trade through high tariffs on imports of manufactured goods. Such high tariffs were used to protect domestic industries from foreign competition.⁴³

After World War II the industrialized nations committed themselves to remove barriers to the free flow of goods and services, between the nations.⁴⁴ The institution of the GATT was created to enshrine this goal and held eight rounds of negotiations among the Member States. But in 1993, the Member States held another round of negotiations known as the Uruguay Round which reduced trade barriers still further and also extended the GATT to cover trade in services. It also enhanced protection for patents, trademarks and copyrights. The institution of WTO was established in 1995 to police the

⁴⁰ C W L Hill, and A K Jain, *International Business; Competing in the Global Arena*, (fifth edition, Indian Institute of Management, Tata McGraw-Hill Publishing Company Limited 2006) 6.

⁴¹ Ibid, 8.

⁴² Ibid, 8.

⁴³ CW L Hill and A K, Jain, *International Business; Competing in the Global Arena*, (fifth edition, Indian Institute of Management, Tata McGraw-Hill Publishing Company Limited 2006) 9.

⁴⁴ Ibid, 9.

international trading system. The WTO initiated a fresh round of talks at Doha in Qatar whose objective was to further liberalize the World Trade and Investment framework.⁴⁵ The aim was to provide developing nations with greater access to the markets of the developed nations and to create a more favorable environment for Foreign Direct Investment (FDI).⁴⁶

Though all these measures have led to globalization of markets and production and thus to growth in world trade and foreign direct investments, nevertheless, Hill posits that it has also led to increasing attacks on the home markets by foreign competitors.⁴⁷ Consequently, KEBS has advised that countries must embrace and operate credible standards and conformity assessment systems since, as the WTO Agreement on Technical barriers to Trade (TBT) notes; this will help them to improve efficiency of production and facilitate the conduct of trade in products and services.⁴⁸ It will enable their products to be competitive in both domestic and international markets.

Accordingly, the East African Community (EAC) is moving towards harmonized standards that will govern the quality of goods and services in East Africa in line with provisions of the WTO-TBT / SPS legal regime. The enactment EAC Standardization, Quality Assurance, Metrology Testing Act, 2006, (EAC SQMT Act, 2006) and the EAC Common Market Protocol is an effort to embrace the world trade legal regime in the region. However the lack of uniform and sufficient standards in the partner states hinders the development of regional trade in the region.

Consequently, all the five EAC states through their national standards institutions are revising their NQRI.⁴⁹ In this regard, the EAC Standards Committee has proposals for the revision of the existing standards and the withdrawal of outdated standards.⁵⁰ The

⁴⁵ B Hoekman, 'The WTO: Functions and Basic Principles', Department for business innovation and Skills<@bisgovuk> accessed on 30th October 2012.

⁴⁶ CWL Hill, and AK Jain, *International Business; Competing in the Global Arena*, (fifth edition, Indian Institute of Management, Tata McGraw-Hill Publishing Company Limited 2006)11.

⁴⁷ Ibid11.

⁴⁸ KEBS observed this at an ISO 9001:2008 certificate presentation to the Agricultural Development Corporation (ADC).

⁴⁹ J W Wepukulu, 'Facilitating Trade in EAC Through Promoting Quality Products' (2012) 15 The Benchmark, KEBS, 6.

⁵⁰ Ibid.

integration of the five EAC countries will establish a Common Market which will allow for the movement of factors of production such as people and money and the right of settlement and establishment of EAC Citizens within the EAC Member States.⁵¹ Consequently, the key institutions for the establishment of a common market have been erected; namely the East African Legislative Assembly and the East African Court of Justice.

International trade is a major driver of economic development and a major objective for Kenya is to develop economically. Consequently, the Kenya Vision 2030 has identified economic prosperity as one of the objectives of the Government of Kenya.⁵² The government has established several initiatives to explore all possibilities at the national level in order to revive economic activities that will lead to improvement in the quality of life. The vision recognises that quality of life is a pillar for social economic development.

The Vision aims to transform Kenya into the provider of choice for basic manufactured goods in eastern and central Africa.⁵³ This will be done through improving competitiveness in the manufacturing sector in order to promote efficiencies and marketability of such goods. For this reason, enterprises need to comply with international standards so that their products may access international markets.⁵⁴ Such compliance will be possible through development and implementation of a comprehensive NQRI as argued in this research.

Furthermore, according to the Ministry of Industrialization in Kenya, the Small and Microenterprises (SMEs) sector is a key driver of the economy in Kenya.⁵⁵ The sector engages in the manufacture of various products, which are marketed locally and regionally. However, these products are generally less attractive in appearance, less

⁵¹ East African Community Protocol on the Establishment of the East African Community Common Market (2009).

⁵² Republic of Kenya 'Kenya's vision 2030' (2007).

⁵³ Ibid.

⁵⁴ KEBS, Editorial (2012) World Standards Day Brochure.

⁵⁵ Republic of Kenya, Ministry of Industrialization, 'The 4K MSE 2030 Initiative, Strategic Plan' (2007-2012) 3.

efficient and less effective with little or no consideration for safety and health issues.⁵⁶In particular, the lack of Standardization in the SME sector makes similar products manufactured by the same entrepreneurs to be different, because of the use of varying parts and components in the product.⁵⁷This makes the application, repairs and maintenance of such products difficult and hence creates a barrier to trade.

Furthermore, the SME sector does not emphasis on the quality of raw materials used in production of their products. Consequently products from this sector are unable to access regional and international markets and this result in slow or lack of development in Kenya as the sector is one of the major players in the manufacturing sector.⁵⁸Hence, in order to fully exploit the accessibility of foreign markets, Kenya's industry should have access to an internationally recognized, but supportive national quality regulatory infrastructure.⁵⁹

It is against this background therefore this research will explore how the implementation of a comprehensive NQRI will enable Kenya's entrepreneurs to access their products and services to the international markets.

1.2 Statement of the Problem

The quality regulatory infrastructure in Kenya faces a number of challenges and this has hampered the competitiveness of Kenya's products in international markets. These challenges include inadequate national policy framework, weak legal and regulatory framework in the country; inadequate quality regulatory infrastructure in Kenya and low awareness of Standardization among stakeholders. These challenges are aggravated by limited participation of Kenya in the development of regional and international

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ This was observed by the consultant who was developing a National Quality Policy in his April 2012 second draft, (*Support to the Kenya Bureau of Standards (KEBS) In Reform of Standards Regulatory Framework and Capacity Building for SQMT Activities*) 6.

standards as required by the WTO/TBT/SPS legal regime and this leads to poor representation in development of international standards.⁶⁰

The problem is further complicated by the fact that some of the quality regulatory agencies involved in the quality regulation in Kenya have overlapping mandates since the relevant legislation has not clarified their mandates. This leads to unnecessary bureaucratic activities in the development and implementation of WTO/TBT/SPS legal measures by the regulatory agencies, thereby leading to creation of unnecessary barriers to trade. This is aggravated by the fact that the various legislation dealing with quality control in Kenya have not been updated to be in tandem with the principles of WTO TBT/SPS measures.

As a result of the afore gone therefore, goods and services produced in the country, do not meet the quality standards required under the WTO/TBT/SPS Agreements in order to compete in the international markets. Secondly, this leads to low investors' confidence⁶¹ and consequently it slows down the rate of economic development. This research therefore, sets out to explore whether these challenges would be addressed, through the development and implementation of a comprehensive NQRI which is based on the WTO/TBT/SPS Agreement and whether this would lead to the production of products of the quality which are able to compete in international markets and hence lead to economic development in Kenya.⁶²

1.3. Objectives of the Study

The main objective of the study is to explore whether the implementation of a comprehensive NQRI would lead to the production of quality products in the country which would lead to improvement of Kenya's competitiveness in the regional and international markets and to greater economic development for Kenya.

⁶⁰ Ibid, 7.

⁶¹ Ibid, 15.

⁶² M Kellerman, 'Thoughts on National Quality Policy' (2011) Discussion paper 4 Physikalisch, Technische Physikalisch- Bundesanstalt, 11, accessed on May 2012.

1.3.1 Specific Objectives

The study will be guided by the following specific objectives:

1. To find out the role of law in the development of a quality culture in a country.
2. To establish the role Standardization plays in enhancing competitiveness of products in regional and international markets.
3. To examine how a harmonized and strengthened Quality Regulatory Infrastructure will lead to an effective National Quality Regulatory Infrastructure which supports regional and international trade.

1.4. Research Question

The major question this research seeks to answer is whether the implementation of a comprehensive NQRI can lead to the production of quality products in the country which may lead to improvement of Kenya's competitiveness in the regional and international markets and to greater economic development?

1.4.1 Specific Research Questions

Specifically, the research sets to answer the following questions;

1. Does law play a role in the development of a quality culture in country?
2. What role does Standardization play in enhancing competitiveness of products in regional and international markets?
3. Will a harmonized and strengthened Quality Regulatory Framework lead to an effective National Quality Regulatory Infrastructure which supports regional and international trade?

1.5. Hypotheses of the Study

The research poses the following hypotheses;

1. The implementation of a comprehensive NQRI will lead to the production of quality products in Kenya which would lead to improvement of her products'

competitiveness in the international markets and hence to economic development for the country.

2. Law is necessary for the development of a culture of quality in a country.
3. Standardization will enhance competitiveness of products in regional and international markets.
4. A harmonized and strengthened Quality Regulatory Framework may lead to an effective National Quality Regulatory Infrastructure which supports regional and international trade.

1.6. Theoretical Frame Work

This research relies on the Neoclassical Counter Revolution theory.⁶³ The theory was developed in the 1980s due to the ascendancy of conservative governments in the United States, Canada, Britain and West Germany. It emphasized on the supply side macroeconomic policies, rational expectations theories and privatization of public corporations. In the developing countries there was an emphasis on freer markets and removal from public enterprises, statistic planning and government regulation of Economic activities.⁶⁴

This theory argues that by permitting competitive free markets to flourish, privatizing state-owned enterprises promoting free trade and export expansion, welcoming investors from developed countries and eliminating hindrances of government regulations and price distortions in factor, product and financial markets, both economic efficiency and economic growth will be stimulated.⁶⁵

It further argues that what is needed for the developing world to achieve development is the promotion of free markets within the context of permissive governments that allow the “magic of the market place” and the market prices to guide resource allocation and stimulate economic development.⁶⁶

⁶³ M P Todaro, *Economic Development*; (7TH edition, \new York University, Addition-Wesley 1994), 64.

⁶⁴ Ibid, 77.

⁶⁵ Ibid, 77.

⁶⁶ Ibid, 77.

Using the neo-classical counter revolution as a basis, this study endeavors to show that when a country is producing quality products, such products are able to access international markets since the principle of free markets will enable such goods to compete successfully in the international markets without hindrances. This would act as an efficient tool to spur economic growth. This is where the state does not control, but only facilitates markets to produce freely and efficiently what they can produce best, through the formulation of policy and regulatory framework which is in line with international benchmarks. This facilitation is through investments of the state in physical and social infrastructure.⁶⁷

The principle promotes export expansion and investments through elimination of hindrances of government regulations and this leads to economic development. This principle supports the WTO/ TBT agreement whose objective is to ensure that technical regulations do not act as barriers to trade.

The research also relied on the endogenous theory. This theory argues that an active public policy which promotes economic development through direct and indirect investments in human capital formation will lead to development. Secondly, there is need to encourage foreign private investments in knowledge intensive industries such as ICT. By so doing this new growth theory is restoring the significant role for government policy in promoting long-run growth and development.⁶⁸

The research will endeavor to show that when the government has put in place the right policy and regulatory framework then, the products and services produced in the Kenyan market will be of the standards which are required in the international markets and which therefore are able to compete fairly in the market. This in turn will spur economic growth in Kenya.

⁶⁷ Ibid, 77.

⁶⁸ Ibid,77.

1.7 Literature Review

1.7.1 The Role of Law in Development

Development has received diverse interpretation. It has been seen as progress,⁶⁹ growth, emancipation, increase and change. Amartya Sen has defined development as expansion of people's freedoms to live the kind of life they want.⁷⁰ According to Merryman development is progressive social change whereby he perceives law and development as an aspect of both law and social change.⁷¹ Consequently the research explored the role of law in achievement of development of a country. Rajeev on the other hand poses, how should we assess law and development in the legal realms? He sees Law and development fitting well where the creation and implementation of laws and policies are intensely married with law.⁷²

However William⁷³ is of the view that the rule of law and development should be separated since in a democracy, a government is expected to be transparent and accountable.⁷⁴ This contributes to legal conditions that are suitable in promoting investor confidence which is a hallmark of the rule of law. This leads to confidence in the rule of law and the judiciary that fosters human rights, property rights and honors contracts in their adjudication.⁷⁵ David Trubek and Marc Galanter⁷⁶ argue that the law and development movements emphasized the role of law as the support tool and institutional framework for the classic development State as well as a process of economic progress. The research argues that law is a basic ingredient for development since development cannot be achieved on its own but requires laws for regulating its evolving nature.

⁶⁹ B A Garner *Black's Law Dictionary*, (7th edition. West Group 1999), 482.

⁷⁰ A Sen, *Development as Freedom*, (Anchor Books, New York 1999) ,36.

⁷¹ J Merryman, 'Comparative Law and Social Change on the Origin, Style, Decline & Revival of the Law and Development Movement' (1977) *American Journal of Comparative Law* 25 3 457 471-491.

⁷² R Dhavan 'Law as a Concern: Reflecting on Law and Development', in Yash Vyas et al. (eds) *Law and Development in the Third World*, (1994) Kenya Litho Limited, Nairobi, 25-50 27.

⁷³ W Whitford 'The Rule of Law: New Reflections on an Old Doctrine' (2000) *East African Journal of peace and Human Rights*, 159.

⁷⁴ *Ibid*, 162.

⁷⁵ *Ibid*, 161,169 & 170.

⁷⁶ D Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review*: 1062-1101.

This research argues that an increase in international trade in a country leads to development which in turn leads to an increase in the quality of life for the people of that country. A cultural development⁷⁷ among the people in a country will lead to a demand for quality products and services; this will in turn lead to the production of high quality products and services by entrepreneurs so as to meet domestic market. Such a production, further, leads to surplus which may be exported to international markets. Consequently, the implementation of a comprehensive NQRI in the country, which is founded upon the WTO/TBT/SPS legal regime, is therefore essential in attaining the development as envisaged by scholars such as Amartya Sen and the others.

David Trubek critiquing the Max Weber's theory on relationship between law and capitalist development⁷⁸ posits that the reason why capitalism thrived in Europe was because of its unique legal system which was found only in Europe. He further asserts that this unique system had, coerciveness, normative order, specialised and rational enforcement agencies, legitimacy and was calculable.⁷⁹ This proposition illustrates the nexus between law and development and is relevant to Kenya today. For instance, in trade, there are laws governing production of goods and services. Therefore, foreign and local investors will be able to know in advance what is legally required of them and the enforcement mechanisms that exist to facilitate the production of goods and services which illustrates the calculability of the law in this instance.

Additionally, Trubek's theory underscores the importance of having specialised and rational enforcement agencies for a comprehensive regulatory infrastructure to function because this ensures coerciveness and normative order. In Kenya, however the element of quality regulatory enforcement mechanism has not been comprehensively provided for in the legal system. This research therefore argues that the legal system ought to take this into account the fact that a comprehensive NQRI is vital for stimulating international trade and hence for economic development. .

⁷⁷ Ibid, 36.

⁷⁸ D Trubek, 'Max Weber on Law and the Rise of Capitalism,' (1972) *Wisconsin Law Review* 3 720-753.

⁷⁹ Ibid.

There is a nexus between freedoms and economic development. Amartya defines these freedoms as instrumental freedoms and classifies them as political; economical facilities; social opportunities; transparency guarantees and protective securities.⁸⁰ These instrumental freedoms contribute to the general capabilities of a person to live more freely and are also complementary to each other. These interlinkages of instrumental freedoms are important in the development of policies in a country and they are what led to the so-called East- Asia miracle.⁸¹ The implementation of a comprehensive NQRI Kenya will thus embrace instrumental freedoms as envisaged by Amartya⁸² and will attract investors' confidence and hence an increase in international trade.

According to World Bank, sustainable development is measured by the extent to which countries progress towards the achievement of the millennium development goals.⁸³ Kenya needs to create an enabling regulatory environment so as to ensure progression towards the achievement of sustainable development. However development cannot function on its own but requires a legal system to regulate its evolving nature; for development in its character requires regulatory measures of modern law. Rajeev⁸⁴ argues that the rule of law is required and can be achieved through legal education, encouraging modernization of laws in achieving development and in legal aid and support of legal reforms.

Trubek and Galanter,⁸⁵ argue that different theories about the role of law in economic development and models for reform have been applied especially by American Scholars in an attempt to help the Third World Countries to develop. They argue that the law and development theory and its different movements emphasized the role of law as the support tool and the institutional framework for the classic development state as well as

⁸⁰ A Sen, *Development as Freedom* (Anchor Books, New York 1999)16.

⁸¹ *Ibid*, 16.

⁸² *Ibid*, 17.

⁸³ World Bank 'Selected World Development Indicators, 'World Development Report (2012), World Bank, Washington, D.C.33 < <http://data.worldbank.org/sites/default/files/wdi-2012-ebook.pdf> > accessed 29th September 2012).

⁸⁴ R Dhavan 'Law as a Concern: Reflecting on Law and Development', in Yash Vyas et al. (eds) *Law and Development in the Third World*, (1994) Kenya Litho Limited, Nairobi, 25-50 27

⁸⁵ D Trubek and M Galanter 'Scholars in Self Estrangement; Some Reflections on the Crisis in Law and Development Studies in the United States'. 1974) *Wisconsin Law Review*: 1062-1101.

a process of economic progress. Further they continue to assert that this was followed by neoliberal stage where private law emphasized the operation of free markets. In this stage, they argue, courts were applied as forces of restraining the state from interfering with private affairs. Duncan Kennedy in his essay: “Three Globalizations of Law and Legal Thought” is also of the same view that law is important for development.⁸⁶

Thus, law can be seen not only as an instrument of, but also as a constituent element of development. As put by Dhavan in his analysis of law and development, “law and development secures an efficient regulatory system under conditions of rule of law.”⁸⁷

Merryman argues that if there are some factors to be considered in using law for development, then it should be practical and workable as the available literature is in an empirical form and does not serve all the important issues for promoting legal reform in developing countries.⁸⁸ He argues that the intellectual origins of law and development as a new field of technical assistance and scholarship is composed of the idea of, progress movement, law reform, emergence of an interest in law and society, notion of social engineering and the US Post World War II commitment to foreign assistance to developing countries.

Through a discussion of various legal instruments and statutes which apply to Kenya, this research argues that law is very instrumental for the achievement of development.⁸⁹The research endeavors to show, in particular, how the adherence to the international trading legal regime is instrumental in the achievement of development in a country.

⁸⁶ D Trubek & A Santos, ‘The New Law and Economic Development; A critical Appraisal’. eds(2006) Cambridge University Press, Cambridge 19-73.

⁸⁷ R Dhavan ‘Law as Concern: Reflecting on Law and Development’ in Yash Vyas et al. (eds) *Law and Development in the Third World*, (1994) Kenya Litho Limited, Nairobi, 25-50 32.

⁸⁸ J H, Merryman ‘Comparative Law and Social Change: On the Origin, Style, Decline & Revival of the Law and Development Movement’(1977) *American Journal of Comparative Law* 25 3, 457 471-491.

⁸⁹ A Sen *Development as Freedom* (Anchor Books, New York 1999), 36.

1.7.2. The International Trading System

International Trade is the buying or selling of goods, services and capital between entities in different countries. Countries usually engage in international trade through Regional Trade Agreements (RTAs). Examples include, the Common Market for Eastern and Central Africa (COMESA) and the East African Community (EAC) Common Markets. Countries may also engage in international trade through bilateral treaties, that is, trade agreements signed between two countries that facilitate trade between the countries. An example of a Bilateral Treaty is the Double Tax Treaty (DTA) between Germany and Kenya, which eliminates incidences of double taxation under the respective Income Tax laws.⁹⁰ DTA's are important since they help in alleviating double taxation where business is conducted in different tax jurisdictions and also assist tax administrations in preventing fiscal evasion.

World Trade Organisation (WTO) is the institution which regulates international trade by providing a single and coherent set of institutions and rules to govern multilateral trade relations. Its provisions apply to all member countries with equal force. It is also capable of enforcing its decisions.⁹¹ Surya P. Subedi ⁹² critically analyses the effectiveness of WTO in governing International trade. The article focuses on the Doha Declarations of 2001, analyzing the background to the Doha Conference, assessing the nature of the negotiations at the conference and evaluating the outcome of the negotiations.⁹³

Dani Rodrik like other Scholars has argued that developing states should focus on more friendly alternatives rather than to meeting integration requirements under WTO Agreements. ⁹⁴ He argues that there is no need for developing countries to focus on integration at the expense of more-friendly alternatives. This is because a strategy

⁹⁰ Kenya/Germany – 17.5.1977 Legal Notice No. 20/1980 <http://www.revenue.go.ke/lto/dta/Double_Taxation_Relief_%28Federal_Republic%29_Of_Germany%29.pdf>

⁹¹ J Croome, *Reshaping the World Trading System a History of the Uruguay Round* (Second and Revised edition World Trade Organization's Kluwer law international 1999), 337-338.

⁹² S Subedi, 'The Road from Doha: The Issues for the Development Round of the WTO and the Future of International Trade' (2003) 52(2) *International and Comparative Law Quarterly*, 425.

⁹³ Ibid.

⁹⁴ D Rodrik, 'The Governance of Trade: As if Development Really Mattered' (2001) UNDP.

focused on integration crowds out more development-friendly alternatives. He illustrates this by using estimation that it costs a typical developing country \$ 150 Million to implement requirements under just three of the WTO Agreements: Customs Valuation, Sanitary and Phyto-Sanitary measures (SPS) and Intellectual Property Rights (TRIPS). The argument therefore is that, at times, it is less costly to succeed in implementing local economic policies than to meet integration conditions. The research agrees with this argument and posits that the implementation of a comprehensive NQRI, will enable Kenya achieve economic development through formulation of its own local economic policies.

Rodrik argues that open trade policies do not necessarily spur a higher economic growth than would greater trade barriers. He gives an example of Vietnam that is growing faster than Haiti and yet Haiti has a more liberalized economy and is WTO compliant whereas Vietnam is a protected economy with more trade barriers than Haiti. He holds the view that countries should instead gradually open up their economy after the trade restrictions have achieved high economic growth. He has observed that a country like China and India started with trade restrictions and only started opening up its trade once the trend growth rate had already increased substantially.⁹⁵ The research argues that Kenya as a developing state should develop and implement its own NQRI which is supported by the WTO/TBT/SPS provisions which grant developing countries differential treatment, in implementing the provisions of the Agreements.⁹⁶

1.7.3. Standards of Trade in Developed Nations

Rodrik⁹⁷ has argued that it is possible to preserve developing countries' autonomy while also respecting the legitimate objectives of advanced industrial countries to maintain high labour, social and environment standards at home. He outlines four principles which can lead to achievement of this balance between the developed countries and the developing countries. However these principles mainly apply for labour, social and environment standards but they can also be applied to other objectives of international

⁹⁵ Ibid.

⁹⁶ Article 12 of the TBT Agreement.

⁹⁷ D Rodrik, 'The Governance of Trade: As if Development Really Mattered' (2001) UNDP.

trade since they can be useful in the improvement of a country's competitiveness in international trade.

He argues that trade should be a means to an end rather than an end in itself; developing countries' main aim should not be accessing the international markets but that rather the more fundamental developmental challenges at home first. Industrial countries should balance the interests of their exporters and multinational companies with those of their workers and consumers. The research argues that these developmental challenges include the implementation of a comprehensive NQRI which this research sets out to address.

Secondly, he argues that trade rules should allow for diversity in national institutions and standards; since there is no single recipe for economic development, international trade rules should seek for peaceful co-existence among national practices, not harmonization. A comprehensive NQRI will be able to take into account the need for peaceful co-existence in standards of products among different countries since harmonization of standards may not always be possible.

The third argument is that, countries have the right to protect their own institutions and development priorities; this entails the acceptance that countries can uphold national standards and policies in these areas, by withholding market access or suspending WTO obligations if necessary, when trade demonstrably undermines domestic practices that enjoy broad popular support. For example, poor countries might be allowed to subsidize industrial activities (and by extension exports) when this is part of a broadly supported development strategy aimed at stimulating technological capabilities. Through the implementation of a comprehensive NQRI, a country can be able to protect their institutions and development priorities as envisaged in this postulation.

The fourth argument is that, countries do not have the right to impose their institutional preferences on others; in as much as international trade rules should allow countries relax some trade rules so as to protect their institutions, the rules should not allow countries impose their priorities on other countries. This research argues that Kenya can

therefore develop and implement its own unique NQRI albeit based on the WTO/TBT/SPS measures.

1.7.4 Standards Code and International Trade

The Tokyo Round Standards Code of 1979 was drawn up to ensure that international trade would not be unnecessarily hampered by technical regulations and standards drawn up to protect health, safety and the environment.⁹⁸ Croome argues that these same factors can, nonetheless operate in ways that discriminate against imports and exports into and out of a country. This is especially so where different standards from different countries are in operation and are enforced through testing or certification requirements for imports or where there isn't enough publication of such differing standards as required under WTO legal regime.⁹⁹

Croome continues to positively critique the 1979 code by stating that it is an encouragement to the WTO members to use internationally agreed standards, where these exists, to inform one another about the preparation, adoption and application of standards, and to consult when necessary. He asserts that¹⁰⁰ testing and certifying bodies are called upon to avoid discrimination against imports and, as far as possible, to recognize each other's tests and certificates.¹⁰¹ This research therefore posits that the producers in Kenya can greatly benefit from this Standards code and their products can have access to the world trading system, if the government of Kenya implements a comprehensive NQRI as outlined in the 1979 the code.

1.7.5 International Standards and Trade

Swann postulates that where exporting countries use international standards, this has, in most cases, a positive effect, on their export performance.¹⁰² However he points out an

⁹⁸ J Croome, *Reshaping the World Trading System a History of the Uruguay Round* (Second and Revised Edition World Trade Organization Kluwer Law International 1999) 70.

⁹⁹ *Ibid*, 71.

¹⁰⁰ *Ibid*, 71.

¹⁰¹ *Ibid*,71.

¹⁰² G Swann, 'The Economics of Standardization: An Update Innovative Economics Limited' (2010) Report for the UK Department of Business, Innovation and Skills (BIS) Complete Draft Version 2.2* 27 May 2010 © Innovative Economics Limited.

exception to this rule which refers to trade in agricultural products where standards have been found to restrict trade.¹⁰³ The research establishes the role of Standardization in enhancing the competitiveness of goods and services in international markets.

According to the International Organisation for Standardization (ISO) a higher implementation rate of standards results in an increased benefit ratio. This is positively affected by the increase in the number of standards been implemented. The activity volumes affected by standards increase per year and this leads to an increase in the gross national products all over the world.¹⁰⁴

International standards such as those from International Electrotechnical Commission, (IEC), International Organisation for Standardization (ISO) and International Telecommunication Union (ITU) are crucial for increasing efficiency of enterprises. This is because International standards are developed by experts from around the world and contain internationally harmonized best practice which can be used to measure, compare and increases efficiency and reduce waste.¹⁰⁵

ISO has posited that the future progress of industry and commerce in the developing countries will, to some extent; rest on the implementation of standards.¹⁰⁶ This study is therefore seeking to establish the role Standardization plays in enhancing competitiveness of goods and services in regional and international markets. Standards have been posited to enhance the marketability of products both locally and internationally. Standards are a guarantee that what the consumer has purchased will meet their requirements. This is why both marketing and purchasing rely on standards a great deal and especially at the international level.¹⁰⁷ The implementation of NQRI will encourage the Kenyan producers and users to adopt a culture of standardization which will increase Kenya's competitiveness in international markets.

¹⁰³ Ibid.

¹⁰⁴ ISO, *Benefits of Standardization* (International Organization for Standardization, Switzerland, 1982) 19

¹⁰⁵ According to KEBS. International Standards ensure that countries, organizations, regulators and researchers, do not have to reinvent the wheel. (World Standard Day Report November 2012, KEBS).

¹⁰⁶ ISO, *Benefits of Standardization* (International Organization for Standardization, Switzerland, 1982) 20.

¹⁰⁷ Ibid, 118.

Furthermore standards are a mark of trust.¹⁰⁸ According to Butter and Mosch trust helps to reduce transaction costs and therefore supports trade. They estimated a gravity model of bilateral trade for twenty five countries and found that different measures of trust have a positive role to play in promoting trade.¹⁰⁹ They found, moreover, that this causal relationship ran primarily from trust to trade.¹¹⁰ The research agrees that when products and services have complied with set standards, consumers will have greater trust in such goods and services hence lead to promotion of trade. The research argues that an effective NQRI should be of the type which is able to assist entrepreneurs produce goods and services which will lead to trust from consumers.

1.7.6 Role of Institutions in the Promotion of Trade

Berkowitz and others have shown how good institutions in the exporter country enhance international trade.¹¹¹ They found strong empirical evidence for their arguments by theorizing that countries with good institutions tend to export more complex products and import more simple products. This implies that in such a country the exports will be able to increase the foreign exchange and hence increase the GDP and consequently lead to development.

Islam and Reshef further argue that good quality institutional capacity can help to promote international trade by reducing transaction costs.¹¹² Using a gravity model of bilateral trade, they found that good institutions have trade-promoting effects which outweigh any trade-reducing effects that may arise from differences in legal systems of various countries.¹¹³ The research argues that a comprehensive NQRI will strengthen the

¹⁰⁸ G Swann, 'The Economics of Standardization: An Update,' Innovative Economics Limited (2010) Report for the UK Department of Business, Innovation and Skills (BIS) Complete Draft Version 2.2* 27 May 2010 © Innovative Economics Limited, 16.

¹⁰⁹ F A G den Butter, and R.H.J. Mosch, 'Trade, Trust and Transaction Costs', (2003) *Tinbergen Institute Discussion Papers*, -082/3, Tinbergen Institute, Amsterdam. cited in G M P Swann, *ibid* 16

¹¹⁰ *Ibid*, 16.

¹¹¹ D Berkowitz and others, 'Trade, Law and Product Complexity', (2006) *The Review of Economics and Statistics*, 88 (2), 363–373. cited in G M P swann, *ibid* 14.

¹¹² A Islam and A Reshef, 'Trade and Harmonization; If your Institutions are Good, Does It Matter If They Are Different', (2006) Policy Research Working Papers, No. 3907, World Bank, Washington, DC. cited in G Swann *Ibid* 14.

¹¹³ G Swann, 'The Economics of Standardization: An Update,' Innovative Economics Limited (2010). Report for the UK Department of Business, Innovation and Skills (BIS) Complete Draft

quality regulatory institutions in line with the WTO legal regime and this will in turn enhance their ability to regulate the quality of goods and services produced in the country and hence enhancement of access to international markets.

ISO, in support of good institutions, on the other hand has observed that the growth of international trade and the increasing importance of high level standards and technical regulation in developed markets has presented greater opportunities for the various institutions in the quality regulatory sector to collaborate and create more opportunities for exporters to demonstrate compliance with market requirements and enhance national competitiveness.¹¹⁴

Rodrik on his part argues that the key to help countries to maximize development potential is integration in the global economy. This in turn requires both enhanced market access in the advanced industrial countries and a wide range of institutional reforms at home to render economic openness viable and growth promoting. These reforms should range from legal and administrative reforms to safety nets.¹¹⁵ This corroborates the argument been advanced by this research that the comprehensive implementation of a NQRI will enable products access international markets and this will lead to economic development.

1.8 Research Methodology

This research adopted a descriptive qualitative research design.¹¹⁶ This is a method of collecting information from interviewing a sample of persons.¹¹⁷

Version 2.2* 27 May 2010 © Innovative Economics Limited, 13.

¹¹⁴ ISO/ITC Building Linkages for Export Success (2010) <International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org>9.accessed

¹¹⁵ D Rodrik, 'Governance of Trade as if Development Really Mattered' (2001)United Nations Development Programme ,11.

¹¹⁶ M Mugenda and A Mugenda *Research Methods Quantitative and Qualitative Approaches* (ACT PRESS Nairobi 2003) 50.

¹¹⁷ R Kumar *Research Methodology: A Step by Step Guide for Beginners*. (2nd edition Sage Publications, 2005).

It can be used when collecting information about people's attitudes, opinions, habits or any social issues.¹¹⁸

The research collected information about people's experiences and perceptions of the quality regulatory infrastructure in Kenya. The population of the study was all the quality infrastructure institutions in Kenya. Both primary and secondary data was collected. Content analysis of primary and secondary data sources was undertaken.¹¹⁹ Primary sources included treaties and statutes, secondary sources included written materials such as books, cases, policies, journals, working papers, treatise, seminar presentations, newspapers, and e-materials from the internet and websites. The researcher benefitted enormously from participating in various workshops¹²⁰ and seminars¹²¹ where the issue of quality regulation and enforcement was substantially discussed. The research uses some of the information gathered from the said presentations and discussions in such forums.¹²²

1.9 Chapter Breakdown

1.9.1 Chapter One: Introduction

The chapter shows the importance of a NQRI; it explains how standards are a key factor in enhancing international trade. It explains the importance of quality infrastructure in a country. It discusses the problem been investigated, mainly that, Kenya lacks competitiveness in international and regional markets due to her failure to implement a comprehensive NQRI. It outlines the objective of the study which is to explore whether the implementation of a comprehensive NQRI would lead to the production of quality goods and services in the country which would improve Kenya's competitiveness in the regional and international markets and to greater economic development for Kenya. It

¹¹⁸ J Orodho, *Techniques of Writing Research Proposals and Reports in Education in Social Science* (Second Edition, Kanezja Hp Enterprise, Nairobi) 10.

¹¹⁹ P Leedy. and J Ormrod, *Practical Research, Planning and Design*, (Ninth Edition, Pearson Education International 2010) 190.

¹²⁰ Support to the Kenya Bureau of Standards (KEBS) In Reform of Standards Regulatory Framework and Capacity Building for SQMT Activities, Stakeholders Workshop in Nairobi on 7th to 9th August 2012 organised by Trademark for KEBS.

¹²¹ Stakeholders Consultative Workshop on Review of Standards Act Held Between 24th to 30th June, 2012 at Green Hills Hotel, Nyeri, under the auspices of Kenya Bureau of Standards.

¹²² Ibid.

discusses the hypothesis and the theories guiding the study. It also explains the methodology of the study which is mainly descriptive qualitative design.

1.9.2 Chapter Two: The International Trade Legal Regime.

The chapter addresses the first research question of the research, that is, what is the role of law in development? The chapter is a critique of the International Trade legal regime. It also describes how the principle of liberalized markets has been applied in both the developed countries and the developing countries; it shows the factors that enhances competitiveness of products and services in the international markets. It also briefly analyzes the various regional and international agreements regarding trade, namely WTO / GATT with emphasis on TBT-SPS measures.

1.9.3 Chapter Three: The Role of Standardization in Enhancing the Competitiveness in International Markets

This chapter discusses the role Standardization plays in enhancing competitiveness of products and services in regional and international markets. It addresses the second question of the research, that is, what is the role of Standardization in enhancing competitiveness of products and services in the regional and international markets. The chapter will contain a brief discussion of how standards, technical regulations and conformity assessment, enhance competitiveness of products in international markets; also a discussion of the linkages between international standards and regional standards and national standards. It will also contain a brief discussion of application of standards in some of the legal systems of the world.

1.9.4 Chapter Four: An Analysis of the Quality Regulatory Systems In Kenya

The chapter addresses the third question of this research, that is, whether a harmonized and strengthened Quality Regulatory Framework will lead to an effective national quality infrastructure that supports regional and international trade. The chapter analyses the existing quality regulatory system in Kenya. It discusses several legal instruments dealing with standards in Kenya and explains how these legal instruments establish

different quality regulatory institutions with different overlapping mandates. The chapter explains how the overlapping mandates are a hindrance to the implementation of WTO/TBT/SPS legal measures thereby acting as Non-Tariff barriers to trade. The chapter also shows how the EAC trade regime and the COMESA treaty apply to the Kenyan quality regulatory framework.

1.9.5 Chapter Five: Conclusion and Recommendations

The chapter contains a summary of the study. It also contains the conclusion derived from studying various documents, policies, legal instruments, journals, books and from the websites of the institutions identified in the sample population.

It also proposes recommendations which Kenya can adopt in implementing a NQRI in order to enable Kenyan goods and services become competitive in regional and international markets and hence lead to economic development.

CHAPTER TWO

2.0 The International Trade Legal Regime

2.1 The Function of World Trade Organisation-WTO in Facilitating Trade.

The World Trade Organisation (WTO) was established by the Marrakesh Agreement of 1994 which became operational in 1995.¹²³ The main objective of WTO is to alleviate the standards of living of the people of the Member States by establishing legally binding rules and regulations which help trade to flow as freely as possible between these Member States.¹²⁴ WTO is a full-fledged international agency with legal personality¹²⁵ and is housed in Geneva.¹²⁶

States and separate customs territories (e.g. the European Community, Hong Kong, Macao) may become members of the WTO, whose membership currently numbers 154.¹²⁷ WTO is built on four main pillars, namely, General Agreement on Tariffs and Trade of 1994 (GATT), General Agreement on Trade in Service (GATS), the Agreement on Trade Related Aspects of intellectual property Rights (TRIPS), and the Dispute Settlement Understanding (DSU).¹²⁸

However the WTO is different from its predecessor the GATT in many respects and its scope is far wider than that of the GATT. Some of the differences include the fact that the WTO provides a single and coherent set of institutions and rules that govern multilateral trade relations. These rules apply to more countries and with greater force than those under the GATT. Further WTO is capable of enforcing its own decisions unlike its predecessor the GATT. Therefore WTO is an international body with an international influence that the GATT never attained.¹²⁹ The GATT was a flexible institution which embraced bargaining and deal-making as its mode of operation, with

¹²³ A Qureshi and A Ziegler, *International Economic Law* (Sweet & Maxwell London 2007) 268.

¹²⁴ See Marrakesh Agreement establishing the World Trade Organisation, Preamble paras 1 and 2.

¹²⁵ Articles I, VI and VIII of the TBT Agreement.

¹²⁶ WTO<[http:// www.org](http://www.org)>WTO-dcn.making.ministerial conferences 102> accessed on 13 September 2013.

¹²⁷ A state or separate customs territory which wants to become a member of WTO has to accept all Agreements with Members and this can be a lengthy process.

¹²⁸ J Croome, *Reshaping the World Trading System ;A History of the Uruguay Round* (Second edition WTO Kluwer Law International 1999) , 137.

¹²⁹ Ibid 337- 338.

significant opportunities for countries to “opt out” of specific disciplines.¹³⁰ In contrast, WTO rules apply to all members, who are subject to its binding dispute settlement procedures. The binding rules are attractive to groups seeking to introduce multilateral disciplines on a variety of subjects, for example the environment and labor standards, competition and investment policies and animal rights. But it is a source of concern to groups that perceive the multilateral rules to be inappropriate or worry that the adoption of specific rules may affect detrimentally the ability of governments to regulate domestic activities and deal with market failures.¹³¹

The WTO legal obligations embodied in the GATT, the GATS, and the TRIPS Agreements, regulate the trade policies of its Member states. These obligations have been put in place to ensure that: there is free flow of trade between Member States, that further liberalization is gradually achieved through negotiation and that a neutral means is created for the settlement of disputes.¹³² WTO also rules deal with numerous other areas such as dumping, customs procedures, technical barriers to trade and sanitary (human and animal health) and phytosanitary (plant health) measures. These are contained in Multilateral Trade Agreements, which are essentially contracts that bind governments to operate their trade policies in accordance with what was agreed in the multilateral negotiations.¹³³

WTO rules contain certain exceptions which allow Member States to derogate from the WTO rules so long as they comply with certain laid down conditions. These exceptions fall into the following categories;¹³⁴ General exceptions, which include restrictions to

¹³⁰ A Appleton, *Environmental Labeling Programmes: International Trade Implications*, (Kluwer Law International 1997)87-88.

¹³¹ B Hoekman, 'The WTO: Functions and Basic Principles' in, B. Hoekman and A. Mattoo and P. English (eds) *Development Trade and the WTO, a Handbook* (The world Bank Washington DC 2002) 41, accessed 30th October.2012.

¹³² C Lumina, Free Trade or Just Trade? The World Trade Organisation, Human Rights and Development(Part1)- (2008). AJOL Vol 12 .2 <www. AJOL.Journal Home- Vol 12, No.2 2008> accessed 5th Oct.2013.

¹³³ ISO/UNIDO, 'Fast Forward, National Standards Bodies in Developing Countries', (2013) 01/2 50035 ISO Central Secretariat© ISO, -<Web www.iso.org> accessed 27th January 2014

¹³⁴ Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance-of-Payments (BOPs) & Waiver, Available at:<http://etraining.wto.org/admin/files/Course_223/Module_537/Module_Documents/eWTO-M8-R1-E.pdf>

protect human health, animal health, or plant and health;¹³⁵ Security exceptions which gives a Member State the right to derogate if taking measures essential for the preservation of national security;¹³⁶ Regional Trade Agreements (RTAs) which are meant to grant preferential treatment to goods and services produced by trading partners of Member States of regional trading partners;¹³⁷ Balance-of-Payments (BOP), which are the measures a state will take to safeguard their external financial position;¹³⁸ and waivers, which are granted by Member States to other states on their authorization.¹³⁹

Of particular interest and importance to this study are the WTO Agreements on Technical Barriers to Trade (WTO/TBT) and on the Application of Sanitary and Phytosanitary Measures (WTO/SPS). The WTO/TBT Agreement recognizes that access to markets can be impeded through the use of technical regulations and standards. These vary from country to country and, if set arbitrarily, can be used or perceived as disguised protection in the form of non-tariff barriers to trade.¹⁴⁰

On its part the WTO/SPS Agreement is concerned with measures taken to protect human, animal or plant life from risks arising from additives or disease-causing organisms in food, and to protect a country from the damage caused by the spread of pests, which may, directly or indirectly, affect international trade.¹⁴¹

2.1.1 International Trade Legal Regime and Standards

International trade law plays a significant role in the shaping of international relations between states. It is characterized by rules and a myriad of exceptions which are detailed and complex and at times overlap and are unclear. The International trade law informs a

¹³⁵ Article XX of GATT, Article XIV of GATS.

¹³⁶ Article XXI of GATT, Article XIV of GATS, Article 73 of TRIPS.

¹³⁷ Article XXIV of GATT, Article V of GATS.

¹³⁸ Article XII of GATT, Article XII of GATS.

¹³⁹ Article IX: 3 of Marrakesh Agreement.

¹⁴⁰ ISO/UNIDO, 'Fast Forward, National Standards Bodies in Developing Countries' (2013) 01/2 50035 <ISO Central Secretariat© ISO, 2013-01/2 50035 Web www.iso.org> accessed 27th January 2014.

¹⁴¹ Ibid.

country's national foreign policy and this has a great impact on foreign producers, exporters and consumers which in turn has a big effect on national prosperity.¹⁴²

Some scholars have, however, observed that the International trading system has failed to fully take into account the needs of developing countries.¹⁴³ They note that, generally speaking, the new disciplines and normative standards proclaimed within the WTO currently, mean that the developing countries no longer have available to them the economic options, which the industrialized States resorted to in the nineteenth and early twentieth century, to promote their own development and industrialization. These economic options were in form of trade barriers, export or import subsidies.¹⁴⁴

In addition, some specific standards of trade prove to be of little benefit or even disadvantageous to emergent countries. Thus, for instance, the Agreement on Subsidies and Countervailing Measures prohibits subsidies normally used by developing countries, whereas it exempts from the prohibition agricultural subsidies used by developed states.¹⁴⁵ Furthermore, it has been argued that the Agreements on trade related Aspects of Intellectual Property (TRIPs) tend to favour technology producers and owners who are the developed states more than technology users and importers who are the developing and least developed states.¹⁴⁶

On the use of standards, the WTO legal regime encourages Members to use internationally agreed standards, where these exist.¹⁴⁷ It encourages international harmonization of standards.¹⁴⁸ For instance it requires Members to inform one another about the preparation, adoption and application of standards, and to consult when necessary.¹⁴⁹ Further testing and certifying bodies are also required to avoid discrimination against imports and, as far as possible, to recognize each other's tests and certificates.¹⁵⁰ Such harmonization has been noted to bring certainty to trade;¹⁵¹ this is in terms of information for consumers, environmental protection and compatibility of related goods and services. However technical standards can also be used as

¹⁴² A Qureshi and A Ziegler, *International Economic Law* (Sweet & Maxwell London 2007) 270-271.

¹⁴³ J Croome, *Reshaping the World Trading System ;A History of the Uruguay Round* (Second Edition WTO Kluwer Law International 1999) 518.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid, 518.

¹⁴⁶ Ibid, 518.

protectionist measures and can result in higher operating costs for developing country producers.¹⁵² The research therefore explores whether a harmonized NQRI is able to enhance the quality of goods produced in the country and thereby enable them to access the international markets.

The world of Standardization has become more complex, and yet is important to national and international development. The creation of the World Trade Organisation (WTO) in 1995 and its Agreement on Technical Barriers to Trade (WTO/TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (WTO/SPS) was an attempt to reduce the incidence of standards and technical regulations based on them, been used as technical barriers to trade between various countries of the world.¹⁵³

2.2 The Agreement on Technical Barriers to Trade (TBT) and International Trade

In the Tokyo Round of multilateral trade negotiations (1974-79), an Agreement on Technical Barriers to Trade was negotiated; this came to be known as the 1979 TBT Agreement or “Standards Code”. Only some countries signed the Agreement.¹⁵⁴ Although the primary purpose of this agreement was not the regulation of sanitary and phytosanitary measures,¹⁵⁵ it covered all technical requirements including those resulting from food safety and animal and plant health measures, pesticide residue limits, inspection requirements and labeling. Governments that signed the 1979 TBT Agreement agreed to use relevant international standards; such as those for food safety

¹⁴⁷ Article 2(4) of the TBT Agreement.

¹⁴⁸ Ibid, Article 2(4)-2(7).

¹⁴⁹ J Croome, *Reshaping the world Trading System ;A History of the Uruguay Round* (Second edition WTO Kluwer Law International 1999) 71.

¹⁵⁰ Ibid 71.

¹⁵¹ WTO ‘Exploring the Links Between Trade, Standards and the WTO,’(2005)World Trade Report World Trade Organisation, Geneva.

¹⁵² Ibid.

¹⁵³ Ibid,7.

¹⁵⁴ The 1979 Agreement took effect on 1 January 1980. At the end of 1994, before it was superseded by the new version, its signatories were the European Union and 26 others.

¹⁵⁵ Article 1(6) of TBT Agreement.

developed by the Codex Alimentarius Commission, except when they considered that these standards would not adequately protect health. They also agreed to notify other governments, through the GATT Secretariat, of any technical regulations which were not based on international standards. The 1979 TBT Agreement included provisions for settling trade disputes arising from the use of food safety and other technical restrictions.¹⁵⁶

The Uruguay Round¹⁵⁷ updated the TBT Agreement and made two broad changes to it; namely, revision of the original version of the TBT, and, secondly, all WTO members have to sign the agreement as part of the “single undertaking”, which includes the SPS Agreement and the majority of other WTO treaties.¹⁵⁸

While a number of GATT provisions already addressed technical barriers, their scope was deemed to be insufficient to tackle growing concerns. During the Tokyo Round, a Standards Code was drafted to govern the preparation, adoption and application of technical regulations, standards and conformity assessment procedures.¹⁵⁹ The Agreement on Technical Barriers to Trade (TBT) has built upon, as well as strengthened, the Standards Code.¹⁶⁰ The Code hence entered into force in 1995, with the entry into force of the World Trade Organisation (WTO).

The objective of the TBT Agreement is to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade, while also providing Members with the right to implement measures to achieve legitimate policy objectives, such as the protection of human, health and safety, or the environment. Member States in this case are seen to be given discretion when it comes to the choice of

¹⁵⁶ A E Appleton, *Environmental Labelling Programmes: International Trade Implications* (Kluwer Law International 1997) 87-88.

¹⁵⁷ From 1986-1993 international trade liberalization went through multilateral trade negotiations, or “trade rounds”, under the auspices of GATT; a trade round is a package approach to trade negotiations with significant advantages in that participants can seek and secure advantages across a wide range of issues, necessary concessions that are difficult to defend domestically can be made easier in a package with political and economic benefits and developing countries can influence multilateral negotiations a lot easier than through bilateral negotiations where major nations dominate.

¹⁵⁸ A E Appleton, *Environmental Labelling Programmes: International Trade Implications*, (Kluwer Law International 1997) 87-88.

¹⁵⁹ Article 5 of TBT Agreement.

¹⁶⁰ Whereas the Standards Code was a plurilateral agreement (with only limited membership), the Agreement on Technical Barriers to Trade applies to all WTO Members.

standards or measures to apply in order to protect human, health and safety and in the manner in which these standards are to be used.¹⁶¹

The TBT agreement encourages the development of international standards¹⁶², stresses on their use by WTO Members as a basis for regulation, and holds them up as a principal basis for regulatory alignment so as to facilitate international trade.¹⁶³ Such international standards set under the TBT Agreement act as benchmarks for regulation and this in turn acts to reduce unnecessary barriers in trade. The Agreement does not specify by name those international organisations whose standards are to be referred to in such cases. However it defines an international body or system as a body whose membership is open to the relevant bodies of at least all Members.¹⁶⁴ This definition is similar to the definition established by the ISO.¹⁶⁵ Consequently, WTO Members may have recourse to a variety of international standards when seeking to demonstrate whether or not a given standard is in accord with international standards.

2.2.1 Distinction between Technical Regulations and Standards

The TBT Agreement distinguishes technical regulations and standards. According to the Agreement, “a technical regulation is a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method”.¹⁶⁶

On the other hand, “a standard is a document approved by a recognized body that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

¹⁶¹ Article 2(2) of TBT Agreement.

¹⁶² Ibid, Article 2(4).

¹⁶³ World Trade Organization: International Standards and the WTO TBT Agreement (Improving Governance for Regulatory Alignment).

¹⁶⁴ Annex 1 of TBT Agreement.

¹⁶⁵ A E Appleton ,*Environmental Labelling Programmes: International Trade Implications*,(Kluwer Law International 1997) 118.

¹⁶⁶ Annex 1(10) of the TBT Agreement.

It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."¹⁶⁷

This definition show that while both technical regulations and standards are product technical requirements, the main difference between the two is that compliance with technical regulations is mandatory, while compliance with standards is voluntary. An example of a technical regulation could be, for instance, a law that stipulates that all vehicles be equipped with catalytic converters.¹⁶⁸ An example of a standard could be, for instance, a voluntary product labeling requirement affirming that there has been testing on animals; the labeling requirement would, however, have to be "approved by a recognized body" and would have to provide for "common and repeated use, rules guidelines or characteristics", as stated in the above-mentioned definition of a standard.¹⁶⁹

Technical regulations are addressed in the main body of the Agreement, and provisions are laid out to ensure that they do not act as unnecessary obstacles to trade. The provisions apply to technical regulations developed by central and local governments, as well as non-governmental bodies.¹⁷⁰ WTO Members are fully responsible for ensuring the observance of all the provisions of the Agreement relating to technical regulations. They must also formulate and implement positive measures and mechanisms in support of the observance of the provisions of the Agreement by local and non-governmental bodies.¹⁷¹

On the other hand standards are addressed separately under the Code of Good Practice, which is one of the Annexes to the TBT Agreement.¹⁷² Most of the principles applied by the Agreement to technical regulations also apply to standards through the Code. The Code is open to acceptance by central, local and non-governmental standardizing bodies

¹⁶⁷ Ibid Annex 1(2).

¹⁶⁸ The new laws on alcohol sale and consumption in Kenya, which includes the testing of the amount of alcohol in the blood for drivers is a practical example of a technical regulation.

¹⁶⁹ Section 4,9 and 10 of the Standards Act chapter 496 Laws of Kenya gives KEBS the mandate to develop Standards and to issue standardization marks for products manufactured in Kenya.

¹⁷⁰ Article 2 and 3 of the TBT Agreement.

¹⁷¹ Ibid Article 3(5).

¹⁷² Annex 3 of the TBT Agreement.

at the national level, as well as to regional governmental or non-governmental ones.¹⁷³ However, the Agreement notes that "The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice."¹⁷⁴

The Agreement also defines conformity assessment procedures as any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.¹⁷⁵ Conformity assessment procedures are also subject to most of the same principles as those which apply to technical regulations and standards. This ensures that they too do not constitute unnecessary obstacles to international trade.¹⁷⁶ Members are fully responsible for ensuring the observance of all provisions relating to conformity assessment under the Agreement, and must formulate and implement positive measures and mechanisms in support of the observance of the provisions by local government bodies. They must also ensure that central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these bodies comply with the relevant provisions of the Agreement.¹⁷⁷

On the other hand researchers have asserted that both standards and technical regulations may raise producer costs because compliance with them is expensive. However they note that they may reduce consumer costs, through making readily available product quality information. This is because trade increases or falls depending on whether the positive effect on demand is greater than the negative effect on supply.¹⁷⁸

¹⁷³ The Code is open to acceptance by governmental regional standardizing bodies when one or more of their members are WTO Members, and to non-governmental regional standardizing bodies when one or more of their Members are situated in the territory of a WTO Member.

¹⁷⁴ Annex 3 (H) of the TBT Agreement.

¹⁷⁵ Ibid Annex 1(3).

¹⁷⁶ Articles 5-8 of the TBT Agreement.

¹⁷⁷ Ibid Article 8(2).

¹⁷⁸ WTO, The Trade Effects of Non-tariff Measures and Services Measures (2012) World Trade Report.

2.2.2 The Principal of Avoidance of Unnecessary Obstacles to International Trade

The principal objective of the TBT Agreement is the avoidance of unnecessary obstacles to international trade. With respect to both technical regulations and standards, the Agreement states that Members must ensure that neither technical regulations nor standards are "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade."¹⁷⁹ With respect to technical regulations, the Agreement elaborates on the meaning of this phrase. It stipulates that technical regulations should not be more trade restrictive than necessary to fulfill a legitimate objective, taking into account the risks that non-fulfillment would create.¹⁸⁰

Therefore, two steps are involved in determining whether a technical regulation poses unnecessary obstacle to international trade. First, the regulation must be designed to meet one of the legitimate objectives delineated in the Agreement and, second, it must be the least trade-restrictive option available to a WTO Member that achieves that legitimate objective, taking into account the risks that would be associated with its non-fulfillment.

To avoid unnecessary obstacles to international trade, the Agreement requires WTO Members to dis-invoke technical regulations when the objectives that had given rise to their adoption no longer exist, or if changed circumstances or objectives can be addressed in a less trade-restrictive manner.¹⁸¹

Further in the preparation, adoption and application of conformity assessment procedures for technical regulations and standards, WTO Members must also ensure that unnecessary obstacles to international trade are avoided.¹⁸² The Agreement states that conformity assessment procedures shall not be stricter or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform

¹⁷⁹ Article 2 (2) of TBT Agreement.

¹⁸⁰ Ibid.

¹⁸¹ Ibid Article 2 (3).

¹⁸² Ibid Article 5 (1).

to the applicable technical regulations or standards, taking account of the risks that non-conformity would create."¹⁸³

The Agreement also urges Members to ensure that conformity assessment procedures; are undertaken as expeditiously as possible, that information requirements are limited to whatever is necessary, that the confidentiality of information is respected for legitimate commercial interests, that the fees charged domestically are equitable to the fees charged for foreign products.¹⁸⁴

2.2.3 Harmonization with International Standards

The TBT Agreement encourages WTO Members to base their technical regulations, standards, and conformity assessment procedures, on international standards, guides and recommendations, when these exist or their completion is imminent, except when they are deemed to be inappropriate or ineffective.¹⁸⁵ This call for harmonization with international standards is designed to avoid the emergence of undue layers of technical requirements and assessment procedures, and to encourage the use of those that which have already been developed with the approval of the international community. To complement this requirement, the Agreement calls upon Members to participate in the work of international standardizing and conformity assessment bodies.¹⁸⁶

However, the Agreement recognizes that there may be instances in which Members would need to derogate from this obligation. It allows them to do so for technical regulations and standards in the event of fundamental climatic or geographic differences, or due to fundamental technological problems.¹⁸⁷ For example, a WTO Member may derogate from the use of international construction standards if, due to a fundamental geographic difference, such as its country being particularly earthquake prone, the standards are inappropriate for it. Such derogation could also take place when, for

¹⁸³ Ibid Article 5 (1).

¹⁸⁴ Ibid Article 5(2).

¹⁸⁵ Ibid Article 2(4).

¹⁸⁶ Ibid Article 2(6).

¹⁸⁷ Preamble to the TBT Agreement.

instance, the technology required for the application of the international standard is unavailable domestically.¹⁸⁸

The exceptions allowed for conformity assessment procedures are broader and according to the Agreement, they may be obtained for;

"inter alia, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographic factors; fundamental technological or infrastructural problems."¹⁸⁹

Therefore, while the Agreement calls upon Members to use international standards, guides or recommendations, it creates sufficient scope for them to derogate from this obligation in order to tailor domestic requirements to the specifics of the Members' situation.

2.2.4 Mutual Recognition of Technical Regulations by Members

The TBT Agreement stipulates that WTO Members give positive consideration to recognizing other Members' technical regulations as equivalent to their own, even when they differ from theirs, provided they are satisfied that they adequately fulfill their objective.¹⁹⁰ As international harmonization is a time-consuming process, and is sometimes one which is difficult to achieve, the Agreement encourages Members to accept each other's regulations as equivalent until full-fledged international harmonization becomes possible. Therefore, the principle of equivalency is designed to complement that of harmonization. Through equivalency arrangements, products that meet the regulations of the exporting country do not have to comply with the regulations of the importing country, provided that the same objectives are fulfilled by the two sets of requirements. This significantly reduces barriers to trade.¹⁹¹

With respect to conformity assessment procedures, the Agreement calls upon WTO Members to ensure, whenever possible, that the results of the assessment procedures of other Members are accepted as equivalent, even when they differ from theirs, provided

¹⁸⁸ Ibid.

¹⁸⁹ Article 5(4) of TBT Agreement.

¹⁹⁰ Ibid Article 2 (7).

¹⁹¹ Ibid.

the procedures give the same level of confidence.¹⁹² The purpose of this provision is to avoid multiple products testing, in both exporting and importing country markets, and its associated costs, financial and otherwise. The Agreement recognizes, however, that for equivalence to be achieved, negotiations may need to be entered into so that the continued reliability of conformity assessment results can be ensured. The accreditation of conformity assessment bodies is a factor that can be taken into account in this regard.

As a specific approach to achieving the equivalence, the Agreement encourages Members to enter into mutual recognition agreements (MRAs)¹⁹³ for the acceptance of each other's assessment results.¹⁹⁴ While the specific steps involved in an MRA are not covered in the TBT Agreement, in general MRAs tend to involve the following; a definition of the products covered by the agreement, an obligation to accept reports, certificates and marks of conformity by approved bodies as equivalent to one's own, the establishment of criteria for the identification of competent laboratories and certifiers i.e. accreditation, provisions for the exchange of information, the establishment of dispute settlement mechanisms, and, usually, Provisions for the future broadening of scope.¹⁹⁵

2.2.5 Obligation for Notification as a Measure for Transparency

Transparency is a central feature of the TBT Agreement, and is comprised of; notification obligations, the establishment of enquiry points, and the creation of a WTO TBT Committee.¹⁹⁶ Notification means the circulation of information by a WTO Member to other Members on matters relating to the Agreement. Notification obligations include; notifying the measures taken to implement the provisions of the TBT Agreement nationally, such as how its provisions have been incorporated into domestic legislation; notifying draft technical regulations, conformity assessment procedures and standards and providing other Members with sufficient time to comment on them, with the obligation of taking these comments into account;¹⁹⁷ and, notifying

¹⁹² Article 6 of the TBT Agreement.

¹⁹³ MRAs are usually negotiated on either a bilateral or plurilateral basis to cover defined product groups.

¹⁹⁴ Article 6(2) of the TBT Agreement.

¹⁹⁵ Ibid Article 10.

¹⁹⁶ Ibid.

¹⁹⁷ Draft technical regulations and conformity assessment procedures only have to be notified when an International standard, guide or recommendation, does not exist (or they are not in accordance with

entry into any bilateral or multilateral agreements regarding technical regulations, standards or conformity assessment procedures.

Notifications allow for the dissemination of information, and for avoiding unnecessary obstacles to international trade at an early stage.¹⁹⁸ They allow exporters to be informed of new requirements that are developed in their export markets prior to their entry into force, to comment on these requirements, to have their comments taken into account, and to prepare themselves for compliance.¹⁹⁹

The TBT Agreement stipulates that each WTO Member establish an enquiry point that can respond to questions on technical regulations, standards and conformity assessment procedures (whether proposed or adopted), and supply relevant documents.²⁰⁰ Enquiry points are designed to increase transparency by contributing to the flow of information.²⁰¹ Information on conformity assessment procedures and technical regulations in target markets is of importance to exporters. National Standards Bodies (NSBs) are well placed to access such information through their knowledge and international links. ISO observes that such an information service would be a valuable addition to NSB portfolios in developing countries. However the said enquiry points are normally established in the relevant government ministries or agencies thus leading to overlapping mandates and thereby creating barriers to trade.²⁰²

The Agreement has also established a TBT Committee in the WTO, which is a standing body that acts as a forum for consultation and negotiation on all issues pertaining to the Agreement.²⁰³ Participation in the Committee is open to all WTO Members. Further disputes under the TBT Agreement are settled using the WTO's Dispute Settlement

existing ones) and if they may have a significant effect on the trade of other WTO Members.

¹⁹⁸ Article 10 (7) of the TBT Agreement.

¹⁹⁹ ISO/ITC , Building Linkages for Export Success, (2010) <International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org ISO/ITC, 2010, 26> accessed 27th January 2014.

²⁰⁰ Article 10 of the TBT Agreement.

²⁰¹ Ibid Article 2(11).

²⁰² ISO/ITC , Building Linkages for Export Success, (2010) <International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org ISO/ITC, 2010, 57 > accessed 27th January 2014.

²⁰³ Article 13 of TBT Agreement.

Mechanism.²⁰⁴ Such consultations and settlement of disputes with respect to any matter affecting the operation of the Agreement take place under the auspices of the Dispute Settlement Body and follows, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.²⁰⁵ A panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts at the request of a party to a dispute, or at its own initiative.²⁰⁶

2.3 Sanitary and Phytosanitary (SPS) Measures and International Trade

It has been noted that the General Agreement on Tariffs and Trade (GATT) allows members of the WTO, to act on trade in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism.²⁰⁷ Article XX (b) particularly permits countries to take measures “necessary to protect human, animal or plant life or health” as long as these do not unjustifiably discriminate between countries where the same conditions prevail, or are not a disguised restriction to trade. In other words, where necessary, for the purposes of protecting human, animal or plant health, governments could impose more stringent requirements on imports than they required of domestic goods, and could ban imports that presented a serious health risk.²⁰⁸

Thus it is clear that the GATT rule recognizes the Sanitary and Phytosanitary (SPS) measures. These measures impose on governments the responsibility of protecting human, animal and plant life by requiring that goods of all kinds meet certain standards, particularly of safety.²⁰⁹ These regulations must be based on science²¹⁰ and should be applied to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between countries where identical or

²⁰⁴ *Ibid* Article 14.

²⁰⁵ *Ibid* Article 14(1).

²⁰⁶ *Ibid* Article 14(2).

²⁰⁷ Articles I, III, XI, and XX GATT.

²⁰⁸ *Ibid*.

²⁰⁹ J Croome, *Reshaping the World Trading System a History of the Uruguay Round* (Second and Revised Edition World Trade organization’s Kluwer law international 1999)201.

²¹⁰ Article 2(2) of the SPS Agreement.

similar conditions prevail.²¹¹ “Sanitary” refers to human and animal health, including food safety, and “phytosanitary” means plant health.²¹²

These SPS Measures are also regulated under the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures. These Sanitary and phytosanitary measures may include, requiring products to come from a disease-free area, inspection of products, specific treatment or processing of products, setting allowable maximum levels of pesticide residues or limiting the permitted use of additives in food.²¹³ However, members may use measures which result in higher levels of health protection, so long as their measures are based on an appropriate assessment of risks and the approach is consistent, not arbitrary.²¹⁴

The SPS Agreement describes Sanitary and phytosanitary measures to include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.²¹⁵ All these SPS measures are matters which are relevant to international trade and their implementation therefore determine the ability of products to access international markets. The agreement sets out a framework for what countries can do, but is not prescriptive in how countries use health standards and methods of inspecting products.²¹⁶

²¹¹ WTO ‘Understanding the WTO: The Agreements the WTO Agreements Series, *Sanitary and Phytosanitary Measures* <http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm>accessed 8th August 2013.

²¹² Ibid 13.

²¹³ ISO/ITC , ‘Building Linkages for Export Success’, (2010) <International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org> accessed 27th January 2014.

²¹⁴ Article 3(3) of the SPS Agreement.

²¹⁵ Ibid, Annex A (1).

²¹⁶ The WTO Agreements Series, *Sanitary and Phytosanitary Measures*, 13. <http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm>accessed 8th August 2013.

The SPS measures apply to both domestic produce and imported produce where countries are required to take into account the safety of humans, animals and plants.²¹⁷ In this case, imports may be banned where it is suspected that such imports might bring, for instance, a cattle disease or plant pest into the country or region which is otherwise free from such disease or pests.²¹⁸ The research argues that Kenya should ensure that there is compliance with SPS measures in the production sector through a culture of Standardization of products and services for this will create confidence in products emanating from Kenya at the international markets. This will in turn lead to greater access to international markets and hence to economic development for the country.

The basic aim of the SPS Agreement is to maintain the sovereign right of any government to provide the level of health protection it deems appropriate, but also to ensure that this sovereign right is not misused for protectionist purposes and do not result in unnecessary barriers to international trade.²¹⁹ In other words, the Agreement strikes a balance between the right of governments to protect health and their desire to see goods flow smoothly in international trade.²²⁰ Governments must provide advance notice of new or changed sanitary and phytosanitary regulations, and establish a national enquiry point to provide information.²²¹

The application of SPS measures may have different effects on trade depending on the measures which have been put in place. The introduction of product safety regulation will increase production costs but can also serve as an important quality signal, thereby helping to promote the competitiveness of those products that meet stringent standards. Product safety regulations also increase trust in quality of foreign products, thus reducing transaction costs and fostering trade.²²² This argument supports the hypothesis

²¹⁷ Article 6 of the SPS Agreement.

²¹⁸ J Croome, *Reshaping the World Trading System; A History of the Uruguay Round* (Second and Revised Edition World Trade Organization's Kluwer Law International 1999) 201.

²¹⁹ ISO/ITC, 'The SPS Agreement: WTO Agreement on the Application of Sanitary and Phytosanitary Measures', International Trade Forum Magazine Issue 3/2010 accessed on 14th February 2014.

²²⁰ J.Söderblom. 'SPS Agreement: Balancing National Sovereignty against Disguised Protectionism', *World International Community Experts* (2004) 37.

²²¹ Article 3 of Annex B of the SPS Agreement.

²²² J.Söderblom. 'SPS Agreement: Balancing National Sovereignty against Disguised Protectionism', *World International Community Experts* (2004) 30.

on which this research is grounded, namely that the implementation of a comprehensive NQRI in a country leads to the production of quality products which will be able to access international markets.

However as observed by the European commission a sanitary or phytosanitary restriction, which is not actually required for health reasons, can be a very effective protectionist device²²³ and, because of its technical complexity, it can be a particularly deceptive and difficult barrier to trade.²²⁴

Nevertheless, though SPS measures may at times result in restrictions on trade, some trade restrictions may however be necessary to ensure food safety and animal and plant health protection. The SPS Agreement acknowledges such a need for restriction on trade.²²⁵ It introduces an appropriate level of sanitary or phytosanitary protection which it describes this as,

*‘ the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory’.*²²⁶

The SPS Agreement accordingly recognises the sovereign right of WTO members to take unique measures tailored to domestic needs, needs that are necessary for the protection of human, animal or plant life or health.

However there is a need to strike a necessary balance so as to prevent disguised protectionism. Article 2(2) of the SPS therefore requires scientific evidence, and provides that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health. Article 2(3) of the SPS goes further by proscribing arbitrary and unjustifiable discrimination, where identical or similar conditions prevail. Article 5(5) of the SPS deals with arbitrary discrimination by requiring internal consistency in the use of restrictions.

The WTO recommends that countries base their SPS measures and technical regulations on international standards, where they exist.²²⁷ The standards of the Codex Alimentarius

²²³ European Commission Sanitary and phytosanitary (SPS) issues accessed on 11th February 2014.

²²⁴ Ibid.

²²⁵ Annex A the (Definitions) and in Article 2(1) of the SPS Agreement.

²²⁶ Ibid Annex A (5).

Commission (CAC), the International Plant Protection Convention (IPPC) and the World Organisation for Animal Health (OIE) are of particular relevance.²²⁸ While SPS measures may be based on CAC, IPPC and OIE standards, conformity assessment procedures including sampling, inspection, certification and testing are based mostly on ISO standards. These organisations work closely for the benefit of their members since the 1960s. The 30th session of the CAC, held in July 2007, supported continued cooperation and coordination with ISO and agreed that Codex and ISO maintain contact at the central secretariats level. The Commission also supported increased coordination and cooperation between the national focal points of CAC and the national ISO member bodies.²²⁹

2.3.1 Administration of Sanitary And Phytosanitary Measures

The SPS Agreement is administered by the Committee on Sanitary and Phytosanitary measures (the ‘SPS Committee’), in which all WTO members can participate.²³⁰ Observer governments in the higher level WTO bodies (such as the Goods Council) are also eligible to be observers in the SPS Committee.²³¹ The SPS Committee is a forum for consultations where WTO members regularly come together to discuss SPS measures and their effects on trade, to oversee implementation of the SPS Agreement, and to seek to avoid potential disputes. Through its Secretariat, the Committee is a forum through which Governments inform each other about their regular and emergency SPS measures. The committee also considers information provided by governments regarding their national regulatory procedures, their use of risk assessment in the

²²⁷ ISO/UNIDO, ‘Fast Forward, National Standards Bodies in Developing Countries’ (2013) 01/2 50035 <ISO Central Secretariat© ISO, 2013-01/2 50035 Web www.iso.org> 35-37 accessed 27th January 2014.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Article 12(1) of SPS Agreement.

²³¹ Representatives of several international intergovernmental organizations are also observers, including the FAO/WHO Joint Codex Alimentarius Commission (CODEX), the Office International des Epizooties (aka) the World Animal Health Organization (OIE), the Secretariat of the International Plant Protection Convention (IPPC), the World Health Organization of the United Nations (WHO), the United Nations Conference on Trade and Development (UNCTAD) and the International Organization for Standardization (ISO). Some regional governmental bodies working on SPS issues are also observers as provided in Article 3 (4) of the SPS Agreement.

development of sanitary and phytosanitary measures and the status of diseases in their territories.²³²

WTO Members can also raise specific trade concerns regarding SPS measures imposed by other members in the SPS Committee. The SPS Committee also monitors countries' use of international standards. The Committee has also developed guidelines to ensure consistency in risk management decisions, in order to reduce possible arbitrariness in the actions taken by governments. In addition, the Committee has developed a number of guidelines to assist governments in the implementation of Article 4 on "equivalence"²³³ and Article 6 on recognition of areas free of pests or diseases.²³⁴

In case of a trade dispute, the WTO's dispute settlement procedures encourage the governments involved to "settle out of court" through consultations.²³⁵ If the governments cannot resolve their dispute, they can choose to follow any of several means of dispute settlement, including the "good offices", conciliation, mediation and arbitration. Alternatively, a government can formally ask for an impartial dispute settlement panel of experts to hear all sides of the dispute and to make recommendations. In a dispute on SPS measures, the panel can seek scientific advice, and even set up a technical experts group.²³⁶

If the panel concludes that a country is violating its obligations under any WTO agreement, it will normally recommend that the country bring its measure into conformity with its obligations. This could, for example, involve procedural changes in the way a measure is applied, modification or elimination of the measure altogether, or simply elimination of discriminatory elements.²³⁷ The panel submits its recommendations for consideration by the WTO Dispute Settlement Body (DSB), which consists of WTO member countries. Countries in the dispute can appeal against the panel's findings. The final ruling is adopted by the DSB, unless the DSB decides by

²³² Article 12 (4) of the SPS Agreement.

²³³ G/SPS/19/ Rev.2.

²³⁴ G/SPS/48.

²³⁵ Article 11 of the SPS Agreement.

²³⁶ J. Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: EC – Hormones, Australia – Salmon and Japan – Varietals,' (1999) *Journal of International Economic Law* 641-664.

²³⁷ *Ibid.*

consensus to reject it. If the measure is found to be wrong, the defending country has to implement the panel's recommendations and to report on how it has complied.²³⁸

2 .4. Relevance of WTO Principles to the Challenges of Developing Countries

As observed earlier one of the reasons for the establishment of the WTO was the reduction of the imbalance in trade which was detrimental to emergent countries. In the 1950s changes beneficial to developing countries were introduced to GATT 1947 and in 1965 part IV on Trade and Development were accessed to the agreement. The concepts of differentiated and more favorable treatment for developing countries and the principle of non-reciprocity in trade negotiations were further elaborated in 1979 by the so-called 'enabling clause'. This provides the legal basis for the generalized system of preferences i.e. that developing countries exchange trade concessions among themselves.²³⁹

The goal of GATT to progressively bring about the elimination of trade barriers had also to take into account the needs of developing countries.²⁴⁰ These countries, because of their lack of development and the scant competitiveness of their industrial products, risked specializing in agriculture and in the production of primary goods and this could jeopardize their process of industrial development.²⁴¹ For developing countries the temporary protection of some of their industries and the setting up of customs barriers to their imports therefore proved justified and it was therefore necessary for industrialized states, to grant preferential treatment to exports from these countries.²⁴²

Some scholars have observed that the Most-Favored-Nation clause did not meet the needs of emergent countries.²⁴³ They posit that whereas it was designed to put on the same footing states having similar economic structures; it was ill-suited for developing countries. In addition they observe that, until the 1986-94 Uruguay round, the clause did not cover areas crucial to developing countries, namely agriculture, textiles, and

²³⁸ Ibid.

²³⁹ A Cassese, *International Law* (Second Edition Oxford University Press 2005) 515.

²⁴⁰ Ibid.

²⁴¹ Ibid 516.

²⁴² Ibid 516.

²⁴³ A Cassese, *International Law* (Second Edition 2005 Oxford University Press) 515.

clothing, areas in which industrialized states permitted levies, quotas, and subsidies so as to protect themselves from the products of developing countries.²⁴⁴

During the review session of 1954-1995 of Article XVIII of GATT, the need for a preferential treatment for developing countries was first acknowledged. The amendment essentially recognized the structural nature of developing countries' balance of payments problems and reiterated the requirement of prior approval in regard to measures deviating from the GATT's obligations for the promotion of a particular industry.²⁴⁵

In 1965 significant changes were introduced through a protocol which amended the general agreement, and a special section, part IV, called 'trade and development', was added to the agreement. This amendment codified, in the multilateral trading system, the concept of non-reciprocity in trade negotiations between developed and developing countries. Consequently, developing countries were allowed to modify or withdraw tariff concessions previously made for manufactured products of industrialized countries; to impose quantitative restrictions on the importation of foreign goods in order to safeguard their financial position and ensure an adequate level of monetary reserves.²⁴⁶ This was with a view to promoting the establishment of particular industries in the developing states. Kenya as a developing nation can therefore benefit from this concept of non reciprocity if an effective NQRI was implemented.

Through the said amending protocol, industrialized countries, in their turn, undertook the following commitments; first, to accord high priority to the reduction or elimination of barriers to products of particular export interest for developing countries; second, to refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on those products; and, third, to refrain from imposing new fiscal measures which could hamper significantly the growth of consumption of primary products from developing countries.²⁴⁷ The implication of this to the study is that when a country implements a comprehensive NQRI which takes advantage of these commitments from the industrialized countries, the producers will be able to produce

²⁴⁴ Ibid 516.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

products which can compete successfully in the international markets. Part IV of the GATT was further elaborated in 1979, in the decision known as the "Enabling clause".²⁴⁸

This clause consolidated both the concept of 'differential and more favourable treatment' for developing countries and the principle of non-reciprocity in trade negotiations. Under the clause members of the GATT parties to a trade agreement were authorized 'to accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties'. Though the application of standards and technical regulation which are anchored on the TBT/SPS provisions Kenya can implement a NQRI which takes advantage of this enabling clause²⁴⁹

2.4.1 Application of TBT/SPS Measures to Developing Countries

Under the TBT Agreement special and differential treatment for developing countries is provided for.²⁵⁰ Such treatment includes: ensuring that the technical regulations, standards and conformity assessment procedures of developed countries do not create unnecessary obstacles to developing country exports (including to their expansion and diversification);²⁵¹ not expecting developing countries to use international standards (since these, for instance, may be inappropriate for their level of technological development);²⁵² ensuring that developing countries participate representatively in international standardizing bodies and international systems for conformity assessment;²⁵³ preparing international standards for the products that are of export interest to them; and, allowing them (particularly the least-developed among them) to obtain certain time-limited exceptions from obligations.²⁵⁴ These requirements therefore

²⁴⁸The clause is the legal basis of; the generalized system of preferences, whereby developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries; the global system of trade preferences, whereby developing countries that are members of the group of 77 exchange trade concession among themselves and; Regional arrangements among developing countries.

²⁴⁹ However, this clause has the drawback that it does not legally oblige industrialized states to; grant the treatment it provides for to developing countries. it merely authorizes them to grant that treatment.

²⁵⁰ Article 12 of the TBT Agreement.

²⁵¹ Ibid Article 12(7).

²⁵² Article F of the Code of Good Practice for the Preparation, Adoption and Application of Standards.

²⁵³ Article 11 (7) of the TBT Agreement.

²⁵⁴ Ibid Article 12 (8).

imply that it is possible for Kenya to rely on this special and differential treatment clause while implementing a NQRI and ensure that the goods and services produced in the country are able to access international markets.

In addition, the Agreement calls upon developed countries to provide developing countries with technical assistance.²⁵⁵ Such assistance may be directed towards helping developing countries prepare their own technical regulations, meet the technical requirements of their export markets, establish national standardizing bodies and participate in international fora, establish bodies for conformity assessment with technical regulations and standards, access the conformity assessment systems of other countries, and become members of international bodies. Priority is to be given to the needs of least-developed countries.²⁵⁶ Kenya should take advantage of these provisions and seek assistance from developed states to develop a comprehensive NQRI.

On the SPS measures the WTO recognizes that the technical capacity to implement the SPS Agreement will vary between WTO members.²⁵⁷ Developing country members, in particular, may find implementation challenging due to resource constraints, including limited expertise.²⁵⁸ To help overcome this problem, a number of mechanisms are built into the SPS Agreement. WTO members agree to facilitate the provision of technical assistance to other members, especially developing countries,²⁵⁹ either bilaterally or through international organisations such as the Three Sisters²⁶⁰. The form of this technical assistance and how it can be provided is broadly defined.²⁶¹

Whereas WTO members are entitled to determine their own SPS measures provided they are in accordance with the terms of the SPS Agreement²⁶² however, under the principle of harmonization WTO members are encouraged to base their SPS measures

²⁵⁵ Ibid Article 11 (1).

²⁵⁶ Ibid Article 12 (9).

²⁵⁷ Article 10 of the SPS Agreement

²⁵⁸ Ibid Article 14.

²⁵⁹ Ibid Article 9(10).

²⁶⁰ There are three international standard-setting bodies specifically mentioned in the SPS Agreement. These are often referred to as the 'Three Sisters'; the International Plant Protection Convention (IPPC) dealing with plant health; the World Organisation for Animal Health (OIE) dealing with animal health; the Codex Alimentarius Commission (Codex) dealing with food safety.

²⁶¹ Article 9 of the SPS Agreement.

²⁶² Ibid Article 3.

on international standards, guidelines and recommendations, where they exist.²⁶³ The SPS Committee promotes and monitors international harmonization.²⁶⁴ WTO Members are especially encouraged to participate actively in the Three Sisters, which provide other forums for delivering technical assistance.

In many cases, the standards developed by the Three Sisters are higher than those of individual countries, including developed countries. Governments may nonetheless choose to use higher standards than the international ones, if the international standards do not meet their health protection needs.²⁶⁵ However, if governments do set their own standards, they may be required to justify their higher standards if the difference gives rise to a trade dispute. Their justification must be based on an analysis of scientific evidence and the risks involved.²⁶⁶

In 2001, the heads of the Food and Agriculture Organisation (FAO), The Office International des Epizooties, (aka) the World Animal Health Organisation (OIE), World Health Organisation (WHO), World Trade Organisation (WTO) and the World Bank (WB) agreed to work together to improve technical assistance in SPS measures.²⁶⁷ This led to the creation of the Standards and Trade Development Facility (STDF), which serves to raise awareness of the importance of compliance with international SPS standards and coordinates the provision of SPS-related technical assistance. The STDF also works on project development, the mobilization of funds, exchange of experiences and the dissemination of good practice in relation to the provision and receipt of SPS-related assistance. Limited grant financing is also available to developing countries seeking to gain and maintain market access by complying with international SPS standards.²⁶⁸

The SPS Agreement also provides for special and differential treatment.²⁶⁹ For example, in applying SPS measures WTO members are required to take account of the special needs of developing country members, particularly the least-developed country

²⁶³ Ibid Article 3(1).

²⁶⁴ Ibid Article 3(5).

²⁶⁵ Ibid Article 3(3).

²⁶⁶ Ibid.

²⁶⁷ Standards and Trade Development Facility, <<http://www.standardsfacility.org/en/AUHistory.htm>> accessed 19th February 2014.

²⁶⁸ Ibid.

²⁶⁹ Article 10 of the SPS Agreement.

members. Countries which need time to implement certain programmes, for example to improve their veterinary services or to implement specific obligations of the agreement, can ask the SPS Committee to grant them further delays. Developing countries can also request special treatment or technical assistance to meet importing countries' requirements.²⁷⁰ This research concurs that Kenya as a developing country should seek this special treatment and technical assistance so as to ensure that there is an effective implementation of a comprehensive NQRI which will enable the country's products access international markets.

2.5. Conclusion

The chapter has shown that the WTO legal regime consist of clearly laid down provisions that support international trade. The Preamble to the WTO stipulates that trade and economic endeavour should be conducted with a view to raising the standard of living, ensuring full employment and a growing income and expanding the production of trade in goods and services with the objective of sustainable development.²⁷¹ This supports the argument that law must go hand in hand with development for progressive social change to take place in a country, as postulated by Merryman.²⁷² A comprehensive legal system is necessary for development because it secures efficient regulatory systems under conditions of the rule of law as argued by Rajeev.²⁷³ The research, therefore, argues that the implementation of a comprehensive NQRI, which is based on the WTO-TBT/SPS principles, will provide the required regulatory framework which will enhance the competitiveness of Kenyan products in the international markets.

However with the increase of international trade, there is a risk that the growing complexity of quality and regulatory requirements, imposed by the WTO/TBT/SPS legal regime, may become insurmountable obstacles especially to exporters from developing countries.²⁷⁴ This research, therefore, argues that the implementation of a comprehensive

²⁷⁰ Ibid Article 9.

²⁷¹ The Preamble to the WTO Agreement.

²⁷² J H Merryman, 'Comparative Law and Social Change on the Origin, Style, Decline & Revival of the Law and Development Movement' *American Journal of Comparative Law* 25 3 457 471-491.

²⁷³ R Dhavan; '*Law As a Concern: Reflecting on Law and Development* (1994) "in Yash Vyas *et al.* (eds) *Law and Development in the Third World*, Kenya Litho Limited, Nairobi, 25-50 32.

²⁷⁴ ISO/ITC, 'Building Linkages for Export Success', (2010) < International Organization for

NQRI will enable the country to cooperate with other states which will lead to stronger and more comprehensive support systems for the export industry of its economy. This will enhance competitiveness for its exports, and, ultimately, to a better quality of life for all its people which has been termed as development by Amartya Sen.²⁷⁵ An analysis of the various quality regulatory systems in the world reveals how countries can benefit from Standardization through complying with the provisions of the WTO/TBT/SPS legal regime.

Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org >19 accessed 27th January 2014.

²⁷⁵ A Sen; Development as Freedom (Anchor Books, New York 1999)16.

CHAPTER THREE

3.0 Role of Standardization in Facilitating International Trade

This chapter discusses the role Standardization plays in enhancing competitiveness of goods and services in regional and international markets. The chapter involves a brief discussion of how standards, technical regulations and conformity assessment, enhance competitiveness of products in international markets. It also discusses the linkages between international standards, regional standards and national standards. It also contains a brief illustration of standardization in a few jurisdictions in the world.

3.1 Historical Development of Standardization

Standardization has been described as both the formulation of standards and promotion of their implementation.²⁷⁶ Standardization involves the development and provision of standards, and the supply of information on standards to interested parties, and takes place on various levels. Companies, trade associations and consortia may produce standards for their own purposes. For national application, a national standards body may develop a national standard or may adopt an international standard that has been developed by international consensus and published by one of the main international standards organisations (ISO, IEC, ITU, Codex Alimentarius Commission, etc). When two countries adopt the same international standard, trade between them is simplified.²⁷⁷

The Institute of Standards Engineers of India (SEI) has observed that, since the beginning of human civilization, Standardization was observed especially in nature's creation and has subsequently been used for the progress of human society and is presently been applied in an organized manner, for industrial and economic growth and operations.²⁷⁸

The industrial revolution saw the advent of mass production by industries as the demand for their products by consumers increased. Standardization was seen by these

²⁷⁶ S.R. Kuppanna, *Monograph on Standardization Historical Development* (Institute of Standards Engineers Bombay Section 1988) 1.

²⁷⁷ ISO/UNIDO, 'Fast Forward, National Standards Bodies in Developing Countries' (2013) 01/2 50035 <ISO Central Secretariat© ISO, 2013-01/2 50035 Web www.iso.org >22 accessed 27th January 2014.

²⁷⁸ Ibid 1.

industrializing countries as an important tool in ensuring that there was increase in productivity and this led to the establishment of various Standardization bodies in the early parts of the 20th century.²⁷⁹ With increased trade among industrialized countries, there was need for internationally accepted norms or standards to support this development. This led to the establishment of international bodies for Standardization such as the International Electrotechnical Commission (IEC) in 1906 and the International Organisation for Standardization (ISO) in 1947 among others.²⁸⁰

According to ISO, Standardization causes changes in social structures. This in turn causes changes in Standardization since as the society progresses new needs arise that necessitate more research and consequently to creation of new standards to meet the new needs. This is termed as standards upgrade.²⁸¹

How familiar companies are with the regulations and the standards prevailing in the export markets determines whether they succeed or fail when they move away from their domestic markets to compete internationally.²⁸²

3.2 Objectives of Standardization

The WTO/TBT recognizes the contribution that international Standardization can make to the transfer of technology from developed to developing countries, and the role of international standards and conformity assessment systems in improving the efficiency of production and in facilitating international trade.²⁸³ Standards assist in ensuring that there is transfer of technology since they are a representation of the technological advancement which has taken place.²⁸⁴

²⁷⁹ Ibid.

²⁸⁰ A.O Sykes, 'Products Standards for Internationally Integrated Goods Markets' (1995) Brookings Institution Washington).

²⁸¹ S.R. Kuppanna, *Monograph on Standardization Historical Development*, (Institute of Standards Engineers Bombay Section 1988) 5.

²⁸² -- Standards and Regulations in International Trade: United Nations Economic Commission for Europe

²⁸³ ISO/UNIDO, 'Fast Forward, National Standards Bodies in Developing Countries' (2013)01/2 50035 <ISO Central Secretariat© ISO, 2013-01/2 50035 Web www.iso.org >22 accessed 27th January 2014.

²⁸⁴ Recital to the TBT Agreement.

The use of standards is seen as an important tool in ensuring that goods and services produced by entrepreneurs are able to compete favorably in a given country and also in international markets.²⁸⁵ Standards have been seen to work well only where there is an established clear legal framework which ensures the protection of consumers that the various regulations put in place are complied with and that clear and accessible enforcement mechanisms are in place.²⁸⁶

The introduction of standards in a given market has been seen to have positive impacts in most cases to both manufacturers and consumers. To manufacturers, standards ensure that the manufacturing process is rationalized, it leads to the reduction of waste during the manufacturing process and it also reduces the cost of manufacture. To consumers, standards lead to the assurance of the quality of the goods manufactured and it also provides a good return for the money spent.²⁸⁷

Furthermore standards play a crucial role in encouraging innovation and thereby motivating management to develop more sustainable processes, products and services. They also inform the purchasing decisions by giving customers confidence that their suppliers have attained benchmark levels of sustainability.²⁸⁸

One of the major objectives of Standardization is to ensure compatibility. Thus a product or a spare part bought by a buyer will be compatible and therefore be able to work properly in a given device. Standards also ensure that products and services are fit for human consumption and safe for human, animals and plants health.²⁸⁹ Thus regulators can use international standards as a means to show compliance and as a base for market and consumer friendly regulations. Standards are also put in place to ensure that the various products manufactured are environmentally friendly.²⁹⁰

²⁸⁵ A.O Sykes, 'Products Standards for Internationally Integrated Goods Markets', (1995) Brookings Institution Washington.

²⁸⁶ Ibid.

²⁸⁷ G Swann, *The Economics of Standardization: An Update-*, (Report for the UK Department of Business Innovation and Skills (BIS), Complete Draft, Version 2.2, *27 May 2010 © Innovative Economics Limited, 2010) accessed 5th March 2012.

²⁸⁸ Ibid.

²⁸⁹ This objective of the TBT and SPS Agreements.

²⁹⁰ Article 2(2) of the TBT Agreement.

KEBS, the national standards body in the country agrees that the implementation of standards lead to improved quality service, streamlined operations, reduced waste of resources, encourages internal communication, cost effectiveness, management of business risk, competitive advantage, opportunities for technology transfer, enhanced brand reputation, removal of barriers to trade, and attraction of investment.²⁹¹

On their part international standards are core to the TBT Agreement which in its preamble recognizes the value of international standards in improving efficiency of production and facilitating international trade. The TBT Agreement encourages the development of international standards and recognizes the contribution of international standards to technology transfer from the developed countries to developing countries.²⁹² International standards are used by the Agreement as a means of promoting international harmonization of standards, technical regulations, and conformity assessment procedures, with national standards.²⁹³ Therefore by implementing a comprehensive NQRI which is based on the WTO regime, Kenya will be able to develop quality assurance measures which are compliant with international standards and thus enable her goods access international markets.

Article 2 (2) of the TBT Agreement aims at striking a balance that is elaborated in the sixth recital of its preamble. This equilibrium can be described as, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate. The use of international standards has been posited to help operationalize this balance. This is because international standards provide a benchmark for TBT measures by ensuring that they do not unnecessarily become trade-restrictive.²⁹⁴

²⁹¹ KEBS Editorial; The Benchmark 2012 KEBS 14 23.

²⁹² The Preamble of WTO Agreement.

²⁹³ Article 4 (1) of the TBT Agreement mandates Members to ensure that their Standardizing bodies adopt and comply with the code of Good Practice which emphasis the use of international standards and conformity assessment procedures.

²⁹⁴ E Wijkström and D McDaniels, 'International standards and the WTO TBT Agreement: Improving governance for Regulatory Alignment' (2013 World Trade Organization (WTO) Staff Working Paper ERSD-2013-06 Date: April 25) 3 accessed on 2nd March 2013.

International standards are powerful tools for helping organisations capitalize their potential in the global marketplace. Developed by experts from around the world, they contain internationally harmonized best practice which can be used to measure, compare and increases efficiency and reduce wastage.²⁹⁵ This is by providing common specifications, which enable products services and technology from different vendors to fit together in what is called “hub-and-spoke”²⁹⁶ characteristics. They provide a solid base for developing innovations and facilitating market access to new products. They ensure that countries, organisations, regulators and researchers, do not have to reinvent the wheel, and can invest in other priorities.²⁹⁷

The state-of-the-art know-how contained in international standards is accessible to all, including developing countries, helping them make the best use of their human and material resources. More efficient industrial and business processes, facilitated by standards, empower companies to compete globally, and produce faster for more markets at a lesser cost.²⁹⁸

3.2.1 Standards as a Tool for Economic Development

It has already been observed that Standardization is a means of achieving several tangible and intangible benefits to industry, trade and consumer.²⁹⁹ These benefits thereafter accrue to the national economy.³⁰⁰ This supports the broad argument of this research that if Kenya implements a comprehensive NQRI her products can be able to access international markets and this would lead to economic development for the country. Economic development is measured by the rate of growth and through such

²⁹⁵ The 43rd World Standards Day Brochure underscored the fact that, Standards are crucial for increasing efficiency.

²⁹⁶ G. Swann, *The Economics of Standardization: An Update-*. (Report for the UK Department of Business, Innovation and Skills (BIS), Complete Draft, Version 2.2, *27 May 2010© Innovative Economics Limited) 152 accessed 5th March, 2012.

²⁹⁷ ISO, *Benefits of Standardization* (International Organization for Standardization, Switzerland, 1982), 20.

²⁹⁸ Ibid.

²⁹⁹ G. Swann, *The Economics of Standardization: An Update-* (Report for the UK Department of Business, Innovation and Skills (BIS), Complete Draft, Version 2.2, *27 May 2010© Innovative Economics Limited) 9 accessed 5th March, 2012.

³⁰⁰ S.R. Kuppanna, *Monograph on Standardization Historical Development* (1988 Institute Of Standards Engineers Bombay Section) 27.

parameters as gross national product, per capital income and annual exports. This growth rate is influenced by the availability of the requisite infrastructural facilities such as roads, water, power supply, telecommunication, transport, manpower development. Standards are also one of such infrastructural facilities.³⁰¹

Consequently, SEI advises industries to implement standards throughout their manufacturing programme; that is to say, in Design, Materials management, production quality control maintenance personnel management and marketing.³⁰² Further, organisations should also do their purchasing by implementing standards in all the procurement process, including pre-qualifications; invitation for tenders, quotation of bids and awarding of contracts.³⁰³ Such implementation of standards will lead to economic progress in a country. This is because at the international level, Standardization brings about technological advancement and understanding among the community of nations³⁰⁴ thereby contributing to economic progress among such nations.

On its part, ISO has posited that Standardization allows organisations to source for materials from any supplier all over the world because such materials have the same properties irrespective of their country of origin.³⁰⁵ This also enables foreign firms to set up branches in other countries and to produce parts for their products in that country using the readily available raw materials and readily available labor in the said country.³⁰⁶ Such products are then sold in international markets thereby leading to an increase in a country's GDP and consequently to its economic development. This is important for the Kenyan small and medium enterprise, since through the use of WTO/TBT complaint standards, their goods can be able to access international markets and this would lead to economic development.

As argued by Rodrik development must encompass more than material and financial side of people's lives. It must be perceived as a multidimensional process which

³⁰¹ Ibid, 1.

³⁰² Ibid, 28.

³⁰³ Ibid, 29.

³⁰⁴ G. Swann, *The Economics of Standardization: An Update-* (Report for the UK Department of Business, Innovation and Skills (BIS), Complete Draft, Version 2.2, *27 May 2010 © Innovative Economics Limited) 83 accessed 5th March, 2012.

³⁰⁵ Ibid, 114.

³⁰⁶ Ibid, 115.

involves reorganizing and reorientation of the entire economic and social systems. This involves radical changes in institutional, social and administrative structures as well as popular attitudes, customs and beliefs. Consequently such radical changes can be achieved through adopting Standardization and this will lead to reorganisation of the entire economic and social systems and ultimately to economic development for the country as contemplated by Rodrik. This is because as the endogenous growth theorists posits, where investments produce social change as well as private benefits, governments may improve efficiency of resource allocation. This is through the provision of public goods such as infrastructure or encouraging private investment in knowledge intensive industries where human capital can be accumulated.³⁰⁷ Such an argument underscores the importance of implementing a comprehensive NQRI in Kenya.

3.3 Importance of a Comprehensive National Quality Regulatory Infrastructure

The national quality regulatory systems established in different countries set up a mechanism to ensure that the products from different countries are of a quality that is competitive in the global economy. The establishment of a national quality regulatory infrastructure involves various players since the manufacturers cannot do this on their own. Most countries have therefore developed an entire industry of service providers that specialize in the diffusion of standards of quality through the provision of quality assessments, technical assistance, information, and training services.³⁰⁸

Since a national quality infrastructure is essential in breaking down technical barriers to trade, it is consequently the key to a greater integration of partner countries into the international trading system.³⁰⁹ The bodies tasked with ensuring quality in the products establish what are known as conformity assessment procedures, which entail such activities which are meant to measure whether certain products are in compliance with

³⁰⁷ D Rodrik, 'The Global Governance of Trade as if Development Really Mattered', (October 2001 United Nations Development Programme) 77.

³⁰⁸ J Luis. and Others, 'Quality Systems and Standards for a Competitive Edge'(2007) World Bank Report).

³⁰⁹ D Sektorkonzept, 'MNPQ', (2004) Federal Ministry for Economic Cooperation and Development, Division of Development Education and Information- Bonn, < www.bmz.de>accessed 5th march 2014.

the technical requirements set. These requirements can be either mandatory or voluntary. These bodies perform functions of testing, calibration and certifying products.³¹⁰

Conformity assessment activities are supported by a varied infrastructure system of calibration, metrology, accreditation, and standards organisations. Conformity assessment activities can be performed by the supplier or by the purchaser of the goods whose quality is to be ascertained, but in most cases independent organisations often carry out conformity assessment activities.³¹¹

Consequently a National Quality System must consist of several entities. These include; National Standards Bodies which are in most cases public sector entities but can also be private entities which are tasked with ensuring that both public and private stakeholders are brought together to ensure that there is development of national standards; Certification Bodies which provide assurance that a product, service, system, process or material conforms to one or more standards or specifications³¹² (It is usually done in most cases by a third party who is in most cases a non-profit making body); Testing Laboratories, which are used to measure the effects of a product on human health; Inspection Bodies where inspection is in most cases done using an instrument and can either be done by a public entity or a private entity; Calibration Laboratories which use calibration instruments to measure the working of a product; National Metrology Institute which is used to provide the measurement systems to be adopted by a given country and which in most cases are public entities;³¹³ National Accreditation Body which gives accreditation to products which have been seen to be competent and also to signify that the process used in the production is competitive.

The creation of national quality systems makes productivity in most countries to be more sustainable. It also ensures that the goods produced in a country are able to compete in the markets outside the country of production. For the local markets, these systems ensure that the domestic producers are protected by ensuring that there is fair

³¹⁰ Ibid.

³¹¹ Ibid 1.

³¹² Ibid 1.

³¹³ C Sanetra and R M Marban, 'The Answer to the Global Quality Challenge: A National Quality Infrastructure- (2007). In *Organization Of American States, Washington, DC; International Trade Centre, Geneva; Physikalisch-Technische Bundesanstalt (PTB), Braunschweig.*

trade. It is therefore necessary to ensure the strengthening of the national quality infrastructure for this ensures competitiveness of the products in the national markets as well as the international markets.³¹⁴

However, most developing countries, including Kenya have experienced major challenges accessing global markets in developed countries. The developed countries on the other hand have made great progress in ensuring that their products comply with standards. This can be attributed to the assistance provided by regional organisations like the European Union and the United Nations which have ensured that guidance and expertise is provided to these developed countries. Such assistance include; ensuring that there is expansion of mutual recognition agreements; ensuring the avoidance of unnecessary trade restrictiveness and that the measures put in place are proportionate.³¹⁵

Nevertheless as posited by Swann, developing countries have, however, started realising the importance of using international and regional standards as a tool for ensuring that the needs of local industries are met.³¹⁶ But , he argues that, how efficient these measures work will depend on, the degree to which they reflect the local needs and the circumstances prevailing in the country and the enforcement of those measures which majorly reflect their domestic needs.³¹⁷

Kellerman on the other hand observes that developing countries hardly have a totally decentralized NQI. This is because of the high costs involved in maintaining different institutions for the various elements of the NQI, and also due to the scarcity of human resources. In such developing countries, industry is also generally not in a position to establish the necessary infrastructure unless government does so and therefore, in such countries, the national standards body is government-type institutions which have been made responsible for the majority of the NQI services.³¹⁸ Where the inspection services and laboratory services are established by different government ministries it leads to a

³¹⁴ Ibid.

³¹⁵ M Kellerman, 'Thoughts on National Quality policy' (Discussion Paper 2011. Physikalisch, Technische Physikalisch-Bundesanstalt, May 2012),11.

³¹⁶ G Swann, *The Economics of Standardization: An Update-*. (Report for the UK Department of Business, Innovation and Skills (BIS), Complete Draft, Version 2.2, *27 May 2010© Innovative Economics Limited) 4 accessed 5th March, 2012.

³¹⁷ Ibid.

³¹⁸ An analysis of the ISO membership provides the evidence that this is indeed the case.

precarious situation. This is because it may lead to massive duplication and overlap in these ministries' mandates.³¹⁹ Firstly, it increases pressure on the small pool of skilled experts available in a given country³²⁰. Secondly, such laboratories unnecessarily re-test many imported products falling within the scope of technical regulations, in order to gain finances, thereby, creating totally unnecessary barriers to trade.³²¹

In contrast in fully industrialized countries conformity assessment services are provided by a myriad of private and multinational service providers operating at market-related pricing, and the standards bodies, metrology institutes and accreditation bodies established independently of each other, as observed by Kellerman.³²² There is clear separation between the standards domain and the regulatory frameworks in industrialized countries. He, therefore, suggests that proper checks and balances need to be introduced through appropriate policy in developing economies by providing for such a separation of functions.³²³ By implementing a comprehensive NQRI Kenya may be able to create such a distinction of functions. This will facilitate trade, enhance exports, accelerate economic development and reduce poverty in the country.³²⁴

3.4 Relevance of the Code of Good Practice for the Preparation, Adoption and Application of Standards and Facilitation of Trade

According to the Institute of Standards Engineers of India (SEI), the creation of barriers to trade may arise when several countries are separately involved in the preparation of national standards for their products across the world.³²⁵ In some of these countries, several standardizing bodies representing large manufacturing interests are to be found.

³¹⁹ M Kellerman, 'Thoughts on National Quality policy' (Discussion Paper /2011.Physikalisch, TechnischePhysikalisch- Bundesanstalt, May 2012) 6.

³²⁰ It also results in the non-optimal utilization of expensive laboratory equipment, rendering the whole system non-viable from a financial perspective.

³²¹ The Daily Nation September 17th 2013,9 contains a report of how donated cancer drugs were held in the Jomo Kenyatta International Airport as two government departments were debating on the relevant charges to be levied by the government. The ministry of Health had to pay the Kenya Revenue Authority while Kenya Bureau of Standards declined to test the drugs.

³²² M Kellerman 'Thoughts on National Quality policy' (Discussion Paper /2011.Physikalisch, TechnischePhysikalisch- Bundesanstalt, May 2012)6.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ ISO/ITC, ' Building Linkages for Export Success', (2010)< International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org > accessed 27th January 2014.

In addition, a large number of Government departments issue standards on subjects of their specialization. These results in three undesirable situations, namely one product could have different requirements among different countries as far as national standards are concerned; or there may be divergence in the same country for the same product between a national standard on one side and governmental and industry standards on the other; and in some countries there may be more than one standard for the same product covering the different aspects of the product.³²⁶This creates an apparent impossible situation for the exporter to satisfy standards for the same product. In the process, there is loss due to low volume, escalation in costs and finally loss of market.³²⁷

In addition, in most of the countries, technical regulations form part of the Laws of the land and hence they are statutory in nature and it is not possible to deviate from them. These regulations may refer to national standards or other governmental standards. Hence it is not possible for an exporter to know all the technical regulations and standards in a given foreign country.³²⁸ Additionally, a number of proposed new standards and regulations may be anvil in a country which a potential exporter may have no prior knowledge.³²⁹ This compounds an already complex competitive situation where new regulations and standards are enforced.³³⁰ Further an exporter may not be aware of the sampling, inspection and certification procedures in particular countries since he is aware of only those organisations which are recognized universally for inspection.³³¹

In light of the foregone circumstances, therefore, the WTO legal regime established a Code of Good Practice which the Members are supposed to adhere to in matters of standardization.³³²The code was created to ensure that the challenges faced by exporters as discussed above can easily be resolved. Countries which have adopted the code are

³²⁶ S. Kuppanna, *Monograph on Standardization Historical Development* (Institute of Standards Engineers Bombay Section 1988), 109.

³²⁷ Ibid.

³²⁸ ISO/ITC, 'Building Linkages for Export Success', (2010) < International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org > accessed 27th January 2014.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Annex 3 of the TBT Agreement (Code of Good Practice or the Preparation, Adoption and Application of Standards).

able to guide their industries in building international competitiveness in their products through sustainable application of standards.³³³

The Code does not attempt to regulate Standardization activities nor formulate any directives in this connection, but ³³⁴ attempts to provide a framework which can be evolved and where trade problems can be minimized, particularly those arising out of Standardization, regulations and certification systems. ³³⁵ The signatory countries are guided through certain steps which can be followed, such as, the formulation of national standards on the basis of available international standards.³³⁶ Such international standards have wider acceptance in several countries and their adoption, therefore, reduces the differences between the standards of countries which have adopted international standards and thereby facilitates the free flow of goods in the international markets. ³³⁷

The code stipulates that countries should prepare standards in terms of performance rather than specification for this enables the exporting country to design products that meet such performance requirements and ensure their quality.³³⁸ Countries are encouraged to participate in relevant international standardizing activities.³³⁹ But where international standards are not used countries are then required to adopt an open system of preparing standards.³⁴⁰

For determination of conformity to technical regulations or standards Member States have the following options; either accepting products for testing on the same conditions as for domestic products; developing test methods and administrative procedures comparable to those imposed on products of national origin; making available test results and test facilities; accepting test results, certificates or marks of conformity

³³³ S. Kuppanna, *Monograph on Standardization Historical Development*, (Institute of Standards Engineers (Bombay Section 1988) 109.

³³⁴ Annex 3, Article B of the TBT Agreement (Code of Good Practice).

³³⁵ Ibid.

³³⁶ Ibid, Annex 3, Article F.

³³⁷ Recital 6 of the SPS Agreement. The TBT and the SPS Agreement also mentions these international organization as bodies charged with the responsibility of developing International Standards.

³³⁸ Annex 3, Article I, of the TBT Agreement (Code of Good Practice).

³³⁹ Ibid, Annex 3, Article G.

³⁴⁰ Ibid, Article J.

issued by other countries;³⁴¹ not to formulate certification systems with a view to creating obstacles to trade; ³⁴²acquainting other countries of proposed changes in standards, technical regulations and certification systems and allowing them to make comments on such changes.³⁴³

Member States are also required to; also disseminate information concerning the above actions through establishing an enquiry point and avail necessary documents to interested parties;³⁴⁴ take into account special development, financial and trade needs of developing countries while preparing and applying standards, technical regulations, test methods and certification systems; ³⁴⁵Countries are required to co-operate in implementing the Code.³⁴⁶ Thus the code lays down a framework for Standardization with a view for removing barriers to international trade. Kenya been a Member state needs to adhere to this Code when implementing a NQRI for this will enable the production of products that access international markets.

3.5 International Standards, Regional Standards and Private Standards as a Means of Facilitating International Trade

The WTO/TBT/SPS Agreements recognizes the contribution International standards can make toward improving the efficiency of production and international trade.³⁴⁷ They also make provisions for regional standards and other standards.

Formal international standards are an established and proven approach to technological and global challenges. WTO disciplines in using standards as the basis for regulatory measures demand that “International Standards” be developed by designated organisations in the case of the SPS Agreement³⁴⁸ or according to principles for

³⁴¹ Ibid, Article 11.

³⁴² Ibid, Article 11.

³⁴³ Ibid, Article 11.

³⁴⁴ Ibid, Article 10.

³⁴⁵ Ibid, Article 12.

³⁴⁶ Ibid, Article 4.

³⁴⁷ The Recital of the TBT Agreement.

³⁴⁸ The SPS Agreement specifically names the Codex Alimentarius Commission (CAC) ; the World Organization for Animal Health (OIE) ; and the International Plant Protection Convention (IPPC) as organizations that produce “ international standards ” regarding food safety, animal health, and plant health respectively.

international standards development in the case of the TBT Agreement. Formal international standards, such as those from ISO and the International Electrotechnical Commission (IEC), are prepared following such principles.

A distinction is made between international standards prepared using the principles set out in the WTO Agreements³⁴⁹ and disciplines established through the *Code of Good Practice for the Preparation, Adoption and Application of Standards*³⁵⁰, and other “private” standards that do not adhere to these principles and disciplines. Standards that are developed using processes open to worldwide participation, and that use these principles, are considered to be “international standards”.

International Standards are developed within proven structures, operational approaches and participation models detailed in ISO/IEC’s existing directives and development procedures.³⁵¹ While other standards may be developed that meet the needs of specific sectors or segments of the population, and may be perfectly valid and relevant for their purpose, they do not adhere to such disciplines, nor do they share other attributes of formal international standards³⁵². The use of international standards in support of public policy and regulation has increased in recent years. This is as a result of countries joining the WTO applying TBT and SPS Agreement disciplines in use standards as a way of reducing barriers to trade.³⁵³

Apart from international standards, there may exist regional standards developed by regional Standardization bodies whose members consist of countries in the same region and these guides the industrial production in such countries. Examples of regional

³⁴⁹ See Annex 4 on “*Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement*” contained in the Second Triennial Review of the TBT Agreement at <<http://docsonline.wto.org/DDFDocuments/t/G/TBT/9.doc>>

³⁵⁰ See <[http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#annex III](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#annex%20III)>

³⁵¹ ISO/ITC ‘Building Linkages for export success’, (2010) International organization for Standardisation <www.iso.org and International Trade Centre (ITC) www.intracen.org>, 19. accessed 27th January 2014.

³⁵² Several international standards – notably the management system standards ISO 9001 7) and ISO 14001 have become extremely important in the manufacturing and service sectors.

³⁵³ ISO/ITC ‘Building Linkages for Export Success’, (2010) International organization for Standardisation <www.iso.org and International Trade Centre (ITC) www.intracen.org>, 19- accessed 27th January 2014.

Standardization bodies include the European Committee for Standardization (ECS) and the African Regional Organisation for Standardization (ARSO).³⁵⁴

Examples of regional standards are those of the European Union (EN), East African Community (EAC) and Southern African Development Community (SADC). Other bilateral and multi-lateral trade arrangements, as well as existing and new regional free trade agreements in different parts of the world, have also been major drivers to adoption of international standards. Organisations or trade areas, such as the Organisation for Economic Co-operation and Development (OECD), Asia-Pacific Economic Cooperation (APEC), and Southern Common Market of Argentina, Brazil, Paraguay and Uruguay (MERCOSUR), encourage the use of international standards as a way of fostering trade within their membership, and with the rest of the world.³⁵⁵

Further there is a vast and growing number of nongovernmental standards and significant differences in the bodies/organisations that develop them for areas such as governance, development approach and stakeholder engagement. ISO makes a distinction between “formal international standardizing organisations as described above, and other “private” standards setters. At least three important categories of private standards have evolved in the context of ISO’s work, leading to efforts to harmonize or coordinate them with the ISO standards development system; Private standards in the information and communication technology (ICT) sectors; Private standards from the retail and agro-food industry; Private standards related to social and environmental aspects.³⁵⁶

Compliance with private standards is not a legal requirement, but is frequently a precondition for trading with some of the major purchasing groups or retailers in the developed economies. However, certification to these standards can be costly. The market reality is that they are in place, and current or potential exporters to such markets have to pursue compliance in order to be competitive.³⁵⁷ Other private standards are

³⁵⁴ Ibid, 8.

³⁵⁵ Ibid, 19.

³⁵⁶ Ibid, 20.

³⁵⁷ Ibid, 21.

those imposed by some of the large multinational retail organisations. These are developed as a consequence of intense competition among retailers and are used to gain a competitive advantage. These retail organisation standards have a very short lifespan, typically one to two years, until competitive advantage has diminished and a new one has to be sought. Currently, these standards apply mainly to the food sector, but they may extend to other areas in the future.³⁵⁸

3.6 Referencing International Standards in Technical Regulations

Some Member States may incorporate Standards in legislative instruments by means of what is known as a reference. This constitutes a method of drafting a code or regulation in such a way that a detailed statement of technical requirement is replaced in the text of the code or regulation by a reference to existing standards. This has been seen to be an effective means of supporting national, regional and global policies by the Member States. Several regions of the world are using this method in Legal concepts, agreements and Legal frame works. Examples are; the New Approach in the European Union, the Good Regulatory practice of Asia – Pacific Economic cooperation; the Sub committee on standards and conformance and the North American Free Trade agreement.³⁵⁹

Major economies in the world have developed policies to actively encourage standards in technical regulations.³⁶⁰ Some of these economies are discussed in the following part of this research.

3.7 Application of WTO/TBT/SPS Law to National Systems.

3.7.1 European Union and Standards Law

The law in regard to application of standards as a means of facilitating trade in the European Union is captured in the Functioning of the European Union Statute. Article 34 of the Functioning of European Union (TFEU) “provides that, quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between

³⁵⁸ Ibid, 21.

³⁵⁹ Ibid 3.

³⁶⁰ J. Luis and Others, ‘Quality Systems and Standards for a Competitive Edge’, (2007) World Bank Report, 26.

Member States” This principle applies in terms of value, physical quantity or other factors. A good example is limitation of number of cars which can be imported into a member country per year.³⁶¹ Further, such measures may concern the way products are produced or packaged i.e. their physical specifications.

In the case *Cassis De Dijon*³⁶² the ECJ HELD that; Obstacles to movement within the union resulting from disparities between the National laws relating to the marketing of the products in question must be accepted in so far as these provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and defense of consumer. This rule came to be known as the rule of reason formulated by the *Cassis de Dijon* case in the European Union.³⁶³

The case discusses the issue of product standards and the application of article 34 of the TFEU. It also lays down the principles of regulating movement of goods between member states of the European Union.³⁶⁴

The basic principle the case lays down is that harmonization of laws within a regional Trade area may not be as effective as it was thought earlier on. This is because product development and national regulation grows faster than the capacity of the European institutions to harmonize. The case therefore attempts to answer this issue by laying down the following principles; that application of product standards to imports hinders their importation; however to prohibit product standards would result in an unregulated European products market which is undesirable and therefore there is need to regulate; and Product standards were not the problem but their application to products from other member states was the problem.

³⁶¹ D Chalmers, and others, *European Union Law, Cases and Materials* (Second Edition Cambridge University Press 2011) 760-773.

³⁶² Case 120/78 *Revue-Zentral Ag V. Bundesmonopolverdtung For Brantwein* (*Cassis De Dijon*) (1979) ECR 649.

³⁶³ T.Storey, and C Turner, *Unlocking E U Law*. (3rd Edition Routledge 2011).

³⁶⁴ Case 120/78 *Revue-Zentral Ag V. Bundesmonopolverdtung For Brantwein* (*Cassis De Dijon*) (1979) ECR 280.

The case consequently formulated two solutions to the challenge of product standards from Member countries; the first is the principle of Mutual Recognition, if products comply with the laws of the Member states where they were produced, then they should be sold in all other Member states. Therefore each Member state should accept products made according to the laws of other Member states since ‘what is good enough for France is good for Germany’.³⁶⁵ Secondly, the case decided that mandatory requirements in Article 34 of TFEU, implies that it may be necessary at times to derogate from the general principle that the goods from one state should be marketable in all other states. This is where it is necessary to apply standards to imports so as to protect important interests e.g. consumer protection or public health or because of ‘public interest’ objective.

3.7.2 Standardization in the United Kingdom

The United Kingdom has recognized the importance of ensuring that goods and services produced by their industries are of good quality and it has also worked towards the promotion of standards in other countries. This has been done through granting financial assistance to these countries.³⁶⁶ An example of an area which the United Kingdom government has supported when it comes to standards is the field of biometrics, which are systems used to identify individuals based on some predetermined characteristics. The United Kingdom government has supported Standardization in this area. For example standards have been made the only basis of awarding tenders to companies. They also facilitate the exchange of information between different actors in industry.

An independent 2009 review of Standardization and innovation programmes in the United Kingdom found that funding in the area of biometrics had facilitated the diffusion of technology in the marketplace, made procurement more cost-effective and eased SMEs’ access to the procurement market,³⁶⁷ for instance open-systems based standards had saved the UK government considerable sums by enabling competition on

³⁶⁵ Members should recognize each other’s laws and regulations as adequate and should not impose additional requirements on products complying thereof.

³⁶⁶ J. Luis and others, ‘Quality Systems and Standards for a Competitive Edge’, (2007) World Bank Report.

³⁶⁷ Ibid.

identity card contracts. Further, the use of standards had accelerated progress on biometrics programmes, such as that run by the identity and passport services, and had future-proofed the technology. Standards had been found to enable United Kingdom-based system integrators to operate in a fair and open market and had prevented domination by a small number of overseas companies.

3.7.3 The Chinese Standardization Law

China is another country which has embraced the use of standards in industry with considerable success. The Standardization Law of the People's Republic of China states that Standards prescribed in laws and administrative regulations are compulsory, mandatory standards, and any products that do not comply with mandatory standards are prohibited from been produced, sold or imported in the Republic of China.³⁶⁸ Standards became mandatory when quoted in regulatory documents such as legislative texts and departmental regulations. China uses WTO/TBT principles while referencing standards in technical regulations. For example, where an international standard exists, China will make an effort to adopt the International standard.³⁶⁹

This ensures that international standards become China's technical regulation. The philosophy behind China's position of using standards to support technical regulation is that on one hand technical standards can help laws to regulate the market and on the other hand, they can help legal and administrative measures to conduct necessary intervention in order to establish fair and reasonable competition for the market economic order. This supports the argument advanced by the proponents of the Law and Development movement that law and development must go hand in hand in order for economic development to take place.

In China, laws only stipulate the general rules, while standards specify the technical criterion that facilitates the implementation of laws and in return, the implementation of laws can promote the carrying out of standards. In this case laws and standards actually

³⁶⁸ J. Luis and Others, 'Quality Systems and Standards for a Competitive Edge', (2007) World Bank Report, 26.

³⁶⁹ This is in conformity with the TBT and SPS Agreements which require the adoption of International standards where these exist.

supplement each other, working together on the realization of the overall objectives specified in the law and the implementation of technical standards. Consequently the standards are implemented compulsorily during the implementation process of the laws.³⁷⁰ A good example of this is found in the product quality law of the People's Republic of China which provides that,

*“... Industrial products that fail to meet the standards and requirements especially for Safeguarding people's health, safety and properties are prohibited to be produced”.*³⁷¹

Rodrik has argued that the success of the Chinese economy is largely due to the convergence of Chinese institutions with those non-socialist economies. Therefore countries should focus on harmonizing their institutions with those abroad though the implementation of a comprehensive NQRI.³⁷²

3.7.4 South Africa Standardization Law

South Africa Standards Act 2008³⁷³ in its Preamble gives the objects of the Act as; ensuring provision of an internationally recognized Standardization system that continues to support the needs of South African enterprises competing in a fast paced global economy; and the promotion of African National Standards as a means to facilitate international trade and enhancing South Africa's economic performance and transformation.³⁷⁴ This Act unlike the Kenya Standards Act recognizes that an internationally recognized Standardization system can be a powerful tool for facilitation of international trade.³⁷⁵ It also acknowledges the fact that standards enhance economic performance of a country.³⁷⁶

The Act continues to list down the objects of the South Africa Bureau of Standards (SABS) to include; obtaining membership in international and foreign bodies; reviewing

³⁷⁰ J. Luis and Others, 'Quality Systems and Standards for a Competitive Edge', (2007) World Bank Report, 26. Ibid,

³⁷¹ Ibid, 26.

³⁷² D Rodrik, 'The Global Governance of Trade as if Development Really Mattered (2001) United Nations Development Programme, 19-20.

³⁷³ Republic of South Africa Act No. 8: Standards Act 2008.

³⁷⁴ Ibid.

³⁷⁵ Part II of the Preamble.

³⁷⁶ Part III of the Preamble.

involvement in international standards committees regularly to ensure resources are targeted where they are most relevant to South Africa ;establishing and maintaining the necessary enterprise at internationally acceptable level; coordinating, interacting and managing the international and bilateral interactions with other national standards bodies from other countries; providing information services to deal with enquiries about standards, handle the sale and distribution of South African National Standards and related publications as well as similar publications from international and foreign bodies; providing the South African enquiry point to maintain the South African notification system in terms of the technical barriers to trade agreement of the World Trade Organisations.³⁷⁷

This object clause reveals the effort of South Africa to develop a NQRI which is based on the WTO/TBT/SPS legal regime. However such an effort is lacking in the Kenyan quality regulatory infrastructure. This research argues that Kenya should implement a comprehensive NQRI which incorporates the WTO/TBT/SPS principles so as to enable access to international markets by Kenyan products.

The Act requires the SABS to appoint an organisation as a recognized standards development organisation for a specified activity.³⁷⁸ It must develop and maintain a South African National standard setting out the criteria to be met and maintained by the organisation. The recognized standards development organisation must develop and maintain standards within its specified scope of activity for approval and issue by the SABS as a South Africa National standard. The SABS must maintain and make available to the public a register of recognized standards development organisations and their specified scope of activity.

The provision is meant to ensure harmonization of the standards developed by any organisation in South Africa. It ensures that the various agencies in the country do not overlap as they regulate quality of products, such provisions are lacking in the Kenyan Law and this continues to cause challenges for Kenyan exporters and investors. Kenya therefore ought to benchmark with South Africa.

³⁷⁷ Section 4 of the South Africa Standards Act.

³⁷⁸ Ibid, Section 25.

The South Africa statute provides a system for referencing standards in the law.³⁷⁹ The section states that a South African National Standard or any provision thereof that has been published in terms of this Act in respect of any commodity, product or service which may affect public safety, health, or environment protection may be incorporated in any law. This may be done by title or number or by the title, number and year or edition number. Referencing of standards in the law is an effective system because it guarantees that there is compliance with the set standards while parties are complying with that particular law.

3.8. Critique of TBT/SPS Measures on Quality Regulation in international Trade

Despite all the above benefits posited about standardization, some scholars have criticised Standardization. Various studies conducted, under the auspices of the World Trade Organisation³⁸⁰ focusing on Standards, Technical Regulation, and conformity assessment procedures have brought out this criticism. The studies found out that though TBT/SPS measures have positive trade effects for the more technologically advanced sectors, they however have negative effects in agricultural sectors. These studies also show that TBT/SPS measures have a negative effect on export market diversification. However they show that such negative effects on trade caused by the diversity of TBT/SPS measures and domestic regulation are mitigated by the harmonization and mutual recognition of these measures.³⁸¹

The studies also found that there are differences across sectors and countries on the effect of TBT/SPS measures. Further, it was found that, standards, by providing exporters with valuable information about market preferences, reduce transaction costs though they impose adaptation costs. Also that, the introduction of product safety regulation increases production costs but it also serves as an important quality signal, thereby helping to promote the competitiveness of those products that meet stringent

³⁷⁹ Ibid, Section 28 (1)a.

³⁸⁰ --'Trade and Public Policies : A Closer Look at Non -Tariff Measures in The 21st Century' (2012)World Trade Report, 137.

³⁸¹ Ibid.

standards. Product safety regulations also increase trust in the quality of foreign products, thus reducing transaction costs and fostering trade.

The studies further show that most of the negative effects of TBT/SPS measures on trade are concentrated mainly in developing country exports to developed countries.³⁸² In contrast, exports from developed countries to other developed countries are not significantly impeded by these measures. While ACP country exports appear to have been significantly negatively affected by such measures the impact on Asian countries is not statistically significant.³⁸³

In the world report of 2011 it was reported that harmonization and mutual recognition of TBT/SPS provisions in PTAs has different effects on trade at the regional level. It was also found out that harmonization and mutual recognition, at the regional level affects other countries outside the region in different ways. While harmonized standards allow entry into the whole regional market once the harmonized standard is adopted, mutual recognition may not provide access to third countries. Consequently agreements involving mutual recognition of conformity assessment procedures, for instance, are likely to divert trade for countries outside the agreement especially where they are subject to strict rules of origin.³⁸⁴

The report found out that in developing countries regional agreements on harmonization tend to divert trade which affects exports negatively. This is because harmonization agreements can increase trade between participating countries but do not necessarily increase trade with other countries. In particular, harmonization has been found to increase exports from developed countries outside the region, but it reduces exports from developing countries outside the region.

The report found that the costs related to compliance and conformity assessment impinge particularly on developing countries. This is because; such countries lack the technical infrastructure necessary to effectively develop and design technical regulation, standards and conformity assessment procedures; and also because they lack the

³⁸² Ibid.

³⁸³ --'Trade and Public Policies : A Closer Look at Non -Tariff Measures in The 21st Century' (2012)World Trade Report, 151.

³⁸⁴ I.e. laws, regulations and administrative procedures which determine a product's country of origin.

laboratories and accredited certification bodies to test and certify compliance with a certain standards.³⁸⁵

In view of the foregoing this research, argues that the WTO report³⁸⁶ underscores the importance of developing countries like Kenya, to critically analyse the effect of the provisions of the WTO-TBT/SPS Agreements on their international trade. They should benchmark best practices from other states which have successfully implemented the aforesaid measures. This will enable them adopt a suitable quality regulatory infrastructural system which will improve the competitiveness of their products and services in the regional and international markets.

3.9 Conclusion

Although international trade is increasing globally, it is clear that there is a risk that the growing complexity of quality and regulatory requirements are insurmountable obstacles to exporters from developing countries due to their poor quality infrastructural capacity. Potential exporters will need information about the regulatory and market requirements for their product which exists in international markets in order for them to determine compliance of the product or service with such requirements. They will also need support in redesigning the product or service until it does comply.³⁸⁷

Thus there is need for cooperation between states. This can lead to stronger and more comprehensive support systems for the export industry of a developing economy, enhanced competitiveness for its exporters, and, ultimately, to a better quality of life for all its peoples.³⁸⁸ The WTO/TBT/SPS legal regime has provided for such cooperation among the Member states. The implementation of these WTO measures, through the implementation of a comprehensive NQRI in a country will therefore open more markets to a state and this will lead to economic development and hence a better quality of life for the people.

³⁸⁵ --'Trade and Public Policies : A Closer Look at Non -Tariff Measures in the 21st Century', (2012) World Trade Report.

³⁸⁶ Ibid.

³⁸⁷ Ibid, 61.

³⁸⁸ Ibid, 61.

CHAPTER FOUR

4.0 An Analysis of the Existing Quality Regulatory Systems in Kenya

This chapter discusses the question whether a harmonized and strengthened Quality Regulatory Infrastructure will lead to an effective national quality regulatory infrastructure that supports regional and international trade. It analyses the existing quality regulatory system in Kenya and discusses how several legal instruments dealing with standards in Kenya establish different quality regulatory institutions with different overlapping mandates. The chapter will explain how these overlapping mandates are a hindrance to the implementation of WTO/TBT/SPS legal measures thereby acting as Non-Tariff barriers to trade. The chapter also discusses how the EAC trade regime and the COMESA treaty apply to the Kenyan quality regulatory framework.

4.1 Implementation of GATT/ WTO Legal Regime in Kenya

Presently Kenya's Trade regime is guided by the market-driven international trade principles of liberalization under the World Trade Organisation (WTO), which came into effect in 1995 and secondly by the increased efforts in the regional economic integration that has resulted in the establishment of the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) among others.³⁸⁹ However, despite the fact that Kenya is a member of WTO, EAC and COMESA, it is noteworthy that, there is no statute in Kenya which expressly provides that the country has adopted the WTO/TBT/SPS Measures, unlike the situation which attains in other countries like in South Africa or in China.

Kenya as a member of WTO has adopted the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards.³⁹⁰ Kenya implements the TBT Agreement through the Kenya Bureau of Standards (KEBS).³⁹¹

However the Standards Act³⁹² which has established KEBS³⁹³ does not expressly mention the WTO/TBT/SPS measures nor does it expressly give the bureau exclusive

³⁸⁹ Republic of Kenya National Trade Policy 2010,7.

³⁹⁰ Article 4(1) of the TBT Agreement.

³⁹¹ Ikonya L, 'KEBS' Role in the Implementation of the WTO TBT Agreement' 2012 14 The Benchmark The official magazine of the Kenya Bureau of Standards, 8.

jurisdiction over the enforcement of these measures. Furthermore, other government agencies like KEPHIS, NEMA and KENAS also regulate quality which makes the mandates of these institutions to overlap.

The Bureau observes the WTO principles of Non-discrimination and National Treatment.³⁹⁴ Hence imported products from one country are given like treatment as those from any other country. Also, the bureau does not discriminate between local products and imported products.³⁹⁵ The Bureau frequently notifies WTO members about all product specifications that are not based on international standards, and which may have a significant effect on international trade.³⁹⁶ The Bureau also provides copies of such technical regulations when required by other members.³⁹⁷ Standards that are declared to be technical regulations are published in the Kenya Gazette in accordance with the TBT Agreement.³⁹⁸

In accordance with the WTO principles of free trade and regional cooperation Kenya has entered into Mutual Recognition Agreements (MRAs) with the five EAC countries for recognition of each other's product certification marks.³⁹⁹ She has also signed MOUs with several other countries e.g. South Africa, China, UAE, India, Pakistan, Mauritius and Burundi and is involved in bilateral negotiations with these and other countries for implementation of these MOUs.⁴⁰⁰

Kenya has a functional TBT National Enquiry Point located at KEBS as required by the TBT Agreement.⁴⁰¹ The Bureau is the secretariat to the National TBT Consultative

³⁹² Chapter 496 of the Laws of Kenya.

³⁹³ Ibid Section 4.

³⁹⁴ Annex 3 Article D of the TBT Agreement (Code of Good Practice for the Preparation, Adoption and Application of Standards).

³⁹⁵ Article 5(1) of the TBT Agreement.

³⁹⁶ Ibid Article 2(9)2.

³⁹⁷ Ibid Article 2(9)3.

³⁹⁸ Ikonya L, 'KEBS' Role in the Implementation of the WTO TBT Agreement' 2012 14 The Benchmark the official magazine of the Kenya Bureau of Standards, 8.

³⁹⁹ Ibid; Article 6 of TBT Agreement deals with recognition of conformity assessment by central government bodies.

⁴⁰⁰ Article 11 of the TBT Agreement.

⁴⁰¹ Ibid, Article 10(1).

Committee that analyses notifications made by other WTO member countries.⁴⁰²The WTO is notified of any new conformity assessment procedures implemented in the country e.g. the use of Import Standards Mark (ISM) as a label for quality assurance for products. This aims to prevent deceptive practices, ensure product safety and protect human health and the environment.⁴⁰³ Kenya is actively involved in the formulation and adoption of international systems for conformity assessment, and is a member of several such systems for example International Laboratory Accreditation Cooperation (ILAC).
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The country has benefited from several technical assistance programs, for instance UNIDO has assisted KEBS in building capacity in its laboratories.⁴⁰⁵ Further, Kenya through KEBS actively participates in the activities of the Committee on TBT, which is based in Geneva, Switzerland.⁴⁰⁶ Despite the implementation of such a detailed WTO regime the government of Kenya has conceded that there is no empirical evidence of a thriving international trade in Kenya.⁴⁰⁷ This research attributes this situation to the weaknesses found in the national quality regulatory infrastructure in the country and therefore, argues that there is need for Kenya to implement a comprehensive NQRI.

Regionally Kenya has entered into several multilateral agreements which have enabled her to expand her access to larger foreign markets.⁴⁰⁸ The research discusses two of these agreements, namely the COMESA Treaty and the EAC Common Markets Protocol.

⁴⁰² Article 10 deals with information about technical regulations, standards and conformity assessment procedures.

⁴⁰³ Article 10 (1)3 of the TBT Agreement.

⁴⁰⁴ Articles 9 deals with international and regional systems.

⁴⁰⁵ Article 11 deals with Technical assistance to other members.

⁴⁰⁶ Article 13 deals with the committee on technical barriers to trade. KEBS, under sponsorship of SIDA, attends three TBT Committee meetings every year. Further, KEBS is also involved in the process of setting up a regional TBT forum.

⁴⁰⁷ Republic of Kenya National Trade Policy 2010, 33.

⁴⁰⁸ Kenya is a Member of the East Africa Common Market Protocol, The Common Market for Eastern and Southern Africa (COMESA) Treaty.

4.2 The Common Market for Eastern and Southern Africa (COMESA) and Trade

The COMESA Treaty contains elaborate provisions on liberalization of trade. The treaty borrows heavily from the WTO legal regime. Kenya is a member of COMESA which brings together nineteen countries that form an economic bloc.⁴⁰⁹ Eleven of the COMESA Member States have joined the COMESA Free Trade Area (FTA) including Kenya. As such, she exchanges free-trade preferences with fourteen COMESA FTA Member countries, as compared to tariff preferences exchanged with non-FTA COMESA Members. COMESA aimed to become a Customs Union by 2009 and also to become a full Economic Community by 2025. COMESA is currently the leading destination for Kenyan export products. The main exports to COMESA include manufactured goods, fuel and lubricants and machinery and other equipments.⁴¹⁰

Such an expanded market is aimed at diversifying exports particularly in the area of manufactured goods and trade in services. It is the argument of this research, therefore, that if Kenya implements a comprehensive NQRI, entrepreneurs will be able to improve the quality of goods and services produced and thereby take advantage of the expanded markets leading to economic development in the country. The most important provisions of the treaty for the purpose of this study are those relating to liberalization of trade, Standardization and quality assurance.

The principle of free trade is upheld among COMESA member states.⁴¹¹ The principle has similar application to WTO and GATT legal system. Member states are required to co-operate in trade liberalization and development under the Treaty. The Scope of this Co-operation in Trade Liberalization and Development is set out in Article 45 as;⁴¹²

“There shall be progressively established in the course of a transitional period of ten years from the entry into force of this Treaty, a Customs Union among the Member States”; and “Non-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States shall also be removed”.

⁴⁰⁹ COMESA Treaty.

⁴¹⁰ Republic of Kenya National Trade Policy 2010, 18.

⁴¹¹ Ibid, Chapter fifteen.

⁴¹² Ibid, Chapter six.

These provisions ensures that Member states do not put measures, including standards which will create obstacles to free trade among themselves but will endeavor to remove barriers to free trade. Further the treaty ensures that there is elimination of Non-tariff Barriers on Common Market Goods by providing that each of the Member States should undertake to remove immediately upon the entry into force of the Treaty, all the existing non-tariff barriers to the import into that Member State, of goods originating in the other Member States. They should thereafter refrain from imposing any further restrictions or prohibitions.⁴¹³ However the treaty can exempt or permit members to derogate from this provision.

For example article 50 of the treaty , allows members to impose restrictions or prohibitions affecting matters such as; the application of security laws and regulations, and, the protection of human, animal or plant health or life, or the protection of public morality after having given notice to the Secretary-General of the intention to do so. However a Member State should not so exercise the right to introduce or continue to execute the restrictions or prohibitions conferred by this Article so as to restrict the free movement of goods as envisaged in the treaty. These provisions are similar to those of the WTO/TBT/SPS Agreements.

4.2.1 Standardization and Quality Assurance in COMESA

The treaty mandates Member States to recognize the importance of Standardization and quality assurance in the promotion of health.⁴¹⁴ The objectives of this recognition are to enhance the standard of living, to rationalize and reduce unnecessary variety of products and to facilitate interchangeability of products. It will also promote trade, protect consumers, create savings in government purchasing, improve productivity, and facilitate information exchange.⁴¹⁵ It will also protect life, property, and the environment.⁴¹⁶ These objectives are similar to those highlighted in the previous chapter

⁴¹³ Article 49 of the Treaty.

⁴¹⁴ Ibid, Article 112.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

as benefits of Standardization.⁴¹⁷ Kenya as a member of COMESA, will, therefore be able to realize these benefits through the implementation of a comprehensive NQRI.

In respect of Standardization and quality assurance Member States are required to evolve and apply a common policy with regard to the Standardization and quality assurance of goods produced and traded within the Common Market. They should also develop the relationship between their national standards bodies and the regional, international and other organisations concerned with Standardization and quality assurance. Members should be involved in the development of activities in Standardization and quality assurance for the achievement of the objectives of the Common Market.⁴¹⁸

The treaty further requires states to establish within their territories, national standards bodies, and to develop the technical capacities of such bodies. This will enable them to adequately carry out Standardization and quality assurance activities at the national level and to co-operate with other Member States. This is in line with the TBT Agreement and the Code of good practice which requires Members to develop National institutions for quality assurance.⁴¹⁹ The treaty therefore reiterates the importance of good institutions in the implementation of a comprehensive NQRI.⁴²⁰ Furthermore Members should recognize the African Regional Organisation for Standardization as a leading cooperating partner in the implementation of appropriate provisions of Standardization. They should agree to accede to the Agreement establishing ARSO.⁴²¹ This is in line with the TBT Agreement which encourages states to adopt standards developed by Regional bodies.⁴²²

The Member States are required to apply uniform rules and procedures for the formulation of their national standards and to adopt African regional standards where theirs are unavailable. They should adopt suitable international standards for products

⁴¹⁷ Section 3.1.1 of this project.

⁴¹⁸ Article 112 of the Treaty.

⁴¹⁹ Article 4(1) of the TBT Agreement.

⁴²⁰ G Swann, *The Economics of Standardization: An Update Innovative Economics Limited* (2010) Report for the UK Department of Business, Innovation and Skills (BIS) Complete Draft Version 2.2* 27 May 2010 © Innovative Economics Limited.

⁴²¹ Article 112(d) of the COMESA Treaty.

⁴²² Article 9 of the TBT Agreement.

traded in the Common Market. With regard to the selection, recognition, adaptation and application of regional and international standards Member states should coordinate their views in so far as the needs of the Common Market are concerned, and constantly endeavor to improve the Standardization of goods and services within the Common Market. A notable provision is that of applying the principle of reference to standards in national regulations, so as to facilitate the harmonization of technical regulations within the Member States.⁴²³ Such provisions are in line with the intention of the WTO to accord the developing and the least developed states differential treatment so as to enable them compete favorably in the international markets.⁴²⁴

The treaty has put in place requirements for ensuring that quality assurance of goods and services is carried out within Member States. These requirements include; applying uniform standards and specifications for the inspection and testing of goods traded within the Common Market, so that the results may be more easily interpreted and be coordinated in a uniform manner within the Common Market; adopting regionally acceptable quality management systems, and developing capacities for quality assurance of products traded in the Common Market; using harmonized documentation for the evaluation of the quality of goods traded in the Common Market; and in conjunction with customs and other relevant authorities, provide for the ease of movement of samples meant for testing within the Common Market.⁴²⁵

Member States should adopt and apply harmonized schemes for the certification, accreditation of laboratories used for the evaluation and adopt common rules and procedures for the certification marks to be applied on goods produced and traded in the Common Market. They should also mutually recognize each other's national certification marks, as well as certification and laboratory accreditation schemes.⁴²⁶

Kenya as a member of COMESA will greatly benefit from this Treaty by ensuring that the trade and quality assurance legal and institutional framework adheres to COMESA

⁴²³ Article 113 of the COMESA Treaty.

⁴²⁴ Article 12 of the TBT Agreement.

⁴²⁵ Article 114 of the COMESA Treaty.

⁴²⁶ Ibid, Article 115.

provisions. By so doing Kenyan products will be able to access regional and international markets.

4.3 The East African Community (EAC) Trade Agenda

The EAC is another regional market where Kenyan products are traded competitively. The EAC Members have been implementing a wide range of trade-related policies. From late 1980s EAC members started to separately implement reforms as part of World Bank/IMF structural adjustment programs (SAPS) whose objective was to reduce the role of government in the economy and thus liberalize the productive sectors as well as open financial markets to foreign competition and foreign exchange liberalization.⁴²⁷ These reforms also sought to reduce the average tariff protection. Further, the EAC member states have enacted the EAC Competition Policy and Law (2006) and the EAC Standardization, Quality Assurance, Metrology and Testing Act (2006). These laws are meant to provide a conducive environment for Trade and investments in the region.

The EAC has been implementing the EAC Common Markets Protocol which provides opportunities for free movement of persons, goods, services, labor capital and the rights of establishing business and residence across their borders.⁴²⁸ Furthermore a framework for monitoring and evaluating the implementation of the E.A.C Common Market Protocol has been put in place so as to ensure effective and efficient implementation of policies, projects and programmes as envisaged in the protocol.⁴²⁹

The region has, however, not fully harmonized their individual national laws with the E.A.C Common Market Protocol nor established a one stop border post at strategic border points so as to ease cross border movement for the promotion of regional trade as anticipated.⁴³⁰ Further the following issues remain to be resolved in the region; the setting up of a single customs territory to enhance free circulation of goods, the East

⁴²⁷ WHO- *Trade ,Foreign Policy Diplomacy and Health; Structural Adjustments Programmes*, < www.who.int/trade/glossary/story/084.en> accessed on 16th November 2013.

⁴²⁸ EAC, Protocol on the Establishment of the East African Community Common Market; The Ministry of EAC revealed this fact in a Newspaper supplement in the DAILY NATION, Friday November 30 2012.

⁴²⁹ President Mwai Kibaki. Statement on DAILY NATION, Friday November 30 2012.

⁴³⁰ The Ministry of EAC 's Supplement in the DAILY NATION, Friday November 30 2012.

African Monetary Union and the EAC Political Federation to coordinate foreign policy, cooperation in defense and good governance.⁴³¹

Stakeholders have observed that, the lack of uniform and enough standards in the partner states also hinder regional trade. To circumvent this situation the EAC is harmonizing standards governing quality of goods and services in the Region.⁴³² The EAC Standards Committee in particular wants to revise the existing standards and to withdraw standards which are outdated in line with the provisions of the EAC Common Market Protocol and the EAC Standardization, Quality Assurance, Metrology Testing Act, 2006, (EAC SQMT Act, 2006).⁴³³

4.3.1 EAC Standardization, Quality Assurance, Metrology Testing Act 2006

The East African Community in 2006 enacted the East African Community Standardization, Quality Assurance, Metrology and Testing (EAC SQMT) Act 2006. The purpose of the Act is to ensure that there is standardization, quality assurance; metrology and testing of products produced or traded in the regional block so as to facilitate industrial development and trade.⁴³⁴ It also aims to protect the health and safety of society and the environment in the Community. The Act has established institutional frameworks at the regional and at the national level.

At the regional level, the Act has established the East African Standards Committee,⁴³⁵ the Liaison office⁴³⁶ and the East African Accreditation Board.⁴³⁷ At the National level, each partner state is to designate a national quality system institution to function as a national standards body, a national metrology institute, a national legal metrology

⁴³¹ Musa C. Sirma, Minister for the E.A.Community DAILY NATION, Friday November 30 2012.

⁴³² The Burundi minister of agriculture and livestock called for regional coordinated efforts and integrated approaches for managing real and perceived risks to public health, food security trade and economic development. This calls for the setting up of appropriate standards which ensures compliance with both regional and international market requirements for their products⁴³² DAILY NATION, smart company, Tuesday March 11,2014, 3.

⁴³³ According to Kenyan EAC economic affairs director Richard Sindiga all the EAC partner states have their product standards harmonized at a regional level except Burundi, which is still working on its standards. The Benchmark Magazine.

⁴³⁴ The object clause of the EAC SQMT Act.

⁴³⁵ Ibid, Section 4.

⁴³⁶ Ibid, Section 5.

⁴³⁷ Ibid, Section 1(1).

department and a national accreditation body.⁴³⁸ The partner states are mandated to appoint regulatory authorities whom are to be tasked with administering compulsory standards.

These provisions are meant to establish the pillars of a comprehensive quality regulatory sector in the region since according to ISO, these characteristics are what constitute a comprehensive NQRI.⁴³⁹ ISO posits that these characteristics are separate but interdependent and interlinked “pillars” of knowledge which are essential for developing a quality infrastructure that facilitates sustainable development. They can also lead to full participation in international trade, and satisfies the technical requirements of the multilateral trading system.

Accordingly, Kenya needs to harmonize its national laws with this Act so that the goods and services emanating from the country can achieve competitiveness in the regional and international Markets.

This is because the Member States of the Community are required to recognize the quality marks of the other EAC partners and the products being traded are to be assessed based on international norms.⁴⁴⁰

The provisions of the Act confer several benefits to Member States. These include; the ability to easily share information and thus be able to deal with TBTs in a manner that is more coordinated; the general rise in the levels of trade in the region; the harmonization of the system which has resulted in the ease of reporting any TBTs and thereby leading to a drop in the number of TBTs; and the reduction in the delays experienced by traders at the border points due to the coordination of the system.⁴⁴¹

However the implementation of the Act has faced several challenges due to the fact that different States in the region are at different levels of development thereby making the

⁴³⁸ Ibid, Section 6.

⁴³⁹ ISO UNIDO ‘Fast Forward National Standards Bodies in Developing Countries’, (2013)Second Edition, -01/2 500 ISO Central Secretariat,19-22 © ISO <Web www.iso.org> accessed 27th January 2014.

⁴⁴⁰ Section 2(2) of the EAC SQMT Act.

⁴⁴¹ W Musinguzi ,’The Role of Standards in Facilitating Trade’<www.-minicom.gov.rw/the_role_of_standards_in_facilitating_trade> accessed 7th October, 2013.

development of quality infrastructure difficult.⁴⁴² Furthermore only very few accredited laboratories exist in the region and these have very limited scope of operating. This compromises on implementation of standards and makes the process of conformity assessment very challenging.⁴⁴³ This argument is supported by the Kenya National Accreditation Services (KENAS) which has observed that since conformity assessment is a voluntary service very few organisations see the need for acquiring the certificate of conformity⁴⁴⁴

The other challenges experienced in the region include: poor awareness of product quality marks and the SQMT Act in general; existent of NTBs which arise from standards; cases of non-compliance with standards which has had a negative effect to the movement of goods across borders; existence of multiple regulatory bodies especially at the national level which has had a negative effect to cross-border trade; lack of awareness by traders, of the locations of the certification bodies; lack of clear control mechanisms at the borders to ensure that substandard goods do not enter the country which can be attributed to overlaps in the mandates of the different national regulation bodies; development of standards by some Member states which are not known to the other countries and thereby causing confusion among the Member states.⁴⁴⁵ These challenges reveal the fact that the entire East Africa region, suffers from lack of a comprehensive NQRI and it is imperative for Kenya to therefore implement a comprehensive NQRI to enable her tackle these challenges.

4.4 Status of the Quality Regulatory Infrastructure in Kenya

The NQRI in Kenya appears to be fragmented, non-compliant with WTO, TBT and SPS Agreement requirements.⁴⁴⁶ The various regulatory agencies suffer from overlapping mandates⁴⁴⁷ which cause them to stand on “each other’s feet” in trying to regulate the

⁴⁴² Ibid.

⁴⁴³ S M Ochieng ‘The Role of KENAS in Quality Assurance’(2014)Paper presented during the Standards Tribunal’s workshop in Mombasa 17th to 21st March 2014 (unpublished).

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ National Quality Policy (April 2012, Second Draft), (*Support to the Kenya Bureau of Standards (KEBS) In Reform of Standards Regulatory Framework and Capacity Building for SQMT Activities*) 7.

⁴⁴⁷ For example, KEBS, NEMA and KEPHIS all regulate products to ensure that they are not harmful to the environment and are safe for use. They all have inspectors at border entry points.

quality of products entering or leaving the Kenyan market. This creates bureaucratic instability for suppliers and raises complaints from traders.⁴⁴⁸

Furthermore the use and application of sub-standard products and services in the local market is a serious threat to the health and safety of consumers in Kenya and this is due to the fact that Kenya lacks a comprehensive NQRI, to ensure supply of safe and quality products in the market.⁴⁴⁹ This has resulted in a clamor from various stakeholders, including KEBS, for the review, strengthening and harmonizing of all standards related laws that impact on health, safety, economic and environment protection.⁴⁵⁰

A scrutiny of various legal instruments regulating standards and quality assurance reveals that there lacks a harmonized NQRI among the various regulatory bodies in Kenya.

4.5 The policy Framework for Standardization in Kenya

The Constitution of Kenya has provided for the protection of the consumer. The application of an effective NQRI in the country will therefore support this constitutional protection for the consumer in regard to quality of the products and services.⁴⁵¹ The Constitution provides inter alia that Consumers have the right to:

“... goods and services of reasonable quality; information necessary for them to gain full benefit from goods and services; and to the protection of their health, safety, and economic Interests”

This protection for the consumer is further captured by the Kenya Vision 2030.⁴⁵² The Vision envisages as a priority issue, the development of relevant and enforceable laws and regulations in relation to standards, technical regulations, and conformity

⁴⁴⁸ Ibid, 7.

⁴⁴⁹ L.Ikonya ,'KEBS' Role in the Implementation of the WTO TBT Agreement'(2012) 14 The Benchmark. The official magazine of the Kenya Bureau of Standards, 8.

⁴⁵⁰ Ibid.

⁴⁵¹ Article 46 Constitution of Kenya 2010.

⁴⁵² This is a blue print long term plan for economic, social and political transformation of Kenya into a Medium income industrializing country by the year 2030.

assessment. This shows an intention to implement the TBT and SPS measures under the WTO/GATT trading system.⁴⁵³

Further, the government of Kenya has developed several policy measures which are meant to improve the quality of products been produced in Kenya. Among these policy measures, is the National Industrialization Policy Framework for Kenya.⁴⁵⁴ The policy is expected to create and ensure a level playing field that facilitates fair competition by guarding against infringement of Intellectual Property Rights, and supply of counterfeits and substandard and second hand goods.

In order, therefore, to enhance standards and quality infrastructure, the government is required to facilitate the provision of internationally recognized standards, measurement and conformity assessment solutions through the following measures; fast tracking the harmonization and implementation of EAC and COMESA common quality standards and EAC Anti-Counterfeit Bill; establishing the Kenya National Standards Inspectorate to replace the Anti-Counterfeit Agency (ACA); establish the Kenya Intellectual Property and Standards Tribunal by merging ACA, IPT and Standards Tribunal; develop a National Quality, Standards and Anti-counterfeit Policy.

The policy recognizes the responsibilities of importers, exporting countries, shipping lines, clearing and forwarding agents and government agents with respect to substandard, counterfeit and illegal goods imported into Kenya. The policy proposes to put in place graduated and progressive standards for local Small Medium Industries and; to harmonize and streamline levies charged by the regulatory agencies. The policy therefore acknowledges that the regulatory infrastructure in the country is in need of reengineering so as to take into account the principles of international trading system especially in regard to quality assurance.

⁴⁵³ Support to the Kenya Bureau of Standards (KEBS) in Reform of Standards Regulatory Framework and Capacity Building for SQMT Activities Original Title: “Revised Standards Bill “New Proposed Title: “Standards, Metrology and Conformity Assessment Bill”(July 2012, Sixth Version).

⁴⁵⁴ Republic of Kenya Ministry of Industrialization, *National Industrialization Policy Framework for Kenya* date: 2011-2015.

Another policy regulatory framework is the National Trade Policy of Kenya.⁴⁵⁵This policy aims to make Kenya an efficient domestic market and export led globally competitive economy. Further the policy's objectives include; facilitating Kenya's transformation into a competitive export led economy, enhance regional integration and widen participation in both domestic and international trade.⁴⁵⁶This policy recognizes the fact that standards play an important role in ensuring the quality and safety of products in the market and therefore notes the importance of participation by the various players in the formulation of the standards. The policy further recognizes that domestic institutions, tasked with the enforcement of standards, have inadequate capacities and therefore need to be strengthened.

The policy further aims to enhance compliance with international standards requirements.⁴⁵⁷This will be done through the following policy actions; develop institutional capacities to improve compliance with standards and Technical Regulations, customs administration; establish collaboration between standards bodies and institutions of higher learning; upgrade the capacities of institutions dealing with standards; harmonize local standards with regional standards; benchmark trade facilitation institutions; and implement best practice programs.

The Policy identifies several institutions to be responsible for development of standards. These include the Ministry of agriculture, Kenya Plant Health Inspectorate Services, Ministry of Environment, Kenya Bureau of Standards, Ministry of Trade, National Standards Council and the Kenya National Accreditation Services. From the foregone it is clear that the trade policy supports the argument of this research, that, the implementation of an effective quality regulatory infrastructure can lead to the production of goods and services in the country which are able access international markets.

⁴⁵⁵ Republic of Kenya, Ministry of Trade *National Trade Policy* 2010, 34.

⁴⁵⁶ Ibid, 34.

⁴⁵⁷ Ibid, 34.

4.6 The Legal Framework for Standardization in Kenya

There exist in Kenya several statutes which regulate the quality of goods and services in the country. This section of the research discusses some of these statutes with a view of demonstrating that the various quality regulatory institutions have overlapping and unclear mandates. It will show how the said institutions do not comprehensively regulate the quality of goods and services in the country and therefore do not comply with the WTO-TBT/SPS and thus act as non-tariff barriers to trade.

One of the statutes that control quality, is the Environmental Management and Coordination Act of 1999(EMCA).⁴⁵⁸ This is an Act of Parliament which makes provision for the establishment of an appropriate legal and institutional framework for the management of the environment.⁴⁵⁹ Since one of the objectives of WTO is the protection of the environment, consequently, it can be concluded that the EMCA, upholds the principles of WTO as far as the protection of the environment is concerned.

According to the Act a standard is described as the limits of discharge or emissions established under the Act or under regulations made pursuant to the Act or any other written law.⁴⁶⁰EMCA establishes the Standards and Enforcement Review Committee.⁴⁶¹The mandate of the committee is to advise the National Environmental Management Authority on how to establish criteria and procedures for measurement of water quality standards;⁴⁶²air quality standards;⁴⁶³ standards for the handling, storage, transportation, segregation and destruction of any waste;⁴⁶⁴ pesticides residue in food, agriculture products and animal feeds;⁴⁶⁵ minimum standards for emissions of noise necessary to preserve and maintain public health and the environment;⁴⁶⁶ and standards

⁴⁵⁸ The Environmental Management and Co-ordination Act, 1999 No 8 of 1999.

⁴⁵⁹ Ibid preamble.

⁴⁶⁰ Ibid section 2.

⁴⁶¹ Ibid section 70.

⁴⁶² Ibid section 71.

⁴⁶³ Ibid section 78.

⁴⁶⁴ Ibid section 86.

⁴⁶⁵ Ibid section 94.

⁴⁶⁶ Ibid section 101.

for the setting of acceptable levels of ionizing and other radiation in the environment.⁴⁶⁷
The Act creates liability for any contraventions of the regulations set under the Act.

The Act therefore gives power to the committee to develop guidelines on standards in the protection of the environment. The environment encompasses several sectors which are in the domain of other agencies, for example, land is in the ministry of agriculture, industries are in the domain of KEBS and mining is under the Radiation Board of Kenya. This creates an overlap of mandates and hence bureaucracy because entrepreneurs must comply with several rules, regulations and standards before engaging in production. This leads to barriers to trade which is contrary to WTO principles.

Another Act of Parliament that deals with the implementation of the TBT/SPS measures in the country is the Plant Protection Act.⁴⁶⁸ The Act makes provision for the prevention of introduction and spread of disease and destructive pests to plants. In order to prevent the introduction of pests and diseases, the Act provides that the inspector and his assistants may enter any land or building other than a dwelling house at all reasonable hours for the purpose of discovering pests or diseases in any plant, and of ascertaining whether any orders of inspection have been complied with.⁴⁶⁹ The act implements the GATT/SPS measures in regard to protection of safety, health and life of human, animal, plant and environment. However it does not expressly refer to this international regulatory regime.

The Act also provides that the Minister of agriculture may prohibit, restrict or regulate the importation and exportation of any plants and soil, packages, coverings or wrappings thereof and of any article or class of articles, whether of the nature similar to plants or not, and of any animals or insects likely to infect any plant with any pest or disease. The Act creates several regulatory agencies which implement the GATT/ SPS measures in the country.

⁴⁶⁷ Ibid section 104

⁴⁶⁸ Chapter 324 of the Laws of Kenya.

⁴⁶⁹ Ibid, section 5.

Among these agencies is Kenya Plant Health Inspectorate Services (KEPHIS).⁴⁷⁰ KEPHIS was established to be vigilant for the Government, business sector, scientists and farmers on all matters related to plant health and quality control of agricultural inputs and produce. Through the activities of KEPHIS, the introduction of plant pests, diseases and noxious weed into Kenya is prevented or delayed.

All phytosanitary measures are based on international standards such as those of the International Plant Protection Convention (IPPC) and World Trade Organisation (WTO) Agreement on Sanitary and Phytosanitary (SPS) regulations and guidelines. The Plant Protection Act,⁴⁷¹ the suppression of Noxious Weeds,⁴⁷² and the Agricultural Produce (Export) Act⁴⁷³ provides the legal framework through which the authority carries out phytosanitary regulation service.

KEPHIS also undertakes inspection of the plants and plant products at the points of entry/exit. Inspection of all material for export is done to ensure compliance to the recommended quality standards. The plant inspectors ensure that the plant produce being exported or imported into the country is of high quality. Phytosanitary certificates are issued for export consignments meeting the quality standards. Plant materials failing to meet the standards are destroyed or prohibited from leaving or entering the country.⁴⁷⁴ An entrepreneur must comply with these requirements and also with several other regulatory requirements. However not many producers will be aware of all these requirements and they may fail to comply with the law thereby rendering their products non-compliant with the WTO/TBT/SPS measures and hence uncompetitive in the international markets.

Further, the Food, Drugs and Chemical Substances Act⁴⁷⁵ makes provision for the prevention of adulteration of food, drugs and chemical substances. It makes provisions in respect to standards of food, drugs and chemical substances. The Act creates the

⁴⁷⁰ Rule 2, Plant Protection (Importation of Plants, Plant Products and Regulated Articles) Rules, 2009.

⁴⁷¹ Chapter 324 Laws of Kenya.

⁴⁷² Chapter 325 Laws of Kenya.

⁴⁷³ Chapter 319 Laws of Kenya.

⁴⁷⁴ <http://www.kephis.org/services-topmenu-29/inspection-operations-topmenu-31/phyto-sanitary-services-topmenu-32.html> accessed 12th April 2014.

⁴⁷⁵ Chapter 254, Laws of Kenya.

Kenya Medical Board which controls the distribution of drugs in Kenya. The provisions of the Act create overlaps with other laws, and in particular the Standards Act, as the former Act provides that the enforcements of standards should be dealt with in accordance with the Act. Clearly this is an overlap with the mandates of KEBS which is tasked with ensuring compliance with standards in Kenya.

For instance the Act gives power to the Minister and to the Board to develop and enforce standards of food, drugs and chemicals. On the other hand KEBS has the mandate to develop standards and also to enforce their compliance. This is an additional cost on the manufacturer since the two bodies have to grant the relevant permits. It also means that an offender may be penalized by various agencies under the different laws. The research argues that this is a Non Tariff Barrier to trade.

Further the newly promulgated Agriculture, Fisheries and Food Authority Act⁴⁷⁶ was enacted; to consolidate the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Kenyan Constitution and for connected purposes.⁴⁷⁷

The Act establishes an authority to be known as the Agriculture, Fisheries and Food Authority. The Authority is required, in consultation with the county governments, to administer the Crops Act, and the Fisheries Act in accordance with the provisions of these Acts and promote best practices in, and regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural and aquatic products excluding livestock products as may be provided for under the Crops Act N0.16 of 2013 Laws of Kenya, and the Fisheries Act Chapter 378 Laws of Kenya.⁴⁷⁸

⁴⁷⁶ Act No. 13 of 2013 The act was assented to on 14th January, 2013 and commenced on 25th January, 2013.

⁴⁷⁷ The preamble of the Agriculture, Fisheries and Food Authority Act no.13 of 2013.

⁴⁷⁸ Ibid Section 4.

The provisions of this Act are unclear since they refer to several other Acts and it may not be clear what is provided in the other Acts without referring to them. Entrepreneurs may not be aware of the regulations in these Acts which may affect their production activities. This leads to bureaucracy especially taking into account that the Act repeals several former Acts including the Agriculture Act which vested the Minister with power to make standards for crops and animal products. It is not clear who has been vested with this power currently. The WTO-TBT-SPS measures provide that states have to be transparent in regard to any technical regulations which may act as a barrier to trade. The research posits that this new law may create bureaucracy and act as a barrier to trade and hence hinder expansion of international trade.

On its part, the Kenya Accreditation Bill 2013 seeks to provide for an internationally recognized and effective accreditation and quality monitoring system for Kenya by establishing the Kenya Accreditation Services (KENAS) and to recognize KENAS as the sole National Accreditation Body for the accreditation of Conformity Assessment Bodies. KENAS has been assigned the role of participating in the formulation of regional and international guidelines and standards to facilitate the accreditation process. The bill seeks to set an accreditation committee consisting of various government departments. The main role of this committee will be to determine the accreditation marks or symbols and how the accreditation marks or symbols and certificates shall be used by accredited bodies.

It is noteworthy that KEBS also carries out conformity assessment and testing services and issues compliance certificates. This may to a large extent lead to an overlap of mandates of the two institutions and thus resulting in bureaucracy and hence creating barriers to trade. A harmonized regulatory framework would be able to define and clarify their mandates. It is noteworthy that, KENAS been an offshoot of KEBS, is guided by similar principles as KEBS in the regulation of quality and does not have its own law but applies the rules formulated under the Standards Act. Further the proposed bill does not take into account the international law principles which this study has discussed in previous sections. This bill is still undergoing scrutiny and discussions by

the various stakeholders and is yet to be introduced into parliament to be pulmagated into law.

4.5.9 A Critical Appraisal of the Standards Act

The standards Act ⁴⁷⁹ is one of the major Acts which deal with quality regulation in Kenya. As a matter of fact the Act ought to be the bedrock of quality regulatory infrastructure in Kenya as its name suggests. The objectives of this Act include; the promotion of Standardization and specification of commodities; provision for the Standardization of commodities and codes of practice; establishing a Kenya Bureau of Standards; defining its functions and providing for its management and control.

The Standards Act in section 4 establishes the Kenya Bureau of Standards, whose roles include; promotion of Standardization in industry and commerce; making arrangements or providing facilities for the testing and calibration of precision instruments, gauges and scientific apparatus, for the determination of their degree of accuracy by comparison with standards approved by the Minister on the recommendation of the Council, and for the issue of certificates in regard thereto; making arrangements or providing facilities for the examination and testing of commodities and any material or substance from or with which and the manner in which they may be manufactured, produced, processed or treated; to control, in accordance with the provisions of this Act, the use of Standardization marks and distinctive marks; the preparation, framing, modification or amendment of specifications and codes of practice; encouraging or undertaking educational work in connection with Standardization; assisting the Government or any local authority or other public body or any other person in the preparation and framing of any specifications or codes of practice.

The bureau should also provide for co-operation with the Government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards; provide for the testing at the request of the Minister, and on behalf of the Government, of locally manufactured and imported commodities with a view to determining whether

⁴⁷⁹ Chapter 496 of the Laws of Kenya.

such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description.⁴⁸⁰

The Act provides for the National Standards Council which shall be responsible for the declaration of standards set by the Kenya Bureau of Standards.⁴⁸¹ The Council is also responsible for the specification of Standardization marks for commodities. The Act further provides for penalties for failure to comply with the provisions of the Act.⁴⁸² The Act also provides for a Standards Tribunal (ST) whose role is to adjudicate on matters of persons aggrieved by decisions or orders of KEBS or the National Council.⁴⁸³ Other provisions include Standardization marks,⁴⁸⁴ procedures for granting and cancelling licenses,⁴⁸⁵ powers of inspectors,⁴⁸⁶ destruction of goods which do not comply with standards,⁴⁸⁷ and other miscellaneous matters.

In Section 9 the Act gives the Council power to declare any specification or code of practice framed or prepared by the Bureau to be a Kenya standard. On the other hand, section 21 states that where there is a conflict between the provisions of a specification declared to be a Kenya standard under section 9 (1) and a specification made or declared under any other written law the Kenya standard shall prevail. This means that standards developed by the bureau have been given a higher value than those developed by others agencies in Kenya under section 9 and section 21⁴⁸⁸ this in an attempt to harmonise standards development in Kenya. However this attempts fails terribly since the Act does not incorporate the intentions of WTO, COMESA or EACSQMT Law in regard to harmonization of national standards with international standards.

Consequently the Standards Act is seen as largely out dated since it does not provide clear definitions of all terms or principles used in the sector which govern standardization, in line with the WTO TBT and SPS Agreements, as well as the

⁴⁸⁰ Section 4 of the Standards Act.

⁴⁸¹ Ibid, Section 6 and 9.

⁴⁸² Ibid, Section 15.

⁴⁸³ Ibid, Section 16.

⁴⁸⁴ Ibid, Section 10.

⁴⁸⁵ Ibid, Section 10 A.

⁴⁸⁶ Ibid, Section 14.

⁴⁸⁷ Ibid, Section 14 A and 14 B.

⁴⁸⁸ The standards Act, chapter 496 of the Laws of Kenya.

EAC SQMT Act of 2006 or the COMESA Treaty. Further it does not cover expressly issues of conformity assessment. It also lacks enforcement provisions in relation to the control at the border or within the territory of the Republic of Kenya.⁴⁸⁹ All these issues are seen as a serious drawback to the overall standards setting, enforcement, compliance and conformity assessment legal framework in the country and lead to the creation of barriers to trade and consequently affect economic development in Kenya.⁴⁹⁰

Though the standards Act has undergone a number of revisions and amendments (namely, in 1980,⁴⁹¹ 1988,⁴⁹² 1989,⁴⁹³ 2001,⁴⁹⁴ 2002⁴⁹⁵ and 2004;⁴⁹⁶) nevertheless stakeholders have observed that there is still a need for a new comprehensive and updated revision of the Standards Act which takes into account the current international and regional commitments of Kenya.⁴⁹⁷

The foregone discourse reveals that the regulatory agencies established under various laws in Kenya have conflicting mandates which results in confusion to the entrepreneurs and thus creates technical barriers to trade thereby contravening the WTO-TBT/SPS Agreements. This is a contrast to the South African Act which has attempted to harmonise its quality regulatory legal framework with the international law.

Since the world relies on various standards and technical regulations to carry out trade-related activities; Kenya must therefore adhere to a culture of Standardization through the reengineering of its quality regulatory legal framework. Though quality infrastructure refers to all aspects of Standardization, metrology, testing and quality management, including certification and accreditation; however the Kenya Standards Act does not take into account this definition and therefore needs to be amended so as to

⁴⁸⁹ This has been observed by Trade Mark East Africa (TMEA) project consultants who have been tasked, by KEBS, to review the Standards Act and to draft a National Quality Policy and a Technical Regulation Act.

⁴⁹⁰ Ibid.

⁴⁹¹ Act no 5 of 1980.

⁴⁹² Act no 13 of 1988, Act no 1 of 1988.

⁴⁹³ Act no 1 of 1989.

⁴⁹⁴ Act no 6 of 2001.

⁴⁹⁵ Act no 2 of 2002.

⁴⁹⁶ Act no 7 of 2004.

⁴⁹⁷ Trade Mark East Africa (TMEA) project consultants who have been tasked, by KEBS, to review the Standards Act and to draft a National Quality Policy and a Technical Regulation Act.

take into account these elements of a comprehensive NQRI. This will facilitate Kenyan products to be competitive in the regional and global market.

4.7 Conclusion

As observed by the ISO Report, the fact that different quality regulatory agencies are hosted by different ministries in a country makes their collaboration more difficult since every action must be approved by different ministry officials, thereby creating bureaucracy.⁴⁹⁸ This fragmentation of the administration of technical regulations and SPS measures can be a major issue in both developing and developed economies. Where several ministries and agencies are involved, each is responsible for regulations in its own area thereby causing overlaps in their mandates and making the coordination between the ministries and other agencies to be difficult.

Consequently, in this state of affairs an exporter may find it difficult to obtain the necessary information which he needs to comply with quality regulations.⁴⁹⁹ Eventually such an exporter encounters difficulties in accessing international markets. However as the report has posited, this situation may be alleviated through the implementation of a comprehensive National Quality Regulatory Infrastructure which enables collaboration between various agencies, the quality national enquiry points and the National Standards Bureaus in a country.⁵⁰⁰

As the chapter has discussed, Kenya faces these challenges and therefore needs to develop its quality infrastructure capacity so that it can be able to harmonize its NQRI with the regional and international systems. A comprehensive NQRI ensures the promotion of a culture of quality and hence an increase in competitiveness of products and services in the regional and international markets. The research argues that it is important to formulate and implement a legal framework which is harmonized and clear enough so as to avert overlaps between the implementing agencies.

⁴⁹⁸ ISO/ITC 'Building Linkages for Export Success', <2010 International Organization for Standardization www.iso.org and International Trade Centre (ITC) www.intracen.org>.57. Accessed 27th January, 2014.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid 57.

CHAPTER FIVE

5.0 Conclusion and Recommendations

This chapter contains a summary of the study and the conclusion derived from studying various documents, policies, legal instruments, journals, books and from the websites of the institutions identified in the sample population. It also proposes recommendations on the solutions which Kenya may adopt in implementing a comprehensive NQRI in order to enable Kenyan goods and services become competitive in regional and international markets and hence lead to economic development.

5.1 Conclusion

This research has observed that the lowering of the imbalance in trade among the countries of the world was one of the reasons for the establishment of the WTO. The WTO incorporated all the major provisions of its forerunner, the GATT relating to developing countries, including the 'enabling clause'. The clause established a system which is characterized by the generalized system of preferences, whereby developed countries offer non-reciprocal preferential treatment, for example the zero or low duties on imports to products originating from developing countries.⁵⁰¹ Such countries unilaterally decide which countries and which products to include in their schemes. The clause also established the global system of trade preferences. This is where developing countries that are members exchange trade concession among themselves. It also applies to regional arrangements among developing countries. The GATS, just like the GATT, also granted developing countries such preferential treatment as provided under the agreement.⁵⁰²

However scholars have posited that the new trading system does not fully take into account the needs of the developing countries. According to them the new standards proclaimed within the WTO regime do not provide developing countries with similar economic options that the industrialized States resorted to in the nineteenth and early twentieth century so that they could promote their own development and

⁵⁰¹ A Cassese, *International Law*, (Second Edition Oxford University Press United States of America, 2005).

⁵⁰² Ibid.

industrialization.⁵⁰³ Such options include trade barriers, export or import subsidies, tariffs and other such measures.⁵⁰⁴

In the light of the above discussion it is clear that developing nations due to their economic structure and conditions should be given international economic relations which are different from the liberal, free-market approach taken and advocated by industrialized States.⁵⁰⁵ For instance developing countries should be allowed to enjoy 'discriminatory treatment'. Cassese pinpoints the areas which should be addressed so as to afford developing nations preferential treatment; stabilization of the price of primary commodities, so as to avoid price fluctuations and decline, to the detriment of the producers; trade preferences and concessions, particularly trade barriers on their imports and 'preferential treatment for their exports, notably the most-favoured-nation treatment without giving any concession to developed countries in return.⁵⁰⁶

Further Cassese has observed that developing countries need good governance in the form of a better public administration and more efficient State institutions because as he points out they lack truly democratic processes. This is evidenced by frequent corruption, both among civil servants and politicians; rampant conflicts or tensions between ethnic, tribal, or religious groups. Such States tend to choose inadequate economic policies. All this creates conditions unfavorable to foreign investments and private initiative.⁵⁰⁷

This study explored whether the implementation of a comprehensive NQRI in Kenya, would be able to address challenges in relation to trade experienced in the country. Further, whether such an implementation would lead to the production of quality

⁵⁰³ Ibid.

⁵⁰⁴ Thus, for instance, the Agreement on Subsidies and Countervailing Measures prohibits subsidies normally used by developing countries, whereas it exempts from the prohibition agricultural subsidies used by developed states. Furthermore, the Agreements on Trade-Related Aspects of Intellectual Property (TRIPs) has been seen to favour technology producers and owners more than technology users and importers.

⁵⁰⁵ A Cassese, *International Law*, (Second Edition Oxford University Press United States of America 2005).

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid.

products and services which will be able to achieve competitiveness in international markets thereby leading to economic development in the country.⁵⁰⁸

The research has observed that the rapidly growing international trade as a result of globalization coupled with increasing consumers' expectations requires compliance with international standards. Such compliance is usually evidenced through an internationally recognized accreditation system of conformity assessment bodies. Consequently this research is arguing for the strengthening and the establishment of an international complaint NQRI that assists in the protection of the rights of the consumers and in the establishment of a strong and effective regulatory mechanism, and which uses accredited laboratories, certification bodies and inspection agencies in accordance with a clear set legal framework.

The study, however, observed that enterprises and manufacturers in Kenya face challenges in accessing markets in the more developed economies due to the absence of a clear and internationally recognized quality regulatory system. For instance, Kenyan fish has faced rejection in international markets.⁵⁰⁹ This was during the ban of the Kenyan fish products between 1997-1999 due to poor hygiene and sanitation standards at the points of handling in Kenya. This dealt a big blow to the fish industry in Kenya. This is a good example of how the accessibility of markets by a product can be influenced by quality standards.

The National Quality Infrastructure (NQI) in the study was taken to be the totality of the institutional framework (public or private) that requires an establishment and implementation of Standardization, metrology (scientific, industrial and legal), accreditation and conformity assessment services (inspection, testing and product- and system certification) necessary to provide acceptable evidence that products and services

⁵⁰⁸ M Kellerman, Thoughts on National Quality Policy' (Discussion paper4/ 2011. Physikalisch, Technische Physikalisch Bundesanstalt, May 2012) 11.

⁵⁰⁹ The Role of Standards under Kenya's Export Strategy the World Bank Contribution to the Kenya Diagnostic Trade and Integration Study March, 2005 41

meet defined requirements, be it demanded by authorities (technical regulation) or the market place (contractually or inferred).⁵¹⁰

The establishment of a national quality framework involves various players. This is usually done at the national level so as to ensure that there is diffusion of standards and that the goods produced in the country are of the quality that can compete at international level. Most countries have therefore developed an entire industry of service providers that specialize in the diffusion of quality and standards through the provision of quality assessments, technical assistance, information, and training services.⁵¹¹

The study observed that a national quality infrastructure is essential in breaking down technical barriers to trade; it is thus the key to the greater integration of the partner countries into the international trading system.⁵¹²

This study has endeavored to show that the quality regulatory infrastructure in Kenya faces a number of setbacks which hamper Kenya's competitiveness in international trade. These include inadequate policy and regulatory framework, inadequate quality infrastructure; weak coordination and collaboration among stake holders; low awareness among stakeholders; limited participation in regional and international standards among others.⁵¹³ All these factors cause Kenyan products and services to lack access to international markets and also to low investors' confidence.

Further the study has revealed how overlaps and unclear legislation between the various agencies involved in the quality regulation in the country lead to unnecessary bureaucratic activities which have hampered the development and implementation a coordinated NQRI that can facilitate international trade in the country.

⁵¹⁰ Support to the Kenya Bureau of Standards (KEBS) In Reform of Standards Regulatory Framework and Capacity Building for SQMT activities; Proposed National Quality Policy (July 2012, Sixth Version from the Experts team).

⁵¹¹ J Luis and Others, 'Quality Systems and Standards for a Competitive Edge' (2007) World Bank Report).

⁵¹² D Sektorkonzept' MNPQ', (July 2004) Federal Ministry for Economic Cooperation and Development, Division of Development Education and Information- Bonn, < www.bmz.de > accessed 22nd November 2013.

⁵¹³ National Quality Policy (April 2012, Second Draft), (*Support to the Kenya Bureau of Standards (KEBS) In Reform of Standards Regulatory Framework and Capacity Building for SQMT activities*) 7.

The study also discussed how the lack of a Standardization culture prevails in Kenya thus causing business people to use tactics to circumvent the laws.⁵¹⁴ This is because Kenya has a low level of development and hence the populace has low incomes, which leads to a great demand of low priced and low quality goods which at times do not comply with the set standards.

The study has observed that, although the Standards Act has undergone a number of revisions and amendments it has not cured these negative effects on the quality regulatory framework in Kenya.

All these issues are a serious drawback to the overall standards setting, enforcement, compliance and conformity assessment legal framework in the country. It may also lead to the creation of barriers to trade and consequently to negative effects on the overall development in Kenya.

The research hopes that through this study the various stakeholders would realise the importance of implementing a comprehensive NQRI. Further, that, the implementation of a comprehensive NQRI will lead to a practical application of standards by entrepreneurs which will leverage industrial development in Kenya in line with vision 2030. Further, that, the implementation of a comprehensive NQRI will lead to export enhancement and market control of product and services in accordance to national and international requirements. Finally, the study hopes that the implementation of a comprehensive NQRI will facilitate the products manufactured in the EAC Partner States to be granted free cross-border movement without further testing and certification in accordance with the EAC SQMT Act.

The objectives of the study were, to find out the role played by law in the development of a quality culture in Kenya; secondly, to find out the role Standardization plays in enhancing competitiveness of goods and services in regional and international markets and; thirdly, to find out whether a harmonized and strengthened quality regulatory

⁵¹⁴ For example, to avoid inspection at the point of entry, a person will indicate that the goods are destined to a neighboring country; that is, that the goods are on transit. However when they are cleared at the border, they will be reshipped back to Kenya.

infrastructure would lead to an effective National Quality Infrastructure that supports regional and international trade.

The hypothesis of the study was that the implementation of National Quality Regulatory Infrastructure leads to competitiveness of a country's products in the regional and international markets and such an increase in a country's competitiveness leads to increased economic development for the country. The study has shown that that law is important for development since it contributes to legal conditions that are suitable in promoting investor confidence which is a hallmark of the rule of law. This is because the rule of law that fosters human rights, property rights and honors contracts is a key parameter for investors.⁵¹⁵

The study theoretical framework was grounded on both, the Neoclassical Counter Revolution theory⁵¹⁶ and on the Endogenous theory⁵¹⁷ in showing that when the government has put in place the right policy and regulatory framework which emphasis on, free markets, export expansion, investment in human capital and ICT then, the products and services produced in the Kenyan market will be of the standards which are required in the international markets. Such products can therefore be able to compete fairly in the market and this will in turn spur economic growth in all parts of the Kenyan economy thereby leading to improvement in all the socio-economic fields of the peoples of Kenya.

This research adopted a descriptive qualitative research design. The research analysed the contents of six quality regulatory infrastructure institutions in the country. Both primary and secondary data was collected. Primary data was obtained through a study of various legal instruments dealing with quality regulatory institutions. Secondary data was obtained from books, reports, the internet, newspapers, magazines, journals, government publications, published government records and seminar presentations in workshops and seminars organized by the quality regulators in the country.

⁵¹⁵ H Merrymann, 'Comparative Law and Social Change on the Origin, Style, Decline & Revival of The Law and Development Movement' (1977) *American Journal of Comparative Law* 25 3 457 471-491.

⁵¹⁶ M P Todaro, *Economic Development*; (7TH edition, \new York University, Addition-Wesley)64

⁵¹⁷ *Ibid*, 77.

The research has argued that for entrepreneurs to improve on the quality of their products, they should embrace the culture of Standardization. Such a culture will enable entrepreneurs to meet the strict export requirements of major customers in international markets like Europe.⁵¹⁸ The research has, therefore established the fact that there is a need for Kenya to implement a comprehensive NQRI so as address the highlighted setbacks to the quality regulatory infrastructure in the country.

Among the suggested measures are the revision of laws so that they can be harmonized with the regional and international laws; harmonization of national laws so as to remove overlaps from different laws. Further there should application of MRA and MOUs between Kenya and other States for this will lead to recognizing products from Kenya by other States. Kenya should exploit the concept of preferential treatment and enter into agreements with other states so as to get preferential treatment of the Kenyan goods in their markets.

The Regional trade regimes should also be exploited by Kenyan entrepreneurs, e.g. COMESA and EAC in order to enhance trade between Kenya and other countries in these regional blocs. The regional blocs are said to be home to millions of people and are capable of providing the much needed market for the Kenyan goods.

Further the concept of liberalization of trade and accessing markets internationally causes countries to ensure that their products are competitive enough to access these international markets. This eventually leads to economic development. This requires strict adherence to standards. Consequently the more quality goods and services access international markets, the more such a country achieves economic development. This is because standards have been shown to lead to skills transfer and technological development from developed countries to less developed countries. Such less developed countries adopt new the skills and technology and thereby leading to their development.

⁵¹⁸ KEBS 'Editorial', The Benchmark the official magazine of the Kenya Bureau of Standards April 2012, 11.

5.2 Recommendations

The research has shown that the changing economic policy environment prompted by liberalization and privatization in Kenya along with globalization of trade, calls for a strong standards and quality infrastructure that supports industry, trade, environment and consumer's health and safety both in the domestic and the export markets. In order for the products and goods produced in Kenya to gain competitiveness and access to the domestic, regional and international markets and subsequently for the country to achieve economic development, this study makes the following recommendations.

A new Standards Act should be enacted. The enactment of a new Act will enable the country to achieve high national quality objectives that ensure that goods and services emanating from or traded in Kenya are designed, manufactured and supplied in a manner that matches the needs, expectations and requirements of the purchasers and consumers as well as the regulatory authorities in the local as well as in the export markets. Such a new Act, should provide for the agencies created for ensuring compliance with standards, to operate under one legal framework in order to enable more coordination and efficiency among them. This will lead to the removal of overlaps in the mandates of implementing agencies.

The legal and institutional quality framework in Kenya needs to be updated and made WTO-TBT / SPS compatible. This would address issues of quality promotion based on relevant international standards and principles, such as the use of science, risk assessment, precautionary principle, transparency, openness and coordination.⁵¹⁹

Further the principle of referencing standards and technical regulations in the national laws should be adopted in the Kenyan legal drafting. This will call for revising relevant legislation which deals with standards and technical regulations so as to take into account the required WTO-TBT/SPS measures. For instance some Acts of parliament have already been revised and have taken these measures into account.⁵²⁰

⁵¹⁹ The government had hired consultants to develop a new legal regime for quality assurance in the country.

⁵²⁰ The Plant Protection Act Chapter 324 of the Laws of Kenya.

The quality legal framework in Kenya should be updated so as to provide for effective control structures. These structures include inspection and laboratory services; this can be done through the enhancement of the powers and duties of inspectors who carry out surveillance in matters of quality assurance under the various laws in the country. It also involves the streamlining and strengthening of all quality inspection services in the country. These include national regulatory, accreditation and certification infrastructure. Such control structures will protect the environment, health and safety of the consumers and improve the quality of imports. It will facilitate trade, enhance export, and accelerate economic development.

The law should provide for the establishment of a National Quality Institute. Its role would be to place all the efforts in quality promotion work under one administrative body. This would contribute to the economic development of Kenya by providing a sound regulatory foundation for domestic and international trade in quality goods and services. Such an institute will facilitate the upgrading of technology through research and development in key sectors and support the development of research institutions.⁵²¹

The international law principles of Harmonization and Mutual Recognition of Standards should be encouraged in the country since the lack of harmonized product standards creates barriers to trade.⁵²² The full harmonization of products standards in the region would reduce the cost of re-testing and re-certification of products since a product tested in one of the partner states would be accepted in the markets of the other trading partners.⁵²³ Further common standards lower the information costs faced by consumers and increase their confidence about the quality of imported products; this also applies for business-to-business relationships, where harmonization enhances communication effectiveness and also allows compatibility between imported and domestically-produced products.

⁵²¹The TMEA project have suggested that such a National Quality Institute will ensure the establishment of a quality culture in industry.

⁵²² For example, in Kenya, vehicles older than eight years cannot be imported to the country, whereas in Tanzania there is no limit and the other countries allows up to 10 years.

⁵²³ KEBS Editorial The Benchmark the official magazine of the Kenya Bureau of Standards July 2012 15 12.

Rationalizing and streamlining of all quality regulation agencies should be done in accordance with the new measures which will be recommended by the new laws and regulations. This will help to avoid duplication, fragmentation, overlaps, gaps and conflict of interest in the quality infrastructure as well as strengthen standards enforcement and deterrent mechanisms.⁵²⁴ This will enhance compliance with the WTO TBT and SPS Agreements coordinate the activities of the various institutions dealing with technical regulations and consequently facilitate international trade.

There is a need therefore to put in place a National Quality Policy framework to link up the entire quality regulation regime in Kenya. It will link up government policies with market-related service provision. The policy will facilitate the establishment of a single National Quality Infrastructure which will deal with the technical competency issues as well as the required legal checks and balances.

The legal framework should provide for the adoption of implementation of a sectoral approach to quality management and control similar to that which has been applied in other sectors in the country (for instance, Governance, Justice Legal Order and Security sector (GJLOS)). This will lead to the development of the quality sector and to the control and enforcement functions of various competent authorities of the government. This will further assist the work of different ministries, and government agencies in relation to quality controls and inspection to be properly co-ordinated with well-developed communication and exchange of information. It will also clarify mandates and elaborate a proper division of work regarding the administration of WTO/ TBT SPS / measures by various governmental agencies which is presently lacking.

Further, in line with the public-private partnerships approach to development, independent quality assurance institutions should be established and given commercial freedom by allowing them to provide services at market-oriented prices. These may include public-private partnerships, or private-not-for-profit organisations. This will

⁵²⁴ National Quality Policy (April 2012, Second Draft), (*Support to the Kenya Bureau of Standards (KEBS) In Reform of Standards Regulatory Framework and Capacity Building for SQMT Activities*) 7.

establish an effective coordination and collaboration mechanism with the private sector, international development agencies, NGOs, consumer organisations and civil society.

On the other hand the government should implement measures of good governance in order to integrate better with the international community. The establishment of a comprehensive quality infrastructure is one such measure that contributes greatly to good governance. This can be done when the Government develops the appropriate quality policy framework which will help the government to re-engineer its quality infrastructure and the technical regulation regimes. It will also help to determine the proper division of the responsibilities between various agencies and hence address the issue of overlapping mandates. When transparency in the governance structure is ensured and guaranteed trust is built among various players. Another way of promoting good governance is to establish a more appropriate legal framework for the development and publication of national standards and technical regulations.

Regulations should be made which ensure that industries and other organisations adopt quality improvement practices in their day-to-day activities, for instance, through the adoption of ISO standards. A good example is the regulation of the implementation of CSR activities by industries and organisations so as to require the carrying out public awareness campaigns in order to promote the use of standards. Similarly, the Government should put measures in place that support both the public and private sector organisations to develop and implement best management practices according to national and international standards that ultimately help in enhancement of the economy.

On the other hand it is important to create a quality culture which will encourage local consumers to demand high quality products and services. This may be done through the development of national quality policy strategies which include; supply of products and services to the public which are in accordance with national or international standards; creation of an environment by the government that allows initiatives which promote the best quality practices in all sectors of the economy e.g. training and education and establishment of information centers for general public to improve the country's productivity; creation of public awareness and continued development of human resources, in the field of quality and to prepare Kenya industries and trade sectors to

meet the challenges of such enhanced standards and technical regulations in line with WTO/ TBT/SPS measures.

The Government should put in place mechanisms to mobilize resources from public funds, international development partners and the private sector for the implementation of a National Quality Regulatory infrastructure. This can be in form of fees, levies, grants, donations and other funds. This will support the development of new and the upgrading and restructuring of the existing, Quality Infrastructure institutions within the public sector which supports WTO/ TBT/SPS in the country.

Monitoring of the implementation of the NQRI is key to its success. Therefore there is need to grant the proposed National Quality Institute the responsibility monitoring of implementation of the national quality regulatory infrastructure in the country. The institute will supervise all the other agencies in the quality regulatory sector. This will ensure an effective implementation of a comprehensive NQRI. This is because the institute will disseminate any relevant information concerning any standardization measures undertaken by all the other agencies in the quality sector in the country. This will ensure a well coordinated national quality regulation system

Such a harmonised implementation of NQRI, will lead to a sustainable application of standards. This will support producers in the production of products, which are able to compete in the international markets. When this is achieved then the country will be able to achieve economic development and hence quality of life for the people of Kenya as envisaged in the WTO preamble.

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