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## Of Sustainable Development in Africa: Addressing the (In)Congruence of Plastic Bag Regulations with International Trade Rules

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# OF SUSTAINABLE DEVELOPMENT IN AFRICA: ADDRESSING THE (IN)CONGRUENCE OF PLASTIC BAG REGULATIONS WITH INTERNATIONAL TRADE RULES

*Regis Y. Simo\**

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## INTRODUCTION

Several aspects of the trade policies of African countries currently suffer from neglect in the legal literature. This article intends to add to the existing stream of research and fill the gap by tackling trade measures geared toward sustainable development and environmental protection in Africa, with a

particular focus on the growing body of legislation to restrict the use of plastic bags. The integration of developing countries into the global economy in general, and in the world trading system in particular, continues to resonate strongly in different constituencies. Nowhere in the world is that need to integrate as acute as it is in sub-Saharan Africa, where many countries continue to rely on development assistance.<sup>1</sup> The launch of the World Trade Organization (WTO) Doha (“Development”) Round, with developing countries’ needs and interests at the center of the work program, was an important testament to that concern.<sup>2</sup> While the negotiations are still expected to deliver on their promises to the WTO’s underdeveloped members, trade expansion has been met by enormous challenges, especially environmental degradation.<sup>3</sup>

Conscious of this threat for present and future generations, as well as the need to preserve the environment from man-induced degradation, many African countries have undertaken to ban plastic bags within their respective territories. For instance, in August 2017, Kenya enforced what has come to be known as the world’s toughest plastic bag legislation.<sup>4</sup> This move followed that of Rwanda, which had been enforcing a

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1. See generally Joseph Fosu, *Sub-Saharan Africa: The Challenge of Integration into the Global Trading System*, 10 PERSPECTIVES ON GLOB. DEV. & TECH. 115 (2011). The aftermath of the Uruguay Round signaled developing countries’ concerns about the results of trade liberalization, especially those of net food importer countries, as it was already anticipated that the generated gains would not be evenly shared. See WORLD BANK, GLOBAL ECONOMICS PROSPECTS AND THE DEVELOPING COUNTRIES 30–40 (1995).

2. The Doha Round launched in November 2001 in Doha, Qatar, with the aim of not only achieving major reform of the international trading system through the introduction of lower trade barriers and revised trade rules, but also to improve the trading prospects of developing countries. See World Trade Organization, Ministerial Declaration of November 14, 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Ministerial Declaration].

3. In fact, the conclusion of the Uruguay Round not only opened doors to implementation challenges, but also put the world trading system in front of the new realities of regionalism and the interaction between trade and the environment. See WORLD BANK, *supra* note 1, at 40.

4. The severity of the penalty associated with the prohibition has spurred extensive media coverage. See *Kenya brings in world’s toughest plastic bag ban: four years jail or \$40,000 fine*, GUARDIAN (Aug. 28, 2017), [https://www.theguardian.com/environment/2017/aug/28/kenya-brings-in-worlds-toughest-plastic-bag-ban-four-years-jail-or-40000-fine?CMP=share\\_btn\\_link](https://www.theguardian.com/environment/2017/aug/28/kenya-brings-in-worlds-toughest-plastic-bag-ban-four-years-jail-or-40000-fine?CMP=share_btn_link).

plastic bag prohibition for more than a decade. Since then, South Africa, the Democratic Republic of the Congo (DRC), and a dozen other African countries have all joined the fight against plastic as an environmental hazard.

While the global move to regulate plastic bags is somewhat wavering,<sup>5</sup> African countries have embraced the universal concern over environmental protection in line with the objectives of the 1994 Marrakesh Agreement Establishing the WTO.<sup>6</sup> These states have implemented measures to ban, restrict, or tax the manufacture, importation, and trade of plastic bags. While some countries, like Rwanda, have banned plastic bags entirely, others, like South Africa, have instead chosen to combine the ban of thinner plastic bags with a tax on the sale and use of thicker ones.<sup>7</sup> Despite the disparity among African countries in the adoption and application of these measures, like anywhere else in the world,<sup>8</sup> the rationale for this *revolution* stems from the fact that plastic bags are used for food packaging, and therefore may pose serious human health concerns

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5. See Jennifer Clapp & Linda Swanston, *Doing Away with Plastic Shopping Bags: International Patterns of Norm Emergence and Policy Implementation*, 18 ENVTL. POL. 315 (2009). The authors also find this from-South-to-North pattern of norm adoption to be the “opposite of the patterns typically seen with international norms.” *Id.* at 318.

6. One of the objectives of the WTO is to allow its members to conduct relations in the field of trade and economic endeavour “with a view to raising standards of living . . . and expanding the production of and trade in goods and services, while allowing for the *optimal use of the world’s resources in accordance with the objective of sustainable development.*” See Marrakesh Agreement Establishing the World Trade Organization, recital 1 of pmb., Apr. 15, 1994, 1867 U.N.T.S. 154 (emphasis added) [hereinafter WTO Agreement]. On the fact that this preambular aspiration, which “explicitly acknowledges ‘the objective of sustainable development,’” informs “not only the GATT 1994, but also the other [WTO] covered agreements,” see Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, ¶ 129, WTO Doc. WT/DS58/AB/R, (adopted Nov. 6, 1998) [hereinafter Appellate Body Report, *US – Shrimp*].

7. See, e.g., Johane Dikgang, Anthony Leiman & Martine Visser, *Analysis of the Plastic-Bag Levy in South Africa*, 66 RES., CONSERVATION & RECYCLING 59 (2012).

8. See Clapp & Swanston, *supra* note 5, at 316 (arguing that the anti-plastic bags norm somehow originated from the global South on an ad hoc basis in several jurisdictions simultaneously, and were translated differently by implementing communities).

due to the residue of chemicals used in their manufacture.<sup>9</sup> Moreover, plastic bags are capable of threatening the environment, as well as animal and plant life.<sup>10</sup> Hence, safeguarding a clean and safe environment, a precondition for sustainable development, is a shared rationale across the countries concerned.

Although WTO agreements are often criticized for restraining members' policy autonomy,<sup>11</sup> countries frequently take actions to protect their environment. This paper focuses on trade measures or policies geared toward sustainable development and environmental protection in Africa. It concentrates specifically on the plastic bag laws enacted by a number of African countries to safeguard the environment and public health. As WTO members, these African countries' respective measures are capable of restricting trade and are potentially subject to challenges if not applied in a WTO-compliant manner.

This article responds to the debate on regulatory autonomy and international regulatory cooperation concerning environmental protection in Africa. It analyzes the contribution of African countries to non-trade concerns, notably the sustainable development goals of international trade law. While the focus is on Africa, the international trade implications of these measures are relevant for current or future plastic measures taken by other WTO members, whether developed or developing country-members. The imposition of such measures would be susceptible to trigger disputes, especially in the context of a

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9. See generally M. Whitt et al., *Survey of Heavy Metal Contamination in Recycled Polyethylene Terephthalate Used for Food Packaging*, 29 J. OF PLASTIC FILM & SHEETING 163 (2012).

10. U.N. Environment Programme (UNEP), *Selection, Design and Implementation of Economic Instruments in the Solid Waste Management Sector in Kenya*, at 23–24, (2005), <https://wedocs.unep.org/bitstream/handle/20.500.11822/8655/Selection-Design-Implementation-of-Economic-Instruments-Solid-Waste-Management-Kenya.pdf?sequence=3&isAllowed=y>.

11. Reduced or limited policy space is very often voiced by WTO developing-country members who generally claim that by undertaking multilateral commitments, little room is left for the pursuit of policies in the national interest. See generally Jörg Mayer, *Policy Space: What, For What, and Where?*, 27 DEV. POL'Y REV. 373 (2009). See also Sheila Page, *Policy Space: Are WTO Rules Preventing Development?*, OVERSEAS DEV. INST. BRIEFING PAPER NO. 14 (Jan. 2007).

resurgent use of environmental measures to advance industrial policies.<sup>12</sup>

It is true that African countries, which represent about one-quarter of overall WTO membership, generally have not participated in shaping the WTO dispute settlement system. Empirical studies find that developing countries' low level of exports also translates into fewer opportunities to face import trade barriers in destination countries, which could give them an opportunity to bring a complaint.<sup>13</sup> In a similar vein, this suggests that developing countries generally would not be prone to erect domestic trade barriers to protect local producers if they depend on imports to satisfy their national market. Thus, on the complainant side, a number of reasons have been cited as preventing developing countries' participation in WTO litigation. These constraints, according to Gregory Shaffer, are of three main orders: (1) lack of legal expertise in WTO law, (2) financial constraints to meet the costs associated with litigation, and (3) political economy challenges (associated with power imbalance between sometimes aid-receiving countries or

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12. See e.g. Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. U. L. REV. 401 (2014). Plastic bag regulations are susceptible to challenges because, while they may be imposed to pursue legitimate domestic environmental policies, they also restrict trade.

13. See generally Henrik Horn, Petros C. Mavroidis, & Hakan Nordstrom, *Is the Use of the WTO Dispute Settlement System Biased?*, CTR. FOR ECON. POL'Y RES. DISCUSSIONS PAPER 2340 (1999); see also Joseph Francois, Henrik Horn, & Niklas Kaunitz, *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV. ISSUE PAPER NO. 6 (2008). This conclusion, however, deserves to be nuanced. Weaker countries, by virtue of their status, also stand to face illegalities more frequently than (economically and legally) powerful countries since they (are known to) lack the capacity to retaliate. On this score, see Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 WORLD BANK ECON. REV. 287 (2005). This was corroborated by the communication of the WTO African Group in 2002 during the negotiations of the Dispute Settlement Understanding. On that occasion, the Group alleged clearly that the diminutive participation of African Members, many of which are classified as Least-Developed Countries (LDCs), "is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the [Dispute Settlement System]." See Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding*, WTO DOC TN/DS/W/15 (Sept. 25, 2002).

beneficiaries of special and differential treatment).<sup>14</sup> These reasons notwithstanding, legal capacity seems to be the most plausible one.<sup>15</sup> On the respondent side, except for Egypt and South Africa, which have appeared as respondents in a number of limited cases,<sup>16</sup> practice shows that economic size and stakes

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14. See generally Gregory G. Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 *WORLD TRADE REV.* 177 (2006). Taking the example of WTO developed-country members, such as the United States and the European Community—which, despite their armies of well-trained government lawyers, still resort to the services of private law firms, companies and trade associations—the author argues essentially that developing countries, if left on their own, cannot cope with these challenges. *Id.* at 177. The author then explores various strategies to address these challenges, including, but not limited to, institutional capacity building initiatives that also include the private sector and civil society representatives. *Id.* at 197.

15. See generally Marc L. Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? A Survey of WTO Members*, 8 *WORLD TRADE REV.* 559 (2009). Yet, the Advisory Center on WTO Law, as an international legal aid structure, was actually set up to deal with some of these legal challenges, especially expertise and the costs associated thereto. It seems to have been of great support in that sense, even though (discounted rate) access is still cited by some developing countries as a barrier. See Jan Bohanes & Fernanda Garza, *Going beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4 *TRADE, L. & DEV.* 45, 70–75 (2012).

16. See, e.g., Request for Consultations by Thailand, *Egypt – Import Prohibition on Canned Tuna with Soybean Oil*, WTO Doc. WT/DS205/1 (Sept. 27, 2000) (abandoned prior to panel's stage); Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WTO Doc. WT/DS211/R (adopted Oct. 1, 2002) (where Egypt's definitive anti-dumping measures were found inconsistent with the Antidumping Agreement, and it had to implement the panel's findings to bring its measure into conformity with its obligations); Notification of Mutually Agreed Solution, *Egypt – Measures Affecting Imports Textile and Apparel Products*, WTO Doc. WT/DS305/4 (May 25, 2005) (settled by mutually agreed solution between Egypt and the United States); Request for the Establishment of a Panel by Pakistan, *Egypt – Anti-Dumping Duties on Matches from Pakistan*, WTO Doc. WT/DS327/2 (June 10, 2005) (settled by mutually agreed solution between Pakistan and Egypt); Request for Consultations by India, *South Africa – Anti-Dumping Duties on Certain Pharmaceutical Products*, WTO Doc. WT/DS168/1 (Apr. 13, 1999) (resolved at the Consultation phase); Request for Consultations by Turkey, *South Africa – Definitive Anti-Dumping Measures on Blanketing*, WTO Doc. WT/DS288/1 (Apr. 15, 2003); Request for Consultations by Indonesia, *South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper*, WTO Doc. WT/DS374/1 (May 16, 2008) (terminated after a mutually agreed solution); Request for Consultations by Brazil, *South Africa – Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*, WTO Doc. WT/DS439/1 (June 25, 2012).



in global trade shield WTO African-country members from legal battles.

Consequently, it is likely that African countries' plastic measures, whether notified or applied in compliance with multilateral trade rules, would go unchallenged, although they can potentially be the object of disputes. Even if African countries' plastic regulations were to fare undisputed, this article's analysis informs other, more "powerful" countries (from the WTO standpoint) with similar measures that stand to be scrutinized against their commitments under WTO-covered agreements. With the foregoing in mind, Part I of this article sets the scene for WTO African-country members' plastic regulations in the framework of the apparent conflict between trade liberalization and environmental protection. Parts II through V address these measures in light of their compatibility with multilateral trade rules. Part VI concludes the review, suggesting, among others, that these measures may fare unchallenged due to the evenhandedness in their application and the developing country status of these states, even though they sometimes fail to comply with the transparency requirement of WTO-covered agreements.

## I. THE BAN OF PLASTIC BAGS IN AFRICA IN THE TRADE AND SUSTAINABLE DEVELOPMENT CONTEXT

The implementation of African countries' plastic bag regulations as environmental policies are also measures capable of restricting international trade. This is reminiscent of the trade and environment debate that surfaced in the 1990s, with a palpable tension between the competing objectives of trade liberalization and environmental protection.<sup>17</sup> This section sets the

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17. See generally Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. OF WORLD TRADE 37 (1991) (examining what he sees as a "new attitude" about the GATT in the context of the 1992 Rio de Janeiro UN Conference on Environment and Development and the emergence of the long-dormant "trade and the environment" topic); David Palmetter, *Environment and Trade: Much Ado About Little?*, 27 J. OF WORLD TRADE 55 (1993) (arguing that the apparent conflict between the goals of a cleaner environment and freer trade falls "somewhere between the non-existent and the minimal"); Matthew H. Hurlock, *Note, The GATT, U. S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV 2098 (1992) (expressing the United States' "growing impatience" with the multilateral approach to environmental protection in a context of what he sees as a lack of provisions allowing

scene for these plastic bag regulations in light of that apparent conflict.

#### *A. International Trade and Environmental Protection in Africa*

Economists consider that the liberalization of trade has a positive impact on the economy. As a major contributor to economic growth, trade also contributes its share to poverty reduction.<sup>18</sup> Yet, the benefit of growth does not come without a cost on environmental and social resources. In that context, governments engaged in sustainable development initiatives are confronted with the issue of how best to balance the challenges and opportunities of growth with the imperative of environmental protection.

While environmental issues have somehow come into the limelight of debates at the global scale, the effects of economic integration on the environment were a principal concern when the multilateral trading system was rebuilt after the Second World War.<sup>19</sup> The General Agreement on Tariffs and Trade (GATT) 1947 exception clause, notably Article XX, only includes indirect references to these effects.<sup>20</sup>

In the early 1990s, the environmentalist community feared that there could be a conflict between trade liberalization and enhanced environmental protection, especially against the backdrop of the Rio Earth Summit of 1992.<sup>21</sup> In particular,

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trade restrictions as a means of enforcing a country's environmental standards extraterritorially); Robert Howse, *The Turtles Panel – Another Environmental Disaster in Geneva*, 32 J. OF WORLD TRADE 73 (1998).

18. It is also argued that trade liberalization can directly enhance environmental protection and be a good policy tool to promote sustainable development. On this score, see Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L.J. 608, 634–36 (2000).

19. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 9 (1994).

20. General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. It should, however, be mentioned that states' familiarity with and use of trade measures to restrict trade is anterior to the GATT. See generally Charnovitz, *supra* note 17. In fact, a convention to preserve (colonial) African wildlife already recognized the need for export restriction as early as 1890. See Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in THE OXFORD HANDBOOK OF INT'L TRADE L. 505, 513 (Daniel Bethlehem et al. eds., 2009).

21. One "triggering event" was the announcement made by the United States to start negotiations for a trade agreement with Mexico. See ESTY,

some considered the ruling in *US – Tuna I*<sup>22</sup> to be an indication that GATT rules were not sufficiently responsive to environmental concerns.<sup>23</sup> On the other side of the debate, the trade community suspected that environmental matters could be used for protectionist purposes, or that environmental standards could have the effect of creating unnecessary obstacles to trade.<sup>24</sup> By the time the WTO was created in 1995, environmental issues had gained worldwide attention. This led to their inclusion in several agreements.

Indeed, besides Article XX of the GATT, which allows governments to justify measures otherwise inconsistent with the principles of GATT in order to protect human, animal, or plant life or health, the Agreement on Technical Barriers to Trade (TBT Agreement) recognizes countries' rights to adopt the products' standards that they consider appropriate for the same reasons.<sup>25</sup> Nationally pursued environmental policies fall within the scope of the TBT Agreement. Taking active steps to protect the environment, however, is beyond the WTO mandate under international law. The WTO is not, and does not aspire to become, an environmental protection organization. Its role in the "trade and environment" galaxy is strictly limited to trade policies and the aspects of environmental policies that have a significant effect on trade.<sup>26</sup> There is, however, equally nothing in the WTO Agreements requiring free trade to be accorded

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*supra* note 19, at 27–29. American environmentalists became wary about trade expansion with a developing country that may lack a certain degree of environmental awareness. *Id.* This resulted in the inclusion of environmental provisions in the trade deal that carried over to the GATT, which coincidentally was grappling with a high-profile dispute over a tuna import ban. *Id.*

22. See generally Report of the Panel, *United States – Restrictions on Imports of Tuna (US – Tuna I)*, DS21/R (Sept. 3, 1991), GATT BISD (39<sup>th</sup> Supp.) (1993) [hereinafter Report of the Panel, *US – Tuna I*].

23. See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 489, 490 (2002).

24. *Id.* at 491.

25. Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

26. See Trade Negotiations Committee, Ministerial Declaration on Trade and Environment of Apr. 14, 1994, recital 5, GATT Doc. MNT.TNC/MIN(94)/1/Rev.1, 33 I.L.M. 1267 (1994). See also Doha Ministerial Declaration, *supra* note 2, ¶ 6 (reaffirming the WTO Members' commitments to the "protection of the environment and the promotion of sustainable development").

priority over other societal values and interests that conflict or compete with free trade. In effect, the objective of sustainable development is emphasized in the WTO's founding charter, the Marrakesh Agreement Establishing the WTO.<sup>27</sup> Additionally, WTO members have entrusted the Committee on Trade and Development and the Committee on Trade and Environment to each act "as a forum to identify and debate developmental and environmental aspects of the negotiations in order to further the objective of having sustainable development appropriately reflected."<sup>28</sup>

Nevertheless, the relationship between trade liberalization and environmental protection has evolved in a conflicting and controversial manner.<sup>29</sup> The much-criticized GATT panel decision in *US – Tuna I*,<sup>30</sup> the ruling of which resulted in an outcry from environmentalists, became emblematic in the trade versus environment debate.<sup>31</sup> In that case, Mexico challenged the United States Marine Mammal Protection Act (MMPA) of 1972, as revised,<sup>32</sup> which required a general prohibition on the "taking" (harassment, hunting, capture, killing, or attempt thereof) and importation of marine mammals into the United States (US), except where an exception was explicitly authorized.<sup>33</sup> The goal of the MMPA was to reduce the "incidental kill or serious injury of marine mammals in the course of commercial fishing" to "insignificant levels approaching zero."<sup>34</sup> The US fishermen were required to use certain fishing techniques to reduce the taking of dolphins incidental to the harvesting of fish.

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27. See WTO Agreement, *supra* note 6, recital 1 of pmb. See also GATT, *supra* note 20, arts. XX(b) & XX(g).

28. Doha Ministerial Declaration, *supra* note 2, ¶ 51.

29. Professor Jackson explains why pursuing these two goals has led to a "policy discord." See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1227–28 (1992).

30. See Report of the Panel, *US – Tuna I*, *supra* note 22.

31. See Frederic L. Kirgis, *Environment and Trade Measures after the Tuna/Dolphin Decision*, 49 WASH. & LEE L. REV. 1221, 1221 (1992).

32. See Marine Mammal Protection Act of 1972, Pub. L. No. 92–522, 86 Stat. 1027 (1972), amended by Pub. L. No. 100–711, 102 Stat. 4755 (1988) and Pub. L. No. 101–627, § 901, 104 Stat. 4436, 4467 (1990).

33. Report of the Panel, *US – Tuna I*, *supra* note 22, ¶ 2.3.

34. *Id.*

Consequently, fish caught with commercial fishing technology resulting in the incidental killing or serious injury of ocean mammals were not allowed in the US customs territory. This ban affected Mexican yellowfin tuna and yellowfin tuna products that were caught with purse-seine nets. Mexico contended that these measures were inconsistent with the GATT, especially the prohibition of quantitative restrictions.<sup>35</sup> The US argued that its embargo was justified under Article XX(b) of the GATT as a measure necessary to protect the life and health of dolphins.<sup>36</sup> The US further argued that dolphins were an exhaustible natural resource and that the ban was a measure relating to its conservation pursuant to Article XX(g) of the GATT.<sup>37</sup>

The Panel sided with Mexico, reasoning that Article XX(b) limits the protection of human, animal, or plant life or health to the jurisdiction of the importing country, and not outside.<sup>38</sup> Even assuming that Article XX(b) permitted extrajurisdictional application, the Panel decided that the US failed to meet the requirement of necessity because the US had not, in the Panel's view, "exhausted all options reasonably available to it to pursue its dolphin protection objectives."<sup>39</sup> The US import ban, therefore, failed to pass the test of Article XX(b).<sup>40</sup> The US embargo equally failed the Article XX(g) test because, not only was the extrajurisdictional application of conservation policies not allowed under this provision, but also because Article XX(g) requires such a measure to be "primarily aimed at" the conservation of exhaustible natural resources.<sup>41</sup> According to the Panel, the US had "linked the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the [US] to the taking rate actually recorded for [US] fishermen during the same period."<sup>42</sup> As such, Mexico could not possibly know at what point in time its conservation policies complied with the US conservation standards. For the Panel, therefore, a "limitation on

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35. *Id.* ¶ 3.1.

36. *Id.* ¶ 3.33.

37. *Id.* ¶¶ 3.40–3.42.

38. *Id.* ¶¶ 5.25–5.27.

39. *Id.* ¶ 5.28.

40. *Id.* ¶ 5.29.

41. *Id.* ¶¶ 5.32–5.33.

42. *Id.* ¶ 5.33.

trade based on such unpredictable conditions” could not be regarded as “being primarily aimed at the conservation of dolphins.”<sup>43</sup>

The Panel’s ruling in *US – Tuna I*, finding US measures illegal from a WTO law standpoint, attracted acrimony from environmentalists. Some even accused “GATT-zilla,” the trade monster,<sup>44</sup> of being a disaster for the environment. Later, in *US – Tuna II*, the Panel arrived at substantially the same decision as the *US – Tuna I* Panel, thus confirming, in the view of environmentalists, a bias against environmental protection.<sup>45</sup> These cases set the scene for many who continue to perceive the relationship between trade and the environment to be adversarial in nature. Since then, the WTO has increasingly faced pressure to reconcile its free trade agenda with mounting requests to watch over non-trade concerns, such as environmental, labor, or public health issues.

Still, these critiques are at times exaggerated. In fact, the entry into force of the WTO in 1995, and the establishment of its standing Appellate Body, marked a departure from the hitherto strict interpretation of non-trade concerns towards a more constitutional and balanced reading of WTO agreements.<sup>46</sup> The landmark case *US – Gasoline*, in which the Appellate Body emphasized WTO members’ sovereignty to determine their environment policies, called the tune in this regard.<sup>47</sup> That decision, and the Appellate Body’s new approach to the WTO’s sustainable development objectives, are rightly considered by scholars as “the consecration of WTO [m]embers’ fundamental right to take measures to protect the environment . . . at a level

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43. *Id.*

44. See Jackson, *supra* note 29, at 1235 (citing Nancy Dunne, *Fears Over ‘GATT-Zilla the Trade Monster,’* FIN. TIMES (Jan. 30, 1992)).

45. Report of the Panel, *United States – Restrictions on Imports of Tuna (US – Tuna II)*, DS29/R (June 16, 1994), unadopted [hereinafter Report of the Panel, *US – Tuna II*].

46. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9, 47–48 (2016). Howse argues that the deliberate and strict interpretation of GATT was rooted in the “crude economic ideology and strong deregulatory orientation” of that time, which rendered any public policies virtually impossible to justify under the general exceptions. *Id.*

47. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, 1, 30, WTO Doc. WT/DS2/AB/R, (adopted May 20, 1996) [hereinafter Appellate Body Report, *US – Gasoline*].

they consider appropriate.”<sup>48</sup> Consequently, when deciding that the US had not applied its measures in a non-discriminatory manner, the Appellate Body made the following, sometimes overlooked, dictum in *US – Shrimp*:

[In this dispute], [w]e have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. And we have *not* decided that sovereign states should not act together . . . either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.<sup>49</sup>

The Appellate Body is unambiguously reaffirming countries’ policy spaces to adopt environmental protection measures, so much so that environmentalists’ grievances against the WTO do not always seem to be well-founded. However, when confronted with trade-restrictive national regulations, such as plastic bag regulations, the challenge for the WTO adjudicator is to strike a delicate balance between the competing imperative of free trade and that country’s regulatory autonomy.<sup>50</sup>

African countries have battled for decades not only with severe cyclical economic crises, but also with environmental crises, some of which emanated from colonial environmental management policies, or lack thereof.<sup>51</sup> While their environmental laws have for years been rooted in their colonial pasts, a progressive shift began in the 1970s regarding African countries’ environmental legislations.<sup>52</sup> Almost all of the African countries’ constitutions drafted after 1970 contained a refer-

48. Gabrielle Marceau & Julian Wyatt, *The WTO’s Efforts to Balance Economic Development and Environmental Protection: A Short Review of Appellate Body Jurisprudence*, 1 *LATIN AM. J. INT’L TRADE L.* 291, 294 (2013).

49. Appellate Body Report, *US – Shrimp*, *supra* note 6, ¶ 185, (emphasis in original).

50. Emily Lydgate, *Sustainable Development in the WTO: From Mutual Supportiveness to Balancing*, 11 *WORLD TRADE REV.* 621, 632 (2012). *See also* Appellate Body Report, *US – Gasoline*, *supra* note 47, at 30 (where the Appellate Body cautioned that Members’ autonomy “is circumscribed . . . by the need to respect the requirements of the [GATT] and the other covered agreements”).

51. *See generally* Annie P. Kameri-Mbote & Philippe Cullet, *Law, Colonialism and Environmental Management in Africa*, 6 *REV. EUR., COMP. & INT’L ENVTL. L.* 23 (1997).

52. *See* Bondi D. Ogolla, *Environmental Law in Africa: Status and Trends*, 23 *INT’L BUS. L.* 412, 412–13 (1995).

ence to a certain “right” to a clean or healthy environment.<sup>53</sup> This trend continued through the 1990s and the 2000s, when environmental challenges linked to economic development gained prominence. Even when a constitution was silent regarding the environment, courts would actively champion sustainable development by interpreting the constitutional right to life as including the right to a healthy environment.<sup>54</sup>

Another feature of the environmental policies designed in post-colonial Africa has been the combination of command and control regulations, like outright prohibition, with economic instruments, like levies.<sup>55</sup> This holds true for modern plastic bag legislation, where certain African countries impose criminal sanctions on defaulters in a bid to induce compliance, while others prefer to tax producers, retailers, and eventually consumers for the use.

### *B. Plastic Bag Ban in Furtherance of Sustainable Development: East Africa Calls the Tune*

While almost all African regions have instituted plastic bag measures with the same objective to contribute to sustainable development, the strictest regulations so far have come from East Africa, particularly Kenya and Rwanda. The penalties enforced against defaulters of these laws are a testament to the environmental awareness of the imposing countries.

#### 1. Rwanda

In a session on July 2, 2008, the parliament of Rwanda adopted a law prohibiting the manufacture, importation, use,

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53. *Id.* at 414–15. Some of these constitutional principles are simple mimics of European and other developed countries’ environmentalists’ postures, and stranger to local peoples’ concerns at that particular time in history. See Kameri-Mbote & Cullet, *supra* note 51, at 24. This does not necessarily mean that pre-colonial Africa lacked environmental preservation strategies. See generally Paul Richards, *Community Environmental Knowledge in African Rural Development*, 10 INST. OF DEV. STUD. BULL. 28 (1979).

54. See, e.g., *Joseph D. Kessy and Others v. City Council of Dar es Salaam*, 4 I.E.L.R. 445 (1991) (High Court of Tanz.); *Waweru v. Republic* (2006) 1 K.L.R. 677, 677, 683 (Kenya).

55. See UNEP, *supra* note 10, at 10. See also Reviva Hasson, Anthony Leiman & Martine Visser, *The Economics of Plastic Bag Legislation in South Africa*, 75 S. AFR. J. ECON. 66 (2007).



and sale of polythene bags in Rwanda.<sup>56</sup> With the enactment of this legislation, Rwanda became one of the first countries in the world, let alone in Africa, to actually enforce a ban on the use of non-biodegradable plastic bags in its territory. The plastic bag regulation draws its source from the *Organic Law* of 2005 that determined the modalities of protecting, conserving, and promoting the environment in Rwanda.<sup>57</sup> The *Organic Law*, which is mainly aimed at “conserving the environment, people and their habitats”<sup>58</sup> and guarantees all citizens of the country a “sustainable development which does not harm the environment and the social welfare of the population,”<sup>59</sup> was based on a number of well-known environmental law principles.<sup>60</sup>

With regard to the protection of biodiversity, and in a bid to regulate human activities in this sense, Article 26 of the *Organic Law* provides, “[a]ny activities that may pollute the atmospheric pressure are governed by an order of the Minister having environment in his or her attributions. Burning of garbage, waste or any other object (tires, plastics, polythene bags and others) shall respect regulation of competent authorities.”<sup>61</sup> In addition, the law controls the manner in which waste has to be managed and disposed of, including plastics.<sup>62</sup> To guarantee the implementation of the government’s environmental policy, in particular the *Organic Law*, the Rwanda Environment Management Authority (REMA) was created.<sup>63</sup>

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56. Law No. 57/2008 of September 10, 2008 Relating to the Prohibition of Manufacturing, Importation, Use and Sale of Polythene Bags in Rwanda, Official Gazette of the Republic of Rwanda (O.G), Mar. 23, 2009, p. 78 [hereinafter Rwanda, *Plastic Bag Law*].

57. See generally Organic Law No. 04/2005 of April 8, 2005 Determining the Modalities for Protection Conservation and Promotion of the Environment in Rwanda, Official Gazette of the Republic of Rwanda (O.G.), May 1, 2005 [hereinafter Rwanda, *Organic Law*].

58. *Id.* art. 1(1).

59. *Id.* art. 1(5).

60. *Id.* art. 7 (speaking of (i) the precaution and protection principles; (ii) the principle of sustainability and equal opportunities among generations; (iii) the polluter pays principle; (iv) the principle of information dissemination and Community sensitization in conservation and protection of the environment; and (v) the principle of information).

61. *Id.* art. 26.

62. *Id.*, arts. 32–35, 109(1).

63. *Id.* art. 65(1). On the mandates, roles, and functions of REMA, see Law No. 16/2006 of April 3, 2006 Determining the Organisation, Functioning and

The protection of environmental and sustainable natural resource management is a central pillar of Rwanda's Vision 2020, in which the country seeks to diminish pressure on natural resources and reverse environmental degradation.<sup>64</sup> It is therefore not surprising that Rwanda will proceed to regulate the use of plastic bags, the disposal of which was identified as a problem for the protection of the environment by the *Organic Law*. As its name indicates, the purpose of the *Plastic Bag Law* is to prohibit "the manufacturing, usage, importation and sale of polythene bags in Rwanda."<sup>65</sup> The measure here, therefore, is the "prohibition" of the polythene bag, which is defined under Article 2 of the law as "a synthetic industrial product with a low density composed of numerous chemical molecules ethene [which in] most cases . . . is used in packaging of various products."<sup>66</sup>

The measure imposes a rather heavy penalty for defaulters. Those in violation face between six months to twelve months imprisonment and a fine for both manufacturing companies and individuals found to be selling or using polythene bags.<sup>67</sup> Nonetheless, the law balances rigidity and the imperative to fight against environmental degradation with instances of necessity. In effect, the law can be derogated from following an express authorization by the REMA.<sup>68</sup> Derogation, however, is not tantamount to granting a *carte blanche* to manufacturers or eventual importers. Authorization can only be sought and granted for a bag specifically included on an exemption list of plastic bags "necessary to be used in exceptional cases" in Rwanda.<sup>69</sup> The Prime Minister has not yet publicly announced such an exception list, which will be periodically updated as provided for by the law,<sup>70</sup> nor has he clarified what constitutes "exceptional cases." A study conducted in the field, however, revealed that the first beneficiaries of the exemption were the

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Responsibilities of Rwanda Environment Management Authority, Official Gazette of the Republic of Rwanda (O.G.), (June 1, 2006), p.10.

64. See Republic of Rwanda, *Rwanda Vision 2020* (rev'd, 2012), [http://www.minecofin.gov.rw/fileadmin/templates/documents/NDPR/Vision\\_2020\\_.pdf](http://www.minecofin.gov.rw/fileadmin/templates/documents/NDPR/Vision_2020_.pdf).

65. Rwanda, *Plastic Bag Law*, art. 1.

66. *Id.* art. 2.

67. *Id.* art. 7.

68. *Id.* art. 5.

69. *Id.* art. 4.

70. *Id.*

military, hospitality, medical, and agricultural sectors.<sup>71</sup> The official publication of an exemption list is essential to satisfy the WTO transparency requirement and guarantee predictability. This opacity at the domestic level is coherent with the country's practice regarding its multilateral trade obligations. Rwanda is one of the countries that is yet to notify the WTO organs of its plastic bag ban.

As a Member of the East African Community (EAC), it was unsurprising that the representative of Rwanda sponsored the *2011 EAC Bill* that was tabled before the East African Legislative Assembly in Kampala, Uganda, on February 3, 2012.<sup>72</sup> Rwanda is understandably interested in seeing other EAC members adopt a similar, if not the same, level of plastic bag restriction because the EAC is a common market with goods moving freely within the region. This implies a risk of smuggling plastic bags from countries with no ban into Rwanda, especially in border cities. Rwanda only joined the EAC in 2007, alongside Burundi, adding to the founding members of Kenya, Tanzania, and Uganda.<sup>73</sup> South Sudan became part of the EAC in 2016.<sup>74</sup> One objective of the EAC is to promote a sustainable utilization of the natural resources of the parties and to take measures to effectively protect the environment.<sup>75</sup> In this vein, the EAC parties are enjoined to cooperate in all issues of environmental and natural resource management, particularly by adopting common environmental control regulations and standards, as well as by encouraging the manufacture and use of bio-degradable packaging materials.<sup>76</sup> By virtue of Article 112(2)(h) of the EAC Treaty, EAC countries are further re-

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71. See Audrey Froidbise, *Behind the Scenes of the Plastic Bag Ban in Rwanda: Connections to Culture, Power and Sustainability*, at 2 (2015) (unpublished Master's Thesis, Lund University).

72. East African Community Polythene Materials Control Bill of 2011, East African Community Gazette No. 11, Aug. 12, 2011 [hereinafter *2011 EAC Bill*].

73. See *Rwanda*, East African Community, <https://www.eac.int/eac-partner-states/rwanda> (last visited Nov. 6, 2019).

74. See *Republic of South Sudan*, East African Community, <https://www.eac.int/eac-partner-states/south-sudan> (last visited Nov. 6, 2019).

75. Treaty for the Establishment of the East African Community art. 5(3)(c), Nov. 30, 1999, 2144 U.N.T.S. 255 (as amended on Dec. 14, 2006 and Aug. 20, 2007) [hereinafter EAC Treaty].

76. *Id.* art. 112.

requested to “adopt common environment standards for the control of atmospheric, terrestrial and water pollution arising from urban and industrial development activities.”<sup>77</sup>

Mindful of this environmental cooperation stipulation, the mover of the *2011 EAC Bill* also emphasized in her memorandum that all EAC countries are parties to a number of international environmental treaties.<sup>78</sup> The use of polythene materials needs to be controlled because these materials destroy the environment and wildlife habitats. The object of the *2011 EAC Bill*, which essentially reproduced the content of the Rwandan *Plastic Bag Law* and applied it to all polythene materials, was “to provide a legal framework for the preservation of a clean and healthy environment through the prohibition of manufacturing, sale, importation and use of polythene materials” in the EAC.<sup>79</sup>

For more than five years, the *2011 EAC Bill* was not adopted by the EAC parliament because of disagreements among the members echoing worries within their business communities.<sup>80</sup> Stakeholders also raised several concerns, such as waste management. Consequently, the Rwandan parliamentarian reintroduced a similar project with the same objective in 2016, but with some, albeit minor, modifications.<sup>81</sup> For instance, the *2016*

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77. *Id.* art. 112(2)(h).

78. *See 2011 EAC Bill*, ¶ 1 of the Memorandum of Hon. Patricia M. Hajabakiga.

79. *Id.* ¶ 3.

Paragraph 3 of the *2011 EAC Bill* states the following objectives of the Bill:

- (a) establish a legal framework for the control of the use of polythene;
- (b) promote the use of environmental friendly package materials;
- (c) preserve and promote a clean and healthy environment and land use management for sustainable development;
- (d) prevent any type of pollution caused by polythene materials in lakes, rivers and oceans;
- (e) protect infrastructure including drainage systems, biodiversity and livestock;
- (f) brand the East African Community as green and clean.

80. *See* Njiraini Muchira, *Plastics ban Bill stalls in EALA after opposition from Kenya*, EAST AFRICAN (Nov. 25, 2016), <https://www.theeastafrican.co.ke/news/ea/Kenya-opposition-stall-plastics-ban-Bill-in-EALA/4552908-3464774-12xx0vmz/index.html>.

81. East African Community Polythene Materials Control Bill, 2016, EAC Gazette No.12, Nov. 18, 2016 [hereinafter *2016 EAC Bill*].

*EAC Bill* added the promotion of recycling to the list of objectives, recognizing that plastic *waste* had not received due attention.<sup>82</sup> The list of exempted products in the *2016 EAC Bill* was also more expansive and now includes eight categories of materials, compared to the five outlined in the *2011 EAC Bill*.<sup>83</sup> Although discussions regarding the *2016 EAC Bill* are still ongoing, the leadership of Rwanda, and by extension the EAC, augurs a better day for environmental protection in Africa. This is something that should be emulated in other parts of the continent.

Rwanda launched the war against plastic bags in 2004,<sup>84</sup> which resulted in the passing of the 2005 *Organic Law* to give effect to plastic waste disposal. Consequently, the promulgation of the 2008 plastic bag ban in Rwanda only came to implement what had already been in place since 2004. Rwanda's national move was immediately followed by other countries in Africa, particularly in East Africa. This has been the case even though Rwanda's leadership on the subject appears to be resisted at the regional level, where many stakes in the business of plastic conflict with the ideal of environmental protection.

## 2. Kenya

Like Rwanda, Kenya began to regulate the use of plastic bags in the early 2000s. In effect, aware that the "environment constitutes the foundation of national economic, social, cultural and spiritual advancement," Kenya's Parliament enacted the Environmental Management and Coordination Act (EMCA) in 1999.<sup>85</sup> The *EMCA* acknowledged the country's constitutional

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82. *See id.* art. 3(f).

83. The list of exemptions comprise of the following: Materials used in (1) medical services; (2) industrial packaging; (3) the construction industry, including water pipes; (4) the manufacture of tents; (5) plumbing, including water pipes; (6) the agricultural industry; (7) mechanical and machine parts; and (8) the production of household wares and furniture. *2016 EAC Bill*, sched. Only the first four were broadly covered in the *2011 EAC Bill*, sched. The fact that Rwanda is the sponsor of this bill may give an indication of what might appear in its own domestic plastic bag law exemption list, which up to this date has not been adopted or publicized.

84. *See Rwanda's war on plastic bags*, BBC NEWS (Oct. 4, 2004), <http://news.bbc.co.uk/2/hi/africa/3714126.stm>.

85. *See generally* The Environmental Management and Co-Ordination Act, No. 8 (1999), Cap. 387 [hereinafter *EMCA*].

entitlement to a clean and healthy environment.<sup>86</sup> As the subtitle of the law indicates, it is an Act “to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto,” and in that vein, it also puts a duty on every person in Kenya to “safeguard and enhance the environment.”<sup>87</sup> Section 3 of Kenya’s *EMCA* enumerates the sustainable development principles guiding the legislation, including the “precautionary principle.”<sup>88</sup> The *EMCA* also created the National Environment Management Authority (NEMA), an institution in charge of the general supervision and coordination of environmental matters, as well as the implementation of governmental policies relating to the environment.<sup>89</sup>

Regarding the issue of plastics, Section 86 clarifies the standards of waste. It states that the Standards and Enforcement Review Committee (SERC)<sup>90</sup> will not only “identify materials and processes that are dangerous to human health and the environment,” but will also “issue guidelines and prescribe measures” for their management.<sup>91</sup> Moreover, the SERC is tasked with developing and advising on “standards of disposal methods and means for such wastes”<sup>92</sup> or, alternatively, devising regulations for the “handling, storage, transportation, segregation and destruction of any waste.”<sup>93</sup>

It is against this backdrop that Kenya enacted its plastic bag legislation. In a public notice from Kenya’s Official Gazette on February 28, 2017, the Cabinet Secretary for Environment and Natural Resources announced that, effective six months from

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86. *Id.* § 3.

87. *Id.*

88. *See id.* § 3(5)(f). Section 2(2) interprets the “precautionary principle” as “the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” *Id.* § 2(2).

89. *Id.* §§ 7, 9.

90. This function was previously carried out by the Cabinet Secretary. *See* The Environmental Management and Co-Ordination (Amendment) Act (2015) KENYA GAZETTE SUPPLEMENT NO. 74 § 55 [hereinafter *EMCAA*], which reassigns the tasks to the SERC.

91. *EMCA*, § 86.

92. *Id.* § 86(3).

93. *Id.* § 86(4).

the date of the notice, a ban on “the use, manufacture and importation of all plastic bags used for commercial and household packaging.”<sup>94</sup> The measure applies to two categories of bags, to wit: (a) carrier bags, defined as a “bag constructed with handles, and with or without gussets”; and (b) flat bags, a “bag constructed without handles, and with or without gussets.”<sup>95</sup> Notified to the TBT Committee under Article 2.10 of the TBT Agreement, the rationale and the “urgent” problems that the measure seeks to address are human health or safety and environment protection.<sup>96</sup>

Unlike Rwanda, Kenya’s ban comes with few exemptions. In a press release on June 2, 2017, the Director General of NEMA stated that the ban does not apply to “flat bags used in industrial packaging as long as they are used for industrial primary packaging at the source of the product and are not available on sale at the counter or given freely outside the industrial setting.”<sup>97</sup> In other words, only industries that use plastic for the packaging of their goods at source are exempted. These industries can equally be domestic manufacturers or importers. To fully comply with this exemption, the bags “must be labelled clearly,” such as bearing the logo or other distinctive signs of the industry concerned,<sup>98</sup> so as to prevent fraud. The exemption applies mainly to flat bags, not carrier bags.<sup>99</sup>

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94. See The Environmental Management and Co-ordination Act, No. 2334, (2017), KENYA GAZETTE [REPUBLIC OF KENYA] NO. 31 [hereinafter Kenya Gazette Notice No. 2334]. In another version of the same issue of the Kenya Gazette, the notice appears as Notice No. 2356, with Notice No. 2334 this time being reserved to one of the Universities Acts. The reason for this mismatch is unknown to the present author. However, Notice No. 2334 was preferred because it is the document that was notified to the WTO TBT Committee. See Committee on Technical Barriers to Trade, *Notification of Kenya*, WTO Doc. G/TBT/N/KEN/593 (Aug. 30, 2017).

95. Kenya Gazette Notice No. 2334, *supra* note 94.

96. Notification of Kenya, *supra* note 94.

97. Geoffrey Wahungu, National Environment Management Authority, Immediate Press Release – Ban on Plastic Bags, [http://www.nema.go.ke/images/featured/Ban\\_on\\_plastic\\_bags.pdf](http://www.nema.go.ke/images/featured/Ban_on_plastic_bags.pdf) (last visited Nov. 3, 2019).

98. *Id.*

99. See National Environment Management Authority, *Ban on plastic carrier bags*, NEMA, [https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=102&Itemid=120](https://www.nema.go.ke/index.php?option=com_content&view=article&id=102&Itemid=120) (last visited Oct. 12, 2019). Since the passing and the entry into force of the law, about ten statements were issued seeking to clarify the

Of the measures aimed at reducing the use of plastic bags in Africa, and in the world generally, Kenya's efforts appear to be the most restrictive insofar as Kenya imposes heavy penalties on contraveners. While the notice does not indicate the applicable sanctions, a look at the underlying legislation reveals the magnitude of the punishment. Indeed, Section 144 of the *EMCA* states:

Any person who contravenes against any provision of this Act or of regulations made thereunder for which no other penalty is specifically provided is liable, upon conviction, to imprisonment for a term of not less than one year but not more than four years, or to a fine of not less than two million shillings<sup>100</sup> but not more than four million shillings,<sup>101</sup> or to both such fine and imprisonment.<sup>102</sup>

This change, from a penalty of eighteen-month imprisonment and a fine of about three US Dollars in the principal Act, to the minimum of about twenty-thousand US Dollars plus a minimum of one-year imprisonment introduced with the plastic bag law, only goes to demonstrate the seriousness of "environmental crimes" in Kenya.

Kenya's severeness toward domestic environment crimes, particularly with plastic bags, contrasts sharply with its attitude at the regional level. Kenya has been one of the opponents of the Rwanda-sponsored Bill on the ban of plastics bags before the EAC Parliament.<sup>103</sup> Environmentalists would definitely hope that this domestic move signals a policy shift. The same optimism extends to Uganda, another persistent objector to a regional plastic bag regulation.

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exemptions and to address the disposal of bags that were still in the possession of citizens. *Id.* The multiplicity of clarifying notices is a testament to the difficulty that authorities encounter in implementing the ban.

100. Two million shillings is about 19,650 US Dollars.

101. Four million shillings is equivalent to approximately 39,300 US Dollars.

102. *EMCA*, § 144, as amended by *EMCAA*, § 77(b). The original penalty was of the tune of "not more than eighteen months or to a fine of not more than three hundred and fifty thousand shillings." *EMCA*, § 144.

103. See Njiraini Muchira, *Plastics Ban Bill Stalls in EALA after Opposition from Kenya*, EAST AFRICAN (Nov. 25, 2016), <https://www.theeastafrican.co.ke/news/Kenya-opposition-stall-plastics-ban-Bill-in-EALA/2558-3464774-6pkgnc/index.html>.



### C. Southern Africa Follows Suit

Following their counterparts in East Africa, Southern Africa countries have also implemented plastic bag measures. These regulations are addressed here in turn, with a focus on Mauritius, Seychelles, and South Africa.

#### 1. Mauritius

Mauritius is a small island with rather limited resources. As a tourist destination that is exposed to environmental risks, the need to manage its environment in a sustainable manner is really pressing.<sup>104</sup> Mauritius has a tradition of plastic bag regulation dating back to 2003 when it adopted its first *Environmental Protection (Plastic Carry Bags) Regulation*.<sup>105</sup> The measure prescribed the standards for the manufacture of a “vest-type carrier bag made of plastic which is designed for the general purpose of carrying goods purchased by consumers.”<sup>106</sup> This was not a ban at that point in time, but merely an instruction relating to the standards of thickness and degradation of manufactured or imported plastics.<sup>107</sup>

Years later, after mounting worldwide concerns regarding the toxicity of plastics, and after having amended its Environment Protection Act twice to respond to emerging environmental challenges,<sup>108</sup> Mauritius promulgated its *Environment Protection (Banning of Plastic Bags) Regulations* in August 2015.<sup>109</sup> It consequently repealed the *2003 Plastic Carry Bags Regulations*.<sup>110</sup> To comply with the WTO transparency principle, Mauritius notified the TBT Committee of the regulation in January 2016 under Article 2.10 of the TBT Agreement.<sup>111</sup> The docu-

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104. Odile J. Lim Tung, *Rethinking the Regulation of Environment Impact Assessment and Precaution in Mauritius*, 61 J. AFR. L. 227, 228 (2017).

105. *Environmental Protection (Plastic Carry Bags) Regulations*, No. 14 (2004), GOVERNMENT GAZETTE OF MAURITIUS.

106. *Id.* § 2.

107. See Committee on Technical Barriers to Trade, *Notification of Mauritius*, WTO Doc. G/TBT/N/MUS/2 (May 3, 2005).

108. See *The Environment Protection Act (1991) (Mauritius)*, as amended in 2002 and 2008.

109. See generally *Environment Protection (Banning of Plastic Bags) Regulations*, No. 153 (2015), MARUITIUS GAZETTE SUPPLEMENT NO. 81 [hereinafter *Mauritius, Plastic Bag Regulations*].

110. *Id.* § 7.

111. Committee on Technical Barriers to Trade, *Notification of Mauritius*, WTO Doc. G/TBT/N/MUS/5 (Jan. 1, 2016). By notifying under Article 2.10 of

ment states openly that the purpose of the ban is to protect the environment, and in case of a dispute, Mauritius would seek justification under either Article XX(b) or Article XX(g) of the GATT, or simply under Article 2.2 of the TBT Agreement.

Under the new regulations, the import, manufacture, sale, or supply of bags “of any size or type made of plastic, with or without handles or gussets, designed for carrying” are banned from the territory except those included in the Schedule of exemption.<sup>112</sup> Such exempted bags include, *inter alia*, those “designed to be used for the disposal of waste,” bags carried by passengers disembarking from planes or ships, and bags destined for exports.<sup>113</sup> Interestingly, there is no restriction on the type of plastic that can be exported. The manufacturing of the latter category is only subject to registration and the granting of a permit.<sup>114</sup> By this action, Mauritius did not seek to restrict investment, both foreign and domestic, in the sector of plastic bag production. The output must simply be bound for export and not local consumption.

In addition to the exemption for essential uses, the law provides that, in case of a disaster, the Minister of Environment may allow plastic bags in the territory.<sup>115</sup> However, that law does not define the type of “disaster” necessary to allow the lifting of the ban. Despite this shortcoming, the Mauritius law contrasts somewhat with other countries, like Rwanda, whose situation of “emergency” is even more vague.<sup>116</sup> Nevertheless, the Mauritius measure falls short of specifically stating the timeframe during which the exceptional measure would operate in case of disaster. Such a determination certainly rests on the Minister in charge and would probably be dictated by the type and nature of the disaster.

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the TBT Agreement, like Kenya, Mauritius is also indicating the “urgency” of the situation that the measure aims to address. *Id.* For the discussion of the notification routes, see *infra* Part VI.D.

112. Mauritius, *Plastic Bag Regulations*, §§ 2, 4.

113. *Id.*, first sched.

114. *Id.* § 5.

115. *Id.* § 4(2).

116. See Mauritius, *Plastic Bag Law*, art. 4, which essentially states that the Prime Minister is in charge of establishing a list of polythene bags “necessary to be used in exceptional cases” in the country, without defining what may constitute as “exceptional cases.” Compared to Rwanda, Mauritius is slightly more transparent in that its exceptional circumstances are controlled by the word “disaster.”

In December 2015, the principal regulations were amended to include biodegradable plastic bags and compostable plastic bags on the exemption list.<sup>117</sup> The *Environment Protection (Banning of Plastic Bags) (Amendment) Regulations 2015* specifically target plastic bags meant to carry goods purchased at a point of sale, such as a wholesale or retail outlet, a market, a fair, or a hawker.<sup>118</sup> As mentioned, the amendment stipulates a number of modifications to the principal regulations. For instance, while it includes a “non-woven polypropylene bag” in the definition of plastic bags,<sup>119</sup> the ban excludes from its target biodegradable and compostable plastic bags whose manufacture has to be in conformity with standards prescribed in the Third Schedule of the *Plastic Bag Amendment Regulations*.<sup>120</sup> The latter is undoubtedly an import licensing mechanism, since the person wishing to import the type of permitted bags must apply for a clearance. As such, Mauritius plastic bag regulations are peculiar in that they surreptitiously combine a total ban with a quota system through licensing procedures. The import quota applies to those willing to obtain a license to import exempted plastic bags.

Pursuant to Article 2.4 of the TBT Agreement, WTO members are obligated to base technical regulations, standards, and conformity assessment procedures on international standards, wherever relevant ones exist.<sup>121</sup> In this vein, Mauritian measures prescribe the applicable international standards to biodegradable and compostable bags.<sup>122</sup> According to the TBT Agreement, members are similarly required to notify other members of the technical regulation through the WTO Secretariat, either before the adoption of the measure<sup>123</sup> or immediately after, if the measure was adopted to address an urgent

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117. See *Environmental Protection (Banning of Plastic Bags) (Amendment) Regulations*, No. 233 (2015), GOVERNMENT GAZETTE OF MAURITIUS, p. 1555 [hereinafter Mauritius, *Plastic Bag Amendment Regulations*].

118. *Id.* § 4 (new).

119. *Id.* §3 (new).

120. *Id.* § 5(E).

121. See TBT Agreement, *supra* note 25, art. 2.4.

122. See Mauritius, *Plastic Bag Amendment Regulations*, third sched. The standards referred to are American Society for Testing and Materials (ASTM), the European Standard (ES), and the International Organisation for Standardisation (ISO).

123. TBT Agreement, *supra* note 25, art. 2.9.

problem of national security, health, or environment.<sup>124</sup> The same transparency requirement applies when the measure is a quantitative restriction, like the bans of plastic bags. This is what prompted Mauritius to notify the TBT Committee and the Market Access Committee of its plastic bag regulation.<sup>125</sup>

## 2. Seychelles

Seychelles is an archipelago situated in the Indian Ocean with an economy that mainly relies on tourism and fishing. Like Mauritius, the imperative to sustainably manage its resources is crucial because the effects of climate change expose its economy to serious risks. As a result, Seychelles passed a number of environmental protection regulations in recent years, including its first plastic bag restriction in 2008.<sup>126</sup> *The Environment Protection (Restrictions on Plastic Bags) Regulations* (“*Regulations 2008*”) merely “restricted” the manufacture, sale, and distribution of both nationally produced and imported plastic bags.<sup>127</sup> The measure, which addressed the thickness of plastic bags by stating they should not be below thirty microns, allowed a twenty percent variation in the measurement of the minimum thickness.<sup>128</sup> Even though the legislation, while not a ban, did not define the word “restriction,” it incontestably qualified as a quantitative restriction since it limited imports and eventual manufacture for exports.<sup>129</sup> Seychelles was not yet a WTO Member at the time that it implemented *Regulations 2008*.

Seychelles is one of the youngest WTO members. It initiated its accession process in 1995<sup>130</sup> and only completed it in 2014.<sup>131</sup>

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124. *Id.* art. 2.10.

125. Committee on Market Access, *Notification of Mauritius Pursuant to the Decision on Notification Procedures for Quantitative Restrictions*, at 5, WTO Doc. G/MA/QR/N/MUS/2 (Feb. 3, 2017).

126. Environment Protection (Restrictions on Plastic Bags) Regulations 2008, SI. 39 (Sey.) [hereinafter *Regulations 2008*].

127. *Id.* § 3(1).

128. *Id.* § 3(2).

129. Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 320, WTO Doc. WT/DS394/AB/R (adopted Feb. 22, 2012) [hereinafter Appellate Body Report, *China – Raw Materials*].

130. Working Party on the Accession of the Republic of Seychelles, *Accession of the Republic of Seychelles*, WTO Doc. WT/ACC/SYC/1 (May 31, 1995).

131. See General Counsel, *Accession of the Republic of Seychelles*, WTO Doc. WT/L/944 (Dec. 10, 2014).

Seychelles became the 161st official WTO Member on March 26, 2015.<sup>132</sup> Recently acceding WTO members have taken on additional commitments on a number of issues, especially trading rights and import and export restrictions. These additional commitments are an integral part of the WTO Agreement and are consequently enforceable in dispute settlement.<sup>133</sup> As part of its specific accession obligations, Seychelles committed to not “introduce, reintroduce or apply quantitative restrictions on imports or other non-tariff measures such as licensing, quotas, prohibitions, bans and other restrictions having equivalent effect *that cannot be justified* under the provisions of the WTO Agreement.”<sup>134</sup> In other words, it can only do so if the measure is justified under a WTO Agreement provision, which is what it would fairly plead should the measure be questioned. Likewise, Seychelles committed to the same terms regarding export restrictions, notably that after accession it “would apply its laws and regulations governing export measures, including prohibitions, export licensing requirements and other export control requirements, in conformity with WTO provisions including those contained in Articles XI, XVII, XX and XXI of the GATT 1994.”<sup>135</sup> Simply put, Seychelles committed not to impose export restrictions, except to protect the values under Article XX or to achieve national security.

While Seychelles ensured that “all of its laws, regulations or other measures governing technical barriers to trade, standards, and certification would be in full conformity with the provisions of the TBT Agreement,” it would only do so progressively.<sup>136</sup> The transition period, within which Seychelles agreed to comply with WTO rules by bringing its laws, regulations, and practices in conformity after accession, ended in December

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132. See Roberto Azevêdo, *Notification of Acceptance and Entry Into Force*, WTO Doc. WT/LET/1036 (Apr. 1, 2015). Seychelles is also the thirty-third economy to join the WTO pursuant to Article XII of the WTO Agreement.

133. See Appellate Body Report, *China – Raw Materials*, *supra* note 129, ¶ 266, where the Appellate Body upheld the Panel’s recommendation that China bring its export duty and export quota measures into conformity with its WTO obligations (undertaken in its Accession Protocol).

134. See Working Party on the Accession of the Republic of Seychelles, *Report*, ¶ 191, WTO Doc. WT/ACC/SYC/64 (Nov. 5, 2014) (emphasis added).

135. *Id.* ¶ 240.

136. *Id.* ¶ 282.

2015.<sup>137</sup> Seychelles notified the TBT Committee of its new plastic regulations in February 2017.<sup>138</sup> The new plastic bag law, the *Environment Protection (Restriction on manufacturing, importation, distribution and sale of Plastic Bags) Regulations 2017* (“*Regulation 2017*”),<sup>139</sup> which came into force on July 1, 2017, repealed *Regulations 2008*.

Under the *Plastic Bag Regulations 2017*, the manufacture, importation, and distribution of plastic bags are prohibited in Seychelles, with the exception of certain types of plastics included in a Schedule.<sup>140</sup> Seychelles’ measures are largely inspired by, when they are not simply a reproduction of, the Mauritian 2015 *Plastic Bag Amendment Regulations* in several respects. Not only do both regulations distinguish between prohibited and permitted plastic bags, but the content of their exemption list of permitted plastic bags displays a high degree of similarity. Like Mauritius, Seychelles exempts from the ban bags that are used for waste disposal, carried by persons disembarking from aircrafts or ships, or manufactured for export, among others.<sup>141</sup> However, unlike Mauritius, which requests permits for exempted, biodegradable, and compostable plastic bags, Seychelles’ licensing system only considers both exempted and biodegradable bags.<sup>142</sup> Import permit applications for biodegradable bags in Seychelles must be accompanied by a certificate of conformity to the applicable standards stipulated

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137. For a study of the legal analysis of the accession procedures to the WTO, including the obligation to undertake domestic reforms to adapt to WTO rules, see DYLAN GERAETS, *ACCESSION TO THE WORLD TRADE ORGANIZATION: A LEGAL ANALYSIS* (2018).

138. Committee on Technical Barriers to Trade, *Notification of Seychelles*, WTO Doc. G/TBT/N/SYC/3 (Feb. 7, 2017). Notification was done under Article 2.9 of the TBT Agreement, i.e. prior to the entry into force of the measure.

139. *Environment Protection (Restriction on Manufacturing, Importation, Distribution and Sale of Plastic Bags) Regulations 2017*, at 207, S.I. 37 of Supplement to Official Gazette (June 30, 2017) (Sey.) [hereinafter *Plastic Bag Regulations 2017*]. This law was adopted concomitantly with the *Environment Protection (Restriction on Importation, Distribution and Sale of Plastic Utensils and Polystyrene Boxes) Regulations 2017*, S.I. 38 of Supplement to Official Gazette (June 30, 2017) (Sey.) (dealing, as the name indicates, with plastic utensils (such as spoons, forks, knives, plates, bowls, cups and trays) and polystyrene boxes (i.e. takeaway boxes used for containing food)). For purposes of this article, only the *Plastic Bag Regulations 2017* are of interest.

140. *Plastic Bag Regulations 2017*, § 3.

141. *Id.*, first sched..

142. *Id.* §§ 4(1)(a)–(b).

in the Second Schedule of the regulations and validated by the Seychelles Bureau of Standards.<sup>143</sup> Seychelles' plastic bag import licenses are governed by the *Customs Management (Prohibited and Restricted) Regulations 2014* that contains lists of prohibited and restricted goods.<sup>144</sup> It is noteworthy that exempted plastic bags, like those manufactured for export or for waste disposal, are not subject to any particular standards. It is therefore the responsibility of the manufacturer to meet the standards of the country it contemplates exporting to.

### 3. South Africa

South Africa was among the first countries to implement plastic bag legislation. In the early 2000s, the South African authorities decided to address the waste problem relating to the collection and disposal of plastic bags as a growing environmental problem.<sup>145</sup> The South African Minister of Environmental Affairs and Tourism then passed regulations prohibiting the manufacture, sale, and commercial distribution of plastic carrier bags and plastic flat bags for use within the country, whether domestically manufactured or imported.<sup>146</sup> As a compromise between different stakeholders, some of whom were opposed to an outright ban,<sup>147</sup> this regulation also specified the thickness and printing requirements of approved plastic bags.<sup>148</sup> These requirements are found in the Compulsory Spec-

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143. *Id.* §§ 4(2)–(3).

144. Customs Management (Prohibited and Restricted Goods) Regulations 2014, at 1293, S.I. 43 of Supplement to Official Gazette (Sey.).

145. *See generally* Hasson *et al.*, *supra* note 55.

146. *See* Plastic Carrier Bags and Plastic Flat Bags Regulations, GN R.625 of GG 24839 (May 9, 2003).

147. The first draft regulation published in May 2000 intended to ban, by January 2001, the supply of carry bags of a thickness of less than thirty microns, as well as ban the supply of carry bags of a thickness less than eighty microns by June 2001. *See* Proposed Regulations under Section 24 of Environment Conservation Act, GN 1994 of GG 21203 (May 19, 2000).

148. *See* Committee on Technical Barriers to Trade, *Notification of South Africa*, WTO Doc. G/TBT/N/ZAF/29 (May 14, 2003) (specifying the requirements for carrier bags and flat bags made from thermoplastic materials). The underlying legislation is the Standards Act of 1993 Compulsory Specification for Plastic Carrier Bags and Flat Bags, GN R.867 of GG 25082 (June 20, 2003).

ification developed by the South African Bureau of Standards (SABS) and published by the Minister of Trade and Industry.<sup>149</sup>

South Africa's plastic bag regulation uses a combination of regulatory and market-based tools to curb consumers' demands for plastic bags.<sup>150</sup> In addition to the ban on thin plastic bags, the measure also institutes a tax on the use of thicker bags.<sup>151</sup> The tax is collected by supermarkets at the point of purchase, who in turn charge customers and consequently give the customers the option to decline the bags.<sup>152</sup> Notably, the regulation also contains a list of exempted bags, including "bread bags, refuse bags, bin liners, household plastic bags, and primary packaging, such as barrier bags."<sup>153</sup> Likewise, plastic bags manufactured for export are also exempted.<sup>154</sup> South Africa cites environmental protection as the objective and rationale of this measure and has notified the WTO Committee on Technical Barriers to Trade, as well as announced its objective to the entire membership in accordance with Article 10.6 of the TBT Agreement.<sup>155</sup>

Interestingly, upon amending its plastic bag standards in 2012, South Africa included human health and safety as the rationale for the new standards.<sup>156</sup> After the creation of the National Regulator for Compulsory Specifications (NRCS) in

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149. See Compulsory Specification for Plastic Carrier Bags and Flat Bags, GN R.867 of GG 25082 (June 20, 2003) [hereinafter South Africa Gazette No. 25082]. Section 4.2 requires that plastic bags be thicker than twenty-four microns. *Id.* § 4.2.

150. Studies suggest that high taxes on plastic bags tend to reduce their usage in the tax-imposing country. For a case study of the ensuing drastic drop in plastic consumption in Botswana, a country with a similar regulation to South Africa, see Johane Dikgang & Martine Visser, *Behavioural Response to Plastic Bag Legislation in Botswana*, 80 S. AFR. J. ECON. 123 (2012).

151. See Dikgang, Leiman & Visser, *supra* note 7, at 59–60.

152. See Clapp & Swanston, *supra* note 5, at 320. On the public's response to this "mixed tool," see generally Hasson et al., *supra* note 55.

153. South Africa Gazette No. 25082, § 1.4. Section 3.1 defines carrier bags as thin or flimsy bags, used to separate incompatible products at the final point of sale, for health, hygiene, or transport purposes. *Id.* § 3.1.

154. *Id.* § 1.5.

155. See Notification of South Africa, *supra* note 148.

156. See Committee on Technical Barriers to Trade, *Notification of South Africa*, WTO Doc. G/TBT/N/ZAF/155 (Oct. 9, 2012) (stating South Africa's objective and rationale as health and safety).



2008<sup>157</sup>—then operating as a regulatory department of SABS—the government proposed to amend the plastic bag standards in 2012.<sup>158</sup> The goal of the amendment was to improve the traceability of plastic carrier and flat bags, facilitating improved regulatory efficiency. The new compulsory specification for plastic bags, published in 2013,<sup>159</sup> states that plastic carrier bags and flat bags shall comply with *SANS 695*,<sup>160</sup> a South African national standard for plastic bags developed by SABS in compliance with Annex 3 of the TBT Agreement.<sup>161</sup> The document also describes the approval process for plastic bags, as well as the conformity of production and plastic bags testing.

#### *D. Other African Countries Join the Race*

Apart from the foregoing surveyed measures, other African countries have also joined the fight against plastic bags, spanning all regions in Africa. In Central Africa, Cameroon adopted a law in 2012 that regulates the manufacture, importation, and sale of lightweight plastic bags.<sup>162</sup> The law provides for

157. See National Regulator for Compulsory Specifications Act 2008, GN 728 of GG 31216 (July 4, 2008).

158. See Proposed Amendment of the Compulsory Specification for Plastic Carrier Bags and Flat Bags-VC 8087, GN R.776 of GG 35707 (Sept. 28, 2012).

159. See Compulsory Specification for Plastic Carrier Bags and Flat Bags-VC 8087, GN R.651 of GG 36808 (Sept. 6, 2013) [hereinafter South Africa Gazette No. 36808]. See also Committee on Technical Barriers to Trade, *Ad-dendum: Notification of South Africa*, WTO Doc. G/TBT/N/ZAF/155/Add.1 (Sept. 10, 2013).

160. See South Africa Gazette No. 36808, § 3.1. See South African Bureau of Standards, SOUTH AFRICAN NATIONAL STANDARD: PLASTIC CARRIER BAGS AND FLAT BAGS (1st ed., 2011) [hereinafter *SANS 695*].

161. TBT Agreement, *supra* note 25, at Annex 3, is a “Code of Good Practice” addressed to standardizing bodies like the SABS for the “preparation, adoption and application of standards.” It requires, among others, that standards must not be “prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.” See TBT Agreement, *supra* note 25, at Annex 3(E). *SANS 695* applies to both domestically manufactured and imported plastic bags alike.

162. See Arrêté Conjoint No. 004/MINEPDED/MINCOMMERCE du 24 octobre 2012 portant réglementation de la fabrication, de l’importation et de la commercialisation des emballages non biodégradables. [Joint Order No. 004/MINEPDED/MINCOMMERCE of October 24, 2012 Regulating the Manufacture, Import and Marketing of Non-Biodegradable Packaging] (Cameroon),

[https://www.cameroontradeportal.cm/tradeportal/templates/Tip\\_accueil/docs/arretes/Arrete\\_minepedd\\_mincommerce.pdf](https://www.cameroontradeportal.cm/tradeportal/templates/Tip_accueil/docs/arretes/Arrete_minepedd_mincommerce.pdf). This order was co-signed by both

measures to limit the production of lightweight plastic bags and promote the recycling, reuse, and other forms of recovery of waste from such packaging. According to the law, these activities are subject to the obtention of an environmental permit to ensure the traceability of their recycling and destruction in an environmentally sound manner.<sup>163</sup>

The Cameroonian measure followed the example set by the Republic of Congo one year earlier, when the President of the Republic issued a decree prohibiting the production, import, marketing, and use of plastic bags for the sale of food, water, and other beverages.<sup>164</sup> Also prohibited in Congo are the production, importation, marketing, and use of so-called oxo-biodegradable bags and plastic films.<sup>165</sup> The other Central African country with a similar measure is the DRC, whose law prohibits the manufacture, import, marketing, and use of plastic bags, sachets, films, and other plastic packaging for the sale of food, water, and any beverages.<sup>166</sup> The ban also extends to non-biodegradable plastic bags.<sup>167</sup> Besides Central African countries, Uganda<sup>168</sup> in East Africa and four other West Afri-

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the Minister of Environment, Nature Protection and Sustainable Development and the Minister of Trade. *Id.* It has not yet been notified to the WTO.

163. *Id.* art. 4.

164. *See* Décret No. 2011-485 du 20 juillet 2011 réglementant la production, importation, la commercialisation et l'utilisation des sacs, sachets et films en plastique [Decree No. 2011-485 of July 20, 2011 regulating the production, import, marketing and use of plastic bags, sachets and films], Journal Officiel de la République du Congo [J.O.] [Official Gazette of Congo], July 20, 2011, art. 1. The measure was notified to the other WTO Members under Article 2.9 of the TBT Agreement. *See* Committee on Technical Barriers to Trade, *Notification of Congo*, WTO Doc. G/TBT/N/COG/1 (Sept. 12, 2013).

165. Décret No. 2011-485 du 20 juillet 2011, art. 2.

166. *See* Décret No. 17/018 du 30 décembre 2017 portant interdiction de production, d'importation, de commercialisation et d'utilisation des sacs, sachets, films et autres emballages en plastique [Decree No. 17/018 of December 30, 2017 prohibiting the production, import, marketing, and use of plastic bags, sachets, films and other packaging], Journal Officiel de la République Démocratique du Congo [J.O.] [Official Gazette of Democratic Republic of Congo] (Dec. 30, 2017), art. 1.

167. *Id.*

168. *See* Committee on Technical Barriers to Trade, *Notification of Uganda*, WTO Doc. G/TBT/N/UGA/17 (Apr. 25, 2008) (notification under Article 2.9 of the TBT Agreement). This is a standard for the manufacture of plastic bags. It should be noted that a subsequent measure was adopted in 2009, which is not captured by this TBT notification, and which prohibits the importation,

can countries—namely Benin,<sup>169</sup> Cote d'Ivoire,<sup>170</sup> Senegal,<sup>171</sup> and Togo<sup>172</sup>—all currently have a plastic regulation in force.

## II. PLASTIC BAG REGULATIONS AS RESTRICTIONS ON INTERNATIONAL TRADE

The WTO agreements codify a number of circumstances in which members can lawfully address their health and environment-related policy objectives. What follows is an analysis

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local manufacture, sale or use of plastic bags. The Finance Act, No. 14 (2009) UGANDA GAZETTE SUPPLEMENT No. 8 § 3.

169. See Loi No. 2017-39 du 26 décembre 2017 portant interdiction de la production, de l'importation, de l'exportation, de la commercialisation, de la détention, de la distribution et de l'utilisation des sachets en plastique non biodégradables en République du Bénin [Loi No. 2017-39 of December 26, 2017 prohibiting the production, import, export, marketing, possession, distribution, and use of non-biodegradable plastic bags in the Republic of Benin], FAOLEX No. LEX-FAOC179912, Dec. 26, 2017) (Benin).

170. See Décret No. 2013-327 du 22 Mai 2013 portant interdiction de la production, de l'importation, de la commercialisation, de la détention et de l'utilisation des sachets plastiques [Decree No. 2013-327 of May 22, 2013 prohibiting the production, import, marketing, possession, and use of plastic bags], FAOLEX No. LEX-FAOC140523 (May 22, 2013) (Côte d'Ivoire).

171. See Committee on Technical Barriers to Trade, *Notification of Senegal*, WTO Doc. G/TBT/N/SEN/9 (May 4, 2016) (notification under Article 2.9 TBT Agreement). The measure is Loi No. 2015-09 du 04 mai 2015 relative à l'interdiction de la production, de l'importation, de la détention, de la distribution, de l'utilisation de sachets plastiques de faible micronnage et à la gestion rationnelle des déchets plastiques [Law No. 2015-09 of 04 May 2015 prohibiting the production, importation, possession, distribution, use of small-size plastic bags and the rational management of plastic waste], Journal Officiel de la République du Senegal [J.O.] [Official Gazette of the Republic of Senegal] (Jul. 4, 2015).

172. See Committee on Technical Barriers to Trade, *Notification of Togo*, WTO Doc. G/TBT/N/TGO/2 (Mar. 6, 2012) (notification under Article 2.9 TBT Agreement). The measure at issue is Décret No. 2011-003/PR du 05 janvier 2011 fixant les modalités de gestion des sachets et emballages plastiques au Togo [Decree No. 2011-003/PR of January 5, 2011 assigning management procedures for plastic bags and packaging in Togo], FAOLEX No. LEX-FAOC143632, Jan. 5, 2011. The implementing text is Arrêté No.11/13/MIZFIT/CAB du 22 mars 2013 fixant les modalités de gestion des sachets, sacs et emballages plastiques biodégradables et des additifs pour la production des sachets et emballages plastiques biodégradables au Togo [Order No. 11/13/MIZFIT/CAB of March 22, 2013 assigning management procedures for biodegradable plastic bags, sachets, and packaging and additives for the production of biodegradable plastic bags and packaging in Togo] Journal Officiel de la République Togolaise [J.O.R.T.] [Official Journal of Togo] (June 7, 2013).

of how African countries' measures banning the importation, manufacture, use, or sale of plastic bags in their respective territories fit within the WTO regime landscape.

It is worth recalling that developing African countries have seldom, if ever, been on the receiving end of WTO disputes from developed-country members, nor among themselves.<sup>173</sup> This reality is complemented by Article 24.1 of the Dispute Settlement Understanding, which asks WTO members to exercise due restraint in bringing disputes against Least-Developed Countries (LDCs). This explains why some developing-country members, like Cameroon, and LDCs like the DRC or Rwanda, may feel safe to operate at the margin of legality by not notifying the relevant WTO bodies of their respective plastic bag measures. This pattern runs counter to the WTO's transparency requirement.

#### *A. Per Se Illegality of Plastic Bag Restrictions*

The common denominator of the laws banning the importation of plastic bags is that they qualify in one way or another as quantitative restrictions and, as such, are measures prohibited by Article XI of the GATT.<sup>174</sup> As a form of protection, tariffs are preferred over quantitative restrictions, principally because they are far more transparent.<sup>175</sup> As one of the cornerstones of the GATT system,<sup>176</sup> Article XI:1 of the GATT provides, in relevant part, that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member].”<sup>177</sup>

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173. It is important to note that the WTO recorded its first intra-African dispute in July 2018. See Request for Consultations by Tunisia, *Morocco – Provisional Anti-Dumping Measures on School Exercise Books from Tunisia*, WTO Doc. WT/DS555/1 (July 10, 2018).

174. Article XI of the GATT provides for the general elimination of quantitative restrictions. GATT, *supra* note 20, art. XI.

175. See Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)*, ¶ 9.63, WTO Doc. WT/DS34/R (adopted Nov. 19, 1999) [hereinafter Panel Report, *Tukey – Textiles*]. There are also some economic, policy and practical reasons for this preference. See JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 139–42, 153–54 (2d ed. 1997).

176. Panel Report, *Turkey – Textiles*, *supra* note 175, ¶ 9.63.

177. GATT, *supra* note 20, art. XI:1.

This provision applies to “all measures” instituted or maintained by a WTO member “other than measures that take the form of duties, taxes or other charges,” which prohibit or restrict imports and exports.<sup>178</sup> Regardless of whether the measure is legally binding or not, it will be covered by the provision if it restricts imports or exports.<sup>179</sup> However, not every condition or burden associated with import formalities or requirements are inconsistent with Article XI:1. Rather, “only those that are limiting, that is, those that limit the importation or exportation of products” are concerned, and this limiting effect may be demonstrated “through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”<sup>180</sup> The permissive aspects of plastic regulations, namely the type of plastic inscribed in the exemption lists in Mauritius and Seychelles, are measures caught by Article XI:1. Through their design, architecture, and revealing structure, these regulations limit the importation of exempted plastic bags via the system of clearance, which is only granted at the discretion of the authority in charge and is non-automatic.

Apart from quotas and import and export licenses, Article XI:1 also applies to “other measures” that restrict trade, which may take virtually any form, especially import bans.<sup>181</sup> It follows that the other aspects of the plastic bag bans, which are not import or export licenses—notably the prohibitive part of these regulations—fall under this category of “other measures.” Here, all of the surveyed measures qualify as “other measures” within the meaning of Article XI:1.

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178. Report of the Panel, *Japan – Trade in Semi-Conductors*, ¶ 104, L/6309 (May 4, 1988), GATT BISD (35<sup>th</sup> Supp.), at 116, 143 (1989).

179. *Id.* ¶ 106. See Appellate Body Report, *China – Raw Materials*, *supra* note 129, ¶ 320 (deciding that Article XI covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported).

180. Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, ¶ 5.217, WTO Doc. WT/DS438/AB/R (adopted Jan. 26, 2015).

181. See Report of the Panel, *US – Tuna I*, *supra* note 22, ¶¶ 5.17–5.18 (finding that the provisions of the MMPA under which import prohibition on certain yellowfin tuna and certain yellowfin tuna products from Mexico were imposed amounted to restrictions and, thus, were inconsistent with Article XI:1).

### B. Plastic Bag Bans Must Be Non-Discriminatory

Quantitative restrictions are further subject to a non-discrimination requirement akin to the most-favored nation clause in Article I of the GATT. Article XIII:1 of the GATT provides that quantitative restrictions applied under Article XI to the products of one country should be extended to like products of other WTO members.<sup>182</sup> It does so by requiring that the importation of all third countries be “similarly prohibited or restricted” because “like products should be treated equally, irrespective of their origin.”<sup>183</sup> As such, a plastic bag-restricting country is henceforth under the obligation to treat all imported plastic bags similarly. The story may not end there, however, if a regional trade agreement (RTA) like the Rwanda-proposed EAC plastic ban law applies.

The question that follows is whether Article XXIV, which regulates the formation and functioning of goods RTAs, can waive the obligation of non-discrimination as affirmed by the Appellate Body in *EC – Bananas III*,<sup>184</sup> even in the presence of a quantitative restriction. In *Turkey – Textiles*, the Panel ruled that WTO members cannot deviate from the non-discrimination obligation of Article XIII, even when an RTA is involved.<sup>185</sup> That finding, however, rested on the fact that quantitative restrictions were not necessary for the formation of the customs union. What the adjudicator did not rule on is of particular interest to this article, particularly because the EAC is not a customs union in formation, but is essentially operating as such. In effect, the *Turkey–Textiles* Appellate Body made “no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will ever be justified by Article XXIV,”<sup>186</sup> indicating the likelihood of a finding in a different direction.

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182. GATT, *supra* note 20, art. XIII:1.

183. Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas (EC – Bananas III)*, ¶ 190, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997) [hereinafter Appellate Body Report, *EC – Bananas III*].

184. *Id.* at ¶ 191.

185. See Panel Report, *Turkey – Textiles*, *supra* note 175, ¶¶ 9.188–9.189.

186. Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)*, ¶ 65, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999) (emphasis in original) [hereinafter Appellate Body Report, *Turkey – Textiles*].

It can be argued that the EAC, as an RTA among developing countries and notified under the Enabling Clause,<sup>187</sup> is not concerned with the *Turkey – Textiles* ruling delivered in the context of Article XXIV. This is true only to a certain extent. Pursuant to Paragraph 3 of the Enabling Clause, any favorable treatment *shall* be designed solely for promoting trade among the parties and “not to raise barriers to or create undue difficulties for the trade of any other contracting parties.”<sup>188</sup> The Enabling Clause has been interpreted as *lex specialis* vis-à-vis Article XXIV.<sup>189</sup> *Lex specialis* is a general international law principle pursuant to which a law unique to a particular regime, or applicable in specific scenarios, prevails over the general law.<sup>190</sup> Following the application of that principle, one may contend that the Enabling Clause only prevails over Article XXIV in tariff barriers. With regard to non-tariff measures like quantitative restrictions, the Enabling Clause provides for their elimination subject to “criteria and conditions” yet to be set by the WTO Ministerial Council.<sup>191</sup>

Consequently, in the absence of these criteria and conditions, the issue of whether the Enabling Clause embraces the elimi-

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187. See Committee on Trade and Development, *Notification of the East African Community*, WTO Doc. WT/COMTD/N/14 (Oct. 11, 2000); see also GATT Council, *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 2(c), L/4903 (Nov. 28, 1979), GATT BISD (26<sup>th</sup> Supp.), at 203 (1980) [hereinafter Enabling Clause] (allowing developing countries to enter into regional trade agreements among themselves without necessarily meeting the strict requirements of Article XXIV).

188. Enabling Clause, *supra* note 187, ¶ 3.

189. See Committee on Trade and Development, *Legal Note on Regional Trade Arrangements Under the Enabling Clause by the Secretariat*, ¶5, WTO Doc. WT/COMTD/W/114 (May 12, 2003).

190. See generally Regis Y. Simo, *The Law of International Responsibility: The Case of the WTO as a ‘Lex Specialis’ or the Fallacy of a ‘Self-contained’ Regime*, 22 AFRICAN J. INT’L & COMP. L. 184 (2014). For the function and scope of the *lex specialis* rule as a in international law, see Int’l Law Comm’n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682 (2006) [hereinafter Report of the Study Group]. The Report notes that *lex specialis* is a “widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.” See *id.* at ¶ 56. The appointment of this study group was a response to the growing concerns about the fragmentation of international legal norms characterized mainly by the growing proliferation of international tribunals and courts.

191. See Enabling Clause, *supra* note 187, ¶ 2(c).

nation of non-tariffs measures remains an open question.<sup>192</sup> That is why, following the *lex specialis* principle, coupled with the Appellate Body ruling in *EC – Bananas III*, finding that “a waiver from the obligations under Article I [does not] impl[y] a waiver from the obligations under Article XIII,”<sup>193</sup> the non-discrimination requirement of quantitative restrictions apply *mutatis mutandis* to RTAs under both the GATT and the Enabling Clause. Therefore, although the *2016 EAC Bill* has not yet been adopted by all East African countries, the *Turkey – Textiles* dictum would guide its relation with WTO rules.<sup>194</sup> By leaving the door open, the Appellate Body in *Turkey – Textiles* suggested that EAC countries may not necessarily violate WTO non-discrimination rules in Article XIII in the future if they do not similarly restrict plastic bags from non-EAC countries.

### *C. Transparency of Plastic Bag Regulations*

Transparency is one of the cornerstones of the multilateral trading system. It is a requirement in each WTO-covered agreement<sup>195</sup> and is generally divided into three main obligations: (1) to publish all relevant laws, regulations, and measures of general application; (2) to notify the WTO of these laws and regulations; and (3) to administer these measures, for example, through the establishment of a point of contact. Transparency serves the information gap-filling function while enabling members to comply with their commitments. The Trade Policy Review Mechanism instituted in the GATT during

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192. Legal Note on Regional Trade Arrangements Under the Enabling Clause by the Secretariat, *supra* note 189, ¶ 53(b).

193. Appellate Body Report, *EC – Bananas III*, *supra* note 183, ¶ 183.

194. *See* Appellate Body Report, *Turkey – Textiles*, *supra* note 186, ¶ 65.

195. *See* GATT, *supra* note 20, art. X; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 63, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); TBT Agreement, *supra* note 25, arts. 2, 10; Agreement on the Application of Sanitary and Phytosanitary Measures art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 493, 33 I.L.M. 1165 (1994); Agreement on Agriculture art. 18, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.



the Uruguay Round serves this purpose, as its function is to review members' trade policies at regular intervals.<sup>196</sup>

Article X of the GATT requires "prompt" publication of all trade measures in a domestically accessible gazette, "in such a manner as to enable governments and traders to become acquainted with them."<sup>197</sup> WTO members monitor compliance with transparency by requiring notification of measures to the relevant bodies. The Decision on Notification Procedures for Quantitative Restrictions, adopted by the Council for Trade in Goods in 2012,<sup>198</sup> specifies the format and the timelines for the notification of quantitative restrictions. According to this Decision, WTO members must make "*complete* notifications of all quantitative restrictions in force" from September 30, 2012, and in two yearly intervals thereafter.<sup>199</sup> Any intervening changes shall be reported "as soon as possible," which must not be beyond "six months from their entry into force."<sup>200</sup> This Decision contemplates the situation of a reverse or counter-notification, whereby a member notifies the committee of the imposition of quantitative restrictions by another member that has not given prior notification.<sup>201</sup> It follows that, except for Cote d'Ivoire,<sup>202</sup> Mauritius,<sup>203</sup> and Seychelles,<sup>204</sup> which have no-

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196. On the origins, objectives, and the functioning of the Trade Policy Review Mechanism, see Petros Mavroidis. *Surveillance Schemes: The GATT's New Trade Policy Review Mechanism*, 13 MICH. J. INT'L L. 374 (1992).

197. A measure that has been published eight months after it was implemented has not been considered "prompt." See Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, ¶ 7.1076, WTO Doc. WT/DS375/DS376/DS377/R (adopted Sept. 21, 2010).

198. See Council for Trade in Goods, *Decision on Notification Procedures for Quantitative Restrictions*, WTO Doc. G/L/59/Rev.1 (July 3, 2012).

199. *Id.* ¶ 1 (emphasis added).

200. *Id.*

201. *Id.* ¶ 5.

202. Committee on Market Access, *Notification of Côte D'Ivoire Pursuant to the Decision on Notification Procedures for Quantitative Restrictions*, WTO Doc. G/MA/QR/N/CIV/1 (Oct. 2, 2014) (notification for biennial period 2014-2016, and representing restrictions in force as of Jan. 8, 2014).

203. Committee on Market Access, *Notification of Mauritius Pursuant to the Decision on Notification Procedures for Quantitative Restrictions*, WTO Doc. G/MA/QR/N/MUS/3 (Mar. 15, 2017) (notification for biennial period 2016-2018, representing restrictions in force as of Feb. 28, 2017).

204. Committee on Market Access, *Notification of Seychelles Pursuant to the Decision on Notification Procedures for Quantitative Restrictions*, WTO Doc.

tified their plastic regulations to the Market Access Committee, other states that have not complied with their obligations are not immune from a reverse notification. It also is worth noting that transparency for quantitative restrictions under the GATT is without prejudice to notification requirements under the SPS and the TBT Agreement.<sup>205</sup>

#### *D. Relationship between Quantitative Restrictions and National Treatment of Plastic Bags*

Article XI:1 of the GATT not only regulates measures instituted on imports, but also reaches restrictions placed “on the exportation or sale for export” of any product destined for the territory of any other contracting party.<sup>206</sup> This has nourished a debate concerning the relationship between Article XI:1 and Article III of the GATT. Distinguishing between measures falling under either of these provisions has not always been clear.<sup>207</sup> It suffices to say that, while Article XI applies to measures that affect the *importation* of goods, Article III applies to measures affecting imported *products*.<sup>208</sup>

In *India – Autos*, the United States and the European Communities challenged India’s import restrictions in the automotive sector as violating both Articles III and XI of the GATT.<sup>209</sup> The Panel addressed the relationship between the two provisions, finding that it is possible for different aspects of a measure to affect the competitive opportunities of imports in different ways, making them fall within the scope of either Article III or Article XI.<sup>210</sup> Consequently, there may be an overlap between the two provisions.<sup>211</sup> Restrictions on plastic bags, therefore, can fall simultaneously under both provisions. Despite

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G/MA/QR/N/SYC/1 (Jan. 19, 2018) (covering notification for biennial period 2016-2017, and representing restrictions in force as of Jan. 1, 2016).

205. Decision on Notification Procedures for Quantitative Restrictions, *supra* note 188, n.1. For TBT, see *infra* Part V.D.

206. See GATT, *supra* note 20, art. XI:1.

207. On this controversial relationship, see Erich Vranes, *The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services*, 12 J. INT’L ECON. L. 953, 957–62 (2009).

208. Panel Report, *India – Measures Affecting the Automotive Sector (India – Autos)*, ¶7.220, WTO Doc. WT/DS146/DS175/R (adopted Dec. 21, 2001).

209. See *id.*

210. *Id.* ¶ 7.224.

211. *Id.*

this uneasy relationship, the WTO adjudicator nevertheless cautioned against the risk of rendering Article III superfluous “[i]f Article XI:1 were interpreted broadly to cover also internal requirements.”<sup>212</sup>

### III. CHARACTERIZING PLASTIC BAG BANS AS “DOMESTIC REGULATION” UNDER WTO LAW

As stated, when the impugned laws do not restrict the importation of plastic bags, the laws would most likely affect plastic bags once they have cleared customs or when they are domestically produced. This can take the form of internal taxation, like sales taxes, or other internal regulations, such as safety requirements. As mentioned earlier, however, classifying a measure as either a market access restriction or a domestic regulation is not always a straightforward task. The legal consequences attached thereto are crucial. Indeed, while a quantitative restriction is *prima facie* prohibited, a domestic regulation under Article III can only be illegal with regard to the manner in which international tax and regulatory measures are applied, particularly if they favor domestic products over imported products.<sup>213</sup>

South Africa imposes a levy on both domestically produced and imported thick plastic bags, while banning thinner ones. Since the reach of WTO-covered agreements extends beyond the elimination of border measures, the national treatment (NT) principle prohibits the use of domestic fiscal and regulatory environmental measures, like South Africa’s, for protectionist ends.<sup>214</sup> In the words of the Appellate Body in *Japan – Alcoholic Beverages II*, NT “obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.”<sup>215</sup> Regardless of whether a specific tariff commitment was made, NT not only covers explicitly dis-

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212. *Id.* ¶ 7.220 (citing Report of the Panel, *Canada – Administration of the Foreign Investment Review Act*, ¶5.14, L/5504 (Feb. 7, 1984), GATT BISD 30<sup>th</sup> Supp.), at 140 (1985)).

213. See Report of the Panel, *United States – Section 337 of the Tariff Act of 1930 (US – Section 337)*, ¶ 5.10, L/6439, GATT BISD (36<sup>th</sup> Supp.) 345 (adopted Nov. 7, 1989).

214. See GATT, *supra* note 20, art. III.

215. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, at 16, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996) [hereinafter Appellate Body Report, *Japan – Alcoholic Beverages II*].

criminary internal measures, but also policies that indirectly have such consequences.<sup>216</sup> This sometimes supports the argument that WTO agreements curb countries' freedom because the potential reach of the NT principle relates to virtually all governmental policies of every WTO member.<sup>217</sup>

The NT provision thus prevents South Africa from discriminating against imported plastic bags in favor of domestically manufactured ones. Such conduct will likely fall afoul of Article III of GATT. The crux of the matter, however, when it comes to the determination of whether there has been discrimination between domestic and imported goods, rests on the blurry notion of "likeness" of the products under consideration. While discrimination between unlike goods would generally be permitted, the determination that two products are "like" has evolved as one of the thorniest issues in the WTO jurisprudence, and one of the most discussed issues in the WTO literature. Likeness does not necessarily imply equivalence or identicalness, but certainly includes a degree of similarity. That is why it has been stressed countless times that the determination as to whether two goods are like should be made on a "case-by-case basis,"<sup>218</sup> taking into consideration a number of factors, including "the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality."<sup>219</sup>

Under this provision, whether two plastic bags are like does not necessarily involve their process or production method (PPM). This is because Article III of the GATT only touches on the characteristics of the merchandise as such, and not the way

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216. *Id.* The relevant part reads: "The Article III national treatment obligation . . . extends also to products not bound under Article II." *Id.*

217. For a further elaboration on the legal and economic interpretation of the NT, see generally, Henrik Horn & Petros C. Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case Law on Tax Discrimination*, 15 EUR. J. INT'L L. 39 (2004).

218. See Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an 'Aim and Effects' Test*, 32 INT'L LAWYER 619 (1998). Robert Hudec believes that proceeding this way has deprived the WTO dispute settlement mechanism of a coherent conception of "likeness" when comparing domestic to imported goods. *Id.* at XX. He then suggests reliance on the "aim and effects" approach of the measures, which is more intuitively sound to cure that multiplicity of likenesses. *Id.* at XX.

219. Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 215, at 21.

it is manufactured or obtained.<sup>220</sup> Accordingly, South Africa cannot treat two bags having the same physical characteristics in a different way simply because they were not produced or harvested in the same manner, as their PPMs do not prevent them from being like. Since likeness is understood as a relative concept,<sup>221</sup> domestic environmental measures become an issue only when they discriminate between imported and domestic like products.<sup>222</sup> When that happens, the country in question can seek to justify discrimination under the general exception clause.

#### IV. REGULATION OF PLASTIC BAGS JUSTIFIABLE AS MEASURES FOR THE PROTECTION OF THE ENVIRONMENT

Countries imposing a ban on the importation of plastic bags contrary to Article XI of the GATT generally invoke Article XX of the GATT as a justification. This also holds true for the South African plastic bag levy, if found to violate Article III of the GATT.

##### A. A Brief Overview of the General Exceptions

Article XX of the GATT allows governments to enact trade measures to protect human, animal, or plant life or health, provided the measures do not discriminate and are not used as protectionism in disguise. WTO members are therefore allowed to justify violations of their GATT obligations through recourse to one of the exceptions listed in Article XX. In fact, the GATT's drafters intended this series of grounds to trump trade-liberalizing obligations present in the GATT legal instruments. This goes to show that, at times, other social concerns take precedence over trade commitments.

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220. Report of the Panel, *US – Tuna I*, *supra* note 22, ¶¶ 5.14–5.15 (emphasis in the original).

221. In a famous and oft-quoted Appellate Body decision, it stated that “[t]he accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied.” See Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 215, at 21.

222. See Hudec, *supra* note 218, at 626. Hudec, on his part, does not seem to “understand why important issues of regulatory policy should turn on these sterile concepts of physical likeness.” *Id.* On the intricacies of the definition and application of non-discrimination, see generally, Julia Y. Qin, *Defining Nondiscrimination under the Law of the World Trade Organization*, 23 B.U. INT'L L. J. 215 (2005).

Article XX of the GATT contains so-called “affirmative defenses.” Affirmative defenses typically allow members to pursue legitimate policy objectives, which, while not among the WTO Agreement’s own specific objectives, are deemed compatible with them.<sup>223</sup> When a dispute arises, the onus to prove that the measures comply with one of the acceptable grounds rests on the party invoking it, who then, if successful, would be lawfully discharged of the obligation he sought to deviate from. This balances the value of the trade commitment on the one hand, and the endorsement of members’ regulatory diversity on the other hand.<sup>224</sup> Apart from trade measures, Article XX of the GATT can also be invoked to justify violations of internal measures,<sup>225</sup> as well as to provide exceptions to obligations assumed under the Protocol of Accession.<sup>226</sup>

The Appellate Body has devised a two-pronged test of the GATT-consistency of a measure sought to be justified under Article XX: “[T]he measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.”<sup>227</sup> Unless compliance with an Article XX subparagraph has been shown, a panel may not proceed with the examination of the compli-

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223. See Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 15-16, WTO Doc. WT/DS33/AB/R, (adopted May 23, 1997) (stating that Article XX is a “limited’ exception from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences.”).

224. See Appellate Body Report, *US – Shrimp*, *supra* note 6, ¶ 121, where, overturning the Panel ruling, the Appellate Body made it clear that WTO members are free to unilaterally regulate their market subject to their compliance with the relevant GATT disciplines.

225. See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 115, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) (finding that a measure that is inconsistent with the NT provision of Article III of the GATT was capable of justification under Article XX) [hereinafter Appellate Body Report, *EC – Asbestos*].

226. See Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 7.158–7.160, WTO Doc. WT/DS394/R (adopted Feb. 22, 2012) [hereinafter Panel Report, *China – Raw Materials*].

227. Appellate Body Report, *US – Gasoline*, *supra* note 47, at 22.

ance of the measure with the chapeau<sup>228</sup>—since compliance by the invoking-member paired with the requirements of the chapeau is the ultimate stage for deciding whether an exception applies in the case.<sup>229</sup>

*B. Are Plastic Bag Bans “Necessary to Protect Human, Animal or Plant Life or Health?”*

While trade should not normally be depicted as hostile to human, animal, or plant health, Article XX(b) of the GATT is a perfect illustration of the existing tensions between international trade and public health and environmental concerns.<sup>230</sup> Under Article XX(b), a qualifying measure imposed to protect human, animal, or plant life has to be “necessary.”<sup>231</sup> In *Thailand – Cigarettes*, the Panel explained that a measure would be considered necessary “only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”<sup>232</sup> This necessity test requires governments to use the least GATT-inconsistent measure that is reasonably available to achieve the Article XX(b) objective.

The main objective of plastic bag measures is to protect human health and the environment from the nuisances resulting from the use of plastic bags.<sup>233</sup> A growing body of literature illustrates how plastics bags are harmful to the environment, as well as to human health. Apart from the migration of chemicals

228. Panel Report, *China – Raw Materials*, *supra* note 226, ¶ 7.469. *See also* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 139, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter Appellate Body Report, *Brazil – Retreaded Tyres*].

229. Appellate Body Report, *US – Shrimp*, *supra* note 6, ¶ 157.

230. Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 228, ¶ 210.

231. *See* GATT, *supra* note 20, art. XX(b).

232. Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand – Cigarettes)*, ¶ 75, DS10/R (Nov. 7, 1990), GATT BISD (37th Supp.), at 200 (1991).

233. Regarding human health, a press statement from the Kenyan government expressly states that the purpose of the ban “is to avoid health and environmental effects resulting from the use of plastic bags,” and includes, *inter alia*, “[e]ndangering human health when used for packaging food in particular hot food.” *See* Geoffrey Wahungu, *Press Statement on Total Ban on All Plastic Bags*, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY, [http://www.nema.go.ke/images/Docs/Awarness%20Materials/PRESS\\_STATEMENT\\_ON\\_TOTAL\\_BAN\\_ON\\_ALL\\_PLASTIC\\_BAGS.pdf](http://www.nema.go.ke/images/Docs/Awarness%20Materials/PRESS_STATEMENT_ON_TOTAL_BAN_ON_ALL_PLASTIC_BAGS.pdf).

from plastics to food items,<sup>234</sup> plastic bag litter, when filled with rainwater, is known to be a breeding ground for insects. These insects, like mosquitoes, facilitate the spread of diseases, especially in malaria-endemic countries in sub-Saharan Africa.<sup>235</sup> Seen from this angle, the plastic bag bans are capable of achieving the objectives for which they are designed. In other words, the regulation of plastic bags can be justified under Article XX(b) as a measure “necessary” for the protection of “human, animal or plant life or health.”<sup>236</sup> Even when the regulations do not necessarily lead to a dispute, members have systematically relied on Article XX, particularly Article XX(b), to justify their quantitative restrictions.<sup>237</sup>

*C. Plastic Bag Regulations as Measures “Relating to the Conservation of Exhaustible Natural Resources”*

Article XX(g) of the GATT addresses a departure from the GATT rules for environmental protection purposes. A three-tier test is required for a measure to be justified under this exception: the measure must (1) “relate to” (2) the “conservation of exhaustible natural resources” and (3) be made effective in conjunction with “restrictions on domestic production or consumption.”<sup>238</sup> The vagueness of the term “exhaustible natural resources” often gives rise to diverging and conflicting interpretations regarding the scope of the provision.

GATT and WTO adjudicators have adopted a rather expansive definition of this term to include any living and non-living resources. In the words of the Appellate Body in *US – Shrimp*, the “generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition,

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234. See generally Whitt et al., *supra* note 9, at 166; see also Rolf U. Halden, *Plastics and Health Risks*, 31 ANNUAL REV. PUB. HEALTH 179 (2010).

235. See UNEP, *supra* note 10, at 23.

236. See GATT, *supra* note 20, art. XX(b).

237. See Committee on Market Access, *Note by Secretariat: Quantitative Restrictions: Factual Information on Notification Received, Committee on Market Access*, ¶ 3.12, WTO Doc. G/MA/W/114/Rev.1 (Apr. 27, 2017) (stating that, of the 886 quantitative restrictions notified as of Apr. 21, 2017, 630 quantitative restrictions [approximately sixty-nine percent of all quantitative restrictions] cited Article XX. Article XX(b) alone was invoked in forty percent of all cases). This figure excludes instances where Members have simply cited “protection of animal life and of the environment,” without specifically mentioning Article XX(b). See *id.* ¶ 3.13.

238. GATT, *supra* note 20, art. XX(g).



evolutionary.”<sup>239</sup> The Appellate Body added that “[i]t is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.”<sup>240</sup> This finding adopted a dynamic approach to the interpretation of the term “exhaustible natural resources.” Thus, salmon, dolphins, clean air, and virtually any resource qualify.<sup>241</sup> A resource need not be rare or endangered to qualify as “exhaustible.” Furthermore, the measure must not only “relate to,” such as being “primarily aimed at”<sup>242</sup> the conservation of natural resources, but it must also operate “in conjunction” with restrictions on domestic production or consumption.<sup>243</sup> The latter requires a certain degree of “even-handedness in the imposition of restriction,” although not necessarily “identical treatment of domestic and imported products.”<sup>244</sup>

Plastic bag bans may be justified under Article XX(g) of the GATT as measures “relating to the conservation of exhaustible natural resources.”<sup>245</sup> Since the term “exhaustible natural resources” was not given a meaning in the drafting history of the clause, the panels and the Appellate Body have been left to interpret the phrase within the customary international law rules codified in the Vienna Convention on the Law of Treaties. WTO adjudicators have not always been consistent in their rulings regarding the meaning of “exhaustible natural resources,” sparking criticism not only from the disputants, but also in legal literature. As the GATT and WTO jurisprudence on this provision displays, Article XX(g) can be invoked for virtually anything relating to natural resources. Despite Article XX(g)’s historical purpose to address exhaustible minerals, issues such as air pollution, fish, and raw materials, among others, have been upheld as falling under Article XX(g).<sup>246</sup> By extension, a

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239. Appellate Body Report, *US – Shrimp*, *supra* note 6, ¶ 130.

240. *Id.*

241. On the GATT and WTO disputes grappling with the matter, see generally Manjiao Chi, ‘*Exhaustible Natural Resource*’ in *WTO Law: GATT Article XX(g) Disputes and their Implications*, 48 J. WORLD TRADE 939 (2014).

242. Appellate Body Report, *US – Gasoline* *supra* note 47, at 18.

243. See GATT, *supra* note 20, art. XX(g).

244. Appellate Body Report, *US – Gasoline* *supra* note 47, at 21.

245. See GATT, *supra* note 20, art. XX(g).

246. See generally Chi, *supra* note 241, for a survey of the different disputes where Article XX(g) was invoked and for the interpretation of the term “exhaustible natural resources” by the respective panels and the Appellate Body.

ban on the importation and sale of plastic bags can be justified under this provision because plastic bags are known to be obnoxious to the soil, the subsoil, and marine life.

## V. PLASTIC BAG REGULATIONS AS “TECHNICAL BARRIERS TO TRADE”

As studied above, the surveyed plastic bag regulations qualify either as market access or as “behind the border” measures capable of justification under Article XX of the GATT. It is not rare, however, for countries’ actions to fall under two or more WTO-covered agreements at the same time. This is the case for the TBT Agreement, which, in its function, sometimes coincides with the GATT.<sup>247</sup> What follows is therefore an analysis of the TBT Agreement to plastic measures.

### A. *The TBT Agreement as a “Special” Law Applicable to Plastic Bag Regulations*

Although the provisions of the TBT Agreement and the GATT can overlap and apply simultaneously in their scope and content, WTO members’ obligations are not the same.<sup>248</sup> While overlap of the GATT and the TBT Agreement is almost inevitable, it may also lead to a conflict of norms where two or more obligations under separate agreements claim precedence over a particular matter. The General interpretative note to Annex 1A of the WTO Agreement attempts a solution by providing the following: “[i]n the event of conflict between a provision of the [GATT] and a provision of another agreement in Annex 1A to the [WTO Agreement], the provision of the other agreement shall prevail to the extent of the conflict.”<sup>249</sup> Strictly speaking,

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247. See Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 100, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter Appellate Body Report, *US – Clove Cigarettes*] (noting that “technical regulations are in principle subject not only to Article 2.1 of the TBT Agreement, but also to the national treatment obligation of Article III:4 of the GATT 1994, as ‘laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use’ of products.”).

248. See Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 405, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter Appellate Body Report, *US – Tuna II (Mexico)*].

249. See WTO Agreement, *supra* note 6, general interpretative n. to Annex 1A.

this would mean that the TBT Agreement would prevail over the GATT to the extent of the conflict. The story, however, does not end there. The TBT Agreement prevails pursuant to this note only to the extent of the conflict, but it does not preclude the GATT's relevance.

When there is no conflict between two or more agreements, the WTO adjudicator resorts to the *lex specialis derogat lege generali* principle.<sup>250</sup> In the WTO context, contrary to disengaging the general norm in favor of the specific rule, *lex specialis* has been used to channel the sequence of analysis between general and specific rules.<sup>251</sup> In effect, as the United Nations International Law Commission Study Group suggests in its report on the fragmentation of international law, it is not always necessary to set aside the general rule when applying *lex specialis* as a conflict rule in a case.<sup>252</sup> This means that, while the general rule remains applicable to the case, the WTO adjudicator first analyses the challenged measure against the requirement of the specific agreement, such as the TBT Agreement, before addressing its compatibility with the *lex generalis*, in

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250. For a critique of the maxim's vagueness and its application in the fragmented international law system, see Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27 (2005). The author argues that, while the *lex specialis* may be suited to resolve conflicts within sub-regimes (e.g., the WTO regime), the maxim may find it hard to operate in a non-hierarchical international legal system made of different legal orders where some are even considered as "self-contained." *Id.* at 30. This is because, in certain circumstances, two norms may well be regarded as special, say, for our purposes, environmental law and trade law. *See id.* at 41–42. For instance, the Appellate Body considered that whatever the status of the "precautionary principle" in the field of international environmental law, it had not yet become binding for the purpose of interpreting members' obligations under WTO covered agreements. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶¶123–125, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998). For a critical analysis of the WTO dispute settlement system as *lex specialis* in the international law rules on state responsibility, see Simo, *supra* note 190.

251. See, for instance, Panel Report, *Turkey – Textiles*, *supra* note 175, ¶9.92, where the Panel stated that, since the WTO Agreement is a "Single Undertaking," WTO obligations flowing from the respective covered agreements are therefore cumulative. Consequently, WTO members "must comply with all of them at all times unless there is a formal 'conflict' between them." Hence, in the Panel's view, the special rule prevails over the general rule only when they cannot be applied simultaneously. *Id.*

252. *See* Report of the Study Group, *supra* note 190, ¶ 31.

this case the GATT.<sup>253</sup> This is what the Panel in *EC – Sardines* did when it relied on *EC – Bananas III*, where the Appellate Body had suggested that, “where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement.”<sup>254</sup> That Panel consequently preceded its analysis of the claim under Article III of the GATT by its examination under the TBT Agreement.

Yet, “[a]s a general principle, panels are free to structure the order of their analysis as they see fit,” which may include taking account of the manner in which a claim is presented by a complainant.<sup>255</sup> This means that strict adherence to the *lex specialis* principle may not always hold. In practice, therefore, a panel may choose to begin its analysis with the general rule (the GATT) before falling back to the more specific rule (the TBT Agreement), or even exercise judicial economy if analysis under the specific agreement is not necessary in resolving the dispute. This entails that, although plastic bags may well be TBT measures, a panel can choose to begin its examination under the GATT and not even come back to the TBT Agreement. Alternatively, a panel may opt to follow the *lex specialis* sequence by opting to first analyze the claim under the TBT Agreement.

### *B. The Scope of Application of the TBT Agreement to Plastic Bag Regulations*

The TBT Agreement imposes multilateral legal disciplines on technical regulations and standards, which are two legal instruments available to WTO members. Established WTO case law makes it clear that qualifying a measure as a technical regulation or a standard is a threshold issue that falls under the ambit of the TBT Agreement. For instance, in *EC – Sardines*, the Appellate Body stated that “whether a measure is a technical regulation is a threshold issue because the outcome of

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253. See Joost Pauwelyn, *Cross-Agreement Complaints before the Appellate Body: A Case Study of the EC-Asbestos Dispute*, 1 WORLD TRADE REV. 63, 82–83 (2002).

254. Panel Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, ¶ 7.15, WTO Doc. WT/DS231/R (adopted Oct. 23, 2002) [hereinafter Panel Report, *EC – Sardines*].

255. Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 126, WTO Doc. WT/DS276/AB/R (adopted Sept. 27, 2004).

this issue determines whether the TBT Agreement is applicable.”<sup>256</sup> In other words, “[i]f the measure . . . is not a technical regulation, then it does not fall within the scope of the TBT Agreement.”<sup>257</sup>

Annex 1.1 of the TBT Agreement defines a “technical regulation” as a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory,” and may also exclusively include or deal with “terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”<sup>258</sup> Plastic bag bans qualify as technical regulations in the sense of Annex 1.1 of the TBT Agreement because the regulations “lay down” the characteristics of the plastic bags that are either prohibited or exempted. A “characteristic” has been defined by standing WTO case law as “‘features,’ ‘qualities,’ ‘attributes,’ or other ‘distinguishing mark[s]’ of a product . . . [relating] *inter alia*, to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.”<sup>259</sup> This adds to the definition provided by Annex 1.1 of the TBT Agreement, which gives examples of product characteristics as including “terminology, symbols, packaging, marking or labelling requirements.”<sup>260</sup> While this is not necessary to meet the definition of “technical regulation” in Annex 1.1 of the TBT Agreement, which may be confined to simply laying down “only one or a few” characteristics,<sup>261</sup> some of these regulations delve deeper into the details by defining the end-uses of the banned products. For instance, Mauritius speaks of bags “designed for carrying”<sup>262</sup> or those “meant to

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256. Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 175, WTO Doc. WT/DS231/AB/R (adopted Oct. 23, 2002).

257. *Id.*

258. TBT Agreement, *supra* note 25, at Annex 1.1.

259. Appellate Body Report, *EC – Asbestos*, *supra* note 225, ¶ 67.

260. See TBT Agreement, *supra* note 25, at Annex 1.1.

261. Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, ¶ 5.11, WTO Doc. WT/DS400/DS401/AB/R (adopted June 18, 2014) [hereinafter Appellate Body Report, *EC – Seal Products*].

262. See Mauritius, *Plastic Bag Regulations*, § 2.

carry goods.”<sup>263</sup> Rwanda, on the other hand, provides the chemical formula ( $\text{CH}_2=\text{CH}_2$ ).<sup>264</sup>

Another important feature of the technical regulation is that it is mandatory to comply with the measure specifying product characteristics. A technical regulation was interpreted by the Appellate Body in *EC – Seal Products* as a document establishing or prescribing something, and consequently has “a certain normative content.”<sup>265</sup> In other words, the regulation must “regulate the ‘characteristics’ of products in a binding or compulsory fashion.”<sup>266</sup> For example, a Rwandan law that defines the interdicted “polythene bag” as “a synthetic industrial product with a low density composed of numerous chemical molecules ethene with a chemical formula; ( $\text{CH}_2=\text{CH}_2$ )”<sup>267</sup> is definitely a technical regulation that specifies product characteristics in the sense of Annex 1.1, the compliance of which is also compulsory.

Some of these laws further rely on international standards when adopting their measures, especially when the technical regulations provide that, for an exempted bag to be imported, it must conform to a particular standard. The case of the Mauritian compostable plastic bag regulation is a prime example, since the importer is provided with a list of international standards to choose from.<sup>268</sup>

The substantive scope of the TBT Agreement also covers conformity assessment procedures. Conformity assessment procedures are defined in Annex 1.3 of the TBT Agreement as “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.”<sup>269</sup> The South African plastic bag regulation is the most elaborate with its conformity assessment procedures, particularly since it addresses production control and routine testing procedures for plastic bags.<sup>270</sup>

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263. See Mauritius, *Plastic Bag Amendment Regulations*, § 4.

264. See Rwanda, *Plastic Bag Law*, art. 2.

265. Appellate Body Report, *EC – Seal Products*, *supra* note 261, ¶ 5.10.

266. Appellate Body Report, *EC – Asbestos*, *supra* note 225, ¶ 68.

267. See Rwanda, *Plastic Bag Law*, art. 2.

268. See Mauritius, *Plastic Bag Amendment Regulations*, third sched.

269. TBT Agreement, *supra* note 25, at Annex 1.3.

270. Compulsory Specification for Plastic Carrier Bags and Flat Bags-VC 8087, *supra* note 149, at Annexure B.

*C. The TBT Legal Disciplines on Plastic Bag Regulations*

The TBT Agreement recognizes countries' rights to adopt the standards they consider appropriate; for example, to protect human, animal, or plant life or health, to safeguard the environment, or to meet other consumer interests. Furthermore, members are not prevented from taking measures necessary to ensure that their country's standards are met. The concern of the TBT Agreement is to ensure that legitimate technical regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade.<sup>271</sup> The main legal disciplines of the TBT Agreement that are relevant for this article are found under Article 2. Article 2.1 stipulates that imported products be accorded treatment no less favorable than like products of national origin. Article 2.2 emphasizes that technical regulations be no more trade-restrictive than necessary to fulfill a legitimate objective, such as protection of the environment.

Article 2.1 of the TBT Agreement uses similar language as Article III:4 of the GATT in requiring "treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."<sup>272</sup> This provision prohibits the use of technical regulation to discriminate against imported like products in favor of domestic ones.<sup>273</sup> Unlike Article III:4 of the GATT, where the detrimental impact on the competitive conditions can suffice to prove a violation, the fact that a measure distinguishes between like products is insufficient to establish inconsistency under Article 2:1 of the TBT Agreement. To investigate if a measure actually accords "treatment no less favourable," the adjudicator has to also analyze whether the "detrimental impact" stems exclusively from "a legitimate regulatory distinction" rather than "reflecting discrimination against the group of imported products."<sup>274</sup> This includes whether the design, architecture, or the revealing structure of the measure is impartial in its application. Pursuant to Article 5.1.1 and Annex 3.D

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271. See TBT Agreement, *supra* note 25, at sixth recital of the pmb.

272. *Id.* art. 2.1.

273. See Appellate Body Report, *US – Clove Cigarettes*, *supra* note 247, ¶¶ 156–60 (where the Appellate Body upheld the Panel's finding that clove cigarettes imported from Indonesia and menthol cigarettes produced in the United States were like products within the meaning of Article 2.1).

274. *Id.* ¶ 182.

of the TBT Agreement, the non-discrimination discipline also applies to conformity assessment procedures set up by South Africa.

Although countries are free to pursue a “legitimate objective,” or objectives, and define their own level of protection, the choice of the means at their disposal is controlled by Article 2.2 of the TBT Agreement. The Panel in *EC – Sardines* explained:

[T]he TBT Agreement, like the GATT 1994, . . . accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, *shows less deference to the means* which Members choose to employ to achieve their domestic policy goals.<sup>275</sup>

In *US – Tuna II (Mexico)*, the Appellate Body elaborated on the “less trade-restrictive” test and stated:

[A]n assessment of whether a technical regulation is ‘more trade-restrictive than necessary’ within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors . . . : (i) the degree of the contribution made by the measure to the legitimate objective at issue; (ii) the trade restrictiveness of the measure; and (iii) the nature of the risk at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.<sup>276</sup>

This assessment implies a comparison of the challenged measure and the possible less trade-restrictive alternatives, taking into account whether any alternative is “reasonably available.”<sup>277</sup> If a complainant is able to identify a less trade-restrictive alternative that would achieve a level of protection equal to that achieved by the challenged measures, the existing measures would be considered more trade-restrictive than necessary under Article 2.2 of the TBT Agreement. Article 2.2 of the TBT Agreement also enjoins any panel in assessing the “legitimate objective(s)” of a measure to consider “the risks that non-fulfilment would create.”<sup>278</sup> This means weighing “both the likelihood and the gravity of potential risks (and any associated

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275. Panel Report, *EC – Sardines*, *supra* note 254, ¶ 7.120 (emphasis added).

276. Appellate Body Report, *US – Tuna II (Mexico)*, *supra* note 248, ¶ 322.

277. *Id.*

278. TBT Agreement, *supra* note 25, art. 2.2.



adverse consequences) that might arise in the event that the legitimate objective being pursued would not be fulfilled.”<sup>279</sup> Accordingly, “an alternative means of achieving the objective that would entail greater ‘risks of non-fulfilment’ would not be a valid alternative, *even if it were less trade-restrictive*.”<sup>280</sup> The latter renders the alternative to the rationale of plastic bags difficult to defend.

The TBT Agreement addresses “product characteristics or their related processes and production methods” reflected in technical regulations<sup>281</sup> and requires that these regulations conform to basic principles of transparency and non-discrimination.<sup>282</sup> Pursuant to Article 2.4 of the TBT Agreement, members shall use relevant international technical standards, such as the ISO, as the basis for their own technical regulations, except where such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate policy objectives.<sup>283</sup> For instance, any biodegradable plastic bags imported in Mauritius and Seychelles shall comply with the stipulated existing international standards.<sup>284</sup>

#### *D. Transparency Requirement of Plastic Bag Regulations in the TBT Agreement*

Article 2.9 of the TBT Agreement requires WTO members to notify, through the WTO Secretariat, all other WTO members of their proposed technical regulation.<sup>285</sup> This is an *ex ante* transparency obligation since the measure has to be notified prior to its entry into force, and in an early enough stage of the process to leave room for comments and suggestions for amendments. Members are also expected to “promptly” publish or otherwise make available any forthcoming technical regula-

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279. Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R, ¶ 7.467 (June 13, 2012).

280. *Id.* (emphasis added).

281. See TBT Agreement, *supra* note 25, at Annex 1.1.

282. See generally *id.* arts. 2.9, 2.10.

283. *Id.* art. 2.4.

284. See (1) Mauritius, *Plastic Bag Amendment Regulations*, § 5E, third sched.; and (2) Seychelles, *Plastic Bag Regulations 2017*, § 4(2), second sched.

285. TBT Agreement, *supra* note 25, art. 2.9.

tions.<sup>286</sup> What constitutes promptness in this case is not expressly defined. In addition, there must be a “reasonable” period of time between notification and the entry into force of the proposed technical regulation.<sup>287</sup> This period, normally no less than six months, is meant to allow time for exporters to adapt their production accordingly.<sup>288</sup> The TBT Agreement provides for instances where exceptional circumstances may justify departure from Articles 2.9 and 2.12. These are situations “where urgent problems of safety, health, environmental protection or national security arise or threaten to arise.”<sup>289</sup> In such a scenario, the member concerned is subject to an *ex post* notification and consultation obligation, a situation that can easily be subject to abuse.

The provisions of Articles 2.10 (more lenient) and 2.9 (more stringent) of the TBT Agreement do not easily cohabit and have been the object of several concerns.<sup>290</sup> Kenya and Mauritius have made their notifications under Article 2.10, while Congo, Senegal, Seychelles, South Africa, Togo and Uganda have notified their technical regulation under Article 2.9.<sup>291</sup> On the other spectrum lie countries that have not complied with either Article 2.9 or Article 2.10, and are hence operating illegally from

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286. *Id.* art. 2.11.

287. *Id.* art. 2.12.

288. See Appellate Body Report, *US – Clove Cigarettes*, *supra* note 247, ¶ 275. The Appellate Body also noted, however, that a Member may depart from this obligation if this interval “would be ineffective to fulfil the legitimate objectives pursued.” *Id.*

289. TBT Agreement, *supra* note 25, art. 2.10.

290. See, e.g., Committee on Technical Barriers to Trade, *Note by the Secretariat: Specific Trade Concerns Raised in the TBT Committee*, WTO Doc. G/TBT/GEN/74/Rev.9 (Oct. 17, 2011) (where Mexico, the United States and the European Union raised concerns about Kenya’s Alcohol Control Act 2010 which would, in their opinion, give rise to unnecessary barriers to trade). Kenya had notified the measure under Article 2.10, even though it should have been notified under Article 2.9. See Committee on Technical Barriers to Trade, *Notification of Kenya*, WTO Doc. G/TBT/N/KEN/282 (Mar. 1, 2011). Kenya eventually changed its notification requirements and complied with the provision of Article 2.9. See Committee on Technical Barriers to Trade, *Revision: Notification of Kenya*, WTO Doc. G/TBT/N/KEN/282/Rev.1 (Dec. 12, 2012).

291. See *supra*, Parts I.B–D.

the TBT Agreement standpoint. These countries are Benin, Cameroon, Cote d'Ivoire,<sup>292</sup> the DRC and Rwanda.<sup>293</sup>

### *E. Specific Trade Concerns*

One institutional provision of the TBT Agreement is the creation of the TBT Committee. Composed of representatives of all WTO members, it meets when necessary, but at least once a year.<sup>294</sup> The mandate of the TBT Committee is to afford “[m]embers the opportunity of consulting on any matters relating to the operation” of the TBT Agreement.<sup>295</sup> Central to its function is the administration of specific trade concerns (STCs) raised by members. STCs are not formal disputes; rather, they are mere forums for discussion on members’ proposed measures notified to the TBT Committee, or on their implementation. While it is not formally an antechamber for disputes, as members do not need to go through the TBT Committee to lodge a complaint against a trade-restricting measure, STCs send strong messages regarding the (in)consistency of targeted members’ TBT measures and offer room for correction. Consequently, STCs are considered an “informal form of resolution of trade conflicts” that run in parallel to the dispute settlement mechanism.<sup>296</sup> The WTO records more than five hundred STCs accessible to the public through a comprehensive database.<sup>297</sup>

## CONCLUSION

This paper addresses plastic bag regulations adopted by African countries in a bid to protect the environment and their citizens’ health. The aggregate of these measures is the contribution of WTO African-country members to the objective of sustainable development stipulated in the WTO constitution. Alt-

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292. Although it has not yet done so under the TBT Agreement, Cote d'Ivoire has already notified its measure under the GATT as a quantitative restriction. See Notification of Côte D'Ivoire Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, *supra* note 202.

293. See *supra*, Parts I.B–D.

294. TBT Agreement, *supra* note 25, art. 13.1.

295. *Id.*

296. Henrik Horn, Petros C. Mavroidis & Erik N. Wijkström, *In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees*, 47 J. WORLD TRADE 729, 730 (2013).

297. See *Technical Barriers to Trade Information Management System*, WORLD TRADE ORG., <http://tbtime.wto.org/> (last visited Oct. 12, 2019).

though the measures under review fall within the reach of Article XI:1 of the GATT, which prohibits the use of quantitative restrictions as a means of protection, as well as Article III of the GATT, which precludes discrimination at the detriment of imported products, they can also be justified under Article XX(b) and (g) of the GATT. This article has further demonstrated two trends in the application of the bans: one of total ban, and the second combining the ban with a licensing scheme for a category of exempted plastic bags. South Africa further combines its regime of prohibition at the border with an internal mechanism of taxation.

The measures also fall under the TBT Agreement, which addresses the products' regulation. While some of these countries have notified their plastic bag ban under Article 2.9 of the TBT Agreement, others have done it under Article 2.10. As discussed, notification under Article 2.10 is subject to an *ex post* transparency obligation and, if not more prone to abuse than notification under Article 2.9, it at least buys additional time for any country in breach of its obligations under the TBT Agreement. Other countries, in contrast, have chosen not to notify their measures at all, thereby operating at the margin of WTO legality, perhaps strengthened in that position by their status as LDCs or developing-country WTO members.