

Compliance to the Agreement on Technical Barrier to Trade (TBT): The Case of Malaysia's Environmental Protection Measures

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To Link this Article: <http://dx.doi.org/10.6007/IJARBS/v15-i3/23579> DOI:10.6007/IJARBS/v15-i3/23579

Published Date: 21 March 2025

Abstract

This article examines the impact of Trade-Related Environmental Measures (TREM) on Malaysia, with a specific focus on the Technical Barriers to Trade (TBT) Agreement under the World Trade Organization (WTO) framework. As international trade increasingly incorporates environmental standards, developing countries like Malaysia face unique challenges and opportunities in balancing trade liberalization with environmental sustainability. The articles explore how TREMs imposed by major trading partners affect Malaysia's import and export sectors, particularly in industries sensitive to environmental regulations such as palm oil, electronics, and manufacturing. Through an analysis of key WTO disputes, domestic regulatory adjustments, and the WTO trade agreements, this article assesses the effectiveness of Malaysia's compliance with the TBT Agreement and its application of the domestic regulations, while highlighting potential barriers and benefits. The findings suggest that while TREMs can drive improvements in environmental standards, they may also impose additional costs and technical challenges on Malaysia's imports and exports, necessitating enhanced regulatory capacity and international cooperation.

Keywords: Trade Related Environmental Measures, World Trade Organization, Malaysia, TBT Agreement, Technical Barriers

Introduction

In 1992, the United Nations Conference on Environment and Development (UNCED) adopted the Rio Declaration. This Declaration acknowledges the interdependence of the environment and development and reflects the determination of both developed and developing nations to create and preserve a balance between economic development and environmental preservation. The Declaration's Principles 3 and 4 state that every nation's economic development should take environmental preservation into account. According to Fuentes (2002), international law works to control behaviour in order to accomplish sustainable

development. In light of these, numerous international instruments and treaties have been adopted.

The General Agreement on Tariffs and Trade (GATT) was first signed in 1947, and this has an impact on economic progress. Lowering trade tariffs, levies, and other trade barriers is the goal of this agreement. To prevent discrimination, equal treatment for imported goods is also promoted. The 1947 GATT was supplemented by the 1994 Agreement, which was signed during the Uruguay Round and led to the creation of the World Trade Organization (WTO). The preamble of the Marrakesh Agreement Establishing the World Trade Organization (WTO) states that:

“ Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, 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 ,seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...”

This preamble made it clear that the WTO's goal is to promote sustainable development in addition to preventing discrimination in global trade. With environmental protection as part of its mandate, the WTO is also making every effort through its Dispute Settlement Panel to guarantee that any environmental protection measures implemented by members are sincere and, if so, can be implemented going forward. Every environmental protection measure shouldn't discriminate against other WTO members or act as a technical trade barrier.

However it is, a nation may utilize regulatory authority and national restrictions as a means of defence to safeguard its domestic producers or to discriminate against other states. When tariffs were reduced or eliminated through multilateral trade agreements, non-tariff measures became the alternative to promote environmental protection (Ando & Obashi, 2009). According to Birnie et al (2009), the types of measures taken out in view of environmental protection are trade restrictions to protect resources beyond national jurisdiction and trade restrictions to protect the domestic environment. To a certain extent, however, the authority of these national regulatory bodies has been maintained by international trade law in the form of the WTO. According to Trachtman (2007), the WTO has so far been successful in defining "legitimate regulatory choices" and a regulation that was established as a justification for protectionist.

The Agreement on Technical Barriers to Trade (TBT), a key part of the World Trade Organization (WTO) framework, aims to prevent the creation of unnecessary obstacles to international trade while respecting each member's right to implement necessary regulatory measures. The agreement allows members to adopt technical regulations and standards to protect human health, safety, and the environment, but these measures must comply with non-discrimination principles and must not create disguised trade barriers. The WTO Technical Barriers to Trade (TBT) Agreement is designed to ensure that technical regulations, standards, and conformity assessment procedures do not create unnecessary obstacles to

trade. For examples, the TBT Agreement has provisions in respect to technicality of a product. It can be a condition impose on a product or on the way the product is made or produce. And, it has provisions which allows member to take out environmental measure based on technicality that is important for the quality of its exports and for the protection of human, animal and plant health. Furthermore, under the agreement, if a measure does not have a negative effect on trade, it will still be allowed although it discriminates. The TBT Agreement requires that technical regulations to be less restrictive even if they are discriminatory. (Van Calster, 2008).

The TBT Agreement is a non-discriminatory regulation which is reasonably available to a member to achieve regulatory goal for matters such as environmental protection, public health, consumer safety and welfare or financial security. Therefore, a member, however, must opt for a measure which will have the least trade restrictive consequences (Van Calster, 2008). Technical barriers to trade refer to regulations, standards, testing, and certification procedures that could create obstacles to international trade. These regulations have the effect and might be affected by the plight for environmental protection. Although it is necessary to protect environment and public health, sometimes such measure invoked by a party could be a disguised restriction to trade and used as a protectionism, which is against the WTO agreement. Apart from assessing the application of the TBT Agreement in international trade, this article also aims to investigate Malaysia's adherence to the TBT

Agreement. It is intended that this article will raise awareness of and provide knowledge about technical barriers to international trade for both industry and academia. In Malaysia, these barriers can arise from various regulatory frameworks and standards that businesses must adhere to when exporting to or importing from the country.

The implementation and administration of the Agreement on Technical Barriers to Trade (TBT) in Malaysia has been the responsibility of the Ministry of Trade and Industry (MITI). MITI then appointed the Department of Standards Malaysia to implement Malaysia's obligation under the TBT agreement. The Department of Standards has put up a committee which is called a National Mirror Committee on World Trade Organization Technical Barriers to Trade. This committee is headed by the Department of Standards and comprises of representatives from government ministries and other national organizations which might be related to the TBT Agreement. The objective of this committee is to coordinate Malaysia's obligation to the WTO requirements. Malaysia develops its standards in line with international practices. Department of Standard Malaysia and SIRIM Berhad work to harmonize Malaysian standards with international standards whenever possible to facilitate trade and ensure compliance with the TBT Agreement. Malaysia often adopts standards from international organizations such as ISO (International Organization for Standardization), IEC (International Electrotechnical Commission), and Codex Alimentarius.

Malaysia follows the TBT Agreement's transparency requirements by notifying the WTO of proposed technical regulations and standards that may affect trade. This allows other WTO members to review and comment on these regulations. Malaysia has established an inquiry point under the TBT Agreement to handle notifications and provide information on technical regulations and standards. The inquiry point is also managed by Department of Standard Malaysia. Conformity assessment procedures in Malaysia include testing, certification, and

inspection to ensure that products meet the required standards and regulations. These procedures are designed to be transparent and non-discriminatory. Malaysia's commitment to the TBT Agreement is also reflected in its regulatory framework. In view of the above requirements, this article has investigated as to whether Malaysia regulations are in line with the WTO laws and legal principle.

The Legal Provisions of the World Trade Organization's (WTO) Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement is a provision which regulates on measures which deals with a matter of technicality taken out by a member. The measure can be an environmental measure which has a technical description which may affect international trade. The preamble of the TBT states:

“No country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it consider appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.”

The form of a measure that can be under the TBT agreement should be in the form as stated in Annex 1.1 of the Agreement. The environmental measure which are categorised as technical regulation and falls under the TBT agreement can also be found therein.

Annex 1.1 states:

“Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process or production method.”

The TBT agreement also applies to a standard which can be imposed by a member for environmental protection. A standard is necessary to be followed but not mandatory.

A 'standard' is defined in Annex 1.2 of the agreement. It states:

‘Document approved by a recognised body, that provides for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.’

In view of the requirements above, the form of measure that need to be look out for and which would fall under the TBT Agreement are in form of documents for characteristic of products and production methods i.e. technical regulation, in which it is mandatory; and a

measure that is in a form of a standard. However, the compliance to a standard is not mandatory.

The Agreement has set out a Code of Good Practice in Annex 3 regarding the standard that could be acquired. Annex 3 states:

“Article 4.1 obliges members to ensure that their central government standardising bodies accept and comply with the code. Members are obliged to take such reasonable measures as may be available to them to ensure compliance with the code by local government and non-governmental standardising bodies within their territories.”

The requirements of the TBT Agreement can be found in the following terms of the agreement. Article 2.1 of the TBT Agreement requires members to apply ‘technical regulation’ on to both the domestic and foreign producers and that it should not discriminate between the parties. It states:

“Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

Article 2.2 of the Agreement states that Members cannot prepare, adopt or apply technical regulations with a view to or with the effect of creating unnecessary obstacle to international trade’. It states that:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.”

Article 2.2 of the Agreement requires that the regulation should not create an unnecessary obstacle to international trade and that is “shall not be more trade – restrictive than necessary”. Here it can be understood that any measure can be trade restrictive but not to a point that it will create an obstacle to trade.

Further, a measure should have a legitimate objective. A ‘legitimate objective’ stated in Article 2.2 of this agreement can be defined as “national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment”. Thus, measures which are protecting health, and the environment are allowed under this Agreement.

Article 2.2 of the TBT Agreement provides that “technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-

fulfilment would create". Megher (2015) argued that the Appellate Body of the WTO has articulated the following standard for Article 2.2 and that the task of a panel under Article 2.2 of the TBT Agreement is to determine whether the technical regulation at issue restricts international trade beyond what is necessary for that technical regulation to achieve the degree of contribution that it makes to the achievement of a legitimate objective.

The TBT Agreement encourages the use of international standard by Members in obtaining their goal. Article 2.4 provides that members are to use such standards, 'except when such international standards or relevant parts would be ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued'. The agreement encourages the use of international standard by Members in assessing their protection measures. It states that:

"Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

Article 2.5 then provides that a technical regulation that is adopted in accordance with a legitimate objective and is based on international standard 'shall be rebuttable presumed not to create an unnecessary obstacle to international trade.' It states that:

"a Member preparing, adopting, or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraph 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."

Article 2.9 provides a notification procedure in respect of a technical regulation that 'may have a significant effect on trade of other members in cases where a relevant international standard does not exist' or 'the technical content of the proposed regulation is not in accordance with the technical content of relevant international standards.' It states that:

Parties shall take such reasonable measures as may be available to them to ensure that regional standardizing bodies of which they are members comply with the provisions of Article 2, paragraphs 1 to 8. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with those provisions.

Article 2.10 further states that:

Parties which are members of regional standardizing bodies shall, when adopting a regional standard as a technical regulation or standard fulfil the obligations of Article 2, paragraphs 1 to 8 except to the extent that the regional standardizing bodies have fulfilled these obligations.

An example of a dispute which involved the application of the TBT agreement was in respect to public health and the environment is laid by the Appellate Body of the WTO in the European Communities- Measures Affecting Asbestos and Asbestos Containing Products. The question arose in the dispute was whether the decree imposed comes under the TBT Agreement and that whether it is a technical regulation. In this case, France has invoked a decree which banned the production, sale and import of asbestos and products containing asbestos due to health risks.

Canada has been exporting products containing asbestos into France and claimed that the decree invoked is not consistent to the WTO regulations. However, the WTO Dispute Settlement Panel found that France was justified to invoke the measures on the ground of necessity. Canada claimed that there was still a violation because they believed that a control used of asbestos will not pose health risks and that they have good measure to achieve the same plus it would be less restrictive to trade. Canada claimed that the French decree is not a measure to protect the public but a measure to protect its own domestic producer from foreign competition. The European Communities argued that the decree is necessary to protect the public from health risks of asbestos and asbestos containing products.

There was a question as to whether the decree comes under the TBT Agreement and that whether it is a technical regulation as required by the said agreement. The Panel addressed the threshold question of whether the French Decree No. 96-1133, concerning asbestos and products containing asbestos, constituted a 'technical regulation' under Annex 1.1. The Appellate Body held that the proper legal character of the measure could only be determined by looking at the measure. It then considers the definition of 'technical regulation' under Annex 1.1. The definition is that a document must lay down 'product characteristics' including the 'applicable administrative provisions' with which compliance is mandatory. It might provide that products must possess certain characteristics or might not possess certain characteristics. A 'technical regulation' must also be applied to an identified product, or group of products which comply with the TBT Agreement.

In the United States — Measures Affecting the Production and Sale of Clove Cigarettes, Indonesia requested negotiations with the US on April 7, 2010, in reference to the Family Smoking Prevention Tobacco Control Act of 2009, which prohibits clove cigarettes. Section 907, which went into effect on June 22, 2009, prohibited, among other things, the production and sale of cigarettes in the US with certain additives, like clove, but permitted the production and sale of cigarettes with other additives, like menthol. This was the contention made by Indonesia. Article 2 of the TBT Agreement, Article 4:4 of the GATT 1994, and other provisions of the Sanitary and Phytosanitary Agreement (SPS) are among the agreements with which Indonesia alleged that Section 907 is at odds.

The issue of no less favourable treatment was discussed in the dispute. The Appellate Body upheld, albeit for different reasons, the Panel's finding that clove cigarettes imported from Indonesia and menthol cigarettes made in the US were "like products" under Art. 2.1. When interpreting the term "like products" in Art. 2.1 considering the regulatory objective of the relevant technical regulation, the Panel and the Appellate Body couldn't agree. Appellate Body opinion instead was that evaluating whether two products are "similar" under Art. 2.1 requires evaluating the competitiveness of the two goods and is predicated on a review of

the traditional "likeness" criteria, which include physical characteristics, end use, consumer preferences and habits, and tariff classification.

The Appellate Body upheld the Panel's finding that because Section 907(a)(1)(A) prohibited clove cigarettes while exempting menthol cigarettes from the prohibition, albeit for different reasons, it gave imports less favourable treatment than it did for "like" domestic menthol cigarettes. As per the Appellate Body's construal of Art. 2.1, a negative impact on imports that arises exclusively due to a legal regulatory distinction is not prohibited by "treatment no less favourable". The Appellate Body concluded that Section 907(a)(1)(A) was applied unfairly to the group of comparable Indonesian imports in terms of design, architecture, disclosing structure, operation, and application, which hurt clove cigarettes' capacity to compete.

Thus, it may be inferred from the foregoing that the following TBT Agreement requirements must be met:

- i) a measure should not be an obstacle to international trade. Article 2.1 of the TBT Agreement requires members to apply 'technical regulation' on to both the domestic and foreign producers and that it should not discriminate between the parties. However, it was to be made understood that the measure involved can be discriminatory if it is less trade restrictive. Article 2.5 then provides that a technical regulation that is adopted in accordance with a legitimate objective and is based on international standard 'shall be rebuttable presumed not to create an unnecessary obstacle to international trade.
- ii) The measure could be under the TBT agreement if it is a technical regulation as found in Annex 1.1, and it should be a technical regulation which is a legitimate objective and less trade restrictive. A 'legitimate objective' stated in this agreement can be defined as "national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment".
- iii) The TBT Agreement encourage the use of international standard as a benchmark or a guide for certain measures. This agreement also applies to a standard which can be imposed by a member for environmental protection. A standard is necessary to be followed but not like a regulation which is obligatory.
- iv) notification and transparency of a measure should be taken out if a measure does not comply to any international standards as required by Article 2.9 of the Agreement.

The legislation should have a valid goal and be a technical rule. If there is an international standard, it should serve as the foundation for the measure. In any case, the action should not conflict with the WTO's non-discrimination standard. This study examined whether Malaysian regulations are compliant with WTO statutes and legal principles considering the conditions.

The Implementation of the Agreement on Technical Barrier to Trade (TBT) in Malaysia

Examining Malaysia's compliance with the trade-related environmental standards established by the WTO through the TBT Agreement is the aim of this article. Implementing legislation that incorporates the provisions or laws of the relevant international agreements is one way a nation might fulfil its obligations under those agreements. As a WTO member, Malaysia is required to follow and implement the General Agreement of Tariff and Trade

(GATT) 1948 and WTO accords. The Agreement on Technical Barriers to Trade (TBT) governs actions taken in relation to a product's technically and the process used to make it.

a) Compliance with the TBT Agreement

The analysis here will be on the compliance and the application of the government of the TBT agreement in their regulations. Thus, the compliance to the following need to be addressed.

Requirement of International Standard

The Ministry of Trade and Industry (MITI) has overseen carrying out and overseeing the Agreement on Technical Barriers to Trade (TBT) in Malaysia. The Department of Standards Malaysia was then chosen by MITI to carry out Malaysia's responsibilities under the TBT agreement. A National Mirror Committee on WTO Technical Barriers to Trade has been established by the Department of Standards. Representatives from government ministries and other national organizations that may be connected to the TBT Agreement make up this group, which is led by the Department of Standards. This committee's goal is to coordinate Malaysia's commitment to WTO regulations. Malaysia has created its standards in accordance with global norms. To ease trade and guarantee adherence to the TBT Agreement, the Department of Standard Malaysia and SIRIM Berhad strive to harmonize Malaysian standards with international standards whenever feasible. International bodies including the International Electrotechnical Commission (IEC), the International Organization for Standardization (ISO), and Codex Alimentarius frequently accept standards from Malaysia.

The country has invoked the Standards of Malaysia Act 1996 which has the provisions in the law relating to standards and for other matters connected therewith. Part IV of the Act focus on standard and accreditation.

Section 2 of the Act define standard as:

'A document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory; and which may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method'.

Section 2 states the characteristic of a measure that can fall under the Standards of Malaysia Act 1996. The law in Section 2 is the same as in the Article 2 of the TBT Agreement. Therefore, any measures which falls and in accordance with Section 2 of the Standard Act will be in accordance with the TBT Agreement. This regulation should conform to Annex 1 of the TBT Agreement. Here it was stated that a measure can be any documents, rules, guidelines for products or process and production method. It also states that such rules are not mandatory to be complied. Therefore, environmental measure taken out by domestic importers and exporters should complied with this Act.

Under this Act, standard specification means 'a specification that has been declared to be a standards specification pursuant to Section 15.' Section 15(1) states:

'The Minister may, by notification in the Gazette, declare any specification that has been adopted with or without modification, to be a standard specification or a provisional standard specification for the purposes of this Act, and may amend or withdraw any standard specification or provisional standard specification.'

Further Section 22 (1) states:

'The Minister may make such regulations as may be expedient or necessary for carrying out the purposes of this Act.'

As part of its responsibility in adopting higher standard, the Department of Standards Malaysia appoints SIRIM Berhad as the agent to develop Malaysian Standards. It plays an active role in local industry and international standards. It coordinates the country participation in international standardisation activities. Products manufactured in Malaysia and foreign products should be certified by SIRIM as a mark that such product has met the Malaysia Standard specification. Under the Standards of Malaysia Act 1996, Malaysian Standards should be aligned to or is adopting international standards, and they are reviewed periodically. The Department of Standards has also accepted the WTO TBT Code of Good Practice for the preparation, adoption and applications standards. Technical regulations are developed and implemented by authorised regulatory agencies. Federal regulatory agencies have the responsibility to developed and implemented technical regulations for matter under the federal agreement jurisdiction and the state are responsible for technical regulations at the state level.

In theory, Malaysian standards are optional unless the appropriate local authorities have mandated them. The total number of Malaysian standards has been declining as the standards development policy has changed from a numbers-based to a needs-based model. International standards are being used directly, and obsolete standards have been removed. During the period under consideration, Malaysia sent the WTO 38 TBT notifications and 13 SPS notifications. (WT/TPR/S/436)

The Measure should not be an Unnecessary Obstacle to International Trade

Here, it can be understood that a standard specified under this rule, and which has been based on by a certain measure, can make the measure be deemed to be necessary as required by the TBT Agreement. One of the objectives of Department of Standards Malaysia is to enforce the Standards of Malaysia Act 1996 and one of main function of the department is "to benefitting the health and safety of the public, protecting the consumers, facilitating domestic and international trade and furthering international cooperation in relation to standards and standardisation."

As for TBT agreement, the rules of the agreement applied to technical regulations, standard and conformity assessment procedures. Annex 1.2 of the agreement defines standard as a document approved by a recognized body. Here, it can be apprehending that Malaysia could apply their own standard which is recognized by its own respective bodies as necessary. Thus it, justify any of its trade – related environmental measures as necessary. The Standards of Malaysia Act 1996 is enforced by the Department of Standards Malaysia. It appoints SIRIM Berhad as the agent to develop Malaysian standards. Under the Standards of Malaysia Act 1996, Malaysian standards are aligned to or are adopting of international standards, and they are reviewed periodically.

To avoid any restriction or any rules become a technical barrier to trade, Malaysian government had given notification to all its trading partners in respect to all its trade-related environmental protection provisions. For example, the Malaysian Standards Industrial

Research Institute Malaysia (SIRIM) has been designated as a national enquiry point for technical barriers to trade (TBT) in the World Trade Organization (WTO). In 2003, it had informed the local manufacturers that the Ministry of Social Welfare of Colombia had proposed a new requirement for the labelling of natural latex condoms. The NSC consists of the representatives of the Ministries for Trade, Industry, Consumer Affairs, Health, Agriculture and Science, other regulatory agencies and SIRIM as the secretariat. https://www.wto.org/english/res_e/booksp_e/casestudies_e/case24_e.htm)

The Notification and Transparency of the Measure

Malaysia follows the TBT Agreement's transparency requirements by notifying the WTO of proposed technical regulations and standards that may affect trade. This allows other WTO members to review and comment on these regulations. Malaysia has established an inquiry point under the TBT Agreement to handle notifications and provide information on technical regulations and standards. The inquiry point is managed by Department of Standard Malaysia. Conformity assessment procedures in Malaysia include testing, certification, and inspection to ensure that products meet the required standards and regulations. These procedures are designed to be transparent and non-discriminatory.

SIRIM is also a notification point where it is used by the WTO and the foreign exporters and importers to inform local producers or manufacturer as to the new requirements that they need to follow. SIRIM also acted as the notification point for import and export as appointed by MITI. Under Malaysian food standards and regulations, domestic and imported food products must be processed, stored and handled in a sanitary manner. The authorities have worked to harmonize food standards with those applied internationally and contributed to the development of Codex standards. For example, nutritional labelling requirements are imposed for certain food products, including cereals, breads, milk, various canned foods and fruit juices, soft drinks and salad dressings.

the Measure Should be a 'Legitimate Objective'

The next issue that needs to be explored is whether the legitimate objectives of measures taken out have been met i.e. whether such measures are legitimate enough to be permitted as a trade restrictive and discriminatory measure. As stated in Annex 1 of the TBT Agreement, a legitimate objective can be a national security requirement and measures in respect to the protection of human health or safety, animal or plant life or health or the environment. Since the customs' regulations of Malaysia are in respect to the protection of environment which includes human health, the regulations should be deemed legitimate. Since a 'legitimate objective' stated in the TBT agreement can be defined as "national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment". Thus, measures which are protecting health, and the environment are allowed under this Agreement. The TBT Agreement also encourage the use of international standard to enable a measure to be eligible under the Agreement.

For example. the Customs (Prohibition of Imports) Order 1998 contains four schedules of items that are subject to various levels of restrictions. The first schedule includes 14 prohibited items banned for religious, security, health and environmental reasons. The second schedule lists products requiring licences, mainly for health, sanitary, security, environmental protection or intellectual property reasons. Products include poultry and beef

(which must come from facilities that have been approved as halal, or acceptable to Muslim consumers) eggs, rice, sugar, cement clinker, fireworks etc. The third schedule, covering items subject to temporary import restrictions to protect domestic industry, includes milk, coffee, cereal flours, certain wire and cables, and some iron and steel products. The fourth schedule contains items that may be imported only after meeting specific criteria; these include animals, animal products, plants, plant products, cigarettes, soils, fertilizers of animal origin, bullet-proof vests, electrical apparatus, safety belts and imitation weapons.

The Application of the TBT Agreement

Malaysia has pursued various environmental protection measures over the past decades. These include regulations on product labelling, energy efficiency standards, and restrictions on harmful substances in products. However, such measures, while aimed at sustainable development, have raised questions regarding Malaysia's compliance with the TBT Agreement, particularly in relation to the balance between legitimate environmental objectives and the potential for trade restrictions. This article examines Malaysia's environmental protection measures considering the TBT Agreement, analysing its compliance and the potential trade implications.

The few matters pertaining to Malaysia's compliance to the TBT agreement has been in respect to food labelling, conformity assessment and environmental issues. In respect to food labelling, Malaysia has implemented various environmental measures in line with its commitment to sustainable development and international environmental agreements. Key measures include Product Labelling and Eco-certification where Malaysia has introduced mandatory labelling requirements for products such as electrical appliances and vehicles, focusing on energy efficiency and environmental impact. For instance, the Energy Efficiency Labelling Scheme mandates that electrical appliances meet certain energy efficiency standards and display energy labels. Conformity Assessment Procedures: Malaysia has established conformity assessment procedures for various products, ensuring compliance with environmental and health standards. These procedures involve product testing, certification, and inspection to ensure products meet the country's regulatory requirements.

Labelling is regulated to protect consumers who should have the correct information to make confident and informed food choices based on diet, allergies, personal taste or cost. Mislabelled food deceives the consumer and creates unfair competition with manufacturers or traders. Malaysia has specific requirements for food labelling to protect consumers. For instance, labels must include information about ingredients, nutritional content, and allergen warnings. Malaysia aligns its food labelling regulations with Codex Alimentarius standards to minimize trade barriers and ensure international compatibility.

Malaysia has also adopted regulations that restrict the use of hazardous substances in products, particularly in electrical and electronic equipment. These standards are designed to limit the environmental impact of toxic chemicals, such as lead and mercury, during the manufacturing process and disposal of such products. As for electrical and electronic products, SIRIM QAS International is an accredited testing, inspection and certification body from the National Accreditation Body, Standards Malaysia and the United Kingdom Accreditation Service (UKAS). Malaysia requires conformity assessment for electrical and electronic products to ensure safety and performance. SIRIM QAS International conducts

testing, and certification based on IEC standards, facilitating the acceptance of Malaysian products in international markets and ensuring imported products meet local safety standards.

In the European Union and certain Member states — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels regarding Sustainability Certification for Palm Oil. Malaysia has introduced the Malaysian Sustainable Palm Oil (MSPO) certification scheme, which sets standards for sustainable palm oil production. Palm oil is a crucial export product, and this certification is designed to meet global environmental concerns regarding deforestation and biodiversity loss. The EU raised concerns about Malaysia's palm oil sustainability certification standards, arguing that they were overly restrictive and discriminatory against EU imports. The dispute was brought to the WTO, where it was eventually settled through mutual agreement. Malaysia agreed to adopt more transparent and non-discriminatory certification processes for palm oil. Under the EU's 2018 second edition of its renewable energy directive, biofuels are set to play a key role in decarbonising road transport. But Brussels has capped the use of fuels classed as involving a high risk of fostering 'indirect land usage change', and hence climate damage, to 7% of the fuel mix. More importantly it is gradually phasing them out by 2030. The report rejects the claim made by Kuala Lumpur that the way the measure is designed has a protectionist and discriminatory intent targeting Malaysian exports. It accepts the EU's arguments that the measure has mainly an environmental objective. The panel says that the measure, although regulating the way palm oil is produced in far-away countries, is legal under WTO and international law due to the global nature of the problem it tries to address: the climate crisis.

Conclusion and the Significance of the Study

Malaysia's environmental protection measures appear to align with the TBT Agreement's principles, particularly in relation to pursuing legitimate objectives such as environmental sustainability and health protection. However, the balance between these objectives and the prevention of unnecessary trade barriers is delicate. Malaysia's environmental regulations apply equally to both imported and domestic products, ensuring that they do not discriminate against foreign products. The energy efficiency labelling and hazardous substance standards, for example, are enforced across the board, reflecting compliance with the TBT's non-discrimination principle. In using the International Standards, Malaysia has made efforts to base its environmental regulations on international standards where possible. For instance, Malaysia's restrictions on hazardous substances in electrical products align with the Restriction of Hazardous Substances (RoHS) directive implemented by the European Union. Such alignment with international standards ensures that Malaysia's measures are not arbitrary and do not create unnecessary obstacles to trade.

To avoid any unnecessary barriers, while Malaysia's environmental regulations are legitimate in pursuit of sustainable development, some trading partners have raised concerns about the potential for trade restrictions. For instance, the palm oil industry has faced scrutiny, with some countries alleging that the sustainability certification requirements create barriers to market access. Malaysia, however, maintains that such measures are necessary to address deforestation and environmental degradation associated with palm oil production. As to notification and transparency. Malaysia has largely complied with the TBT Agreement's transparency provisions, notifying the WTO of its technical regulations and allowing for

comments from trading partners. This ensures that stakeholders are informed of regulatory changes and could voice concerns. Despite Malaysia's compliance efforts, certain environmental measures, particularly those related to the palm oil industry, have led to tensions with trading partners. The European Union's Renewable Energy Directive II (RED II), for example, restricts the use of palm oil in biofuels due to environmental concerns, affecting Malaysia's palm oil exports. Malaysia has argued that such measures violate the TBT Agreement by imposing unjustified trade restrictions, despite the environmental justification.

Malaysia's environmental protection measures are largely consistent with the principles of the TBT Agreement. They pursue legitimate objectives such as environmental sustainability and public health protection while adhering to non-discrimination, transparency, and the use of international standards. However, tensions may arise when such measures intersect with sensitive trade issues, particularly in the case of palm oil. While Malaysia must continue its commitment to environmental protection, it must also remain vigilant in ensuring that its measures do not become unnecessarily trade restrictive. Continued engagement with the WTO framework and international trading partners will be crucial in maintaining a balance between environmental goals and trade obligations. In conclusion, Malaysia's experience demonstrates the complexities of complying with the TBT Agreement while pursuing robust environmental protection policies, particularly in an increasingly globalized and environmentally conscious world.

Regulations, standards, testing, and certification processes that may obstruct international trade are referred to as technical barriers to trade. Various regulatory frameworks and standards that companies must follow while exporting to or importing from Malaysia may give rise to these obstacles. To settle disputes resulting from TBTs, governments and businesses usually negotiate and make use of well-established international procedures. Navigating potential trade barriers in Malaysia may be made easier with an understanding of these procedures and the resolutions of previous cases. A thorough understanding of Malaysia's standards, certification procedures, and regulatory environment is necessary to comprehend and negotiate the country's technical trade hurdles. To guarantee compliance and reduce trade barriers, companies looking to trade with Malaysia can also look for help from regional specialists and pertinent trade associations. Technical barriers to trade (TBT) are the subject of numerous court decisions and disagreements. Conflicts regarding adherence to import limitations, product certifications, and regulatory norms frequently give birth to disagreements. For instance, in the 2019 case of *Malaysia v. India*, Malaysia challenged India's import restrictions on palm oil, which included tight certification and labelling standards. Malaysia contended that these actions were needless trade restrictions. Both nations agreed to work together to mutually recognize standards and certifications in order to ease trade after the disagreement was settled diplomatically. The ASEAN Dispute Settlement Mechanism (DSM) and the World Trade Organization (WTO) Dispute Settlement Body are two examples of multilateral processes or bilateral negotiations that are used to settle many TBT disputes affecting Malaysia. In respect to WTO laws, Malaysia as a developing country should be given flexibility to implement WTO rules. This act would result to the rebalancing of right and obligation of WTO members. But it should only be in the circumstances where such measure will contribute to the developing countries needs and there is no reasonably alternative less trade restrictive measure available (Seung, 2007).

References

- Agreement on Technical Barrier to Trade, January 1, (1995).
https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf
- Ando, M., & Obashi, A. (2010). The pervasiveness of non-tariff measures in ASEAN-evidences from the inventory approach. *Studies in Trade and Investment, in: Mia Mikic (ed.), Rising Non-Tariff Protectionism and Crisis Recovery*, (pp. 27-55), United Nations Economic and Social Commission for Asia and the Pacific (ESCAP).
https://ideas.repec.org/h/unt/ecchap/tipub2587_chap2.html
- Birnie, P., Boyle, A., & Redgwell, C. (2009). *International Law and the Environment*. New York: Oxford University Press. <http://oceanlaw.ru/wp-content/uploads/2017/10/International-Law-and-the-Environment-Third-Edition-Patricia-Birnie.pdf>
- Fuentes, X. (2002). International Law Making in the Field of Sustainable Development. *International Environmental Agreements: Politics, Law and Economic*, 109-133
<https://link.springer.com/article/10.1023/A:1020990026398>
https://www.wto.org/english/res_e/booksp_e/casestudies_e/case24_e.htm
<https://www.sirim.my/services/standards-quality>
<https://www.sirim.my/services/inspection/inspection-services>
<https://www.jsm.gov.my/standards/about-standard> <https://www.jsm.gov.my/trade-facilitation/wto-tbt/tbt-notification>
- Meagher, N. (2015). Regulatory convergence and dispute settlement in the WTO. *Journal of International Trade Law and Policy*, 157-162.
<https://www.emerald.com/insight/content/doi/10.1108/jitlp-11-2015-0041/full/html>
Standard of Malaysia Act 1996 (Malaysia)
- Chang, S. W., (2007). WTO for Trade and Development Post-Doha. *Journal of International Economic Law* 553 <https://academic.oup.com/jiel/article-abstract/10/3/553/2193539?redirectedFrom=fulltext>
- Trachtman, J. (2007). Regulatory Jurisdiction and the WTO. *Journal of International Economic Law* , 631. <https://academic.oup.com/jiel/article-abstract/10/3/631/2193522?redirectedFrom=fulltext&login=false>
- Trade Policies and Practices by Measure- Malaysia, WT/TPR/S/436 (WT/TPR/S/436)
https://www.wto.org/english/tratop_e/tpr_e/s436_e.pdf
- Van Calster, G. (2008). Faires Vos Jeux - Regulatory Autonomy and the World Trade Organization after Brazil Tyres. *Journal of Environmental Law*, 121-136.
<https://www.jstor.org/stable/44248640>
- United States — Measures Affecting the Production and Sale of Clove Cigarettes WT/DS135/12 (Dispute Settlement Body 11 April 2001)*