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Committee on Technical Barriers to Trade

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**CERTIFICATES OF FREE SALE: COMPLIANCE WITH THE PROVISIONS
OF THE WTO AGREEMENT ON TECHNICAL BARRIERS TO TRADE**

EIGHTH TRIENNIAL REVIEW

Submission from South Africa

The following submission, dated 23 October 2017, is being circulated at the request of the delegation of South Africa.

1.1 Introduction

1.1. The information contained and opinions expressed in this document are made in good faith by South Africa and are made without prejudice to the rights and obligations of any other WTO Member in terms of the WTO multilateral agreements including the Agreement on Technical Barriers to Trade (TBT). The document is not a legal opinion and is merely circulated to Members to encourage further discussion and possible consensus recommendations of the TBT Committee on the occasion of the Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4 of the Agreement.

1.2. A short abstract of the Certificate of Free Sale matter, further elaborated on in the Annex to this document, is firstly provided followed by South Africa's proposal.

1.2 Abstract

1.3. A number of South Africa's exporters have raised concerns about the requirement of several WTO Members to which they are exporting to, for Certificates of Free Sale to accompany certain products in order to receive market access.

1.4. A Certificate of Free Sale is a document which states that a specific product meets the domestic regulatory requirements of the exporting Member and that the product is freely available for purchasing in the exporting Member's domestic market.

1.5. There are alternative terms for Certificates of Free Sale, but such certificates are mostly required from exporting Members to receive market access for products such as foodstuffs, cosmetics, toiletries, fragrances, household detergents, medical devices, pharmaceuticals fertilizers and pesticides, amongst others, in certain importing Members' market.

1.6. A Certificate of Free Sale complies with the TBT Agreement definitions for a technical regulation and a conformity assessment procedure as contained in Annex 1 of the TBT Agreement.

1.7. The TBT Agreement allows importing Members to regulate domestic products and imported goods for the legitimate provisions as provided in Article 2.2 of the TBT Agreement. Furthermore, the TBT Agreement provides for conformity assessment procedures to certify compliance with the performance requirements contained in the technical regulations of an importing Member, but the TBT Agreement is silent on the obligations of an exporting Member.

1.8. However, there are questions about the compliance of Certificates of Free Sale with the most-favoured nation and the national treatment provisions of the TBT Agreement as well as the elimination of quantitative restrictions in terms of the GATT 1994, Article XI.

1.3 Proposal

1.9. In view of the information provided above and in the Annex, South Africa would like to request the TBT Committee to:

- Reemphasize the use of technical regulations, when considering the risks posed by unregulated products, to address legitimate policy objectives for national security requirements, product quality requirements, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health and the environment;
 - Reiterate that Members shall ensure that their technical regulations and conformity assessment procedures are based on relevant international standards, guides or recommendations issued by international standardizing bodies where they exist or their completion is imminent, except in cases where such international standards or relevant parts thereof would be an ineffective or inappropriate manner for the fulfilment of the legitimate policy objectives pursued;
 - Encourage Members with financial, human and technological resource constraints for the development of appropriate technical regulations and conformity assessment procedures, to request technical assistance from other Members, or the use and adoption of technical regulations and conformity assessment procedures already adopted by other Members in addressing a similar regulatory objective;
 - Recommend to Members requiring Certificates of Free Sale to accompany certain imports into their market, to replace it with appropriate technical regulations and conformity assessment procedures as a matter of urgency.
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ANNEX

1.1 Background

1.1. A number of South Africa's exporters have raised concerns about the requirement from several WTO Members to which they are exporting certain products to, for Certificates of Free Sale to accompany these products in order to receive market access into the importing Member's market. Without such certificates, the products are refused entry into the market of such importing Members.

1.2. A Certificate of Free Sale is an official document issued by a governmental or a government authorized authority of the exporting Member, which should attest that a specific product meets the domestic regulatory requirements of the *exporting* Member and that the product is freely available for purchase by the general public at retailers or wholesalers in the exporting Member's domestic market. The Certificate of Free Sale is in almost all circumstances, a mandatory legal requirement in terms of an importing Member's domestic legislation imposed at the borders of the importing Member, making the Certificate of Free Sale a prerequisite for the goods subject to the measure, to enter the market of these importing Members.

1.3. Alternative terms used for a Certificate of Free Sale include, amongst other related terms, Free Sale Certificate, Certificate of Free Trade, Certificate of Export, Export Certificate and Certificate to a Foreign Government. The preferable term to use for the certificate is usually prescribed by the importing government.

1.4. Goods being exported that require a Certificate of Free Sale, include amongst others, but are not limited to, foodstuffs, cosmetics, toiletries, fragrances, household detergents, medical devices, pharmaceuticals fertilizers and pesticides.

1.2 Rights and Obligations of WTO Members

1.5. South Africa recognizes the sovereign right and obligation of all governments, considering the risks, to adopt and enforce measures necessary for national security requirements, the protection of public morals, human, animal or plant life or health and for the prevention of deceptive practices in terms of the General Agreement on Tariffs and Trade 1994 Articles XX and XXI in relation with the Agreement on Technical Barriers to Trade (TBT) Article 2.2 and the Agreement on the application of Sanitary and Phytosanitary Measures (SPS) Article 2.2 in normal and when necessary, in urgent circumstances.

1.6. However, the right to introduce regulatory measures necessary and to regulate for the legitimate objectives, as prescribed in the TBT and SPS Agreements, are underpinned with the obligation that such measures are transparent and not applied in a manner which would constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade.

1.7. The purpose of the TBT Agreement is, on the one hand, to provide to governments the policy space and rules to introduce standards, technical regulations and conformity assessment procedures to address legitimate public policy objectives pursued, whilst on the other hand, the TBT Agreement provides rules that should be followed to prevent that such legitimate policy objectives being addressed, don't lead to the creation of unnecessary, unjustifiable, discriminatory and arbitrary obstacles to international trade.

1.8. Although some Members will reason a Certificate of Free Sale is not a "technical regulation" or a "conformity assessment procedure", it is perhaps necessary to refer to the definitions as provided in the TBT Agreement, Annex 1:

A technical regulation is defined under point 1 of Annex 1 of the TBT Agreement as a *"Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method"*.

1.9. It is therefore, South Africa's opinion that a Certificate of Free Sale requirement by an importing WTO Member, complies with the TBT Agreement's definition of a technical regulation for the following reasons:

- firstly, the Certificate of Free Sale is a document which lays down an administrative procedure with which compliance is mandatory where required by an importing Member;
- secondly, although the Certificate of Free Sale does not provide detail of product performance requirements, it nevertheless, lays down a mandatory compliance requirement with the terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method of the exporting Member.

1.10. Since a Certificate of Free Sale should demonstrate that a product meets the regulatory requirements of the exporting Member, South Africa considers a Certificate of Free Sale as also being a conformity assessment procedure within the meaning of its definition contained in Annex 1 point 3 of the TBT Agreement that reads:

"Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled".

1.11. The attestation that a product complies with the relevant requirements in the technical regulations of the exporting Member, falls clearly within the definition of a conformity assessment procedure.

1.12. Occasionally, importing Members require that some products comply with both the exporting Member and importing Member's technical regulations. As technical regulations are not always equivalent or harmonized, such a requirement makes it extremely difficult for exporters that have to ensure that a product of export interest to them complies to multiple and sometimes disproportionate technical regulations. This requirement, makes certain products of export interest of an exporter, subject to multiple conformity assessment procedures.

1.13. South Africa is of the view that the TBT Agreement provisions relate to the rights and obligations of importing Members to ensure that regulatory and conformity assessment measures introduced for addressing legitimate policy objectives, do not create unnecessary obstacles to international trade. This view is supported by the various WTO Dispute Settlement Panel and Appellate Body findings on the rights and obligations of WTO Members in terms of the TBT Agreement provisions which in all cases concern measures introduced by an importing Member.

1.14. Furthermore, the Specific Trade Concerns raised by Members in meetings of the Committee on Technical Barriers to Trade, form a substantial part of the regular work of the triannual WTO TBT Committee meetings. Thus, the onus to regulate for legitimate policy objectives, as provided for in TBT Agreement Article 2.2, is on the importing Member for its domestic market and definitely not on the exporting Member. However, the exporting manufacturers and traders in the exporting Member are obliged to ensure that the products they export, comply with the statutory product performance requirements of the importing Member.

1.15. South Africa recognizes the rights of developing countries, especially least developed countries, contained in Article 12.4 of the TBT Agreement that provides as follows: *"Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs".*

1.16. Nevertheless, this Article 12.4 provision, does not exonerate any developing WTO Member from its obligation of non-discrimination, national treatment and the elimination of arbitrary and unjustifiable technical barriers to trade.

1.17. South Africa also understands and recognizes that some developing Members do not have the necessary human, financial, technical and institutional resources to fully participate in standards development work of international standards setting bodies and to develop domestic standards, technical regulations and conformity assessment procedures. Some of these Members, therefore, rely on Certificates of Free Sale to obtain the necessary confidence that certain imported products would not pose any risks to their domestic public consumption and use.

1.18. However, the constraints caused by a lack of human, financial, technical and institutional resource can be addressed with appropriate technical assistance provided by other Members and the use of relevant parts of international standards, or the adoption of technical regulations and conformity assessment procedures, already in use by trading partners which have addressed similar or identical policy objectives pursued.

1.3 Compliance with the Certificate of Free Sale requirement

1.19. The compliance with a Certificate of Free Sale requirement with the WTO rules, especially the TBT Agreement and GATT 1994 rules is questionable. The TBT Agreement Article 2.1, stipulates as follows: *"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 Member."* The TBT Agreement Article 2.1 contains both a most-favoured-nation (MFN) and a national treatment requirement that form the fundamental principles of the multilateral trading system.

1.20. Considering that a Certificate of Free Sale should state that the product for which such a certificate is required for, complies fully with the applicable technical regulations of the exporting Member, and not with that of the importing Member, the compliance with the WTO Most-Favoured-Nation (MFN) principle is questionable. The importing Member requiring the Certificate of Free Sale may import like or similar products from various sources, which in effect means that the Certificate of Free Sale is based on the regulatory needs of the exporting Member, which may differ from Member to Member, including the importing Member. The Certificate of Free Sale requirement is thus, establishing multiple product characteristics for similar or like products. Not alone is the compliance with the MFN principle questionable, but also the compliance with TBT Agreement Article 2.8 due to the absence of clear product performance requirements.

1.21. Although the harmonization¹ of technical regulations is an objective of the TBT Agreement to facilitate trade, this objective has not yet been achieved for all products and exporting Members, thus resulting in still divergent technical regulations and conformity assessment procedures around the world for similar or like products depending on the regulatory objective pursued.

1.22. Where importing Members require that some products comply with both the exporting Member and importing Member's technical regulations the compliance with the MFN and national treatment principles are also questioned.

1.23. It also happens that exporters sometimes manufacture specifically for the export market and therefore, the product is not sold in the domestic market of the exporting Member. A specific product may also not be regulated by a Member, but may be manufactured for exporting in accordance with international standards. In such cases it is also not possible to verify compliance with applicable domestic technical regulations since such specifications do not exist. International standards have a voluntary application in terms of TBT Agreement Annex 1, point 2 and therefore, compliance with international standards testing and certification can only be done at conformity assessment bodies in a position to do so, which may even be situated in the territory of another Member. In such cases, such bodies are not mandated, or in a position to issue Certificates of Free Sale, resulting in a de facto ban on the importation of such products by the importing Member requiring a Certificate of Free Sale.

1.24. Furthermore, the exporting Member may have a specific technical regulation in place that is not based on international standards or relevant parts thereof as it would be an ineffective or

¹ Article 2.6 of the TBT Agreement.

inappropriate means for the fulfilment of the legitimate policy objective being pursued, but its exporters may also manufacture in accordance with the applicable international standard or parts thereof for export purposes. Therefore, such products would not be able to acquire a Certificate of Free Sale.

1.25. Due to the integration of different economies resulting from preferential trade agreements negotiated in terms of the General Agreement on Tariffs and Trade (GATT) 1994, Article XXIV or the enabling clause² as well as from existing or emerging global value chains, the final product being exported may not have origin in the Member from which the product is exported. In such cases, and cases of trans-shipment and trans-loading, it is not possible for the exporting Member to issue a Certificate of Free Sale declaring compliance with domestic technical regulations and the availability of the product in the domestic retail. In such cases a product will not have the required Certificate of Free Sale. As a result, it will not be allowed entry into the market of the Certificate of Free Sale requiring Member. As a consequence, such a product will not be treated the same as similar or like products originating from other Members. This in effect comprises a *de facto* import ban contrary to the provisions of GATT 1994 Articles I³ and XI⁴.

1.26. Surely the test for MFN is not in the Certificate of Free Sale requirement in itself, but in the same product characteristics and performance requirements of similar or like products imported from different trading partners.

1.27. The national treatment requirement in Article 2.1 of the TBT Agreement, is equally important in the application of the TBT Agreement provisions. National treatment is defined in GATT 1994 Article III:4 as;

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

1.28. The question is to what technical regulations and conformity assessment procedures the products manufactured and originating in the importing Member requiring the Certificate of Free Sale should comply with?

1.29. In the cases where the importing Members require that some products comply with both the exporting Member and importing Member's technical regulations, there is a conflict in terms of national treatment as the same is not required from the importing Member's domestic manufactured product. Where an importing Member does not have manufacturing capacity of a specific product for which a Certificate of Free Sale is required, the attestation that the product complies with the applicable technical regulations of the exporting Member is also not in line with the national treatment principle, as technical regulations are not always harmonized amongst exporting Members and different product performance requirements may apply in the different exporting Members.

1.30. Importing Members requiring Certificates of Free Sale seldom provide information about which legitimate objective they want to address as the requirement for importation is compliance with the exporting Member's technical regulations. As exporters may have different technical regulations to address different policy objectives, product performance characteristics may not be the same for similar or like products produced in different countries. Thus the policy objective of the Certificate of Free Sale requirement is questionable. The lack of a clear policy objective and appropriate technical regulations and conformity assessment procedures on the part of some importing Members requiring Certificates of Free Sale, raise the question whether the Certificate of Free Sale requirement is not perhaps an unnecessary obstacle to international trade?

² *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT BISD, 26th Supp, 203, GATT Doc L/4903 (1979) (Multilateral Trade Negotiations Decision, adopted on 28 November 1979).

³ Most-favoured-nation treatment.

⁴ The elimination of quantitative restrictions

1.31. Certificates of Free Sale also act as conformity assessment procedures in the sense that an attestation indicating that the product complies with the exporting Member's applicable technical regulations. In this regard, Members are referred to Article 5.1 of the TBT Agreement, stating;

"Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members"

1.32. Article 5.1 of the TBT Agreement clearly requires that Members shall ensure their central government bodies apply the provisions. Therefore, the obligation is on the importing Member to institute conformity assessment procedures and not the exporting Member as is required to be attested in Certificates of Free Sale.

1.33. Article 5.4 of the TBT Agreement furthermore states;

"In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, inter alia, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems".

1.34. In the cases where Certificates of Free Sale are required, it is evident that the central government bodies of those importing Members did not use relevant guides or recommendations issued by international standardizing bodies or the relevant parts thereof. Although South Africa recognizes that some countries requiring Certificates of Free Sale may experience specific challenges, such as fundamental technological or infrastructural problems, exporters who requested more information on the purpose of the Certificate of Free Sale requirement, have only received very vague general responses such as that it is a legislative requirement, without being informed of the actual policy reasons.

1.35. Where circumstances or objectives giving rise to the Certificate of Free Sale requirement exist, why are the Members requiring it for certain imports, not making use of the TBT Agreement Article 2.2 right to regulate through using appropriate technical regulations? Surely the Certificate of Free Sale requirement emanated from the identification of risks associated with the available scientific and technical information, related processing technology or intended end-uses of the products for which Certificates of Free Sale are required.

1.36. Since the Certificates of Free Sale need to be issued by government or a government authorized body, it creates legal and administrative issues for the exporting government. Governments and their authorized bodies issuing Certificates of Free Sale, are not always designated or approved conformity assessment bodies, or accredited to certify compliance with technical regulations or standards. On the other hand, accredited conformity assessment bodies in many instances, do not have legal authority to certify that a product is freely available for use in the exporting Member's domestic market. The verification of compliance with regulations and the certification of the domestic availability of a product for the purpose to obtain Certificates of Free Sale, create an additional burden for authorities of exporting Members and is increasing the cost of exports.

1.4 Bibliography/Resource documents

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1.38. World Trade Organization, The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations, Cambridge University Press;

- a. Annex 1A, Multilateral Agreements on Trade in Goods;
 - i. Agreement on the Application of Sanitary and Phytosanitary Measures;
 - ii. Agreement on Technical Barriers to Trade
 - iii. General Agreement on Tariffs and Trade 1947;

1.39. World Trade Organization, Committee on Technical Barriers to Trade, Note by the Secretariat, Twenty-Second Annual Review of the Implementation and Operation of the TBT Agreement, document G/TBT/39 of 15 March 2017;

1.40. World Trade Organization, Committee on Technical Barriers to Trade, Note by the Secretariat, Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, WTO document G/TBT/1/Rev.13 of 8 March 2017.
