THE IMPACT OF THE PRECAUTIONARY PRINCIPLE AND

THE SPS AGREEMENT ON INTERNATIONAL TRADE.

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DEDICATION

I dedicate

this thesis to the two most remarkable

women in my life, to my wonderful mother

Mrs M. Chinyama and to my one and only sister Mrs M.

Motsi who have been the source of strength and inspiration in my life.

Their belief in my strength and capabilities as well as their unwavering

support has gone a long way into moulding

me into being the bold and confident woman

that l am today.

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To my mentor Mr. T. Motsi without whose moral and financial support I would not have been able to attain my tertiary education; and

To all those friends, family and relatives who have been there for me during my time of need.

DECLARATION

I, Chinyama Grace, do hereby solemnly declare that:

(i) This thesis is my own original work, unless it is otherwise indicated.

(ii) This thesis has not been submitted for the purposes of fulfilment of any other degree or examination at any university except for the University of KwaZulu Natal.

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(b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.

Chinyama G.

November 2012

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ABBREVIATIONS

NATIONAL

South Africa

DAFF	Department of Agriculture, Forestry and Fisheries
IPAP	Industry Policy Action Plan
NIPF	National Industrial Policy Framework
NPPOZA	National Plant Protection Organization
PPECB	Perishable Products Export Control Board
SABS	South African Bureau of Standards

Zimbabwe

CCZ	Consumer Council of Zimbabwe
FSAB	Food and Standard Advisory Board
FSCA	Food and Food Safety Control Authority
MAMID	Ministry of Agriculture, Mechanization and Irrigation Development
SAZ	Standard Association of Zimbabwe
AREX	Agricultural and Research Extension
VSD	Veterinary Services Department

INTERNATIONAL

WTO

DS	Dispute Settlement
DSB	Dispute Settlement Board
DSU	Dispute Settlement Understanding
GATT	General Agreement on Tariffs and Trade
IOE	International Office of Epizootics
IPPC	International Plant Protection Convention
SPS Measures	Sanitary and Phytosanitary Measures
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
WTO	World Trade Organization

Other

EU	European Union
GMOs	Genetically Modified Organisms
FAO	Food and Agricultural Organization
NGOs	Non-Governmental Organizations
UN	United Nations
WHO	World Health Organization
ISO	International Standards Organization
UNU	United Nations University

ABSTRACT

WTO Agreements have failed to adequately cater for the needs of developing countries. The WTO Agreements, particularly the SPS Agreements has failed to take into account the special needs of developing and least developing countries and clearly their interests have received no representation in the Agreement. Instead of reducing the negative impact of the SPS measures, the Agreement itself has become a barrier to trade. The problems of its implementation inclusive of the expertise, the high costs of conformity, lack of infrastructure and adequate resources have created further restrictions for exporters in international commerce. The failure to adequately deal with the implementation problems of developing countries is evident in the stalemate that culminated at the Doha Ministerial Conference which has extended for over a decade. Perhaps the future of African developments lies in regional agreements, since it is clear that the multilateral trading system has failed. Whereas some scholars are of the view that Article 5.7 of the Agreement should be used as model for the precautionary principle. The principle is highly controversial and does not even have a universal definition; its application might prove to be highly problematic. However the trade-environment debate has already taken center stage in the WTO jurisprudence, suggesting possibly the emergence of an Agreement to that effect. One however can only wonder whether in including the trade-environment debate under the ambit of the WTO when clearly it has failed to deal with issues and concerns' relating to trade only, might be biting much more than it can chew.

Keywords

Conformity costs, developing countries, least developing countries, developed countries, Doha Ministerial conference, environmental standards, food safety standards, precautionary principle, precautionary approach, the principle, SPS Agreement, the Agreement, SPS measures, trade barriers, market access, ISO, FAO, WHO, EU

1. INTRODUCTION

1.1 Background

One of the most fundamental aspects of trading in animal and plant products at an international scale is that such food products should be safe and do not in themselves cause unnecessary risks to human, animal and plant life or health.[1]It is important for countries to adopt measures that safeguard the legitimate interests of their own human, animal and plant life or health.[2] Increasingly stringent and restrictive food safety standards however have the negative effect of blocking market access and growth especially in developing countries.[3]Which rely on the export of food and agricultural products into foreign markets for a greater percentage of their Gross Domestic product (GDP)[4] It is estimated that over US$400 million is lost in revenue in developing countries due to restrictive SPS measures on 'cereals, dried and preserved fruits, and nuts.'[5] It is of paramount importance that a balance is struck between the achievements of quality food safety standards and ensuring that such standards are not used as a form of disguised trade protectionism.[6]

It was within this context that the SPS Agreement was brought into being by the World Trade Organization (WTO), to ensure that the adoption of food safety standard may be done when necessary and not act as a barrier to trade.[7]The Agreement on Sanitary and Phytosanitary Measures specifically deals with the appropriate food safety standard for human animal and plant life or health.[8] The goals of the SPS Agreement are accordingly two-fold; on one hand it recognizes the rights of each member to provide the appropriate level of support that they deem appropriate.[9] The Agreement was also put into place to ensure that the measures which have been put in place are only applied to such an extent that is necessary to protect plant life

[1] Dr. Jacques DIOUF –Director-General Food and Agricultural Organization of the United Nations, Inaugural statements from FAO/WHO Global Forum of Food Safety Regulations Marrakesh, Morocco, 28-30 January 2002
[2] Dr. Jacques DIOUF (above note 1) 1
[3] Dr. Jacques DIOUF (above note 1) 1
[4] T. Otsuki, J.S Wilson and M. Sewaden, '*Saving two in a billion: quantifying the Trade effects on European food standards on African exports'* Food Policy (2001) 499 Development Research Group DECRG *ww.elsevier.com/locate/foodpol* accessed on 23 May 2012
[5] T. Otsuki et al as quoted by H. Nyangito (above note 4) 496
[6] T. Josling and D. Roberts*'Measuring the impact of SPS standards on Market Access' (*2011)International Trade and Agricultural Policy Council,1-10, 4
[7] H. Nyangito '*Post Doha Challenges in the Sanitary and Phytosanitary and Trade Related Aspect of Intellectual Property Rights Agreements*' KIPPRA Occasional Paper No. 4 (2002) 10
[8] T. Josling and D. Roberts (above note 6) 4
[9] Keisuke Iida '*Is the WTO Dispute Settlement Effective?*' (2004) Global Governance 10, 207-225, 218*http://www.library.eiu.edu/ersvdocs/4295.pdf* accessed on 20 August 2013

or health[10] and are not arbitrary or unjustifiably discriminatory between countries that have similar measures in place.[11]

Article 2.2 of the SPS Agreement provides that countries are allowed to put in place their own safety standards to protect human, animal and plant life or health.[12] Article 5.7 of the same agreement however provides an exception that where there is a perceived "threat or harm"[13] member states may adopt measures that are necessary for the protection of human, animal and plant life or health without "sufficient scientific" evidence.[14] It is this aspect of the SPS Agreement that is highly contentious and presents problems on where exactly do we draw the line between the exception provided for in Article 5.7 and guarding against the use of such standards as means of disguised trade protectionism.[15]

It has been argued by other authors that section 5.7 of the SPS Agreement introduces the precautionary principle within the ambit of international trade law and codifies it.[16] The precautionary principle is a long established principle of international environmental law.[17] What the principle entails is that statesman should adopt the appropriate measures to protect human, animal and plant life or health in the absence of scientific evidence where appropriate.[18]This principle is highly controversial since it does not have a universal definition or international standard of application which inevitably means that application of the principle would be country specific.[19] Critics of the principle however argue that the WTO had no place in bringing the trade-environment issue within in its realm when it's clearly failing to deal with the current problems arising from trade issues, particularly failing to honor their the obligations to developing and least developing countries in the WTO

[10] T. Otsuki, J.S Wilson and M. Sewaden (above note 4) 2
[11] H. Nyangito (above note 7) 10
[12] H. Nyangito (above note 7) 12
[13] K. Iida (above note 9) 208
[14] Ibid
[15] T. Otsuki et al as quoted by H. Nyangito (above note 7) 496
[16] J. Henson and T. Loader '*Impact of sanitary and phytosanitary measures on developing countries and the role of the SPS Agreement*", Agribusiness, 15(3) 355-369
[17] J. Henson and T. Loader (above note 16) 356
[18] According to G.D Orriss the recent food detentions of imported food by the United States Food and Drug Administration indicate that most of the problems faced by developing countries are not related to technical requirements only. But the food hygiene problems which are posed by food contamination with insects and rodents filth. Microbial contamination failures are also noted due to failure to comply with the United State low acid canned food registration requirements and the labeling/ Over 50% of the rejections are attributable to lack of basic food hygiene and failure to meet the labeling requirements. (Director of Food Safety and Consumer Protection) in 'Food Safety and Capacity Building'
[19]In the United Nations University Paper, '*The Growth of Trade Barriers that Ignore Sound Science*.' 5

Agreements.[20]It is mostly the uncertainty that surrounds the principle that leads to skepticism about its application.[21]

Whether the precautionary principle is codified or not in the SPS Agreement it does not absolve from the fact that both the SPS Agreement and the precautionary principle if not clearly implemented can be used as a form of disguised trade protectionism.[22] The SPS Agreement on its own without codifying the precautionary principle has been a source of much criticism since the practical effect of the Agreement leaves a lot to be desired. This Agreement has been a bone of contention which has been raised by developing countries in several series of trade negotiations such as the Doha Development Agenda.[23] From a developing country perspective the Agreement is theoretical and has failed to adequately address the challenges that are faced by them.[24] This contention is supported by Khor[25] who avers that the Agreement has fallen short of its aims and has created more problems than solutions for developing countries.[26] Furthermore the implementation of the Agreement itself creates huge conformity costs that in themselves serve as barriers to market access, since it is beyond the reach of most developing countries.[27] It is contended that the costs of complying with the SPS Agreement are even much higher for developed countries, worse still for developing countries.[28]

Furthermore it is not only the implementation of restrictive standards that poses huge problems to developing countries but also the rapid emergence of newer ones.[29] What this

[20]G.D Orris Director of the Bureau of Food Safety and Consumer Protection. Canadian Food Inspection Agency. '*Food Safety Capacity Building'*
[21]H. Veinla, '*Free Trade and the Precautionary Principle'* Juridica International VIII/ (2003) 183
[22]H. Veinla (above note 21) 188
[23] The Doha Development Agenda is the Fourth Ministerial Conference in Doha from 9-14 November 2001. This round of trade of negotiations has been on going up to 2012 due to the failure by the negotiators particularly developing and least developing countries to reach consensus on the issues affecting them.
[24] M. Khor, Director Third World Network in his paper '*The WTO, the POST Doha and the Future of the Trade System.*' Third World Network (TWN) Paper on the WTO. The paper was presented at a seminar for the WTO held at the annual meeting of the Asian Development Bank in Shanghai, China 10 May 2002
[25] M. Khor (above note 24) 2
[26] M. Khor is of the view that the Doha decisions are very disappointing. On implementation issues that had been brought before the WTO by developing country nations. The decision was lacking on only few substantive decisions. There has hardly been any progress made with regards to the implementation of the Sanitary and Phytosanitary Measures. Furthermore the longer time frames for compliance have not even yet been clarified.
[27] T. Josling and D. Roberts (above note 6) 10
[28] In a survey carried out by Nyangito on Ongoing studies on the standard compliance costs in Kenya indicate that to grow flowers using high investments that are capable of conforming to the EU MRLs standards costs 10 time more that when traditional conventional methods are used. It has also been estimated that to upgrade a honey processing plant in Uganda to conform to ISO standards will require US$ 300 million. This amount of money is way beyond the reach of most developing countries in as much as there levels of compliance differ. Extracted from H. Nyangito 'Post- Doha African Challenges in the SPS and TRIPS Agreement' 12
[29]Ibid

effectively means is that developing countries fail to keep up with the evolution of newer food safety standards. According to Henson et al,[30] not only do the huge costs of compliance pose a great challenge, "it often involves significant capital expenditure for product re-design, building administrative systems and attaining new quality control testing and certification processes."[31]Also of concern are the losses suffered on border rejection of goods where they fail to meet the relevant standards during border inspections.[32] Furthermore in a World Bank Report (2002) it was noted that the cost of regulatory intervention can be quite huge more especially where a developing country is attempting to penetrate into a market that is dominated by developing countries.[33] Gaining access into foreign market is quite essential for developing

1.2 The aims of the dissertation

This paper will consider the link between the precautionary principles and standards in international trade law. In that assessment it will explore the relationship between the standards and the precautionary principle, by analyzing the contention that article 5.7 of the Agreement on Sanitary and Phytosanitary measures provides provisional acceptance of the precautionary principle. Furthermore it will analyze the efficacy of the Sanitary and Phytosanitary Agreement. Specifically on how successful have the objectives of such standards been achieved and conformity to such standards by member states. Moreover the paper will also consider the issues facing developing countries and the limitations on conformity to such standards and regulations. The paper shall also investigate whether the Agreement on Sanitary and Phytosanitary Measures together with the application of the precautionary principle constitutes a barrier to trade and a limitation on market access.

The introduction has given the background to the SPS Agreement and the precautionary principle. Throughout the paper an analysis of the complexity of the issues surrounding the implementation of food safety and environmental standards will be carried out and their impact on international trade will be critically analyzed. The problem is placed into its proper

[30] J. Henson and R. Loader (above note 16) 355
[31] J. Henson and R. Loader (above note 16) 359
[32]According to G.D Orriss the recent food detentions of imported food by the United States Food and Drug Administration indicate that most of the problems faced by developing countries are not related to technical requirements only. They are also exposed to food hygiene problems which are caused by food contamination due to insects and rodents filth. Microbial contamination failures are also noted due to failure to comply with the United State low acid canned food registration requirements and the labeling/ Over 50% of the rejections are attributable to lack of basic food hygiene and failure to meet the labeling requirements. (Director of Food Safety and Consumer Protection) in 'Food Safety and Capacity Building'
[33] World Bank Report 2002 extracted from an article by T. Otsuki, J.S Wilson and M. Sewaden (in above note 4) 3

perspective by highlighting the broader political, social and economic issues that have a bearing on international trade. The overall focus of the research is the negative impact of restrictive environmental and food safety standards particularly on developing countries. This is accentuated by a comparative analysis of the impact of the SPS Agreement on Zimbabwe and South Africa, as examples of developing countries in chapter four. The main aim of the comparative analysis is to provide a practical assessment into the thesis of the impact of the SPS Agreement in so far as it affects trade in South Africa and Zimbabwe, as examples of developing countries.

Chapter two of the paper will define the scope of the precautionary principle and will critically analyze the definition thereof. This definition of the principle will be critically analyzed within the context of the impact of the principle on international trade. In so doing I shall explore the meaning and several definitions of the precautionary principle. I will also examine the origins and the scope of application of the principle. It shall also dwell upon the definition of the precautionary principle, its nature, origins and scope of application. I will furthermore look at how the principle has been dealt with in international trade law and specifically at the reception of the principle in the World Trade Organization.

Chapter three focuses on the purpose of the SPS Agreement and whether the agreement is capable of being implemented by members of the World Trade Organization particularly developing and least developing countries. I will pay close attention to the preamble which sets out the objective of the agreement articles 2.2; 3.3; 5.1 and 5.7 of the agreement. I will address the question of whether section 5.7 can be used as a model for the precautionary principle.

In chapter four the paper will provide a comparative assessment of compliance with the SPS standards based on the current SPS management capacity in Zimbabwe and South Africa. The analysis will be based on the available data in the form of statutes, policy documents and existing reports, so this will be more of a desktop research and not an actual study carried out. Difficulties have been encountered in carrying out the project since the available information is inconsistent and readily available this presents a huge challenge in attempting to carry out a comparative analysis. Since the information available on one country is not necessarily the same as that which is available for the other. It is due to these and other problems that are highlighted in chapter four and five that render the scope and depth of the analysis limited and does not present a conclusion on its own.

The last chapter highlights the main issues that have been raised in as far as the impact of both the precautionary principle and the SPS Agreement are concerned. It also gives a brief overview of the problems that are encountered by developing countries in the actual implementation of the agreements. It goes on further into giving some recommendations of how developing countries can be able to harness the benefits of the Agreement and increase their trade in goods and services at a global level. Furthermore there is a consideration of other alternatives that exist to the multilateral system such as regional and inter-regional trade.

1.3 Research Methodology

This paper is highly based on desktop research; it is centered upon locating and analyzing articles, on standards and their impact on market access. As such the findings reached at the end are in no way conclusive. They largely depend on the availability of the policy documents and articles on the subject matter, and as such the nature of the comparative analysis carried out herein is limited. Reliance in this paper will be largely placed upon the WTO SPS Agreement which is the agreement which deals with the protection of human, animal and plant life or health based on scientific evidence for all member states. I shall also illustrate the relationship between the SPS Agreement and the precautionary principle. The following cases shall also be utilized in relation to the impact of sanitary and phytosanitary measures; and technical standards and regulations and their relationship with the precautionary principle;

1. EC- Measures Concerning Meat and Meat Products
2. EC- Measures Concerning Asbestos
3. Thai-Measures Affecting Importation of Cigarettes
4. Japan- Measures Affecting Agricultural Products

A comprehensive list of journals and articles on the precautionary principle and impact of standards have also been assimilated into the paper, which have aided in giving academic and expert opinion on the impact of standards and regulations on international trade which are inclusive of but not limited to the following journal articles:-

Cameroon J. and Aboucher. J.'*The Precautionary Principle: A fundamental principle of Law and Policy for the protection of the Global Environment.'* Boston College International and Company Law Review, Vol. 14. Issue 1, (1991)

S. Henson and R. Loader *'Barriers to Agricultural Exports from Developing Countries: The roles of the Sanitary and Phytosanitary Requirements'*(2001) World Development, 29, Issue 1,
85-102.

Tickner. J. and Raffensperger C. *'The Precautionary Principle in Action'* A Handbook 1st Edition 20 available at*http://www.biotech-info.net/handbook.pdf*accessed on 18 May 2012

S.A Neeliah; D. Goburdhurn and H Neeliah, *'The SPS Agreement: Barrier or Catalyst?*' The Royal Veterinary and Agricultural University (2002).

S. Shaw and R. Schwartz, UNU-IAS Report '*Trading Precaution; The Precautionary Principle and the WTO*.' (2005) United Nations University, Institute of Advanced Studies, 1-24 available at *http://www.ias.unu.edu/binaries2/Precautionary%20Principle%20and%20WTO.pdf* accessed on 16 May 2012

2. THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL TRADE

2.1 Background

The essence of the precautionary principle is that policy makers should adopt appropriate measures to "protect human, animal as well as plant life or health", in the absence of full scientific evidence,[34] article 5.7 of the SPS Agreement provides for this exception.[35]The controversy that surrounds the precautionary principle is that it does not have an internationally acceptable definition hence the scope of its application is thus not clarified.[36] The precautionary principle has formed the heart of the trade environment debate, particularly because the principle clashes with the issue of market access in international trade.[37] One of the practical difficulties associated with the use of the precautionary principle is that it does not have a universally acceptable definition therefore different countries will have different levels of risk which will result in much inconsistency with regards to its application.

Difficult questions arise in this regard, like for instance; what is the determination of the appropriateness of any level of risk for one particular country over another? How can one define the level of appropriateness of risk?[38] Even if there is a definition it still remains unclear whether such a level of appropriateness can be the same between a least developing country such as Lesotho, and a developed country such as Canada. Does it differ from continent to continent or region to region? These questions are just but the tip of an iceberg, in an attempt to illustrate the practical difficulties that are associated with the implementation of a principle that has not yet been defined and does not have clear guidelines of implementation. Furthermore in the midst of all these questions, it should be borne in mind that what constitutes acceptable risk in one country may as well be perceived as unacceptable

[34] T. O'Riodan and A. Jordan '*The Precautionary Principle Sounds Science and Politics'* CSerge Working Paper PA 95-02 *http://www./cserge.uk/sites/default/files/pa_1995_02.pdf* accessed on 18 October 2012, 1

[35]Article 5.7 of the WTO SPS Agreement provides for the provisional adoption of safety measures in the absence of scientific proof.

[36]V. Heinna '*Free Trade and the Precautionary Principle'*Juridica International (2003) 187

[37] V. Heinna (above note 36) 186

[38] The appropriateness of the level of risk in Annex A of the SPS Agreement is defined as the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory. This definition in the SPS Agreement gives practical difficulties in its application; the level of appropriateness is defined as appropriate level in the definition. It does not explain what the appropriate level is in any given circumstance. Furthermore what is deemed an appropriate level is left to the discretion of the country which is implementing such a measure. This presents a loophole in that in a dispute a country may simply state that the level of implementation was appropriate then the burden to prove the inappropriateness of the measure will be on the other country. Clearly if this definition would be used on the precautionary principle it would be highly problematic.

risk in another taking into account the different economic, environmental, cultural, social and political influences within these different countries. Challenges arise as to whether these different considerations can be harmonized into one universally acceptable principle that takes into account the various needs of the individual countries.

In as much as governments may have "legitimate national interest"[39] in the implementation of precautionary policies to safeguard the health and lives of their general populace and the environment. These interests should be balanced with the need to protect freer and fairer trading practises.[40]The principle furthermore has the undesirable effect of placing a reversed burden of proof on the exporter of goods, who has the duty to prove the safety of their products.[41] This raises huge concerns especially for developing countries to which the costs of carrying out scientific research are beyond their reach. Developing countries have expressed concern with the application of the precautionary measures adopted without sound science which threaten economic interest, distort trade, increase transaction costs and divert issues from addressing the concerns at stake.[42] If applied in this manner the precautionary principle constitutes a form of disguised trade protectionism and negatively impacts on trade.[43]

2.2 Definition of the Precautionary principle

Definitions of the principle vary widely, from the general notion that it is desirable to prevent pollution, to the requirement that polluters establish by some appropriate burden of proof that their activities are not releasing potentially eco-reactive substances into the environment and thereby causing damage.[44]O'Riodarn and Jordan endorse this view and states that the controversy surrounding the use of the precautionary principle is that there is no universally acceptable definition.[45] It cannot be easily determined where and when the principle can be applied as has been previously mentioned.[46] Furthermore it is not clear whether the burden of

[39] S. Shaw and R. Schwartz, '*Trading Precaution; The Precautionary Principle and the WTO'* 2005 United Nations University –Institute of Advanced Studies (UNU/IAS) Report, 4
[40] S. Shaw and R. Schwartz (above note 39) 8
[41] T. O'Riordan and A. Jordan (above note 34) 3
[42] T. O'Riordan and A. Jordan (above note 34) 4
[43] T. O'Riordan and A. Jordan (above note 34) 5
[44] J. Cameroon and J. Abouchar, '*The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment.*' (1991) Boston College *International and Comparative LR* Volume 14 Issue 1, Article 2, 3
[45] A. Leopold, '*Sovereignty and Regulation of Environmental risk under the Precautionary Principle in the WTO Law'* VLR, (2011) 719
[46] Ibid

proof shifts towards ensuring health, safety or protecting the environment.[47]According to the UN/IAS report (2005) they are more than 12 definitions of the precautionary principle which are found in various treaties and conventions such as the Bergen Ministerial Declaration of 1990, the Rio Declaration on Sustainable Development 1990 and it is also found in the preamble of the Vienna Convention on the Protection of the Ozone Layer.[48] In some cases the principle is made use of in official Agreements for instance the principle is included in the United Nations Framework Convention on Climate Change and Principle 15 of the United Nation Convention on the Rio Declaration mentioned earlier. In other instances such as in the Convention on Biological Diversity, the principle itself is not stated explicitly but traces of its elements can be found in the Agreement itself. However, even though the principle is contained in these various treaties, they do not concur on the threshold requirements for risk assessment and do not clarify the conditions under which the precautionary principle can be triggered.[49]

It is interesting to note however that even the European Union has failed even to give a conclusive definition of what is the precautionary principle and what it does entail.[50] This issue is ironical since the principle is often applied by European countries a lot. This goes a long way to show the complexity of the issue. Where such influential developed nations such as the EU are failing to clearly define and therefore implement the principle. What of least developing countries that neither have the resources nor the know- how to ensure the application of the principle? There is no comprehensive outline of what exactly is required to prove the existence and therefore enforcement of the principle.[51]

Focus herein shall be on the two definitions of the principle that have been given in the Bergen Ministerial Declaration[52] and the Rio Declaration.[53]

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[47] S. Shaw and R. Schwartz (above note 39) 10

[48] A typical example of these various treaties and conventions is the Rio Declaration of the United Nations Conference on the Environment and the Development of 1992. Another example is the Bergen Ministerial Declaration of 1990.

[49] S. Shaw and R. Schwartz (above note 39) 12

[50]National Foreign Trade Council Inc., 'The *Growth of Trade Barriers that Ignore Sound Science'* (2003) available at *http://www.wto.org/english/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf* accessed on 23 May 2012

[51] Ibid

[52]*Bergen Ministerial Declaration on Sustainable Development in the ECE Region*Ref: UNDoc. A/CONF.151/PC/10; 1 Yearbook on International Environmental Law 429 (1990): 4312

[53] The 1992 Earth Summit in Rio de Janeiro Summit in Brazil. This Rio Declaration was signed by 178 nations who were participating in the conference including the United States.

Principle 15 of the Rio Declaration provides that; "In order to protect the environment, the precautionary approach shall be held widely applied by states according to their capabilities. Where there are threats of serious or irreversible harm, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."[54]

Percival[55] however notes that the English translation of the Principle 15[56] makes references to "the precautionary approach" whereas the official translation in several other languages refers to "the precautionary principle". The significance of the shift in the terminology is not apparent. However construed from the ordinary meaning of the words it is possible that a different meaning of these words may have an effect. The ordinary meaning of the word approach from the Oxford English dictionary is defined as "a way of dealing with the situation or a problem."[57]On the other hand, principle is defined as "a general scientific theorem or law that has numerous applications across a wider field."[58] It is clear from these two definitions that they do not quite clearly profess the exact same thing. The use of the word principle creates a much nearer meaning to the subject matter. However whether this was of any significance or can make a change in the meaning is not so apparent on the face of it.

It is important to note at this juncture the fundamental differences between these two definitions of the precautionary principle. Whereas the Bergen Ministerial Declaration makes no mention of economics except where it relates to sustainable development,[59] principle 15 of the Rio Declaration on the other hand promotes precaution provided that such measures are taken in a manner that is cost effective.[60] It is these material differences in the definition of the principle in both the Rio Declaration and the Bergen Ministerial declaration that pose a great challenge to its implementation. In the absence of a universally acceptable definition

[54] R. Percival, *'Who is Afraid of the Precautionary Principle?' (2005)* Environmental *LR*, *23* no.1, University of Maryland Legal Studies Research Paper No. 2005-62 available at SSRN*: http://ssrn.com/abstract=831864*accessed on 18 August 2012 in his article he quotes Principle 15 of the United Nations Conference on Environment and Development, Declaration of Principle (1992).

[55] R. Percival Proffesor of Law and Director, Environmental Law Program, University of Maryland School of Law.

[56] Of the 1992 Rio Declaration (above note 53)

[57] Oxford Online Dictionary *http://oxorddictionaries.com/definition/english/approach?q=approach* date accessed 10 October 2012

[58] Oxford Online Dictionary *http://oxforddictionaries.com/defintion/english/principle/q=principle* date accessed 10 October 2012

[59] The Bergen Ministerial Declaration (above note 52)

[60] T. Josling and D. Roberts, '*Measuring the impact of SPS Standards on Market Access*' (2011) International Food and Agricultural Trade Policy Council, 5 *http://www.agritrade.org/Publications/documents/MarketAccess.pdf* accessed on 22 May 2012

which shapes the manner of implementation, the application of such standards would be so different that they constitute an indirect form of trade protectionism.

Josling[61] and Roberts [62] endorse this line of thought by noting that there is indeed no internationally acceptable standard for setting out such standards and regulations.[63] Furthermore the precautionary principle is to a greater extent viewed as a "culturally framed concept" muddled in policy advice subject to the whims of international diplomacy and the unpredictable public mood over the true cost of sustainable living.[64]These two definitions however set out what triggers the precautionary principle.[65] There are two elements that must be proved to invoke the principle which have been derived from the definition of the principle.

The first element to be set out is "a threat that is of serious or irreversible harm" this is uniform in both the Bergen and the Rio Declaration.[66]However the second element which deals with the threshold of the harm is not consistent between the two declarations.[67] Thus it is clear that the definitions of the principle or the requirements that are supposed to be approved are in no way easier to establish. The elements to be proved are dependent on the definitions of the precautionary principle that are being in any given place.[68]Freestone holds that the impact of this is severe because having different definitions of the principle means that there is no uniformity in the application of the principle.[69]

In a working paper of the United Nations,[70] the criterion for setting out the requirements of the precautionary principle so that it can be uniformly adopted by different countries has been proposed. These are set out below:

- "Firstly it sets out the requirements for adoption of the principle into customary international law; if such principle were (i) consistently defined, (ii) if they are

[61] T. Josling and D. Roberts (above note 60) 6
[62] T. O'Riordan and A. Jordan, '*The Precautionary Principle; Science; Politics and Ethics*'(1995) CSerge Working Paper PA95-02 *http:www./cserge.uk/sites/default/files/pa1995 02.pdf* 3
[63] S. Shaw and R. Schwartz (above note 39) 3
[64] S. Shaw and R. Schwartz (above note 39) 4
[65] S. Shaw and R. Schwartz (above note 39) 6
[66] S. Shaw and R. Schwartz (above note 39) 10
[67] Ibid
[68] J. Cameroon and J. Aboucher (above note 44) 2
[69] D. Freestone and E. Hey '*Origins and Development of the precautionary principle'* Chapter 1 Kluwer Law International (1996) 2
[70] S. Shaw and R. Schwartz (above note 39) 4

applied in international treaties and (iii) if they are recognized in international tribunals."[71]

- Secondly that it should be discerned by "*opinion juris"*[72]

- The third criterion set out is a situation" where states persistently object to be bound by the precautionary principle."[73]

2.3 Origins and History of the precautionary principle

The bulk of scholarly views associate the emergence of the precautionary principle with the former west of Germany around 1970.[74] At the heart of the precautionary principle (*vorsogre*)[75]is the idea that states should carefully plan their policies so as to ensure that there is no damage to the environment. However, Percival in his translations of the German articles on the precautionary principle argues that it is a" principle of foresight planning".[76] He concedes that the translation does not however adequately capture the true meaning of the precautionary principle.[77]The meaning, he argues, promotes the development of mechanisms for detecting risks to human health and the environment so as to be able to prevent harm.[78]

Even though it is widely accepted that the precautionary principle came into being in Germany around 1970, some authors are of the opinion that the principle had already been in existence before then. Among these authors is Martin[79] who holds the view that the principle had been around for thousands of years before.[80] He substantiates that with the millennial oral traditions which contain the concept.[81] Furthermore Harremones[82] believes that the principle emanated from a doctor's prescription in 1854 to remove the handle of water pumping an

[71] S. Shaw and R. Schwartz (above note 39) 5
[72] Opinio juris is the second element (along with state practice) necessary to establish a legally binding custom. Opinio juris denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question.ICJ Statute, Article 38(1) (b) (the custom to be applied must be accepted as law. Legal Information Institute (LII) Cornell University Law School
[73] S. Shaw and R. Schwartz (above note 39) 18
[74] T. O'Riodarn and A. Jordan (above note 62) 2
[75] N.M. Levine, '*Is Precautionary Regulation a Civil Law Instrument? Lessons from the History of the Alkali Act.*' 1 *http:jel.oxfordjournals.org/content/early/2011/01/07* accessed 20 October 2012
[76] R. Percival (above note 54) 3
[77] R. Percival (above note 54) 5
[78] N.M Levine (above note 75) 31
[79] P. H. Martin, '*If you do not know how to fix it, please stop breaking it! Foundations of Science*' 262 (1997), at 276 as quoted by R. Percival in '*Who is Afraid of the Precautionary Principle?*' 4
[80] R. Percival (above note 54) 4
[81] R. Percival (above note 54) 4
[82] P. Harmones, et al; '*The Introduction of the Precautionary Principle in the 20th century: Late Lessons from Early Warnings*' as quoted by R. Percival in '*Who is Afraid of the Precautionary Principle?*' 4

effort to curb the spread of a diarrhoea epidemic.[83] In the same manner Haigh[84] attributed the principle to the Britain Alkali Act[85] which was amended in 1874.[86]

There are also dissenting views as some scholars attribute the principle to Hippocrates,[87] who is hailed as the father of the precautionary principle. His famous phrase "As to diseases make a habit of two things – to help, or at least, to do no harm",[88] is believed by some to be the true genesis of the principle.Environmental Law activists such as Hannes,[89] dismiss the principle as a product of mere common sense.[90] He also states further that the precautionary principle is by no measure a new concept, it is a principle that has long been recognised by environmentalists as a general principle.[91]

It is from the emergence of the principle in Germany however, that it gained entry into international circles.[92] This saw the introduction of the principle into international conventions, protocols and national policies.[93] The flourishing of the principle into the international arena has not been without controversy. The inclusion of the principle internationally means that there should at least be a universally recognized definition of the principle.[94] Failure to have such a comprehensive definition which is accepted the world over would not only potentially create problems of confusion and uncertainty on the exact application of the principle but also raises difficulties on implementation.

[83] P. Harmones, et al (above note 82) 6
[84] N. Haigh, the Founder and long time Director of the Institute of European Environmental Policy.
[85] N. M Levine (above note 75) 11 explains that British Alkali Act 1863 brought about the precautionary principle in the history of Britain which entails uncertainty about when the uncertainty disappears. The ambiguous boundary between the precaution and prevention is especially well-illustrated through the Mix of Concerns that have been brought about through the Alkali Act.
[86] N. M Levine (above note 75) 28
[87]Hippocrates is an ancient Greek physician who lived during Greece's Classical period and is traditionally regarded as the father of medicine. He is believed to have been the source of the precautionary principle during the Middle Ages.
[88](Ref: Hippocrates in Epidemics). *http://www.sculpturegallery.com/sculpture/hippocrates_bust.html*date accessed 29 September 2012
[89] V. Hannes, Magistur Iuris, Lecturer of environmental law in his article on '*Free Trade and the Precautionary Principle*.'18
[90] V. Hannes (above note 89) 23
[91] M.B.A Van Asselt and E. Voss '*The Precautionary Principle and the Uncertainty Paradox'*(2006) Journal of Risk Research, 9, Issue 4, 313
[92] J. Tickner, C. Raffensperger and N. Meyers '*The Precautionary Principle in Action*' A Handbook 1st Edition1st Edition, The Science and Environmental Network 1-23 available at *http://www.biotech-info.net/handbook.pdf*accessed on 18 May 2012
[93] J. Tickner et al (above note 92) 6
[94] R. Percival (above note 54) 7

In the words of Freestone[95] this "widespread and rapid" adoption of the principle creates a paradox, a complicated situation in which it is not clear whether it can be applauded and termed a "good thing" or whether it is a time bomb waiting to explode.[96] In a situation where there is much uncertainty on the meaning as well as the implementation of the precautionary principle.[97]This contention seems to cast a dark shadow on the future of the precautionary principle in international law. Among such authors who share the same views are Grey[98] and Bordansky[99] who describe the principle as "empty and devoid." [100] Reasonably so because if the principle cannot be clearly defined it bears little meaning and should be clarified first before it can be implemented. However there are other commentators who view this principle as a fundamental environmental policy.[101]

2.4 Scope of application of the precautionary principle

Theoretically the essence of the precautionary principle is the balancing of freedoms and rights of individuals on one hand and the protection of the environment and industries on the other.[102]On a much more practical basis, the principle is however tilted in favour of multinational companies as a means of protecting their own domestic produce from foreign exporter; it is therefore used as a defence of trade restrictions which is induced by trade protectionism.[103] The central idea of the principle is the premise that where there is a threat of serious or irreversible harm lack of full scientific uncertainty should not be used as a reason for postponing cost effective measures to prevent the degradation of the environment.[104] Controversial issues surrounding the precautionary principle concern what exactly is the precise time or place where the principle can be triggered.[105] Furthermore the question of whether the burden of proof shifts towards ensuring health or safety or protecting the environment still remains largely unclarified.[106]

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[95] T. O'Riodarn and A. Jordan (above note 62)7
[96] T. O'Riodarn and A. Jordan (above note 62) 9
[97] N.M. Levine (above note 75) 1
[98] D. Bodansky, '*Scientific Uncertainty and the Precautionary Principle.*' (1991) 4-5
[99] J.S.Gray, '*Statistics and the Precautionary Principle. Marine Pollution Bulletin'*, (1990) 174
[100] J.S Gray and D. Bodansky (above notes 99 and 100) 5, 176
[101] L.A Kogan *'Looking Behind the Curtain: The growth of trade barriers that ignore science'* (2003) National Foreign Trade Council Inc, 1-125 available at http:www.itssd.org/White%20Papers/L%20Kogan%20.pdf accessed May 2012, 13
[102] V.Hannes, , Magister Iuris, Lecturer of Environmental Law Juridica International VIII/ (2003) 187
[103] V.Hannes (above note 102) 197
[104] This definition is the one that is contained in the United Nations Summit which gave rise to the Rio Declaration and the definition is contained in principle 15 thereof
[105] UNU-IAS Report, '*Trading Precaution; The Precautionary Principle and the World Trade Organization'* 4
[106] V. Hannes (above note 102) 199

Questions however arise as to whether there can ever really be a situation where there is full scientific certainty. If there is no sufficient certainty, what would be the manner in which it would be achieved? What an answer to these questions entails is extensive scientific research, for a long period of time to prove that the products or goods in question are scientifically safe.[107] At this juncture it is important to note that it is the party which is alleging that any foreign products or policies that have been implemented pose a serious threat or irreversible harm that imposes the duty to obtain scientific certainty on a party seeking to gain entry into its domestic market. This decision is taken without taking into account any empirical evidence of the harm that will be caused, but just the slight inclination that certain products and processes are harmful is sufficient to trigger the principle. Whether the taking of such a decision is influenced by legitimate national interest or disguised trade protectionism cannot be readily ascertained on the face of it.

Unfortunately the question of whether it is a genuine concern or it is merely political or trade protectionism is not clear. Individual governing nations reserve the right to protect their citizens from potential harm. Sadly where one state adopts the precautionary principle against another it is the party which intends to gain entry into that particular state's market that bears the burden of proof and thus the costs of the extensive research over a long period of time.

2.4.1 The shifting of the burden of proof by the precautionary principle

As it has already been mentioned, one of the significant effects of the precautionary principle is the shifting of the burden proof. Cameron and Wade-Grey[108] note that it caused a reversal of the normal position where the – would- be - developer has to show the likelihood of likely or unreasonable harm. This constitutes an effective trade restriction on the producers of goods who seeks to gain entry into a foreign market.[109] The cumulative effect of this all would be that if the importer does not have the means and capacity to be able to produce sufficient evidence to the effect that their products do not pose a health risk or hazard, they cannot be able to continue trading with that particular state. Until and when their products are up to the standard desired by the country in whose market they seek to gain entry.

This is the problem that is created by the precautionary principle and its source is the lack of an internationally accepted definition and a clear formulation of the guidelines or required

[107] L.A Kogan (above note 101) 42
[108] L.A Kogan (above note 101) 45
[109] L.A Kogan (above note 101) 48

standards for enforcing the principle.[110] Freestone is critical of this point and asserts that the principle raises much concern where there is uncertainty as to its meaning and its implementation is not clear.[111] The effect now would be market manipulation where countries would apply the precautionary principle on products that pose a competition on their domestic produce and relax the approach where the products that do not have such an effect. This view is supported by Tickner, [112] who argues that the EU requirement that foods containing genetically modified should be labelled as a precautionary principle measure in order to alert consumers of the genetic status of the food only applies to foods that originate from other countries. This in turn gives the European producers a competitive advantage. [113]To illustrate further the EU labelling mandate is extended to foods or animal feeds that are made from genetically modified organisms where residues of the novel gene or protein detected in the final product.[114] Furthermore all food products containing more than 0.9% of bio engineered ingredients in their final products should be labelled.[115]Ironically foods that contain genetically modified enzymes including cheese, beers and wines produced with GM yeasts are exempted from food labelling regulations even though they contain enzyme residues in their end products.[116] An interesting point to note is the fact that all these exemptions on food labelling are only applied to foods originating from European producers, a clear policy of trade protectionism.

2.4.2 Elements of the Precautionary principle

The need to formulate a definition and set out the elements of the precautionary principle should be on the priority list of international organizations, since the principle has gained popularity and become widely accepted within the international arena. Despite the uncertainty surrounding the scope of its application the principle has been incorporated into several national and international policies such as The Bergen Ministerial Conference and the Rio Declaration on Sustainable Development mentioned earlier on.[117] The fact that the trade-

[110] The WTO Reports of the Panel and Appellate Body: European Communities –Measures Affecting the Approval and Marketing of Biotech Products. In this dispute the Panel raised concerns on the question regarding the precise definition and content of the precautionary principle. The panel cited the absence of the comprehensive definition of the principle as a loophole in the application of the principle. WT/DS291/R (United States); WT/DS292R (Canada); WT/DS293/ R (Argentina) 2006

[111] T. O'Riodarn and A. Jordan (above note 65) 10

[112] J. Tickner and C Raffensperger, '*The Precautionary Principle in Action'* A Handbook 1st Edition 20

[113] J.Tickner and C Raffensperger, (above note 112)

[114] L.A Kogan '*Looking Behind the Curtain :The growth of trade barriers that ignore science*' National Foreign Trade Council, Inc (2003) 43

[115] L.A Kogan (above note 114) 42

[116] L.A Kogan (above note 114) 45

[117] United Nations University article (above note 63) 20

environment debate has taken centre stage in the WTO's jurisprudence also substantiates the popularity of the precautionary principle among member states.[118]Although it is not certain what the outcome is, the possibility that the implementation of the policy could prove to be quite disastrous particularly where the scope of the principle is not clear cannot really be ruled out.

2.5 The implications of section 5.7 of the SPS Agreement on the precautionary principle

Article 2.2 of the SPS Agreement[119] provides that unless in circumstances that are explicitly provided for in Article 5.7 all SPS measures should be based on sufficient scientific evidence. Thus section 2.2 of the SPS Agreement provides a blanket exemption of a situation where SPS measures can be adopted without sufficient evidence in the form of article 5.7, although these possible formulations for the basis of codifying the precautionary principle within the WTO are supported by some authors. There is still no recognition of the principle as a general principle of customary international law.[120]It has been suggested that perhaps the solution to the application of the precautionary principle lies within the ambit of the WTO Agreement on Sanitary and Phytosanitary Measures in article 5.7.[121]

Chih suggests that perhaps the precautionary principle can be remodelled along the lines of the four requirements of Article 5.7 of the SPS Agreement.[122]He argues further that this should be the case even if the legal status of the principle has not yet been ascertained. The formulation of article 5.7 of the Agreement was decided upon in the Japanese – Varietals dispute.[123]

The Japan- Varietals dispute concerned the prohibition of certain fruits of US origin on the basis that they contained codling moths which since that time had been unheard of in Japan.

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[118] T.O 'Riordan '*Europe and the and the United States on the Precautionary Principle*' Environmental *LR*, 2000, Vol 42 No.4

[119] Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

[120] Niu Huei –Chih '*Can Article 5.7 of the SPS Agreement be a model of the Precautionary Principle*' Volume 4, Issue 4, September 2007

[121] In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

[122] Niu Huei – Chih (above note 120) 376

[123] WTO Panel Reports of the Panel and the Appellate Body, Japanese – *Measures Affecting Agricultural Products* WT/ DS76/AB/R, 19 March 1999

Japan therefore instituted a ban on the United States, who challenged the measures on the basis of article 2.2, 5.1, 5.2 and 5.6.[124] The panel found that indeed there had been a violation of the relevant article. What is crucial in this case is that the court laid down the test to be applied when making use of article 5.7, the panel laid out the following requirements;

(a) 'measure should be applied in a situation where there is relevant scientific information' and
(b) 'on the basis of the available pertinent information'

The measure should not be mentioned unless the member adopting the measure;

(c) 'seeks to obtain additional information necessary for a more objective assessment of risk' and
(d) 'reviews the measures accordingly within a reasonable time.'[125]

The panel in this case only examined the third and fourth element, and found no evidence that Japan had sought to obtain information necessary for a more objective assessment of risk and reviewed the measures accordingly within a reasonable time.[126] The Appellate Body confirmed that the four requirements where cumulative and thus found an infringement of article 2.2 and 57 of the SPS Agreement.[127]Perhaps a remodelling of the precautionary principle along the lines of the decision by the Appellate body might bring out an element of predictability and certainty. However supporters of the principle such as Hannes are of the view that the issues concerning the environment are non-trade issues and are better left off without any interference from the WTO.[128]

It appears though, however that the issue of trade and the environment in some cases are inseparable. The Shrimp-turtle dispute[129] and the Asbestos dispute[130] are other disputes in which the WTO has had to deal with the trade-environment debate. The Shrimp – turtle dispute concerned a ban by the US on shrimp that were caught by four Asian countries without using devices that protected turtles. This followed the adoption by the United States of an environmental policy on turtles. The Appellate body upheld the measure on

[124] WT/DS76/AB/R para 8.50
[125] WT/DS76/AB/R para 84
[126] WT/DS76/AB/R para 85
[127] WT/DS76/AB/R para 89
[128] H. Veinla '*Free Trade and the Precautionary Principle*' Juridica International VIII (2003) 183
[129] H. Veinla (above note 128) 186
[130] European Communities –Measures Affecting Asbestos and Products Containing Asbestos: Measures Concerning Asbestos G/SPD/GEN/204/Rev.8/Add.3

environmental protection but criticized the measures that had been made by the United States. In the Asbestos dispute, the issue was a ban that was made by France on asbestos imposed on Canada. The basis of the ban was that the asbestos had been a source of lung disease and thus posed a major health hazard. The WTO Panel upheld the ruling on the basis that a country has to adopt measures that are necessary to protect its citizen's well-being.

2.6 The status of the precautionary principle in the WTO

The WTO has taken an interest in the trade environment debate which is one of the issues that was discussed in the Doha Development Agenda. This area was included in the WTO working programme. The Doha meeting has given rise to the inclusion of the trade and environment debate in its rulemaking of the WTO, which has had the effect of widening its scope. It is highly speculated that the WTO might enact legislation that deals specifically with the trade environment issues. The problems that will arise especially in as far as developing standards are concerned are that the regulations of environmental standards imposed by developing countries will be much higher than their own standards.[131] This inevitably increases the problems that already exist in as far as compliance with the WTO Agreement is concerned, an agreement on the interface between trade and the environment would add on to the problems that developing countries already have.

2.6.1 The EC Hormones dispute

The EC Hormones case[132] is the first dispute in which the precautionary principle was brought up in an international dispute settlement tribunal. However the Appellate Board declined to take a position on the status of the precautionary principle as a principle in customary international law. The board stated unequivocally that the status of the precautionary principle is a subject for huge debates among academics, lawyers, regulators and judges.[133] Even though the principle has been regarded by some as a general principle of customary environmental law appears less clear and furthermore the board was not convinced of the fact that it had been widely accepted as a principle of customary international among the WTO members.[134] The board therefore refused to adjudicate over the issue of the

[131] M. Khor , '*The WTO, The Post Doha Agenda and the Future of the Trade System*'(2002) Third World Network Paper Presented at the WTO annual meeting held at the Asian Development Bank held in Shanghai, China available at *http://www.twnside.org.sg/*accessed on 20 May 2012

[132] The WTO Agreement on Sanitary and Phytosanitary Measures, WTO Analytical Index: Sanitary and PhytosanitaryMeasuresarticle2.2*http://www.wto.org/english/res_e/books/booksp_e/analytic_index_e/sps_01_e.htm#article2* date accessed 05 September 2012

[133] WT/DS76/AB/R para 85

[134] Ibid

precautionary principle and passed it off as an abstract. There is hope however by some propounders of the principle that it will find voice in other international forums.

According to the National Research Council, the safeguard which has been provided for in this section in article 5.7 was considered in this case to be only of limited application of the precautionary principle.[135] The principle does not override the obligations to bases SPS measures on a risk assessment.[136]

2.7 The legal status of the precautionary principle in international law

The precise position of the principle in international law is not quite clear.[137]The precautionary principle has been in existence as a policy in international environmental law for decades.[138] It has thus been implemented in various national and multinational protocols and conventions. It is believed that the principle emanated from Germany in around the 1970s. Even though some scholars have argued that the principle is already a principle of customary international law, the status of the principle as a custom has not yet been concretized.[139]

From that point onwards the principle has since flourished in international statements of policy; conventions dealing with high-stakes environmental concerns in which the science is uncertain; and national strategies for sustainable development.[140] The principle was introduced in 1984 at the First International Conference on Protection of the North Sea. Following this conference, the principle was integrated into various international conventions and agreements, including the Bergen Declaration on Sustainable Development, the Maastricht Treaty on the European Union, the Rio Declaration, the Barcelona Convention, and the Global Climate Change Convention.[141][142]The principle was adopted in Europe around 1970's to provide environmental risk managers with a tool for decision-making on environmental threats.[143] It has since spread to a wide base of environmental concerns, and is

[135] L.A Kogan '*Looking Behind the Curtain :The growth of trade barriers that ignore science*' National Foreign Trade Council, Inc (2003) 43
[136] Ibid
[137] A. Leopold, '*Precautionary Principle in WTO Law'* (2011) 719
[138] V. Hannes*Free Trade and The Precautionary Principle'* Juridica International VIII/ (2003) 187
[139] V. Hannes (above note 138) 186
[140] V. Hannes (above note 138) 190
[141] On a national level, Sweden and Denmark have made the precautionary principle and other principles, such as substitution for hazardous materials, guides to their environmental and public health policy.
[142] The Precautionary principle an impossible burden of proof for new products
[143] T. O'Riodarn and A. Jordan (above note 75) 11

included in the environmental regulations of the European Union (EU), Canada, and several international environmental agreements.

There is no question about the status however of the precautionary principle in international environmental law. It is a principle that has been widely accepted within environmental law circles. With the increasing emergence of environmental law issues which is affecting trade, environmentalists are arguing that the precautionary principle should be accepted as a fundamental part of international trade law. Furthermore that it should form part of principles in the World Trade Organization.

The principle is only but just a principle of environmental law and has not received much recognition in international tribunals.[144] The most far reaching formulations of the principle have been an echo in international agreements that require proof of no harm before proceeding with a potentially harmful activity. Whereas in other formulations the principle is defined so as to include as subordinate to require action to be cost effective.[145]

2.8 Does the precautionary principle constitute a barrier to trade?

With the rise in environmental threats and risks posed by scientific uncertainty, the adoption of precautionary policies constitute real and "legitimate national interests" and policy makers have the moral obligation to ensure that these obligations should be honoured.[146] However there is need to create a balance increased need for international trade and the desire for increased health and environment protection which has stimulated a huge debate. Since the precautionary principle has come squarely into conflict with market access.[147] Ideally the values of taking precaution in the face of scientific uncertainty and the value of promoting increased trade flow and growth should be placed on an equal pedestal.

In the United Nations University article[148] it is duly noted that countries especially in the developing world face huge difficulties in an attempt to integrate the different standards and regulations especially imposed by the EU. The complexity of integration[149] has resulted in the

[144] H. Veinla (above note 138) 186
[145] L. Kogan (above note 135) 48
[146] United Nations University paper: '*The growth of Trade Barriers that ignore Sound Science*.'
[147] P. Hardstaff, Trade Policy Officer RSPB '*The Precautionary Principle and International Trade"* A Discussion Paper for the European Commission Consultation on Trade and Sustainable Development *http://www.rspb.org/uk/Images/precautionaryprinciple_tcm-133066.pdf* accessed on 3 October 2012
[148] S. Shaw and R. Schwartz (above note 39) 19
[149] P. Hardstaff (above note 147)10

failure to adhere to international standards[150] especially for the poorer countries. Implementation of uncertain standards and environmental measures constitutes disguised trade barriers.[151] The implementation of these arbitrary standards has brought EU and the United States at loggerheads several times, a particular example is the EC Hormones dispute[152] which will discussed in due course. This is the tension that has been created with a state that has an equally stronger bargaining power, the United States. It only leaves one to wonder what a developing or least developing country somewhere in the third world would have been able to do.

There has been a variety of diverse opinions on the actual effect of the precautionary principle; the protagonists of the principle hail it as an essential tool for development whereas those who criticise the principle believe that it does indeed constitute an effective barrier to trade. As has been mentioned earlier on, much of the criticism on the principle is levelled on the absence of a universally accepted standard. This inevitably means that the principle may in some cases be used in an arbitrary and discriminatory manner which may amount to disguised trade protectionism since there is much uncertainty surrounding it.[153]

Among those who have debated the issue such as Jones[154] argue that the principle effectively fails to balance the risks of regulatory actions that are designed to improve the environment.[155] He alludes further to the fact that the principle has been unfairly applied for the protection of selfish interests by nations such as the European Union.[156] He gives an analogy of the treatment of genetically modified organisms contained in food, where residues of the novel gene or protein can be detected in the final product.[157] Until 2003 it meant that foods and fat where exempt because the component of that protein was crushed and therefore was not easily detected. However the EU passed regulations that foods products should be labelled in such a manner that they show whether they contain genetically modified organisms. Foods contained genetically modified enzymes such as cheese, wine and beers where exempted even though the final product had traces of enzymes.[158] This illustrates the

[150] R. Percival (above note 54) 6
[151] R. Percival (above note 54) 4
[152] R. Percival (above note 54) 9
[153] L.A Kogan (above note 135) 32
[154] L.A Kogan (above note 135) 44
[155] L.A Kogan (above note 135) 45
[156] L. N. Wassenhove (above note 142) 76
[157] P. Hardstaff (above note 147) 12
[158] K. Anderson, L.A Jackson, '*Transgenic crops, EU Precaution and Developing countries.*' International Journal on Technology and Globalization,2 (2002) 10

bias and one sidedness of the EU precautionary policy that will only be stringent to products that emanate from foreign countries but not domestic products.[159] Jones holds that the exemption was just for the products that European products are competitive on. This inevitably constitutes a double standard and illustrates that the precautionary principle is a tool for disguised trade protectionism.

Hainnes[160] is in support of this view and holds that the high standard of proof which is required in terms of the precautionary principle though it paints a better protection, places the heavy burden upon importers who want to penetrate a foreign market.[161] The costs of the scientific exercise would require highly mechanized equipment, highly skilled personnel, the costs of such a scientific expedition will be much higher especially for those in developing countries.[162] The standards would be even much higher.This view is also shared by Graham[163] of the Harvard School of Public Health,[164]who avers that the precautionary principle has been applied to further selfish interests especially of the developed countries who apply the standards selectively.

Jones however argues that the application of the principle in some cases should be based on rational grounds and not merely on common sense. [165] Accordingly the focus should not be on "speculative harm but rather on the actual harm that stands to be caused, focusing on speculative harms can cause real harm**."[166]**Furthermore it is argued that although the precautionary principle may appeal to common-sense notions of safety, but it does not necessarily produce a safer, cleaner world. On the contrary incorporation of the principle into environmental, health, and safety regulations is in itself a threat to environmental protection and optimal safeguards for public health.[167]

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[159] K. Anderson and L.A Jackson (above note 158) 21

[160]H.Veinla, '*Free Trade and the Precautionary Principle'* Juridica International VIII (2003) 186 *http://www.juridicainternational.eu/public/pdf/ji_2003_1_186.pdf* accessed on 28 May 2012

[161] H.Veinla(above note 160) 187

[162] P. Hardstaff (above note 147) 48

[163] The Harvard School of Public Health

[164]Lewis, Marlo, Jr., Staff Director, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs,U.S. House of Representatives. Speech to the Doctors for Disaster Preparedness, "*Precautionary Foolishness*," July 1, 2000. *http://www.biotech-info.net/precautionary_foolishness.html*

[165] Chemical Industries' Association, "Cot Deaths Not Due to Fire Proofing Materials," April 1, 1999. *http://www.cia.org.uk/newsite/talking_points/tparticle.asp?id=104* accessed 19 November 2012

[166]Ibid

[167] A. Jonathan. "*Dangerous Precaution: The Precautionary Principle's Challenge to Progress*," National Review Online September 13, 2002. *http://www.nationalreview.com/adler/adler091302.asp* 19 November 2012

3. THE WORLD TRADE ORGANIZATION AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

3.1 Background

Due to the problems and concerns that arose due to the inconsistency of the application of SPS measures during the Uruguay Trade Round (1986-1994) was to reduce unnecessary trade impacts of national SPS measures by promoting greater convergence of the risk regulatory requirements applied by Members.[168] The primary 'tool' selected to achieve this aim was that of harmonization of WTO Members' SPS measures, 20 based on the international standards, guidelines and recommendations developed by organizations such as the Codex Alimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention.[169] Although harmonization was to be encouraged, it was recognized that it would not be feasible in all cases. [170]Where Members' SPS measures cannot be harmonized because no international standard exists or some Members opt for more stringent regulations,[171] the SPS Agreement requires that such national measures be based on scientific evidence.[172]

The 1994 WTO Agreement continued the historical progression of successive Rounds of multilateral trade negotiations and the General Agreement on Trade and Tarrifs (GATT) case

[168] WTO: *Understanding the WTO; World Trade Organization Information and External Relations Revision* 5th Edition (2011) 6*http://www.wto.org,*accessed on 22 November 2012

[169] See SPS Agreement, Preamble, para. 6. Article 3.1 of the SPS Agreement requires Members to "base" their SPS measures on the international standards, guidelines and recommendations developed by the Codex Alimentarius Commission (in the area of food safety), the International Office of Epizootics (in the area of animal health) and the International Plant Protection Convention (in the area of plant health).Members' measures that conform to such international standards are, in accordance with Article 3.2 of the SPS Agreement, "deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of the Agreement and of GATT 1994."

[170] Harmonization is not feasible, for example, where countries differ significantly as regards their prevailing climatic conditions and disease profiles. Equally, differences between countries as to the acceptability of certain levels of risk may prevent agreement on harmonized standards at the international level.

[171] The SPS Agreement specifically allows for this possibility in Article 3.3, although Members must be able to show a "scientific justification" or that SPS measures are in "consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5" (dealing with risk assessment). This rather confusing provision was interpreted by the WTO Appellate Body in the *Beef Hormones* case (para. 175) as requiring a Member to undertake a risk assessment in accordance with Article 5 of the SPS Agreement in order to demonstrate a scientific justification for its measures.

[172] The required scientific standard for SPS measures is elaborated upon in Article 5.1 and 5.2 of the SPS Agreement which provides that such an assessment must adhere to the appropriate level of risk and assessment techniques which have been developed by the relevant international organizations such as the Codex Alimentarius Commission and the International Office of Epizootics depending on the type of risk incurred. However the question of the appropriate level of risk is based on a subjective test. As the appropriate level of risk as defined in Annex A of the Agreements largely depends on the specific country which is applying such measures.

law which has steadily reinforced periodically augmented rules disciplining the use of technical restrictions on imports.[173]

The negotiation of the SPS Agreement during the Uruguay Round was also motivated by shortcomings in the two legal instruments that disciplined the use of SPS measures prior to the round.[174][175] Although language in these documents stated that measures could not be "applied in manner which could constitute…a disguised restriction on international trade"[176] or "create unnecessary obstacles to trade",[177] the consensus view that emerged over the years was that the GATT and the Standards Code[178] which were used as aid to the Agreement had failed to stem disruptions of trade in international markets caused by proliferating technical restrictions.[179]

Three flaws in the pre-Uruguay Round legal infrastructure blunted the effectiveness of disciplines on SPS measures and other technical barriers: (a) the lack of single integrated rule system;[180] (b) the GATT's consensus – based dispute settlement process;[181] and (c) the arguable exemption of production.[182]

3.2 What is an SPS measure?[183]

Any measure applied to protect;

(a) Human or animal life from risks arising from food additives, contaminants, toxins or disease causing organisms in their food;[184]

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[173]Ibid
[174] Understanding the WTO (above note 168) 9 the GATT 1947 and the 1979 Tokyo Round Agreement on Technical Barriers to Trade.
[175] Understanding the WTO (above note 168) 8
[176] Article 3.5 of the SPS Agreement
[177] Preamble to the Agreement on Sanitary and Phytosanitary Measures
[178] The Standard Code refers to the 1979 Agreement on Technical Barriers to Trade. Even though the TBT Agreement was not created for the purposes of regulating sanitary and phytosanitary measures, it however covers technical aspects of food safety, animal and plant life or health safety such as restrictions on pesticides residue limits, inspection and food labeling. Member states during the negotiation phase of the SPS Agreement agreed to use the relevant international codes except in circumstances where they did not have anything to do with human, animal and plant life or health.
[179] Understanding the WTO (above note 168) 15
[180] Ibid
[181] Ibid
[182] Ibid
[183] The definition of SPS measures in Annex A (1) means sanitary and pytosanitary measures including all the relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatment including relevant requirements associated with the transport of animals or plants, or with the material necessary for their survival during transport; provisions on relevant statistical methods of risk assessment; and packaging and labeling directly related to food safety.

(b) Human life from plant, animal-carried diseases (zoonoses);[185]

(c) Animal or plant life from pests, diseases, or diseases- causing organisms;[186]

(d) A country from damage caused by the entry , establishment or spread of pests[187]

The distinctions made in the definition matter to regulatory authorities because the SPS Agreement arguably holds government to a higher standard than does the GATT 1994 or the Agreement on Technical Barriers to Trade (TBT) Agreement.[188] For example, import disciplines which do not explicitly appear in the other two legal instruments are found in Article 5. This Article requires, among other things, that any SPS measures be based on an assessment of risks posed by the import and provide a level of health protection that does not arbitrary or unjustifiably vary from the level of health or environmental protection provided by other measures, if such distinctions result in discrimination or a disguised restriction on trade.

From this definition of what constitutes an SPS measure, the question of what amounts to an SPS measure depends on the goals that such measures are intended to achieve and their specified purpose.[189] The definition provides for aims that protect humans, animal and plant life from risks that may be posed by pests and diseases, thus from the definition it is safe to conclude that measures addressing other health risks relevant for international trade[190] and other measures not aimed at health protection, but rather at consumer information,[191] do not fall within the ambit of this definition.

3.2.1 Ascertainment of the purpose or goal of SPS Measures from the definition

According to a UNCTAD (2003) study, the standard that would be used to determine the goal of any measure should be objective.[192] This can be clearly distinguished from the subjective standard where the Member relying upon such standard intends to impose it on another Member.[193]There is no dispute that has yet been brought before the WTO Dispute Settlement

[184]The WTO SPS Agreement , Annex A Definition Paragraph1(a)
[185] Paragraph 1(b) (note 183 above)
[186] Paragraph 1(c) (note 183 above)
[187] Paragraph 1(d) (note 183 above)
[188] Ibid
[189] Ibid
[190]Such health risks are inclusive of bans on asbestos containing products
[191] Measures that are aimed at consumers protection are measures such as
[192] The objectivity in the standard would involve an examination of the formulation of the measure, its structure or design or its effects.
[193] Ibid

Board with regards to the definition of SPS measures up to date.[194] It has been suggested that the objective test mentioned above could be used to ascertain the purpose and goal of SPS measures.

Furthermore the goals mentioned in points (a) and (b) of Annex 1 of the SPS Agreement [195] qualify an SPS measures for the purposes of the SPS Agreement regardless of its form.[196]Also the definitions in Annex 1 expressly refers to "protection of human, animal and plant life", this effectively reduces measures that are aimed at the extra-territorial application of domestic health standards.[197]

3.3 Key provisions in the SPS Agreement

3.3.1 Article 2 - Rights and Obligations of members

In article 2 the rights and obligations of the members are set out. Furthermore it reflects the underlying aim of the SPS Agreement which is the balancing of the rights of sovereign governments to take measures for the protection of health, with the need to promote free trade and prevent trade protectionism.[198]Article 2.1 acknowledges the rights of Members to take SPS measures which are necessary for the protection of human, animal and plant life.[199] According to a UNCTAD (2003)[200] it also provides the measures that should be adopted by members should not be arbitrary or unjustifiably discriminate as between member states.[201]The provisions of article 2 are echoed in article XX(b) of GATT which contains an exception which allows members to take measures that are necessary to protect human, animal and plant life or health provided such measures are not discriminatory or do not amount to disguised trade protectionism.[202]

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[194] Ibid
[195] Ibid
[196] This appears from the second part of the definition, which contains broad, illustrative, non-exhaustive lists of various types of government measures which could be classified as SPS measures, ranging from end-products criteria and quarantine requirements to certification and sampling procedures. (UNCTAD Paper 2003)
[197] United Nations Conference on Trade and Development; '*Dispute Settlement World Trade Organization'* 3.9 SPS Measures 4
[198] United Nations Conference on Trade and Development (above note 196) 5
[199] Ibid
[200] Ibid
[201] Article 2.3 provides that members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which constitutes disguised restriction on international trade.
[202] Subject to the requirement that such measures 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 restrictions on international trade, nothing in this Agreement shall be construed to prevent the adoption or

3.3.2 Article 3 – Harmonization

The agreement provides that members should adopt measures that are compatible with international standards, [203] through the process of harmonization.[204] These international standard setting bodies are the Codex Alimmentarius Commission,[205] the International Office of Epizootics[206] and the International Plant Protection Convention[207] gives the essential guidelines and the appropriate standards for their respective functions. Article 3 further provides that where members my adopt measures that are much higher than those prescribed by the standards shall not be taken to be inconsistent with the provisions of the Agreement.[208] This actually means that adoption of higher standards is not prohibited within the context of the SPS Agreement not unless those provisions are not based on sound science.

3.3.3 Article 4 - Equivalence

Article four provides for the issue of equivalence, the principle provides that the sanitary and phytosanitary measures of members should be deemed to be equivalent if these measures adhere to international guidelines but are not in themselves similar to those in other states or to those that emanated from other countries.[209] What brings the question though with this

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enforcement by any contracting party of measures: (b) necessary to protect human, animal and plant health or life.

[203] See article 3.4 which provides for the relevant international standards which include the Codex Alimmentarius Commission, the International Office of Epizootics, and the international and regional organization operating within the framework of the International Plant Protection Convention.

[204] Article 3.2 SPS Agreement

[205] The FAO/WHO Codex Alimentarius Commission is a collection of international food safety standards that have been adopted by the Codex Alimentarius Commission. The Codex Alimentarius Commission is based in Rome and is jointly funded by the Food and Agricultural Organization and the World Health organization.

[206] The World Organization for Animal Health which is formerly the Office des Epizooties is the world organization for animal health recognized which is recognized by the SPS Agreement, it has the following aims amongst others; to ensure transparency in the global animal disease situation; to collect analyze and disseminate veterinary scientific information and to provide expertise and encourage international solidarity in the control of animal diseases.

[207] Article 12.3 provides that the Committee should maintain close contact with the relevant international organizations in the field of sanitary and phyosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics and the Secretariat of the International Plant Protection Convention. With the purpose of bringing out the best available scientific and technical advice for the administration of this Agreement.

[208] Article 3.3 provides that members may introduce or maintain sanitary and maintain sanitary or phytosanitary measures which result in higher level of sanitary or phytosanitary protection that would be achieved by measures that are based on the relevant international standards, guidelines or recommendations, if there is scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through to 8 of article 5.Notwithstanding the above measures which result in a level of phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provisions of this Agreement.

[209] Article 4.1 Members shall accept the sanitary and phytosanitary measures of the other members as equivalent even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member's appropriate level of sanitary and

particular provision is what exactly is termed the "appropriate level of sanitary and phytosanitary measures". It appears that the appropriate level would be the level that is set by international standard setting boards. But article 3.3 expressly provides that members are allowed to adopt measures that often are higher than the expected levels of sanitary and phytosanitary measures that would be adopted by international standards.[210] In that case it is not clear whether the meaning of appropriate level would be the appropriate international standards or the appropriate level of the country that one is intending to trade with.

3.3.4 Article 5 – Risk Assessment

The article provides for the determination of the appropriate level of sanitary and phytosanitary protection and the assessment of risk.[211] Such assessments of risks should be based on relevant international standards.[212]Article 5.2 provides that members should take into account relevant scientific evidence relating to the relevant processes and production methods, relevant inspections including relevant sampling and testing methods.[213] Furthermore the prevalence of diseases should also be taken into account.[214]Even though article 5.5 makes mention of the level of sanitary and phytosanitary protection, the meaning of appropriate sanitary level is subjective in this case. This is so because the "level of appropriate sanitary and phytosanitary" within the definition of the term in Annex A part six simply defines the term as " the level of protection deemed appropriate by the Member establishing a sanitary and phytosanitary measure to protect human, animal or plant life or health within its territory."[215] This definition does not provide clarity for what is an appropriate level and what is not and hence leaves the decision as to whether the measure is appropriate to the discretion of the individual members. This is a loophole because any member can allege that whatever measure they have used within their territory is appropriate.

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phytosanitary protection. For this purpose, reasonable access has been shall be given, upon request, to the importing member for inspection, testing and other relevant procedures.

[210] The FAO International Plant Protection Convention is a multilateral treaty for international cooperation in plant protection. The Convention makes provision for the application of measures by government to protect their plant resources from harmful pests (phytosanitary measures) which may be introduced through international trade. The IPPC is deposited with the Director-General of FAO and is administered through the IPPC Secretariat located in FAO'S Plant Protection Service. *http://www.org/english/thewto_ippc_e.htm* accessed 13September 2012

[211] Annex A part 4 defines risk assessment as the evaluation of the likelihood of entry, establishment or spread of pest or diseases within the territory of an importing member according to the sanitary and phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human, animal health or life from the presence of additives, contaminants, or disease causing organisms in food, beverages and food stuffs.

[212] Article 5.1 of the SPS Agreement

[213] Article 5.2 of the SPS Agreement.

[214] Ibid

[215] This is in accordance to Annex A of the Agreement on Sanitary and Phytosanitary Measures.

Since what is appropriate to one person might be inappropriate to another. The problem is what the standard of determining appropriateness is.

Article 5.7 of the Agreement provides for the provisional adoption of measures to protect human, animal and plant life or health in the absence of concrete scientific proof. It provides further that such an assessment should be objective and should be taken within a reasonable time. But the problem that exits in this regard is what a reasonable time is.[216] How does one determine what a reasonable time would be? Sub article 8 does not provide much assistance in this regard it only says that if a member believes that the measures which were adopted where inappropriate then they have to provide reasons in writing.

3.3.5 Article 10 –Special and differential treatment

Provides for the special and differential treatment, which intends to take into account the special problems and needs of the developing countries.[217] In so doing the agreements takes into account their financial, trade and economic developments.[218] It also makes provision for the increase in the time frame within which the members are expected to comply.[219] The question in this regard remains however whether these measures have been applied in the actual implementation of trading relations. This remains by far the largest implementation problem of the SPS Agreement, since the developing nations have not benefitted much from this clause.[220] Much more will be discussed on this particular aspect further on in this paper.

3.4 Disputes under the SPS Agreement

Article 11.1 provides that dispute settlement under the SPS Agreement should be governed by provisions of articles XXII and XXIII of GATT 1994. Furthermore where a dispute arises in which the issue is scientific or technical, the Dispute Settlement Board (DSB) reserves the right to call upon scientific experts to give expert evidence.[221]For such a decision to call upon

[216] M. Khor '*The WTO, The Post Doha Agenda and the Future of the Trade System*' (a Third World paper on the WTO) (2002)
[217] Article 10.1 of the SPS Agreement
[218] Article 10.3 which provides that with a view to ensuring that developing country members are able to comply with the provisions of this Agreement , the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from the obligations under this Agreement, taking into account their financial, trade and development needs.
[219] Article 10.2 which provides that where the appropriate level of sanitary and phytosanitary measures , longer time frames for compliance should be accorded on products of interest to developing countries to developing country members, longer time frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
[220] M. Khor (above note 216)
[221] Article 11.2 reads that in a dispute under the SPS Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel including consultation with parties to the dispute. To this

experts to be made it has to be at the initiative of the panel or upon the request of either of the parties to the dispute who intends to rely upon such scientific information.[222]Up to date they are about 41 disputes that have been brought before the Dispute Settlement board on the SPS Agreement. For purposes of this discussion only a few of these disputes are discussed below;

3.4.1 EC Hormones dispute[223]

The complainant in this dispute was the United States and Canada, and the defendant was the European Union. The complainants where alleging that the EU had infringed Article 3 and 5 of the SPS Agreement by the prohibition of certain meat and meat products that had been treated by certain growth advancing hormones.[224]

The Appellate Body rejected the Panel's interpretation that article 3.1 requirement should be based on international standards guidelines or recommendations, though this did not necessarily mean that SPS measures should conform to such standards. Furthermore as to the relationship between article 3.1, 3.2 and 3.3 which relates to harmonization, it was held that the approach that had been taken by the panel to interpret article 3.3 to be an exception to article 3.1, 3.2 was wrong since articles 3.1 and 3.2 where not supposed to be lumped together and that they all represented separate issues.[225] The Appellate Body in light of this revelation reversed the panel's finding that the burden of proof for the violation under article 3.3, as a provision providing the exception shifts to the responding party. [226]

With regard to article 5.1 which expressly provides for risk assessment, while the Appellate Body did in fact uphold the decision that had been held by the panel, which stated that the measures in question violated article 5.1 and consequently 3.1 for the reason that the measure was not based on risk assessment. The Appellate Body however reversed the panel's finding that article 5.1 had to have a relational link between the measure at issue and risk assessment.

Furthermore the Appellate Board also considered the prohibition on discrimination and disguised trade restrictions on international trade. In this regard the Appellate Body reversed the Panel's findings that measures adopted by the E.C where in violation of article 5.5 noting

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end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organization, at the request of the either parties to the dispute or on its own initiative.

[222] *EC-Hormones Panel Report* para 8.9

[223] *The WTO Panel and Appellate Body : Certain Measures Concerning Meat and Meat Products* WT/ DS48/R; WT/ DS261/AB/ R/USA; WT/DS48/AB/R(Canada); WT/DS48/R para 125

[224] *EC-Hormones* Panel Report para 8.98

[225] Article 11.2 (note 221 above)

[226] *EC-Hormones Panel Report* para 8.13

that; the evidence showed that there was genuine cause for concern, in as far as the safety of the growth inducing hormones where concerned. The board continued that there existed the necessity to establish a common market.

3.4.2 Japanese Varietals dispute[227]

The basic obligation to ensure that SPS measures were not maintained in the absence of sufficient evidence was the issue in this dispute.[228] The panel stated that for a measure to be adopted without sufficient evidence there was need to ensure that there was lack of an objective relationship between the phytosanitary measure at issue and the scientific evidence that was submitted before the panel. The panel found that there was lack of an objective measure between the measure applied and the relevant scientific evidence. Furthermore the panel went on to consider whether there had been a violation of article 2.2 of the Agreement. The panel considered the defense that had been relied upon by the Japanese that the measure in place was a provisional measure provided for in terms of article 5.7 which article 2.2 expressly referred to. The panel found that there had indeed been a violation of article 5.7 and hence a violation of article 2.2 as well. The panel held that the question of what would constitute a reasonable period of time had to be decided on the merits of each case that had been presented before the panel.

3.4.3 The Australian Salmon dispute

The question of assessment risk was also decided upon in the Salmon case. The issue in this case concerned the importation of fish. The concern was a fish disease which was associated with a particular type of fish, the Canadian-Adult, wild, ocean-caught Pacific Salmon. The Panel considered the first definition of risk assessment in the first sentence of the definition.[229]

The Panel set out a three pronged test, to determine risk assessment in respect of animal health;

(a) ‘identify the disease(s) whose entry, establishment or spread within its territory it wants to prevent as well as the associated potential biological and economic consequences

[227] M. Khor (above note 216)
[228] *Japan-Varietal Panel report* par 8.42
[229] M. Khor (above note 216)

(b) 'evaluate the likelihood of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and,

(c) 'evaluate the likelihood of entry, establishment and spread of these diseases according to the SPS measure which might be applied.'[230]

The Appellate Body found that Australia had managed to satisfy the first requirement of the test by identifying the diseases which posed a risk, however it reversed the Panel's findings on the other two elements. Further the Appellate Body found that some evaluation of the likelihood was not enough, so they made use of expert opinion that the evaluation and expression of probability of likelihood of harm was crucial to risk assessment.[231] It was held that there had been a violation of article 5.2 as well as article 2.2.

3.5 Impact of SPS measures on African agricultural products

While several African, Caribbean and Pacific (ACP) countries, including South Africa, Zimbabwe and Mauritius, have sufficient resources and expertise to meet all the exacting standards required by customers in industrialized countries for food products, most ACP developing countries do not.[232] These standards not only apply to the safety of the products, but also to its appearance, packaging and labeling of contents.[233]

Several problems are faced by countries in the developing world as far as meeting these standards requires a long list of systems to be in place, including quality control at the farm level and in processing, laboratory facilities, access to clean inputs such as water and packaging materials, controlled temperature storage facilities and testing facilities and certification systems.[234] If customers in importing countries are not confident about the standards of any of these facilities, they are likely to demand additional testing at the port of discharge and may reject any defective goods. This adds significant costs and uncertainty to any transaction.[235]

[230] *Australia- Salmon,* Panel Report para 8.83
[231] *Australia – Salmon* Panel Report para 8.91
[232] M. Khor (above note 216)
[233] M. Khor (above note 216)
[234]G.D Orriss '*Food Safety and Capacity Building*' FAO/WHO Global Forum of Food Safety Regulators Marrakesh, Morocco, 28-30 January 2002 G.F 01/5 Agenda Item 4.3 *www.fao.org/docrep/meeting/004/y1889e.htm accessed on 12* December 2012
[235] G.D Orriss (above note 234) 5

Furthermore developing countries merit special consideration from importing countries over the time they may take to develop control systems.[236] Assistance with the difficulties of setting up and administering these systems is also available from a number of international development organizations, such as the World Bank and Commonwealth Secretariat, overseas development departments of governments of industrialized countries and NGOs.[237]The most comprehensive programme of assistance is offered by the UN Food and Agricultural Organization (FAO).[238]

Although these measures that have been put in place may go a long way in assisting especially developing countries to meet their objectives much more still needs to be done to address the problems that they face.[239] These problems are inclusive of the lack of necessary resources and experienced personnel to run these systems effectively and to participate fully in the functions of the Agreement.[240]

These problems in compliance could themselves serve as effective barriers to trade. Most developing countries do not have the skills, technology, expertise as well as the finance to carry out such huge operations.[241] What this effectively means is that to be able to comply with these measures fully these countries require highly skilled personnel who have to be adequately paid at that. This is in the midst of brain drain where about 90% of highly skilled personnel have migrated to the first world countries in search for better living standards and better salaries.

Furthermore the other problems that are faced by developing countries are that some of these standards that they have to implement are implemented from scratch and have to upgrade their systems to the level of countries in the developed world that have already upgraded their systems.[242] The irony of the situation is that, it is the developed and least developing

[236] Mamdouh Gabr '*Improving Efficiency and Transparency in Food Systems –Sharing Experiences'*FAO/WHO Global Forum of Food Safety Regulators Marrakesh, Morocco, 28-30 January 2002 *www.fao.org/docrep/meeting/004/y3680e/Y3680E08.htm* accessed on 22 December 2012
[237] Dr. Deepak Gupta, '*Capacity Building and Technical Assistance –New Approach and Building Alliance*' FAO/ WHO Global Forum of Food Safety Regulators Marrakesh, Morocco 28-30 January 2002 Agenda Item 4.3b GF01/12 79 *www.fao.org/docrep/meeting/004/y1897e.htm* accessed on 22 December 2012
[238] Among the services offered by the FAO are: - the strengthening of laboratory analysis and food inspection capabilities; the provision of basic training in all aspects of food control; the provision of advice, information and documents on a wide range of related subjects; the publishing of manuals on food quality controls and the provision of assistance in the strengthening of administrative structures.
[239] Dr. D. Gupta (above note 237) 1
[240] Ibid
[241] H. Nyangito '*Post- Doha Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Agreements*' KIPPRA Occasional Paper No. 4 10
[242] H. Nyangito (above note 241) 8

countries that have to upgrade their systems to the level of the developed countries. Developing countries do not have the means to sustain their own population with an increase in the growth of starvation, HIV/AIDS, natural disasters, infant mortality rates and low life expectancies due to lack of basic health care and amenities, this leaves them with barely enough resources to be able to deal with the costs of compliance with SPS measures. [243]

Several studies have been carried out to measure and assess the impact of SPS measures on trade involving developing and least developed countries. According to Murphy[244] and Shleifer[245] more theoretical work has demonstrated that developing countries find it difficult to trade with developed countries due to differences in quality requirements, which in turn reflect prevailing consumer demands or the nature of government regulation.[246] This often forms a huge impediment to trade of products for developing countries, as they have to comply with the food safety and environmental standards of developed countries in order to be able to carry out trade. The standards are often unattainable at most and are far beyond the reach of those in the developing world.[247]

Henson[248] and Loader[249] illustrate another study that attempts to quantify the costs of compliance with SPS measures by developing countries in Cato (1998).[250] This study assesses the costs of upgrading sanitary conditions in the Bangladesh frozen shrimp industry to satisfy European Union requirements.[251] It is estimated that $ 17.6 million was spent to upgrade plants over 1997-98.[252] This gives an average expenditure per plant of $239, 630.[253] The total industry cost required to maintain HACCP is estimated to have spent $ 283,000 over this period and predicts an expenditure of $225,000 per annum to maintain HACCP monitoring Programme.[254]

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[243]Dr. Jacques DIOUF –Director-General Food and Agricultural Organization of the United Nations, Inaugural statements from *FAO/WHO Global Forum of Food Safety Regulations* Marrakesh, Morocco, 28-30 January 2002

[244] Dr. D. Gupta (above note 237) 2

[245] K.M Murphy and A. Shleifer '*Quality and Trade' Journal of Development Economics Volume* 53 (1997)1-15

[246] K.M Murphy and A. Shleifer (above note 245) 12

[247] T. Otsuki et al '*Saving two in a billion: quantifying the trade effect of European food safety standards on African exports.'* 1

[248] S. Henson and R. Loader, '*Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements.' 90*

[249] Ibid

[250] Ibid

[251] Ibid

[252] S. Henson and R. Loader (above note 248) 92

[253] Mutasa and Nyamandi as quoted by S. Henson and R. Loader (above note 248) 91

[254] S. Henson and R. Loader (above note 248) 92

Another survey was also carried out by Mutasa[255] and Nyamandi[256] which assessed the degree to which SPS requirements impede exports of agricultural and food products from African countries through a survey of the Codex Alimentarius contact points.[257] Of the countries that responded, 57% indicated that exported products had been rejected within the previous two years following border inspection.[258] The main reasons where microbiological spoilage or contamination.[259] Although all of these countries inspected food products prior to export, most considered that financial constraints limited the effectiveness of these procedures and that, in particular testing and inspection facilities where inadequate.[260]

3.6 The efficacy of the SPS Agreement

Neligh[261] concedes that literature on the impact of the SPS Agreement presents divergent views.[262] The bulk of scholarly views are that the WTO Agreements, inclusive of the SPS Agreements have mostly benefited developed countries, while developing countries do not having any significant benefits at all.[263]This view is shared by Jensen[264] who concedes that the Agreement fell short of the expectations of the developing countries after the Uruguay Round of Negotiations.[265][266]Years after the benefits that had been anticipated in the post-Uruguay round of opening up market access for agriculture and textiles has not even been realized yet.[267] The World Bank, on the other hand however notes that developing countries have also benefited from the SPS Agreements and have integrated with global trade.

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[255] H. Nyangito '*Post-Doha African Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreements*' KIPPRA Occasional Paper No. 4. 11

[256] H. Nyangito (above note 255) 12

[257] S. Henson and R. Loader (above note 248) 93

[258] S.A Neeliah et.al, '*The SPS Agreement: Barrier or Catalyst?*' International Trade Policy Law, ECJ Volume 12 Number 2 2011/104 -130 *estey.journal.com*

[259] S.A Neeliah (above note 258) 106

[260] Ibid

[261] S.A Neeliah (above note 258) 118

[262] S.A Neeliah (above note 258) 120

[263] Ibid

[264] M.C. Jensen, '*Reviewing the SPS Agreement: A developing Country perspective*' Royal Veterinary and Agriculture University (2002) 18

[265] M.C Jensen (above note 264) 22

[266] The Uruguay Round was one of the longest trade negotiations which took almost seven and a half years which was almost twice as the original schedule. It included wide range of topics which included tariffs, non-tariff barriers, natural resource products, textiles and clothing, agriculture, tropical products, GATT articles, Tokyo Round Codes, antidumping, subsidies, intellectual property, investment measures, dispute settlement, the GATT system and services. It brought the biggest world trading system reform since GATT was created after WWII. This is the negotiations that saw the coming into place of the SPS and TBT Agreement among other issues. Source 'Un*derstanding the WTO –Uruguay Round'http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_ehtm* accessed 10 October 2012

[267] M. Khor, '*The WTO, The Post Doha Agenda and the Future of the Trade System*' Third World Network (TWN) paper. This is a paper which was presented at the WTO, Post Doha Agenda and the Future of the Trade

To be able to clearly assess the impact of the SPS Agreement and its particular impact on international trade, it is essential in this regard to compare the specific clauses of the SPS Agreements and how successfully they have been implemented. These are inclusive of;

3.6.1 Special and differential treatment[268]

Special and differential treatment is provided for in article 9 of the SPS Agreement which granted to developing countries to enable them to build regulatory frameworks on scientific foundations.[269]It is believed that between 1994 and 2009 alone the WTO Secretariat undertook a total of 198 technical assistance activities on the SPS Agreement, including 20 regional and 85 national workshops.[270] Henson and Jaffe (2008) believe that such assistance has boosted trade for some developing countries[271]. These provisions of special and differential treatment do not however form obligations that are binding, and therefore do not have a force of law.[272] This is the source of the problem that arises from the Agreement; countries do not conform to it because there is really no concrete way of binding them to their obligations. Most developing countries feel that the SPS Agreement was negotiated without the concerns of developing countries at heart.[273] This view is shared by many scholars among who is Knorr, who argues that the Agreement in itself fails to adequately cater for the individual needs of developing countries.[274]

3.6.2 Provision of technical assistance

Generally the effectiveness of implementation of SPS requirements is dependent upon the availability of funds and technical skills.[275] This poses a huge challenge because there is need to create an adequate human, capital, and physical capacity for SPS related work. This is the crux of the problem that developing countries face in the implementation of the WTO Agreements. Since it is not only the provision of technical assistance[276] but also funding that is adequate that would ensure that the developing countries are not lagging behind and are better able to implement the provisions of the Agreement.

System which was presented by the TWN Director Martin Khor at a seminar on the WTO held at the annual meeting of the Asian Development Bank held in Shanghai, China on 10 May 2012.

[268] Article 10 of the SPS Agreement

[269] Ibid

[270] G/SPS/53 as quoted by Neeliah et al, 'The SPS Agreement : Barrier or Catalyst, International Trade and Policy Law' ECJ Volume 12 Number 2 2011/p 104-130 estey.journal.com page 11

[271] S. Henson (above note 248) 93

[272] S. Henson (above note 248) 94

[273] Ibid

[274] M.Khor (above note 267)

[275] Neeliah (above note 257) 12

[276] M. Khor (above note 267)

Technical assistance has taken the form of grants and loans which were given to ensure that developing countries as well are able to maintain their own SPS measures since 1995.[277] But however such loans and grants largely depend on the existing relationship between the particular developed country rendering assistance and the developing country in need. However, Neligh noted that with regards to the provision of technical assistance, in terms of the measurement of the direction and the extent of assistance that is given to developing countries has a significant impact on trade.[278] This is expounded upon by Wig[279] and Karlstad[280] who noted that such type of assistance is haphazard and is often based on technical assistance which is often limited.[281] What is worse is that even then such technical assistance is limited and this still poses a great challenge to international trade flows, in as far as developed countries are concerned.[282] The absence of adequate technical assistance has a significant effect on trade especially in developing countries since they will be incapable of upgrading their measures to international standards, meaning that they will continue facing difficulties in entering into international trading market systems.

3.6.3 Risk assessment and scientific justification[283]

Risk assessment and scientific justifications pose a great challenge to effective enforcement of the SPS Agreement.[284]The requirements of risk assessment and scientific justification under the Agreement are much higher, such that not all countries are able to meet them.[285] Furthermore some developed nations such as the EU have tendencies of applying their own private standards of risk assessment which are often so high and beyond the reach of most developing countries.[286] This often has a very negative impact on international trade. Some developed countries in some instances are even unable to meet the high standards that are in line with the conformity assessment provisions.[287] Roberts and Boutros are of the view that risk assessment methodology and practice could pose as a greater cause for concern in as far

[277] M. Khor (above note 267)
[278] M. Khor (above note 267)
[279] G/SPS/53 as quoted by Neeliah et al, '*The SPS Agreement: Barrier or Catalyst?*'(2011) International Trade and Policy Law, ECJ Volume 12 Number 2104-130 estey.journal.com 11
[280] Ibid
[281] Ibid
[282] Ibid
[283] Ibid
[284] Article 2.2 and 5.7 of the SPS Agreement read together with the preamble.
[285] T.Otsuki, J. S. Wilson and M. Sewadeh (2001) '*A race to the top? A case study of food standards in Africa and African exports.*' Discussion Paper for Development Research Group, World Bank, Washington D.C. 1
[286] M. Khor (above note 267)
[287] T.Otsuki, J. S. Wilson and M. Sewadeh (above note 285) 2

as developing countries are concerned.[288] This is substantiated by Neligh who views risk assessment unscientific justifications as two areas where the problems that are posed by implementation of SPS measures outweigh the benefits thereof, furthermore that risk assessment poses a de facto barrier to trade within developing countries.[289]

3.6.4 Market access

The Preamble of the SPS Agreement provides that in as much as members are allowed to "adopt measures necessary to protect human, animal and plant life or health" this is subject to the condition that these measures should not be "arbitrary or unjustifiable discrimination" and further should not constitute disguised protectionism.[290] It is clear that the drafters of the agreement where aware of the negative impact that SPS measures might have on trade. This should have called for harsher penalties for failure to comply, however. Showing a significant failure on the WTO in its enforcement mechanism, but however on the other hand it is difficult to enforce private standards of one country against another.

One of the major failures of the Agreement is that it has exacerbated the blocking of market access.[291]Restriction of market access for products from Africa to developed countries on basis of SPS measures is a common feature.[292]

[288] Ibid
[289] Ibid
[290] Article 2.2 of the SPS Agreement
[291] For example Otsuki et.al (2001) has mentioned that he losses that are incurred by African countries due to restrictions to market on SPS basis can be enormous have estimated the loss in revenue for African countries from implementation of low aflatoxin levels required by EU under a new stringent standard than the international standard set by Codex Alimentarius Commission at about US$400 million for cereals, dried and preserved fruits, and nuts. Similar studies indicate that trade flow of these products from Africa could increase by nearly US$700 million if an extension of current international Codex standard is used rather than the EU one.
[292] H. Nyangito et al (2002) in '*Bridging the standards divide: Challenges for improving Africa's market access. The case of Kenya.'* 11gives examples include fisheries bans from East Africa countries and Mozambique in 1997 to European Union (EU) countries due to Cholera outbreaks and from East African countries between 1999 and 2000 because of the inability of the countries to enforce Hazards Analysis and Critical Controls Points (HACCP) management systems as required for the EU.

4. COMPARATIVE ANALYSIS OF ZIMBABWE AND SOUTH AFRICA ON COMPLIANCE WITH THE SPS AGREEMENT

4.1 The obligations of the member states under the SPS Agreement

The SPS Agreement entails that the Member states adopt measures that are necessary for the protection of human, animal and plant life or health.[293]These measures adopted at a national level should be able to harmonize with international standards.[294] Furthermore the SPS Agreement also requires that member states should also play a role in international standard setting bodies such as the Codex Alimentarius Commission,[295] the International Office of Epizootics (IOE) [296]and the International Plant Protection (IPP).[297]The Agreement further urges the different Member states to set up national contact point which contains up to date information on the different measures available.[298] Such membership to the various standard bodies is a prerequisite, which entails that members participate fully.[299] Full participation in this case refers to the submission of a country members' compliance status to the WTO

[293] Article 2 of the SPS Agreement sets out the rights and obligations of the Member states in adopting measures that are necessary for the protection of plant life or health, provide that such measures are based on sound science and do not constitute disguised trade restrictions.

[294] The International Standard setting bodies that are set out in Article 3.4 of the Agreement on Sanitary and Phytosanitary Measures. Compliance with these standards is a prerequisite for Member states.

[295] The Codex Allimentarius Commission C.A.C is an intergovernmental body, established in 1963, under the co-sponsorship of two UN organizations: the World Health Organization (WHO) and the Food and Agricultural Organization (FAO). Its primary function is to administer the joint FAO/WHO Food Standards Programme with the aim of protecting consumers and to promote fair practices in food trade. It establishes food safety and agricultural trade standards, codes of practice and maximum limits for additives, contaminants and pesticides. From Understanding the WTO Informational and External Relations Revisions (2011) *http://www.cac.int/eng/normes/ennorm.htm accessed* 13 July 2012

[296] The IOE is an intergovernmental organization engaged in the prevention and control of the spread of animal and zoonotic diseases. Its mandate is to promote transparency and knowledge of the world's animal health situation, collect, analyze and disseminate veterinary scientific information, provide expertise and strengthen international cooperation and coordination. It also develops standards and guidelines for use by states to prevent them from incursion of diseases or pathogens during trade. WTO (2011)*http://www.oie.int/eng/normes/ennorm.htm* accessed 13 July 2012

[297] The IPPC is a multilateral treaty which aims to secure common and effective action to prevent the spread and introduction of pests of plant and plant products, and to promote the appropriate measures for their control. The IPPC Secretariat, located in FAO Headquarters, Rome, and is responsible for coordination of the work programme for the global harmonization of phytosanitary measures. Implementation is ensured through a network of regional and national phyosanitary measures. WTO (2011) *http://www.oie.int/eng/normes/ennorm.htm.* accessed 13 July 2012

[298] Annex B of the SPS Agreement provides for the setting up of enquiry points and the requisite notification procedures for the benefit of the other Member states.

[299] D. Cassidy '*Case Study: SPS issues and Regional Trade in Livestock and Livestock Products in the SADC Region*' USAID/Southern Africa, SADC Secretariat ,Gaborone, Botswana (2010) 23 *www.rr-africa.oie.int/docspdf/en/2010/Cassidy_livestock.pdf*accessed on 28 November 2012

database.[300]Member countries under the Agreement may use international standards, guidelines and recommendations in as far as they exist.[301]

4.1.1 Provisions in the SPS Agreement for developing countries

The SPS Agreement has provisions that are specifically meant for developing countries such as:

(i) Article 9 consists of an obligation by developed member states to render assistance to developing countries through bilateral or other forms of assistance.[302] Furthermore the assistance extends to adjusting and compliance with the SPS Agreement.[303] Such assistance should be as much as 'to permit maintain and expand its market access opportunities for the product involved.'[304] Although these provisions have been agreed to by developed countries, the implementation of the technical assistance clause on the actual ground leaves a lot to be desired.[305]

(ii) Article 10 provides for the special and differential treatment of developing and especially least developed countries in as far as compliance with SPS measures are concerned.[306] It also makes provision for longer time-frames within which one may comply with the SPS Agreement's requirements for conformity.[307]

Focus herein will be on the comparison of the level of compliance of South Africa and Zimbabwe with the SPS Agreement. The analysis is in no way conclusive due to the scarcity of data especially in as far as Zimbabwe, which was the major challenge in carrying out this study. The study focuses on South Africa and Zimbabwe which are two developing countries, geographically located next to each other. In spite of the fact that both countries are developing countries, their level of economic development differ significantly and also the

[300] D. Cassidy (above note 299) 2
[301] Understanding the WTO 2011 (above note 266) 17
[302]Article 9 of the SPS Agreement provides that Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, donations and grants, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary and phytosanitary.
[303] Article 9.1 of the SPS Agreement
[304] Article 9.2 of the SPS Agreement
[305] H. Nyangito *'Post Doha Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreements'* KIPPRA Occasional Paper No. 4
[306] Article 10.1 of the SPS Agreement
[307] Article 10.2 of the SPS Agreement

level of compliance to food safety standards in both countries. The South African SPS system is one of the most advanced in Africa, the same cannot be said about Zimbabwe's which is still lagging behind. This may possibly be suggesting a relationship between economic stability and the level of compliance with the SPS Agreement. However in as much as South Africa and Zimbabwe may differ in their levels of development and compliance, they share a similar set of concerns and issues that affect developing countries.

4.2 The legal framework for food safety and standards in Zimbabwe

4.2.1 Overview of food safety and standards

Zimbabwe is a member of the WTO and a signatory to its Agreements and particularly the SPS Agreement. Zimbabwe is a member of the IOE and the Codex Alimentarius Commission, but not the IPPC.[308] The responsibility for SPS related measures is a shared responsibility among the various governmental departments, there is legislation and regulations to that effect.[309] The Ministry of Agriculture and the Ministry of Health within their respective areas give effect to the international standard setting bodies stipulated in the Agreement, the Codex, IOE and the IPPZ.[310] This is in compliance with article 3 of the SPS Agreement which provides for the harmonization of SPS measures with international standards at a national level.[311] Furthermore Ministry of Agriculture Mechanisation and Irrigation Department is the National Notification enquiry point, while the Department of Livestock and Veterinary Services, Department of Research and Specialist Services and the Government Analyst Laboratory are the Enquiry Points for Animal Health, Plant Health and Food Safety issues respectively.[312]

4.2.2 Roles and Responsibilities of Government Departments

4.2.2 (a) The Ministry of Health, Social and Child Welfare

[308] The World Trade Organization SPS Information Management System, Membership in the WTO and the International Standard – Setting Bodies 10 October 2012, 8

[309] D.B Nhari.*Government Laboratory Analyst and Conference Technical Sub-committee. Codex Alimmentarius Commission, Zimbabwe Conference Document on National Food Safety Systems: A Situational Analysis. Codex Alimentarius Commission: Food and Agriculture Organization of the United Nations, World Trade Organization* CL 1998/39 13TH Session held in Harare, Zimbabwe 3-6 October 2005

[310] *Zimbabwe Trade Policy Review report*, WTO/TRP/G/252 14 September 2011, Pursuant to the Agreement Establishing the Trade Policy Review Mechanism (Annex 3 of the Marrakesh Agreement Establishing the World Trade Organization), the policy statement by Zimbabwe. 26

[311] Article 3.4 of the SPS Agreement provides that Members shall play a full part within their limits of resources, in the relevant organizations and their subsidiary bodies, in particular the Codex Allimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention.

[312] The Zimbabwean Trade Policy (above note 310) 28

The Ministry of Health is largely responsible for food and food safety.[313] It is within this ministry that the Codex Contact Point is established.[314] The ministry is empowered by the Public Health Act Chapter 15:09 and the Food and Food Standards Act Chapter 15:04 to inspect premises where food is sold and to collect food samples. They also monitor food that has been exported or imported into Zimbabwe.

The Ministry of Health has got four sub-departments that work under it, these are;

(i) Food and Standard Advisory Board (FSAB) 2005

The FSAB is one of its sub-departments and it is composed of a number of representatives from the different government departments such as the Ministry of Agriculture, Ministry of Industry and Commerce as well as the Ministry of Health.[315] It also contains members from independent boards as well, such as the Standards Association of Zimbabwe (SAZ) and the Consumer Council of Zimbabwe (CCZ). The powers of the FSAB emanate from the Food and Food Standards Act.[316]

The main objectives of the FSAB are;

- Advising the Ministry of Health on policy issues;[317]
- Harmonization of national food standards in accordance with the international codex standards;[318]
- Reviewing of several regulations which relate to food standards which include the Food and Food Safety Standards Act; The Public Health Act Chapter 15:09; Animal Health Act Chapter 19:01; Dairy Act Chapter 18:08 and the Fruit Marketing Act. These Acts are then given effect by the powers empowered to do so. For instance in the Urban Councils' Act local authorities are empowered to inspect premises where food is prepared and sold.[319]

[313] Joint FAO/WHO Food Standards Programme Codex Allimentarius Commission 23rd Session Rome, 28-3 July 1999. Report of the Thirteenth Session of the Codex Coordinating Committee for Africa 14
[314] Zimbabwean Government Analyst Laboratory and Conference Technical Sub-committee. Zimbabwe Conference Room document on National Food Safety Systems: *A situational Analysis. Agenda Item 5 FAO/WHO Regional Conference* on Food Safety, Harare, Zimbabwe 3-6 October 2005. 3
[315] Zimbabwe Government Analyst Laboratory Conference (above note 315) 4
[316] FAO/ WHO Report (1999) (Above note 313) 18
[317] FAO/ WHO Report (2005) (Above note 314) 7
[318] *FAO/WHO Global Forum of Food Safety Regulators, Country Paper Proposed by Zimbabwe* (2002) Marrakech, 28-30 January
[319] FAO/WHO Report (2005) (above note 314) 14

- The board has also established training of food handlers in the informal food distribution sectors. The board with regards to informal sectors has managed to establish a system for registering and re-registering licensing for food vendors.

The FSAB does not have the capacity to make food laws and such authority is vested in the Food and Safety Control Authority (FSCA).The FSCA will bring together inspectors in provinces and at ports of entry, meat and plant inspectors, veterinary and dairy services as well as food and water laboratory. The FSAB is revising the food standards in Zimbabwe to bring them in line with the Codex Requirements.[320]

(ii) The Government Analyst Laboratory

It is also a sub-department under the Ministry of Health, Social and Child Welfare it has the main duties of testing foods for regulatory purposes.[321] The government analyst lab has the following functions and responsibilities;

- Analyzing food and water samples to ensure that they do not contain physical and chemical hazards and limited microbiological hazards.[322] For *salmonella, shigella, staphylococcus aurease* and *faecial*[323]

- It also has the responsibility of food certification for importation and exportation of foods.[324]

- The government analyst also conduct internal audit for their staff and also seek accreditation for the most frequent tests.[325]

- It is responsible for food safety, quality and standardization, water treatment and industrial processing.[326]

4.2.2(b) The Ministry of Agriculture, Mechanization and Irrigation Development (MAMID)

The Ministry of Agriculture is responsible for SPS measures which are related to animal and plant commodities.[327] It also plays a role in food and food safety standards particularly

[320] FAO/ WHO Report (2005) (above note 314) 7
[321] FAO/WHO Global Forum Report (2002) (above note 318) 3
[322] Zimbabwean Government Analyst Laboratory and Conference Technical Sub-committee. Zimbabwe Conference Room document on National Food Safety Systems: '*A situational Analysis. Agenda Item 5. FAO/WHO Regional Conference on Food Safety'*, Harare, Zimbabwe 3-6 October 2005. 4
[323] FAO/WHO Report (2005) (above note 314) 12
[324] Ibid
[325] Ibid
[326] Ibid

related to plants and animals.[328] The veterinary department under the Ministry of Agriculture is responsible for the inspection of meat and meat products.[329] The responsibilities are outlined as follows;

- Ensuring food safety from the initial stages of farming to the last stage of harvesting.[330] If food is consumed after harvest without any further processing the department makes certain that such food is safe before it is consumed by human beings.[331] It also has the responsibility for farm and meat products.[332]

- Under the Ministry of Agriculture and Research the Department of Agriculture and Research Extension (AREX) deals with the safety of food and crops.[333] It also ensures that such food is free from pests and diseases. Especially when such food gains entry into the domestic market.

- Another department under the same Ministry, the Veterinary Services Department (VSD) deals with safety of animal products such as milk and poultry, through its meat hygiene units the VSD inspects and certifies abattoirs.[334]

The Ministry of Agriculture is responsible for SPS related issues for plant and animals whilst the Ministry of Health is responsible for food quality and standardization.[335] These organizations use the available international standard setting bodies such as the Codex Alimentarius Commission, International Plant Protection Convention and the World Organisation for Animal Health in the performance of their duties.[336]

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[327] *Zimbabwe Trade Policy Review Report*, WTO/TRP/G/252 14 September 2011, Pursuant to the Agreement Establishing the Trade Policy Review Mechanism (Annex 3 of the Marrakesh Agreement Establishing the World Trade Organization), the policy statement by Zimbabwe. 27
[328] Ibid
[329] Ibid
[330] D.B. Nhari (above note 309) 81
[331] D.B. Nhari (above note 309) 83
[332] D.B. Nhari (above note 309) 82
[333] D.B. Nhari (above note 309) 86
[334] D.B. Nhari (above note 309) 80
[335] The Zimbabwean Trade Policy (above note 327) 19
[336] Zimbabwe Trade Policy (above note 327) 16

4.2.2(c) Ministry of Industry and Trade

- Issues import and export licenses and promotes trading in foods, this is dealt with through their food and beverages sections.[337]

- It also has the responsibility of effecting trade measures and voluntary standards through the Standards Association of Zimbabwe.[338]

- The certification and evaluation processes of the department for exportation purposes are based on laboratory analysis and evaluation of products.[339]

4.2.3 Legislation governing food control

Food quality and standards in Zimbabwe are governed by various pieces of legislation as well.[340] The legislation includesthe Food and Food Standards Act; Public Health Act; Animal Health Act; the Dairy Act and the Fruit Marketing Act. These pieces of legislation shall be briefly discussed in turn;

4.2.3 (a) The Food and Food Standards Act Ch 15:04

The purpose of the Act is to provide for the sale importation and manufacture of food for sale in a "pure state."[341] The Act does not however define what a pure state in the definition section is. The Act also prohibits the sale, importation and manufacture for the sale of food which is falsely described. Thus section 4(1) of this Act gives the description of what constitutes adulterated or falsely described goods.[342] Section 4(2) gives a description of such goods that are deemed to be adulterated. The Act also provides for the fixing of standards relating to food and matters that relate to such fixing. Part V of the Act also provides for the establishment of the FSAB and the number of Members that shall be contained therein from

[337] Ibid
[338] Ibid
[339] Ibid
[340] Conference Paper prepared by Zimbabwe. Assuring Food Safety and Quality in SME Foods Enterprises Agenda Item 8.FAO/WHO Regional Conference on Food Safety for Africa. Conference Room document 11. Harare-Zimbabwe 3-6 October 2005 4
[341] According to section 4 of the Food and Food Standards Act Chapter 15:04, a 'pure state' is the normal state in which food is supposed to be found in. Section 4(1) (i)-(vii) gives an outline of circumstances under which food may be considered not to be in its pure or normal state. Such as when it contains, or is mixed or diluted with, any substance or ingredient not present when the food is in a pure or normal state and in a sound condition or when it has been subjected to any process or treatment which injuriously affects its nature, substance or quality or any of its other properties.
[342] Section 4(1) of the Food and Food Standard Act Acts 25/1971, 39/1973 (s. 52), 61/1973 (s. 8), 42/1976 (s. 35), 32/1979 (s.12), 29/1981, 8/1988, 22/1994, 22/2001.

the various departments[343]and their qualifications as well as representatives from the food manufacturing industry and food retailing business.[344]

4.2.3(b)The Animal Health Act Chapter 19:01

The Act provides for the eradication and prevention of animal and pest diseases within Zimbabwe.[345] It also provides for the prevention of the introduction in of animal pests and diseases into the country.[346] Section 5 provides for the regulation of the powers of the Minister concerning the eradication and prevention of animal pests and diseases.[347] The Act states that the prevention of spreading of diseases is regulated by the importation or exportation of foods and animals across international borders.[348] The Act further provides for the construction and use of structures for the cleansing and treatment of animals.[349] Section 15 gives an order to the Minister for the destruction of wild animals having diseases.

4.2.3(c) The Water Act Chapter 20:24

The Act provides for the management, administration, and conservation of water resources in Zimbabwe.[350] Section 3 provides that all water is vested in the President.[351] Section 6 outlines the general functions of the Minister of Rural Resources and Water Management.[352] Section 9 defines the powers of the officers appointed under section 7.[353] The Water Act chapter 20:24 repealed the previous water Act Chapter 20:22

4.2.3(d) The Dairy Act Chapter 18:08

The Act provides for the regulation and control of the dairy industry.[354] The other aim of the Act is to ensure that dairy produce is pure, wholesome and unadulterated.[355] Article 3 prohibits the unauthorized use of premises as cream depots, creameries and factories by

[343] Section 8 (a) –(k) of the *Food and Food Standards Act*
[344] Section 18(h) of the *Food and Food Standards Act*
[345] Long title of the *Animal Health Act 19:01Acts 5/1960 (Federal), l5/1962 (Federal), 32/1963 (Federal), 41/1978 (s. 10), 20/1982, 8/1983, 8/1988, 16/1990, 22/2001; R.G.Ns 638/1963, 95/1964, 745/1964 216/1970, 217/1970, 452/1970*
[346] Ibid
[347] Section 5 of the *Animal Health Act*
[348] Section 7 and 8 of the *Animal Health Act*
[349] Section 14 of the *Animal Health Act*
[350] Long title of the *Water ActActs 31/1998, 22/2001, 13/2002, 14/2002*
[351] Section 3 of the *Water Act*
[352] Section 6 of the *Water Act*
[353] Section 7 and 9 of the *Water Act*
[354] Long title of the *Dairy Act* Chapter 18:08 Acts 28/1937, 29/1952, 14/1962 (s. 2), 61/1966 (s. 72), 12/1973 (s. 270), 29/1976, 17/1977, 37/1977 (s. 8), 22/2001; R.G.N.s 637/1963, 214/1964, 217/1970, 378/1972.
[355] This is provided for in the preamble of the *Dairy Act*

persons without registration certificates.[356] The Act further stipulates the grounds for the refusal to issue a new certificate[357] and to reissue a new certificate.[358] The act in article 9 and 10 further provides for the testing and grading of creameries and milk.

4.2.4 The role of Non-Governmental Organization (NGOs)

4.2.4(a) Standards Association of Zimbabwe (SAZ)

SAZ is a non-profit organization(NGO) that has got its Technical Services Division Laboratories which is based in Harare and Bulawayo and due to their independent nature are ideal in cases where there is uncertainty and where there are disputes where the quality of the products is at issue.[359] It is a key player in the development and implementation of food safety standards in Zimbabwe.[360] SAZ also has a wide variety of food standard and products that can be easily applied.[361] SAZ also put in place the ISO/IEC 17025[362] and should be applied to for accreditation in South Africa.[363]

4.2.4(b) The Tobacco Research Board

The board is a private organization that initially was funded by FAO, but is now generating its own funds.[364] The board offers food and water sampling; furthermore their labs are able to detect the presence of GMOs in food.[365] The food policy in developing countries with regards

[356] Section 3of the *Dairy Act*
[357] Section 4 of the *Diary Act*
[358] Article 5of the *Dairy Act*
[359] D.B Nhari (above note 309) 84
[360] Conference paper prepared by Zimbabwe. '*Assuring Food Safety and Quality in SME Foods Enterprises Agenda Item 8.FAO/WHO Regional Conference on Food Safety for Africa.*' Conference Room document 11. Harare-Zimbabwe 3-6 October 2005
[361] Zimbabwe's Conference Paper (above note 360) 10
[362] ISO/IEC 17025 specifies the general requirements for the competence to carry out tests and or calibrations, including sampling. It covers testing and calibration performed using standard methods, and laboratory-developed methods it applies to all organizations applying to testing and calibration. It is for use by laboratories in their management system or quality, administrative and technical operations. *http://www/iso/org/iso?catalogue_detail.htm?csnumber=39883* accessed 11 August 2012
[362] Such Accreditation can be obtained from the Accreditation Board South Africa and it has to comply with all the procedural requirements
[363] ISO/IEC 17025 specifies the general requirements for the competence to carry out tests and or calibrations, including sampling. It covers testing and calibration performed using standard methods, and laboratory-developed methods it applies to all organizations applying to testing and calibration. It is for use by laboratories in their management system or quality, administrative and technical operations. *http://www/iso/org/iso?catalogue_detail.htm?csnumber=39883* accessed 11 August 2012. Such Accreditation can be obtained from the Accreditation Board South Africa and it has to comply with all the procedural requirements
[364] Zimbabwe's Conference Paper (above note 360) 9
[365] Zimbabwe's Conference Paper (above note 360) 11

to GMOs is that they can only be admitted into the country where it is urgent and can only be allowed if it has complied with the permit requirements.[366]

4.3 The legal framework for food safety and standards in South Africa

4.3.1 Overview of the food control regulation

South Africa as well is a member of the WTO and is a signatory to the Agreement on Sanitary and Phytosanitary Measures.[367] South Africa is a member of the OIE, IPPC and the Codex Alimentarius Commission.[368] The international treaties speak to the rights and obligations that should be observed by the Member states.[369]

The National Codex Committee in South Africa comprises of the Ministries of Health, Agriculture, and Foreign Affairs, the Bureau of Standards and Consumer's Organizations.[370] Individuals working in these various departments where allocated their respective duties which was then monitored by the Codex Contact points.[371] In South Africa food control is shared between several authorities and various components, within the health sector, at national, provincial and local level.[372] A brief outline of the roles and responsibilities of the different authorities is as follows.

4.3.2 Roles and responsibilities of Government Departments:

4.3.2(a) The Department of Health

The South African Ministry of Health has got shared responsibility at national, provincial and local level that regulates matters related to health. The duties and responsibilities of these departments in accordance with their relevant departments are as follows;

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[366] Zimbabwe's Conference Paper (above note 360) 8

[367] South Africa is a member of the WTO and has been one since 1 January 1995. South Africa has participated actively within the WTO for the past Decade. *http:www.wto.org/English/thewto_e/countries_e/south_africa_e.htm* accessed 22 October 2002.

[368] The World Trade Organization SPS Information Management System, Membership in the WTO and the International Standard – Setting Bodies 10 October 2012, 7

[369] The Government Gazette on the Draft Plant Health (Phytosanitary) Policy. Department of Agriculture and Forestry Notice 356 of 2012, 8

[370] Agenda Item 8 paragraph 52 Report on the Implementation of National Action Plans to establish/ strengthen the Roles of the Codex Contact points and the National Codex Committees in the region

[371] Above note

[372] *Policy Guidelines: National Food Safety Alerts and Official food product recalls in South Africa*. Department of Health. June 2004 , 9

- The National Department of Health

The Department of Health at national level assumes the role of the National Codex Contact Point. Furthermore it is also responsible for the setting up of national standards and the recall of food products that are not in conformity with the health requirements. The department at national level should also be able to give support to the provincial as well as local authorities.

- The Provincial Department of Health

The main responsibility of the Department of Health is to provide support to the local authorities. The Department will also be responsible for addressing health issues at provincial level. It is also responsible for the provision of services on behalf of the National Department of Health such as import control. The Department may also formulate policies and plans of action in relation to health concern within the provinces.

- Districts/Local authorities

The Department at local level deals with food and health concerns at their levels. They are responsible for engaging the communities in health related issues and monitoring health hazards at grassroots level. They are also able to monitor the level of compliance since they can deal with the communities' one on one. They are also able to investigate complaints and act as enforcers of hygiene related regulations.

4.3.2(b) The Department of Agriculture

Under the Department, the Directorate for food safety and quality assurance regulates and promotes the safety of animal and animal products.[373] It also promotes the safety and quality of foods of plant and animal origin.[374] It also ensures that the safety, quality and efficiency of production of enhancement agents.[375] The National Plant Protection Organization (NPPOZA) is contained within the Department of Agriculture, Forestry and Fisheries (DAFF).[376]

[373] Department of Health Policy Guidelines (above note 372) 9
[374] Department of Health Policy Guidelines (above note 372) 10
[375] Department of Health Policy Guidelines (above note 372) 8
[376] Jeremiah M.A '*Procedure to be followed when importing plants and plant products into South Africa. The National Plant Protection Organization of the South African Department of Agriculture, Forestry and Fisheries.*'

4.3.3 Legislation governing food control

The relevant South African legislation and the authorities that are involved in the administration and enforcement thereof include the following:

4.3.3(a) The Foodstuffs, Cosmetics and Disinfectants Act, 1972[377]

The Act governs the manufacture, sale and importation of foodstuffs, cosmetics and disinfectants from a safety or public health point of view and is administered by the Directorate: Food Control of the Department of Health and enforced by local authorities in their areas of jurisdiction. Import control is performed on behalf of the National Department by Provincial Departments of Health. The Act regulates the foodstuffs as such, as well as labelling and advertising of foodstuffs.[378] It does not regulate hygiene provisions that relate to the handling and transport of food.

4.3.3(b) The Health Act, 1977[379]

There are several sets of regulations promulgated under this Act that have direct relevance to food safety and are enforced by local authorities in their areas of jurisdiction. These several regulations under the Health Act govern hygiene provisions that relate to, amongst others, the handling and transport of food[380.] Furthermore they regulate the safety of milk shades and its transportation,[381]as well as provisions that relate to investigations and inspection which empower the enforcing officials to detain the persons contravening the Act or the seizure of such goods.[382] The Health Act also provides for the regulation as well of certain metals from containers to food products[383] as well as the transportations of meat and meat products.[384]

4.3.3(c) The International Health Regulations Act, 1974 (Act 28 of 1974):

This Act provides for the approval, by the Department of Health, of the source of food for consumption at ports, airports, on vessels and on aircraft, as well as for the inspection of such

[377] Act 54 of 1972
[378] *The Foodstuffs, Cosmetics and Disinfectants Act*, 1972
[379] Act 63 of 1977
[380] Regulations Governing General Hygiene Requirements for Food Premises and the Transport of Food
[381] Regulations Relating to Milking Sheds and the Transport of Milk (G.N. No.R. 1256 of 27 June 1986).
[382] Regulations Relating to Inspections and Investigations (G.N. No. R. 1128 of 24May 1991)
[383] Regulations Regarding Food and Water Vessels (G.N. No. R. 1575 of 10September 1971)
[384] General Regulations Promulgated in terms of the Public Health Act, 1919 (G.N.No. R. 180 of 10 February 1967),

premises and the sampling of food by local authorities.[385] The provincial health departments currently approve premises on behalf of the national Department of Health.[386]

4.3.3(d) The Agricultural Products Standards Act[387]

This Act controls and promotes specific product quality standards for the local market and for export purposes.[388] It is administered and enforced by the Directorate: Food Safety and Quality Assurance in the Department of Agriculture. Assignees such as the Perishable Products Export Control Board (PPECB) are appointed and authorized as assignees to do physical inspections under the Act.[389]

4.3.3(e) The Meat Safety Act[390]

This Act is administered by the Directorate: Food Safety and Quality Assurance in the Department of Agriculture and enforced by the Departments of Agriculture of the nine provinces.[391] It addresses, amongst others, meat safety and hygiene standards in abattoirs and regulates the importation and exportation of unprocessed meat.[392]

4.3.3(f) The Liquor Products Act[393]

This Act is also administered by the Directorate: Food Safety and Quality Assurance of the Department of Agriculture.[394] It addresses requirements for all liquor products except beer, sorghum and medicine.[395]

4.3.3(g) The Standards Act 1993[396]

This Act is administered by the SABS and has compulsory specifications that address canned meat and fish products, as well as frozen sea foods.[397]The Act provides for the promotion and

[385] Policy Guidelines: National Food Safety Alerts and Official food product recalls in South Africa. Department of Health. June 2004 , 9
[386] Ibid
[387] *The Agriculture Products Standards Act* 119 of 1990
[388] Policy Guidelines (above note 385) 11
[389] Ibid
[390] *The Meat Safety Act* 40 of 2000
[391] Policy Guidelines (above note 385) 14
[392] Ibid
[393] The *Liquor Act* 60 of 1989
[394] Policy Guideline (above note 385) 6
[395] Ibid
[396] The *Standards Act* 29 of 1993
[397] Policy Guidelines (above note 385) 18

the maintenance of standardization and the quality of goods and services.[398]It also makes provision for the continued existence of SABS as an institution at a national level which caters for the promotion, maintenance and standardization of food safety standards. Section 2 of the Standards Act establishes the South African Bureau of Standards.[399] SABS is a juristic person which is responsible for the promotion and maintenance of standards.[400]

4.3.2(h) The Agricultural Pest Act[401]

The national phytosanitary system of South Africa is currently administered under the Agricultural Pest Act.[402] The problem however with the Act is some of its regulations where passed before the revised IPPC texts was published and the SPS Agreement as well[403]. This could mean that it is out-dated and needs to make up for the deficiencies.[404] The Act does not provide for plant protection contact points.[405] Even though the Directorate Plant Health, Director Inspection Services and the Directorate Food and Import Export Standards serve as the National Plant Protection Organization (NPPO), legislation that exists does not cater for the its existence and functions.[406] Article 4 of the IPPC provides that countries should have an official NPPO, which has the following responsibilities amongst others the issuance of clearance certificates, inspection and surveillance of plants as well as the training and developing of staff.[407] The fact that South Africa does not have an official NPPO means that South Africa is lagging behind in terms of aligning its laws to international agreements. It is therefore imperative that the South African legislation complies with the requirements of the IPPC and updates the legislation that is already in existence or creates new ones which caters for the recognition and being given effect to the NPPO.[408]This will not only ensure that South African products can equally compete on international markets but also that its trading partners gain full confidence in such products.[409]

[398] This is in accordance with the preamble of the Standards Act 1993
[399] Section 2(1) of the Standards Act
[400] Ibid
[401] The *Agricultural Pest Act* 36 of 1983
[402]*The Government Gazette on the Draft Plant Health (Phytosanitary) Policy.* Department of Agriculture and Forestry Notice 356 of 2012, 14
[403] Ibid
[404] Ibid
[405] Ibid
[406] Government Gazette (above note 402) 12
[407] Government Gazette (above note 402) 11
[408] Government Gazette (above note 402) 13
[409] Ibid

4.4 The South African Bureau of Standards (SABS)

This is a statutory body which was established by the Standard Act 1945 and continues to exist under the Standards Act 2008.[410] It is the national institution for the promotion of and maintenance of standardization and quality in commodities and the rendering of services.[411]

The mission of SABS is the provision of standards and conformity assessment services.[412] The strategic goals of SABS are to provide standardization and conformity assessment services that facilitate development and regulation of national and regional economic activity, and support the National Industrial Policy Framework (NIPF) and Industrial Policy Action Plan (IPAP).[413]The board also allows for broader participation and access to the national standardization process and services.[414] It also develops standards and provides conformity assessment services that protect the integrity of the South African market.

4.5 Comparative analysis

In both South Africa and Zimbabwe from the legal framework explained above it is evident that both these two developing countries have made effort to enhance their food safety standards. The fact that there is specific legislation which is designed to govern the specific areas of human, animal and plant safety is a move that should be applauded. Similarly in both countries there has been an updating of legislative frameworks, the enhancement of laboratory facilities and the creation of websites which enhances the accessibility of information. However even though generally legislation has been updated however, the information on the actual compliance and implementation is very limited in as far as Zimbabwe is concerned, at least for South Africa it is accessible to some extent. This aspect is problematic because it difficult to measure the actual level of compliance based only on policy reviews and pieces of legislation and will serve as a limiting factor on the depth of the analysis. It should be borne in mind however that this analysis is in no way conclusive, since it is based on the little available information.

[410] About SABS Overview *http://www.sabs.co.za/About-SABS/index.asp*accessed 23 October 2012
[411] Ibid
[412] SABS Vision and Mission *http://www/sabs.co.za/About-Sabs/about_vision.asp* accessed 23 October 2012.
[413] Ibid
[414] Ibid

4.5.1 Membership in international standard setting bodies

From the above information South Africa is a member of all the standard setting bodies as required by the SPS agreement that is the IPPC, the IOE and the Codex Allimentarius.[415] It is not only that South Africa was a member of these bodies but was also actively involved and has held several positions in the Codex Alimmentarius Commission.[416] South Africa has also managed to set up a Codex Contact Point, the National Plant Protection (NPPOZA) in the Department of Agriculture.[417]While the same cannot be said about Zimbabwe which was until2007 only a member of the IOE and the Codex Alimentarius Commission but not the IPPC.[418]The level of compliance between these two countries in line with article 3.4 of the SPS Agreement which requires full participation in standard setting bodies differs significantly from one country to the next. Whereas South Africa has been in full compliance with this particular provision, the same cannot be said about Zimbabwe. The situation is not the same for Zimbabwe which has although it has the department of Agriculture the sub department of Mechanization has not yet fully implemented the IPPC.[419]There is however need for an independent organisation that deals with the issue of plant protection.

4.5.2 Participation in WTO SPS notifications

Although Zimbabwe and South Africa are both members of the IOE, as a prerequisite for compliance with the SPS Agreement.[420] It is not enough that a country has joined the organization, full participation in the submission of national animal pests and disease status in the OIE/WAHIS/WAHID database is an obligation that a country must fulfil.[421] In a survey carried out by Cassidy of the reports on the status of SADC countries in reporting the standards on animal health information,[422]the survey revealed that the OIE reporting history in South Africa is regular, and the history in Zimbabwe is largely incomplete.[423] The low instances of reporting by Zimbabwe show a significant gap in food safety systems.[424]

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[415] The World Trade Organization SPS Information Management System, Membership in the WTO and the International Standard Setting bodies. 7
[416] WTO Committee on Sanitary and Phytosanitary Measures; Membership in WTO and International Standard Setting Bodies G/SPS/GEN/49/Rev.8 (2007) 7
[417] *The Government Gazette on the Draft Plant Health (Phytosanitary) Policy*. Department of Agriculture and Forestry Notice 356 of 2012, 14
[418] The Government Gazette (above note 417) 8
[419] WTO Committee on Sanitary and Phytosanitary Measures 2 (above note 415) 8
[420] Ibid
[421] D. Cassidy (above note 299) 22
[422] D. Cassidy (above note 299) 23
[423] D. Cassidy (above note 299) 20
[424] Ibid

4.5.3 Establishment of a national enquiry point

Several developing countries which include Botswana, Malawi, Mauritius, Namibia, South Africa, Tanzania, Zambia and Zimbabwe have established national notification and enquiry points. [425] As has already been discussed above, in Zimbabwe the notification enquiry point is located within the ministry of Agriculture Mechanisation and Irrigation Department whilst the enquiry points for animal health and plant health and food safety is located in theDepartment of Livestock and Veterinary Services, Department of Research and Specialist Services and the Government Analyst Laboratory.[426] The main concern in this regard is that the responsibility shared is haphazard there is an overlapping of roles and duties. Whereas in South Africa the contact point is a shared responsibility between the Ministries of Health, Agriculture, and Foreign Affairs, the Bureau of Standards and consumer are Organizations.[427]The establishment of a national authority and enquiry point is useful for the provision of information to other trading partners. Whereas the South Africa points do have the accessible information, the situation in Zimbabwe is not the same the information is haphazard and is not readily accessible. The failure to provide access to such information to potential trading partners bears a negative impact on trade. Thus it is recommended that Zimbabwe should follow the example of South Africa and provide easy access to such information. Again it has to be stressed on this point that the evidence presented here is from the information that is available from policy documents but does not indicate the level of compliance on the actual ground.

4.5.4 Technical assistance

Given the constraints that most developing country governments are faced with the aspect of funding. The provision of technical assistance is also another crucial aspect of the SPS Agreement that has to be given practical effect to. This aspect is one of the issues that has presented developing countries with problems in as far as cost of conforming to SPS measures are concerned. Furthermore with regards to the influential trade agreements that have potential to bring foreign currency investments. South Africa is most influential with membership in the G20[428] and has influential trade agreements with the European Union,

[425]Y. Gebrehwet, S. Ngqangweni and J.F Kirsten ' *Quantifying the Trade Effects of Sanitary and Phytosanitary Regulation of OECD countries on South African Exports'* Agrrekon: Agricultural Economic Research Policy and Practice in Southern Africa 46.1, 1-17 (2007)
[426] Ibid
[427]Agenda Item 8 paragraph 52 Report on the Implementation of National Action Plans to establish/ strengthen the Roles of the Codex Contact points and the National Codex Committees in the region.
[428] Supra note 423

United States and Japan.[429] This has a significant effect on the South African economy and provides funding for conformity to assessment procedures.[430] Zimbabwe is not on an equal footing, since 2000 the relationship of Zimbabwe with donor agencies and money lenders have been severed, since that period there has been no major developments in terms of technical assistance.[431]

4.5.5 Organization of the responsibility for food control

As noted above in Zimbabwe the responsibility for food safety is in various legislation and government departments.[432] However some of the responsibilities overlap as within different departments of government, a typical example would be the fact that in order to get clearance for the importation of dried beans, one has "to approach at least three different government departments before they can have clearance."[433] This clearly shows the lack of a proper distribution of powers and responsibility for food safety control, thus forming barriers to the implementation of the SPS legal framework.[434]

On the contrary in South Africa there is decentralization of responsibilities and duties in the national, provincial and local departments. Which have their respective duties that facilitate the proper implementation of the SPS related issues.[435] Furthermore the fact that there is decentralization enables reaching out to the community at large at the local levels. This system of food control ensures that the department is in touch with reality and enables it to deal with the real problems that are faced by the communities.

[429] South Africa Trading profile *www.wto.org* accessed on 4 January 2013
[430] Ibid
[431] Zimbabwe WT/TPR/S/252 Trade Policy Review Page vii
[432] *FAO/WHO Global Forum of Food Safety Regulators GF/CRD Zimbabwe* Agenda Item 4.2b (2002)
[433] Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission Twenty-Third Session Rome, 28-3 July 1999. Report of the 13th Session of the Codex Coordinating Committee for Africa Harare, Zimbabwe (1998) 9
[434] FAO/WHO Report 1999 (above note 433) 9
[435] *Policy Guidelines: National Food Safety Alerts and Official food product recalls in South Africa*. Department of Health. June 2004 , 9

5. CONCLUSIONS

5.1 Overview

The fate of the developing nations in the achievement of sustainable development and economic growth relies on a more predictable and more accessible market. That can only be achieved through the maintenance of food and environmental standards that are compatible with international standards.[436] This is the only way through which any aspiring developing country can be able to gain access into the international and developed country markets. The application of SPS measures and environmental standards however legitimate should be applied in a manner that does not pose unnecessary restrictions to trade.[437]

However with regards to the level of sanitary or sanitary measures that are required the SPS Agreement does not adequately deal with the issue of what does in actual fact constitute an appropriate level of SPS measures. Even though there is a definition of the appropriate level of SPS protection this definition is left to the discretion of the individual country members to determine what is appropriate within their territory.[438] This causes potential problems as what constitutes an appropriate level of SPS measures in one country does not necessarily constitute an appropriate level in another, and this leaves room for abuse of the Agreement.[439] The test in this regard is rather subjective and therefore depends on which country is implementing that particular measure or standard.

It therefore follows that the appropriate level of SPS protection within a developing world setting differs significantly from the appropriate level in the developed countries. What this means inevitably is, if a developing country however implementing its own appropriate standards which are significantly lower than those in developed countries they have to comply with the appropriate level of standards of that developing country and has to upgrade their standards to the levels appropriate for that developed country. Not only is there no definition of the term but to acquire such levels of conformity poses some huge financial constraints on the already burdened developing countries, with massive budget deficits and severe economic implications.

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[436] H. Nyangito, '*The Post Doha Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreements*' KIPPRA Occasional Paper No. 4 (2002) 10

[437] H. Nyangito (above note 436) 12

[438] Annex 1.5 defines the appropriate level of sanitary and phytosanitary measures as the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

[439] D. Cassidy (above note 299) 18

These high levels of conformity costs related with SPS measures themselves constitute barriers to trade. The costs of manpower and resources that are required to man SPS measures, according to Jensen are not even accessible to developed countries themselves.[440] It is held that the levels of standards that are set by the SPS Agreement are set up too high so much that they are in themselves inaccessible. If developed countries themselves are not able to fully conform with such measure very little can be said about developing countries. It is safe to conclude in this regard that the SPS agreement has set up standards which are much higher and beyond the reach of most in developing countries this in turn impedes international trade. [441]

Furthermore, even though the Agreement provides for clauses such as special and differential treatment and technical assistance for developing and least developed countries; these clauses have only been theoretical and are not worth much more than the papers that they are written on.[442] This is apparent from the fact that since the Agreement has come into place with the promises of greater market access and technical support much of these have not even materialized. Several years have passed since the Uruguay round; there have not been any significant changes in market access for developing countries in the developed countries as promised.[443] As if that is not enough, there are increased demands for the developing countries to liberalize their markets for the benefit of developed countries, while the developed country markets are closed.[444]

The multilateral trading system and particularly within this context of the Agreement on Sanitary and Phytosanitary measures has not borne any significant benefits to the developing countries at large.[445] The Agreement fails to take into account the special and differential needs of the developing country nations which are at the heart of the WTO founding values. Ironically since the WTO has come into place it has not borne any significant impact on the developing country exports and has not improved them from the predicaments within which its predecessors found them in. Perhaps fresh round of trade negotiations might hopefully help level the playing field.[446] However with the obvious inequality of bargaining powers

[440] H. Nyangito (above note 436) 16
[441] T. Otsuki, J.S Wilson and M. Sewaden *'Saving two in a billion: quantifying the trade effect on European food safety standards on African exports.*' African Exports Food Policy 26 (2001) 495 -514 Development Research Group DECRG *www.elsevier.com/locate/foodpol* accessed on 22 October 2012
[442] T. Otsuki et.al (above note 441) 512
[443] M. Khor '*The WTO, the post Doha and the Future of the Trade System'* Third World Network Paper (2002)
[444] M. Khor (above note 443)
[445] M. Khor (above note 443)
[446] Ibid

between the first world and the third world, it is uncertain whether there will be any significant changes, if any that will be brought about by a fresh round of negotiations.

In as far as environmental safety standards are concerned the application of the precautionary principle without clear and proper outlines will prove to be highly problematic. Since it would be used in an arbitrary manner that serves the purpose of disguised trade protectionism and this effectively form a barrier to international trade. According to Kogan due to overregulation of its industries and because they are lagging behind the Europe Union has responded especially to America by imposing increasingly restrictive regional and global environmental standards.[447] One of the most contentious issues here is because there is no proper guideline for the implementation of such environmental standards at an international. This is also the problem that is faced by developing countries when faced with highly industrial nations particularly where the imported products are posing as competition for the domestic products. The financial burden of proving that such products are environmentally safe is too high and is way beyond the reach of most developing countries.

5.2 Recommendations

Evidently the multilateral trading sytem has failed to deal with the concerns of developing and least developing countries. The WTO has been placed under much criticism for its failure to honor its obligations concerning the special needs of developing and least developing countries.[448] Since the multilateral trading system has failed to bear any significant benefits to developing countries. The levels of poverty and lack of development that existed prior the Uruguay Round still exists even.

A ray of hope has emerged for developing and least developed countries when the Doha round of trade negotiation came into place.[449]The purpose of the round of trade negotiations was to address the imbalance that existed since most developing nations felt that the multilateral trading system only benefitted the developing nations.[450] During this round of trade negotiations there was a platform which was opened up for developing countries to renegotiate some of the agreements that have been previously negotiated such as the SPS

[447] M. Khor (above note 443)
[448] T Otsuki (above note 441) 495
[449] M. Khor (above note 443)
[450] S. Joseph and A. Charlton, '*The Development Round of Trade Negotiations in the Aftermath of Cancun*' A report prepared for the Commonwealth Secretariat. *academiccommons.columbia.edu/.../ Development round of Trade In The Aftermath.* accessed on 22 July 2013 9

Agreement.[451] According to Khor, most of these agreements had been negotiated before most developing countries where a part of the WTO and as such did not represent their collective interests.[452] The Doha round of trade negotiations presented the developing country members of the WTO with a chance to renegotiate some of the terms of the agreements in an equitable manner.[453] However the fact that the round of negotiations has been a stalemate for so many years and the manner in which developing countries where treated in the negotiations leaves a lot to be desired.[454] Other authors cite problems of transparency in the negotiation processes and the lack of bargaining power that weighed heavily against developing countries.[455]However the treatment of these issues at the Doha Ministerial conference has left the developing countries in despair. The failure to adequately deal with the interests of developing countries at this round of negotiations has reduced confidence in the WTO multilateral trading system.

The Doha Agreement also sought to decide upon the inclusion of the trade-environment debate within the ambit of the WTO. The precautionary principle has featured in some of the decisions of the WTO and as such this issue was raised in that round of trade negotiations. While most developing countries expressed concern about the inclusion of the trade-environment debate within the ambit of the WTO since it is clearly failing to deal with the issues that arise from trade that it is already faced with, more industrialized and powerful nations where of the idea that the issue should be brought under the WTO perhaps creating a possibility of an agreement in which the trade-environment debate features. However it remains skeptical whether even if such an agreement exists it will resolve the issues of implementation which are at the heart of the controversy surrounding the WTO Agreements which are already in existence.

Furthermore if the multilateral trading system is failing developing countries as is evident from the Doha round of trade negotiations which has fallen short of its desired goals.[456] With the rapid emergence of regional trading agreement perhaps it is better for developing countries to look up to regional trade agreements that may assist in enhancing international trade at regional level.[457] Africa is a vast continent that has got rich vegetation, arable lands

[451] Ibid
[452] S. Joseph (above note 450) 10
[453] S. Joseph (above note 450) 12
[454] M. Khor (above note 443)
[455] S. Joseph et al (above note 450) 13
[456] Ibid
[457] M Khor (above note 443)

and mineral resources that are yet to be tapped. African leaders should look up to Regional Agreements such as South African Development Community (SADC), Common Market for Eastern and Southern Africa and African Union (COMESAA), as well as African Union (AU) as platforms for dealing with their concerns and issues.

Not only should they look up to regional agreements with countries in Africa, but also seek agreement abroad with more influential states such as those in the European Union or the United States of America which are a major source of foreign currency in developing countries. Furthermore the duty for maintaining safety standards should not be left only to the government. Other stakeholders in the economy such as NGO's and private companies should also engage the government and assist in the upgrading and maintenance of food safety standards. They should also take a proactive role in the strengthening of food safety standards.

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