

**TO WHAT EXTENT DO SPS MEASURES IMPACT ON MARKET
ACCESS FOR DEVELOPING COUNTRIES: A CASE STUDY OF
SOUTH AFRICA.**

BY

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DECLARATION

I declare that 'To what extent do SPS measures impact on market access for developing countries: A case study of South Africa' is my own work and that all the sources that I have used and quoted have been indicated and acknowledged by means of references.

T. MUTAMBA

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DEDICATION

To my mom and my late dad for believing in me; my sisters for you were always my source of motivation.

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Give thanks to the LORD, for he is good! His faithful love endures forever. Psalms 107 vs 1.

For this dissertation to be a success, I am thankful to a lot of people who offered professional and personal support. I would like to acknowledge them for the completion of this study.

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ACRONYMS

CBS	Citrus Black Spot
CGA	Citrus Growers Association
DSU	Dispute Settlement Understanding
EFSA	European Food Safety Authority
ECC	European Economic Community
EPAs	Economic Partnership Agreements
EU	European Union
FAO	Food and Agriculture Organisation
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
IPPC	International Plant Protection Convention
ITO	International Trade Organisation
MFN	Most Favoured Nation
MTS	Multilateral Trading System
NTBs/NTMs	Non-Tariff Barriers/ Measures
OECD	Organisation for Economic Co-operation and Development
(OIE)	Office International des Epizooties
SA	South Africa
SADC	Southern African Development Community
SPS	Agreement on the Application of Sanitary and

	Phytosanitary Measures
TDCA	Trade Development Cooperation Agreement
UK	United Kingdom
USA	United States of America
UR	Uruguay Round
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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CHAPTER 1:

KEY WORDS

Sanitary and Phytosanitary (SPS) measures, market access, developing countries, developed countries, Doha Round, Multilateral trading system, WTO, GATT, Non-Tariff Barriers/ Measures (NTBs/NTMs).

GENERAL INTRODUCTION AND BACKGROUND

1.1 BACKGROUND

In the recent years the international trade arena has witnessed the growing importance of “within the border” barriers. Standards and technical regulations appear to several commentators as the new critical issue on the international trade agenda. Among these, Sanitary and Phytosanitary (SPS) measures occupy a special place because of their crucial aim to safeguard health and safety of human beings, plants and animals. From an economic efficiency point of view, there are very few circumstances in which it can be accepted as a departure from free trade.

Henson S and Loader R have asserted that, “as tariffs and quantitative restrictions to trade have declined, there has been growing recognition that Sanitary and Phytosanitary measures can impede trade in agricultural and food products”.¹ Many problems have been encountered by most of the developing countries in meeting the SPS requirements of developed countries. This has further resulted in them failing to export especially agricultural and food products. Attempts have been made to reduce the trade distortive effects of SPS measures, within the World Trade Organization (hereafter the WTO) and the Agreement on the Application of Sanitary and

¹ Henson, S. J., and Loader, R. J. 'Impact of Sanitary and Phytosanitary standards on developing countries and the role of SPS Agreement'(1999), 15 (3), 9.

Phytosanitary Measures (hereafter the "SPS Agreement") but however, current initiatives fail to address many of the key problems experienced by developing countries.²

The efforts to liberalize the world trade reached a significantly higher stage when countries signed the Final Act concluding the Uruguay Round negotiations better known as the Marrakesh Declaration in Morocco in 1994.³ Before this declaration the world trade was governed by the General agreement on Tariffs and Trade (hereafter the GATT) which came into force in 1948.⁴ This agreement was put in place so as to try and liberalize world trade and this can be evidenced by the successive rounds of negotiations and the establishment of the WTO in 1995. The WTO aims to assist developing countries to access the markets for the developed countries by using trade agreements such as the Agreement on Agriculture, Agreement on African growth opportunity and the Agreement on Sanitary and Phytosanitary.⁵

Since its creation in 1948 the GATT has rendered discipline to national food safety and animal plant and health protection measures which affect trade. "Article 1 of the GATT, the Most Favored Nation treatment (MFN) clause called for non- discriminatory treatment of imported products from different foreign suppliers".⁶ Apart from that, article III of the GATT prescribed that such products be treated equally to domestically produced goods with respect to any laws or requirements affecting their sale.⁷ "This is now recognized as the principle of national treatment".⁸ These rules applied to pesticide residue and food additional limits as well as the restriction for animal and plant health purposes. However, the GATT rules also included an exception (article xx (b)) which eventually became the basis for SPS Agreement. Furthermore, article xx (b) stated that, "countries could take measures to protect human, animal or plant life or healthy as long

² Henson, S.J and Loader, R.J page 8.

³ O. Giirler, 'WTO Agreements on Non- Tariff Barriers and the Implication for the OIC Member States: Customs Valuation, Pre-shipment Inspection, Rules of Origin and Import Licensing', (2002) 1 JCE, 61, 62.

⁴ Ibid O. Giirler page 61.

⁵ Ibid O. Giirler page 61.

⁶ Ibid O. Giirler page 62, 63.

⁷ Article 3 of the General Agreement on Tariffs and Trade (GATT) 1994.

⁸ Article 3 of the General Agreement on Tariffs and Trade (GATT) 1994.

as these do not unjustifiably discriminate between countries where the same conditions prevailed or were not designed to be a disguised hindrance to trade”.⁹

In particular, “the Punta del Este declaration which launched the Uruguay round in 1986 initiated the birth of the SPS measures”.¹⁰ The Uruguay round resulted in increased discipline in three areas namely in the agricultural sector i.e. market access, direct and indirect subsidies SPS measures.¹¹ Furthermore, “these negotiations were to develop a multilateral system that would allow simplification and harmonization of SPS measures as well as elimination of all restrictions that lack any valid scientific basis”.¹²

The SPS Agreement is of great importance to international trade as it extends significantly beyond the GATT obligations not to discriminate among or against imported products. It also improves certain international disciplines on national regulation regarding products characteristics and production. Spencer and Henson concurs that,

“...the SPS Agreement should provide a means for developing countries to overcome some of the inherent problems they face in world agri-food trade, and the various special measures that exist within the Agreement are designed to recognize this”.¹³

However, according to Henson and Loader, “concurrent with the liberalization of tariff and quantitative restrictions there has been increased concern pertaining to the impact of other measures on agricultural and food exports” in the form of non-tariff measures (NTMs) or non-tariff barriers (NTBs).¹⁴ Sanitary and Phytosanitary (SPS) measures constitute one of these NTBs. In this respect Michalopolous C, points out that “it is now widely acknowledged that technical measures such as food quality and (SPS) measures impede trade particularly in the case of developing countries”.¹⁵ The WTO SPS

⁹ GATT article XX (b).

¹⁰ O. Giirler, WTO Agreements on Non- Tariff Barriers and the Implication for the OIC Member States: Customs Valuation, Pre-shipment Inspection, Rules of Origin and Import Licensing’, (2002) 1 JCE page 63.

¹¹ Ibid O. Giirler page 63-65.

¹² Henson, S. J, and Loader, R. J page 7-8.

¹³ Henson, S. J and Loader, R.J, ‘Impact of Sanitary and Phytosanitary Standards on Developing Countries and the Role of the SPS Agreement’ (1999)15 (3), page 355,356,357.

¹⁴ Henson, S.J and Loader R. J page366.

¹⁵ This is the case “independent of whether the countries in question are additionally a member of a Free Trade Agreement (FTA) or not” see C Michalopolous ‘The developing countries in the WTO’. (1999) 27 *World Development* 117, 135, 136.

Agreement “adopted in the 1994 UR lays down a common basis with respect to SPS measures for all WTO Member countries”.¹⁶ According to Annex 1A of the SPS Agreement, SPS measures are defined as “all types of trade rules aimed at the protection of human, animal and plant life or health”.¹⁷

The SPS Agreement is mainly aimed at protecting and improving the current human health, animal health, and phytosanitary situation of all Member countries.¹⁸ Griffin asserts that most of the non- tariff barriers to trade are now the subject of a number of multilateral and legally binding trade agreements.¹⁹ The main objective of these agreements is to do away with legal and bureaucratic issues that may pose obstacles to trade or that may be used as restrictions and discriminatory trade policies. These also include Sanitary and Phytosanitary (SPS) measures and Technical Barriers to Trade.

However despite the fact that SPS measures help countries to protect their human, animal and plant life, the way in which the agreement is interpreted by developed countries hinders trade with developing countries. It is also noted that these non-tariff barriers may create problems that can be as serious as the actual tariff for duty rates charged at country borders. SPS measures theoretically speaking are there to protect trade but however in practice they tend to be impediments to trade for developing countries as they fail to meet the requirements in developed countries.

A particular matter affected by the situation is, market access which refers to the reduction of tariff or non- tariff barriers to trade by WTO members. The Agreement on Agriculture (AOA) required tariff reductions so that developing countries would be able to access the markets of developed countries.²⁰ Market access is also one of the central core discussions of this thesis and is discussed under the current World Trade Organization (WTO) Doha Development Agenda Round.

Indeed, it has been noted by a number of developing countries that the greatest barrier to trade in agricultural and food products, particularly in the case of the European Union

¹⁶ Henson S.J and Loader, R. J page 355-357.

¹⁷ WTO Agreement on the Application of Sanitary and Phytosanitary Measures 1994 ANNEX 1 A.

¹⁸ SPS Agreement ANNEX 1A (a)-(d).

¹⁹ R. Griffin, History of the Development of the SPS Agreement; Plant Protection and Production Division.

²⁰ WTO Agreement on Agriculture (AoA) 1994 Art 4.

(EU) are the SPS requirements.²¹ One could argue that “the problems developing countries have in following the SPS requirements reflect their wider resource and infrastructure constraints that limit not only their ability to comply with SPS requirements, but also their ability to demonstrate compliance”.²² The most specific problem is access to appropriate scientific and technical expertise. It should be noted further that in many developing countries knowledge of SPS issues is poor. This has been reflected “both within government and the food supply chain, and the skills required to assess SPS measures applied by developed countries are lacking”.²³

Furthermore, the issue of SPS measures becomes very problematic considering that one of the objectives underpinning the WTO is to contribute to the institution’s objectives by encouraging members to “enter into reciprocal and mutually advantageous arrangements”.²⁴ Such arrangements are directed at substantially reducing tariffs and other barriers to trade amongst other commitments. However, SPS measures do pose a fundamental challenge to this traditional “economic perspective” and this thesis will try to tackle this challenge and how this SPS Agreement impact on market access for developing countries in international trade. This analysis tries to disentangle the complexity of SPS measures that, uniquely amongst “potential trade obstacles”, mix elements of genuine protection and elements of disguised protectionism. This thesis will critically assess the SPS measures and the extent to which they pose as hindrance to developing countries in trying to access developed countries’ markets in particular the European Union (EU). The EU is of particular interest to this thesis as studies suggest that the SPS requirements called for by the EU in trade are more stringent thus hindering market access for other developing countries.²⁵

1.2 RATIONALE

This thesis focuses on addressing the problem caused by different interpretations given to the SPS Agreement and also its application there by causing detrimental effect on

²¹ Henson S.J and Loader, R. J page 355.

²² WTO ‘Understanding the WTO’ Available at www.wto.org ACCESSED ON 07 April 2016

²³ WTO ‘Understanding the WTO’ Available at www.wto.org ACCESSED ON 07 April 2016.

²⁴ GATT Preamble.

²⁵ R. Griffin, History of the Development of the SPS Agreement; Plant Protection and Production Division.

particular African developing countries' market access, such as South Africa. It appears that, the underlying goals of the WTO and its predecessors to liberalize trade are being hindered by the obstacles posed by these SPS measures. It is therefore, important that all measures and forms that impede trade for developing countries in respect of market access be eliminated.

Apart from that, it has been established that many SPS measures raises legitimate concerns about trade hindrance which may have greater implications for developing nations than for the developed ones. However, most of these measures require improved technology, for better production, efficient trade infrastructure and use of more expensive shipping material and all of this is more costly to implement in developing countries.²⁶ It should be noted that the successful Rounds of the GATT and the establishment of the WTO (1995) have created opportunities for developing countries to access the markets of developed countries without obstacles.²⁷ It appears however, that these opportunities and their progress are being hindered and threatened by the rapid growth of NTB's (non- tariff barriers). It is therefore, fitting to submit that, SPS measures are the main focus of this thesis and in particular their impediment to trade for developing countries. Nevertheless, it has also been established that these SPS measures are not mandatory thus the assertion that they are used as protectionist tools by developed countries will be criticised later on in the thesis.

In relation to the above highlighted rationale, Henson points out that,

“SPS Agreement should provide a means for developing countries to cater for the problems they face in trying to meet the requirements of the agreement and various special measures that exist within the agreement are designed to recognize this”.²⁸

²⁶ Henson S. J and Loader R J page 359, 360.

²⁷ O. Giirler, WTO Agreements on Non- Tariff Barriers and the Implication for the OIC Member States: Customs Valuation, Pre-shipment Inspection, Rules of Origin and Import Licensing', (2002) 1 JCE page 61, 62.

²⁸ Henson S.J and Loader, R.J page 359, 360.

However, it has been noted that developing countries are not currently benefiting from the SPS measures. Moreover, “evidence seems to suggest that these countries are adversely affected by the SPS measures which for various reasons are unable to implement or effectively participate in the processes”.²⁹ This thesis will thus, discuss some of the above raised concerns affecting developing countries due to implementation of SPS measures.

It has been postulated that the constraints faced by developing countries in respect of their ability to export agricultural and food products to developed countries are mainly due to the overly stringent SPS requirements imposed by developed countries.³⁰ It is therefore fitting, to note that, SPS requirements are one of the greatest impediments to market access for developing countries in terms of trade in agricultural and food products. In respect of this market access it will be of great significance if developing countries are given access to the markets of developed countries as this facilitates trade liberalization which is the main goal of the WTO. However, market access cannot be possible if SPS measures are not dealt with fairly and uniformly. Certainly, there is need to implement SPS measures to developing countries in line with the commitments of the SPS Agreement itself. Such commitments include the objective of extending special treatment to developing countries as highlighted in the preamble of the WTO and Article 10 of the SPS.

Moreover, it has been established that, the major goal of the WTO is to liberalise trade.³¹ SPS measures are being used as a gate away by developed countries which is contrary to the WTO goals. This thesis’ argument is that international trade facilitation can only be effective if SPS measures are regulated fairly by taking into consideration the needs of the developing countries. This thesis will also explain the negative impacts of the SPS measures on market access from the perspective of developing countries.

²⁹ S. Henson and R Loader, “Impact of Sanitary and Phytosanitary standards on Developing countries and the role of the SPS Agreement”, page 359-361.

³⁰ Henson, S. J, and Loader, R. J, page 28.

³¹ O. Giirler, page 61.

1.3. LITERATURE REVIEW

It has been established that there is ample literature review centred on SPS measures and market access for developing countries in terms of International trade law. The journal article of Economic Cooperation by O. Giirler examines the issues of customs procedures and foreign trade customs administration under the related WTO Agreements and their implications for developing countries.³²

Scholars such as Ndayisenga, F, Kinsey, J., Henson and Loader have extensively written on effects of SPS measures in particular the effects of these measures on the market access of the developing countries and how they have created obstacles to trade due to failure of developing countries to meet the requirements of the SPS measures. It also appears that some of the scholars have also focused on how these SPS measures have been used as protectionist tool and how they have hindered developing countries' ability to trade. To further cement the above Loader and Spencer asserts that, "although tariff barriers have been declined there is a concern that the non-tariff measures (NTB's/ NTM's) can either explicitly or implicitly act as a barriers to trade in a similar manner to tariffs and quantitative restrictions".³³

Henson and Loader purports that,

"in the case of trade between developing and developed countries, it is evident that in many cases a "regulatory gap" can be observed both in terms of the level and types of SPS standards applied and the systems of conformity assessment that operate".³⁴

This research concurs with the authors in the sense that this gap may impose costs of compliance on suppliers from developing countries over and above the costs of compliance of suppliers from developed countries. This is also further cemented by the fact that the degree to which these standards differ from those that exist in the supplier's

³² O. Giirler page 61.

³³ Henson, S. J and Loader, R.J, page 8.

³⁴ Henson, S.J and Loader, R.J Agri-business journal, page 359.

domestic market is reflected by the cost of compliance.³⁵ It is further highlighted that developed countries apply stringent requirements than developing countries thus showing their greater economic means to control human, animal and plant health and demands of their population.

Furthermore, it is of great significance to venture into the implications of the SPS measures in particular their effects to market access for developing countries to developed countries' markets. With this in mind it is important to scrutinize the literature review surrounding market access as it plays a pivotal role in international trade. From this perspective, it is therefore suggested that potential means for reducing negative effects of SPS measures on developing countries be identified and implemented. More literature surrounding this topic is written from an economic perspective. This thesis will stimulate further research work to explore how this problem can be addressed from a legal perspective taking into account the relevant legal framework of the WTO Agreement.

Furthermore, Henson and Loader purports that, SPS measures provides "long-term benefits provided that the agreement is implemented in an appropriate manner".³⁶ However, the research assertion is that due to the diverse means whereby the SPS Agreement has been implemented by particular countries, there have been many concerns up to date which then create an obstacle to market access for developing countries to international trade. Apart from that even if they are implemented appropriately many developing countries seem to fail to reach the standards that are being set. They further postulated that, "developed countries apply stricter SPS measures than developing countries and that SPS controls in many developing countries are weak and overly fragmented".³⁷ The research quite frankly agrees with their postulation thus it will be therefore, fitting to submit that, SPS measures are a protectionist tool for developed countries and that they hinder the ability of developing countries to trade as they fail to meet the requirements of SPS measures. The above

³⁵ Henson S.J and Loader, R.J (see note33; 8).

³⁶ Henson, S. J and Loader, R. J page 10.

³⁷ Henson, S. J and Loader, R.J page 9.

noted assertion is further cemented by Murphy and Shleifer (1997) who submitted that, “more theoretical work has demonstrated that, developing countries find it hard and sometimes fail to trade with developed countries due to their differences in quality requirements which in turn reflect consumer regulation”.³⁸

Other authors like Henson and Spencer highlighted the impact of the WTO’s SPS Agreement on the extent to which SPS measures hinders exports from developing countries.³⁹ However, in as much as their work is elegant and of great quality it also fails to venture into the WTO legal frameworks that can be used to deal with the effects of the SPS measures. Mutasa and Nyamandi as cited by N. Mupure in his thesis, also “assesses the degree to which SPS requirements impede exports of agricultural and food products from African countries”.⁴⁰ Their approach is also problematic because it is purely economic as it neglects the current legal framework that regulates the use of the SPS measures and how to address the negative effects of these measures on market access in trade.

Moreover, Lionel Fontagne, Mimouni and Jean Michel also analysed the magnitude and structure of environment-related measures notified under the SPS Agreements.⁴¹ Their focus of the SPS measures on developing countries and market access for these countries is only limited to environment SPS measures thus failing to look at the legal and economic impact of these measures. Their study is not of much relevance to this thesis as it mainly focused on the environmental perspective of SPS measures whilst this thesis aims at taking the legal route which seems to be ignored by many authors.

Moreover, the report by Cerrex also identified the impact of the application of SPS measures by the EU on exports from ACP countries.⁴² However, their study is not water

³⁸ Murphy, K. M., & Shleifer, A. ‘Quality and trade’. *Journal of development economics*, 1997, page 1-15.

³⁹ S, Henson and R Loader, ‘Barriers to Agricultural Exports from Developing Countries’: *The Role of Sanitary and Phytosanitary Requirements*, 2001 (1), page 85.

⁴⁰ Mupure, L.N.A (2014) International Trade Law, “A Critical assessment on the Impact of SPS measures on Market Access for Developing Countries: Case Study of South Africa and Kenya. University of KwaZulu-Natal page 7-10.

⁴¹ L. Fontagné, M. Mimoun & J,M Pasteels, ‘Estimating the impact of environmental SPS and TBT on international trade’, 2005, 1, 2.

⁴² Cerrex Ltd, UK May 2003

tight as it fails to quantify the influence of these measures either in terms of how they actually may act as trade impediment on individual's country's export potential.

Athukorala P and Jayasuriya S as cited by N. Mupure in his dissertation pointed out that "processed food exports to developed country markets have emerged as a potentially major new source of dynamic export growth for many developing countries in the recent years".⁴³ The reason for this setback is that the capacity of developing countries to penetrate developed countries' markets critically depends on them being able to meet strict food safety standards prescribed by developed countries.⁴⁴ They further argued that this situation leads to unpredictability in terms of trade. As such this raises suspicions that SPS measures are being used as "a non-transparent, trade impeding protectionist tool", rather than as a legitimate instrument for the protection of human, plant and animal health.⁴⁵ The purpose of the authors' paper is to review the key issues related to the trade effects of food safety standards. The context of the paper however points to the "strengthening of global trade architecture for development".⁴⁶ As such these authors write from an economic and development perspective. This thesis critically analyses the issue of SPS measures and their impact on market access in relation to developing countries from a legal perspective.

In this respect this thesis, aims at analysing the SPS measures and their effects on market access in relation to SPS measures and their effects on market access in relation to developing countries. Apart from that, and more specifically, this thesis shows what measures can be adopted to deal with the SPS measures so that market access for developing countries will be created. The legal frame work of the WTO that governs trade will also be discussed and examined to show how it operates to counter the effects of SPS measures on developing countries.

⁴³ P Athukorala & S Jayasuriya 'Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective' 2003 *The World Economy* 1, 1.

⁴⁴ Ibid P Athukorala & S Jayasuriya page 1.

⁴⁵ Mupure N. L.A (2014). INTERNATIONAL TRADE LAW, A Critical Assessment on the Impact of SPS Measures on Market Access for Developing Countries: Case study of South Africa and Kenya. University Of KwaZulu-Natal page 8.

⁴⁶ Athukorala & Jayasuriya (see note 43; 1396).

1.4 PURPOSE STATEMENT (AIMS AND OBJECTIVES)

The purpose of this thesis is to assess the impact of SPS measures on how they create obstacles for developing countries in their quest to access the markets of developed countries. In this respect the thesis has the following aims and objectives:

1. To trace how the development needs of developing countries have been dealt with in the Multilateral Trading Systems (MTS).
2. To understand the nature of non- tariff barriers, more specifically SPS measures and their effects on market access to developing countries.
3. To highlight the problems that have been suffered or are likely to be suffered by developing countries due to the current implementation of SPS measures by developed countries.
4. To recommend remedies on how these problems and concerns raised can be dealt with.

It should be put in mind that, the assessment of the effects of SPS measures on market access of developing countries will be achieved based on the case study of South Africa and its trading relationship with the European Union.

1.5 RESEARCH QUESTIONS

The main focus of the thesis is to mainly assess the impact of SPS measures on the ability of developing countries to access the markets of developed countries; these are the following research questions:

- What necessitated the change from GATT to the WTO? And to what extent did this change affect the multilateral trade system and the position of developing countries?

- To what extent has the MTS addressed the development needs of developing countries in respect of SPS measures, in particular? To what extent do SPS measures impede trade between developing and developed countries, in general? Has the SPS Agreement been effective in enhancing market access for developing countries?
- What impact has the TDCA agreement have on the relationship between SA and EU? How has the EU SPS measures impeded market access for South Africa, in respect of the Citrus dispute and how has this effected the current trade relationship between the parties?

1.6 CONCEPTUAL OR THEORETICAL FRAMEWORK

This thesis will adopt a legal theoretical framework. The purpose of this approach is to conduct the research in a legal context namely under the realm of International Trade Law. Hence in assessing the impact of the SPS measures on market access of developing countries, this exercise will be undertaken using legal lenses.

1.7 RESEARCH METHODOLOGY

This thesis will make extensive use of qualitative methods of research in pursuit of the aforementioned research objectives. It will be *purely desktop research*. This is the case because much of the issues related to SPS measures are found in codified legal instruments and this thesis will be conducted by referring to the already existing primary literature such as the relevant WTO Agreements; the Trade Development Cooperation Agreement (TDCA) between SA and EU. In addition, reference will also be made to a number of textbooks, journals and working papers; policy papers; trade reports and case studies in conducting this research.

1.8 STRUCTURE OF THE THESIS

<u>CHAPTER 1</u>	<u>RESEARCH PROPOSAL</u>
<u>CHAPTER 2</u>	<u>HISTORY OF THE GATT\WTO</u>
<u>CHAPTER 3</u>	<u>SPS AGREEMENT</u>
<u>CHAPTER 4</u>	<u>CASE STUDY OF SOUTH AFRICA</u>
<u>CHAPTER 5</u>	<u>RECOMMENDATION AND CONCLUSION</u>

1.9 TIMELINE FOR THE DISSERTATION

<u>1 AUGUST</u>	<u>CHAPTER 2</u>
<u>31 AUGUST</u>	<u>CHAPTER 3</u>
<u>30 SEPTEMBER</u>	<u>CHAPTER 4</u>
<u>20 OCTOBER</u>	<u>CHAPTER 5</u>

CHAPTER 2

HISTORICAL OVERVIEW OF THE GENERAL AGREEMENT ON TRADE AND TARIFFS (GATT) AND THE WORLD TRADE ORGANISATION (WTO)

2.1 INTRODUCTION

After the World War II the countries focused on reconstructing the international economy. Part of the Bretton Woods institutions (now known as the World Bank and the International Monetary Fund (IMF)), proposed the formation of the International Trade Organisation (ITO). The main objective of ITO was to foresee a new multilateral trade system of liberalised international trade along with the IMF and the World Bank.⁴⁷ It has been submitted that, about 50 countries participated in negotiations to create this organisation as a specialised agency of the United Nations (UN).⁴⁸ The draft ITO Charter was determined to succeed because it stretched beyond world trade disciplines.⁴⁹ The major aim was to bring into existence the ITO at a UN conference on Trade and Employment in Havana, Cuba in 1947.⁵⁰ ITO charter was finally agreed in Havana in March 1948, but ratification in some national legislatures proved impossible.

The overall plan after the war was twofold; first the idea was to give an early boost to trade liberalisation and to secondly begin to address the large overhang protectionist measures which remained in place from the early 1930's. As such tariff negotiations were opened among the 23 founding contracting parties in 1946.⁵¹ It "was agreed that the value of the concessions should be protected by early and largely provisional acceptance of some of the trade rules in the draft ITO Charter".⁵² As such, "at the International Conference on Trade and Employment held in 1946 at Havana, a proposal for establishing an agency called the International Trade Organisation (ITO) was made

⁴⁷ S. Chand: GATT: General Agreement on Tariffs and Trade; Origins, Objectives, Tariff Negotiations, 2015.

⁴⁸ Ibid S. Chand.

⁴⁹ These world trade disciplines included rules on employment, commodity agreements, restrictive business practices, international investment and services

⁵⁰ S. Chand (see note 47).

⁵¹ R. Howse, MJ Trebilcock: International Review of law and Economics, Psychology Press 2005.

⁵² S. Chand (see note 47).

with the miscellaneous and general objective of augmenting and maintaining world trade and employment”.⁵³ Despite finally agreeing on the Charter at a UN conference on Trade and Employment in Havana in March 1948, it appeared as though national ratification by particular states proved difficult. A relevant example is when the United States government announced in 1950 that it would not seek congressional ratification of the Havana Charter (report suggest that the ITO Charter unfortunately never entered into force because even though it was submitted to the US Congress it was never approved). Thus, it appears as though these were the reasons for the demise of the ITO. One common argument presented for the disapproval of the new organisation was that it would be too much involved in internal (national) economic issues of particular states.⁵⁴

The tariff concessions and “rules together became known as the General Agreement on Tariffs and Trade (GATT) and entered into force in January 1948”.⁵⁵ Albeit being a provisional plan, the GATT, from 1948 until the establishment World Trade Organisation (WTO) governed international trade.

Having provided the brief background, the main focus of the chapter is to determine and discuss the factors that necessitated the change from GATT to the WTO and the extent to which this change affected the multilateral trade system and the position of developing countries. As such, the chapter will firstly provide a discussion of the GATT and the rounds that necessitated the birth of the WTO. Secondly it will further look at the multilateral trading system, how it was changed by the development of the GATT to the WTO and thirdly the position of developing countries in terms of international trade.

2.2 GATT

2.2.1 HISTORY OF THE GATT

⁵³ R. Howse, MJ Trebilcock: International Review of law and Economics, Psychology Press 2009, page 25-37.

⁵⁴ B Peter. Kenen, the International Economy, 1999 (1) page 376.

⁵⁵ Ibid B. Peter. Kenen, page 376.

As noted earlier, the GATT was a multilateral agreement regulating international trade.⁵⁶ According to its preamble, its purpose was the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis."⁵⁷ It was negotiated during the United Nations Conference on Trade and Employment and it was the outcome of the ITO.⁵⁸ GATT was signed by 23 nations in Geneva on October 30, 1947 and took effect on January 1, 1948.⁵⁹ It lasted until the signature by 123 nations in Marrakesh on April 14, 1994 of the Uruguay Round Agreements, which established the (WTO) on January 1, 1995.⁶⁰

It has been submitted that the GATT was inspired by the success of the Agreement for international monetary co-operation⁶¹ "as reflected in the formation of the IMF, similar co-operation as reflected in international trade also was desired by many trading nations for expansion of world trade".⁶² This was due to the fact that many people thought that it was healthy for world trade, and an attempt was made to relax the existing trade restrictions, such as tariffs.⁶³

As the name itself suggests, the General Agreement was concerned only with tariffs and trade restrictions and related international matters. It served as an important international forum for carrying on negotiations on tariffs.⁶⁴ Under the GATT, member nations "met at regular intervals to negotiate agreements to reduce quotas, tariffs and such other restrictions on international trade".⁶⁵ GATT, by its very nature, was a

⁵⁶ Trebilcock MJ (note above 53, page 25-37).

⁵⁷ P. Van de Bosche, "The law and Policy of the World Trade Organisation: Text, cases and Materials eBook Complete Collection, Cambridge University Press, 2008.

⁵⁸ Michael Hudson, *Super Imperialism: The Origin and Fundamentals of U.S. World Dominance*, 2nd ed. (London and Sterling, VA: Pluto Press, 2003), 258.

⁵⁹ Trebilcock MJ & R Howse, *The Regulation of International trade*, Psychology Press 2ed (1999) p25-37.

⁶⁰ Ibid Trebilcock MJ page 25-37.

⁶¹ Ibid Trebilcock MJ page 25-37.

⁶² Ibid Trebilcock MJ page 25-37.

⁶³ S. Chand; *GATT: General Agreement on Tariffs and Trade: Origins, Objectives, Tariff Negotiation*, 2015.

⁶⁴ Ibid S. Chand.

⁶⁵ Ibid S. Chand.

contractual agreement among parties (or nations). It is a treaty that is collectively administered by the contracting nations.⁶⁶

Furthermore, GATT has served both as a legal institution and a forum for member nations to resolve trade conflicts. The GATT sought eight rounds of trade negotiations, in which all of them were successful and resulted in trade agreements that were later ratified and implemented by member countries.⁶⁷ The major focus in earlier rounds was the reduction in tariffs on merchandise.

2.2.2 THE GATT ROUNDS

Much of the history surrounding the GATT was written in Geneva. However, “it also traces a journey that spanned the continents, from that hesitant start in 1948 in Havana (Cuba), via Annecy (France), Torquay (UK), Tokyo (Japan), Punta del Este (Uruguay), Montreal (Canada), Brussels (Belgium) and finally to Marrakesh (Morocco) in 1994”.⁶⁸ The rounds in which trade liberalization was being negotiated can be divided into three phases. The first phase started from 1947 and it was the Geneva round, 1949 Annecy round until 1951 with the Torquay Round.⁶⁹ Commodities which would be covered by the agreement and freezing existing tariff levels. The second phase encompassed three rounds, from 1960 to 1961 it was the Geneva (Dillon) round, 1964 to 1967 there was a Geneva (Kennedy) round which covered tariffs and anti-dumping measures then lastly the Geneva Tokyo round from 1973 to 1979 which focussed on Tariffs, non-tariff measures, framework agreements.⁷⁰ The third phase only constituted of the Uruguay Round from 1986 to 1994 and it extended the agreement fully to new areas such as intellectual property, services, capital and agriculture.⁷¹

⁶⁶ S. Chand (see note above 63).

⁶⁷ <https://www.ces.ncsu.edu/depts/agecon/trade/seven.html> accessed on 01 July 2016 at 09.55am.

⁶⁸ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 22 July 2016 at 13.35pm.

⁶⁹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 22 July 2016 at 13.35pm.

⁷⁰ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 22 July 2016 at 13.35pm.

⁷¹ https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm accessed on 20 July 2016 15.43pm.

Since the ITO failed to be the multilateral trading system the GATT became the only multilateral instrument to regulate international trade during that period. It should be noted that the GATT played a pivotal role in establishing a strong and prosperous multilateral trading system that became more liberal through the famous rounds of negotiations.⁷² “By the 1980s the system needed a thorough overhaul there by leading to the Uruguay round and ultimately to the WTO”.⁷³ These rounds of the GATT will be discussed in brief below.

2.2.2.1 GENEVA ROUND, SWITZERLAND, APRIL–OCTOBER 1947

The Geneva negotiations in advance of the ITO's formation were motivated in part by the expiry of US presidential negotiating authority in June 1948.⁷⁴ This first round sparked the formation of the GATT as it was the first round of negotiations which was held. “This first round of negotiations yielded a package of trade rules and 45,000 tariff concessions affecting \$10 billion of trade, about one fifth of the world's total”.⁷⁵ However, by the time the deal was signed on 30 October 1947, the group had extended to a greater extent.⁷⁶ The tariff concessions came into effect by 30 June 1948 through a “Protocol of Provisional Application”. Hence, the new General Agreement on Tariffs and Trade was born, comprising of 23 founding members (officially “contracting parties”).⁷⁷

2.2.2.2 ANNECY ROUND, FRANCE, APRIL 1949 -OCTOBER 1949

The year 1949 saw the emergency of the second round known as the Annecy round in which 13 countries took part in.⁷⁸ Indeed this, round focused on the expansion of tariff reductions, around 5000 in total. Apart from that, primary purpose of the Annecy negotiations was to allow the accession of eleven other countries to the GATT as

⁷² https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm accessed on 20 July 2016 15.43pm.

⁷³ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 22 July 2016 at 13.35pm.

⁷⁴ I Douglas A. “The GATT in Historical Perspective,” American Economic Review Vol. 85, No. 2, (May, 1995), pp 134-135.

⁷⁵ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#rounds accessed on 22 July 2016 at 14.57pm.

⁷⁶ ⁷⁶ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#rounds accessed on 22 July 2016 at 14.57pm

⁷⁷ I Douglas (see note 74; 325).

⁷⁸ I Douglas (see note 74; 326).

contracting parties⁷⁹. The original twenty-three members did not exchange tariff concessions with each other but did negotiate with the eleven new members of the GATT, and these tariff changes were generalized. This widened the geographic scope of GATT membership and provided for a marginal reduction in tariff levels.⁸⁰

2.2.2.3 TORQUAY, ENGLAND, SEPTEMBER 1950–APRIL 1951

In 1951 the third round occurred in Torquay, England and thirty-eight countries participated in this round. Furthermore, “8,700 tariff concessions were achieved totalling the remaining amount of tariffs to three quarters of the tariffs which were in effect in 1948”.⁸¹ This third round saw countries cutting the 1948 tariff levels by 25% hence it was the only round which yielded appreciable tariff reductions. The third GATT round saw the original Contracting Parties again exchanging tariff concessions among themselves along with several new members acceding to the GATT, most importantly the Federal Republic of Germany.

The Torquay round encountered two problems that accounted for much of its failure which included the dispute between the United States and the United Kingdom, and the growing disparity of tariff levels within Europe.⁸² The continuing dollar shortage in Europe prompted the United Kingdom to request unilateral tariff cuts by the United States, which the United States rejected on the grounds of the reciprocal mutual benefit criteria. The “two major countries (UK & USA) failed to compromise, thus resulting in no bilateral tariff cuts on their trade”.⁸³ This failure on both their parts directly meant that no one would benefit indirectly from their generalization. Koch argued that,

⁷⁹ These include, Colombia, Denmark, Dominican Republic, Finland, Greece, Haiti, Italy, Liberia, Nicaragua, Sweden and Uruguay.

⁸⁰ I, Douglas A. “The GATT in Historical Perspective,” *American Economic Review* Vol. 85, No. 2, (May, 1995), pp 134-135.

⁸¹ <https://www.wto.org/english/thewto-e/whatis-e/tif-e/fact4-e.htm> accessed 22/07/2016 at 16.31pm.

⁸² Irvin Douglas (see note 80; 134-135).

⁸³ <https://www.wto.org/english/thewto-e/whatis-e/tif-e/fact4-e.htm> accessed 22/07/2016 at 16.31pm.

⁸³ Irvin Douglas (see note 80; 134-135).

“this attitude unfavourably affected countries that would have reaped indirect benefits from such tariff cuts and made them cautious about granting concessions in their own negotiations”.⁸⁴

One positive result from Torquay was that all tariff reductions from the Geneva and Annecy rounds were renewed and extended until 1954 (and later extended again until the end of the 1950s).⁸⁵ Widespread pessimism and frustration with the GATT process marked the end of the Torquay round. After a successful negotiating round in 1947 and a membership expansion in 1949, the GATT's momentum had suddenly stopped making progress towards facilitating international trade very early in the post-war recovery. After the difficulties at Torquay, more than five years elapsed before the next GATT conference, and the other one in Geneva in 1956 produced similarly meagre results.

2.2.2.4 GENEVA AND DILLON ROUNDS: 1955-1962

The fourth round took place in Geneva in 1955 and it stretched to May 1956.⁸⁶ Furthermore, about twenty-six countries participated in this round and an estimation of about \$2.5 billion in tariffs were eliminated or reduced.⁸⁷ “The negotiations started in Geneva on 1 September 1960 were named the Dillon Round, after C Douglas Dillon, US undersecretary of state under President Eisenhower, and Treasury Secretary under President Kennedy (who took office during the round in January 1961)”.⁸⁸ This was due to the fact that he was the one who first proposed the talks and this became the fifth round. It has been submitted that twenty-six countries took part in this round. The Dillon round successfully reduced over \$4.9 billion in tariffs, it also resulted in the discussion relating to the carving out of the European Economic Community (ECC).⁸⁹

⁸⁴ K. Koch, International trade policy and the GATT, 1947-1967, (1969), Stockholm: Almqvist and Wiksell.

⁸⁵ Ibid K. Koch.

⁸⁶ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 23/07/16 at 11.45am.

⁸⁷ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 23/07/16 at 11.45am.

⁸⁸ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 23/07/16 at 11.45am.

⁸⁹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed on 23/07/16 at 11.45am.

2.2.2.5 Kennedy Round: 1962–67

This was the sixth round of GATT multilateral trade negotiations. In honour of the U.S. President John F Kennedy's support for the reformulation of the United States trade agenda this round was named after him. This resulted in the Trade Expansion Act of 1962.⁹⁰ This Act ensued that the President had the widest-ever negotiating authority.⁹¹

"As the trade rounds were getting longer and more complicated, the participation in this round included more than 60 countries".⁹² Apart from traditional tariff cuts and new trade rules such as those on the use of antidumping measures were introduced.⁹³ During this round, negotiations went beyond the subject of tariffs for the first time, resulting in particular to the conclusion of the anti-dumping code, the first multilateral GATT agreement on non- tariff measures.⁹⁴ This round marked the formal recognition of preferential mechanism in favour of developing countries which was subsequently embodied in part of the general Agreement adopted in November 1964.⁹⁵ It is within this round where GATT anti-dumping agreement was first introduced.

2.2.2.6 TOKYO ROUND 1973-1979

In 1970 the Tokyo round saw the first major attempt to tackle non-tariff barriers. The Tokyo Round Agreements were signed on June 30, 1979 and the agreements were incorporated in the Geneva Protocol (1979), which contained the tariff concessions negotiated by a number of countries during the Round.⁹⁶ This round made further progress in reducing tariff and non-tariff trade barriers as it also withstand another decade of GATT negotiations that was treading outside Europe for the first time. This Round apparently took a broader approach to the trade rules than its predecessor, but still it had mixed results. This round "aimed at reducing tariffs and it also established

⁹⁰ <https://www.usitc.gov/publications/332/pub3621.pdf> accessed on 23/07/16 at 11.50am.

⁹¹ S252 of the Trade Expansion Act, it directed the President to do everything feasible within his power to obtain the removal of the unjustifiable foreign import restrictions that impair the value of tariff commitments made to the US.

⁹² https://en.wikipedia.org/wiki/General_Agreement_on_Tariffs_and_Trade#Kennedy_Round: 1962.E2.80.936 accessed on 23/07/16 at 12.56pm.

⁹³ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 23/07/16 at 13.43pm.

⁹⁴ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 23/07/16 at 13.43pm.

⁹⁵ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 23/07/16 at 13.43pm.

⁹⁶ G. M. Meier; The Tokyo Round of the Multilateral Trade Negotiations and the Developing Countries, Cornell International Law Journal Volume 13, 1980.

new regulations aimed at controlling the proliferation of non-tariff barriers and voluntary export restrictions, which saw the participation of 102 countries”.⁹⁷ This round led to tariff negotiations which resulted in further substantial reductions in customs duties. A series of agreements known as the “Tokyo Round Codes”, which were only signed by some of the participants were reached on various non-tariff barriers.

Supplementary Protocol was opened in November 1979 for additional signatures and concessions. Most of the Tokyo Round Agreements entered into force on January 1, 1980, although a few did so on January 1, 1981. Tariff reductions were phased in over eight annual stages, beginning on January 1, 1980; U.S. staged reductions for a few more sensitive products’ tariffs were continued through January 1, 1991⁹⁸. However, according to Meier, “the talks failed to come to grips with fundamental reforms in agricultural trade and stopped short of providing a new agreement on “safeguards” (emergency import measures)”.⁹⁹

2.2.2.7 URUGUAY ROUND: 1986–94

This was the 8th round of the GATT negotiations, it was the most significant round of all the rounds that took place during the GATT negotiations as it marked the birth of the WTO. In September 1986, the Ministerial Declaration in the Punta del Este, Uruguay launched this 8th round of the multilateral trade negotiations known as the Uruguay round.¹⁰⁰ Although the major trading nations had sought to begin another round of negotiations after the Tokyo Round Agreements entered into force, these efforts failed in 1982 when many countries proved unwilling to make fresh concessions to liberalize world trade at a time of world recession. After further efforts and several years of delay, these negotiations began slowly in 1986.¹⁰¹

⁹⁷ <https://www.usitc.gov/publications/332/pub3621.pdf> accessed 26/07/16 at 09.45am.

⁹⁸ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 23/07/16 at 13.43pm.

⁹⁹ G. M. Meier The Tokyo Round of the Multilateral Trade Negotiations and the Developing Countries, Cornell International Law Journal Volume 13, 1980.

¹⁰⁰ CEA, Economic Report of the President, 1986, page.122.

¹⁰¹ Ibid CEA Economic report page 122.

It was reported that there were fears that the talks were going to extend the trading system into several new areas, such as trade in services and intellectual property, and moreover would lead to substantial reforms in sensitive sectors such as agriculture and textiles (the stronghold of some countries). Interestingly, due to the plan to review all the original GATT articles, which was considered as the biggest negotiating mandate on trade ever agreed, four years was given to complete it.¹⁰² While all previous rounds had failed to cover trade in agriculture in any substantive manner, the Uruguay Round Agreements included an Agreement on Agriculture that covered trade in agricultural products on the same basis as trade in industrial products. Though previous rounds applied only to trade in goods, the Uruguay Round Agreements applied to trade in goods, trade in services, and trade-related aspects of intellectual property rights, thus extending the multilateral trading rules to cover the technological progress and globalization of production that has been transforming economies since the Second World War.¹⁰³

2.3. EVALUATION OF THE GENERAL AGREEMENT ON TRADE TARIFFS

The GATT for 47 years played a significant role in the world trade negotiations. It is during this period when world trade was being boosted by 8% each year during the 1950s and 1960s faster than the world economic growth.¹⁰⁴ By increasing the world trade, the GATT promoted world peace which was a great impact for the world at large.¹⁰⁵ It should also be noted that, communication between the smaller countries was also improved as they were provided with incentives to learn English. This measure helped in reducing misunderstandings in respect of trading as all countries were using the same language.

However, it would be an intellectual myopia to overlook the failures of the GATT because in as much as it brought about good outcomes, there are some disadvantages

¹⁰² https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed on 22/07/16 at 16.59pm.

¹⁰³ <https://www.usitc.gov/publications/332/pub3621.pdf> accessed 26/07/16 at 09.45am.

¹⁰⁴ https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf accessed on 22/07/16 at 17.17pm.

¹⁰⁵ https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf accessed on 22/07/16 at 1730pm.

it posed to international trade. Low tariffs destroy domestic industries, thereby leading to high rates of unemployment in those sectors.¹⁰⁶ Governments subsidized many industries, especially the United States and European agriculture to make them more competitive on a global scale. In the early 1970s, the textile and clothing industries were exempted from GATT.¹⁰⁷ When the Nixon Administration took the U.S. dollar off the gold standard in 1973, it lowered the value of the dollar compared to other currencies, further lowering the international price of US exports.¹⁰⁸ This affected the international trade arena on the part of US as its international price of exports was lowered thus affecting the US whilst benefiting developing countries who depended on US exports.

Moreover, GATT like other free trade agreements required nations to change their domestic laws to gain the trade benefits, “for example, India allows companies to create generic versions of drugs without paying a license fee”.¹⁰⁹ This helped the people afford the medicine they needed. India removed this law to conform to international agreements, thus raising the price of drugs for its low-income population. Trade agreements, like GATT often destabilize traditional economies and countries, for example in the United States subsidization of agricultural exports can put local family farmers out of business. Due to failure of competing with low-cost grains, the farmers migrate to cities looking for work, often in factories set up by multi-national corporations. However, these factories can move to other countries with lower-cost labour, leaving the farmers unemployed. All of these analyses can be deducted from the outcomes of the GATT trade negotiation rounds.

The result has been a reduction from an average tariff rate of approximately 40 percent at the time GATT was created to around 4 percent in the early 1990s. Agricultural and textile products were notable exceptions to the goods covered in these earlier rounds.¹¹⁰ The emphasis changed and broadened in the Uruguay Round: non-tariff trade barriers

¹⁰⁶ <http://useconomy.about.com/od/Trade-Agreements/fl/GATT.htm> accessed 20/07/16 at 09.57am.

¹⁰⁷ <http://useconomy.about.com/od/Trade-Agreements/fl/GATT.htm> accessed 20/07/16 at 09.57am.

¹⁰⁸ Ibid Accessed 20/07/16 at 09.57am.

¹⁰⁹ <http://useconomy.about.com/od/Trade-Agreements/fl/GATT.htm> accessed 20/07/16 at 09.57am

¹¹⁰ M.D, Walilullah Wali; “Assignment on: General Agreement on Tariffs and Trade (GATT), South East University, 2013.

received more attention; agriculture and textiles were included; trade in services and intellectual property was considered for the first time; the powers and structure of the WTO.

2.4. WORLD TRADE ORGANISATION (WTO)

In January 1995, the WTO was established, but its trading system is half a century older. As it has been highlighted above the GATT evolved through several rounds of negotiations, but it was the last and largest GATT round, the Uruguay Round, which is regarded as the most important as it led to the creation of this particular institution. The WTO would differ from GATT which had mainly dealt with trade in goods, as the new institution and its agreements (part of the single undertaking), would cover “trade in services, and in traded inventions, creations and designs (intellectual property)”.¹¹¹

2.4.1 PRINCIPLES OF THE WTO

“The organization aimed at regulating trade between participating countries; providing a framework for negotiating and formalizing trade agreements”.¹¹² In essence it is also a dispute resolution process dealing with participants to WTO agreements making sure that that they honour their obligations.¹¹³ Moreover, in many instances these issues that the WTO focuses on stems from the previous trade negotiations, especially from the Uruguay Round (1986–1994).¹¹⁴

¹¹¹ Understanding the WTO PDF can be accessed on <http://www.wto.org/english/thewto-e/whatis-e/tif-e/understanding-e.pdf>

¹¹² R, Rena, 2012 Impact of WTO policies on developing countries: Issues and perspectives. Transnational Corporations Review (Canada) (3) 77

¹¹³ The Final Act signed in Marrakesh in 1994 is the cover note; everything else is attached to this. Annexed are the agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements. Schedules also form part of the Uruguay Round agreements.

¹¹⁴ Understanding the WTO PDF can be accessed on <http://www.wto.org/english/thewto-e/whatis-e/tif-e/understanding-e.pdf>.

The WTO institutes a framework for trade policies, and it does not explain or specify outcomes.¹¹⁵ This therefore, means that it is concerned with setting the rules of trade policy game not with the results of the game. There are 5 principles that are of particular importance in understanding both pre-1994 GATT and the WTO: non- discrimination, reciprocity, enforceable, commitments, and transparency and safety values.¹¹⁶ It should also be highlighted that the WTO intends to supervise and liberalise International trade.

2.4.2 PRINCIPLE OF NON DISCRIMINATION

Fundamentally speaking, the WTO is built on the foundation of non-discrimination which has two major components: the Most Favoured Nation rule and the National Treatment Principle.¹¹⁷ These principles are the cornerstone of the WTO and they are of great importance to this thesis as they show how the WTO aimed to liberalise trade through the implementation of these principles and the extent to which the SPS measures impact on market access for developing countries.

2.4.3 THE MOST FAVOURED NATION (MFN) PRINCIPLE AND THE NATIONAL TREATMENT PRINCIPLE

The MFN principle entails that a product made in one member country must be treated no less favourably than a very similar good that originates in any other country.¹¹⁸ It can be submitted that, these two principles also strengthened the trade liberalization intended by the WTO as goods are being treated without discrimination. Hoekman further adds that, “if best treatment is accorded to a trading partner supplying a specific

¹¹⁵ Understanding the WTO PDF can be accessed on <http://www.wto.org/english/thewto-e/whatis-e/tif-e/understanding-e.pdf>.

¹¹⁶ Reciprocity entails reflection on both a desire to limit the scope of free-riding that may arise because of the MFN rule and a desire to obtain better access to foreign markets. Transparency is when WTO members are required to publish their trade regulations, allowing review of administrative decisions affecting trade and to notify of any changes in trade policies to the WTO. Binding and enforceable commitments refers to the tariff commitments made by the WTO members in a multilateral trade negotiation and on accession are enumerated in a schedule of concession. Safety values require that in specific circumstances governments are able to restrict trade.

¹¹⁷ Article 1 and 24 of the GATT.

¹¹⁸ Hoekman, B.M., Mattoo, A. and English, P. eds., 2002. *Development, trade, and the WTO: a handbook* (Vol. 1). World Bank Publications p41.

product is a 5% tariff; this rate must be applied immediately and unconditionally to imports of 'this good originating in all WTO members'.¹¹⁹ MFN is also the best treatment offered to any country including countries that are not members of the GATT.

Furthermore, in terms of National Treatment principle, article III of the GATT entails that 'foreign goods once they have satisfied whatever boarder measures that are applied, they should be treated no less favourably in terms of internal taxation than like or directly competitive domestically produced goods'.¹²⁰ Therefore, it means that, goods that are of foreign origins circulating in the country must be accorded same treatment which is no less favourable than those that apply to similar goods of domestic origins in terms of taxes, charges and regulations.¹²¹

MFN rule also applies unconditionally although exceptions are made for the formation of free trade areas or customs unions and for preferential treatment of developing countries.¹²² It is also of great significance to note that, this rule provides a guarantee to smaller countries that they will not be exploited by larger countries through their markets when times are bad. To further concretise the issue of non-discrimination amongst countries, MFN rule reduces negotiating costs because once a negotiation has been concluded with a country, the results are extended to all.

This principle ensures that liberalisation commitments are not offset by tax imposition. All goods irrespective of being local or foreign are treated the same. Hence, thus providing a greater certainty that a conducive environment is created in which foreign suppliers can operate.

2.5 DIFFERENCE BETWEEN THE WTO AND THE GATT

The main difference between the two is that, the GATT was provisional and its contracting parties never ratified the General Agreement, and it contained no provisions for the creation of an organisation. However, on the other hand the WTO and its

¹¹⁹ Hoekman, B.M., Mattoo, A. (see note above 118 ; 43).

¹²⁰ Article 3 of the GATT.

¹²¹ Article 3 of the GATT.

¹²² B Hoekman 'Global Trade Governance' in T Weiss & R Wilkinson (eds) *International Organization and Global Governance* (2013) page 44.

agreements remain indefinitely unchanged. Apart from that, “as an international organisation, the WTO has a sound legal basis because all members have ratified the WTO Agreements, and the agreements themselves describe how the WTO is to function”.¹²³

Furthermore, another distinguishing feature is that the WTO has “members” whereas the GATT had “contracting parties,” underscoring the fact that officially the GATT was a legal text.¹²⁴ It is also of great importance to point out that the WTO dispute settlement system is more efficient and prompt than the old GATT system and its rulings cannot be blocked. The WTO has introduced a trade policy review mechanism that increases the transparency of members’ trade policies and practices.

2.6 LATEST DEVELOPMENTS

The Bali conference was the Ninth Ministerial Conference, held in Bali, Indonesia, from 3 to 7 December 2013, where ministers adopted the so-called “Bali Package”. In this agenda the major focus entailed a series of decisions aimed at streamlining trade, minimise delays at borders, permitting developing countries more options for providing food security, boosting least-developed countries’ trade and helping development more generally.¹²⁵ They also adopted a number of more routine decisions and accepted Yemen as a new member of the WTO. This therefore shows how the conference intended to improve trade facilitation which is one of the major principles of the WTO.

This conference was the first multilateral trade deal to be signed since the creation of the WTO. The three pillars of the Bali package included trade facilitation, some agricultural issue and selected development focussed provisions.¹²⁶ This conference was hailed as a success as it for the first time WTO truly delivered on its main

¹²³ <http://www.yourarticlelibrary.com/organisation/difference-between-wto-and-gatt/40416/> accessed on 27/07/16 at 10.53am

¹²⁴ <http://www.yourarticlelibrary.com/organisation/difference-between-wto-and-gatt/40416/> accessed on 27/07/16 at 10.53am.

¹²⁵ <http://www.tralac.org/discussion/article/5348-a-summary-of-the-bali-package.html> accessed on 27/07/16 at 12.58pm.

¹²⁶ WTO (2013a), Bali Ministerial Declaration, Ministerial Decision of 7 December 2013WT/MIN (13)/DEC, (Geneva: WTO).

objectives. Beyond trade facilitation, however, achievements under agriculture, development, and LDCs' issues are rather limited if not disappointing. The success of Bali also needs to be put into perspective. Clearly, it provided some much needed breathing space for the system but much more still needs to be done to effectively rehabilitate the WTO's centrality in global trade governance.¹²⁷ In other words, while success was a necessary condition for creating momentum and building trusts it was clearly not sufficient to fully restore the WTO's fortunes, let alone to unlock the Doha Round.

Furthermore, the Nairobi Ministerial conference was the WTO's 10th Ministerial Conference, which was held in Nairobi, Kenya, from 15 to 19 December 2015.¹²⁸ It culminated in the adoption of the "Nairobi Package", a series of six Ministerial Decisions on agriculture, cotton and issues related to least-developed countries (LDCs).¹²⁹ The Conference was chaired by Kenya's Cabinet Secretary for Foreign Affairs and International Trade, Amina Mohamed. This was also the WTO conference to be held in Africa.

The Nairobi Declaration preserves the positions of all WTO members and offers a basis for further engagement to advance the negotiations in future, taking into account all the views.¹³⁰ This conference also confirms the strong commitment by the WTO members to advance negotiations on the remaking Doha issues including all its three pillars namely domestic support, market access and export competition.¹³¹

2.7 CONCERNS OF THE DEVELOPING COUNTRIES WITH THE GATT AND THE WTO

The Uruguay Round, as mentioned above, did not only lead to the creation of the WTO but also resulted in a shift in the North-South politics. It has been highlighted in the past that developed and developing countries used to be in opposite groups, although there

¹²⁷ WTO (2013a), Bali Ministerial Declaration, Ministerial Decision of 7 December 2013WT/MIN (13)/DEC, (Geneva: WTO).

¹²⁸ <http://www.wto.org/english/thewto-e/minst-e/mc10-e/mc10-e.htm> accessed on 28/07/16 at 13.51pm.

¹²⁹ <http://www.wto.org/english/thewto-e/minst-e/mc10-e/mc10-e.htm> accessed on 28/07/16 at 13.51pm.

¹³⁰ Bridges' Negotiation Briefing, LCD'S WTO MC10 (Nairobi, 2015), Volume 19-number42.

¹³¹ <http://www.wto.org/english/thewto-e/minst-e/mc10-e/mc10-e.htm> accessed on 28/07/16 at 13.51pm.

were some exceptions.¹³² “In the run up to the Uruguay Round, the line between the two became less rigid, and during the round different alliances developed, depending on the issues (a trend which continues).”¹³³ Despite these concerns, one can argue that the GATT and the WTO have managed to bring together all countries in trade irrespective of their statuses.

Most of developing countries have benefited from the WTO agreements to such an extent that they utilised the available opportunities to make gains.¹³⁴ In addition, the Doha Agenda negotiations aims to improve the opportunities. In spite of enjoying the benefits from the trade agreements, developing countries face a number of problems in implementing the present agreements especially the SPS Agreement.¹³⁵ These problems also include being charged exceptionally high tariffs on selected products and increasingly high SPS measures in important markets that continue to obstruct their important exports. Typical examples of these include tariff peaks on textiles, clothing, and fish products.

Tariff escalation is also an important matter to be discussed as one of the major concerns of the developing countries in relation to the GATT and the WTO. It is “when an importing country protects its processing or manufacturing industry by setting lower duties on imports of raw materials and components, and higher duties on finished products”.¹³⁶ After the Uruguay Round, the tariff escalation policy still existed but since then much improvement has been noted as a number of developed countries came to party and eliminated escalation on selected products. Since, the advent of the Doha agenda, in respect this issue, special attention had been given to tariff peaks and escalation to ensure that a plan is put in place to substantially reduce it.

2.8. CONCLUSION

¹³² https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm accessed on 28/07/16 at 19:58pm.

¹³³ https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm accessed on 28/07/16 at 19:58pm.

¹³⁴ https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm accessed on 28/07/16 at 19:58pm.

¹³⁵ https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm accessed on 28/07/16 at 19:58pm.

¹³⁶ ¹³⁶ WTO (2013a), Bali Ministerial Declaration, Ministerial Decision of 7 December 2013WT/MIN (13)/DEC, (Geneva: WTO).

The WTO and GATT are historical developments in World Trading System and they played and still play a pivotal role in shaping the life of international trade. This analysis is of great significance to this thesis. The GATT through its rounds of negotiations helped in creating the WTO through the Uruguay round. However, during the trade negotiation rounds a number of tariffs were reduced and this was also advantageous to least developed countries as they managed to have market access of the developed countries. However, it has been noted that the developing countries have accepted liberalizing their trade but they are also demanding access to the markets of the rich nations and for such countries not to create trade barriers by using SPS measures. There is a need for a better framework for bringing reforms to trade and it will be of benefit to the world as a whole to create a suitable environment for free trade.

The importance of market access was also highlighted in the discussion of the concerns of the developing countries to the GATT and WTO. In as much as there has been a determined effort to improve the development needs of developing countries in the GATT/WTO Rounds there exists a new threat to the market access of developing countries. This threat is in the form of proliferation of NTBs or NTMs which can be potentially used as protectionist tools. The NTBs that are of particular importance to this thesis are the SPS measures which will be discussed in Chapter 3.

CHAPTER 3

A CRITICAL LEGAL ANALYSIS OF THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (SPS AGREEMENT) IN THE MULTI-LATERAL TRADING SYSTEM

3.1 INTRODUCTION

“The Agreement on the Application of Sanitary and Phytosanitary Measures, also known as the SPS Agreement, is an international treaty of the World Trade Organisation (WTO).¹³⁷ It was negotiated during the Uruguay round of the GATT and “entered into force with the establishment of the WTO at the beginning of 1995”.¹³⁸ SPS measures were typically negotiated so that they would be applied to both domestically produced and imported goods to protect human or animal life or health from food-borne risks; humans from animal and plant-carried diseases; plants and animals from pests or diseases; and, the territory of a country from the spread of a pest or diseases.¹³⁹ The SPS Agreement’s major purpose is to regulate the use of domestic SPS measures by developed countries such that they won’t use them for protectionist purposes. These SPS measures were only to be imposed where they were justified so as to protect the objectives of the General Agreement on Trade and Tariffs (GATT)/World Trade Organisation (WTO).¹⁴⁰ Furthermore, the Agreement balanced freedom of WTO members to set such legitimate measures and the objective of reducing trade disruptions.¹⁴¹

¹³⁷ The World Trade Organisation, Agreements Series; Sanitary and Phyto-Sanitary Measures, prepared by the WTO Secretariat page 9.

¹³⁸ E, A Evans “Understanding the WTO Sanitary and Phytosanitary Agreement, University of Florida, 2004, Page 1-2.

¹³⁹ Simonetta Zarrilli, WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries, 1999. Page 9.

¹⁴⁰ Article 3(2) of the SPS Agreement.

¹⁴¹ Lain Sandford: Hormonal Imbalance? Balancing Free Trade and SPS Measures after the decision in Hormones, 29 Victoria U. Wellington L. Rev, page 389 1999.

This chapter thus seeks to highlight the problems that have been suffered or are likely to be suffered by developing countries due to the current implementation of SPS measures by developed countries. It will further critically assess the SPS agreement, its history, purpose and its achievements and current failures. In order to achieve this there is need to firstly consider to what extent has the MTS addressed the development needs of developing countries in respect of SPS measures, in particular? Moreover there is need to critically analyse to what extent do SPS measures impede trade between developing and developed countries, in general? Lastly this chapter will look at whether the SPS Agreement has been effective in enhancing market access for developing countries.

3.2 HISTORY OF THE SPS AGREEMENT

In 1973 the Tokyo Round of GATT multilateral negotiation started in 1973 and it ended in 1979.¹⁴² Indeed it was the first major attempt by GATT to try and deal with non-tariff trade barriers and farm trade.¹⁴³ The negotiations were successful in continuing GATT's efforts to progressively reduce tariffs.¹⁴⁴ It also resulted in a series of agreements on non-tariff barriers and agreements on certain modifications and additions to the GATT system. According to Griffin, one of the very significant outcomes of the Tokyo Round was the Agreement on Technical Barriers to Trade (the 1979 TBT Agreement or "Standards Code").¹⁴⁵ Irrespective of the Agreement being established mainly to regulate sanitary and phytosanitary (SPS) measures, it also catered for technical requirements.¹⁴⁶ Hence, this resulted in food safety and animal and plant health measures, including pesticide residue limits, inspection requirements and labeling.¹⁴⁷

The SPS agreement entered into force with the establishment of the WTO on 1 January 1995. There was a consensus that the time for reform of international agricultural trade

¹⁴² R. Griffin: History of the Development of the SPS Agreement; Plant and Protection Division, page 5.

¹⁴³ Ibid R. Griffin page 5.

¹⁴⁴ Ibid R. Griffin page 5.

¹⁴⁵ Ibid R. Griffin page 8-9.

¹⁴⁶ Ibid R. Griffin page 8.

¹⁴⁷ Ibid R. Griffin page 8

had arrived when the Uruguay round started.¹⁴⁸ The Agreement's main purpose is to regulate the application of food safety and animal and plant health regulations. Zarrilli asserts "that the Punta del Este Declaration, which launched the Round in September 1986, called for increased disciplines in three areas in the agricultural sector: market access; direct and indirect subsidies; and sanitary and phyto-sanitary measures".¹⁴⁹ Hence the SPS Agreement came into existence after the unfolding of the above mentioned events.

Furthermore at the advent of the Uruguay Round, some negotiators suggested "broad harmonization efforts, based on the knowledge of international organizations".¹⁵⁰ According to Griffin, several negotiators proposed that, all standards be based on scientific evidence.¹⁵¹ They further conveyed that, onus to justify SPS measures should be placed upon the importing country.¹⁵² Apart from that this was supported by others, who concurred with the harmonization efforts based upon the work of international organizations. They further, asked for "the improvement of notification and consultation procedures and for dispute settlement as well as special allowances for developing countries".¹⁵³ On the other hand, developing countries strongly argued for the removal of SPS measures that, according to them, acted as non-tariff barriers to trade.¹⁵⁴ However, such countries, did support "international harmonization of SPS measures to prevent developed countries from imposing arbitrarily strict standards".¹⁵⁵ Hence this highlights one of the major objectives of the SPS measures.

¹⁴⁸ Stewart, T, P, Editor (1993) The GATT Uruguay Round; A Negotiating history, Kluwer Law and Taxation Publishers, Deventer, Boston.

¹⁴⁹ [GATT, BISD. 33th Supp. 19, 24 (1987)]The text of the Punta del Este Ministerial Declaration states, with respect to agriculture, that "Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by:

(iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements"

¹⁵⁰ Griffin; History of the Development of the SPS Agreement; Plant and Protection Division, page 8-9.

¹⁵¹ Ibid Griffin page 9.

¹⁵² Ibid Griffin page 11.

¹⁵³ Ibid Griffin page 11.

¹⁵⁴ Ibid Griffin page 11.

¹⁵⁵ Ibid Griffin page 11.

According to Griffin,

“the priorities in the area of the SPS were international harmonization on the basis of the standards developed by international organisations, development of an effective notification process for national regulations, setting up a system for the bilateral resolution of disputes, improvement of the dispute settlement process and provisions concerning the scientific basis for the working group on sanitary and phyto-sanitary Regulations which was formed in 1988, and produced a draft text in Nov 1990”.¹⁵⁶

Furthermore, on the 15th of April 1994 Ministers from most of the 125 governments that participated in the Uruguay Round met in Marrakesh, Morocco to sign the deal concluding the Uruguay Round.¹⁵⁷ “The final text of the Agreement on the Application of Sanitary and Phytosanitary Measures that was approved at the end of the Uruguay Round was largely based on the Dunkel text and fulfilled the general objectives set out for it in the Punta del Este Declaration”.¹⁵⁸ In terms of Article 14 of the SPS Agreement, least developed country Members were allowed to delay implementation for five years.¹⁵⁹ Hence the concern for least developed countries continued even after the GATT/WTO thus the inclusion of ‘special and differential’ treatment being accorded to them in relation to implementation of the SPS agreement.

Additionally, the national food safety, animal and plant health measures which affect trade were subject to GATT rules since 1948.¹⁶⁰ The GATT member government required clear rules in relation to the SPS measures as they were observed to be restrictions to trade. Indeed, the Uruguay Round’s major aim to minimise other possible barriers to trade increased fears that SPS measures would be used as a protectionist tool.¹⁶¹ However, the SPS Agreement was intended to close this potential loophole, as it

¹⁵⁶ Griffin (see note above 150; 11).

¹⁵⁷ https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm accessed on 11/08/16 at 19.25pm.

¹⁵⁸ Griffin. The SPS Agreement entered into force for most Members of the WTO on January 1, 1995 page 10-15.

¹⁵⁹ The SPS Agreement art 14.

¹⁶⁰ https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm accessed on 11/08/16 at 19.25pm

¹⁶¹ Griffin (see note 159; 15).

sets more detailed rights and obligations for food safety and animal and plant health measures which affect trade.¹⁶² In terms of implementing the SPS measures, countries are allowed to impose only those requirements needed to protect health which are based on scientific justification.¹⁶³

SPS measures must be applied only to the extent necessary to protect human, animal or plant life or health hence, they should not be applied arbitrarily. Article 3.2 of the Agreement purports that these measures should not unjustifiably discriminate between countries where similar conditions prevail.¹⁶⁴ However, in terms of Article 3 (3) of the SPS Agreement, “members may use measures which result in higher standards if there is scientific justification”.¹⁶⁵ They can further, impose higher standards based on appropriate assessment of risks as long as the approach is consistent and not arbitrary.¹⁶⁶ Both developing and developed countries are allowed to adopt different standards and different methods of inspecting products.¹⁶⁷

3.3 THE UNDERLYING PRINCIPLES BEHIND THE FORMATION OF THE SPS AGREEMENT

The rationale behind the formation of the SPS agreement is to enable protection of human or animal life or health. According to E. A Evans the main purpose of this agreement is to promote free trade.¹⁶⁸ In principle mutual trade between countries enhances their national income by utilising their limited resources, thus trade facilitation. However when such trade encounters negative externalities or hidden costs (i.e. from importing harmful pests and diseases), acceptance of the general premise becomes blurred.¹⁶⁹ Irrespective of that assumption, the SPS Agreement was thus promulgated to regulate these externalities so that trade facilitation would be achieved.

¹⁶² Griffin (see note 159; 15).

¹⁶³ Dr Lukasz Gruszczynski: The Standard Review in International SPS Trade Disputes, Some New Developments page 1.

¹⁶⁴ Article 3.1 of the SPS Agreement.

¹⁶⁵ The SPS Agreement article 3.3

¹⁶⁶ <http://www.wto.org/english/tratop-e/sps-e/spsund-e.htm> accessed on 04/08/16 at 14.16pm

¹⁶⁷ <http://www.wto.org/english/tratop-e/sps-e/spsund-e.htm> accessed on 04/08/16 at 14.16pm

¹⁶⁸ E. A Evans “Understanding the WTO Sanitary and Phytosanitary Agreement” University of Florida page 5..

¹⁶⁹ Ibid E. A Evans page 5.

Furthermore the negotiation of the SPS Agreement in the “Uruguay Round in 1986-1994 marked a turning point in the development of multilateral trade rules and gave prominence to the issues related to agricultural trade and the risk of importing invasive pests and diseases and food borne illnesses”.¹⁷⁰ The other reason that encouraged the negotiations of this agreement was “deeper integration of agriculture into the international trading system”. James and Anderson purported that, the intent of the Agreement was to ensure that when SPS measures were applied, they were used only to the extent necessary to ensure food safety and animal and plant health, and not to unduly restrict market access for other countries.¹⁷¹ It is therefore fitting to critically argue that the main reason for the promulgation of the SPS Agreement is to protect human, plant and animal health and life, with also the intentions to promote free trade and to regulate prominence issue related to agricultural trade.

Moreover the agreement is based on five general principles which include harmonization which refers to the use of measures that assimilate to international standards guidelines and recommendations of international agencies.¹⁷² Equivalence is also one of these principles as it entails “mutual recognition of different but equivalent measures to achieve international standards”.¹⁷³ Apart from that, non-discrimination is also another principle forming the basis of the SPS Agreement as is treatment of imports equally like domestic produce.¹⁷⁴ Transparency also purports that trading partners should notify each other of the changes in their SPS measures especially when the measures are different from international standards.¹⁷⁵ Lastly regionalisation is also one of the four principles as it permits continued exports from clean areas affected countries.¹⁷⁶

3.4 ANALYSIS OF PARTICULAR ARTICLES IN THE SPS AGREEMENT

¹⁷⁰ E A Evans; “Understanding the WTO Sanitary and Phytosanitary Agreement” University of Florida page 4.

¹⁷¹James and Anderson “On the need for More Economics Assessment of Quarantine Policies”, Australian Journal of Agricultural and Resource Economics 42 (4): 425-444.

¹⁷²See Article 3 (1) - (5) of the SPS Agreement.

¹⁷³ Article 4 (1) – (2) of the SPS Agreement.

¹⁷⁴ https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm accessed on 11/08/16 at 21.25pm.

¹⁷⁵ See Article 7 of the SPS Agreement.

¹⁷⁶ https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (see note 174).

The preamble of this Agreement sets out the main aims of the agreement and what it entails on doing.

ARTICLE 1 AND ARTICLE 2

This article states out the general provisions of the agreement as where it applies and when it would be applicable.¹⁷⁷ It basically deals with the rights and obligations of the members to the SPS Agreement. Article 2.1, entails that members are allowed to use the SPS measures as long as it is not inconsistent with agreement, hence providing members with the right to use the SPS Agreement.¹⁷⁸ Article 2.2 only allow members to use the measures to the extent where it is necessary to protect human, plant or animal life and must be scientifically based except in terms of article 5.7. However, in the *Japan Apples* case, Japan allegedly imposed restrictions on its imports of apples from United States as they said the restrictions were necessary to protect against introduction of fire blight.¹⁷⁹ The panel found that Japan's phyto-sanitary measure imposed on imports of apples from United States was contrary to art 2.2 of the SPS Agreement and was not justified under art 5.7 of the agreement and that Japan's 1999 Pest Risk Assessment did not meet the requirements of art 5.1 of the SPS Agreement.¹⁸⁰

Furthermore, it can be submitted that, article 2 allows member countries to use the SPS measures to the extent where it is necessary however, member countries tend to use measures as protectionist tools to protect their domestic producers from economic competition.¹⁸¹ Basically, article 2's main goal is to guide against the misuse of the measures by member countries i.e. using it as a protectionist tool against developing countries but in reality it is doing the opposite.¹⁸² "Article 2.3 places obligations on members that their use of the SPS measures should not arbitrarily and unjustifiably discriminate between members where similar conditions prevail on their territory and

¹⁷⁷ Article 1 of the SPS Agreement.

¹⁷⁸ See Article 2(1) of the SPS Agreement.

¹⁷⁹ *Japan Apple's case* (article 21.5 of the us) panel report at para 8.45. can be accessed at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm#fntext38

¹⁸⁰ Ibid *Japan Apple's case*.

¹⁸¹ Article 2 of the SPS Agreement.

¹⁸² Ibid Article 2.

that of another member states".¹⁸³ Therefore, application of these measures should be kept in line with international trade thus avoiding trade restriction.

ARTICLE 3 HARMONIZATION

The main key goal of the SPS Agreement is to encourage the harmonisation¹⁸⁴ of SPS measures between Members. To this end the Agreement requires Members to base their SPS measures on "international standards, guidelines or recommendations, where they exist" unless they wish to impose a "higher level of sanitary or phytosanitary protection".¹⁸⁵ "International standards, guidelines and recommendations are defined as

"the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food safety as well as those relating to animal and plant pests and diseases developed by other relevant international organisations".¹⁸⁶

Apart from that, article 3(5) provides for an "SPS committee"¹⁸⁷ to develop procedure to monitor the process of international.

ARTICLE 4 EQUIVALENCE

This article basically states that "SPS measures of other members must be treated as equivalent even if they different".¹⁸⁸ The SPS Agreement reduces the compliance cost created by the measures irrespective of whether no harmonisation - either because there are no international standards, or where a Member has chosen its own higher

¹⁸³ Article 2(3) of the SPS Agreement.

¹⁸⁴ SPS Agreement, Annex **A** - Definition 2 defines "[h]armonisation" as "[t]he establishment, recognition and application of common sanitary and phytosanitary measures **by** different Members".

¹⁸⁵ SPS Agreement, art 3.

¹⁸⁶ Simonetta Zarrilli: WTO Agreement on Sanitary and Phyto-sanitary measures, Issues for Developing Countries; UNCTAD (1999)page 16.

¹⁸⁷ The SPS committee consists of 150 WTO members, observer governments (observers in the SPS includes Codex, IPPC and OIE. Other observers in the SPS committee include FAO, WHO, UNCTAD, World Bank, IMF, ITC and ISO. and intergovernmental organisations. Its major aim is to implement the SPS Agreement, review compliance, potential trade impacts and also to regulate cooperation with technical organisations.

¹⁸⁸ SPS Agreement art 4.

"appropriate level of protection".¹⁸⁹ Accordingly, a Member is obliged to accept the SPS measures of other Members as equivalent, if such measures achieve their appropriate level of SPS protection.¹⁹⁰

ARTICLE 5 ASSESSMENT OF RISK AND DETERMINATION OF THE APPROPRIATE LEVEL OF SANITARY OR PHYTOSANITARY PROTECTION

This article emphasizes more on the "issues of risk assessment as it purports that countries must establish SPS measures on the basis of an appropriate assessment of the actual risks involved".¹⁹¹ Apart from that, members should also upon request, disclose what factors they took into consideration, assessment procedures they used and the level of risk they determined to be acceptable.¹⁹² In order to do this scientific evidence, relevant inspection, sampling and testing methods are required.¹⁹³ Article 5.3 requires "Members to take into account relevant economic factors when determining measures to achieve their appropriate level of protection".¹⁹⁴ Article 5.4 encourages Members to:

"take into account the objective of minimising negative trade effects" when determining the appropriate level of protection.

Additionally, Article 5.5 purports that the application of SPS measures must be at an appropriate level of protection, by requiring Members to avoid "arbitrary or unjustified distinctions as these would create discrimination or a disguised restriction on international trade".¹⁹⁵

Finally, Article 5.6 requires Members to "ensure that [SPS] measures are not more trade restrictive than required to achieve the appropriate level of protection". It is important to note that the right of Members to impose SPS measures is qualified with words such as "appropriate", "relevant economic factors", "take into account the objective", "arbitrary or

¹⁸⁹ Ibid article 4.

¹⁹⁰ The SPS Agreement article 4.

¹⁹¹ SPS Agreement art 5.

¹⁹² Wto-sps-agreement-booklet.pdf.

¹⁹³ Wto-sps-agreement-booklet.pdf.

¹⁹⁴ SPS Agreement article 5.3.

¹⁹⁵ SPS Agreement article 5.5.

unjustified" and "discrimination or disguised restriction". These above stated words shows that the SPS Agreement represents a document agreed between trade negotiators, each with different requirements and expectations in terms of desired outcomes.¹⁹⁶

Furthermore, the *EC Hormones* case dealt with the requirements of article 5. In this case "the United States and the European Community (EC) were involved in a dispute over the importation of beef from the United States into the EC".¹⁹⁷ Apparently, the EU, "in 1988, banned the use of growth-promoting hormones in beef production", by subsequently (in 1989) implementing an import ban on such hormone treated meat.¹⁹⁸ The United States and Canada argued that "the use of hormones for growth promotion purposes in beef cattle was safe and posed no threat to human health".¹⁹⁹ As such, these parties contended that the EU's policy was not scientifically proved and was in actually a protectionist tool by the EU to protect its beef producers from competition.²⁰⁰ Likewise, the EU countered this assertion by stating that "beef hormones might threaten human health and stated that science supported its policy".²⁰¹

Furthermore, on August 18, 1997, "the WTO dispute settlement Panels, that were formed to solve the issues, released their reports".²⁰² In arguing before the panels, here the United States and Canada argued submitted that the EU's prohibition on the importation of hormone treated beef was a violation of its obligations under Article 3.1 of the SPS Agreement because the country failed to base its measure on international standards, as required by the provision.²⁰³ In critically analysing the implementation of the SPS measures it can be submitted that, the EU in this case used them as a protectionist tool.²⁰⁴

¹⁹⁶ Dr Lukasz Gruszczynski: The Standard Review in International SPS Trade Disputes, Some New Developments page 16-17.

¹⁹⁷ EC measures concerning meat and meat products(hormones) original complaint by the United States, WT/DS48/ARB 12 July, DSR 1999:III, p.1105

¹⁹⁸ Ibid EC Hormone case.

¹⁹⁹ EC measures concerning meat and meat products(hormones) original complaint by the United States, WT/DS48/ARB 12 July, DSR 1999:III, p.1105.

²⁰⁰ Ibid EC Hormones case.

²⁰¹ Ibid EC Hormones case.

²⁰² https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm accessed on 11/08/16 at 22.15pm.

²⁰³ EC Hormones case (see note above 195).

²⁰⁴ Ibid EC Hormone case

The Codex maintains standards for five of the six hormones under dispute. The Codex states that there are five hormones used in veterinary practices for purposes of growth promotion in beef cattle. They are not a health hazard to humans if they are used where necessary and according to the correct veterinary practices.²⁰⁵ The EU's measures deviated from the international standards of the Codex thus they were not in conformity with Article 3.1.²⁰⁶ Article 3.3 makes it clear that a WTO member is not required to base its SPS measures on international standards. As such Article 3.3 purports that members to this agreement may maintain higher standards than the international norm, only if such measures are scientifically justified. This is further allowed if also they operate "as a consequence of the level of sanitary or phyto-sanitary protection and members determines appropriateness in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5."²⁰⁷ Furthermore, article 5 states that "members base their measures on risk assessments" and this also supported the EU's position.²⁰⁸ However, the panel deemed that the EU failed to demonstrate that its position on risk assessments as required in Article 3.3. The panels therefore submitted that "the EU's policy on beef hormones deviated from its obligations under article 3.3 of SPS Agreement".²⁰⁹

Subsequently, the EU appealed the findings of the respective panels, and the WTO Appellate Body released its report on January 16, 1998".²¹⁰ Although the Appellate Body's decision dismissed a number of arguments put forward by the panels, it considered the panels' conclusions that the EU's beef hormone policy violated article 3.3 as it was not based on a risk assessment.²¹¹ The Body submitted in their report that, voluntary standards of international organizations such as the Codex has no hard rule standards for WTO members meaning members can choose to deviate from them. It should also be noted that this case highlighted on how member states sometimes fail

²⁰⁵ Daniel A, "Summer, Frank. H, Buck Jr; Exotic Pests and Diseases; Biology AND Economics for Biosecurity", 2007 page 45.

²⁰⁶ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm accessed on 11/08/16 at 22.15pm.

²⁰⁷ SPS Agreement, art 5.

²⁰⁸ Ibid art 5.

²⁰⁹ Danie A Summer, "Summer, Frank. H, Buck Jr; Exotic Pests and Diseases; Biology AND Economics for Biosecurity", 2007 page 46.

²¹⁰ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm accessed on 11/08/16 at 23.25pm.

²¹¹ EC measures concerning meat and meat products(hormones) original complaint by the United States, WT/DS48/ARB 12 July, DSR 1999:III, p.1105.

to meet the risk assessment criteria stipulated in article 5 of the agreement. The SPS measures are obstacles to international trade as members to this agreement use them to protect themselves against competition in trade and this puts other international trading countries' market access at stake.

ARTICLE 7: TRANSPARENCY

“Members must notify of changes in SPS measures and provide information on these SPS measures in accordance with Annexure B”.²¹² It should be noted that the members of the SPS Agreement have two obligations which are to provide information on SPS measures and to notify changes in the implementation of the SPS measures.²¹³ Apart from that in the Japan Apples case,

“the Panel relied on the standard set in the Japan Agricultural Products II held that, the measure at issue in the dispute was also a phyto-sanitary regulation within the meaning of annexure B (I) and as such was to have been published promptly in such a manner to enable interested members to become acquainted with them”.²¹⁴

Apart from that, it is of great significance to note that, the most important factor in this transparency²¹⁵ issue is to note the changes that affects the conditions of market access for the product concerned. It would also be relevant to “consider whether the change has resulted in any increase in production, packaging and sales costs, such as more onerous treatment requirements or more time consuming administrative formalities”.²¹⁶

Annex B (1) publications of regulations, as every Member is obliged to publish all the SPS regulations that they would have adopted so as to enable all Members who are interested to be able to familiarise with them. In terms of publication, for a measure to

²¹² The SPS Agreement art 7.

²¹³ Ibid art 7.

²¹⁴ [Panel Report, Japan — Apples](#), paras. 8.23 and 8.24.

²¹⁵ The word transparency is used in the context of the WTO to signify one of the fundamental principles of its agreements: the aim is to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members. In implementing this concept, Members use notifications

²¹⁶ [Panel Report, Japan — Apples](#), paras. 8.313–8.314

be able to adopted for publication three conditions should apply which entails, firstly that,

“the measure must have been adopted”; (2) the measure is a ‘phytosanitary regulation’, namely a phytosanitary measure such as a law, decree or ordinance, which is (3) applicable generally”.²¹⁷

Annex B (2) entails the issue of reasonable interval and at the Doha Ministerial Conference Members agreed that, it should be understood as a period of not less than six months. Moreover, annex B (3) also explains the enquiry points and in the Panel in *Australia — Salmon case*, the panel found that “there was no obligation under the SPS Agreement for a Member to positively identify its chosen appropriate level of protection”.²¹⁸ In the context of this finding, the Panel held that paragraph 3 of Annex B did not impose a “substantive obligation on Members to identify or quantify their appropriate level of protection”, but rather merely a “mainly procedural obligation to provide ‘answers to all reasonable questions from all interested Members’”.²¹⁹ However, this decision was reversed by the panel as it held that, there was such an obligation.

ARTICLE 9: TECHNICAL ASSISTANCE

This article purports that Members will have to provide technical assistance²²⁰ to other Members especially developing country members in any way.²²¹ This assistance will help the countries to adjust and to comply with SPS measures which are necessary to achieve the appropriate level of phytosanitary protection in their export markets. In doing this the Agreement balances the rights between the developing and developed countries as it gives leverage to developing countries by facilitating technical assistance to them thus boosting international trade.

²¹⁷ Panel Report Japan-Apples paras 8.23.

²¹⁸ Panel Report, *Australia — Salmon*, para. 7.15

²¹⁹ Ibid Panel Report, *Australia — Salmon*, para. 7.15.

²²⁰ Technical assistance is a form of aid given to less-developed countries by international organizations such as the United Nations (UN) and its agencies, individual governments, foundations, and philanthropic institutions. Its object is to provide those countries with the expertise needed to promote development.

²²¹ The SPS Agreement art 8.

ARTICLE 10: SPECIAL AND DIFFERENTIAL TREATMENT

This article purports that, members should consider the special needs of developing and in particular least developed country members when preparing the application of the SPS measures.²²² Furthermore, in reviewing the SPS Agreement, “the committee noted that it had no information on the extent to which this article had been implemented and encouraged members to further its practical implementation”.²²³ In terms of article 10.2 of the agreement it is stipulated that, “where the appropriate level of protection allows it, Members should use longer time frames when applying the new SPS measures where products of interest to developing country members are concerned”.²²⁴ Indeed this is done so that, developing country members will be able to maintain opportunities for their exports. In reviewing the SPS Agreement, the committee lacked information on the implementation of this article and thus submitted that it should be applied where it is possible.²²⁵ This generates confusion as there is no certainty as to when this provision can be implemented and on what basis.

Apart from that, in the Doha Ministerial Conference of 2011 it was submitted that where the appropriate level of protection allows scope for the phased introduction of the SPS measures, longer time frame for compliance as stated in article 10.2 shall normally mean at least 6 months.²²⁶ Moreover, where the phased introduction of a new measure, fails but however, a member identifies specific problems. These problems may include (restricting market access for other members), members can enter into consultations after requesting, to try to find a mutually satisfactory solution.²²⁷ The committee can grant specified time-limited exceptions partially or wholly from obligations under the SPS Agreement to developing countries, considering their financial, trade and

²²² The SPS Agreement art 10.

²²³ The SPS Agreement art 10.1.

²²⁴ SPS Agreement art 10.1

²²⁵ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/spis_03_e.htm accessed on 29/08/16 at 09.26am.

²²⁶ SPS Agreement art 10.2.

²²⁷ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/spis_03_e.htm accessed on 29/08/16 at 09.26am

development needs.²²⁸ This is of great significance to countries focusing on a two year programme to upgrade its veterinary inspection facilities, or their chemical residue testing laboratories.²²⁹

Furthermore, article 10.4 purports that, “members should encourage and facilitate the active participation of developing countries in the three standard-setting organizations, often called the three sister organizations: Codex, Office International des Epizooties (OIE) and International Plant Protection Convention (IPPC)”.²³⁰ Indeed, most of the developing countries attend the meetings of at least one of these committee organizations, or comment on standards that are being developed.²³¹ However, it has been stressed out that some of these international standards are often not appropriate for developing countries and their special needs. This is due to that some developed countries fail to implement these measures because of financial constraints and also time limits.²³²

Upon realising the above, the Director-General of the WTO was tasked to regulate the standard-setting organizations as well as international financial institutions.²³³ This was done so as to identify ways to boost active participation of developing countries in international standard-setting activities.²³⁴ The three sister organizations have made efforts to facilitate developing country participation. “The Food and Agriculture Organisation (FAO) has established a Food Safety and Quality Facility to help fund capacity building in least-developed countries and their participation in relevant standard-setting activities”.²³⁵ In addition to that the WTO Secretariat and the secretariats of the three sister organizations work together closely to facilitate

²²⁸ SPS Agreement art 10.3.

²²⁹ [WT/MIN\(01\)/17](#), para. 3.1.

²³⁰ SPS Agreement art 10.4.

²³¹ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm accessed on 29/08/16 at 09.26am.

²³² https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm accessed on 29/08/16 at 09.26am.

²³³ Khor M, Implications of some WTO rules on the realization of the MGDs Third World Network August 2005. Accessed on www.twn.my/title2/par/mk004.doc.

²³⁴ Ibid Khor M.

²³⁵ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm accessed on 29/08/16 at 11.36am.

developing country participation.²³⁶ This is further seen, by the WTO-sponsored workshops on the SPS Agreement which are mostly organized in relation to Codex Committee meetings, and funds may be sourced by both the WTO and FAO to facilitate the participation of some developing country officials in both events.²³⁷ At the Doha Ministerial Conference, Members took note of the actions followed by the Director-General to aid participation of developing countries in standard setting, and encouraged him to continue his cooperative efforts.

ARTICLE 11: CONSULTATIONS AND DISPUTE SETTLEMENTS

This article states that whenever there are disputes and settlements arising as a result of the agreement, the Dispute settlement understanding shall apply equally as it was applied and elaborated in the provisions of the articles XXII and XXIII of the GATT 1994. Article 11.2 of the Agreement also stipulates that, “for matters that concerns scientific or technical issues, the panel should seek advice from the experts chosen by the panel in consultation with the parties to the dispute”. The appellate body in *US/Canada* continued suspension using authority from article 10.2.

Furthermore, in *Australia — Salmon (Article 21.5 — Canada)*, the Panel took into consideration that “the assistance of scientific experts in the original dispute was of utmost relevance, noting how valuable such expert advice had been during its previous examination” of the matter before it.²³⁸ Moreover, the panel sought to seek further scientific and technical advice for the 21.5 proceedings because the findings obtained included several new risk analysis reports.²³⁹ In the *Japan Apples* case, “the Panel having noted that the proceedings involved²⁴⁰ scientific or technical issues, consulted with parties regarding the need for expert advice. Neither party objected to the Panel’s intention to seek expert advice.”²⁴¹ Hence it is therefore fitting to submit that article 11 of the SPS Agreement allows the panel to consult with the DSU in dispute settlement

²³⁶ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm accessed on 29/08/16 at 11.36am.

²³⁷ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm accessed on 29/08/16 at 11.36am.

²³⁸ Appellate Body Reports, *US/Canada- continued suspension*, paras, 474, 475 and 477.

²³⁹ Panel Report, *Australia — Salmon (Article 21.5 — Canada)*, para. 6.1.

²⁴⁰ Panel Report, *Japan — Apples*, para. 6.2.

²⁴¹ Panel Report, *Japan- Apples*, para, 62.

matters, apart from that, if the matter concerns scientific and technical issues then there is need to consult with the experts for advice in relation to the matter at hand.

Moreover, this article also states that, “the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations”.²⁴² However, “in the *EC — Hormones*, the Appellate Body agreed with the Panel’s decision to consider the individual experts reports other than to hear from an expert review group”.²⁴³ It is therefore fitting to submit that, “due to these circumstances panels have resorted to consult experts on an individual basis, rather than create an expert group”.²⁴⁴

Article 11.2 also allows the panels to seek advice from any international organisations²⁴⁵ of their choice. This is evidenced by the *EC — Approval and Marketing of Biotech Products* case which held that,

“Although the complaining parties disagreed with the Panel’s decision to consult with international organizations, the Panel found it relevant to seek assistance from certain international organizations²⁴⁶ in order to clarify certain aspects of the parties’ submissions. The Panel considered that the concepts at issue “raised scientific and/or technical issues” in respect of which it might benefit from experts’ advice.”²⁴⁷

Article 11.3 also states that, rights of the members to this agreement will not be impaired

²⁴² SPS Agreement art 11.2.

²⁴³ Panel Reports, *EC — Hormones (Canada)*, para. 8.7; and *EC — Hormones (US)*, para. 8.7. The Panel ruled:

“[W]e decided to request the opinion of experts on certain scientific and other technical matters raised by the parties to this dispute. For our examination of this dispute, we considered it more useful to leave open the possibility of receiving a range of opinions from individual experts on specific scientific and technical questions, rather than to establish an expert review group which would have been required to reach a consensus view on the basis of general terms of reference given to it by the Panel. We considered that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU limits our right to seek information from *individual* experts as provided for in Article 11.2, first sentence, of the SPS Agreement and Articles 13.1 and 13.2, first sentence, of the DSU. The procedures we adopted in this respect and the views expressed by the experts are set out in paragraphs 6.1 and following”.

²⁴⁴ EC measures concerning meat and meat products(hormones) original complaint by the United States, WT/DS48/ARB 12 July, DSR 1999:III, p1105.

²⁴⁵ These International organisations includes WIPO, International Monetary Fund (IMF), International Court Of Justice (ICJ).

²⁴⁶ These International organisations includes WIPO, International Monetary Fund (IMF), International Court Of Justice (ICJ).

²⁴⁷ Panel Report, *EC — Approval and Marketing of Biotech Products*, paras. 7.16–7.18.

under any international organisations or any international agreements.

ARTICLE 12: ADMINISTRATION

This article complements one of the major principles of the WTO as it provides for a committee to be established, to carry out functions of the agreement and promote harmonization. Article 12.2 states that, the Committee shall facilitate consultations and negotiations among members in all matters concerning the SPS measures. Based on the proposals from Members, in 2009 the Secretariat prepared a “Proposed Recommendation Procedure (to Encourage and Facilitate) (on) Ad Hoc Consultations (or Negotiations) Among Members under the SPS Agreement (article 12.2)”.²⁴⁸ The Secretariat has been revised on several occasions, most recently on 12 September 2009.²⁴⁹ “Article 12.2, along with articles 12.1 and 12.3, is highlighted in the second sentence of article 5.5”.²⁵⁰ In this sentence, Members are asked to work with the SPS Committee to develop guidelines to aid the implementation of the provision.²⁵¹ Taking this article into consideration, the SPS Committee has adopted guidelines to facilitate the practical implementation of article 5.5.²⁵²

Apart from that, the SPS committee implemented provisional procedures to guard against the use of international standards, and also agreed to review the operation of the provisional monitoring.²⁵³ “They also agreed on using the 18 month’s procedure after its implementation, with a view to decide at that time whether to continue with the same procedure, amend it or develop another one”.²⁵⁴ After a series of negotiations to monitor the use of international standards, “at its meeting of 27–28 October 2004, the SPS Committee adopted modifications to the provisional procedure to monitor the use

²⁴⁸ The SPS Agreement art 12.2 accessed on [G/SPS/W/243](#).

²⁴⁹ [G/SPS/W/243/Rev.1](#); [G/SPS/W/243/Rev.2](#); [G/SPS/W/243/Rev.3](#) accessed on 01/09/16 at 16.55pm.

²⁵⁰ SPS Agreement art 5.5.

²⁵¹ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#fntext538 accessed on 06/09/16 at 09.57am.

²⁵² These includes, that a Member should, when determining an appropriate level of protection, either as an overall policy objective or for a specific situation, consider certain factors. Apart from that a Member should establish clear and effective communication and information flows within and between the authorities responsible for the determination of appropriate levels of protection.

²⁵³ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#fntext538 accessed on 06/09/16 at 09.57am.

²⁵⁴ [G/SPS/R/9/Rev.1](#), para. 21. The text of the procedures can be found in [G/SPS/11/Rev.1](#).

of international standards”.²⁵⁵ On “5 July 2006, the Committee adopted a decision to modify and extend the provisional procedure to monitor the process of international harmonization”.²⁵⁶ The committee shall remain in close contact with all necessary international organizations responsible for setting standards.

Furthermore, article 12.4 states that, the Committee is responsible for developing procedures to monitor the process of international harmonization and the use of international standards.²⁵⁷ Therefore, it should set guidelines of these areas in conjunction with international organizations that have a major trade impact, for example when such standards and guidelines may apply and further on what conditions must be satisfied for imported products. Furthermore, it should be noted that, where members have not adhered to such standards they must give reasons for not complying with them. Members are obliged to provide an explanation as to why after revising their position in the use of certain standards or guidelines as a condition for import to the Secretariat and as well as the relevant international organisations. This is very significant in the sense that it prevents members from using SPS measures as a protectionist tool in international trade as every change to the standard applications needs to be explained. Article 12.6 also compliments 12.4 “as the committee will have to invite relevant international bodies or their subsidiary bodies to examine the specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given by the members as per request in 12.4”.²⁵⁸ Furthermore, “pursuant to the provisions of on the Application of Sanitary and Phytosanitary Measures, the Committee on Sanitary and Phytosanitary Measures is instructed to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years”.²⁵⁹ Hence there is need to review the measures and on how they are working every now and again as per the times stipulated in the Agreement, thus accountability on the part of members.

²⁵⁵ G/SPS/36 accessed on https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#fntext538

²⁵⁶ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm accessed on 29/08/16 at 11.36am.

²⁵⁷ These include, international standards, guidelines and recommendations relating to sanitary measures which they apply as conditions for import

²⁵⁸ SPS Agreement article 12.6.

²⁵⁹ SPS Agreement art 12.7.

ARTICLE 13: IMPLEMENTATION

Members are responsible for the implementation of this agreement, and they are also obliged to formulate and implement positive measures that cement the purpose of this Agreement. As such, it is stated in the Agreement that:

“Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement”.²⁶⁰

In the *Australia Salmon case* “the Panel, read together article 1.1 and 13 of the SPS Agreement and found that, a measure taken by a regional government with Australia’s territory, was a measure taken by an other than central government body”.²⁶¹ Hence, “it would fall under the responsibility of Australia as a WTO Member when it comes to observance of SPS obligations”.²⁶² The Panel held that, it was entitled to consider whether the measures followed by the regional government were in compliance with the SPS Agreement.²⁶³ Therefore, “they considered that sanitary measures taken by the Government of Tasmania, being an ‘other than central government’ body as recognized by Australia, were subject to the SPS Agreement and fell under the responsibility of Australia as WTO Members in relation to their observance of SPS obligation”.²⁶⁴

ARTICLE 14: FINAL PROVISIONS

Despite the fact that the Agreement entered into force in 1995, “least-developed countries were permitted to delay application of the Agreement to their import requirements until 1 January 2000”.²⁶⁵ Developing countries were also permitted to delay the application of the Agreement, but only with respect to existing sanitary or

²⁶⁰ SPS Agreement art 13.

²⁶¹ Panel Report, *Australia — Salmon (21.5 — Canada)*, paras. 7.12–7.13.

²⁶² Panel Report, *Australia — Salmon (21.5 — Canada)*, paras. 7.12–7.13.

²⁶³ Panel Report, *Australia — Salmon (21.5 — Canada)*, paras. 7.12–7.13.

²⁶⁴ Panel Report, *Australia — Salmon (Article 21.5 — Canada)*, para. 7.13.

²⁶⁵ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/spis_03_e.htm#fntext553 accessed on 02/09/16 at 13.52pm.

phyto-sanitary measures on imported products in cases where they lacked technical expertise, technical infrastructure or resources, other than its transparency provisions, until 1 January 1997.²⁶⁶ Hence these developing countries will delay the application of the SPS when there is lack of technical infrastructure or shortage of resources. This right to defer application of the provisions of the SPS Agreement concerns, however, both SPS measures existing before the entry into force of the WTO Agreement and SPS measures enacted since.

Annex: Definitions

This annexure deals with the detailed definition of the meaning of the SPS measures and what they entail. “The Appellate Body in *Australia — Apples* case considered that a fundamental element of the definition of “SPS measure” set out in Annexure 1(A) is that such a measure must be one applied to protect at least one of the listed interests or to prevent or limit specified damage”.²⁶⁷ In determining whether a measure is an SPS measure in the *EC Hormones* case the Panel looked at whether various European Communities’ actions amounted to an SPS measure that would fall under the SPS Agreement.²⁶⁸ It further, looked specifically at the definition of a sanitary or phyto-sanitary measure set out in Annex A (1) and explained that in deciding whether a measure is an SPS measure, regard must be given to such elements such as the purpose of the measure, its legal form and its nature and these are also explained in the annex A 1(A).²⁶⁹

Annex C applies to the development of the SPS measures especially checking and making sure that the SPS measures adopted by Members are fulfilled. “The text of Annex C (1) (a) relates to procedures to *check and ensure* the fulfilment of SPS measures, not to *develop* SPS measures”.²⁷⁰ Furthermore in the *US — Poultry (China)*

²⁶⁶ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_03_e.htm#intext553 accessed on 02/09/16 at 13.52pm.

²⁶⁷ Appellate Body Report, *EC — Hormones*, WT/DS320/AB/R para 7.148

²⁶⁸ Panel Report, *EC — Approval and Marketing of Biotech Products*, para. 7.149.

²⁶⁹ Panel Report, *Australia — Apples*, paras. 7.144–7.145

²⁷⁰ SPS Agreement Annex C (1) (a)

case the Panel found out that, “the *SPS Agreement* does not specify, or limit, the SPS measures referred to in Annex C (1). Indeed, Annex C 1) of the *SPS Agreement* merely provides that any procedure to check and ensure the fulfilment of SPS measures is subject to the provisions of items (a) through (i).”²⁷¹ Hence it is within this context to submit that the annex C deals with the control inspection and approval procedures of the SPS measures, thus protecting the abuse of these measures as protectionist tools by Members.

3.5 PROBLEMS WITH THE SPS AGREEMENT

It should be borne in mind that, the intentions behind the SPS agreement was to protect flora and fauna in terms of international trade law. It also aimed to achieve certain binding commitments in the following areas: market access, domestic support, export competition and reaching an agreement in SPS issues.²⁷² However, this has been difficult to achieve especially for, developing countries as they find it difficult to attain such high standards set by the SPS agreement (SPS standards set up by the EU against the citrus fruits from SA. Hence, this creates exploitation, where developed countries seem to obtain and to be well equipped to utilize such SPS agreements, whereas developing countries struggle to implement these measures.

Furthermore, the SPS measures on the face of it may result in restrictions on trade, although it is agreed that some restrictions are necessary for protection of food, animal and plant health. However, in some instances “governments are sometimes pressured to go beyond what is needed for health protection and use these SPS restrictions as a protection tool against domestic producers from economic competition”.²⁷³ If an SPS measure does not serve a purpose of protecting health of plants, humans and animals it can be a very effective protectionist tool and also a barrier to international trade, thus the need for strict compliance.

²⁷¹ Panel Report, *US — Poultry (China)*, paras. 7.363–7.364.

²⁷² The WTO Agreements Series: Sanitary and Phytosanitary Measures. Accessed on http://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf&sa.

²⁷³ The WTO Agreements Series: Sanitary and Phytosanitary Measures. Accessed on http://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf&sa.

Apart from that, it should be considered that the implementation of regional and non-governmental entities with regard to standardizing bodies creates conflict with regards to jurisdictional matters. Furthermore, what has to be asked is to what extent are these measures being enforced on countries? The major issue of infrastructure in developing countries affects the level to which SPS agreements may be implemented. Since, technical assistance is not obligatory, the running of SPS agreements would be a smoother process worldwide.

From an analytical point of view, the SPS agreement was designed for countries with first world infrastructures, hence the implementation of such agreements would be difficult for developing countries as it makes it difficult for such countries to trade fairly. The end result seems to be that such agreements seem to promote free trade for developed countries, but impede it for developing countries.²⁷⁴ The question that needs to be considered is whether such agreements are merely used as a tool to promote inequality rather than ending it?

Although in the Agreement it is provided that, technical assistance should be provided to Member countries, this does not happen in practice as insufficient technical assistance is given to developing countries.²⁷⁵ Henson and Loader have purported that, “developed countries takes insufficient account of the needs of developing countries in setting SPS requirements”.²⁷⁶ This is a flaw in international trade because most of the SPS requirements are too rigid and expensive and to make matters worse, most developing countries fail to adapt and to implement these requirements as they face insurmountable difficulties in trying to do so.

²⁷⁴ The WTO Agreements Series: Sanitary and Phytosanitary Measures. Accessed on http://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf&sa.

²⁷⁵ In terms of implementing the SPS measures the time limit periods allowed for developing countries needs to be reconsidered as many developing countries are failing to live up to these standards. Examples include the efficacy of prevailing systems of the SPS controls, development of scientific and technical expertise and access to modern testing methods.

²⁷⁶ Henson and Loader: The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports, October, 1999 page 10-11.

A case in point is the dispute between South African fruit exporters and European Union officials that occurred concerning EU phyto-sanitary import restrictions on citrus fruit.²⁷⁷ The Citrus Black Spot (CBS), a common and benign fungal infection, renders the infected fruit unmarketable and severe import restrictions were launched in 1992 and 2000 by the European Economic Community and EU respectively.²⁷⁸ From a South African perspective, these current restrictions are too rigid and are more stringent than technically justified, based on an increasing amount of scientific evidence upheld by the Department of Agriculture, Forestry and Fisheries (DFF). Therefore, the application of SPS measures to SA's citrus fruits by the EU could be argued to be a protectionist tool by the EU to its domestic markets.

Apart from that, it should be noted that, South Africa is the world's biggest exporter of whole oranges and the largest shipper of grapefruit. However, since 2012 after the CBS was discovered the EU expects full compliance with the EU phyto-sanitary measures and a threshold of not more than 5 interceptions for CBS in one trading season have been set up.²⁷⁹ In case of failure, the EU would consider to initiate the procedure of safeguard measures against citrus fruits from SA.²⁸⁰ Considering the fact that SA has been the biggest exporter of fruits to the EU this somehow jeopardizes its international trade. The DAFF in South Africa (SA) after some investigations alleged that the fungus cannot spread once the fruit is picked.²⁸¹ Therefore, there is no evidence which supports the allegations from the EU thus, they might only want to protect their domestic markets from competition using the SPS measures.

Furthermore, these measures that have been imposed by the EU has negatively cost many South African citrus growers as they lost almost fifty million after the suspension of all exports of organic lemons to the EU due to the risk of CBS. SPS measures surely, causes a lot of problems in developing countries because of the way they are being

²⁷⁷<http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 22/09/16 at 14.25pm.

²⁷⁸<http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 21/09/16 at 20.15pm.

²⁷⁹ C Dunmore 'EU bans South African citrus imports over disease fears' *Reuters* 28 November 2013.

²⁸⁰<http://www.tralac.org/discussions/article/6611-sanitary-and-phytosanitary-measures-citrus-black-spot-and-american-foulbrood-disease.html> accessed on 21/09/16 at 20.57pm.

²⁸¹ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

implemented thus hindering trade for most of the countries involved in international trade. "The foregoing discussion suggests that SPS measures are potentially a significant barrier to exports of agricultural and food products from developing to developed countries".²⁸² According to Henson and Loader, a survey was conducted on the impediments of agricultural exports to the EU, many factors were raised and these are of most significance in hindering international trade. Altogether, the overall factor that was discussed and which was found to be the factor causing impediment to agricultural exports in trade was the manner in which the SPS measures are implemented by developed countries.²⁸³ This is because a number of developing countries are concerned with the manner in which the transparent mechanisms established under the SPS agreement are operating.²⁸⁴

Having discussed the impeding factor, transport, costs, other technical requirements and direct export costs were also mentioned as aiding factors to the barriers of trade. Hence it is within this context that, one submits that, these highlighted impediments surely hinder international trade in developing countries as they lack financial stability due to the very high SPS standards that leads to many expenses. Moreover, country case studies conducted also highlighted the problems associated with the SPS requirements in EU that impedes international trade for example the SA-EU dispute where the EU imposed strict SPS measures on citrus fruits from South Africa. It has been pointed out in this chapter as a whole that, compliance resources, availability of technical or scientific expertise, access to information on SPS requirements and financial constraints are some of the major problems associated with the SPS requirements.

3.6 CONCLUSION

This chapter critically analysed the extent to which the SPS measures impede trade between developing countries and developed countries and a number of issues have

²⁸² Henson, S.J and Loader, R.J; The Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements, University of Reading, UK.

²⁸³ S.J Henson and R. J Loader: The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports, October, 1999 page 5.

²⁸⁴ Ibid Henson S.J and Loader,R.J page 5-6.

been raised and concerns that relate to the market access of developing countries into developed countries. It is evident from the analysis that SPS measures to a certain extent impede trade amongst countries and particularly developing countries. The support for this assertion can be drawn from the difficulties that SPS measures in general impose on developing countries in respect of implementation of SPS measures and the standard of care required in most cases is very stringent. Furthermore, it can be argued that SPS measures have the potential to be used to impede trade as observed by the disputes namely the *EC-Hormones* and *Japan Apples case*.²⁸⁵ Furthermore, they can impede trade since they have the potential to be improperly applied without due consideration of the relevant rules. Consequently, this problem hinders the market access of developing countries into developed countries' markets. Another significant point raised was the susceptible nature of SPS measures which may result in their use as domestic protectionist tools. The CBS dispute between SA and EU is the evident case that explains more on how these SPS measures are being used to protect the domestic markets of developed countries.

While the international community has tried to reduce the trade distortive effects of SPS measures through the SPS Agreement, many developing countries have failed to exploit opportunities offered by the Agreement due to lack of resources.²⁸⁶ This is due to the fact that the SPS standards are too stringent such that developing countries fail to implement them. Again this reflects the relatively poor scientific and technical infrastructure in many developing countries. Furthermore, developing countries are concerned with the way in which the SPS Agreement currently operates specifically the extent to which needs of developing countries is considered. This includes the setting of SPS requirements and the periods of time allowed between the notification and implementation of SPS measures. The SPS Agreement provides criteria in the use of SPS measures, but certain methods need to be found to facilitate the better inclusion of

²⁸⁵ EC Hormones, Appellate body report, EC Measures concerning meat and meat products(Hormones), WT/D526/ABIR, WT/D548/AB/R, adopted 13 February 1998, DSR 1998:1, 135 and Japan –Measures Affecting the Importation of Apples, Report of the Panel, WT/D5245/R, 15 July 2003.

²⁸⁶ Henson, S.J and Loader, R.J page 1-10.

developing countries when operating by also accommodating the needs of low and middle-income Members of the WTO.²⁸⁷

However, it would be a travesty of justice to overlook at the problems of the SPS measures while completely disregarding the legitimate purposes of the SPS measures as the Agreement was enacted so as to protect plant and animal health and to ensure that the states' duty to protect should not be encroached. In this respect the Agreement counterbalances the member countries sovereign right to adopt and maintain SPS measures with the need to promote international trade.

The next chapter will focus on analyzing how the SPS Agreement has been effective in enhancing market access for developing countries? More specifically it will outline the specific impact of SPS measures imposed by the EU on the developing countries in particular South Africa.

²⁸⁷ EC Hormones, Appellate body report, EC Measures concerning meat and meat products(Hormones), WT/D526/ABIR, WT/D548/AB/R, adopted 13 February 1998, DSR 1998:1, 135 and Japan –Measures Affecting the Importation of Apples, Report of the Panel, WT/D5245/R, 15 July 2003

CHAPTER 4:

CRITICAL ASSESSMENT OF THE IMPACT OF SPS MEASURES ON MARKET ACCESS FOR DEVELOPING COUNTRIES: CASE STUDY OF SOUTH AFRICA

4.1 INTRODUCTION

The Trade, Development and Cooperation Agreement (TDCA), which was entered into force on 1 January 200, between South Africa (SA) and the European Union (EU), was intended to strengthen co-operation in various fields and regulating agricultural trade between SA and EU.²⁸⁸ The objectives of this agreement are as follows:

“to support South Africa in its economic and social transition process, strengthening dialogue between the parties, promoting regional co-operation and the country’s economic integration in Southern Africa and in the world economy and also expanding and liberalising trade in goods and services and boosting capital between parties”.²⁸⁹

SA is the largest trading partner in Africa for EU. It should be noted that, “the agreement between these two parties provided for the establishment of a bilateral free trade area between the EU and SA in accordance with the World Trade Organization (WTO) rules²⁹⁰ and the strengthening of European development assistance to South Africa”.²⁹¹ Burger in his thesis purported that, “the main reason why South Africa entered into a Free Trade Agreement (FTA) with the EU was to enhance exports to South Africa's largest export market, attract higher levels of investment from the EU, and gradually

²⁸⁸ SA- EU TRADE DEVELOPMENT AND COOPERATION AGREEMENT: Published by Department of Agriculture, Forestry and Fisheries, Directorate, International trade; 2009. Accessed at <http://www.nda.agric.za/doaDev/sideMenu/internationalTrade/docs/TDCA.pdf> on 27/10/16 at 09.45am.

²⁸⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:r12201> accessed on 27/10/16 at 09.25am.

²⁹⁰ The WTO rules include, the principle of non- discrimination, reciprocity, binding and enforceable commitments, transparency and safety values.

²⁹¹ GENERAL NOTICE: 1084 OF 2014, DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES PROCEDURES FOR THE APPLICATION, ADMINISTRATION AND ALLOCATION OF EXPORT PERMITS UNDER THE TRADE, DEVELOPMENT AND CO-OPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE REPUBLIC OF SOUTH AFRICA FOR THE YEAR 2015, No. 38260. Accessed on www.gpwonline.co.za.

expose the South African industry to competition to ensure that it is restructured to become globally competitive”.²⁹²

This agreement was negotiated to promote reduction of trade barriers in order to liberate trade on global basis. Furthermore, it was and is still of great importance to the Southern African Development Community (SADC) countries as they will also be benefiting from the European Union future trade relations. It is within this context to note that, the trade liberalization between the EU and the South Africa is asymmetric because the liberalization period is different for the two parties.²⁹³

Apart from that, Tsolo and others have submitted that, “South Africa has 12 years to fully implement the agreement, while the EU has only 10 years”.²⁹⁴ Furthermore, “South Africa was to liberalize around 86% of its imports from the EU, while the respective figure for the EU is 95%”.²⁹⁵ It was further analysed that, “the EU-SA TDCA covers around 83% and 86.5% of South Africa’s agriculture and industrial sectors, respectively, while for the EU, the corresponding figures are 61.4% and 99.98%”.²⁹⁶ This is of vital importance to note as it unveils the importance of the TDCA and its progress between the EU and South Africa in terms of reduction of trade barrier in intentional trade.

On this note, this chapter focuses on the impact of the TDCA agreement in relation to its relationship between SA and EU. It will further assess the impediments to market access for SA because of the EU SPS measures in respect of the Citrus dispute and the extent to which this has affected the current trade relationship between the parties.

²⁹² Pieter Francois Theron Burger; *the Trade Development Agreement between SA and the EU: Implications of SACU*, 2000.

²⁹³ Ibid P.F Theron Burger.

²⁹⁴ M. Tsolo, I. B. Mogotsi and G. Motlaleng; *the impact of European Union – South Africa Trade Development and Cooperation Agreement on Botswana, Lesotho, Namibia and Swaziland*, Volume 3, Issue 1, pp. 129-148, June 2010 ISSN-1843-763X.

²⁹⁵ Ibid M Tsolo etal... page 129-148.

²⁹⁶ Ibid M. Tsolo etal...page 129-148.

Currently, the EU is negotiating a series of economic partnership agreements (EPAs) with the 79 ACP countries.²⁹⁷ These agreements aim to create a shared trade and development partnership backed up by development support. Moreover, it has been submitted that;

“in June 2016 the EU and South Africa, together with Botswana, Lesotho, Mozambique, Namibia and Swaziland, signed the Southern African Economic Partnership Agreement (SADC EPA) that regulates trade in goods between the two regions. Under the so-called 'SADC EPA', the EU has fully or partially removed customs duties on 98.7% of imports from South Africa while guaranteeing full free access to the rest of the signing countries.”²⁹⁸

4.2 THE TRADE DEVELOPMENT COOPERATION AGREEMENT (TDCA)

4.2.1 BRIEF HISTORY OF THE TDCA

The TDCA is a bilateral agreement between the European Union (EU) and South Africa signed in 1999 after 5 years of negotiations, but it only came into force in 2004.²⁹⁹ “The Agreement was first provisionally applied partially in 2000 and was later on fully entered into force from 1 May 2004”.³⁰⁰ The main objectives of this agreement as stipulated by the Department of Trade and Industry (DTI) includes,

“promotion of co-operation between the EU and South Africa in a wide array of areas *inter alia* trade relations, development co-operation, economic co-operation, social and cultural co-operation, political dialogue and co-operation in areas such as health and the environment.”³⁰¹

²⁹⁷ <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/> accessed on 12/15/16 at 08.43am.

²⁹⁸ https://eeas.europa.eu/delegations/south-africa/730/south-africa-and-eu_en accessed on 15/12/16 at 09.00am

²⁹⁹ http://europa.eu/legislation_summaries/development/south_africa/r12201_en.htm accessed on 26/10/16 at 13:45pm.

³⁰⁰ <http://www.dirco.gov.za/foreign/saeubilateral/tdca.html> accessed on 31/10/15 at 10.02am.

³⁰¹ <http://www.dirco.gov.za/foreign/saeubilateral/tdca.html> accessed on 31/10/16 at 10.05am.

The Agreement is a comprehensive one that establishes a 'free trade area' (TDCA, Article 5).³⁰² As such, the Agreement largely deals with the movement of goods but there are provisions related to services and investment as well as other issues, such as government procurement, competition policy and intellectual property.³⁰³ Alfredo in his article submits that, "the strategic partnership is built on two strands:

- enhanced political dialogue and cooperation on regional, African and global affairs; and
- stronger cooperation in economic and social sectors".³⁰⁴

Furthermore, this agreement's central objective is the establishment of a free trade area taking into consideration the objectives that have been provided in the TDCA. The aforementioned suggests that, "this agreement also provides for the progressive abolishment of customs duties on listed industrial and agricultural goods over a maximum period of 10 years in the case of Europe and 12 years in the case of SA (i.e. until 2012) to fully establish the free trade area".³⁰⁵ The ambit of the agreement is extensive in that it covers "95 % of the EU's imports from SA and 86 % of South Africa's imports from the EU".³⁰⁶

Apart from that, it appears as though, the partnership has been consolidated over the past 13 years along economic lines. Moreover, while enhanced political dialogue is the cornerstone for cooperation, others matters such as democracy, human rights, peace and security, forms part of this unique partnership. ³⁰⁷ It has been submitted that, "trade between South Africa and the EU amounted to 39 billion euros in 2010, with more than 50% of the country's exports to the EU being processed and semi-processed goods".³⁰⁸ Moreover, according to Hengari "SA is the EU's 13th largest trading partner, and it also

³⁰² Article 5 of the Trade Development Cooperation Agreement 2000.

³⁰³ <http://www.dirco.gov.za/foreign/saeubilateral/tdca.html> accessed on 31\10\16 at 10.05am.

³⁰⁴ A, T Hengari; *South Africa and European Union; Moving Beyond Asymmetry*, 2013.

³⁰⁵ N. Kruger; *Portfolio Committee On Trade and Industry: ADDITIONAL PROTOCOL TO SA\EU TRADE DEVELOPMENT AND COOPERATION AGREEMENT (TDCA)*.

³⁰⁶ Ibid N. Kruger.

³⁰⁷ http://europa.eu/legislation_summaries/development/south_africa/r12201_en.htm accessed on 26\10\16 at 13:55pm.

³⁰⁸ http://europa.eu/legislation_summaries/development/south_africa/r12201_en.htm accessed on 26\10\16 at 13:57pm.

accounts for a third of Sub-Saharan Africa's Gross Domestic Product (GDP)"³⁰⁹. Thus, it is not surprising that SA is the only country in Sub-Saharan Africa whose relations with the EU are at the level of a strategic partnership, although the EU has, in recent times, also identified Nigeria as a possible strategic part.

4.2.2 PHASES OF THE TDCA AGREEMENT

Relations between SA and the EU have increased significantly, following SA transition to democracy in 1994.³¹⁰ According to DIRCO, "SA and the EU in the mid-nineties identified the need to enter into a broad framework agreement that would cover all spheres of cooperation, which ultimately led to the signing of the SA-EU Trade, Development and Cooperation Agreement (TDCA)".³¹¹

The TDCA succeeded, as the EU and SA entered into a more extensive agreement as they saw the need to further cement cooperation in order to help address the many global and regional challenges.³¹² This led to the adoption in Brussels on 14 May 2007 of the SA-EU Strategic Partnership Joint Action Plan (JAP).³¹³ This Strategic Partnership "is built on the many shared values and common interests of the EU and South Africa and serves as an instrument to jointly pursue both parties' commitment to promote liberty, peace, prosperity, security and stability in the world, and in Africa in particular".³¹⁴ This is very significant in the sense that, the implementation of this agreement is yielding great results for South Africa as a nation and this is facilitating international trade the main goal of the WTO.³¹⁵

³⁰⁹ . A. Hengari; *South Africa and European Union: Moving Beyond Asymmetry*, 2013.

³¹⁰ <http://www.dirco.gov.za/foreign/saeubilateral/index.html> accessed on 31\10\16 at 11.50am.

³¹¹ <http://www.dirco.gov.za/foreign/saeubilateral/index.html> accessed on 31\10\16 at 11.55am.

³¹² <http://www.dirco.gov.za/foreign/saeubilateral/index.html> accessed on 31\10\16 at 12.00pm.

³¹³ <http://www.dirco.gov.za/foreign/saeubilateral/index.html> accessed on 31\10\16 at 12.05pm.

³¹⁴ Catherine Grant; *Southern Africa and European Union: The TDCA and SADC EPA TRALAC brief*, 2006.

³¹⁵ For example in agriculture, there is marginal increase in South African imports from the EU of \$148 million that contributes to the overall change in agricultural imports of \$178 million. In the natural resources sector, there are minor increases in fish imports as the 7.4 percent duty is abolished, but the main issue is the change in imports of coal/oil/gas and from the Rest of the world that total \$66million as other South African sectors becomes relatively more efficient than coal/gas/oil production.

It has also been submitted that, “the SA exports and imports within the EU both had an annual growth of about 9% during the period 2011 to 2015”.³¹⁶ In terms of all the goods that are exported from SA, “its exports to EU increased from R 151 Billion in 2011 to R 216 Billion in 2015”.³¹⁷ In summation of the role contributed by this agreement in boosting international trade, the total trade has grown by 257% since the agreement was implemented, which is very significant to both parties and the WTO. However, the EU remains South Africa’s main trading partner and the total trade ten months of 2016, exports went up 5.6 percent to ZAR 903.42 billion from ZAR 855.25 in the EU-SA trade.³¹⁸

Currently, SA and the EU work together at various levels and in many forums. Apart from trade and development cooperation, various dialogue forums address issues relevant to South Africa, the EU, Africa and the rest of the world.³¹⁹ These include “dialogue fora on trade, development cooperation, environment, science and technology, space, energy, transport, health and migration”.³²⁰ These functional dialogue fora operate in addition to annual summit meetings and 6-monthly Ministerial meetings held at the political level.³²¹

4.3 SOUTH AFRICA AND THE TDCA

According to Kruger, in “the past 15 years, South Africa’s economy has experienced vast growth and change in economic, political and social sectors”.³²² The South African government has therefore strived hard to promote its strategic alliances with global superpowers. The country has continually sought number of ways to ensure that its

³¹⁶ N. Kruger, *Portfolio Committee On Trade and Industry: ADDITIONAL PROTOCOL TO SA\EU TRADE DEVELOPMENT AND COOPERATION AGREEMENT (TDCA)*.

³¹⁷ N. Kruger, *Portfolio Committee On Trade and Industry: ADDITIONAL PROTOCOL TO SA\EU TRADE DEVELOPMENT AND COOPERATION AGREEMENT (TDCA)*.

³¹⁸ <http://www.tradingeconomics.com/south-africa/exports> accessed on 15/12/16 at 09.17am.

³¹⁹ <http://www.tradingeconomics.com/south-africa/exports> accessed on 15/12/16 at 09.

³²⁰ N. Kruger (see note above 314).

³²¹ European Commission, ‘Bilateral Relations: South Africa’ (EUROPA, 2009) <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/south-africa/> accessed on 31/10/16 at 1403pm.

³²² N. Kruger (see note above 314).

markets are available to foreign investors and aim to increase its connections with the first world. However, “opening up its trade borders has often come at a price, a price the developing countries have been willing to pay in order to gain access to one of the world’s biggest and most prestigious markets: the EU”.³²³

Since 1994, “and political transformation and entry into the WTO, the South African agricultural and trading sector has undergone many changes, increasingly integrating itself into world markets”.³²⁴ This is of great significance in the sense that, South Africa sort to reintegrate into international markets after years of social and political exclusion, as this became the top priority for the South African government.³²⁵ This view further cements the submission that South Africa has the strongest economy amongst the Sub Saharan African economies. Apart from that, South Africa's exports to the EU are growing and the composition of these exports is becoming more diverse.³²⁶ South Africa is gradually moving from mainly commodity-based products to more diversified export profiles that include manufactured products.³²⁷

Franicevic further purports that, “in terms of agricultural activities, SA range from crop production and mixed farming, to cattle ranching in open wide plains, and sheep farming in the arid regions”.³²⁸ Therefore, due to these varied resources, “it is one of the world’s leading exporters of wine, sugar, fresh fruit, nuts, beverages, preserved food, tobacco, cereals, wool, meat, milling products, malt and starch”.³²⁹ Moreover, “South Africa is also amongst the world’s top five exporters of avocados, grapefruit, tangerines, plums, pears, table grapes and ostrich products”.³³⁰ However, SA exports mostly to the EU fruits, coal, coca cola, and non-metallic manufactured mineral products from the region.³³¹ It is vital to note that South Africa's primary exports to the EU are fuels and

³²³ N. Kruger (see note above 314).

³²⁴ S.V Franicevic; *Trade Relations between the European Union and South Africa*, 2011 page 10.

³²⁵ Ibid S. V Franicevic.

³²⁶ For example since the signing of the TDCA trade between the two has improved substantially, in particular trade in goods has increased by more than 120%

³²⁷ S. V Franicevic (see note 321).

³²⁸ S.V Franicevic; (see note 321).

³²⁹ Ibid S. V Franicevic. (see note 321).

³³⁰ S.V Franicevic. *Trade Relations between the European Union and South Africa*, 2011.

³³¹ Ibid S.V Franicevic.

mining products, machinery and transport equipment, and other semi-manufactured goods.³³² However, having said all that, agriculture remains the main sector that South Africa deals with in this trade agreement with the EU.

For more than 100 years, citrus fruits have been exported from South Africa to all over the world.³³³ The industry has a long and successful history of growth, innovation and forward thinking. Since 2006, South Africa has been the second largest exporter of fresh citrus in the world, although it is the twelfth largest producer.³³⁴ The citrus industry has four sectors as defined by the main citrus types,³³⁵ and SA exports citrus fruits to more than sixty foreign countries.³³⁶

In terms of grape fruits that are grown in South Africa, most of them are largely grown in the Limpopo province about 32% to 34%.³³⁷ In Mpumalanga, they grow about 30% and in Kwa-Zulu natal, it is about 20%.³³⁸ The bulk of the fruit is exported which is approximately 200 000 tons.³³⁹ Moreover, lemons are largely grown in Eastern Cape particularly in Sunday's river area, which generates about 45% of the production.³⁴⁰ The Western Cape Province also produces at about 21%, then 110 000 tons of grapes which are exported every year.³⁴¹

Apart from that, soft citrus are grown in Western Cape, which produces 58%, Eastern Cape also produces 25% and there are small pockets of citrus up in Limpopo and Mpumalanga provinces.³⁴² Of all this soft citrus produce, 100 000 tons are exported

³³² Ibid S.V Franicevic.

³³³ Ibid S.V Franicevic.

³³⁴ Ibid S.V Franicevic.

³³⁵ These include grapefruit, oranges, soft citrus and lemons. South Africa exports oranges, grape fruit, lemons and soft citrus

³³⁶ Countries which South Africa exports its citrus fruits includes China, EU, Ilran, Japan, USA, South Korea and Mexico.

³³⁷ Justin Chadwick, "The South African Citrus Industry", Citrus Research International, 2008 key Industry page 4.

³³⁸ Ibid J. Chadwick page, 4.

³³⁹ Ibid J Chadwick page 4.

³⁴⁰ Ibid J. Chadwick page5.

³⁴¹ Ibid J Chadwick page 5.

³⁴²Ibid Justin Chadwick page 3.

every year.³⁴³ It is of great significance to note that here in South Africa two-thirds of their citrus productions are oranges and they are valencia and navels oranges. Most of the valencia oranges are produced in Limpopo and Mpumalanga provinces whereas Navels prefer the colder areas around Marbel Hall and Groblersdal.³⁴⁴

Thus the above, is indicative of SA's citrus industry and on how it depends much on the EU and UK in exporting its citrus fruits. This in essence, further outline the relationship between the EU and SA, as they are trading partners and on how SA has been the largest importer of citrus fruits in the EU.

4.4 EUROPEAN UNION (EU) AND THE TDCA

The EU is the major key player in the global market in terms of international trade.³⁴⁵ The "EU powerhouse of 27 Member States shares a single market, a single external border, and a single trade policy".³⁴⁶ By working together as a solidified union, the EU has become the world's largest trading block (partly due to its population of 495 million, which accounts for 20% of global trade).³⁴⁷ EU has superpowers status that are used to encourage less developed states such as SA to open up their markets thus it has increased the market availability of often-limited natural resources.³⁴⁸ EU has always experienced vast growth in citrus production and consumption all over the world since the mid- 1980s.³⁴⁹

There has been rapid expansion in the production of oranges, grape fruit, mandarins, limes and lemons. The citrus production within the EU has increased in the last two

³⁴³ Justin Chadwick, "The South African Citrus Industry", Citrus Research International, 2008 key Industry page 3.

³⁴⁴ Ibid J. Chadwick page 2.

³⁴⁵ S, V Franicevik.

³⁴⁶ Directorate-General for Trade, 'Europe's Trade Policy' (Europa, 2009) http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc_143154.pdf accessed on 28/11/16 at 15.45pm.

³⁴⁷ Ibid http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc_143154.pdf accessed on 28/11/16 at 15.45pm

³⁴⁸ http://trade.ec.europa.eu/doclib/docs/2009/may/tradoc_143154.pdf accessed on 28/11/16 at 15.45pm

³⁴⁹ Halil Fidan, "Comparison of Citrus Sector Competitiveness between Turkey and EU- 15 Member Countries" HORTSCIENCE 44(1):89–93. 2009.

decades. The large production levels have enabled higher levels of total as well as per capita consumption of citrus fruits. In addition to that, “rapid growth has been achieved for processed citrus products as improvements in transportation and packaging have lowered costs and improved quality”.³⁵⁰

Furthermore, within the 2 decades stated above, Fidan asserts that, “production from oranges and mandarin rose in the EU in this period approximately 55%, this totaled to over 8 million tons”.³⁵¹ The entire citrus production in the EU concerning oranges and mandarins constitutes 83%, lemons and limes 16% and the remainder is 1%. Moreover, the fact that, consumption of fresh oranges and mandarin in EU increased during the last two decades by 54%, it is higher than the normal production period. However, the domestic supply is 44.6% that means that the EU is dependent outside on orange and mandarin yields. Hence, this proves what has been submitted by Chadwick that South Africa has been the second largest exporter of fresh citrus in the world, thus EU is dependent on that.

Apart from that, EU is rated amongst the top five largest importers of citrus fruits meaning that it plays a pivotal role in the citrus industry and many analysts have evidenced this.³⁵² Its policies in the citrus sectors have recently changed in a number of ways in recent years. As such, Fidan submits that, the “Uruguay Round Agreement on Agriculture required the EU to reduce its tariffs and adjust the former reference price system in accordance with ‘tariffication’”.³⁵³ In addition, the WTO agreed to a Special Safeguard Clause³⁵⁴ for products subject to tariffication, and the EU has introduced related changes into its trade regime for citrus products.³⁵⁵ Moreover, “the TDCA

³⁵⁰H.Fidan; “Comparison of Citrus Sector Competitiveness between Turkey and EU- 15 Member Countries” HORTSCIENCE 44(1):89–93. 2009. page 89-93.

³⁵¹Ibid H.Fidan;. page 89-93.

³⁵² Ibid H. Fidan page 89-93.

³⁵³ Ibid H. Fidan page 89-93.

³⁵⁴This entails that a WTO member may take a safe guard action to restrict imports of a product temporarily to protect a specific domestic industry from an increase in imports of any product which is causing or which is threatening to cause serious injury to the industry.

³⁵⁵ Halil Fidan, “Comparison of Citrus Sector Competitiveness between Turkey and EU- 15 Member Countries” HORTSCIENCE 44(1):89–93. 2009.

specifies new rules on sanitary and phytosanitary measures in terms of the EU trade industry”.³⁵⁶

It should be noted that, “the EU is made up of the superpowers of Europe and this has enabled it to hold a dominant position within the international trading system and, more importantly, the WTO”.³⁵⁷ It is evident that from GATT through to the establishment of the WTO, the EU has played and continuous to play a pivotal role in influencing international trade through its numerous trade agreements with other developed countries and more importantly the developing and least developed countries. This stronghold, has allowed it to affect the outcome of trade disputes and settlements, more so it has also permitted the EU to thus manipulate the international trade framework. Following the transition to democracy in 1994, Fidan thus notes, “the fact that the EU has the ability to initiate and change international trade policies, as opposed to simply reacting to them, affords it a rather large amount of advantage within the global economy”.³⁵⁸ Furthermore, in terms of the agricultural sectors of the EU, economists regard extreme forms of trade protection by developed countries as anomaly. “Economists further argue that the nature of trade and market supply is vastly distorted, as countries are denied the ability to trade the agricultural products that they have a natural comparative advantage in producing”.³⁵⁹ As such these kind of subsidies are detrimental and thus at the expense of the consumer and taxpayer.³⁶⁰

4.5 SA-EU CITRUS DISPUTE

A dispute between South African fruit exporters and EU officials surfaced concerning EU phytosanitary import restrictions on citrus fruit’.³⁶¹ The “Citrus Black Spot (CBS), a common and benign fungal infection, renders the infected fruit unmarketable and severe

³⁵⁶ EC, 1998, Trade regime for Agricultural products, decision no. 1/98 of the EC- Turkey Association Council Official Journal of the European Communities, L 86/1, Brussels.

³⁵⁷H Fidan (see note 352; 89-93).

³⁵⁸H Fidan (see note 352; 89-93).

³⁵⁹H. Fidan (see note 352; 89-93).

³⁶⁰H. Fidan (see note 352; 89-93).

³⁶¹<http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

import restrictions were launched in 1992 and 2000 by the European Economic Community and EU respectively”.³⁶²

The EU took steps to prohibit imports of SA citrus fruits such that it avoids contamination, as it feared the Citrus Black Spot (CBS).³⁶³ The EU thus imposed the ban arguing that the CBS is a fungal blight disease, which causes black blemishes to grow on the outsides of the citrus fruits. In imposing the ban, the EU purported that it was protecting its plants, animal and human health thereby relying on the SPS Agreement.

Furthermore, in 2013 the ban was likely to have virtually no impact on trade as it exclusively applied to imports harvested over the period 2012-2013.³⁶⁴ The impact of the SPS measures as used by the EU on the ability of developing countries to access its market was evident in the 2013 ban of SA citrus exports to the EU markets.³⁶⁵ There existed threats from the EU to extend the ban should the risk of spreading persist.³⁶⁶ “The South African government was strongly against closure of EU borders to its exports for lack of conclusive scientific evidence as to the likelihood of the fungus spreading from picked fruit”.³⁶⁷ Such a ban based on “a SPS measure that has the effect of impeding South Africa’s access into the European markets reflects a greater problem that is also affecting the greater part of other developing countries in terms of international trade”.³⁶⁸

³⁶² <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁶³ <http://www.gdard.gpg.gov.za/MediaRoom/News/Pages/EU-bans-SA-citrus-for-the-rest-of-the-year.aspx> accessed on 15/12/16 at 10.11am.

³⁶⁴ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁶⁵ C Dunmore ‘EU bans South African citrus imports over disease fears’ *Reuters* 28 November 2013 available at <http://www.reuters.com/article/2013/11/28/us-eu-southafrica-citrus-idUSBRE9AR0E920131128> ACCESSED ON 29 /11/ 2016 at 18.01pm

³⁶⁶ Ibid C. Dunmore.

³⁶⁷ Francesco Montanari ‘EU to adopt and review SPS measures’ available at <http://foodlawlatest.com/2013/12/17/eu-to-adopt-and-review-sps-measures/> accessed on 29/11/16 at 17.45pm

³⁶⁸ The affected developing countries include the ACP (African Caribbean and Pacific) countries which have a longstanding trading relationship with the EU. See D Prévost ‘Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries’ (2010) (*ICTSD Working paper series* 6.

This ban according to the South African view, “its restrictions are more stringent than technically justified, based on an increasing amount of scientific evidence upheld by the Department of Agriculture, Forestry and Fisheries (DAFF)”.³⁶⁹ Based on reports, it appears as though, that the SPS measures by the EU are too strict to such an extent that they impede South Africa’s market access in trade. Instead of protecting human and plant life, the SPS measures by the EU are unjustly hindering SA’s access to market. According to the investigations conducted by the DAFF, the alleged fungus cannot spread once the fruit is picked.³⁷⁰ However, “in response a scientific study by the European Food Safety Authority (EFSA) reported that the biological data provided by South Africa did not offer sufficient detail to decide whether contamination could occur at the point of wholesale”.³⁷¹ From an analytical point of view, it is therefore fitting to submit that this import ban by the EU is an SPS measure that is used by the EU as a protectionist tool for its own benefit rather than for phytosanitary concerns.

Apart from that, it is submitted that, “since 2012 the EU expects full compliance with the EU phytosanitary measures and a threshold of not more than 5 interceptions of the CBS in one trading season has been set up”.³⁷² Further, in case of failure the EU would consider to initiate the procedure of safeguard measures against citrus fruits from SA. Mupure in his thesis also purported that,

“these EU regulations unjustifiably limit the market access for SA to the EU since the CBS fungal disease carries no health hazards to consumers or non-infected orchards as contemplated by the SPS Agreement”.³⁷³ “The SPS Agreement stipulates that an SPS regulation should be set up by a Member country to protect human or animal life or health from food-borne risks or pests and/or

³⁶⁹ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁷⁰ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁷¹ Ibid <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁷² <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁷³ Recent studies by South African and USA experts confirm that “the fruit itself cannot transmit the disease but the citrus trees can”. These studies further support the assertion that the EU regulations were not based on science. South Africa is only exporting the citrus fruit and not the trees. See *ibid*

diseases”.³⁷⁴ “Moreover, for some SA citrus exporters these EU regulations are impossible” to meet yet the EU mandates compliance despite the regulations’ lack of a scientific basis.³⁷⁵

Furthermore, it has been highlighted that, “South Africa’s citrus industry is valued at about 6.5 billion rand (\$733 million) according to the government, and Europe is one of the country’s largest export markets”.³⁷⁶ SA is the world’s biggest exporter of oranges and the largest shipper of grape fruit.³⁷⁷ It should be noted further that, “in a draft scientific opinion published by the EFSA it was concluded that the chances of CBS affecting the EU were “moderately likely”.³⁷⁸ However, this opinion was criticised by CBS experts as being full of “factual errors and omissions owing to the fact that there is no recorded case of the disease ever having spread via fruit exports”.³⁷⁹

According to a recent EFSA scientific report on the risk of CBS, “there is a high level of uncertainty due to a lack of knowledge over how the disease would respond to the EU climate”.³⁸⁰ The EFSA report reasoned that considering that eradication and containment of CBS are difficult, SPS measures should focus on preventing entry.³⁸¹ Such an opinion points towards the exclusion of SA citrus exports from the EU market. This is particularly problematic since these EU SPS regulations negatively impact on the market access of SA (in particular) into the EU.

Moreover, these phytosanitary measures by the EU have been challenged on so many grounds by the South African citrus growers and trade officials. They have argued that

³⁷⁴ Annex 1A (a) - (d) SPS Agreement.

³⁷⁵ N.L.A Mupure: “A Critical Assessment of the Impact of the SPS Measures on Market Access For Developing Countries: case study of South Africa and Kenya, University of Kwazulu-Natal, 2014, page 67-68.

³⁷⁶ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁷⁷ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-and-eu-lock-horns-again-in-citrus-fruit-disease> accessed on 28/11/2016 at 11.03am.

³⁷⁸ EFSA Panel on Plant Health ‘Scientific opinion on a pest risk assessment and additional evidence provided by South Africa on *Guignardia citricarpa* Kiely, citrus black spot fungus (CBS)’ (2008) 925 *The EFSA Journal* available at <http://www.efsa.europa.eu/en/efsajournal/doc/925.pdf> accessed on 30/11/16 at 12.45pm.

³⁷⁹ N.L.A Mupure, (see note 372; 68).

³⁸⁰ SAM Perryman & JS West ‘External Scientific Report: Splash dispersal of *Phyllosticta citricarpa* conidia from infected citrus fruit’ 2014 *UK EFSA Journal* 1, 174.

³⁸¹ Ibid Sam Perryman page 174.

the “CBS report is based on shaky methodological grounds because the South African Citrus Growers Association (CGA) characterised the risk levels defined by the EU as both arbitrary and unscientific in nature”.³⁸² Chadwick is of the view that, “the level set by the EU has no technical or scientific basis and is tantamount to threatening market closure”.³⁸³ He further submitted that, ‘CBS is a disease caused by fungus *Guignardia Citricarpa* and it only affects the appearance of the fruit, thus the report by the EFSA is likely to be of no accuracy but rather aimed at protecting the EU domestic markets’.³⁸⁴

Moreover, Chadwick has pointed out that, many rural economies will suffer, jobs will be lost, downstream business such as transport packaging and ports will suffer.³⁸⁵ This is due to the fact that, growers are of the view that the CBS issue is an industry ending event. “The movement of banning citrus fruits from SA by the EU pose a risk of the fruit moving to other markets thus destabilising these delicately balanced markets and returns will plummet and growers will be out of business”.³⁸⁶

Furthermore, the Investment Solutions’ Chief Economist, Chris Hart purported that,

“China, India and Brazil are big enough for them to say, “well you do that and we can retaliate and that actually makes quite a big difference”. Whereas South Africa is quite small so if we retaliate they will say ‘well so what?’ Hence this is the hassle but I don’t think we can use our multilateral platforms and the BRICS platform and see if there can be a more balanced approach to this so that you can’t just have the Europeans acting unilaterally”.³⁸⁷

From an analytical point of view, it is of great significance to note that the SPS measures imposed by the EU are mainly aimed at protecting its own interests especially the domestic markets. Hart further said, “that the threat against the Citrus wouldn’t be surprising because it aims at protecting the Spanish citrus industry and it’s across

³⁸² <http://www.ictsd.org/bridges-news/south-africa-involves-wto-in-citrus-dispute-with-the-eu> accessed on 30/11/16 at 11.56pm.

³⁸³ <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry> accessed on 30/11/16 at 11.48pm.

³⁸⁴ Ibid <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry> accessed on 30/11/16 at 11.48pm.

³⁸⁵ Ibid <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry>.

³⁸⁶ <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry> accessed on 30/11/16 at 11.48pm.

³⁸⁷ <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry>. (see note above 384).

agricultural products whether its grains or in meat”.³⁸⁸ He has also characterised the EU as having tendencies of wanting to access other markets freely however restricting access to their own economy, thus showing its protectionist behaviour.

Furthermore, Mupure in his thesis submitted that, the current EU-EFSA regulations can be challenged on a number of grounds.

Firstly, the “scientific values used by EFSA are questionable... its criteria to assess the risk for entry, spread and establishment of a disease are very likely, and very unlikely, but never no risk”. Secondly, “South Africa is not the only country with black-spot issues, yet the EU focuses on South Africa, perhaps because it is the main competition for Spanish producers, whose season overlaps with that of South Africa. There are reasonable grounds for discrimination as contemplated by the SPS Agreement”. Lastly “in terms of WTO rules, countries have to try to “regionalise” their trade restrictions. If the scientific assessment shows there is a risk of spread or establishment in a certain region, but not in others, there is no justification for introducing trade restrictions in all the regions”³⁸⁹

In analysing the above assertion, it is vital to submit that, the EU-EFSA regulations, lacks certainty in the sense that their criteria in assessment of risk is likely, unlikely or never risk which is a disadvantage to SA as there is no stipulated risk assessment criteria. These regulations also seem to be more stringent on SA considering the fact that SA is not the only trading partner to the EU and also not the only country with citrus black spots issues.³⁹⁰ The EU therefore is using these regulations as a protectionist tool.

As pointed out earlier, evidence suggests that the EU’s current regulations are not based on science as required by the SPS Agreement,³⁹¹ which is particularly

³⁸⁸ <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry> accessed on 30/11/16 at 11.48pm.

³⁸⁹ N.L.A Mupure: “A Critical Assessment of the Impact of the SPS Measures on Market Access For Developing Countries: case study of South Africa and Kenya, University of Kwazulu-Natal, 2014 page 69.

³⁹⁰ Ibid L.N.Mupure page 69.

³⁹¹ Art. 2 (2) SPS Agreement.

problematic for the SA Citrus exporters as they had gone to great lengths and cost to ensure compliance with EU requirements namely new testing regimes and a comprehensive CBS risk management programme. “More concerning is the fact that despite the efforts rendered by SA to deal with EU’s regulations no agreement has been reached with the EU since 1992 on the risk of CBS’ transmission to EU citrus orchards via fruit exports”.³⁹² Although the current ban is voluntary this does not in any way positively impact on SA’s market access to the EU. It could be further argued that such a decision by the SA citrus growers is merely a compromise to maintain the possibility of future market access into the EU.

Fabricius has submitted that, EU and SA scientists are still arguing over whether or not CBS could infect European citrus plants..³⁹³ Apparently it is important to note “that exports from South Africa continue under strict controls to prevent fruit with the black spot on its skin entering the EU market”.³⁹⁴ A vast majority of “SA citrus growers ceased exporting their citrus fruits to the EU because too many CBS infected fruits bound for exports were being discovered”.³⁹⁵ Although, the current ban is voluntary this does not in any way positively impact on SA’s market access to the EU.

4.6 CONCLUSION

This chapter outlined the TDCA agreement and its impact on SA and EU, it further ventured into the citrus dispute between the EU and SA and on how it affected market access of SA. The TDCA may be considered a success when considered against objectives to support the efforts made by South Africa “to consolidate the economic and social foundations of its transition process and promote the expansion and reciprocal liberalisation of mutual trade in goods, services and capital”.³⁹⁶

³⁹² N. L. A Mupure PAGE (see note above³⁸⁶; 69-70).

³⁹³ P. Fabricius.

³⁹⁴ Peter Fabricius, “SA Citrus Exports to the EU Increase”, Economy 2015 can be accessed on <http://www.iol.co.za/business-report/economy/sa-citrus-exports-to-eu-increase-1866762>

³⁹⁵ Ibid P. Fabricius.

³⁹⁶ Peter Fabricius, “SA Citrus Exports to the EU Increase”, Economy 2015 can be accessed on <http://www.iol.co.za/business-report/economy/sa-citrus-exports-to-eu-increase-1866762>

From the discussion, it appears, as though, the TDCA is a comprehensive agreement formalising South Africa's relationship with the European Union over the long term. It presents unique challenges and opportunities for the country and for the region. It further represents an important milestone in the development of South Africa's trade policy, moving the country a long way towards a deregulated and liberalized trading environment. This new environment presents unique challenges to the South African agricultural economist.

Furthermore, the outbreak of the citrus dispute between SA and EU has been considered in the sense that, the ban of citrus fruits into the EU markets due to the CBS also impeded SA's access to market in international trade. The SPS measures imposed by the EU are too stringent and not scientifically proven according to several reports discussed above. One might come to an inference that, EU SPS measures are not fulfilling the purpose of protecting plant, animal and human lives but rather used as a protectionist tool by the EU for its own markets. Hence, it is thus the argument that, SPS measures impede market access for developing countries in particular South Africa. Moreover, despite the appeal of Article 5 (4) of the SPS Agreement that Member countries adopt the least trade distorting measures, EU actions appear to be the opposite as the SA growers alleged that the CBS only affects the fruit skin and nothing more.

CHAPTER 5:

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

Throughout this thesis it has been highlighted by the many authors in the field of international trade that, SPS measures are major barriers for developing countries in terms of agricultural international trade. As it has been identified by Chadwick the EU is leading on the issue of using these technical standards in their market in terms of trade, but however they are saving a different purpose.³⁹⁷ Apart from that, it has been identified in the preceding chapters that the SPS measures can be a serious impediment to the objectives of the WTO when used as protectionist tool by developed countries. Developing countries in particular experience problems in meeting the SPS requirements of developed countries and it has been proven that this can seriously prevent their ability to export especially agricultural and food products.

Thus, attempts have been made to reduce the trade impairing effects of SPS measures, within the World Trade Organization (WTO) and the SPS Agreement. However, according to Henson and Loader “current initiatives fail to address many of the key problems experienced by developing countries”.³⁹⁸

The thesis intended to seek answers for the research questions identified in each of the chapters. Firstly, chapter two addressed the question of what necessitated the change from GATT to the WTO and to what extent this change affected the multilateral trade system and the position of developing countries. Secondly, chapter three assessed the extent to which the MTS addressed the development needs of developing countries in respect of SPS measures, in particular. It further analysed the extent to which the SPS measures impede trade between developing and developed countries. More so the chapter dealt with the effectiveness of the SPS agreement in enhancing market access for developing countries. Thirdly chapter four addressed the impact of the TDCA

³⁹⁷ <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry> accessed on 09/12/16 at 3.46pm.

³⁹⁸ S.J Henson and R.J Loader, “The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports”, October, 1999, Geneva Switzerland.

agreement on the relationship between SA and EU. It also discussed how the EU SPS measures impeded market access for South Africa in respect of the Citrus dispute, and how this affected the current trade relationship between the parties. Henceforth, this chapter will focus on concluding the findings of this thesis in terms of the problems imposed by the SPS measures and it will further proffer recommendations that need to be adopted so as to deal with these issues.

5.2 FINDINGS

This thesis has highlighted a number of issues “that need to be addressed by international institutions such as the WTO and the International standards organisations, developed countries that implement SPS requirements as well as developing countries themselves”.³⁹⁹ It was highlighted that the main objectives of the SPS measures is to protect human, plant and animal health and also to improve the current human health, animal health, and phytosanitary situation of all Member countries. However, despite the fact that SPS measures help countries to protect their human, animal and plant life, the way in which the agreement is interpreted by developing countries hinders trade to these countries, like South Africa. It is also noted that these non-tariff barriers may create problems that can be as serious as the actual tariff since duty rates charged at country borders are very high. Interestingly, SPS measures theoretically speaking are there to protect trade however in practice they turn to be impediments to trade for developing countries as they are failing to meet the requirements in developed countries in applying these measures.

Furthermore, a number of developing countries (such as Zimbabwe, Botswana, South Africa, Zambia, Kenya etc.) “consider SPS requirements to be one of the greatest impediment to trade in agricultural and food products, particularly in the case of the EU”.⁴⁰⁰ This is due to the fact that SPS requirements adopted by developed countries are usually costly and difficult for developing countries to comply with.⁴⁰¹ As was

³⁹⁹ Henson, S.J and Loader,R.J; “The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports”, October, 1999 page 355-357.

⁴⁰⁰ <https://www.enca.com/south-africa/tight-squeeze-sa-citrus-industry> accessed on 09/12/16 at 3.46pm.

⁴⁰¹ Henson, S.J and Loader,R.J The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports, October, 1999 page 355.

highlighted, the problem of non-compliance with such requirements has spill-over effects on developing countries' ability to penetrate developed countries' markets and/or maintain their position in those markets. Such a problem is made more apparent by developing countries lack of adequate infrastructure, financial resources and technical expertise to comply with the developed countries' SPS requirements. Even more, in circumstances where compliance is adhered to, the timeframe for compliance is often unreasonable thus, making it difficult for developing countries to meet the requirements within the prescribed time.

It is of great concern that in particular access to appropriate scientific and technical expertise, is a problem. Indeed, in "many developing countries knowledge of SPS issues is poor⁴⁰², both within government and the food supply chain, and the skills required to assess SPS measures applied by developed countries are lacking".⁴⁰³

Apart from that, article 3 (as was discussed in the chapters) of the SPS Agreement encourages countries to use international standards as a basis for their regulations. In annex A it:

"recognizes for food safety the standards, guidelines and recommendations established by the Codex Alimentarius Commission, for animal health those developed by the International Office of Epizootics (OIE), and for plant protection those developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC)".⁴⁰⁴

Apart from that, issues that are not dealt with by these organizations, standards facilitated by other relevant international organizations open for membership to all Members, as identified by the SPS Committee, are recognized.⁴⁰⁵ However, the Agreement does not specifically stipulate the procedures that should be followed by

⁴⁰² These countries comprise of ACP and SADC countries in particular three quarters of the African countries which are involved in international trade.

⁴⁰³ Hagedoorn, M.L.F., 2002. Support of the Netherlands to capacity building in developing countries. In *FAO/WHO Global Forum of Food Safety Regulators, Marrakesh (Morocco), 28-30 Jan 2002*. FAO.

⁴⁰⁴ S. Zarrilli: "WTO Agreement on Sanitary and Phytosanitary measures; Issues of Developing Countries, South Centre July 1999, page 16.

⁴⁰⁵ R. Griffin: History of the Development of the SPS Agreement; Plant and Protection Division, page11.

relevant international organizations so as to produce genuine international standards.⁴⁰⁶ Hence this brings the issue of uncertainty as to what international standards to follow if no specific organisation is stipulated.

5.3 RECOMMENDATIONS

It is therefore fitting to note that as of late SPS requirements are one of the greatest impediments to market access for developing countries in terms of trade in agricultural and food products. This is due to the fact that there have been many disputes⁴⁰⁷ submitted to the WTO concerning the implementation of the SPS agreement as have been discussed in the previous chapters.

However, market access will not be achieved if SPS measures are not dealt with fairly and uniformly. Certainly, there is need to implement SPS measures to developing countries in line with the commitments of the SPS Agreement itself. Such commitments include the objective of extending special treatment⁴⁰⁸ to developing countries as highlighted in the preamble of the WTO and Article 10 of the SPS.

Apart from that, for international trade to be facilitated the SPS measures must be regulated fairly taking into consideration the needs of the developing countries. In order to achieve this, there is need to improve transparency (between Members) and relevant international organisations, promote harmonization and prevent the implementation of SPS measures which lack adequate scientific justification.⁴⁰⁹ Much of this however, depends on the ability of developing countries to effectively participate in the implementation of the Agreement namely: standard setting processes.⁴¹⁰ In support of this recommendation Henson and Loader as quoted by N.Mupure submitted that,

⁴⁰⁶ The WTO Agreements Series: Sanitary and Phytosanitary Measures. Accessed on http://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf&sa.

⁴⁰⁷ Consider, the EC Hormones case, Japan Apples case, SA-EU dispute etc.

⁴⁰⁸ Special treatment in the course of the Uruguay Round, agreement, also by the Southern governments on the principle of the so-called Single Undertaking turned out to be crucial to the Design of special treatment in the WTO agreements. Single Undertaking meant that all WTO candidates have to accept all agreements of the Uruguay Round as a whole.

⁴⁰⁹ Though the SPS Agreement specifically provides for the regulation of these contemplated areas there is uncertainty pertaining to these areas resulting in the weak implementation thereof.

⁴¹⁰ The SPS Agreement art 13.

“developing countries will only actualize the potential benefits of the Agreement if they are willing and able to participate in the institutions it establishes”.⁴¹¹ With this in mind, it should also be highlighted out that, in most cases willingness to participate is always available but ability is often the obstacle. Hence, for developing countries to be able to effectively participate in the implementation of the SPS measures, they need to be assisted to achieve it.

It is also significant to recommend that, developed countries in applying the SPS measures, they should be in line with art 3.1 of the Agreement which purports that “measures should be applied only to the extent necessary to protect human, animal or plant life or health”.⁴¹² As such they should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.⁴¹³ It could be inferred that developed countries should not rush to conclude that they are protecting their plant, animal and human health thus imposing these measures arbitrarily without proper scientific justification. In particular, “these members are encouraged to use proper international standards, guidelines and recommendations where they exist and where they are applicable”.⁴¹⁴

Although the International community has tried to harness the trade distortive effects of SPS measures by enacting the SPS Agreement, many developing countries fail to utilize the opportunity as they lack the resources.⁴¹⁵ Henson and Loader points out that:

“this again reflects the relatively poor scientific and technical infrastructure in many developing countries. It can also be recommended that, the WTO and

⁴¹¹Mupure, L.N.A (2014) International Trade Law, “A Critical assessment on the Impact of SPS measures on Market Access for Developing Countries: Case Study of South Africa and Kenya. University of KwaZulu-Natal page 80-82.

⁴¹² SPS Agreement article 3.1

⁴¹³ Article 3.1 of the SPS Agreement.

⁴¹⁴ Article 3.1 of the SPS Agreement.

⁴¹⁵ Henson, S. J and Loader, R.J page 9-10.

international standard organisations need to facilitate the more effective participation of developing countries”.⁴¹⁶

This may involve for example “changes to procedures and provision of technical and other forms of assistance”.⁴¹⁷ Moreover, developed countries have to consider needs and special circumstances of developing countries and to take these into account when implementing the SPS measures.⁴¹⁸

Furthermore, Henson and Loader as quoted by Mupure N, his dissertation asserted that,

“effective participation hinges upon the following key areas: representation in the WTO and its related institutions namely the SPS committees and international standards organisations; effective participation in activities associated with the SPS Agreement and institutional capacity in developing countries in order to implement effective SPS controls and to comply with commitments under the SPS Agreement.”⁴¹⁹

Apart from that, although in the Agreement it is provided that, technical assistance should be provided to Member countries, this does not happen in practice as insufficient technical assistance is given to developing countries.⁴²⁰ Henson and Loader have purported that, “developed countries takes insufficient account of the needs of developing countries in setting SPS requirements”.⁴²¹ This is a flaw in international trade because most of the SPS requirements are too rigid and expensive and to make matters worse, most developing countries fail to adapt and to implement these

⁴¹⁶ S.J Henson and R.J Loader: The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports, October, 1999 page 10.

⁴¹⁷ Henson, S.J and Loader, R.J page 10-11

⁴¹⁸ S.J Henson and R.J Loader page 11.

⁴¹⁹ Mupure N.L.A, (see note above 407; 83).

⁴²⁰ In terms of implementing the SPS measures the time limit periods allowed for developing countries needs to be reconsidered as many developing countries are failing to live up to these standards. Examples include the efficacy of prevailing systems of the SPS controls, development of scientific and technical expertise and access to modern testing methods. These countries include South Africa, Kenya, Netherlands, India, Botswana, Zambia and Zimbabwe.

⁴²¹ Henson, S.J and Loader, R.J: The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports, October, 1999 page 10-11.

requirements as they face insurmountable difficulties in trying to do so. Hence it can be recommended that, in implementing the SPS measures developed countries should consider also the vulnerable economic position of developing countries and thus technical assistance must be provided such that the implementation may be attained in a fair manner.

Furthermore in relation to technical assistance, it is further recommended that it should be largely in the form scientific infrastructure and expertise since science is considered as the “touchstone against which SPS measures must be judged”.⁴²² This entails making technical cooperation in terms of Article 9 of the SPS Agreement mandatory. If technical cooperation is to be made mandatory by the Agreement it would deter developed countries from arbitrarily adopting SPS measures since they would be obligated to share the burden of infrastructural capacity building and the costs of ensuring compliance with their imposed SPS requirements.

Since 2012 after the CBS was discovered the EU expects full compliance with the EU phyto-sanitary measures and a threshold of not more than 5 interceptions for CBS in one trading season have been set up.⁴²³ In case of failure, the EU would consider to initiate the procedure of safeguard measures against citrus fruits from SA.⁴²⁴ This has been considered to be a very strict approach followed by the EU; it can be recommended that, their ban should be based on scientific justification for it to be implemented and it should not be too strict.

In October 2014, SA involved the WTO in the citrus dispute with the EU as the citrus growers in SA argued that the reasons for the ban of citrus fruits in the EU are based on shaky grounds.⁴²⁵ It should be noted that, earlier this year the European Commission standing committee on plant and health endorsed stricter import requirements for SA’s

⁴²²Bossche, D Prévost & M Matthee ‘WTO Rules on Technical Barriers To Trade’ *Maastricht Working Papers* (2005-6) 27 also see Zarilli

⁴²³ C Dunmore ‘EU bans South African citrus imports over disease fears’ *Reuters* 28 November 2013.

⁴²⁴<http://www.tralac.org/discussions/article/6611-sanitary-and-phytosanitary-measures-citrus-black-spot-and-american-foulbrood-disease.html> accessed on 21/09/16 at 20.57pm.

⁴²⁵ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-involves-wto-in-citrus-dispute-with-the-eu> Accessed on 16/12/16 at 13.10pm.

citrus fruits to Europe.⁴²⁶ It was said that, imported citrus would be subjected to more strict measures, as pre and post-harvest chemical treatments would be recorded. Apart from that, packing houses and official on-site inspections at citrus orchards will be obligated to be registered.⁴²⁷ However, this is not economically suitable for SA as it has been singled out for special treatment by the EU in this instance.

Although, the SPS Agreement provides for discipline in the use of SPS measures, it is recommended that developing countries must be included in the operation of the Agreement. More so, a sense of ownership of the Agreement needs to be facilitated among low and middle-income Members of the WTO.⁴²⁸

Furthermore, developing countries themselves need to implement institutional structures and procedures (such as in terms of transportation logistics and distribution systems) that allows national agricultural producers and food processors to comply with the SPS requirements they face in developed country markets.⁴²⁹ Developing countries need to act on all three levels to overcome the barriers faced by developing countries caused by SPS requirements and thus enable them to participate better in the world trading system for agricultural and food products.⁴³⁰ It should also be noted that, Article 6 of the SPS Agreement which pertains to adaption to regional conditions is another provision that requires review.

One of the concerns raised by developing countries in light of Article 6 is that the full benefits of regionalization, as contemplated in the provision, are not being realized due to the difficulties in implementing this provision.⁴³¹ The process of proving that some areas are pest and/or disease free is time consuming and complex. As such the process can be onerous since it requires scientific and infrastructural support which is usually lacking in developing countries. In light of these problems it is recommended

⁴²⁶ <http://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-involves-wto-in-citrus-dispute-with-the-eu> Accessed on 16/12/16 at 13.10pm

⁴²⁷ <http://www.zestfruit.co.za/2016/06/20/eus-decision-on-citrus-black-spot-has-ended-uncertainty> Accessed on 12/16/16 at 14.30pm.

⁴²⁸ S.J Henson and R.J Loader; Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phyto-sanitary Requirements, world development page 99-100.

⁴²⁹ Henson, S.J and Loader, R.J page 99-100.

⁴³⁰ Henson, S.J and Loader, R.J page 90-100.

⁴³¹ Bossche *et al* page 65

that this provision should explicitly make reference to the effect that “scientific and administrative support shall be provided by international organizations and developed countries to developed countries to facilitate implementation of the Article 6 provisions”.⁴³²

Apart from that, the issue of market access is also another area which needs recommendations when it comes to the SPS Agreement implementation. Market access of developing countries is adversely affected by the limited time afforded to developing countries between notification and implementation of SPS measures; it is recommended that adequate time (for example 8 months must be afforded) be afforded to the developing countries. Thus, the Agreement should specifically stipulate that the timeframe between notification and implementation should be determined relatively, taking into consideration special needs and circumstances of developing countries. It would be more rational to afford developing countries more time to comply with the SPS requirements given their limited infrastructural capacity and lack of requisite expertise.

5.4 CONCLUSION

As a way of inference, the research has proven that SPS measures impede trade between developing countries and developed countries and a number of issues have been raised and concerns that relate to the market access of developing countries into developed countries. The support for this assertion can be drawn from the difficulties that SPS measures in general impose on developing countries in respect of implementation of SPS measures and the standard of care required in most cases is very stringent. It can be argued that SPS measures have the potential to be used to impede trade as observed by the disputes namely the *EC-Hormones* and *Japan Apples case*.⁴³³ Furthermore, they can impede trade since they have the potential to be improperly applied without due consideration of the relevant rules. Consequently, this

⁴³² see Zarrilli page 25

⁴³³ EC Hormones, Appellate body report, EC Measures concerning meat and meat products (Hormones), WT/D526/AB/R, WT/D548/AB/R, adopted 13 February 1998, DSR 1998:1, 135 and Japan –Measures Affecting the Importation of Apples, Report of the Panel, WT/D5245/R, 15 July 2003.

problem hinders the market access of developing countries into developed countries' markets. Another significant point raised was the susceptible nature of SPS measures which may result in their use as domestic protectionist tools as was observed in the CBS dispute between SA and EU.

Although the international community has attempted to deal with effects of SPS measures through the SPS Agreement, many developing countries lack the resources necessary to exploit the opportunities offered by the Agreement.⁴³⁴ This is due to the fact that the SPS standards are too stringent and very high such that developing countries fail to implement them.⁴³⁵ Again this reflects the relatively poor scientific and technical infrastructure in many developing countries.

As it has been pointed above, developing countries have concerns about the way in which the SPS Agreement is implemented especially the way in which the needs of developing countries are catered for. This is further highlighted by the periods of time allowed between the notification and implementation of SPS measures. Certainly, specific methods need to be provided so as to facilitate the better inclusion of developing countries in the operation of the Agreement and also accommodating the needs of low and middle-income Members of the WTO.

Conclusively, the SPS Agreement should be reviewed in light of the difficulties that developing countries encounter in implementing the Agreement. This review should be undertaken in respect of the problems outlined in the recommendations. Secondly, the review of the highlighted provisions ought to be dealt with by the unified effort of both developing and developed countries as well as other relevant stakeholders. This would ensure effective participation which is an important determinant in developing countries' like South Africa market access.

⁴³⁴ S. Henson and R. Loader: The Impact of Sanitary and Phyto-sanitary Measures on Developing Country Exports of Agricultural and Food Exports, October, 1999 page 5.

⁴³⁵ Ibid Henson and Loader page 5-10.

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APPENDIX 1



02 June 2016

Ms Tendai Mutamba (212555176)
School of Law
Howard College Campus

Dear Ms Mutamba,

Protocol reference number: HSS/0700/016M

Project title: To what extent do SPS measures impact on market access for developing countries: A case study of South Africa

Full Approval – No Risk / Exempt Application

In response to your application received on 01 June 2016, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.


Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully


.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Clydenia Stevens
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak / Ms Robynne Louw

Humanities & Social Sciences Research Ethics Committee

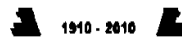
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