



UNIVERSITY OF KWAZULU-NATAL
COLLEGE OF LAW AND MANAGEMENT STUDIES
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**AN ANALYSIS OF THE IMPACT OF THE SANITARY AND PHYTOSANITARY
AGREEMENT ON MARKET ACCESS: CASE STUDY ON THE SAEU CITRUS
DISPUTE AND AGOA DISPUTE**

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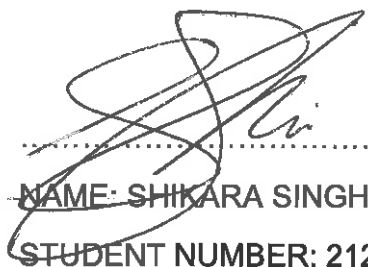
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KEYWORDS: SPS Agreement, South Africa, AGOA, EU Citrus Dispute, Market Access, WTO, GATT, US, Developing countries; Trade Barrier

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ACRONYMS

African, Caribbean and Pacific Countries (ACP)

African Growth and Opportunity Act (AGOA)

Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)

Citrus Black Spot (CBS)

Codex Alimentarius Commission (Codex)

Common Agricultural Policy (CAP)

Dispute Settlement Understanding (DSU)

European Food Safety Authority (EFSA)

European Union (EU)

General Agreement on Tariffs and Trade (GATT)

International Plant Protector Convention (IPPC)

International Trade Center (ITC)

International Trade Organisation (ITO)

Most-Favoured-Nation (MFN)

Multilateral Trade System (MTS)

Non-tariff Barrier (NTB)

Organization for Economic Co-operation and Development (OECD)

Sanitary and Phytosanitary Measures (SPS measures)

South Africa (SA)

Sub-Saharan African (SSA)

Technical Barrier to Trade (TBT)

The Bank of Reconstruction and Development (The World Bank)

The International Monetary Fund (IMF)

The Sanitary and Phytosanitary Committee (The Committee)

The Standards Code (The Code)

Trade Development and Cooperation Agreement (TDCA)

United Nations (UN)

United Nations Conference on Trade and Development (UNCTAD)

United States (US)

World Trade Organization (WTO)

CHAPTER 1

INTRODUCTION AND GENERAL BACKGROUND

1.1 Background

The issue of market access for developing countries has historically been an important one. Market access for goods in the World Trade Organisation ('WTO') includes the conditions, both tariff and non-tariff measures, agreed to by WTO members for the entry of certain goods into their own markets. The Uruguay Rounds saw progress made in terms of market access for developing countries, including the reduction of non-tariff barriers to trade ('NTBs')¹. However, the development of such countries continues to be impeded by lack of market access to developed markets. This is particularly prevalent in the context of the WTO Agreement on Sanitary and Phytosanitary Measures² ('SPS Agreement') which evolved from the framework created in terms of the General Agreement on Tariffs and Trade (the 'GATT') and developed even further under the WTO.

Historically, the Uruguay Rounds were the first to tackle the issue of trade liberalisation in agricultural products as well as negotiations on reducing and eventually eliminating non-tariff barriers to trade in terms of agricultural products. The right of states to introduce sanitary and phytosanitary measures necessary to protect human, animal and plant life was included for the first time in the GATT 1947³. According to Article XX(b) of The General Agreement on Trade and Tariffs this right encompassed a general exclusion of states from other provisions of the GATT provided that such measures taken were not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries". This refers to situations where the same conditions apply internationally or where such measures taken ostensibly as sanitary and phytosanitary measures were instead well disguised restrictions on international trade

¹ Finger, J. and Schuknecht, L. "Market access advances and retreats: The Uruguay Round and beyond" (World Bank Policy Research Working Paper, 1999)

² The Agreement on the Application of Sanitary and Phytosanitary Measures

³ Article III and XX(b) of The General Agreement on Trade and Tariffs

with protectionist considerations in mind. The *Punta del este Trade Declaration*⁴ further clarified this position by formally declaring that such measures, for whatever reason they are taken, function as effective trade barriers. It was from this framework that the SPS Agreement came into existence

The SPS agreement is technically difficult even in its conception, aiming to harmonize and balance ostensibly conflicting goals: firstly, the need to respect state sovereignty by not unduly impeding on individual states' rights to make policy decisions regarding the protection of human, animal or plant life⁵; and, secondly the need for such policies to be fair and based on a uniformly accepted international standard. These goals were considered essential in order to create transparency and fairness in each state's participation in the international market, as well as to guard against the implementation of protectionist policies⁶ that unfairly discriminate against foreign exporters.

The need for a uniform standard is acknowledged within the SPS Agreement itself, which states that there is a need to "harmonize sanitary and phytosanitary measures on as wide a basis as possible."⁷ The Agreement compels members to adopt only measures based on "international standards, guidelines or recommendations". The most persuasive of these is the *Codex Alimentarius Commission (Codex)*, a collection of international food safety standards. However, these standards are not 'binding norms' according to the *Beef Hormones*⁸ case, for although SPS measures must be 'based on' international standards and guidelines, they do not necessarily have to conform to them.

There are vast differences between SPS measures and technical barriers to trade (TBT's). SPS measures aim to first and foremost address market failures and are therefore not concerned strictly with the creation of obstacles to trade for foreign producers, while TBT's would intend to create such obstacles. Sanitary and phytosanitary

⁴ The General Agreements on Tariffs and Trade: The Punta Del Este Declaration (1986) Section D(iii)

⁵ Article 2 of the Sanitary and Phytosanitary Agreement

⁶ Kono Y. "Protection for whom?" (Paper prepared for the Oxford-Princeton conference on Global Trade Ethics and the Politics of WTO Reform, 2009) p. 3

⁷ Article 3 of the Sanitary and Phytosanitary Agreement

⁸ US continued retaliation in the Hormones Dispute (2008) WT/DS 320/R [US continued suspension]

measures merely have the potential to impact trade negatively and are not solely motivated by protectionist considerations

Developing countries, the institutional capacity of which struggles to comply with the domestic SPS standards of more developed countries, often run foul of these provisions, which may be far more onerous than the internationally recognized standards adopted by other states⁹. Such overly-burdensome standards would then constitute a NTB. States are, however, entitled to deviate from these recognized international standards if they have 'sufficient scientific reason'¹⁰ to do so.

The SPS Agreement further obligates states to accept equivalent measures taken by exporting states under certain circumstances. This would occur where the exporting country 'objectively demonstrates'¹¹ to the importing country that the measures taken by the former achieve the latter's appropriate level of protection, but through different means. This further emphasizes an important aspect of the Agreement: that it is not the method by which a level of sanitary protection is achieved that is relevant, but the fact that equivalent standards have been reached that is significant¹².

Issues of market access in terms of SPS measures are common and have had a massive impact on the ability of developing countries to trade freely, as can be seen in the recent EU Citrus Saga and AGOA debacle¹³. It is submitted that the EU Citrus Saga in particular is useful in analysing issues with SPS measures taken by states; it also showcases the inherent problems in the SPS Agreement itself, which is fraught with difficulties, in both interpretation and application.

Developing countries, and in particular South Africa ('SA'), as can be seen in EU Citrus Saga, rely on agricultural and food exports. In Sub-Saharan Africa alone, such exports

⁹Iacovone, L. 2003. "Analysis and Impact of Sanitary and Phytosanitary Measures" <http://www.cid.harvard.edu/cidtrade/Papers/iacovone.pdf> (ACCESSED ON 22 April 2016) p.22

¹⁰ Article 5 of the Sanitary and Phytosanitary Agreement

¹¹ Article 4 of the Sanitary and Phytosanitary Agreement

¹² Henson S, Loader R "Barriers to agricultural exports from developing countries: The role of sanitary and Phytosanitary Requirements" (2001) 29(1) *World Development* p. 84

¹³Erasmus G "This dispute is about more than black spots on oranges" <https://www.tralac.org/discussions/article/6519-this-dispute-is-about-more-than-black-spots-on-oranges.html> (Accessed on: 24 October 2016)

accounted for over 25% of all exports from the region.¹⁴ This creates a reliance on trade with wealthier countries as a means to actualize and encourage development. The SPS Agreement itself commits all members to take account of and provide special treatment to developing nations. In practice, however, this is often reported not to be the case.¹⁵ Certain aspects of the Agreement, which were largely negotiated by major developed nations at the Uruguay Rounds, are critically flawed. The forms and provisions of the Agreement do not adequately take cognizance of the special circumstances of developing nations and the difficulties they experience in achieving compliance. Consequently, certain standards set by the Agreement have been criticized as being 'inappropriate and unattainable'¹⁶ for developing countries.

As a result of these technical difficulties with the SPS Agreement itself as well as its inconsistent application, the negotiated goals of the Agreement of progressive liberalization of trade and assistance in the development of developing countries are often not realized. In fact, the opposite applies.

1.2 Statement of Purpose

The purpose of this study is to critically analyze the extent to which the SPS Agreement hinders the market access of developing nations, with particular focus on the SA-EU citrus saga and the SA- US AGOA saga.

1.3 Rationale

The fundamental reason for this analysis is the need to critically examine how the history and negotiation of the SPS Agreement has influenced its form and content to such an extent that its application no longer advances the aim of encouraging development of developing countries or promoting trade liberalization. A greater level of scrutiny is required to understand how this Agreement functions and what possible solutions exist

¹⁴ Henson and Loader (note 13 above) 86

¹⁵ Henson and Loader (note 13 above) 98

¹⁶ Ibid.

to address the fundamental inequality of the Agreement in the multilateral system. The recent spate of SPS-related disputes between developed and developing nations has highlighted such issues and therefore necessitates a further analysis of the Agreement as a tool for the promotion of trade and development in the developing world.

These challenges are of particular importance to developing SSA countries owing to their massive reliance on the exportation of agricultural products as a means to encourage development. South Africa is a key example in terms of the damage done to its domestic citrus industry as a result of SPS measures undertaken in the EU.

The choice of South Africa as an example to analyze in this discussion is based on the country's status as one of the largest developing economies in Africa, coupled with its involvement in recent SPS sagas with developed nations, including the EU and US.

Further, the relationship between the European Union and South Africa surpasses trade and incorporates directives to achieve cooperation in development between SA and its largest trading partner. Trade relations between South Africa and the European Union are governed by the Trade, Development and Co-operation Agreement.¹⁷ This Agreement has led to the establishment of a 'free-trade area' relevant to 90% of the trade between these two nations. This relationship, much like South Africa's relationship with the US is not altruistic in nature. South Africa's status as the strongest Sub-Saharan economy in Africa is beneficial to the European Union in terms of the country's ability to provide both an increasingly diverse range of goods as well as market stability for trade. The European Union in return provides well over 70% of all external assistance funds.

This relationship is further underpinned by South Africa's historical status, as a former colonial state, which binds it to various countries that comprise the European Union ('EU'). It is owing to the long-standing and dynamic relationship shared by these nations that it is important to understand both the historical context underpinning the relationship as well as more modern factors relating to trade diversification. These factors played a crucial

¹⁷ "South Africa" <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-africa/> (Accessed on: 1 May 2016)

role in influencing the EU citrus ban that has had a disastrous effect on South African access to the markets of EU member states.

The United States ('US') similarly functions as South Africa's third largest trading partner.¹⁸ Unlike South Africa's relationship with the European Union, the trade relationship between South Africa and the US has not been characterized by any disputes regarding the SPS Agreement. Their relationship has been largely influenced in recent history by the African Growth and Opportunity Act (AGOA), a piece of domestic United States legislation. The rationale behind the enactment of the AGOA was recognition of the importance of trade stimulation to encourage development in developing African states. Contrary to this stated purpose however, the AGOA has had a negative impact on the development and economic independence of various African states, including South Africa in the 'poultry saga'.

With regard to US-SA trade relations, it is important to note that passage of the AGOA represented a shift in domestic US trade policy towards African states. The AGOA in its ideology intended to represent the encouragement of trade and investment in developing African states. However, its unilateral nature was rooted in its status as domestic legislation rather than a negotiated agreement between states. This has led to problems relating to access of developing countries (especially South Africa) to the US market¹⁹. The literature in this area, which comprises mainly trade briefs and working papers, provides a useful legal analysis of the flaws of the AGOA, as well as the one-sided nature of South African trade interactions with the US²⁰. This thesis attempts to show the structural flaws in the AGOA, as well as the steps available to developing countries to counter similar issues in other agreements and acts.

¹⁸"South Africa Trade Relations" <http://www.southafrica.info/business/trade/relations/tifa-210415.htm#.VzOE8vI97IU> (Accessed: 3 May 2016)

¹⁹Erasmus G 'The AGOA Saga in a Governance context' <http://www.tralac.org/images/docs/9024/us16wp012016-erasmus-agoa-saga-in-a-trade-governance-context-20160210-fin.pdf> (Accessed: 2 May 2016)

²⁰ Adams S "Foreign Direct Investment, domestic investment, and economic growth in Sub-Saharan Africa" (2009) 31(6) *Journal of Policy Modeling* p. 942

Pursuant to the rationale highlighted above, this thesis also aims to deal with the problems associated with the measures outlined in the SPS Agreement in relation to market access of developing countries.

1.4 Research Questions

The main focus of this thesis shall be the impact of the provisions of the SPS Agreement on the ability of developing countries to access markets of developed countries, especially in light of the AGOA dispute and the SA/EU citrus dispute. Pursuant to this focus, the following research questions are relevant:

- How was the SPS Agreement formed in the context of the GATT/WTO and the multilateral system (MTS)?
- To what extent does the SPS Agreement inhibit the development of developing countries? How has the SPS Agreement been utilized by developing countries and to what extent has this impacted the development of these countries?
- To what extent do the SA-EU Citrus dispute and the SA-US AGOA dispute demonstrate the limits and complexities of SPS measures?
- What legal and policy interventions need to be implemented to ensure that developing countries such as South Africa fully utilize the SPS Agreement?

The assessment of the effects of SPS measures on market access of developing countries will be achieved on the basis of case studies of South Africa and its trade relationships with the EU and the US respectively.

1.5 Literature review

There is extensive literature on the topic of SPS measures as well as analyses on the SPS Agreement itself. Most of the authors have written on the effects that the SPS measures have had on developing countries, which affect their access to foreign markets. However, there has been a clear focus by a majority of authors on disputes that have

occurred between developed countries - such as the *Japan Apples*²¹ case and the *Beef Hormones*²² case - rather than those between developing countries and their more developed counterparts. The focus on the latter in this makes it necessary to consider a wide array of literature based in both the field of economics, which involves a great deal of empirical evidence, and the field of International Trade Law.

Henson S and Loader R (2001)²³ are critical of the use of SPS measures to impede market access of developing countries for agricultural and food products in particular. These authors make use of mainly empirical evidence in their analysis of such measures, thereby enlightening the true extent of the impact such measures have on the market access and development of developing countries. They compile various studies and interpret the data therein to form meaningful conclusions which are particularly useful in assessing the impact of SPS measures on market access. Henson and Loader are particularly critical of the fact that the impact of SPS measures has historically been viewed in the context of disputes between developed countries rather than developing countries. Their study and conclusions are pertinent to the SA/EU citrus saga in particular, owing to its focus on the access of agricultural products and food products to the EU market. Their conclusion in this regard is that the biggest barrier to market access for developing countries are SPS measures.²⁴

*Josling, Roberts and Hassan*²⁵ measure the impact of SPS measures on market access through the lens of the *Beef Hormones* dispute. They suggest a high level of flexibility on the part of states to determine which SPS measures they find appropriate, the consequence of this being, according to the authors, a distinct lack of specific criteria and parameters. SPS risk assessment cases therefore have no predictable outcome and are determined largely on their own merits. Their analysis of the *Beef Hormones Dispute* brings into prominence the pitfalls of SPS measures in the context of its development and background. They deconstruct the Dispute Panel's findings and Appellate Body report

²¹ Japanese- Agricultural products WT/DS76/AB/R, 1987

²² EC – Hormones (Canada) Panel Report WT/DS48/R/CAN, 1998

²³ Henson and Loader (note 13 above) 87

²⁴ Henson and Loader (note 13 above) 85

²⁵ Josling T, Roberts D, Hassan A, "The Beef Hormones Dispute and its implications for Trade Policy" (Stanford University Working Paper, 1999) p. 20

with respect to considerations from both a consumer-centric standpoint as well as a political standpoint²⁶. The authors proffer the view that SPS measures, in the context of developed countries, are unfairly skewed towards “ultra-conservative”²⁷ consumers and away from producer interest. The article acknowledges the use of “phony” technical barriers²⁸ to pander to domestic consumer interests which may incorporate ‘unscientific motivations’. Although useful in understanding the impact on developing countries’ exporters, the article fails to consider specifically the issues of market access with regard to developing countries and the impact on their development. -The article falls short as it does not consider the very real issue that developing countries face: the lack of infrastructure to be compliant with SPS measures as well as the imbalance in bargaining power between developing and developed countries, which is fundamental to the issues to be raised by this thesis.

The *WTO Report on the African Growth and Opportunity Act*²⁹ discusses the duty free treatment under the AGOA as well as the economic statistics in terms of its success in encouraging trade and development with regard to specific products produced in Sub-Saharan Africa. This report indicated that the largest US import under the Act is energy and oil related products, which draws into question the ‘altruism’ towards Sub-Saharan African Countries on the part of the US as developed country. While the report does identify the top US imports under the AGOA, its heavy use of empirical evidence makes it difficult to interpret. Furthermore, it lacks both legal consideration and analysis of the nature and form of the agreement. The information provided by the report may be useful but is not crucial to the analysis conducted in this thesis, which focuses predominantly on an analysis from a legal perspective.

A well rounded, albeit generalized legal perspective on the impact of SPS measures on market access in the context of the SPS Agreement can be found in *The Regulation of*

²⁶ Ibid 25.

²⁷ Josling, Roberts and Hassan (note 26 above) 26

²⁸ Ibid 27.

²⁹ World Trade Report “United States – African Growth and Opportunity Act: Report of the Government of the United States for the year 2014 under the decision of 27 May 2009” (2015)

*International Trade*³⁰. Trebilcock breaks down the relevant articles of the Agreement as well as its place in the context of other Agreements relevant to the discussion of market access, such as the Agreement on Agriculture. The analysis is made from a legal perspective and is useful when assessing the theoretical basis of the Agreement as it provides a firm basis by which to critique its inherent structural flaws as well as the mechanisms created by the WTO to deal with these flaws and disputes where the Agreement itself provides no remedies for disenfranchised states.

*Athukorala P and Jayasuria S*³¹ address the issues not tackled in Josling, Roberts and Hassan, namely the inadequate financial and technical resources that have effectively barred developing countries from reaping the benefits of trade liberalization successes and market access. They tackle this issue not from a strictly legal perspective, but rather from an economics viewpoint. Modern developing states are acknowledged by these authors to have begun to turn to processed food exports as a source for development and growth³² Despite this dynamic, ever growing market however, increasingly onerous food safety standards of developed countries function as a non-tariff barrier to trade, preventing states from exploiting their newfound opportunities. The authors correctly state that such standards are both unnecessarily high compared to cross border standards of other developing nations and are subject to change – often creating a non-transparent tool implemented for protectionist reasons rather than to legitimately protect the health and safety of the people of the state. The authors are highly critical of the implementation of SPS measures in the context of the multilateral framework. They provide a concise critique of these measures, which is highly relevant to this thesis' analysis on market access and development from a legal perspective.

As the EU-SA citrus saga is a fairly recent event in international trade law, most of the literature available on the EU ban have approached the issue from a distinctly economics-orientated approach. Although not a strictly legal analysis, this focus has nonetheless

³⁰ Trebilcock M. Howse R. Eliason A. *The Regulation of International Trade* 4th edition (Psychology printing, 2013) p. 649

³¹ Athukorala P & Jayasuriya S "Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective" (2003) 26(9) *The World Economy* p.1396

³² Athukorala and Jayasuria (note 32 above) 1396

been useful in assessing the practical impact of the Trade Development and Cooperation Agreement (TDCA) on South Africa. This is, further, a necessary analysis as it provides sufficient factual data to compare the actual gains and disadvantages for the EU and SA, respectively. This approach is evident in the GTAP Working Paper³³ on the subject. In this working paper *Macdonald* and *Walmsley* express a far more pessimistic view of the possible benefits of the TDCA for South Africa, arguing that the EU's listed reservations to the free-trade agreement, listed as 'sensitive products' undermine the reciprocity of the Agreement. They point out the inherent 'implicit asymmetry'³⁴ of attempts made towards trade liberalization between the EU and developing African states. The authors further express concern that the reluctance of the EU to fully liberalize food and agricultural commodities renders the Agreement one-sided in terms of benefits.

EU-SA relations developed historically long before the democratization of South Africa. As discussed in the SAIIA trade brief³⁵ negotiations regarding the TDCA and its application began prior to the democratization of South Africa. The brief correctly states that EU negotiations with South Africa regarding trade liberalization have been ineffective. Protectionist motivations on the part of the EU to safeguard European agriculture was shown to be difficult to balance with the ostensible goals of the TDCA - to assist with fostering the development of South Africa through market access³⁶. This brief emphasizes the 'unwillingness' of the EU, as a group of developed nations, to promote trade through the elimination of market barriers for developing countries.

This thesis shall therefore focus on the impact of provisions of the SPS Agreement on market access in relation to developing countries as well as the various preferential trade agreements concluded between the EU and South Africa as well as the US and South Africa respectively.

³³Macdonald S and Walmsley T 2003 "Bilateral Free Trade Agreements and Customs Unions: The Impact of the EU Republic of South Africa Free Trade Agreement on Botswana" (*Global Trade Analysis Project Working Papers* 2003) p. 2

³⁴Macdonald and Walmsley (note 34 above) 3

³⁵Bertelsmas-Scott T, Draper P "The TDCA: Impacts, Lessons and Perspectives for EU-South and Southern African Relations" Trade Report No 7. <http://www.saiia.org.za/research-reports/278-trade-report-no-7-july-2005/file> (Accessed on: 1 May 2016)

³⁶ Ibid 37.

1.6 Conceptual Framework

This thesis will adopt a hybrid theoretical framework that encompasses both an economic and legal theoretical framework. The purpose of this approach is to premise the research in a legal context – the realm of International Trade Law. Consequently, in assessing the impact of SPS measures on market access of developing countries, the exercise will be undertaken using a legal lens.

1.7 Research Methodology

This thesis will make extensive use of qualitative research. It will be purely desktop research and as such, the research will involve an economic-legal analysis of the World Trade Organization Agreement, the Sanitary and Phytosanitary Agreement, the Trade Development and Cooperation Agreement and the African Growth and Opportunity Act which are codified legal instruments. The secondary sources will include journal articles, textbooks, trade briefs and working papers of relevance in conducting this research.

CHAPTER 2

HISTORICAL OVERVIEW OF GATT, WTO AND SPS AGREEMENT

2.1 Introduction

In order to make sense of the current world trade system and the challenges posed to developing countries by onerous sanitary and phytosanitary standards, it is necessary to analyze the current system contextually, in the light of the many cycles of development that have preceded it. The nature of this evolution of the General Agreement Trade and Tariffs (GATT) to the World Trade Organisation (WTO), as well as the Sanitary and Phytosanitary Agreement itself during this time, appears to continually foster an environment of oppressive disparity, not conducive to the development of historically poor African states.

An analysis of the history of the multilateral system, indicates that this geographically concentrated, Western-centric evolution has led to cracks in the brickwork of the multilateral system – which was, as of its inception, never intended to provide for the needs of non-Western nations. These flaws, which are foundational and thus far reaching, are possibly fatal to the success of the WTO and the SPS Agreement in balancing the necessary aims of distributive justice in terms of state treatment as well as its effectiveness in attaining its intended goals.

This chapter shall therefore discuss the development of the SPS Agreement in the context of the development of the GATT and the WTO within the multilateral system. It will firstly discuss the historical background of the GATT, which was significantly influential in shaping current structures and practices. Secondly, it shall discuss the development of the WTO as a successor of the GATT in terms of international governance and attempt to show how the differences between the WTO and the GATT influenced the formation of the SPS Agreement.

2.2 Historical overview

2.2.1 Brief background

For the sake of simplicity, this paper shall begin its analysis of the history of the GATT from the beginning of the 20th Century. According to *Irvin and Mavroidis*, interconnectedness and prosperous growth of European trade was interrupted by years of turmoil during the Great Depression of 1929 and the successive World Wars³⁷. The fragmentation of political loyalties during this period was accompanied by strict wartime controls on trade which were phased out too gradually to allow for effective recovery of the fluidity of the pre-wartime trade experienced by Europe and the United States. Accompanied by the protectionist measures taken by the states to mitigate the turmoil of the Great Depression of 1929, this resulted in a catastrophic reduction in world trade during the early 20th Century³⁸.

Such protectionism resulted in states attempting to insulate themselves against the economic downturn of the 1930s by making use of what *Trofimov* refers to as “Beggary Neighbour”³⁹ policies that increased barriers to trade. The tide of protectionism began in the United States with the passing of the *Smoot-Hawley Act of 1930* which saw a 59% increase in tariffs across thousands of types of goods⁴⁰. Historically, this protectionism inevitably resulted in a lack of market access which had the poisonous effect of exacerbating the already dire economic slump to catastrophic levels. In an attempt to kick-start the recovery of the global trading system, many countries concluded highly discriminatory trade agreements and applied high tariffs⁴¹. According to *Irwin et al* this, together with inward looking domestic policy decisions implemented by European nations at this time actively led to a severe breakdown of the already weakened existing

³⁷Irwin, D, Mavroidis P, Sykes O, *The Genesis of the GATT* (Cambridge University Press, 2008). p. 5

³⁸Ibid.

³⁹Trofimov I “The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective” (2012) 5(1) *Journal of Politics and Law* p.56

⁴⁰Ibid 57.

⁴¹The United States for example, in 1930 imposed the ‘Hawley-Smoot tariff’ ostensibly to protect American farmers who were unable to compete with cheaper imported goods. This tariff would not extend only to agricultural products however and would apply across the board to all imports to the United States.

multilateral trade system and hindered the recovery of the global economy from the Depression⁴².

It was during this time that the need for greater coordination was acknowledged. Governmental incentive to restrict trade was apparent both politically and economically to preserve employment and struggling industries⁴³. Trade liberalization was perceived as the only means of ensuring recovery of the global economy and could only be achieved by means of systematic international cooperation.

The coordination of the powers which were victorious after the Second World War made it imperative for European states to negotiate on a greater scale than before in order to formulate a plan of recovery from the slump in the economy. Representatives of the victorious 'Allied Powers' entered into negotiations for the creation of a coordinated system to enable the recovery of the world economy⁴⁴. The solution posed was the creation of three international institutions which would liberalise trade and payment between states with a view to restoring the efficiency and growth of the multilateral system. These three conceptualized institutions were: The Bank of Reconstruction and Development ('The World Bank'), the International Monetary Fund ('The IMF') and, the most relevant for the purposes of this chapter, the International Trade Organization ('The ITO').

2.2.2 The Failure of the International Trade Organization

Unlike the World Bank and the IMF, the ITO from the start encountered problems which ultimately sealed its fate. Nevertheless, the ITO formed an important part of the genesis of the GATT and the WTO, which originated as an interim measure to regulate international trade before the establishment of the ITO. According to *Toye* however, the significance of the ITO goes beyond being a foundation for the GATT and shows an

⁴² Irwin, Mavroidis and Sykes (note 38 above) 8

⁴³ Pauwelyn J "The Transformation of World Trade" (2005) 104(1) *Michigan Law Review* p.8

⁴⁴ Irwin, Mavroidis and Sykes (note 38 above) 40

important ideological shift in international trade that persists in the current multilateral system⁴⁵.

The ITO in its conception was intended to be the first of its kind. Part of the United Nations ('UN') system as an organization, the ITO would have operated as an independent body subject to external operational control⁴⁶. One of the most prominent features of the ITO was also its greatest source of controversy – according to *Drache* policy makers foresaw the creation of an organization that governed more than trade alone⁴⁷. The organization was envisioned to have a 'special responsibility'⁴⁸ in terms of trade regulation by addressing issues related to trade as well, including the setting of labour standards and the consideration of the needs of human development⁴⁹. It is therefore apparent that the scope of the ITO, which went as far as standard-setting in terms of boycotts, restrictive business practices and commodity agreements, far exceeds the current scope of even the WTO and the GATT, which mainly act as trade organizations, both possessing a very narrow scope of action

A series of conferences held from 1946 – 1948 were to determine the future of the ITO, the IMF and the World Bank as the harbingers of a new international trade regime. Meetings were conducted between the United States and 15 other 'nuclear states' for the negotiation of tariff reductions. It is noteworthy that South Africa was selected among them.

A temporary means of regulating international commercial trade policy was needed prior to the ratification and implementation of the ITO. The GATT 1947 was signed less than a month prior to the ITO negotiations and featured, according to *Toye* a far narrower scope than the ITO and was only intended to be a protocol to the final organization⁵⁰. Furthermore, the failure of the proposals in respect of the ITO to deal with specificities of

⁴⁵Toye R. "The International Trade Organization." in *The Oxford Handbook on The World Trade Organization* (2012) p.124

⁴⁶Ibid 129.

⁴⁷Drache, D "*The short but significant life of the International Trade Organization: lessons for our time*" (Coventry: University of Warwick. Centre for the Study of Globalisation and Regionalisation Working papers, 2000) p.3

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Toye (note 46 above) 126

proposed tariff reductions made it necessary to create a protocol that would. This protocol was intended to come into force prior to the implementation of the ITO and would later be amended where necessary to be incorporated into the ITO Charter. It is thus apparent that the GATT 1947 was intended to be an interim measure and was not structured to be a permanent means of regulating and ensuring the protection of states' interest.

Following a period of multilateral negotiations, the United Nations Economic and Social Council convened a general conference on issues of trade and employment⁵¹ in Havana, Cuba, in order to create a charter for the proposed International Trade Organization ('The Havana Charter'). Negotiations ultimately failed and the ITO never came into being. Political infighting and a perceived lack of protection of American interests led to the US failing to ratify the Havana Charter. This failure of the ITO – which would have been arguably far more onerous on states in terms of labour laws - saw the GATT 1947 graduating from its role as a temporary measure into the only established means of governing international trade until the founding of the WTO.

The failure of the ITO as a multifaceted organization left the proposed triad of UN organizations incomplete. The GATT 1947 was never meant to be a substitute and was thus ineffective in regulating certain aspects of trade. The narrow scope of the GATT left a massive void in regulation and arguably wasted much of the potential of efficient international governance. *Daunton et al* argue however that the spirit of the ITO did not die with its failure to exist: the 1947 GATT's subsequent incorporation into the Marrakesh Agreement⁵² means that the spirit and values underpinning the ITO live on in the founding Agreement of the WTO⁵³.

⁵¹Irwin, Mavroidis and Sykes (note 38 above) 110

⁵²Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 U.N.T.S. 154 (entered into force 1 January 1995), available at <http://www.wto.org> (Marrakesh Agreement or WTO Agreement).

⁵³Narlicker A, Daunton M, Stern R *the Oxford Handbook on The World Trade Organization* (Oxford University Press, 2012) 129

2.2.3 The GATT

As the GATT 1947 was concluded with the intention of its being incorporated as a Protocol of the ITO, upon becoming the major force regulating international trade it was incomplete and unsuitable as a device to fill the gap as the third party of the Bretton-Woods organizations. It required much further negotiation to achieve full effectiveness – which occurred over several ‘Rounds’ over the course of the 20th century. It is necessary to analyze these rounds and the changes in scope that occurred within them to understand the progressive development of the GATT 1947 as a tool for governance, as well as to understand the ever more prominent role it plays in regulating states’ use of sanitary and phytosanitary measures.

2.2.3.1 History of the GATT

The failure of the ITO was not the only significant development in 1947. The origins of the GATT as the dominant form of regulation of international trade show a massive shift from previous approaches to international coordination towards the attainment of trade liberalization⁵⁴. According to *Pauwelyn* the creation of the GATT 1947 embodied the shift in national commitment from mere declarations of good faith and honourable intentions towards specific undertakings and commitments understood to be more binding in nature⁵⁵. This is not to say however that the GATT 1947 in its original form remained unchanged over its decades of dominance – various ‘Rounds’ of negotiations saw its role and scope of application shift dramatically through various additions and protocols.

The longevity of the GATT 1947 was unprecedented given its origins as an interim measure before the establishment of the ITO⁵⁶. The GATT 1947 for the greater part of the 20th Century was the *de facto* multilateral forum for the negotiation of tariff reductions and tariff related issues on an international scale⁵⁷. *Jackson* describes the pessimism

⁵⁴Pauwelyn (note 44 above) 11

⁵⁵Ibid

⁵⁶Jackson J. *The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (Cambridge University Press, 2000) p.17

⁵⁷ Zeiler T W “Expanding the Mandate of the GATT: The First Seven Rounds” in *The Oxford Handbook on The World Trade Organization* (2012) p.145

over the success of the GATT as a regulatory body as arising from its nature as an Agreement rather than an international institution with a sufficient framework – which initially ‘tied’ it to the failed institution of the ITO⁵⁸.

2.2.3.2 Origins of the GATT

The original round for the negotiation of the GATT 1947 was the Geneva Round of 1947, in which the rules and initial 24 Articles of the GATT were outlined and initial standards set⁵⁹. This original form of the GATT was significant in that it stressed the importance of trade liberalization for the benefit of the world economy, but did not expressly outlaw or discourage the use of protectionist measures⁶⁰. Two standout features of the GATT 1947 (which have now been incorporated by reference into the GATT 1994) were its inclusion of the Most-Favoured-Nation (‘MFN’) clause in Article I⁶¹ - which accorded every trade advantage given to one contracting state be given to *all* contracting states to the GATT – and Article III:4⁶² which dealt with the Principle of Non-Discrimination. According to *Glassner* these principles established an important basis for future trade liberalization efforts, which were to be negotiated over a series of multilateral negotiations⁶³.

Importantly for the purposes of this paper, the GATT, 1947 also featured the origins of the SPS Agreement⁶⁴ in the form of GATT Article XX: b, which provides:

‘This provision effectively is an exception from the Principle of Non-discrimination which permitted contracting states to take “any measures necessary to protect human, animal or plant health” provided that such measures do not “unjustifiably discriminate” between countries where the same conditions prevail and do not function as a disguised restriction to trade. This clause would eventually grow to

⁵⁸ Jackson (note 57 above) 51

⁵⁹ Irwin, Mavroidis and Sykes (note 38 above) 80

⁶⁰ Zeiler (note 58 above) 147

⁶¹ Article I of the General Agreement on Tariffs and Trade, 1947

⁶² Article III:4 of the General Agreement on Tariffs and Trade, 1947

⁶³ Glassner, M, (ed). *The United Nations at Work*. (Greenwood Publishing Group, 1998) p.109

⁶⁴ Article XX: b of the General Agreement on Tariffs and Trade 1947

be the subject of an entirely new Agreement on its own, also fraught with difficulties.'

However, the GATT 1947 has expanded over the course of the 20th century, not by means of direct amendment to its actual text, but by various additions necessitated by the gaps left by the failure of the ITO to come to fruition. These additions were born out of various 'Rounds' of negotiations between contracting states, which will be briefly discussed below.

i. The Kennedy Rounds

Named after the American president who had been assassinated only 6 months prior to the opening of negotiations, the Kennedy Round saw the first attempt by contracting states to reduce the impact of non-tariff barriers ('NTBs') as well as the first real attempt made to address the concerns and interests of developing countries⁶⁵ by expanding the GATT. Non-tariff barriers were addressed in separate, smaller agreements in this Round, known as 'Codes'⁶⁶.

This Round also featured the first 'plurilateral agreements' which were binding only on signatories to these agreements. This led to a perceived dilution of the nature of the GATT as an organization that intended to hold the same obligations binding on all member states. This "fragmentation"⁶⁷ of the GATT, according to *Marceau and Trachtmann* was influential in shaping the future structure of the TBT and SPS Agreements. Furthermore, the Kennedy Rounds also resulted in the creation of special rules for developing countries in the form of an exception to the Principle of Reciprocity⁶⁸. It could be argued that, at this stage, developing countries were offered a chance to enter into multilateral

⁶⁵ Zeiler (note 58 above) 152

⁶⁶ Jackson (note 57 above) 67

⁶⁷ Marceau G, Trachtman J "The technical barriers to trade agreement, the sanitary and phytosanitary measures agreement, and the general agreement on tariffs and trade: a map of the new World Trade Organization law of domestic regulation of goods." (2002) 36(5) *Journal of World Trade* p.11

⁶⁸ Toye (note 46 above) 155

negotiations and meaningfully participate in the global economy. This new non-reciprocity clause was novel and carried through into the future Tokyo Rounds⁶⁹.

Unfortunately, as *Hudec* states, any possible benefits accorded to developing countries in this round were theoretical rather than practical.⁷⁰ Developing countries were still not granted vital tariff concessions on products of “special interest” that were crucial to the success of their economies. Further development of the GATT jurisprudence would be needed before meaningful consideration of the special needs of developing countries was to be taken into account.

ii. The Tokyo Rounds

A common criticism levelled against the GATT 1947 in its original form is its perceived status as a form of ‘Gentleman’s club’⁷¹ for wealthier developed contracting states, which valued political flexibility over the need for a structured system with a strong foundational rule of law. Contracting states further had the ability to actively resist the development of new rules and obligations by choosing not to sign any new rules that arose out of the Rounds of negotiation⁷² and could choose to continue to abide by the GATT rules in their original form.

The resultant variation of the obligations of contracting states was undesirable in that it allowed for a fragmentation of responsibilities on states, who were able to ‘pick and choose’ their commitments to the multilateral system. However, contracting states at the time took advantage of this ‘flexibility’ and entered into various side agreements in order to effect the changes to the GATT which they deemed appropriate⁷³. This resulted in unfair treatment towards developing countries by the developed world, which often engaged in stringent protectionism of their own industries by means of disguised technical barriers to trade.

⁶⁹Morton. K Tulloch. P *Trade and developing countries* (Routledge, 2011) p.57

⁷⁰Hudec. R. *Developing countries in the GATT legal system*. (Cambridge University Press, 2010) p.46

⁷¹Pauwelyn (note 44 above) 11

⁷²Hudec (note 70 above) 72

⁷³*Ibid*

It was during these Rounds that Developing Countries took on a more active role in protecting their economic interests through negotiations that took on a wider scale than ever before. Developing countries in these Rounds stressed the need for 'special and favourable treatment' in all areas of negotiation where 'feasible and appropriate', to take into account their special economic vulnerability⁷⁴. The need for a less reciprocal and more 'just' relationship was emphasized by developing countries, who pushed for greater trade concessions and most importantly, the acknowledgment that ever more stringent technical barriers were often greater stumbling blocks to their ability to trade than tariff barriers. Possible protectionism by developed countries was "forcefully brought to the table by developing countries, spurred by desperation for consideration of their economic needs"⁷⁵.

Negotiations between developing and developed countries were tense, as calls for intervention by developing countries was seen as an unwelcome intervention in the GATT business by developed countries⁷⁶. This led to a significant event: the development of a series of Codes and Agreements regarding NTBs and related matters. These Agreements would finally address issues relating to the regulation of technical barriers to trade and agricultural products, as indicated below.

a) The Standards Code

A plurilateral agreement known as the 'Standards Code' ('The Code') came into being and laid down the first set of regulations that governed various aspects of technical regulations and conformity assessment procedures. Whether this new Code was to be effective in achieving the aims of stamping out protectionism was yet to be determined.⁷⁷ In this respect, a more detailed discussion will follow in Chapter 3.

⁷⁴Morton and Tulloch (note 69 above)

⁷⁵Hudec (note 70 above) 73

⁷⁶Ibid

⁷⁷ Caswell, J. A. "Incorporating science, economics, and sociology in developing sanitary and phytosanitary standards in international Trade-Overview." (2000) p. 32

b) The Enabling clause

Another significant development in these Rounds was the inclusion of the Enabling Clause of 1979 which, according to *Michalopoulos*, functioned as a stronger foundation for special and favourable treatment for developing countries in the multilateral system. However, it is noteworthy that the language of this provision was non-binding and that rather than imposing serious binding obligations on developed states, it functioned more as a gateway that allowed for the introduction of new non-reciprocal and preferential market access schemes that would encourage the consideration of the needs of developing countries⁷⁸.

Unfortunately, much like the Rounds that preceded Tokyo, commitments made by developed countries to consider the need for special and differential treatment of their developing counterparts was neither binding nor meaningful, with vague promises only to 'take into account' the needs of developing countries, rather than binding undertakings with enforceable legal authority⁷⁹. *Zeiler* argues that a lack of participation of the 'Third World' was instrumental in preventing effective reforms that benefitted developing countries⁸⁰. These non-committal undertakings would later prove to be problematic for developing countries when both the original text of the GATT as well as the Code would inevitably fail to prevent the mass use of undue technical restrictions to disrupt the trade of agricultural products⁸¹.

iii. The Uruguay Rounds

The dominance of the GATT drew to a close in the late 1970's, with the final set of Rounds taking place in Punta del Este in Uruguay. The objectives of this round were to further develop provisions of the GATT in order to lower unfair agricultural subsidies⁸² and further address the disruptive practices of Developed Countries against the agricultural sector of

⁷⁸ Michalopoulos C. *Developing Countries in the WTO* (Palgrave Macmillan, 2001) p. 32

⁷⁹ Hudec (note 70 above) 74

⁸⁰ Zeiler (note 58 above) 159

⁸¹ Caswell (note 77 above) 814

⁸² Michalopoulos (note 78 above) 33

the developing world⁸³. According to *Preeg*, these Rounds were a watershed in efforts to reduce barriers to trade and led to an overall reinforcement of the international trading system⁸⁴.

Developing Countries expressed their dissatisfaction with the lack of progress in diminishing the power of protectionist measures which were disguised as technical regulations since the Tokyo Rounds. The original intention of these Rounds had been the strengthening of preexisting systems created in The Code and the original text of the GATT, to ensure their future effectiveness⁸⁵.

According to *Hudec* these Rounds were hugely significant in their wide scope and content and represented a deepening of the content of international trade law and began the process of the creation of the future dominant international body and umbrella organization, the World Trade Organization ('The WTO')⁸⁶. Furthermore, these Rounds marked the first time that issues of agriculture had been tabled for discussion, which resulted in certain agricultural products being accorded 'special treatment' by means of exemptions from various GATT rules⁸⁷.

The original text of the GATT 1947 was no longer effective in dealing with international disputes over technical barriers to trade or sanitary and phytosanitary disputes as espoused in the Code. This was due in large part to the GATT system of consensus-based dispute resolution, which was ineffective in providing true redress⁸⁸. It was further necessary to provide meaningful content to Article XX⁸⁹, which exempted a measure from other GATT provisions if the measure was necessary to protect "human, animal or plant life and health"⁹⁰.

⁸³ Ibid 34.

⁸⁴ Preeg E "The Uruguay Rounds Negotiations and the Creation of the WTO" in *The Oxford Handbook on The World Trade Organization* (2012) p.165

⁸⁵ Ibid.

⁸⁶ Hudec (note 70 above) 107

⁸⁷ "South Africa-US Relations" <http://www.globalsecurity.org/military/world/rsa/forrel-us.htm> (Accessed on 6 November 2016)

⁸⁸ Michalopoulos (note 78 above) 33

⁸⁹ Article XX of GATT 1947

⁹⁰ Article XX of the General Agreement on Tariffs and Trade 1947

The Uruguay Rounds prominently featured agricultural negotiations that dealt with the need to lower barriers to trade - such as tariff barriers - that plagued international trade in agricultural goods. This process eventually resulted in the conclusion of the SPS Agreement, negotiated with the intention of circumventing the use of protectionist measures, which were disguised as technical barriers or sanitary and phytosanitary requirements, as a means to counteract various tariff reductions⁹¹. This course of action was born out of the prevailing belief that the best means of counteracting protectionist forces is to encourage trade liberalization⁹².

These Rounds also marked the first time that Developing Countries were actively challenged by Developed Countries to reciprocate on a greater scale than ever before. The United States in particular viewed it as time for the developing world to 'graduate' from the need for special and favourable treatment, due to the perceived 'progressive development' of the economies of the developing world⁹³.

Michalopoulos argues, however, that the Uruguay Rounds offered great potential to aid developing countries by improving market access for them, especially in the newly incorporated agricultural sector, where developing countries were offered special and favourable treatment as well as tariff concessions⁹⁴. *Preeg* agrees with this assertion and suggests that a strengthening of the Dispute Settlement Understanding⁹⁵ ('DSU') would also work to the benefit of developing countries which could now negotiate on a more even keel with the developed world⁹⁶.

The cost of compliance with these new Agreements would ultimately diminish, to some degree, their possible success. However, this too was mitigated against in the new provisions, which dealt with the provision of technical assistance to Developing Countries, which would be unable to bear the high cost of compliance with the new additions to the GATT jurisprudence. While the failure of the ITO was not fatal to the development of international trade law, it did shape its future development in a 'patchwork' manner with

⁹¹ Ibid

⁹² Preeg (note 84 above) 166

⁹³ Preeg (note 84 above) 168

⁹⁴ Michalopoulos (note 78 above) 28

⁹⁵ WTO Dispute Settlement of Understanding Agreement

⁹⁶ Preeg (note 84 above) 170

respect to the rule of law. A “*de facto* regime”⁹⁷ in the form of the GATT rose out of the ashes and featured as the “dominant ‘organization’” for governance of trade. Instead of focusing on a permanent replacement for itself, the GATT operated as a vehicle for reform – evolving to account for the needs of all contracting parties. Sadly, the exclusion of developing countries from crucial periods of negotiations over the various rounds has left an indelible mark on the GATT’s ability to provide effectively for their needs. The practical effect of this was the marginalization of the interests of developing countries for the majority of the 20th century⁹⁸.

2.2.4 The World Trade Organization

2.2.4.1 Brief history of the WTO

It became apparent after the Uruguay Rounds that the GATT’s structural flaws would be fatal to the long term success of current efforts to regulate international trade, especially when considering the proliferation of various new Agreements from the Uruguay Rounds that lacked the necessary structural foundations and support to be effective, as well as better dispute resolution in terms of SPS disputes. This re-invigorated the idea that an international trade organization was needed to create an adequate framework for success. This was how the World Trade Organization (‘WTO’)⁹⁹ came to be established.

A structural flaw that required amendment in the GATT was the *a la carte* nature of its obligations – Contracting States were bound by separate agreements on different terms that excluded application over other contracting parties who chose not to incur such obligations. This problematic arrangement led to a lack of harmonization between contracting states. It is for this reason that the WTO was engineered to be a ‘single undertaking’.

⁹⁷ Michalopoulos (note 78 above)

⁹⁸ Michalopoulos (note 78 above)

⁹⁹ Matsushita, M., Schoenbaum, T.J., Mavroidis, P.C. Hahn, M., *The World Trade Organization: law, practice, and policy*. (Oxford University Press, 2015) p.9

2.2.4.2 Agreement establishing the WTO

The WTO is established by means of the WTO Agreement¹⁰⁰. Although the WTO has gained prominence as the primary institution of international trade in the multilateral system, it has not 'replaced' the GATT in its entirety¹⁰¹. The GATT still plays an important role by establishing rules through which countries interact with one another, which have been further adapted and developed through the WTO¹⁰².

This institution goes further than its predecessor by creating an actual forum for member countries to negotiate with one another regarding a plethora of issues that affect their interactions in the multilateral system. In order to become a member state of the WTO, states must sign the Agreement establishing the organization as a 'single undertaking'.¹⁰³ Once a state becomes a member of the WTO, it may not 'pick and choose' which aspects of the Agreement it wishes to be party to, as with the *a la carte* nature of the GATT, but will instead be bound by all the agreements under the umbrella of the WTO. These agreements under the WTO cover a wide spectrum of subject matter, including the trade of goods and services¹⁰⁴, special and differential treatment for developing countries¹⁰⁵ as well as dispute resolution procedures to be followed. One of the agreements under the WTO is the Agreement on Sanitary and Phytosanitary Measures ('SPS Agreement'), which was incorporated into the WTO as an annexure to the Agreement Establishing the WTO¹⁰⁶. As the SPS Agreement finds its origins as an annexure in this way, it is the view of this thesis that functioning of the SPS Agreement in regulating certain aspects of the trade of agricultural goods is linked to and ultimately reflects the functioning of the WTO as a whole.

¹⁰⁰ Marrakesh Agreement Establishing the World Trade Organization

¹⁰¹ Oatley T. "The Multilateral Trading System" http://www.unc.edu/~toatley/poli140/Chapter_2.pdf (Accessed on: 1 August 2016)

¹⁰² For example, the attainment of WTO objectives and goals (which will be discussed at a later stage) are intended to be achieved by means of encouraging states to enter into reciprocal and mutually advantageous relationships, as per the preamble of the GATT (1994)

¹⁰³ Hudec (note 70 above) 107

¹⁰⁴ Dealt with in Annexure 1 of the Agreement establishing the WTO

¹⁰⁵ Reflected in the Sanitary and Phytosanitary Agreement and Agreement on Technical Barriers to Trade

¹⁰⁶ Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization

2.2.4.3 Objectives

Unlike the GATT, the WTO was more than a legal arrangement and was intended from the outset to function as a permanent international institution that functions as an oversight body in matters relating to trade and international goods¹⁰⁷. The objectives of this international institution are outlined broadly in the Preamble of the Marrakesh Agreement. Many of these objectives have survived from the preamble of the GATT with three novel¹⁰⁸ additions¹⁰⁹. Such carry-overs include raising international standards of living and ensuring the best possible use of world resources. New additions to the WTO preamble are significant as they acknowledge the special vulnerability of developing countries which must be able to “secure a share in international trade commensurate with the needs of their economic development”¹¹⁰. The preamble of the WTO is an important tool in interpretation, which provides an important lens through which to view the relevant provisions of the SPS Agreement which forms part of the ‘single undertaking’ of the WTO Agreement.

2.3 The Sanitary and Phytosanitary Agreement (‘The SPS Agreement’)

2.3.1 History of the SPS Agreement

As illustrated above, the historical regulation of Sanitary and Phytosanitary regulations extends far beyond the promulgation of the SPS Agreement. The right of states to take measures necessary to protect human, animal and plant life were embodied in the GATT 1947 under the General Exceptions in Article XX¹¹¹.

¹⁰⁷Sinha A, ‘What are the functions and objectives of the WTO?’ accessed at <http://www.preservearticles.com/201012291900/functions-and-objectives-of-wto.html> (Accessed on: 23 April 2016)

¹⁰⁸ These new additions, while not directly relevant for the purposes of this thesis include: the expansion of the coverage to trade in services as well as trade in goods; the attainment of “sustainable development” and environmental protection and finally (and most importantly) the promotion of the “development dimension” aimed at securing greater developing country growth in international trade.

¹⁰⁹ The WTO Agreement Series: Agreement establishing the WTO accessed at https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf (Accessed on: 23 April 2016)

¹¹⁰ Preamble to the Agreement establishing the World Trade Organization

¹¹¹ Article XX of the GATT (1994) recognizes that the rules of the WTO when strictly applied may be unduly restrictive or burdensome on the autonomy of member states. Therefore, this Article allows Member States of the WTO to adopt measures in pursuit of certain purposes, even if those measures ordinarily would be

In spite of this, the first meaningful attempt to regulate SPS measures was embodied in the Kennedy Rounds which sought, according to *Lamy*, to extend the coverage of the GATT and address previously unregulated forms of non-tariff barriers¹¹². The aforementioned fragmentation of the GATT due to its *a la carte* nature led to a very segmented application amongst Contracting States. This uneven application was instrumental in inspiring the push by drafting parties of the WTO to ensure that it operated as a 'single undertaking': in order to be members of the WTO, parties would have to be signatories to all the relevant Agreements, without the option of amending portions of each Agreement.

The Kennedy Round of negotiations further developed the regulation of SPS measures by contracting parties to the GATT. It was out of these Rounds that the First General Notification exercise came to operate. These Rounds confirmed that the "explosion" of use by states of broad general standards and thus precipitated the need for harmonization of international SPS standards in order to prevent the use of potentially unfair barriers to trade¹¹³. Although there was greater acknowledgement of the potentially discriminatory nature of misused SPS measures, the creation of the Standards Code as espoused in the Tokyo Rounds did little to prevent such misuse and the resultant disruption of trade. The Standards Code's failures would parallel the failures of the GATT in that it failed to establish an operable system to be effective with the result that not a single SPS measure was successfully challenged through dispute settlement under the GATT, which was heavily reliant on a consensus-based dispute settlement process.

Growing dissatisfaction with regulation by contracting states necessitated a greater level of enforceability and discipline over measures taken to protect domestic agricultural industries. The Uruguay Rounds were therefore hugely significant in addressing concerns that SPS measures were ineffectively regulated. Several new Agreements

a breach of their obligations under the GATT/WTO. Therefore, there are certain 'general exceptions' that allow member states a measure of flexibility when regulating and legislating. These include preservation of public morals; protection of human and animal life and health (which shall be discussed further in this chapter and Chapter 3)

¹¹² Lamy, P "The Place of the WTO and its Law in the International Legal Order" (2006) 17(5) *European Journal of International Law* p.975

¹¹³ Spec (71) 143, 30 September 1971, Section III, Article 1 (a)

arose out of negotiations, including the Agreement on Agriculture and, most significantly, the SPS Agreement and the TBT Agreement. This according to *Cardwell et al* represented an important shift in the regulatory framework for agricultural trade¹¹⁴.

The Agreements that arose out of the Uruguay Rounds built on and exceeded what was previously embodied in Article III:4 and Article I of the GATT by laying down a 'substantive [basis] for the regulation of barriers to trade, all of which would require greater institutional capacity and tighter domestic regulations to ensure compliance¹¹⁵.

Unlike the GATT *a la carte* the SPS Agreement formed part of the WTO's 'single undertaking'¹¹⁶, meaning that parties to the Marrakesh Agreement (which established the WTO) automatically ratified and bound themselves to the SPS Agreement as well¹¹⁷.

2.3.2 Focuses of the Agreement

The SPS Agreement straddles the difficult balance between recognizing the right of WTO members to apply any measures necessary to protect human, animal and plant life and health with the need to ensure that 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries...'¹¹⁸. The preamble of the SPS Agreement reaffirms its commitment to achieving this balance by acknowledging the importance of members' actions to minimize any possible negative impact of such measures on trade.

Recognizing the importance of state autonomy, the SPS Agreement allows the governments of states to implement any measures they deem necessary to achieve the level of protection they determine appropriate in order to protect human, animal and plant life or health. In this way, the SPS Agreement in its current form can be seen as a

¹¹⁴ Cardwell M, Grossman M, and Christopher P, (eds) *Agriculture and international trade: law, policy, and the WTO* (CABI, 2003) p. 2

¹¹⁵ Prevost, D. "Operationalising 'Special and differential treatment of developing countries under the SPS Agreement.'" (2005) 30 *South African yearbook of international law* p. 53

¹¹⁶ Especially due to the fact that it is an annexure of the WTO Agreement.

¹¹⁷ Marceau and Trachtman (note 68 above) 812

¹¹⁸ Preamble of the Sanitary and Phytosanitary Agreement

development of Article XX of the GATT, 1947 with greater substantive content to give more meaning to its application.

The Agreement therefore acknowledges the possibility of misuse of SPS measures by WTO Member States and sets out various substantive and procedural rules that must be complied with in order to guard against the possibility of domestic protectionism being 'disguised' as SPS measures. A more detailed analysis of these rules shall be undertaken in following chapters.

2.4 Conclusion

Understanding of the historical background of the SPS Agreement is essential to contextualize its origins as a provision of the GATT and its recent development as a fully-fledged Agreement. It is, furthermore, important to understand the GATT's nature as a legal undertaking rather than a *bona fide* institution, in order to understand the structural flaw that pervades the current arrangement of the multilateral system. The WTO may be seen as a spiritual return to the underlying values of the failed ITO and a step towards a stronger institutional and structural foundation. However, the lack of developing country participation in many of the Rounds of negotiation that shaped the development of the GATT have influenced the nature of both the SPS Agreement and the WTO: the inherent structural inequalities and lack of consideration for the needs of developing countries goes down to the very foundation of the multilateral system. This understanding is crucial when analyzing the flaws and difficulties faced by developing countries with regard the SPS Agreement in the current multilateral system.

CHAPTER 3

A CRITICAL LEGAL ANALYSIS OF SANITARY AND PHYTOSANITARY MEASURES AND THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

3.1 Introduction

In the past developing countries have encountered various hurdles when attempting to access the markets of their developed counterparts. Many of these nations have become disillusioned with the current multilateral system, especially with regard to the World Trade Organization ('WTO'), and its perceived ineffectiveness in promoting development and trade liberalization. Some authors have suggested that the imbalance between the developed and developing world has actually become entrenched and institutionalized by the WTO¹¹⁹ and now forms part of the status quo in the multilateral system¹²⁰. This apparent lack of progress in encouraging a more level playing field of trade between the developed and developing world became a major stumbling block in negotiations at the Doha Development Round, much to the frustration of the developing world who are increasingly confronted with new forms of protectionist barriers to trade and market access.

It is therefore imperative in light of this increasingly widening gap, especially between standards that are desired by developed countries and practically attainable by developing countries, that such disparity and market access restrictions be addressed. This should be done in a manner that both ensures effective implementation of sanitary and phytosanitary measures to protect human, animal and plant life, as well as prevention

¹¹⁹Davis C L and Bermeo S B "Who Files? Developing country participation in GATT/WTO Adjudication" (2009) 71 *The Journal of Politics* 1033 – 1049: *In this article the authors state at pg. 1034 that the 'law may simply reinforce existing power symmetries'*

¹²⁰Neumayer E "Developing countries in the WTO: Support or Resist the 'Millennium' Round?" (1999) 9(5) *Development in Practice* p. 592: *Neumayer suggests that the even the most beneficial Round of Negotiation, the Uruguay Round, had an unbalanced beneficial effect that swings firmly in favour of developed countries. These countries have benefitted immensely from increased access to developing country markets without any substantial reciprocal benefit for developing countries with respect to trade liberalization and market access.*

of misuse of such standards to create insurmountable barriers to trade for developing countries.

The former Director-General of the WTO, Pascal Lamy in his address to the 59th session of the UNCTAD's Trade and Development Board described this issue in the 21st Century as follows:

“Small trade restrictions are accumulating like bad cholesterol, and the danger is that the benefits of trade openness will be incrementally undermined. The WTO’s and UNCTAD’s monitoring of trade-restrictive measures are a useful means to help members keep their cholesterol levels under control ... What can we in the international community do to help in the present circumstances? First of all, we must remain focused on our primary objective, a goal that the WTO and UNCTAD share: to help developing countries benefit from the globalized economy to raise living standards. In essence, to use trade as a conduit to achieve development that is both sustained and sustainable.”¹²¹

This ‘bad cholesterol’ has become especially problematic in recent years¹²². From a developing country perspective, substantial progress has been made in the reduction of tariff barriers to trade since the Uruguay Round¹²³. In spite of this progress (or perhaps because of it) developed countries have begun to make increasing use of Non-tariff barriers (‘NTBs’) as forms of disguised protectionism to safeguard their own domestic industries from cheaper, more economically competitive foreign producers. Sanitary and phytosanitary measures (‘SPS measures’) in particular have proved to be an effective means of blocking access to developed country markets and a hindrance to free trade¹²⁴.

¹²¹ Director-General of the WTO, Pascal Lamy, Address to the 59th session of UNCTAD's Trade and Development Board on 25 September 2012

¹²² Kallumal M “SPS Measures and possible market access implications for agricultural trade in the Doha Round: An analysis of systemic issues” (2012) http://www.networkideas.org/featart/sep2012/Murali_Kallummal.pdf (Accessed on 10 September 2016)

¹²³ Iacovone (note 10 above)

¹²⁴ Ibid

This is not to say however that protectionism is the sole or primary purpose of SPS measures. First and foremost, SPS measures ought to be aimed at the protection of human, animal and plant life¹²⁵. This shall be discussed further in due course.

The Sanitary and Phytosanitary Agreement ('The SPS Agreement'), which governs all SPS measures and related non-tariff barriers, therefore straddles a difficult line involving what *Iacovone* describes as a 'mix of [genuine] protection and protectionist objectives which [are] very complex to disentangle'.¹²⁶ The potential of SPS measures to impede market access for developing countries is especially prevalent in the case of fresh fruit, agricultural and food exports¹²⁷.

As chapter 2 provided a brief historical overview, this chapter aims to specifically provide an analysis of the position of developing countries within the multilateral system and the role that the SPS Agreement plays in the development of such countries. Thus the chapter will aim to discuss the extent to which the SPS Agreement inhibits the development of developing countries and, more positively, whether it has been utilized by developing countries and the extent to which this has impacted their market access and overall development.

3.2 Developing countries

In order to better understand the provisions of the SPS Agreement and the impact they have on the developing world, it is necessary to discuss and unpack the concept of a 'developing country' and the problems that states associated with this label face in the multilateral system. These issues, as the term 'developing' implies, predominantly relate to the needs of these states to develop in terms of both their infrastructure and economies. These crucial aspects are understood as being realizable by means of market access and freer trade.

¹²⁵ Preamble of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures

¹²⁶ Iacovone (note 10 above)

¹²⁷ Kallumal (see note 121 above)

The term 'developing country' is not defined in the WTO Agreement¹²⁸. The decision on whether it applies is at the discretion of the state concerned. On paper, adopting the title of 'developing' can be seen to bring many advantages to states, including the ability to invoke special and differential treatment provisions found in the various WTO Agreements¹²⁹. However, adopting the title of 'developing' does not provide automatic exemption from all obligations in terms of their membership of the WTO. These countries may be allowed limited 'grace periods' of adjustment in order to allow sufficient time for major infrastructural changes in order to remain in accordance with international standards.

However, the conceptual basis for 'developing countries' is a difficult one. *Pahuja* states that this term is 'too indiscriminate to be of practical usefulness as it groups together countries with distinct cultural identities and specific economic issues under a single umbrella' that does not address the diverse needs of developing member states¹³⁰.

Although problematic in this regard, there are certain shared traits among developing countries that aid in distinguishing them from more developed states. Many developing countries according to *Henson and Loader* share the common trait of lacking in sufficient resources to access the markets of developed countries and thus to participate effectively in trade activity in the WTO¹³¹. This results in states being left largely 'outside' of major trade negotiations conducted between more economically influential developed country members which renders them unable to exploit the opportunities for market access afforded to wealthier member states. Owing to the lack of meaningful progress in this regard, developing countries are growing increasingly cautious about the ability of the WTO to address their concerns over market access¹³². In order to encourage the evolution of a more equitable WTO, which ought to encourage fairer treatment¹³³ (by means of greater consideration of the needs and special vulnerabilities of developing

¹²⁸ Marrakesh Agreement Establishing the World Trade Organization

¹²⁹ Such as Article 10 of the SPS Agreement

¹³⁰ Pahuja, S. "Global Poverty and the Politics of Good Intentions" (2014) *Law in Transition: Human Rights, Development and Transitional Justice* p. 33

¹³¹ Henson and Loader (note 13 above) 87

¹³² Henson and Loader (note 13 above) 88

¹³³ Pahuja, S. "Global Poverty and the Politics of Good Intentions" (2014) *Law in Transition: Human Rights, Development and Transitional Justice* p. 46

countries), developing country members of the WTO have increasingly pushed for greater tariff concessions and special and differential treatment at negotiations¹³⁴.

This handicap in terms of developing countries' influence has become a substantial part of their identity as states¹³⁵ which, according to *Hudec* has become:

“almost entirely a matter of demanding non-reciprocal and preferential treatment and developed countries responding grudgingly to those demands...”¹³⁶

In terms of commonalities over goods exported, developing countries commonly do not feature extensively diversified markets. While a minority of states have managed to defy this stereotype¹³⁷, *Michalopoulos* notes an overwhelming reliance of developing countries on exporting a select few primary commodities, which are often subject to price instability and increasingly deteriorating terms of trade with developed states¹³⁸. The latter is most apparent in the case of fresh fruit, food and agricultural exports which face significant barriers to trade and market access for developing countries¹³⁹. This is especially destructive to developing country industries which have a 'comparative advantage'¹⁴⁰ over developed countries when it comes to food and agricultural products¹⁴¹.

Developing countries also differ from developed countries in terms of both their industries and their technological capabilities. Developed countries, due to the rapid increase of their technological capabilities have shifted their industries away from the exportation of

¹³⁴ Especially in the Doha Development Round

¹³⁵ Finger, J.M., 2008. "Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round" (2008) 31(7) *The World Economy* p.887.

¹³⁶ *Ibid* p. 888

¹³⁷ Such as industrialized nations like China and Singapore according to *Michalopoulos*

¹³⁸ *Michalopoulos* (note 78 above) 71

¹³⁹ Davis and Bermeo (note 118 above) 1035

¹⁴⁰ This refers to the phenomenon where one country is better than producing and trading in certain goods relative to other countries who produce the same goods. This could be due to a variety of reasons, including (regarding certain agricultural products) a climate more conducive to the growth of that product or a greater national focus on cultivating that products (*Oatley* http://www.unc.edu/~toatley/poli140/Chapter_2.pdf p. 13)

¹⁴¹ Henson and Loader (note 13 above) 92

primary commodities (and what *Steger* refers to as 'dirty industries'¹⁴²) since the 1980's. These industries have since shifted to developing countries. As a result of this, food and safety standards in developed countries have risen beyond the technical capabilities of developing countries. This has had a negative impact on the interests of developing countries¹⁴³. *Finger* goes on to explain that the SPS Agreement has been relatively ineffective in supporting the liberalization of developing of countries as it is unable to effectively discipline the developing countries use of overly restrictive/protectionist measures, making it difficult for such nations to attain meaningful market access¹⁴⁴.

It is no surprise that the advancement developing countries within the WTO framework has been controversial. Authors have been divided over the success of developing countries to effectively enforce WTO rules and provisions of the SPS Agreement. *Michalopoulos* regards the WTO framework as being moderately successful in facilitating the integration of more developed of the developing countries into the multilateral system. However, he acknowledges that for the majority of developing member states, this has not been the case, thus leaving them lagging behind in terms of development and market access.

Theoretically, special and differential treatment has been designed to alleviate the burdens faced by developing countries in this regard by ensuring that developed member states comply with their trade obligations and interact with one another according to recognized rules of trade¹⁴⁵. According to *Davis* and *Bermeo* focusing on the creation of such commitments alone has been largely ineffective in creating binding legal obligations on developed countries to treat developing countries fairly. In order to remedy this, they suggest a greater emphasis be placed on analyzing the distribution of power within the WTO¹⁴⁶.The inequity in distribution in the multilateral system has resulted in unequal effectiveness of rights between member states. Developing countries, due to a lack of ability to exert economic pressure on developed states and lack of skills and expertise to

¹⁴² Steger D, (ed.) *Redesigning the World Trade Organization for the twenty-first century*. (Wilfrid Laurier Univ. Press, 2009) p. 16

¹⁴³ Finger (note 134 above) 889

¹⁴⁴ Finger (note 134 above) 890

¹⁴⁵ Preamble to the Agreement on the Establishment of the World Trade Organization

¹⁴⁶ Davis and Bermeo (note 118 above) 1039

effectively challenge unfair practices by using WTO rules, are left unable to realize their potential and are left without meaningful protection from exploitation.

As it stands, the special vulnerability of developing countries remains lacking in meaningful consideration. The application of the SPS Agreement in particular has resulted in troubling results for developing nations with respect to market access.

3.3. Overview of the SPS Agreement

3.3.1 General overview

The SPS Agreement¹⁴⁷ is a technically difficult agreement. According to its Preamble, the Agreement acknowledges importance of two competing interests:

“[F]irstly, the right of member states to adopt or enforce measures necessary to protect human, animal or plant life or health¹⁴⁸; and

secondly the need that such measures taken be consistent with the obligation of member states to prevent arbitrary and unjustifiable discrimination between countries where identical or equivalent conditions prevail”

The latter is meant to ensure that measures taken ostensibly to protect health are not used as disguised restrictions to international trade with protectionist intent. According to *Muata* and *Nyamandi* the SPS Agreement has superseded Article XX of the GATT 1947, which was completely ineffective at achieving its aims. The authors suggest that this was due in large part to the lack of further clarification regarding the meaning of this particular

¹⁴⁷ The World Trade Organization Agreement on Sanitary and Phytosanitary Measures

¹⁴⁸ It is noteworthy that the right of member states to set such standards is not novel to the SPS Agreement but is imported from the GATT 1947 in the form of a general exclusion to other parts of the Agreement in Article XX: b of the GATT 1947. Such measures were subject to the proviso that measures take in terms of this right are ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction to international trade.

provision as well as its scope and the lack of a sufficient institutional framework to ensure effective implementation. Unlike Article XX (due to the nature of the GATT *a la carte*) the SPS Agreement is mandatory for all WTO members who are bound to comply with the provisions of the Agreement¹⁴⁹.

Further in the *EC-Hormones*¹⁵⁰ case, it was concurrently held that the obligations imposed by the SPS Agreement are indeed more targeted and specific than the obligations imposed by Article XX: b of the GATT¹⁵¹. The SPS Agreement deals with 'specific obligations... in order for a member to enact or maintain specific types of measures, namely sanitary and phytosanitary measures'¹⁵².

Recent trends in the number of SPS notifications made by developed and developing countries indicate that since 2008, notifications made by developed countries are on the rise, whilst the number of notifications made by developing countries is dropping¹⁵³. This brings into question the practical ability of the Agreement to lend itself to the protection of the domestic markets of developing countries¹⁵⁴.

3.3.2 General Comments

Before embarking on an analysis of the specific provisions of the SPS Agreement, it is necessary to begin with a few general comments about the nature of the Agreement and measures taken in terms of its provisions. As such, Article 6.2 of the SPS Agreement states that it "applies to all sanitary and phytosanitary measures that may 'directly or indirectly affect trade between the Parties'".

The SPS Agreement attempts to strike a delicate balance between maintaining the sovereign right of domestic governments to choose the level of sanitary and phytosanitary

¹⁴⁹ Mutasa, M. Nyamandi.T "Report of the survey on the identification of food regulations and standards within the Africa Region Codex member countries that impede food trade." (Workshop on Codex and Harmonisation of Food Regulations, 1998)

¹⁵⁰ EC – Hormones (Canada) Panel Report WT/DS48/R/CAN, 1998

¹⁵¹ EC - Hormones (Canada), para. 8.39

¹⁵² EC-Hormones Panel report para 8.39

¹⁵³ Kallumal (see note 121 above)

¹⁵⁴ Ibid

measures appropriate to that particular state's needs while ensuring that the use of this right is genuine (not for purely protectionist purposes) and does not result in the creation of unnecessary non-tariff barriers to trade between states¹⁵⁵.

According to *Iacovone* genuine SPS measures are difficult to distinguish from non-tariff barriers to trade implemented solely for the purposes of protectionism¹⁵⁶. The main difference according to the author, is that SPS measures are not primarily intended to become obstacles to trade for its own sake¹⁵⁷. However, *Iacovone* does recognize that by their very nature genuine SPS measures all have the potential to cause destructive effects on international trade¹⁵⁸ - this potential alone makes SPS measures a challenge to the attainment of free trade under the auspices of the WTO. SPS measures are technically complex and require a great deal of expertise and skill in order to understand and challenge making them an effective and deceptive barrier that is difficult to address, especially for poorer developing countries¹⁵⁹. It is therefore essential that the application of the Agreement be effectively overseen by the relevant body, the Sanitary and Phytosanitary Committee ('The Committee').

3.3.3 The SPS Committee

The administration of the SPS Agreement is handled by the SPS Committee. Established in terms of Article 12.1 of the SPS Agreement, the Committee is aimed at providing a regular forum for consultations on specific issues connected to the SPS Agreement¹⁶⁰ as well as to assist member states in effectively protecting human, animal or plant life as well as to enhance consultation and cooperation between the parties.

¹⁵⁵ Norman, A., 2004. "The impact of regulations on agro-food trade: The Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreements" (2004) 42(3) *Journal of Economic Literature* p.979.

¹⁵⁶ *Iacovone* (note 10 above) 4

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ Norman (see note 153 above) 979

¹⁶⁰ Article 12(1) of the Agreement on Sanitary and Phytosanitary Measures

The Committee is made up of all WTO members and reaches its decisions by consensus¹⁶¹. According to *Appleton and Plummer*, the obligation to facilitate meaningful consultation processes when coupled with the requirement for transparency in Article 7¹⁶² indicates that the Committee has the potential to make meaningful progress in resolving conflicts amongst member states that fall under the SPS Agreement in a cheap and efficient manner, avoiding possible dispute settlement procedures.¹⁶³ Article 12.2¹⁶⁴ imparts an obligation on the Committee to ‘develop a procedure to monitor the process of international harmonization and the use of standards, guidelines or recommendations’ – meaning that the Committee plays a central role in encouraging harmonization of international and domestic standards. It is therefore imperative that all WTO members be well represented within the Committee in order to meaningfully engage in the process of international harmonization.

However, according to the 2003 Organization for Economic Co-operation and Development (‘OECD’) Report, many states have not sent delegates to the regular meetings nor the special meetings of the SPS Committee¹⁶⁵. A large number of these countries were developing countries (43 developing countries did not have a representative at a single one of the 12 regular meetings conducted during this period). This is problematic as it means that developing countries and their interests are not sufficiently represented at the Committee, leaving them largely excluded from the consultation process to negotiate the nature of international standards and recommendations. According to *Finger and Schuler* reasons for the lack of participation of developing countries members in this process include the lack of any appropriate functional institutions, including ‘inquiry points’ to develop expertise in accessing

¹⁶¹ Appleton, A.E. and Plummer, M.G. (eds.) *The World Trade Organization: legal, economic and political analysis* (Springer Science & Business Media, 2007) p. 342

¹⁶² Article 7 of the World Trade Organisation Agreement on Sanitary and Phytosanitary Measures

¹⁶³ Appleton & Plummer (note 159 above) 342

¹⁶⁴ Article 12(2) of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures

¹⁶⁵ Article 12(2) of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures

NOTE: Attendance at these meetings has varied from between 44 to 77 members from 1995 – 2000. This number is very low considering that the total number of member states of the WTO at the time was 164.

developed country markets and the cost of establishing such institutions which would far exceed available domestic funds¹⁶⁶.

This also reflects a common problem faced by developing countries in the WTO, that they lack both the financial resources as well as the technical expertise to send a delegate to the SPS Committee¹⁶⁷. The nature of the Committee is therefore exclusionary to the interests of developing states

3.4 Provisions of the SPS Agreement:

3.4.1 Overview

Although well-intentioned, the SPS Agreement is fundamentally flawed as it is based on incorrect assumptions regarding both the nature of international negotiations as well as the actual capabilities of developing countries. The Agreement therefore suffers from what *Kallumal* refers to as 'systemic issues' that skew the outcome of issues in terms of the Agreement firmly in favour of developed countries¹⁶⁸. This begs the question of what it is about the Agreement that results in this biased outcome? *Kallumal* explains that the bias arises from the fact that developed countries often have higher standards for human, animal and plant health safety than their developing counterparts¹⁶⁹. The most problematic of these provisions shall be analyzed below.

3.4.2 The Preamble

The preamble of the SPS Agreement as previously discussed, attempts to balance the right of member states to choose their own level of protection, with the need to ensure that such levels do not unduly prevent or inhibit trade. It is arguable that the Agreement fails to achieve both of these objectives. From a developed country perspective, the Agreement's stated aims move accountability for the choice of appropriate standards

¹⁶⁶ Finger (note 134 above) 900

¹⁶⁷ See OECD Report Above

¹⁶⁸ Kallumal (note 121 above)

¹⁶⁹ Ibid

away from national policymaking towards international institutions, which are less accountable for the direct consequences of these standards within national borders. From the perspective of developing countries, the Agreement is ineffective in preventing disguised protectionist NTB's taken by developed countries to protect their own markets¹⁷⁰.

3.4.3 Scientific justification

One of the most prevalent issues with the provisions of the SPS Agreement is the lack of impetus for developed countries to conform to international recommendations, guidelines and standards. On paper, the Preamble of the SPS Agreement encourages members to adopt international standards and guidelines by means of 'recognizing' the important contribution of these standards¹⁷¹.

However, Article 2 of the SPS Agreement undercuts this commitment to unified standards by reaffirming the rights of WTO members to adopt their own standards. However, this right is subject to a proviso, that such measures be applied '*only to the extent necessary*' to protect human, animal and plant life. The case of *EC – Approval and Marketing of Biotech Products*¹⁷² saw the Panel find that the use of a state's own domestic standards is subject to three requirements, as per Article 2.2:

- (i) "measures be applied only to the extent necessary to protect human, animal or plant life;
- (ii) SPS measures be based on scientific principles; and
- (iii) measures not be maintained without sufficient scientific evidence".

Requirement (ii) has been interpreted by the Panel in the *US-Poultry* case as meaning that the scientific evidence given must bear a 'rational relationship' to the measure taken,

¹⁷⁰ Rigod, B. "The purpose of the WTO agreement on the application of sanitary and phytosanitary measures (SPS)" (2013) *European Journal of International Law* p. 504

¹⁷¹ This position was reaffirmed by the Appellate Body in the case of *US - Canada Continued Suspension*, para. 522

¹⁷² Panel Report *EC –Biotech* para. 7.1424.

must demonstrate the nature of the risk that the measure seeks to address and must be the type of scientific information necessary for a risk assessment¹⁷³. Furthermore, as of the *EC-Hormones* case, the Panel interpreted the meaning of ‘sufficient scientific evidence’ in light of the purpose of the SPS Agreement and with the regard to the purpose of the actual provision itself¹⁷⁴. It was held in this case that the concept must be interpreted to balance the international interest of the complaining state in promoting international trade with the need of the other party to protect the health and safety of human beings¹⁷⁵.

Athukorala and *Jayasuriya* suggest that SPS Agreement is far too lax in allowing the importing country to adopt “SPS measures that impede imports no matter how unlikely the risk may be”¹⁷⁶. They are further critical of the latitude allowed to members to impose measures more stringent than international guidelines. The authors state that the requirement that measures be based on sound science is “vague” as it “assumes that there is a single objective shared amongst member states and single correct approach to scientific issues”¹⁷⁷. This results in standards possibly being higher than developing countries are technically capable of attaining; causing their domestic exporters to suffer.

3.4.4 Special and Differential Treatment

An earlier discussion regarding the use of the term ‘developing country’ as an umbrella term to group together countries with divergent issues indicates, a one-size-fits-all approach to regulation and trade rules that is not appropriate, given the diversity of the membership of the WTO¹⁷⁸. *Prevost* in her article on this issue indicates that the specialized goal of the SPS Agreement in balancing competing interests makes the need for consideration of variance in technical capabilities and vulnerabilities of developing country market especially important¹⁷⁹.

¹⁷³ Panel Report US Poultry (China), para. 7.200

¹⁷⁴ Panel Report *EC - Hormones (US)*, para.8.36

¹⁷⁵ Panel Report *EC-Hormones (US)* para 27

¹⁷⁶ Athukorala & Jayasuriya (note 32 above) 1141

¹⁷⁷ Ibid

¹⁷⁸ Prevost (note 114 above) 87

¹⁷⁹ Ibid 89.

Article 10 of the SPS Agreement states that:

“In the application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country member, and in particular least-developed country members”

The use of the word ‘shall’ in Article 10 indicates that this is a mandatory term that forms a binding obligation on member states to take into account the needs of developing countries. Unfortunately, it seems that this obligation does not extend past the need to take such countries’ needs ‘into account’. Thus there is no meaningful obligation imposed on WTO members to take action other than ‘considering’ the needs of their developing counterparts. Thus *Prevost* states that the strength of this “binding” obligation is questionable. Thus, non-compliance with this Article is onerous and difficult to prove for developing countries¹⁸⁰.

The *EC-Biotech*¹⁸¹ case interim report attempted to deal with the interpretation of the term ‘take into account’. The Panel in this case relied on the *Oxford Dictionary* definition of the term and found that Article 10 does not provide that an importing member must invariably accord special and differential treatment in a case where the measure taken may affect developing country exports¹⁸². Thus the Panel found that Article 10.1 even though couched in mandatory terms (‘shall’) does not impose a binding obligation on developed countries to give priority to the needs of developing countries¹⁸³. This matter further interpreted the burden of proof in matters concerning Article 10 obligations to fall to the complaining party to prove that the other Member state did not take into account the needs of the developing complaining party¹⁸⁴. Such finding is very onerous and places an immense burden on developing parties wishing to prove their claim – a burden they

¹⁸⁰ Fritz, T. “Special and differential treatment for developing countries’ (2005) 18 *Global Issue Paper* p.18

¹⁸¹ Panel Report EC - Biotech case

¹⁸² Panel Report EC – Biotech, para 7.1620 –7.1621

¹⁸³ Panel Report EC – Biotech, para 7.1620 –7.1621

¹⁸⁴ Panel Report EC – Biotech, para 7.1622

financially and scientifically might not have the skills and resources to bear. Thus the Panel's interpretation of the application of Article 10 appears to undermine the spirit of the SPS Agreement as well as the commitments espoused in the Preamble.

Special and differential treatment for developing countries is further recognized in the SPS Agreement in Article 14, which allows Least-Developed Country members to "delay application of certain provisions" of the SPS Agreement where application is prevented by a lack of "technical expertise, technical infrastructure or resources". These provisions along with Annex B, paragraphs 2, 8 and 9 also allow for special and differential treatment of developing countries but to a lesser extent.

3.4.5 Transparency

One of the basic principles of the WTO is that states should be transparent in the policies that they invokes as this would, in the greater scheme, assist with the flow of trade in the multilateral trading system. Thus, Article 7 of the SPS Agreement obliges WTO members to notify other members of changes in their SPS measures as well as to provide information on their SPS measures in accordance with the provisions of Annex B. This requirement of transparency is essential to ensure that all SPS measures implemented are scientifically sound and have their impact on international trade with other members justified without being unduly restrictive¹⁸⁵. In this Article the SPS Agreement requires members to designate domestic notification authorities and notify WTO members of all new or amended measures that do not conform to international standards, guidelines or recommendations¹⁸⁶. The information to be provided, according to this Annex B is: notification of the proposed measure, the products to which it applies and the international standard which it applies to, if relevant¹⁸⁷.

¹⁸⁵ Zarrilli S "WTO Sanitary and Phytosanitary Agreement: Issues for developing countries" (South Centre T.R.A.D.E. Working paper series, 1999) p24

¹⁸⁶ Appleton & Plummer (note 159 above) 28

¹⁸⁷ Annex B of the Agreement on Sanitary and Phytosanitary Agreements

According to the OECD report however, not all members of the WTO have been providing the requisite information¹⁸⁸. *Zarrilli* also notes that possible reasons for partial and non-compliance with this requirement include the fact that links between the public and the private sector are tenuous, resulting in a lack of effective communication to domestic governments about the nature of difficulties faced by exporters, as well as a lack of effective domestic channels for exporters to pursue¹⁸⁹.

According to *Athukorala* and *Jayasuriya* the attainment of effective transparency is largely dependent on the ability of the developing world to effectively participate in the implementation of Article 10. In acknowledgement of this, the SPS Agreement attempts to provide meaningful assistance to developing countries to achieve these ends¹⁹⁰. More prominent examples of this include, as previously discussed, Special and Differential Treatment as espoused in Article 10 of the SPS Agreement and the provision of technical assistance in terms of Article 9, which shall be discussed in due course.

3.4.6 Technical assistance

According to *Fritz*, technical assistance is predominantly applied in the instance of Agreements that require a high level of technical implementation, far outweighing the capabilities of many developing countries¹⁹¹. He further goes on to explain that the nature of this assistance usually manifests in the form of workshops and seminars¹⁹² offered to regional groups of countries or across a large global scale¹⁹³.

Article 9 of the SPS Agreement deals with the provision of technical assistance to developing countries, whereby members have “agreed” to facilitate the provision of technical assistance to other members either bilaterally or through the appropriate

¹⁸⁸ Appleton & Plummer (note 159 above) 29

¹⁸⁹ Zarrilli (note 183 above) 25

¹⁹⁰ Athukorala and Jayasuriya (note 32 above) 1414

¹⁹¹ Fritz (note 178 above) 24

¹⁹² In 2016 for example there have been: An Advanced course on SPS Measures which ran for 21 days in October and a thematic SPS workshop on Pesticide Maximum Residue levels which ran for one day (https://www.wto.org/english/tratop_e/sps_e/events_e.htm Accessed: 19 October 2016)

¹⁹³ Fritz (note 178 above) 25

international organizations (i.e. The International Trade Center). According to *Zarrilli*, this provision when properly implemented could create “substantial, binding commitments on developed countries with respect to their developing counterparts”¹⁹⁴. She does however also caution that the provision of assistance alone is ‘not a panacea’ in itself and must be used in conjunction with the removal of unnecessary obstacles to trade¹⁹⁵. *Athukorala* and *Jayasuriya* share similar sentiments, suggesting that while international organizations such as The United Nations Conference on Trade and Development (‘UNCTAD’), the International Trade Center (‘ITC’) and the World Bank have begun to provide technical assistance, they do not provide nearly enough to achieve the required aims, making them largely inefficient and not binding to the required extent on the developed countries¹⁹⁶. The reality of the effects of the notification requirements often do not conform to the spirit of the SPS Agreement¹⁹⁷ as they do not adequately account for the needs of developing countries, who are unable to meaningfully engage with notifications or receive them at all.

3.5 How does the Agreement affect developed/developing nations?

Due to the ineffective application of the SPS Agreement, it has largely failed to safeguard the interests of the developing world. A crucial reason for this failure is the inability of the SPS Agreement as a legal instrument to effectively discipline developed countries from utilising unfair, unduly onerous or protectionist measures under the guise of SPS measures¹⁹⁸. Furthermore, the recognition that countries have the right to deviate from internationally accepted standards in the implementation of SPS measures is in itself problematic, as *Henson* and *Loader* argue, in that the heterogeneity of the Agreement itself is unduly onerous on developing country exporters, who are obligated to comply with multiple different regimes and deal with varying degrees of barriers to trade¹⁹⁹. It is

¹⁹⁴ *Zarrilli* (note 183 above) 28

¹⁹⁵ *Ibid*

¹⁹⁶ *Athukorala* and *Jayasuriya* (note 32 above) 1430

¹⁹⁷ *Steger* (note 141 above) 18

¹⁹⁸ *Finger* (note 134 above) 890

¹⁹⁹ *Henson* and *Loader* (note 13 above) 87

therefore clear that a greater level of harmonization is required in order to effectively balance the needs of the developing and developed world²⁰⁰.

The need for harmonization, as addressed by *Athukorala* and *Jayasuriya* is not one that can be addressed by a single organization or actor. The process of attaining harmonization must be holistic in nature and cannot be the business of the WTO alone. A step towards this harmonization taken by the WTO could however be implemented in a change in the nature of the wording of the SPS Agreement. It is therefore submitted that the language of the SPS Agreement largely operates on the basis of gentle encouragement. Member states' choices to take into account the needs of developing countries and offer technical assistance when they feel it is necessary and to whatever extent they wish, needs to be altered to 'force' developed countries to take on binding, meaningful binding obligations. This, it is suggested would render certain developed countries' obligations in terms of the SPS Agreement mandatory for compliance with the SPS Agreement. Compliance and the level of standard setting also needs to be flexible and account for the needs of all Member states. Thus according to these authors there needs to be "a harmonious blending of three issues – science, safety and trade".

3.6 Conclusion

On paper, the SPS Agreement offers a balanced approach to regulation. However, it lacks meaningful consideration for the practical difficulties faced by developing countries, in both enforcing provisions favourable to them, as well as in implementing the more onerous of their obligations. This has resulted in a great deal of bias within the SPS Agreement which is favourable to developed countries and their high standards. Finally, and most importantly for the analysis in the following chapter, this has also prevented the SPS Agreement from becoming an effective tool in disciplining over-burdensome protectionist measures taken by developing countries. Reform and greater harmonization is needed for the SPS Agreement to be truly representative of the needs of all developing country WTO members.

²⁰⁰ Ibid 90.

CHAPTER 4:

A CRITICAL ASSESSMENT OF THE IMPACT OF SPS MEASURES ON MARKET ACCESS FOR DEVELOPING COUNTRIES: CASE STUDY OF THE EU-SA CITRUS DISPUTE AND THE US-SA POULTRY DISPUTE

“... the most profound reasons for the economic backwardness of a given African nation are not to be found within the nation... The true explanation lies in seeking out the relationship between Africa and certain developed countries and recognizing that it is a relationship of exploitation.”

“How Europe Underdeveloped Africa” – Walter Rodney²⁰¹

4.1 Introduction

The complexities of the nature of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) have become ever more prevalent in international trade law, especially in the case of South Africa, which in the last four years, has suffered numerous financial and economic losses and loss of domestic policy autonomy as a result of lax application of the SPS Agreement. In a manner that almost reinforces the extent of the difficulties faced by developing countries in the current international trade regime, South Africa's recent trade related woes have predominantly been instigated by wealthier Western developed nations, specifically the European Union (EU) in the SA-EU citrus dispute and the United States (US) dispute, centered around the importation of poultry into South Africa in respect of The African Growth and Opportunity Act ('AGOA').

With regard to the EU, but equally applicable to South African-US relations, “Africa and Europe have a long shared history with many dark pages”²⁰². This shared history,

²⁰¹ Rodney, W. *How Europe Underdeveloped Africa. Beyond borders: Thinking critically about global issues* (2006) p 22.

²⁰² Van de Geer R “South Africa and the European Union: 1994 -2014 Trends, developments and a perspective on the future” (2014) <http://www.unisa.ac.za/news/wp-content/uploads/2014/11/SA-and-the-European-Union-final.pdf> (Accessed on: 23 October 2016) p.3

featuring Africa as an ex-European colonized continent, has been and remains a hugely influential factor in regulating trade relations between the EU and South Africa in our modern dispensation. It therefore remains to be seen whether such historical inequality and resultant developmental needs of developing countries (especially African states) can be meaningfully addressed through the World Trade Organization (WTO) at large and, more specifically for the purposes of this thesis, through the SPS Agreement as it currently operates. This chapter therefore intends to determine the extent to which the SA-EU citrus dispute and SA-US poultry dispute demonstrate the complexities of the SPS Agreement.

In order to undertake such an analysis, it is necessary to understand that while South Africa qualifies as a developing country, its well-developed economy and status as a major supplier of certain agricultural products to the EU²⁰³ as well as its status as one of the most industrialized African trading partners with the US²⁰⁴ distinguishes it from its less developed counterparts. The complex nature of South Africa's relationship with both of these Western powers also necessitates further analysis, as shall be discussed in this chapter.

4.2 South Africa as a developing country

While it has been established that developing countries are suffering from special vulnerability with regard to SPS measures, the nature and extent of such suffering varies greatly from state to state. There is great disparity in terms of various developing countries' integration into the international trade system. Least developed countries occupy the lowest rung in this intra-developing-country-hierarchy and suffer most in terms of global economic integration²⁰⁵. This failure to thrive in the current system has the near

²⁰³ Kareem, F.O., Martinez-Zarzoso, I. Brümmer, B. "Protecting health or protecting imports? Evidence from EU non-tariff barriers" (*GlobalFood Discussion Papers*, 2016) p.11

²⁰⁴ Shaw, T. *Comparative regionalisms for development in the 21st century: insights from the Global South* (Routledge, 2016)

²⁰⁵ Daya Y. "South African Agricultural exports trends comparison, direction and protection" *FAO report of 2005 World Bank Development indicator* <http://data.worldbank.org/country/south-africa> (Accessed on: 1 November 2016) p. 3

fatal effect of stunting agricultural trade and growth resulting in decline in these industries that adversely affect overall development, which frequently already shows low levels of progress²⁰⁶.

South Africa, a developing African country and WTO member state²⁰⁷, in contrast to this, possesses many advantages over its least developed counterparts. Unlike many African states, South Africa possesses more than an abundance of natural resources and a thriving agricultural sector, but is also endowed with a pre-existing and well-developed financial, transport and industrial sector. The presence of this infrastructure has led the World Bank Development indicators to classify South Africa as an “upper middle income developing economy”²⁰⁸, rendering it (comparatively) an economic powerhouse of Southern Africa in terms of trade, ranking 39th in the world for imports and exports, the latter accounting for 0.3% of total world exports²⁰⁹.

While South Africa possesses a sophisticated stable free-market economy compared to other states in the same geographical region, its significant economic success is relative to its neighbours and other states on the African continent. South Africa is plagued by socio-economic developmental woes such as a high unemployment rate of over 30%²¹⁰ and low structural growth²¹¹ that undercut possible long term success. Thus while successful in many respects, South Africa still requires greater economic activity and increased trade in order to achieve its development goals. However, in terms of exports, South Africa has shown an increase in trade over the past decade²¹². This is due in large part to a vibrant agricultural sector with the strongest exports in this sector being fruit and nuts (which account for 32% of South Africa’s total export contributions) and beverages (19%)²¹³. Most of South Africa’s exports are to developed industrialized countries and comprise mainly primary unprocessed raw commodities and materials and some

²⁰⁶ Ibid 4

²⁰⁷ South Africa has been a member state of the WTO since 1 January 2005

²⁰⁸ World Bank Development indicator (<http://data.worldbank.org/country/south-africa>) Accessed on 1 November 2016)

²⁰⁹ Daya (see note 202 above) 5

²¹⁰ See note 204 above

²¹¹ Evenett, S.J. “The impact of economic sanctions on South African exports” (2002) 49(5) *Scottish Journal of Political Economy* p. 562

²¹² Daya (see note 202 above) 5

²¹³ Ibid 7

intermediate commodities. South Africa's largest trading partner remains the EU, with its third largest being the US²¹⁴.

4.3 Case Study: South Africa-European Union Trade Dispute

4.3.1 Relationship between South Africa and the European Union

According to *Goodison* the future success of the African continent is largely dependent on the trade relations between the African continent and the EU, owing to former colonial ties²¹⁵. He further goes on to explain that the origins of their relationship have led to much hostility and hard bargaining– with features such as economic nationalism and, more recently, the imposition of strong market forces by the EU, which in recent decades sought to reform its agricultural policy with respect to African and other trade-partner states²¹⁶.

As with most African states, the relationship between South Africa and the EU was founded on the basis of colonialism – in this case, both by British and Dutch powers. This relationship remained relatively unaltered even during South Africa's Apartheid regime as most European states remained silent about the institutionalized racism controlled by an undemocratic white-minority government²¹⁷. This would remain the case until the 1970's when economic sanctions were taken against South Africa as public opinion against the country soured due to human rights abuses and increasingly negative publicity²¹⁸.

This 'hands-off' approach on the part of European countries was reconsidered in the early 1990's following South Africa's shift to a democratic, economically stable system of governance. Europe's change of approach was paralleled by a strategic reorientation by

²¹⁴ South Africa Exports, major trade partners <http://southafrica.opendataforafrica.org/uxqhmgf/south-africa-exports-major-trade-partners> (Accessed on: 10 November 2016)

²¹⁵ Goodison, P. "EU trade policy & the future of Africa's trade relationship with the EU" (2007) 34(112) *Review of African Political Economy* p. 249

²¹⁶ Ibid

²¹⁷ Fioramonti L "The Evolution of EU-SA relations: What influence on Africa?" <http://www.tandfonline.com/doi/full/10.1080/10220461.2015.1111166> p 464 (Accessed on: 20 October 2016) p. 464

²¹⁸ Ibid

South Africa of its trade policies²¹⁹ which focused mainly on recovery from the effects of extended economic sanctions. This reorientation, in order to successfully achieve the aims of the newly democratic state, included an extended focus on tariff reform which was driven by both regional and multilateral commitments²²⁰. In light of these economic policy changes, it became necessary for the EU to conclude a more substantial partnership with the young democracy.

a) The Trade Development and Cooperation Agreement (TDCA)

At the end of the 20th century, the newly formed EU had become South Africa's largest trading partner in Africa²²¹ with nearly 60% of all South African exports going to European states²²². This relationship would later be overshadowed by South Africa's increasingly significant import/export relationship with China, which would go on to become South Africa's largest bilateral trading partner from 2009 onwards²²³.

Following the end of Apartheid and lifting of restrictive economic sanctions to trade, South Africa sought to apply for membership to the Lomé Convention²²⁴ (a preferential trade regime between the EU and other African, Caribbean and Pacific ('ACP') countries) in order to take advantage of this opportunity for the development as well as to strengthen trade relations between South Africa and the former colonial powers, with whom it had previously established trade relations²²⁵. South Africa's application was rejected, however, on the basis that it occupied a more advantageous economic position than other eligible developing countries. Thus began a series of negotiations between South Africa and the EU in 1999 – which resulted in the creation of the Trade Development and Cooperation Agreement ('TDCA') in 2000. This comprehensive Agreement was first and

²¹⁹ Vickers, B. "Towards a trade policy for development: the political economy of South Africa's external trade, 1994-2014 (2014) *Strategic Review for Southern Africa* 36(2), p.57

²²⁰ Ibid

²²¹ Fioramonti (see note 213 above) 465

²²² Vickers (see note 215 above) 63

²²³ Rankin N "Exporting and Export dynamics among South African Firms" SAIIA Occasional Paper No 149 p.11

²²⁴ Matthews, J. "The Third Lomé Convention and its significance to southern Africa" (1985) 15(4) *Africa Insight* p.263

²²⁵ Gibb, R. "Globalisation and Africa's Economic Recovery: A Case Study of the European Union–South Africa Post-Apartheid Trading Regime" (2003) 29(4) *Journal of Southern African Studies*, p.887.

foremost aimed at establishing a free trade area between the Southern African countries and the EU²²⁶ and was, unlike its predecessors, reciprocal in nature, meaning that preferences awarded by the EU to Southern African goods must also be awarded by South Africa to European goods – an Agreement ostensibly for mutual benefit²²⁷.

The TDCA is wide in its scope and covers five major areas significant to trade, including;

- trade related issues²²⁸;
- economic cooperation²²⁹;
- development cooperation²³⁰; and
- most significantly tariff reduction commitments²³¹.

These tariff reduction commitments differ between the developed EU and developing Southern African countries as the former commits to the elimination of tariffs on 95% of goods currently traded between the partners²³² while the latter bears no such obligation to the same extent. While ostensibly a fair trade-off with great benefits for the developing South Africa, the TDCA therefore does not offer the same level of fairness to South Africa as to the EU, in its failure to protect its agricultural exports²³³.

When analysis of the TDCA is framed solely in terms of tariff elimination on agricultural exports, a troubling disparity of treatment can be seen: under South Africa's obligations, the state has committed to eliminating tariffs on 83% of all agricultural exports from the EU, while the EU is only obligated to reduce tariffs on a paltry 61% of all agricultural exports from South Africa²³⁴. The balance of power in this Agreement is swung firmly in

²²⁶ Article 5 of the Trade Development and Cooperation Agreement

²²⁷ Grant, C. "Southern Africa and the European Union: the TDCA and SADC EPA" (*TRALAC Trade Brief*, 2006) p. 4

²²⁸ Dealt with in Title III

²²⁹ Dealt with in Title IV

²³⁰ Dealt with in Title V

²³¹ Goodison, P, and Stoneman C. "Trade, Development and Cooperation: Is the EU Helping Africa?" (2005) *Trade, Development, Cooperation—What Future for Africa*. p 18 – Dealt with in Article 11 and Article 12 of the TDCA

²³² Goodison P *The EU's Use of SPS measures as de facto NTBS* (Initiatiet for Handel og Udvikling, 2015) p 19

²³³ Gibb (see note 221 above) 890.

²³⁴ Goodison & Stoneman (see note 227 above) 18

the favour of the EU and is based on the need to protect European agriculture against more efficient, year-round South African agricultural producers²³⁵. Furthermore, over 25% of the most lucrative South African exports²³⁶ have been excluded from the ambit of the Agreement by means of a list of 'reserved exports'.²³⁷

b) Common Agricultural Policy (CAP)

The CAP is the current agricultural policy of the EU which provides extensive support systems and agricultural subsidies to EU farmers thereby insulating them from global competition²³⁸. This protection comes, unfortunately, at the expense of farmers in developing countries such as South Africa, as it is implemented through three instruments which often function effectively as non-tariff barriers ('NTBs'): import tariffs, export subsidies and direct subsidies for EU farmers²³⁹.

While this does offer great benefits and advantage to EU farmers, it also has the effect of qualifying the quota-free access offered under the TDCA²⁴⁰ to the detriment of African farmers: Their comparative advantage in agricultural trade arises from both an abundance of natural resources as well as cheaper production costs, but these are almost completely nullified when in competition with highly subsidized European produced goods²⁴¹. Thus it can be said that while the TDCA does in theory create opportunity in the form of preferential trade for African countries, it gives such opportunity with one hand and diminishes its effectiveness with another – South Africa's required reciprocity to lower tariff barriers for such goods (especially agricultural products) shifts the balance of advantage in this Agreement firmly in favour of EU producers. With the background of the

²³⁵ Gibb (see note 221 above) 899

²³⁶ Including sugar, beef, maize and sweetcorn

²³⁷ Greenberg, S "Raw deal: South Africa–European Union trade pact" (2000) 15(4) *Southern Africa Report* p 17

²³⁸ Borrell, B. Hubbard, L. "Global economic effects of the EU Common Agricultural Policy" (2000) 20(2) *Economic Affairs* p.18

²³⁹ Ibid

²⁴⁰ Goodison and Stoneman (see note 227 above) 17

²⁴¹ Gilroy, B.M., Gries, T. and Naudé, W. (eds.) *Multinational enterprises, foreign direct investment and growth in Africa: South African perspectives* (Springer Science & Business Media ,2006) p. 84

relationship between SA and EU and the policies affecting it, the discussion will now venture into a dispute which is partly due to such policies.

4.3.2 The SA- EU Citrus Dispute

4.3.2.1 History

As previously mentioned, South Africa has a highly successful agricultural sector and, due to a relatively mild climate with favourable weather conditions, it is also a key world producer of fresh citrus fruit, with oranges in particular accounting for over 70% of South Africa's citrus output. It is the second largest supplier and producer of such fruit in the world, overtaken only by Spain²⁴².

However, Spain and other EU member states alone cannot produce sufficient citrus fruit to satisfy domestic demand. Thus the EU has become a net importer of citrus fruit with a significant trade deficit, and has turned to importing what it cannot produce alone²⁴³. This high level of demand has resulted in a concomitantly high level of domestic consumption of citrus fruit in the EU territories, thus creating a strong dependence on South African citrus exports, which account for one third of all citrus imported into the EU territories²⁴⁴.

Geographic factors are the reason that the EU is unable to produce sufficient fruit to satisfy its own domestic needs. Less favourable climatic and weather conditions have severely limited the ability of EU producers to compete with their African counterparts, who are able to produce citrus fruit all year round, free from the seasonal limitations of European weather²⁴⁵. In essence, it can be said that South Africa has a comparative advantage over the EU with respect to the production of citrus fruit and is a powerful contender for supremacy in terms of citrus exports to EU member states²⁴⁶.

It has been suggested by some authors that this clear advantage in the face of highly subsidized competition leaves the South African citrus industry open to victimization in

²⁴² Kareem (see note 200 above) 11

²⁴³ Ibid

²⁴⁴ Ibid 17

²⁴⁵ Ibid 11

²⁴⁶ Ibid 17

the form of NTB's which threaten to diminish the industry's competitiveness with EU producers²⁴⁷ who are vocal in their lobbying for greater protection against foreign imports.

South Africa's clear advantage in this industry has been compromised in recent years²⁴⁸ due to an outbreak of a fungal infection known as 'Citrus Black Spot' ('CBS'). CBS has the effect of causing black spots on the leaves of trees and fruit of afflicted citrus orchards. While cosmetically unsightly (perhaps leading to the fruit being more difficult to sell), it has been scientifically determined that this infection does not cause any harm to human or animal life and is safe to consume²⁴⁹. It has also been determined that CBS cannot be transferred from fruit to trees and only from tree-to-tree²⁵⁰. CBS first and foremost cannot be transferred from black lesions (or 'spots') to mature trees and secondly, the fungus cannot survive in a Mediterranean climate (as is present in Europe) making them safe from any possible spread of the disease²⁵¹. Thus it appears that there is no (established) scientific justification for the claim that CBS is contagious and would infect European orchards as there is no demonstrable effect on 'human, animal or plant life' as required by the SPS Agreement in order for a state to take action in the form of an SPS measure against an imported product. This contention and the application of the SPS Agreement in this instance shall be discussed further.

In 2012 in response to this outbreak, the EU Commission implemented a new 'five strike rule' regarding action that could be taken if infected fruit was found in shipments to EU territories²⁵². This rule stipulated that action would be taken against South African citrus imports to the EU if CBS infection was detected in more than 5 consignments in any single season²⁵³. This harsh response was allegedly necessitated by 36 instances of the

²⁴⁷ Ibid 3

²⁴⁸ Concerns regarding the transmission of this fungal infection have existed since 1992 but have intensified in the 2010's as more infected fruit made its way to EU borders than ever before.

²⁴⁹ W Viljoen "Sanitary and Phytosanitary measures: citrus black spot and American Foulbrood disease" <https://www.tralac.org/discussions/article/6611-sanitary-and-phytosanitary-measures-citrus-black-spot-and-american-foulbrood-disease.html> (accessed: 24 October 2016)

²⁵⁰ Erasmus (see note 13 above)

²⁵¹ "Eosta: "Import ban on citrus smells like protectionist measure"" <http://www.eosta.com/en/content/eosta-import-ban-citrus-smells-protectionist-measure> (accessed: 1 November 2016)

²⁵² Goodison and Stoneman (see note 227 above) 15

²⁵³ Goodison (see note 228 above) 13

infection being found in South African citrus in 2012²⁵⁴. The five strike rule would allow the EU to adopt additional restrictions against South African citrus exports as well as a possible ban against such imports altogether should there be more instances of infected fruit.

In 2013, fruit infected with CBS were found in import shipments to the EU. In response to this, the import of these fruit was allowed only where such fruit came from orchards that had been inspected and found to be totally free of the infection. South Africa²⁵⁵ responded to this by taking steps to comply with the newly created EU standards through the implementation of spraying programmes and other measures, including regular inspections of orchards. In addition, South Africa made the necessary changes to agricultural policy and regulatory frameworks. It is estimated in the South African Department of Agriculture, Forestry and Fisheries' *Tradeprobe* that South Africa spent in excess of R1 billion in 2013 alone in order to comply with these new, onerous measures – raising the production costs of citrus fruit for South African producers dramatically²⁵⁶.

Although all the measures required by EU authorities were complied with by South African producers, 36 citrus consignments were intercepted in the latter part of 2013 after showing signs of infection. This interception resulted in the EU Commission instituting a ban on all South African citrus fruit for the remainder of the year²⁵⁷ citing concerns that allowing such products into the EU would 'threaten' domestic citrus producers in the EU even though CBS infected fruit was found only on fruit originating from certain areas.

Although this ban was lifted in May 2014, safety rules regarding South African citrus exports had become more restrictive and compliance more onerous than ever:

²⁵⁴ Kapuya, T. Chinembiri, E. Kalaba, M "Identifying strategic markets for South Africa's citrus exports" (2014) 53(1) *Agrekon*, p. 124

²⁵⁵ Meaning the South African Department of Agriculture, Forestry and Fisheries as well as the Citrus Growers Association and Perishable Products Control Board.

²⁵⁶ International Trade Probe No. 22" (2015) <http://www.namc.co.za/upload/DAFF-NAMC-TradeProbe-Issue-No-55---January-2015.pdf> (Accessed: 2 November 2016)

²⁵⁷ Dunmore C. "EU bans South African citrus imports over disease fears" <http://www.reuters.com/article/us-eu-southafrica-citrus-idUSBRE9AR0E920131128> (Accessed: 2 November 2016)

“According to the new measures, citrus fruits imported from South Africa will be subject to more stringent criteria such as recording pre and post-harvest chemical treatments and mandatory registration of packing houses as well as on-site official inspections at citrus orchards. A sample of at least 600 of each type of citrus fruit per 30 tonnes will need to be taken by the South African authorities. All fruit showing symptoms will be tested. Moreover, a sample per 30 tonnes of ‘Valencia’ oranges will also be tested. No distinction between citrus fruits for fresh consumption and citrus fruits for processing is made.”²⁵⁸

As a result of this decision by the EU Commission, South African producers were forced to make use of more expensive chemical fungicides further adding to the already unsustainably expensive compliance costs.

It was found in the EU Standing Committee on Plant Health’s 2015 Report that South Africa’s risk management standards implemented in lieu of the increase in EU standards for citrus import are up EU standards²⁵⁹. While this may offer a short term reprieve for South African citrus producers, it comes at a massive increase of compliance costs of over R1 billion, almost 10% of the total income of the R10 billion industry²⁶⁰. However, the EU later approved a relaxation of some of the more onerous measures required to be implemented by South Africa²⁶¹. This relaxation came into effect on 1 June 2016 and not

²⁵⁸ “European Commission Press release: Plant Health: Commission strengthens rules on citrus fruit from South Africa” http://europa.eu/rapid/press-release_IP-14-614_en.htm (Accessed: 24 October 2016)

²⁵⁹ “European Commission Directorate-General for health and food safety “FINAL REPORT OF AN AUDIT CARRIED OUT IN SOUTH AFRICA FROM 24 FEBRUARY 2015 TO 06 MARCH 2015 IN ORDER TO EVALUATE THE SYSTEM OF OFFICIAL CONTROLS AND THE CERTIFICATION OF CITRUS FRUIT FOR EXPORT TO THE EUROPEAN UNION” https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjw-pyU2c7QAhWLuBQKHWNPAQoQFggcMAA&url=http%3A%2F%2Fec.europa.eu%2Ffood%2Fvo%2Ffact_getPDF.cfm%3FPDF_ID%3D11839&usq=AFQjCNEZWoyfI8GhcWa1ii9JOWyKsevidQ&sig2=VvsyaUGWVG-WP3DO5uV3aQ&bvm=bv.139782543,d.d24 (Accessed on: 1 November 2016)

p. 28

²⁶⁰ “Black spot control finds favour with EU” <http://farmingportal.co.za/index.php/farmingnews/breking-news/item/5162-black-spot-controls-find-favour-with-eu?tmpl=component&print=1> (Accessed: 2 November 2016)

²⁶¹ Collen C “EU Commission decision unacceptable” <http://www.fruitnet.com/eurofruit/article/168506/eu-commission-decision-unacceptable> (Accessed 3 November 2016)

only removes the 'five strike rule' but also relaxes regulations relating to fruits imported for juicing. Whether this foreshadows a future relaxation of standards is at this stage unknown.

The dispute between South Africa and the EU has been referred to International Plant Protector Convention²⁶² (IPPC) dispute resolution mechanism for mediation as of March 2010. Unfortunately, the dispute resolution process has stalled and finality on this issue remains elusive. The final avenue open to South Africa to seek finality on this issue is WTO formal dispute resolution procedure. While South Africa appears to be seriously considering this option²⁶³ it seems that it is unwilling to take this step against an established trading partner.

4.3.3 Analysis of the dispute

The SPS Agreement limits the application of SPS measures instituted by states to cover three distinct grounds: the protection of human, animal and plant life and health²⁶⁴. In the case of the measures taken by the EU, it has been established that humans and animals are not at risk from fruit being infected with CBS²⁶⁵. Furthermore, according to Article 2.2 of the Agreement²⁶⁶, SPS measures must be 'necessary'²⁶⁷, based on scientific principles and not be maintained without 'sufficient scientific evidence'. WTO members are therefore obligated to use the least restrictive means in applying SPS measures. Most importantly for our assessment, however, it is also required that such measures not be arbitrary and that they must be based on 'sufficient scientific evidence'²⁶⁸.

²⁶² This body is tasked with the prevention of movement of pests and other plant related diseases as well as the enhancement of trade through the prevention of unjustified barriers to trade. It has no power to make binding resolutions.

²⁶³ Meintjies F "RSA Lemon ban 'not country wide'" <http://www.fruitnet.com/eurofruit/article/168453/south-africa-lemon-ban-not-country-wide> (Accessed: 3 November 2016)

²⁶⁴ Annex 1A (a) - (d) of the Sanitary and Phytosanitary Agreement

²⁶⁵ Laurenza, E.C. and Montanari, F. "Pet Risk Analysis-Recent Trends in the EU and its Trade Implications: The Citrus Black Spot Case" (2014) *Eur. J. Risk Reg* p.202.

²⁶⁶ Article 2.2 of the WTO Agreement on Sanitary and Phytosanitary Measures 1994

²⁶⁷ Meaning they should not be unduly restrictive to trade.

²⁶⁸ Article 2.2 of the WTO Agreement on Sanitary and Phytosanitary Measures, 1994

The basis for the ‘five strike rule’, import ban and more stringent rules relating to importing such goods into the EU are based on the allegation that CBS shall spread to European orchards due to contamination from infected fruit – in effect, that it poses a risk to plant life and health in accordance with Article 2.2. However, it is submitted that, with regard to the requirement of scientific justification for this measure, the rules implemented by the EU fall short of the required standard.

Whether or not a measure has complied with Article 2.2 shall be determined by means of ‘risk assessment’ in accordance with Article 5.1 of the SPS Agreement²⁶⁹. The *US-Poultry* judgment further elucidates the point made in Article 2.2 (ii) that there must be a ‘rational relationship’ between the measure taken²⁷⁰ – in this case the ban on South African citrus fruit and the nature and extent of the risk sought to be addressed.

4.3.4 Presence of risk

While states have the right, as espoused in the Preamble of the SPS Agreement to choose their own SPS standards and measures, for the sake of harmony, members are encouraged to make use of internationally accepted standards and guidelines. In this instance the relevant standard setting body is the Codex Alimentarius, whose standards with regard to CBS infection are far less onerous than that of the EU. While the standards utilized by the EU are far more stringent, there is no obligation on the EU to adopt lower standards in the SPS Agreement²⁷¹.

With regard to the five strike rule, a risk assessment conducted in 2000 by the EU found that the European climate was unsuitable for the survival of the CBS fungal infection²⁷² and furthermore that the disease could not spread through the actual fruit of citrus trees, only the trees themselves²⁷³. These findings were later confirmed by a 2010 risk

²⁶⁹ Article 5.1 of the WTO Agreement on Sanitary and Phytosanitary Measures, 1994

²⁷⁰ This position was reinforced in the case of *Australia – Measures Affecting the importation of Apples from New Zealand*

²⁷¹ As discussed in Chapter 3, while WTO member-states are ‘encouraged’ to consider the special needs of developing countries, provisions that deal with this consideration are permissive and not couched in mandatory language.

²⁷² Kareem (see note 200 above) 17

²⁷³ Goodison (see note 228 above) 13

assessment from the US which found that it was “highly unlikely” that CBS would establish itself in Europe²⁷⁴. Finally, in a damning indictment of the necessity for the measures taken by the EU against South African products, a CBS expert panel (consisting of international citrus scientists in a Panel on Plant Health) found that:

“a sequence of unlikely events would have to occur for there to be any prospect of imported citrus fruit giving rise to infection of citrus plants in the EU”. What is more, it was maintained “even if an infection event was to occur...there is no risk of establishment and spread under EU climate conditions”²⁷⁵

Thus the Panel concluded that the CBS regulations taken by the EU were not, as required by the SPS Agreement, “scientifically justified or proportionate to the risk”.²⁷⁶ This begs the question, in light of international consensus on the lack of risk posed to domestic producers, how the EU justified the decision to increase restrictions on South African citrus fruit.

The answer lies in the preamble of the SPS Agreement which recognizes the right of WTO member states to adopt and enforce measures they deem necessary to protect human, animal and plant life and health²⁷⁷. In this instance, a 2014 report by the European Food Safety Authority (‘EFSA’) states, contrary to all other international reports, opinions and studies, that the possibility of the spread of CBS in the EU territory was “moderately

²⁷⁴ “Risk assessment of Citrus spp. fruit as a pathway for the introduction of *Guignardia citricarpa* Kiely, the organism that causes Citrus Black Spot disease” https://www.aphis.usda.gov/plant_health/plant_pest_info/citrus/downloads/black_spot/cbs-risk-assessment.pdf (Accessed on 2 November 2016)

²⁷⁵ CBS Expert Panel, “Comments on: EFSA Panel on Plant Health, 2013. Draft Scientific Opinion on the risk of *Phyllosticta citricarpa* (*Guignardia citricarpa*) for the EU territory with identification and evaluation of risk reduction options” 11 September 2013 <http://www.citrusres.com/sites/default/files/documents/CBS%20Expert%20Panel%20comments%20EFSA%20PRA%20CBS%202013.pdf> (Accessed: 1 November 2016)

²⁷⁶ CBS Expert Panel, “Comments on: EFSA Panel on Plant Health, 2013. Draft Scientific Opinion on the risk of *Phyllosticta citricarpa* (*Guignardia citricarpa*) for the EU territory with identification and evaluation of risk reduction options” 11 September 2013 <http://www.citrusres.com/sites/default/files/documents/CBS%20Expert%20Panel%20comments%20EFSA%20PRA%20CBS%202013.pdf> (Accessed: 1 November 2016) p. 15

²⁷⁷ Subject to certain qualifications in terms of Article 5.7 of the SPS Agreement.

likely” indicating a much higher level of risk than previously established. The report further went on to state, in line with the action taken by the EU, that the focus should not be on eradicating this disease from within Europe’s borders but rather that the focus should be on preventing its entry into the territory²⁷⁸. This report was later attacked by international experts, who regarded its findings as being unreliable, as being full of errors and omissions²⁷⁹.

It can therefore be said that both the standards and scientific assessments of the EU in this regard go far beyond what would be required in terms of international standards and guidelines. However, while such standards are onerous, there is nothing in the SPS Agreement that prevents states from imposing their own higher standards. As previously mentioned, the SPS Agreement explicitly allows states to choose measures that are far more burdensome on developing states²⁸⁰. Finally, in the face of conflicting report, there is no clarity provided in the SPS Agreement as to what ‘sound science’ would be in this case, in light of conflict between EU and international reports, leaving this requirement both vague and ambiguous.

4.4 Case study: United States-South Africa AGOA dispute

4.4.1 US-SA Trade relations

Although the US is not a former colonial power, South Africa’s relations with the US also go back centuries, beginning with the creation of the US consulate in Cape Town in 1789. Relations between the two countries remained cordial until the Apartheid era, which saw the US Congress enact the ‘*Comprehensive Anti-Apartheid Act of 1986*’ which instituted severe economic sanctions against South Africa for the remainder of the Apartheid

²⁷⁸ Perryman S & West J “External Scientific Report: Splash dispersal of *Phyllosticta citricarpa* conidia from infected citrus fruit” (UK EFSA Journal, 2014) p. 174

²⁷⁹Dunmore C. “EU bans South African citrus imports over disease fears” <http://www.reuters.com/article/us-eu-southafrica-citrus-idUSBRE9AR0E920131128> (Accessed on: 2 November 2016)

²⁸⁰ Athukorala and Jayasuriya (note 32 above) 1141

regime²⁸¹. Upon democratization of South Africa in the early 1990's, relations gradually improved, with an accompanying desire to interact economically after decades of sanctions²⁸². One of the products of this desire was the African Growth and Opportunity Act of 2000²⁸³ ('AGOA').

4.4.2 The African Growth and Opportunity Act (AGOA)

a. Overview

The AGOA went through various amendments before being signed into law in May 2000 under the administration of US President Clinton²⁸⁴ and marked a new era in US-South African trade relations²⁸⁵. The AGOA was intended to be a revolutionary preferential trade regime that offers eligible African countries market access to the US that is both duty-free and quota-free. The intention behind this piece of legislation was to encourage a closer trading relationship between beneficiary African states and the US which was already a major trading partner. The AGOA differs from its European counterpart, the TDCA, in two major respects: firstly, it is non-reciprocal in nature²⁸⁶; secondly it is not a negotiated multilateral agreement between states. It is rather a piece of domestic legislation enacted by the US Congress. These two differences are crucial to understanding the operation of AGOA as well as the issues that plague its implementation.

²⁸¹ South Africa-US Relations (<http://www.globalsecurity.org/military/world/rsa/forrel-us.htm>) Accessed on 6 November 2016

²⁸² South African Department of International Relations and Cooperation "The United States of America" <http://www.dirco.gov.za/foreign/bilateral/usa.html> (Accessed on: 26 October 2016)

²⁸³ It is important to note that AGOA was signed into domestic legislation by the United States on 18th May 2000 as Title 1 of the Trade and Development Act of 2000

²⁸⁴ Schneidman W. Lewis Z. "The African Growth and Opportunity Act (AGOA): Looking Back, Looking Forward" <https://www.brookings.edu/research/the-african-growth-and-opportunity-act-agoa-looking-back-looking-forward/> (Accessed on: 25 October 2016)

²⁸⁵ Note: The text of the AGOA has been amended many times over the various Presidential administrations from AGOA, AGOA II, AGOA III, AGOA IV and finally AGOA VI

²⁸⁶ Williams, B.R. "African growth and opportunity act (AGOA): Background and reauthorization" (2014) 7(3) *Current Politics and Economics of Africa* p.20

The fact that AGOA is non-reciprocal does not mean that it is unconditional²⁸⁷. The preferences afforded by it are simply ‘taken’ by beneficiary states²⁸⁸, who are not required to open their own markets in a similar manner to the US²⁸⁹. Finally, as AGOA is an act of US domestic law, beneficiary countries that are aggrieved over the application of its sections have no recourse to independent arbitration or WTO dispute resolution. The US has total and absolute discretion over the awarding of preferences as well as the implementation of the AGOA^{290, 291}.

The stated objectives of the AGOA are all altruistic in nature including objectives such as to ‘encourage economic integration of African countries into the global economy’ and more practical objectives such as ‘[expanding] US trade and investment relations with Sub-Saharan African (‘SSA’) countries into the global economy”²⁹². In spite of this the unilateral nature of the AGOA has led to an overshadowing of developing country interests in its application.

b. Product coverage

According to S504A(b) of AGOA, “the President of the US may provide duty free access for any article listed in the AGOA provided that it is the ‘growth, product or manufacture’ of a beneficiary SSA country”. This allows AGOA to have a wide range of coverage which includes energy-related products, manufactured goods, agricultural products, and certain textiles and apparel – all of which can be exported duty-free into US markets. However,

²⁸⁷ Naumann E “South Africa and AGOA: Recent Developments 2015 -2016 and possible suspension” Tralac Working Paper No US16WP02/2016 <https://www.tralac.org/images/docs/9025/us16wp022016-naumann-south-africa-agoa-recent-developments-2015-2016-possible-suspension-20160210-fin.pdf> (Accessed on: 26 October 2016) p. 3

²⁸⁸ This means that preferences under the AGOA are not meant to be an ‘exchange’ of mutual discharge of opposing obligations, rather the beneficiary state is to be given preferential treatment without offering any trade privileges to the US in return – unlike the previously discussed TDCA which does require the mutual discharge of reciprocal obligations.

²⁸⁹ Naumann (see note 283 above) 3

²⁹⁰ S104 states that the President of the United States bears the discretion of determining whether a Sub-Saharan African country is eligible for benefits under AGOA. There are no provisions in the AGOA that give beneficiary states any power or discretion to influence the awarding of privileges.

²⁹¹ Naumann (see note 283 above) 3

²⁹² Section 103 of the African Growth and Opportunity Act of 2000

these preferences do not include certain products which are determined by the President to be 'import sensitive'.

South Africa's top exports under AGOA vary between manufactured goods, such as vehicles and transport equipment (which account for 27% - the majority of our exports under the AGOA) and metals and minerals (unprocessed), which when combined make up a massive 43% of all South African AGOA exports – in this sense, it is the view proffered by this thesis that the AGOA does not actively encourage beneficiary states to develop their industries to become more sophisticated, but actively rewards the trade of raw products, discouraging development.

c. Eligibility requirements

In order for a SSA country to reap the benefits under the AGOA, it must meet the requirements for eligibility under S104 – benefits are therefore not automatically awarded by virtue of geographic location. This section grants the US President the authority to determine whether a SSA country shall be eligible for trade preferences based on the following criteria:²⁹³

“The state must have a market based economy that protects private property rights, effective rule of law, economic policies to reduce poverty and develop infrastructure and, most curiously given the supposedly non-reciprocal nature of the AGOA – elimination of barriers to US trade and investment”²⁹⁴.

This means that a beneficiary country may not put in place any policy or measures that would be disadvantageous to US trade and investment interests²⁹⁵. Most disturbingly of all, S104 also empowers the President with the discretion to terminate AGOA benefits to an eligible SSA state if they do not make 'continual progress' on one or more of these issues – as mentioned above. Further, should benefits be revoked, the beneficiary state has no recourse to any independent body or arbitrator. Finally, according to

²⁹³ S104(1) (a – f) of the African Growth and Opportunity Act of 2000

²⁹⁴ S104(1)(c) of the African Growth and Opportunity Act of 2000

²⁹⁵ Naumann (see note 283 above) 4

S112(b)(3)(c)(ii) of the AGOA benefits can be removed from a beneficiary state if that state takes any action that could '*cause serious damage or threat*' to US domestic industries. This section of the AGOA further reinforces the magnitude of the power granted to the President of the US who now has even greater discretion to terminate AGOA benefits, even while this provision further adds to the uncertainty and inequality faced by developing AGOA beneficiary countries.

South Africa, as one of the more industrialized and developed SSA countries was the leading AGOA exporter to the US in 2015. South Africa doubled the value of exports to the US from 2000 to 2014 to \$8.27 billion, over 40% of which is attributable to the AGOA trade preferences²⁹⁶. The current extension of preferences of the AGOA, which was originally meant to expire in September 2015, were tumultuous, with questions being raised regarding South Africa's continued eligibility under the program because of its economic success and advancement over other beneficiary states, which suggested to the US that it ought to 'graduate' from the AGOA. Most significantly for South Africa, also possibly under review, it's supposed failure to eliminate barriers to US trade and investment as per its eligibility requirements under S104 of AGOA²⁹⁷. For the purposes of this analysis we shall focus our discussion on South Africa's treatment of meat imports from the US with regard to dumping measures as well as a blanket ban following an outbreak of poultry disease in the US.

4.4.3 The Poultry Dispute

The heart of the dispute regarding AGOA preferences is not focused on the economic growth and stability of South Africa but rather on anti-dumping duties imposed on US chicken exports to South Africa that have been a source of tension between the states for more than 15 years²⁹⁸.

²⁹⁶ Prinsloo C "AGOA and the future of US- Africa trade relations" March 2016 <http://www.saiia.org.za/opinion-analysis/agoa-and-the-future-of-us-africa-trade-relations> (Accessed on 3 November 2016)

²⁹⁷ Naumann (see note 283 above) 4

²⁹⁸ Ibid 5

The reason for these anti-dumping duties was the contention that US producers want to export chicken pieces that are undesirable in their domestic market (“bone-in cuts”), to South Africa²⁹⁹. US producers wish to export these unsellable cuts to South Africa (which has extensive consumer preference for bone-in cuts) below cost and still make a profit, resulting in unfair trade and competition against South African domestic producers³⁰⁰. The ensuing anti-dumping duty was set at R9.80 per kg – making US chicken almost double the price of chicken from other foreign exporters³⁰¹.

This was not the only reason South Africa sought to avoid US chicken entering its market. In 2014, the South African government passed a blanket ban on all US poultry products due to outbreaks of avian influenza (‘bird flu’) in US producer farms³⁰². In response to this the US sought to regionalize this ban to ensure that producers whose flocks were not affected by bird flu could maintain their presence in the South African market. This request went unanswered with the blanket ban remaining in place indefinitely³⁰³. Similarly, at earlier stages, South Africa imposed blocks on US pork and beef imports for similar disease related reasons. The beef ban in particular has been ongoing for over 12 years.

As a result of these unresolved, long standing agricultural differences between the US and South Africa, President Obama³⁰⁴ wrote to the US Congress detailing his intention (not giving formal notice of suspension) to suspend South Africa’s preferences under the AGOA. The rationale behind this was South Africa’s failure to eliminate barriers to US trade and investment in accordance with its obligations under S104(1)(c) of the AGOA³⁰⁵.

On 11 January 2016, President Obama issued a formal notice that South Africa was failing to meet its requirements for eligibility under AGOA, giving South Africa 60 days’ notice of the imminent suspension of their preferences, which were intended to be

²⁹⁹ Prinsloo (see note 296 above)

³⁰⁰ See note 292 above

³⁰¹ Barlow A “South Africa and the African Growth and Opportunity Act I: Much ado about chicken” <http://hsf.org.za/resource-centre/hsf-briefs/south-africa-and-the-african-growth-and-opportunity-act-i-much-ado-about-chicken> (Accessed: 2 November 2016)

³⁰² ‘SA bans poultry imports’ (<http://www.fin24.com/Economy/SA-bans-poultry-imports-20141210-3>) Accessed on 10 November 2016

³⁰³ Barlow (see note 296 above)

³⁰⁴ Barack Obama is the current President of the United States.

³⁰⁵ Williams (see note 282 above) 19

effective on 15 March 2016.³⁰⁶ A series of negotiations between South Africa and the US took place in Paris on 4 and 5 June 2015 in order to find a suitable middle ground such as granting the US concessions on their banned meat products and South Africa not losing its AGOA benefits³⁰⁷. In the Paris talks, agreement was reached on an import quota of 65 000 tons of chicken a year from the US into the South African market³⁰⁸. With regard to pork and beef, South Africa agreed to permit unrestricted access on the importation of pork shoulder cuts and all beef products, with assurances given by the US that such products will comply with US domestic requirements for health and safety³⁰⁹. South Africa's tangible benefit from these negotiations is the securing of its preferential treatment and benefits under AGOA.

4.4.4 Analysis

It appears from the sequence of events that South Africa in its capacity as a developing country still faces a great deal of issues relating to development. AGOA as an instrument of US legislation has removed South Africa's ability to meaningfully challenge issues relating to SPS measures (in this case, issues relating to the importation of poultry, beef and pork). This matter demonstrates that even in the absence of the SPS Agreement and its developed country-centric provisions, developing countries by virtue of their newfound reliance on preferential trade regimes (to develop their economies), are still unable to successfully challenge unfair policies directed against them. During the Paris negotiations of AGOA, while the Department of Trade and Industry lauded the outcome as being mutually beneficial to both the US and South Africa, it is clear by virtue of the multitude of concessions granted by South Africa to US meats that there was far from an equal playing field between these states. This suggests that while the current WTO framework (in which

³⁰⁶ Naumann (see note 283 above) 25

³⁰⁷ Davis R "Paris chicken deal aids SA's inclusion in Agoa" <http://www.iol.co.za/business/opinion/paris-chicken-deal-aids-sas-inclusion-in-agoa-1873363> (Accessed: 29 October 2016)

³⁰⁸ Speech: The Paris Deal on Poultry: Implications for South Africa's access to the US under AGOA <https://www.thedti.gov.za/delegationspeechdetail.jsp?id=3361> (Accessed 10 November 2016)

³⁰⁹ The Department of Trade and Industry "AGOA negotiations concluded successfully" <http://www.thenewage.co.za/negotiations-between-south-africa-and-usa-to-exports-poultry-beef-and-pork-meat-from-the-usa-to-south-africa/> (Accessed 1 November 2016)

the SPS Agreement finds application) is flawed and does not take into account power imbalances between the developed and developing world, it at least offers dispute resolution to aggrieved states which have an opportunity to bring important issues regarding their welfare to dispute resolution. This would be more in line with the goals of the WTO which promotes greater globalization with no requirements in order to benefit from its Agreements unlike AGOA, which imposes additional criteria for eligibility that are vague and arbitrary under which privileges can be revoked effectively at random. Furthermore, the nature of the WTO as an international body means that while there are structural imbalances in state trade interactions, decision making does not depend on the whim of a single state making the WTO a more democratic institution.

Thus while the overarching multilateral system, in this case the SPS Agreement and WTO Dispute Settlement Body, is flawed – the pre-existing rules and structures in place can be utilized by developing countries in a more meaningful manner than they could possibly be afforded when interacting economically with the developed world.

4.5 Conclusion

The power imbalance inherent in trade interactions between developed and developing countries make fair application of the WTO rules near impossible. While the WTO offers a clear system of rules and dispute resolution, the SPS Agreement's failure to find meaningful application in such disputes due to issues with implementation compromises developing countries like South Africa when faced with trade disputes, as demonstrated by the EU-SA citrus dispute. However, theoretically, the SPS Agreement does provide a clear foundation and legal basis for such challenges. In the case of preferences and rules that fall outside the ambit of the WTO and SPS Agreement, such as the AGOA developing countries are easily cowed into submission by threats of preference removal and other dire sanctions should they fail to give in to the demands and hard bargaining of developed states like the US in the AGOA dispute.

Although South Africa has the option of engaging in dispute settlement with the EU, it has shown hesitance in initiating such procedures. This is not an isolated phenomenon. Many

developing countries have also shown a reluctance to challenge unfair measures taken against them. The proper functioning of the SPS Agreement and DSU procedures is dependent on all WTO member states making use of the relevant provisions to ensure and equitable result. Therefore, it is submitted that South Africa and other developing countries ought to make better use of favourable provisions in order to assert their rights as member states. Without this engagement, the plight of developing countries shall not be dealt with in any meaningful way. It is therefore imperative that developing countries begin to take the initiative on such issues before they are able to do lasting damage to their economies.

The AGOA dispute serves as an example of how, without any sort of oversight or regulatory body, the difference in economic capabilities and bargaining power between developed/developing countries is magnified to an intolerable extent, leading to developing country needs, sovereignty and developmental requirements being steamrolled for the protection of developed country interests at the expense of the needs of the developing world for developmental empowerment through trade.

Thus while the framework of the SPS Agreement is unbalanced and difficult for developing countries to utilize, the presence of an overarching institutional body does offer more protection to the developing world than unilateral extra-WTO preferences. It is therefore imperative that, in order to safeguard the interests of developing countries, meaningful reform be enacted to ameliorate the disparity in treatment of states, caused by poor formulation of the SPS Agreement. Developing countries must also begin to take a more meaningful, less submissive role when faced with disputes and must where necessary challenge unfair measures in dispute settlement.

CHAPTER 5:

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

It is apparent from the analysis undertaken in previous chapters, that developing countries occupy a position of major disadvantage when faced with sanitary and phytosanitary measures of developed countries (in particular). This disadvantage is further recognized to be near-fatal to their successful utilization of the Agreement on Sanitary and Phytosanitary Measures to gain fair market access to developed markets and thus serve their own developmental agendas.

Certain provisions of the SPS Agreement, while well intentioned, fail to take into account the lack of meaningful competition between developing and developed countries due to economic and structural inequalities³¹⁰. Furthermore, based on the research conducted, it appears as though the underlying developmental agenda, which informs the basis of all WTO Agreements, has been largely misunderstood or ignored in the formulation of its provisions. In accordance with this, the chapter will firstly state the primary findings identified in the previous chapters and thereafter make some recommendations in respect of particular issues.

Therefore, this thesis proffers the view that amending certain provisions of the Agreement must be undertaken in conjunction with a shift in approach towards developing country issues. This approach, it is suggested, ought to be focused aggressively on infusing fairness and equity into its text.

³¹⁰ This is manifested in several ways in the Agreement including the permissiveness of provisions dealing with the provision of special and differential treatment for developing countries, which places no meaningful, binding obligations on developed states to consider the special needs of the developing world. This approach while acknowledging the presence of structural and economic inequality between states in rhetoric, provides no meaningful solution to addressing this issue.

5.2 Findings

As demonstrated in previous chapters, the Sanitary and Phytosanitary Agreement fails to strike the delicate balance between the need for governments to take measures necessary to protect human, animal and plant life and ensuring that such measures do not constitute an unjustifiable imposition of barriers to trade. This failure, swung firmly in favour of the developing world, is not unique to this Agreement alone and demonstrates systemic asymmetries in the functioning of the entire global economic community and manifests itself in the rules governing the WTO as a framework for development and liberalization.

While this thesis has not dealt in any detail with the wider issue of development, it is important to understand that the pervasiveness of these asymmetries, as well as fundamental misunderstandings regarding development and developing country success are crucial in addressing the failures of the SPS Agreement in a meaningful fashion. Thus this chapter shall deal with possible legal and policy interventions that need to be implemented in order for developing countries, such as South Africa, to fully utilize the SPS Agreement.

Finally, in acknowledgement of the potential and capabilities of the domestic governments of developing countries, it is imperative that developing countries such as South Africa not rely too heavily on ostensibly beneficial bilateral or multilateral agreements outside of the current WTO framework³¹¹. Such states must supplement the necessary changes to be made at the multilateral level with changes in their own domestic jurisdictions including the development of their own institutional capacities – changes imperative to take advantage of the scant opportunities afforded by the SPS Agreement for their future success.

³¹¹ Such as the TDCA between the EU and other SSA countries and preferences that arise from the AGOA as discussed in previous chapters

5.3 Recommendations

5.3.1 A more development-centered approach

As the concept of “development” operates as both a goal and a means³¹², it must therefore be understood according to *Pahuja* in light of the current state of affairs of the multilateral system and in light of the history of global inequality which necessitated it – a history indelibly marked by colonialism³¹³. The practical reality of the maintenance of trade relationships between former colonial powers and developing states is that the nature of these relationships remains largely unchanged – with the same “lack of accountability” vesting in the more powerful actors in the global community at the expense of poorer developing nations³¹⁴.

Pahuja identifies the frame of reference that dominates current developmental discourse as being distinctly “Western” in nature (that is, centered on developed countries). She proffers the view that actions taken to ostensibly benefit poorer states (under the guise of ‘altruism’) are actually characterized by “self-interest and impoverishing behavior”³¹⁵ by the developed world³¹⁶. It is for this reason, *Pahuja* suggests that recent ‘developmental’ efforts have had the detrimental effect of compelling developing states to open up their borders by removing barriers to trade³¹⁷. Unequal bargaining power between the developed and developing world has allowed economic special interests³¹⁸ to underpin many efforts to force unequal liberalization on developing countries.

It is submitted that while this bleak ‘survival of the fittest’ assessment reflects the current realities of the multilateral system (within which the SPS Agreement operates) which is both inherently unfair and unsustainable. The WTO, as an institution that oversees all international trade law should provide developing countries with a greater level of

³¹² Pahuja, S. "Global Poverty and the Politics of Good Intentions" (2014) *Law in Transition: Human Rights, Development and Transitional Justice* p 31

³¹³ *Ibid* 37

³¹⁴ *Ibid* 35

³¹⁵ *Ibid* 36

³¹⁶ As demonstrated in previous chapters by the coercive behavior of the United States in the recent poultry dispute, even though the Act in question had the stated goal of encouraging African economic growth and development.

³¹⁷ Pahuja (see note 307 above) 44

³¹⁸ Such as interests in the abundance of natural resources in Africa and protectionism of European domestic industries in the EU-Citrus saga as discussed in Chapter 4.

protection against exploitation. A stated purpose in the Preamble of the WTO Agreement³¹⁹ recognizes the ‘need for greater consideration of developing country growth’. As it forms part of the preamble, this sentiment ought to underpin the application of the WTO and all Agreements that fall within its control – including the SPS Agreement ensuring equitable application of provisions relating to developing countries.

A possible means of ensuring more equitable results in both the formulation and application of provisions of the SPS Agreement (and indeed all WTO Agreements) was proffered by *Stiglitz* and *Charlton* in their book “*Fair Trade for All*”³²⁰. The approach taken therein suggests that the nature of the power relationships between states removes the element of voluntariness in developing country participation with developed countries. *Stiglitz* and *Charlton* therefore formulate a novel approach, similar to domestic legislation, that focuses on the need for ‘social justice’ between states, fairness in agreements and a decidedly ‘development-centric agenda’³²¹. It is proffered by this thesis that a more development- focused approach to the application and relevant amendments to the SPS Agreement would not only benefit developing countries, but would also create a more sustainable developmental process that is not antagonistic to developed country needs.

5.3.2 Special and differential treatment

In taking into account the inherent inequality of bargaining power between the developed and developing world, it is imperative that Article 10.1 of the SPS Agreement (which deals with special and differential treatment for developing states) be amended. This Article, as held in the *EC-Biotech* case, has been interpreted permissively by the Panel and consequently does not currently impose any binding obligation on developed states to give any special priority to the needs of developing states³²² as it does not prescribe a

³¹⁹ “Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”

³²⁰ Stiglitz, J.E. and Charlton, A. *Fair trade for all: how trade can promote development* (Cambridge University Press, 2005)

³²¹ Ibid 74

³²² Prevost (note 114 above) 94

specific result. The heavy³²³ burden of proving the alleged lack of consideration falls on the complaining (developing country). It is therefore clear that this provision operates as no more than empty rhetoric purporting to safeguarding the needs of developing countries with neither encouragement nor practical means of achieving its aim.

In light of the need for equitable reform of the SPS Agreement, in a manner that promotes social justice and fairness³²⁴, as encouraged by *Stiglitz and Charlton*, it is submitted that the current application of Article 10 is untenable both because it reinforces and entrenches existing power asymmetries between developed and developing states, but also because failure to comply with this Article is difficult to prove rendering it vague³²⁵ - a 'best endeavor' provision serving no tangible purpose.

Thus, the wording of Article 10.1 ought to be amended in line with the reasoning followed in *EC-Biotech* – and ought to state that developed countries 'shall give priority to the needs of developing countries' (not merely 'take them into account') and ought to specify that the result to be achieved by means of the creation of several specific obligations³²⁶, all with a view to addressing the systemic inequalities between developed and developing states. This provision of a clear aim should create a binding obligation on developed countries.

Finally, a development-centred amendment ought to be made reversing the burden of proof in proving compliance with Article 10.1 to the country seeking to justify the measure. This approach would achieve two significant aims: firstly, the need for proper explanation of how a developing country's needs were 'considered' as per this Article would create a culture of accountability amongst developed countries for their treatment of developing states – no SPS measure would be easily defended in dispute settlement without proper justification. Secondly, the underlying value of fairness as espoused by *Stiglitz and Charlton* dictates that the more onerous burden ought to lie with the state more capable

³²³ Fritz (note 178 above) 18

³²⁴ Stiglitz (see note 315 above) 75

³²⁵ Fritz (note 178 above) 18

³²⁶ Zarrilli (note 183 above) 24

of bearing it³²⁷ in order to ensure a just result³²⁸ that dissuades the use of overly harsh SPS measures.

5.3.3 Transparency

As established in previous chapters, technical deficiencies and lack of a functional institutional framework put developing countries at a great disadvantage with regard to their ability to meaningfully utilize the SPS Agreement. With a view to ensuring a fair result, *Stiglitz* and *Charlton* proffer the view that procedural fairness is paramount – especially with regard to transparency³²⁹ as it allows greater developing country participation in negotiation and standards setting process³³⁰.

Article 7 of the SPS Agreement outlines the need for transparency and establishing the procedures by which states are obliged to set up notification and enquiry points to improve other states knowledge of any change in standards³³¹. Developing countries' issues with Article 7 have largely arisen from a lack of financial and technical resources required to effectively understand and make comments on SPS developments³³².

It is therefore submitted, in line with suggestions made by *Henson* and *Loader*³³³, that the transparency mechanisms of the SPS Agreement be revised or clarified by means of the creation of guidelines, to more adequately take account of the unique issues faced by developing countries. Possible changes to the existing mechanism include: a longer period between notification and application of the SPS measure³³⁴ and development of

³²⁷ Both in terms of financial resources as well as practical expertise.

³²⁸ Stiglitz & Charlton (see note 315 above) 76 - "developed countries are in a better position to prevail"

³²⁹ Ibid 168

³³⁰ Ibid 82

³³¹ Jensen, M.F. *Reviewing the SPS Agreement: A developing country perspective* (Center for Udviklingsforskning, 2002) p 23

³³² Ibid

³³³ Henson, Spencer, et al. *Impact of sanitary and phytosanitary measures on developing countries*. (University of Reading, Department of Agricultural & Food Economics, 2000) p 67

³³⁴ This would give developing countries more time to meaningfully comment on the effect of such measures.

the format of notifications which go into greater detail regarding the nature and extent of the measure³³⁵.

5.3.4 Technical Assistance

Article 9 of the SPS Agreement deals with the provision of technical assistance to developing countries. Arguably, this provision is the most important as it may have the effect of addressing a large portion of the systemic inequalities between developed and developing states. Such of technical assistance is discussed in detail by *Stiglitz* and *Charlton* as being an important factor in addressing institutional incapacity of developing states³³⁶. Much like Article 10 however, Article 9 is not mandatory in nature³³⁷.

International Organisations³³⁸ have largely borne this responsibility but current forms of assistance provided have largely fallen short of the required standard³³⁹. It has also been suggested that technical assistance is often implemented reactively and inappropriately to the relevant circumstances³⁴⁰. From a developed country perspective, the need for such assistance is often expensive and seemingly endless.³⁴¹

Athukorala and *Jayasuriya* state that the SPS Agreement and indeed the WTO as a whole cannot shoulder this burden both practically and financially in a manner that would sufficiently meet the needs of developing country beneficiaries³⁴². Thus greater efforts on the part of bodies and organizations outside of the existing institutions in the multilateral trade system are required to involve themselves. Thus, *Henson* and *Loader* suggest that a possible improvement to the current system of technical assistance is a shift in the manner in which provision is interpreted and implemented. Rather than merely focusing

³³⁵ Henson & Spencer (see note 328 above) 67

³³⁶ Stiglitz, J.E. and Charlton, A. *Fair trade for all: how trade can promote development* (Cambridge University Press, 2005) p. 205

³³⁷ Joseph S. *Blame It on the WTO: A Human Rights Critique* (Oxford University Press, 2013), p 126

³³⁸ Such as the International Trade Center ('ITC') and Standards and Trade Development Facility ('STDF'), the latter of which organizes and conducts workshops and training sessions on the SPS Agreement (https://www.wto.org/english/tratop_e/sps_e/events_e.htm) Accessed on 17 November 2016

³³⁹ Athukorala and Jayasuriya (note 32 above) 1141

³⁴⁰ Henson & Spencer (see note 328) 70

³⁴¹ Ibid 70

³⁴² Athukorala and Jayasuriya (note 32 above) 507

on the amount of technical assistance provided to a developing country, they suggest that the nature of the assistance ought to change to be more specialized and more hands-on³⁴³ – moving into more practical assistance and training rather than the current approach that focuses largely on workshops educating developing countries on measures generally.

In terms of the actual text of the provision however, Article 9 is couched in wide terms with little guidance as to its application. It is submitted that Article 9 should be revised in a manner that prescribes greater specificity – it should therefore make explicit reference to specific measures that ought to be taken under the ambit of technical assistance, such as the creation of more development-centered bodies and training of individuals³⁴⁴.

5.3.5 Equivalence

Article 4.1 has largely been criticized by developing countries as requiring ‘sameness’ over true equivalency.³⁴⁵ According to *Zarrilli* this is a misuse of the provision which intended to accept equivalent standards to give states a measure of flexibility in determining what standards they deemed appropriate.

It is therefore the view of this thesis that the lack of recognition faced by developing countries, individually, of their conformity assessment certificates and procedures be remedied by the creation of new independent regional bodies (financed collectively by states within that region) tasked with the accreditation and certification of standards within that region. Further that such bodies should be tasked with advocating for the needs of developing countries within its territory’s interests, with international standards setting procedures. By pooling together resources to create this overarching body – developing countries would, as a collective, united front have sufficient resources for the representation of their interests by employing experts and utilising scientific processes

³⁴³ Henson & Loader et al (see note 328 above) 71

³⁴⁴ Jha, V. *Environmental regulation and food safety: Studies of protection and protectionism* (IDRC, 2005) p 207

³⁴⁵ Appleton & Plummer (note 159 above) 330

that would otherwise be unaffordable to each state individually. The function of these new bodies should be overseen by the *Codex Alimentarius* and the other ‘three sisters’ in order to balance the need for meaningful representation of developing country interests with reasonable respect for the need for uniform standards³⁴⁶.

5.3.6 Capacity and infrastructure development

While all recommendations thus far have been focused on distributive justice in the form of either contribution from developed countries for the benefit of developing countries, this does not mean that all reform ought to come from wealthy states. Developing countries also bear the onus of making changes conducive to their own development.

In particular, African countries, due to their reliance on the export of primary agricultural commodities, must also enact meaningful reform within their regional and domestic borders. These reforms must be dedicated first and foremost to the development of their own institutional capacity to best exploit the SPS Agreement. This can be achieved by a more proactive approach on the part of governments to take a firmer stance on protecting their own agricultural industries and producers at policy level. It is the view of this thesis that South Africa must also adopt a more cautious approach when concluding agreements and trade relationships with wealthier states to ensure terms are fair and guard against possible exploitation.

5.3.7 Amendment Procedures

Amending WTO Agreements (in this case the SPS Agreement) is a difficult process. WTO member states will only be held to proposed amendments if those amendments are accepted by two-thirds of WTO member states³⁴⁷. These amendments must also be

³⁴⁶ This involvement could be implemented by means of the drafting of relevant guidelines regarding this body as well as changes to the structure of the ‘three sisters’.

³⁴⁷ Appleton & Plummer (note 159 above) 85

formally accepted by particular member states for those states to be bound by them³⁴⁸. Thus the process of amending the SPS Agreement is seen to be an uphill struggle with limited chances of success unless there is major consensus among WTO member states.

5.4 Conclusions

The key tenet of the text of WTO Agreement is that trade facilitates development. In reality, trade has often hindered the development of states and irreparably soured economic relationships crucial for their success.

Based on the sheer number of disputes in respect of the SPS Agreement, between developed and developing countries, it is clear that there are fundamental inadequacies in its structure and conception. This includes the manner in which it purports to enable development, which fails to take into account the social, economic and political factors that influence its success. This flawed approach has resulted in a 'double edged sword' – an Agreement that purports to enshrine the need for consideration of developing countries' unique circumstances and weaknesses on one hand, while on the other it creates an environment that facilitates exploitation of these very weaknesses by providing no meaningful method of discouraging opportunistic behaviour. These issues with the SPS Agreement stem largely from its structural basis – only two Articles³⁴⁹ of fourteen dealing specifically with developing countries' needs.

The majority of developing African economies rely on the export of agricultural products in order to bolster their own economic and industrial growth. The imposition by developed countries of unduly burdensome SPS measures and standards higher than international guidelines is therefore especially fatal to the success of those economies as they have the effect of effectively shutting out agricultural products from their biggest markets. Even if developing countries are able to make the necessary policy amendments to meet such

³⁴⁸ Ibid

³⁴⁹ Article 9 and Article 10 of the SPS Agreement dealing with technical assistance and special and differential treatment respectively

standards, the compliance costs related to such changes often cripple the viability of agricultural sectors to achieve meaningful growth.

The SPS Agreement allows the imposition of such standards which are often far beyond the technical and institutional capabilities of developing states. Even the consultation processes to establish a lower, more internationally recognized standard is conducted largely in the absence of developing country representatives. This renders even 'international best practice' out of step with the practical realities faced by developing agricultural industries further locking out their access to developed markets even in the absence of obvious protectionism.

It is the view of this thesis that the SPS Agreement, due to both the circumstances surrounding its inception as well as the drafting of its provisions, operates on the basis of a serious misconception: that developing countries are capable of harnessing its provisions in the same manner as their developed counterparts. It is submitted that states, wealthy or poor, will always make policy decisions in their own best interests and that the SPS Agreement, as the rule of law governing interactions between them should remedy the unequal bargaining power between state parties.

As it has not achieved this in its current formulation, it is the suggestion of this thesis that the SPS Agreement be revised in line with what has previously been referred to in this thesis as a more 'development-centric' approach, which prioritizes the needs of developing countries for market access, special treatment and technical assistance. Furthermore, developed and developing countries must co-operate in the formulation of clearer guidelines to remove the ambiguities of the current SPS Agreement with a view to promoting an agenda based on fairness, distributive justice and development.

This approach would better reflect the purpose of the WTO as an institution to bring about meaningful sustainable development. While the SPS operates only as part of the WTO, its application has great influence over the SPS provisions in other bilateral and multilateral agreements, such as the Trade Development and Cooperation Agreement ('TDCA') and the African Growth and Opportunity Act ('AGOA'). Thus meaningful reform would not only affect the viability of the WTO as an international institution to bring about meaningful change, but would also result in a filtering down of important values of fairness

and the need for sustainable development to underpin its Agreements (including the SPS Agreement) to other extra-WTO relations.

Furthermore, the difficulties outlined above which associated with the amendment of the SPS Agreement would be resolved were there a unification of member states' actions towards the attainment of a common goal – fair and equitable treatment. Therefore, it is submitted that reviewing and amending the relevant provisions of the SPS Agreement (as outlined above) does more than patch-up a flawed framework; it also infuses a culture of accountability and distributive justice into the current multilateral system as a whole.

(23393 words)

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03 June 2016

Ms Shikara Singh (212508968)
School of Law
Howard College Campus

Dear Ms Singh,

Protocol reference number: HSS/0751/016M

Project title: An analysis of the impact of the SPS Agreement on Market Access: Case study on the SA-EU Citrus and SA-USA Agoa Dispute

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

Humanities & Social Sciences Research Ethics Committee

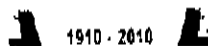
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