



**UNIVERSITY OF KWAZULU-NATAL
COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW**

**A CRITICAL ASSESSMENT OF THE IMPACT OF SPS MEASURES ON MARKET
ACCESS FOR DEVELOPING COUNTRIES: CASE STUDY OF SOUTH AFRICA
AND KENYA.**

NAME OF CANDIDATE: NGONIDZASHE L A MUPURE
STUDENT NUMBER: 2105550203

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of the requirements of the degree Master of Laws in Business Law at
the University of KwaZulu-Natal.

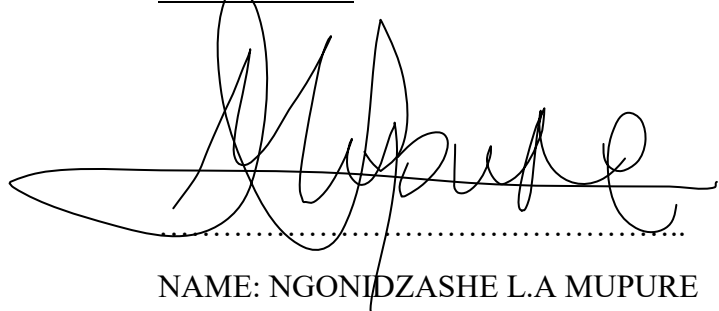
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NAME: NGONIDZASHE L.A MUPURE

DATE: 28 NOVEMBER 2014.

STUDENT NUMBER: 210550203

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ACRONYMS

African Caribbean and Pacific (ACP)
Agreement on Agriculture (AoA)
Aid for Development (AfD)
Aid for Trade (AfT)
Appropriate Level of Protection (ALOP)
Citrus Black Spot (CBS)
Consumer Unity & Trust Society (CUTS)
Contracting Parties (CPs)
Cotonou Partnership Agreement (CPA)
Department of Agriculture, Forestry and Agriculture (DAFF)
Dispute Settlement Body (DSB)
Dispute Settlement Mechanism (DSM)
Dispute Settlement of Understanding Agreement (DSU)
Dispute Settlement System (DSS)
Doha Development Agenda (DDA)
Economic Partnership Agreements (EPAs)
European Economic Community (EEC)
European Food Safety Authority (EFSA)
European retailers Produce on Good Agricultural Practice (EUREPGAP)
European Union (EU)
Food Aid Organisation (FAO)
Free Trade Area (FTA)
General Agreement on Tariffs and Trade (GATT)
General Agreement on Trade in Services (GATS)
Generalized System of Preferences (GSP)
Global Partnership for Good Agricultural Practice (GPGAP)
Good Hygiene Practices (GHP)
Hazard Analysis Critical Control Point (HACCP)
Integrated Crop Management (ICM)
International Monetary Fund (IMF)
International Office of Epizootics (IOE)
International Plant Protection Convention (IPPC)

International Trade Organization (ITO)
Least Developed Countries (LDCs)
Maximum Residual Levels (MRLs)
Most Favoured Nation (MFN)
Multilateral Trading System (MTS)
Multinational Corporations (MNCs)
Mutual Recognition Agreements (MRAs)
Non- Agricultural Market Access (NAMA)
Non-tariff barriers (NTBs)
Non-tariff measures (NTMs)
Organization for Economic Cooperation and Development (OECD)
Preferential Trade Area (PTA)
Regional Trade Agreement (RTA)
Sanitary and Phyto-sanitary (SPS)
South Africa (SA)
Special and differential treatment (S&D/SDT)
Trade Development and Cooperation Agreement (TDCA)
Trade Facilitation (TF)
Trade Related Aspects of Intellectual Property Rights (TRIPS)
Trade-Related Investment Measures (TRIMs)
United Kingdom (UK)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
United States (US)
United States of America (USA)
Uruguay Round (UR)
Vienna Convention on the Law of Treaties (VCLT)
Voluntary Export Restraints (VERs)
World Bank (WB)
World Health Organization (WHO)
World Trade Organisation (WTO)
World War (WW)

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KEYWORDS: Sanitary and Phytosanitary (SPS) measures, Market Access, Developing Countries, Developed Countries, Doha Round, Multilateral Trading System, WTO, GATT, Non- Tariff Barriers/Measures (NTBs/NTMs), Comparative advantage

CHAPTER 1:

GENERAL INTRODUCTION AND BACKGROUND

1.1. BACKGROUND

Henson S and Loader R, identify that ‘one of the most important manifestations of economic globalization is the expansion of international trade’.¹ It is also noteworthy that while some other countries have been successfully integrated into the world markets namely developed countries, most developing countries have struggled and still struggle to ‘become fully integrated into the world trading system’.² In this respect there has been a determined effort to liberalize world trade. Some of these efforts can be traced in the General Agreement on Tariffs and Trade (GATT) successive Rounds- negotiations and the subsequent establishment of the WTO (1995), which was intended to ‘create opportunities for developing countries to access the markets of developed countries’³ with minimal trade distortions.

In particular the Uruguay Round (UR) attempted to reduce barriers to trade in agricultural and food products thus, providing opportunities for enhanced export performance.⁴ These commitments to liberalize trade were taken over by the Doha Round in relation to market access as well as the Bali Round. However, ‘concurrent with the liberalization of tariff and quantitative restrictions there has been increased concern pertaining to the impact of other measures on agricultural and food exports’ in the form of non-tariff measures (NTMs) or non-tariff barriers (NTBs).⁵ Sanitary and Phytosanitary (SPS) measures constitute one of these NTBs. In this respect Michalopolous C, points out that ‘it is now widely acknowledged that technical measures such as food quality and (SPS) measures impede trade particularly in the case of developing countries’.⁶ The WTO Sanitary and Phyto-Sanitary (SPS) Agreement ‘adopted in the 1994 UR lays down a common basis with respect to SPS measures for all WTO Member countries’.⁷ According to Annex 1A of the SPS Agreement, SPS measures are

¹ S Henson & R Loader ‘Barriers to agricultural exports from developing countries: The role of sanitary and Phytosanitary Requirements’ (2001) 29 *World Development* 85, 87.

² Ibid, 85.

³ Ibid.

⁴ These barriers included tariffs, quantitative restrictions and related trade barriers and formed the primary target of the WTO Agreement on Agriculture (AoA).

⁵ See (note 2 above)

⁶ This is the case ‘independent of whether the countries in question are additionally a member of a Free Trade Agreement (FTA) or not’ see C Michalopolous ‘The developing countries in the WTO’. (1999) 27 *World Development* 117, 136.

⁷ B Rudloff. & J Simons ‘Comparing EU free trade agreements: Sanitary and Phytosanitary Standards’ 2004 6B *Maastricht In Brief* 1, 1.

defined as ‘all types of trade rules aimed at the protection of human, animal and plant life or health’.⁸

The foregoing emphasizes that the SPS Agreement, negotiated under the auspices of the UR, is intended to enable Member countries to protect their human, animal and plant life or health. According to Mustafizur R, ‘the spirit of the particular Agreement is to ensure this objective without making any discriminatory trade-restrictions’.⁹ However, despite the impression that, SPS measures provide WTO Member countries with ‘an opportunity to safeguard their interest in crucial areas of health and hygiene, there is a growing apprehension in developing countries that there are certain provisions in the SPS Agreement which act as border protection instruments’.¹⁰ Another concern advanced by Michalopolous C is that developing countries lack the requisite resources to effectively participate in the WTO institutions thus impeding on their ability to exploit the opportunities provided by the SPS Agreements for example.¹¹

SPS measures are considered to be the most significant impediment to agricultural and food exports to a number of developed countries’ markets.¹² The particular focus of this thesis will be to critically assess the SPS measures and the extent to which they affect the ability of developing countries to access developed countries’ markets in particular the European Union (EU). This is of particular interest to this thesis as studies suggest that the market for which SPS requirements were considered to be the most significant impediment to trade was the EU.¹³ The commitment to market access received more attention under the UR which produced the first multilateral agreement namely the WTO Agreement on Agriculture dedicated to agricultural trade¹⁴. Market access forms one of the core areas of focus and commitments of the AoA.¹⁵ In particular the Agreement provides for the tariffication on (NTMs) affecting agricultural trade and the reduction of these and prevailing tariffs.¹⁶ Market access which will form part of the core discussion of this thesis is extensively discussed

⁸ WTO Agreement on Sanitary and Phytosanitary Measures 1994 ANNEX 1A (a)-(d)

⁹ R Mustafizur ‘EU Ban on Shrimp Imports from Bangladesh: A Case Study on Market Access Problems Faced by the LDCs’ (2005). *Consumer Unity & Trust Society (CUTS)*.

¹⁰ Ibid

¹¹ Michalopolous (note 5 above) 136

¹² Henson & Loader (note 1 above) 91

¹³ Ibid

¹⁴ WTO ‘Understanding the WTO’ Available at www.wto.org at 23 ACCESSED ON 27 MARCH 2014

¹⁵ WTO Agreement on Agriculture (AoA) 1994 Art 4 and preamble which outlines the commitment of the AoA to ‘achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues...’

¹⁶ DE Hathaway & MD Ignco ‘Agricultural liberalization and the Uruguay Round’ W Martin & L .A Winters In (Eds) *The Uruguay Round and the developing countries*. (1996) 30, 30

under the current World Trade Organisation (WTO) Doha Development Agenda Round (DDA). To highlight the growing importance of market access, it can be noted that ‘since the launch of the Doha Development Agenda at the November 2001 Ministerial Meeting, market access issues on exports of particular interest to developing countries have been given greater prominence’.¹⁷

In relation to the AoA mentioned above there were concerns that the ‘incremental benefits of liberalisation of trade under this Agreement could, in effect, be undermined by protectionist use of SPS measures’.¹⁸ It could also be argued that protectionist uses ‘may not necessarily be aimed at safeguarding the interest of domestic industries only, but the interests of favoured trading partners and developed country entrepreneurs investing abroad as well’.¹⁹ It should also be noted that this is in contravention with the WTO underlying multilateral trading principle against discrimination and more particularly the ‘Most Favoured Nation’²⁰ treatment hereinafter referred to as the MFN treatment principle. This principle entails that countries cannot discriminate between their trading partners and should accord the same treatment for all of its trading partners save where exceptions such as ‘preferential or special treatment’ apply.²¹

Furthermore, the issue of SPS measures becomes very problematic considering that one of the commitments underpinning the WTO is to contribute to the institution’s objectives by encouraging members to ‘enter into reciprocal and mutually advantageous arrangements’.²² Such arrangements are directed at substantially reducing tariffs and other barriers to trade amongst other commitments. The interest of this thesis in this area of International Trade Law is derived from such a background as provided above. In this respect the impact of SPS measures on developing countries’ (South Africa and Kenya) ability to access the developed countries’ markets will be assessed in this thesis. The point of departure is tracing the development of trade from the GATT (1947) past the GATT Rounds, GATT 1994, the Uruguay Round, WTO (1995) until the Doha Round negotiations and the Bali Round.

¹⁷ R Sandrey, L Smit, T Fundira & H Edinger ‘Non-tariff measures inhibiting South African exports to China and India’ *Tralac* Working Paper No 6/2008 Available at <http://www.tralac.org> ACCESSED ON 1 APRIL 2014

¹⁸ Mustafizur (note 8 above)

¹⁹ Ibid

²⁰ Article I General Agreement on Tariffs and Trade (GATT) 1994

²¹ Ibid Art XXIV

²² Ibid preamble

1.2. RATIONALE

This thesis is motivated by the need to address the growing problem of SPS measures and the detrimental effect they pose on developing countries' market access. It should be emphasized that if the underlying commitment of the WTO and its predecessors to liberalize trade is to be sustained; all forms of measures that impede trade for developing countries in respect of market access should be eliminated. Whereas the successive Rounds of the GATT negotiations and the establishment of the WTO (1995), have created opportunities for developing countries to access the markets of developed countries without difficulties²³ this progress is being threatened by the proliferation of NTBs. Of these NTBs, SPS measures (as highlighted earlier) are the central focus of this thesis and in particular their potential use by developed countries as a protectionist tool²⁴. The susceptibility of the SPS measures to be misused as a protectionist tool can be contributed to the assertion that some of the SPS Agreement's provisions are a 'best endeavour provisions' and thus not mandatory.²⁵ These provisions will be critically analysed later in the thesis.

Pursuant to the rationale highlighted above, this thesis targets to deal with the problems associated with SPS measures in relation to market access of developing countries. It is explicit in the SPS Agreement that the Agreement should assist to facilitate trade.²⁶ In terms of Article 10 of the Agreement 'developed countries should take account of the special needs of developing countries in the preparation and application of SPS measures'. It follows that if the acknowledgement of the special needs of the developing countries is adhered to, this would facilitate trade.²⁷

In respect of the issue of market access, Noor H points out that 'evidence shows that developing countries have comparative advantage in the production of agricultural and food products'.²⁸ In respect of this, market access is of great importance if developing countries are to successfully exploit opportunities for-high value added food exports to developed

²³ Henson & Loader (note 1 above) 85

²⁴ Australian SPS Capacity Building Program 'The WTO SPS Agreement' at 5 Available at <http://wwwustr.gov/sites/default/files/2013%20SPS.pdf> ACCESSED ON 03 APRIL 2014

²⁵ H Noor 'Sanitary and Phytosanitary Measures and their Impact on Kenya' (2000) *EconNews Africa* 1, 12- Article 10 of the SPS Agreement is one such example. The S & D provisions contemplated in the article are not mandatory.

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid 11

countries.²⁹ However, market access with the same capacity as the one contemplated above cannot be possible if the effects of SPS measures in respect of market access are not dealt with. This emphasises the need to implement SPS measures particularly those of developed countries in line with the underlying commitments of the SPS Agreement itself. Such commitments include the objective of extending special treatment to developing countries as highlighted in the preamble of the WTO and Article 10 of the SPS Agreement.

It is also important to note that amongst the WTO's cardinal principles, are the commitments to promote fair competition and open trade as well as enhancing freer trade and predictability in trade.³⁰ It follows that if SPS measures are not regulated and remain susceptible to manipulation by developed countries, the talk of fair competition will be merely lip service by the developed countries. The same applies to open and freer trade which presuppose ideal market access. In the same respect, the thesis' argument is that predictability in trade can only be effectively possible if the SPS measures are regulated fairly taking into consideration the needs of developing countries. This thesis will show the negative effects of SPS measures on market access generally and from the perspective of developing countries as well. This approach serves to show the need to eliminate the effects of SPS measures on the ability of developing countries to access the markets of developed countries without difficulties.³¹

It is against the arguments highlighted above that thesis is written and relevant in this area of International Trade Law.

1.3. PURPOSE STATEMENT (AIMS AND OBJECTIVES)

The purpose of this thesis is to assess the impact of SPS measures on the ability of developing countries to access the markets of developed countries. In this respect the thesis has the following aims and objectives:

1. To trace how the development needs of developing countries have been dealt with in the MTS.
2. To understand the nature of non- tariff barriers, more specifically SPS measures and their effects on market access from the perspective of developing countries.

²⁹ Ibid

³⁰See (note 14 above) 13 ACCESSED ON 02 APRIL 2014

³¹Henson & Loader (note 1 above) 85

3. To highlight the problems that have been suffered or are likely to be suffered by developing countries due to the current implementation of SPS measures by developed countries.
4. To subsequently recommend how these problems and concerns raised can be dealt with.

It should be noted that the assessment of the effects of SPS measures on market access of developing countries will be achieved based on the case studies of South Africa and Kenya and their trading relationships with the European Union.

1.4. RESEARCH QUESTIONS

Pursuant to the main focus of the thesis namely, assessing the impact of SPS measures on the ability of developing countries to access the markets of developed countries, these are the following research questions:

1. To what extent has the Multilateral Trading System (MTS) addressed the development needs of developing countries?
2. To what extent do SPS measures impede trade between developing and developed countries?
3. To what extent has the SPS Agreement been effective in enhancing market access for developing countries?
4. How have the EU SPS measures impeded market access for South Africa and Kenya?

1.5. LITERATURE REVIEW

A focus on SPS measures indicates that there is extensive literature on this area in general. The WTO World Trade Report 2012, for instance, focuses on the trade effects of non-tariff measures in general.³² In the report, where SPS measures are analysed, they are discussed alongside domestic regulation in services in order to examine whether 'regulatory harmonization and/or mutual recognition help to reduce the trade-hindering effects caused by

³² World Trade Report 'Trade and public policies: A closer look at non-tariff measures in the 21st century' (2012) 134

the diversity of TBT/SPS measures and domestic regulation in services'.³³ Most of the authors have extensively written on the effects of SPS measures on the ability of developing countries to trade. More specifically they have written on how these measures can impede trade or be used as a protectionist by some developed countries.³⁴ The general consensus however, seems to be that as 'traditional trade barriers such as tariff and quantitative restrictions continue to decline, protectionist interests are likely to prompt the increasing use of food safety regulations and other technical barriers to block trade'.³⁵ As highlighted earlier these are called NTBs or NTMs and they can constitute trade barriers as effective as traditional tariffs.³⁶

It is also important to analyse the effects of SPS measures specifically in relation to market access of developing countries to developed countries' markets. Such literature would be very crucial in the sense that market access is a by-product of 'trade liberalization'. As such if a measure of any sort limits market access it would be contrary to the building mandate of WTO to promote trade via elimination of trade barriers of any sort. In this respect considering the crucial importance of market access in international trade would allow recommendations to be made in respect of how SPS measures can be harmonized and regulated so as to improve market access. Moreover, much of the literature on this area is written from an economic perspective. This thesis attempts to show how this problem can be addressed from a legal perspective taking into the consideration the relevant legal framework.

Athukorala P and Jayasuriya S in their paper, in addressing the issue SPS measures, point out that 'processed food exports to developed country markets have emerged as a potentially major new source of dynamic export growth for many developing countries in the recent years'.³⁷ They correctly identify that this opportunity is heavily limited as 'exploiting it (opportunity/potential) poses many challenges'.³⁸ It can be argued that the reason for this setback is that the capacity of developing countries to penetrate developed countries' markets critically depends on their ability to meet increasingly more stringent food safety standards imposed by developed countries. They further argue that this situation leads to

³³ Ibid 143

³⁴ Australian SPS Capacity Building Program (note 22 above) 5 ACCESSED ON 03 APRIL 2014

³⁵ P Athukorala & S Jayasuriya 'Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective' 2003 *The World Economy* 1, 1

³⁶ T Josling & D Roberts 'Measuring the Impact of SPS Standards on Market Access' 2011 at 1 Available at www.agritrade.org/Publications/documents/MarketAccess.pdf ACCESSED 10 July 2014

³⁷ Athukorala & Jayasuriya (note 35 above) 1

³⁸ Ibid 1395

unpredictability in terms of trade. As such this raises suspicions that SPS measures are being used as ‘a non-transparent, trade impeding protectionist tool’³⁹, rather than as a legitimate instrument for the protection of human, plant and animal health. The purpose of the authors’ paper is to review the key issues related to the trade effects of food safety standards. The context of the paper however points to the ‘strengthening of global trade architecture for development’.⁴⁰ As such these authors write from an economic and development perspective. This thesis critically analyses the issue of SPS measures and their impact on market access in relation to developing countries from a legal perspective.

In respect of the above Mutume G notes that while the SPS Agreement aims to protect the health of citizens within states, it ‘also provides a loophole that allows countries to introduce measures that result in higher levels of protection than the international norm’.⁴¹ He further argues that whereas high tariffs remain a significant barrier, NTBs, such as ‘arbitrarily imposed SPS rules’, further limit goods exported to the Organization for Economic Cooperation and Development (OECD).⁴² It can be gathered from these concerns that the SPS measures favour the developed countries to the disadvantage of the developing countries which lack adequate resources to meet or implement these SPS measures. This argument finds favour with Finger J and Schuler P who argue that most developed countries lack a ‘sense of ownership’⁴³ in relation to the SPS Agreement rules and procedures. They further argue that the rules and procedures underpinning this Agreement were imposed by developed countries that are perceived to have dominated the UR negotiations.⁴⁴

Other authors namely Josling T & Roberts D engage in the problem of SPS measures by ‘measuring the impact of SPS standards on market access’.⁴⁵ The problem associated with their approach is that it is purely economic. As such it does not reveal how the current legal framework governing and regulating use of SPS measures can address the negative effects of these measures on market access. The closest there is to what this thesis will focus on is the work of Henson S and Loader R who assess the impact of SPS measures on the ability of

³⁹Ibid, 1396.

⁴⁰Ibid.

⁴¹Gumisai Mutume ‘New barriers hinder African Trade’ (2006) Africa Renewal Available at <http://www.un.org/africarenewal/magazine/january-2006/new-barriers-hinder-african-trade> ACCESSED ON 31 MARCH 2014

⁴²Ibid.

⁴³J.M Finger & P Schuler ‘Implementation of the Uruguay Round Commitments: The Development Challenge’ Paper presented at the conference *Developing Countries in a Millennium Round* (1999) Geneva September.

⁴⁴Ibid.

⁴⁵Josling & Roberts (note 36 above).

developing countries to access markets of developed countries for agricultural and food products in particular the EU.⁴⁶ However, their work is highly empirical and also fails to focus on how the WTO legal instruments can be used to deal with the problem of SPS measures. The WTO Report points out that ‘SPS measures have positive trade effects for more technologically advanced sectors but negative effects for the agricultural sector’.⁴⁷ However, the report is not specific as to the issue that ‘agricultural and food exports are of particular importance for many developing countries’.⁴⁸ As such their focus on the effects of SPS measures on the developing countries and market access for these countries is limited.

In this respect this thesis has its focus on the issue of SPS measures and their effects on market access in relation to developing countries. More particularly the thesis shows how the current WTO legal framework governing trade as well the foundational principles of the MTS can be invoked to deal with the problem in question.

1.6. CONCEPTUAL OR THEORETICAL FRAMEWORK

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

1.7. RESEARCH METHODOLOGY

This thesis will make extensive use of qualitative methods of research in pursuit of the aforementioned research objectives. It will be purely desktop research. This is the case because much of the issues related to SPS measures are found in codified legal instruments and this thesis will be conducted by referring to the already existent literature. Reference will also be made to a number of textbooks, journals and working papers in conducting this research.

⁴⁶Henson & Loader (note 1 above) 85

⁴⁷World Trade Report (note 32 above) 35.

⁴⁸Henson & Loader (note 1 above) 86

CHAPTER 2:

HISTORY OF DEVELOPING COUNTRIES IN THE MULTILATERAL TRADING SYSTEM (GATT, WTO)

2.1 INTRODUCTION

It is evident that international trade has ‘increased over the past century and that it has grown consistently and more rapidly than world economic output’.⁴⁹ This historically unprecedented expansion of international trade since World War II is largely accredited to the multilateral trade system (MTS).⁵⁰ According to Hoekman B, the genesis of the MTS was the ‘interwar experience of the beggar-thy-neighbour protectionism and capital controls put in place by governments’.⁵¹ The purpose of these protectionist measures by governments was to stimulate domestic economic activity and employment.⁵² In 1947, General Agreements on Tariffs and Trade (GATT), 1947 created a ‘new basic template of rules and exceptions to regulate international trade between contracting parties’ (CPs).⁵³

The MTS itself is both ‘a political process and a set of political institutions’.⁵⁴ Moreover, the MTS can also be defined as a set of legal institutions. In support of this Birkbeck C asserts that, law is central to the World Trading Organisation (WTO) which is an MTS institution.⁵⁵ Furthermore the core purpose of the WTO is to ‘protect a stable, multilateral, rules-based approach to international trade’.⁵⁶ The MTS’ ‘political process’ aspect is based on negotiations between States.⁵⁷ It is through this bargaining and negotiating process that governments create trade rules to govern their behaviour towards each other and open their markets to each other’s exports.⁵⁸ The political institutions and legal institutions ‘initially the GATT and now the WTO provide the rules of the game, facilitate trade negotiations, and

⁴⁹T Oatley ‘The Multilateral Trading System’ available at http://www.unc.edu/~toatley/poli140/Chapter_2.pdf ACCESSED ON 19 MAY 2014

⁵⁰Ibid

⁵¹ B Hoekman ‘Global Trade Governance’ in T Weiss & R Wilkinson (eds) *International Organization and Global Governance* (2013) 1, 3

⁵² Ibid

⁵³ ‘The WTO and GATT: A Principled History’ available at http://www.brookings.edu/~media/press/books/2009/selfenforcingtrade/selfenforcingtrade_chapter.pdf ACCESSED ON 19 MAY 2014

⁵⁴ Oatley (note 49 above)

⁵⁵ CD Birkbeck ‘Making Global Trade Governance Work for Developing Countries: Proposals for WTO Reform’ 2009 *Global Economic Governance Programme Working Paper* 15

⁵⁶ Ibid

⁵⁷ Oatley (note 49 above)

⁵⁸ Ibid

more generally promote international trade cooperation'.⁵⁹ One reason why trade has expanded so rapidly since World War II is largely because governments have used the MTS to progressively eliminate national barriers to international trade. Such progressive efforts can be traced in the formation of the GATT and its successive Rounds and finally the WTO and their concerted efforts to liberalize trade.⁶⁰

One of the important questions that ought to be dealt with is the extent to which the MTS has addressed the development needs of developing countries. However, before critically assessing the extent to which the MTS has addressed the needs in question, it is of great importance to understand what the multilateral trade system is, the principles underlying it and its *modus operandi*.⁶¹ Furthermore, it is vital to have an understanding of why the MTS exists and the purpose it serves in International Trade. These questions will be further discussed in this chapter.

2.1.2 The Multilateral Trading System (MTS)

As mentioned previously, the MTS is an international political system and international trade institutions stand at its centre.⁶² One of these international trade institutions is the GATT which was the principle international trade 'institution' of the MTS throughout most of the post-war period. However in 1994, the GATT was folded into a novel international institution known as the WTO. In contrast to the GATT, which was a treaty, the WTO is an international organization that enjoys the same legal status as other international organizations such as the United Nations (UN) and the Bretton Woods Institutions namely the World Bank (WB) and the International Monetary Fund (IMF).

However, the MTS differs from the other institutions as it can be broken down into three individual components: 'an inter-governmental bargaining process, a set of rules governing international trade relations, and a dispute settlement mechanism'.⁶³ As an intergovernmental bargaining process, the GATT/WTO focuses on the liberalization of international trade. The trade liberalization in question has been achieved through a series of bargaining rounds that have taken place since 1947. The bargaining rounds in question bring GATT/WTO members

⁵⁹ Ibid

⁶⁰ Henson & Loader (note 1 above) 85

⁶¹ Oatley (note 49 above)

⁶² Ibid

⁶³ Ibid

together to negotiate an agreement covering a specific set of trade-related issues. Governments have also used the GATT/WTO process to ‘develop multilateral rules for other trade-related issue areas’.⁶⁴ During the Tokyo Round, for instance, governments addressed the problem of NTBs in relation to trade. These included health and safety regulations and government procurement practices.

2.1.3 Principles underlying the MTS

The MTS rules provide the legal framework for international trade relations. Furthermore, they specify how governments ought to treat and deal with each other and ‘what types of trade policy measures they can and cannot use’.⁶⁵ In enforcing this, four principles embodied in these rules are used. These rules form the foundation upon which the multilateral trade system is based.⁶⁶ Market-based liberalism is considered to be the broadest of these principles. According to market-based liberalism, the liberalization of international trade is an important objective because of the notion that, free trade raises all countries’ standards of living.⁶⁷ This principle provides the justification for the creation of an international institution oriented towards the development and maintenance of a liberal trading system.

The second fundamental principle that the MTS is based upon is that of non-discrimination. In terms of Article I of the GATT,

[A]ny advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁶⁸

In respect of this principle each member of the WTO is obliged to treat all other WTO members in the same manner as it treats its most-favoured trading partner. This principle is known as the ‘Most Favoured Nation’ (MFN) principle.⁶⁹ The importance of this principle

⁶⁴ These Rounds namely, *inter alia* the Geneva Round (1947), Annecy (1949), Dillon Round (1960–1962), Kennedy Round (1964–1967), Tokyo Round (1973–79), Uruguay Round (1986–94) will be discussed in detail in the course of this thesis. Ibid.

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Art I GATT 1994 (note 20 above) By way of example if a WTO member country desires to reduce the tariffs it imposes on goods it imports from one trading partner it is obliged to extend the same tariff rates to all other WTO members.

⁶⁹ WTO (note 14 above) 10 ACCESSED ON 30 APRIL 2014

can be seen in its inclusion as the first article of the (GATT) which governs trade in goods.⁷⁰ Furthermore, this principle is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Article 4).⁷¹ However, exceptions exist in relation to the principle of non-discrimination namely Free Trade Agreements (FTAs) and Special or Preferential Treatment.⁷² Under the Generalized System of Preferences (GSP) developed countries can grant preferential treatment to imports from developing countries and LDCs thus granting the latter special access to their markets.⁷³

Closely related to the principle of non-discrimination in trade is the national treatment principle which was adopted by the WTO at its inception.⁷⁴ In terms of this principle, imported and locally produced goods ought to be treated equally.⁷⁵ The same principle applies to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. It is important to note that ‘national treatment’ only applies once a product, service or item of intellectual property has entered the market.⁷⁶ It follows that, charging customs duty on an import is not a violation of national treatment even in cases where locally-produced products are not charged. This principle of ‘national treatment’ is also found in all the three main WTO agreements.⁷⁷

The third principle upon which the MTS is based is the principle of reciprocity. Reciprocity ensures that ‘any trade concessions made by governments through multilateral bargaining are mutually beneficial’.⁷⁸ When one country reduces tariffs on imports from another country, it has the right to expect the other country to make tariff concessions of equal value in return.⁷⁹ The principle of reciprocity, therefore, aims to ensure that the concessions that each country makes in the multilateral trade negotiations are equalled by the concessions it gains from its

⁷⁰ See note 68 above

⁷¹ See note 69 above

⁷² Art XXIV GATT (1994) - under the FTAs constituent member states extend preferential treatment to countries with which they enter into free trade agreements or customs unions with. One example is that of the Trade Development and Cooperation Agreement (TDCA) between the EU and South Africa. It should be noted that the exceptions to non-discrimination are only permitted under strict conditions probably to safeguard against use of these exceptions as protectionist tools.

⁷³ WTO (note 14 above) 11

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Art 3 GATT (1994), Art 17 GATS (1994) & Art 3 TRIPS (1994)

⁷⁸ Art XXVIII GATT (1994)

⁷⁹ Oatley (note 49 above)

trading partners. Lastly, multilateral trade rules incorporate ‘domestic safeguards.’ Domestic safeguards are ‘escape clauses that allow governments to temporarily opt out of commitments they have made when changes in the domestic or international [economy] reflect that compliance would seriously undermine the well-being of part or all of their population’.⁸⁰

2.2 GATT

2.2.1 History of the GATT

As highlighted earlier trade liberalization was achieved through a series of bargaining rounds that have taken place since 1947.⁸¹ States have used these rounds to progressively reduce tariffs on manufactured goods and to address other obstacles to international trade. Tariff reductions were the principal focus of the first six GATT rounds. In this respect Patrick L and Lattimore R note that successive rounds of multilateral trade negotiations since 1947 have assisted in achieving deep reductions in import duties.⁸²

It can be gathered from the MTS principle of reciprocity that ‘reciprocal agreements are the standard approach to multilateral trade bargaining’.⁸³ As such the WTO, an MTS institution, facilitates Member states to liberalize trade by enabling them to enforce such reciprocal trade agreements.⁸⁴ It will also be shown that in the early GATT Rounds, governments reduced tariffs by making reciprocal tariff reductions in manufacturing industries.⁸⁵ According to Jackson H ‘the objective in each bargaining round was to reach an overall agreement in which the value of the total tariff concessions each government granted equalled the value of the total tariff concessions each government received from all other GATT system members’.⁸⁶ It should be noted that in theory, the GATT was not an organization and as such the GATT did not have members. The accepting governments were known as ‘contracting parties’ (CPs).⁸⁷

⁸⁰ FA Jock & Z Mark ‘The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions’ (1981) 35 *International Organization* 561, 602.

⁸¹ Oatley (note 49 above)

⁸² P Love & R Lattimore *International Trade: Free, Fair and Open?* (2009) 57

⁸³ Oatley (note 49 above)

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 143-4

⁸⁷ JH Jackson, A Arbor & E Hessel *The constitutional structure for international cooperation in trade in services and the Uruguay round of GATT* (Revised draft) (1987) 6

2.2.2 GATT: The Origins- ‘From Havana to Marrakesh’

The story of GATT can be traced as back as ‘1948 in Havana (Cuba), via Annecy (France), Torquay (UK), Tokyo (Japan), Punta Del Este (Uruguay), Montreal (Canada), Brussels (Belgium) and finally to Marrakesh (Morocco) in 1994’.⁸⁸ In the course of that journey ‘the trading system came under GATT, salvaged from the aborted attempt to create the ITO’.⁸⁹ GATT is considered to have immensely assisted in the establishment of a strong and prosperous MTS.⁹⁰ The latter became progressively liberal through rounds of trade negotiations.⁹¹ In support of the former assertion, Bhala R argues that the GATT was more than a tariff cutting document. It gave birth to a multilateral trade institution in Geneva.⁹² This explains why the GATT is dubbed as the ‘forerunner of the WTO’.⁹³ It is also crucial to note that the process of the integration of weaker countries into the MTS started with the commencement of GATT.⁹⁴

Bhala R argues that the origins of GATT as both the constitution of international trade law and the dominant multilateral trade institution lie in ‘the disastrous experience with protectionism in the 1930s’.⁹⁵ The most important fact about GATT is that the GATT was never intended to be what it has become.⁹⁶ In support of this point Bhala R notes that, from the onset GATT was intended to be a provisional legal instrument.⁹⁷ It is against this standpoint that Bhala R also points out that ‘it was always assumed that the written product of the trade tariff reduction negotiations namely the GATT would terminate once the Havana Charter entered into force’.⁹⁸ The principal and enduring agreement was to be the Havana Charter which would establish the ITO.⁹⁹ In this respect the GATT was intended to form one component of a broader International Trade Organization (ITO). According to Jackson H, ‘the GATT was to be merely an agreement on tariffs, sort of appended to and serviced by the

⁸⁸ WTO (note 14 above) 15 ACCESSED ON 13 APRIL 2014

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² R Bhala *International Trade Law: Theory and Practice* 2 ed (2001) 128

⁹³ Love & Lattimore (see note 82 above) 31

⁹⁴ Shrirang P Shukla ‘The Crisis in the MTS: What is to be done?’ available at <http://www.twinside.org.sg/title/mts.htm> ACCESSED ON 3 APRIL 2014

⁹⁵ It can be argued that this protectionism during the Great Depression was disastrous due to its effect of hindering trade leading to the collapse in global trade. See Bhala (note 92 above) 127

⁹⁶ Jackson, Arbor & Hessel (note 87 above) 6

⁹⁷ Art XXIX GATT (1994)

⁹⁸ Bhala (note 92 above) 127

⁹⁹ Ibid

ITO'.¹⁰⁰ This supports the assertion that the original idea, during the immediate post World War II period was to create an organizational counterpart to the World Bank (WB) and the IMF namely the ITO.¹⁰¹

The ITO had the mandate to facilitate trade liberalization amongst other things.¹⁰² It was assumed that the creation of an international trade organization, 'to promote freer trade on a multilateral, non-discriminatory basis and to regulate the use of devices such as trade preferences and state trading' would assist achieve the abovementioned mandate.¹⁰³ However, the USA Congress objected to the 'employment and development features' of the ITO and subsequently refused to accept American participation in the ITO.¹⁰⁴ Another reason advanced as to why the US rejected the ITO is that accepting it would cede too much sovereignty to an international body.¹⁰⁵ Due to the ITO's rejection by the U.S no other country was willing to bind itself to that Charter without its application to the then pre-eminent economic power, the U.S.¹⁰⁶ As a consequence of this refusal the ITO was never created.¹⁰⁷

This occurrence necessitated the GATT to become the central trade institution since it did not require congressional ratification in order to be operational.¹⁰⁸ In support of the latter point it can be observed that GATT was thus thrust into the position of the principal international institution for controlling trade.¹⁰⁹ Up to this day, GATT remains the most important legal document in International trade law.¹¹⁰ It has been argued that the 'GATT-based system embodied the interests of the United States and Western Europe'.¹¹¹ This had the profound effect of neglecting the concerns and needs of developing countries; as such a vast number of developing countries played no role in the GATT system's creation.¹¹² To this extent it can be observed that developed countries were key players in the development of the MTS. This

¹⁰⁰ Jackson, Arbor & Hessel (note 87 above) 2

¹⁰¹ Ibid 6

¹⁰² Oatley (note 49 above)

¹⁰³ R Toye 'Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization 1947-1948' (2003) 25 *The International History Review* 2, 286.

¹⁰⁴ D William 'The End of the ITO' (1952) 16 *Princeton essays in International Economics* 1, 6

¹⁰⁵ Bhala (note 92 above) 127

¹⁰⁶ Jackson, Arbor & Hessel (note 87 above) 6

¹⁰⁷ Oatley (note 49 above)

¹⁰⁸ Ibid

¹⁰⁹ Jackson, Arbor & Hessel (note 87 above) 6

¹¹⁰ Bhala (note 92 above) 128

¹¹¹ Oatley (note 49 above)

¹¹² Ibid

possibly explains why developing countries still struggle to be fully integrated into the MTS which was built with the interests of the developed countries at heart.

One reason that can be advanced for the minimal participation of the developing countries in the MTS is that many developing countries had not yet become independent nation states by 1947 when the GATT was created. Furthermore, the developing countries that had the privilege to participate in the formation of the 1947 GATT system negotiations ‘fought hard to link trade and development in the ITO’.¹¹³ As a consequence when the ITO failed to become operational, developing countries became sceptical of the MTS. Thus, most of the developing countries ceased to be active participants in trade liberalization.¹¹⁴ It can be noted that contrary to the expectations of the GATT-based system ability to liberalize trade, developing countries believed that it hindered economic development.¹¹⁵ The arguments advanced above partially show the fault-lines within the MTS namely its failure to adequately cater for the development needs of developing countries in its infancy stages.

However, the extent to which MTS did not cater for the needs of developing countries should not be exaggerated. The same can be said about the perspective of the MTS by developing countries. In the mid-1980s developing countries began to adopt development strategies that emphasized the importance of international trade to economic development.¹¹⁶ The profound effect of this transition was that developing countries progressively ceased to advocate for fundamental reforms of the MTS. Furthermore, they became active participants in multilateral trade negotiations. One reason for this is that this period coincided with the political independence of developing countries.

Such a transition also influenced the reorientation of developing country trade policies and this also strengthened the MTS.¹¹⁷ Regardless of this development it would be an overstatement to assert that ‘developing countries have become enthusiastic supporters of the MTS’.¹¹⁸ The reality is that ‘they no longer challenge the fundamental principles upon which the multilateral trade system is based’.¹¹⁹ Prior to this development namely between 1950 and

¹¹³ Oatley (note 49 above)

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

1980 developing countries had minimally participated in the process of trade liberalization.¹²⁰ Moreover, they had ‘pressed continually to supplant the GATT and replace it with an institutional structure that addressed their perceived development goals’.¹²¹

2.2.3 The core of GATT

Substantively the core of GATT can be described as including obligations which relate to trade in goods (but not only trade in goods).¹²² As highlighted earlier these essentially applied to constrain government regulatory actions.¹²³ As such ‘GATT was designed to limit what governments could do to place hurdles on trade across borders’.¹²⁴ Jackson H notes that ‘only a minute few of GATT obligations could be said to even impliedly apply to business firms or individuals’.¹²⁵ This argument points to the international nature of the GATT system. These obligations include:

Negotiated tariff binding MFN obligation, National Treatment obligation and a broad prohibition on the use of quotas (quantitative restrictions), with a few exceptions amongst other obligations.¹²⁶

It should be noted that the GATT agreement also contains a series of exceptions, some of which arguably make serious inroads in the obligations mentioned above. Some of the most prominent among the exceptions are those for: national security, intellectual property measures, customs unions and free trade areas (FTAs), certain measures by developing countries to aid economic development, and escape clause measures to slow imports to allow domestic industries to better adjust to competition.¹²⁷

2.3 THE GATT ROUNDS

Following the demise of the ITO as highlighted earlier the GATT became the sole multilateral instrument governing and/or international trade.¹²⁸ The GATT’s basic legal

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Jackson, Arbor & Hessel (note 87 above) 6

¹²³ Jackson (note 86 above)

¹²⁴ Jackson, Arbor & Hessel (note 87 above) 6

¹²⁵ Ibid.

¹²⁶ GATT 1994

¹²⁷ Jackson, Arbor & Hessel (note 87 above) 6

¹²⁸ Love & Lattimore (see note 82 above) 79

principles remained much as they were in 1948 for almost half a century.¹²⁹ However, they were supplemented or amended in the series of multilateral negotiations known as ‘trade rounds’.¹³⁰ It will be shown that the early trade rounds focused on further reducing tariffs on manufactured goods.¹³¹ The Kennedy Round in the mid-1960s introduced a GATT Anti-Dumping Agreement and a section on development.¹³² However, agricultural liberalisation was left on the periphery of these negotiations.¹³³ It was only until the Uruguay Round that agricultural liberalisation became part of the core focus of the negotiations. In this respect Patrick L and Lattimore R point out that the UR was ‘highly significant in reinforcing the architecture of the world trading system and for the first time agriculture was subject to multilateral trade disciplines’.¹³⁴

There have been a total of nine Rounds, dedicated to the reduction of trade barriers, in the history of GATT.¹³⁵ Although Bhala R mentions only eight there are in fact nine considering the current Doha Development Agenda (DDA) Round formed in 2001. Another Round known as the Millennium Round would have been created in 1999 at the WTO Ministerial Conference had it not been for the strong antagonism it received from interest groups and NGOs as well as developing countries representing an array of concerns.¹³⁶ These concerns included environmental, labour, human rights and consumer protection interests. It will be noted that in the earlier Rounds most developing countries were neither principal suppliers nor major importing markets.¹³⁷ As such ‘little was asked of them in terms of their own trade liberalization’¹³⁸, thus leaving at the periphery of the trade liberalization commitment. This reinforces the idea that the GATT system is largely economically conducive to the developed countries.

These GATT Rounds will be discussed below and the extent to which the development needs of developing countries were addressed under these successive GATT Rounds will be considered.

¹²⁹ Ibid.

¹³⁰ Ibid. Also *see* WTO (note 14 above) 16

¹³¹ Ibid

¹³² Agreement on implementation of Article VI GATT (1994), Also *see* WTO (note 14 above) 16

¹³³ Love & Lattimore (see note 82 above) 79

¹³⁴ Ibid

¹³⁵ Bhala (note 92 above) 132

¹³⁶ Ibid 127

¹³⁷ See note 53 above

¹³⁸ Ibid

2.3.1 The early 5 Rounds: Geneva Round – Dillon Round.

The first five rounds of multilateral trade negotiation succeeded in lowering tariff barriers substantially.¹³⁹ This shifted protectionism to non-tariff barriers (NTBs). The first five rounds reduced average trade weighted tariff from 50 to 12%.¹⁴⁰

2.3.2 The Geneva Round (1947)

Bhala R argues that this Round was disappointing in terms of the scope of coverage of trade tariffs affecting only 2.5 billion in trade.¹⁴¹ However, it was successful in the following respects namely; the CPs recognized the importance of trade liberalization in the agricultural sector which had been previously excluded from the disciplines of GATT.¹⁴² As such it led to the collapse of agricultural protectionism among developed countries which had adverse trade effects on domestic traders.¹⁴³ Secondly, it created awareness amongst the contracting parties (CPs) of the need to tackle the trade and development needs of LDCs and developing countries.¹⁴⁴ Such an initiative points to the initial consciousness of the MTS to the development needs of developing countries.

2.3.3 The Dillon Round (1960–1962)

It is suggested that the Dillon Round was created due to two threats from the European Economic Community (EEC) namely EEC's common external tariff and the threat concerning 'agricultural subsidies pursuant to the EEC's common Agricultural Policy'.¹⁴⁵ Furthermore, the Geneva Round had drawn attention to 'trade-distorting',¹⁴⁶ agricultural policies and the Dillon Round provided an opportunity to discuss the problem.¹⁴⁷ It should however, be noted that these discussions proved to be problematic and as a consequence 'agricultural and other politically sensitive products' were excluded from the final deal.¹⁴⁸ The Dillon Round results disappointed the expectations of the GATT CPs in the following

¹³⁹ Aaron Smith 'History of the WTO/GATT system' available at <http://aic.ucdavis.edu/oa/Smith.pdf> ACCESSED ON 27 APRIL 2014

¹⁴⁰ Ibid.

¹⁴¹ Bhala (note 92 above) 134

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Bhala (note 92 above) 135

¹⁴⁶ Trade distortion occurs if prices are higher or lower than normal. For example, import barriers and domestic subsidies can make crops more expensive in a country's internal market- see WTO (note 14 above) 26 ACCESSED ON 17 MAY 2014

¹⁴⁷ Bhala (note 92 above) 135

¹⁴⁸ Ibid. These discussions were problematic due to the fact that there was no consensus amongst the CPs in relation to dealing with tariff reductions on agricultural products *inter alia*.

respects; nothing was done to combat Non-Tariff Barriers (NTBs) and tariff cuts were at times too shallow where they could have been deeper'.¹⁴⁹

2.3.4 The Kennedy Round (1964–1967)

It is dubbed as the most ambitious of its predecessors as it had the objective of having 'a starting point or working hypothesis of 50% reduction in tariffs on many products and somehow met these objectives'.¹⁵⁰ It should be noted that prior to the Kennedy Round the basic approach to tariff negotiations was 'request and offer'.¹⁵¹ Under this approach 'the contracting parties sought to balance the concessions they were offering against those they were seeking'.¹⁵² As such the negotiations were essentially bilateral, but were then extended to other GATT CPs through the MFN (Most Favoured Nation) principle.¹⁵³ The new approach to tariff negotiations namely the single undertaking was finally consolidated by the end of the Uruguay Round.¹⁵⁴

Bhala R proposes five factors that made the Kennedy Round successful. Firstly, it changed the negotiation process for cutting tariffs from the traditional product-by-product approach to an across-the-board or linear method.¹⁵⁵ Secondly, its negotiations spanned over both agricultural as well as industrial goods.¹⁵⁶ It should however, be noted that in respect to the reduction of tariffs in the agricultural sphere, the exercise was not easy.¹⁵⁷ As such the efforts to liberalize trade in agriculture continued throughout the subsequent Tokyo and Uruguay Rounds.¹⁵⁸ Thirdly, it led to the emergence of other CPs as the driving forces in the negotiating Rounds as opposed to the earlier circumstances where the US was the sole driving force in the negotiating Rounds.¹⁵⁹ These new forces included Japan having acceded

¹⁴⁹ See Bhala (note 92 above) 135 for more discussion and examples.

¹⁵⁰ Love & Lattimore (see note 82 above) 83

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ C Blouin 'The Great North-South Bargain?: The Uruguay Round and Developing Countries' available at <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2002-The-Reality-of-Trade-the-Uruguay-Round-and-Developing-Countries.pdf> ACCESSED ON 17 MAY 2014. The single undertaking method which will be discussed in the course of this thesis- see note 227

¹⁵⁵ Bhala (note 92 above) 135- The use of the linear method was intended, *inter alia*, to overcome time-consuming, complex problems of the product-by-product method. The latter method entailed the determination of tariff reduction on each product whilst the former was an aggregating method that brought forward many products at once for consideration for tariff reductions.

¹⁵⁶ Bhala (note 92 above), 136.

¹⁵⁷ Ibid, 137.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

to the GATT in 1955 and the ECC in 1957.¹⁶⁰ These parties both emerged as key players in the Kennedy Round negotiations that followed.¹⁶¹

Fourthly, akin to the Geneva Round the interests of the developing countries were discussed.¹⁶² This is evident in the number of LDCs that acceded to GATT in the early 1960s which were treated as non-linear countries during the Kennedy Round.¹⁶³ This means that they participated in the tariff reductions through affirmative product specific offers.¹⁶⁴ Lastly, the Round was responsible for attempting to reduce NTBs as well as other traditional trade barriers through establishing an AD Code.¹⁶⁵

2.3.5 The Tokyo Round (1973–79): ‘An initial attempt to reform the system’

This Round is significant for its recognition of the needs of developing countries namely through the Tokyo Round GATT codes which provided special assistance to developing countries.¹⁶⁶ This Round also witnessed the first major attempt to tackle non-tariff barriers (NTBs) as the CPs collectively tackled the growing problem of NTBs.¹⁶⁷ The trade tariff reductions achieved in the Dillon and Kennedy Rounds stimulated international trade and enmeshed the CPs thereto in a growing network of economic interdependence.¹⁶⁸ However, despite this remarkable achievement by the two Rounds in question, more progress was needed on reducing trade tariff barriers on agricultural products, managing the special needs of developing countries and most importantly combating the outbreak of NTBs.¹⁶⁹

Robert Gilpin points out some of the areas that formed the core of the Tokyo discussions. These include violations of the non-discrimination or MFN principle through preferential trading arrangements namely the Lome Convention between the EEC and certain LDCs.¹⁷⁰ Other areas include resolution of issues related to the unilateral imposition of import restriction in cases of serious injury to the domestic industry namely the ‘safeguard provision of the GATT’, overall tariff reductions and the removal of NTBs, liberalized trade in

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid, 138.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Jackson, Arbor & Hessel (note 87 above) 25

¹⁶⁷ Love & Lattimore (see note 82 above) 79- The problem of NTBs had not been given adequate attention in the preceding Rounds.

¹⁶⁸ Bhala (note 92 above) 138

¹⁶⁹ Ibid.

¹⁷⁰ R Gilpin *The political economy of International trade Relations* (1987) 196

agriculture and consideration of commodity agreements amongst other areas.¹⁷¹ In light of this Gilpin argues that the primary goal of the Tokyo Round was to stabilize trading relations among the Organization for Economic Cooperation and Development (OECD) countries.¹⁷² This is problematic as it creates the presumption that the development needs of developing countries were neglected.¹⁷³

It is also important to consider how the Tokyo Round improved on the Kennedy Round. Whereas under the Kennedy Round, a general formula for tariff reduction would be reduced by 50% for industrial goods with exceptions being negotiated between CPs; under the Tokyo Round tariffs were reduced according to the 'Swiss Formula'.¹⁷⁴ This formula had the effect of 'generating deeper cuts in the highest tariffs thereby addressing the issue of tariff peaks – exceptionally high tariffs'.¹⁷⁵ However, negotiations still applied to some sectors, notably textiles. This had the effect of avoiding the full impact that a full application of the Swiss Formula would have caused.¹⁷⁶ Moreover, like the Kennedy Round many tariff negotiations were conducted on a linear, across-the-board basis under the Tokyo Round.¹⁷⁷ However, its negotiations are argued by Bhala R to have been broader and more ambitious as they were open to non CPs and most significantly, they dealt with the reduction of NTBs.¹⁷⁸ As a consequence the concerted effort of the Round yielded remarkable results that saw the emergence of a 'comprehensive package of agreements' which was adopted by at least 99 countries.¹⁷⁹

Bhala R outlines three key results of the Round namely achievement of agreements that reduced NTBs, establishing of agreements on trade remedies and granting of preferential treatment to developing countries (GSP). Gilpin R on the other hand argues that the Round's most significant accomplishment was the establishment of a number of 'codes of good

¹⁷¹ Ibid

¹⁷² Ibid

¹⁷³ The OECD is a group of 30 member countries that discuss and develop economic and social policy. OECD countries are democratic countries that support free market economies. The most important aspect of the OECD in light of the argument in question is that it is largely constituted by developed countries. In this respect the formation of the Tokyo Round with the primary goal of stabilizing the trading relations of the OECD countries raises the question whether the Round was created to cater for the development needs of developing countries at all. See Love & Lattimore (see note 82 above). For a discussion on the primary goal of the Tokyo Round, see *ibid*.

¹⁷⁴ Love & Lattimore (see note 82 above) 83

¹⁷⁵ See *ibid* 83 for an understanding of the Swiss formula.

¹⁷⁶ *Ibid*.

¹⁷⁷ Bhala (note 92 above) 138

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*.

behaviour' regarding NTBs.¹⁸⁰ These codes were meant to regulate the areas of NTBs and trade promotion policies namely restrictions in government procurement, granting of tax benefits and the use of export credits.¹⁸¹ However, 'the codes' were problematic as they were not accepted by the full GATT membership.¹⁸² As such they were not 'plurilateral' in nature which made them difficult to enforce.¹⁸³ A plurilateral option offers a mechanism for CPs of the GATT to agree to rules in a policy area that is not covered by the GATT.¹⁸⁴ Despite, this it can be argued that though the 'codes' were not 'multilateral' they were a significant start. This is supported by the fact that several codes were eventually amended during the Uruguay Round and turned into multilateral commitments accepted and subscribed to by all WTO members.¹⁸⁵ Hoekman argues the use of the Tokyo codes was one of the reasons why the 'single undertaking' was pursued in the Uruguay Round.¹⁸⁶ It follows that many countries strongly felt that the Tokyo Round plurilateral agreements had led to the excessive fragmentation of the trading system.¹⁸⁷

With regard to the last key result mentioned above namely 'the granting of preferential treatment to developing countries', an enabling clause was agreed to and it served as the legal basis for the GSP scheme offered to developing countries by developed countries.¹⁸⁸ The GSP scheme is a non-reciprocal scheme whereby certain exports from the beneficiary developing countries receive duty free treatment.¹⁸⁹ The key result in question exists as an exception to the non-discrimination or MFN principle of the GATT and it provides that,

Notwithstanding the provisions of Article I of GATT contracting parties may accord differential and favourable treatment to developing countries without according such treatment to other contracting parties.¹⁹⁰

It is important to note that such a step was crucial in addressing the development needs of developing countries in the MTS.

¹⁸⁰ Gilpin (note 170 above) 196

¹⁸¹ Ibid.

¹⁸² WTO (note 14 above) 16

¹⁸³ Ibid.

¹⁸⁴ Hoekman (note 51 above) 9

¹⁸⁵ WTO (note 14 above) 17

¹⁸⁶ Hoekman (note 51 above)

¹⁸⁷ Ibid.

¹⁸⁸ Bhala (note 92 above) 139

¹⁸⁹ Ibid.

¹⁹⁰ GATT (1994)

Despite these remarkable breakthroughs in the elimination and reduction of trade barriers, the international economic community was faced with retarded economic growth, rapid inflation and high unemployment (stagflation) amongst other economic impediments.¹⁹¹ This resulted in most of the CPs including the US resorting to protectionist measures like the voluntary export restraints (VERs).¹⁹² These measures were discriminating quantitative measures that circumvented the Tokyo Round disciplines due to their voluntary nature.¹⁹³ They were only banned when the Uruguay Round agreements were signed in terms of Article 11(1) (b) of the Agreement on Safeguards.¹⁹⁴

2.3.6 The Uruguay Round (1986–94)

During the 1980s the GATT system needed a thorough overhaul.¹⁹⁵ Jackson H, argues that such a time seemed convenient for the development of an international regime that would function to inhibit the purely protectionist impulses of governments.¹⁹⁶ The above consideration was among those which led the participants in the GATT Ministerial Meeting of September 1986, at Punta del Este, Uruguay, to launch the eighth major GATT round of trade negotiations¹⁹⁷ and ultimately to the WTO.¹⁹⁸ The failure to establish such a Round to regulate global trade would have led to national regulatory systems that would have become ‘hardened’ and difficult to dismantle in the future.¹⁹⁹

In the seven previous GATT rounds of trade negotiations, discussions were mainly focused on tariff reductions.²⁰⁰ It should be noted that previously developing countries had been focusing most of their attention on obtaining preferential access to industrial country markets.²⁰¹ Only a few developing countries actively participated in the core business of the negotiations; the exchange of market access concessions.²⁰² By contrast, under the Uruguay many developing countries were active participants.²⁰³ Their participation was not limited to

¹⁹¹ Bhala (note 92 above) 139

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ WTO (note 14 above) 15 ACCESSED AT 30 APRIL 2014

¹⁹⁶ Jackson, Arbor & Hessel (note 87 above) 2

¹⁹⁷ Ibid.

¹⁹⁸ WTO (note 14 above) 15 ACCESSED AT 30 APRIL 2014

¹⁹⁹ See note 196 above.

²⁰⁰ P Kumar ‘Impact of the Uruguay Round on the Multilateral Trading System. The Uruguay Round and Developing Countries’ available at <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2002-The-Reality-of-Trade-the-Uruguay-Round-and-Developing-Countries.pdf> (2002) 12

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

the formulation of new rules for the world trading system. Developing countries also made important market access offers in the ‘conventional area of reducing tariff protection on manufactures trade and in new areas’. The new areas in respect of which important market offers were made by developing countries included, *inter alia*, trade in services and trade in agricultural products.²⁰⁴

Bhala R also provides another reason as to why the Uruguay Round was critically needed in the realm of international trade around the 1980s. She argues that amongst the most challenging problems faced by the world trading community after the Tokyo Round were substantive market access issues in key economic sectors.²⁰⁵ She further points out that the Tokyo Round had failed to deal with certain sectors adequately or at all. This was in respect to providing a framework for market liberalization.²⁰⁶ Other problems areas that necessitated the establishment of the Uruguay Round were ‘the burgeoning of trade in services and barriers to such trade remained wholly outside the GATT framework’ and a vast number of CPs were overly protecting their agricultural sectors through tariffs, NTBs and subsidies.²⁰⁷ In light of these problems it can be noted that ‘a permanent multilateral infrastructure was essential in order to promote trade liberalization and deal with the expanding scope of international trade and policy’.²⁰⁸ In the words of Bhala R, it was necessary to ‘resurrect the ITO, ultimately under a different name; the WTO’.²⁰⁹

The strongest proponent for the formation of the Uruguay Round was the United States, supported primarily by the Japanese and the economies of the Pacific Basin.²¹⁰ A possible explanation provided for such a keen interest by the US in the Round, is that the Round was globally competitive and in some instances dominant in services, intellectual property (IP), industries and agriculture.²¹¹ A round that produced significant market access for the American economy in these sectors would be openly welcomed by the US.²¹² Despite its popularity with the US and other Pacific Basin countries, the Round was also subject to

²⁰⁴ Ibid, 5.

²⁰⁵ Bhala (note 92 above) 193

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Gilpin (see note 170 above) 196

²¹¹ See note 205 above

²¹² Ibid.

antagonism by LDCs since it was not consonant with the LDCs' interests.²¹³ Gilpin also asserts that some members of the European Community opposed it on the same grounds as those of LDCs.²¹⁴

As was highlighted earlier, governments used the GATT/WTO process to 'develop multilateral rules for other trade-related areas'.²¹⁵ In this respect during the UR, governments created new multilateral rules in three main areas. Firstly, governments created multilateral rules to protect intellectual property (IP).²¹⁶ In negotiating Trade-Related Intellectual Property Rights (TRIPs), 'governments created multilateral rules that would oblige those countries that were not currently enforcing intellectual property rights to do so'.²¹⁷ Secondly, international trade in services was brought into the multilateral regime as part of the commitment to liberalize trade.²¹⁸

Hoekman B and Kostecki M point out that during the 1980s and 1990s international trade in services grew more rapidly than trade in manufactured goods.²¹⁹ However, regardless of this reality and the importance of service sector activities, there were no rules to govern and regulate international trade in services.²²⁰ The General Agreement on Trade in Services (GATS) provided a framework for a limited amount of liberalization and for negotiations aimed at further liberalization.²²¹ Finally, governments created a set of rules governing policies toward the foreign direct investments made by multinational corporations in the form of Trade-Related Investment Measures (TRIMs).²²² These rules were designed to reduce governments' abilities to impose import or export requirements on multinational corporations (MNCs) operating in their countries.²²³

²¹³ Bhala (note 92 above) 193- LDCs were of the opinion that the Round had a bias for developed countries interests and paid insufficient attention to the interests of LDCs.

²¹⁴ Gilpin (note 170 above) 199

²¹⁵ Oatley (note 49 above)

²¹⁶ RP Michael *Knowledge Diplomacy Global Competition and the Politics of Intellectual Property* (1998) 12

²¹⁷ Oatley (note 49 above) - In terms of Article 1 (1) of the TRIPS Agreement Members were obliged to 'give effect to the provisions of the Agreement'. The provision in question further stated that 'Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

²¹⁸ Ibid.

²¹⁹ B Hoekman & M Kostecki *The Political Economy of the World Trading System: from GATT to WTO* (1995) 127

²²⁰ Oatley (note 49 above)

²²¹ Hoekman & Kostecki (note 219 above) 141

²²² Oatley (note 49 above)

²²³ Ibid.

In its infancy stages the Uruguay Round, in relation to tariff negotiations, used a combined approach with aspects of ‘request and offer’ and a general tariff reduction target of 30% on average.²²⁴ As part of the GATT’s commitment to address the needs of developing countries, an average 36% reduction was agreed upon for developed countries in respect of agricultural goods.²²⁵ As highlighted earlier by the end of the Uruguay Round the notion of a ‘single undertaking’ had become established.²²⁶ Under this notion ‘virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately’.²²⁷ It should be noted that the Doha Declaration reasserts the single undertaking nature of the negotiation.²²⁸ It is in respect of the above that Blouin C asserts that the UR was the first of its kind in terms of developing country participation. Developing countries were generally not very active in the GATT. However, with the UR all members had to be signatories to all the agreements based on the single undertaking method.²²⁹

A lot of merit has been awarded to the Uruguay Round in respect of trade liberalisation. For instance the commitment to market access received more attention under the Uruguay Round which produced the first multilateral agreement namely the Agreement on Agriculture, dedicated to agricultural trade.²³⁰ Kumar argues that the ‘Uruguay Round brought some significant institutional changes, which have resulted in relatively better governance of the world trading system under the aegis of the WTO’.²³¹ Furthermore, this Round also advanced the integration of the world economy, especially the integration of developing countries into the MTS. Moreover, it can be noted that the Round contributed to the ‘liberalization of developing countries’ own trade regimes and improvements in the conditions affecting access to the major markets for their export products’.²³²

It is evident from the discussion of the Rounds including the Uruguay Round that the issue of agricultural liberalisation was very problematic. In support of this Gilpin asserts that ‘the problem of world trade in agriculture almost defies solution’.²³³

²²⁴ Love & Lattimore (see note 82 above) 83

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Blouin (note 154 above)

²³⁰ WTO (note 14 above) 23 ACCESSED ON 27 MARCH 2014

²³¹ Kumar (note 200 above)

²³² Ibid.

²³³ Gilpin (note 170 above) 199

2.3.7 Evaluation of the GATT

The overall impact of the Uruguay Round trade negotiations on the MTS is mixed. Though the GATT was ‘provisional with a limited field of action’ its success, in promoting and securing liberalisation of world trade over 47 years, is incontestable.²³⁴ Furthermore, the momentum of trade liberalization assisted to ensure that ‘trade growth consistently out-paced production growth throughout the GATT era, a measure of countries’ increasing ability to trade with each other and to reap the benefits of trade’.²³⁵ Moreover, the rush of new CPs during the UR demonstrated that the MTS was recognised as an anchor for development and an instrument of economic and trade reform.²³⁶

2.4 WTO

The creation of the WTO in 1995 is considered to be ‘the biggest reform of international trade since after World War 2’.²³⁷ In support of this assertion, Hoekman B argues that the 1995 establishment of the WTO was the ‘capstone of a gradual process of liberalization’ that started after WW 2.²³⁸ It is dubbed to have ‘brought to reality in an updated form that is the failed attempt in 1948 to create an International Trade Organization’.²³⁹ The creation of the WTO strengthened multilateral system.²⁴⁰ In this respect Patrick L and Lattimore R assert that multilateralism is the basis of the WTO system implying that ‘the more partners there are to an agreement, the better’.²⁴¹

In essence the WTO is a place where member governments meet and attempt to sort out the trade problems they face with each other and at ‘its heart are WTO agreements, negotiated and signed by the bulk of the world’s trading nations’.²⁴² It is important to note that the method of signing in question is the single undertaking method which implies that once a nation becomes a member of the WTO it becomes bound by all of its agreements.²⁴³ The WTO Agreement is essentially an agreement establishing the WTO.²⁴⁴ It created a permanent

²³⁴ WTO (note 14 above) 17 ACCESSED ON 30 APRIL 2014

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid, 13.

²³⁸ Hoekman (note 51 above) 1

²³⁹ See note 234 above 13

²⁴⁰ Oatley (note 49 above)

²⁴¹ Love & Lattimore (see note 82 above) 72

²⁴² WTO (note 14 above) 7

²⁴³ Blouin (note 154 above)

²⁴⁴ Bhala (note 92 above) 201- See Article 1 of the Marrakesh Agreement Establishing the World Trade Organization.

forum for Member countries to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated under the UR.²⁴⁵

The WTO Agreements mentioned above cover goods, services and intellectual property and they spell out the principles of liberalization as well as the permitted exceptions. Furthermore, they include individual countries' commitments to lower customs tariffs and other trade barriers, and 'to open up and keep open service markets' amongst other functions.²⁴⁶ One of the functions of the WTO Agreements that are of importance to this thesis is its prescription of the special treatment for developing countries.²⁴⁷ It is important to note that the current WTO agreements are the legacy of commitments that countries have voluntarily negotiated with each other over time since 1947.²⁴⁸

The functions of the WTO include administering trade agreements, providing a forum for trade negotiations, providing a mechanism through which governments can resolve trade disputes, and monitoring national trade policies.²⁴⁹ Although the WTO is now the institutional centre of the world trade system, the GATT has not disappeared.²⁵⁰ The WTO merely replaced GATT as an international organization but the GATT Agreement still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round.²⁵¹ The GATT continues to provide many of the rules governing international trade relations. The creation of the WTO, therefore, 'represented an organizational change, but it did not produce a new set of international trade rules'.²⁵² The rules at the heart of the MTS are those that were initially established in 1947 and have been gradually revised and amended since that time.²⁵³

One of the commitments of the WTO that is of significant importance to this thesis is the institution's desire to contribute to its objectives by entering into reciprocal and mutually advantageous arrangements.²⁵⁴ Such arrangements are directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in

²⁴⁵ Ibid.

²⁴⁶ WTO (note 14 above) 23

²⁴⁷ Love & Lattimore (see note 82 above) 83

²⁴⁸ See note 53 above

²⁴⁹ Hoekman (note 51 above) 8- Also see See Articles 2 and 3 of the Marrakesh Agreement Establishing the World Trade Organization.

²⁵⁰ Oatley (note 49 above)

²⁵¹ WTO (note 14 above) 19

²⁵² See note 250 above

²⁵³ Ibid

²⁵⁴ Preamble GATT (1994)

international trade.²⁵⁵ These commitments are reflective of some of the principles underlying the MTS namely market-based liberalism²⁵⁶ and non-discrimination in trade.²⁵⁷

2.5 THE DOHA ROUND (2001- PRESENT)

It is not a novel fact that large economies still dominate trade and the multilateral system as well.²⁵⁸ Patrick L & Lattimore R²⁵⁹ argue that, this position, has however been challenged under the Doha Development Agenda (DDA) negotiations. They further assert that developing countries have grouped and regrouped with some success around different issues.²⁶⁰ These areas include cotton subsidies or special treatment of the poorest countries.²⁶¹ The Doha Round in question was formed at the Fourth Ministerial Conference in Doha, Qatar in November 2001 with the intention of concluding the DDA negotiations by 1 January 2005.²⁶²

One of the principal aims of the Doha Development Agenda is ‘to boost the integration of developing countries into world trade’.²⁶³ What makes Doha of great interest to this thesis is its dedication to the needs of developing countries. In support of this assertion Patrick L and Lattimore R note that, agriculture is at the centre of the Doha Round’s negotiations, ‘both because of its importance to developing countries and because of questions left unresolved from previous negotiations’.²⁶⁴ The core negotiations on agriculture under this Round concern three ‘pillars’. These include but not limited to market access, notably tariffs; trade-distorting forms of domestic support and various forms of export subsidies.²⁶⁵ The focus areas of the Doha Round namely agriculture imply that developing countries have a strong comparative advantage in this respect.²⁶⁶ This follows that developing countries’ economies are majorly agriculture based.²⁶⁷

²⁵⁵ Ibid

²⁵⁶ Oatley (note 49 above)

²⁵⁷ Art I GATT (1994)

²⁵⁸ Love & Lattimore (see note 82 above) 12

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² WTO (note 14 above) 77

²⁶³ Ibid

²⁶⁴ Love & Lattimore (see note 82 above) 89

²⁶⁵ Ibid

²⁶⁶ Ibid

²⁶⁷ Henson & Loader (note 1 above) 21

The DDA is committed to address the development needs of developing countries via the implementation decision.²⁶⁸ Implementation is a short-hand for developing countries' problems in implementing the current WTO Agreements namely those arising from the Uruguay Round negotiations.²⁶⁹ The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)²⁷⁰ together with agriculture²⁷¹ and General Agreement on Trade and Tariffs (GATT)²⁷² constitute the implementation decision of the Doha Round.²⁷³ However, despite the commitment of Doha to the needs of developing countries impediments still exist in respect to developing countries' market access in developed countries' markets.²⁷⁴ As highlighted in Chapter 1 the use of NTMs or NTBs in the form of SPS measures threatens the commitment to address the needs of developing countries.²⁷⁵

Other focus areas of DDA apart from agriculture include trade in goods (NAMA or Non-agricultural market access) and services. The aim of the negotiations on goods is to 'reduce, or, as appropriate, eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries'.²⁷⁶ It should be noted that services were one of the areas where a resumption of negotiations was already mandated by the UR.²⁷⁷ These were subsequently incorporated into the DDA. The extent to which the needs of developing countries' needs have been addressed in the MTS and particularly under the Doha Round can be seen in the Round's extensive work programme to improve aspects of the rules or the manner in which they are implemented.²⁷⁸ Of great significance is that this is achieved at the request of developing countries.²⁷⁹

2.4.1 Doha Round and Market access

The reductions in levels of protection that are currently 'on offer' in WTO negotiations would restrict the capacity of countries to raise protection from current levels in order to protect

²⁶⁸ Doha Ministerial Declaration 2001: Implementation-related issues and concerns para. 12

²⁶⁹ WTO (note 14 above) 77

²⁷⁰ Doha Ministerial Declaration (note 268 above) para.3

²⁷¹ Ibid para.2

²⁷² Ibid para.1

²⁷³ Ibid para.12

²⁷⁴ Sandrey *et al* (note 17 above)

²⁷⁵ Mustafizur (note 8 above)

²⁷⁶ Love & Lattimore (see note 82 above) 90

²⁷⁷ Ibid

²⁷⁸ Ibid

²⁷⁹ Ibid 89

domestic industries.²⁸⁰ As a consequence this would force a significant further increase in market access and reduction in support that distorts trade and this equally applies in the case of both agricultural and for industrial goods.²⁸¹ Gurría argues that, ‘the opening up of markets, further, in the Doha negotiations is one of the most important contributions that can be made in order to stimulate the world economy and to allow all nations to benefit from global economic progress’.²⁸² Such a step will be advantageous to the development needs of developing countries. The conclusion of the Doha Round would assist to avoid protectionist reactions to the current economic situation. Moreover, it would make trade more predictable.²⁸³

2.6 THE BALI PACKAGE (2013- PRESENT)

Trade facilitation issues are currently being hosted by the Bali Package which forms part of the DDA. The Bali Package is a trade agreement which is a brainchild of the WTO Ninth Ministerial Conference, 2013.²⁸⁴ The package has the mandate of reducing global trade barriers. In essence the package is a ‘series of decisions aimed at streamlining trade, allowing developing countries more options for providing food security, boosting least-developed countries’ trade and helping development more generally’.²⁸⁵ It is also important to note this is the first trade agreement approved by all the WTO Members under the WTO auspices.²⁸⁶

Developed countries consider this historical development as remarkably important whereas developing countries express concerns in relation to the agreements. Whilst it is appreciated that the Bali package agreements serve an important purpose there are concerns that ‘there is structural imbalance in which the least-developed countries secured only best endeavour

²⁸⁰ Love & Lattimore (see note 82 above) 72

²⁸¹ Ibid

²⁸² Angel Gurría ‘Doha trade negotiations: Let’s go the last mile’ (2008) available at <http://www.oecd.org/general/dohatradenegotiations/lets-go-the-last-mile-says-oecdsgurria.htm> ACCESSED ON 15 MAY 2014. It is submitted that agriculture was the lynchpin of this agenda for both developing and developed countries. However, other issues have been afforded significant attention namely issues pertaining to compulsory licensing of medicines and patent related matters. Of relevance to this thesis are issues relating to the review of provisions giving special and differential treatment to developing countries and the problems that developing countries face in implementing existent trade obligations. The main issues that stalled the Doha negotiations include, *inter alia*, agriculture, industrial tariffs and non-tariff barriers (NTBs), services, and trade remedies. The major divide in terms of these issues exist between developed and developing countries.

²⁸³ Love & Lattimore (see note 82 above) 72

²⁸⁴ WTO ‘Bali 9th Ministerial Conference’ Available at <https://mc9.wto.org/> ACCESSED ON 25 NOVEMBER 2014

²⁸⁵ Ibid

²⁸⁶ Kanth Devarakonda ‘Asymmetries mark WTO’s Bali Accord’ *Asia Times Online* 17 December 2013 Available at http://www.atimes.com/atimes/Global_Economy/GECON-02-171213.html. ACCESSED 25 NOVEMBER 2014

solutions while there is a binding agreement on trade facilitation'.²⁸⁷ One of the most significant decisions, *inter alia*, that forms the core of the Bali Package is the Trade Facilitation (TF) Agreement.²⁸⁸ The TF Agreement will be significant in the reduction of trading costs, the enhancement of transparency and provision of technical assistance to developing and LDCs for implementation of the Agreement.²⁸⁹

2.7 DEVELOPING COUNTRIES IN THE MULTILATERAL TRADING SYSTEM

It can be gathered from earlier discussions that developing countries did not fully participate in the GATT activities and negotiations.²⁹⁰ Their participation was mainly confined to 'seeking exceptions from the rules and more favourable treatment from industrialised nations'.²⁹¹ This position began to change with the formation of the Uruguay Round.²⁹² One of the reasons advanced for this transition is the 'awareness of the limitations of development policies based on import substitution and to the success of the East Asian 'tigers' in international markets'.²⁹³ Another reason advanced for this transition is that some developing countries faced the threat of unilateral action against their exports in certain markets.²⁹⁴ On the other hand others especially smaller developing countries were under the apprehension that they would be excluded from emerging regional trading blocs.²⁹⁵

However, the formation of the Uruguay Round and its ability to address the needs of developing countries should not be overemphasized. Some developing countries still lacked the resources to implement certain obligations in the UR.²⁹⁶ Their dissatisfaction is evident in their perspective of the transition periods provided to ease the adjustment process, which they considered to be inadequate.²⁹⁷ Patrick L and Lattimore R argue that this problem led to the intensified calls for further differentiation in WTO rules to take into account the special needs

²⁸⁷ Ibid

²⁸⁸ WTO (2013b), *Agreement on Trade Facilitation, Ministerial Decision of 7 December 2013* WT/MIN (13)/36, (Geneva: WTO). For example see Article 6 (2) of the TF Agreement which relates to specific disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation.

²⁸⁹ C Bellmann 'The Bali Agreement: Implications for Development and the WTO' 2014 *Open Edition* 4-5

²⁹⁰ Love & Lattimore (see note 82 above) 82

²⁹¹ Ibid

²⁹² Ibid

²⁹³ Ibid

²⁹⁴ Ibid

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Ibid

and capacity limitations of developing countries.²⁹⁸ In an effort to address these concerns initiatives like the Aid for Trade (Aft) initiative led by the WTO and OECD were implemented.²⁹⁹

Another important initiative meant to address the needs of developing countries is found in the WTO Agreements. Special and differential treatment (S & D or SDT) provisions were introduced in the WTO Agreements by the WTO.³⁰⁰ These provisions afford developing countries special rights to assist them in meeting implementation periods.³⁰¹ More specifically S&D provisions allow countries to provide more favourable treatment to developing and least developed countries which may have more difficulties in adjusting to the impact of trade liberalisation.³⁰² This allows the latter countries to ‘take advantage of new trading opportunities and to shoulder the costs associated with reform’.³⁰³

The extent to which the needs of developing countries have been addressed under the MTS is evident in the WTO’s Dispute Settlement System (DSS) and more particularly the existence of a Dispute Settlement Body (DSB).³⁰⁴ The DSS is intended to assist resolve disputes that arise among governments with respect to their legal obligations under the WTO rules.³⁰⁵ The formation of these bodies under the WTO has facilitated further participation of developing countries in the MTS.³⁰⁶ This is demonstrated by the *Cotton Subsidies Case*³⁰⁷ brought by Brazil against the United States. This highlights that developing countries are becoming more active in seeking WTO arbitration.³⁰⁸ Moreover, developing countries have initiated more than 40% of the disputes submitted to its Dispute Settlement Mechanism to date.³⁰⁹ Whereas the active participation in the WTO arbitration may be applauded as a positive move to address the needs of developing countries, this may be suggestive of a loophole in the MTS and its sensitivity to the needs of developing countries. The increase in the number of

²⁹⁸ Ibid

²⁹⁹ Ibid

³⁰⁰ An example of these provisions is Article 10 of the SPS Agreement which requires members to take special account of the needs of developing countries and LDCs in the preparation and application of SPS measures. Article 10 (1) in particular stipulates that ‘in the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members’.

³⁰¹ Love & Lattimore (see note 82 above) 83

³⁰² Ibid 85

³⁰³ Ibid 82

³⁰⁴ WTO (note 14 above)- Also see note Love & Lattimore (see note 82 above) 86

³⁰⁵ Ibid

³⁰⁶ Love & Lattimore (see note 82 above) 86

³⁰⁷ *United States Subsidies on Upland Cotton DS267*

³⁰⁸ See note 306 above

³⁰⁹ These disputes were mostly instituted against developed countries- see WTO (note 14 above)

complaints being brought against developed countries by developing countries may suggest that the needs of developing countries have not been effectively addressed by the MTS.

2.8 CONCLUSION

Having discussed the history of developing countries in the MTS it is imperative to assess whether the development needs of developing countries were effectively addressed. A number of points can be noted from the discussion above. There has been a general improvement in the treatment of developing countries' needs in the MTS. Hoekman B, asserts that 'many developing countries want to see the rules and processes adapted to better support development objectives'.³¹⁰ The GATT/WTO Rounds have made giant steps in attempting to achieve these objectives by liberalizing trade and enhancing market access.

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

³¹⁰ Hoekman (note 51 above) 19

CHAPTER 3:

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

3.1 INTRODUCTION

The preceding chapter addressed the extent to which the multilateral trading system (MTS) has addressed the development needs of developing countries. The conclusion was that the MTS did not effectively address most of the key development needs of developing countries. This accounts for the myriad of pending issues involving developing countries currently being discussed under the Doha Round as well as the Bali package.³¹¹ One of the main key concerns raised in the preceding chapter in this respect is that most developing countries have struggled and still struggle to ‘become fully integrated into the world trading system’.³¹²

In determining the extent to which SPS measures impede trade between developing and developed countries this chapter will firstly highlight how market access is crucial for the full integration of developing countries into the world trading system. It will further highlight how SPS measures impede the market access in question. Secondly, the chapter will delve into a historical background of the SPS Agreement in order to understand the purpose for its formation. Lastly this chapter will undertake a critical legal analysis of the central provisions of the SPS Agreement and determine the extent to which the Agreement extent has been effective in enhancing market access for developing countries.

3.1.1 Market access and the SPS Agreement

The emphasis on the importance of market access has its basis on the evidence that, ‘more outward oriented countries tend to develop more rapidly than inward oriented countries’.³¹³ In essence market access allows developing countries, for instance, to export products which they have comparative advantage in.³¹⁴ According to Henson S and Loader R evidence suggests that developing countries have ‘a potential comparative advantage over developed

³¹¹ 9TH WTO Ministerial Conference (2013) ‘Bali Ministerial Declaration and Decisions’ available at http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm ACCESSED ON 08 AUGUST 2014

³¹² Henson & Loader (note 1 above) 85

³¹³ See, for example, IMF ‘World Economic Outlook’ May 1997; TN Srinivasan & J Bhagwati ‘Outward Orientation and Development: Are the Revisionists Right?’ *Yale University Economic Growth Center Discussion Paper No. 806, 199*; J Frankel & D Romer ‘Does Trade Cause Growth?’ 1999 *American Economic Review*

³¹⁴ Noor (note 25 above) 11

countries in the production of agricultural products'.³¹⁵ Thus, market access is of significant importance as it enhances developing countries' exportation of their agricultural products. Consequently, if SPS measures are erected by the developed countries they might have the negative impact of limiting the market access for developing countries in products that the latter has comparative advantage in.

The promulgation of the Agreement served to regulate and govern the development and application of SPS measures. This is consonant to the Agreement's preamble namely to establish a multilateral framework of rules and disciplines to achieve the aforementioned goal. One of the central and underlying reasons for regulating the application of SPS measures is to minimise their negative effects on trade. These include hindering of market access of developing countries in particular.³¹⁶ This occurs when SPS measures are applied in a manner which could constitute arbitrary or unjustifiable discrimination between members. The application of SPS measures in a discriminatory manner as contemplated above is in essence a violation of the Most Favoured Nation principle which prevents the unjustifiable differential treatment between trading partners.³¹⁷ The use of SPS measures in manner that hinders market access may also occur when the SPS measures are applied as domestic protectionist tools. This in essence also constitutes as a violation of the national treatment principle which requires imported and locally produced goods to be treated equally.³¹⁸

The emphasis of the SPS Agreement on market access shows the critical importance of market access for the successful integration of developing countries into the global economy.³¹⁹ The foregoing suggests that SPS measures due to their complex nature appear to pose a threat to the achievement of market access for developing countries. Even more,

³¹⁵ Henson & Loader (note 1 above) 86

³¹⁶ Ibid 88- However, it should be appreciated that standards serve an important role in trade *vis* protection of human, animal or plant life or health even protection against importation of substandard or low quality products.

³¹⁷ Art 1 GATT (1994)

³¹⁸ Ibid Art 3

³¹⁹ The SPS Agreement, *inter alia*, is cognisant 'that developing country Members may encounter special difficulties in complying with the SPS measures of importing Members and as a consequence in access to markets...' See (note 311 above); Annex 3A -Understanding on tariff rate quota administration provisions of agricultural products as defined in article 2 of the AoA. Also see Duty-Free and Quota-Free Market Access for Least-Developed Countries Ministerial Decision WT/MIN (13)/44 or WT/L/919- for development and LDCs issues. 'Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets and also in the formulation and application of SPS measures in their own territories and desiring to assist them in their endeavours in this regard...'

Josling T has noted that SPS measures can act as significant barriers to entry into a particular market.³²⁰

Josling T and Roberts D assert that though SPS measures are desirable as a way of protecting plant, animal and human health in the importing country, ‘they are sometimes formulated and implemented in a way that makes it unnecessarily difficult for foreign producers to compete’.³²¹ As such they can constitute trade barriers as effective as traditional tariffs.³²² The WTO on the other hand mandates trade to be competitive but fair for all member countries and more particularly for developing countries.³²³ The reality of the problem is that developed countries formulate and implement SPS measures more than developing countries.³²⁴ This makes developing countries’ producers more susceptible to the obstacles imposed by SPS measures.³²⁵ The foregoing discussion highlights the critical need to address the background and specific problems related to SPS measures that concern developing countries.

3.2 BACKGROUND OF THE SPS AGREEMENT AND SPS MEASURES

The SPS Agreement was enacted in order to regulate the application and implementation of these SPS measures. For the purpose of this thesis, it is thus important to also consider the extent to which the SPS Agreement has stood up to its commitment of enhancing market access particularly for developing countries. This question will be addressed by critically discussing the central provisions of the SPS Agreement. Before the Uruguay Round (UR) Agreements were concluded, the rules governing and regulating SPS measures had not been fully elaborated in a multilateral agreement.³²⁶ However, SPS measures were covered by GATT namely Article XX (b)³²⁷ and the Tokyo Round Standards Code.³²⁸ Despite the

³²⁰ Josling & Roberts (note 36 above) ACCESSED 10 JULY 2014

³²¹ Ibid.

³²² Ibid; also see LR Horton ‘Food from developing countries: Steps to improve compliance’ (1998) 53 *Food and Drug Law Journal* 139-171

³²³ For further discussion see WTO (note 14 above) ACCESSED ON 07 AUGUST 2014

³²⁴ See Henson & Loader (note 1 above) 86

³²⁵ It is suggested that SPS measures are particularly an issue for developing countries. It follows that, if compliance with technical requirements is a prerequisite for successful export trade the market access of developing countries into developed countries is substantially limited. This is due to the fact that developing countries face difficulties in complying with these complex technical requirements due to limited infrastructure or lack of requisite expertise. See Ibid 89

³²⁶ Bhala (note 92 above) 1666

³²⁷ Historically, the GATT took into cognizance the right of Contracting Parties (CPs) [as they were referred to as back then] to take certain measures as contemplated in Article XX of the GATT. This right applied even if those measures taken by a CP imposed trade restrictions on other CPs. As such Article XX functioned as an exceptions clause. The specific article namely Article XX (b) provided that ‘subject to the requirement that such

existence of these instruments they could not successfully cope with the trade restrictive effects of various convoluted measures adopted for sanitary and phytosanitary purposes.³²⁹ For example the rules under the GATT Article XX (b), neither sufficiently clarified nor specified how to deal with complicated SPS measures.³³⁰ In this light, it can be argued that the negotiations on Sanitary and Phytosanitary initially began as an attempt to elaborate on the provisions of Article XX (b).

During the negotiations that preceded the launching of the Uruguay Round (UR), the contracting parties (CPs) agreed, as a subject for negotiation, to minimize ‘the adverse effects that SPS measures and barriers can have on trade in agriculture, taking into account the relevant international agreements’.³³¹ It was upon this backdrop that the subsequent negotiations to establish rules on SPS measures were conducted in the context of the Agreement on Agriculture (AOA)³³² Finally, the ‘Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations’³³³ (hereinafter the ‘Brussels Draft’) issued on December 1990 included the draft text on SPS measures, entitled ‘Decision by CPs on the application of SPS measures’³³⁴ (hereinafter ‘Decision on SPS Measures’), as Appendix D of Agreement on Agriculture.

In essence the Punta del Este Declaration, which launched the UR in September 1986, called for ‘increased disciplines in three areas in the agricultural sector: market access; direct and indirect subsidies; and SPS measures’.³³⁵ On the latter, the negotiators sought to ‘develop a multilateral system that would allow simplification and harmonization of SPS measures, as well as elimination of all restrictions that lack any valid scientific basis’.³³⁶ It is of vital importance to note that the ‘Decision on SPS Measures’ constituted a foundation for

measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health’

³²⁸ See D Ahn ‘Comparative analysis of the SPS and TBT Agreements’ (2008) 3-4

³²⁹ Ibid 4

³³⁰ Ibid

³³¹ [GATT, BISD. 33th Supp. 19, 24 (1987)]The text of the Punta del Este Ministerial Declaration states, with respect to agriculture, that ‘Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by: (iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements’.

³³² Ahn (note 328 above)

³³³ GATT, MTN.TNC/W/35/Rev.1 (dated on Dec. 3, 1990).

³³⁴ GATT, MTN.GNG/NG5/WGSP/7 (dated on Nov. 20, 1990).

³³⁵ [GATT, BISD. 33th Supp. 19, 24 (1987)]

³³⁶ [GATT, BISD. 33th Supp. 19, 24 (1987)]

articulating rules on SPS measures and their implementation.³³⁷ This draft was subsequently modified and included as ‘Part C’ of the ‘Text on Agriculture’ in the Dunkel Draft.³³⁸ The Decision on SPS Measures was later separated from the AOA and included in Annex 1A of the ‘Marrakesh Agreement Establishing the World Trade Organization’ as the ‘Agreement on the Application of Sanitary and Phytosanitary Measures’.³³⁹ One author, Ahn D asserts that ‘due to this natal origin, the SPS Agreement has a major implication for measures concerning agricultural products’.³⁴⁰ However, it should be noted that the jurisdictional ambit of the SPS Agreement is not confined to agricultural products, only.³⁴¹

In comparison to the Tokyo Standards Code and Article XX (b) the SPS Agreement was broader and extended beyond the scope and coverage of the existing GATT provisions.³⁴² For example the current SPS Agreement includes provisions on new obligations namely transparency requirements; the provision of notification and an opportunity to comment on proposed SPS measures.³⁴³

3.2.1 The underlying reasons for the formation of the SPS Agreement

The discussion above has highlighted that the SPS Agreement was created to exclusively regulate the formulation, implementation and application of SPS measures. The SPS Agreement has drawn much attention from the WTO Member countries. One of the reasons advanced for this is that many of the recent trade barriers, particularly for agricultural

³³⁷ Ahn (note 328 above)

³³⁸ One significant aspect that distinguished the Dunkel Draft from the Brussels Draft is that the former contained a provision that specified the relationship between the SPS Agreement and the Agreement on Technical Barriers to Trade (TBT Agreement). As such the Dunkel Draft clarified the exclusivity of the two Agreements, a problem that existed prior to the enactment of both Agreements. Currently both Agreements contain provisions that reinforce the mutual exclusivity relationship of these Agreements. For example Article 1.5 of the TBT Agreement stipulates that its provisions do not apply to SPS measures as defined in Annex A of the SPS Agreement. In the same manner Article 1.4 of the SPS Agreement provides that ‘[n]othing in this Agreement shall affect the rights of Members under the TBT Agreement with respect to measures not within the scope of this Agreement’.

³³⁹ Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization

³⁴⁰ Ahn (note 328 above) 5

³⁴¹ In particular, Paragraph 2 of the Annex 1 of the Agreement on Agriculture explicitly stipulates that the product coverage of the SPS Agreement is not limited to agricultural products. See Annex 1 (2) - The foregoing shall not limit the product coverage of the SPS Agreement.

³⁴² Bhala (note 92 above) 1666

³⁴³ In this respect Article 7 of the SPS Agreement obliges ‘Members to notify changes in their SPS measures and provide information thereof in accordance with the provisions of Annex B’. The latter stipulates regulations meant to promote transparency *inter alia* publication of regulations promptly (Annex 1B), establishment of Enquiry points (Annex 3B) and notification procedures (Annex 5B)

products, take the form of SPS measures.³⁴⁴ It should be noted that while standards and regulations can promote trade, they may also be used as powerful tools to impede international trade and protect domestic producers as alluded to earlier.³⁴⁵

Unjustified SPS measures are frequently employed when other barriers to trade *inter alia* tariffs and non- tariff import restrictions are either reduced or removed.³⁴⁶ This situation, however, produces anomalous results. For instance developing countries would negotiate the elimination of high tariffs or import quotas for a product only to be confronted with an unjustified SPS measure that negates the benefit of an earlier negotiation.³⁴⁷ The drafters of the AoA probably had this in mind when they included a provision related to the SPS measures.³⁴⁸ To support this assertion Bhala R argues that, ‘the SPS Agreement was negotiated in conjunction with the AoA to ensure that the benefits of liberalized agricultural trade would not be undermined through the application of protectionist trade barriers disguised as SPS measures.’³⁴⁹

It can be concluded from the foregoing that the SPS Agreement as negotiated during the UR was enacted due to the concern that SPS measures might be used for protectionist measures.³⁵⁰ Furthermore, article 2 (3) of the SPS Agreement explicitly provides *inter alia* that, ‘...SPS measures shall not be applied in a manner which would constitute a disguised restriction on international trade’.³⁵¹ The Agreement in essence recognizes the Member countries’ rights to maintain SPS measures for the protection of human, animal or plant life or health. However, it requires them to base them on scientific principles and not to use them as disguised restrictions to trade.³⁵²

³⁴⁴ Ahn (note 328 above) 1

³⁴⁵ S Zarrilli ‘WTO Sanitary and Phytosanitary Agreement: Issues for developing countries’ *South Centre T.R.A.D.E. Working paper series* (1999) 1

³⁴⁶ Bhala (note 92 above) 1667

³⁴⁷ Ibid

³⁴⁸ In support of the argument above the preamble of the AOA *inter alia* provides that, the Agreement is ‘committed to achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues’.

³⁴⁹ Bhala (note 92 above) 1667 The AoA has a specific provision that relates to the SPS Agreement. Namely Article which obliges Members to give effect to the SPS Agreement

³⁵⁰ This is evident in the Agreement’s preamble and Art 2 (3).

Preamble: ‘[R]eaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade; [D]esiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade’.

³⁵¹ Art 2 (3) SPS Agreement

³⁵² See Article 2 (1)-(3) SPS Agreement -*Basic Rights and Obligations of the Member countries*

Developing countries have always been sceptical of SPS measures and their impact on agricultural exports.³⁵³ As a consequence developing countries strongly advocated for the removal of SPS measures which according to them acted as non-tariff barriers (NTBs) to trade.³⁵⁴ Therefore, they supported the ‘international harmonization of SPS measures to prevent developed countries from imposing arbitrarily strict standards’.³⁵⁵ Subsequently, the negotiators of the WTO Agreements considered that SPS measures ‘merited special attention due to their close link to agricultural trade, a particular sector of trade that was notoriously difficult to liberalise’.³⁵⁶ As a result SPS measures are now dealt with in a separate agreement as mentioned earlier namely the SPS Agreement.

3.3 SCOPE AND APPLICATION OF THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Article 1 (1) establishes the scope and coverage of the SPS Agreement and it expressly stipulates that the Agreement ‘applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade’. As such two requirements have to be satisfied for a measure to fall within the ambit of the agreement, thus, it must be:

- i. a sanitary and phytosanitary measure and
- ii. a measure that may directly or indirectly affect international trade.

In respect of the first requirement, SPS measures are measures aimed at the protection of human, animal or plant life or health from certain specified risks.³⁵⁷ The question of whether a measure is an ‘SPS measure’ depends on its purpose or aim.³⁵⁸ It appears as though that the intention of the Member country and/or objective of the measure is the standard for

³⁵³ Zarrilli (note 345 above) 11

³⁵⁴ Ibid 3

³⁵⁵ Ibid

³⁵⁶ P. Bossche, D Prévost & M Matthee ‘WTO Rules on Technical Barriers To Trade’ *Maastricht Working Papers* (2005-6) 27 To emphasize the problematic nature of agricultural trade liberalisation in world trade Gilpin argues that the area of agriculture in respect of liberalisation almost defies solution -see Gilpin (note 170 above) 196

³⁵⁷ Annex 1A (a) - (d) of the SPS Agreement. In broad terms, an ‘SPS measure’ is one that ‘aims at the protection of human or animal life or health from food-borne risks; or aims at the protection of human, animal or plant life or health from risks from pests or diseases’. See Bossche et al (note 356 above) 29

³⁵⁸ It is also important to note that an SPS measure may take any one of a broad range of forms including laws, decrees, regulations, requirements and procedures as contemplated in Annex A. It follows that once a measure is directed at one of the goals listed in Annex 1A (a) - (d) of the Agreement, it is covered by the SPS Agreement regardless of the specific form it takes.

determining whether a measure is one that qualifies to be an SPS measure.³⁵⁹ It is also important to note that the definitions in Annex A specifically refer to the protection of human, animal or plant life or health ‘within the territory of the Member’.³⁶⁰ This has the effect of excluding measures aimed at extra-territorial health protection from the ambit of the SPS Agreement.³⁶¹ Furthermore, it should be noted that the scope of application of the SPS Agreement is not limited to discriminatory SPS measures. It equally applies to non-discriminatory measures.

The second requirement for the application of the SPS Agreement as contemplated in the Agreement is that the measure in question ‘may directly or indirectly affect international trade’.³⁶² Thus, if a measure does not have any trade effect the Agreement does not apply to it. It can be argued that the second requirement is easy to satisfy.³⁶³ The reasoning behind this assertion is that, any measure that applies to imports can be said to affect international trade.³⁶⁴ Furthermore, the relevant provision of the Agreement³⁶⁵ only requires that the measure ‘may affect international trade’. The fact that the measure in question merely has the potential to affect international trade does not exclude the measure from the ambit of the SPS Agreement.³⁶⁶

3.4 THE EXTENT OF THE SPS AGREEMENT’S EFFECTIVENESS IN ENHANCING MARKET ACCESS FOR DEVELOPING COUNTRIES

This chapter now has to consider the extent to which the provisions in the said agreement have or can enhance market access for developing countries. It was highlighted that the SPS Agreement was enacted in order to regulate and ‘guide the development, adoption and

³⁵⁹ It would appear that the ‘purpose of a measure would be determined objectively, rather than by attempting to determine the subjective aim of the Member imposing it. The latter would have the clearly unintended result of enabling a Member to evade the disciplines of the SPS Agreement by denying that the purpose of its measure’ is one of those contemplated by the Annex 1A definition. *See* D Prévost ‘WTO SPS Measures, Dispute settlement’ 2003 *UNCTAD* 4; Also *see* Bhala (note 92 above) 1667-The question whether a measure is an SPS measure is ‘determined by the intent of the measure’. It follows that if the measure is not intended to protect against the enumerated risks the measure is not an SPS measure.

³⁶⁰ Annex 1A (a) - (d) SPS Agreement.

³⁶¹ *See* Bossche et al (note 356 above) 29

³⁶² Article 1(1) SPS Agreement

³⁶³ It should be noted that ‘empirical proof of a reduction in trade flows is not required, but it suffices to show that the measure is applied to imports and therefore can be presumed to have an impact on international trade’. The requirement of ‘an effect on international trade should thus be easy to fulfil and has in fact not been in dispute in any SPS case’ thus far. *see* (note 359) 5

³⁶⁴ Bossche et al (note 356 above) 29

³⁶⁵ *See* note 362 above

³⁶⁶ In support of this assertion the Panel in the *EC Hormones* case noted that ‘there are no additional requirements for the applicability of the SPS Agreement’. (*See* Panel Report *EC - Hormones* (Canada), para. 8.39; and Panel Report *EC Hormones* (US), para.8.36).

enforcement of SPS measures in order to minimize their negative effects on trade'.³⁶⁷ It is thus, imperative to analyse the provisions of the SPS Agreement in order to determine the extent to which the SPS Agreement has been effective in enhancing market access for developing countries. As highlighted earlier this question will be addressed by critically discussing the central provisions of the SPS Agreement, under the next subheading. Zarrilli argues that despite the concern that some SPS measures may be inconsistent with the SPS Agreement and unfairly impede the flow of trade and more particularly agricultural trade; developing countries are not well positioned to address this issue.³⁶⁸ The resultant effect of this situation is that developing countries struggle to access markets of developed countries which have a monopoly on the use of SPS measures.³⁶⁹

3.5 MAIN AND CENTRAL PROVISIONS OF THE SPS AGREEMENT

3.5.1 Right to take SPS measures (Art. 2.1)

The basic rights and obligations or the basic principles of the SPS Agreement, contained in Articles 2 and 3 thereof, reflect the underlying aim of addressing the need to increase market access for food and agricultural products.³⁷⁰ At the same time the Agreement is also cognisant of the sovereign right of governments to take measures to protect human, animal and plant life and health in their territories.³⁷¹ This position substantially differs from the position under the GATT rules, where discriminatory measures or quantitative restrictions are in principle prohibited and justification for such measures would be found under Article XX

³⁶⁷ The SPS Agreement preamble *inter alia* highlights the Agreement's drafters' commitment to 'establish a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of SPS measures in order to minimize their negative effects on trade'.

³⁶⁸ It is submitted that this is the case because most developing countries lack the adequate or requisite institutional and infrastructural capacity to deal with SPS requirements and problems associated with them. See Zarrilli (note 345 above) 3

³⁶⁹ The problems in question include (but not limited to), 'the lack complete information on the number of measures that affect their exports; uncertainty of whether these measures are consistent or inconsistent with the SPS Agreement; lack of reliable estimates on the impact such measures have on their exports and developing countries' serious problems with issues related to scientific research, testing, conformity assessment and equivalency' See *ibid*

³⁷⁰ Bossche et al (note 356 above) 33 The basic principles of the Agreement as contemplated above include; 'the sovereign right of WTO Members to take SPS measures; the obligation to take or maintain only SPS measures necessary to protect human, animal or plant life or health (the 'necessity requirement'); the obligation to take or maintain only SPS measures based on scientific principles and on sufficient scientific evidence (the 'scientific disciplines'); the obligation not to adopt or maintain SPS measures that arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade; and the obligation to base SPS measures, as much as possible and appropriate, on international standards (the 'goal of harmonisation')'

³⁷¹ Art 2 (1) SPS Agreement

(b).³⁷² It can be argued that the SPS Agreement has a wider scope than the GATT rules in respect of the application of SPS measures.³⁷³

It should be noted that the right to take SPS measures is subject to the disciplines contained in the provisions of the SPS Agreement as a whole.³⁷⁴ An example of a discipline contemplated above is Article 5 which deals with risk assessment and the determination of the Appropriate Level of Protection (ALOP).³⁷⁵ Such provisions complement the existing GATT rules applicable to health measures through the introduction of scientific requirements for the use of SPS measures.³⁷⁶ The Agreement envisages some limitations to the application of SPS measures in order to promote trade. It can be argued that such limitations, as contemplated in Article 2 of the Agreement, if adhered to will enhance market access for developing countries.

3.5.1.1 Necessity Requirement (Art. 2.2)

Firstly, Article 2.2 in particular envisages the necessity requirement as a way of promoting international trade. It provides that,

‘[M]embers shall ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health ...’³⁷⁷

It follows that the sovereign right of Members to take SPS measures is limited only to extent of the purpose contemplated in Article 2 (2). This in essence safeguards against the arbitrary use of SPS measures thus regulating their impact on international trade; in particular market access. It is submitted that the necessity requirement in question mirrors the necessity requirement contained in Article XX (b) of the GATT 1994 namely the health policy exception. The Panel in *Thailand-Cigarettes* defined a measure as ‘necessary’ when there is

³⁷² See (note 327 above) Also see Bossche et al (note 356 above) 33

³⁷³ This difference in between treatment of discriminatory measures under the SPS Agreement and GATT 1994, Article XX (b) has ‘important implications for the burden of proof in dispute settlement proceedings. Under the GATT 1994, a Member imposing a discriminatory health measure or one that constitutes a quantitative restriction bears the burden of proof to show that it complies with the requirements of the Article XX (b) exception. On the contrary, under the SPS Agreement, the complaining Member must show that the measure is inconsistent with the rules of the SPS Agreement’. See Bossche et al (note 356 above) 33

³⁷⁴ Arts 2 (2) & 2 (3) SPS Agreement

³⁷⁵ Annex 5A of the SPS Agreement defines ALOP as ‘the level of protection deemed appropriate by the Member establishing an SPS measure to protect human, animal or plant life or health within its territory’. This principle is also known as ‘acceptable level of risk’

³⁷⁶ Art 5 SPS Agreement

³⁷⁷ Ibid Art 2 (2)

‘no alternative measure consistent with GATT obligations that a Member could be expected to employ in order to achieve the desired public health objective’.³⁷⁸ In addition, the Panel in *US-Gasoline* further clarified that the ‘requirement of necessity under Article XX (b) does not examine the necessity of the state’s policy objective, but rather the necessity of the disputed measure to achieve that objective’.³⁷⁹ The necessity requirement in Article 2 (2) has not yet been subject to interpretation in dispute settlement. As this requirement is made more specific in other provisions of the SPS Agreement, Members prefer to challenge SPS measures under these more specific provisions.³⁸⁰

3.5.1.2 Scientific disciplines (Art. 2.2)

Apart from the limitation contemplated above, Article 2 (2) of the SPS Agreement also introduces new scientific disciplines for the use and maintenance of SPS measures.³⁸¹ This provision requires any SPS measure to be based on scientific principles. It follows that an SPS measure should not be maintained without sufficient scientific evidence except as provided for in Article 5 (7) which envisages the precautionary principle. This principle in essence provides for the possibility to adopt provisional SPS measures where scientific information is insufficient, under certain conditions.³⁸² The SPS Agreement ‘necessity’ and ‘science-based’ requirements earmark ‘science as the touchstone against which SPS measures must be judged’.³⁸³ In asserting the essentiality of scientific disciplines, the Appellate Body in *EC - Hormones* held that:

‘The requirements of risk assessment under Article 5.1, as well as of ‘sufficient scientific evidence’ under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but

³⁷⁸ Panel Report, *Thailand-Cigarettes*, para. 15

³⁷⁹ Panel Report, *US-Gasoline*, para 6.22

³⁸⁰ An example of such a ‘more specific provision’ is Article 5.6 of the SPS Agreement, which ‘requires SPS measures not to be more trade restrictive than required to achieve their policy objective’. For this assertion see Bossche et al (note 356 above) 34

³⁸¹ Ibid.

³⁸² Article 5 (7) may be regarded as a particular formulation of the precautionary principle. See *ibid.* however the principle is also incorporated in paragraph 6 of the Preamble and Article 3 (3) of the SPS Agreement. The precautionary principle is ‘a notion which supports taking protective action before there is complete scientific proof of a risk; that is, action should not be delayed simply because full scientific information is lacking’.

see WTO ‘Current Issues: The precautionary principle’ available at http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c8s2p1_e.htm ACCESSED ON 27 NOVEMBER 2014

³⁸³ Bossche et al (note 356 above) 34-These scientific requirements are further elaborated on, in Article 5 (1) which provides that ‘SPS measures must be based on a risk assessment’.

sometimes competing interests of promoting international trade and of protecting the life and health of humans...'³⁸⁴

The Agreement's requirement that measures be based on scientific principles and not be maintained 'without sufficient scientific evidence' has some serious implications on the interpretation of the Agreement. It follows that a WTO Panel is not authorized to substitute its scientific judgement for that of the government maintaining the SPS measure.³⁸⁵ This implication affords member countries more protection in terms of the SPS measures that they may adopt. The problem is further heightened by the fact that, the term 'scientific' is not separately defined in the text of the SPS Agreement.³⁸⁶ This can potentially affect the determination of what constitutes 'scientific principles' as contemplated by the Agreement. Bhala R proposes such a determination ought to be undertaken in light of the Vienna Convention on the Law of Treaties (VCLT).³⁸⁷ Furthermore, as per the rules pertaining to the interpretation of treaties, the term 'scientific' is to 'be interpreted in good faith using its ordinary meaning in context and in light of the object and purpose of the Agreement'.³⁸⁸

3.5.1.3 No arbitrary or unjustifiable discrimination or disguised restriction on trade (Art. 2.3)

Thirdly, Article 2 (3) of the SPS Agreement also functions as a basic limitation on a Member's sovereign right to impose SPS measures. It achieves this by requiring all member countries to ensure that their SPS measures 'do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members...'³⁸⁹ It is also important to note that Article 2 (3) in essence reinforces the WTO/GATT non-discrimination obligations namely the MFN principle and the national treatment principles.³⁹⁰ It can be argued that this emphasizes the Agreement's purposed goal to alleviate the difficulties encountered by developing countries in accessing markets of developed countries. In support of this it can be argued that Article 2

³⁸⁴ Appellate Body Report, *EC - Hormones*, para. 177

³⁸⁵ Bhala (note 92 above) 1669

³⁸⁶ Ibid 1668

³⁸⁷ Ibid

³⁸⁸ Article 31 (1) Vienna Convention on the Law of Treaties 1969

³⁸⁹ Article 2 (3) SPS Agreement

³⁹⁰ Arts 1 (3), 3 (4) GATT (1994) respectively & *Chapeau* of Article XX thereof

(3) reiterates the requirements in the '*chapeau*' of Article XX of GATT 1994 'that are designed to ensure that SPS measures are not padded with extra obstacles to trade'.³⁹¹

3.5.2 The goal of harmonisation (Art.3)

The Agreement also lays a foundation for the harmonisation³⁹² of SPS measures around international standards in Article 3, as contemplated by Annex 3A.³⁹³ The underlying purpose for harmonisation lies in the 'different factors that regulators take into account when enacting SPS measures',³⁹⁴ which in turn result in major differences in SPS measures across countries. This situation has a number of negative implications on market access for developing countries, which are more likely to be the victims of these occurrences.³⁹⁵ An underlying reason could be that developing countries' exporters will be compelled to adjust their products to suit different SPS measures from one member country to another.

In fulfilling the goal of harmonization the Article envisages three autonomous choices with regard to international harmonised standards, each with its own consequences.³⁹⁶ The objective in promoting the use of international standards is to harmonize different member countries' SPS measures on as wide a basis as possible to facilitate trade.³⁹⁷ Consequently member countries may choose to 'either base their SPS measures *on* (emphasis intended) international standards according to Article 3(1) or *conform* their SPS measures to international standards under Article 3 (2) or impose SPS measures resulting in a *higher level of protection* than would be achieved by the relevant international standard in terms of Article

³⁹¹ Bhala (note 92 above) 1669

³⁹² Annex 2A of the SPS Agreement defines harmonization as 'the establishment, recognition and application of common sanitary and phytosanitary measures by different Members'.

³⁹³ The *EC – Hormones* case is instructive of the main object and purpose of Article 3 namely '...to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people'. See Appellate Body Report, *EC – Hormones* para. 177. Also see Annex 3A SPS Agreement which recognizes guidelines and recommendations established by the Codex Alimentarius Commission for food safety standards, those developed by the International Office of Epizootics (OIE) for animal health and those developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC) for plant protection.

³⁹⁴ Bossche et al (note 356 above) 39- These factors include geographical factors and climatic conditions amongst other factors.

³⁹⁵ Ibid

³⁹⁶ Ibid 40

³⁹⁷ This aspect of the Agreement reiterates the Agreement's commitment to enhance market access for foreign producers and more specifically those in developing countries. Also see Bhala (note 92 above) 1667

3 (3)’.³⁹⁸ In *EC - Hormones* the Appellate Body confirmed that options are equally available and there is no rule-exception relationship between them.³⁹⁹ As a consequence a Member will not be penalised for choosing the Article 3 (3) alternative for instance.⁴⁰⁰

In a case where a Member chooses the Article 3 (3) option there is an obligation upon that member country to base its SPS measures on international standards where they exist, except as provided for in Article 3(3).⁴⁰¹ The second option available to member countries under Article 3 (2) is more onerous than the ‘base on’ option available under Article 3 (1).⁴⁰² It can be argued that the term ‘conform’ dictates a stricter standard upon Member countries as opposed to the term ‘base’. Further support for this assertion can be drawn from *EC - Hormones* wherein the Appellate Body interpreted a measure formulated under the Article 3 (3) option as follows:

‘...such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard’.⁴⁰³

Thus, Article 3 (3) provides that SPS measures which ‘conform to’ international standards are presumed to be consistent with the SPS Agreement and the GATT 1994.⁴⁰⁴ Lastly, the option, provided for in Article 3 (3) is important as it reflects the recognition of Member countries’ right to choose the level of protection they deem appropriate in their territories. It should however be noted that ‘the right of a Member to establish its own level of sanitary protection under Article 3 (3) of the SPS Agreement is an autonomous right and not an ‘exception’ from a ‘general obligation’ under Article 3 (3)’.⁴⁰⁵ More importantly, it should

³⁹⁸ Bossche et al (note 356 above) 42

³⁹⁹ Appellate Body Report, *EC – Hormones* para. 104.

⁴⁰⁰ Ibid para. 102.

⁴⁰¹ The ‘international standards’ contemplated in Article 3 (1) are set by international organisations, such as the ‘3 Sisters’, the Codex Alimentarius Commission with respect to food safety, the International Office of Epizootics, for animal health, and the Secretariat of the International Plant Protection Convention with respect to plant health. See Annex 3A (a), (b) & (c) of the SPS Agreement. For matters not covered by the three mentioned organisations, international standards within the meaning of Article 3 of the SPS Agreement may also be standards set by other relevant international organizations open for membership to all WTO Members, as identified by the SPS Committee (see Annex A, paragraph 3(d) of the SPS Agreement). Pursuant to Article 3 (4) of the SPS Agreement, ‘Members have an obligation to participate in the work of the Codex Alimentarius Commission and the other organisations to the extent that their resources permit and to promote the development and periodic review of international standards’.

⁴⁰² Bossche et al (note 356 above) 42

⁴⁰³ Appellate Body Report, *EC – Hormones* para. 170

⁴⁰⁴ This presumption was held to be rebuttable by the Appellate Body in *EC – Hormones*. See Art 3 (2) SPS Agreement.

⁴⁰⁵ See (note 403 above) para. 172.

be noted that the right to choose measures that ‘deviate from international standards is not an ‘absolute or unqualified right’.⁴⁰⁶

Zarrilli, S notes minimizing distortions to international trade, as contemplated by the Agreement, is dependent upon the ‘efficiency and fairness of the international standard development process’.⁴⁰⁷ However, the process itself has problems of its own. It should be noted ‘the benefits of harmonization may be impeded if the process is captured by special interests in order to exclude other market participants or if it is not adequately transparent’.⁴⁰⁸ Furthermore, the composition of the ‘three Sisters’ has been a subject of criticism by developing countries and other stakeholders.⁴⁰⁹ One of these criticisms relates to the inability of developing countries’ governments to sufficiently fund their delegates to attend SPS meetings.⁴¹⁰ Moreover, developing countries protest that the standards promoted in SPS decisions lack their input and are dominated by the interests of developed countries.⁴¹¹

Another problem that relates to the Agreement is that ‘it does not specify the procedures that international organizations should adhere to in order to produce genuine international standards’ in respect of matters not covered by the ‘three Sisters’.⁴¹² This has the undesirable effect of affording ‘standards developed by a limited number of countries or approved by a narrow majority of participants to assume the status of international standards’.⁴¹³ Moreover, the process of international standard setting itself is becoming increasingly politicized which

⁴⁰⁶ There are two alternative conditions which deserve compliance as contemplated in Article 3.3, namely that:

- a) either there must be a scientific justification for the SPS measure
- b) or the measure must be a result of the level of protection chosen by the Member in accordance with Articles 5.1 through 5.8. (*see ibid*)

⁴⁰⁷ Zarrilli (note 345 above) 11

⁴⁰⁸ OECD (1997) ‘Product standards, conformity assessment and regulatory reform’ TD/TC/WP (96)49/Rev2.

⁴⁰⁹ WTO News ‘Committee agrees on treatment for developing countries’ *WTO News* Available at http://www.wto.org/english/news_e/news03_e/sps_1_3apr03_e.htm ACCESSED ON 07 AUGUST 2014

⁴¹⁰ *Ibid*

⁴¹¹ ‘Sanitary and Phytosanitary Measures and Technical Barriers to Trade Summary’ available at <http://www.cid.harvard.edu/cidtrade/issues/spsbt.html> ACCESSED ON 07 AUGUST 2014

Also see Zarrilli (note 345 above) 11-‘developing countries have repeatedly expressed their concern about the way in which international standards are developed and approved, pointing out how their own participation is very limited from the point of view of both numbers and effectiveness’.

⁴¹² *See* Annex 3A SPS Agreement- for matters not covered by the 3 Sisters, standards developed by ‘other relevant international organizations open for membership to all Members’, as identified by the SPS Committee, are recognized. *Also see* Zarrilli (note 345 above) 12

⁴¹³ As a consequence of the inadequacy of the process ‘international standards are often inappropriate for use as a basis for domestic regulations in developing countries and these countries face problems when they have to meet regulations in the importing markets developed on the basis of international standards’. *ibid* 14

makes the adoption of standards more difficult especially for developing countries.⁴¹⁴ This has negative effects on the latter's market access to developed countries.

3.5.3 Equivalence (Art. 4)

Whilst harmonization proves to be essential in the 'establishment, recognition and application of common SPS measures by different member countries'⁴¹⁵, there are conditions which may make it difficult or even undesirable to harmonise SPS measures.⁴¹⁶ These differences in conditions, prompting a variety of SPS measures across countries, can and/or substantially hinder trade. However, the negative impact of divergent measures is not without a remedy. Bossche P and Prévost D note that, the impact can be limited by the 'recognition that it is possible for different measures to achieve the same level of protection and consequently allow imports of products that comply with different, but equally effective, SPS measures'.⁴¹⁷

In this respect Article 4 of the SPS Agreement stipulates specific obligations for member countries in respect of the recognition of equivalence. Article 4 (1) of the SPS Agreement obliges member countries to accept different SPS measures as equivalent if the exporting member country objectively demonstrates to the importing member country that its measures achieve the latter's appropriate level of protection (ALOP).⁴¹⁸ It is for this purpose that, 'the importing Member must, upon request, be given reasonable access to carry out inspections, tests and other relevant procedures'.⁴¹⁹ In addition, Article 4 (2) obliges Members to enter into consultations, upon request, for purposes of concluding agreements on the recognition of equivalence.

Despite equivalency being the best option when harmonization is not desirable or when international standards are inadequate and/or are inappropriate, the implementation of this principle thus far has been minimal.⁴²⁰ Zarrilli S notes that developing countries protest that developing countries are looking for 'sameness' instead of equivalency, of measures. As a consequence the interpretation of equivalency as sameness unjustifiably deprives Article 4 (1) of its function namely 'to recognize that different measures can achieve the same level of

⁴¹⁴ Zarrilli (note 345 above) 14

⁴¹⁵ Annex 2A SPS Agreement

⁴¹⁶ For examples of these factors see Bossche et al (note 356 above) 62

⁴¹⁷ Ibid 57

⁴¹⁸ Art 4 (1) SPS Agreement (*Also see* Annex 5A thereof)

⁴¹⁹ Ibid

⁴²⁰ See Zarrilli (note 345 above) 17

SPS protection’.⁴²¹ It should be noted that equivalency of SPS measures, to those applied by developing countries, can function as a key instrument in enhancing market access for developing countries’ products.⁴²² It is submitted that the failure to holistically apply the principle of equivalency as contemplated in the Agreement impedes market access between developing and developed countries.

3.5.4 Risk Analysis Obligations (Art. 5)

It is important to note that, ‘the national regulatory process by means of which SPS measures are imposed typically involves risk analysis’.⁴²³ Risk analysis comprises of risk assessment and risk management for purposes of the SPS Agreement.⁴²⁴ Risk assessment refers to ‘the scientific process of identifying the existence of a risk and establishing the likelihood that the risk may actually materialise according to the measures that could be applied to address the risk’.⁴²⁵ The second element of risk analysis, risk management by contrast, is a ‘policy-based process of determining the level of protection a country wants to achieve in its territory and choosing the measure that will be used to achieve that level of protection’.⁴²⁶ The distinction between the two elements in question is not absolute. As such scientific considerations also partially assume a pivotal role in risk assessment as well.

3.5.4.1 Provisional measures and the precautionary principle (Art. 5)

It has been shown thus far, that the SPS Agreement requires that all SPS measures to be ‘based on’ science.⁴²⁷ It follows that the Agreement considers science as the touchstone against which SPS measures ought to be judged.⁴²⁸ However, absolute reliance on science suffers the setback that, ‘science does not have clear and unambiguous answers to all

⁴²¹ Ibid

⁴²² Ibid ; *Also see* Bossche et al (note 356 above) 62

⁴²³ Ibid Bossche et al

⁴²⁴ Art 5 of SPS Agreement

⁴²⁵ Bossche et al (note 356 above) 44 (*Also see* Annex 4A SPS Agreement)

⁴²⁶ In risk management decision-making, ‘not only are the scientific results of the risk assessment taken into account but also societal value considerations such as consumer preferences, industry interests, relative costs’. (*See* note 425 above) *Cf see* Bhala (note 92 above) 1668-the Agreement explicitly affirms the right of each government to choose its levels of protection including a ‘zero risk’ level if it so chooses. The Agreement ‘imposes no requirement to establish a scientific basis for the chosen level of protection because the choice is not a scientific judgement but a societal value judgement’.

⁴²⁷ Art 2 (2) SPS Agreement

⁴²⁸ *See* Bossche et al (note 356 above) 35

regulatory problems'.⁴²⁹ A hypothetical situation to illustrate the aforementioned problem would be where a member country needs to act promptly and take measures to safeguard against possible harm regarding the existence and extent of the relevant risk in the absence of sufficient scientific evidence.⁴³⁰ In this case a Member country can act in accordance with the 'precautionary principle'.

However, the use of the precautionary principle has its own shortfalls which can potentially lead to the abuse of the provision.⁴³¹ In support of this assertion, Bossche P and Prévost D note that, 'considerable differences of opinion exist between Members regarding the role that precaution plays in the regulatory process'.⁴³² In spite of this assertion, it is undisputable that precaution is an inherent part of risk regulation. This is particularly the case in the sphere of health and environment.⁴³³ The foregoing discussion prompts the need to determine the extent to which the SPS Agreement allows for precautionary measures as well as the requirements thereof. The *Japan- Agricultural Products* decision is instructive of the cumulative requirements for the adoption of provisional measures.⁴³⁴ It follows that the measure must:

‘...be imposed in respect of a situation where relevant scientific information is insufficient; be adopted on the basis of available pertinent information; not be maintained unless the Member seeks to obtain the additional information necessary

⁴²⁹ Ibid

⁴³⁰ Art. 5 (7) SPS Agreement provides that 'in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time'.

⁴³¹ The Japanese Variety testing case is illustrative of this problem. Japan's restrictions against U.S. apple imports to prevent the introduction of the 'fire blight' plant disease, which affects plants but has no human health consequences, were found to be in violation of the SPS Agreement because of lack of scientific evidence to support such a measure. Japan defended the restrictions arguing they were provisional and precautionary and argued that their national authorities should be given deference in their interpretation of the scientific evidence. The WTO rejected this defense and ruled that objective assessment of the evidence should be the measure by which compliance with the WTO SPS measures will be determined. Without the deference to interpretation by national authorities, Japan's precautionary were found to be clearly disproportionate to the risk.

See (note 411 above) ACCESSED ON 07 AUGUST 2014

⁴³² Bossche et al (note 356 above) 57

⁴³³ See Ibid- It is disputed 'whether precaution should be taken into account in risk assessment or whether it only comes into play in risk management decisions. There is also a difference of opinion as to whether precaution has emerged as a 'principle' in international law, or whether it is a mere 'approach' followed by countries'.

⁴³⁴ Ibid

for a more objective assessment of risk; and be reviewed accordingly within a reasonable period of time'.⁴³⁵

In essence these requirements flow from Article 5.7 of the Agreement.

3.6 OTHER SUBSTANTIVE PROVISIONS OF THE AGREEMENT

Other substantive provisions of the SPS Agreement worth mentioning include adaptation to regional conditions, control, inspection and approval procedures and transparency and notification.

3.6.1 Adaptation to regional conditions (Art. 6)

It is important to note that 'despite the fact that, traditionally an importing country applies its SPS measures to an exporting country as whole, differences in SPS conditions within exporting countries often exist'.⁴³⁶ Therefore, the failure of importing countries to recognize such inter-territory variations and accordingly adapt SPS measures to regional conditions may lead to the application of SPS measures that are excessively trade restrictive.⁴³⁷ Such a situation will be contrary to the SPS Agreement's goal to promote international trade.

In this respect the Agreement obliges member countries to ensure that their SPS measures are 'adapted to the SPS characteristics of the region of origin and destination of the product'.⁴³⁸ However, developing countries have raised concerns in respect of this provision.⁴³⁹ One of the concerns is that, 'the full benefits of regionalization, as provided for in Article 6, are not being realized due to difficulties implementing this provision'.⁴⁴⁰

⁴³⁵ Panel Report, *Japan – Agricultural Products*, para. 8.54; Appellate Body Report, *Japan – Agricultural Products*, para. 89.

⁴³⁶ Pest and disease prevalence is 'independent of national boundaries and can differ within a specific country, due to variations in climate, environment, geographic conditions and regulatory systems in place to control or eradicate pests or diseases. The adaptation of SPS measures to the conditions prevailing in the region of origin of the product may thus be highly desirable'. *For a further discussion see* Bossche et al (note 356 above) 64-65.

⁴³⁷ *Ibid*, 65.

⁴³⁸ The characteristics in question must be determined with reference to, *inter alia* 'the level of pest or disease prevalence; the existence of eradication or control programs; and guidelines developed by international organisations'. *See* Arts 6 (1) & 6(2) SPS Agreement.

⁴³⁹ *For a further discussion see* Zarrilli (note 345 above) 21.

⁴⁴⁰ *See* (note 432 above) Also *see* Zarrilli (note 345 above) 21 for more discussion.

3.6.2 Transparency and notification (Art. 7 & Annex B)

Another important provision that the Agreement envisages is that of transparency.⁴⁴¹ There is a correlation between transparency and market access. It follows that, ‘the lack of transparency with regard to SPS measures may constitute a barrier to market access since it increases the cost and difficulty for exporters in determining what requirements their products must comply with on their export markets’.⁴⁴² Article 7 of the Agreement addresses the issue in question by obliging member countries to notify interested member countries of changes in their SPS measures.⁴⁴³ It further requires member countries to provide information on their SPS measures in the manner contemplated in Annex B.⁴⁴⁴

Article 5.8 also complements Article 7 by making a provision that promotes transparency. In this respect it obliges member countries to provide information, upon request, regarding the reasons for their SPS measures where such measures are not ‘based on’ international standards or no relevant international standards exist.⁴⁴⁵ It follows that a member country, which believes that a SPS measure does or could potentially restrain its exports, may request information under Article 5 (8).⁴⁴⁶ In the *Japan-Apples* dispute, the Panel had to decide whether certain changes in a Japan’s SPS related measure ‘may have a significant effect on trade of other Members’ and whether such member countries should thus, have been notified. The outcome of the dispute is instructive of the fact that, the determinant factor is ‘whether the changes in question have an actual or potential effect on the conditions for market access’.⁴⁴⁷ If the answer is in the affirmative, the member country proposing those changes must notify such changes to other member countries.⁴⁴⁸ This provision also has its own setbacks which negatively impact on the market access of developing countries.⁴⁴⁹

⁴⁴¹ The principle of transparency is considered to be significantly important for trade by the WTO as it ‘stabilises the trading environment’. It could be equally argued that it promotes market access and safeguards against protectionist policies. (For further discussion *see* WTO (note 14 above) ACCESSED ON 03 AUGUST 2014)

⁴⁴² Bossche et al (note 356 above) 67

⁴⁴³ Art 7 SPS Agreement

⁴⁴⁴ Annex B contains ‘detailed rules ensuring publication of adopted SPS measures and prior notification of proposed SPS measures that differ from international standards, to allow time for comments from other Members. It also obliges Members to create the necessary infrastructure to carry out their transparency obligations through the establishment of a national Notification Authority and Enquiry Point’.

⁴⁴⁵ Article 5 (8) SPS Agreement. Also *see* note 442 above)

⁴⁴⁶ *Ibid* Bossche et al

⁴⁴⁷ Panel Report, *Japan-Apples*, para. 8.314.

⁴⁴⁸ *Ibid*

⁴⁴⁹ *See* Zarrilli (note 345 above) 20-‘variations in the quality and content of the information provided by countries in their notifications, short comment periods, delays in responding to requests for documentation,

3.6.3 Control, inspection and approval procedures (Art. 8 & Annex C)

Another significant provision of the Agreement is that which relates to control, inspection and approval procedures.⁴⁵⁰ These procedures exist to ensure that an importing country's SPS requirements are complied with. However, if these procedures are complex, lengthy or costly, they may have the undesired effect of restricting market access.⁴⁵¹ This result has serious negative implications for developing countries which often fail to meet these procedures due to limited technical resources.⁴⁵² The Agreement purports to safeguard against related consequences through the vehicle of Article 8 as complemented by Annex C.⁴⁵³ The relevant provision, Article 8, makes it mandatory for member countries to comply with the disciplines contained in Annex C and the SPS Agreement collectively in the operation of their control, inspection and approval procedures.⁴⁵⁴

3.6.4 Technical co-operation and Special and Differential Treatment (Article 9 & 10)

The Agreement also specifically makes provision for developing and less developed countries (LDCs) by affording them with technical co-operation and special and differential treatment (S&D).⁴⁵⁵ In respect of technical co-operation Zarrilli S argues that the Agreement was 'negotiated and concluded with scant regard for the conditions necessary for its effective implementation, particularly in developing countries'.⁴⁵⁶ In terms of Article 9 (1), technical assistance contemplated could *inter alia* take the form of advice, credits, donations and grants. The purpose thereof would be 'to allow developing countries to adjust to, and comply with, SPS measures necessary to achieve the ALOP in their export markets'.⁴⁵⁷

It follows that the effective implementation of this provision would 'create a more substantial type of policy coherence since it would enable developing countries to establish the necessary infrastructural and other conditions necessary for the effective implementation of the

absence, at times, of due consideration for the comments provided by other Members are recurrent problems limiting the effective implementation of the transparency provisions'.

⁴⁵⁰ Art. 8 & Annex C SPS Agreement

⁴⁵¹ Bossche et al (note 356 above)

⁴⁵² Consider Zarrilli (note 345 above) 21

⁴⁵³ Art. 8 SPS Agreement

⁴⁵⁴ Ibid (*Also see* Annex C thereof)-'the disciplines in Annex C aim to ensure that procedures are not more lengthy and burdensome than is reasonable and necessary and do not discriminate against imports'. (*Also see* Bossche et al (note 356 above)

⁴⁵⁵ Arts 9 & 10 SPS Agreement respectively

⁴⁵⁶ Zarrilli (note 345 above) 21

⁴⁵⁷ Art 9 (1) SPS Agreement

Agreement’.⁴⁵⁸ However, it should be noted that ‘technical co-operation and financial support are not a panacea and should not be used to replace the removal of unnecessary obstacles to trade’.⁴⁵⁹ In respect to the Agreement’s dedication to special and differential treatment (S&D) for developing countries and LDCs, it should be noted that the provisions of this article have not been converted into specific obligations.⁴⁶⁰ Consequently, ‘developing countries’ agricultural exports are often concentrated in a few products and in a few markets’.⁴⁶¹ This exists as a setback to the Agreement’s enhancement of market access for developing countries.

3.6.5 Institutional and Procedural Provisions of the SPS Agreement

The SPS Agreement also has provisions that are dedicated for the implementation of the Agreement.

3.6.5.1 SPS Committee (Art. 12)

The SPS Committee, for instance, is established under Article 12 (1) of the SPS Agreement with a ‘mandate to carry out the functions necessary for the implementation of the SPS Agreement and the furtherance of its objectives’.⁴⁶² The composition of the relevant committee includes the representatives of all WTO member countries and decisions are effected by way of consensus.⁴⁶³

The Agreement outlines the three main tasks of the SPS Committee. Firstly, the Committee functions as a forum for consultations. It follows that the Committee must encourage and facilitate consultations or negotiations between member countries on SPS issues under the auspices of Article 12 (2). Secondly, according to Article 12 (2), the SPS Committee must encourage the use of international standards by Member countries.⁴⁶⁴ Thirdly, the SPS Committee also has an obligation to undertake a triennial review of the operation and implementation of the SPS Agreement.⁴⁶⁵

⁴⁵⁸ Zarrilli (note 345 above) 24

⁴⁵⁹ Ibid

⁴⁶⁰ Ibid

⁴⁶¹ Ibid 23

⁴⁶² Art 12 (1) SPS Agreement

⁴⁶³ Ibid

⁴⁶⁴ The SPS Committee is obliged by Article 12 (3) ‘to maintain close contact with the international standard-setting organisations, and must develop a procedure for the monitoring of the process of international harmonisation in terms of Article 12 (4)’.*See* Bossche et al (note 356 above) 70

⁴⁶⁵ Art 12 (8) of the SPS Agreement-this obligation applied three years after the Agreement’s entry into force and as necessary thereafter.

3.6.5.2 Dispute settlement (Art. 11)

The provisions of Articles XXII and XXIII of the GATT 1994, as elaborated by the Dispute Settlement of Understanding Agreement (DSU), apply to consultations and the settlement of disputes under the SPS Agreement, except as otherwise provided.⁴⁶⁶ The SPS Agreement contains only one ‘special or additional rule and procedure’.⁴⁶⁷ The SPS Agreement authorises panels to consult experts to assist them in dealing with complex issues related to SPS disputes that turn on scientific facts.⁴⁶⁸ These experts in question are selected by the panel in consultation with the parties. Furthermore Panels may also organize advisory technical expert groups or consult relevant international organisations.⁴⁶⁹ This may be done at the request of either party to the dispute at the Panel’s own initiative or discretion. The importance of consultations with experts can be seen on the reliance of the WTO Panels on individual experts in most disputes with scientific issues.⁴⁷⁰

3.7 CONCLUSION

The critical analysis undertaken by this thesis thus far has raised a number of issues and concerns that relate to the market access of developing countries into developed countries. Firstly, this chapter had to critically analyse the extent to which SPS measures impede trade between developing countries and developed countries. It is evident from the analysis that SPS measures generally impede trade amongst countries and particularly developing countries. The support for this assertion can be drawn from the difficulties that SPS measures in general impose on developing countries. Furthermore, it can be argued that SPS measures have the potential to be used to impede trade as observed by the disputes namely the *EC-Hormones case*. Moreover, they can impede trade since they have the potential to be improperly applied without due consideration of the relevant rules. Consequently, this problem hinders the market access of developing countries into developed countries’ markets. Another significant point raised was the susceptible nature of SPS measures which may result in their use as domestic protectionist tools.

⁴⁶⁶ Ibid Art 11 (1)

⁴⁶⁷ See Appendix 2 of the Dispute Settlement of Understanding Agreement; Bossche et al (note 356 above) 71. Note that-‘special or additional dispute settlement rules and procedures prevail over the rules and procedures of the DSU to the extent that they differ’ (*Also see* Article 1 (2) of the DSU).

⁴⁶⁸ Article 11.7 of the SPS Agreement

⁴⁶⁹ Ibid

⁴⁷⁰ Bossche et al (note 356 above) 71 who note that ‘in all SPS disputes to date, panels have consulted individual experts to help them to understand the complex issues of scientific fact that arose in these disputes’. *Also see EC – Hormones, Australia – Salmon, Japan – Agricultural Products II and Japan – Apples*.

The resultant effect is that producers in developing countries struggle to export their products in markets that they previously exported into. For other developing countries the effect is that they struggle to penetrate developed countries markets. As such SPS measures in general can act as obstacles to effective trade. It was also shown that developed countries have a monopoly on the use of SPS measures which makes developing countries the victims in the whole economic transaction. SPS measures were shown to have major negative implications especially in the agricultural sector. It follows that developing countries experience more economic backlashes as a result of the unjustified use of SPS measures. This is due to the fact that agriculture exists as the backbone of developing countries' economies. It can be concluded from the foregoing that SPS measures impede trade between developing countries and developed countries.

However, it should be noted that on the other hand SPS measures may be adopted for legitimate reasons namely for the protection of human, animal or plant life or health. This purpose is outlined in the objectives of the SPS Agreement which was put in place to regulate the adoption and implementation of SPS measures. In this respect the Agreement counterbalances the member countries sovereign right to adopt and maintain SPS measures with the need to promote international trade. This is achieved through subjecting the 'right' in question to certain limitations namely earmarking 'science as the touchstone against which SPS measures must be judged'.⁴⁷¹ In this respect this chapter also had to critically determine the extent to which the SPS Agreement has been effective in enhancing market access for developing countries. It was argued that developing countries face major problems in the implementation and application of the SPS Agreement. It was shown that developing countries fail to effectively participate in the international standard-setting process and in essence they take issue with the Agreement based on the reasoning that standard-setting was until recently the exclusive domain of developed countries. As a consequence developing countries face insurmountable difficulties when requested to meet SPS measures in foreign markets. This problem is exacerbated by lack of adequate infrastructure and requisite experts in complying with SPS measures imposed by developed countries. The existence of such a problem makes the provisions 'S&D' and technical co-operation irrelevant. Moreover, the

⁴⁷¹ See *ibid*, Bossche et al -These scientific requirements are further elaborated on, in Article 5 (1) which provides that 'SPS measures must be based on a risk assessment'.

‘S&D’ provisions remain rather theoretical and apparently have not materialized in any concrete step in favour of developing countries.⁴⁷²

In respect of technical cooperation it was highlighted the provisions thereof, have not been converted into specific obligations.⁴⁷³ It was argued that, this has the effect of concentrating products of developing countries in a few markets, which defeats the essence of international trade. The SPS Agreement’s provisions on transparency and adaptation to regional conditions also pose a serious burden for developing countries since they fail to benefit from these provisions due to inadequate and requisite infrastructure or resources. Ultimately, as has been indicated by this chapter, the existence of the abovementioned problems, *inter alia*, has the undesired effect of impeding market access for developing countries. Thus, one could come to the conclusion that the SPS Agreement has not been effective in enhancing market access for developing countries to a larger extent. This may be due to lack of clarity in respect of certain provisions

The next chapter will be dedicated to critically analysing the impact of SPS measures on market access for particular developing countries such as Kenya and South Africa and their specific trading relationship with the European Union. More specifically it will outline the specific impact of SPS measures imposed by the EU on the developing countries in question.

⁴⁷² Zarrilli (note 345 above) 3

⁴⁷³ Ibid, 24.

CHAPTER 4:

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

4.1 INTRODUCTION

The previous chapter, was dedicated towards critically assessing the extent to which SPS measures can impede trade between developing and developed countries and it also came to the conclusion that (based on the facts provided); SPS measures impede trade to a larger extent. Consequently, SPS measures can act as trade barriers or obstacles to market access for developing countries in one or two of the following ways. Firstly, when an exporting developing country is unable to comply with certain conditions or standards imposed by developed countries.⁴⁷⁴ Secondly, SPS measures can impede market access for developing countries when an importing country imposes arbitrary regulations which are not based on science as required by the SPS Agreement.⁴⁷⁵

The foregoing suggests that, there is an intimate correlation between the implementation of SPS measures by developed countries and the access of developing countries into developed countries' markets. Market access is defined by the World Bank as a foreign producer's ability to sell in a given country.⁴⁷⁶ In the WTO context, 'market access' is premised on both obligations and rights.⁴⁷⁷ For example in the South African context SA's obligation as a WTO member is to provide market access to other Member countries in return for her 'right' of access to other Member countries' markets for SA's goods on multilaterally agreed terms.

⁴⁷⁴ A Ogambi 'The Small farmer on the Way to the Global Market: The case of Kenya' (2006) *Agriculture and Rural development* 1, 13

⁴⁷⁵ Article 2 (2) SPS Agreement-As highlighted in the previous chapter Article 2 (2) envisages both the necessity requirement as well the scientific basis requirement namely the need to base any SPS measure on science.

⁴⁷⁶ See IMF & World Bank (2002) 'Market Access for Developing Country Exports- Selected Issues' *Joint Staff Paper*; Also see E Ronge 'Implications of an EPA for Kenya's agricultural market access in the European Union' (2006) 6 *IEA Research Paper Series* 32

⁴⁷⁷ The FAO Resource Manual on Agreement on Agriculture provides introductory analysis of various market access provisions. See the chapters by Elamin (2000), Pearce and Sharma (2000), Sharma (2000a) and Sharma (2000b), available at www.fao.org/trade ACCESSED 22 JUNE 2014

It follows that a balanced analysis of market access provisions envisages both obligations and rights.⁴⁷⁸

It should be noted that ‘the ability of developing countries to maintain and/ or expand their world trade market share is dependent upon their ability to meet the demands of the world trading system’.⁴⁷⁹ For the purposes of this thesis the demands contemplated above include meeting and complying with quality and safety standards. An example is that of, SPS measures which have been shown to have the detrimental impact of impeding trade between developing countries and developed countries.⁴⁸⁰ The problem projected above impedes the expansion of developing countries in global trade. This chapter will be committed towards determining the extent to which SPS measures have impeded market access of South Africa and Kenya in respect of agricultural products, as case examples of developing countries. Thus, the chapter will commence the discussion by providing a background to the trading relationship between South Africa and Kenya with the European Union (EU), followed by critically analysing the implications of EU SPS requirements on South Africa and Kenya and finally, critically discussing the problems currently being faced by the developing countries in question, in accessing EU markets.

4.2 BACKGROUND

There exists evidence suggesting that the Agreement on Agriculture (AoA) yielded notable improvements in the developing countries’ market access to developed country markets.⁴⁸¹ This was achieved by the process of tariffication.⁴⁸² On the other hand such a development consequently led to the proliferation in the use of SPS measures and other non-tariff barriers (NTBs). Henson S and Loader R argue that with the liberalization of traditional tariffs and quantitative restrictions on agricultural and food products technical measures have become popular.⁴⁸³ The problem associated with the increasing popularity of technical measures is

⁴⁷⁸ P Krishna, K Yogendra, RP Pradyumna (2009) 41 ‘Agreement on agriculture: Market Access’ available at <ftp://ftp.fao.org/docrep/fao/008/ae896e/ae896e03.pdf> ACCESSED ON 23 MAY 2014

⁴⁷⁹ See Henson & Loader (note 1 above) 87

⁴⁸⁰ This issue was dealt with under Chapter 3 of this thesis wherein it was concluded that SPS measures generally impede trade between countries particularly developing and developed countries.

⁴⁸¹ Henson & Loader (note 1 above) 87- under the process of ‘tariffication’ all countries were obliged to eliminate all their non-tariff barriers namely import bans, import quotas or quantitative restrictions on imports *inter alia* and convert these to tariffs. This had the effect of enhancing market access for developing countries. See A Glipo ‘The WTO-AoA: Impact on Farmers and Rural Women in Asia’ *Advocacy paper prepared for the 2003 WTO Ministerial meeting* 2003, 1

⁴⁸² WTO (note 14 above) ACCESSED ON 26 OCTOBER 2014 for an understanding of the process of tariffication under the WTO Agreement on Agriculture

⁴⁸³ Henson & Loader (note 1 above) 87

that they ‘can impede trade in the same manner as traditional barriers and quantitative restrictions’.⁴⁸⁴ In some instances NTBs have been dubbed to be more trade restrictive than traditional tariffs.⁴⁸⁵ It should be further noted that in the case of agricultural and food exports in particular, ‘compliance with technical requirements such as SPS measures is a prerequisite for successful export trade’.⁴⁸⁶

It follows that if compliance with the measures contemplated above is a prerequisite for successful export trade, developing countries’ market access may be hindered or limited. The reasoning for this, as argued in the previous chapter, is that developing countries lack the requisite or adequate technical infrastructure needed to comply with developed countries’ SPS requirements.⁴⁸⁷ Recent studies suggest that SPS measures are considered to be the most significant impediment to exports to the European Union (EU).⁴⁸⁸ This is premised on the fact that the EU has been dubbed as the leading developing country in the use of SPS measures.⁴⁸⁹ One reason proffered for the former evidence, is the assertion that the EU’s enforcement of SPS measures is process based⁴⁹⁰ and such a process is considered by developing countries as more onerous.⁴⁹¹ This makes it particularly difficult for developing countries to comply with SPS measures involving such a method.

To date, SPS measures are increasingly becoming impediments to market access for developing countries for a number of reasons including lack of compliance resources, financial constraints and lack of technical and/ or scientific expertise.⁴⁹² These constraints result in most developing countries’ failure to comply with developed countries’ SPS requirements within the prescribed time or at an exorbitantly high cost in cases where compliance is adhered to. These problems and other issues will be dealt with in the course of

⁴⁸⁴ S Laird & A Yeats ‘Trends in non-tariff barriers of developed countries’ (1990)126 *Weltwirtschaftliches*. 299, 299 For statistics to support the assertion, see Henson & Loader (note 1 above) 88

⁴⁸⁵ Athukorala & Jayasuriya (note 35 above) 1

⁴⁸⁶ Horton (note 322 above)

⁴⁸⁷ See K Murphy & A Shleifer ‘Quality and Trade’ (1997) 53 *Journal of development economics* 1,1- ‘theoretical work has demonstrated that developing countries find it difficult to trade with developed countries due to differences in quality requirements’.

⁴⁸⁸ Henson & Loader (note 1 above) 91-92

⁴⁸⁹ See *ibid*

⁴⁹⁰ Process-based controls are enforced by a ‘competent authority’ within the exporting country as opposed to border inspection. In essence this implies that exporters have to comply with SPS requirements during all the processes preceding exportation of the agricultural products. Due to the multiplicity of these processes developing countries usually struggle with undertaking them. See ‘WTO Agreement on SPS measures’ available at <http://projects.nri.org/nret/PWB/WTO.htm> ACCESSED ON 20 NOVEMBER 2014

⁴⁹¹ Henson & Loader (note 1 above)

⁴⁹² Y Gebrehiwet, S, Ngqangweni & JF Kirsten ‘Quantifying the trade effect of SPS regulations of OECD Countries on South African Food Exports’ (2007) 46 *Agrekon* 1, 23

critically assessing the impact of SPS measures on market access for developing countries in the context of South Africa and Kenya.

4.3 CASE STUDY OF SOUTH AFRICA (SA) AND THE EU

4.3.1 Background

South Africa's main export destination for citrus fruit is the EU, which constitutes up to 65% of all South African citrus fruits export destination.⁴⁹³ The most prominent and current example of the use of SPS measures on South Africa relates to the Citrus Black Spot (CBS)⁴⁹⁴ standard established by the EU and the USA which had the effect of banning citrus exports from South Africa. The result of this ban was the loss of export revenue and increased costs of compliance which translated into reduction in market access for SA to the EU due to compliance failure and/or constraints.⁴⁹⁵

Consequently, the SA citrus exporters had to 'comply with either the requirements of Hazard Analysis Critical Control Point (HACCP) or its similar component namely Integrated Crop Management (ICM)'.⁴⁹⁶ One issue that is noteworthy is that the central focus of ICM, *inter alia*, entails 'environmental management, responsible agricultural practices and socio aspects'. It should, however be noted that SPS measures, in order to qualify as such, should be aimed at the protection of human or animal life or health from food-borne risks or pests and/or diseases.⁴⁹⁷ Based on such, ICM compliance does not fall within the ambit of SPS measures as contemplated by the SPS Agreement.

Apart from these requirements SA citrus exporters are now confronted with the requirement to conform to the European retailers Produce on Good Agricultural Practice (EUREPGAP) Protocol.⁴⁹⁸ This particular requirement presents a major challenge for citrus exporters as it includes issues that are not related to the maintenance of the quality of the citrus.⁴⁹⁹ This

⁴⁹³ Y Gebrehiwet *Quantifying the trade effect of SPS regulations of OECD Countries on South African Food Exports* (Unpublished Agricultural Economics thesis, University of Pretoria, 2004) 61

⁴⁹⁴ This will be dealt with later in the chapter

⁴⁹⁵ Gebrehiwet (note 493 above) 61

⁴⁹⁶ Gebrehiwet et al (note 492 above) 23

⁴⁹⁷ Annex 1A (a) - (d) SPS Agreement

⁴⁹⁸ The UREPGAP is now commonly known as Global Partnership for Good Agricultural Practice (GLOBALGAP) as of 2007 and is a 'pre-farm-gate standard, which means that the certificate covers the process of the certified product from before the seed is planted until it leaves the farm' available at http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting_Better/Quality_Management/R redesign/EQB81_SPS_eng_October%202007_5_final.pdf ACCESSED ON 31 OCTOBER 2014

⁴⁹⁹ See (note 495 above)

requirement, like its counterpart the ICM, is not justifiable under the SPS Agreement. Apart from lacking justification under the SPS Agreement EUREPGAP imposes further requirements which pose compliance problems to SA exporters due to high costs associated with it. These include, *inter alia*, the requirement to prepare washing facilities and portable toilets every 600 metres in the orchard.⁵⁰⁰

Compliance with the two tier certification system (EUREPGAP and HACCP) exists as a precondition for successful export trade of SA's citrus fruits and subsequently SA's market access in the EU. However, due to the exorbitant costs of compliance, the SA's access into the EU market is unduly restricted. Of alarming significance is the fact that the risk analysis undertaken by experts in relation to CBS highlights that CBS cannot spread to the EU region since, by the time the fruit exported to the EU reaches the EU the climatic conditions prevalent will be unfavourable for the disease to germinate.⁵⁰¹ Of relevance is that, the SPS Agreement requires SPS measures to 'be only applied to the extent necessary to protect human, animal or plant life or health ... and be based on science'.⁵⁰²

According to Cook L 'since 1925 when citrus were exported to the EU there has never been an incidence of CBS in the European orchards'.⁵⁰³ In light of this, the recurring bans based on EU SPS measures appear to be a disguised means of protection without a scientific justification as required by Article 2 of the SPS Agreement. It has also been argued that the EU sets SPS regulations or standards that are more stringent than those set by the CODEX Alimentarius.⁵⁰⁴ The CODEX is responsible for 'setting standards to ensure the safety of consumers and circumvent the use of standards as protectionist tools'.⁵⁰⁵ According to the SPS Agreement all SPS standards ought to be based on science and international standards subject to certain exceptions namely Article 5 (7) of the Agreement.⁵⁰⁶

⁵⁰⁰ A Jooste, E Kruger. & F Kotze 'Standards and trade in South Africa: Paving pathways for increased market access and competitiveness' in JS Wilson. & VO Abiola (eds) *Standards and Global Trade: A voice for Africa*. (2003) 235, 370

⁵⁰¹ SADC (2000) Country Paper: South Africa- Paper presented at the SADC *Conference on SPS/Food Safety* held in Windhoek, Namibia.

⁵⁰² Arts 2 (1) SPS Agreement

⁵⁰³ L Cook 'SA Citrus Growers Blame Spain for Ban' *Business Day Newspaper* 2002 available at <http://allafrica.com/publishers.html> ACCESSSED ON 26 OCTOBER 2014

⁵⁰⁴ Henson & Loader (note 1 above) 91

⁵⁰⁵ Ibid

⁵⁰⁶ See Arts 2 (2), Article 3 & 5 (7) SPS Agreement.

4.4. SOUTH AFRICAN CITRUS CASE

The impact of the SPS measures as used by the EU on the ability of developing countries to access its market is evident in the 2013 ban of SA citrus exports to the EU.⁵⁰⁷ The ban was prompted by several interceptions, by the EU, of citrus imports from South Africa infested by the CBS which is a fungal plant disease that, although harmless to humans, can damage quality and quantity of citrus cultivation.⁵⁰⁸ In 2013 the ban was likely to have virtually no impact on trade as it exclusively applied to imports harvested over the period 2012-2013. There existed threats from the EU to extend the ban should the risk of spreading persist.⁵⁰⁹ The South African government strongly opposed closure of EU borders to its exports for lack of conclusive scientific evidence as to the likelihood of the fungus spreading from picked fruit.⁵¹⁰ Such a ban based on SPS measures which has the effect of impeding South Africa's access into the European markets reflects a greater problem that is also affecting the greater part of other developing countries.⁵¹¹

The 2013 CBS based ban which was lifted earlier this year led the EU to introduce new regulations with the purpose of safeguarding the spread of CBS to the EU.⁵¹² However, the CBS 2013 ban raises concerns in respect of SA Citrus exporters' market access into the EU following the threats of market closure. These EU regulations unjustifiably limit the market access for SA to the EU since the CBS fungal disease carries no health hazards to consumers or non-infected orchards as contemplated by the SPS Agreement.⁵¹³ The SPS Agreement stipulates that an SPS regulation should be set up by a Member country to protect human or animal life or health from food-borne risks or pests and/or diseases.⁵¹⁴ Moreover, for some

⁵⁰⁷ C Dunmore 'EU bans South African citrus imports over disease fears' *Reuters* 28 November 2013 available at <http://www.reuters.com/article/2013/11/28/us-eu-southafrica-citrus-idUSBRE9AR0E920131128> ACCESSED ON 31 MARCH 2014

⁵⁰⁸ Ibid

⁵⁰⁹ Ibid

⁵¹⁰ F Montanari 'EU to adopt and review SPS measures' available at <http://foodlawlatest.com/2013/12/17/eu-to-adopt-and-review-sps-measures/> ACCESSED ON 31 MARCH 2014

⁵¹¹ The affected developing countries include the ACP (African Caribbean and Pacific) countries which have a longstanding trading relationship with the EU. See D Prévost 'Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries' (2010) (ICTSD) *Working paper series* 6.

⁵¹² J Shanon 'Blackspot fears squeeze citrus fruits' *Bdlive* 09 July 2013 available at <http://www.bdlive.co.za/business/agriculture/2013/07/09/black-spot-fears-squeeze-citrus-exports#> ACCESSED ON 27 OCTOBER 2014

⁵¹³ Recent studies by South African and USA experts confirm that 'the fruit itself cannot transmit the disease but the citrus trees can'. These studies further support the assertion that the EU regulations were not based on science. South Africa is only exporting the citrus fruit and not the trees. See *ibid*.

⁵¹⁴ Annex 1A (a) - (d) SPS Agreement

SA citrus exporters these EU regulations are impossible⁵¹⁵ to meet yet the EU mandates compliance despite the regulations' lack of a scientific basis. According to Chadwick, the EU's regulations are motivated by 'protectionism rather than by phytosanitary concerns'.⁵¹⁶ The regulations are alleged to serve the purpose of protecting citrus industries of Spain, Italy and Greece.⁵¹⁷ Hannes de Waal argues that whereas such a trade dispute could end up before the WTO DSU there have been suggestions that 'it is difficult to win wars with trading partners'.⁵¹⁸

In light of this case CBS experts have confirmed that 'CBS is not a risk and a ban would be thus unnecessary' since the fungal disease poses no threat to human, plant or animal health.⁵¹⁹ In a draft scientific opinion published by the European Food Safety Authority (EFSA) it was concluded that the chances of CBS affecting the EU were 'moderately likely'.⁵²⁰ However, this opinion was criticised by CBS experts as being full of 'factual errors and omissions owing to the fact that there is no recorded case of the disease ever having spread via fruit exports'.⁵²¹ According to a recent EFSA scientific report on the risk of CBS there is a high level of uncertainty due to a lack of knowledge over how the disease would respond to the EU climate.⁵²² The EFSA report reasoned that considering that eradication and containment of CBS are difficult, SPS measures should focus on preventing entry.⁵²³ Such an opinion points towards the exclusion of SA citrus exports from the EU market. This is particularly problematic since these EU SPS regulations negatively impact on the market access of SA (in particular) into the EU.

Following the temporary ban instituted against the SA citrus exports and its lifting in May 2014 stricter plant safety rules have been implemented against South African citrus.⁵²⁴ The reason why a potential ban will negatively impact SA's market access is that the EU is South

⁵¹⁵ These regulations were identified earlier see (note 504 above)

⁵¹⁶ See (note 512 above)

⁵¹⁷ Ibid

⁵¹⁸ Ibid -It can be argued that the pessimism of SA in approaching the DSU lies in their desire to maintain trading relations with the EU. As highlighted earlier the EU is the major SA citrus exports' destination and fighting with such a trading partner will have major economic repercussions on SA.

⁵¹⁹ See (note 507 above) ACCESSED ON 27 OCTOBER 2014

⁵²⁰ EFSA Panel on Plant Health 'Scientific opinion on a pest risk assessment and additional evidence provided by South Africa on *Guignardia citricarpa* Kiely, citrus black spot fungus (CBS)' (2008) 925 *The EFSA Journal* available at <http://www.efsa.europa.eu/en/efsajournal/doc/925.pdf> ACCESSED ON 27 OCTOBER 2014

⁵²¹ See (note 512 above)

⁵²² SAM Perryman & JS West 'External Scientific Report : Splash dispersal of *Phyllosticta citricarpa* conidia from infected citrus fruit' 2014 *UK EFSA Journal* 1, 174

⁵²³ Ibid

⁵²⁴ African resource Network 'EU rules against SA citrus ban, imposes stricter import criteria' available at http://afresnet.mbandi.com/a_sndmsg/news_view.asp?I=151200&PG=16 ACCESSED ON 27 OCTOBER 2014

Africa's and the industry's largest trading partner. Minister Rob Davies ⁵²⁵ argues that the current SPS measures based on the EFSA 2014 report are 'not driven by EU's desire to limit access to the EU market for plant safety measures but, protectionist desires'.⁵²⁶ In support of this, according to a media statement issued by the Department of Agriculture, forestry and fisheries, 'the fungal disease only affects the cosmetic appearance of the citrus fruit but has no impact on the citrus' safety or the quality of its flesh'.⁵²⁷

The current EU-EFSA regulations can be challenged on a number of grounds.

Firstly, the 'scientific values used by EFSA are questionable... its criteria to assess the risk for entry, spread and establishment of a disease are very likely, likely and very unlikely, but never no risk'. Secondly, 'South Africa is not the only country with black-spot issues, yet the EU focuses on South Africa, perhaps because it is the main competition for Spanish producers, whose season overlaps with that of South Africa. There are reasonable grounds for discrimination as contemplated by the SPS Agreement'. Lastly 'in terms of WTO rules, countries have to try to 'regionalise' their trade restrictions. If the scientific assessment shows there is a risk of spread or establishment in a certain region, but not in others, there is no justification for introducing trade restrictions in all the regions'.⁵²⁸

As of September 2014 the vast majority of SA Citrus growers voluntarily ceased exporting citrus fruits to the EU.⁵²⁹ The cessation of this nature was prompted by the EU Citrus Growers association's notification of the SA Department of Agriculture, Forestry and Fisheries to put in place a permanent ban if another consignment⁵³⁰ of CBS infected fruit was

⁵²⁵ Davies Rob is the current South African Minister of Trade and Industry

⁵²⁶ A Visser 'Citrus black spot still haunts local industry' *Bdlive* 24 July 2014 available at <http://www.bdlive.co.za/business/trade/2014/07/24/citrus-black-spot-still-haunts-local-industry> ACCESSED ON 27 OCTOBER 2014.

⁵²⁷ Media Release 'Reports of the European Commission's decision to lift the ban on the importation of South African Fruits' 2 May 2014 available at <http://www.nationaljournal.com/library/147699> ACCESSED ON 27 OCTOBER 2014

⁵²⁸ Visser (note 526 above) -This furthers the challenge against the EU-EFSA regulations on the basis that they are justifiable as contemplated by the SPS Agreement. It can be argued that these regulations are arbitrary.

⁵²⁹ P Vecchiato 'SA citrus growers halt fruit exports to EU' *Bdlive* 08 August 2014 available at <http://www.bdlive.co.za/business/trade/2014/09/08/sa-citrus-growers-halt-fruit-exports-to-eu> ACCESSED ON 27 OCTOBER 2014

⁵³⁰ Consignment is defined by the SA Plant Health (Phytosanitary) Bill 2013 as a quantity of plants, plant products or other regulated articles being moved from or to the Republic and covered, when required, by a single phytosanitary certificate.

found.⁵³¹ As highlighted earlier, evidence suggests that the EU's current regulations are not based on science as required by the SPS Agreement.⁵³² The current situation is particularly problematic for the SA Citrus exporters as they had gone to great lengths and cost to ensure compliance with EU requirements namely new testing regimes and a comprehensive CBS risk management programme. More concerning is the fact that despite the efforts rendered by SA to deal with EU's regulations no agreement has been reached with the EU since 1992 on the risk of CBS' transmission to EU citrus orchards via fruit exports.⁵³³ Inasmuch as the current ban is voluntary this does not in any way positively impact on SA's market access to the EU. It could be further argued that such a decision by the SA citrus growers is merely a compromise to maintain the possibility of future market access into the EU.

4.5 CASE STUDY OF KENYA AND THE EU

4.5.1 Background

The trading relationship between Kenya and the EU dates as back as 1975 when approximately 71 countries, including Kenya, from the African Caribbean and Pacific (ACP) signed a trade agreement with the EU, known as the Lome Convention.⁵³⁴ The Convention, *inter alia* provisions relating to future trade and aid relations, provided for the granting of non-reciprocal trade preferences in respect of the ACP products destined to the EU market.⁵³⁵ In essence it afforded the ACP countries free market access into the EU market.⁵³⁶ Upon its expiry in February 2000, the Lome IV Convention was replaced by the Cotonou Partnership Agreement (CPA).⁵³⁷ Under the CPA, ACP countries were mandated to reciprocate the duty

⁵³¹ P.A.A.M. 'SA citrus growers halt fruit exports to EU' available at http://www.paaam.net/news_articles/view_story/1242 ACCESSED ON 27 OCTOBER 2014

⁵³² Art. 2 (2) SPS Agreement

⁵³³ Vecchiatto (note 529 above) Also *see* (note 527 above) SA has been disputing the scientific basis of EU's phytosanitary measures in relation to CBS for a number of years.

⁵³⁴ Ronge (note 476 above) 1

⁵³⁵ Art 167 (1) – (2) of the Lome Convention (1975) provided that '... the object of this Convention is to promote trade between the ACP States and the EU...paying particular regard to securing effective additional advantages for ACP States' trade with the EU, and to improving the conditions of access for their products to the market in order to accelerate the growth of their trade and in particular, of the flow of their exports to the Community'.

⁵³⁶ I.E.A (2000) .*The Point* .Institute of economic Affairs, Nairobi

⁵³⁷ In comparison to its predecessor, the Lome Convention, the CPA had the broader objective of '... fostering the smooth and gradual integration of the ACP states into the world economy thereby promoting their sustainable development and contributing to poverty eradication in the ACP states'. *See* Article 34 (1) of the Cotonou Partnership Agreement (2000). Also *see* Articles 34(2) and (3) which outline the Agreement's the broader objective of 'enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment by creating new trade dynamics between the parties with a view to facilitate their transition to the liberalised global economy'.

free access to the EU as from 2008.⁵³⁸ Consequently, ACP countries would have to sign Economic Partnership Agreements (EPAs) with the EU in their respective regional groupings.⁵³⁹

In overall Kenyan agricultural exports face four major challenges related to the EU SPS requirements. These include adherence to maximum residue levels (MRLs), conformity to quality standards⁵⁴⁰, traceability directives and the EUREPGAP requirements.⁵⁴¹ It will be shown that though Kenya enjoyed duty free market access into the EU under the ACP- EU CPA the emergence of the EU SPS requirements stipulated above acted as substantial barriers to Kenyan market access to the EU.⁵⁴²

4.5.2 EU-KENYAN FISH IMPORTS BAN CASE

Another case study that focuses on how SPS measures can impede the ability of developing countries to access markets of developed countries is that of Kenya and the EU. Noor H⁵⁴³, points out that ‘two issues arise from the latest experiences of the fishing sector of Kenya.’ He further argues that these issues ‘may serve as a salutary lesson’ and that they are indicative of the problems which the SPS measures raise or are likely to raise in the future.⁵⁴⁴ One issue is that of the ‘knee-jerk reaction of the EU to the Cholera outbreak in 1997 by the imposition of a ban instead of the acceptable formula advised by the World Health

⁵³⁸ Such a change was majorly prompted by the application of the MFN principle which obliges each WTO Member country to treat all other WTO members in the same manner as it treats its most-favoured trading partner. The Lome IV Convention was allegedly in violation of this principle.

⁵³⁹ Economic Partnership Agreements (EPAs) are ‘development-focused’ reciprocal trade agreements negotiated between the ACP countries/regions and the EU. The balance of the Agreements is such that EU as one regional block, provides full duty free and quota free market access to EPA countries and/or regions whilst ACP countries/ regions, commit to open at least 75% of their markets to the EU. For EPAs see Article 36 (2) of the CPA which stipulates that ‘the Parties agree that the new trading arrangements shall be introduced gradually...’

⁵⁴⁰ The Conformity to Quality Standards (Directive No EC 1148/2001) requires that ‘in addition to a phytosanitary certificate, a certificate of conformity be issued after a conformity check has been undertaken for each exported consignment by official inspection bodies’. The other requirements will be addressed in the course of this Chapter.

⁵⁴¹ K.I.P.P.R.A. ‘Assessment of the Potential Impact of Economic Partnership Agreements (EPAs) on the Kenyan Economy’. *Kenya Institute for Public Policy Research and Analysis* Unpublished mimeograph (2005).

⁵⁴² OJ Odeko (2003) ‘East Africa’s Agricultural Interests: A defensive and Offensive Strategy with Regard to EU-CAP reform’ *Friedrich Ebert Stiftung*, Nairobi. However, Kenya no longer enjoys the benefits of ACP-EU CPA due its non-ratification of the ACP- EPAs, as contemplated by Article 36 (2) of the CPA of 2000 which was due to expire on the 1st of October 2014. This will remain the case until Kenya ratifies an Economic Partnership Agreement with the EU.

⁵⁴³ H Noor (2000) ‘Sanitary and Phytosanitary Measures and their Impact on Kenya’ *EconNews Africa* available at <http://www.oceandocs.net/handle/1834/386> ACCESSED ON 20 NVEMBER 2014

⁵⁴⁴ Ibid.

Organisation (WHO), with the consequential damage to Kenya's export earnings'.⁵⁴⁵ This occurrence is sufficient proof that 'much needs to be done to protect exporting developing countries which are at the mercy of the whim of importing developed countries'.⁵⁴⁶ The second issue is that 'what had twenty months ago started out as a scare story in an adverse report about illegal fishing by the use of chemicals at Lake Victoria culminated in a ban (instead of a more acceptable remedy- use of Good Hygiene Practices) which was to be lifted only after certification that fish from the lake were free from pesticide residues'.⁵⁴⁷ This is reflective of how SPS measures can be disguised by developed countries as a protectionist measure resulting in problems in market access.

The EU has over time imposed several bans on the fish exports from Lake Victoria which was the main source of fisheries for Kenya, Uganda and Tanzania.⁵⁴⁸ It should however, be noted that whereas some of the bans might have been motivated by legitimate SPS concerns the overall effect was the limitation of market access into the EU. This thesis will focus on the bans that affected Kenya in particular due to the use EU SPS measures. The first controversial case involving such a ban occurred in April 1997 and was imposed on the basis of the presence of salmonellae in Lake Victoria. This ban is reflective of how developed countries have used and continue to use SPS standards that adversely affect the capacity of developing countries to comply with them. This is due to the complex nature of the requirements⁵⁴⁹ and the absence of requisite infrastructure in developing countries.⁵⁵⁰ The second ban on Kenyan fish exports occurred in 1998 as prompted by cholera outbreak in Kenya. Of particular concern is the fact the EU insisted on passing a second ban despite the risk analysis undertaken by the WTO and Food Aid Organisation (FAO). This risk analysis proved that the cholera outbreak would not pose any health threat to consumers.⁵⁵¹

⁵⁴⁵ Ibid.

⁵⁴⁶ Noor (note 25 above).8

⁵⁴⁷ Ibid

⁵⁴⁸ Gebrehiwet (note 493 above) 59

⁵⁴⁹ One of the requirements that Kenya was unable to meet was the EU's hazard analysis critical control points (HACCP) requirement.

⁵⁵⁰ Henson & Loader (note 1 above) 93

⁵⁵¹ The Food Aid Organisation outlined that 'epidemiological data suggests that the risk of transmission of cholera from contaminated imported fish is negligible...' See FAO Press Release 'Import ban on fish products from Africa not the most appropriate answer' 1998/21 available at http://www.fao.org/waicent/ois/press_ne/presseng/1998/pren9821.htm ACCESSED 28 OCTOBER 2014. This implies that the ban was arbitrary and disregarded the requirement of the SPS Agreement that SPS measures should not be maintained without sufficient scientific evidence-Article 2 (3) . In considering what constitutes an SPS measure it can be noted that it should be a measure aimed at protecting human and animal health and life and plant life- see Annex 1A. The EU ban seems to have overlooked this provision.

The significance of this finding is that the EU imposed an SPS related ban without a sufficient scientific basis as contemplated by the SPS Agreement.⁵⁵² It can be argued that the ban could possibly affect Kenya's market access into the EU. Moreso, the ban prompted the need for Kenya to comply with stringent regulations which posed compliance difficulties for Kenya due to its limited technical infrastructure.⁵⁵³ The third ban occurred in 1999 as a consequence of fish poisoning on Lake Victoria.⁵⁵⁴ The ban had an adverse impact of affecting approximately 40 000 artisan fishermen's livelihoods.⁵⁵⁵ The further consequences of the three bans apart from being an obstacle to market access included grave costs to the Kenyan agricultural sector and trade diversion.⁵⁵⁶ The latter occurred as a consequence of the fact that upgrading infrastructure in order to comply with the EU requirements was exorbitantly high taking into account Kenya's limited economic capacity.⁵⁵⁷

Notwithstanding the serious illness that consuming such fish could cause, the bans in question seem to have been taken without regard to the disciplines of the SPS Agreement.⁵⁵⁸ The SPS Agreement stipulates that any Member country applying SPS measures has to scientifically prove that the product in question poses a real threat to people's, animal and plant health and/or life in the circumstances.⁵⁵⁹ The Agreement further imposes or requires that risk assessment be carried out based on guidelines developed by relevant international organizations where they exist.⁵⁶⁰ Furthermore, a reasonable opportunity has to be afforded to the exporter to put in place measures that eliminate health risk and a timeframe for compliance.⁵⁶¹ It is also apparent from the EU African fish case that the ban was not based on scientific evidence but rather 'the lack of a credible system in Kenya to protect the products

⁵⁵² Art 2 (2) SPS Agreement

⁵⁵³ Henson & Loader (note 1 above) 93

⁵⁵⁴ EU decision 99/253/EC

⁵⁵⁵ RO Abila 'Food safety in food security and food trade case study: Kenyan fish exports' (2003) available at http://www.ifpri.org/sites/default/files/publications/focus10_08.pdf ACCESSED ON 28 OCTOBER 2014

⁵⁵⁶ Gebrehiwet (note 493 above) 96 Also see NK Gitonga, L Okal & E Mutegi 'The effects of the EU ban on Lake victoria fish exports on Kenyan fisheries' (1998) available at <http://www.fao.org/docrep/008/y9155b/y9155b0h.htm> ACCESSED ON 28 OCTOBER 2014

⁵⁵⁷ S Henson & W Mitullah 'Kenyan Exports of Nile Perch: The Impact of Food Safety Standards on an Export-Oriented Supply Chain' (2004) *World Bank Policy Research Working Paper* 3349 29

⁵⁵⁸ C.U.T.S. 'Perspectives from Kenya: Importance and effects of SPS and TBT on trade policy and trade relations' (2012) *CUTS 4* available at <http://www.cuts-geneva.org/pacteac/eac-geneva-forum/209-importance-and-effects-of-sps-and-tbt-measures-on-trade-policy-and-trade-relations.html> ACCESSED ON 28 OCTOBER 2014

⁵⁵⁹ Art 2 SPS Agreement- necessity requirement

⁵⁶⁰ Art 5 SPS Agreement- such strict impositions are meant to ensure that the application of SPS measure is not based on merely on conjecture but sufficient scientific evidence.

⁵⁶¹ Annex 2B of the SPS Agreement stipulates that 'except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member'.

from possible contamination'.⁵⁶² The failure to comply by Kenya would be met by closure of EU market to the Kenyan fish exports.⁵⁶³ It can be argued that the bans in question had the undesirable effect of limiting Kenya's market access to the EU in products that Kenya has a comparative advantage.⁵⁶⁴

4.6 IMPLICATIONS OF CURRENT EU SPS MEASURES ON KENYAN MARKET ACCESS

Ogambi A notes that meeting the EU SPS requirements is very challenging for agro-food exporters and this is aggravated by the multiplicity of requirements across different export markets.⁵⁶⁵ Despite the inclusion of special and differential (S&D) provisions in the SPS Agreement, *inter alia* affording developing countries extended timeframe for compliance;⁵⁶⁶ developing countries still face difficulties in implementing the Agreement itself.⁵⁶⁷ The manner in which these standards are set and the process of challenging their legality poses enormous difficulties for a developing country like Kenya which lacks adequate technical or negotiating skills.⁵⁶⁸ In support of this assertion it can be argued that developing countries always lack bargaining power in such negotiations owing to their dependence on developed countries' markets.⁵⁶⁹ One implication of this is that a developing country will be forced to comply with unjustifiable or arbitrary SPS measures for the sake of maintaining a healthy

⁵⁶² JS Wilson 'Standards, regulation and trade: WTO Rules and developing country concerns' in BM Hoekman, P English & A Mattoo (eds) *A Development, trade and the WTO: A handbook* (2002) 428, 430

⁵⁶³ From the EU Kenyan Fish case, *inter alia*, it can be identified that any limitation or restriction on Kenyan fish products' export to EU would be arbitrary which is contrary to the commitments of the SPS Agreement. See SPS Agreement's preamble and Article 2(3). Also see *ibid* 430

⁵⁶⁴ The limitation of Kenya's market access to the EU is particularly concerning considering the intimate trading relationship Kenya shares with the EU and more significantly the dependence of Kenyan exporters on the EU market. Evidence suggests that the Common Market for Eastern and Southern Africa (COMESA) is Kenya's key export market for manufactured goods whereas the EU is Kenya's major export market for agricultural goods. It follows that the ban would restrictively hinder the market access in question. See Ogambi (note 474 above) 13

⁵⁶⁵ *Ibid* Also see CUTS (note 558 above) 2

⁵⁶⁶ Art 10 SPS Agreement

⁵⁶⁷ CUTS (note 558 above) 3 ACCESSED ON 28 OCTOBER 2014 Henson S and Loader R argue that the concerns in respect of the SPS Agreement are not directly attributable to the inherent flaws of the Agreement but the manner in which developed countries set and manage SPS measures- the refers to their formulation and implementation- see Henson & Loader (note 1 above) 91

⁵⁶⁸ See (note 564 above)

⁵⁶⁹ The SA-EU Citrus situation advances a good case for the argument that developing countries have limited bargaining power in some instances due to their dependency on the EU market. For instance, the majority of EU's citrus exports and other agricultural commodities are largely dependent upon the EU market. The same can be said of most ACP countries as the success of their exports hinges on the existence of a healthy trading relationship with the EU.

trading relationship with an offending developing country.⁵⁷⁰ Ogambi A further argues that the limitation of Kenyan market access based on the stringent EU regulations will result in a collapse in Kenyan export production and increased production cost (where EU regulations have to be strictly complied with).⁵⁷¹ This has adverse economic backlashes. Other consequences entail higher risk of crop wastage especially amongst small scale farmers and producers in developing countries.⁵⁷²

The increasingly strict EU rules on Minimum Residue Levels (MRLs)⁵⁷³ exist as a major impediment which limits holistic compliance with them.⁵⁷⁴ Whereas MRLs rules can benefit workers by affording them access to improved healthcare and acting as incentives for technology development they have proved to be a major impediment to Kenyan small scale farmers' productivity.⁵⁷⁵ The minority of exporters that comply with the EU MRLs regulations do so with considerable strains that can gradually mutate into hindrances to market access due to ineffective compliance. The most difficult requirement in relation to the EU's SPS' measures on Kenyan exports to the EU is the traceability requirement.⁵⁷⁶ The processes involved in complying with the traceability requirement are usually costly which inhibits the Kenyan exporters' capacity to comply with them.⁵⁷⁷

In general NTBs such as SPS measures have affected Kenyan market access in respect of products such as fish (as shown above) and also horticultural products namely cut flowers.⁵⁷⁸

⁵⁷⁰This is evident in the EU fish import bans on Kenya where Kenyan exporters had to upgrade their infrastructure in order to comply with the EU requirements. Also *see* Vecchiato (note 529 above) where SA Citrus growers voluntarily ceased their citrus exports to EU due to fear of compromising the possibility of a permanent ban should they fail to meet the required EU CBS requirements.

⁵⁷¹ Ogambi (note 474 above) 13

⁵⁷² *See* *ibid*- small scale farmers usually face the full wrath of market access limitation since they cannot meet the complex technical requirements that exist as preconditions to successful exportation of their produce.

⁵⁷³ The requirement of MRLs at analytical zero is notoriously strict and onerous since it requires that there be no trace of pesticide residue in agricultural products destined for the EU market. The major problem with this requirement is that the Kenyan climate requires use of pesticides and failure to apply pesticides is risky to the quality of the agricultural products. *See* Noor (note 25 above) 11

⁵⁷⁴ CUTS (note 558 above) 4

⁵⁷⁵ *See* (note 571 above) Small scale farmers usually face the full wrath of market access limitation since they cannot meet the complex technical requirements that exist as preconditions to successful exportation of their produce. Furthermore, the implementation of SPS agreement requires both financial and technical resources which Kenya lacks.

⁵⁷⁶This requirement has the capacity to impact on the market access of Kenya into the EU in the following manner: refusal by distributors in the EU to obtain products from foreign importers who fail to guarantee the traceability and food safety of the consignment in question. Other challenges related to this requirement include the certification schemes and testing procedures which are mainly provided by foreign firms at exorbitant costs. Also *see* CUTS (note 558 above) 6

⁵⁷⁷ According to World Bank Studies it was projected that 4000 to 5000 small scale producers in Kenya who account for 5% to 13 percent of the total export production are possible casualties of the EU strict rules. *See* World Bank Studies (2004) *Growth and Competitiveness in Kenya*.

⁵⁷⁸ CUTS (note 558 above) 4

This can be evidenced by the above EU ban on Kenyan fish imports in the 1990s and the perpetual protests by Kenya against the use of SPS measures by developed countries alleging that their use constitutes a disguised form of protectionism.⁵⁷⁹ The nature of EU's SPS regulations on Kenyan exporters can be summed up by Kibicho K's (Kenyan Foreign affairs principal secretary) complaint. He asserts that the 'EU has repeatedly introduced SPS measures which constitute a handicap for Kenyan exporters'.⁵⁸⁰ Kenya's problem is further aggravated by the rapid proliferation of private standards or private sector requirements which impose stricter conditions than those imposed by the EU's public standards.⁵⁸¹ The implications of private standards namely compliance with the Euro-Retail Produce Working Group Good Agricultural Practices (EUREPGAP) requirements is that they require 'financial costs to the producer both on- and off-farm...' and act as a prerequisite to successful exportation of citrus fruits for example.⁵⁸² This is due to the fact that compliance with the EUREPGAP is a norm for citrus exports purchasers in the EU.⁵⁸³

The paradox of private standards is that, though they are considered to be voluntary, they are 'essential for successful exportation which makes them *de facto* mandatory'.⁵⁸⁴ These standards thus, unjustifiably inhibit the market access of exporters who fail to comply with them.⁵⁸⁵ Moreover, private standards frequently impose additional costs of production which is particularly concerning considering 'the differential impact of increasing private

⁵⁷⁹ Ibid 3

⁵⁸⁰ News24 'Kenya and EU to develop platform to enhance market access' *News24* 08 May 2014 available at <http://m.news24.com/kenya/Business/News/Kenya-EU-to-develop-platform-to-enhance-market-access-20140508> ACCESSED ON 14 OCTOBER 2014

⁵⁸¹ Private standards or private sector requirements are defined as standards set by the private sector. These include the good agricultural practices set by the Euro-Retail Produce Working Group (EUREP)/Global Partnership for Good Agricultural Practice (GlobalGAP) and the food safety management system standard ISO 22000 from the International Organization for Standardization (ISO). It has been argued that these standards are essential since they complement the public standards' which follow a slow process in their setting and implementation. See A Disdier, B Fekadu, C Murillo & SA Wong 'Trade Effects of SPS and TBT Measures on Tropical and Diversification Products' (2008) *ICTSD Issue Paper No. 12* 13. Also see CUTS (note 558 above) 3-4

⁵⁸² Disdier *et al* (note 581 above) 14

⁵⁸³ Article 13 of the SPS Agreement stipulates that 'Members are fully responsible under this Agreement for the observance of all obligations set forth herein... Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories...comply with the relevant provisions of this Agreement'. However, the SPS Agreement apart from this stipulation does not provide what constitutes 'reasonable measures' and how Members can specifically ensure the 'observance' of the SPS Agreement's stipulations.

⁵⁸⁴ S Henson & J Northen 'Economic Determinants of Food Safety Controls in the Supply Retailer Own-Branded Products in the UK' (1998) 14 *Agribusiness* 113-126.

⁵⁸⁵ Cf. Disdier *et al.* (note 581 above) 15 Disdier. *et. al* argues that 'private standards could be trade enhancing since they assist producers to improve the quality of their products and provide access to new markets. This potential positive impact of standards on market access partly explains why producers in exporting countries try to fulfil them, despite the associated costs...' However, this case is usually the exception and not the norm- see ibid 99 where Disdier. *et. al* argues that '...some standards are restrictive on market access, acting as NTBs'

standards'.⁵⁸⁶ It has been argued by foreign exporters that private sector requirements lack transparency since they are not notified to the WTO and lack scientific bases as contemplated by the SPS Agreement.⁵⁸⁷ In extreme cases these private standards conflict with the public standards and can be more onerous than them.⁵⁸⁸

4.7 CRITICAL ANALYSIS OF EU SPS REQUIREMENTS AND PROBLEMS FACED BY DEVELOPING COUNTRIES

The SPS measures adopted by the EU against both South Africa and Kenya fail to subscribe to the key commitments of the WTO.⁵⁸⁹ Moreover, as alluded to above, according to Article 2(2) of the WTO SPS Agreement members are required to ensure 'that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health is based on scientific principles and is not maintained without sufficient scientific evidence'. Moreso, in terms of Article 5 (4) of the SPS Agreement Member countries are encouraged to adopt the least trade distorting measures. Noor H argues it is self-evident that the EU did not holistically engage with these provisions in their previous trade relations with Kenya.⁵⁹⁰ The same can be argued in light of the South African citrus cases. In relation to the horticultural and fishing sectors; Kenya faces difficulties in complying with the EU SPS requirements due to infrastructural constraints as well as lack of access to appropriate technical and scientific expertise.⁵⁹¹ SA citrus exporters are currently facing compliance problems with the EU requirements which are costly to adhere to.⁵⁹² It is submitted that these constraints adversely impact on Kenya and SA's market access to a greater extent.

⁵⁸⁶ Ibid,15.

⁵⁸⁷ Ibid 14

⁵⁸⁸ This can be of particular concern considering that private sector standards cover not only food safety but also other issues namely quality, production methods and environmental concerns which do not fall within the ambit of the SPS Agreement. This has the adverse effect of imposing additional burdens on developing countries' exporters due to the multiplicity of requirements which may not necessarily be SPS related. See

www.unctad.org/trade_env/test1/meetings/wto1/Summary%20of%20SPS%20Committee%20Discussion%20on%20Private%20Standards.pdf ACCESSED ON 29 OCTOBER 2014

⁵⁸⁹ These include trade liberalization via the removal of all forms of trade barriers and transparency

⁵⁹⁰ Noor (note 25 above) 8

⁵⁹¹ Noor (note 543 above) - This infrastructure includes, *inter alia*, building laboratories, processing plants and cooling facilities.

⁵⁹² The EU regulations on the SA citrus industry are likely to have adverse economic backlashes on the SA employment sector and livelihoods of about 100 000 farmworkers who are amongst the least paid in SA. In total is estimated that 'more than a million households depend on the South African citrus industry for their livelihood'. D.A.F.F. 'A profile of the South African citrus market value chain' (2012) 15-16 available at <http://www.nda.agric.za/docs/AMCP/Cmvp2012.pdf> ACCESSED 21 NOVEMBER 2014

It should be noted that developed countries in giving priority to food safety over trade subsequently apply stricter SPS measures based on ‘risk’ assessment in comparison to those adopted by developing countries. Noor H argues that the setback in the use of risk assessment to adopt stricter SPS measures is that ‘risk’ assessment is ‘an inexact science and developing countries lack the technical, scientific and financial resources to challenge measures grounded on risk’.⁵⁹³ In this respect, Ronge E argues that standards can assume the status of prohibitive trade barriers when onerous requirements are imposed at the expense of normal procedures namely failure to initially undertake a comprehensive risk assessment.⁵⁹⁴ Apart from the costly conformity assessments related to SPS requirements the bureaucratic procedures involved in obtaining SPS approvals constitute a significant barrier to trade. The situation is further exacerbated by market segmentation which occurs ‘when developed countries maintain separate, *albeit* legitimate, measures to deal with same perceived risks’.⁵⁹⁵

Another problem related to the developed countries’ SPS requirements is their incompatibility with the prevailing systems of production and marketing in developing countries.⁵⁹⁶ It can be argued that these are often adopted without taking into account the special needs and difficulties faced by developing countries in complying with these requirements.⁵⁹⁷ The problem is exacerbated by the lack of appropriate scientific expertise and infrastructure in developing countries coupled with little or no assistance from developing countries.⁵⁹⁸ Furthermore, the S&D provisions which might afford developing countries assistance from developed countries as contemplated by Article 10 of the SPS Agreement are limited in their application. This is because they are ‘best endeavour

⁵⁹³ Noor (note 543 above)

⁵⁹⁴ Ronge (note 476 above) 26

⁵⁹⁵ Ibid

⁵⁹⁶ Henson & Loader (note 1 above); Noor (note 543 above); Also *see* CUTS (note 558 above) 4- It can be argued that the incompatibility of SPS requirements of developed countries and developing countries’ production methods can result in extended times for compliance which affects production and exportation save in cases where developed countries accept different procedures as equivalent in terms of the level of SPS protection afforded. However, such exceptions are highly unlikely to occur.

⁵⁹⁷ The SPS Agreement [Article 10 (1)] ‘encourages developing countries to take into account the special needs of developing countries’. It can be argued that the apparent insensitivity of developed countries in dealing with developing countries as far as standards are concerned, despite having been encouraged to do so by the SPS Agreement, supports the assertion that these measures are arbitrarily imposed thus constituting protectionist devices. This is despite the fact the SPS Agreement asks of states to consider this (special needs of developing countries) before introducing such measures and even calls for discussion between the states/parties before the measure is introduced. Also *see* CUTS (note 558 above) 3

⁵⁹⁸ Article 9 of the SPS Agreement requires developing countries to render assistance to developing countries. However, the technical assistance prescribed in terms of the Agreement falls short of the ability to adequately deal with the prevalent problems faced by developing countries namely low levels of economic development.

provisions', thus they lack the authority mandate developed countries to assist developing countries.⁵⁹⁹

The failure of developing countries to comply with the developed countries SPS measures have also been attributed to a number of factors. These include the argument that the participation of developing countries in international standard setting bodies is inadequate. It can be argued effective participation in standard setting requires adequate institutional infrastructure, human and financial resources yet most developing countries lack these.⁶⁰⁰ Developing countries have also raised concerns in relation to the standard setting bodies alleging that these institutions fail to adequately take into account the special needs and circumstances of developing countries.⁶⁰¹ Developing countries have also argued that the impact of SPS measures on market is adversely affected by the limited time afforded to developing countries between notification and implementation.⁶⁰² Another problem which needs to be addressed is that of transparency in the implementation of SPS measures.⁶⁰³ It is argued that 'though the notification system is supported in principle', its arrangements do not adequately cater for the special needs and circumstances of developing countries.⁶⁰⁴

4.8 CONCLUSION

This chapter outlined the manner in which the EU -SPS measures impeded and continue to impede market access for South Africa and Kenya. As a point of departure it was shown that market access serves an important role in the integration of developing countries into multilateral trading system. Moreover, it allows developing countries to yield the benefits of trade in agricultural goods which they have a comparative advantage in. However, the current developed countries' SPS measures are heavily limiting developing countries' economic gains from global trade due to their onerous nature. It was shown that developed countries apply SPS measures which are difficult for developing countries to comply with. This problem is prompted by developing countries' limited infrastructural capacity and expertise

⁵⁹⁹ Noor (note 25 above) 12

⁶⁰⁰ CUTS (note 558 above) 3-4 Infrastructural resources include laboratories for complying with SPS tests and human resources relates to technical experts.

⁶⁰¹ These standard setting bodies commonly known as the 3 sisters as contemplated Annex 3A (a) – (c) namely (Codex Alimentarius Commission, International Office of Epizootics and International Plant Protection Convention) were discussed in Chapter 3.

⁶⁰² Noor (note 25 above) 15; Also see Henson & Loader (note 1 above) 98

⁶⁰³ CUTS (note 558 above) 4 *ff*

⁶⁰⁴ WTO (1999) 'SPS agreement and developing countries' Submission by Egypt

and lack of requisite financial resources. Consequently, developing countries' access to developed countries markets is adversely affected.

The problem is particularly concerning due to the fact that developed countries are increasingly implementing SPS measures without regard to the disciplines of the SPS Agreement. As discussed, the ability of developing countries to challenge these SPS measures is often hindered by their lack of scientific expertise and financial resources. The current nature of the S&D provisions and the technical assistance provisions of the SPS Agreement cannot afford developing countries any justice as they are not mandatory. This is further exacerbated by the insensitivity of developing countries' special needs and circumstances in developed countries' SPS standards setting. All these problems, *inter alia*, have co-jointly resulted in the limitation of market access for developing countries.

CHAPTER 5:

FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

Studies suggest that technical measures in general, are the most significant impediment to exports.⁶⁰⁵ The EU has been dubbed to be the leading group of developed countries in the use of technical standards.⁶⁰⁶ As identified and discussed in the preceding chapters, SPS measures are ‘increasingly becoming a major stumbling block in agricultural trade for developing countries’.⁶⁰⁷ This poses serious market access problems for developing countries which have a comparative advantage in agricultural products which are the mainstay of most developing countries’ economies. This chapter will outline the findings of this thesis particularly in respect to the difficulties faced by developing countries in complying with developed countries’ SPS standards. Furthermore, this chapter will proffer recommendations for purposes of remedying the problems and difficulties contemplated in the findings and the thesis at large.

5.2 FINDINGS

There are a number of problems that developing countries face in the attempt to access developing countries’ markets. The formulation and implementation of SPS measures by developed countries forms the core of the problem of limited market access. This is due to the fact that SPS requirements adopted by developed countries are usually costly and difficult for developing countries to comply with. The problem of non-compliance with such requirements has spill-over effects on developing countries’ ability to penetrate developed countries’ markets and/or maintain their position in those markets. Such a problem is made more apparent by developing countries lack of adequate infrastructure, financial resources and technical expertise to comply with the developed countries’ SPS requirements. Even more, in circumstances where compliance is adhered to, the timeframe for compliance is often unreasonable thus, making it difficult for developing countries to meet the requirements within the prescribed time.

⁶⁰⁵Henson & Loader (note 1 above) 91

⁶⁰⁶ This can be attributed to its technical requirements which are ‘process based controls enforced by a competent authority in exporting countries’. Such requirements are considered to be very onerous. *See ibid*

⁶⁰⁷ Gebrehiwet *et al* (note 492 above) 23

The problem becomes particularly acute considering the proliferation in the arbitrary and unjustified use of SPS regulations as protectionist tools by developed countries. Developing countries on the contrary lack the requisite technical infrastructure and scientific insight to challenge the basis of these standards. Moreover, developing countries have indicated a tendency of merely attempting to comply with the imposed standards, *albeit* legitimate, for the sake of maintaining a share in the foreign markets.⁶⁰⁸ Such infrastructural and diplomatic constraints (lack of bargaining power) adversely impact on the developing countries' market access into developed countries. Furthermore, the SPS requirements that are adopted and applied by developed countries usually conflict with the prevailing production and/or marketing systems in developing countries.⁶⁰⁹ It was also noted that the increasing proliferation of private standards poses a major threat and difficulty to developing countries' market access. This problem is attributable to the fact that the SPS agreement is not explicit on the relationship between private standards schemes and the SPS Agreement. The problem with this situation is the prevailing uncertainty regarding whether the ambit of the SPS Agreement extends to private sector standards.⁶¹⁰

The leeway of SPS standard setting is also an issue of concern owing to the amount of discretion given by the SPS Agreement to Member countries in formulating SPS measures. All that is required is for a Member country to base its measures on science and not to maintain them without sufficient scientific evidence with the exception of the precautionary rule principle.⁶¹¹ The impact of SPS measures on developing countries market access to developed countries is exacerbated by the fact that there is unwillingness on the part of developed countries to accept measures in developing countries as equivalent. On the contrary developing countries insist on the strict compliance with the letter of their requirements.⁶¹²

⁶⁰⁸ See (note 569 above)

⁶⁰⁹Henson & Loader (note 1 above) 93; Noor (note 543 above); Also *see* CUTS (note 558 above) 4 ACCESSED ON 29 OCTOBER 2014

⁶¹⁰Disdier *et al.* (note 581 above) 99

⁶¹¹Art 2 (1) SPS Agreement & *see* Article 5 (7) for the precautionary rule principle.

⁶¹²See (note 604 above)

5.3 RECOMENDATIONS

5.3.1 Promotion of Harmonization and Transparency

Since developing countries ‘implement qualitatively and/or quantitatively lower SPS standards’⁶¹³ than developed countries; the SPS Agreement should in principle, bridge this lacuna. It can achieve this by improving transparency, promoting harmonization and preventing the implementation of SPS measures which lack adequate scientific justification.⁶¹⁴ Much of this however, depends on the ability of developing countries to effectively participate in the implementation of the Agreement namely: standard setting processes. In support of this recommendation Henson L and Loader R assert that developing countries will only actualize the potential benefits of the Agreement if they are willing and able to participate in the institutions it establishes.⁶¹⁵ However, it should be noted that whereas willingness to participate may be present, ability to do so is often the problem. Thus, it is argued that participation goes beyond simply affording developing countries an opportunity to participate in the SPS Agreement-established institutions. The participation should be effective and where necessary developing countries should be supported to actualize it.

5.3.2 Encouraging Effective Participation

Effective participation hinges upon the following key areas: representation in the WTO and its related institutions namely the SPS committees and international standards organisations; effective participation in activities associated with the SPS Agreement and institutional capacity in developing countries in order to implement effective SPS controls and to comply with commitments under the SPS Agreement.⁶¹⁶ In dealing with the problem related to the operation and implementation of the SPS Agreement by developed countries it is recommended to conduct a review of the SPS Agreement’s operation and its implementation as stipulated by Article 12 (7) of the SPS Agreement.⁶¹⁷ The proposed recommendations can

⁶¹³ Henson & Loader (note 1 above) 93-94

⁶¹⁴ Though the SPS Agreement specifically provides for the regulation of these contemplated areas there is uncertainty pertaining to these areas resulting in the weak implementation thereof.

⁶¹⁵ Henson & Loader (note 1 above) 96

⁶¹⁶ Ibid- ‘Studies suggest that developing countries do not notify the SPS Committee on a routine basis on new measures that do not conform to international standards’ as contemplated by Annex 5B of the Agreement. This is a clear marker to the fact that developing countries are not effectively participating in the SPS Agreement and its implementation. One possible danger of this limited participation in the Agreement and its institutions will tend to be driven by developed countries’ priorities and standards. It can be further argued that in extreme cases it will culminate in the exploitation of the disciplines of the SPS Agreement by developed countries.

⁶¹⁷ However, it should be noted that this thesis is cognisant of the fact that the review of the Agreement’s operation and implementation might also prompt the need to review SPS Agreement related WTO Agreements

be effected via the instrument of Article 12 (7) of the SPS Agreement which requires the SPS committee to ‘review the operation and implementation of the SPS Agreement....as the need arises’. The stipulation extends to the submission of proposals by the SPS Committee to the Council for Trade in Goods seeking amendment of the Agreement’s text where appropriate.⁶¹⁸

5.3.3 Review and revision of harmonization and equivalence provisions

It is recommended that the review in question be undertaken in the manner outlined subsequently. Firstly, it is recommended that Article 3 (harmonization provision) should be revised to the extent that international standards will be developed in a manner that takes into consideration the special needs and circumstances of developing countries on a consensual basis.⁶¹⁹ This will be complemented by the recommendation outlined earlier namely affording developing countries effective participation in the standard setting bodies. Such an approach will enhance the capacity of developing countries to comply with the general SPS requirements which have their basis on international standards. Consequently, it is suggested that this will improve developing countries’ market access which is often impeded by failure to comply with developed countries’ SPS requirements. The SPS committee could develop a set of rules that the bodies responsible for standard setting will be mandated to adhere to in the standard setting processes.⁶²⁰ Whereas it appreciated that such a reform will limit state sovereignty,⁶²¹ it is argued that the recommended reform is important for purposes of ensuring uniformity in the multilateral trading system.

Secondly, in dealing with the arbitrary nature of SPS requirements it is recommended that Member countries adopt less restrictive SPS measures as contemplated by the SPS Agreement. This can be achieved by revisiting the provision on equivalence, Article 4. The problem lies with the interpretation of equivalence as sameness which Zarrilli S argues to have the adverse effect of depriving Article 4 (1) of its function.⁶²² The provision could also

namely the TBT Agreement and the AoA. It is inevitable that the latter agreements will also be affected if such a review is conducted.

⁶¹⁸ Article 12 (7) SPS Agreement

⁶¹⁹ Zarrilli (note 345 above) 21

⁶²⁰ Ibid

⁶²¹ The SPS Agreement to some extent hinges on Member Countries’ sovereignty via the vehicle of Article 2 (1) ‘Members have the right to take SPS measures necessary for the protection of human, animal or plant life or health...’ subject to some limitations stipulated therein.

⁶²² The proper function of Article 4 (1) is to ‘recognize that different measures may achieve the same level of protection’ thus affording countries to adopt equivalent SPS measures to the extent that they can achieve the same level of protection sought by the importing Member country. Dismantling rigidity in this respect will

specifically encompass the use of mutual recognition agreements (MRAs) on conformity assessments which are currently outside the ambit of the SPS Agreement.⁶²³ Other alternatives namely Good Hygiene Practices (GHP) could be used in cases where agricultural products in question do not pose an imminent threat to human and animal health and/or life or plant life.⁶²⁴

The recommendations in respect of equivalence and harmonization will be significant in the creation of transparent and uniform standards across developed countries. This will effectively address the problem faced by developing countries in complying with the multiplicity of SPS requirements imposed by different developed countries in respect of same sanitary and phytosanitary threats. This problem is known as market segmentation and occurs when developed countries maintain separate, *albeit* legitimate, SPS measures to deal with same perceived risks.⁶²⁵ This can be corrected by lobbying for uniform SPS standards by developed countries where conditions permit.⁶²⁶ In dealing with the problem of private standards which pose a major threat and difficulty to developing countries' market access the SPS committee ought to clarify the relationship between private standards schemes and the SPS Agreement. The determination of whether private standards fall within the ambit of the SPS Agreement will assist in the effective regulation of such standards. The importance of creating certainty in the area of private standards is that it will also enhance transparency and uniformity in the implementation of these standards.

5.3.4 Increased and effective use of bilateral trade forums

It is also recommended that developing countries should make effective use of bilateral agreements to negotiate on recognition of different SPS measures as contemplated by Article 4 (2) of the SPS Agreement.⁶²⁷ It has been argued that countries enter into Regional Trade

enhance the capacity of developing countries to comply with the imposed SPS requirements using available resources. *See* (note 619 above) 25

⁶²³ MRAs on conformity assessments have the capacity to improve market access for developing countries by avoiding repetitive testing which usually increase the costs of compliance thus hindering market access. Currently, the SPS Agreement via the vehicle of Article 4 only recognises MRAs that deal with equivalence on SPS measures.

⁶²⁴ Noor (note 25 above) 9

⁶²⁵ Ronge (note 476 above) 26

⁶²⁶ This preserves Member countries' sovereignty to some extent as argued earlier- *see* (note 621 above)

⁶²⁷ Article 4 (2) of the SPS Agreement stipulates that 'Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified SPS measures'. There is need for developing country governments to engage more in these discussions so as to effectively yield the benefits of the SPS Agreement.

Agreements (RTAs) in order to ensure continued access to a certain country markets.⁶²⁸ Furthermore, 'RTAs can also increase the bargaining power of an RTA's constituent members within multilateral arrangements'⁶²⁹ namely the SPS Agreement and RTAs have been dubbed to be important in speeding up the dismantling of tariffs namely NTBs. It follows that NTBs are easier to dismantle within the context of RTAs as opposed to the WTO multilateral framework.⁶³⁰ On the weight of the assertions highlighted above, developing countries could seek to join RTAs so as to secure continued market access into developed country markets, thus increasing their bargaining power in effectively dealing with the adverse impact of SPS measures. These bilateral treaties could assume the form of Economic Partnership Agreements (EPAs)⁶³¹ such as the recent SA-EU Economic Partnerships Agreement.⁶³²

There is no evidence to support that RTAs have been effectively used to deal with the problem of SPS measures in the EU-SA Trade and Development Cooperation Agreement (TDCA).⁶³³ Stoler A however argues that despite the avowed commitment to deal with SPS and TBT measures within the framework of the TDCA, the agreement is 'less ambitious in those areas in comparison with other RTAs signed by the EU namely the EU-Chile Association Agreement'.⁶³⁴ To evidence this, SPS measures are only referred to in the general provisions on agriculture namely Article 61⁶³⁵ within the provision on economic

⁶²⁸ C Picker 'Regional Trade Agreements v. the WTO: A proposal for reform of Article XXIV to counter this institutional threat' (2005) 275 available at [https://www.law.upenn.edu/journals/jil/articles/volume26/issue2/Picker26U.Pa.J.Int'lEcon.L.267\(2005\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume26/issue2/Picker26U.Pa.J.Int'lEcon.L.267(2005).pdf) ACCESSED ON 31 OCTOBER 2014

⁶²⁹ The chances of securing this bargaining are however argued to be less common. See World Bank, Trade Blocs. 'A World Bank Policy Report' (2000) 17-21 Available at http://siteresources.worldbank.org/INTRANETTRADE/Resources/2390541187893756753/wdlttable6_6_2008.pdf ACCESSED ON 31 OCTOBER 2014

⁶³⁰ Picker (note 628 above) 276

⁶³¹ Since, the WTO is persisting on the formation of these EPAs; this provides a lucrative opportunity for developing countries to use that domain to deal with non-tariff barriers.

⁶³² L Ensor 'SA neighbours in new farm deal with EU' *Bdlive* 21 July 2014 available at <http://www.bdlive.co.za/business/agriculture/2014/07/21/sa-neighbours-in-new-farm-deal-with-eu> ACCESSED ON 27 OCTOBER 2014

⁶³³ Under the TDCA, *inter alia*, the parties thereof vow to 'cooperate on the development of MRAs on conformity assessments in areas of mutual economic interest as well as the area of quality management and assurance in selected sectors of importance to SA. More importantly, the facilitation of technical assistance for Southern African capacity building initiatives in the fields of accreditation amongst others and in particular the development of practical links between SA and EU standardization, certification and accreditation organizations'. See *Official Journal of the European Communities*, L 311/18, December 12, 1999.

⁶³⁴ A Stoler 'TBT and SPS measures in practice' (2012) L331/18 *Journal of the EU* 217, 223

⁶³⁵ Article 61 (1) (e) of the TDCA stipulates that 'co-operation in this area (Agriculture) shall be aimed at the promotion of integrated, harmonious and sustainable rural development in South Africa. Cooperation will in particular be geared ...to examine measures to harmonise standards and rules on animal and plant health, with a view to facilitating trade, taking into account the legislation in force for both Parties and in conformity with the rules of the WTO'.

cooperation. More alarming is the fact that ‘there is no ready evidence on the extent to which the implementation of SPS provisions has been achieved’.⁶³⁶ It is recommended that SA and the EU should consider a reorientation and possible revision of the TDCA in respect of the economic cooperation text.⁶³⁷ This can be achieved by extending to other areas particularly that of SPS measures. The underlying reason for this dealing with SPS matters will enhance trade cooperation.⁶³⁸ It also recommended that if Kenya ratifies an EPA with EU it should also substantially house provisions on SPS matters. Under both EPAs it is further recommended that both bilateral agreements should ‘incorporate technical assistance and capacity building measures to assist the exporters of the developing-country partner’.⁶³⁹ These bilateral forums would also be crucial in dealing with the problem of complying with private standards of producers in the EU.

5.3.5 Review of Article 6 of the SPS Agreement

Article 6 of the SPS Agreement which pertains to adaption to regional conditions is another provision that requires review. One of the concerns raised by developing countries in light of Article 6 is that the full benefits of regionalization, as contemplated in the provision, are not being realized due to the difficulties in implementing this provision.⁶⁴⁰ The process of proving that some areas are pest and/or disease free is time consuming and complex. As such the process can be onerous since it requires scientific and infrastructural support which is usually lacking in developing countries. In light of these problems it is recommended that this provision should explicitly make reference to the effect that ‘scientific and administrative support shall be provided by international organizations and developed countries to developed countries to facilitate implementation of the Article 6 provisions’.⁶⁴¹

⁶³⁶ According to the European Commission ‘as regards the provisions that have not been implemented yet, there seems to be a strong interest in deepening cooperation in the following areas: trade and related-trade areas, intellectual property rights, customs, competition policy, regional policy, sanitary and phytosanitary measures (emphasis intended), technical barriers to trade...’ see European Commission. (2006) ‘Toward an EU-South Africa Strategic Partnership’ available at <http://eurlex.europa.eu> ACCESSED ON 22 NOVEMBER 2014

⁶³⁷ Ibid.

⁶³⁸ Ibid

⁶³⁹ Stoler (note 634 above) 231 – ‘If technical regulations and conformity assessment procedures cannot be harmonized, it is important for the purposes of the PTA that the parties work to eliminate duplicate or multiple measures or mandatory tests for the same product. This is particularly crucial for small and medium-size enterprises that cannot afford the high cost of meeting differing regulations and testing regimes. Mutual recognition agreements are important tools in this respect’.

⁶⁴⁰ Bossche *et al* (note 356 above) 65

⁶⁴¹ see Zarrilli (note 345 above) 25

5.3.6 Revision and clarification of notification timeframes

In respect of the concern that market access of developing countries is adversely affected by the limited time afforded to developing countries between notification and implementation of SPS measures, it is recommended that adequate time be afforded to the developing countries. In giving effect to this recommendation the meaning of ‘reasonable interval’, as contemplated by Annex 2B of the SPS Agreement, should be clarified.⁶⁴² Alternatively the Agreement should specifically stipulate that the timeframe between notification and implementation should be determined relatively, taking into consideration special needs and circumstances of developing countries. It would be more rational to afford developing countries more time to comply with the SPS requirements given their limited infrastructural capacity and lack of requisite expertise.

The solution contemplated above will also positively impact on the concerns related to transparency⁶⁴³ in developed countries SPS requirements and the differences that exist between developed countries SPS requirements and production methods prevalent in developing countries. In relation to the latter, an extended period of time for compliance would also allow capacity building in developing countries. However, as noted in this thesis inasmuch as developing countries are willing to comply with developed countries SPS requirements they are hindered by lack of infrastructural and financial resources. As such affording them an extended time frame for compliance with SPS requirements is not a panacea to the problem of limited market access. More needs to be done.

5.3.7 Implementation of effective technical assistance

In lieu of the finding outlined above it is recommended that developing countries be afforded effective technical assistance (as will be outlined shortly) to enhance their compliance with developed countries’ SPS requirements. This entails making technical cooperation in terms of

⁶⁴² Annex 2B of the SPS Agreement stipulates that ‘with the exception of urgent circumstances, Members shall allow a reasonable interval between the publication and SPS regulation and its entry into force in order to afford producers in exporting Member Countries (particularly developing Member countries) to adapt their products and methods of production to the stipulated requirements of the importing Member country’.

⁶⁴³ In relation to the problem of transparency in respect of developed countries SPS requirements related concerns could be resolved if ‘Member countries comprehensively applied the recommended procedures laid down by the SPS Committee’. See Henson & Loader (note 1 above) 99. With the advent of technology notification and access to new SPS requirements could be enhanced by exploiting electronic transmission means. Whereas Zarrilli S argues that the exploitation of such methods can be hampered by lack or limited access to the internet such an assertion is no longer relevant taking into consideration the improved access of developing countries to internet resources. However, where such access is limited the problem can be alleviated by the mandating developed countries to introduce such resources via technology transfer for instance. This recommendation is in line with the recommendation that technical assistance should be an integral part of capacity and not ‘reactionary’. Also see Zarrilli (note 345 above) 21

Article 9 of the SPS Agreement mandatory. Currently, the technical cooperation provision of the SPS Agreement is canvassed in voluntary terms ‘which have not been converted into specific obligations’.⁶⁴⁴ If technical cooperation is to be made mandatory by the Agreement it would deter developed countries from arbitrarily adopting SPS measures since they would be obliged to share the burden of infrastructural capacity building and the costs of ensuring compliance with their imposed SPS requirements.

It is further recommended that technical assistance should be largely in the form scientific infrastructure and expertise since science is considered as the ‘touchstone against which SPS measures must be judged’.⁶⁴⁵ It should also be noted that technical assistance is currently reactionary as opposed to a stand-alone strategy of capacity building. It is considered to be reactionary because it is only provided once compliance problems have been identified. In order to effectively deal with this setback it is recommended that where developed countries contemplate setting up SPS requirements, capacity assessment followed by capacity building should be undertaken. For example transfer of technology could be undertaken by developed countries to achieve this.

5.3.8 Adoption of Aid for Development (AFD)

It is submitted that whereas the Doha Development Agenda and the Bali Round have made some significant strides in pursuing the Aid for Trade (AFT) initiative⁶⁴⁶ this development should not be taken as a substitute for mandatory technical cooperation contemplated above. It is thus, recommended that the WTO current Bali Round adopt a counterpart of AFT known as Aid for Development initiative (AFD).⁶⁴⁷ This initiative would be specifically dedicated towards technical and infrastructural development in developing countries and LDCs in order catalyse the capacity of developing countries to comply with SPS requirements. It is submitted that this initiative will complement the Bali- WTO Agreement on Trade

⁶⁴⁴ See Ibid, 23-The same situation applies to the nature of S & D provisions in terms of Article 10.

⁶⁴⁵ Bossche *et al* (note 356 above) 35; Also see Zarrilli (note 345 above) 26

⁶⁴⁶ The WTO-led Aid for Trade initiative ‘encourages developing country governments and donors to recognize the role that trade can play in development. In particular, the initiative seeks to mobilize resources to address the trade-related constraints identified by developing and least-developed countries’. See World Trade Organisation ‘Aid for Trade’ available at http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm ACCESSED ON 21 OCTOBER 2014.

⁶⁴⁷ I would like to acknowledge my supervisor C. Stevens (LLB, LLM,LLD Candidate UKZN) for the proposition of the idea of Aid for development (AFD) which focuses on infrastructural and capacity building inter alia in developing countries and LDCs.

Facilitation ‘which contains provisions that deal, *inter alia*, with assistance for capacity building’.⁶⁴⁸

5.3.9 Revision of Article 10

Another recommendation relating to the nature of the Agreement is Article 10, which deals with special and differential treatment. The problem of the current S&D provisions is that they have not been converted into specific obligations.⁶⁴⁹ To this extent, as outlined earlier, S & D provisions are ‘best endeavour provisions’ with no binding effect, thus they lack the authority to mandate developed countries to assist developing countries.⁶⁵⁰ As such developing countries still face the problem of compliance with SPS requirements due to infrastructural and financial constraints. In dealing with this problem it is recommended that the S&D provisions be converted into specific obligations particularly in circumstances where developed countries have imposed onerous SPS requirements.

5.3.10 Encouraging a collaborative approach

In effecting the recommendations stipulated above it is further recommended that the problems related to the impact of SPS measures on market access can be effectively dealt with via a collaborated effort. This would involve both developing and developed countries as well as other private stakeholders. Such an approach will ensure a certain level of uniformity in the SPS requirements which could potentially improve (in this respect) market access for especially developing countries. This thesis is cognisant of the fact that the SPS Agreement is merely one of the areas of concern in the MTS and the implementation of these recommendations in respect of the concerns thereof is thus merely a starting point in dealing with the problems faced by developing countries.

5.4 CONCLUSION

Whilst there has been a determined effort to regulate the trade restrictive effects of SPS measures by promulgating the SPS Agreement under the auspices of the WTO, developing countries still struggle with market access. Moreover, it was noted that developing countries lack the requisite infrastructural and technical resources to effectively exploit the opportunities offered by the Agreement. This has gradually been hampered by the increasing use of stringent SPS measures by developed countries with the adverse effect of excluding

⁶⁴⁸ Bali 9th Ministerial Conference 2013 *Ministerial Decision on Aid for Trade* (WT/COMTD/AFT/W/51)

⁶⁴⁹ Noor (note 25 above) 11

⁶⁵⁰ Ibid, 12.

developing countries' agricultural exports from the latter's market. The impact of SPS measures on market access of developing countries has been shown to be adverse to the agricultural sector which is the mainstay of most developing countries' economies. The backlashes of this occurrence are apparent in, *inter alia*, increased costs of compliance with onerous SPS requirements, a decrease in productivity in the agricultural sector and potential loss of employment due to exclusion of agricultural products from foreign markets.

The incompatibility of SPS requirements and production methods prevalent in developing countries has been identified as one of the major setback prompting the declining access to developed country markets. There are strong grounds to argue that the adverse impact of SPS measures on developing countries access into developed countries markets are related to the manner in which the SPS Agreement operates and the manner in which it is implemented by developed countries. These problems areas span from the insensitivity of developed countries to developing countries' special needs and circumstances in setting their SPS requirements to the limited timeframes afforded for compliance with these requirements. The problem of market access can be remedied along these outlined fault lines.

The problem of market access as prompted by onerous SPS requirements can be addressed in the following respects *inter alia*. Firstly, the SPS Agreement should be reviewed in light of the difficulties that developing countries encounter in implementing the Agreement. This review should be undertaken in respect of the problems outlined in the recommendations. Secondly, the review of the highlighted provisions ought to be dealt with by the unified effort of both developing and developed countries as well as other relevant stakeholders. This would ensure effective participation which is an important determinant in developing countries' market access. Lastly, in setting and implementing SPS requirements developed countries ought to choose the least trade restrictive measures without necessarily compromising legitimate SPS measures objectives.

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