

**AN ASSESSMENT OF THE APPLICATION OF THE SANITARY AND
PHYTOSANITARY AGREEMENT OF THE WTO AND ITS IMPACT ON
INTERNATIONAL TRADE: A SUB-SAHARA AFRICAN PERSPECTIVE.**

BY

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DECLARATION

I MUHSIN SERWADDA, declare that “*An assessment of the Application of the Sanitary and Phytosanitary Agreement of the WTO and its impact on International Trade: A Sub-Saharan African Perspective.*”, is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Dated

Signed



DEDICATION

To my brother, Dr Rashid Kalema and his wife, Mrs. Rashida Kalema, for their financial as well as constant moral support.

and

to my mother, Hajat Nuur Serwadda, for the person i am.



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LIST OF ACRONYMS

ACWL-- Advisory Centre on WTO Law

AGOA—African Growth and Opportunity Act

CAC—Codex Alimentarius Commission

DSU—Understanding on dispute settlement Mechanism

EAC- East African Countries

EC—European Communities

EU- European Union

EU-ACP—European Union- African, Caribbean & Pacific Countries

FMD—Foot and Mouth Disease

GATT – General Agreement on Trade and Tariffs

HACCP—Hazard Analysis Control Centre Points

IMF—International Monetary Fund

IPPC—International Plant Protection Convention

MRL—Maximum Residual Levels (MRL)

MPC—Maximum Permissible Concentrations

LDC—Least Developed Countries

SADC—Southern African Development Committee

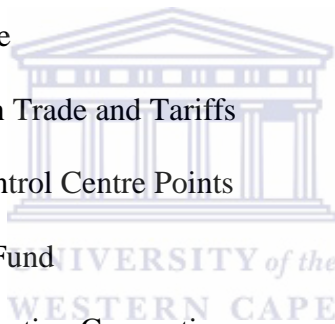
SDT—Special and Differential Treatment

SPS Agreement –Agreement on the application of sanitary and phytosanitary measures

SPS Measures –Sanitary and Phytosanitary Measures

SPS Standards –Sanitary and Phytosanitary Standards

SSA—Sub Sahara Africa



TBT Agreement – Technical Barriers to Trade Agreement

UNCTAD-United Nations Conference on Trade and Development

UNDP-United Nations Development Program

UNIDO – United Nations International Development Agency

USA—United States of America

WB-World Bank

WTO - World Trade Organization

&- And



INTRODUCTION AND PROBLEM STATEMENT

1.0 INTRODUCTION AND PROBLEM STATEMENT

Many of the development gains arising from international trade depend on the ability of developing countries to respond to existing as well as new opportunities in foreign markets. This ability is however, adversely affected by market-access related issues in developed countries and difficulties in meeting market entry conditions set in the importing countries.

For many developing countries, integration into the world economy means being able to meet those market entry conditions such as the sanitary and phytosanitary (SPS) standards and creating the necessary conditions for competitiveness and development. The inability to do so which is frequently the case implies that these conditions often become entry barriers with protectionist effects. Some of the SPS standards are difficult to overcome even for the European Union and the United States in each other's markets. Thus the difficulty of market entry barriers for developing countries can only be multiplied given the latter's less capacity and sophistication as regards the scientific and technological development among other factors.¹

In light of this is the Sanitary and Phytosanitary (SPS) Agreement,² which came into effect on the same date as the WTO.³ The SPS Agreement's main aim is to maintain the

¹ UNCTAD, (2003) "Market Access, Market competitiveness", Available at http://www.unctad.org/en/docs/cid65_en.pdf (accessed on 20 April 2006).

² Agreement on the Application of the Sanitary and Phytosanitary Measures, GATT Doc.TN/FA-AIA-4, adopted 15 December 1993, in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, adopted on the 15 December 1993, 33 I.L.M9 (1994).

sovereign right of any government or country to produce the level of health protection it deems appropriate while at the same time ensure that these sovereign rights are not abused or misused for protectionist purposes⁴ and not to result into unnecessary barriers to international trade.⁵

The SPS Agreement allows countries to set their own SPS standards which have to be scientifically justifiable.⁶ The SPS measures should only be applied to the extent necessary to protect human, animal and plant life or health. They should also not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.⁷

By way of harmonisation of the SPS standards, member states are encouraged to use international standards, guidelines and recommendations where they exist.⁸ The recognised international organisations are the Codex Alimentarius Commission (CAC), the International Office of Epizootics (IOE) for animal health and zoonoses and the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention.⁹

However, members may use measures which result in higher standards if there is scientific justification.¹⁰ They can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, and not arbitrary.¹¹ But at the same time, in case need arises, for example, where there is an outbreak of a dangerous

³ www.wto.org (Accessed on 20 April 2006) The SPS Agreement was one of the several Trade Agreements signed by the then GATT members at MARRAKESH on the 15th April 1994 in order to give effect to the formation of the WTO which came into effect on the 1st January 2006.

⁴ Oyejide, A T Ogunkola, EO & Bankole, S.A (2000) “Quantifying the trade impact of sanitary and phytosanitary standards: What is known is issues of importance to the Sub-Saharan Africa” University of Ibadan, 3.

⁵ SPS Agreement, Article 2.3.

⁶ SPS Agreement, Article 2.2.

⁷ SPS Agreement, Article 2.3.

⁸ Jackson, J.H., & Sykes, A., (Eds.) (1997) *Implementing the Uruguay Round*, Clarendon Press, Oxford Univeristy Press,10.

⁹ SPS Agreement, Item 3 of Annex A.

¹⁰ SPS Agreement, Article 3.3.

¹¹ The WTO Secretariat, “Understanding the WTO”, 3rd Ed, September 2003, p.32 available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (Accessed on 20 April 2006).

disease like the Avian Influenza (Bird flu) or pests, a country is allowed to apply a provisional precautionary principle to deal with scientific uncertainty.¹²

The agreement still allows countries to use different standards and different methods of inspecting products.¹³ Where an exporting country can demonstrate that the measures it applies to its exports achieve the same level of health protection as in the importing country, then the importing country is expected to accept the exporting country's standards and methods.¹⁴

Much as the sanitary standards arising from the SPS Agreement can facilitate trade by clearly defining product characteristics, and improving compatibility and usability,¹⁵ as well as advancing domestic social goals like the public health by establishing minimum standards or prescribing safety requirements, they are, however, sometimes used to hide protectionist policies.¹⁶

Whereas developing countries continue to point 'suspicious fingers' toward developed ones, that the latter are using SPS measures as a protectionist tool, it is important to find out whether the developing countries are not the ones failing on their part to fulfil the minimum required standards due to lack of technological advancement and skill among a combination of other factors.

1.1 OBJECTIVES OF THE RESEARCH

- a) To study some of the forms of recognised health safety measures established under the SPS Agreement.
- b) To fully understand the input of the SPS Agreement as regards international trade.

¹² SPS Agreement, Article 5.7. However, the precautionary principle has not yet crystallised into a recognised principle of public international law, though, applied in environmental law.

¹³ The WTO Secretariat, "Understanding the WTO", 3rd Edition September 2003, p.32.

¹⁴ SPS Agreement, Article 4.

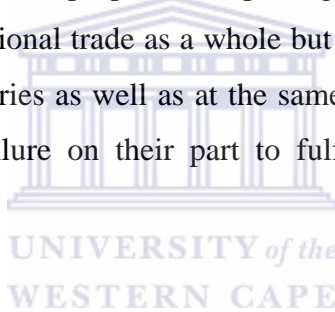
¹⁵ SPS and TBT Summary, University of Harvard, available at <http://www.cid.harvard.edu/cidtrade/issues/spstbt.html> (accessed on the 15th on April 2006)

¹⁶ Michalopoulos, C (2001) "Developing Countries in the WTO" Hampshire: Palgrave, 112.

- c) To explore the role of the various organisations such as the Codex Alimentarius Commission (CAC), International Office of Epizootics (IOE) and the International Plant Protection Convention (IPPC) in the implementation of the SPS standards.
- d) To find out how the application of the SPS standards has affected international trade more particularly in the Sub-Saharan African Countries' perspective.
- e) To find out whether it is not the Developing Countries' failure to meet the minimum safety standards as well as being in compliance thereof.

1.2 SIGNIFICANCE OF THE STUDY

This study shall serve mainly a dual purpose of exploring the impact of the application of the SPS Agreement on international trade as a whole but in more particular in relation to the Sub-Saharan African countries as well as at the same time find out whether it is not the Developing Countries' failure on their part to fulfil the minimum required SPS standards.



1.3 METHODOLOGY

This study shall basically be a literature with emphasis on an analysis of the relevant available literature on the impact of the SPS Agreement and measures on international trade. The primary sources shall include domestic legislations of selected SSA countries, International instruments, declarations, and WTO disputes regarding the SPS Agreement as well as textbooks on the subject matter. On the secondary sources, reference shall be taken from various background papers, books and scholarly articles as well as Internet websites for up-to-date information.

1.4 SCOPE OF THE STUDY

A lot of work has been done regarding the SPS Agreement and its impact on international trade, though not so conclusive. This study however, is going to deal specifically with an assessment of the impact of the SPS Agreement to the SSA countries, by analysing the balance between protection of human, animal and plant life or health on the one hand, and promotion of international trade in this region.

1.6 CHAPTER OVERVIEW

The mini-thesis shall be divided into five main chapters, chapter one being the introduction (the proposal) containing the statement problem, objectives and methodology of the study. Then chapter two dealing with the evolution and development of the SPS Agreement and a brief overview of the SPS Agreement, then chapter three shall cover the application of the provisions of the SPS Agreement and the WTO Dispute Settlements about the SPS, chapter four assessing the effect of the SPS Agreement on international trade as regards the Sub-Saharan African countries and lastly recommendations and conclusions shall follow thereafter.

THE DEVELOPMENT AND AN OVERVIEW OF THE SPS AGREEMENT

2.0 INTRODUCTION

The SPS Agreement provides the WTO member countries with a ‘qualified’ right to apply measures necessary to protect human, animal and plant life or health. The sanitary measures are the ones that deal with the protection of human and animal health and life, while phytosanitary measures are aimed at the protection of plant life and health.¹⁷ However the SPS Agreement does not establish any particular sanitary or phytosanitary measure *per se*, but, it just establishes a number of requirements and procedures to ensure that a sanitary or phytosanitary measure is in fact intended to protect against the risk asserted, rather than to serve as a barrier to trade.¹⁸ The SPS Agreement recognizes that countries have the right to maintain SPS measures for the protection of their population and the agricultural sector. However, it requires them to base their SPS measures on scientific principles¹⁹ and not to use them as disguised restrictions to international trade.²⁰

In order to achieve its objective, the SPS Agreement encourages members to use international standards, guidelines and recommendations where they exist.²¹ The international standards envisaged are those that are set by the international organisations such as the Codex Alimentarius Commission (CAC), the International Office of Epizootics (IOE) and the Organisations established under the International Plant

¹⁷ Bhala, R. (2 Ed, 2000) *International Trade Law: Theory and Practice*, Lexis Publishing Limited, New York 1665

¹⁸ Ibid.

¹⁹ SPS Agreement, Article 2.2.

²⁰ SPS Agreement, Article 5.5.

²¹ Das, BL (1999) *The World Trade Organisation: A guide to the new Framework for International Trade*, Zed Books, 133.

Protection Convention.²² Nevertheless, members may adopt SPS measures which result in higher levels of health protection or measures for health concerns for which international standards do not exist provided that they are scientifically justifiable.²³ Science may, however, play an important role in the determination of a particular SPS measure, but economic and political issues determine when, how and where to apply²⁴ them.

2.1 Application of the SPS Agreement: Is it an agricultural agreement?

The SPS Agreement covers product standards, which apply equally to domestic and imported products, and health-related import restrictions²⁵ and it is not limited only to risks posed by agricultural products, but also extends to all measures regarding the protection of human, animal and plant health and/or life.²⁶ Thus it could be argued contrary to the general perception, that the SPS Agreement only covers agricultural products. It could be that most of the risks to human, animal and plant life relate to agricultural products, but it is not absolutely correct that the SPS Agreement only covers the agricultural sector. This has been illustrated by the Panel decision in the EC- Bio-Tech case,²⁷ that the SPS Agreement has a broad scope. For example for as long as a measure is aimed at the protection of human life and health, then the SPS Agreement would automatically apply irrespective of other measures. In that case, the EU had claimed that its measures were concerned with the protection of the environment and thus the SPS Agreement could not apply.

²² Jackson, H.J., & Sykes, A (1997) *Implementing the Uruguay Round* (Eds.), Clarendon Press, Oxford, 10. Item 3 Annex A of the SPS Agreement also provides for the three organisations as the organisations upon whose standards, member states have to base their SPS standards. Any measure which is in conformity with the standards set by those organisations is considered an internationally recognised standard

²³ Article 3.3 of the SPS Agreement is to the effect that as long as a country can scientifically justify a measure, it can go ahead to maintain a measure which is higher than what is set by an international organisation.

²⁴ Roberts, D (1998) "The Preliminary Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations", *Journal of International Economic Law*, 378. As shall be discussed later in chapter 3, economic or political considerations can only be referred to during determination of risk to animals and plants and not for human's life or health.

²⁵ Schultz, J. "The GATT/WTO Committee on Trade and the Environment: Toward Environmental Reform" *The American Journal of International Law*, p. 551.

²⁶ Article 1.1 of the SPS Agreement provides that the SPS agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.

²⁷ European Communities—Measures Affecting the Approval and Marketing of Biotech Products, WT/DS.291.292.293/R.

In order to fully understand the application of the SPS Agreement, it is imperative to first go through the situation before the SPS Agreement came into effect.

2.2 Situation before the SPS Agreement

Initially, the multilateral disciplines²⁸ for the protection of human, animal and plant life or health were bestowed in Article XX (b) of the General Agreement on Trade and Tariffs (GATT) 1947.²⁹ It provided that a member state may apply necessary measures to protect human, animal or plant health or life if such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or as a disguised restriction on international trade.

On the other hand, GATT member states used other GATT trade rules to facilitate trade. For example, Article 1 of the GATT, the most favoured nation clause (MFN principle) required non-discriminatory treatment of imported products from different foreign suppliers³⁰ and Article III required that such products be treated no less favourably than similar domestically produced goods, with respect to any regulations.

It should, however, be noted that much as the MFN and National Treatment principles are applicable to all member countries, the provisions of Article XX (b) of the GATT 1947, was and is still an exception to the said trading principles as long as countries could justifiably meet the conditions set down in its *chapeau*.³¹ Also, the most favoured nation principle does not allow an importing member to discriminate against member states' like-products.

²⁸ Multilateral Agreements refer to agreements that are applicable to the entire WTO system. As long as a country becomes a member of WTO, then such a multilateral agreement becomes applicable automatically. Reference should be made to footnote 38 for the definition of plurilateral agreements.

²⁹ Das, BL (1999) *The World Trade Organisation: A guide to the new Framework for International Trade*, Zed Books, 131

³⁰ Horn, H & Petros C. Mavroids (2001) 17 "Economic and Legal Aspects of the Most Favoured Nation Clause" *The European Journal of Political Economy*, 233.

³¹ The Chapeau to Article, XX of the GATT provides that, "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures".

Having discussed the situation before the SPS agreement, it is significant for the purpose of this discussion to trace the history and development of the SPS Agreement in order to understand the role of the SPS measures in international trade.

2.2.1 Development of the SPS Agreement

The broad scope accorded to sanitary measures under Article XX was necessary to maintain public support for the GATT as a system and for the various member countries. No democratic government could properly disregard policies necessary to protect its citizens' health and that of its agricultural and animal production sectors.³² However, difficulty arose as to how countries could ensure that same or similar standards of health and sanitary protection were applied at each other's borders. There was nothing in Article XX that created a standard definition of the word "necessary" as expressed, in Article XX (b).³³ This caused some tension among GATT members and alerted them that something needed to be done to harmonise the health standards.

2.2.2 Threat of Non-Tariff Barriers

Following GATT's successful reduction of tariffs as barriers to international trade, many countries feared that the use of one or another of the non-tariff barriers would obviously circumvent those beneficial results.³⁴ Thus later on, members recognised during the Uruguay Round that as trade barriers in the form of tariffs were reduced, domestic agricultural lobbies as well as some governments would resort to non-tariff barriers such as the sanitary and phytosanitary measures³⁵ to keep food and agricultural products out of their markets.

³² Thomson, A P (2002) 33 "Salmon and Compliance Issues Surrounding the SPS Agreement, Sovereign Acceptance and Measure of Adaptation", *Law and Policy in International Business*, p.8

³³ Desta, GM (2002) *The Law of Trade in Agricultural Products: From GATT 1949 to the WTO Agreement on agriculture*, Kluwer Law International, p.17.

³⁴ Ibid.

³⁵ Croome, J (1999) *Guide to the Uruguay Round Agreements*, Kluwer Law International, 62

The problem of non-tariff barriers was the most crucial challenge for the multilateral trading system since the Kennedy Round³⁶ (1964-1967) as it was later observed in 1970 that;

“If the only thing at stake were high tariffs, one’s judgment could be more generous...unfortunately for the prestige of the GATT, however, the most important restrictions on international trade in temperate agricultural commodities are non-tariff barriers, and a large proportion of these are maintained in blatant violation of the General Agreement. The continued violation of the terms of the General Agreement by substantial number of contracting parties has become such a way of life that little embarrassment seems to be felt by national representatives and no effort is made to suggest dates on which violations might be terminated.”³⁷

2.2.3 The Tokyo Round (1973-1979)

During the Tokyo Round there was a major breakthrough in the field of non-tariff barriers. A number of trade agreements were concluded. Most of them were plurilateral,³⁸ which later on became multilateral agreements after the WTO’s coming into effect. Such agreements included subsidies and countervailing measures, technical barriers to trade (the standards code of 1979), import licensing procedures, government procurement, and customs valuation.³⁹ However the area of sanitary and health standards was left out of the agenda, mainly because on the one hand, it was perceived to be covered under the standards code of 1979 which later on became the Agreement on Technical Barriers to Trade (TBT Agreement).⁴⁰ Although this agreement was not developed primarily for the purpose of regulating sanitary and phytosanitary measures, it covered technical

³⁶ The Kennedy Round was in the aftermath of the assassination of the American President, John F. Kennedy. It went on between 1964-1967, but it was more focused on the elimination of tariff barriers to trade.

³⁷ Desta, GM (2002) *The Law of Trade in Agricultural Products: From GATT 1949 to the WTO Agreement on agriculture*, Kluwer Law International, p.22.

³⁸ Plurilateral Agreements refer to those agreements which are of minority interest. Only few members are party to such agreements. Examples include, the agreements on trade in civil aircraft and government procurement. The opposite of plurilateral is multilateral, see an explanation in footnote 28.

³⁹ Desta, GM (2002) *The Law of Trade in Agricultural Products: From GATT 1949 to the WTO Agreement on agriculture*, Kluwer Law International, p.22.

⁴⁰ The TBT Agreement was initially a plurilateral agreement known as the Standards Code but after the WTO coming into effect, it became a multilateral agreement.

requirements resulting from food safety and animal and plant health measures, including pesticide residue limits, inspection requirements and labelling.⁴¹ As such, countries continued to rely on the ambiguous provisions of Article XX (b) of the GATT as well as the TBT agreement for the protection of life and health.

2.2.4 The Uruguay Round (UR)

Before the conclusion of the UR, rules governing the SPS measures had not yet been elaborated in a multilateral agreement,⁴² but they were covered by the GATT Article XX (b). Thus at the time the Uruguay Round commenced, there was a general consensus on part of the negotiating countries that this was the appropriate time for reform of international agricultural trade. This sentiment was reiterated in the Punta del Este Declaration, which launched the U R in September 1986, which called for increased disciplines in three areas of the agricultural sector;

- *Market access;*
- *Direct and indirect subsidies; and*
- *Sanitary and phytosanitary measures.*⁴³

The text of the Punta Del Este Ministerial Declaration, within the context of agriculture, stated:

“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: minimizing the adverse effects that *sanitary and phytosanitary regulations* and barriers can have on trade in agriculture, taking into account the relevant international agreements”.⁴⁴ [Emphasis added]

⁴¹ WTO Secretariat (1998) “Understanding the WTO Agreement on Sanitary and Phytosanitary Measures” Available at http://www.wto.org/English/tratop_e/sps_e/spsund_e.htm (Accessed 20 May 2006).

⁴² Bhala, R. (2Ed, 2000) *International Trade Law: Theory and Practice*, Lexis Publishing Limited, 1665.

⁴³ Griffin, R. (1999) “Multilateral Trade Negotiations on Agriculture” A Resource Manual, FAO Corporate Document Repository. Available at <http://www.fao.org/docrep/003/x7354e/x7354e01.htm> (accessed 1 July 2006).

⁴⁴ Griffin, R., (1999) “Multilateral Trade Negotiations on Agriculture” A Resource Manual, FAO Corporate Document Repository. Available at <http://www.fao.org/docrep/003/x7354e/x7354e01.htm> (Accessed on 1 of July 2006).

It suffices to point out at this stage that the SPS measures at the time were discussed as a branch of the agricultural sector. This is clearly illustrated from the language of the negotiators at the commencement of the UR as well as during the entire negotiations as they were unfolding.

2.2.5 SPS Negotiations

The SPS negotiations initially began as an attempt to elaborate on the provisions of Article XX (b) of the GATT⁴⁵ and the TBT agreement. 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.⁴⁶ Argentina, Australia, Canada, the EC, Japan, New Zealand, the Nordic Countries and the United States led the SPS negotiations.

Zarrilli summarised the positions of different countries at the start of the Uruguay Round negotiations⁴⁷ as follows:

- Firstly the United States and the European Communities (EC) were proposing broad harmonization efforts, based upon the expertise of international organizations.
- Second, the EC was calling for all standards to be based on scientific evidence.
- Thirdly, the Cairns Group⁴⁸ endorsed the broad recommendations toward harmonization proposed by the EC and the United States. However, regarding the determination of what would be an acceptable level of sanitary and phytosanitary risk, it suggested that the burden of justification of SPS measures should be placed upon the importing country.

⁴⁵ Bhala, R (2nd Ed, 2000) *International Trade Law: Theory and Practice*, Lexis Publishing Limited, 1666

⁴⁶ Saqib, M., (2005) "Sanitary and Phytosanitary Measures in South Asia", *South Asian Yearbook of Trade and Development*", 293.

⁴⁷ Zarrilli, S (1999) "The Agreement on the Application of the Sanitary and Phytosanitary measures: Issues for Developing Countries", p.1 Available at <http://www.southcentre.org/publications/snp/snp-04.htm> (accessed 15 August 2006).

⁴⁸ At the time of the UR negotiations was comprised of Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay. The composition of the Group has changed meanwhile, since South Africa has joined while Hungary left.

- Japan supported harmonization efforts based upon the work of international organizations; the improvement of notification and consultation procedures and of the dispute settlement mechanism; and special allowances for developing countries.⁴⁹
- Some other countries such as Japan supported the idea that international standardization bodies should develop guidelines rather than standards, thus providing member states with more flexibility in drafting their own SPS regulations. This is now reflected in Article 3.3 of the Agreement that allows countries to deviate from the internationally recognised grounds as long as the standards they set are scientifically justifiable.
- But as for the Developing Countries, they strongly advocated for the removal of sanitary and phytosanitary measures that acted as non-tariff barriers to trade by supporting international harmonization of SPS measures to prevent developed countries from imposing arbitrarily strict standards.⁵⁰

The history in the negotiating positions is crucial as is reflected today as to where each country falls with regard to the SPS measures. For example, the EU being stricter and Japan more liberal in its application of the SPS measures. However, for most of the developing countries, have not yet shifted from the fact that they want the measures to be extremely lenient. This is mainly because of their lack of resources to meet some of the stringent measures set by developed countries, a factor which denies SSA the ability to export to developed countries' markets.

2.2.6 The Mid-term review of the UR.

In December 1988, during the Mid-Term Review of the UR, it was agreed that the priorities in the area of SPS were; international harmonization of SPS measures, development of an effective notification process for national regulations; improvement of

⁴⁹ Zarrilli, S (1999) "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures: Issues for Developing Countries." Trade Related Agenda, Development & Equity, (T.R.A.D.E), South Centre, p.1 Available at <http://www.biosecurity.govt.nz/sps/resources/international/dc-issues.pdf> (Accessed on 10 June 2006).

⁵⁰ Ibid.

the dispute settlement process; and provision of the necessary input of scientific expertise and judgement, relying on relevant international organizations.⁵¹

2.2.7 The Working Group on Sanitary and Phytosanitary measures

In 1988, the Working Group on Sanitary and Phytosanitary Regulations was established which later on produced a draft text in November 1990.⁵² Both the Mid- Term review and Working group findings were centred on the principles of the GATT, like the Most Favoured Nation principle, National treatment and transparency.⁵³ Thus the SPS Agreement is based on the same principles, as all other agreements under the GATT, and should be interpreted from that context.

2.2.8 The Dunkel Report: A break through?

Due to the failure of the UR to meet its deadline, the Director General of the GATT in December 1991 ordered for the making of the "Dunkel Draft". The draft included *inter alia* proposals on sanitary and phytosanitary issues, which closely followed the draft text produced by the Working Group in November 1990, but it provided for more stringent national regulations and excluding economic considerations. The final text of the Agreement on the SPS Measures that was approved at the end of the Uruguay Round was largely based on the Dunkel text.⁵⁴ But at the same time it incorporates some of the international trade principles found in the other WTO agreements. Thus the need to differentiate the SPS Agreement from other GATT Agreements.

⁵¹ Zarrilli, S (1999) "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures: Issues for Developing Countries." Trade Related Agenda, Development & Equity, (T.R.A.D.E), South Centre, p.4 Available at <http://www.biosecurity.govt.nz/sps/resources/international/dc-issues.pdf> (Accessed on 10 June 2006).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Zarrilli, S (1999) "The Agreement on the Application of the Sanitary and Phytosanitary measures: Issues for Developing Countries", p.1 Available at <http://www.southcentre.org/publications/snp/snp-04.htm> (Accessed 15 August 2006).

2.3 Relation of the SPS Agreement with other WTO Agreements

Before going into details of the SPS Agreement, a brief comparison of the agreement to other WTO agreements is necessary. Among the agreements that relate to the SPS Agreement include; the Agreement on Technical Barriers to Trade, General Agreement on Trade and Tariffs, and the Agreement on Agriculture.

2.3.1 The SPS and Technical Barriers to Trade (TBT) Agreements

The jurisdictional delineation between the SPS and Technical Barriers to Trade (TBT) Agreements is often obscure.⁵⁵ Although the SPS Agreement and the TBT are almost similar in content, they differ in scope. The SPS Agreement applies to measures the purpose of which are to protect human, animal and plant life and health⁵⁶ while the TBT Agreement covers all regulations and voluntary standards, and the procedures to ensure that standards are met, save for when they are SPS measures.⁵⁷

The provisions of the TBT Agreement compared to the SPS Agreement are less strict⁵⁸ because member countries can decide that international standards are inappropriate for a number of other reasons, which are not found in the SPS Agreement, such as national security.⁵⁹ The determination of which WTO Agreement covers a measure is of particular importance, as it shall be shown during a discussion in chapter three.

In addition, in order to determine which of the two agreements applies to a measure, it is important to look at the exclusion articles of both Agreements. Article 1.4 of the SPS Agreement provides that nothing in the agreement shall affect the rights of members under the TBT Agreement with regard to measures, which fall within the scope of the TBT Agreement. Yet more clearly, article 1.5 of the TBT Agreement provides that the provisions of the TBT Agreement do not apply to Sanitary and Phytosanitary measures as

⁵⁵ Ahn, D, (2002) 8,3 “A comparative Analysis of the SPS Agreements”, *International Trade Law and Regulation*, 85.

⁵⁶ Art. 1.1 SPS Agreement.

⁵⁷ Art. 1.5 of the TBT Agreement.

⁵⁸ UNCTAD, Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p. 6

⁵⁹ Anderson, K & Nielsen, C.P., “GMOs, the SPS Agreement and the WTO: The Economics of Quarantine and SPS Agreement” p. 312.

defined in the SPS Agreement. However, it should be noted that the SPS and TBT Agreements are mutually exclusive, in that, they cannot both apply to the same measure.⁶⁰

In addition, there are other major differences between the SPS & TBT Agreements. The TBT Agreement requires that product regulations be applied on an MFN basis, while the SPS agreement permits members to impose different sanitary and phytosanitary requirements on food, animal or plant products sourced from different countries, provided that they 'do not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail'.⁶¹ The rationale for this is that differences in climate, pests or diseases and food safety conditions are considered.

The SPS Agreement introduces the precautionary principle which permits member countries to adopt SPS measures on a provisional basis in cases where relevant scientific evidence is insufficient'.⁶² This principle takes into account available information' that a member country may have or which other members or the relevant international organizations may have. Since there is the risk of irreversible damage due to the spread of pests and diseases in the case of trade in animals, plants and their products, the SPS Agreement incorporates this precautionary principle.⁶³

However, certain important similarities exist between the SPS and TBT Agreements among which being; they both have the same basic rights of non-discrimination and similar requirements for the advance of notification of proposed measures and creation of information offices known as the enquiry points. To conclude, the SPS Agreement was

⁶⁰ Course on dispute settlement, 3.9 SPS measures UNCTAD/EDM/Misc.232/Add.13, p.6.

⁶¹ Jha V (2005) "Environmental Regulation and Food Safety: Studies of Protection and Protectionism" International Development Research Centre, Edward Elgar Publishing Ltd available at <http://www.idrc.ca/openebooks/185-X> (Accessed on 16 August 2006).

⁶² SPS Agreement, Article 5.7.

⁶³ Jha V (2005) "Environmental Regulation and Food Safety: Studies of Protection and Protectionism" International Development Research Centre, Edward Elgar Publishing Ltd available at <http://www.idrc.ca/openebooks/185-X> (Accessed on 14 August 2006).

largely crafted on the basis of the TBT Agreement⁶⁴ that no wonder there is little difference between the two.

2.3.2 SPS Agreement and GATT 1994

The General Agreement on Tariffs and Trade (the GATT) covers all measures relating to trade in goods.⁶⁵ Thus it is a wider Agreement compared to the SPS Agreement. Under the SPS Agreement the question does not arise as to whether the measure is discriminatory or not, as long as it is scientifically justifiable. By contrast under the GATT, Article XX (b), such a measure can only be applied if it were non-discriminatory. Much as the SPS Agreement was broadly based on the provisions of Article XX (b), of the GATT it did not, however, replace the provisions of the GATT 1947 now replaced by GATT 1994, but rather the two Agreements do complement each other.⁶⁶

2.3.3 SPS Agreement and Agreement on Agriculture

The SPS Agreement complements the Agreement on Agriculture by way that the latter recognises that member states should give effect to the provisions of the SPS Agreement.⁶⁷ In addition, in the event of conflict between the Agreement on Agriculture, on the one hand, and the SPS Agreement, on the other, the agreement on agriculture prevails.⁶⁸ Article 21 of the Agreement on Agriculture states: ‘The provisions of GATT 1994 and of other multilateral trade agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.’⁶⁹

⁶⁴ Croome, J., “Guide to the Uruguay Round Agreements”, The WTO Secretariat, Kluwer Law International, 1999, p.62.

⁶⁵ Course on Dispute Settlement 3.9 SPS Measures UNCTAD/EDM/Misc.232/Add.13, P. 6.

⁶⁶ UNCTAD, Course on Dispute Settlement 3.9 SPS Measures UNCTAD/EDM/Misc.232/Add.13, P. 6.

⁶⁷ Article 14 of the Agreement on Agriculture, provides that members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.

⁶⁸ Pauwelyn, J (2003) *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 359.

⁶⁹ The multilateral trade agreements contained in Annex 1A to the WTO Treaty (Marrakesh Agreement) are those dealing with trade in goods under the WTO. They include; The SPS Agreement, TBT Agreement, Agreement on Textiles and Clothing, Agreement on Trade-Related Investment Measures, Agreement on Rules of Origin, Agreement on Safeguards among others.

2.4 Definition of an SPS measure

Not all measures aimed at public health protection are SPS measures for purposes of the SPS Agreement.⁷⁰ The scope of the SPS Agreement is limited by article 1.1,⁷¹ which states that the SPS Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. The definitions of the SPS Agreement are contained in Annex A of the SPS Agreement, and paragraph 1 of the Annex, defines SPS measures to mean; any measure applied to protect animal or plant life or health within the territory of the member from risks related to the entry, establishment or spread of pests, or diseases, disease carrying organisms or disease causing organisms.

According to the SPS Agreement, the sanitary and phytosanitary measures include all laws, decrees, regulations, requirements, and procedures related to; end products criteria, processes and production procedures, testing, inspection, certification and approval procedures, quarantine treatments (associated with animal and plant transport and materials required during their transport), statistical methods, sampling procedures, methods for risk assessment, packaging and labelling requirements directly related to food safety.⁷² From such definitions it can be concluded that to determine whether a measure is an SPS measure it is important to look at the intent of the measure.⁷³

But the definition only covers measures aimed at protecting human and animals from food-borne health risks and protecting humans, animals and plants from risks from pests or diseases thus measures not directly aimed at health protection, but rather consumer information such as labelling requirement for biologically grown vegetables, do not fall under the SPS measures.⁷⁴ This is so because if a measure is not intended to protect against one of the mentioned risks in Annex A, then such a measure cannot be a sanitary

⁷⁰ Course on dispute settlement, 3.9 SPS Measures,(2003) UNCTAD/EDM/Misc.232/Add.13, 2003, p.3.

⁷¹ WorldTradeLaw, (2006) Dispute Settlement Commentary, European Communities- Measures Affecting the Approval and Marketing of Biotech Products, p.81.

⁷² Para 1 A (d) of Annex A of the SPS Agreement.

⁷³ R, Bhala, (2nd Ed, 2000) *International Trade Law, Theory and Practice*, Lexis Publishing Limited, 1667.

⁷⁴ Course on Dispute Settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, p.4.

or phytosanitary measure. It could fall under the TBT Agreement or the other environmental protection agreements.

2.5 Application of the SPS Agreement

The SPS Agreement applies to all sanitary and phytosanitary measures which directly or indirectly affect international trade.⁷⁵ Article 1.1 of the SPS Agreement was fully illustrated in the EC-Measures concerning Meat and Meat Products (Hormones) that there are two requirements for the SPS Agreement to apply, namely that the measure in dispute is an SPS measure and directly or indirectly affect international trade.⁷⁶ Thus the SPS Agreement can only be reliably invoked when the measure is an SPS measure and only when it has an effect on international trade. The effect should be a substantial one. The SPS Agreement can not for example affect transfer of one or a few pets on a non-commercial volume of agricultural products. In such situations, countries use other agreements.

In addition, in European Communities- Measures Affecting the Approval and Marketing of Biotech Products,⁷⁷ the panel held that in the context of considering the applicability of the SPS Agreement, the Panel explained that Annex A(1) indicates that for purposes of determining whether a particular measure constitutes an SPS measure regard must be had to such elements as the purpose of the measure, its legal form, and its nature. It continued that the purpose is contained in Annex A (1)(a) to (d) referring to ‘any measure applied to’, the form element is contained in Annex A(1) (relating to laws, decrees and regulations), while the nature of the measure is also contained in the same paragraph, that is, requirements and procedures include end product criteria, processes and production methods.⁷⁸ Thus for a measure to be considered to be an SPS measure, must fall within the definition provided for Annex A, least of which, a measure is not an SPS one.

⁷⁵ SPS Agreement, Article 1.1.

⁷⁶ Panel Report, WT/DS26/R/USA, DSR 1998:III, 699N para. 8.38.

⁷⁷ WD/DS291.292.293/R.

⁷⁸ WD/DS291.292.293/R, para. 7.148-149

2.6 Overview of the provisions of the SPS Agreement of particular interest to SSA.

This section seeks to provide an overview of some of the provision of the SPS Agreement of particular relevance to the SSA by explaining the meaning of each article and its implications for the developing countries especially the SSA ones.

2.6.1 Harmonisation of SPS standards

Due to the fact that different WTO member states apply different SPS measures⁷⁹ due to variance in interests of domestic industries, consumers' tolerance, climatic and geographical conditions among other factors,⁸⁰ the SPS agreement calls for internationally set standards to serve as a benchmark for the harmonization of standards among WTO members by adopting standards developed by the standard setting bodies.⁸¹ However, this does not prohibit a country from setting standards higher than an international norm.⁸² Tougher standards may be set as long as there is scientific justification.⁸³ But this does not require a downward harmonisation to less stringent SPS measures.⁸⁴ The SPS Agreement attempts to balance the aim of increasing free trade through harmonising SPS measures and thus reducing barriers to trade caused by differing standards, with respect of the right of members to choose their own level of protection.

In EC- Hormones dispute, it was held by the Appellate Body that;

“In general terms the object and purpose of Article 3 is to promote the harmonisation of the SPS measures of members on as wide a basis as possible, while recognising and safeguarding, at the same time, the right and duty of members to protect the life and health of their people. The ultimate goal of the harmonisation of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between members from adopting or enforcing measures which are both necessary a to protect

⁷⁹ Bhala, R (2nd Ed, 2000) *International Trade Law: Theory and Practice*, Lexis Publishing Limited, 1669

⁸⁰ Course on dispute settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, 2003, P.16 It is also provided in article 3.3 of the SPS Agreement.

⁸¹ Jackson, HJ & Sykes, A (Eds.) (1997) *Implementing the Uruguay Round*, Clarendon Press, Oxford, 10

⁸² Art. 3.2 SPS Agreement

⁸³ SPS Agreement, Article 3.3

⁸⁴ Bhala, R (2nd Ed, 2000) *International Trade Law: Theory and Practice*, Lexis Publishing Limited, 1669

human life or health and based on scientific principles and without requiring them to change their appropriate level of protection...”.⁸⁵

It is important to note that article 3 lays down three methods of harmonisations, those being that members may base their SPS measures on international standards, or conform their SPS measures to international standards or deviate from the international standards under article 3.3 as long as they can scientifically justify such deviation. These three alternatives are equally available and there is no rule-exception between them as some countries were claiming that the alternative in Art 3.3 is an exception to Art. 3.1 and 3.2.⁸⁶ In EC- Hormones,⁸⁷ it was held that the right of members to establish its own level of sanitary protection under Art. 3.3 of the SPS Agreement is not an autonomous right and not an exception from a general obligation under Article 3.1⁸⁸ but rather an alternative to the others.

2.6.2 Equivalence

Harmonisation of SPS measures around international standards is desirable, but not always possible as local conditions, consumer preferences and technical capacity differ between countries. In addition, there are many areas where no international standards exist yet.⁸⁹ Thus the differences in SPS standards between different trading partners can negatively affect international trade because the consumers are lacking knowledge of which standard applies in which country or region.

Thus the SPS Agreement encourages the use of equivalence and mutual recognition agreements in applying SPS measures.⁹⁰ Article 4 of the SPS Agreement sets out the

⁸⁵ Appellate Body EC- Hormones, WT/DS48/AB/R, para. 177.

⁸⁶ The US in The EC- hormones case had argued that Art 3.1 and 3.2 are the general rule while Article 3.3 is an exception to them, which the Panel and Appellate Body did not agree with.

⁸⁷ Appellate Body, EC – Hormones, WT/DS48/AB/R.

⁸⁸ Appellate Body, EC - Hormones, WT/DS48/AB/R para 172.

⁸⁹ Course on dispute settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, 2003, p.43. Also available at http://www.unctad.org/en/docs/edmmisc232add13_en.pdf (Accessed 8 July 2006).

⁹⁰ Jensen, M.F., (2002) “Reviewing the SPS Agreement: A Developing Country Perspective”, The Royal Veterinary and Agricultural University, 8 Available at <http://www.tcd.ie/iiis/policycoherence/index.php/iiis/content/download/373/1454/file/Jensen%20SPS%20Agreement.pdf>. (Accessed on 10 August 2006).

obligations of members with regard to the recognition of equivalence.⁹¹ According to article 4.1 of the SPS Agreement, two SPS measures are said to be equivalent to one another when they are not identical but yield the same level of sanitary and phytosanitary protection.

However, difficulty arises where the developed countries are maintaining a relatively higher level of SPS standards than their developing counterparts, and then they are required to accord equivalence status to the low standards. To developed countries, equivalence operates to lower SPS standards because it is designed to facilitate trade not to raise consumer protection standards.⁹² Yet on the other hand, the DCs are concerned about developed countries implementation of equivalence, where they demand for 'sameness' rather than 'equivalence' to certify the compliance of SPS standards in the different countries.⁹³

On the contrary, I suggest that since developing countries have differing capabilities in the implementation of SPS measures, equivalence of SPS measures could go a long way towards improving market access for their food and agricultural products. This is because even the agricultural products from the developing countries where there are low levels of SPS standards, can gain access to the developed countries' markets due to equivalence of their SPS measures.

Article 4.2 of the SPS Agreement provides that member states upon request can enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures. This allows countries with divergent SPS measures to enter into negotiations aimed towards

⁹¹ Article 4.1 of the SPS Agreement provides that member states shall accept the sanitary or phytosanitary measures of other members as equivalent, even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection.

⁹² Silverglade, BA (2000) "The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?" *The Food and Drug Law Journal*, 517, 522.

⁹³ Course on dispute settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, 2003, p.44. Also available at http://www.unctad.org/en/docs/edmmisc232add13_en.pdf (Accessed on 14 July 2006).

recognising each other's measures. This may be on a bilateral or multilateral level. Again, the developing countries, more especially those in the SSA region lack the ability to negotiate in order to reach meaningful equivalence levels. This can be attributed to their lack of technical capacity to do so.

2.6.3 Adaptation to regional conditions

Article 6 of the SPS Agreement encourages members to adapt their SPS measures to the regional characteristics of their trading partners.⁹⁴ Prior to the SPS Agreement, it had been common to impose a ban on exports of a country if a particular problem exists in that country, even in case where the problem is isolated to specific regions in the country.⁹⁵ In addition prevalence of pests and diseases is not determined by national boundaries, and may differ between various regions within a country due to variation of climatic, environmental and or geographical conditions. What article 6 does is to make countries recognise pest-or disease free areas of other countries where a particular region might be infected by a disease or pests by use of objective factors⁹⁶ such as geography, ecosystems, and effectiveness of sanitary or phytosanitary controls.⁹⁷

By having an importing country adapt their SPS measures to the conditions prevailing in a region of origin of the product, may greatly improve market access possibilities.⁹⁸ Thus the opportunities for DCs especially the larger countries to access agricultural markets could be improved, as the cost of eradicating pests or diseases or keeping a region pest free can be limited by focusing on specific areas.

⁹⁴ In part, article 6.1 of the SPS Agreement provides that Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area — whether all of a country, part of a country, or all or parts of several countries — from which the product originated and to which the product is destined.

⁹⁵ Jensen, M.F., (2002) “Reviewing the SPS Agreement: A Developing Country Perspective”, The Royal Veterinary and Agricultural University, p.9 Available at <http://www.tcd.ie/iis/policycoherence/index.php/iis/content/download/373/1454/file/Jensen%20SPS%20Agreement.pdf>.

⁹⁶ Ibid.

⁹⁷ SPS Agreement, Article 6.2.

⁹⁸ Course on dispute settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, 2003, p.45 Also available at http://www.unctad.org/en/docs/edmmisc232add13_en.pdf (Accessed on 14 July 2006)

2.6.4 Transparency

The SPS Agreement emphasises the importance of transparency in the development and application of SPS measures.⁹⁹ Countries are supposed to notify any changes in their SPS measures.¹⁰⁰ The procedure is provided for under Annex B of the SPS Agreement. However, lack of transparency has remained an obstacle to international trade.¹⁰¹ This is so because SPS measures are complex and subject to change. Thus transparency and notification is key to export markets in international trade as regards SPS measures.

Under transparency and notification, countries are not only required to promptly publish new SPS measures¹⁰² but also set up enquiry points¹⁰³ to provide further information when needed. However where there is no measure and no international standard, guideline or recommendation, then a country seeking to establish such a measure has to publish a notice so as to acquaint other WTO countries with the proposal to introduce a measure,¹⁰⁴ then allow other members through the WTO secretariat¹⁰⁵ and lastly allow reasonable time (which is in most cases is 6 months)¹⁰⁶ to make comments in writing.¹⁰⁷

However in cases of an emergency or urgency, a country may introduce new or revise existing measures without delay by dispensing with the above said procedure, but in order to do so a member must immediately notify other Members, through the WTO Secretariat. But again, the SSA countries lack the ability to make any response to the notifications. As such, they end up with standards they cannot meet.

⁹⁹ SPS Agreement, Article 7.1.

¹⁰⁰ Ibid.

¹⁰¹ Course on Dispute Settlement, UNCTAD/EDM/Misc.232/Add.13, p.43.

¹⁰² Para. 1 Annex B, SPS Agreement.

¹⁰³ Para. 3 Annex B, SPS Agreement.

¹⁰⁴ Para. 5(a) Annex B, SPS Agreement.

¹⁰⁵ Para. 5(b) Annex B, SPS Agreement.

¹⁰⁶ Decision on Implementation adopted at the Doha Ministerial Conference sets the reasonable adaptation period at normally a period of not less than 6 months (WT/MIN (01)/17, dated 14th November 2001).

¹⁰⁷ Para. 5(d) Annex B, SPS Agreement.

2.6.5 Technical Assistance

The SPS Agreement in principle applies equally to both the developed as well as developing countries (DCs).¹⁰⁸ However the SPS agreement recognises that member countries have to facilitate the provisions of technical assistance, especially to DCs either bilaterally or through the appropriate international organisations.¹⁰⁹ The required technical assistance not only relates to improving DCs understanding of the rules applicable under the SPS Agreement, but crucially the acquisition of technical and scientific capacity to meet their obligations and enforce their rights under the SPS Agreement.¹¹⁰ This is done by the establishment of infrastructures such as laboratories, veterinary services, and equipments, among other things. During the Doha Decision on implementation, members were urged to provide financial assistance to LDCs to enable them to respond to SPS measures, which may negatively affect their trade.¹¹¹ But the SPS Agreement provides that longer time frames for compliance should be accorded on products of interest to DCs so as to maintain their exports.

In 2002, the World Bank and WTO established a fund to provide funding for developing countries to assist them to meet SPS standards. The World Bank pledged US\$ 300,000 and the WTO pledged to contribute from the Doha Development Trust Fund.¹¹² However, no substantial use of these funds to the SSA countries has been made.

2.6.6 Special and Differential Treatment

In preparation and application of SPS measures, members have to take into account of the special needs of DCs, in particular the Least Developed Countries,¹¹³ to which a majority of SSA countries fall. The special and differential treatment under the SPS Agreement is

¹⁰⁸ Course on Dispute Settlement, UNCTAD/EDM/Misc.232/Add.13, p.51.

¹⁰⁹ SPS Agreement, Article 9.1.

¹¹⁰ Course on Dispute Settlement, UNCTAD/EDM/Misc.232/Add.13, P.51.

¹¹¹ WT/MIN (01)/17, dated 14 November, 2001.

¹¹² WTO Press Release (2002) "The World Bank Grant kicks off Bank- WTO assistance on standards" p.314 dated 27 September 2002

¹¹³ SPS Agreement, Article, 10.1.

aimed at ensuring that the special constraints faced by DCs are recognised whenever an SPS measure is introduced.¹¹⁴ But the SPS Agreement provides that longer time frames for compliance should be accorded on products of interest to DCs so as to maintain their exports.¹¹⁵ Unfortunately as it shall be discussed in chapter four, the special and differential provisions are not mandatory, a factor has led the developed countries to defy applying them without impunity.

In setting the SPS measures, the WTO uses the international standards setting organisations, which are discussed below.

2.6.7 International Standard Setting Organisations

The WTO tackles the SPS Agreement's potential to cause distractions in international trade by harmonising the standard setting through establishment of standards setting organisations, like the; Codex Alimentarius Commission, Office of International Epizootics and the organisations set up under the International Plant Protection Convention. The WTO gives greater importance to the said international bodies.¹¹⁶ Thus a discussion of the application of the SPS Agreement cannot be concluded without referring to these important standard setting organisations.

- **The Joint FAO/WHO, Codex Alimentarius Commission**

The Codex Alimentarius Commission (CAC) was formed in 1961,¹¹⁷ as a partnership between the World Health Organisation (WHO) and the Food and Agricultural Organisation (FAO). The Codex Alimentarius, which is a collection of international food standards adopted by the Codex Alimentarius Commission, includes standards for all the principal foods: processed, semi-processed or raw.¹¹⁸ To date, the Codex Alimentarius

¹¹⁴ UNCTAD UNCTAD/EDM/Misc.232/Add.13, p.53.

¹¹⁵ SPS Agreement, Article 10.2.

¹¹⁶ Bureau, JC & Doussin, JP (1999) "Sanitary and Technical Regulations: Issues for the Trade Liberalisation in the Dairy Sector", Working Paper INRA-ESR Grignon p.2.

¹¹⁷ Understanding the Codex Alimentarius Commission, FAO Corporate Document Repository, 1999, M-83 ISBN 92-5-104248-9, p. 2 available at

¹¹⁸ Ibid

Commission includes 4,821 standards.¹¹⁹ The main purpose of the standards is to protect the health of consumers and to ensure fair practices in the food trade.¹²⁰ The CAC creates a uniform set of standards to assist in the harmonization of domestic regulation in order to facilitate international trade. Standards are specified in the areas of Food Standards for Commodities, Codes of Hygienic or Technological Practice, Limits for Pesticide Residues, Guidelines for Contaminants and Food Additives Evaluated, and Veterinary Drugs Evaluated among others.¹²¹ With the SPS Agreement, the function of the Codex in the international order changed dramatically. In the past, although the goal of the Codex ostensibly had been to encourage the unification of state food policies, the harmonization mechanism most effectively used by the Codex was informal policy convergence, utilizing the "soft" tools of persuasion and the spread of scientific information. Now, Codex standards are backed by a system of significant legal and economic incentives promoting the unification of regulatory food policy.¹²²

However, the main issues that arise are that the SSA countries are some times unable to meet the harmonised standards, and they are poorly represented in the Codex. This in turn affects their exports to the international market because they are not party to the standards set.

- **The Office of International Epizootics (OIE)**

The OIE was formed in 1924.¹²³ Its objectives and functions include the harmonization of health requirements for international trade in animals and animal products and the adoption of international standards in the field of animal health.¹²⁴ In the absence of more precise indications, standards developed by a limited number of

¹¹⁹ Zarrilli, S (1990) "Main Issues for Developing Countries in the SPS Agreement," Available at, <http://www.southcentre.org/publications/snp/snp-05.htm> (Accessed 10 August 2006)

¹²⁰ Livermore, MA (2006) "Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius." *New York University Law Review*, 767

¹²¹ Ibid

¹²² Livermore, MA (2006) "Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius." *New York University Law Review*, 767, 777.

¹²³ Zarrilli, (1999) "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures: Issues for Developing Countries." Trade Related Agenda, Development & Equity, (T.R.A.D.E), South Centre, p.1 Available at <http://www.biosecurity.govt.nz/sps/resources/international/dc-issues.pdf> (Accessed on 10 June 2006).

¹²⁴ Ibid.

countries or approved by a narrow majority of participants may get the status of international standards. 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 irrespective of the preamble of the SPS Agreement that they should be encouraged to take part in the standard setting organisations.¹²⁵

- **The International Plant Protection Convention.**

The Secretariat of the International Plant Protection Convention (IPPC) was formed in 1993.¹²⁶ The IPPC has 153 members to date the latest to join being Myanmar.¹²⁷ The IPPC is responsible for phytosanitary (Plant Protection) standard setting and the harmonization of phytosanitary measures affecting trade.¹²⁸ To date, a number of standards have been completed and 14 others are at different stages of development.¹²⁹ Just like the Codex Alimentarius Commission, the IPPC uses harmonisation as the tool for streamlining the phytosanitary measures in as far as the protection of plant life and or health is concerned. But again the participation of the developing countries especially the SSA countries is still minimal.

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2.6.8 An appraisal of the three sister organisations

The standards, guidelines and recommendations of these three international organisations, referred to as the “three sisters”, are the benchmark for meeting the requirements of the SPS Agreement. It should be pointed out as earlier was, that the SPS

¹²⁵ Article 10.4 of the SPS Agreement also provides that Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

¹²⁶ Zarrilli, S (1999) “The WTO Agreement on the Application of Sanitary and Phytosanitary Measures: Issues for Developing Countries.” Trade Related Agenda, Development & Equity, (T.R.A.D.E), South Centre, p.1 Available at <http://www.biosecurity.govt.nz/sps/resources/international/dc-issues.pdf> (Accessed on 10 June 2006).

¹²⁷ Available at, <http://www.fao.org/Legal/TREATIES/004s-e.htm> (Accessed on the 12th August 2006.) Myanmar joined on the 26th June 2006.

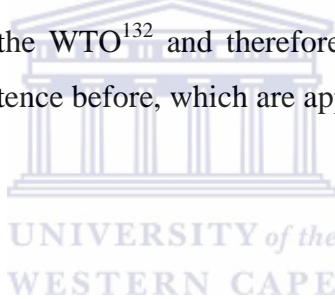
¹²⁸ International Plant Protection Convention, http://www.oie.int/eng/OIE/en_histoire.htm (Accessed on 12 August 2006).

¹²⁹ Ibid

agreement itself does not set standards or establish any particular measure, but rather provides guidelines that have to be followed in the establishment of measures.

Thus the above standard setting organisations have been influential in the international harmonisation of the SPS measures. This is because measures that conform to international standards are presumed to be in conformity with the requirements of the SPS Agreement and GATT 1994. Thus the standards set reduce the compliance costs by reducing the number of standards with which developing countries would have to comply.¹³⁰

However, these organisations are dominated by developed countries¹³¹ and they choose which areas to set up SPS standards and also there are no established standards in areas where they do not have interest. It should also be recalled that the organisations were established some time before the WTO¹³² and therefore most countries have taken up SPS measures that were in existence before, which are applicable to them. But sometimes those measures are stringent.



2.7 Conclusion

From the start of the negotiation of the SPS agreement, it has been clearly shown as to where each country falls with regard to the implementation of SPS measures. As for the EC and the US, were agitating for stricter measures, yet on the other hand, most DCs advocated and still do for the removal or downward harmonisation of the SPS measures.

The SPS Agreement sets up provisions which are aimed at the promotion of international trade specifically for DCs and SSA as a region. These range from harmonisation of SPS

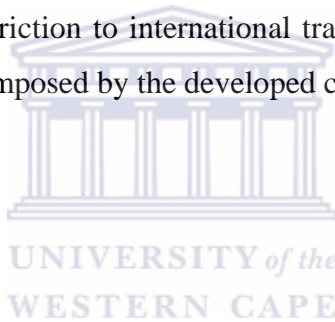
¹³⁰ Mayeda, G (2004)7 “Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries”, *Journal of International Economic Law*, Oxford University Press, p.751.

¹³¹ Ibid p.752.

¹³² The Codex Alimentarius Commission (CAC) was established in 1961, the Office of the International Epizootics (OIE) in 1924, and the International Plant Protection Convention (IPPC) in 1993. Yet the WTO and thus the SPS Agreement was only formed in 1995. Again these organisations were primarily set up to promote health standards and not trade, thus, some of the measures recognised as international standards are a little bit to stringent.

measures, recognition of equivalence agreements, adaptation to regional conditions, technical assistance, recognition of special and differential treatment of DCs, dispute resolution which puts into consideration the DCs, transparency and notification provisions

Lastly, it can be noted that the SPS Agreement aims at balancing the apparent conflict between a country's right to protect its human, animal and plant life and health but at the same time not to use such measures as a disguised barrier to international trade. This is done through the strong emphasis being put on the harmonisation of the sanitary standards by adhering to the standards set by the international standard setting bodies. For most SSA countries, however, meeting such standards has proved to be costly and at the same time, they are set too high thus denying them access to developed countries' markets. The result is that restriction to international trade both by accident and design because of the high standards imposed by the developed countries.



THE SPS AGREEMENT AND DISPUTE SETTLEMENT UNDER THE WTO

3.0 INTRODUCTION

This chapter is focusing on the various Panel and Appellate Body decisions pertaining to the interpretation of the SPS Agreement. This discussion shall not delve too much into the entire SPS Agreement as this has already been covered in chapter 2, but rather on interpretations of some of the articles which have been found to be contentious. Then an implication for SSA countries of the rulings shall be critically discussed. There have been a number WTO cases brought under the SPS Agreement, but notable among which to be referred to include but not limited to; The EC—Hormones¹³³, Australia—Salmon¹³⁴, and Japan—Agricultural products II,¹³⁵ covering the three parts of the SPS Agreement; human, animal and plant life or health respectively.

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The parties to the trade disputes have invoked only Articles 2,3,5,7, and 8 of the SPS Agreement. Thus, a significant number of deliberations have been made on these articles both by the Panel and Appellate Body. It follows that this discussion is to be based on the Panel and Appellate Body's interpretation of articles 2,3, & 5 of the SPS Agreement. Table 1, below shows the different cases and articles that have been invoked so far under the SPS Agreement:

¹³³ EC-Measures Concerning Meat and Meat Products (Hormones) (EC-Hormones) WT/DS48/ABR, DSR 1998:1

¹³⁴ Australia-Measures Affecting Importation of Salmon(Australia-Salmon), WT/DS18/AB/R (1998)

¹³⁵ Japan-Measures Affecting Agricultural Products (Japan-Agricultural Products II, WT/DS76AB/R, adopted on 19 March 1999.

Table1: SPS/WTO trade disputes

	Case Name	Case Number	Invoked Articles
1	Australia—Salmon	WT/DS18	Articles 2,3 and 5
2	EC- Hormones (US)	WT/DS26	Articles 2,3, and 5
3	EC-Hormones (Canada)	WT/DS48	Articles 2,3, and 5
4	Japan – Agricultural Products II	WT/DS76	Articles 2,5,7 and 8

Source: WTO Analytical Index: Guide to WTO Law and Practice. Vol. 1, 1st Ed, (2003) p.525

Apart from the trade disputes mentioned above, reference is going to be made to the latest EC-Biotech trade dispute.¹³⁶ However, from the onset, it should be noted that it is just a panel decision which may be overturned by the Appellate Body on appeal. But it raises a number of principles that are of significance to the SSA countries.

3.1.1 The Dispute Settlement system

The objective of this chapter is the concentration on the interpretation of the various SPS Agreement articles, it is important to cover the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), so as to facilitate an understanding how the entire dispute settlement procedure under the WTO functions

3.1.2 Dispute Settlement Procedures of particular relevance to the SPS Disputes.

When a country has allegedly violated the SPS Agreement in its application of an SPS measure, a complaining country can request the DSB for consultations with that country. Within 10 days, a member to which a request for consultations is made has to reply to the request or within 30 days enter into consultations with the other party.¹³⁷ If consultations fail to settle the matter within 60 days from the date of receipt of the request for

¹³⁶ The EC-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291.292.293/R. The Panel Report was adopted in September 2006.

¹³⁷ The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Article 4.3.

consultations, then the complaining party may request the establishment of a Panel.¹³⁸ But before a Panel is constituted, at the request of either party to the dispute, there is always the good office of the Director General of the WTO for Conciliation and Arbitration.¹³⁹ Notwithstanding the good offices provisions, when the 60 days have elapsed, if a complaining party so requests, then a Panel shall be constituted.¹⁴⁰

A request for a panel has to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.¹⁴¹ A Panel can only address those measures and legal claims sufficiently specified in the complaining party's request.¹⁴² The Appellate Body in *Australia- Salmon* held that the SPS measure at issue could only be the measure that is actually applied to the product at issue.¹⁴³ In that case, the complainant, Canada, had only referred the product at issue to be 'fresh, chilled and frozen salmon' thus only being an import ban on those items rather than being a SPS infringement relating to smoked fish. Thus it is important to define broadly the product scope of SPS claims and not to limit them only to the specific kind of product denied market access¹⁴⁴. In that case, it would have been better to refer to Salmon generally rather than the particular salmon.

3.1.3 Burden of proof

The issue of which party bears the 'burden of proof' has been very prominent in SPS disputes.¹⁴⁵ But the Appellate Body has since resolved this issue. In the *EC-Hormones*, it was held that the initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a provision of the SPS Agreement by the

¹³⁸ DSU, Article 4.7.

¹³⁹ DSU, Article 5.3.

¹⁴⁰ DSU, Article 6.1.

¹⁴¹ DSU, Article 6.2.

¹⁴² Pauwelyn, J (1999) "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes, *Journal of the International Economic Law*, Oxford University Press, 657.

¹⁴³ Appellate Body Report on *Australia- Salmon*, WT/DS18/AB/R (1998) para. 101.

¹⁴⁴ Pauwelyn, J "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes, *Journal of the International Economic Law*, Oxford University Press, footnote 94, p. 657-658.

¹⁴⁵ *Ibid*, p. 659.

Respondent. If a prima facie case is established or made, the respondent has the burden to counter or refute the inconsistency.¹⁴⁶

Further in United States- Measures Affecting Imports of Woven Wool shirts and Blouses from India,¹⁴⁷ the Appellate Body held that:

“The party who asserts a fact, whether the Claimant or the Respondent, is responsible for providing proof thereof. Also, it is a generally- accepted canon of evidence in civil law, common law and in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”¹⁴⁸

So, it would be correct for one to suggest that the burden of proof is not always constant on the defending party (Respondent) but rather on a party which alleges an affirmative.

3.1.5 Implementation of Panel and Appellate Body rulings

The Dispute Settlement Body (DSB) is responsible for surveillance of implementation of Panel and Appellate Body rulings.¹⁴⁹ The adoption of reports is automatic unless a consensus against them is found.¹⁵⁰ If a Panel finds that an (SPS) Agreement has been violated, it recommends that the member concerned immediately brings the offending measure into conformity with its WTO obligations.¹⁵¹ If it is impractical to do so, then it is granted a reasonable period of time for implementation.¹⁵² The reasonable period normally does not exceed 15 months from the date of adoption of a Panel or Appellate Body Report.¹⁵³

¹⁴⁶ Appellate Body Report, EC-Hormones, WT/DS48/ABR para. 98.

¹⁴⁷ WT/DS33/AB/R.

¹⁴⁸ WT/DS33/AB/R, para. 14.

¹⁴⁹ Davey, WJ (2005) “The WTO dispute settlement system: How have developing countries Fared?” P. 7

¹⁵⁰ Pauwelyn, J (1999) “The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes, *Journal of the International Economic Law*, Oxford University Press, 662.

¹⁵¹ DSU, Article 21.3.

¹⁵² Pauwelyn, J (1999) “The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes, *Journal of the International Economic Law*, Oxford University Press, 662.

¹⁵³ Davey, WJ (2005) “The WTO Dispute Settlement System: How Have Developed Countries Fared?” SSRN Draft, p. 7.

If a party fails to implement the request within a reasonable period, the prevailing party may request for compensation, though, compensation is only temporary. But if compensation is not forthcoming, then it may request the DSB to authorise it to suspend concessions (taking retaliatory action) against a non-complying country.

Analysing the available remedies, however, reveals that they are impracticably applied to the context of the SSA countries because of a number of reasons but notable among them is that they lack the ability to put up meaningful retaliation. However, suspension of concessions only comes as a last resort after failure of compensation.

3.2 Right to take SPS Measures

Art. 2.1 of the SPS Agreement recognises the right of sovereign governments to take SPS measures for the protection of human, animal and plant life or health, with the need to promote free trade and prevent protectionism.¹⁵⁴ This provision represents a movement away from the position under GATT, where in principle discriminatory health measures are prohibited unless they can be justified under the exception in article XX (b), thus the burden of proof rests on the imposing country that its measure is justifiable.¹⁵⁵ While the SPS agreement provides that the SPS measures in principle are allowed subject to the condition that such measure comply with the disciplines of the Agreement. Art 2.2 provides that;

“Members shall ensure that any sanitary 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 evidence, except as provided for in paragraph 7 of Article 5.”¹⁵⁶ [Emphasis added]

Thus the article lays down two basic requirements for SPS measures, namely that they should be applied only to the extent necessary to protect human, animal or plant life or health, and also they must have a basis in scientific evidence save as provided for in

¹⁵⁴ Course on dispute settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, 2003, P.11

¹⁵⁵ Ibid

¹⁵⁶ SPS Agreement, Article 2.2.

Article 5.7 This article introduces science as a cornerstone upon which SPS measures should be based.

However, the determination of what is necessary causes some difficulties because it is not clearly defined. Though applying the Appellate Body's interpretation of the word necessary in relation to article XX of GATT, it is reasonable to assume that the decision would be applicable to the definition of the word necessary in article 2.2 of the SPS Agreement. In Korea— Measures Affecting Imports of Fresh, Chilled and Frozen Beef (“Korea—Beef”),¹⁵⁷ the Appellate Body stated:

“As used in Article XX (d), the term “necessary” refers, in our view, to a range of degrees of necessity. At one end of this continuum lies “necessary” understood as “indispensable”; at the other end, is “necessary” measure is, in this continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to.”¹⁵⁸

Thus in order to demonstrate that a measure is “necessary” to protect human, animal and plant life or health therefore, a defending party would have to show that the measure is close to indispensable to a country's policy of protection of life and health. This should be the test to be applied whenever a country tries to put up sanitary and phytosanitary measures.

3.2.1 Measures to be based on scientific evidence

Article 2.2 of the SPS Agreement provides that the SPS measures should be based on scientific principles and not be maintained without sufficient scientific evidence save for as provided in Article 5.7 (dealing with situations where there is insufficient scientific evidence). This provision is the first to mention the scientific disciplines in the SPS

¹⁵⁷ Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001

¹⁵⁸ Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001, para.161.

Agreement and establishes science as a cornerstone against which SPS Measures are to be based.¹⁵⁹

3.2.2 Sufficient Scientific Evidence

The second part of Article 2.2 of the SPS Agreement is with regard to the fact that a measure is based on sufficient scientific evidence. The question would, however, be that what amounts to sufficient scientific evidence. In Japan – Agricultural Products, the Appellate Body held that sufficiency is a relational concept, requiring the existence of an adequate relationship between two elements, in this case the SPS measure and the scientific evidence which is to be determined on a case-by-case basis and depending upon the particular circumstances of the case.¹⁶⁰

As such, it suffices to suggest that the Panel has a ‘qualified’ discretion in determining whether an objective or rational relationship exists between the SPS measures and scientific evidence.¹⁶¹ This is so because the panel looks at factors such as quantity and quality of the scientific evidence and the various characteristics of the SPS measure. However, where there is a reputable scientific evidence or support for a measure, there is no need to prove sufficiency of scientific evidence, because the relationship between the SPS measure and scientific evidence is established.¹⁶²

One would however, question whether this relationship should have a pivotal role in determining whether there is sufficient scientific evidence or not. This is in relation to the fact that countries sometimes determine sufficiency of scientific evidence abruptly because of an emerging risky disease like the Avian Influenza or the Mad Cow Disease. It suffices to suggest that in such a situation the relationship would be easy to establish because of the fact that the risk poses more danger and would be out of hand if not controlled as soon as possible, thus it would be more reasonable for such countries to prevent dangerous outbreaks by way of taking ‘safeguard’ measures. Such provisional

¹⁵⁹ Ibid, p.12.

¹⁶⁰ Appellate Body Report, Japan- Agricultural Products II WT/DS245/AB/R, Para.73.

¹⁶¹ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p.13.

¹⁶² Ibid.

measures are, however, provided for under Article 5.7 of the SPS Agreement (which shall be discussed later).

3.2.3 No arbitrary or unjustifiable discrimination or disguised restriction on trade

Article 2.3 SPS Agreement provides that in applying SPS measures, countries should not arbitrarily or unjustifiably discriminate against or between countries where similar or same effects appear, or prevail including their own territory and that of other countries, and SPS measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

The Compliance Panel in the Australia- Salmon,¹⁶³ identified 3 elements, which have to be cumulative in nature, for a measure to qualify under Article 2.3 of the SPS Agreement.

Those being:

- The measure discriminates between the territories of members other than the member imposing the measure or between the territory of the member imposing the measure and that of another.
- The discrimination is arbitrary or unjustifiable, and
- Identical or similar conditions prevail in the territory of the member compared.¹⁶⁴

This principle in effect reflects the provisions of the Article I of the GATT (The MFN principle) and Article III (on National Treatment) as well the chapeau of Article XX of the GATT. The kind of discrimination envisaged in Article 2.3 of the SPS Agreement, however, aims not only at like products but across different products as well. This is because different products may pose the same or similar health risks and should therefore be treated in the same way.¹⁶⁵ For example, different animals may pose the same risk of avian influenza

¹⁶³ WTO Secretariat, (1st Ed, 2003) *WTO Analytical Index: Guide to WTO Law & Practice*, Cambridge University Press. P.482

¹⁶⁴ Compliance Panel Report, Australia- Salmon, para. 7.111

¹⁶⁵ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p.15

Thus discrimination would only be justifiable to be along all products which are associated with the risk, as long as the discrimination is backed up with sufficient scientific evidence, rather than a single product because risk may be posed by one or another similar product. But still, the said discrimination does not have to be unjustifiable, as this would be construed to mean that it is a disguised restriction on international trade.

That being said, it suffices, to note that the provisions of Article 2.3 can only apply if the three above listed grounds are all in play because they are cumulative in nature. For example, even if there is discrimination but if such discrimination is not justifiable, or the conditions differ, then Article 2.3 cannot apply. This provision is further reiterated in the provisions of Article 5.5 of the SPS Agreement which should be read in context. Article shall be discussed later.

3.3 Harmonisation of SPS measures

Article 3.1 of the SPS Agreement provides that members are to harmonize sanitary and phytosanitary measures on as wide a basis as possible, based on established international standards. In EC-Hormones, the US argued that 'based on' should be interpreted as 'conform to'. Thus it would imply that countries are obliged to use measures resulting in the same level of protection as the international standards.¹⁶⁶

The Appellate Body was of a different view that countries are allowed to use SPS measures that result in levels of protection that differ from those achieved by international standards while still respecting the harmonisation requirement of the SPS Agreement. According to Jensen (2002), the interpretation implies that the standards issued by international organisations are not binding norms for SPS measures.¹⁶⁷ This interpretation has been held to be the correct one by the Appellate Body, in the preceding cases of Australia-Salmon and Japan-Agricultural Products II.

¹⁶⁶ Jensen, MF (2002) "Reviewing the SPS Agreement: A Developing Country Perspective", p.14

¹⁶⁷ Ibid. p.15.

However on a closer reading of Article 3.1 of the SPS Agreement, it can be said that a member country can be made to ratchet up its SPS measure if it is below the recognised international standard¹⁶⁸ to the minimum acceptable measures. Thus I suggest that the standards setting organisations should not only be looked at as the only source of scientific proof. Otherwise, this would render the principle of risk assessment and taking a provisional measure (in case there is no insufficient scientific evidence) on the other hand redundant yet there are always other established scientific schools of thought which countries can and do use to reach their desired health standards.

3.4 Risk Assessment

Article 5.1 of the SPS Agreement provides that Members should ensure that their SPS Measures are based on an assessment of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations such as the CAC, OIE and the organisations established under the auspices of IPPC. On the other hand, risk assessment has been defined in the SPS Agreement.

Annex A.4 of the SPS Agreement defines two types of risk assessment techniques, which correspond to the two broad goals of the SPS measures as defined in Annex A.1, namely, protection from risks from pests or diseases, and protection from food-borne risks.

3.4.1 Risk assessment for protection from risks of pests or diseases

Risk assessment in relation to protection from risks of pests or diseases requires the evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing country according to the SPS measure which might be applied and of the associated potential biological and economic consequences.¹⁶⁹ In EC-

¹⁶⁸ Pauwelyn, J., “Non-Traditional Patterns of Global Regulation: Is the WTO ‘Missing the Boat’? p.15 A paper presented at a conference on Legal Patterns of Transnational Social Regulations & Trade” The European University Institute, Florence Italy 24-25th September 2004. Also available at <http://eprints.law.duke.edu/archive/00001311/01/6Sept04.pdf> (Accessed on the 27th off September 2006). However, by interpreting Article 3.1 to allow a country to have its low SPS measures made tighter would be encouraging stricter SPS measures which would be against one of the main aims of the WTO is to allow free trade as much as possible by reduction of all forms of trade restrictions.

¹⁶⁹ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p.24.

Hormones, the Panel was of the view that a risk assessment carried out in accordance with the SPS Agreement should:

- a) *Identify* the adverse effects on human health arising from the presence of the hormones at issue when used as growth promoters in meat or meat products, and
- b) If any such adverse effects exist, evaluate the *potential or probability* of occurrence of these effects¹⁷⁰

However the Appellate Body cautioned about the use of the words potential and probability inter-changeably. It stated:

“...the Panel’s use of *probability* as an alternative term for *potential* creates a significant concern. The ordinary meaning of *potential* relates to *possibility* and is different from the ordinary meaning of *possibility*. *Probability* implies a higher degree or a threshold of potentiality or possibility. It thus appears that here the Panel introduces a quantitative dimension to the notion of risk”¹⁷¹

The Appellate Body’s conclusion is spot on as the risk cannot, and should not only be quantitative in nature, but rather more qualitative. This is so because the risk which is being considered should not be looked at in terms of how much it is going to affect, but rather how it is going to affect a country’ s human, animal and plant life or health.

3.4.2 Risk assessment in relation to food borne risks

Risk assessment for food borne risks requires that the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.¹⁷²

In Australia-Salmon, the SPS measure at issue was aimed at preventing the entry, establishment or spread of fish diseases. Thus the **second** definition of risk assessment was applicable. The Panel held that, this type of risk assessment must:

¹⁷⁰ Panel Report, EC-Hormones (US), WT/DS48/ABR, para. 8.98.

¹⁷¹ Appellate Body Report, EC-Hormones, WT/DS48/ABR para. 184.

¹⁷² Course on Dispute Settlement, 3.9 SPS measures UNCTAD/EDM/Misc.232/Add.13 p.24.

- a) Assess the risk of entry, establishment or spread of a disease, and
- b) Assess the risk of the associated potential biological and economic consequences.¹⁷³

In order to assess the above two elements of risk under the first definition, a three prolonged test must be met¹⁷⁴ as found by the Appellate Body in Australia- Salmon¹⁷⁵ to be:

- Identify the pests or diseases whose entry, establishment or spread a member wants to prevent within its territory as well as the potential biological and economic consequences as associated with the entry, establishment or spread of these diseases.
- Evaluate the likelihood of entry, establishment or spread of these pests or diseases, as well as the associated potential biological and economic consequences, and
- Evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied.

However the second definition differs from the first as the former does not involve an evaluation of biological and economic consequences,¹⁷⁶ thus arguably being easier to conduct.¹⁷⁷ The reason is that in cases where human health is at risk, there is no need to consider economic factors.¹⁷⁸

In addition, there is a difference in the use of the language in the definitions; the first definition requires the “likelihood” or probability of entry while the second calls for the evaluation of the potential. In Japan- Agricultural Products II, the Appellate Body

¹⁷³ WT/DS18/R corr.1 para. 8.72.

¹⁷⁴ Course on Dispute Settlement, 3.9 SPS measures UNCTAD/EDM/Misc.232/Add.13, p.25.

¹⁷⁵ Appellate Body Report, WT/DS18/AB/R para. 121.

¹⁷⁶ Course on Dispute Settlement, 3.9 SPS measures UNCTAD/EDM/Misc.232/Add.13, p.25

¹⁷⁷ Pauwelyn, J (1999) “The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes, *Journal of the International Economic Law*, Oxford University Press, p.648.

¹⁷⁸ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p.25.

equated likelihood to probability which is not sufficient just to show the possibility of entry, establishment or spread of diseases.¹⁷⁹

It suffices to point out that this is due to the fact that in cases involving human life or health, it would only be sensible not to consider other factors like economic, but has to be based on the genuine reason of protection of life and health. Thus to the SSA countries, such a risk assessment is easy to conduct. Yet on the other hand, risk assessment involving animals and plants is quite expensive and difficult to carryout as it involves a number of issues to be considered.

3.4.3 Relevant factors in assessing risk.

Apart from requiring countries from taking into considerations techniques developed by international organisations,¹⁸⁰ the SPS Agreement does not specify a methodology to be used in conducting a risk assessment. Article 5 of the SPS Agreement, however, sums up specific factors to be taken into account in risk assessment. Article 5.2 provides the necessary factors, namely; available scientific evidence, relevant processes and production methods, relevant inspection, sampling and testing methods, prevalence of specific diseases or pests, existence of pest-or-disease free areas, relevant ecological and environmental conditions and quarantine or other treatment.

However one would question whether the above listed factors eliminate other factors other than the scientific ones, like consumer concerns. In EC- Hormones, the Appellate Body was of the view that:

“There is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but

¹⁷⁹ Appellate Body Report, Japan Agricultural Products II, WT/DS76AB/R, para. 113-114.

¹⁸⁰ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p.27.

also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die”¹⁸¹

This decision by the Appellate Body is quite good considered from the SSA countries perspective. The SSA countries lack adequate technical advancement and expertise in order to carryout risk assessment. Thus holding that risk assessment should also be done basing on the actual potential effect on people, in a way simplifies the whole risk assessment process which is of benefit to the SSA.

3.4.4 Common Scientific finding

In cases where different experts exist, and they have differing positions, which view would the Panel take as the right one in determining whether the risk assessment was based on sufficient scientific evidence? This issue has now been resolved. The risk assessment does not have to come to a monolithic conclusion that coincides with the scientific conclusion. In EC-Hormones,¹⁸² the Appellate Body held that Article 5.1 of the SPS Agreement requires that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. Governments can and should be able to base their risk assessments on other recognised sources.

3.5 Determination of the Appropriate Level of Protection (ALOP)

Paragraph 5 of Annex A defines the concept of appropriate level of protection, as the level of protection deemed appropriate by the member imposing the measure. In Australia- Salmon, the Appellate Body stated that the determination of the appropriate level of protection is a prerogative of the member concerned and not of a panel or the Appellate Body.¹⁸³ But it may be asked as to what extent should this “prerogative” be taken, and what are the determinant factors for this?

¹⁸¹ Appellate Body Report, EC-Hormones, WT/DS48/ABR para. 187.

¹⁸² Appellate Body Report, WT/DS48/ABR, para.194.

¹⁸³ Appellate Body Report, Australia-Salmon, WT/DS18/AB/R, para. 125.

This discretion has to be based on scientific information as well as other considerations such as the producer and consumer preferences.¹⁸⁴ In such a situation, a country can look at other social judgments before establishing a measure, like the social acceptability of certain types of risk, consumer tolerance and risk perception. But this only applies to measures where there is protection of animal and plant life or health. To put it differently, when determining an SPS measure for the protection of human life, there is no need to refer to other considerations as long as a measure is scientifically proved.

However looking at the ALOP from such a perspective, it may seem as if countries have a right to set up appropriate levels of sanitary and phytosanitary protections, which they in their own discretion deem fit. But a member could exercise this unjustifiably and as such end up being an impediment on international trade.

3.6 Consistency in application of SPS measures

Article 5.5 of the SPS Agreement, contains a binding obligation relating to ALOP.¹⁸⁵ In part, Article 5.5 of the SPS Agreement provides that the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

There are basically two principles provided for in article 5.5, namely:

- a) The goal of achieving consistency in the application of the concept of ALOP of sanitary or phytosanitary protection; and
- b) The legal obligations to avoid arbitrary or unjustifiable distinctions in the levels of protection considered to be appropriate in different situations, if these distinctions result in discrimination or disguised trade restrictions¹⁸⁶

¹⁸⁴ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13, p.29.

¹⁸⁵ UNCTAD Course on dispute settlement 3.9 SPS measures, UNCTAD/EDM/Misc.232/Add.13,p. 30.

¹⁸⁶ Ibid, p. 31.

With regard to the first element, the Appellate Body in EC-Hormones, held that governments often establish their appropriate levels of production on a case-by-case basis over time as risks arise, thus the goal is not absolute or perfect consistency, but only the avoidance of arbitrary or unjustifiable inconsistencies.¹⁸⁷

On the second element, the Appellate Body in the EC-Hormones set out the requirements required for a violation to be shown. They are not isolated but cumulative in nature, and they are:

- (i) The member has set its own level of protection in different situations.
- (ii) The levels of protection show arbitrary or unjustifiable differences in their treatment of different situations; and
- (iii) These arbitrary or unjustifiable differences lead to discrimination or a disguised restriction on trade.¹⁸⁸

3.6.1 Level of protection in different situations

With this regard the Appellate Body in the EC-Hormones case held that comparison of several levels of sanitary protection deemed appropriate by a member is necessary if a panel's inquiry under article 5.5 is to proceed at all. It went on to state that situations having different levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable.¹⁸⁹ In Australia-Salmon, comparable situations under article 5.5 were those where either the same or similar disease, or where the same biological and economic consequences were involved.¹⁹⁰

3.6.2 Arbitrary or unjustifiable distinctions in levels of protection

In the EC-Hormones, the Appellate Body held that there is a fundamental distinction between added hormones and naturally-occurring hormones in meat and other foods. In

¹⁸⁷ Appellate Body Report, EC-Hormones, WT/DS48/ABR para.213.

¹⁸⁸ Ibid, 214-215.

¹⁸⁹ Appellate Body Report, EC-Hormones, WT/DS48/ABR para.217.

¹⁹⁰ Appellate Body Report, Australia-Salmon, WT/DS18/AB/R, para.146.

respect of the latter, the EC does not take any regulatory action thus to create such distinction, is an absurdity.¹⁹¹

Distinctions that result in discrimination or a disguised restriction on international trade
The interpretation of article 5.5, in particular, the terms discrimination or a disguised restriction on international trade, have to be read in the context of the basic obligations contained in article 2.3, which requires that “*sanitary and phytosanitary measures shall not be applied in a manner which would constitute disguised restriction on international trade*”[Emphasis added]

Since the factors are cumulative in nature, it means that in case one of them is not complied with, then an allegation of inconsistency cannot be claimed by a party to the dispute. It has to prove all the three factors in order to rely on inconsistency.

3.7 Application of Provisional measures

Article 5.7 SPS Agreement, provides that a country can take up provisional SPS measures in cases where there is insufficient science evidence. Article 5.7 states:

“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 organisations 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.”


Thus the article allows an exception to the obligation to base sanitary measures on a risk assessment (in cases where relevant scientific evidence is insufficient). But this exception is only a qualified one because it is only provisional measures that can be imposed. In the Japan-Agricultural Products II, the Appellate Body held that;

¹⁹¹Appellate Body Report, Australia-Salmon, WT/DS18/AB/R, para. 221

“Article 5.7 operates as a qualified exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless.”¹⁹²

Thus it follows that Article 5.7 operates not by the existence of scientific uncertainty, but rather by insufficiency of scientific evidence.¹⁹³ This comes from the fact that it is only a provisional measure and not a permanent one. So a party cannot claim to have imposed a provisional measure basing on the uncertainty of scientific evidence.

The Appellate Body in Japan- Agricultural Products identified four requirements for provisional measures under Article 5.7 to be consistent with the disciplines of the SPS Agreement and these include;

- 
- The measure is imposed in respect of a situation where relevant scientific information is insufficient.
 - The measure is adopted on the basis of available pertinent information
 - The Member must seek to obtain the additional information necessary for a more objective assessment of risk, and
 - It must review the [sanitary and] phytosanitary measure accordingly within a reasonable period of time.

3.7.1 Situations with insufficient scientific evidence

In the Japan-Agricultural Products II, the Appellate Body held that Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence. The two concepts are not interchangeable.¹⁹⁴

¹⁹² Appellate Body Report on Japan- Agricultural Products II, para. 80

¹⁹³ Bhala, R and Gantz, AD (2004) 21(2) WTO Case Review 2003, *The Arizona Journal of International and Comparative Law*, p.433

¹⁹⁴ Appellate Body, Japan-Agricultural Products II, WT/DS76AB/R, para. 184

3.7.2 Seek to obtain additional information

The second element is to seek to obtain additional information. In Japan-Agricultural Products II, the Appellate Body held that in seeking additional information it would allow the member to conduct a more objective assessment of the risk.¹⁹⁵

Thus the two elements are so essential to rely on in the application of the provisions of Article 5.7 of the SPS Agreement. The first one, about insufficient evidence plays a role of not allowing countries to use their measures a protectionist tool. Otherwise they would be just alleging that a measure is justified because there is uncertainty in the scientific evidence. However, the fact that those countries have to base such provisional measures in situations where there is insufficient scientific evidence helps in the curtailing on the use of the measure as a protectionist tool.

In respect to the last two requirements, the Appellate Body noted that the additional information sought by the member must be germane to conducting a risk assessment and the reasonable period of time had to be established on a case-by-case basis depending on the special circumstances of each case.

Thus it suffices to point out that the provisions of Article 5.7 of the SPS Agreement are to the effect that when there is insufficient scientific evidence, a country can establish an SPS measure to protect it citizens. However on several occasions, countries tend to use these provisional measures as away to distort international trade.

¹⁹⁵ Appellate Body, Japan-Agricultural Products II, WT/DS76AB/R, para. 192.

3.8 Participation of SSA countries in the DSU

Since the DSU's inception, there have been 348 disputes brought for settlement.¹⁹⁶ The Developing countries' participation has greatly increased from the days of GATT. In its 48 years of existence, GATT only handled an estimated 306 disputes¹⁹⁷ and developing countries participation was minimal. But with the DSU, more developing countries have started engaging in the system, though, developing countries' participation has been limited to the bigger developing countries whereas the smaller, weaker ones have not initiated a complaint at the WTO. This is not because they do not have trade disputes, but rather due to a combination of other factors, including but not limited to the following:

- Africa is not a very active participant in the world trading system.
- There is general lack of legal expertise in the WTO's dispute settlement system.
- Fear of political and /or economic pressure from the developed countries such as the European Union and the United States given the fact that Sub-Saharan African countries hugely depend on non-reciprocal trade arrangements like AGOA¹⁹⁸ and the ACP-EU.¹⁹⁹ It is only logical to abandon any interest in a case where there is a non-reciprocal trade arrangement. This is because you can not start a trade dispute with a country that has in the first place given you a chance to export in its market.
- The available remedies; compensation and retaliation are practically unenforceable on part of most SSA Countries. For example, how can an LDC

¹⁹⁶ As of 31st August 2006, 348 disputes had been referred to the WTO

http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (accessed on the 1st of September 2006)

¹⁹⁷ Manduna, C (2004) "Africa's Participation in the World Trade Organization's DSU Process" p.3.

¹⁹⁸ AGOA is the Agricultural Growth Opportunity Act of the USA aimed at encouraging trade between SSA countries and the United States. It was passed in 2000. To date, there are 37 countries benefiting from this arrangement. www.agoa.gov (Accessed on the 15 September 2006). However, a few commodities are allowed particularly from the agricultural sector.

¹⁹⁹ The ACP-EU is the African Caribbean and Pacific- European Union which just like the AGOA is aimed at the promotion of trade between the Europe Union and the African Caribbean and Pacific countries. The European Union under the "Everything but Arms Initiative", has allowed exportation of African products to the EU.

country retaliate against a developed country? The entire enforcement is based on trade war logic.²⁰⁰

- Litigation using the DSU is quite costly, both financially and in terms of time. It is estimated that the procedure of instituting a trade dispute through up to the Appellate Body is US\$500,000²⁰¹ yet in terms of time it can take up to two years.²⁰² Thus most SSA countries fail to pursue their legitimate trade rights.

With such challenges, it is not too surprising that as of 20th January 2004, only two African countries; South Africa and Egypt had ever requested for consultations at the DSU.²⁰³ At the Appellate level, however, no African country has ever participated as either a Complainant or a Respondent. Participation has only been limited to third party status.

This situation is worrisome on part on the SSA countries as they let their trade interests be determined by other countries yet the SPS Agreement applies to both Developed and Developing Countries alike.



3.9 Conclusion

The SPS Agreement has two main aims; one is encouraging international trade and the other allowing countries to maintain the appropriate levels of health standards that they deem necessary but which are scientifically justifiable. As most of the WTO Agreements, the SPS Agreement is aimed at promoting international trade. The Panel and Appellate Body have also tried to promote trade in as far as the interpretation of the SPS Agreement is concerned. But analysing some of the provisions of the SPS Agreement as interpreted by the WTO's competent bodies, it has been clearly shown that a majority are ambiguous and they need amendment or reconsideration.

²⁰⁰ Jensen, MF (2002) "Reviewing the SPS Agreement: A Developing Country Perspective" p. 20.

²⁰¹ Manduna, C (2004) "Africa's Participation in the World Trade Organization's DSU Process" p.2

²⁰² Ibid

²⁰³ Ibid

CHAPTER 4

CHALLENGES AND IMPACT OF THE SPS AGREEMENT ON SUB- SAHARAN AFRICA

4.0 INTRODUCTION

A successful liberalization of international trade created more opportunities for developing countries (DCs) to easily access developed countries' markets.²⁰⁴ Thus the developing countries are increasingly under pressure to improve their delivery of food and animal products as a prerequisite for entering the competitive arena of international trade.²⁰⁵ As for the Sub Saharan African (SSA) countries, their requirements are even more substantial. The SSA countries consist of 47 African countries, geographically lying below the Sahara desert, and most are among the world's poorest countries— normally referred to as the Least Developed Countries (LDCs).²⁰⁶ To many SSA countries, agricultural and food products are of particular importance. For example, during 1980-1997, agricultural and food products accounted for over 25% of the total merchandise exports from SSA. Agriculture itself accounts for 61% of the total employment and 14% of the GDP in DCs and 85% of employment and 36% of the GDP in LDCs.²⁰⁷ These

²⁰⁴ Henson, S., & Loader, R (2000) "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements" Elsevier Science Ltd, 2000, p.85.

²⁰⁵ Bruckner, GK (2005) "Evaluation of the Alternatives and Possibilities for Countries in Sub- Saharan Africa to Meet the Sanitary Standards for Entry into the International Trade in Animals and Animal Products" TRALAC Working Paper No 6/ 2005 p.2.

²⁰⁶ There are basically 47 countries categorised as falling in the category of the Sub-Saharan Africa. They are; Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo (Brazzaville), Congo (Democratic Republic), Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Réunion, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Western Sahara, Zambia and Zimbabwe. Some are quite developed, such as South Africa and Nigeria, but a majority fall under the Least Developed Countries category.

²⁰⁷ World Bank, (1999) "The World Bank Support for Developing Countries on International Trade Issue" at <http://web.worldbank.org/WBSITE/EXTERNAL/DEVCOMMEXT.html>, (Accessed on 20 September 2006).

statistics establish the undoubted significance of the agricultural base in this region. Due to the introduction of sanitary and phytosanitary measures under the application of the SPS Agreement, the SSA countries have faced a number of challenges and obstacles over and above the mere compliance with sanitary standards before a successful entry into the export market.

With the successful reduction in barriers to trade in agricultural and food products, including tariffs, quantitative restrictions and other trade barriers through the Uruguay Round, there are more opportunities for the exportation of SSA agricultural products to developed countries' markets. However, the liberalisation of tariff and quantitative restrictions have increased concerns over the impact of other measures, many of which are explicitly trade-related on agricultural and food exports²⁰⁸ including the SPS Agreement.

Generally when tariffs are allowed, there is no general permission for non-tariff measures. For example, a member cannot generally prohibit or restrict the importation of goods into its territory or the exportation of goods from its territory. There are specific preconditions for such non-tariff measures, which can be taken only through prescribed procedures.²⁰⁹ But with the SPS Agreement, concerns have been expressed, that developing countries lack the resources to participate effectively in the institutions of the WTO and thus may be unable to exploit the opportunities provided by the Agreement.²¹⁰ The SPS measures are set up by the international standard setting organisations, and there are various measures which need to be examined.

²⁰⁸ Henson, S., & Loader, R (2000) "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements." Elsevier Science Ltd, 4.

²⁰⁹ Lal Das, B (1999) *The WTO: A Guide to the Framework for International Trade*, Zed Books Ltd, London, 11.

²¹⁰ Ibid.

4.1 Some SPS Measures that affect SSA countries.

There are various SPS measures established that are aimed at the protection of human, animal and plant life or health. But below are some of which affect international trade, particularly from the SSA perspective.

The international standards affecting food and food stuff are set by the Codex Alimentarius Commission (CAC), which is an institution attached to WTO and the Food and Agricultural Organisation (FAO), while for the animals and plants, they are set by the OIE and the IPPC. The CAC sets standards to ensure the safety of the consumers and circumvent the use of standards for trade protection purposes. It sets, Maximum Residual Levels (MRL) for agricultural and veterinary chemical residues, as well as Maximum Permissible Concentrations (MPC) for heavy metals such as cadmium, lead and mercury and Extraneous Limits (ERL) for some of the environmental contaminants in foods.²¹¹

Among the SSA countries, the EU is known for its most stringent SPS standards that hinder market access to their agricultural products.²¹² In most cases the SPS standards established by the EU are often more stringent than the CAC and the US level. No wonder the European Communities (EC) has been a respondent more times than any other country or member state as far as the SPS trade disputes are concerned.²¹³ For example, the EU proposal pertaining to the Maximum Pesticide Residuals Limits (MRL), stipulates that for most of the tropical crops, MRL should be set at an analytical zero

²¹¹ Gebrehiwet, YF (2004) "Quantifying the Trade Effects of Sanitary and Phytosanitary Regulations in OECD Countries on South African Food Exports", p.63 Department of Agricultural Economics, Extension and Rural Development, Faculty of Economic and Management Sciences, University of Pretoria. Available at <http://upetd.up.ac.za/thesis/available/etd-08272004-072352/unrestricted/00dissertation.pdf> (Accessed on 12 October 2006).

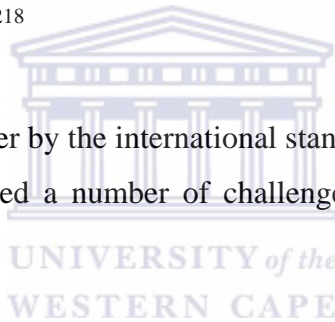
²¹² Henson, S., & Loader, R. (2000) "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements.", Elsevier Science Ltd. p.4.

²¹³ Out of the 5 disputes in which a violation of the SPS Agreement has been invoked, the European Communities (EC) has been a respondent 2 times (the EC-Hormones & EC-Biotech) as compared to the next in line being Australia, with 2 cases but some being repeated for implementation (under 21.5 DSU). Data obtained at http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c5s2p1_e.htm It should be recalled that state members have only challenged the SPS measures for being high, and not for being too low. Thus, the EC's measures are more strict, a factor which has affected a lot of SSA exports.

level, which implies that a zero tolerance level for any pesticide residue.²¹⁴ Since the standards of most tropical crops do not exist in CAC, there is a serious concern that these stringent standards by the EU have a negative impact SSA access to international markets.²¹⁵

Developed countries also use other SPS standards such the detection of aflatoxins in foodstuffs. Aflatoxins are cancer-causing chemicals produced by species of *Aspergillus*. *Aflatoxins* are cancer-causing chemicals produced by species of *Aspergillus* moulds that can develop on some plants. The spores of these moulds are present anywhere in the air or soil and require specific temperature, moisture and nutrient substrates to germinate.²¹⁶ They first attracted attention because of the turkey disease in 1960s.²¹⁷ The measures regarding aflotoxins have mainly affected the trade in groundnuts. With this regard, Gambia has been the worst hit.²¹⁸

The various SPS standards either by the international standard setting organisations or the developed countries, have posed a number of challenges and difficulties for the SSA countries.



²¹⁴ By setting the Maximum Residual Levels (MRL) at analytical zero level, the effect is that there is a zero tolerance for any pesticide residues in the fruits and all crops. This is quite difficult to maintain given the fact that some pesticides are used by the SSA farmers in the eradication of pests and diseases in crops.

²¹⁵ Gebrehiwet, YF (2004) "Quantifying the Trade Effects of Sanitary and Phytosanitary Regulations in OECD Countries on South African Food Exports", p.63 Department of Agricultural Economics, Extension and Rural Development, Faculty of Economic and Management Sciences, University of Pretoria. Available at <http://upetd.up.ac.za/thesis/available/etd-08272004-072352/unrestricted/00dissertation.pdf> (Accessed 12 October 2006). p.63.

²¹⁶ Wilson, SJ & Sewadeh, M (2001) "A Race to the Top? A Case of Food Safety Standards and African Exports" p.7 Available at, http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/03/30/000094946_01032007445741/Rendered/PDF/multi0page.pdf. (Accessed on 25 October 2006).

²¹⁷ Frank, CLU (2003) "Assessment of Safety/ Risk Vs Public Health Concerns: Aflatoxins & Hepatocarcinoma", *Environmental Health & Preventive Medicine*, 235.

²¹⁸ Wilson, SJ & Sewadeh, M (2001) "A Race to the Top? A Case of Food Safety Standards and African Exports" p. 8 Available at, http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/03/30/000094946_01032007445741/Rendered/PDF/multi0page.pdf. (Accessed on 25 October 2006).

4.2 Challenges facing SSA with regard to the SPS Agreement

A number of challenges confront SSA countries in participating in the SPS Agreement and taking full advantage of the trade opportunities created. They range from lack of resources to the high standards set by the developed countries as well as the international standards setting organisations. The potential challenges are covered below;

4.2.1 Harmonisation of international standards.

The preferred tool used in the SPS Agreement to achieve its goal is international harmonisation.²¹⁹ Harmonisation is broadly defined as the process of making different domestic laws, regulations, principles and government policies substantially or effectively the same or similar.²²⁰ In terms of SPS measures, it refers to adopting the same or similar international standards. The international standards referred to in the SPS Agreement are to date limited to those established by the Codex Alimentarius Commission (CAC) for food safety, the International Office of Epizootics (IOE) for animal health and zoonoses and the organisations established under the Secretariat of the International Plant Protection Convention (IPPC).²²¹ Thus, Sanitary and Phytosanitary standards established by those three sister organisations are widely recognised as the international standards and countries should harmonise their SPS standards basing on those legal foundations.²²² A country can, nevertheless establish its own measure as long as it is scientifically justifiable.²²³ Accordingly, SSA countries can only actualise the potential benefits of the SPS Agreement if they are willing and able to participate fully in the institutions established by the SPS Agreement for the formulation of SPS measures.

²¹⁹ Jensen, MF (2002) "Reviewing the SPS Agreement: A Developing Country Perspective" p.22.

²²⁰ Mayeda, G. "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law* Vol. 7 No. 4, Oxford University Press, 737 p.740.

²²¹ Pauwelyn, J (2003) *Conflict of Norms in Public International Law: How WTO Law Relates to Rules of International Public Law*, Cambridge University Press, p.349.

²²² Mayeda, G. (2004) 7(4) "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law* Vol. 7 No. 4, Oxford University Press, 737 at 740.

²²³ The SPS Agreement, Article 3.3.

4.2.2 Composition of the international standard setting organisations.

Article 10.4 of the SPS Agreement provides that state members should encourage and facilitate the active participation of DCs in the relevant organisations such as the CAC, IPPC and IOE. This provision, however, contains no binding obligation on part of the developed countries to assist the developing countries.²²⁴ Thus, one finds that the standard setting organisations are dominated by the developed countries and what developed countries consider as the appropriate level, automatically becomes the standard which the SSA countries must adhere to.²²⁵ With their minimal participation in the standard setting organisations, the SSA countries have taken on the role of ‘standards takers.’ According to a study by Wilson & Abiola (2003), they refer to SSA countries as becoming “standards takers” due to their apparent lack of participation in international standards setting activities.²²⁶

Due to their non-participation in the standard setting, SSA countries end up with standards set at levels inappropriate to their situation or which require a standards infrastructure which simply does not exist in their countries.²²⁷ This is because some of the standards were set even before the SPS Agreement came into effect. To Oyejide, Ogunkola, and Bankole, ‘various standards were not developed as part of the WTO process and ignored the developing countries.’²²⁸ At the same time standards are less likely to be developed where the developed countries have no interest. Thus, to Bruckner, the result is that ‘non-participatory countries are forced to accept and try to meet initial

²²⁴ Course on Dispute Settlement, 3.9 SPS measures UNCTAD/EDM/Misc.232/Add.13, p. 54.

²²⁵ With regard to membership in the international standard setting organisations such as the Codex Alimentarius Commission, Office of the International Epizootics and the International Plant Protection Convention, while 64% of upper-middle and high-income countries are members of all three organisations, only 33% of low and low-income countries are [Henson, S & Loader, R., ‘Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary Requirements’ 29:1 World Development 85 (2001) 96. The data was obtained from WTO documentation for June 1999. Income groups were those defined by the World Bank.] quoted in Mayeda, G., p.752

²²⁶ Wilson, J.S, & Abiola, V.O, (2003) “Standards and Global Trade: A Voice for Africa” World Bank, Washington DC, p.3.

²²⁷ Jensen, M.F (2002) “Reviewing the SPS Agreement: A Developing Country Perspective” p. 23.

²²⁸ Oyejide, TA and Ogunkola, EO, and Bankole, AB “Quantifying the Trade Impact of Sanitary and Phytosanitary Standards: What is Known and Issues of importance for Sub Saharan Africa” in Maskus, K.E., & Wilson, J.S (Eds.), (2001) *Quantifying the Impact of Technical Barriers to Trade: Can it be done?* The University of Michigan Press, 2001 at p. 213.

standards by reacting to ever-changing standards that do not accommodate unique constraints pre-existing in local environments.²²⁹

On the other hand, however, since DCs lack institutional capacities, they cannot contribute effectively towards the standards setting.²³⁰ Zarrilli is of the view that ‘the low participation of developing countries in international standard setting organisations has hampered the representation of their interests and concerns regarding international SPS standards.’²³¹ While Mayeda pointed out that ‘it makes sense for international bodies to adopt standards rather than rules that require less investment on the part of developing countries for evaluating the suitability of the regulations for their domestic context.’²³² It suffices to point out that while it is correct that the poor participation of the SSA countries in the international standard setting organisations has made it difficult for them to ‘voice’ out their interests and grievances, but at the same time it would be important to address the positive side of the harmonisation of standards.

4.2.3 Effect of harmonisation on SSA countries

Harmonisation of SPS standards can reduce compliance costs of developing countries by reducing the number of standards with which developing countries would have to comply, but, in practice, harmonisation also has the potential to place disproportionate burdens on SSA countries.²³³ This is because of the lack of adequate resources and institutional capacities in place to put those measures into place.

²²⁹ Bruckner, G. k., (2005) “An Evaluation of the Alternatives and possibilities for countries in Sub-Saharan Africa to meet the Sanitary Standards for entry into the International Trade in Animals and Animal Products.” TRALAC Working Paper No. 6/2005, p.11.

²³⁰ Mayeda G, (2004) “Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries.” *Journal of the International Economic Law* Vol. 7 No. 4, Oxford University Press, 737 p.753

²³¹ Ibid.

²³² Ibid.

²³³ Ibid. Harmonisation has the potential to reduce the costs for domestic industries exporting to different markets. If a manufacturer faces significantly different requirements in each jurisdiction for which it manufactures, it will not be able to achieve economies of scale beyond its market share for one jurisdiction. Harmonisation can allow manufacturers even in SSA to enjoy economies of scale.

Much as harmonisation of the SPS measures can lead to a reduction of compliance costs on the one hand, by reducing the number of standards with which the developing countries would have to comply, but on the other hand, it may lead to increase in the compliance costs,²³⁴ which is of significance to the SSA countries. But at the same time, it leads to countries especially the developed ones to lower their SPS standards because the SPS agreement is not a public health agreement but rather a trade agreement.²³⁵ This may, however, be against the public health policy of a country to protect its citizens. Thus, many governments in developed countries face stiff resistance from consumer organisations, a factor which sometimes has led to the upward retention of the SPS standards, at the detriment of the SSA countries' agricultural exports. But all in all, in a bid to meet the internationally recognised standards, SSA countries are faced with the problem of high compliance costs.

4.3 Compliance Costs

Compliance with the SPS measures entails costs to exporting countries, which may have disparate impact on developing countries, and more particularly to the SSA countries, many of whom do not have adequate institutional frameworks or financial resources in place to monitor and assess compliance.²³⁶ It should be recalled that prior to the Uruguay Round, implementation of the trade liberalisation agreements was a minor issue. But the new issues included in the Uruguay Round have put emphasis on implementation costs, which go to reforms that involve spending resources on building new public agencies, and educating personnel²³⁷ in both risk assessment and management as far as the SPS Agreement is concerned.

²³⁴ Mayeda, G (2004) 7(4) "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law*, Oxford University Press, 2004, 737 p.752.

²³⁵ Silverglade, BA (2000)55 "The WTO Agreement on Sanitary and Phytosanitary measures: Weakening Food Regulation to facilitate Trade?" *The Food & Drug Law Journal*, Food Drug L.J 517, p. 520.

²³⁶ Mayeda, G (2004) 7(4) "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law*, Oxford University Press, 2004, 737 p.752.

²³⁷ Jensen, MF (2002) "Reviewing the SPS Agreement: A Developing Country Perspective", p.30.

The compliance costs can either relate to compliance with importing country standards or the cost of conformity assessment procedures.²³⁸ Again, these may include access to the resources required to comply with SPS standards in developed countries, like; obtaining information on SPS standards, scientific and technical expertise, appropriate technologies, skilled labour, and general finances.²³⁹

Compliance costs are inordinately high for the developed countries in general but might be multiplied on part of the SSA countries. Thus the most effective solution to the compliance costs would lie in the compliance period granted to SSA countries to be longer, to enable them meet some the SPS measures.

4.3.1 Compliance period

The period allowed for compliance with international set SPS measures is an important factor in determining the compliance costs.²⁴⁰ The SPS Agreement provides that when new measures are introduced, member states should accord longer periods of time to DCs particularly the LDCs so as to maintain opportunities for their exports.²⁴¹ In the Doha Development Agenda (DDA) it was discussed and the developed countries were encouraging the issue to be resolved on a case-by-case basis while the developing countries were positioning themselves towards a blanket extension of the compliance period.²⁴² To Mayeda, neither position is tenable because 'hearing applications for extensions on a case-by-case basis is time consuming and expensive yet a blanket extension seems inappropriate when different countries have different capacities for meeting their obligations.'²⁴³ However, the *Decision on Implementation* adopted at the

²³⁸ Henson, S, Loader, R., (1999) 15 "Impact of Sanitary and Phytosanitary standards on Developing Countries and the Role of the SPS Agreement", *Agribusiness*, 355, 359.

²³⁹ Henson, et al (2000) M. "Impact of Sanitary and Phytosanitary Measures on Developing Countries." University of Reading, 2001 p.40.

²⁴⁰ Mayeda G (2004) 7(4) "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law*, Oxford University Press, 737 p.757.

²⁴¹ The SPS Agreement, Article 10.2.

²⁴² Mayeda G (2004) 7(4) "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law*, Oxford University Press, 737 p.757.

²⁴³ *Ibid*, 759.

Doha Ministerial Conference has increased the adaptation period to no less than six 6 months or where necessary countries can come up to a conclusion.²⁴⁴

The period seems to be sufficiently long for the developed member states, but given the SSA lack of adequate resources, both financial and technical, the compliance period remains short and if exporters do not comply within the specified period they may be prevented from exporting.²⁴⁵ Thus, SSA countries need technical assistance in order to meet most of the SPS standards set by the standard setting organisations.

4.0 Technical Assistance to SSA countries

In order to help developing countries to adjust to, or comply with their developed trading partners' SPS requirements, the SPS Agreement encourages members to provide technical assistance in areas such as processing technologies, research, infrastructure and training.²⁴⁶ The formulation of Article 9 of the SPS is, however, vague and it does not contain any commitments.²⁴⁷ This is one of the reasons why developed countries have not lived up to their obligations in as far as the provision of technical assistance is concerned. So, SSA countries have to find a way of promoting their exports in agricultural products to the developed countries by building institutional capacities. But building institutional capacities for the implementation of the SPS Agreement requires information and technology transfer, as well as financial support to facilitate such transfers.²⁴⁸ The question, therefore remains as to what would be the better way to solve the difficulties relating to provision of technical assistance?

²⁴⁴ WT/MIN (01)/17, dated 14 November 2001. Also available in Course on Dispute Settlement, 3.9 SPS Measures, UNCTAD/EDM/Misc.232/Add.13, p. 54.

²⁴⁵ Henson, SJ Loader, R.J Swinbank, A Bredahl, M & Lux, M (2000) "Impact of Sanitary and Phytosanitary Measures on Developing Countries." University of Reading, United Kingdom, 40.

²⁴⁶ WTO Secretariat, "Guide to the Uruguay Round Agreements" p.245 Available at http://www.wto.org/english/docs_e/legal_e/guide_ur_deving_country_e.pdf. Technical assistance is also provided for in the SPS Agreement, Article 9.

²⁴⁷ Jensen, M.F., (2002) "Reviewing the SPS Agreement: A Developing Country Perspective" p.27.

²⁴⁸ Mayeda, G (2004) 7(4) "Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries." *Journal of the International Economic Law*, Oxford University Press, 737 at 760.

Zarrilli recommends strengthening Article 9.2 of the SPS Agreement,²⁴⁹ which relates to technical assistance to require it to specifically reconsider SPS measures that create difficulties for DCs.²⁵⁰ Another solution would be to require developed countries to subsidize the fees charged to DCs for the conformity assessment procedures for products under the SPS Agreement.²⁵¹ This would be in the form of grants, loans, or real technical expertise at a lesser cost provided to SSA countries in order to enable them meet the required SPS standards as provided for by article 9.1 of the SPS Agreement.

To Mayeda, however, ‘if obligations of developed countries to provide technical assistance to help DC members comply with the SPS measure ‘were made actionable’ this could go a long way towards making the implementation of technical assistance provision a reality rather than a dream.’²⁵² However, if the cause of action upon which an SSA member is to institute legal proceedings upon the failure by a developed country to accord technical assistance to an SSA country, then that would give rise to injustices. Compelling developed countries would be unfair because they also have other areas to attend to in terms of their own economies and above all such a system would be difficult to enforce.

Thus, one would remain to wonder whether the SPS Agreement does really serve one of its purposes, the promotion of international trade other than being an impediment to international trade.

²⁴⁹ Article 9.2 of the SPS Agreement provides that where substantial investments are required in order for an exporting developing member, the latter shall consider providing such technical assistance as will permit the developing country member to maintain and expand its market access opportunities for the Product involved.

²⁵⁰ Zarrilli, S. “The Agreement on the Application of the Sanitary and Phytosanitary measures: Issues for Developing Countries”, South centre p.24 available at <http://www.southcentre.org/publications/snp/snp-04.htm> (accessed on the 15th September 2006).

²⁵¹ Baldwin, RE, (2001) “Regulatory Protectionism, Developing Nations and Two- Tier World Trade System” p. Otsuki, T, Wilson, JS & Sewadeh, M (2001) 26 “Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports” Food Policy, 495.

²⁵² Mayeda, G (2004) 7(4) “Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries.” *Journal of the International Economic Law*, Oxford University Press, 737 at 760.

4.5 Genuine SPS standards: A haven for trade impediment?

In general, from the SSA perspective, SPS standards can impede trade even when they are imposed on genuine health and safety considerations because of additional compliance cost.²⁵³ For example, some SPS standards have been designed by developed countries to reflect their technological advancement and consumer preferences, which may or may not be appropriate for SSA. Upgrading existing SPS standards or developing new ones and performing risk assessments is a costly and difficult procedure, and it is neither technically feasible nor economically affordable for most developing countries.²⁵⁴ Resources, manpower and institutional constraints are naturally more binding for SSA exporters compared to their developed-country counterparts. In addition, when there is no harmonisation, SPS standards sometimes diverge considerably across importing countries, making meeting standards costly and cumbersome for exporters.

In addition, the cost of compliance might even be higher than the trade benefits to some of the countries. Thus, it can be suggested that the SPS Agreement, though prima facie is viewed as a market access promoting agreement through streamlining the SPS measures by harmonisation, at the same time it acts as an impediment to trade either by accident or design in terms of the compliance costs associated with it especially on part of the SSA countries. Thus WTO stated:

“Although considerable resources may be needed to raise health standards to international levels, the benefits are not limited to agricultural exporters. In fact, the most important benefits from improvements in the food safety situation within a country are for the local population, through improvements in health. In a parallel fashion, improving

²⁵³ Athukorola, P-C & Jayasuriya, S (2003) “Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective” Available at http://rspas.anu.edu.au/economics/publish/papers/aciar/aciar_2003_athukorala_jayasuriya.pdf (Accessed on 20 October 2006).

²⁵⁴ Finger, J. Michael and Philip Schuler (2002), ‘Implementation of WTO Commitments: The Development Challenge’ in Hoekman, B., Mattoo, A & English, P. (Eds) (2002), *Development, Trade and the WTO: A Handbook*, Washington DC: World Bank, 493-503, p. 23.

the animal health and plant health situation within African countries also brings benefits to local producers, irrespective of their interest in export markets.”²⁵⁵

Thus, the question would remain that raising health standards to international levels in the way required by the agreement yield substantial benefits to domestic consumers and producers and if so, are they achieved in a cost minimising way?

Apart from the challenges faced by the SSA countries in complying with the SPS standards, it is imperative to explore whether the developed countries are on top of stringent SPS measures, are using other means to defeat the ability of DCs to gain access to their markets.

4.6 Rules of origin

Rules of origin specify the conditions under which a good becomes eligible for zero tariffs in a Free Trade Areas (FTA).²⁵⁶ Rules of origin have had a significant impact on the success of particular trade sectors in which many DCs participate. For example, the agricultural sectors of textile and clothing industry,²⁵⁷ yet in most cases these are the sectors where the DCs are more vigilant and which have been used in the trade preferences between developed countries and their developing counterparts. It is estimated that the Africa Growth and Opportunity Act (AGOA) passed by the United States in 2000 only allows SSA countries to realise 19-26% of the benefits that they could have realised had rules of origin not been applied.²⁵⁸ This is because the preferential access granted to products from African countries are at the same time

²⁵⁵ WTO Secretariat quoted in Jensen, M.F, “Reviewing the SPS Agreement: A Developing Country Perspective” p. 32.

²⁵⁶ Krishna, K. (2005) “Understanding Rules of Origin” National Bureau of Economic Research, p.1 Available at <http://www.nber.org/papers/w11150.pdf> (Accessed on the 12th September 2006).

²⁵⁷ Mayeda, G (2004) 7(4) “Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries.” *Journal of the International Economic Law*, Vol. 7 No. 4, Oxford University Press, 737 p.757.

²⁵⁸ Mattoo, A. Roy, D & Subramanian, A (2003) “The Africa Growth and Opportunity Act and Its Rules of Origin: Generosity Undermined?” The World Bank Development Research Group, Policy Research Working Paper No. 2908, 11 October 2002, available at <http://econ.worldbank.org/view.php?id=20742> (accessed on the 20th of September 2006) p.17.

limited to certain products²⁵⁹ and it imposes strict rules of origin on many of the products granted access to the USA market. Thus Mattoo *et al* analysed the trade impact of rules of origin on the African countries exports and stated:

“ ...When we compare the benefits that will accrue to African countries under the AGOA against the second benchmark, of fully unrestricted access, which is the level that Africa’s trade would have attained had the United States (i) not excluded any product from the scope of AGOA and (ii) not imposed stringent rules of origin requirements to qualify for the benefits under it [we observe that] AGOA as it is now stands will yield only 19-26 percent of the benefits that could have been provided if access had been unconditional. Nearly 80 percent of this shortfall is accounted for by the rules of origin requirements in the apparel sector which will significantly reduce exports below SSA’s full potential.”²⁶⁰

Thus the SSA region which is the sole beneficiary of the AGOA initiative, has been denied the right to fully access the US market on a clumsy ground of rules of origin, yet some of the SSA exporters can obtain merchandise from other countries in Africa which are not benefiting from the AGOA. In addition, even if the US has provided the opportunity to SSA countries to penetrate its market, at the same time, it imposes very stringent SPS standards that sometimes cannot be met.

As most of the agricultural commodities are enjoying duty free access to the EU and USA, a survey conducted by Henson & Loader (2000) suggests that failure to comply with the stringent SPS standards established by the EU and USA will greatly undermine the preference given to African countries in the ‘Everything But Arms’ initiative of the EU²⁶¹ and the African Growth Opportunity Act (AGOA)²⁶² of the US.

²⁵⁹ The AGOA initiative allows African countries to export to the USA only products from agricultural sector, but from the textile and clothing sector being encouraged more.

²⁶⁰ Mattoo, A Roy, D & Subramanian, A (2003) “The Africa Growth and Opportunity Act and Its Rules of Origin: Generosity Undermined?” The World Bank Development Research Group, Policy Research Working Paper No. 2908, 11 October 2002, available at <http://econ.worldbank.org/view.php?id=20742> (accessed on the 20th of September 2006) p.17.

²⁶¹ Everything But Arms (EBA) is a trade initiative from the European Union started in 2001 allowing African products into the European market on duty free. Data available at http://ec.europa.eu/trade/issues/global/gsp/eba/index_en.htm (Accessed on 10 October 2006).

Thus it suffices to suggest that the developed countries give on the one hand the opportunity to SSA countries to export in their markets, but at the same time use the stringent SPS measures to take away such opportunities. But little can be done in this respect, because if a country gives you a right to access its market, the exporting country should be obliged to export only goods that are of good quality.

4.6 Impact of the Imposition of SPS standards on SSA countries

Yet many SSA countries are finding it difficult to meet the SPS measures of the developed countries, and are concerned that in practice, their access to export markets for some food and agricultural products is being hindered, rather than encouraged in the wake of the SPS Agreement.²⁶³ It is imperative to assess the impact of the SPS Agreement and its measures on export of SSA countries as away to identify means by which to reduce possible effects. But, unlike the trade impact of tariffs and quota restrictions which can be easily quantified, non-tariff barriers, healthy and safety standards inclusive are difficult to quantify. Irrespective of that belief, there is a wide recognition that SPS measures can act either explicitly or implicitly as a barrier to trade in a similar manner to tariffs and quantitative restrictions.²⁶⁴

According to Henson & Loader (2000), trade impacts of the SPS measures can be conveniently grouped into three categories;²⁶⁵

- They can prohibit trade by imposing an import ban or by prohibitively increasing production and market access costs.²⁶⁶ This is because of the stringent SPS

²⁶² African Growth and Opportunity Act (AGOA). It is a trade initiative by the United States to the currently 37 countries in the SSA region, where they get to export their products into the US market duty free. <http://www.agoa.gov/> (Accessed on 21 October 2006).

²⁶³ Bourtrif, & Pineiro, M (2002) "The New International Trade Context for Developing Countries: The Impact of the SPS & TBT Agreements", Food and Agricultural Organisation of the United Nations (FAO), Food Quality and Standards Service, 2002, Rome Italy p.3.

²⁶⁴ Petrey & Johnson (1993), Ndayisenga & Kinsey (1994), Thilmay & Barrett (1997), Hillman 1997, Sykes 1995, Unnevehr, 1999, Mayeda 2004, Henson et al 2000 & 2001. All these authors have acknowledged that SPS measures can and do act to impede trade in agricultural and food products.

²⁶⁵ Henson, SJ et al (2000) "Impact of Sanitary and Phytosanitary Measures on Developing Countries." University of Reading, United Kingdom p.40.

standards set coupled with the lack of technical and financial resources on part of the developing countries to maintain high standards. Also there is a general lack of institutional capacities in most SSA countries, a factor that limits productivity and increases market access costs.

- SPS measures can divert from one trading partner to another by laying down regulations that discriminate across potential suppliers. This can be by way of setting the standards that SSA cannot fulfil, thus indirectly diverting trade from one trading partner to another.
- They can reduce overall trade flows by increasing costs or raising barriers for all potential suppliers.²⁶⁷

To date, the trade impacts of SPS measures have been most widely acknowledged in a developed country context.²⁶⁸ For example, Thornsbury, Roberts, De Remer & Orden (1997) estimated the total impact of technical barriers on US exports of agricultural products in 1996 was US\$ 4,907 million. Of this, 90% was due to measures covered by the SPS Agreement.²⁶⁹

However, some studies have been done, addressing the issue of SPS measures and developing countries' exports though in most circumstances limited to costs of compliance and their impact on the SSA trade in agricultural products. Mutasa & Nyamandi (1998) assessed the degree to which SPS requirements impede exports of agricultural and food products from African countries through a survey of CAC contact points. Out of the countries that responded, 57% indicated that their agricultural products had been rejected following border inspection, due to microbiological/ spoilage or contamination.²⁷⁰ Thus the total costs of rejection at the importing countries border of SSA agricultural exports due to the SPS measures include the loss of product value,

²⁶⁶ Ibid

²⁶⁷ Ibid

²⁶⁸ Ibid p.89

²⁶⁹ Ibid

²⁷⁰ Mutasa MP & Nyamandi T (1998), Report of the survey on the identification of food regulations and standards within the Africa Region Codex and Harmonisation of Food Trade. Paper presented at a workshop on Codex and Harmonisation of Food Regulations, Harare August 1998, p.4.

storage and transport costs due to border inspections.²⁷¹ To many of the SSA countries' exporters such expenses deter them from fully exploiting the opportunities offered in the developed countries.

Another study done by Otsuki, Wilson & Sewadeh, in assessing the EU standard on the level of *aflatoxin* B1, estimated that while the EU standard of 2ppm would reduce health risks by approximately 2.3 deaths per billion per year when compared CAC standard on the level of 9ppm, the cost would be a reduction of African exports of US \$ 670 million, which is a 64% reduction in exports over the level of exports at the international standard.²⁷²

Thus, in light of the above statistics, it can be suggested that even if it is every country's sovereign right to protect its citizens, it is rather unimaginable to save 2.3 lives against a vast number of people who would benefit from the estimated loss of US\$ 670 million. Thus one would suggest that even if the SPS Agreement is aimed at the protection of human, animal and plant life or health, it is at the same time supposed to balance that aspiration with promotion of international trade.

Having discussed some of the trade impacts of the SPS measures, now this discussion turns to a highlight of a few case studies where the SPS Agreement has been implemented upon the SSA countries.

²⁷¹ Otsuki, T Wilson, JS & Sewadeh, M "A race to the Top? A case study of Food Safety Standards and African Exports" Policy Research Working Paper, p.5 Available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2001/03/30/000094946_01032007445741/Rendered/PDF/multi0page.pdf. (Accessed 20 October 2006).

²⁷² Otsuki, T. Wilson, JS & Sewadeh, M (2001) "Saving Two in a Billion: A Case Study to quantify the Trade Effects of European Food Safety Standards on African Exports" World Bank, p.18.

4.7 The European Union Ban on fish and fish products from East Africa

The EU has on a number of occasions imposed bans on the fish imports from Lake Victoria, which is the main source of fisheries for Uganda, Kenya and Tanzania.²⁷³ The first ban was due to detection of *salmonella* in fish, in 1997. Due to elevated levels of cholera around the region, in late 1997 further inspection were conducted which led to restrictions that involved testing at the port of entry to the EU for vibro *cholera*.²⁷⁴ The third ban was imposed as a result of fish poisoning on Lake Victoria during 1999-2000. To the EU, the East African countries had failed to enforce the Hazard Analysis and Critical Control Points (HACCP)²⁷⁵ as required.²⁷⁶

The bans on the fisheries sector in Uganda, Kenya and Tanzania cost the agricultural sector both at macro and micro level. Another study done by Henson, Brouder & Mitullah, reveals that at the macro level, the Nile perch export dropped by 64% and the total fish exports fell by 24%.²⁷⁷ They also assessed that in Tanzania, the incomes of fishermen who had become dependant on exports to the EU declined by 80% during the period of the second round of restrictions.²⁷⁸

²⁷³ Henson, S Brouder AM & Mitullah, W (2000) 5 “Food Safety Requirements and Food Exports from Developing Countries: A Case of Fish Exports from Kenya to the European Union”, *American Journal of Agricultural Economics*, 1159, 1164.

²⁷⁴ Henson et al (2000) “Impact of the sanitary and phytosanitary measures on developing countries” University of Reading, United Kingdom, p.35.

²⁷⁵ AN HACCP system establishes process controls through identifying points in the production process that are most critical to monitor and control. HACCP’s preventive focus is seen as more cost effective than testing a product and then destroying or reworking it. The system can be applied to control any stage in the food system and is designed to provide enough to direct corrective activities. HACCP is widely recognised in the food industry as an effective approach to establishing good production, sanitation and manufacturing practices that produce safe foods. (Unnevehr, L.J., & Jensen, H.H., “The Economic Implications of Using HACCP as a food safety Regulatory Standard” p.3, Centre for Agricultural and Rural Development, Iowa State University, available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/99wp228.pdf> (accessed on the 20th of October 2006).

²⁷⁶ Nyangito, H.O., (2002) “Post Doha Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreement” p.5 A paper presented during the ABCDE- Europe conference session on “The Real Opportunities and Constraints to African Development induced by the New Round o Trade Negotiations” Available at <http://www.kippra.org/Download/OPNo4.pdf>. (Accessed 15 October 2006).

²⁷⁷ Henson, S, Brouder AM, & Mitullah W (2000)5 “Food Safety Requirements and Food Exports from Developing Countries: A Case of Fish Exports from Kenya to the European Union, *American Journal of Agricultural Economics*, 1159, 1164.

²⁷⁸ Henson et al (2000) “Impact of the sanitary and phytosanitary measures on developing countries” University of Reading, United Kingdom, p.35.

On a micro level, McCormick and Mitullah (2002) estimated the cost of upgrading a single landing site or beach to meet international standards at US\$ 1.2 million.²⁷⁹ However, according to Henson and Mitullah, it is evident that there has been a tendency to over estimate the costs, perhaps as efforts to attract more significant donor support. Thus the Fisheries Department estimate the cost of basic beach improvements to be around US\$ 99,000 per beach.²⁸⁰

With regard to the Ugandan economy, it was estimated in a study done by Mussa, Vossenaar, & Waniala, that it incurred the following;²⁸¹

- An estimated loss of US\$ 36.9 million over the period of the ban and loss to the fishermen community in terms of reduced prices and less activity of fishing estimated at US\$ 1 million per month.
- Out of 11 factories, which were operational at the time of the ban, three were completely closed and the rest operated at a 20% capacity, thus laying off 60-70% of the directly employed workers. Not to mention a number of those who were indirectly benefiting from the fish trade, like packaging, transport, and the overall economy were directly affected.

Unfortunately, large companies are better placed to undertake additional investments needed to meet international SPS standards. Moreover, firms with foreign capital participation are likely to be better placed, compared to purely locally owned firms, to

²⁷⁹ McCormick, D & Mitullah, WV (2002) “Institutional Response to Global Perch Markets: The Case of Lake Victoria Fish Cluster.” Paper presented at the Conference of local African Food SYSTEMS: Products, Enterprises and local Dynamics, Montpellier, France. P.5.

²⁸⁰ Henson, S & Mitullah, W (2004). “Kenyan Exports of Nile Perch: The Impact of Food Safety Standards on an Export-Oriented Supply Chain, p. 68

Available at

http://www.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/07/30/000009486_20040730093127/additional/106506322_20041117184012.pdf (Accessed on 19 October 2006).

²⁸¹ Mussa, C., Vossenaar, R., & Waniala, N, “Strengthening Developing Countries’ Capacities to Respond to Health, Sanitary and Environmental Requirements” A Scoping Paper for Eastern and Southern Africa Experience of Kenya, Mozambique, the United Republic of Tanzania and Uganda. Paper No. 4 available at <http://www.idrc.ca/uploads/user-S/10322907650paper4.pdf> (Accessed on 19 October 2006).

meet SPS standards and/or to circumvent stringent standards.²⁸² Yet most of the fish exporting firms are owned by foreigners and the locals are on small scale. This could be beneficial to a few people but not to the economy as a whole. This necessitates the need to upgrade beach sanitary facilities in order to make sure that all companies, whether large or small benefit.

Thus all the three countries, Uganda, Kenya and Tanzania had to invest enormous amounts of money in relation to equipment and technical capacity to inspect fish and implement quality control measures. Some countries, Uganda, for example, had to solicit for funds from the United Nations Industrial Development Organisation (UNIDO) to invest in the competent authority and associated facilities.²⁸³

4.7.1 Ban on Citrus Fruits in South Africa

South Africa's main export destination of citrus fruit is the EU market, which makes up 65% of all citrus fruits of South Africa.²⁸⁴ In 2004, the EU and US established a Citrus Black Spot (CBS) standard that banned export of citrus from some parts of South Africa that inflicted revenue loss and increased cost compliance. The areas affected most were the Cape Province which is a predominantly citrus fruits growing area.

Joost, Kruger & Kotze (2003), estimated the cost of compliance with the CBS for a company at an average revenue loss of 4% of the total revenue. The cost of complying is estimated at Rands 1.29 million. The government of South Africa spent between Rand 11

²⁸² Zugarramurdi, A (1999) "Import Requirements and Quality Costs" FAO Corporate Document Repository, Southern Regional Centre INTI-CIC p.4

Available at <http://www.fao.org/docrep/007/y5767e/y5767e0p.htm> (accessed on 25 October 2006).

²⁸³ Nyangito, H.O (2002) "Post Doha Challenges in the Sanitary and Phytosanitary and Trade Related Intellectual Property Rights Agreement" p.7.

²⁸⁴ Gebrehiwet Y F (2004) "Quantifying the Trade Effects of Sanitary and Phytosanitary Regulations in OECD Countries on South African Food Exports", p.61 Department of Agricultural Economics, Extension and Rural Development, Faculty of Economic and Management Sciences, University of Pretoria. Available at <http://upetd.up.ac.za/thesis/available/etd-08272004-072352/unrestricted/00dissertation.pdf> (Accessed 12 October 2006).

to 16.5 million during the 1995 season and between Rand 30-50 million between the 1997 season on fungicides alone for pre-harvest control of CBS.²⁸⁵

However, risk analysis using the latest scientific techniques show that CBS cannot spread to the EU because fruit exported to EU reaches when unfavourable climate prevails for the disease to germinate.²⁸⁶ Fruits have been exported to the EU since 1925, however, there has never been the occurrence of black spot on European Orchards. Thus, the recent phytosanitary standard regarding the CBS would appear to be a disguised restriction on South Africa's citrus fruit export to the EU, which is not based on scientific justifications.

4.7.2 The Zimbabwean Beef exports to the EU.

Due to trade concessions granted to African countries under the Lome Convention,²⁸⁷ Zimbabwe became a big exporter of beef to the EU market. There is little small-scale production of beef as a vast majority is produced at a large scale. Unfortunately, the sanitary standards laid down by the EU require full traceability of animals down the supply chain. For example, exporters have to demonstrate that the animals are from FMD free areas and are free from certain other diseases.²⁸⁸

²⁸⁵ Jooste, A. Kruger, E & Kozte, F (2003) "Standards and Trade in South Africa: Paving pathways for increased market access and Competitiveness", Chapter 4:235-370. In Wilson, JS & Abiola, VO (Eds.) (2003) Standards & Global Trade: A Voice for Africa. The World Bank, Washington DC, 301.

²⁸⁶ Gebrehiwet Y F (2004) "Quantifying the Trade Effects of Sanitary and Phytosanitary Regulations in OECD Countries on South African Food Exports", p.61 Department of Agricultural Economics, Extension and Rural Development, Faculty of Economic and Management Sciences, University of Pretoria. Available at <http://upetd.up.ac.za/thesis/available/etd-08272004-072352/unrestricted/00dissertation.pdf> (Accessed 12 October 2006).

²⁸⁷ The Lome Convention came into force in 1976 aimed at the provision of a new framework of cooperation between the then European Community (EC) and developing ACP countries, in particular former British, Dutch, and French colonies. Among other goods there was preferential access based on a quota system was agreed for products, such as sugar and beef, in competition with EC agriculture. It expired in 2000 and was extended under the new Cotonou Agreement for the next 20 years. (The Lome Convention: Has it changed anything within the ACP countries?" available at <http://homepages.uel.ac.uk/mye0278s/ACP1.htm> (accessed on the 20th of October 2006).

²⁸⁸ Henson, S.J., Loader, R.J., Swinbank, A., Bredahl, M & Lux, M., (2000) "Impact of Sanitary and Phytosanitary Measures on Developing Countries." University of Reading, p.27.

4.7.3 Coffee from Cameroon and Ethiopia

There is a widespread perception that buyers in Europe try to reduce the price on quality grounds due to quality problems especially moisture content in coffee. Although lacking in proper procedures and equipment, the crop worms such as the 12% moisture were well defined and known. Ethiopia's case was due to as tested primarily for black beans and humidity. It was suggested that international n mixed quality attributable largely to sun drying and possible high moisture levels and although they could be sold they tended to attract much lower prices than the equivalent washed coffee crop (20% of exports).²⁸⁹

Having looked at a few case studies about the impact of the application of the SPS measures on developing countries, one would wonder what the implications of the SPS measures on the SSA countries are.

4.8 Implications of SPS Measures on SSA countries economies

The SPS Agreement and measures have had enormous impact on trade for DCs especially the SSA countries. They are both negative and positive but unfortunately the negative ones outweigh the positive ones.

4.8.1 Total Prohibition of trade by the SPS standards

Some SPS standards can prohibit international trade because they are stringent. For example, an EU regulation requires that dairy products be manufactured from milk produced by cows kept on farms and milked mechanically.²⁹⁰ This regulation virtually precludes imports from many DCs especially the SSA countries where milk production is by and large a smallholder activity. The EU recently invoked this regulation to ban

²⁸⁹ Ibid p.50

²⁹⁰ Athukorala P-C & Jayasuriya S (2003) "Food Safety Issues, Trade and WTO Rules: A Developing Perspective." A revised version of a presentation at the International Workshop on "International Food Safety Regulations and Processed food exports" held on 27-28 March, 2003 in New Delhi, India p.8.

import of camel cheese from Mauritania, bringing hardship to small scale enterprises, which developed the product at a considerable cost.²⁹¹

4.8.2 Certainty in SPS measures and requirements

The SSA countries' participation in international trade has been improved because of the harmonisation of the SPS measures and even in case a country establishes its own SPS measures, they are based on scientific evidence. The harmonisation of the SPS Agreement provides all countries with certainty as to what are the rules of exporting and the procedures as well as the requirements to be met by the exporters. All this information is available to the potential exporters.

However, looking at the implications of the imposition of SPS measures on the economies of the DCs, first, in case a commodity does not meet the required export standards, it is still sold on the DCs' markets. This might be because the exporters do not want to lose incomes totally, yet at the same time the SPS standards set by the DCs are lower than those acceptable internationally. For example, due to the high levels of *aflatoxins* in ground nuts in the Gambia, or the unacceptably high levels of *Salmonella* in fish from Kenya, Uganda Tanzania and Mozambique.²⁹² However, this might threaten the welfare of local consumers due to the poor quality of the goods.

On the other hand, the consumer welfare may also be compromised due to non-availability of the products or due to a limited availability at high prices. This is because the SSA countries would be exporting to other countries as a result of the benefit of the SPS Agreement streamlining of an SPS measure applicable in the circumstances.

Food safety is a 'luxury' good whose demand rises as income levels rise, and greater prosperity tends to be accompanied by increased demand for more stringent SPS standards in developed countries. Many in developed countries see the much laxer SPS

²⁹¹ Ibid.

²⁹² Henson, et al (2000) "Impact of Sanitary and Phytosanitary Measures on Developing Countries." University of Reading, 2000 p.51.

standards that often prevail in DCs as a threat precipitating ‘a race to bottom’.²⁹³ Thus the benefits of harmonisation of the SPS measures are under looked by the developed countries, as the DCs establish measures which are way below the level perceived to be the right one in developed countries.

Second, and perhaps more importantly, as traditional trade barriers such as tariff and quantitative restrictions continue to decline, protectionist interests are likely to make increasing use of food safety regulations and other technical barriers to block trade. This has been the case because of the position of the SSA countries.

4.9 Is there away forward?

As already discussed above, the main challenge to the SSA countries is the lack of adequate resources, both technical and financial. Thus, the best way of reducing the challenges of the SSA countries in as far as promoting their exports in agricultural produce is concerned is by way of assisting them in terms of resources.

The developed countries have helped with regard to funding the activities of the WTO. In 2001, the WTO allocated over US\$ 1 million per year, slightly more than 1% of its total budget, for providing assistance to DCs in complying with the WTO. The World Bank (WB) in partnership with other international trade organisations such as the WTO, IMF²⁹⁴, UNCTAD²⁹⁵, and UNDP²⁹⁶ already provide support for DCs in the process of integrating into the international trading regime.²⁹⁷ In 2002, the WB and the WTO established a new fund to provide funding to DCs to assist them meet SPS standards. The

²⁹³ Athukorala P-C & Jayasuriya S (2003) “Food Safety Issues, Trade and WTO Rules: A Developing Perspective.” A revised version of a presentation at the International Workshop on “International Food Safety Regulations and Processed food exports” held on 27-28 March, 2003 in New Delhi, India p.2.

²⁹⁴ International Monetary Fund.

²⁹⁵ United Nations Conference on Trade and Development.

²⁹⁶ United Nations Development Programme.

²⁹⁷ Mayeda, G (2004) 7(4) “Developing Disharmony? The SPS & TBT Agreements and the Impact of Harmonisation on Developing Countries.” *Journal of the International Economic Law* Vol. 7 No. 4, Oxford University Press, 2004, 737 at p.761.

WB pledged US\$300,000 and the WTO will contribute from the Doha Development Trust Fund.²⁹⁸

Another challenge for SSA countries has been the failure to fully participate in the DSU of the WTO. Again, this is due to among other factors, mainly, the lack of adequate resources. The WTO together with some developed countries has set up a fund called the ACWL.²⁹⁹ It assists in providing DCs with legal assistance in terms of training trade lawyers as well provision of legal advice.³⁰⁰ In addition, there has been a fund established which operates on a budget of US\$ 1 million, just reserved for legal assistance for DCs at a subsidised fee while for the LDCs, where a majority of SSA countries fall, it is free of charge.

Thus on the overall, it can be concluded that there is a way forward as far as the SPS measures are concerned. This is because of the input in place for making the provisions of the SPS Agreement work. It should be borne in mind that the SPS Agreement is a relatively new trade agreement, having come into effect in 1995, thus, what has been done, has been quite assuring as far as the future holds for the SSA countries in meeting the standards set under the SPS Agreement.

4.10 Conclusion

The SPS Agreement applies equally to the developed as well as DCs, but it poses challenges in quite a divergent way. The challenges the SSA countries face in meeting their obligations and enjoying their rights under the SPS Agreement have been immense. These range from failure to be represented at the international standard setting organisations, through the inadequacy of the special and differential treatment provisions, to the poor participation of SSA countries in the DSU. The underlying factor, however, has been the lack of adequate resources, both human and financial. But, with the

²⁹⁸ Course on Dispute Settlement, 3.9 SPS measures UNCTAD/EDM/Misc.232/Add.13, p. 53

²⁹⁹ The ACWL is the Advisory Centre on WTO Law. It is aimed at providing legal assistance to the developing countries in terms of legal advice, legal assistance in WTO dispute settlement proceedings and training in the WTO dispute settlement. The Least Developed countries do not have to pay for the services.

³⁰⁰ Davey, WJ (2005) "The WTO Dispute Settlement System: How Have Developed Countries Fared?" SSRN Draft, November 2005, p.36.

assistance of the developed countries, together with the international trade organisations like, the WTO, IMF, WB, UNDP and UNCTAD, the challenges faced by SSA countries in fulfilling their obligations have been reduced and perhaps in the future, SSA countries are also to fully enjoy the rights under the SPS Agreement through recognising the SDT provisions in improving transparency, promoting harmonisation and preventing the implementation of stringent SPS measures.



5.0 RECOMMENDATIONS.

Having discussed the application of the SPS Agreement in depth, particularly to the SSA countries, now this discussion turns to a highlight of some of the proposed recommendations in order for the SSA countries to fully benefit from the rights provided for in the SPS Agreement. The recommendations take a two dimensional view, one is an amendment of various articles of the Agreement and another building of institutional capacities of the SSA countries in order to fulfil their obligations and at the same time enjoy their rights under the SPS Agreement.

5.1 Special and differential Treatment

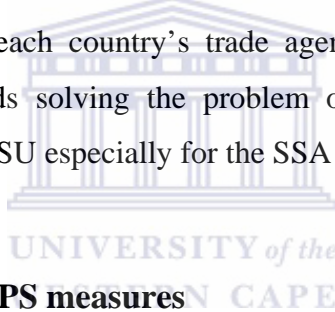
First, the SPS Agreement contains a number of vague formulations about the need for special and differential treatment of the developing countries, particularly the SSA ones. Article 10 of the SPS Agreement should be clarified by the WTO through an appropriate amendment. It provides that members shall take account of the special needs of developing country members, and in particular of the LDC members, when drafting international standards. SSA countries dominate on the list of the list LDCs.

However, article 10, as it is presently being implemented by the international standard setting organisations, creates a double standard for DCs, due to the fact that the provisions of article 10.4 are not mandatory. To correct this problem, instead of lowering international standards to levels that are acceptable to SSA countries, developed countries can and should be compelled to instead beef up efforts to meet the goals of article 10 by organizing international aid to help developing nations meet "world class" standards. This can be done by making sure that SSA countries receive special support from

developed countries and international organisations in relation to agricultural products of particular significance to the SSA countries.

5.1.1 Implementation of Panel and Appellate Body Rulings

There is the problem of enforcing panel and appellate body decisions which can be solved by reform of the dispute settlement process. For example, financial compensation instead of withdrawal of trade preferences should be the penalty for defying trade rules by a member state. Alternatively, the punishment could be a collective withdrawal of preferences by all member countries instead of one member country. This would help the SSA countries due to their lack of ability to retaliate, also due to inadequate resources. However, the possibility of collective withdrawal of trade preferences is more unlikely or difficult to implement given each country's trade agendas, nevertheless, if enforced, would go a long way towards solving the problem of inadequacy of the available remedies to the parties to the DSU especially for the SSA countries.



5.1.2 Harmonisation of SPS measures

Article 3 of the SPS Agreement should be amended with regard to harmonisation of the SPS measures adopted by parties. Since most SSA countries have expressed concerns about their participation in the international standard setting organisations, and the problems faced in complying with the SPS measures, a clear and transparent way of adopting international standards should be addressed. This may be done through basing the SPS measures on consensus, where countries from different geographical areas and levels of development are considered. In addition in case a measure is to affect a certain region, say, SSA, then before it is adopted, the countries from that region should be afforded an opportunity to be heard and if possible adduce evidence in support for an SPS standard.

5.1.3 Equivalence not sameness

Article 4.1 recognises that different measures may achieve the same level of SPS protection. Thus countries have a certain level of flexibility regarding the kind of measures to adopt. However, equivalence has been treated to mean “sameness”. Due to the benefits that would arise from the participation of DCs from bilateral or multilateral agreements on recognition of equivalence of SPS measures, developed countries should assist where possible to make these agreements work. Thus particular emphasis should be put in the setting up of internationally financed regional or sub-regional laboratories, certification bodies. I suggest that such institutions should be made to function under the auspices of the international standard setting organisations. By doing this, it shall be bringing services to the people who need it most, rather than setting standards which many of the SSA countries have no idea about.

5.1.4 Adaptation to regional conditions

Article 6 of the SPS Agreement provides that members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area, whether all of a country, part of a country, or all or parts of several countries from which the product originated and to which the product is destined. The adaptation to regional conditions is of particular relevance to SSA countries, however the procedures to prove that some areas are pest or disease free or at low risk are usually long and burdensome and often include the need to provide complex scientific evidence, thus they are expensive. In addition, the eradication of specific diseases from an area may require considerable investment and there is a need, especially for SSA countries, to establish whether they can get appropriate return on their investment. It would not make economic sense to invest in an area which is not going to benefit a particular sector or the economy as a whole. Thus clear reference should be made in article 6 to the effect that the international standard setting organisations and the developed countries should provide assistance to DCs especially the SSA in a bid to facilitate the implementation of the provisions of the article.

5.1.5 Transparency

Article 7 and Annex B of the SPS agreement provide for the transparency of sanitary and phytosanitary regulations. Member states have to ensure that the SPS measures that are adopted have to be published promptly.³⁰¹ But time should be allowed for SSA countries to adopt their products or methods in order to comply with a number of new SPS measures. Transparency would go a long way towards ensuring that the SPS Agreement works, but, unfortunately for SSA countries, developed countries have chosen to defy the provisions relating to transparency by not providing the necessary documentation relating to a new measure. But, even if such information is made available, SSA countries frequently do not have access to the new standard materials due to a number of reasons already mentioned which stem from lack of finances.

5.1.6 SSA countries initiative

On the other hand, SSA countries can also partially solve the challenges they face under the SPS Agreement by setting aside resources to meet their obligations and requirements under the SPS Agreement. As discussed earlier, SSA countries lack the resources to establish avenues under the SPS Agreement and as such end up not being able to comply with the SPS Agreement. This can be done either nationally or on a regional basis. For example, if countries in the Southern Africa Development Community (SADC), established a fund specifically for upgrading the SPS measures in their countries, this would be a partial solution. The same would go for other regions such as the East and West African regions.

³⁰¹ The SPS Agreement, Article 7 & Item 1 Annex B

5.1.7 The international standard setting bodies

International standards setting bodies should be reformed and/ or developed so as to better address the needs of SSA countries. Ways need to be found to facilitate the better inclusion of the SSA countries' operation in the WTO Agreement. To increase their sense of 'ownership' of the Agreement, revisions to its transparency arrangements may be necessary along with greater harmonisation of international SPS standards, changes to the decision-making procedures of the international setting organisations and the development of mechanisms for legal and or technical assistance relating to SPS matters within the context of the WTO.



5.2 CONCLUSIONS

As tariff trade barriers were being reduced, there was a fear that non-tariff barriers to trade, including areas concerning human and food safety were to become a hindrance to international trade. Thus during the Uruguay Round, the contracting members agreed to establish an agreement aimed at the protection of human, animal and plant life and or health. This led to the introduction of the SPS Agreement in 1995. Its main aim is to protect life and health on one hand as well as promoting international trade on the other. The SPS Agreement is a science based agreement but, thus it poses a number of problems and challenges for the DCs and especially the SSA states.

The challenges the SSA countries face in meeting their obligations and enjoying their rights under the SPS Agreement have been immense. These range from failure to be represented at the international standard setting organisations, through the inadequacy of the Special and Differential Treatment provisions in the Agreement to the poor participation of SSA countries in the DSU. The underlying factor, however, has been the lack of adequate resources, both human and financial. But, with the assistance of the developed countries together with some international organisations like the World Bank WB, IMF, UNDP and UNCTAD, the challenges faced by the SSA countries in fulfilling their obligations have been reduced and perhaps in the future, SSA shall fully enjoy the rights under the SPS Agreement through recognition of the SDT provisions in improving transparency, promoting harmonisation and preventing the implementation of the SPS measures that cannot be scientifically justified.

The SPS agreement has had an enormous impact on international trade, more so from the SSA perspective. This is because of a number of daunting challenges and obstacles that SSA countries face ranging from compliance with the stringent SPS standards, to the lack of adequate resources. Matters are not made any better by the developed countries' technological advancement and sophistication, thus demanding for higher SPS standards. Much as there are various considerations for DCs in the SPS Agreement, the language used is not obligatory enough, thus in most cases, developed countries have out of choice failed to fulfil their part in as far as provision of technical assistance is concerned.

If possible, developed countries should support modest amendments to the SPS Agreement to ensure that the removal of trade barriers does not erode domestic public health standards. Such steps will not only protect consumers or international traders but will also help maintain public support for international trade agreements.



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ANNEXTURE A

AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Members

Reaffirming 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;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring 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;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

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 sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b) (1); Hereby agree as follows:

Article 1

General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.
3. The annexes are an integral part of this Agreement.
4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

Article 2

Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.
2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.
3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.
4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

Article 3

Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.(2) Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

Article 4

Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Article 5

Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest — or disease — free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.
4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.
5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.
6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.(3)
7. 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.

8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

Article 6

Adaptation to Regional Conditions, Including Pest — or Disease — Free Areas and Areas of Low Pest or Disease Prevalence

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area — whether all of a country, part of a country, or all or parts of several countries — from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

2. Members shall, in particular, recognize the concepts of pest — or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

3. Exporting Members claiming that areas within their territories are pest — or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest— or disease—free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Article 7

Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Article 8

Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Article 9

Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.
2. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

Article 10

Special and Differential Treatment

1. 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.
2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.
4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

Article 11

Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.
2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.
3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

Article 12

Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.
2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.
3. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.
4. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a

major trade impact. The list should include an indication by Members of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefor, and, in particular, whether it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following its indication of the use of a standard, guideline or recommendation as a condition for import, it should provide an explanation for its change and so inform the Secretariat as well as the relevant international organizations, unless such notification and explanation is given according to the procedures of Annex B.

5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations.

6. The Committee may, on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4.

7. The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation.

Article 13

Implementation

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

Article 14

Final Provisions

The least-developed country Members may delay application of the provisions of this Agreement for a period of five years following the date of entry into force of the WTO Agreement with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing country Members may delay application of the provisions of this Agreement, other than paragraph 8 of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources.

ANNEX A

DEFINITIONS (4)

1. Sanitary or phytosanitary measure — Any measure applied:

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. Harmonization — The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.

3. International standards, guidelines and recommendations

(a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and

(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

4. Risk assessment — The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

5. Appropriate level of sanitary or phytosanitary protection — The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the “acceptable level of risk”.

6. Pest— or disease-free area — An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest— or disease-free area may surround, be surrounded by, or be adjacent to an area — whether within part of a country or in a geographic region which includes parts of or all of several countries -in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. Area of low pest or disease prevalence — An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

Annex B

Transparency of Sanitary and Phytosanitary Regulations

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations (5) which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

2. 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.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;

(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;

(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;

(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals (6) of the Member concerned.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provides, upon request, copies of the regulation to other Members;

(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.

8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or

(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

ANNEX C

CONTROL, INSPECTION AND APPROVAL PROCEDURES (7)

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

(d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;

(e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;

(f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;

(g) the same criteria should be used in the setting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;

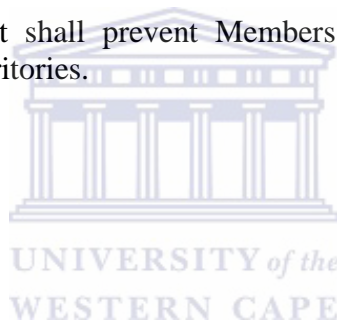
(h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and

(i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.



ANNEXTURE B

GATT 1947

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) *necessary to protect human, animal or plant life or health;*
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of

or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

