

Sanitary and phytosanitary measures as barriers to trade: A South African perspective

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This thesis is dedicated to the memory of Professor Stephen de la Harpe
(23 September 1957 – 18 February 2021)

A kind and supportive human and an amazing research supervisor
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ABSTRACT

Sanitary and phytosanitary (SPS) measures are measures aimed at the protection of human, animal and plant life and health, within World Trade Organization (WTO) Member territories, from the risks associated with the introduction and spread of pests and diseases into such territories through trade. The WTO, through its *Agreement on the Application of Sanitary and Phytosanitary Measures* (WTO-SPS), guides the application of sanitary and phytosanitary measures and provides a set of guiding principles, rights and obligations applicable to Member States.

Dispute resolution through the processes of the WTO is available to Members on a Member to Member level within a defined scope and on specific terms. Private parties who operate within the SPS chain at a national level, whether involved in import or export or neither, are dependent on solutions to barriers or disputes available to them through national legislation. In the absence of an enabling legal framework to facilitate aspects of trade such as certainty and continuity in standard setting, the basis of measures taken in science, transparency and legal recourse to resolving barriers or disputes arising, private parties are vulnerable to fluctuations in, for example, their country's disease-free status. Private parties are also vulnerable to losing relevance as trading partners in periods of ongoing SPS events and to the loss of trust that trading partners have in the country's ability to trade safely. These are matters that affect private parties who do not have legal recourse to the WTO dispute resolution procedures which are well within WTO concern as they are directly related to the purpose of SPS measures, the principles, rights and obligations on which they are based.

Given the importance of agriculture and the increasing inseparability of international rights, obligations and principles in a field of WTO law such as SPS, the importance of a national legislative framework in as far as being the translator of such rights, obligations and principles into legally enforceable rights, obligations, principles, processes and procedures is significant. The rights, obligations, and principles of SPS measures apply to all products, processes and procedures that are within the scope of the agreement and may include at least 36 chapters of the harmonised tariff book. It

is necessary to consider also that international trade, national trade and the associated rights, obligations, and principles of the WTO-SPS agreement interact with the social, political, and economic realities of the country within the countries to which the agreement applies. Therefore, researching some of the persistent challenges experienced by the red meat industry in South Africa prone to negative trade-related consequences during and after the outbreak of a notifiable disease, provides insight into the perception of the ability of the legislative framework to provide solutions to these consequences.

This research applies a mixed methodology approach whereby qualitative research by means of semi-structured interviews was combined with doctrinal legal research and a quantitative content analysis using Rprogramming. The qualitative research focused on the role of legislation and the perspectives of selected actors in the red-meat industry, specifically in reference to the foot-and-mouth-disease (FMD) outbreaks and subsequent loss of disease-free status since 2019. The doctrinal legal analysis and content analysis focused on the SPS-related legislative framework. The combination of these methods provides a multi-perspective analysis of SPS measures as barriers to trade from a South African perspective and contributes to the mixed-methods turn in legal studies. The objective of this research is to identify and explore persistent challenges to the prevention and resolution of barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. Ultimately, this research recommends potential practical solutions to the identified challenges with specific focus on SPS-related barriers or disputes that are beyond the strict terms of dispute resolution available through the World Trade Organization (WTO).

Key words: AfCFTA; barriers to trade; content analysis; dispute resolution; CADA; CAQDSA; FMD; NTB; OIE; qualitative research; SADC; Sanitary and phytosanitary measures; SPS; Rstudio; WTO.

OPSOMMING

Sanitêre- en fitosanitêremaatreëls (SFS-maatreëls) is maatreëls wat op die beskerming van menslike, dier- en plantlewe en -gesondheid, binne die lidlande van die Wêreldhandelsorganisasie (WHO) gemik is. SFS-maatreëls beskerm lidlande teen die risiko's wat verband hou met die inbring en verspreiding van peste en siektes in sulke gebiede wat verband hou met handel dryf. Die WHO-ooreenkoms *The Agreement on the Application of Sanitary and Phytosanitary Measures* rig die toepassing van SFS-maatreëls en verskaf 'n stel leidende beginsels, regte en verpligtinge wat op lidlande van toepassing is.

Dispuutbeslegting deur die prosesse van die WHO is beskikbaar vir lede op 'n lid-tot-lid-basis, binne 'n bepaalde omvang en op spesifieke voorwaardes. Private partye wat op nasionale vlak binne die SFS-ketting funksioneer, hetsy hulle betrokke is by invoer of uitvoer of nie, is afhanklik van oplossings vir hindernisse of dispute wat deur nasionale wetgewing tot hulle beskikking is. In die afwesigheid van 'n bemaagtigende wetlike raamwerk om byvoorbeeld sekerheid en kontinuïteit in standaardstelling te fasiliteer, of opdrag dat maatreëls wat geneem word gebaseer moet word op beginsels van wetenskap, sekerheid, deursigtigheid en regstoevlug tot die oplossing van hindernisse of geskille wat ontstaan, word private partye benadeel. Private partye is ook kwesbaar vir fluktuasies in byvoorbeeld hul lande se siektevrye status. So 'n verlies kan ook private partye kwesbaar maak om relevansie as handelsvennote te verloor in tydperke van voortgesette SFS-gebeurtenisse en as gevolg van die verlies aan vertroue wat handelsvennote het in die land se vermoë om veilig handel te dryf. Hierdie is aangeleenthede wat private partye raak, wat nie toegang tot die WHO-geskilbeslegtingsprosedures het nie, wat tog goed binne WHO se besorgdheid is aangesien dit direk verband hou met die doel van SFS-maatreëls en die beginsels, regte en verpligtinge waarop dit gebaseer is.

Gegewe die belangrikheid van landbou en die toenemende onafskeidbaarheid van internasionale regte, verpligtinge en beginsels in 'n veld van WHO-reg soos SFS, die belangrikheid van 'n nasionale wetgewende raamwerk in soverre dit die vertaler van sulke regte, verpligtinge en beginsels in wetlik afdwingbaar is. Regte, verpligtinge,

beginsels, prosesse en prosedures is betekenisvol. Die regte, verpligtinge en beginsels van SFS-maatreëls is van toepassing op alle produkte, prosesse en prosedures wat binne die omvang van die ooreenkoms is en kan ten minste 36 hoofstukke van die geharmoniseerde tariefboek insluit. Dit is egter nodig om ook in ag te neem dat internasionale handel, nasionale handel en die gepaardgaande regte, verpligtinge en beginsels van die WHO-SFS-ooreenkoms in wisselwerking is met die sosiale, politieke en ekonomiese realiteite binne die lande waarop die ooreenkoms van toepassing is. Deur daarom navorsing te onderneem oor die aanhoudende uitdagings wat 'n bedryf in Suid-Afrika, wat tot negatiewe handelsverwante gevolge tydens en na die uitbreek van 'n aanmeldbare siekte geneig is, bied insig in die persepsie van die vermoë van die wetgewende raamwerk om oplossings vir hierdie gevolge te verskaf.

In hierdie navorsing word 'n gemengdemetodologiebenadering gevolg, waarvolgens kwalitatiewe navorsing deur middel van semigestruktureerde onderhoude gekombineer is met leerstellige regsnavorsing en 'n kwantitatiewe inhoudsanalise deur gebruik te maak van R-programmering. Die kwalitatiewe navorsing het gefokus op die rol van wetgewing en die perspektiewe van geselekteerde akteurs in die rooivleisbedryf, spesifiek met verwysing na die bek-en-klouseer-uitbrekings en die daaropvolgende verlies van siektevrye status sedert 2019. Die leerstellige regsontleding en inhoudontleding is gefokus op die SFS-verwante wetgewende raamwerk. Die kombinasie van al drie metodes verskaf 'n multiperspektiefanalise van SFS-maatreëls as handelshindernisse vanuit 'n Suid-Afrikaanse perspektief en dra by tot die gebruik van gemengde metodes in regstudies. Die doel van hierdie navorsing is om volgehoue uitdagings vir die voorkoming en oplossing van hindernisse of dispute wat verband hou met SFS-maatreëls in die Suid-Afrikaanse konteks te identifiseer en te verken. Uiteindelik beveel hierdie navorsing potensiële praktiese oplossings vir die geïdentifiseerde uitdagings aan met spesifieke fokus op SFS-verwante hindernisse of dispute wat buite die streng bepalinge van WHO-dispuutbeslegting beskikbaar is.

Sleutelwoorde: AfCFTA; CAQDSA; CADA; bek-en-klouseer; dispuutbeslegting; handelshindernisse; inhoudsanalise; kwalitatiewe navorsing; NTB; OIE; Rstudio; Sanitêre en fitosanitêre maatreëls; SFS; SAOG; WHO.

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LIST OF ABBREVIATIONS

AB	Appellate Body of the World Trade Organization
ACWL	Advisory Centre on WTO Law
ADI	Acceptable Daily Intake
AfCFTA	The African Continental Free Trade Agreement
AfCFTA-SPS	Annex 7, Sanitary and Phytosanitary Measures of The African Continental Free Trade Agreement
ALOP	Appropriate Level of Protection
ASF	African Swine Fever Virus
BFAP	The Bureau for Food and Agricultural Policy
CA	Content Analysis
CAC	The Codex Alimentarius Commission
CADA	Computer-assisted data analysis
CAQDSA	Computer-assisted (or aided) qualitative data analysis software
CAQDA	Computer-assisted (or aided) qualitative data analysis
CC	A decision of the South African Constitutional Court
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
FAO	Food and Agriculture Organization of the United Nations
FLS	The Front Line States Alliance
FMD	Foot and Mouth Disease
FMDV	Foot and Mouth Disease Virus
GATS	The General Agreement on Trade in Services
GATT	The General Agreement on Tariffs and Trade

GF-TAD	The Global Framework for the Progressive Control of Transboundary Animal Diseases
GG	South Africa Government Gazette
GLEWS	Global Early Warning and Response System for Major Animal Diseases, including Zoonoses
GN	South Africa Government Notice
HPAI	Highly Pathogenic Avian Influenza
HS	Harmonized Commodity Description and Coding System
IMF	International Monetary Fund
IMS	International Meat Secretariat
IPPC	The International Plant Protection Convention
ISO	The International Organization for Standardization
ISSB	International Standard Setting Body
ITAC	International Trade Administration Commission
ITC	The International Trade Centre
ITO	The International Trade Organization
MMA	Multilateral Monetary Agreement and the Common Monetary Area
MRL	Maximum Residue Level
NGO	Non-Governmental Organisation
NTB	Non-Tariff Barrier
NTM	Non-Tariff Measure
OIE	The World Organisation for Animal Health
OIE-PVS	The OIE Performance of Veterinary Services (PVS) Tool
RSA	The Republic of South Africa
RTA	Regional Trade Agreement
SACU	The Southern African Customs Union
SADC	The Southern African Development Community

SADC-FTA	SADC Free Trade Area/Agreement
SADC-PT	SADC Protocol on Trade
SADC-SPS	Sanitary and Phytosanitary Annex to the SADC Protocol on Trade
SADCC	The Southern African Development Coordination Conference
SAJE	South African Journal of Economics
SALJ	The South African Law Journal
SARS	The South African Revenue Service
SAT	FMD Virus of South African Territories Serotype
SAYIL	South African Yearbook of International Law
SCA	South African Supreme Court of Appeal Decision
SDG	Sustainable Development Goals
SOP	Standard Operating Procedure
STATS SA	Statistics South Africa
STC	Specific Trade Concern
TAD	Transboundary Animal Disease
TBT	Technical Barrier to Trade
TPR	WTO Trade Policy Review
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Right
UNCTAD	The United Nations Conference on Trade and Development
VPN	Veterinary Procedural Notice
WCO	The World Customs Organization
WTO	The World Trade Organisation
WTO-SPS	WTO Agreement on the Application of Sanitary and Phytosanitary Measures

CHAPTER 1 INTRODUCTION

1.1 The Primary research objectives of this study

With a focus on the role of legislation and the perspectives of selected actors in the red-meat industry, the primary research objective of this research is to identify and explore persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. Related to this is the objective to recommend potential solutions to the identified challenges with specific focus on SPS-related barriers or disputes that are beyond the strict terms of dispute resolution available through the World Trade Organization (WTO). These are matters that may very well be within WTO concern that affect private parties who do not have legal recourse to the WTO dispute resolution procedures and are therefore dependent on the solutions available to them through national legislation.

1.2 An introduction to Sanitary and Phytosanitary measures and their role in international trade

1.2.1 A definition and overview of sanitary and phytosanitary measures

Sanitary and phytosanitary (SPS) measures are measures aimed at the protection of human, animal and plant life and health, within World Trade Organization (WTO) Member territories, from the risks associated with the introduction and spread of pests and diseases into such territories through trade.¹ The WTO, through its *Agreement on the Application of Sanitary and Phytosanitary Measures* (WTO-SPS), guides the application of sanitary and phytosanitary measures and provides a set of guiding principles, rights and obligations applicable to Member States. A sanitary or phytosanitary measure is defined by the WTO-SPS as:

Any measure applied:

¹ Annex A (1) of the *World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures* provides a detailed definition of sanitary or phytosanitary measures. This is also discussed in more detail below and at para 3.1.5.1 of chapter 3.

- (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

The agreement applies to all SPS measures that directly or indirectly³ affect international trade and in the definition above and the explanatory foot note to the definition states that:

"animal" includes fish and wild fauna; "plant" includes forests and wild flora; "pests" include weeds; and "contaminants" include pesticide and veterinary drug residues and extraneous matter.

Members have a right to take measures that are necessary, however not measures that are inconsistent with the agreement,⁴ that extend further than necessary and beyond scientific justification,⁵ arbitrary or discriminatory,⁶ or equate to a disguised restriction on trade.⁷

The obligation for the implementation of the WTO-SPS rights, obligations and principles lies with the Members, who "are fully responsible under this Agreement for

² *WTO-SPS* Annex A (1).

³ *WTO-SPS* Article 1 (1).

⁴ *WTO-SPS* Article 2 (1).

⁵ *WTO-SPS* Article 2(2).

⁶ *WTO-SPS* Article 2(3).

⁷ *WTO-SPS* Article 2(4)

the observance of all obligations set forth"⁸ therein and are further required to "formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies."⁹ The implementation Article places further responsibility on Members to ensure that regional bodies also comply, where relevant, with the agreement.¹⁰

SPS measures apply to at least 36 Chapters of the Harmonized Tariff book.¹¹ Most of what consumers eat on a daily basis is in one way or another guided by either a sanitary or phytosanitary measure, or both, along its chain of production and distribution. This is true from primary agricultural production to final state product. This is especially true of food in the formal chain of production and distribution. Resultantly, a large part of international trade and the disease-free status of Member

⁸ *WTO-SPS* Article 13.

⁹ *WTO-SPS* Article 13.

¹⁰ *WTO-SPS* Article 13. The Southern African Development Community (SADC) is an example of a regional body.

¹¹ Chapter One (live animals); Chapter Two (Meat and Edible Offal); Chapter Three (Fish and Crustaceans, Molluscs and Other Aquatic Invertebrates); Chapter Four (Dairy produce, Birds Eggs, Natural Honey, Edible Products of Animal Origin, Not Elsewhere Specified or Included); Chapter Five (Products of Animal Origin Not Elsewhere Specified or Included); Chapter Six (Live Trees and Other Plants, Bulbs, Roots and The Like, Cut Flowers and Ornamental Foliage); Chapter Seven (Edible Vegetables and Certain Roots and Tubers); Chapter Eight (Edible Fruit and Nuts, Peel and Citrus Fruit or Melons); Chapter 9 (Coffee, Tea, Maté and Spices); Chapter Ten (Cereals); Chapter 11 (Products of the Milling Industry, Malt, Inulin, Wheat Gluten); Chapter Twelve (Oil Seeds and Oleaginous Fruits, Miscellaneous Grains, Seeds and Fruit, Industrial or Medical Plants, Straw and Fodder); Chapter Thirteen (Lac, Gums, Resins, and Other Vegetables Saps and Extracts); Chapter fourteen (Vegetable Plaiting Materials, Vegetable Products Not Elsewhere Specified or Included); Chapter Fifteen (Animal or Vegetable Fats and Oils and Their Cleavage Products, Prepared Edible Fats, Animal or Vegetable Waxes); Chapter Sixteen (Preparations of Meat, of Fish, or of Crustaceans, Molluscs or Other Aquatic Invertebrates); Chapter Seventeen (Sugar and Sugar Confectionary); Chapter Eighteen (Cocoa and Cocoa Preparations); Chapter Nineteen (Preparations of Cereals, Flour, Starch or Milk, Pastrycooks Products); Chapter Twenty (Preparations of Vegetables, Fruit, Nuts or Other Parts of Plants); Chapter Twenty-One (Miscellaneous Edible Preparations); Chapter Twenty Two (Beverages, Spirits and Vinegar); Chapter Twenty Three (Residues and Waste from the Food Industries, Prepared Animal Fodder); Chapter Thirty (Pharmaceutical Products); Chapter Thirty One (Fertilizers); Chapter Forty One (aw Hides and Skins (Other than Furskins) and Leather); Chapter Forty Two (Articles of Leather, Saddlery and Harness, Travel Goods, Handbags and Similar Containers, Articles of Animal Gut (Other Than Silkworm Gut); Chapter Forty Three (Furskins and Artificial Fur, Manufactures Thereof); Chapter Forty Four (Wood and Articles of Wood, Wood Charcoal), Chapter Forty Six (Manufactures of Straw, of Esparto or of Other Plaiting Materials, Basketware and Wickerwork); Chapter Fifty One (Wool, Fine or Coarse Animal Hair, Horsehair Yarn and Woven fabric); Chapter Fifty Two (Cotton); Chapter Fifty Three (Other Vegetable Textile Fibres, Paper Yarn and Woven Fabrics of Paper Yarn).

states, as well as the health and safety of consumers and animals, is dependent on the effective implementation of such measures. These are measures without which it is generally not desirable to trade internationally nor locally on account of their role in food safety, animal and plant health. However, there are instances where either with protectionist intent or for alternative, yet still SPS-related reasons, such measures become barriers to trade. SPS measures as barriers, in the sense that their existence serves the specific and justified purposes of protecting human, animal and plant life and health, is not in itself undesirable or even discouraged. What is undesirable and what should be met with consequences are the intentional, unjustifiable or avoidable additional barriers related to SPS that are imposed beyond the bounds of what the provisions of the WTO-SPS permit or that exist as a result of, for example, poor implementation of the provisions of the WTO-SPS.

A measure's justifiability is based on a foundation of science and guidance in this regard is provided by the three main international standard setting bodies (ISSB), the World Organization for Animal Health (OIE),¹² the Secretariat of the International Plant Protection Convention (IPPC) and the Codex Alimentarius Commission (CAC). Each ISSB is responsible for a different aspect of SPS. The OIE deals with matters for animal health and zoonosis;¹³ the Secretariat of the IPPC with plant health, and; the Codex Alimentarius Commission with food safety.¹⁴ The number of commodities and manufactured goods to which SPS measures and the principles of SPS can potentially manifest themselves as barriers to trade, is significant. Practical reasons have resulted in the need for an agreement such as the *WTO-SPS*. One of these reasons is the increase in the use of SPS measures for protectionist¹⁵ purposes in reaction to more

¹² Previously the International Office of Epizootics.

¹³ The WHO defines a zoonosis as "any disease or infection that is naturally transmissible from vertebrate animals to humans". See World Health Organization (WHO) 2020 <https://www.who.int/news-room/fact-sheets/detail/zoonoses>.

¹⁴ These bodies are defined as providing "International standards, guidelines and recommendations" under the *WTO-SPS* Annex A (3).

¹⁵ In this research protectionism is defined as SPS measures that are applied beyond what is necessary to protect human, animal and plant life or health, and includes measures applied unjustifiably, arbitrarily or otherwise beyond the agreed limits of the *WTO-SPS* agreement. This also includes other actions that amount to disguised restrictions on trade.

stringent control over the use of tariffs and other trade remedies in international trade by other WTO Members.¹⁶

There is an inseparable connection between law and science in the field of SPS. Measures, which include legislation,¹⁷ are informed by science in the development of specific standards and measures. In an a similar way in which rivers come together at a confluence and follow one path to the ocean, so do multiple fields of science, law and economics meet at a confluence and pursue the path toward what becomes the practical application of SPS. SPS measures are not limited to emergency situations and a considerable number of measures regulate day-to-day SPS-related activity, with the ideal outcome being the avoidance of emergency situations and unnecessary barriers as far as possible. Legislation typically plays the role, either through the legislation itself or regulations that are created within the powers of such legislation, of enforcing or creating the standards based on principles of science. National regulations can be challenged on the basis of insufficient scientific evidence being presented as the basis of the regulation put in place.¹⁸

A number of values, realities and perspectives are relevant in balancing the purposes of international trade. From a law and development perspective, the criticism and debate surrounding the *WTO-SPS* and the role of the WTO in the progress of developing and least-developed countries, is persistent. SPS measures may legitimately be used as barriers to trade, provided they are not in violation of the *WTO-SPS* and can be justified based on science.¹⁹ For any Member to participate in such a trade environment, significant technical capacity and resources, including technical and infrastructural aspects, are required. Some of these capacity restraints are, for example, directly linked to the expense of laboratory equipment and the high skill level required to operate such facilities. A second example is the sheer number of persons

¹⁶ Kerr 2009 The Esty Centre Journal of International Land and Trade Policy, 4.

¹⁷ As per the definition above, "Sanitary or phytosanitary measures include all relevant laws, decrees regulations, requirements and procedures..."

¹⁸ Scott "Introduction" 3.

¹⁹ *WTO-SPS* Article 2.

required to carry out tasks related to, for example, control, inspection and approval and the related training required to ensure that this is done satisfactorily.

Science is not a unitary field, in the same way that law is not homogenous, but rather a heterogenous field.²⁰ The specific field(s) in play in the context of SPS, at any given time, is dependent on the specific measure, product or scenario in question, for example, animal health or food safety. Two distinguishable fields may very well interact or work within the same system or SPS chain. Law and science, and their various sub-fields involved in SPS,²¹ co-exist in a political, social, legal and economic environment that not only varies from country to country, but between different commodities and even between different levels of production or areas within a country. Beyond the mainstream trade law and scientific dimensions of SPS there are, therefore, broader contexts that are difficult to quantify. It is difficult to quantify the real socio-economic or financial effect that exists to, for example, comply with certain standards. It is also difficult to quantify aspects such as the real value in trade related damage during an SPS event or on account of an unjustifiable measure prohibiting import. As Scott states:

the SPS Agreement is an agreement about managing trade in a context of regulatory diversity. It exemplifies the futility of seeking to view trade in isolation from other issues or values.²²

This is a point that is shown to be of particular application in the South African context in chapter four.

SPS measures are measures that often require significant financial commitment from individual, non-state actors involved in the processes of importing or exporting. It is therefore necessary not only to have financial buy-in from actors in general but also political and social buy-in. In SPS terms, the concept of a country's disease-free status, recognised by the OIE, is affected by the outbreak of listed diseases or the presence thereof. Usually, a country as a whole is either recognised as disease free or loses its

²⁰ de Jong et al 2011 *Research Evaluation* 66.

²¹ "SPS" used in this context is used as a noun that identifies the research field concerned with sanitary and phytosanitary measures, including relevant rights, obligations and principles in context.

²² Scott "Introduction" 6.

status for the whole country based on an outbreak of a disease such as foot-and-mouth disease (FMD).²³ How long a loss like that lasts depends on the specific circumstances and is related to the extent of the outbreak, the severity of the specific strain and to a great extent, the competent authorities' ability to control the outbreak and resolve the matter. The loss of disease-free status is not dependent on whether the outbreak occurred on an exporting farm or not. If it occurs in an area previously recognised as disease free, it is an outbreak that has the likelihood of costing the country their status and recognition as disease free of that particular disease. As such, a country's ability to import or export does not solely depend on the importing and exporting parties' actions, but actions of both the competent bodies and other role players in general.

Most countries do not exclusively import or export. For this reason, a country can find itself legitimately restricted or banned from exporting to certain countries for SPS reasons. The same country may also take measures that legitimately impose a similar restriction or ban on other countries for the same reasons, at a different time. It is also possible that the same may happen where the measures taken are on facts, acting as disguised restrictions on trade. The point, however, is that it is important for a country to focus on both directions of flow in addition to trade in the same products at a national level. The measures taken by other members in pursuit of the protection of their own territories, the ability to satisfy the importing country's measures largely relies on factors such as the country's disease-free status. Additional factors such as private standards and consumer pressures add to the complexity of distinguishing between justifiable and protectionist action.

The protection of human, animal and plant life and health relies on an effective control system. International agreements, such as the *WTO-SPS* set the tone and essentially the rules of the game. Regional agreements often echo the structure and contents of the *WTO-SPS* or, as is common, state that the parties to the specific agreement are

²³ FMD is a virus that affects bovine animals. Disease specific detail is provided in chapter three at para 3.2.3 of chapter 3.

guided by the *WTO-SPS*.²⁴ The national level plays an equally important role in that it facilitates the translocation of rights, obligations and principles into practical effect. For principles guided by science at an international level that are so integral to the ability of commodity groups to trade, there are three essential elements at a national level that facilitate the effective application. These are, firstly, a legislative framework that is both proactive and reactive in containing an SPS event; secondly, legislation that is enabling in the context of SPS in facilitating trade, and; thirdly, an optimal interaction between a variety of actors, including the national competent authorities and the various actors involved and uninvolved in international trade.

1.2.2 SPS measures at the international level – The WTO-SPS Agreement

Experts have traditionally approached SPS measures from the perspective of their role in a WTO and Member to Member context and a vast amount of research tends to focus on interpretation of the facts and aspects of SPS disputes heard at the level of the WTO's dispute settlement body (DSB) and the subsequent reports. This is not surprising as this is the forum through which a number of disputes between Members have been heard by panels and the appellate body. The scope and lens of Member to Member dispute resolution naturally relies on considerable interpretation and is subject to considerable academic interest.

Compared to the available literature that focuses on analyses of the WTO level reports relating to disputes heard by panels and the appellate body there is a limited body of literature that explores a broader focus on SPS measures beyond a WTO and *WTO-SPS* context and their basis in science. A potential drawback of a limited focus on broader aspects affecting SPS or resulting from SPS, outside of the jurisdiction of the WTO, although causally connected to the same rights, obligations and principles which are settled at the DSB level, is that a gap in the literature exists.

Disputes related to SPS measures are not uncommon at a WTO level and SPS measures fall within the category of potential non-tariff barriers to trade. They are a potential

²⁴ For example, the African *Continental Free Trade Agreement* (hereafter AfCFTA-SPS), and the *Sanitary and Phytosanitary Annexure* to the *SADC Protocol on Trade* (hereafter SADC-SPS).

source of conflict and maintaining the balance between rational, non-discriminatory, science-based measures and measures beyond objective rationality and fairness can be controversial. Therefore, the further definition and refinement of a broader concept of SPS and disputes in this context is a desirable outcome of this research.

The WTO dispute settlement mechanism (DSM) provides instruments to tend to member complaints relating to rights and obligations under the WTO. There are up to four steps that the dispute settlement body (DSB) administers. These are consultations,²⁵ the panel phase,²⁶ appeals²⁷ and the implementation of decisions.²⁸ Members, especially developing and least developed members, face numerous challenges in accessing and effectively utilising the dispute resolution mechanism of the WTO. One of the challenges, especially for developing countries, is the high cost of litigation.²⁹ Another challenge is fear of potential retaliation by larger members in the event of a smaller or weaker member launching a dispute.³⁰ Members may also raise specific trade concerns (STCs), which is not the equivalent of a dispute. It is however a formal concern that is recorded. The WTO is not a forum at which private parties have recourse against Member states, even in the absence of actions taken to resolve disputes by their own representative Member state governments.

The volume of traditionally focused SPS literature and research is evidence of a constant and extensive grappling with the complexities involved and the importance of the field. Major cases under the WTO have concerned hormones in meat and meat

²⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4. An attempt to settle the dispute amicably between the Members. See: Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 487.

²⁶ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 6-8. A 3-member ad hoc panel decides whether there has been a violation of the WTO treaty cited. See: Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 487.

²⁷ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 17-19. An appeal may be submitted. An appellate body is established for this purpose. See: Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 487.

²⁸ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 21. There is opportunity to revert to a compliance panel to implement an adverse ruling. See: Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 487.

²⁹ Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 493.

³⁰ Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 494.

products, for example.³¹ Disputes have ranged across a variety of products and have predominantly been between larger trading Members.

With a WTO membership of 164 Members and 25 observers, and the potential application to 36 Chapters of the Harmonized Tariff Book, the reach of the *WTO-SPS* is significant.³²

1.2.3 SPS measures at the regional and African continental level – SADC and the AfCFTA

The *African Continental Free Trade Agreement* (AfCFTA) creates a dispute resolution framework that is very similar to that of the WTO. It has established a Dispute Settlement Body³³ that can establish a dispute settlement Panel³⁴ accessible at a Member to Member dispute resolution level.³⁵ The AfCFTA limits a State Party somewhat in terms of dispute resolution in that,

A state party which has invoked the rules and procedures of this protocol with regards to a specific matter, shall not invoke another forum for dispute settlement on the same matter.³⁶

The AfCFTA's *Protocol on Rules and Procedures on the Settlement of Disputes* does not provide recourse for individual, non-State parties, in the same way that the WTO does not.³⁷

³¹ See EC — Hormones (DS26) and EC- Hormones (Canada) (DS48).

³² As of 29 July 2016; WTO https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

³³ Agreement Establishing the African Continental Free Trade Agreement, Article 20; Agreement Establishing the African Continental Free Trade Agreement: Protocol on Rules and Procedures on the Settlement of Disputes Article 5.

³⁴ Agreement Establishing the African Continental Free Trade Agreement; Agreement Establishing the African Continental Free Trade Agreement: Protocol on Rules and Procedures on the Settlement of Disputes Article 9.

³⁵ Agreement Establishing the African Continental Free Trade Agreement: Protocol on Rules and Procedures on the Settlement of Disputes, Article 3. Although the language of "State" as opposed to "Member" is used.

³⁶ Agreement Establishing the African Continental Free Trade Agreement: Protocol on Rules and Procedures on the Settlement of Disputes, Article 3(4).

³⁷ Agreement Establishing the African Continental Free Trade Agreement: Protocol on Rules and Procedures on the Settlement of Disputes, Article 1(j) defines a third party as "a State Party with a substantial interest in a dispute." And a "State Party" is defined by Agreement Establishing the African Continental Free Trade Agreement, Article 1(v) as "a member State that has ratified or acceded to this Agreement and for which the Agreement is in force."

Internationally there are many agreements related to trade which include SPS-related clauses. Most reaffirm commitment to the WTO and the *WTO-SPS*. Others, almost verbatim, transplant the wording of the *WTO-SPS*. This is particularly true of the *SADC Sanitary and Phytosanitary Annex to the Protocol on Trade (SADC-SPS)*³⁸ and partly true of the *Agreement Establishing the African Continental Free Trade Agreement, Annex 7 Sanitary and Phytosanitary Measures (AfCFTA-SPS)*.

The *AfCFTA-SPS* provides guidance on SPS measures under the AfCFTA. The Annex is objectively detailed and, although very close in wording and structure to the *WTO-SPS*, it does elaborate on certain points and include broader provisions. These are dealt with in Chapter 5. It explicitly ties itself to the *WTO-SPS* in Article 3, which holds that:

In the preparation, adoption, and application of SPS measures, State Parties shall be guided by the provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.³⁹

The *SADC-SPS* is less fleshed out and its wording and structure is closer to the *WTO-SPS* than that of the *AfCFTA-SPS*. It does also explicitly affirm the position of the *WTO-SPS* in Article 5 of the Annex:

Member States affirm their existing rights and obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.⁴⁰

One of the benefits that a regional trade agreement (RTA), such as the *SADC Protocol on Trade* (SADC-PT) and its *SADC-SPS*, theoretically has, is to address themes unavailable at a multilateral level.⁴¹ The SADC tribunal would have potentially been a viable forum through which to settle disputes regarding SPS measures at a regional level as its scope included "jurisdiction over disputes between States, and between natural or legal persons and States" provided domestic remedies had been exhausted.⁴² However the tribunal's disbanding in 2011 has left this provision meaningless in practice.

³⁸ Sanitary and Phytosanitary (SPS) Annex VIII to the SADC Protocol on Trade (2014).

³⁹ *Agreement Establishing the African Continental Free Trade Agreement* (16 May 2018) Annex 7 Sanitary and Phytosanitary Measures Article 3.

⁴⁰ Sanitary and Phytosanitary (SPS) Annex VIII to the SADC Protocol on Trade (2014) Article 5.

⁴¹ Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 175.

⁴² SADC Protocol on Tribunal and the Rules of Procedure Thereof (2000), Article 14.

1.2.4 SPS measures at the national level – the South African SPS-related legislative framework

International trade and the consequences of procedures such as SPS measures start at a national level. The national level is the level at which the "gears" of international trade turn, long before a product is loaded into a container to be shipped. The national level is also the level at which the consequences of the failure of either principles of fair and predictable international trade or the absence of effective effort by a Member state's government to translate international principles, rights and obligations into practically beneficial processes, procedures, capacity and outcomes, is experienced in the lived reality of private parties.

Agriculture, which broadly includes farming with livestock, crops and fruit-bearing trees, in South Africa is integral to the identity and culture of a wide range of persons who reside within the country's borders. The practice and the idea of agriculture carry with them a complex social and political history. The agricultural industry has in recent years faced increasing challenges in a range of factors. Arguably, the red-meat industry, specifically, is one that is emotive on account of its connection to the identity and sense of purpose of many farmers in South African society. It is an industry both steeped in tradition and culture in terms of choice in breed or size of herd but also in choice of production system and end purpose of the animal or the products derived from them.

Each sub-sector in South African agriculture engages to varying degrees with farmers operating farms of different sizes and with different access to resources. Agriculture is a sector in which significant hope is placed in terms of job creation and food security by both the *National Development Plan 2030*⁴³ and the Department of Agriculture's *Strategic Plan*.⁴⁴ In a broader sense, agriculture is also a source of foreign currency flowing into the South African economy. Some sectors are more export-orientated than others, but, with a population of 57.8 million people,⁴⁵ South Africa has significant

⁴³ National Development Plan 2030 (South Africa).

⁴⁴ *Agricultural Policy Action Plan 2015/2016 to 2019/2020* (South Africa).

⁴⁵ As per 2018 statistics, TRALAC April 2020 <https://www.tralac.org/resources/by-country/south-africa.html>.

consumption demand for agricultural products at a national level as well. The reality is, however, that with the increasing inequality between high-income consumers and low-income consumers, the price and type of agricultural product in demand at a national level is increasingly different to that in demand in export markets, especially markets from stronger economies. Regardless, a carcass of a beef animal still slaughters out a range of different cuts and off-cuts and the value of these different cuts varies. Inevitably there are cuts that are more in demand than others and therefore products are also imported and exported because of market-orientated factors.

In rural areas, agriculture plays an important economic role.⁴⁶ The National Development Plan focuses very strongly on the ability of agriculture to improve rural livelihoods and potentially to create new job opportunities. The plan also acknowledges the role that foreign as well as domestic demand plays in terms of driving expansion in commercial agriculture.⁴⁷ South Africa is a country that is greatly dependent on agriculture for food security, job creation and foreign currency generation through exports. South Africa also imports a significant amount of agricultural produce and exports domestically produced produce to directly neighbouring countries as well as trading partners further abroad.

Livestock in Southern Africa is used for various purposes. These include food, income, draught power, social functions and providing an asset base.⁴⁸ The number of persons and households "affected" by agriculture is significant. The red-meat industry in South Africa has not been untouched by the changes in climate. South Africa experienced a severe drought between the years of 2015 and 2016, which has persisted through to 2019.⁴⁹ In the 2013/2014-year South Africa had a cattle herd of approximately 13.9 million animals. This decreased to approximately 12.8 million by the 2017/2018 reporting period.⁵⁰ The exact numbers are at most an educated guess. The limitation

⁴⁶ National Development Plan 2030 (South Africa), 219.

⁴⁷ National Development Plan 2030 (South Africa), 222.

⁴⁸ Rich and Perry 2011 Preventative Veterinary Medicine 133.

⁴⁹ The Bureau for Food and Agricultural Policy (BFAP) 2020 <https://www.bfap.co.za/wp-content/uploads/2020/08/BFAP-Baseline-2020.pdf>. 14.

⁵⁰ Sihlobo "Livestock Traceability Key to Driving SA Beef Exports".

on any statistics in South Africa cited in this regard, is that STATS SA did not include non-VAT registered organisations in their survey.⁵¹ Therefore, the sector that is referred to as "informal" in this research is largely unaccounted for in official statistics available in South Africa. This has an implication for putting a precise figure on the subsequent cattle herd size of the country as well, and, as discussed in Chapter 4, it has implications for controlling SPS events.

When challenges in agriculture are discussed, there is an overwhelming focus on the need for "innovation" or "modernisation" and an increase in productivity. Key to this, which is curiously absent from the mainstream dialogue, is that these concepts and necessities do not apply to technology only. There is equal need for modernisation and innovation in the legislation enabling or inhibiting the progress of the agricultural sector, particularly in the context of animal and plant health.

South Africa has been faced with a number of SPS-related challenges over the past decade. Notable SPS events are outbreaks of OIE reportable diseases such as foot-and-mouth disease (FMD), African Swine Fever (ASF) and highly pathogenic avian influenza (HPAI).

Foot-and-mouth disease is a disease that affects the cattle industry severely in the event of an outbreak, and also has an impact on other livestock industries susceptible to infection with the virus.⁵² An example is that of the South Africa cattle industry. This industry has faced a number of outbreaks between January 2019 and 2021. This is a problem for a number of reasons, and one that has persisted in South Africa for many years with intermittent non-problematic periods. The reaction that trading partners typically, and legitimately, take upon notification of an FMD outbreak, is to prohibit the entry of a range of products that potentially carry the virus. This includes live animals, their meat and by-products. Domestically, there is usually an attempt to contain the event through limitations on movement or outright movement bans in areas of infected and susceptible animals. The impact of such an event is significant on both an

⁵¹ The Bureau for Food and Agricultural Policy (BFAP) 2020 <https://www.bfap.co.za/wp-content/uploads/2020/08/BFAP-Baseline-2020.pdf>. 17.

⁵² More detail on the specifics of the virus are provided in Chapter 3 at 3.2.3.

individual level for farmers and producers, but also on actors in related branches of the SPS chain.

There are significant challenges to containing an SPS event. It requires cooperation from a wide range of actors as well as significant private and governmental resources. The second challenge relates to regaining disease-free status of a country. The OIE is the international standard setting body that provides guidelines to Members regarding animal health and welfare. Members report outbreaks of notifiable diseases to the OIE, which subsequently disseminates the disease report to other Members. A country is either free of specific reportable diseases or it is not. In limited circumstances there are recognised zones or compartments, where the disease is present or where vaccination is practiced and the rest of the country is recognised as disease-free. Depending on the severity of an outbreak and the recurrence of the listed disease in the territories that were declared disease free, the impact on trade can be significant.

A country's ability to prevent such an outbreak in the first place and then its ability to contain an outbreak and control its spread are means by which other trading partners' trust in the exporting country is gained. A country that has an inability to prevent or control and contain an outbreak that is objectively preventable and controllable, may have additional challenges concluding bilateral agreements to re-enter certain markets, especially if the potential to regain disease-free status is unlikely in the shorter or medium term. Therefore, what happens at a national level has a significant impact on a country's prospects to trade internationally or not. The disease-free status of a country is not only determined by the actions of exporters. For the most part, where and in what context an outbreak is detected and reported may be irrelevant. The fact that it is present in the country at all is the relevant concern.

The OIE currently lists 16 notifiable diseases and infections that specifically apply to bovine animals.⁵³ There are additional diseases that are listed under the multispecies

⁵³ These are: Bovine anaplasmosis, Bovine babesiosis, Bovine cysticercosis (*C. jejuni* and *C. coli*), Bovine genital campylobacteriosis, Bovine spongiform encephalopathy, Bovine tuberculosis, Bovine viral diarrhea, Contagious bovine pleuropneumonia, Enzootic bovine leukosis, Haemorrhagic septicaemia, Infectious bovine rhinotracheitis/infectious pustular vulvovaginitis, Lumpy Skin Disease, Malignant Catarrhal Fever, Theileriosis, Trichomonosis

list that potentially apply to cattle too, such as foot-and-mouth disease (FMD).⁵⁴ FMD is a disease which provides a good example of the importance of SPS measures and the problematic nature of SPS measures in the context of barriers to trade. South Africa has had a number of FMD events over the past decade and there were effects on trading volume, value and destination of products. This is addressed in detail in Chapter 4.

The importance of controlling FMD effectively is primarily related to the negative economic effects of an outbreak and the manner in which it disrupts international and regional⁵⁵ and national trade. Both food security and livelihoods of farmers are affected by outbreaks of FMD and especially by FMD-related animal and animal by-product movement bans. It is however not a public health risk and there is no significant concern in terms of transmission to humans.⁵⁶ FMD is a disease that affects cloven-hoofed ruminants. This includes cattle, sheep, goats and swine. Antelope, elephants, giraffe and camelids are also susceptible to infection with FMD, although there is no evidence so far that animals other than buffalos "maintain" the virus.⁵⁷ The doctrinal analysis in Chapter 3 provides more detail on the technical aspects of the disease.

The statistics that the OIE makes available are telling of both the complexity and the extent of the problem of FMD as a transboundary animal disease (TAD). The OIE estimates that, globally, FMD has a 77% circulation rate in livestock.⁵⁸ This is primarily in Africa, the Middle East, Asia and South America.⁵⁹ Lower income countries carry the

and Trypanosomiasis (tsetse transmitted). See: OIE 2022 <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-diseases/>.

⁵⁴ FMD is listed as a multi-species disease. There are 27 multi-species diseases currently listed. See: OIE 2022 <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-diseases/>.

⁵⁵ OIE and FAO The Global Foot and Mouth Disease Control Strategy: Strengthening Animal Health Systems through Improved Control of Major Diseases.

⁵⁶ OIE: <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁵⁷ OIE: 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁵⁸ OIE: <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁵⁹ OIE: <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

heaviest cost burden in terms of the FMD prevention related costs, at 75% of the cost.⁶⁰ Africa on its own accounts for 50% of the costs.⁶¹

Past outbreaks have caused significant damage to the red-meat industry. It is estimated that there was a R4 billion loss to affected industries resulting from just the January 2019 outbreak.⁶² As Members are justified in their prohibition of South African products that pose an FMD risk upon the announcement of outbreaks, it is not as simple lifting a prohibition once it has been put in place. The re-engagement and re-entry processes are dependent on a number of factors and can be time consuming, causing further damage, at least in a financial sense. Most points of contention or dispute do not end up as official disputes or even specific trade concerns (STCs).

South Africa has been a WTO Member since 1 January 1995 and is a Member of all three SPS-specific ISSBs. On a Member to Member level, South Africa has raised specific trade concerns (STC) at the WTO in the past.⁶³ South Africa has also been a supporting Member and the Member listed as maintaining the measure of concern. Of the 17 STCs to which South Africa has been party, either as the Member raising the concern, the Member supporting the concern or the Member listed as maintaining the measure of concern, seven have been connected to products within the focus of this research. South Africa has raised three STCs⁶⁴ since 1995, of which one is related to foot-and-mouth disease. The status of this STC, first raised in 2003, is listed as "not reported" with no date of resolution is provided.⁶⁵ It is an STC raised against the European Union regarding the EU's foot and mouth disease directive 2001/661/EC. There have been six STCs⁶⁶ raised against South Africa as "member maintaining the measure" of which five⁶⁷ were related to beef or live bovine imports. South Africa has

⁶⁰ OIE <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁶¹ OIE <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁶² Purchase "How Much Does FMD Cost the Producer?".

⁶³ Specific trade concerns are raised by Members in specific or relevant WTO committees.

⁶⁴ STC number 161, 326 and 356 WTO <https://tinyurl.com/jrck8sf8>.

⁶⁵ STC number 161.

⁶⁶ STC number 43, 135, 287, 362, 404 and 431 WTO <https://tinyurl.com/jrck8sf8>.

⁶⁷ 43: Prohibition on bone-in beef imports from EC member States; 135: Restrictions on beef and pork; 287: Import restrictions on fresh pork meat and beef; 362: Import restrictions on beef due to BSE; 404: South Africa's revised veterinary health certificates for the import

supported eight STCs⁶⁸ raised by other members. One of these is related to bovines, specifically bovine semen and embryos, milk and milk products. This particular STC was resolved in 2006. It had been raised against Argentina in 1999 for the first time by the European Union.⁶⁹ The level of focus on live bovine animals and their products in past and ongoing STCs is an additional indication of the importance of not only the products, but their potential as subjects of SPS-related barriers to trade. It is of importance to consider that in every STC that has been noted above, it is private parties or groups of private parties within the Member States who are affected by the events that lead to the official STCs rather than their governments. Private parties, however, do not have recourse to these forums. They are dependent on the solutions available to them at a national level, regardless of the direct connection with international law.

In South Africa, the Constitution is supreme and there is a large body of legislation empowering relevant Ministers to make regulations within the scope of their powers. In the case of the red-meat sector, the following Acts are broadly considered the most relevant SPS-related legislation:

- *Animal Health Act* 7 of 2002;
- *Animal Diseases Act* 35 of 1984;
- *Animal Identification Act* 6 of 2002;
- *Animal Improvement Act* 62 of 1998;
- *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947;
- *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972;
- *Meat Safety Act* 40 of 2000;
- *Medicines and Related Substances Act* 101 of 1965;

of cattle, sheep and goats from Botswana, Lesotho, Namibia and Swaziland. WTO <https://tinyurl.com/jrck8sf8>.

⁶⁸ STC number 19, 27, 39, 60, 219, 330, 382 and 394. WTO <https://tinyurl.com/jrck8sf8>.

⁶⁹ STC number 60.

- *Perishable Products Export Control Act* 9 of 1983;
- *National Regulator for Compulsory Specifications Act* 5 of 2008.

The South African SPS-related legislation does not adequately represent the complexity of SPS. The legislation does not indicate a reform that suggests movement towards a comprehensive framework that takes full advantage of rights under the WTO-SPS nor one that provides clear procedures and mandates for matters related thereto. The legislation does not define key SPS concepts⁷⁰, nor does it sufficiently incorporate the guiding principles, rights or obligations of the *WTO-SPS* that should, ideally, be implemented on a national level in a manner comparable to that present in the field of trade remedies, also a WTO discipline, in South Africa.⁷¹

In the South African SPS context, the SPS-related legislation does not provide a sufficient course of action for an aggrieved party to challenge an SPS measure or SPS-related barrier. The legislation that allows for appeals, allows for these in a specific and limited context. The grounds on which appeals are allowed are limited to administrative and procedural grounds,⁷² but do not include technical, scientific or other grounds. Internal appeals, even those within the same administering department, vary in degree of specificity, clarity of process and grounds from Act to Act.

In the same way that import and export statistics (which are traditionally relied upon to indicate a prima facie existence or not of trade related problems) are used to report on the status of different commodities, the courts are often used as an indication of a successful or failing dispute resolution system. Neither import nor export statistics nor a lack (or the presence) of technical SPS-related judgements resulting from court cases

⁷⁰ For example: transparency, notification requirements, harmonisation, science as the basis for measures, zoning, disease-free areas, equivalence etc.

⁷¹ See the *International Trade Administration Act 71 of 2002* for the incorporation of trade remedies through National legislation in South Africa.

⁷² Agricultural Pests Act 36 of 1983 s11; Agricultural Product Standards Act 119 s10; Animal Health Act 7 of 2002 s22; Animal Improvement Act 62 of 1998 s23; Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 s6; Meat Safety Act 40 of 2000 s18 and Perishable Products Export Control Act 9 of 1983 s15.

are indications of a successful application of the WTO principles in South Africa and a robust SPS regime.

The red-meat or cattle industry in South Africa is highly organised into voluntary organisations that represent various parts of the SPS chain. These are generally split along product lines, where one or more organisation represents the interests of a specific product or group of related products. It is also common for organisations to be split according to the category of farming that they represent. Some organisations have regional or provincial representation. Others are centrally organised through one office, most often located in Pretoria. Therefore, there are levels of production where more than one organisation represents the interests of groups of private parties. These groups are active in dialogue on various issues concerning the industry and participate in dialogue with the relevant government departments on behalf of their members, some of which are not official or paying members, but persons who benefit from the engagement nonetheless, and on behalf of the broader industry. There is no obligation for an individual to become a member of an industry organisation. However, in formal agriculture in South Africa, and especially export commodities, it is common for private parties involved in those activities to become members. This is especially common during and after significant SPS events.

1.2.5 An introduction to and overview of the research

This research uses the red-meat industry to bring together a context specific layout of sanitary and phytosanitary barriers in South Africa, beyond the traditional discourse that is often limited to the boundaries of science and the traditional dispute-focused discourse at the level of the WTO. Law is not a field that exists in a silo, or a closed system.⁷³ It operates in a distinctly contextual world and each community and field has its own specific legal context.⁷⁴ The field of law can therefore be described as heterogenous.⁷⁵ This is particularly obvious in the field of international trade law, which can be further delineated to sanitary and phytosanitary measures. In international

⁷³ Burns and Hutchinson 2009 *The Law Teacher* 177.

⁷⁴ Burns and Hutchinson 2009 *The Law Teacher* 177.

⁷⁵ de Jong et al 2011 *Research Evaluation* 66.

trade, the distinction between national law, regional law and international law is decreasing.⁷⁶

Sanitary and phytosanitary measures are measures without which it is generally undesirable to trade due to, for example, the risk that such trade may pose to local industries in the importing countries. They are however also measures which cause significant impact in their application, especially in their unjustified or excessive application. Due to the inevitable impact that SPS measures have on production, operation, transport, manufacturing and other aspects of trade in and consumption of agricultural products, their application is guided by the World Trade Organizations *Agreement on the Application of Sanitary and Phytosanitary Measures* (WTO-SPS) and related international standard setting bodies (ISSB).⁷⁷ Inevitably, disputes do arise, as do barriers.

There are different scenarios through which to explore SPS disputes and barriers in the South African context. Viewing SPS disputes broader than being a dispute on the grounds of the WTO-SPS (i.e. limited to disputes between two WTO Members), requires a broader definition and understanding of SPS⁷⁸ than what is currently available in South Africa. SPS disputes may arise where a South African individual (or group of private parties) is inhibited by South African SPS measures from importing a product at all or in doing so within a timely manner and requires recourse to resolving such a dispute. Another scenario may be where a foreign exporting individual (i.e. an importer into South Africa), without the backing of their national government, but with the necessary legal standing in South Africa to challenge a matter, believes that a prohibition or limitation is directly affecting them and they wish to challenge the SPS measure. A scenario may also develop between two private parties at a national level or where a particular individual or group of private parties wishes to formally and on technical, scientific grounds challenge or propose a measure. The assumption is that

⁷⁶ Narlikar, Daunton and Stern *The Oxford Handbook on the World Trade Organisation* 610.

⁷⁷ These are: The Codex Alimentarius Commission (CAC), the World Organisation for Animal health (OIE), and the International Plant Protection Convention (IPPC).

⁷⁸ "SPS" used in this context is used as a noun that identifies the research field concerned with sanitary and phytosanitary measures, including relevant rights, obligations and principles in context.

technical disputes occur on the basis of science but that there is an undeniable role that context plays in such disputes and scenarios that arise that legislation could address within the limits of international rights, obligations and the principles of SPS.

The basis for any recourse of such an individual is the national legislation of a Member state. Even if the regional option of dispute resolution through the SADC Tribunal existed with the existence of an active tribunal, there is not an adequate basis on which to exhaust domestic remedies in South African SPS-related legislation.⁷⁹ A contention that this research makes is that the reason for this is largely the fact that South Africa does not have SPS legislation. What exists is a set of Acts that are broadly describable as SPS-related legislation to the extent that they touch on aspects of SPS. An SPS legislative framework with the purpose of addressing the application of sanitary and phytosanitary measures, that implements the *WTO-SPS* rights, obligations and principles at a national level and provides processes and procedures for the advancement of measures and recourse for the resolution of SPS-related disputes, does not exist in South Africa.⁸⁰ As such, there is no legislative basis on which to challenge SPS decisions or to approach the relevant authorities formally in presenting a case to challenge measures of other WTO Members on technical grounds. This leaves a considerable gap. Other WTO disciplines such as trade remedies⁸¹ are not at the same disadvantage and are enabled through the *International Trade Administration Act* 71 of 2002 and its regulations.

Within a Member State there are thousands of actors' dependent on the practical application of SPS measures and related rights and obligations. They are not WTO Members but their government which represents them at the WTO is a Member. It is the same government which decides to call for consultations or to pursue specific trade concerns (STC) at the WTO on behalf of their country as only the Member, i.e. the government, has standing at the WTO.

⁷⁹ A discussion of the status of the SADC Tribunal is provided at para 3.1.11.1 of chapter 3.

⁸⁰ The *WTO-SPS* is referred to in the context on account of the fact that both other agreements considered in this research reinforce their Members' obligations and rights under the *WTO-SPS*. It is therefore the main agreement of reference.

⁸¹ Anti-dumping duties, countervailing duties, safeguard duties, and tariffs.

If the barriers which private parties face are not being sufficiently addressed by the national legislative framework, then, given that they have no standing at the WTO, a large group of people are failed by (the non-application of) international trade law where SPS-related barriers exist at a national level in South Africa. The effect is that many barriers potentially exist and continue to directly or indirectly affect both international trade and formal trade within the country without benefitting from the attention of decision makers. The implication is that new agreements signed by South Africa, such as the AfCFTA that reinforce the Member States' rights and obligations under the WTO do not have the prospect of delivering the promises of market access to private parties as envisioned. The problems core to SPS barriers remain, especially those directly related to the legislative framework itself at the national level. These barriers may be less visible barriers but they are still barriers when investigated through the lens of the various actors in the SPS chain. They are barriers at the "point of origin".

A problem with the approach from the traditional perspective that developing countries are ill-equipped to participate at the same level as developed countries in the WTO is that this view perpetuates and plays into a number of stereotypes about the abilities of developing countries and it subtracts a significant level of accountability for SPS-related decisions from developing countries as well as developing country self-determination.

It is not the existence and purpose of SPS measures that is the problem. In fact, it is desirable that products posing serious risk to human, animal and plant life and health be regulated and their movement minimised. A challenge exists in the potential to intentionally exploit such measures to achieve outcomes beyond their scope. A problem secondly lies in the miscommunication between the fields of science and law, especially at a national level, in the application of international SPS rights, obligations and principles. The third complication is that these measures do not operate in vacuum separated from other contexts such as economic, political and social contexts.

Therefore, this research focuses on the specific SPS-related South African legislation as a specific measure in itself, measures that flow from legislation and legal aspects

and situations related to the creation of SPS measures under such legislation. This research emphasizes the importance of SPS and SPS measures at a national level and the pluralism that exists in this field between international, regional and national law. The contextual focus in this research is primarily on the ISSB of the World Organisation for Animal Health (OIE) and the red-meat industry (bovines) which has experienced disruption on account of recent and past outbreaks of foot-and-mouth-disease (FMD). FMD is a suitable focus on account of the importance of the disease in the eyes of the OIE and the potential animal health and trade impact that the disease causes. A second reason is the fact that South Africa does intermittently experience such outbreaks and given the fact that South Africa is a large country, with controlled and uncontrolled interaction between livestock and wildlife as well as extensive internal trade, there is a likelihood that FMD will continue to break out and negatively impact the red-meat industry.

This research explores how sanitary and phytosanitary measures present as barriers in the trade of bovines and their products in South Africa and proposes solutions to dispute resolution in the absence of recourse to the WTO. Chapters four and five explore the perspectives described above. To achieve this, the basis on which any action or measure in this regard is taken and enforced, the instrument of legislation, is examined in detail and from different perspectives. Significant qualitative empirical research was conducted that allowed for the development of theory around the topic in the context of actors actively representing participants along the SPS chain. This research therefore consists of a mixed methodology which is explained in detail in Chapter 2.

1.2.6 The scope of the red-meat industry and the definition of red-meat in this research

The fieldwork aspect of this research was limited to the South African red-meat industry which includes live bovine animals and bovine products such as meat and hides derived from the live animals. The qualitative empirical aspect of Chapter 4 is limited to respondents in a representative capacity within the different levels of the SPS chain in this industry. This is elaborated upon in Chapters 2 and 4.

Tariff Codes from the WCO Harmonized System (HS) system are useful as delimiters of the field and also provide clarity in the empirical aspects of discussion surrounding the industry and related trade statistics. Products included under the term "red-meat industry" are those listed in annexure 1 and dealt with individually in Chapter 4. The criteria and process applied to either include or exclude a product was as follows: if a product satisfied one of the criteria below, they were included. These are Tariff Headings that include:

- live animals classifiable as "bovine;"
- products derived from a bovine;
- products related to tradeable genetic material of bovines;
- by-products derived from a bovine as far as this is *prima facie* the case.

Products that were excluded were products that were too far removed to be reasonably included in the research due to the classification in their particular state being beyond what can reasonably be considered an animal or a product of animal origin or derived from bovine animals.

Tariff codes are universally comparable up to the 6-digit level. South Africa, as is allowed, defines tariff codes further to the 8-digit level on some products. Unfortunately, the level of depth in description in tariff codes that is available for red-meat related meat products in South Africa is not as detailed as, for example the detail for poultry (*gallus domesticus*) products which provides detail down to the description of specific cuts such as wings, breasts, feet, heads, livers etc. The tariff code level of cut specific detail is not as detailed at an 8-digit level compared to poultry. The level of detail available in the case of poultry allows for a much more nuanced view into that particular industry than a broad description of a whole or half carcass fresh or frozen allows for in the red-meat industry, where trade statistics cannot provide specific information on the cuts being imported or exported. The implication is that different products, which is exactly what different cuts are as they do not all carry equal economic value per kilogramme, are lumped into a broad category of, for

example, "boneless" either "chilled" or "frozen," which is not comparable or contrastable on a particularly detailed level.

1.3 The structure and outline of the research

Chapter 2 describes the research methodology employed in this research. This is followed by a doctrinal analysis of the theory applicable to this research at an international, regional and national level across legal and non-legal fields in Chapter 3. The nature of this research is that theory is not limited to legal literature. Chapters 4 and 5 contribute a qualitative and context specific perspective. Chapter 4 is primarily a qualitative empirical chapter that discusses interviewee-specific perception and recurring themes arising from the semi-structured fieldwork interviews conducted as part of this research. Chapter 5 is a critical analysis of the SPS-related legislation in South Africa and also contains the results of a content analysis of the relevant legislation. Chapter 6 binds together, in the form of reflection, conclusions and recommendation based on outcomes and inferences drawn from Chapters 3, 4 and 5.

CHAPTER 2 RESEARCH METHODOLOGY

2.1 Introduction

This chapter describes the research methodology of this doctoral research project in detail. The rationale for a methodology chapter written with a degree of detail in advance of the results and discussion is addressed below.

Firstly, this dissertation is submitted in fulfilment of a PhD degree as opposed to the traditional LL.D degree in a faculty of law. The difference between PhD and LL.D in South Africa ties in with the second reason. This research employs a mixed method approach and is not confined to the single method of doctrinal legal research traditionally preferred in LL.D research. The third reason is that due to the mixed method nature of this research and the inclusion of qualitative empirical research and quantitative aspects as research methods, the researcher believes transparency in method and articulating the connection between methods is a vital component of conferring legitimacy and proving the academic rigor of this aspect of the research. Limiting the detailed description of method only to the qualitative aspects is not desirable as the topic of this research is one that is of interest to multiple disciplines and, as such, it is not assumed that a reader is familiar with each method, which is the fourth reason for a detailed description. The fifth reason answers the question of why this chapter is a chapter on its own and not significantly shorter as traditionally accepted in especially LL.D research in South Africa. That is, the methods employed are better described together focusing on structure, advantages, disadvantages, scope and specific purpose in this research in advance. This allows the reader to read the corresponding chapters with greater ease. Where appropriate, further detail is given in each individual chapter.

2.2 An overview of chapter 3 – SPS Law and Its Analysis in the Literature

Chapter 3 is an analysis of SPS Law in the Literature. The analysis progresses from the international, primarily World Trade Organization level, to the national level across the relevant fields of enquiry. The sources of sanitary and phytosanitary law are differentiated on the basis of being either national, regional or international law.

General sources of literature in the doctrinal analysis include academic, scholarly literature and publications from credible organizations such as the Food and Agriculture Organisation of the United Nations (FAO), the International Trade Centre (ITC), World Bank and other relevant organisations. The doctrinal analysis is therefore not limited to legal sources but includes literature from SPS law and also fields related to law and development.

2.2.1 Sources of law in the field of SPS

2.2.1.1 International sanitary and phytosanitary law

The main source of international sanitary and phytosanitary law in this research is the World Trade Organization's *Agreement on the Application of Sanitary and Phytosanitary Measures* (WTO-SPS). This agreement needs to be read in conjunction with the *Agreement Establishing the WTO*, and the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. The decisions of WTO panels, appellate body or arbitration procedures⁸² as well as major decisions and key publications of the WTO also form part of the sources of law relevant to this research. The World Organisation for Animal Health (OIE) *Terrestrial Animal Health Code* is a secondary source of international SPS regulatory guidelines. Co-operation agreements between the OIE and intergovernmental and international non-governmental organisations form part of the secondary sources of SPS law at an international level.⁸³ To the extent relevant, the Codex Alimentarius is also included.

2.2.1.2 Regional sanitary and phytosanitary law

The *Protocol on Trade in the Southern African Development Community* (SADC-PT) region⁸⁴ and its Sanitary and Phytosanitary *Annexure*⁸⁵ (SADC-SPS) as well as the *African Continental Free Trade Agreement* (AfCFTA)⁸⁶ and its *Annex 7 Sanitary and*

⁸² As far as procedures such as arbitration are not accessible directly by private parties as opposed to Members, they are beyond the scope of this study.

⁸³ World Organisation for Animal Health (OIE) <https://www.oie.int/about-us/key-texts/cooperation-agreements/>.

⁸⁴ Protocol on Trade in the Southern African Development Community (SADC-PT).

⁸⁵ Sanitary and Phytosanitary Annex to the SADC Protocol on Trade (SADC-PT).

⁸⁶ Agreement Establishing the African Continental Free Trade Agreement and Annex 7 (AfCFTA-SPS).

Phytosanitary Measures (AfCFTA-SPS), are sources of regional SPS law in this research. Both agreements refer directly back to the WTO-SPS as the primary source or root of the SPS requirements. To the extent that they contain expanded provisions related to SPS extending further than the contents of the WTO-SPS, these additional provisions are also considered primary sources at a regional level on those specific points.

2.2.1.3 National sanitary and phytosanitary law

National sanitary and phytosanitary related law in South Africa are the primary sources of legislation. Other primary sources are case law, regulations and, to the extent relevant, policy that performs a quasi-legislative function such as Veterinary Procedural Notices (VPNs) and Standard Operating Procedures (SOPs).⁸⁷ Secondary sources include scholarly literature and practice.

2.2.1.4 Technical non-legal information

The World Organisation for Animal Health (OIE) is the primary source of animal health related technical information in this research. The Codex Alimentarius Commission is the primary source of technical information for food safety related trade matters. Scholarly literature in scientific, economic and related fields forms a secondary source.

2.3 An overview of Chapter 4 – Qualitative research by means of semi-structured interviews in the "industry"

Creswell defines qualitative research as

... the enquiry process of understanding based on a distinct methodological approach to inquiry that explores a social or human problem. The researcher builds a complex, holistic picture; analyses words; reports detailed views of participants; and conducts the study in a natural setting.⁸⁸

There are five main approaches that can be taken in qualitative research. These are narrative research, phenomenological research, grounded theory research,

⁸⁷ Discussed further in Chapters 4 and 5.

⁸⁸ Creswell "Appendix A" 300.

ethnographic research, and case study research.⁸⁹ This research follows the approach of grounded theory.

Qualitative research is characterised by distinctive hallmarks. One of these is the logic that is employed in pursuing empirical research. The researcher follows an inductive logic,⁹⁰ from the bottom up⁹¹ and employs the use of memoing⁹² throughout the research. What the "bottom" is depends on how the researcher has demarcated the study and the field. Qualitative research involves a number of processes. The process of qualitative research and analysis is therefore a time-consuming one.⁹³ There is no standard recommended format of analysis of qualitative research data.⁹⁴ It is a type of research where the researcher has less control over the process and outcome, and it is in this sense that this form of research is "inconvenient" in comparison to other forms of research.⁹⁵ This aspect of qualitative research is however not a reason enough, of course, to avoid its inclusion in a research project. In the case of this research, the benefits clearly outweighed the challenges.

A researcher is not limited to using only one approach. However, the choice in approach determines to a large extent the design of the research and structure.⁹⁶ The approach chosen for the fieldwork aspect of this research is grounded theory.

2.3.1 Grounded theory

Grounded theory is a theory attributed to Glaser and Strauss, who published the book *The Discovery of Grounded Theory: Strategies for Qualitative Research* in 1967. Since then, Strauss published the book *Qualitative Analysis for Social Scientists* in 1987. There have been numerous prominent authors writing on the subject since then and the theory is popular in fields such as psychology, anthropology and sociology. The

⁸⁹ Creswell "Five Qualitative Approaches to Inquiry" 69-110.

⁹⁰ Creswell "Philosophical Assumptions and Interpretive Frameworks" 23; W Alex Edmonds and Kennedy "Grounded Theory Approach" 115.

⁹¹ Creswell "Philosophical Assumptions and Interpretive Frameworks" 23.

⁹² A tool recommended by various authors, including in Edmonds and Kennedy "Grounded Theory Approach" 115; Creswell "Five Qualitative Approaches to Inquiry" 89.

⁹³ Cuervo-Cazurra et al 2016 *Journal of International Business Studies* 883.

⁹⁴ Bentzon *et al* "Analysing and Interpreting Data" 237.

⁹⁵ Burns and Hutchinson 2009 *The Law Teacher* 168.

⁹⁶ Creswell "Five Qualitative Approaches to Inquiry" 69.

application of grounded theory in the legal field has been described in detail by Bentzon and Hellum et al in the book *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law*.⁹⁷

Grounded theory can be defined as follows:

In this type of study, the researcher generates an abstract analytical schema of a phenomenon, a theory that explains some action, interaction, or process. This is accomplished primarily through collecting interview data, making multiple visits to the field (theoretical sampling), attempting to develop and interrelate categories (constant comparison) of information, and writing a substantive or context-specific theory.⁹⁸

In their book *The Discovery of Grounded Theory*, Glaser and Strauss describe the approach of purposefully discovering theory through the systematic collection and analysis of social data.⁹⁹ It is used in qualitative research as both a method and an analysis technique.¹⁰⁰ The researcher identifies patterns that emerge from the qualitative data.¹⁰¹ There are two main approaches that a researcher could take in pursuing grounded theory. These are a systematic or constructivist approach.¹⁰² This research favours the systematic approach that is attributed to Strauss and Corbin.¹⁰³ The systematic approach employs constant comparison and may also include the collection of documents as well as making concrete observations.¹⁰⁴ The style of data collection employed here was semi-structured interviews.

Chapter 4 focuses on the data collected during the fieldwork aspect of this research. It addresses the recurring themes that participants identified in their understanding and experience of SPS-related barriers, disputes and methods of resolution in the context of FMD and broader SPS events in the red-meat industry. The methodology allows room for new data to enter, challenge and in some cases confirm some accepted

⁹⁷ Creswell "Five Qualitative Approaches to Inquiry" 86.

⁹⁸ Creswell "Appendix A" 288.

⁹⁹ Glaser and Strauss *The Discovery of Grounded Theory: Strategies for Qualitative Research* 2.

¹⁰⁰ Coolican "Qualitative Approaches in Psychology" 261.

¹⁰¹ Coolican "Qualitative Approaches in Psychology" 274.

¹⁰² Creswell "Five Qualitative Approaches to Inquiry" 86

¹⁰³ Creswell "Five Qualitative Approaches to Inquiry" 86.

¹⁰⁴ Creswell "Five Qualitative Approaches to Inquiry" 86.

narratives related to the roots of SPS-related barriers to trade in the South African context. These are discussed in detail in Chapter 4.

2.3.2 Grounded theory as applied in this research

2.3.2.1 Background to the process of delineation of the field and participant selection

Initially the researcher had hoped to have the opportunity to interview a mixture of medium-sized, smallholder farmers farming with cloven hoofed animals exclusively or involved in mixed-crop farming with livestock and for example seasonal crops or orchards. The intention was to select a sample with varying incentives related to export or local trade of their produce. This selection emerged as practically unviable for the researcher. In order to have gained a reasonable sample size of individual farmers within these categories of farming, the researcher would have either had to do the research on so small a scale as to limit it to one group or on too vast a scale across South Africa's 1.2 million sq. kms.¹⁰⁵ Upon further introspection, engagement with the literature and consideration of the research question, the researcher came to the conclusion that, with limited time and resources, the study as initially envisaged would not be viable. The original design has potential for future study or a component of future study in this field, provided the necessary resources are available and the proposed extent is suited to the context of the future research.

The researcher redesigned the fieldwork component and examined the question through a different lens. The lens remains that of the actors on the ground, i.e. "bottom-up," but shifted focus to representatives of actors along the SPS chain from both industry¹⁰⁶ and government. In an unexpected way this has made the fieldwork component more inclusive of different stages of the SPS chain than the initial fieldwork design had envisaged. The selection of interviewees is relevant to the study and the sampling strategy, it is submitted, matched the research for the reasons that follow.

¹⁰⁵ World Bank 2020
https://databank.worldbank.org/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=ZAF.

¹⁰⁶ Specifically industry bodies.

The interviewees all possess objectively relevant and specific insight into various stages and aspects of the SPS chain and have up-to-date and relevant practical as well as theoretical understanding of the industry and field researched. This is true of both the fields of veterinary and medical science as well as law and policy. The interviewees also possess insight into the complexity of the SPS chain¹⁰⁷ through their specific roles in specific sections of it mapped in this research. They provide insight that is otherwise unobtainable through existing academic literature or is without sufficient, SPS chain-wise combined detail in other publications. The researcher is also of the view that the interviewees provide a desirable combination of experience-based and academically-influenced professional and personal opinion as well as objective data based on collective industry views, challenges and positions on certain topics. This provides a rich data set with which steps can be taken towards narrowing the gap between theory and practice.

Actors were interviewed until saturation.¹⁰⁸ The sample size was therefore not predetermined and surveys did not form part of this methodology. Saturation was gradually reached towards the end of the interview process.

The fieldwork aspect of the research took place between the period of October 2019 and March 2020. The interviews identified as core to the research were completed before the South African National Covid-19 State of Disaster level 5 lockdown commenced on 26 March 2020.

¹⁰⁷ Two diagrams are available in annexure 2. They show through text and color how the actors SPS chain interact and emphasise the interconnectedness between the formal and informal and the eventual destination of products.

¹⁰⁸ Saturation is also referred to as theoretical saturation. As defined by Byrant, "Theoretical saturation is the point beyond which further data centred on a specific category fails to reveal additional properties or theoretical insights relevant to the developing grounded theory" in Bryant "The Grounded Theory Method" 110.

2.3.2.2 Participant selection

The participants in this selection were chosen according to what is called *theoretical sampling*.¹⁰⁹ This is an approach that correlates with the systematic approach to grounded theory.¹¹⁰

The selection of actors happened in two different ways. The first way included various phases of sending direct-emails to potential participants based on the researcher's understanding of the industry from exploratory research and computer-based mapping of the industry, guided by various sources ranging from industry magazines, agricultural industry shows, such as NAMPO Agricultural Trade Show, and engaging informally with industry actors. Once a preliminary list was set up, the researcher further refined the list and limited numbers based on their distance in terms of direct linkage to the SPS-chain and the research questions. Participants were sent interview requests via e-mail. There were limited interview rejections or lack of response to interview requests. Rejections often took the form of an additional recommendation for another person within the chain that the initial potential interviewee felt more capable of participating in a semi-structured interview. Interestingly, many of the recommendations within either interview acceptances or rejections were for one of three specific actors already on the potential interviewee list. Both accepting and declining participants were interested in the research and acknowledged the importance of the subject matter. Participants generally committed to interview appointments as fast as possible and with the exception of one, all interviews scheduled were conducted. Participants were for the most part, with the exception of no more than five individual persons and two organisations, responsive via e-mail-based communication and did not fail to reply to e-mails. The potential participants mentioned previously that did not reply or evaded commitment to an interview were not pursued further than what the researcher viewed as a reasonable number of

¹⁰⁹ Defined by Creswell "Appendix A", 290 as "In data collection for grounded theory research, the investigator selects a sample of individuals to study based on their contribution to the development of a theory. Often this process begins with a homogenous sample of individuals who are similar, and, as the data collection proceeds and the categories emerge, the researcher turns to a heterogenous sample to see under what sample conditions the categories hold true."

¹¹⁰ Creswell "Five Qualitative Approaches to Inquiry" 86.

interview requests. An email requesting an interview was not sent more than three times if there was no response. The researcher responded by adapting the fieldwork design to incorporate other participants who likely presided over similar information and expertise in the field.¹¹¹

There were no interviewees interviewed to which a gatekeeping permission form applied and the researcher was at no stage in a position of power whereby her influence was an ethical factor in as far as informed consent was concerned. The interviewees were all professional persons with objectively strong standing in the industry or sector in which they operate and the researcher had no political or social capital in conflict with the research and research participants. No interviewees objected to the recording of interviews. Moreover, no recordings were made nor data used in the analysis and writing up of this research from informal fact finding or exploratory interviews conducted during the course of the research. There were three exploratory interviews or meetings of this nature.

2.3.2.3 Semi-structured interviews

Interview data serves as a tool in verifying the accuracy of the researcher's understanding of the SPS chain, and the actors, legislation, livestock products and scope of the chain, within the broader context of how it practically works or not in South Africa. It is also a very useful tool in employing the method of triangulation¹¹² to verify information. Semi-structured interviews are central to this research method of grounded theory.¹¹³ They are a type of interview process that is well suited to the production of knowledge.¹¹⁴ Semi-structured interviews can be described as:

a dynamic exchange of ideas based on the researcher's open-ended questions or areas of interest with probes that are designed to elicit details and explanations; questions are loosely sequenced and may be arranged or may change form in response to interviewee participation.¹¹⁵

¹¹¹ This research was granted ethical clearance by the NWU. The ethical clearance number for the research is: NWU-01503-19-S3 LAW.

¹¹² Phillips "Qualitative Disaster Research" 551: "Triangulation means to collect data using multiple methods and look at the research question from multiple data points."

¹¹³ Creswell "Data Collection" 162.

¹¹⁴ Brinkmann "Unstructured and Semi-Structured Interviewing" 287.

¹¹⁵ Trainor "Interview Research" 126.

Interviews provide the opportunity to see the topic from the perspective of the various actors.¹¹⁶ The semi-structured format allows for a researcher to seek clarification and follow-up on important points that arise during the interview process.¹¹⁷ It also does not allow the researcher to "hide" behind a stringent set of questions and encourages active participation from the researcher as well as the participant.¹¹⁸ An interviewer is able to bring focus back to the research at hand in addition to allowing for the leeway to explore points that arise during the research interview that are contributory to the understanding being sought.¹¹⁹ The style of interviewing employed was receptive, which is a style that follows a non-interrogative approach.¹²⁰

Semi-structured interviews are favoured by the researcher, as this less formal, less confrontational format allows for a rapport to build between researcher and interviewee and creates a space for active participation by the interviewee as opposed to the situation being one of passive responsiveness.¹²¹

The use of semi-structured interviews provided insight into the practice of SPS control on a practical level and the differing views and experiences of actors within the same chain. This methodological contribution is relevant in that it is a methodology in the field of SPS-related trade law in South Africa that has as yet not been applied as far as the researcher could ascertain. This particular aspect of the methodology introduced a component into the research beyond the control of the researcher. The interviews were purposefully structured in a semi-formal way to ensure that, as far as possible, the researcher's personal views and biases did not lead the conversation, but that the participant rather had the opportunity to take their response in the direction they felt relevant to the general topic under discussion. The result was that, without exception, every interview delivered data that surpassed the expectations of the researcher and which forced the researcher to reassess previous assumptions and interrogate the research from a perspective which they did not hold personally. The addition of

¹¹⁶ Cassel and Symon Essential Guide to Qualitative Research 11.

¹¹⁷ Brinkmann "Unstructured and Semi-Structured Interviewing" 286.

¹¹⁸ Brinkmann "Unstructured and Semi-Structured Interviewing" 286.

¹¹⁹ Brinkmann "Unstructured and Semi-Structured Interviewing" 286.

¹²⁰ Brinkmann "Unstructured and Semi-Structured Interviewing" 293.

¹²¹ Cassel and Symon Essential Guide to Qualitative Research 11.

fieldwork adds to the richness of understanding of the industry and related problems and enables the inclusion of practice-orientated recommendations.

2.3.2.4 The process of interviewing

Interviews proceeded with an introductory, informal discussion about the specific participant's industry and role in the industry before the interview began. Thereafter, the researcher requested that the interviewee consent verbally to an audio recording of the interview and sign off the informed consent form. The majority of interviews took between 60 and 90 minutes.

2.3.2.5 Interview Language Policy

The researcher is bilingual, fluent in both English and Afrikaans. Interviews were conducted in English or Afrikaans, depending on the language choice of the particular interviewee. Transcriptions were done by a bilingual transcriber and in the language of the recording.

2.3.2.6 Confidentiality

In terms of establishing the extent to which the interviewees wished to remain anonymous, the informed consent form provided the interviewee with the option to mark "yes" or "no" next to the following questions:

- (i) I consent to this interview;
- (ii) I consent to an audio recording of this interview;
- (iii) I have had the purpose and nature of the study explained to me;
- (iv) I have had the opportunity to ask questions about the study;
- (v) I understand that I may withdraw consent at any time during the interview;
- (vi) I confirm that I have the authority in my department/capacity to participate in this interview;

- (vii) The researcher may specifically use my name and quote me directly in her research;
- (viii) The researcher may not use my name but may refer to my organization directly. E.g. "Organisation XYZ has experienced situations where ABC has happened...";
- (ix) I would like the data collected in this study to be kept confidential and written up in a way that keeps my personal identity anonymous as well as that of my organisation, e.g. by using broad statements such as "in the HIJK industry there have been incidents whereby LMNO has happened..."

More than one interviewee indicated that they would like their personal identity and that of the organisation they represent to be kept anonymous. This was a foreseeable outcome and one which the researcher respects in the following manner in her analysis of the data in this research.

Any reference to a specific person, organisation or other actor relevant in the SPS-chain, or quoting an individual, is neither a direct nor tacit acknowledgement of their participation in the research. Mentioning the names of organisations or private parties occurs based on publicly available information and such information is cited throughout the thesis. Confidential information is presented through discussion of themes that arose within the research as opposed to in the context of the views of specific private parties. The purpose of the coding process for interviews described in detail below was to identify broad, specific and highly specific themes that arose within the research in an application of a version of the grounded theory. Where a specific interview is referred to, a coded interview number is cited, and not the name of the interviewee or their employer. All interviews have subsequently been maintained at the highest point of confidentiality requested by interviewees to ensure equal treatment of data across the thesis. Reference in the original research proposal and fieldwork plan is not confirmation that the specific organisations agreed to an interview as the fieldwork plan has developed as described above. Anonymization of interview data and its use in the style applied in this research does not invalidate its usefulness. Upon reflection, the researcher is increasingly of the view that in the future, in legal research of this

nature, in both this and other fields, the application of a similar style of analysis and representation of data may be well suited to incorporate in fieldwork. The analysis of fieldwork in this research provides an example of how legal research combined with fieldwork can contribute significant insight into practical aspects in the field and present the data without compromising the participants confidentiality or the quality of the analysis and the usefulness of the fieldwork endeavour.

Interviews pose a challenge in terms of their potential for replication, especially in cases where the interviews are not structured. This challenge was controlled, to a greater extent, in semi-structured interviews by following the talking points predetermined before the interview and introducing questions to maintain focus, where necessary, as the interview progresses.

The interviews were recorded on two devices. The one device is an iPad with an external microphone and the backup device was a smartphone with no external microphone attached. Audio was loaded onto the researcher's personal computer which is password protected and the audio folder itself is also password protected. The list of interviewees as well as the document containing the conversion of the interviewee name and affiliation into an anonymized code is also password protected. This password is known only to the researcher. Printed copies of the transcribed audio are stored in a locked and fixed storage unit belonging to the researcher and, upon completion of the thesis, digital copies of the interview transcriptions, audio and subsequent excel spreadsheets will be stored securely for the recommended period of time. The audio recordings of the interviews were professionally transcribed by the North West University's Centre for Translation and Professional Services (Ctrans)¹²² under a signed confidentiality agreement. Access to this data is only permissible to the researcher's supervisors or reviewers, where necessary.

¹²² <http://humanities.nwu.ac.za/ctrans>.

2.3.2.7 Collection of documents and data through means other than initial desktop study (data provided or recommended by participants)

During the course of interviews, it was not uncommon for an interviewee to refer to a specific document which is of relevance to the interview, the topic in general or the industry in a broader sense. In these instances, the interviewee often provided a printed copy of the document or the researcher sourced the document through relevant databases or general Google searches. These documents and documents such as public presentations made at industry related conferences during the period within which the research was conducted also form part of the collection of fieldwork-related data. Although none of these documents quoted in this research are considered confidential, some of them are not publicly available and only came to the attention of the researcher as a direct result of the fieldwork interviews. Where relevant anonymised quotes are quoted in the text. This is a considerable advantage of this specific method being incorporated in the research methodology.

2.3.2.8 Method of analysis

Grounded theory, and specifically the systematic analysis approach employed in this research, follows a relatively structured route in analysing the data collected. Once data has been collected and transcribed, the process of analysis starts with coding.¹²³ Coding in this context is a process by which data, in this case transcribed interviews, is labelled and categorised.¹²⁴ There are different stages of coding throughout the process of analysis and the process begins with open or initial coding¹²⁵ and progresses to theorization. Coding is a means by which credibility is given to data derived from qualitative research.¹²⁶ This is especially true when combined with the constant comparative method of analysis.¹²⁷ A code book has been established and is stored in a report exported from Atlas.ti.

¹²³ Coding is Defined by Creswell "Appendix A" 297 as "This is the process of aggregating the text or visual data into small categories of information, seeking evidence for the code from different databases being used in a study, and then assigning a label to the code."

¹²⁴ Thornberg and Charmaz "Grounded Theory and Theoretical Coding" 156.

¹²⁵ Thornberg and Charmaz "Grounded Theory and Theoretical Coding" 156.

¹²⁶ Glaser and Strauss "The Credibility of Grounded Theory Research" 229.

¹²⁷ Glaser and Strauss "The Credibility of Grounded Theory Research" 230.

2.3.3 General limitations to the fieldwork aspect of this study

It is important in a doctoral thesis that places emphasis on the belief that not all actors in the SPS chain experience barriers by SPS measures in the same way and that not all incentives and motivations in terms of international trade and the resolution of related disputes are aligned, to acknowledge where there are limits to what the research aimed to address. The research is not a closed list of potential points of dispute and a definitive map of the complexity of the SPS chain and its overlapping regulatory, economic and social factors in the context of animal health and food safety by example of the red-meat industry in South Africa. The field of SPS as described in this research is broad and at the same time highly specific. Its scope thus exceeds what can reasonably be covered in a single doctoral thesis. At some stage, doctoral research needs to come to an end. Naturally, the inability to include everything is a general limitation.

2.4 An overview of Chapter 5 – Analysis of legislation in the context of sanitary and phytosanitary (SPS) measures

Chapter 5 analyses the data from a mixed methodology approach data analysis. The methodologies employed in this chapter point to the South African SPS-related legislative framework being a barrier to SPS in itself. The methodologies challenge and test the claims made by participants in Chapter 4 and provide a deep and triangulated analysis of the SPS-related framework. They provide proof of a crisis in dispute resolution for private parties who have no recourse to the WTO, which, in specified instances, can be extended to other agricultural products as well.

The researcher designed a methodology by which the South African SPS legislation is analysed and discussed from different perspectives. One is a doctrinal legal methodology and the other is a content analysis. The doctrinal analysis provides what the natural sciences might refer to as a "control." The doctrinal aspect acts as a control in the sense that, through the doctrinal analysis of dissecting the legislation and related sources, the researcher remains "in touch" with the context of the specific source and does not necessarily rely on key words but rather the understanding of entire sentences to reach certain conclusions about the SPS-related legislation in South

Africa. This is a necessary component of the methodology as the second method of analysing the legislation involves a process whereby the researcher has used a methodology of identifying key principles, rights and obligations of international law by applying a computer-assisted content analysis. More detail is provided in the following sections.

The rationale is to establish whether, objectively, the specific computer-assisted analysis – refined during this research after its inception during a research fellowship at UNIDEP in Dakar, Senegal during 2018 – is in fact a potentially sound methodology that can be used either as a stand-alone methodology or, as in this case, a supporting methodology that provides a contrasting view. The doctrinal approach is also strongly employed in the analysis of SPS-related legislation in specific contexts of the OIE guidelines and the assessment of the legislation.

2.4.1 A traditional legal doctrinal approach to critically analysing the South African SPS-related legislation

Doctrinal research is a traditional and largely dominant choice of methodology in legal research.¹²⁸ It has been defined in a number of similar ways. The definition which this research favours is:

Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.¹²⁹

Doctrinal legal research is rarely described in great detail in legal research where empirical research is not included.¹³⁰ The reason is primarily the fact that in doctrinal research the researcher does not collect data as such, unlike is the case in empirical research. Doctrinal research is primarily concerned with analysis.¹³¹ Legislation and case law are the primary sources of doctrinal research in law.¹³²

¹²⁸ Burns and Hutchinson 2009 *The Law Teacher* 158.

¹²⁹ Burns and Hutchinson 2009 *The Law Teacher* 159.

¹³⁰ Chynoweth "Legal Research" 37.

¹³¹ Chynoweth "Legal Research" 37.

¹³² Burns and Hutchinson 2009 *The Law Teacher* 158.

This research, incorporating, as it does, mixed methods, has therefore purposefully included an analysis of the law on the topic in the light of the available academic literature so as to avoid the conclusion that either one of the chosen methods is preferred, rather than their contributing evenly to the outcome.

The importance of the doctrinal legal research component of this research lies in the fact that it situates the legislation within the broader context of the South African legal system and matters related to constitutionality and relevant administrative law considerations. The analysis of the legislation in this research relates to what is referred to above as contrasting perspectives one and two.

The following criteria¹³³ were applied in the selection of the SPS-related legislation specific to this research. Did the long title of the Act¹³⁴ directly state relevance to any one of the following; if yes, the Act is included in the analysis:

- Human health;
- Human life;
- Human food safety;
- Plant health;
- Plant life;
- Animal health;
- Animal life;
- Animal food safety;
- Import and export of agricultural products or livestock;
- Additives or contaminants;
- Standards (likely SPS);

¹³³ These are derived from the *WTO-SPS's* definition of SPS measures.

¹³⁴ In South Africa, the long title describes the subject matter of the particular Act. It forms part of the structure of all South African legislation.

- Standards (General).
- (a) Did a specific section of the Act include an Act as relevant, using the same criteria as above?
- (b) Did a specific section of the Act include an Act as relevant for other, justifiable reasons, despite not directly satisfying the criteria as above?
- (c) Did the "purpose section" of the Act include an Act as relevant using the same criteria as above?

All Acts that satisfy one of the criteria above are included in the content analysis. In Chapter 5 they are further grouped into categories of legislation for more focused analysis.¹³⁵ Although the research focused primarily on the red-meat industry some of the criteria listed above includes non-red-meat provisions. The reason for this inclusion is the fact that in the broader analyses conducted in Chapter 5, the research extends beyond red-meat for purposes of comparison. The principles, rights and obligations on the broad sense remain the same regardless of the specific product. Considering the importance of administrative law in this field and the role that the Constitution plays in the assignment of governmental competencies and provincial/national legislative powers, an analysis of the relevant legislation and considerations is included.

2.4.2 Computer-assisted analysis of SPS-related legislation in the context of international principles, rights and obligations

2.4.2.1 Introduction

The following sub-section describes the evolution of computer-assisted qualitative data analysis (CAQDSA) up to the eventual computer-assisted content analysis (CA) applied in this research. It includes a discussion of the initial design and the reasons for changing this to make use of Rstudio packages¹³⁶ rather than the initial design, which envisioned data collection in Atlas.ti and data visualisation through Rstudio.

¹³⁵ These are categories such as red-meat related legislation, legislation supporting the implementation of SPS etc.

¹³⁶ A full list of Rstudio packages used in this research is provided in the bibliography.

CAQDSA is both a data gathering tool and an analytical method. When describing the role of Rstudio in the context of a content analysis, it is a data gathering tool to the extent that it extracts the content from the legislation. This chapter also describes how the final methodology for the content analysis of legislation evolved from the use of Atlas.ti as a data collection tool, to the point where the methodology transitioned entirely to using only Rstudio. As this data is analysed and visualised, CAQDSA using Rstudio becomes a data analysis tool. CAQDSA, in the context of field work and the transcribed interviews, is an analytical method and these are two separate methods of analysis using different data.

This design of computer-assisted analysis as a methodology in analysing legislation in South Africa is experimental in the field of legal research. It is a method that is suitable to a field such as SPS and WTO law where there are multiple agreements that are applicable to the majority of the world's trade. SPS is especially suitable as very few regional and bilateral agreements elaborate on their SPS requirements further than what is the scope of the WTO. This specific method is one that was designed uniquely for this research project. It will not necessarily translate well into other fields of law as a method of data collection and analysis.

The goal of this methodology is simple. The goal is to identify rights, obligations and principles of international SPS law in the national SPS-related legislation and regulations of South Africa. A secondary goal is to be able to replicate this for and compare it with other jurisdictions. The WTO-SPS, SADC-SPS and AfCFTA-SPS were meticulously divided into rights, obligations and principles, referred to in the research as "codes" that are linked to a specific article in each of the agreements. The codes were then assigned specific key words that identified the right, obligation or principle whose potential existence in the legislative framework is sought. The rationale is equally simple. A field such as SPS relies heavily on specific meaning accorded by specific words. In the absence of specific key words in a field such as SPS there is a justifiable assumption that can be made that the corresponding rights, obligations and principles either do not exist or are not adequately given attention in a national legislative framework.

2.4.3 A general description of computer-assisted qualitative data analysis (CAQDSA)

Computer-assisted qualitative data analysis (CAQDSA) is a method gaining increased popularity in mixed method research.¹³⁷ It has the advantage of providing transparency and the extent of its use is dependent on what the researcher requires.¹³⁸ This flexibility is a significant advantage. Popular CAQDAS software includes Atlas.ti or Nvivo, for example. CAQDAS software, such as Atlas.ti, is not only used for the analysis of data, but also the collection of it and should be perceived as a tool for data analysis, not as a method.¹³⁹ As Gibbs points out, its impact is on how a researcher can undertake the analysis, as it is not an analytical method.¹⁴⁰ A benefit of such tools to researchers conducting mixed method research is that programs such as Atlas.ti support a number of data formats, including text documents, videos and pdf documents.¹⁴¹ There are many programs similar to Atlas.ti available to researchers, however this particular one was available to the researcher for free through the North-West University's Ferdinand Postma Library.

The use of computer-assisted analysis is popular in mixed method research,¹⁴² but the CAQDSA method is not designed as a strictly statistical analysis. It usually remains classified as a qualitative analysis.

Glaser and Strauss developed grounded theory, which is the theory employed in the fieldwork aspect of this research.¹⁴³ A version of this is also applied in the content analysis of legislation in this research. Through analysing the SPS-related legislation from different perspectives, creating the environment in which, within each perspective and then across all perspectives, theory can be generated and then compared,

¹³⁷ Gibbs "Using Software in Qualitative Analysis" 290; Silver and Lewins "Computer Assisted Analysis of Qualitative Research" 613.

¹³⁸ Gibbs "Using Software in Qualitative Analysis" 291.

¹³⁹ Gibbs "Using Software in Qualitative Analysis" 291. This is, however, a reference specific to CAQDSA software and it is explained later in this section how through the use of Rstudio, it is also used as a method for data collection in the Chapter 5 content analysis.

¹⁴⁰ Gibbs "Using Software in Qualitative Analysis" 291. This is, however, a reference specific to CAQDSA software and it is explained later in this section how through the use of Rstudio, it is also used as a method for data analysis in the Chapter 5 content analysis.

¹⁴¹ Gibbs "Using Software in Qualitative Analysis" 292.

¹⁴² Gibbs "Using Software in Qualitative Analysis" 290.

¹⁴³ Glaser and Strauss *The Discovery of Grounded Theory: Strategies for Qualitative Research*.

contrasted or used as part of a broad analysis of inter-connectivity between these different fields, is a version of purposeful and systematic collection of data is followed. The data in the legislative analysis, legislation being traditionally classified as a primary source and one that is commonly¹⁴⁴ approached from the traditional doctrinal legal analytical approach, may also be seen as a "field" in which answers to specific questions are sought by non-traditional means in a way that does not detract from its validity, nor negate the role that the traditional approach also plays. It is with this in mind that the use of computer-assisted analysis is included to add new perspective to the research that the researcher would not otherwise be able to provide. Therefore, to clarify, the "field" is the collection of various SPS-related legislation and regulations. The methods of "data collection" are the doctrinal, legal, analytical approach and the computer-assisted or content analysis approach to data collection. The analysis outcomes of both approaches are then used to generate theory, compare, contrast and contextualise within context of the outcomes of the Chapter 4 fieldwork section.

2.4.3.1 The rationale, design and application of a computer-assisted content analysis (CA) methodology in Chapter 5

This methodology evolved to a form that is more accurately categorised within the quantitative methods than qualitative methods category. It is not strictly "statistical" and, as such, may suffer from criticism that applying Rstudio packages in this manner is, on the face of it, "statistics light". The defence against this type of criticism is also provided below. The Rstudio packages required to execute this methodology are:

- `library(quanteda)`
- `library(readtext)`
- `library(tidytext)`
- `library(tidyverse)`
- `library(ggplot2)`

¹⁴⁴ At least in South African academic research.

- `library(readxl)`
- `library(writexl)`
- `library(textclean)`

This chapter does not discuss results and findings. The results and findings as they relate to this research are elaborated on in Chapter 5, as are the limitations of the legislation and the limitations of the methodology. Chapter 5 also contains recommendations for future improvement and further research.

Before reaching the point of data visualisation and analysis, the following ten steps were broadly followed to collect data, clean and prepare it for analysis and reexport it as a file that can also be viewed in MS Excel. Pre-Rstudio, the original Excel file containing the four things vital to coding the legislation in this phase, had to be amended, again to suit the methodology. What was added was a unique identifier code that identifies each code to avoid confusion in the cases where more than one obligation, for example, is derived from the same agreement article. The key words for coding were also limited to single words as opposed to phrases as a result of concerns described in Chapter 5 related to the accuracy of identical "hits" in a search after generating or tokenising the text into n-grams versus bi-grams. The ten steps followed are as follows:

- Step 1: Import the legislation pre-converted to text documents using `library(readtext)` and create a corpus¹⁴⁵ using `library(quanteda)`
- Step 2: Clean the imported text documents and remove unwanted characters:
 - remove: "_" and "copy.txt" from document names in the `doc_id` column
 - change text to lowercase
 - remove leading and trailing white space
 - remove the html and punctuation

¹⁴⁵ The entire collection of legislation from which the content is drawn for the content analysis in Chapter 5.

- Step 3: Tokenise¹⁴⁶ the data and put each word into its own cell
- Step 4: Clean the tokenised data
 - remove stop words
 - remove non-alphanumeric characters
- Step 5: Convert the clean tokenised data to a data frame.¹⁴⁷
- Step 6: Prepare data and assign key word values to what were the original Atlas.ti codes column. Start extracting key words (exact matches) from the clean tokenised data frame. Do this for each unique right and obligation for each agreement.
- Step 7: Subset the data conditionally and create a corresponding number of new data frames from these subsets. After this, mutate in a new column that contains the code description for the unique value.
- Step 8: Combine the entire set of rights and obligations data frames into one single data frame.
- Step 9: Clean the new data frame and rename columns to suitable descriptors
- Step 10: Export as XLSX, save to the R-project to be used for visualisation in the next step.

The steps are repeated for each category of legislation and the data frames are combined for analysis of regulations. This same process is used in the process of identifying key OIE Terrestrial Animal Health Code and Terrestrial Manual terms as well as FMD specific terms within the legislation and regulations.

¹⁴⁶ In this step each word is put into a row of its own. A token can be described as "a meaningful unit of text, such as a word, that we are interested in using for analysis, and tokenisation is the process of splitting text into tokens" as explained in Silge and Robinson *Text Mining with R: A Tidy Approach*, para 1.

¹⁴⁷ Data frames store tabular data and can be imagined as looking like rows and columns in an Excel spreadsheet.

2.5 Conclusion

The paragraphs above provide a detailed description of the methodology applied in this research. Where indicated and where necessary, further relevant detail related to each is provided in the chapters that follow. A reflection and overall discussion of the strengths and weakness of the mixed-methodology approach in this research is discussed in Chapter 6.

CHAPTER 3 SPS LAW AND ITS ANALYSIS IN THE LITERATURE

This chapter provides an analysis of SPS law relevant to the research conducted, notably also in the light of the academic literature. It contextualises the SPS-Agreement within the broader context of international trade under the WTO. The chapter also reviews the regional and continental commitments with regard to SPS measures that South Africa is bound by. It contextualises the matter of FMD as a Transboundary Animal Disease (TAD) that results in a disturbance of trade in the event of an outbreak in a previously disease-free area. The chapter also reviews some of the broader socio-economic, political and economic challenges specific to a South African context, from which disciplines such as SPS law are not far removed, as far as their effect on the actors within the SPS chain and the effect that actors have on the SPS chain are concerned as well. The analysis is divided into several parts. It is not limited to legal literature. The division is intended to provide a clearer layout of the relevant themes reviewed in the context of sanitary and phytosanitary measures.

The chapter is divided into four parts and it is structured as follows:

Part One: A discussion of SPS at The World Trade Organization (WTO), the Southern African Development Community (SADC), and the African Continental Free Trade Agreement (AfCFTA). The first part starts with a focus on the World Trade Organization and provides an overview of the organisation, its purpose and the principles of the global multilateral trading system as well as the structure and role of the WTO's dispute settlement understanding and the dispute settlement body. Part one situates WTO-SPS in the broader WTO system and introduces the purpose and role of the agreement. The analysis then turns to the SADC and AfCFTA agreements as far as they are relevant to SPS measures.

Part Two: The World Organisation for Animal Health (OIE) and Animal Health in International Trade. This part focuses on animal health and international trade, and focuses specifically the role of the OIE. It provides a review of FMD as a disease and matters related thereto.

Part Three: Broader Perspectives and Considerations of the Role of International Trade and Sanitary and Phytosanitary Measures. This part is a discussion of broader perspectives and considerations of the role of international trade and sanitary and phytosanitary measures. The discussion is limited to relevant points not already addressed in Chapter 1.

Part Four: The broader context within which Sanitary and Phytosanitary Measures exist in South Africa. This part focuses on aspects of the broader context within which sanitary and phytosanitary measures exist in South Africa.

3.1 Part One: A discussion of SPS at The World Trade Organization, the Southern African Development Community, and the African Continental Free Trade Agreement.

3.1.1 Sanitary and phytosanitary measures situated in the broader scope and role of the World Trade Organization (WTO)

The WTO, which was preceded by the General Agreement on Tariffs and Trade (GATT), was established in 1995 and currently consists of 164 member countries.¹⁴⁸ The WTO, according to its own website,

provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development.¹⁴⁹

The General Agreement on Tariffs and Trade (GATT) became part of the World Trade Organization on 1 January 1995,¹⁵⁰ after having been the "principal" or *de facto* arbiter of international trade since 1 January 1948. It continued despite the failure of an attempt to develop the International Trade Organisation (ITO) from 1945 to 1948, which was to provide the operative environment for the GATT 1947.¹⁵¹ GATT was a post-World War II product,¹⁵² and the WTO a product of multiple rounds of negotiation

¹⁴⁸ WTO https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

¹⁴⁹ WTO 2018 https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm.

¹⁵⁰ Irwin 1995 *American Economic Review* 323.

¹⁵¹ McKenzie 2008 *Journal of Cold War Studies* 78; Peter Van Den Bossche and Zdouc "The Origins of the WTO" 76.

¹⁵² van Grastek *The History and Future of the World Trade Organization* 8.

that commenced at the end of the Cold War.¹⁵³ GATT 1947 terminated in 1996 and the provisions incorporated into the WTO are now referred to as GATT 1994.¹⁵⁴

The WTO has its own (international) legal personality¹⁵⁵ and is headquartered in Geneva, Switzerland. The organisation is established by Article I of the *Agreement Establishing the World Trade Organization*. The context for the development of a multilateral trading system is set out quite clearly in the preamble. The preamble supports Article II.(1) especially that states the overarching objective of the WTO:

The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.¹⁵⁶

The multilateral institutional framework therefore expresses the recognition by members that they agree to conduct themselves in a manner that, amongst other things, raises standards of living, raises real income, optimally uses resources in a sustainable manner, and positively supports developing and least developed countries in economic development through these agreements.¹⁵⁷ The members resolve ultimately "to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalisation efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations."¹⁵⁸ The basic principles of the WTO or multilateral trading system are the principles of non-discrimination in trade (most-favoured-nation and national treatment clauses); freer trade; predictability; fair competition and development and economic reform.¹⁵⁹ Article II (2) states that:

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.¹⁶⁰

¹⁵³ van Grastek The History and Future of the World Trade Organization 11.

¹⁵⁴ van Den Bossche and Zdouc "International Trade and the Law of the WTO" 43.

¹⁵⁵ Agreement Establishing the World Trade Organization, Article VIII(1).

¹⁵⁶ Agreement Establishing the World Trade Organization, Article II(1).

¹⁵⁷ Agreement Establishing the World Trade Organization, preamble paraphrased.

¹⁵⁸ Agreement Establishing the World Trade Organization, preamble.

¹⁵⁹ World Trade Organization
https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

¹⁶⁰ Agreement Establishing the World Trade Organization.

The exception to the above rule is plurilateral agreements that are only binding on the parties that have accepted them.¹⁶¹ The WTO therefore performs a number of functions that are further enabled by the binding nature of the multilateral agreements and the scope is therefore limited to the multilateral trade agreements and plurilateral trade agreements where relevant. The WTO is therefore a collection of internationally binding basic rules to which Members have agreed. The basic groups of rules are summarised by WTO authors as rules on:

- (i) Non-discrimination;
- (ii) Market access;
- (iii) Unfair trade;
- (iv) Conflict between trade liberalisation and societal values;
- (v) Institutional and procedural rules.¹⁶²

Article III of the *Agreement Establishing the World Trade Organization* lists the functions of the WTO as: acting as a facilitating organisation for implementation, administering and operating multilateral agreements and their objectives as found in the relevant annexes; being a forum for negotiation; settling trade disputes; administering a trade policy review mechanism and co-operating with the International Monetary Fund (IMF), the International Bank for Reconstruction and Development and their affiliates in pursuit of global coherence.

The institutional structure of the WTO is described by Article IV¹⁶³ and the role of the Secretariat and Director-General by Article VI. The *Agreement Establishing the World Trade Organization*, also termed the Marrakesh Agreement, is the principal source of

¹⁶¹ The Agreement Establishing the WTO, Article II (3). This research does not go into the detail of plurilateral agreements such as the terminated Bovine Agreement.

¹⁶² van Den Bossche and Zdouc *The Law and Policy of the World Trade Organization* 35-40.

¹⁶³ *Agreement Establishing the World Trade Organization*, Article IV and can also be seen as summarized on the WTO website at, WTO 2021
https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.
 World Trade Organization
https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.

WTO law.¹⁶⁴ There are multiple sources of WTO law, some of which serve purposes of clarification or definition but do not necessarily confer rights and obligations enforceable on Members.¹⁶⁵ The *Agreement Establishing the WTO* contains four annexes. Annex 1A consists of agreements related to the trade in goods. These are:

The General Agreement on Tariffs and Trade 1994; the Agreement on Agriculture; the Agreement on the Application of Sanitary and Phytosanitary Measures; the Textiles and Clothing Agreement (terminated); the Agreement on Technical Barriers to Trade; the Agreement on Trade-Related Investment Measures (TRIMs); the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; the Agreement on Pre-shipment Inspection; the Agreement on Rules of Origin; the Agreement on Import Licensing; the Agreement on Subsidies and Countervailing Measures; the Agreement on Safeguards; the Agreement on Trade Facilitation.¹⁶⁶

Annex 1B includes the General Agreement on Trade in Services (GATS), Annex 1C the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Annex 2 contains the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 3 the Trade Policy Review Mechanism and Annex 4 the Plurilateral Trade Agreements. Moreover, there are additional sources of WTO law, described by leading authors in different ways. Van Den Bossche and Zdouc thus point out that there are

Dispute settlement reports, acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of members, the negotiating history of WTO agreements and teachings of the most highly qualified publicists,¹⁶⁷

or, as alternatively summarised by Mavroidis:

state practice, secondary law, and the exercise of implied powers by WTO adjudicating bodies;¹⁶⁸

¹⁶⁴ van Den Bossche and Zdouc "International Trade and the Law of the WTO" 40.

¹⁶⁵ van Den Bossche and Zdouc "International Trade and the Law of the WTO" 40.

¹⁶⁶ World Trade Organization 2020
https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

¹⁶⁷ van Den Bossche and Zdouc "International Trade and the Law of the WTO" 51.

¹⁶⁸ Mavroidis 2008 The American Journal of International Law 442.

There is an extensive body of WTO literature on the subjects of most-favoured-nation and national treatment.¹⁶⁹ These topics, although centrally related to international trade law, are beyond the detailed scope of this research. Authors such as Mavroidis, Wolfe, and Pauwelyn have written extensively about the WTO across a variety of subject matters. Each of the aspects of the WTO agreements and DSB decisions have the potential for vast and varied academic inquiry. The specific subject matter of this research is the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

3.1.2 The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

Dispute resolution of WTO-related disputes is governed by the provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). The DSU establishes a dispute settlement body (DSB),¹⁷⁰ with the task of administering the rules and procedures of the DSU. However, the purpose of the WTO is also not one of micro-managing national bodies.¹⁷¹ The DSB has

authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the covered agreements.

The WTO's jurisdiction is compulsory.¹⁷² Article 3(2) of the DSU states that:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

The DSU clearly sets out the coverage and application of the agreement in article 1, where it states that:

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the

¹⁶⁹ These terms are defined in the glossary of terms at Annexure 6.

¹⁷⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 2.

¹⁷¹ Esserman and Howse "The WTO on Trial" 294.

¹⁷² Van Den Bossche and Zdouc "WTO Dispute Settlement" 160.

"covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of *disputes between Members concerning their rights and obligations* under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.¹⁷³

Jurisdiction *ratione materiae* thus extends to disputes that fall within what are referred to as the "covered agreements".¹⁷⁴ The DSU contains appendixes. Appendix 2, entitled *Special or additional rules and procedures contained in the covered agreements*, provides that the rules and procedures of the DSU apply subject to any "special or additional rules and procedures on dispute settlement" as are contained in the covered agreements, as specifically identified in Appendix 2 of the DSU.¹⁷⁵

The customary rules applicable to the interpretation of international law are applicable in the process of dispute settlement at the WTO.¹⁷⁶ The fact that WTO case law includes customary international law and aspects of the general legal principles of civilised nations in the interpretation of the relevant agreements and their principles, provides legitimacy and consistency in the system.¹⁷⁷ WTO rules and does not have jurisdiction over non-WTO rules.¹⁷⁸ The WTO applies only the provisions of its agreements and does not have jurisdiction beyond them as the WTO is a legal system in itself (a so-called "self-contained regime"). The WTO Agreement constitutes "parent legislation" that delimits the WTO's jurisdiction.¹⁷⁹ With the inclusion of Article 3(2) DSU concerning "customary rules of interpretation of public international law" comes the debate over the application or not of the Vienna Convention on the Law of Treaties of 1969 and the complication of WTO Members not being parties to the Convention. Authors have convincingly contended that this debate is largely solved, although implicitly, by the view taken in *Japan — Alcoholic Beverages II*,¹⁸⁰ effectively holding that the convention

¹⁷³ Understanding on Rules and Procedures Governing the Settlement of Disputes, A1.1. (The text in italics is the authors own emphasis).

¹⁷⁴ van Den Bossche and Zdouc "WTO Dispute Settlement" 163.

¹⁷⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 1.2.

¹⁷⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3.2.

¹⁷⁷ Cameron and Gray 2001 International and Comparative Law Quarterly 252.

¹⁷⁸ Marceau and Trachtman 2014 *Journal of World Trade* 401.

¹⁷⁹ Cameron and Gray 2001 International and Comparative Law Quarterly 264.

¹⁸⁰ Appellate Body *Japan — Alcoholic Beverages II* Section D, p.10. This was a reaffirmation of what was stated in *US- Gasoline*.

is binding on all states as it is a codification of customary international law,¹⁸¹ law explicitly included in Article 3(2) of the DSU.

The WTO applies a narrow definition, as is clear from a number of Appellate body decisions, of what a "conflict" is in the WTO context that may be subject to dispute resolution and this is close to the definition that is accepted of the term in international law.¹⁸² Claims are not limited to claims of violation of commitments but the option exists for a Member to bring a "non-violation complaint", alleging that it has been deprived of an expected benefit, without it being necessary that this constitutes a violation or something that is inconsistent with WTO commitments.¹⁸³

Amicus curiae briefs have been accepted and considered by the WTO dispute settlement bodies, which has met with some controversy.¹⁸⁴ The concerns relate to, amongst other things, the lack of process governing such submissions, and also the variety of goals that *amicus curiae* briefs by NGOs try to achieve.¹⁸⁵

Members request consultations in writing¹⁸⁶ and, in doing so, "undertake to accord sympathetic consideration to and afford adequate opportunity for consultation."¹⁸⁷ The receiving Member then has 10 days within which to respond and is required to start consultations within 30 days of the initial request. This should be done in good faith. The time frame can only differ if mutually agreed upon. Failure to respond entitles the Member to request the establishment of a panel.¹⁸⁸ The complainant will usually request a panel if the parties failed to settle the disputes within 60 days or there is joint agreement that the consultations have failed.¹⁸⁹ Reaching a mutually agreeable solution is preferred:

¹⁸¹ Cameron and Gray 2001 *International and Comparative Law Quarterly* 254.

¹⁸² Marceau and Trachtman 2014 *Journal of World Trade* 425.

¹⁸³ van Grastek The History and Future of the World Trade Organization 238; Cameron and Gray 2001 *International and Comparative Law Quarterly* 261.

¹⁸⁴ Mshomba Africa and the World Trade Organisation, 69. See also Butler 2006 Effects and Outcomes of Amicus Curiae Briefs at the WTO: An Assessment of NGO Experiences.

¹⁸⁵ Butler 2006 Effects and Outcomes of Amicus Curiae Briefs at the WTO: An Assessment of NGO Experiences.

¹⁸⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, 4.4.

¹⁸⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, 4.2.

¹⁸⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, 4.3.

¹⁸⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, 4.7.

Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.¹⁹⁰

Reaching a mutually agreed solution is however not always possible. There is a provision for "cases of urgency", where the timeframes are shortened. Provision is made for situations involving perishable products.¹⁹¹ Article 4.11 allows for other interested Members with "a substantial trade interest in consultations being held" to join in the consultations.¹⁹² They have 10 days from circulation of the request to express such interest.¹⁹³

Panels are established in accordance with Article 6. Article 7 sets out the terms of reference. Again, the request for the establishment of a panel is done in writing. The DSB will usually establish a panel when the request first appears on the DSB's agenda, but may also not to, provided this decision is by DSB consensus.¹⁹⁴ The DSU has shifted from the original GATT position and the consensus requirement was removed. Rather, it is now one of negative consensus,¹⁹⁵ which has inserted a considerable level of automation.¹⁹⁶ There are three members in a panel, or five, if the parties agree to it.¹⁹⁷ Panel members should be independent and diverse.¹⁹⁸ The panels are to be composed of well-qualified governmental and/or non-governmental individuals¹⁹⁹ and they are

¹⁹⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, A3.7.

¹⁹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, A4.8 and A4.9.

¹⁹² Understanding on Rules and Procedures Governing the Settlement of Disputes, A4.11.

¹⁹³ Understanding on Rules and Procedures Governing the Settlement of Disputes, A4.11.

¹⁹⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, A6.

¹⁹⁵ WTO 2021 https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm.: Also referred to as "negative consensus" a procedure explained by the by the WTO whereby "the DSB must approve the decision unless there is a consensus against it".

¹⁹⁶ Delich "Developing Countries and the WTO Dispute Settlement System" 71; Howse "Dispute Settlement in the WTO: A Manual" 809; Esserman and Howse "The WTO on Trial" 132.

¹⁹⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, A8.5.

¹⁹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, A8.2.

¹⁹⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, A8.1.

participants in their personal capacity.²⁰⁰ Panels are tasked with making objective assessments and recommendations to the DSB.²⁰¹ The procedures are guided by Appendix 3²⁰² and the deliberations are confidential.²⁰³ The process follows an interim review stage yielding a panel report²⁰⁴ and then moves on to the consideration for adoption of the report by the DSB not less than 20 days after circulation.²⁰⁵

The appellate body can hear appeals from panel cases.²⁰⁶ Third parties are not able to appeal panel reports, only parties to the dispute may do so.²⁰⁷ The appeal is also limited in that it may only concern "issues of law covered in the panel report and legal interpretations developed by the panel."²⁰⁸ There are a number of remedies recognised by the WTO to which a Member has recourse. These are cessation and withdrawal;²⁰⁹ compensation in a non-pecuniary format;²¹⁰ restitution;²¹¹ and sanctions.²¹² Ultimately, if non-compliance endures, retaliation is the final remedy that can be sought.²¹³

Robert Hudec lists three factors influencing why governments, that Hudec describes as "complex institutions that make decisions in their own, peculiar, often irrational manner, which we call 'politics'", comply with rulings of the WTO dispute settlement mechanism.²¹⁴ Hudec's three factors are paraphrased as follows. Firstly, the defendant government, or relevant parts of it, may believe that the obligations called for are indeed good policy (including influential private interest groups). Secondly, the government and private interest groups may place value on the obligations on account of the belief that there is something to gain. A third reason is pressure to conform

²⁰⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, A8.9.

²⁰¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, A11.

²⁰² Understanding on Rules and Procedures Governing the Settlement of Disputes, A12 and appendix 3.

²⁰³ Understanding on Rules and Procedures Governing the Settlement of Disputes, A14

²⁰⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, A15.

²⁰⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, A16.

²⁰⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, A17.1.

²⁰⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, A17.4.

²⁰⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, A17.6.

²⁰⁹ Cho 2004 University of Pittsburgh Law Review 772.

²¹⁰ Cho 2004 University of Pittsburgh Law Review 775.

²¹¹ Cho 2004 University of Pittsburgh Law Review 776.

²¹² Cho 2004 University of Pittsburgh Law Review 777.

²¹³ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 84.

²¹⁴ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 82.

from other governments.²¹⁵ The enforcement of WTO law in general, as with any international law, remains a challenge.

Countries, especially those with stark developmental and/or ideological differences will always have matters on which they disagree and trade-related tensions may rise as a result. This is one of the "luxuries" of democracy – being allowed to disagree. A democratic country however also has the obligation "to play by the rules" it willingly agreed to and to resolve any tensions that arise according to those rules. The context of SPS measures is no exception. Countries have and always will have differing views on how to regulate SPS matters,²¹⁶ which is precisely why the application of rights, obligations and principles at all levels of trade is important.

SPS regulation is an incredibly diverse field of differing interests and incentives. It is accordingly surprising that so few disputes have been raised citing the agreement. Of course, successful consultations between countries may perhaps partly be mentioned as a reason for the low number of disputes that have reached panel phase, but it may also be that the confusion in the diversity of the field leaves barriers in place that never get to a point where they are raised as disputes or SPS-related matters are addressed at the incorrect or different forums so as not to reach the WTO.

3.1.3 Developing country Members and the provisions of the WTO

There are a number of provisions under WTO law that are intended to benefit developing and least developed countries. Whether or not they do, and to what extent they do (or do not), benefit such countries is subject to broad academic debate, with views supporting both sides. The WTO does not define what a developed or developing country is, and Members self-declare their status.²¹⁷ The distinction between "developing" and "least developed" is important as not all provisions applicable to least developed countries are the same as those for developing countries. Multiple

²¹⁵ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 82.

²¹⁶ Isaac "Sanitary and Phytosanitary Issues" 383.

²¹⁷ WTO 2021 https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

agreements have provisions specific to developing countries²¹⁸ others to least-developed countries²¹⁹ and some to both.

The DSU specifically refers to the developing country in articles 3.12; 4.10; 8.10; 12.10; 12.11; 21.2; 21.7; 21.8; 22.2; and 27.2. The views on the importance of the WTO to developing countries differ. However, there is a generally shared feeling amongst authors that the position of the developing country is more advantageous under the WTO than under GATT 1947.²²⁰ Very few WTO disputes ever progress beyond consultations and it is unknown how many disputes arise but remain unrecorded and resolved (or unresolved) without reaching the point of requesting formation of a panel.²²¹ There are numerous potential explanations for this situation. One is strategy. Parties will logically take the route most likely to succeed, and in this scenario diplomacy and politics may be effective.²²²

Criticism of the WTO from a developing country's perspective has been broad. A number of Articles in the covered agreements refer to developing countries. These have been described as having "proved to be more declarative than operative" in practice.²²³ There is also a shared view that approaching the WTO as a forum through which to settle a dispute against a country of a more industrial nature is a waste of financial resources as well as time.²²⁴ This is a view that is still relevant in 2021. Developing countries lack the resources and high-level expertise necessary to build a case of sufficient strength so organisations such as the Advisory Centre on WTO Law (ACWL) exist to provide assistance to Members.²²⁵ Concern has also been expressed at the possibility of retaliation (as an enforcement sanction) as a possible outcome, at the remedies in general from the perspective of developing countries, and at the

²¹⁸ Agreement Establishing the World Trade Organization, In the preamble; The Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 3.12; 4.10; 8.10; 12.10; 12.11; 21.2; 21.7; 21.8; 22.2; 27.2.

²¹⁹ Agreement Establishing the World Trade Organization, Preamble, Article IV.7; XI.2; The Understanding on Rules and Procedures Governing the Settlement of Disputes, article 24

²²⁰ Hoekman "The WTO: Functions and Basic Principles" 46.

²²¹ Mshomba Africa and the World Trade Organisation 45.

²²² Mshomba Africa and the World Trade Organisation 45.

²²³ Delich "Developing Countries and the WTO Dispute Settlement System ", 73.

²²⁴ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 81.

²²⁵ Delich "Developing Countries and the WTO Dispute Settlement System" 74-75.

enforcement of remedies.²²⁶ The concern is that remedies such as retaliation are really only an effective advantage to large countries and not vice versa.²²⁷

There are a number of concerns that authors raise with regard to the participation of African countries in the settlement of disputes through the WTO. These are broadly: the sheer expense of participating in the process and the fact that complexity adds to this expense;²²⁸ lack of representation;²²⁹ the development agenda and the lack of implementation thereof;²³⁰ and bias in compensation and enforcement.²³¹ More generally the DSU faces similar criticism regarding the position of developing countries and their participation.²³² The most common hinges on participation, capacity and technical support.²³³ Other authors have also raised different points about the success or failure of the WTO in the context of developing country disputes. One is that focusing on participation limits the scope of the research into developing country challenges and that this is an undesirable general limitation in scope of study.²³⁴ The assumption that there is a process of fair, objective and unbiased decision-making once a dispute has reached panel stage, is challenged by authors such as Kristina Mitchell.²³⁵ Mitchell proposes that success can be explained by a model entailing three considerations.²³⁶ These are:

legal capacity, for which I create a novel measure of legal expertise in panel disputes; *economic size*, variables such as economic size and trade volume; and *salience or reputational considerations*, a strategic explanation which may motivate panel judges to decide a case in a particular way.²³⁷

The three explanations of legal capacity, the relevant variables and economic size, salience or reputational factors and strategy, are explanations with which the

²²⁶ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 81.

²²⁷ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 84.

²²⁸ Mshomba Africa and the World Trade Organisation 47.

²²⁹ Mshomba Africa and the World Trade Organisation 50.

²³⁰ Mshomba Africa and the World Trade Organisation 53.

²³¹ Mshomba Africa and the World Trade Organisation 57.

²³² Mitchell 2013 *Journal of World Trade* 77.

²³³ Mitchell 2013 *Journal of World Trade* 77-78.

²³⁴ Mitchell 2013 *Journal of World Trade* 78.

²³⁵ Mitchell 2013 *Journal of World Trade* 87.

²³⁶ Mitchell 2013 *Journal of World Trade* 87.

²³⁷ Mitchell 2013 *Journal of World Trade* 87 (italics is own emphasis).

researcher grapples in more detail in Chapters 4 and 5, although not in the identical context of Mitchell as quoted above. The contention that economic size and income matter is echoed by other authors of WTO law as well. There is a confirmed positive link between submissions and GDP, although this is not proportional.²³⁸ There is also evidence of low-income countries being reliant on joint submissions as opposed to individually making submissions as high-income countries do.²³⁹ Håkan Nordström also submits that there is an additional interesting finding in that the official WTO languages matter in as far as there is evidence of more Member productivity for countries whose language is one of the WTO languages than there is for countries in other language groups outside of French, English and Spanish, with Spanish submissions being the stand-out group.²⁴⁰ In a commentary on Nordström's chapter, Jeffrey Dunoff submits that from their point of view and from the evidence that Nordström's has submitted, "we should not necessarily assume that more developed state participation is better than less participation", at least in the context of that specific research.²⁴¹

3.1.4 What are "barriers" to trade?

Not all SPS measures are barriers to trade. In many ways their existence facilitates trade in that the trust in the safety of products, for example, that such measures facilitate limits the time that could otherwise have been spent trying to procure assurances that the products in question are safe. There are however circumstances in which SPS measures are barriers to trade or even non-tariff barriers to trade. There are also circumstances in which they amount to disguised restrictions on trade. There is no single meaning or definition and the specific term used and its corresponding meaning is dependent on the specific context in which it is used.

The word "non-tariff barrier" essentially means one of two things: either it has a meaning assigned in barrier-related literature or it is defined in Protocols such as the SADC-PT.²⁴² It is often used to either literally mean a barrier that is not a tariff, or to

²³⁸ Nordström "Participation of Developing Countries in the WTO" 165.

²³⁹ Nordström "Participation of Developing Countries in the WTO" 165.

²⁴⁰ Nordström "Participation of Developing Countries in the WTO" 165-167.

²⁴¹ Jeffrey Dunoff's commentary on Nordström "Participation of Developing Countries in the WTO" 194.

²⁴² Article 1 of the *SADC-PT* describes a not tariff barrier as "any barrier to trade other than import and export duties."

mean a barrier that is not a tariff, but that is also not justifiable as an accepted or legitimate barrier according to the agreements to which Members of the WTO have agreed. A barrier can also be understood as in the normal understanding of the word, as a measure or situation by which there is difficulty or impossibility for a trade-related act to take place as a result of, for example, unintentional consequences of a decision or lack of proactive action to create a barrier-free environment.

The WTO agreements such as the SPS and TBT agreements refer to a specific category of barrier. The SPS Agreement refers to "disguised restriction(s) on international trade".²⁴³ The WTO Panel in *India Agricultural Products* has considered the understanding of the term "disguised restriction on international trade" as follows:

we consider that... 'disguised restriction on international trade' may similarly be read to encompass measures that constitute arbitrary or unjustifiable discrimination.²⁴⁴

Another term that is used in the context of barriers or restrictions is "non-tariff measure" (NTM). UNCTAD defines an NTM as "policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both"²⁴⁵ and further classifies NTMs to account for the broadness of the general definition.²⁴⁶ The 2019 version of the United Nations Conference on Trade and Development's (UNCTAD) NTM classifications consists of 16 chapters and each chapter falls within a sub-group. SPS measures are firstly classified under Chapter A and the subgroup of technical measures arising in the category of imports. Chapter A, SPS measures, is further split into eight more detailed divisions.²⁴⁷ These are:

A1 Prohibitions/restrictions of imports for sanitary and phytosanitary reasons;

²⁴³ Article 2.3.

²⁴⁴ Panel report 7.475-7.476

²⁴⁵ United Nations Conference on Trade and Development (UNCTAD) *Non-Tariff Measures: Evidence from Selected Developing Countries and Future Research Agenda* And conformed by United Nations Conference on Trade and Development (UNCTAD) MAST Group *International Classification of Non-Tariff Measures*.

²⁴⁶ United Nations Conference on Trade and Development (UNCTAD) MAST Group *International Classification of Non-Tariff Measures*.

²⁴⁷ United Nations Conference on Trade and Development (UNCTAD) MAST Group *International Classification of Non-Tariff Measures* 1-9.

- A2 Tolerance limits for residues and restricted use of substances;
- A3 Labelling, marking and packaging requirements;
- A4 Hygienic requirements related to sanitary and phytosanitary conditions;
- A5 Treatment for elimination of plant and animal pests and disease-causing organisms in the final product or prohibition of treatment;
- A6 Other requirements relating to production or post- production processes;
- A8 Conformity assessment related to sanitary and phytosanitary conditions;
- A9 Sanitary and phytosanitary measures not elsewhere specified.²⁴⁸

SPS measures also fall within Chapter P, export-related measures, described as "*Measures applied to exported goods by the Government of the exporting country*".²⁴⁹

P1 (Export measures related to sanitary and phytosanitary measures and technical barriers to trade) and P2 (Export formalities) are of specific application to SPS measures. The quantifiability of NTMs remains a challenge²⁵⁰ and in the context of SPS measures, this is especially true.

3.1.5 The Agreement on the Application of Sanitary and Phytosanitary Measures

3.1.5.1 The scope of the Agreement on the Application of Sanitary and Phytosanitary Measures

The definition of SPS measures under the WTO-SPS is:

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;

²⁴⁸ United Nations Conference on Trade and Development (UNCTAD) MAST Group *International Classification of Non-Tariff Measures* 1-9.

²⁴⁹ United Nations Conference on Trade and Development (UNCTAD) MAST Group *International Classification of Non-Tariff Measures*, 80.

²⁵⁰ Kalaba, Kirsten and Sacolo 2016 *Agrekon* 378.

- (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.²⁵¹

Authors agree on the interpretation of the definition of Annex A of the agreement, that SPS measures are defined by their purpose or function.²⁵² *Australia-Apples* held that "the purpose of a measure is to be ascertained on the basis of objective considerations."²⁵³ Authors such as Pauwelyn, supported by Marceau and Trachtman, interpret the functional definition as including partial motivation by SPS concerns for an inclusion of a measure under the scope of the WTO-SPS.²⁵⁴ This view is supported by the fact that there is also no distinction between a "principal measure" and an "ancillary measure" as far as the scope of the agreement is concerned.²⁵⁵ On a plain reading of the definition, and considering other aspects of the agreement, if the measure is not applied for one of the four purposes listed in the definition, or partially motivated by these, it cannot be considered an SPS measure. The matter can however still be SPS-related, and thus a broader issue than measures themselves.

The Appellate Body (AB) has placed emphasis on what is described as a "fundamental element" of the definition, that is, the fact that "a measure must be one "applied to protect" at least one of the listed interests or "to prevent or limit" specified damage."²⁵⁶ The same AB report elaborated on this:

²⁵¹ *WTO-SPS Annex A (1)*.

²⁵² Marceau and Trachtman 2014 *Journal of World Trade*, 417; Scott "Introducing the SPS Agreement" 13.

²⁵³ Appellate Body *Australia — Apples* para 172.

²⁵⁴ Marceau and Trachtman 2014 *Journal of World Trade*, 418 in reference to Pauwelyn 1999 *Journal of International Economic Law*, 179.

²⁵⁵ Appellate Body *Australia — Apples* para 181.

²⁵⁶ Panel Report *Australia — Apples* para 172.

The word "to" in adverbial relation with the infinitive verb "protect" indicates a purpose or intention. Thus, it establishes a required link between the measure and the protected interest.²⁵⁷

The AB further states that "circumstances must reveal a clear and objective relationship between that measure and the specific purposes enumerated in Annex A(1)(a)."²⁵⁸

Broadly, paragraphs (a) to (d) of the definition of SPS measures correlate with the categories of food safety, animal life and health and plant life and health. Also included is human health beyond food safety in the context of animal health as far as for example zoonoses²⁵⁹ are concerned. What is ambiguous is what precisely "other damage" as included in paragraph (d) may be. In *EC – Approval and Marketing of Biotech Products*, it was held as follows on the matter:

The residual category of "other damage" is potentially very broad. In our view, 'other damage' could include damage to property, including infrastructure (such as water intake systems, electrical power lines, etc.). In addition, we think 'other damage' could include economic damage (such as damage in terms of sales lost by farmers). The dictionary defines the term 'damage' as 'physical harm impairing the value, usefulness, or normal function of something' and 'unwelcome and detrimental effects', or 'a loss or harm resulting from injury to person, property, or reputation'. These definitions cover harm resulting in a reduction of economic value, adverse economic effects, or economic loss. Also, interpreting 'other damage' to include economic damage is consistent with the context of Annex A(1)(d). Article 5.3 of the SPS Agreement states that relevant 'economic factors' to be taken into account in a risk assessment include 'the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or a disease'. Thus, Article 5.3 shows that the SPS Agreement elsewhere uses the term 'damage' in an economic sense, and it does so in connection with damage from 'pests'. Thus, Article 5.3 contemplates a similar situation to that contemplated in Annex A(1)(d).²⁶⁰

Whether or not an SPS measure is classified as an SPS measure does not rely on there being a "trade effect". This is stated in *Japan-Apples* as follows:

the definition in Annex A, paragraph 1, does not consider the trade effect of a given measure as a factor to determine whether such a measure is or is not a phytosanitary measure. While such requirements are common practices and, on their own, may not

²⁵⁷ Panel Report *Australia — Apples* para 172.

²⁵⁸ Panel Report *Australia — Apples* para 173.

²⁵⁹ Defined by the FAO, WHO and WTO *Taking a Multisectoral, One Health Approach: A Tripartite Guide to Addressing Zoonotic Diseases in Countries* document as: "Zoonotic diseases, or zoonoses, are diseases shared between animals – including livestock, wildlife, and pets – and people." 2.

²⁶⁰ Panel Report *EC — Approval and Marketing of Biotech Products* paras 7.369-7.370.

have justified the initiation of this case by the United States, we note that they are part of the measure as a whole and that, in combination with other elements of that measure, they may contribute to the restrictive effect of the measure at issue.²⁶¹

As far as the non-exhaustive instruments listed in the second paragraph of the SPS definition are concerned, the *Australia-Apples* panel report held that:

Conversely, the fact that an instrument is of a type listed in the last sentence of Annex A(1) is not, in itself, sufficient to bring such an instrument within the ambit of the SPS Agreement.²⁶²

This paragraph from *Australia-Apples* emphasizes the connection between the "instruments" such as "laws, decrees and regulations" and the purpose of the measure, and refers back to the point made by many authors about the necessary connection between the measure and the purpose within the definition of what an SPS measures is.

An agreement to which the WTO-SPS is commonly closely linked is the Technical Barriers to Trade (TBT) agreement. Both agreements can apply to the same product, however, the TBT agreement does not apply to SPS measures and, as such, the same consideration as described above applies in determining which agreement applies to the particular situation. The question thus is, what is the purpose of the measure in dispute? A measure that falls within the WTO-SPS's Annex A definition of an SPS measure is not one over which the TBT agreement has jurisdiction. Article 1.5 of the TBT Agreement states that:

The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.²⁶³

The definition therefore has both a purpose and form element. The purpose of the measure is a closed list, with the exception of "other damage" and the form of the measure not.²⁶⁴ This has been a matter of debate in different disputes; however, the

²⁶¹ Appellate Body *Japan- Apples* Para 8.24.

²⁶² Panel Report *Australia — Apples* para 175.

²⁶³ Agreement on Technical Barriers to Trade.

²⁶⁴ Panel Report *Australia — Apples* paras 7.144-7.145. See also: Panel Report *US — Poultry (China)* paras 7.97-7.100.

Australia–Apples interpretation of the definition of SPS measures has been preferred in cases post-*EC – Approval and Marketing of Biotech Products*.²⁶⁵

3.1.6 Science and the Agreement on the Application of Sanitary and Phytosanitary Measures

Article 2 of the WTO-SPS contains the basic rights and obligations applicable to Members.²⁶⁶ Article 2.2 requires in particular that "based on scientific principles and is not maintained without sufficient scientific evidence". With science being the basis for the justification of SPS measures, science is an obvious matter to arise in many WTO disputes. Article 2.2 is the provision which essentially lays down the guidelines for the basis of SPS measures in science. As described in *EC – Approval and Marketing of Biotech Products*, the essence of Article 2.2 is that:

- (i) ... SPS measures be applied only to the extent necessary to protect human, animal or plant life or health; (ii) ... that SPS measures be based on scientific principles; and (iii) ... that SPS measures not be maintained without sufficient scientific evidence.²⁶⁷

In *EC-Hormones*, the AB has stated that it "would also stress that Articles 2.2 and 5.1 should constantly be read together."²⁶⁸ The relationship between science, the measure and the risk must also be rational and objective according to the *Japan-Agricultural Products II* case.²⁶⁹ The *Japan-Apples* case describes what constitutes science:

²⁶⁵ Panel Report EC — Approval and Marketing of Biotech Products.

²⁶⁶ Article 2 states that: "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))."

²⁶⁷ Panel Report EC — Approval and Marketing of Biotech Products Para 7.1424

²⁶⁸ Appellate Body *EC — Hormones* para 180.

²⁶⁹ Appellate Body *Japan — Agricultural Products II* para 84.

By using the term 'scientific evidence', Article 2.2 excludes in essence not only insufficiently substantiated information, but also such things as a non-demonstrated hypothesis.²⁷⁰

Importantly, the Panel in *Japan-Apples* continued in its analysis to say that:

[R]equiring 'scientific evidence' does not limit the field of scientific evidence available to Members to support their measures. 'Direct' or 'indirect' evidence may be equally considered. The only difference is not one of scientific quality, but one of probative value within the legal meaning of the term, since it is obvious that evidence which does not directly prove a fact might not have as much weight as evidence directly proving it, if it is available.²⁷¹

Other than science-based obligations there are also administrative and common law-based obligations. As far as identifying protectionism goes, there is one primary basis embedded in the WTO-SPS. This is science.²⁷² Scott elaborates on scientific risk, scientific principle and science-based risk assessment in her book "*The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary*".²⁷³ The authors, Scott and Peel, lay out what can be considered the foundation for understanding science, its role, its limitations and its benefits in SPS law. Peel also connects science and risk with environmental concerns in further publications.

A point that Scott makes, which in the researcher's view is vital to understanding the importance of national legislative frameworks and the necessity for these to incorporate the scientific basis of SPS measures satisfactorily is their statement that "even domestic regulation which is entirely even-handed in its treatment of state and out-of-state producers becomes susceptible to legal challenge, in view of the insufficiency of its scientific basis."²⁷⁴ Arguably this susceptibility to legal challenge extends to the other key principles of SPS and not only science.

The WTO-SPS and the WTO in general have faced significant criticism over the years over their insistence on "science". As Scott describes it, there have been charges of "epistemological imperialism, and positive simple-mindedness."²⁷⁵ The merits of such

²⁷⁰ Panel Report *Japan - Apples* paras 8.92-8.93.

²⁷¹ Panel Report *Japan - Apples* para 8.98.

²⁷² Scott "Introduction" 3.

²⁷³ Scott "Introduction" 3.

²⁷⁴ Scott "Introduction" 3.

²⁷⁵ Scott "Introduction" 3.

criticism should be measured against who is making it and the basis for the criticism. While one can understand them, one can at the same time also ask, "then what is the alternative to a science-based approach?"

This question has no simple or singular answer, but part of its answer lies in the measurability of any decision made and the replicability of any sort of test. Even in law there are certain "tests" applied in ascertaining, for example, the actions of the "reasonable man" or the "proportionality" of a measure. As one deals with a field which has the multiple purposes of protecting human, animal and plant life or health from the risks associated with trade, it is difficult to see what alternative approach to science there would be as a "primary basis for identifying protectionism."²⁷⁶ This is not to say that the researcher contends that science should be the *only* basis, but that as a *prima facie* indicator of protectionism, there does not appear to be a more neutral option, despite the inherent values that science itself carries.²⁷⁷ To clarify this point, consider the consequences to agricultural trade if, for argument's sake, political ideology or political motivations could be tabled as a basis for justifying SPS-related protectionism as opposed to science-based decision-making. The WTO would have ceased to be relevant before it started, as far as SPS measures are concerned at least.

The accusation that the WTO-SPS has ignored "the cultural dimension of risk, and the democratic underpinnings of regulation,"²⁷⁸ are two separate issues in the researcher's view. Regarding the first point of the WTO-SPS ignoring "the cultural dimensions of risk", the researcher agrees to the extent that there are complex agricultural structures that are not easily harmonised in countries such as South Africa. This is a point which clearly emerges in the fieldwork discussed in Chapter 4. Drawing support from the views of Thompson *et al*²⁷⁹ there is support for this view in the broader SADC context and specifically in South Africa. There is undoubtedly a cultural dimension that is

²⁷⁶ Scott "Introduction" 3.

²⁷⁷ See Scott "Introduction" 3 for a discussion of "The Scientific Turn" and Scott "Science and SPS" 77.

²⁷⁸ Scott "Introduction" 3.

²⁷⁹ Cassidy, Thompson and Barnes Establishing Priorities through Use of Multi-Criteria Decision Analysis for a Commodity Based Trade Approach to Beef Exports from the East Caprivi Region of Namibia; Thompson et al 2013 Transboundary and Emerging Diseases.

largely ignored in the WTO-SPS discourse and this is in itself a barrier that requires more than what current legislation and international law cater for.

As for the second aspect of ignoring "democratic underpinnings" (that is, that countries must retain some sovereignty in regulating inter alia SPS matters), the researcher disagrees. There is bound to be some sort of cost to voluntarily becoming a member of the WTO. One of the consequences of playing by a set of trade rules is that some of the freedom of decision-making is bound to be lost. It is exactly *because* of the respect for the democratic underpinnings that members, firstly, have agreements such as the WTO-SPS and, secondly, are encouraged to participate in standard setting bodies etc. Chapters 4 and 5 explore the consequences of the "democracy excuse" or "sovereignty excuse" in reforming legislation to translate international rights, obligations and principles meaningfully into national law.

Science may very well be "ill-suited to global conditions of deep diversity"²⁸⁰ but, as stated above, if not science, despite its flaws, then what should form the basis on which SPS measures are adjudged? Perhaps the only way to get around what Scott describes as a system that ignores

cultural particularity in the construction of knowledge, and ... conceal[s] and dismiss[es] rival forms of knowledge, and alternative values, ... is portrayed as hegemonic in its peddling of science as the one and only version of truth²⁸¹

is then to have a national framework as a basis and include clear and reasonable "others" in the process, to inform decisions at a national level.

The reality is that no single or perfect neutral arbiter exists. There has to be some sort of starting point though and this is what science provides. There is a view that science as the "arbiter," in international trade disputes, "has operated to shut down the space for legitimate difference within scientific discourses, and to posit a single, artificial and exclusionary version of scientific truth."²⁸² The manner in which the differing viewpoints in the SPS jurisprudence have been handled is, in the researcher's view, proof that this criticism is perhaps too harsh. It may be true in some cases that "today's 'minority'

²⁸⁰ Scott "Science and SPS" 77.

²⁸¹ Scott "Science and SPS" 77.

²⁸² Scott "Science and SPS" 77.

science could become tomorrow's 'mainstream' science"²⁸³ and that "science is profoundly social."²⁸⁴ However, to give equal legitimacy to very controversial or highly dissenting science as opposed to mainstream or widely endorsed science, is in the researcher's view more dangerous than not having any sort of yardstick, especially in an era of increasing populism against science and misinformation that is shared online. What science as the "arbiter" does not do, and as Scott states, it does not "insinuate a substantive bottom line."²⁸⁵

An answer to these challenges lies partly in the awareness of not only Members but specifically those engaging in the discourses surrounding science in SPS law and in the broader WTO that "scientific disputes must be adjudicated in the knowledge that all scientific assertions are subject to the possibility of being discarded should they prove to be false"²⁸⁶ and, as already stated above "today's 'minority' science could become tomorrow's 'mainstream' science."²⁸⁷ This is said bearing in mind that there is a difference between the role that science plays as a standard, challengeable by new information but important in its function of setting a bare minimum of validated truth, and the role of mainstream and minority science when a standard or measure or action reaches the point of being in dispute, where the specific incident or set of measures is being adjudicated in a specific context. The approach taken by the AB in *India-Agricultural Products* was to say that:

[I]n scrutinising the underlying scientific basis ... the evidence presented must 'have the necessary scientific and methodological rigour to be considered reputable science.' Thus, 'while the correctness of the views need not have been accepted by the broader scientific community, the views must be considered to be legitimate science according to the standards of the relevant scientific community.'²⁸⁸

If an element of the measure is unjustifiable, the whole measure is treated as being maintained "without sufficient scientific evidence" as the individual requirements are cumulative.²⁸⁹ Panels are objective and provide objective assessments based on the

²⁸³ Foster "Introduction" 10.

²⁸⁴ Foster "Introduction" 10.

²⁸⁵ Scott "Science and SPS" 79.

²⁸⁶ Foster "Introduction" 10.

²⁸⁷ Foster "Introduction" 10.

²⁸⁸ Appellate Body *India — Agricultural Products* para 5.28.

²⁸⁹ Appellate Body *Japan- Apples* paras 8.179, 8.180, 8.182, 8.198.

facts before them. There is no obligation on the panel to give preference to the importing member's "approach to scientific evidence and risk over the views of the experts when analysing and assessing scientific evidence to determine whether a complainant established a prima facie case under Article 2.2."²⁹⁰

One should agree with Foster that "prevailing perspectives influence the scope of contemporary scientific research as well as scientific methodology and working assumptions."²⁹¹ This is true of law and specifically international trade law as well. What arises is the question of what to do with this information. Science is controversial as a basis for adjudication, but at the same time there is no real answer as to what a better alternative would be. However, we do know that cultural aspects play a role and that there cannot be adjudication in the future without "recourse to proportionality as a form of cost-benefit balancing"²⁹² and that this "would be monumentally significant for the future of the SPS Agreement, and monumentally controversial."²⁹³ Looking specifically at South Africa may give some insight into considerations that the Southern African region, at the very least, may need to consider.

There is a polycentricity associated with scientific disputes, especially those of an international nature.²⁹⁴ There is also fluidity in the policies and science in these polycentric disputes,²⁹⁵ as well as the fact that there is multiplicity in those who have an interest in the outcome of such disputes. This polycentricity and multiplicity extends from the national to the international and the public to the private sector. ²⁹⁶ The researcher thus believes that these factors emphasise and support the understanding that viewing SPS regulation in a broader sense and considering the variety of actors and actions within the SPS chain plays a vital role in approaching the dispute resolution of these non-tariff barriers.

²⁹⁰ Appellate Body *Japan- Apples* para 8.107.

²⁹¹ Foster "Introduction" 11.

²⁹² Scott "Science and SPS" 79.

²⁹³ Scott "Science and SPS" 79.

²⁹⁴ Foster "Introduction" 25.

²⁹⁵ Foster "Introduction" 25.

²⁹⁶ Foster "Introduction" 25.

In the *US-Animals* case, a point of significant importance and direct relevance to this research, in as far as the disease of FMD is concerned, is raised, namely that:

[T]he level of risk posed by imports from the two regions is not only a function of their disease-prevalence in a given point in time, but also, and most importantly, of the *credibility of the sanitary measures in place in such regions to prevent and control FMD. Thus, our assessment must include a comparison of the effectiveness and credibility of the sanitary measures in place in the two regions to prevent and control FMD, as well as the ability of imports from the two regions to meet the United States' ALOP*— with or without the application of certain mitigating protocols.²⁹⁷

Despite the Member's rights to define the appropriate level of protection (ALOP), a matter of relevance in the *US-Animals* case, *EC-Hormones* reminds us that

The right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right. Article 3.3 also makes this clear.²⁹⁸

Establishing science and determining what is appropriate in the SPS context are not easy tasks. Under the SPS Agreement, the test of necessity is a "positive requirement," which is different from GATT Article XX's approach of making the necessity test one of "justification" of violations.²⁹⁹ The WTO approach to proportionality is the application of the balancing or proportionality *stricto sensu* test as one component and the less trade restrictive test as a second component in assessing the proportionality of measures.³⁰⁰

In the *EC-Hormones* case, the panel reasoned that Maximum Residue Levels (MRLs) and Acceptable Daily Intake (ADI) levels may also be considered SPS measures within the SPS agreement.³⁰¹ This was in reference to the consideration of how to express the acceptable level of daily ingestion of veterinary drugs by a human or presence of such drugs in food. Six hormones were in dispute and as such the expression of the *level of protection* was important to the case.³⁰² The disputes regarding SPS measures raised at the WTO so far, have very rarely not involved another agreement also being cited. How is the order of analysis then determined? The *US-Animals case (Panel*

²⁹⁷ Panel Report *US — Animals* para 7.581 (italics is the researcher's own emphasis).

²⁹⁸ Appellate Body *EC — Hormones* para 173.

²⁹⁹ Marceau and Trachtman 2014 *Journal of World Trade* 368.

³⁰⁰ Marceau and Trachtman 2014 *Journal of World Trade* 368-369.

³⁰¹ Panel Report *EC — Hormones* para 8.74.

³⁰² Panel Report *EC — Hormones* para 8.74.

Report) clearly describes the situation. The panel refers to *India-Autos*,³⁰³ which considered the potential of creating an "error of law." The Panel in *US-Animals* agreed with the approach in *India-Autos*, requiring the consideration "first, if a particular analysis is compelled by principles of valid interpretive methodology that, if not followed, might constitute an error of law"³⁰⁴ and stating further that "a panel should be aware that the order of analysis may have an impact on the potential to apply judicial economy."³⁰⁵ The test to be applied is that "the provision from the agreement that 'deals specifically, and in detail' with the measures at issue should be analysed first."³⁰⁶ This was the approach followed in the following cases as well: *Australia-Salmon*, *EC-Approval and Marketing of Biotech Products*, and *US-Poultry*.

As with the *US-Animals* case, the WTO-SPS will often be considered the *lex specialis* because it "specifically addresses the type of measure in dispute"³⁰⁷ if the measure falls within the scope of the agreement.

This research has sorted the WTO-SPS agreement into individual rights and obligations for purposes of the content analysis conducted in Chapter 5. The complete list of individual rights and obligations is contained in Annexure 4 of this thesis.

3.1.7 The international standard setting bodies to which sanitary and phytosanitary measures have been assigned

The international standard setting bodies under the WTO-SPS perform an important role of setting standards and formulating guidelines and recommendations that provide a basis for enhanced harmonisation of standards within the trade or agricultural commodities.

The SPS Agreement creates a unique situation whereby there are three standard setting bodies with the authority to develop international standards. These ISSBs are given special status by Article 3 of the SPS Agreement and are listed in Annex A of the

³⁰³ Panel Report *India - Autos* para 7.154.

³⁰⁴ Panel Report *US — Animals* para 7.8 in reference to Panel Report *India - Autos* para 7.154.

³⁰⁵ Panel Report *US — Animals* para 7.8 in reference to Panel Report *India - Autos* para 7.61.

³⁰⁶ Panel Report *US — Animals* para 7.10 in reference to Appellate Body *EC — Bananas III* para 204.

³⁰⁷ Panel Report *US — Animals* para 7.11.

Agreement under the definition of "international standards, guidelines or recommendations." The language of Article 3.1 is that of "shall" and would on a plain reading appear to be unambiguous in its meaning, thus seemingly indicating that the stated standards are legally binding.³⁰⁸ On their own, without this provision, the guidelines provided by the three bodies would not be binding.³⁰⁹ Their guidelines are a form of soft law. The inclusion of the provisions of Article 3 give these organisations' standards definitely quasi-legal status.³¹⁰ The requirement that Members' measures be based on the guidelines of the international standard setting bodies and that they also be in conformity with them, has been dealt with in *EC-Hormones* at both Panel and Appellate Body level. The decision of the Appellate Body reversed that of the Panel.³¹¹ The AB in *EC-Hormones* stated that:

To read Article 3.1 as requiring Members to harmonise their SPS measures by conforming those measures with international standards, guidelines and recommendations, in the here and now, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex recommendatory in form and nature) with obligatory force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding norms. But, as already noted, the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so. *We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary.*³¹²

Subsequently, it is clear that a "refined system of applied subsidiarity" exists whereby, despite constraints in terms of the obligations of Members, they maintain autonomy subject to these constraints. Non-conformity does not necessarily amount to inconsistency where more protective norms are adopted within compliance of the agreement.³¹³

³⁰⁸ Article 3(1) "To harmonise 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."

³⁰⁹ Marceau and Trachtman 2014 *Journal of World Trade* 387.

³¹⁰ Marceau and Trachtman 2014 *Journal of World Trade* 387.

³¹¹ Marceau and Trachtman 2014 *Journal of World Trade* 387.

³¹² Appellate Body *EC — Hormones* para 165 (italics is the author's own emphasis).

³¹³ Marceau and Trachtman 2014 *Journal of World Trade* 387-388.

A question that repeatedly arises in the researcher's mind in this discussion is, why would Members not want to base their regulations on the guidelines of international standard setting bodies? It is the researcher's view that, despite legitimate criticism of such measures in certain cases, in general it would be to the benefit of a developing country to adopt such guidelines formally, in the SPS context. The rationale for this statement is, partly, that one of the reasons repeatedly raised as explanation for the non-participation of developing countries in WTO dispute resolution is a lack of capacity and resources. The international standard setting bodies develop standards in different ways. Importantly, these standards benefit from combined research and frequent amendment as new science becomes available, thus relieving developing countries from bearing these burdens (on their own).

3.1.8 The Emergence of Private Standards and Related Challenges

The position of private standards is one that is becoming increasingly important in the SPS discourse. Private standards are not necessarily guided by the ISSBs, and they are not government-controlled standards or what would be considered compulsory national standards in South Africa. They are private and thus determined in accordance with the needs of the entity or group imposing them.³¹⁴ As Mavroidis and Wolfe have explained, "all forms of standardisation raise governance issues."³¹⁵ The authors are critical of the WTO's indifference towards "private" matters beyond the "contract amongst governments."³¹⁶ Their concerns are particularly important to the context of this research as well, especially the pertinent concerns that the authors raise regarding private standards and the issue of transparency and non-discrimination.³¹⁷

The matter of protectionism³¹⁸ is one that has necessitated the negotiation of a number of the Uruguay agreements. The Agreement on the Application of Sanitary and Phytosanitary Measures, which entered into force in 1995 is one example. The

³¹⁴ An example is standards that retailers enforce in a variety of aspects related to food safety, production, storage and ethics etc. of agricultural products that they procure.

³¹⁵ Mavroidis and Wolfe 2017 *World Trade Review* 1.

³¹⁶ Mavroidis and Wolfe 2017 *World Trade Review* 2.

³¹⁷ Mavroidis and Wolfe 2017 *World Trade Review* 3.

³¹⁸ Intentional acts of protectionism.

Agreement on Technical Barriers to Trade (TBT) is another example. The distinction between what is and what is not a protectionist measure is often difficult to establish.³¹⁹

Lukauskas and Stern comment on the famous quotation of Ronald Coase, in which he observes that, "in a world where transaction costs of bargaining are significant, parties will always bargain in the shadow of the law as they understand it."³²⁰ This is true of national decision makers as well. It is also a point in favour of the argument made in Chapter 6 that there is a need for a purpose-driven SPS national legislative framework. The same authors also make the valid observation that the certainty that parties get from "the rules of the road" may give the "disputing parties a sense of the likely scenarios that would arise if negotiations were to fail to produce such a settlement."³²¹ This is especially important considering the position that private standards often occupy as de facto conditions for, especially developing countries, to enter into markets.³²² The authors also highlight a fact that is often overlooked in the private standards debate, that of the WTO's regulation of private behaviour in, for example, the field of anti-dumping, which allows for the application of anti-dumping duties to specific firms.³²³ The authors suggest a "reference paper" to deal with the complexity of private standards and they criticise the inability of Members to agree on a definition of "private standards" at the WTO that includes principles which guide private standards. They contend that such an approach would encourage Members to show due diligence in the enforcement of the principles as set out in the agreed reference paper in the private sphere.³²⁴ They do not advocate for private standards to be subject to the WTO's formal rules, but as the authors state "even a recluse must abide by certain social norms."³²⁵ The point remains that private standards have consequences, often market access related, and these consequences and other concerns relating to transparency and non-discrimination do not evaporate upon the "reification of the old-

³¹⁹ Marceau and Trachtman 2014 *Journal of World Trade* 352.

³²⁰ Howse "Dispute Settlement in the WTO: A Manual" 810.

³²¹ Howse "Dispute Settlement in the WTO: A Manual" 810.

³²² Mavroidis and Wolfe 2017 *World Trade Review* 6, a view shared by Hammoudi *et al* "Introduction" 2.

³²³ Mavroidis and Wolfe 2017 *World Trade Review* 10.

³²⁴ Mavroidis and Wolfe 2017 *World Trade Review* 18.

³²⁵ Mavroidis and Wolfe 2017 *World Trade Review* 3.

fashioned distinction between public and private ordering."³²⁶ It is unclear to what extent governments can be expected to accept responsibility for the actions of the imposers of private standards. The WTO-SPS states that:

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.³²⁷

What a body 'other than central government' is has been found to include a Regional Government by the Panel in *Australia – Salmon* attributing responsibility to Australia for the regional government's observance of the WTO-SPS.³²⁸

3.1.9 Criticism of the WTO and the WTO-SPS

It is broadly accepted in WTO and academic discourses that one of the barriers to developing country participation in the WTO disputes as well as the various standard setting bodies is the expense of participation and a presence in Geneva, or other relevant locations. For this same reason there are sectors or private parties or groups in sectors of agricultural products that do not have the financial means to address barriers, never mind reach the WTO panel phase through their Member governments. The agreement itself emphasises the role of money or "economic factors" in a number of articles. The fact is that the agreements in which SPS measures, or the application thereof, are found are typically free trade agreements, where the key term "trade" is in itself explanatory and supportive of the fact that these agreements are not unrelated to a monetary aspect. For as long as a country can get away with a) absent or relatively low standard thresholds for export into that territory, b) relatively high, somewhat

³²⁶ Mavroidis and Wolfe 2017 *World Trade Review* 21.

³²⁷ *WTO-SPS* Article 13.

³²⁸ Panel Report *Australia – Salmon* (21.5 – Canada), paras 7.12-7.13.

protectionist-like thresholds (in the sense that it prohibits acts, but not on the level on which protectionism is usually understood to operate, i.e. just below the threshold so to speak), without any challenge or resistance from exporting, hence standard taking countries, who are reliant on export markets, the importing Member will continue to do so.

The assumption that there would be some sort of moral code attached to these measures is incorrect. If moral decisions played a significant role in international trade of animal and plant products, there would be no need for the SPS Agreement. The agreement exists precisely because there does not appear to be voluntary government action taken in a proportional manner on the grounds that the life and well-being of humans, animals and plants should be protected, within reason and in non-arbitrary or justified manners. It is precisely because of the tendency to use such measures for protectionist purposes (in monetary terms, not health and safety-wise), that is, to protect the domestic industry against competition under the guise of health standards, that the agreement was necessary.³²⁹ There are examples in South African media of the blatant misrepresentation of the role of SPS measures and their relationship to trade remedies such as anti-dumping to get the impression that there is no legitimate reason to expect any change in regulation unless there were significant consequences of not making changes.

There are aspects of the WTO as it stands after the Uruguay round that can be described as beneficial to developing countries in, potentially, a more tangible way. One of these is the removal of the GATT era consensus requirement and the move to "negative consensus" and the new level of automation in terms of dispute resolution.³³⁰ The reason this is a benefit is that it results in developing countries having the space in which to stand their ground as far as maintaining complaints, and not having to rely on excessive diplomacy in such cases, is concerned.³³¹ Simply, it is not as easy to bully developing countries into retreating from their complaints when there is a certain level

³²⁹ In addition to the purpose of balancing free trade and SPS concerns.

³³⁰ Delich "Developing Countries and the WTO Dispute Settlement System" 71.

³³¹ Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 83.

of automation in the process and the other party does not need to consent to its continuation.³³² The DSU also provides Members with a view of what the likely consequences will be in the event of a dispute, through past rulings, transparency and reasons for decisions.³³³

3.1.10 WTO law and national law

WTO law is, like other fields of international law, subject to the challenge of states not complying with it. In general, international law faces a considerable amount of criticism in this regard. There is evidence that neighbouring countries' compliance, and subsequent reputation in the specific context of SPS, has a spill-over effect in terms of a country's access to markets.³³⁴ The same is true of a region's reputation in the context of SPS enforcement.³³⁵

What is also true is that the "spectrum of commitment" that countries enter into varies.³³⁶ An author has argued that there is insufficient focus on the international law that lies between the two poles of customary international law and treaties, which are generally regarded to be within the classical understanding of what international law is.³³⁷ The same author advocates for what he calls a definition that is "functional rather than doctrinal" and descriptive of characteristics rather than a list.³³⁸

Measures such as retaliation are only effective if their implementation is likely to work. A point which puts developing countries in an unfavourable position when attempting to use retaliation as a mechanism of policy change against a larger trading partner lies in the fact that this would often have no significant impact.³³⁹ The opposite of this scenario is, of course, likely to have a devastating effect on a developing country.³⁴⁰ It

³³² Hudec "The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective" 83.

³³³ Howse "Dispute Settlement in the WTO: A Manual" 810.

³³⁴ Jouanjean, Maur and shepherd "Reputation Matters: Spillover Effects in the Enforcement of US SPS Measures" 112.

³³⁵ Jouanjean, Maur and shepherd "Reputation Matters: Spillover Effects in the Enforcement of US SPS Measures" 112.

³³⁶ Guzman 2002 *California Law Review* 1881-1882.

³³⁷ Guzman 2002 *California Law Review* 1881-1882.

³³⁸ Guzman 2002 *California Law Review* 1882.

³³⁹ Mshomba Africa and the World Trade Organisation 60.

³⁴⁰ Mshomba Africa and the World Trade Organisation 60.

has been suggested that the same is potentially true of trade barriers, that larger economies may ignore their own barriers into smaller economies.³⁴¹ The author disagrees with this suggestion and contends that this depends entirely on the specific product to which a trade barrier is imposed.

As it stands, an aggrieved party (Member, individual or group) has various options to resolve disputes related to SPS measures. The appropriate option depends on the classification of the aggrieved party as either a Member or an individual. A dispute may be addressed by:

- The WTO-DSB at a Member to Member level;
- The national courts of the importing state, provided there is enabling legislation;³⁴²
- A regional court if the matter is provided for in one of the relevant regional protocols and the aggrieved party has standing;
- Arbitration or mediation;
- The equivalent of a National Trade Commission or Tribunal in the importing country in which the dispute arises, provided there is enabling legislation;
- A body specified in a bilateral or multilateral agreement, likely to incorporate one or more of the above.

It has been shown above that there does not appear to be a single forum that is entirely suited to the resolution of all SPS-related disputes. The obvious question is then, what happens now?

The WTO is a Member to Member forum. Private parties' options are already limited by this fact. National standards are not the only standards in an SPS context which may have prohibitive or distorting effects. Private standards increasingly do as well, as discussed above. Combined with the assumptions concerning a developing country's

³⁴¹ Mshomba Africa and the World Trade Organisation 60.

³⁴² In this case private parties may be aggrieved by decisions their own country made as well. This route is not necessarily limited to one for importers.

ability or willingness to become involved in, and the disadvantages to them to participate in international or regional dispute resolution mechanisms, individual actors in the SPS chain of high risk or volatile SPS products face a predicament. The irony is that whether or not an individual is "interested" in international trade and whether or not a Member government has the capacity or competence. Non-Member (non-government) actors both have a direct and indirect bearing on the effectiveness of SPS measures taken and are also directly and indirectly affected by SPS measures, but have no recourse to the institution that has set the basic rules of the game in the event of a failure at national or regional level. This leaves a gap that is, for the most part, inadequately filled by the other options to dispute resolution. In the absence of recourse to the WTO, faced with the additional possibility that problematic SPS standards and measures are not necessarily those of the importing country but may very well be those of the individual actors' home country, there perhaps being limited recourse to national courts, commissions or tribunals, how are SPS related disputes resolved? It is not acceptable that these disputes must remain unresolved. It can however be reasonably assumed that the answer to how and "whose" disputes are resolved may very well be more complex.

What is clear is that the challenge to resolving any disputes at a level other than that of the WTO lies at the very core of the SPS legislative framework under discussion. If a country does not have a legislative framework that appropriately and effectively lays down SPS rules, which by their nature are highly complex, vulnerable to manipulation and susceptible to outright incorrect application, and if this framework further does not adequately cater for dispute resolution, then what is the purpose of its existence at all? The South African SPS-related legislative framework exists as a matter of coincidence and the coincidence extends to the fact that, to some extent, it fits the minimum requirements to be considered an SPS-related framework. The bar is incredibly low in terms of what is expected from a country with regard to amending legislative frameworks to truly follow the international rights and obligations to which it has agreed.

An argument could be made that the day may come when the WTO ceases to exist and that one cannot be expected to amend an entire legislative framework to match

one specific agreement or set of agreements that may become redundant at some point. This argument is typical of slippery slope arguments. It is easily countered by an examination, at least in the South African context, of what the country collectively stands for. When South Africa took the turn to democracy in the 90s, around the same time that the WTO came into existence, the country agreed to a final Constitution that, on many fronts, is unrivalled by any other in the world.³⁴³ The Constitution has remained the final voice of moral authority on matters very far removed from SPS measures. The beauty of law, however, is that certain principles apply across all sets of facts as it is the principles at hand that matter, and its application can be fitted to any set of facts.

The researcher contends that a government that truly has the best interests of its citizens and the economic growth of a country at heart will have little reason to object to the application of principles it has undertaken to support and uphold. The access of private parties to a forum where they are able to have disputes between themselves, the government and other governments heard or SPS measures taken challenged on SPS grounds, is only undesirable to a government that benefits from the oppression of this access.

What is dispute resolution at its core? Simply, it is finding as mutually agreeable a solution as possible, preferably in as short a space of time as possible, with as little financial and good relationship-related consequences as possible, to a disagreement over certain points between two parties, that they have not been able to, or are not able to, resolve amicably on their own. It often involves a relationship where the power dynamic between the parties is one where one party carries considerably more power than the other.

Why should SPS-related non-tariff barriers be treated differently from other trade-related disputes? The answer is simply because they are different but the focus argued in this research is not beyond the detailed focus that other WTO agreements, such as trade remedies already benefit from the International Trade Administration (ITA) Act. Key characteristics of SPS-related matters are the large number of different actors

³⁴³ The Constitution of the Republic of South Africa, 1996 .

involved in the SPS chain, the challenge of quantifiability of SPS-related barriers and the interaction between the basis of measures in science and the practical application thereof in the lived realities of individual actors in a complex political and social society within which these measures operate.

3.1.11 South Africa and SPS-related matters at the World Trade Organization

South Africa was a founding member of the WTO in 1995. Despite South Africa's ratification of the WTO Agreement by Parliament in 1995 and the country's membership in the WTO since then, South Africa has not incorporated WTO law into national law. This has resulted in the situation where South Africa is bound, internationally, by the agreements, but at a national level, no enforceable rights emerge.³⁴⁴ Despite this situation, there are a number of indications that South Africa considers itself bound by the obligations agreed to under the various agreements.³⁴⁵ Therefore, in as far as barriers related to sanitary and phytosanitary measures at the national level in South Africa are concerned, the law to interpret would be the (deficient) South African national law. The WTO-SPS would not be the direct source of rights and obligations.³⁴⁶ The implications of this situation are analysed and engaged with in depth in Chapters 5 and 6. The suitability of the existing national law in the context of SPS is examined in Chapters 4 and 5.

There are three past decisions of particular relevance to the current analysis. These are the cases of *Progress Office Machines CC v South African Revenue Service and Others*,³⁴⁷ *International Trade Administration Commission v SCAW South Africa (Pty)*

³⁴⁴ Schlemmer 2004 SAYIL, 135; confirmed also in *Progress Office Machines CC v South African Revenue Service and Others* 2008 (2) SA 13 (SCA) 154 and *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) 629.

³⁴⁵ Schlemmer 2004 SAYIL 126.

³⁴⁶ *Progress Office Machines CC v South African Revenue Service and Others* 2008 (2) SA 13 (SCA).

³⁴⁷ *Progress Office Machines CC v South African Revenue Service and Others* 2008 (2) SA 13 (SCA).

*Ltd*³⁴⁸ and *Association of Meat Importers and Exporters and Others v International Trade Administration Commission*.³⁴⁹

Progress Office Machines CC v South African Revenue Service and Others identifies an intention on the part of the government to give effect to the provisions of the WTO treaties. The Supreme Court of Appeal (SCA) states as follows:

The effect of international treaties on municipal law is regulated by ss 231, 232 and 233 of the Constitution. Section 231(4) provides that '(a)ny international agreement becomes law in the Republic when it is enacted into law by national legislation'. The WTO Agreement was approved by parliament on 6 April 1995 and is thus binding on the Republic in international law but it has not been enacted into municipal law. Nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade been made part of municipal law. *No rights are therefore derived from the international agreements themselves. However, the passing of the International Trade Administration Act 71 of 2002 (ITAA) creating ITAC and the promulgation of the Anti-Dumping Regulations made under s 59 of ITAA are indicative of an intention to give effect to the provisions of the treaties binding on the Republic in international law.* The text to be interpreted, however, remains the South African legislation and its construction must be in conformity with s 233 of the Constitution.³⁵⁰

There is considerable evidence of South Africa honouring WTO commitments on a spectrum. The commitments related to customs duties, or trade remedies, which are arguably more detrimental to reputation when flouted and quantitatively determinable, appear to be adhered to at a higher level than those related to sanitary and phytosanitary measures. The WTO commitments that South Africa is party to, a product of the Uruguay round, are not severable. By agreeing to the rules of the multi-lateral system, South Africa has agreed to all the commitments of Annexes 1A, B and C of the Agreement Establishing the WTO. South Africa repeatedly affirms its support for the enforcement of international trade law rights, obligations and principles, including those of the SPS-Agreement. This is further evident from South Africa's use of the WTO as a forum to raise specific trade concerns (STC). The importance of this discussion becomes quite clear in Chapters 5 and 6 where the South African SPS-

³⁴⁸ *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC).

³⁴⁹ *Association of Meat Importers and Exporters and Others v International Trade Administration Commission* 2013 (4) All SA 253 (SCA).

³⁵⁰ *Progress Office Machines CC v South African Revenue Service and Others* 2008 (2) SA 13 (SCA). 17 [6].

related legislation is analysed and in Chapter 4 is the analysis of the empirical fieldwork conducted.

South Africa has undergone trade policy reviews (TPRs) in 1998, 2003, 2009 and 2015. Their role is, as the name suggests, to review the policy of the particular Member in focus. Kuenzel describes trade policy reviews as "informal policy nudges" and "non-binding transmissions of policy concerns."³⁵¹ The format, in which there is a report submitted by the secretariat, a report by the government and eventually a report by the trade policy review board chairman, is one that gives considerable insight into the trade policy of the Member under review. SPS measures are addressed in TPRs. However, in the case of South Africa, there is little content in comparison to that related to matters such as trade remedies. The potential reasons for this are discussed in Chapter 6. What is concerning is that the SPS-related legislation has not undergone significant or meaningful reform between the first TPR and now. This is the case despite there being claims made that review is underway.³⁵² The review has been raised in reports by both the secretariat³⁵³ and by South Africa,³⁵⁴ since 1998.³⁵⁵ The "informal policy nudge", therefore, has had little positive effect on South African SPS policy. It is unclear what the exact reasons are for this lack of inaction.

³⁵¹ Kuenzel 2019 Review of International Economics 736.

³⁵² WTO Trade Policy Review Report by the Secretariat Southern African Customs Union (Revision) WT/TPR/S/324/REV.1, 306.

³⁵³ The most recent is 2015/2016. There are currently four reviews and one revision by the secretariat: WTO Trade Policy Review Republic of South Africa Report by Secretariat WT/TPR/S/34; WTO Trade Policy Review Report by the Secretariat Southern African Customs Union (Revision) WT/TPR/S/324/REV.1, WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/114/ZAF. WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/222. WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/324.

³⁵⁴ There are also four reports with one revision. WTO Trade Policy Review South Africa Report by Government 1998 WT/TRP/G/34; WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/114/ZAF; WTO Trade Policy Review Reports by the Members of the Southern African Customs Union 2009 WT/TRP/G/222; WTO Trade Policy Review Reports by the Members of the Southern African Customs Union (Revision) 2009 WT/TPR/G/222/REV.1; WTO Trade Policy Review Report by Southern African Customs Union 2015 WT/TPR/G/324.

³⁵⁵ WTO Trade Policy Review Republic of South Africa Report by Secretariat WT/TPR/S/34.

3.1.11.1 South Africa's SADC commitments and the implication for SPS

The Southern African Development Community (SADC) was founded on 17 August 1992³⁵⁶ and currently has 16 members, of which South Africa and her directly neighbouring countries are all Members.³⁵⁷ Southern Africa has been described as an area not entirely new to regionalism. SADC is what is considered a "new regionalism" when compared to the "old regionalism" of the Southern African Customs Union (SACU), the Multilateral Monetary Agreement and the Common Monetary Area (MMA), the Front Line States Alliance (FLS), the Constellation of Southern African States (CONSAS), and ultimately the Southern African Development Co-ordination Conference (SADCC), for example.³⁵⁸ Regional Trade Agreements (RTAs), such as the Southern African Development Community are notified to the WTO.³⁵⁹ They are however, as stated in the 2015 Nairobi Ministerial Declaration "complementary to, not a substitute for, the multilateral trading system."³⁶⁰

SADC protocols are legally binding on Members. However, only if they are signed and ratified by a two-thirds majority of members do they enter into force.³⁶¹ Substantial detail is provided on the main SADC organs by various authors.³⁶² This overview therefore limits the detail on these organs and focuses on an organ key to the gap in available dispute resolution forums: the SADC Tribunal. The SADC Tribunal has jurisdiction over the SADC *Sanitary and Phytosanitary Annex to the Protocol on Trade* (SADC-SPS) through Article 32 of the *Protocol on Trade in the Southern African*

³⁵⁶ Southern African Development Community (SADC) 2020 <https://www.sadc.int/about-sadc>.

³⁵⁷ The 16 Members are: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

³⁵⁸ Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 84-88.

³⁵⁹ The WTO database containing the SADC RTA information: WTO 2021 <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=45>.

³⁶⁰ WTO Nairobi Ministerial Declaration WT/MIN(15)/Dec, para 28.

³⁶¹ Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 93-94.

³⁶² See Oosthuizen *The Southern African Development Community: The Organisation, Its Policies and Prospects*, Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework", for example.

Development Community (SADC-PT), and the rules and procedures that this Article prescribes.³⁶³

The SADC Tribunal was, at least on paper, the supreme body that had the jurisdiction to interpret SADC treaties and protocols.³⁶⁴ The Tribunal had jurisdiction over matters between Members, or states and natural or legal persons. The Tribunal was suspended at the Summit in Windhoek, Namibia in 2010.³⁶⁵ The cause was a lack of political will and power of the Tribunal to enforce a decision taken against the Government of Zimbabwe,³⁶⁶ an event which serves as somewhat of a cautionary tale for reliance on the SADC agreements and protocols for substantial change in the region.³⁶⁷ In 2014 the Protocol on the Tribunal in the Southern African Development Community was signed at Victoria Falls in Zimbabwe (a venue whose significance cannot be ignored considering the cause of the initial suspension). Even with the original format of the Tribunal, there was a potential for forum shopping by Members as a result of multiple overlapping memberships that Members have at different levels.³⁶⁸ The potential of an alternative forum of course also depends on the specific subject matter of the dispute. The decision to suspend the Tribunal says a lot about the states that supported this decision in as far as respect for the rule of law in a rules-based system is concerned. It should be remembered that effectively there is no other dispute resolution mechanism with which to resolve disputes arising from the SADC agreement and its protocols. South Africa supported the suspension of the tribunal and later signed the 2014 *Protocol on the Tribunal in the Southern African Development Community*, which creates a (new) Tribunal with extremely limited powers. The protocol was signed in Zimbabwe on 18 August 2014. Former President Jacob Zuma was the President of South Africa at the time and it is his signature representing South Africa on the

³⁶³ *SADC-SPS*, Article 13.

³⁶⁴ *SADC Protocol on the Tribunal in the Southern African Development Community*, Article 33. See: Muntshick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 95.

³⁶⁵ By the Summit Heads of State; Saurombe 2011 *SA Mercantile Law Journal* 392.

³⁶⁶ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) (2008) SADCT 2 (28 November 2008) .

³⁶⁷ Nathan 2013 Human Rights Quarterly.

³⁶⁸ Saurombe 2011 *SA Mercantile Law Journal*.

Protocol. In 2018 the South African Constitutional Court of South Africa ordered that this signature be withdrawn after finding that:

[t]he President's participation in the decision-making process and his own decision to suspend the operations of the Southern African Development Community Tribunal are unconstitutional, unlawful and irrational.³⁶⁹

The matter of SADC heads of state opting to rather suspend and then limit the powers of the SADC Tribunal, which is in the author's opinion to the detriment of the region and individual states, is also, it is submitted, a reason why there are no cases between SADC states at the WTO. This is not a situation that bodes well for the success of the AfCFTA's potential role in dispute resolution. South Africa does currently find itself in a markedly different style of leadership under President Cyril Ramaphosa. It would not be a stretch to consider the personal motives of the former President, Jacob Zuma, in supporting the Tribunal disbandment in light of increasing legal action being taken against him in South Africa. Regardless of the reasons, the effect of the disbanding of the tribunal is that, in general, disputes are unresolved at regional level and this includes potential SPS-related disputes.

The SADC-PT has been in force since 1 September 2000, after its signing in 1996, with the following objectives:

- (1) To further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by Protocols in other areas.
- (2) To ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its Members.
- (3) To contribute towards the improvement of the climate for domestic, cross-border and foreign investment.
- (4) To enhance the economic development, diversification and industrialization of the Region.
- (5) To establish a Free Trade Area in the SADC Region.³⁷⁰

³⁶⁹ Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC) 33.

³⁷⁰ Protocol on Trade in the Southern African Development Community (SADC-PT), Article 2.

The SADC-PT is split into nine parts: Part 1: definitions and objectives; Part 2: trade in goods; Part 3: customs procedures; Part 4: trade laws; Part 5: trade and investment matters; Part 6: other trade related issues; Part 7: other substantive provisions; Part 8: trade relations among member states and with other countries; Part 9: institutional arrangements and dispute settlement procedures.

There are 10 articles in the SADC-PT of specific relevance within the context of this research and the conclusions drawn in Chapter 6. These are articles 3, 6, 9, 11, 12, 15, 16, 17, 32, and 33. Part 2, dedicated to trade in goods, states that, in the context of non-tariff barriers, which the protocol defines as "*any barrier to trade other than import and export duties*", that:

Except as provided for in this Protocol, Member States shall, in relation to intra-SADC trade:

- (a) adopt policies and implement measures to eliminate all existing forms of NTBs.
- (b) refrain from imposing any new NTBs.³⁷¹

It is already established that sanitary and phytosanitary (SPS) measures are a type of measure which may be classified as non-tariff barriers to trade under certain conditions. Within the provisions of the SADC-PT, there is a further obligation that

the elimination of barriers to trade shall be achieved within a time frame of eight (8) years from entry into force of this Protocol.³⁷²

The implication of this is that South Africa and other SADC Members should have done so well before the time that this research was conducted. The SADC-SPS was adopted in 2014 and states 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 Member States, or a disguised restriction on intra-SADC trade, nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State... b) necessary to protect human, animal or plant life or health.³⁷³

³⁷¹ SADC-PT, Article 6.

³⁷² SADC-PT, Article 3.1.b.

³⁷³ SADC-PT, Article 9.b.

It provides the basic SADC guidelines, following the broader guidelines of the WTO in the context of SADC trade. There was a considerable gap between the SADC-PT coming into operation in 2000 and the approval of the SADC-SPS in 2014. Barriers that are justified, and that are created in accordance with agreed rights, obligations and principles, are not NTBs, but just barriers. Article 9.b does very little in itself in guiding how and when barriers would be justifiable. Since the SADC-SPS came into operation, Article 9.b can be interpreted as placing extra emphasis on the principles of both multilateral trade and specifically SPS measures and their importance to Members. Similarly, sanitary and phytosanitary measures are specifically dealt with in Article 16, under the heading of "trade laws" in Part 4:

- (1) Member States shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production and food safety.
- (2) Member States shall, upon request, enter into consultation with the aim of achieving agreements on recognition of the equivalence of specific sanitary and phytosanitary measures, in accordance with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.³⁷⁴

The Article also does very little in terms of clarification. The specification of harmonisation in "agricultural and livestock production and food safety" is an additional emphasis that the author believes to be, at least in writing, a significant addition to the broader understanding of the importance of SPS. Article 16 is one which, without the benefit of testing the interpretation at a tribunal level, can only be analysed based on what is in print in the SADC-PT since, as already stated, there was a significant lapse in time before the SADC-SPS become operational. Article 16.1 can reasonably be interpreted as referring to the OIE, IPPC and Codex. These are the recognised standards setting bodies of the WTO-SPS and all SADC Members are WTO Members. SADC Member participation at the WTO varies between countries. Of relevance is the fact that before there was a separate SADC-SPS annex to the SADC-PT, the WTO-SPS Agreement was recorded as the authority on guiding the pursuit of equivalence.³⁷⁵ The SADC-PT was very limited in its scope of SPS provisions and only contained one article

³⁷⁴ *SADC-PT*, Article 16.

³⁷⁵ *SADC-PT*, Article 16.

specific to SPS. In addition to pursuing the recognition of equivalence, the Article requires that standards be based on the international standards and guidelines and that SPS measures concerning agriculture and livestock be harmonised.³⁷⁶ The SADC-SPS itself is close, if not identical, to the WTO-SPS in terms of structure and language with the introduction of specific SADC provisions around primarily dispute resolution, technical assistance and administration.³⁷⁷ There is no doubt that the WTO-SPS is the source of the structure and language. In some instances identical language is used, such as in the definition of sanitary and phytosanitary measures.

The SADC-SPS performs a different role to Article 16 of the SADC-PT. Significantly, the SADC-SPS was approved in 2014, quite some time after the SADC-PT came into force in 2000. The implication is that, for at least 14 years, the correcting role that the SADC-SPS performs in light of the SADC-PT's inadequate attention to SPS was not available. There was no real guidance to Members during this time as to what the SADC position is. The SADC Sanitary and Phytosanitary Coordinating Committee, established by the SADC-SPS, did not exist. Therefore, even if the Tribunal had remained functional post 2011, there were limited specific SPS grounds on which to approach the Tribunal. Parties would first have had to argue the extent to which WTO-SPS rights, obligations and principles were applicable.

The introduction of the SPS-specific SADC-SPS was therefore a welcome development. Its objectives leave no doubt about the rights, obligations and principles of WTO-SPS being authoritative in the region. This is clear when Article 2 is read with Article 5. Article 2 states:

The objectives of this Annex are:

- (a) to facilitate the protection of human, animal or plant life or health in the territory of the Member States;

³⁷⁶ *SADC-PT*, Article 16.

³⁷⁷ *SADC-SPS*, Articles 12, 13 and 14.

- (b) to enhance the Member States' implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures;
- (c) to enhance technical capacity to implement and monitor SPS measures including promoting greater use of international standards and other matters concerning SPS;
- (d) to provide a regional forum for addressing sanitary and phytosanitary matters; and
- (e) to provide a regional forum for resolving trade related sanitary or phytosanitary issues.³⁷⁸

As per Article 5, "Member States affirm their existing rights and obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures". There would conceivably be instances where the WTO would be a more appropriate forum for the resolution of SPS-related disputes. However, Article 2 does provide sufficient legal basis for SPS-related disputes that are related to rights and obligations contained in the SADC SPS to be heard by the Tribunal. Article 5 does not disqualify the jurisdiction of the SADC Tribunal on matters related to SPS.

The suspension of the SADC Tribunal and the adoption of the 2014 Protocol are a shame in the context of SPS measures and a lost opportunity to provide natural and legal persons recourse to a forum where they could have contested SPS matters. The 2014 Protocol limits jurisdiction to disputes between Member states. Such disputes being brought is an unlikely scenario considering the history of the tribunal and the leaders' tendency to shy away from conflict. This is a significant change to take note of, even if, as far as the author could establish, the protocol is not yet in force. Human rights enjoy the overwhelming preference in SADC literature on the topic of the tribunal.³⁷⁹ However, there is an argument to be made that where SPS measures are inadequately utilised to find a balance between trade and the protection of human, animal and plant life and health, this is a matter that has a significant impact on the

³⁷⁸ *SADC-SPS*, Article 2.

³⁷⁹ See generally: Nathan 2013 *Human Rights Quarterly*.

livelihoods and food security of many private parties. There is an acknowledged link between trade and human rights.³⁸⁰

There is insufficient reliable data on the scope of NTBs in Southern Africa.³⁸¹ The data that exists is largely that referred to by the source tradebarriers.org, a tool which relies on self-identification by the public or other stakeholders via text message or via the website. An array of barriers can be reported on the site. The percentage of barriers reported via this mechanism versus the total in existence is unknown. Various authors do however contend that NTBs are among the most significant obstacles that the region is faced with as far as trade is concerned.³⁸²

South Africa is a hegemonic power in the SADC region.³⁸³ This is due to the country's economic strength, it being a middle-income economy and it showing evidence of a diversified level of industrialisation, in comparison to other SADC Members.³⁸⁴ This situation led to early fears that other countries' reliance on South Africa, for multiple reasons, including infrastructure such as ports, and South Africa's dominance, would lead to "polarised development."³⁸⁵ South Africa's role in the formation of the SADC-PT is somewhat contentious in that there is considerable evidence of the country's use of its position as "hegemon" to drive the formation of the SADC-PT and SADC-FTA.³⁸⁶ The description of South Africa as a "hegemon" is not intended by the relevant authors to be positive and indicative of leadership.

³⁸⁰ See generally: Gammage 2014 European Law Journal, in reference to Cottier, Pauwelyn and Burgi (eds) Human Rights and International Trade Law and Lang World Trade Law after Neoliberalism: Reimagining the Global Economic Order.

³⁸¹ Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 140.

³⁸² Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 140; Kalaba, Kirsten and Sacolo 2016 *Agrekon*.

³⁸³ Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 90 and 117.

³⁸⁴ Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 90.

³⁸⁵ McCarthy 1999 *SAJE* 387.

³⁸⁶ Muntschick "The Southern African Development Community (SADC): An Analytical Overview of Its History, Policies and Institutional Framework" 121-141.

3.1.12 Further considerations

Sanitary and phytosanitary (SPS) measures have been defined above.³⁸⁷ There are a number of broad topics related to SPS measures that benefit from considerable focus in the academic literature. Seminal commentaries in the field of SPS measures are those of Joanne Scott and Jacqueline Peel. Scott's *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary*³⁸⁸ draws on extensive WTO and academic sources to provide a comprehensive and detailed study of WTO law in the context of SPS measures. Peel's book, *Science and Risk Regulation in International Law*,³⁸⁹ provides a comprehensive and detailed study of a central aspect of the discipline of SPS regulation.

SPS measures are important not only for the protection they afford consumers in terms of food safety, but also in the effect that their application has on the agricultural sector of any given country. Contributing to the significance of SPS measures and their importance in the agriculture sector is the fact that it is estimated that SPS measure apply to at least 60% of food-related products.³⁹⁰

There is only a limited amount of literature that focuses on enforcement and reputation in the enforcement of SPS measures³⁹¹ whereas there is an overwhelmingly domination of literature in the fields of economics, science and statistics in the context of SPS. Reputation is a matter that has arisen in the literature related to theories of enforcement of WTO requirements and decisions in general.³⁹² It is also a matter that arose in the fieldwork related to this research and is discussed in that context in Chapter 4.³⁹³ Research in the context of SPS measures as barriers has tended to focus on specific countries, even as reflected in the developing country literature, research ultimately depending on whether there is an accessible set of data from which to work. There appear to be limited NTB databases currently under construction in developing

³⁸⁷ See para 1.2.1.

³⁸⁸ Scott *The WTO Agreement on Sanitary and Phytosanitary Measures a Commentary*.

³⁸⁹ Peel *Science and Risk Regulation in International Law*.

³⁹⁰ Gourdon and Nicita "NTMs: Interpreting the New Data" 73.

³⁹¹ Cadot and Malouche "Overview" 8.

³⁹² For example, Trachtman 2007 *Stanford Journal of International Law*.

³⁹³ See discussion in Chapter 4 from para 4.2.2.

countries, as far as the author could establish. The implication is that SPS measures' effect as a barrier, in a context where the effect of any measure is already difficult to quantify, is resultantly even more difficult to assess. Ultimately, limited new insight can be gained, even on a general level, in the case of those countries that are already on the periphery and that stagnate in their database development. This research argues in Chapter 6 that this point is supportive of the case made for the intentional design of SPS legislation, regulations and policy.

Only limited academic literature exists with a specific focus on South African SPS measures. The literature that does exist is generally limited to the scientific analysis of a specific disease or related measure and is generally not written from a legal or trade law perspective.³⁹⁴ Authors consistently agree that SPS measures have the potential to become tools of protectionism and that they are potentially "effective" tools in the pursuit of protectionism.

In general, standards affect market access on the grounds of cost of compliance.³⁹⁵ The costs add to the initial outset costs and fixed investment costs to recurring costs such as various certifications, inspections, audits and pre-shipment inspections.³⁹⁶ It has been shown that there is link between a country's access to markets and its ability to show consistency and reliability in production practices.³⁹⁷

As with any text, there is scope for misinterpretation and selective interpretation of the WTO-SPS. The WTO recognises the World Animal Health Organisation (OIE),

³⁹⁴ See for example: Thomson et al 2013 *Transboundary and Emerging Diseases*; van Andel, Tildesley and Gates 2020 *Transboundary and Emerging Diseases*; Jori et al 2016 *Transboundary and Emerging Diseases*; Thomson, Leyland and Donaldson 2009 *Transboundary and Emerging Diseases*; van Schalkwyk et al 2016 *Transboundary and Emerging Diseases*; Thomson, Fosgate and Penrith 2017 *Transboundary and Emerging Diseases*; Tekleghiorghis et al 2016 *Transboundary and Emerging Diseases*; Knight-Jones et al 2016 *Transboundary and Emerging Diseases*; Thompson 2013 *Transboundary and Emerging Diseases*; Paton, Sinclair and I'iguez 2010 *Transboundary and Emerging Diseases*; Barnett et al 2015 *Transboundary and Emerging Diseases*; Calkins and Scasta 2020 *Research in Veterinary Science*.

³⁹⁵ Jaud, Cadot and Suwa-EisenMann "Sanitary Risk and Concentration in EU Food Imports" 117.

³⁹⁶ Jaud, Cadot and Suwa-EisenMann "Sanitary Risk and Concentration in EU Food Imports" 117.

³⁹⁷ Jouanjean, Maur and Shepherd "Reputation Matters: Spillover Effects in the Enforcement of US SPS Measures" 112.

bodies within the International Plant Protection Convention (IPPC) and the Codex Alimentarius Commission as organisations that set international standards in their various fields of specialisation.

3.2 Part Two: The World Organisation for Animal Health (OIE) and Animal Health in International Trade

3.2.1 Introduction

Animal health and food safety are essentially the categories to which the "sanitary" in "sanitary or phytosanitary measures" refers.³⁹⁸ These categories are linked and in many ways inseparable. The OIE is the primary international standard setting body (ISSB) of focus in this research. It is the ISSB that provides SPS guidance on matters related to animal health through the terrestrial code and terrestrial manual. Its relevance to humans is that animal health and human health intersect at many points and that animals that eventually become the subject of concern for the Codex Alimentarius Commission were once live animals. The focus of Part 2 is also on the specifics of foot-and-mouth disease as a disease. This is the specific disease of reference in the qualitative aspect of this research, and one that has been a source of contention and trade-related tensions for decades.

3.2.2 The World Organisation for Animal Health (OIE)

3.2.2.1 An overview of the OIE

In Chapter 1 it was noted that the OIE is one of three ISSBs that are recognised by the WTO as standard setting bodies in the context of SPS. The OIE describes their role and responsibility in the context of the WTO-SPS in chapter 5.3³⁹⁹ and the OIE's connection to the WTO-SPS is described in the Terrestrial Code as follows:

The SPS Agreement recognises the OIE as the relevant international organisation responsible for the development and promotion of international animal health

³⁹⁸ Human health, too as far as it is affected by either food safety or animal health.

³⁹⁹ OIE Terrestrial Animal Health Code Chapter 5.3.

standards, guidelines and recommendations affecting trade in live animals and animal products.⁴⁰⁰

This research focuses primarily on the OIE. The reason for this is the connection that the OIE has with the specific disease, FMD, and the consequences of its outbreaks on the red-meat industry in this research. The OIE, which is concerned with matters of animal health, does in fact also extend to guidelines for inactivation of FMD virus in bovine products and guidelines for the importation of fresh meat, meat products, milk and milk products, hides and other products of bovine origin other than live animals.⁴⁰¹ The scope guidelines also include products intended for human and animal consumption. Therefore, on account of the FMD context, the research limits the focused inquiry to the OIE. The limitation does not suggest that the Codex Alimentarius is not, in broader contexts, relevant to meat products.

The OIE plays a pivotal role in the international trade of animals and their products. The first agreement to establish the *Office International des Epizooties* (OIE) was signed on 25 January 1924 between 28 states.⁴⁰² There are two lists of key OIE texts. These are the "basic texts"⁴⁰³ and a set of "cooperation agreements."⁴⁰⁴ The "basic texts" are:

- Internal Rules, Terms of Reference of the OIE Specialist Commissions and Qualifications of their Members
- Terms of Reference and Internal Rules of the Regional Commissions and Regional Conferences
- Terms of Reference and Internal Rules for OIE Reference Centres
- Terms of Reference and Internal Rules for Working Groups and *Ad Hoc* Groups

⁴⁰⁰ OIE Terrestrial Animal Health Code Chapter 5.3.1.

⁴⁰¹ OIE Terrestrial Animal Health Code Chapter 8.8

⁴⁰² OIE <https://www.oie.int/about-us/history/>.

⁴⁰³ OIE <https://www.oie.int/about-us/key-texts/basic-texts/>.

⁴⁰⁴ OIE and FAO 2004 <https://www.oie.int/about-us/key-texts/cooperation-agreements/>.

- Terms of Reference and Internal Rules for OIE Regional and Sub-Regional Representations

The OIE cooperation agreements are, as the name suggests, agreements between the OIE and other organisations related to matters where there are overlapping interests⁴⁰⁵ and the OIE hosts a number of specialist commissions.⁴⁰⁶ It also provides guidance in terms of animal health and welfare through the OIE Terrestrial Code⁴⁰⁷ and the OIE Terrestrial Manual.⁴⁰⁸ These two principal documents are of particular relevance to the focus on FMD, South Africa's red-meat industry and relevant existing legislation in Chapter 5.

The OIE standards can be classified as either having a vertical or a horizontal dimension.⁴⁰⁹ The "generic aspects" are described as horizontal standards and the standards that provide specific recommendations, for example in connection with the incubation period for FMD or other listed diseases, are described as vertical standards.⁴¹⁰ The OIE's role in ensuring safe and fair trade of animals and their products is significant. It also has the effect of protecting human life as far as matters of zoonoses are concerned. Its focus is both on prevention and control of disease.⁴¹¹ The visual tool below is descriptive of the role that the OIE plays in the overlapping or

⁴⁰⁵ OIE and FAO 2004 <https://www.oie.int/about-us/key-texts/cooperation-agreements/>. Lists: The Global Framework for the Progressive Control of Transboundary Animal Diseases (GF-TADs); Cooperation Agreement Between the Global Food Safety Initiative (GFSI) and The World Organisation For Animal Health (OIE); Co-operation Agreements Between the OIE and Intergovernmental Organisations and Other International Non-governmental Organisations; Cooperation Agreement Between the International Organization for Standardization (ISO) and The World Organisation for Animal Health (OIE); Agreement Between the International Meat Secretariat (IMS) and The World Organisation For Animal Health (OIE); Agreement Between the Southern African Development Community (SADC) and The Office International Des Epizooties (OIE); Agreement Between the World Organisation for Animal Health (OIE) and the World Customs Organization (WCO); Agreement Between the World Trade Organization (WTO) and the Office International Des Epizooties (OIE); Cooperation Agreement between the World Organisation for Animal Health (hereinafter referred to as OIE) and the International Council for Game and Wildlife Conservation (hereinafter referred to as CIC); Global Early Warning and Response System for Major Animal Diseases, including Zoonoses (GLEWS).

⁴⁰⁶ OIE <https://www.oie.int/about-us/wo/commissions-master/>.

⁴⁰⁷ OIE <http://www.oie.int/en/standard-setting/terrestrial-code/access-online/>.

⁴⁰⁸ OIE 2019 <https://www.oie.int/standard-setting/terrestrial-manual/access-online/>.

⁴⁰⁹ Brückner 2009 Onderstepoort Journal of Veterinary Research 142-143.

⁴¹⁰ Brückner 2009 Onderstepoort Journal of Veterinary Research 142.

⁴¹¹ World Organisation for Animal Health (OIE) Position Paper - Safe Trade for Sustainable Development: The Oie and Its Contribution 7.

intersecting fields related to unsafe trade and unfair trade and highlights pertinent economic losses and costs.

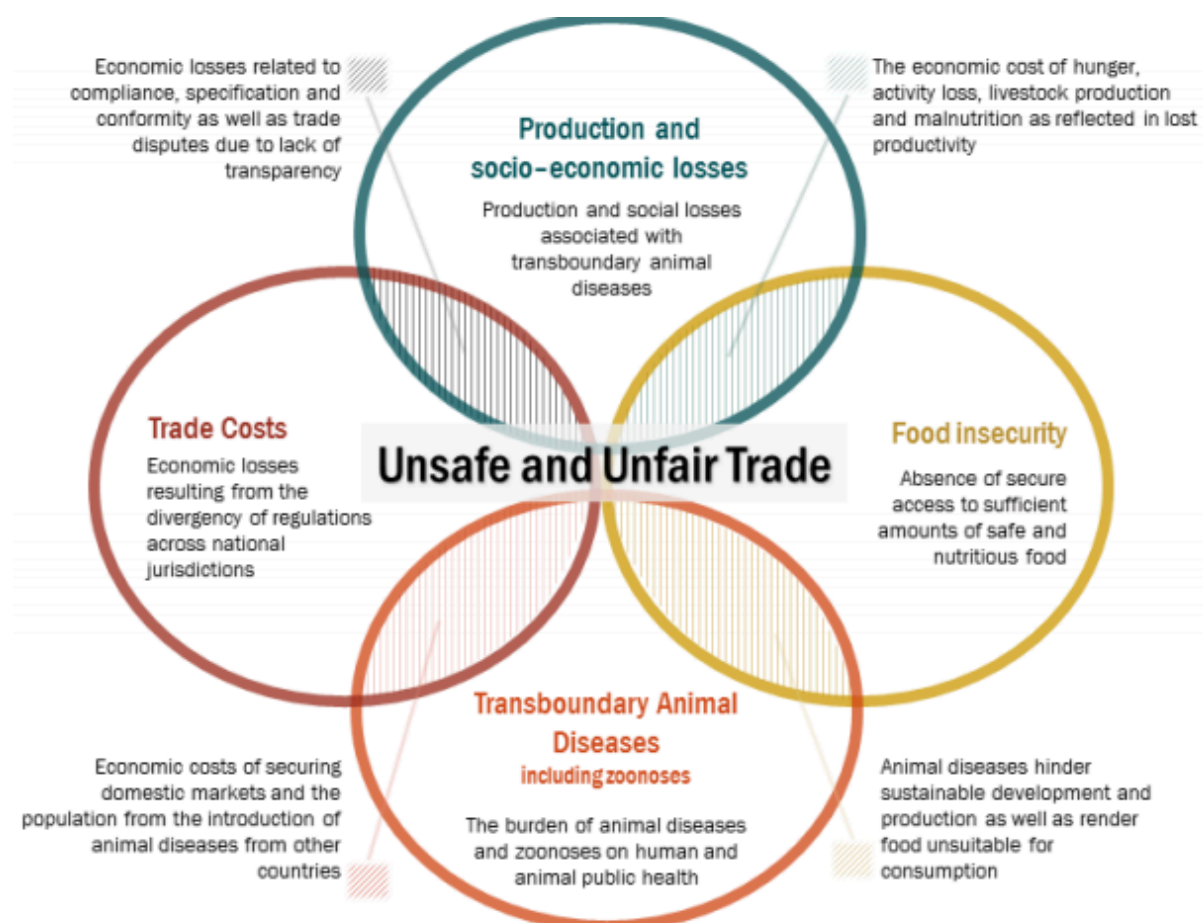


Figure 3-1: Unsafe and unfair trade.

Source: OIE, "Safe Trade for Sustainable Development: The OIE and its Contribution" 7.

The OIE's position paper on safe trade for sustainable development is one that clearly sets out the role that the organisation and its activities play in the pursuit of the 2030 sustainable development goals. The paper lists 11 Sustainable Development Goals (SDGs) to which the outcomes of safe trade facilitated by the actions of the OIE contribute. These are SDGs 1, 2, 3, 5, 8, 10, 12, 14, 15, 16 and 17.⁴¹²

⁴¹² World Organisation for Animal Health (OIE) Position Paper - Safe Trade for Sustainable Development: The OIE and its Contribution 19.

3.2.2.2 The OIE and veterinary legislation

The OIE places emphasis on the role of legislation in achieving good governance.⁴¹³ Chapter 3.4 is specifically dedicated to providing guidance in terms of veterinary legislation. The chapter distinguishes between legal instruments,⁴¹⁴ primary legislation⁴¹⁵ and secondary legislation,⁴¹⁶ and describes stakeholders as "a person, group or organisation that can affect or be affected by the impacts of veterinary legislation."⁴¹⁷

The five general principles that Article 3.4.3 provides in terms of veterinary legislation can be summarised as follows. Primary legislation provides the basis for secondary legislation and the hierarchy between the different types of legislation should be respected.⁴¹⁸ This legislation must enable the competent authorities at all levels of government to conduct the necessary activities related to sanitary measures. It should also "be consistent with national and international law, as appropriate, including civil, penal and administrative laws".⁴¹⁹ The general principles also include provisions related to transparency in veterinary legislation, specifically that it should be "readily accessible and intelligible for use, updating and modification, as appropriate".⁴²⁰ Article 3.4.3 also emphasises consultation as a general principle.⁴²¹ The last general principle listed is one that requires that:

Veterinary legislation should be clear and coherent, and should provide legal certainty and protect citizens, animals and the environment against unintended adverse side effects of legal instruments. The legislation should be stable but regularly evaluated and updated as appropriate to ensure that it is technically relevant, acceptable to society, able to be implemented effectively and sustainable in technical, financial and

⁴¹³ OIE Terrestrial Animal Health Code Article 3.41.

⁴¹⁴ OIE *Terrestrial Animal Health Code* Article 3.4.2: "Legal instrument means the legally binding rule that is issued by a body with the required legal authority to issue the instrument."

⁴¹⁵ OIE *Terrestrial Animal Health Code* Article 3.4.2: "Primary legislation means the legal instruments issued by the legislative body of a Member Country."

⁴¹⁶ OIE *Terrestrial Animal Health Code* Article 3.4.2: "Secondary legislation means the legal instruments issued by the executive body of a Member Country under the authority of primary legislation."

⁴¹⁷ OIE Terrestrial Animal Health Code Article 3.4.2.

⁴¹⁸ OIE Terrestrial Animal Health Code Article 3.4.3.(1).

⁴¹⁹ OIE Terrestrial Animal Health Code Article 3.4.3.(2).

⁴²⁰ OIE Terrestrial Animal Health Code Article 3.4.3.(3).

⁴²¹ OIE Terrestrial Animal Health Code Article 3.4.3.(4).

administrative terms. A high quality of legislation is essential for achieving legal certainty.⁴²²

The last general principle quoted above is one that acknowledges the complexity of the societies within which these measures operate and it also provides a warning that, in some circumstances, there is the possibility that legal instruments⁴²³ have adverse side effects that were not intended. It also emphasises technical and financial sustainability of legislation. In this respect the OIE Terrestrial Animal Health Code is one that respects and addresses the needs and capacities of different countries, through guidelines that take into account the differences in what is sustainable and what is not, and in other chapters provide alternative guidelines where possible, particularly in the determination of equivalence of measures.

Veterinary legislation, as guided by the OIE, should be clear, purpose driven and specific. Chapter 3.4 includes provisions specific to health in animal production. These include provisions related to identification and traceability; Animal markets and other gatherings; Animal reproduction; Animal feed; Animal by-products; and Disinfection.⁴²⁴

Related to the principles and guidelines of veterinary legislation, which concerns the activities and ability of competent authorities and veterinarians within the scope of the OIE's focus, is the evaluation and quality of veterinary services. Chapter 3.3 focuses specifically on the evaluation of veterinary services. In this regard, the OIE has developed a methodology that evaluate the veterinary services of members. This is the Evaluation of Performance of Veterinary Services (OIE PVS Tool).⁴²⁵ There are three ways in which such an evaluation can be conducted. It may be by means of a self-evaluation, evaluation by another country, or by OIE experts.⁴²⁶ The evaluation requires the identification and evaluation various critical competencies on a scale of one to five under each of the categories of human, physical and financial resources;

⁴²² OIE Terrestrial Animal Health Code Article 3.4.3.(5).

⁴²³ OIE *Terrestrial Animal Health Code* Article 3.4.2:"Legal instrument means the legally binding rule that is issued by a body with the required legal authority to issue the instrument."

⁴²⁴ OIE Terrestrial Animal Health Code Article 3.4.8.

⁴²⁵ OIE Terrestrial Animal Health Code Chapter 3.3.

⁴²⁶ OIE Terrestrial Animal Health Code Article 3.3.2.

technical authority and capacity, interaction with stakeholders and access to markets.⁴²⁷

The OIE therefore provides a broad set of guidelines and recommendations that, at a minimum, form the recommended basis for veterinary legislation, and the evaluation and quality of veterinary services. The OIE also provides guidance specific to national legislation.

3.2.2.3 Specific provisions relating to equivalence

The OIE provides specific guidance on the matters related to the concept of equivalence and describes it as a scenario where "If trading partners agree that the measures applied achieve the same level of health protection, these measures are considered equivalent."⁴²⁸ Equivalence is contained in Article 4 of the WTO-SPS. In pursuit of facilitating equivalence, the OIE provides guidelines and in the case of most diseases recommends alternative measures, tests, treatments or other processes in the determination of equivalence.⁴²⁹ Equivalence is closely tied to risk, risk assessment and risk management and the OIE provides a list of principles that a Member should base their determination of equivalence on.⁴³⁰

3.2.2.4 Specific provisions relating to informal OIE dispute mediation

OIE dispute mediation is informal, and voluntary. Members can resolve disagreements through this mechanism and the following list of procedures is applicable when Members elect to do so:

- (1) Both parties agree to give the OIE a mandate to assist them in resolving their differences.
- (2) If considered appropriate, the Director General of the OIE recommends an expert, or experts, and a chairman, as requested, agreed by both parties.
- (3) Both parties agree on the terms of reference and working programme, and to meet all expenses incurred by the OIE.

⁴²⁷ OIE Tool for the Evaluation of Performance of Veterinary Services (PVS Tool).

⁴²⁸ OIE *Terrestrial Animal Health Code* Article 5.3.3.

⁴²⁹ OIE *Terrestrial Animal Health Code* Article 5.3.3.

⁴³⁰ OIE *Terrestrial Animal Health Code* Article 5.3.5.

- (4) The expert or experts are entitled to seek clarification of any of the information and data provided by either country in the assessment or consultation processes, or to request additional information or data from either country.
- (5) The expert or experts submit a confidential report to the Director General of the OIE, who then transmits it to both parties.⁴³¹

The procedure is a mediation and it is therefore dependent on the willingness of Members to apply the recommendations or the report to the extent agreed upon in the terms of reference. It is not formal nor compulsory.

3.2.3 Foot-and-Mouth Disease (FMD)

Foot-and-mouth disease is one of the diseases on which the OIE focuses in its work. The importance of managing the disease and the consequences of FMD outbreaks has been introduced in Chapter 1. It is an example of a disease to which the OIE dedicates particular focus, strategies and initiatives and the OIE has adopted the *Global FAO-OIE Foot-and-Mouth Disease (FMD) Control Strategy*.⁴³²

The virus can be passed on through direct contact, contact with contaminated objects such as clothing and vehicles, swill feeding, artificial insemination, aerosol inhalation and airborne means.⁴³³ The transmission risk depends largely on the specific serotype. The list of sources of the virus is long and includes saliva, faeces, milk, urine, semen, breath, meat and its by-products,⁴³⁴ hay, feed, and water.⁴³⁵ It is a highly contagious disease from the *Picornaviridae* family, and *Aphthovirus* genus.⁴³⁶ There are seven serotypes A, O, C, SAT1, SAT2, SAT3 and Asia1⁴³⁷ and there are two categories of prevention and control. These are sanitary prophylaxis and medical prophylaxis.⁴³⁸ FMD

⁴³¹ OIE Terrestrial Animal Health Code Article 5.3.8.

⁴³² World Organisation for Animal Health (OIE) Position Paper - Safe Trade for Sustainable Development: The Oie and Its Contribution 17.

⁴³³ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴³⁴ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴³⁵ OIE <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴³⁶ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴³⁷ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴³⁸ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

is caused by a virus that is inactivated in meat in a number of ways. These are a pH of <6.0 or >9.0, temperatures above 50 degrees (progressively) or 70 degrees for a minimum of 30 minutes and a number of disinfectants such as sodium hydroxide (2%) and citric acid (0.2%), amongst others.⁴³⁹ The problem with meat and meat by-products is that FMD survives in lymph nodes and bone marrow if methods of inactivation are not effectively applied. For it to survive in marrow and lymph nodes the pH has to remain neutral, but at a <6.0 pH or *rigor mortis*, it is destroyed in muscle.⁴⁴⁰

There has been a concern surrounding FMD in South Africa for at least the past 100 years. In a 1953 article, FMD was described as "an international malady" that required research in isolation "because of the highly contagious nature of the disease."⁴⁴¹ The concerns of rapid spread, loss of production and loss of conditions in animals, dating back as far as 1903,⁴⁴² remain the same as concerns in 2021. It is a disease that is not limited to causing damage in Southern Africa; however the strains prominent in other parts of the world mostly differ from those that caused outbreaks in South Africa in recent history. In the past 15 years, the common strains of FMD in South Africa have been the SAT strains, in particular SAT 1, 2, and 3.⁴⁴³ However, an outbreak of type O has also been recorded in South Africa in 2000 when the strain was introduced into South Africa for the first time in recent history.⁴⁴⁴

⁴³⁹ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴⁴⁰ OIE 2013 <https://www.oie.int/en/animal-health-in-the-world/animal-diseases/Foot-and-mouth-disease/>.

⁴⁴¹ Goldsmith 1953 *South African Journal of Science* 219.

⁴⁴² Christy 1903 *Transvaal Agricultural Journal* 15-16.

⁴⁴³ World Organisation for Animal Health (OIE) 2021 <https://wahis.oie.int/#/dashboards/qd-dashboard>.

⁴⁴⁴ Modisane 2009 *Onderstepoort Journal of Veterinary Research* 118. "Recent history" is the term chosen as the claim of first introduction in 2000 contradicts literature such as that by de Kock that claims presence of the O strain around 1938 at least in the territory of what is now understood to be "South Africa." Thomson, in Thomson 1995 *Revue scientifique et technique (International Office of Epizootics)* claims that "Botswana, South Africa and Zimbabwe have not experienced FMD caused by the virus types other than SAT 1, 2, or 3." This is 5 years before the year 2000 outbreak, but also a contradiction of de Kock.

FMD is a disease that has been present in South Africa since at least 1933 in Mafikeng and Koedoesrand.⁴⁴⁵ Outbreaks continued throughout 1938 and 1945. In 1938 it was confirmed at Satara in the Kruger National Park.⁴⁴⁶ At the time there was speculation as to the potential mode of spread of the disease. There were questions surrounding the possibility of its transfer through animal bedding used during transport from Nuanetsi (in what is now Zimbabwe). Confusion deepened when the virus did not match the known A, O and C strains, leading to concerns about a new mutation.⁴⁴⁷ There were continued outbreak of the virus and changes appeared to emerge in the virulence of the virus.⁴⁴⁸ De Kock also introduces what has ended up as a decades long debate and policy issue regarding domestic versus wildlife interactions and a shifting of blame for subsequent outbreaks. This has since remained a matter of contention, delicate from the point of formulating appropriate policy.

Historically, South Africa⁴⁴⁹ has had some form of legislated or state-controlled animal disease measures, as far back as 1844. There is also an assertion by authors of the time that proclamations were made as far back as 1693 relating to a disease called scab in sheep, requiring notification and slaughter as control measure upon the identification of the disease.⁴⁵⁰ The movement control was between areas in what is now modern-day South Africa, at the time a collection of Republics and Colonies. The "first" legislation related to the control of diseases was passed in 1853, also in the Cape, in an attempt to stop the spread of lung-sickness,⁴⁵¹ followed by legislation published in the Transvaal in 1870 related to the same disease.⁴⁵² The Vaal river was the demarcation point, likely due to its character as a territorial marker. Significantly, water bodies as large as the Vaal are difficult to cross and are effective natural disease barriers. In response to rinderpest, legislative measures were introduced in 1865 (in the Cape), prohibiting importation of animals from Europe. This was amended the

⁴⁴⁵ de Kock 1949 Journal of the South African Veterinary Association 1.

⁴⁴⁶ de Kock 1949 Journal of the South African Veterinary Association 3.

⁴⁴⁷ de Kock 1949 Journal of the South African Veterinary Association 3.

⁴⁴⁸ de Kock 1949 Journal of the South African Veterinary Association 7.

⁴⁴⁹ This refers to what is now modern-day South Africa. The reference to South Africa includes the fragmented Colonies and Republics that existed during the time described in this section.

⁴⁵⁰ Viljoen 1928 Journal of the South African Veterinary Association 21.

⁴⁵¹ Viljoen 1928 Journal of the South African Veterinary Association 21.

⁴⁵² Viljoen 1928 Journal of the South African Veterinary Association 21.

following year by a proclamation that allowed for importation subject to quarantine on Robben Island.⁴⁵³ The modern-day problems of movement of animals were already seen as challenges in 1928. Viljoen states that:

Nowadays [in 1928] international trade has developed so tremendously and has such wide ramifications that importation and exportation of animals take place in practically every part of the world. For political, commercial or diplomatic reasons it would be extremely difficult to place a total embargo on any country. Moreover, in a country like ours, fresh blood is continually required for the improvement of our local stock.⁴⁵⁴

What has changed is that legally embargos on countries in which there are outbreaks of notifiable diseases are now possible, provided prescribed rules and guidelines are respected and the decision concerned has a scientific justification. The "political, commercial or diplomatic" issues, however, remain. Viljoen's article brings to light a number of factors pertinent to the concerns raised in the current research on SPS measures, especially those dealt with in detail in Chapters 4, 5 and 6. The first is current South African legislation's deep rootedness in the colonial style of regulation from which it was born. The second is the "othering" of persons farming in a manner contrary to what the ruling class of the time deemed "proper." Viljoen thus "othered" actors in the SPS chain through the use of derogatory terms to describe the owners of animals and the type of animals that they farm with, and resorts to the description of the animals used for non-stud-breeding as "useless animals".⁴⁵⁵ The derogatory and "othering" terms may have changed, but the assumption that the "other" is the barrier to disease-free status and provides a hindrance to trade is one that persists in academic literature and other writings. Chapter 4 introduces a theory related to the importance of language in the control of animal health matters.

The economic impact of FMD is undisputed and manifests itself in different ways. There is the loss in export-related revenue for the duration of any export ban that may apply. There is the loss of income to the primary producer during the period of prohibitions on animal movement, flowing, for instance, from a ban on live auctions during the 2019/2020 period. There is the loss of income related to production potential of

⁴⁵³ Viljoen 1928 Journal of the South African Veterinary Association 21.

⁴⁵⁴ Viljoen 1928 Journal of the South African Veterinary Association 23.

⁴⁵⁵ Viljoen 1928 Journal of the South African Veterinary Association 25.

infected animals as a result of the virus. There will also be a change in the red meat consumer price as a result of shortages of or excess meat locally available during the FMD-related upheaval. There is the price of containment, vaccination and the prevention of the spread of the disease. Finally, in the event of the slaughter of animals as a control measure, there is the loss to the primary producer, of the national herd. Compensation may or may not be paid for such measures.

One of the challenges in understanding the situation in South Africa is the lack of transparency in reporting during and after outbreaks of FMD and the unpublished nature of such reports. Examples are an unpublished 2005 FMD protocol of the Department of Agriculture,⁴⁵⁶ an unpublished 2005 report on the outbreak and control of classical swine fever in the Eastern Cape (also by the Department of Agriculture),⁴⁵⁷ an unpublished 2001 report relating to an FMD outbreak in Kwa-Zulu-Natal and swill feeding in Durban harbour,⁴⁵⁸ an unpublished 2005 report relating to Avian influenza and related job losses in the Ostrich industry,⁴⁵⁹ and an unpublished 2005 report relating to Salmonella in pigs in the Western Cape.⁴⁶⁰

The damage that a disease outbreak does, in real and in economic terms, is one that is difficult to quantify. It is increasingly common for a multi-disciplinary approach to be taken in understanding the impact of animal disease outbreaks. Even in 1995, with the advent of the WTO and the WTO-SPS, this sentiment was gaining traction, at least at the OIE. Brückner, formerly Acting Director of Animal Health in the Department of Agriculture of South Africa, opined in this regard as follows:

Inasmuch as we accept that economists or anthropologists are not veterinarians, so much must we as a veterinary profession accept that we are just as dependent on the disciplines in the social sciences to add value and a real socio-economic perception to our data and evaluations on the impact of animal diseases.⁴⁶¹

⁴⁵⁶ Modisane 2009 Onderstepoort Journal of Veterinary Research 117.

⁴⁵⁷ Modisane 2009 Onderstepoort Journal of Veterinary Research 118.

⁴⁵⁸ Modisane 2009 Onderstepoort Journal of Veterinary Research 118.

⁴⁵⁹ Modisane 2009 Onderstepoort Journal of Veterinary Research 118.

⁴⁶⁰ Modisane 2009 Onderstepoort Journal of Veterinary Research 119.

⁴⁶¹ Brückner "The Socio-Economic Impact of Disease of Ruminants in Eastern and Southern Africa" 123.

Chapters 4 and 5 practically support this statement through the analysis of fieldwork and content analysis data. It is however necessary to consider the quantifiable aspects as well in research that claims to approach the problem from multiple perspectives. The red-meat industry, defined in Chapter 1 by demarcation using tariff codes from the harmonised system, is used as an example of the impact FMD has on exports before, during and after a continuing disease event. Trade data cannot on their own explain drops or increases of trade volume in a country nor do they account for illegal movement or unidentified false declarations of products or animals imported or exported. They are however as close to accurate as possible when it comes to quantifying the loss in exports caused by an outbreak of FMD across a range of products that fall within the industry defined. What is also interesting is the changes in imports during the same periods when compared month by month with "normal" years where there were no recorded outbreaks. Again, the extent to which such information can provide insight is limited in that trade statistics cannot account for other market-related factors affecting imports. However, for purposes of quantifying the effect on trade before, during and after an outbreak, this is a good point of departure. There is a section dedicated to the analysis of trade statistics around the periods of FMD outbreaks in South Africa in Chapter 4.

In Chapter 4, the "fieldwork chapter" of this research, there are a number of persistent themes that arise related to what actors view as potential solutions to the matter of FMD-related trade bans. These include the proposed approach of commodity-based trade or non-geographical approaches to trade, as well as concepts of traceability and compartmentalisation, particularly in as far as they related to the approaches mentioned above. What each of these entails will be elaborated on.

3.3 Part Three: Broader Perspectives and Considerations of the Role of International Trade and Sanitary and Phytosanitary Measures

The following section justifies the lens of law and development that is used in this research. The law and development approach is intended to provide some insight into the rationale for the particular methods chosen to conduct SPS-related research with a legal background. It also focuses on particular aspects that shape the ongoing

problems in the field of international trade law. It is not intended to be an extensive critical analysis of the academic field of law and development.

What does a "law and development lens" mean in this research? The primary importance of a law and development lens for this research is that there is an added layer of criticism and critical analysis of conventional wisdom, combined with a deeper delve into questions of "why" and "for who", when matters relation to SPS are considered. It means that in analysing fieldwork and when analysing theory related to the entire spectrum of SPS-related themes and subjects, in the context of NTBs, the researcher remains conscious of the roots of accepted views and expectations. The researcher also remains conscious of the origins of such theory and the abstract nature of theory versus practice in certain instances. At the same time, this is by no means to say that the researcher dismissed any theory outright based solely on its origins in the "developed world", but simply that it is not accepted in all circumstances as being the gold standard by virtue of its origin. The term "development" has multiple meanings. The precise definition depends on the context, the specific field of the author and the philosophical convictions of the author.

The assertion that the concept of development or at least the state of certain countries being 'underdeveloped'⁴⁶² is a Western construct with its origins in the latter part of the 20th century is a common assertion in the law and development discourse. The challenge to discussing anything in the context of "development" and more broadly "law and development" (both of these also functioning as two distinct fields) is, as Rolland states:

Just as we lack a clear, uniform characterisation of the concept of development, so we would look in vain for a legal description of 'developing country'⁴⁶³

Important to this research is an appreciation of the fact that there are no criteria, tests, or standards for a country to meet to qualify as 'developing country.' In most cases,

⁴⁶² Rolland "The Multiple Meanings of Development" 16. Usually in the economic sense.

⁴⁶³ Rolland "'Developing Member' and Least-Developed Country Status at the Gatt and WTO: Self-Designation Versus the Politics of Accession" 78.

there is no notification requirement either.⁴⁶⁴ Related to this point, but in an SPS context, Scott states the following:

An expansive reading [of the SPS Agreement] implies SPS imperialism of a kind which is by no means neutral from the point of view of regulating member states.⁴⁶⁵

The importance of this statement in the context of this research cannot be overemphasised. What Scott highlights here is, firstly, that there is a certain "SPS imperialism," a point that the researcher agrees with to an extent, and, secondly, that neutrality is somewhat of a myth. Through the combination of doctrinal research and qualitative research, the research embraces the idea of multiple realities. Undeniably, the concept of development is complicated. It is fraught with extreme views in a number of different directions. The challenge is to limit the definition to a scope that can realistically be addressed. In order to do this, the complexity of the term has to be acknowledged and respected. No single definition, nor discipline, can fully grasp the complexity of human interaction. This study is specifically concerned with the paradoxical relationship between aspects of a specific industry and international trade. The role and function of international institutions has globally been debated thoroughly, and yet the debate lacks a very specific voice, namely that of the actual actors, or in the case of this research, their representatives, practically implicated in the field of SPS.

There may be questions as to why the WTO and its jurisprudence should be relevant in a study focused on the dispute resolution methods where fieldwork is focused on the national level of the South African red-meat industry. The answer is as follows: SPS regulation does not function in a vacuum and cannot be divorced at the national or regional level from the international law of the WTO, not when one considers the fact that decisions made by Members in terms of WTO rights and obligations have a direct effect at the national level. South Africa and the other members of SADC are all members of the WTO. The matter is therefore not limited to that of regional agreements either – even if it had been the case that the SADC-PT merely reinforced

⁴⁶⁴ Rolland "Developing Member' and Least-Developed Country Status at the Gatt and WTO: Self-Designation Versus the Politics of Accession" 78.

⁴⁶⁵ Scott "Introducing the SPS Agreement" 17.

rights and obligations under the WTO. Cross border trade is international trade, even across borders in Southern Africa. Similarly, the turn to national matters, despite the sovereign nature of legislation at the national level, does not exclude the relevance of the WTO-SPS, where matters that fall within the ambit of the SPS agreement's definition of a measure and the "direct or indirect" scope of the agreement are concerned. The same applies to principles of law and international trade.

One particular author has provided some tools to elaborate on the rationale for the design of research of this type. Douglas-Scott⁴⁶⁶ uses art as a means by which to harness the power of visual imagery in explaining not only the complexity of the law, but also the differences in understanding held by "modern" and "post-modern" thinkers. Douglas-Scott argues for what she calls a "pluralistic conception of law".⁴⁶⁷ She does not deny the embeddedness of law in both culture and history. In fact, she emphasises this throughout her book. One of the artworks used as a visual tool is the *Jurisprudentia* created by Gustav Klimt in 1903⁴⁶⁸ The *Jurisprudentia*, originally commissioned by the University of Vienna, was ultimately destroyed in a fire after the artwork had been confiscated from the Austrian Lederer family, a Jewish family.⁴⁶⁹ In her reference to the *Jurisprudentia*, Douglas-Scott gives an account of what her interpretation of the painting is, as a visual commentary on law. The image is at first glance a naked man, surrounded by what looks like an octopus and three women. Her interpretation is that the painting, despite being commissioned to represent the three faculties of law, medicine and philosophy and to depict truth, justice and law,⁴⁷⁰ presumably with positive connotations, represents "not the benefit of a legal system, but rather the isolation of the human being, insecure in the modern world – a portrayal of law in which both justice is uncertain and opaque, seemingly dependent on the fates."⁴⁷¹

⁴⁶⁶ Douglas-Scott Law after Modernity .

⁴⁶⁷ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 1.

⁴⁶⁸ See: Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity".

⁴⁶⁹ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 3.

⁴⁷⁰ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 2.

⁴⁷¹ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 3.

A criticism that this method of explaining the complexity of the law draws is that, as opposed to science, art is imprecise and "imbued in subjective emotions".⁴⁷² Douglas-Scott disagrees and submits that "art may function as a role of rescue and deliverance of law."⁴⁷³ Her use of art is, as she describes it, "grounded in the view that the study of law is enlightened by reflection on other socio-cultural norms that create and enable laws and legal meaning."⁴⁷⁴ Significant to this study is her submission that "law is a creature of culture, with as much claim to be an art as a science, and it is grounded in and composed of images as much as of rules".⁴⁷⁵ Significantly, and a point that is considered in depth in Chapter 5, is the description that

law is a 'deeply aesthetic practice'. Law institutionalises images, as well as other notions, as official ways of seeing, creating and approving particular domains of visibility – ways that we constantly experience.⁴⁷⁶

An interesting view expressed by the same author is that "law manipulates its images rather than permitting a dialogue with them or establishing any other more equal relationship."⁴⁷⁷ The researcher believes this to be especially true in the context of international trade law and in particular with SPS law.

Douglas-Scott refers in her analysis to De Sousa Santos. Douglas-Scott's view of De Sousa Santos's call for "re-enchanting common sense" is that it is utopian.⁴⁷⁸ The researcher agrees with this. The matter of SPS measures as a non-tariff barrier to trade, and how to resolve the conflicts surrounding these, requires a move away from utopian views as much as from single narratives, and dependence on single disciplines for answers. The necessity of common sense is not disputed, but the common sense that De Sousa Santos speaks of may be more radical than what can practically be implemented in this context. It is about finding a balance between the theoretical and the pragmatic.

⁴⁷² Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 4.

⁴⁷³ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 5.

⁴⁷⁴ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 4.

⁴⁷⁵ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 4.

⁴⁷⁶ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 6.

⁴⁷⁷ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 6.

⁴⁷⁸ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 16.

It is important to note that this research does not, as primary methodology, aim to take the form of constituting only "a body of critique of existing legal theories"⁴⁷⁹ or WTO academic literature, as is common in post-modern writing. It does not aim to fall into the seemingly endless cycle that this may result in, and seeks not to get stuck in what Douglas-Scott describes as being "suspicious of 'reason,' hierarchies and unity",⁴⁸⁰ rendering any recommendations pointless.

The discussion relating to the differences between modern law and post-modern law or at least post-millennial law is relevant to international trade law. It is also relevant to WTO law. The WTO is a product of the modern age. Its history as an heir to the GATT throne and ITO is testimony to that, as is the focus on science. Important in support of this argument is Douglas-Scott's statement that

the contemporary legal space is becoming a space of overlapping jurisdictions, segmented authority and multiple loyalties, characterised by the growth of informal, flexible, private or non-state 'governance' organisations and networks as well as by an increasing number of transnational and supranational legal orders.⁴⁸¹

In fact, this researcher views this as much less of an argument and more an indisputable fact. Even when looking at private standards it is undeniable that they, as "orders" that are different to the WTO – though not different in the sense that they exert a form of governance, at least in a less obvious or controlled way in that there is a semblance of self-determination in imposing them – fall within this argument as well. SPS regulation is made up of multiple overlapping jurisdictions. It is not difficult to grasp that there is a certain complexity in this that leads to tensions between actors in the "transnational and national orders" referred to above. What is difficult to do is to situate private parties within member states within the complexity of such overlaps in jurisdiction and to articulate the manner in which member states can conceivably straddle the lines of this complexity in jurisdiction. This is especially true in the context of international trade law, which operates solely within jurisdictional complexity.

What is typically post-modern is a fragmentation, indeterminacy and discontinuity of form; the growth of multiple and different discourses; and acceleration and compression of space and chaotic flurry of change; a tendency to heterarchical rather

⁴⁷⁹ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 17.

⁴⁸⁰ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 17.

⁴⁸¹ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 22.

than hierarchical relationships; and the strengthening of globalism at the expense of national sovereignty.⁴⁸²

These identifying factors contribute to the challenge that the WTO-SPS faces, more specifically challenges surrounding its practical effect at a national level. The post-modern realities of "developing" countries remain rooted in these identifying factors.

This research relies on Douglas-Scott's definition of legal pluralism in "*Law after Modernity*". Legal pluralism describes

a state of affairs in which two or more legal orders occupy the same legal space, sometimes, peacefully coexisting but sometimes in direct competition with each other.⁴⁸³

This turns the focus to justice, which as a crucial component of law, is a matter of importance in legal pluralism as well.⁴⁸⁴ In this research, an integral part of answering the second part of the research question is establishing, with regard to dispute resolution, what justice is in this context and to whom it is being offered. Justice is a difficult concept and the crucial aspect lies in its "diagnosis."⁴⁸⁵ It is the subject of many philosophers' works, many judgements and many debates. What is universally undeniable, and as relevant in the context of SPS as in the context of human rights, is that

justice is more likely to move people in its absence than it is as an academic or rhetorical exercise that fails to convince. It is *injustice* that motivates and propels action, and the highlighting of injustice does its own work.⁴⁸⁶

What exactly that "absence" is and translates into, is of course different in an SPS context, when compared to a human rights context. But the idea that there are pluralities in law leads one to believe that the same exists for the idea of justice.

This research both does and does not focus on the "individual" under the WTO. WTO literature uses the word "individual" to mean something much more specific and narrower than what is generally the meaning of the term in this research. This research

⁴⁸² Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 23.

⁴⁸³ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 23.

⁴⁸⁴ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 23.

⁴⁸⁵ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 24.

⁴⁸⁶ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 24.

applies to a range of private parties and their actions along the SPS chain. For this reason, they are referred to as "actors" in the SPS chain. At the same time, the analysis is not entirely focused on dispute resolution at the WTO; the research question is ultimately focused on the resolution of disputes in the event that there is no recourse to the WTO "from within" South Africa in matters directly related to SPS measures, but perhaps not necessarily under the purview of the WTO. This does not mean that the position of private parties, as understood in the WTO, is not relevant. – the position of the individual ultimately plays a role in the researcher reaching a conclusion and recommendations on what options exist.

3.4 Part Four: The broader context within which Sanitary and Phytosanitary Measures exist in South Africa

A recent publication by du Plessis and Plaut describes South Africa as follows:

It is a Janus-faced nation – diverse and divided; harmonious and confrontational - that defies simple explanations.⁴⁸⁷

This description is one that provides a suitable introduction to the context within which SPS regulation in South Africa exists and confirms the evidence in Chapter 4. South Africa is a country that faces a multitude of challenges at every possible level of society. This research was conducted in a manner constantly mindful of the fact that SPS regulation specifically, and international trade law more broadly, cannot be removed from the social, political and economic context of the countries involved in each case. As described in Chapter 1, despite agriculture being an industry upon which high hopes for job creation and income equality are placed, it is an industry that is not only one existing within the complicated context of South Africa, but also one made up of many different sectors. Each sector experiences challenges unique to the particular product or region. The section below contextualises agriculture in the broader South African context.

Populism is an increasing concern, not only worldwide, but in South Africa as well. This is a matter that the researcher believes to be relevant in the conversation to follow in

⁴⁸⁷ du Plessis and Plaut *Understanding South Africa* 3.

Chapters 4 and 6. It is also related to a matter of concern, and a sentiment that is not uncommon in South Africa, which is the lack of effective policy and policy implementation in South Africa. To quote Mcebisi Jonas, the former Deputy Finance Minister, in his book *After Dawn: Hope After State Capture* in a discussion regarding policy in South Africa:

Many of the key decisions we take as leaders have less to do with the evidence-based correctness of a particular choice, and more to do with narrow and short-term political expediency.⁴⁸⁸

In rural areas, agriculture plays an important economic role.⁴⁸⁹ The government's National Development Plan focuses very strongly on the ability of agriculture to improve rural livelihoods and potentially to create new job opportunities. The plan also acknowledges the role that foreign as well as domestic demand plays in terms of driving expansion in commercial agriculture.⁴⁹⁰ What the plan also briefly describes is the complexity of the SPS chain.

It is not uncommon in both academic literature and NGO reports for the "rural" or "small-scale" farmer to be described in stereotypical and in some instances condescending terms with regard to their ability to achieve goals of "development" or an increase in scale in their operations. The effect is that there is a continuous assumption that this group of persons in their vast diversity, is across the board, a group proving to be a hindrance to, for example, biosecurity and traceability efforts and, as such, a hindrance to larger commercial aspirations and access to foreign markets.

Rural areas – the term in the South African context usually reserved for the former homelands and a legacy of apartheid, rather than a reference to an area that is "not urban" – face realities that complicate an already complicated industry even further. The scaling up of agriculture, its modernisation and the control of various agricultural practices require significant investment. Investment varies, depending on the mean income of the farmer as investor. Jonas describes the challenges that small-holder

⁴⁸⁸ Jonas *After Dawn: Hope after State Capture* 47.

⁴⁸⁹ *National Development Plan 2030* (South Africa) 219.

⁴⁹⁰ *National Development Plan 2030* (South Africa) 222.

farmers face in South Africa. These include insecure tenure rights, infrastructural and technological constraints and access to markets.⁴⁹¹ Where property rights are not secure, there is, unsurprisingly, a hesitation towards investment as such an investment is essentially unsecured and there is the potential of it being lost.⁴⁹²

Jonas, but also others, paint a grim but realistic picture of the state of economic, social, political and other affairs in South Africa.⁴⁹³ South Africa is a country with varying challenges, ranging from a job crisis, to economic inequality, low economic growth, a lag behind other countries in the pursuit of the 4th industrial revolution and the technology it promises, as well as the failure to "build a capable and corruption-free state."⁴⁹⁴

The number of persons and households involved in agriculture in South Africa is significant. The reason for no statistics being cited in this regard is that STATS SA did not include non-VAT registered organisations in their survey.⁴⁹⁵ Therefore, the sector that is referred to as "informal" in this research is largely unaccounted for in official statistics available in South Africa. This has an implication for putting a precise figure on the subsequent cattle herd size of the country, a matter that is confirmed by the Chapter 4 fieldwork data as well.

Populism is not unrelated to protectionist sentiment.

The essence of populism is to define friends and enemies, and it demands that the state take sides and behaves in a partisan manner even if it breaks its own rules and bypasses the institutions established to uphold law.⁴⁹⁶

Protectionist⁴⁹⁷ sentiment regularly arises in mainstream media in South Africa and increasingly in the various "master plans" being published with increased frequency in

⁴⁹¹ Jonas After Dawn: Hope after State Capture 231.

⁴⁹² For a discussion of property rights in rural areas in South Africa, see: Jonas *After Dawn: Hope after State Capture*, Chapter 15 "Rural Development Must Look to the Future, Not the Past" 222-233.

⁴⁹³ Jonas After Dawn: Hope after State Capture.

⁴⁹⁴ Jonas After Dawn: Hope after State Capture 15-34.

⁴⁹⁵ The Bureau for Food and Agricultural Policy (BFAP) 2020 <https://www.bfap.co.za/wp-content/uploads/2020/08/BFAP-Baseline-2020.pdf>. 17.

⁴⁹⁶ Jonas After Dawn: Hope after State Capture 49.

⁴⁹⁷ Protectionism is understood in this research as relating to the intention of those taking the measures to do so for purposes beyond what is reasonably required, or that is discriminatory.

different sectors in South Africa. The importer is an easy enemy to define. It is one that struggles to defend itself and one that a government is unlikely to defend, regardless of how incorrect the statements made against them in public are. South African media is particularly interested in specific agricultural sectors in which WTO subject matter is deeply ingrained in the evidence-based decisions that are made.

In South Africa, access to the courts is a luxury for a large majority of the population. It is also undesirable to fall into a cycle of excessive litigation as has been described in the context of politics in South Africa.⁴⁹⁸ This phenomenon is not limited to politics and remains equally undesirable in the agricultural context, yet it is present. Therefore, where possible, the ideal is dispute or barrier prevention rather than excessive litigation. However, where there is need for dispute resolution, it is desirable that there are options available that may avoid a cycle of excessive litigation.

Present day South Africa must grapple with evidence related to state capture and corruption every day. These matters have a bearing on the outside world and citizens' perception of the state of the rule of law in the country. The most prominent of enquiries under way is that of the Commission of Inquiry into State Capture, led by Justice Zondo. The Department of Agriculture has unfortunately not escaped allegations at this forum either.⁴⁹⁹ This is however not a post-1995 phenomenon and, in a similar fashion, the apartheid political elite took part in corrupt activities.⁵⁰⁰ What is clear is that state capture activities, corruption, and other economic crimes are not matters that are limited to specific political parties, factions in these parties or even the government itself, and certainly not "specific races". These acts take different shapes in terms of scope, scale, duration and target area.⁵⁰¹

⁴⁹⁸ For an analysis of "lawfare" in South Africa, see Michelle le Roux and Davis *Lawfare: Judging Politics in South Africa*.

⁴⁹⁹ The Department was implicated through testimony presented in relation to the Vrede Integrated Dairy Project.

⁵⁰⁰ For a general discussion on the legacy of apartheid and its connection to corruption, see du Plessis and Plaut *Understanding South Africa*, Chapter 5 "Corruption: The Legacy of Apartheid"; Jonas *After Dawn: Hope after State Capture* "A case of the chicken and egg" 7.

⁵⁰¹ This is well articulated in Jonas *After Dawn: Hope after State Capture* Part One: Diagnosing the Problem; du Plessis and Plaut *Understanding South Africa*, Chapter 5 "Corruption: The

Corruption has no single cause – it is a syndrome of many concurrent ailments. It is associated ... with an individual psychology of self-promotion and enrichment.⁵⁰²

The authors of *Lawfare: Judging Politics in South Africa* describe state capture as:

The construction of a parallel state, state-owned enterprises and constitutionally mandated institutions for corrupt objectives, primarily by deploying leaders to those organisations that display a firm commitment to subverting accountability or diverting them from their lawful mandates and a resolute determination to ignore the consequences of their conduct for the people they serve.⁵⁰³

Very few Departments have been left untouched by allegations of either corruption or state capture⁵⁰⁴ in the past three years and during testimony at the ongoing state capture enquiry.⁵⁰⁵ Allegations of state capture are made at both the national and provincial levels of the different departments and with regard to a variety of private sector businesses. The context described above is justification for recommendations and conclusions reached in Chapters 6 and 7. It also serves as an introduction to discussions focused on findings in the fieldwork in Chapter 4.

A "Janus-faced nation – diverse and divided; harmonious and confrontational, that defies simple explanations"⁵⁰⁶ – is a difficult context within which to balance the various interests related to SPS regulation, animal health, trade and food security. It provides an important source of broader considerations which need to be factored into the recommendations put forward at the end of this research.

Legacy of Apartheid", Chapter 6 "The Economy: Explaining the failure to thrive" and Chapter 9 "Justice and the law."

⁵⁰² Jonas After Dawn: Hope after State Capture 79.

⁵⁰³ Michelle le Roux and Davis *Lawfare: Judging Politics in South Africa* 267.

⁵⁰⁴ Defined by Michelle le Roux and Davis *Lawfare: Judging Politics in South Africa*, at 267 as: "The construction of a parallel state, state-owned enterprises and constitutionally mandated institutions for corrupt objectives, primarily by deploying leaders to those organisations that display a firm commitment to subverting accountability or diverting them from their lawful mandates and a resolute determination to ignore the consequences of their conduct for the people they serve."

⁵⁰⁵ The South African Judicial Commission of Inquiry into Allegations of State Capture, headed by Deputy Chief Justice Raymond Zondo.

⁵⁰⁶ du Plessis and Plaut *Understanding South Africa* 3.

3.5 Conclusion

The above analysis is intended to serve as the reference point against which the findings of Chapters 4 and 5 are triangulated and contrasted and serves as the theoretical basis for the analysis of Chapter 6.

CHAPTER 4 AN ANALYSIS OF FIELDWORK CONDUCTED IN THE RED-MEAT INDUSTRY AND TRADE DATA CAPTURED BY THE SOUTH AFRICAN REVENUE SERVICE (SARS)

4.1 Introduction

The following chapter consists of two parts. The first part is an analysis of the fieldwork conducted in the red-meat industry. The second part is an analysis of official import and export data related to the defined red-meat products included in this researcher's definition of the red-meat industry. Part one provides an overview of the red-meat industry whereafter it progresses into a discussion of the fieldwork and its findings in the data. The second part relates to the first part in the following ways. The fieldwork data showed that interviewees perceive the risk of an FMD outbreak to be one that has significant financial implications to the industry on account of the disruption that it causes to both the international trade of the range of products and also the trade of the same products at a national level. This situation, from what is visible in the trade statistics, is discussed on both a general basis and per group of products. The data also shows that there is a perception amongst some of the actors that there is a risk of diseases being introduced into the country by means of both illegal movement and to a lesser extent legal importation. Trade statistics reflect the volume and value of legal imports and exports at South Africa's various international borders. The border is a critical SPS control point. Typically, no agricultural product, with the exception of very few, will be able to enter a country without either a sanitary (also referred to as veterinary) or phytosanitary certificate. The trade statistics are therefore an additional lens through which to consider the destinations exported to and imported from. The trade statistics identify unusual or unexpected imports or exports in the data. These are discussed in the context of what that could mean from an SPS perspective.

4.2 Part one: Observations from fieldwork conducted in the red-meat industry

4.2.1 Introduction

SPS measures are concerned with safe trade. The WTO-SPS prohibits unjustifiable SPS measures and prohibits the use of SPS measures as disguised restrictions on international trade.⁵⁰⁷ It defines the opportunity to, in good faith, pre-emptively or proactively protect human, animal and plant life or health against trade-related and scientifically proven risks. This is unlike trade remedies that are typically reactive to quantifiable damage already experienced and measurable through trade statistics. SPS measures do lack a certain level of quantification and largely, despite the measures themselves being based on science, have a qualitative dimension that is in the researcher's view not emphasised enough.

Despite the existence of considerable theory and guidance available to WTO and OIE Members, SPS measures are still widely experienced as non-tariff barriers to trade. A number of assumptions exist regarding the roots of such barriers. This part of the research captures the essence of fieldwork conducted in South Africa. As described in Chapter 1, the fieldwork aspect of this research is one component of a triangulated approach to exploring the overarching objectives. As stated in Chapter 1, this research has undertaken the following:

With a focus on the role of legislation and the perspectives of selected actors in the red-meat industry, the primary objective of this research is to identify and explore persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. Related to this is the objective to recommend potential solutions to the identified challenges with specific focus on SPS-related barriers or disputes that are beyond the scope of the World Trade Organization (WTO), that are not necessarily related to science, and SPS matters that affect private parties without recourse to the WTO.

⁵⁰⁷ Article 2.

The research did so by speaking to people involved on a practical level in the industry. This includes private parties both in the private sector and in government.

Where relevant, interviewees are quoted directly.⁵⁰⁸ It is accepted that not everything that has been said can be taken as fact. However, the difference between fact and perception, and the impact that such a difference has in a field reliant on co-operation and, to a greater extent, trust and communication is significant. The lived realities or perceptions that actors have are not invalid on account of there being limited evidence through case law or codified dispute reports or legal recourse for the resolution of their quarrels in law or in academic theory. Realities and perceptions are an indication of how the law or academic theory is experienced in practice and where a mismatch potentially exists between the theory related to matters of SPS and the understanding of standards, and law versus its practical implementation. Where there are multiple similar views shared, creating a similar positive or negative narrative, a theme develops.

The interviews collected a significant amount of data related to the industry. However, the emphasis of this chapter is limited to themes that emerged in the defined context and the aspects related to the research sub-questions above. Chapter 2 provided a detailed exposition of the methodology employed and the process followed in participant selection which is not repeated in this chapter. Below is a list of categorised "talking points" that were addressed in the series of semi-structured interviews:

- Animal health: disease outbreaks
- Animal health: foot-and-mouth disease (FMD)
- Animal health: general principles
- Animal health: industry specific information
- Animal Health: technical legal questions
- Dispute resolution

⁵⁰⁸ To maintain confidentiality, the names of interviewees are purposefully withheld.

- Industry's specific statistics and information
- Legislation: general discussion
- Legislation: international obligations
- Mapping: actors' positioning in the SPS chain
- Open-ended discussion related to industry and points arising in specific interviews
- Perception: Communication between government – industry; industry – government
- Perception: industry-specific challenges, barriers or disputes in the context of SPS
- Perception: state and complexity of industry from specific actors' perspective
- Standards: government and private

The list of interviewees engaged with formally in this research is summarised in the table below.

Table 4-1: Interviewee List

Interviewee number	Category of Interviewee
Interviewee 1	Industry Representative
Interviewee 2	Industry Representative
Interviewee 3	Industry Representative
Interviewee 4	Industry Representative
Interviewee 5	Industry Representative
Interviewee 6	Industry Representative
Interviewee 7	Industry Representative
Interviewee 8	Industry Representative
Interviewee 9	Industry Representative

Interviewee number	Category of Interviewee
Interviewee 10	Industry Representative
Interviewee 11	Industry Representative
Interviewee 12	Government Representative
Interviewee 13	Government Representative
Interviewee 14	Government Representative
Interviewee 15	Industry Representative
Interviewee 16	Government Representative
Interviewee 17	Government Representative

Government and industry are often posed as being two parties on different sides to each other in the practice of international trade. In this research, one of the findings has been that it is not beneficial to generalise perception as either being a private industry view or a government view. Such a distinction oversimplifies the challenges within the industry. There are many cross-cutting aspects and perceptions shared by both "sides" and also instances of contradiction or disagreement within one or both of the traditional "sides" of either private industry or government. For this reason, any reference to "the industry" is usually a reference to both government and industry representatives as a collection of actors involved from two "sides" in the process of policy-making, production, manufacture, standard setting, application of guidelines and ultimately import and export of red-meat related products.

This research assumes that SPS-related barriers exist more broadly than within the narrow scope of only science-based disputes. There is evidence provided to support this claim in both this chapter and throughout Chapter 5. This means that there is scope for the exploration of the deeper roots of the cause of SPS-related barriers in a contextual setting such as the one in which the fieldwork took place. In the data, the following main roots of such a cause have been identified. These are trust and communication, or more specifically lack of trust and a breakdown in communication. The different manifestations of each are described below. Although not a closed list, these manifestations are the main points of concern that have emerged from the data

and they support the view that SPS measures as non-tariff barriers to trade need to be addressed within a *context-based* framework of international rights, obligations and solutions. Most of the recurring themes draw directly on either a lack of trust or a breakdown in communication or both.

4.2.2 Fieldwork in the red-meat industry

4.2.2.1 What are SPS-related barriers beyond science-based measures

All interviewees that participated in the research have an understanding of what SPS regulation is on a practical level even though a number used different language to describe and relate to the concept. The immediate discussion following a question regarding what a participant perceived as SPS barriers did not usually focus directly on the science aspect of it. What ensued differed significantly across the spectrum of interviewees. The fact that most interviewees understood that science is the basis of SPS measures under the WTO but did not immediately connect their challenges and barriers thereto is an indication in itself of the existence of a broader understanding of such barriers than that able to be addressed by the WTO. As shown in a quotation as an example below, it is often seen as being an administrative process or a concept of administrative law.

but this whole administrative law concept, and it is exactly that, the government must see us as the auditors. They're the auditors. We tell them these are the rules we want in place; you must ensure that they are applied objectively across the whole value chain or in my industry.⁵⁰⁹

The participant is partly correct in the view that SPS is an administrative law concept. There is indeed a lot within the development of standards, the decisions to grant permits or deny applications, approve facilities for import or export etc. that could amount to administrative action having been taken, providing an avenue to pursue remedies in administrative law. It is however a field that is supported by "administrative law" not formally a concept of administrative law. This distinction is addressed in more detail in Chapter 5. The connection between the legislative framework and formal and informal barriers in the context of SPS regulation as well as the spectrum of views shared on the matter becomes clear as the chapter progresses.

⁵⁰⁹ Interviewee [redacted for confidentiality].

This connection is one that, although it was assumed to exist, was not understood as being as strong and persistently connected to barriers faced by private parties as that which emerges in both this chapter and, in a different context, in Chapter 5. Collectively, the industry knows what SPS measures are, but it does not limit their definition to the same extent as does the WTO-SPS. SPS measures are seen as being a collection of measures, processes, decisions, controls and related matters, including scientific standard setting that are aimed at protecting human, animal and plant life and health. Barriers related thereto are seen by the industry as being any one of the following.⁵¹⁰ Products can either not be traded nationally or internationally on account of an SPS-related event. There is an urgency for new standards or proactive prevention or detection of future SPS events. There is disagreement with either the manner in which a standard was created or its content. There is a lack of co-operation within industry on matters related to food safety, animal health or any other SPS-related point. These scenarios are all connected to different principles, rights or obligations of SPS regulation, but not necessarily to the scientific justification of specific measures.

4.2.2.2 SPS legislation: purpose, function, certainty and trust

Several interviewees in the research hold the view that the legislation under the authority of which they are required to operate is limiting and does not provide an enabling environment in which to address SPS-related requirements adequately. The data does not support claims that the existing legislation creates an environment that enables industry to implement, challenge or benefit from SPS-related rights, obligations or principles. The firework data also indicates that there is no SPS regulatory framework, despite there being SPS-related legislation in an SPS-related legislative framework. South Africa's SPS-related legislative framework is, in itself, perceived to be a barrier related to trade in the context of SPS. It fails to support both national and international trade on both grounds of purpose and function in that it is not an SPS purpose-driven framework and can therefore not entirely function as one either. The legislation has caused substantial uncertainty across the group of interviewees and the perception that legislation is a limiting factor also relates directly

⁵¹⁰ This is not a closed list, however these were the main, recurring views in the data.

back to the broad theme of a lack of trust. There is very limited trust in the usefulness of the existing legislation amongst interviewees. From the data it is also apparent that such a lack of trust in the legislation adds to the breakdown in communication, particularly when matters concerning disputed regulations or requirements arise.

There is a common narrative amongst interviewees that regulations are frequently beyond the scope of the legislation under which they are created. The two quotations below are examples of this sentiment expressed:

You find that the regulations most of the time, and I'm speaking across most of the regulations, if you look at them, those are regulations that actually exceed their own powers. In other words, these are regulations that are beyond the, they go beyond the scope of the [law]... Ultra vires. Most of them.⁵¹¹

If you look at some of the regulations [redacted to maintain interviewee confidentiality], you'll find that people have exceeded their powers... They actually went on, stipulated things that [they] should not necessarily [have], they've got no basis in law whatsoever, but [redacted to maintain interviewee confidentiality], just accept[s] [it]... If it suits them, until they take it to court.⁵¹²

What the interviewee above also highlights is a growing discontent in the industry in South Africa. The idea is that if regulations do not suit a particular sector or group, they should be challenged, despite the sector or group having supported a similar process for the creation of other regulations that do suit them. A quotation rendered earlier, shared again below, reveals another aspect of the challenges to regulation that is pervasive among some of the research interviewees. This is the view that industry's needs are the standard and that government's role is to fulfil that:

but this whole administrative law concept, and it is exactly that, the government must see us as the auditors. They're the auditors. We tell them these are the rules we want in place; you must ensure that they are applied objectively across the whole value chain or in my industry.⁵¹³

It is difficult to conclude what the main challenge is to SPS regulation/implementation in the context of the legislative framework. There are instances where an interviewee is perfectly correct. The quotation above is an example. However, there are situations where more immediate action is necessary in an SPS context, for example during the outbreak of a notifiable disease. As the interviewee correctly held in the context "and

⁵¹¹ Interviewee [redacted for confidentiality].

⁵¹² Interviewee [redacted for confidentiality].

⁵¹³ Interviewee [redacted for confidentiality].

before it's announced in a Government Gazette, it's not law."⁵¹⁴ Would the interviewee view this scenario, imposing emergency measures to contain an outbreak, differently if some of the other themes addressed in this chapter were resolved adequately? For example, if the interviewees in general had confidence in the legislative framework and trusted the system on account of, amongst other things, adequate communication? Potentially, yes. As stated earlier, the challenges and viewpoints often are directly connected to some form of a lack of trust.

In the data there has been a spectrum of views expressed on the point of public consultation. What is clear is that even when there is a form of public consultation followed, there is not always a true representative sample of the broader industry. Who is at the table varies across categories of interviewees. Public consultation is not necessarily the resolution to all these challenges. Public consultation is undeniably important but certain decisions and actions cannot wait for public consultation to occur. A view that was shared by a particular category of interviewees was that it is not uncommon for the process of public consultation to become cumbersome and entirely pointless as an impasse is reached and the process does not proceed.

The industry relies on documents called VPNs and SOPs. A VPN is a veterinary procedural notice and SOP refers to standard operating procedure. These documents, although intended to ease processes and procedures related to SPS matters, are in themselves problematic in some ways. These are documents that are not defined in the legislation and their exact legal status is uncertain amongst the interviewees. Their legitimacy and enforceability are uncertain amongst research interviewees and there is no clarity amongst the latter on what the legal status of such documents is, or what VPN even stands for. One participant describes VPNs and SOPs as policy:

So it would be the main act and its regulations and then we draft VPNs to articulate what the regulation intends to achieve. All of that would be now in the VPN...⁵¹⁵

VPNs or SOPs, that's synonymous, ... [they] give guidelines and the way [to] interpret ... it's policy documents that provide guidelines for state veterinarians having to execute functions in terms of the act and the regulations.⁵¹⁶

⁵¹⁴ Interviewee [redacted for confidentiality].

⁵¹⁵ Interviewee [redacted for confidentiality].

⁵¹⁶ Interviewee [redacted for confidentiality].

VPNs have also been described as synonymous with an SOP by another interviewee.

It's slightly below a regulation because VPNs are not gazetted. They are, as you rightfully indicated, maybe a different acronym or word that we use for a standard operating procedure.⁵¹⁷

Another interviewee describes the status of the documents as follows:

The one is the administrative documents; these policy documents are administrative documents... the legislative process for them to every time go through a full public consultation and be published as a regulation takes a hell of a long time.⁵¹⁸

An additional point of uncertainty created by the use of such documents is the fact that it is unclear when or why some VPNs are gazetted and others not. The fact remains that they are not part of the regulations listed under the Act, and, in that sense, they are unlikely to be of much more "legal" force than a guiding document if not gazetted. This is discussed further in Chapter 5. The status and authority under which these documents are created in the context of the relevant legislation is a matter requiring more detailed analysis.

There are VPNs that follow a traditional consultation process. It would appear, however, that there may also be VPNs or at least SOPs that do not. It has also been noted, in reaction to a question about VPNs and SOPs, that:

They're actually meant to complement each other. So it would be the main act and its regulations and then we draft VPNs to articulate what the regulation intends to achieve. All of that would be now in the VPN.⁵¹⁹

The questions surrounding VPNs are revisited in Chapter 5. For purposes of this chapter, they are considered documents with the potential to provide the relief and guidance sought by the industry, especially in emergency situations, but also as a source of uncertainty. There is an understandable level of resistance to them on account of the lack of clarity on their scope, legality and force. The lack of clarity adds to the lack of trust with which some interviewees view such documents. They might be policy documents, legal instruments or another category of document.

⁵¹⁷ Interviewee [redacted for confidentiality].

⁵¹⁸ Interviewee [redacted for confidentiality].

⁵¹⁹ Interviewee [redacted for confidentiality].

4.2.2.3 The role of the industry itself in the creation and resolution of barriers

In many ways the industry is its own barrier and as much has been said by interviewees themselves. The sentiment is conveyed in the quotation below.

You get the majority of the people who are willing to help and complying, and then you get the extremists who will forever challenge whatever, everything. Even when you tell them that I'm short they'll challenge that. And then you get the other extremists that would also be extreme with something or the other. And the unfortunate thing is even with the majority willing to comply and to participate and to be constructive, I find them not able or willing to convince the extremists to comply for the benefit of everybody else.⁵²⁰

As noted at the start of this chapter, when referring to the industry, the term includes reference to both the government departments involved and the private sector. At the outset of this research the assumption of the researcher was that the main SPS goals were common amongst interviewees. These goals were primarily to eradicate FMD, control future outbreaks efficiently, prevent them altogether if possible, and align with international best practices and standards in doing so. The main and, as it turns out, incorrect assumption made was that the industry is willing to achieve these outcomes by following the most direct route. It is difficult to conclude, based on this data, that those goals are in fact accepted as common. The data shows certain aspects of these goals are shared across the actors, but not to the extent that there would be co-operation and support that can effect genuine reform in the field of animal health-related barriers in the industry. No interviewees expressed a disinterest in these goals. However, whether, to what extent, and in what way they are individually willing to co-operate varies vastly and draws a picture of a fragmented industry. The fragmentation is evident especially between private industry groups and between government departments. How much of this is attributable to a lack of trust in the system is debatable. There is certainly a strong tendency for co-operation to follow only once an obvious type of return on investment in the plan is visible and it appear that at times this may come at the cost of effectively addressing SPS-related barriers.

⁵²⁰ Interviewee [redacted for confidentiality].

4.2.2.4 Transparency and dispute resolution

Another recurring perception in the data is the view that there is a lack of transparency in the decision-making processes. There are cases where this is not stated outright by the interviewee but it is implied or hinted at. In other instances, the language use of the interviewee is an indication of there being limited seats at the table, so to speak. From this it can be deduced that transparency on a broader level is not attained. This includes the processes related to dispute resolution.

The question of how SPS-related barrier disputes are practically resolved is one that mostly provided one of two answers. A large number of interviewees were averse to the idea of litigation as a dispute resolution method. The majority were for the idea of negotiation and engagement within the industry and some form of alternative dispute resolution, understood as meaning an alternative to the courts, though not necessarily arbitration or mediation. However, despite the expression of a broad interest in negotiation and methods of dispute resolution other than litigation, the actual dispute resolution processes or methods described by interviewees vary. The variation is, of course, partly dependent on the nature of the problem which may be regulated in its own specific way. This variation is a problem in itself where informal or uncoded procedures were pursued. Very few of the processes described are formal or follow a defined procedure or format. There is therefore little to no record of the decisions being taken and the reasons for these, making it virtually impossible to replicate these decisions. This is not to suggest that there is evidence in the data of corruption or untoward behaviour. No claims of such a nature were made. However, this is not enough evidence that the non-transparent resolution of disputes is "safe".

Litigation on SPS grounds is, for the most part, non-existent in South Africa. As far as legislation and law-related matters are concerned, dispute resolution is one of the aspects in which there is a considerable level of concern amongst interviewees. Interviewees express frustration in the processes for a few reasons. The lack of options available to private parties in law is one concern. The time that such processes take, in what are usually time sensitive matters, is another. A few interviewees also expressed a fear of retaliation or damage to the relationship of the category of

interviewee for having taken a government department to court. The South African court system is one that is notorious amongst interviewees, from both governmental and private industry, for damaging relationships and eroding goodwill after years of co-operation and relationship building. It is also seen as further limiting the capacity of departments that are already severely understaffed and operating beyond capacity. This is a particular concern of interviewees in government.

There is a common sentiment of disillusion in the ability of legislation to effect any relief or change in the individual's or group's situation. This disillusion is largely linked to the matters of movement control and pro-active measures to avoid future outbreaks of diseases. There are certain interviewees that communicated their experience as one where co-operation and co-ordination with government was positive and, as such, they expressed the views that they used negotiation as a tool for some sort of alternative dispute resolution.

The internal appeal, review and dispute resolution procedures prescribed by the relevant legislation are analysed in detail in Chapter 5. However, what is clear from the data is that most interviewees do not view legislated internal appeals or reviews to the relevant bodies within the relevant ministries as an effective route to resolving disputes. A very limited number of interviewees considered internal review or appeal as options to pursue in the event of a dispute. It is not generally presented by interviewees as the preferred or most effective route to resolving disputes. Litigation was generally presented as being reserved for exceptional cases or when useful as a strategic tool.

4.2.2.5 Broader themes in the data specific to the South African context

SPS measures are in many ways a perfect protectionist tool. They are also in many ways an accidental barrier. This second category exists, for example, because of the poor understanding of the principles, rights and obligations of SPS law and the subsequent lack of translation of these into practical benefit for private parties. The second category may also exist for reasons related to lack of capacity, lack of political will or lack of proactivity in both government and the private industry.

In theory, the basis for SPS measures is science. In reality, the basis often exists in a messy web of politics, government and departmental policy, political agendas, inequality, capacity constraints, and layers of trade.⁵²¹ This reality makes identifying true SPS barriers and resolving SPS-related disputes difficult for a number of reasons. The first is that it makes identifying the SPS disputes in the web of societal factors a very challenging endeavour as they are often co-occurring with other matters and often masked by layers of other, unrelated points of contention. This reality also makes resolving such disputes in a manner that is both within the bounds of the internationally agreed upon rights and obligations that South Africa is bound by, consistent with the Constitution and practically attainable in the field in which it is sought, challenging. A third reason is that the very foundation of measurable standards is trust, and in the messy reality described, trust in process and outcome is easily eroded by decisions made, especially those made with negative consequences for one of the parties within the SPS chain, that are difficult to reverse.

A number of contradictory sentiments amongst interviewees are captured in the data. On the one hand, there is a desire expressed by interviewees to attain "progress" and to enforce compliance and modernisation towards international best practices and standards. There is an expression of willingness to co-operate on a national level within the industry in general and between specific private categories in industry and government. However, on the other hand, there is also a tendency to demand evidence of, primarily financial, benefit before such co-operation or self-regulation is considered valid or worthy of support by the different categories of interviewees or members who they represent. The transactional nature of co-operation is a barrier to the very progress desired by the same interviewees.

As introduced briefly above, in some respects, the "industry" is its own barrier in SPS. This statement is based on the observation of multiple contradictions in views, incentives to act and willingness to concede on matters expressed in the data, such as the content of specific VPNs or movement control during the 2019 FMD outbreak. Some of this is related to SPS aspects; much of it is entirely unrelated. However, the

⁵²¹ Formal, informal or national, regional and international levels.

unrelated matters appear to increase the challenge of SPS rules as a barrier during SPS events. This need for tangible benefit as contingency for compliance is problematic. From a legal perspective, this is absurd. Mindful of the criticism expressed in respect to the SPS-related legislation in Chapter 5, the fact remains that legislation that exists and is in force, that is, which is not repealed, is binding – as are the regulations made within the confines of the enabling legislation. Its application or content is not contingent on the perceptions of private parties and whether they agree with it or foresee a financial benefit thereto.

Undeniably, the current political, social and economic state of the country sets the tone for at least some of the perception that was communicated in the data and that interviewees experience as their reality. There is a level of impunity and lack of consequences for the corrupt actions of persons in the leadership positions in government and other industries implicated in the state capture commission. There is the well-used phrase in South Africa that "the law must be seen to be applied." Unfortunately, when the law is not seen to be applied for seemingly more serious offences, then it is no surprise that private parties distance themselves from abiding by much less "serious" rules and regulations, either hoping that they will not be caught or relative confident that, if they are, there is likely to be no real consequence. This may partly explain the existence of what has been described in the data as a "dual" system that applies to the formal and informal actors in the SPS chain. Where corruption has eroded goodwill and trust as well as the financial and human capacity to implement necessary controls, there is a diminishing chance that private parties will bother following the rules. The disregard for rules is of course easier if the individual is not an exporter who is bound by the rules of the country of destination. However, as repeatedly stated in this research, the actions of one in an SPS context, especially in terms of animal health disease outbreaks such as FMD on a single farm, impact the options available to all, including exporters, throughout the country when FMD-free status is lost.

Food security and SPS regulation are two directly related matters. There is however a different relationship between SPS regulation and long-term food security, on the one hand, and SPS regulation and the immediate food access needs of a large portion of

South African society on the other. It is not disputed that the protection of human, animal and plant life and health, as understood in an SPS context, contributes to the long-term food security of the world. However, there is also the undeniable fact that, in South Africa, people are faced with the lived reality of not having a choice in the source of the food they consume. Inequality of multiple resources and opportunities contributes to the complexity of balancing the protection of human, animal and plant life and health with immediate food security needs. A law and development approach, as considered essential in this research to finding adequate solutions, needs to consider fully what standards are and what real-life consequences they have for different people. Standards are a luxury of the rich – especially private standards. Perhaps this is also somehow true for the ability to operate within the "formal" as opposed to the "informal" system. With any standard that is developed and enforced there is a possible, but not necessarily definite, cost adjustment to the product to which it applies which is passed on to the consumer. Better enforcement of SPS measures and principles will not bring about food security by itself. This is a matter of substantial complexity in South Africa. More robust standards on imports and formally traded goods will not result in a quick fix. In the long run, it is true, a lack of SPS control will result in increased food insecurity as the outbreak and spread of diseases will continue to cause disruption in the agricultural sector.

A contradictory undertone of irritation co-exists in the industry with a widely shared view that the EU is a desirable market to export to and the benchmark for what standards are worldwide. The root of the irritation is twofold. One is the perception of the EU's unwavering "take it or leave it" stance on their standards, both governmental and private, that are to be met before any export to one of their member states can occur, and making it a notoriously difficult export destination, as "unfair." The second factor contributing to the sense of irritation is the perception of relative ease with which the EU and USA can export their products to South Africa. The word "perception" is used deliberately. Despite any perception being subjective and rooted in a particular group's experience, positionality or lens, it remains that particular group's truth. The relative ease, if it is that, with which the EU and USA can export across the world and to South Africa likely follows from the highly regulated environment within which their local producers of primary and manufactured products operate, applied equally in a

significantly less "layered trade" context. Be that as it may, the matter of perception remains one that cannot be ignored.

There are differing perceptions surrounding the usefulness compartmentalisation, traceability and the existence of a "dual" system in South Africa in the data. Compartmentalisation and traceability are seen by many as the solution to the SPS-related problems that the industry faces. Apart from selected early adopting private sector actors on a large enough scale to self-regulate, neither concept has been taken up widely across the red-meat industry. Neither compartmentalisation nor traceability is on its own a solution to the barriers faced in terms of international trade. In the absence of a broader SPS framework incorporating all the principles, rights and obligations that are required to support such a system there is likely less benefit to their formalisation than expected.

4.2.2.6 The role of language in the attribution or acceptance of responsibility in an SPS context

The data also shows a connection between language and SPS regulation as a barrier. South African agriculture is loosely divided into categories of "small scale", "small holder", "commercial", "emerging", "subsistence", "formal" and "informal" farmers.⁵²² This is the language that is used in policy, research, the media and general conversation. The categorisation of farming size or experience in farming is a useful tool in other fields. It serves a useful purpose in economics for example, and in creating policies that allocate resources or financial assistance. These terms are however problematic from an SPS perspective. The problem is that they make groups of persons "others", and "othered" groups distance themselves from the responsibility of SPS compliance to the point where, as multiple interviewees described, an expectation to prove benefit flowing from, or incentive to participate in, the control, resolution or proactive avoidance of SPS events is expected before co-operation. In this regard interviewees used the specific examples of there being a resistance from their members (or other persons in their sphere of industry) to buy into the idea of self-

⁵²² The distinctions also apply beyond farms in the context of for example abattoirs, traders, and retailers.

regulation or systems related to traceability of live animals for example. SPS measures and the consequences of an SPS event affect the "other" regardless of the origin of the event. Language that "others" in any way has the effect of creating distance between the problem, the problem solver and the persons affected by the problem. Language is also able to become a highly politicised tool in the pursuit of political or commercial agendas. It is also a means by which stereotypes are entrenched and groups are treated differently. It also creates tiers of political and social importance and these stereotypes are entrenched, along with a disassociation from the SPS matters with which the other groups are concerned occurring.

"Othering" categories also appear to have created a scenario in which those typically categorised into one of the more affluent categories have taken the view that this is the only category into which they fall. A "commercial farmer", "small holder farmer" or "emerging farmer" can at the same time be engaged in formal trade that is recorded, transparent, compliant with applicable legislation and for example tied to obligations towards the South African Revenue Service and, simultaneously, also participate in acts that can be categorised as "informal" as they are not recorded, transparent, compliant with the applicable legislation or otherwise formalised in the eyes of the law. Similar use of language use and distinction on grounds of formality is also seen in different contexts such as those involving the slaughter and sale of red-meat products.

Skirting the formal sector does not make SPS legislation inapplicable to the individual doing so. The consequence of such an arrangement would be, and to some extent already is, as repeatedly alleged in the data, akin to saying that not all are equal before the law, and that consequences only follow for those that, for whatever reason, choose to operate in the formalised economy. The "othering" also creates an optimal environment for distrust between actors in the SPS chain to emerge as a contributing factor in complicating the elimination of barriers. It breaks down both trust and communication.

An undeniable fact in the regulation of SPS matters is that an unofficial dual system of enforcement and consequences exists. There are areas of trade in which regulation, or the enforcement of the law, takes place. This is especially heavily tilted towards the

"formal" category. There are other areas of trade where, to varying degrees, regulation or enforcement does not take place, particularly in those which interviewees consider to be the "informal" spheres of trade. The distinction is more significant than the overly simplistic idea of a "small scale" or "commercial" split and is better described by the "formal" or "informal" split. The split between "formal" and "informal" is more accurately described as being based on individual acts rather than the individual actor. Many private parties likely exist closer to either the "formal" or "informal" side of the spectrum with the position of some changing over time, or dependent on specific acts. In the absence of the government's ability to transform an agricultural sector and society into one that accepts SPS measures as binding, thus unable to eliminate informal and unregulated activity, the question then becomes, regardless of the scale on which a farmer's particular activity operates, what are the options available to the formal sector that is vulnerable to fluctuation in disease-free status and other SPS concerns. There is a group of actors in the SPS chain who has a desire to export but are constrained by the government's limited ability to facilitate that. The government does not appear to have the capacity to formalise the informal sector, leaving exporters reliant on trade partners' trusting processes and SPS safety in South Africa vulnerable.

It is difficult to reconcile the very conflicting worlds of "formal" and "informal" trade in South Africa. On the one hand, a shared feeling in the data is that without the top down application of the same rules and obligations to both categories, there will likely never be full trust in the "system" in which SPS regulation exists in South Africa, as seen from "outside" South Africa at least.

There may be merit in adopting at least a partially formalised dual system. In the absence of any likelihood of a reform in perception as necessary, and fully appreciating the prospect of South Africa losing its relevance as an exporter in the event of increasing SPS events that cause disruptions in the trade of agricultural commodities, a formalised version of a "dual system" may be an option. This is discussed in more detail in Chapter 6. The OIE recognises concepts such as "zoning" and "compartmentalisation" for a reason. There are already suggestions and recommendations as to the scope and shape of commodity-based trade. The shape of such a system will however still rely on there being equal application of any law across

the entire scope of actors and of the rule of law in South Africa. The existence of trust in such a system and adequate communication would also be necessary and such trust in the system would depend on the balanced incorporation of SPS-related rights, obligations and principles. These are significant ingredients for its success.

4.2.2.7 Discussion

The gap between theory and practice of SPS regulation and implementation, as reflected in the field work data, is huge. There exists a good understanding of the role and importance of SPS measures and related controls. Most interviewees would not immediately rely on the term "SPS" to describe their challenges, but other language such as "animal health", "standards", "food safety" did immediately open conversations into the field of SPS regulation and implementation. However, despite knowing that in theory SPS measures are based on science, and that the OIE exists as a standard setting body providing guidance on FMD prevention, control and containment etc., there is a strong sense of frustration across the industry relating to the implementation of such theories, or the practical possibility of doing so. This feeling that there is something missing in the South African SPS landscape is a concern that led to the design of this research as well. Knowing the theory – that there are certain principles, rights and obligations at the international level that feed into the daily lives of private parties through national legislation and guidance from the international standard setting bodies – but not being able to give a practical solution to *how* this can be optimised to benefit any one particular group, or for a type of dispute resolution to be achieved in a particular scenario, is frustrating. The interviewees expressed a sense of exasperation or having their "hands tied" in situations that required action, and especially those that required swift action. The gap between theory and action is another SPS-related barrier contributing to the challenges faced in the red-meat industry. This can also be directly ascribed to the lack of substance in the SPS-related legislative framework. An individual, a government department, an importer, or an exporter, can only rely on what is available to them in law. Knowing the theory of what is agreed upon internationally is of little consolation in scenarios where a lack of options and action results in a barrier or loss of some sort, particularly if, in theory, this could have been avoided.

Disputes and barriers are not uniform. They vary in form, duration and severity. As the data in this research shows, SPS-related barriers may result in disputes that are very different to the normal understanding of what a dispute linked to an SPS-related barrier is. Arguably, this outcome can be extrapolated across the jurisdictions of many other countries. However, maintaining a South African view in considering the solutions to challenges described in the fieldwork data, there is real cause for concern. A dispute that is not resolved in a transparent, reproducible and objective manner is not a dispute that is resolved. Such a dispute resolution mechanism which produces a non-reproducible outcome is more akin to a negotiation or an agreement, rather than a dispute resolution mechanism. A proper dispute resolution mechanism necessitates that an accessible set of reasons for an outcome exists that can be relied on for the next person, in a comparable situation, to resolve their dispute. Disputes resolved without transparency and public record are not providing such an avenue. Trade remedies through the International Trade Administration Commission of South Africa (ITAC) thus rely on a process whereby non-confidential versions of commercially sensitive information are available in a public file for all interested parties to request. South Africa has no comparable process in the SPS context. Without any comparable legislated dispute resolution process in the SPS context, there is virtually no likelihood of that changing. The same can be said for the process of setting "industry standards," regulations or policy. Regardless of the outcome sought or found, the manner in which this was brought about, and the material on which such an outcome depended, is something that should be made publicly available for future reference, in the same way that those disputes relating to trade remedies in South Africa are.⁵²³ This is a means by which accountability of both the relevant directorates and the private parties, or any other party involved in the process, including researchers and consultants, for actions and outcomes can be ensured. It is also a start to the quantification of the extent of SPS-related barriers in South Africa, as data would become available to do so.

⁵²³ Investigation reports into allegations of dumping, for example, are publicly available on the official ITAC website.

It is not surprising that interviewees view "admin" issues⁵²⁴ broadly as burdens that at times amount to barriers. "Admin" is, however, an unavoidable component of such a process. It should, however, never be excessive. The burdensome nature of admin issues in South Africa is compounded by the lack of clarity on what exactly is required, and from which individual or department such clarity should be sought. Without principled consequence for SPS actions that have negative effects, there is little reason to believe that the crisis in which SPS regulation in South Africa finds itself is likely to be overcome. The data confirms that the mere existence of law is not a solution, in the same way that being a WTO member and party to the WTO-SPS does not guarantee compliance with the latter. The legislation must be purpose specific and mindful of the specific principles, rights and obligations of SPS regulation, but it must also be enforced equally.

There is a crucial need for trust in the scope and quality of legislation, trust in the transparency and necessity of the process, trust in the implementation mechanisms and institutions, and trust in the equal application of the law and the existence of the rule of law. Although alternatives to the courts are potentially preferable in an SPS context, there is a limit to what can be sustained in a fair and transparent manner in the absence of any formal, structured process that may follow alternative dispute resolution. From the data, litigation cannot be seen as an avenue of dispute resolution with which the industry in general feels comfortable. Even if it were, in the light of the limited scope for contesting material aspects related to SPS barriers in terms of most of the legislation, the usefulness of such procedures is equally limited currently.

The point shared above about the need within industry for a regulation to be officially gazetted before recognising its legitimacy is understood when considering the state of the legislative framework as analysed in Chapter 5. Without there being, firstly, a clear provision for the implementation of emergency measures, under defined circumstances with defined scope and awarding defined competencies, based on defined principles, rights and obligations, and, secondly, trust that this is done in a fair and transparent manner, it is unlikely that these concerns and perceptions of

⁵²⁴ Administration, as the word is used in the normal sense. This is not a reference to administrative law.

interviewees will change. In South Africa, there is a tendency to challenge regulation and challenge reform (whether justified or not) and this necessitates that all possible routes be accounted for in law, and if not, that there be certainty in how to go about formalising a process beyond the scope of what is anticipated by the original legislation. The scenario of reactivity to decisions made, as described above, is again directly related to the theme of trust. Neither point one nor two is reflected in the current legislative framework. In the past, situations have developed and processes have been followed that have eroded the trust between parties and this has led to this adversarial dynamic where even Gazette regulations are not trusted. Yet, industry cannot self-regulate if not provided for by a gazetted regulation. The data shows that there is at least a perception that to some extent, decisions of an SPS nature, particularly control measures, are political. This may or may not be true. The fact that the perception exists so predominantly is an indication that, in the context of barriers, it cannot be ignored. As stated elsewhere in this research, SPS measures and the complex system behind them, should endure regardless of the political party in power.

South Africa is in a period of increased protectionism, a trend also seen in the rest of the world. International trade is increasingly politicised, notably also in the media, which arguably offers the easiest way to build perceptions and mould a narrative. Whether this is done on purpose or not is irrelevant. Reporting often does not genuinely concern SPS matters. Making the importer the villain is easy, particularly in SPS aspects. There is no equivalent to the ITAC, with clear and established processes through which to challenge such allegations in South Africa. No period is set within which a review is required of any decisions made. South Africa cannot reasonably expect to export, but not equally facilitate imports. The two processes are politically linked.

The fact that the relevant departments involved in the processes of standardisation, application, enforcement, control and communication of SPS measures are lacking capacity is an understanding shared by the majority of interviewees. This itself is a concern for the SPS-related effectiveness across the agricultural industry in general. It is also a problem that has its roots in the much deeper political complications which South Africa currently faces. Resources have been inadequately allocated and

managed and policies have been non-existent or ineffective resulting in a situation where trust in the departments has generally been eroded. As such, a situation exists where there is no room for movement in either direction. This is not a matter which the private sector can accept, yet, at the same time, it is not one that they can fix either. There must be a willingness from a much broader political base to address the challenges within the departments that impede the ability of South Africa to overcome these challenges. Trading partners are likely equally aware of the situation, which presumably supports the view shared that among trading partners, there is a lack of trust in South Africa's ability to effect safe trade in agricultural commodities. Realistically, the lack of resources of the departments becomes the burden of the private parties in need of SPS support.

Is the problem in the SPS field mostly a communication problem? The conclusion seems that the communication aspect and categories of communication, including the communication of rights, obligations and principles of SPS regulation through law, is one of the root causes of the problem. It is however one that the researcher does not believe to be as substantive as the problem of legislation as a barrier (addressed in Chapter 5). It certainly intensifies barriers when absent or inconsistent. SPS regulation and implementation in the red-meat industry undeniably has a communication problem. The problem can be categorised in two different ways. One is a lack of communication related to standard setting, administrative procedures and the "normal" SPS type of concerns that arise in trade and agriculture. The second category of communication failure is best described as the error of not "selling" SPS measures as something more than a mere inconvenience, administrative burden, rules imposed by the EU and a game played only by exporters or importers. Despite there being, according to a number of interviewees, a "good" relationship amongst actors, and especially between private parties in industry and individuals in government, a "good" relationship does not necessarily amount to action or outcomes. This is regardless of the intentions with which engagement was pursued and it applies particularly to the development, amendment and application of regulatory documents and processes.

The status quo is unlikely to change without significant reform. South Africa may, potentially, lose its access to markets and relevance as a red-meat industry without

such reform. Reform of legislation is one obvious aspect. However, reform of an "industry" perception of international standards, their application and usefulness at the national level as well as their overall importance, is a more challenging aspect to achieve. This is especially so considering the prevailing gap in incentive to do so between the "formal" and "informal" sectors, both of which have an impact on disease-free status in the country. Reform is easily brushed off as being too expensive, too intensive or too large-scale to bring about. The question of reform should be genuinely considered by the parties that have a financial incentive to reform. Is it worth maintaining the status quo in the long run, or is it worth undertaking the work that is required to bring about such reform in order to maintain relevance and market share? The field of trade remedies has implemented such reform. There is no real reason why the SPS field in such an agriculturally rich country cannot do likewise. It already relies on the fundamental principles of other WTO agreements; there is no logical reason to reject the WTO-SPS.

4.2.3 Conclusion

SPS measures are undeniably a source of potential non-tariff barriers to trade, which is not a statement unique to this research. Where this research uniquely contributes to the field is in its broadening of the practical understanding of what shape such barriers may take, beyond the accepted theoretical form of SPS measures being limited to science related aspects of the actual measure or purely related to administrative matters. The fieldwork data has introduced several aspects which will be further developed and analysed in Chapter 5. From the data there is support for a broader definition of SPS barriers that not only includes measures based on science, but also considerations such as the specific context in which the particular rights, obligations and principles exist and the ability in terms of legislation, institutional or industry capacity and willingness to create an effective and trade facilitating system.

What is also apparent in the data is that South Africa is not faced with SPS-related barriers by virtue of being a developing country. Many of the challenges described are more likely connected to broader political mismanagement and decline rather than the fact that South Africa is in the Global South. It is also apparent that at least some of

the challenges that the industry faces are tied to the industry itself being a barrier in some instances. This is a significant departure from the accepted narrative that developing countries per se face special challenges, which are not a fault of their own. Related to this is the fact that a large portion of the themes relate to lack of trust and a breakdown in communication. There is also strong evidence that the inadequacy of the SPS-related legislative framework as a supposed environment enabling SPS measures contributes to the challenges faced. This supports the theory that the challenges faced in South Africa are not all by reason of the country's developmental status. This is, again, not something unique to a developing country and could as easily be the case in a developed one.

The perceptions of actors in the SPS chain is fundamental to the effectiveness of any suggested controls or regulations. Negative perceptions rooted in distrust, frustration or disillusion on account of poor communication and bad precedent that supports these perceptions are bound to hinder the co-operation in and acceptance of suggestions for future control of SPS events or the proactive prevention thereof. The data has revealed a large gap between theory and practice. The reality is that, regardless of the willingness to help or the understanding of the theory, the effective practice is hindered by a lack of resources and co-operation. Knowing what options exist without the ability to take advantage of rights, obligations and principles on account of there being no recourse in law is understandably frustrating to the research interviewees too.

The goal of understanding barriers is working out how to eliminate or "soften" them or avoid them altogether in future. At this stage, dispute resolution in an SPS context is not adequate. It is not accessible, transparent or broad enough in scope to provide the necessary technical solutions to any form of SPS-related barrier beyond those addressed through administrative law measures.

Is it possible that the South African context is too complex to imagine a scenario where a balance can be found in policy, legislation and application of such to accommodate both the necessary and reasonable constraints of the WTO-SPS and the autonomy of farmers to determine their own style of farming? It is submitted that this would be possible if there existed a suitable legislation framework, which, as is shown in Chapter 5, there is not, in combination with the equal and consistent application of both

legislation and policy in the regulation of SPS matters, which this chapter and the literature review also have shown to be lacking. As stated throughout this research, the action of one farmer, using the context of FMD and animal health as an example, may have consequences for not only direct neighbours but farmers across the entire country, regardless of the farmer of origin's interest in international trade matters or not.

The questions posed in this research were more difficult to articulate before the COVID-19 pandemic. The pandemic provides a powerful analogy for the situation that arises in the context of animal health and notifiable diseases. This analogy is true beyond zoonoses as well. Worldwide there has been a concerted effort to control the pandemic of COVID-19 through movement control, isolating places with high virus positivity rates, prohibiting travel to and from areas that are deemed either out of control or in the midst of a peak, reducing the occurrence of gatherings that amount to "super spreader events", the implementation of quarantine and isolation policies in the event of close contact or a positive test, the development of vaccination programs and awareness campaigns. The process of controlling COVID-19 is not unlike that of controlling a disease like FMD. Similar actions as those described above are taken in the event of a positive case of FMD. Similarly, there are also different strains of FMD, with differing virulence as well as limited geographical occurrence. Similarly, as with COVID, regardless of the science-based efficacy of these controls and actions, private parties may still disagree with them and choose to object actively to their implementation or outright refuse to co-operate. There is clear evidence of the importance of science-based decision-making in the control of a virus and the consequences, both negative and positive of giving particular weight to such science in the formulation of policy. The same is true of the application, fairly and reasonably, across the entire country of said policies and regulations. When considering FMD and the containment of a virus which affects animal production to varying extents dependent on factors such as the particular strain, the particular breed of animal that has contracted it and the economic damage that a "shut down" in the form of prohibitions of exports resulting from the loss of disease-free status can cause, there is merit to the sense of disillusionment that has emerged in the fieldwork as far as the

regulatory framework of SPS-related legislation is concerned, both in containing outbreaks and in the preventative measures in place to pre-empt any outbreaks.

With these observations in mind, it is not surprising that trading partners are sceptical of South Africa's ability to control SPS events. Perception is shaped by many factors. The data does not fully support the narrative that, in as far as barriers are concerned, the standards set by trading partners such as the EU and the UK are responsible for South Africa's access challenges into those markets. That is not to say that there is no problematic behaviour on their part. One must do here with the enforcement of Eurocentric views on the back of economic power. What it does say is that the reason why South Africa has an SPS problem cannot be attributed to the fault of a single group of actors or circumstances.

The following part complements this section and confirms and supplements some of the views expressed and perceptions described and adds to the understanding of the broader red-meat industry and the effect of an FMD outbreak.

4.3 Part two: An analysis of import and export data related for red-meat products

4.3.1 Rationale for the inclusion of trade data

On 7 January 2019, an outbreak of FMD was confirmed in the Vhembe district of Limpopo. This is the event through which South Africa lost OIE recognised disease-free status. Another outbreak was confirmed on 1 November 2019 in Molemole. Since then there have been more outbreaks, such as the one on 28 May 2021 in Kwazulu-Natal in a previously FMD-free zone. This has resulted in South Africa not being able to regain FMD-free status since the January 2019 outbreak. The OIE states that FMD has an incubation period of 14 days and animals, such as buffalo, that are termed "carriers" may transmit the virus beyond 28 days.⁵²⁵ What is interesting is that the fieldwork data includes various sentiments that it is not a matter of if, but when,

⁵²⁵ Article 8.8.1.5 & 8.8.1.6.

another FMD outbreak occurs, subsequently confirmed sooner rather than later with the outbreaks that followed.

This section of the research turns to the quantifiable nature of South African Revenue Service (SARS) trade data and it is primarily a discussion of the volume and value of selected tariff codes (products) imported and exported during 2018-2020.⁵²⁶ It explores the extent to which such data can provide insight into SPS-related matters. There is a close link between the assumptions and perceptions shared in the fieldwork and the potential insight, whether confirmatory or not, that trade data potentially provide. The ability of trade data on their own to provide insight into the SPS situation at a national level in a country is rather limited as it is a record of products imported or exported from South Africa, not a record of *why* they were imported or exported as opposed to sold or sourced locally or why they were imported or export to or from a specific destination.

South Africa lists the prohibited and restricted products on the SARS website.⁵²⁷ This location is relevant for a few reasons. Customs, physically at the border, be it a physical land border, harbour or airport, work in conjunction with inspectors from other departments. In formal trade, the port of entry or exit is the literal port of entry or exit of risks to animal, human or plant life or health. It is a critical control point in terms of animal health and food safety matters. This is also the point at which considerable documentation, including veterinary import permits and veterinary health certificates,⁵²⁸ is presented for inspection. SPS regulation essentially relies on the official and accurate declaration of relevant products at the border. The origin or destination of the products is directly related to the SPS requirements and the importance of correctly determining and capturing the origin and destination of products from an SPS perspective cannot be overemphasised.

During the initial data exploration, a few odd observations were made in the trade data. These primarily related to the name of the country of origin or destination. In

⁵²⁶ 01 January 2018 to 31 December 2020, referred to as the period of review.

⁵²⁷ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

⁵²⁸ Veterinary permits/certificates apply to animal products such as meat as well, not only to live animals.

the description of country of origin or destination it is expected that only names of recognised sovereign states reflect in the data. That has not been the case in the trade data analysed in this research. These have been categorised as "odd observations" and the odd observations are noted throughout. This part concludes with a dedicated overview of some of the "odd observations" in the data that are not addressed elsewhere. The fact remains that the ports of entry are significant cross over points of jurisdiction and the trade data captures the volume and value thereof. Trade statistics do not directly speak to the situation in the local market in that they do not also capture context and volume trade nationally. However, some assumptions as to the volume of products traded nationally can be made based on the increases or decreases in export or import volumes of certain products during certain periods. However, there are other SPS-related deductions that can be made from the analysis of trade data. These are addressed in the following sections.

The first is that not all products suffer from the same decline in export volume immediately after an SPS event such as an FMD outbreak. The statistics somewhat challenge the assumption that immediately following an FMD outbreak, or any other SPS event, the export volumes fall to zero. The second is that the trade statistics give an indication of there being different treatment accorded to different products to some extent, following an FMD outbreak. This is noted in particular in the discussion surrounding the volume of imports and exports of live animals in the first quarter of 2019. The third and potentially most significant finding in the trade statistics from an SPS perspective relates to the odd observations, as noted above. During the fieldwork the theme of trust, or the lack thereof, was a persistent theme that emerged from the data. Odd observations thus cover those showing exports to countries recorded as "unclassified". This supports the validity of this theme. Trust directly relates to how interviewees have described what they believe to be the perception that South Africa's trading partners have of South Africa's SPS controls. It is also directly related to the perception that private parties have in terms of the existence of opportunities to export to destinations such as the Netherlands or other EU countries that are generally perceived in the fieldwork data amongst interviewees as being "closed" to South African products, yet present in export statistics.

The breakdown of products broadly considered in this research as forming part of the red-meat industry emphasises the importance of the ability to differentiate between products. From an animal health, food safety and commercial perspective, not all products are equal in that they do not all carry the same SPS risk. There are differences in risk associated to, for example, the presence of bone in the product or not, or for example whether it is chilled as opposed to frozen during transport. Not all products carry the same ability to absorb the effects of an SPS-related trade ban, regardless of the period of time for which it applies. These different products also do not all have the same commercial value and thus their commercial importance as far as resolving trade-related barriers or disputes also vary.

The analysis of products on a product by product basis as opposed to an overview of them all together introduces the extent of detail which any purpose-built SPS legislative framework would ideally be able to account for, in not only the creation of appropriate levels of protection, but also the identification, control, and elimination of related barriers, and the resolution of related disputes. Red-meat is a small sample size when considering the large number of tariff codes to which the principles, rights and obligations of SPS law potentially apply. This part of the chapter connects to the broader argument made in this research that, when considering SPS measures in the context of non-tariff barriers to trade, there is scope to look beyond the science-capacity-development-status connection.

Trade statistics are potentially a useful neutral arbiter to judge trading partner reaction to the outbreaks. The limitation is that they do not capture illegal movement and mis-declarations and can therefore not quantify the real volume and value of all the products traded. The statistics used in this analysis were extracted from the database *stratalyze.com* which is software that draws statistics directly from SARS. To simplify the analysis, this section limits the period of investigation to 2018, 2019 and 2020. 2018 is a full year before South Africa's January 2019 loss of OIE disease free status, 2019 is the full first year within which this occurred and 2020 is the first full year after the year of loss of official disease-free status. In what follows, there is a more granular focus on the individual products and periods.

4.3.2 Description of the scope of the review and the period under review

This section is intended to provide insight into what volumes, values and diversity of products have crossed the borders into and out of South Africa before and after the loss of South Africa's FMD-free status.⁵²⁹ The scope of this includes meat and edible meat offal, as well as hides and skins. For the greater part, the discussion is focused on domestic cattle, which are bovine animals, and their meat and edible meat offal as well as, to a lesser extent, the skin and hides that are a by-product of the process of slaughter and genetic material.

In this section, the World Customs Organization's (WCO) Harmonized System (HS) for tariff classification provides the tariff codes by which the scope of the analysis is defined and described. Every product that is imported into or exported out of South Africa is subject to classification under a tariff heading. The purpose of tariff headings is primarily to establish the import duty payable on specific products, but it also serves as a global type of 'language' through which products are identifiable that provides certainty on the nature and state of the specific product, assuming the classification of the product was done correctly on customs documentation. The first 6 digits of the harmonised system are the same (i.e. harmonised) globally, and individual countries add detail to classification by specifying further digits.

When analysing the trade data of the red-meat industry, as it is defined in this research, there is distinction that can be made between products based on the unit of measure recorded in the statistics that quantifies what volume of that product was imported or exported. Live animals are for example recorded in trade statistics as 'U' for 'unit,' i.e. number of animals. The reason is that the data is provided by SARS, who, upon import or export, records the product under its specific HS code, that then corresponds to an import duty (which can be zero). Import duty is therefore paid per unit of live animal imported, and so it is not possible to compare volume of live animal units with volume of meat and edible offal as meat and edible offal are recorded in the unit of 'KG.' Quantity is a reliable and uniform measurement, whereas value is so only to the extent that the exchange rate does not fluctuate considerably. Value in Rand

⁵²⁹ South Africa's FMD-free status was lost in January 2019.

terms is one that has varied in actual value as the exchange rate and inflation have fluctuated. Quantity as a unit of measurement remains constant. That being true, it is also necessary to compare like product with like product. Therefore, where a broad generalisation is made of the contribution that each category of red-meat product makes, or of financial damage that each category suffered, the comparison is made according to the total Rand value, despite the slight fluctuation in accuracy that such a comparison entails, as already explained. Where specific fluctuations of import or export per category of products are discussed, comparison in terms of unit of measure is usually relied on. This section groups products according to tariff headings as follows:

Live bovine animals; Meat: fresh or chilled; Meat: frozen; Edible offal: fresh, chilled or frozen; Edible offal: salted, in brine, dried or smoked; Genetic material; Hides and skins: raw hides and skins; Hides and skins: tanned or crust hides and skins; Leather: further prepared after tanning or crusting.

The following tariff codes have been considered in this analysis:

010221, 010229, 010231, 010239, 010290, 020110, 02012010, 02012090, 02013010, 02013090, 020210, 02022010, 02022090, 02023010, 02023090, 02061010, 02061090, 020621, 020622, 020629, 02102011, 02102012, 02102090, 051110, 16025030, 16025040, 16025090, 41012010, 41012090, 41015010, 41015090, 41019010, 41019090, 41041110, 41041190, 41041910, 41041990, 41044110, 41044190, 41044910, 41044990, 41071110, 41071190, 41071210, 41071290, 41071910, 41071990, 410791, 410792, 410799.⁵³⁰

The red-meat industry is better understood as including by-products of the slaughtering process as well. Hides and skins, for example, are included in the following analysis. They are by-products of the meat industry. Bovines are for the most part slaughtered for purposes of meat consumption. When an animal is slaughtered, there is inevitably a hide that can either be discarded or, as is the case in the trade statistics reflected in the analysis below, traded with. They are not without commercial value by virtue of being a "just" a by-product. Hides and skins are a separate market, their demand determined by different factors than those for red meat. The effect of an outbreak of FMD is therefore not limited to the red-meat industry as relating only to meat consumed by humans. The analysis below also includes reference to genetic material. The trade statistics capture genetic material or bovine semen in a single tariff

⁵³⁰ See annexure 1 for a description of the tariff codes and further detail.

code. The assumption is that this would primarily be imported or exported for use in the cattle industry, specifically dairy and stud breeding. However, without further definition it is possible that a limited quantity is also used for the artificial insemination of one of the other categories of bovines, such as buffalo or wildlife.

4.3.3 The import and export of red-meat products between 2018 and 2020

The following table is a summary of the total value of the red-meat related imports and exports of all the products included in this section for the period 2018 to 2020, also referred to as the period of investigation. It includes the value of products measured in kilogrammes (kg) and live animals measured in units. The table thereafter is a breakdown of imports and exports for the same period and products per year.

Table 4-2: Summary: Total value (Rand) of all imports and exports for the period 2018 to 2020

Trade Type	Total value (Rand)
Export	12,647,539,557
Import	10,640,402,519

South Africa has exported more in value terms than it has imported during the investigation period. The difference is not in itself enough to say that exports are a more important focus to maintain than imports necessarily. The contribution of each product to the total value, the specific period during which the import or export occurred and the status of the Rand to Dollar or Rand to Euro exchange rate during that time also has an influence on what can be concluded in terms of sector importance.

Table 4-3: Total value of all tariff codes imported and exported per year for the period 2018 to 2020 per year

Year	Trade Type	Total value (Rand)
2018	Export	4,440,995,024
2018	Import	4,207,031,040
<i>2019</i>	<i>Export</i>	<i>3,687,580,266</i>
<i>2019</i>	<i>Import</i>	<i>3,415,578,500</i>
2020	Export	4,518,964,267
2020	Import	3,017,792,979

The total difference in export value between 2018 and 2019 is minus R 753,414,758.00. The total export value grew by R 831,384,001.00 between 2019 and 2020. A decline in export value during an outbreak is generally expected. This is also one of the causes for concern when an outbreak happens at short notice. A decrease of R 753,414,758.00 in value of exports is a significant amount between two years. What is noteworthy is the point to which exports recovered in 2020. This is relevant as South Africa has still not regained FMD-free status since the January 2019 outbreak. An increase of total export value of R 831,384,001.00 the year following an FMD outbreak, despite not having regained FMD-free status, is not insignificant.

A further impact that an outbreak potentially has, where the outbreak results in the prohibition of exports, even for a limited period, is that there is likely going to be a variation on the imports side as well. The total difference in import value between 2018 and 2019 is minus R 791,452,540.00. Between 2019 and 2020 there is a further drop in total value of imports of minus R 397,785,521.00, which makes the total amount by which import value dropped between 2018 and 2020 with minus R 1,189,238,061.00. The loss of FMD-free status and a subsequent inability or delay in being able to export certain products will inevitably result in products flooding the domestic market that would usually be exported, thus reducing the need to import the same product as needed as it is available at a higher level of supply than usual. It is also not subject to the same competition as under normal circumstances. A total value

quantification of loss is limited in what it can explain. If all these products were comparable on the scale of "apples with apples" (identical products), there would be no need for multiple tariff codes. The reality is, however, that they are not. Meat industries are complicated in that the primary product – often the product from which the SPS-related event stems that results in the change of the trade flows – is not a singular product once an animal has been slaughtered. Not all cuts are equally priced nor equally in demand in every country. The drop in imports into South Africa does not indicate that the local manufacturer or consumer is benefitting financially from the sudden abundance of locally available products, likely at a reduced price. If there is a drop in the drive to import because of a ban creating a flooded market of locally available products usually destined for export, this can potentially drive the prices offered to locally supplying primary producers down. Imports stimulate competition, as do envisaged exports that do not take place, especially in the case of the products that would usually be of insignificant competition to the primary producer in South Africa as they were exported, never intended to compete with other local products specifically for supply only to the local market. The increase in the availability of certain products will inevitably affect the financial bottom line of the primary producer. This is a reason to prevent SPS events altogether and control outbreaks that do occur in a more clinical manner in the future. An SPS event within the country is not only an exporter's problem, as explained above.

The total number of live animals exported in 2019 was 22,955 (units). This is 13,454 (units) fewer than in 2018. 2020 did however see an increase of 13,722 (units) exported. By comparison, the volume of imports in 2019 was 2,429 (units) fewer than in 2018. 2020 continued to see a drop in imports by 32,951 (units) from 2019. Section 4.3.4 below focusing on live bovine animals deals with the detail per type of bovine on a more granular level. The total volume of meat exported⁵³¹ in 2019 was 33,218,240.74 kg, which is 6,084,468.57 kg less than in 2018. In 2020, the volume of imports was 409,963,398.10 kg more than in 2019, having increased by 403,878,929.53 kg in 2020

⁵³¹ Tariff codes: 010221, 010229, 010231, 010239, 010290, 020110, 02012010, 02012090, 02013010, 02013090, 020210, 02022010, 02022090, 02023010, 02023090, 02061010, 02061090, 020621, 020622, 020629, 02102011, 02102012, 02102090, 16025030, 16025040, 16025090.

when compared to 2018. The total volume of meat imported in 2019 was 66,441,215.58 kg which is 2,731,512.24 kg less than in 2018. In 2020, the volume of imports was 13,003,225.80 kg less than in 2019, having fallen by 15,734,738.04 kg since 2018.

For purposes of this broad overview, the focus was on volume comparisons of products intended for human consumption measured in kilogrammes. Meat, edible offal, hides and skins are all distinct categories of red meat products that are measured in kilogrammes. Genetic material, bovine semen specifically, is also recorded by SARS statistics in kilogrammes. Although more comparable with live animals in its use for artificial insemination, primarily in stud-breeding and dairy farming, it is treated separately as the unit of measurement is kilogrammes (kg). This is analysed separately later in this chapter. The same applies to hides and skins.

4.3.4 Live bovine animals imported and exported between 2018 and 2020

Live animals are categorised as primary industry in the agriculture sector. There is somewhat of a debate about the position of feedlots within this categorisation, and especially those with abattoirs of their own. For purposes of this research, feedlots are included in the primary industry category, as it is impossible to tell from the trade statistics which live animals were imported or exported for the purposes of feedlotting. There is a rebuttable presumption that breeding animals would unlikely be destined for a feedlot upon import or export. The difference is however irrelevant from an SPS point of view. In terms of SPS concerns, the intended use or destination of the animal is only potentially relevant in as far as the extent of a possible risk of exposure in the case of an infected animal entering or exiting the country is concerned.

The tariff codes, measured in "units" or per animal, are tariff codes 010239, 010231, 010290, 010229, and 010221. The table further below sets out the total volume of live bovine animals exported from South Africa during the period of review. Firstly however, it is important to understand that the classification "live bovine animals" does not necessarily refer to cattle only. The trade statistics provide for five different categories of bovine animals. It should be noted that what is classified under the five tariff codes is extensive, and each is considered separately since a separate tariff code

indicates a separate product group. The WCO Explanatory Notes describe cattle, buffalo and other as follows:

This heading covers all animals of the sub-family Bovinae, whether domestic or not and irrespective of their intended use (e.g., stock, raising, fattening, breeding, slaughter). These include, inter alia: (1) Cattle: This category covers bovine animals of the genus *Bos*, which is divided into four sub-genera: *Bos*, *Bibos*, *Novibos* and *Poephagus*. These include, inter alia: (A) The common ox (*Bos taurus*), the Zebu or humped ox (*Bos indicus*) and the Watussi ox. (B) The Asiatic oxen of the sub-genus *Bibos*, such as the gaur (*Bos gaurus*), the gayal (*Bos frontalis*) and the banteng (*Bos sondaicus* or *Bos javanicus*). (C) Animals of the sub-genus *Poephagus*, such as the Tibetan yak (*Bos grunniens*). (2) Buffalo: This category covers animals of the genera *Bubalus*, *Syncerus* and *Bison*. These include, inter alia: (A) Animals of the genus *Bubalus*, including the Indian or water buffalo (*Bubalus bubalus*), the Asiatic buffalo or arni (*Bubalus arni*) and the Celebes anoa or pigmy buffalo (*Bubalus depressicornis* or *Anoa depressicornis*). (B) African buffaloes of the genus *Syncerus*, such as the dwarf buffalo (*Syncerus nanus*) and the large Caffrarian buffalo (*Syncerus caffer*). (C) Animals of the genus *Bison*, i.e., the American bison (*Bison bison*) or "buffalo" and the European bison (*Bison bonasus*). (D) The Beeffalo (a cross between a bison and a domestic beef animal). (3) Other, including the four-horned antelope (*Tetracerus quadricornis*) and the spiral-horned antelopes of the genera *Taurotragus* and *Tragelaphus*.

The implications are far reaching when considering some of the observations regarding the origin of certain animals and their products noted throughout this section. Bovinae is a sub-family of the family bovidae and words such as *Taurotragus* and *Tragelaphus* refer to the genus and words such as *Bos indicus*, *Bos gaurus*, *Syncerus nanus*, and *Syncerus caffer* refer to the scientific name of the animal. The table below provides a summary of the tariff code and its corresponding description in the South African SARS tariff book. A breakdown of the total volume of live bovine animal imports and exports for the general period of review 2018 to 2020 is available in annexure 3.

Table 4-4: Tariff Code and description of all live bovine animals

Tariff Code		
010221	Cattle	Pure-bred breeding animals
010229	Cattle	Other
010231	Buffalo	Pure-bred breeding animals
010239	Buffalo	Other
010290	Other	

The tariff code 010229 (Cattle: Other) is by far the greater proportion of bovine animals both imported and exported during this period. This category of cattle is colloquially referred to as "commercial" cattle in South Africa. The combined volume of both imports and exports of all bovine animals traded during the period 2018 to 2020 was 999,494 (units). Tariff code 010229 accounts for 970,830 (units) of this amount or 97.13% in imports and exports combined. 010229 accounted for a volume of 80,439 (units) exports during this period and for a volume of 890,391 (units) imports. South Africa was, therefore, importing much more than it was exporting during this period. The "commercial" rather than stud breeding category of cattle is one which, in volume terms, is most vulnerable (compared to the other four live bovine tariff codes) to financial damage in the event of an SPS-related effect on the ability to export. The ability to import animals under the tariff code 010229 is clearly of significant importance to the local South African market as well. Considering 890,391 (units) were imported during a three-year period, the importance of SPS measures and the ability of importers to resolve delays in imports on grounds of disease outbreak is indisputable.

All live bovines are imported under the authority of the *Animal Diseases Act*, which is the only Act listed on the SARS prohibited and restricted Act as conferring authority on the importation of such live animals.

4.3.4.1 Cattle

The following table shows the total value (Rand) imported and exported between 2018 and 2020 for the two tariff codes classifying cattle.

Table 4-5: Cattle: Total value (Rand) imported and exported between 2018 and 2020

Trade Type	Tariff Code			Total value
Import	010221	Cattle	Pure-bred breeding animals	1,063,184
Import	010229	Cattle	Other	5,552,751,464

Trade Type	Tariff Code			Total value
Export	010221	Cattle	Pure-bred breeding animals	83,507,555
Export	010229	Cattle	Other	777,101,467

When considering the table below, which summarises the total volume (Units) imported and exported between 2018 and 2020, it is clear that 010229 remains the dominant tariff code in terms of both value and volume of imports and exports.

Table 4-6: Cattle: Total volume (Units) imported and exported between 2018 and 2020

Trade Type	Tariff Code			Total volume (Units)
Import	010221	Cattle	Pure-bred breeding animals	5,285
Import	010229	Cattle	Other	890,391
Export	010221	Cattle	Pure-bred breeding animals	6,203
Export	010229	Cattle	Other	80,439

Since 2019 was the year in which South Africa lost FMD-free status, 2019 is highlighted in italics and focused on in the analysis to follow. The table below shows a breakdown of the total volume (Units) of cattle exported between 2018 and 2020 by year.

Table 4-7: Cattle: Total volume (Units) exported between 2018 and 2020 by year

Year	Tariff Code			Total volume (Units)
2018	010221	Cattle	Pure-bred breeding animals	1,279
2018	010229	Cattle	Other	29,379
<i>2019</i>	<i>010221</i>	<i>Cattle</i>	<i>Pure-bred breeding animals</i>	<i>3,369</i>
<i>2019</i>	<i>010229</i>	<i>Cattle</i>	<i>Other</i>	<i>18,112</i>
2020	010221	Cattle	Pure-bred breeding animals	1,555

Year	Tariff Code	Total volume (Units)	
2020	010229	Cattle	Other
			32,948

In 2019, there were 11,267 (units) fewer commercial animals exported than during 2018. This number however increased by 14,836 (units) to 32,948 (units) in 2020. Imports also dropped in 2019 by 2,520 (units) from 2018. Imports dropped further by 35,625 (units) in 2020 compared to 2019. Table 3 in Annexure 3 shows the total volume (units) exported 2019 by month. In the annex, the emphasis in italics highlights the months January, February, March and April, the first quarter of 2019, January being the month of the confirmed FMD outbreak. Table 4 in Annexure 3 details the destination and volume (units) of exports from January to April 2019.

Finding that exports of live cattle had occurred during the first quarter of 2019 was a surprise. During the exploratory analysis, the expectation was that there would be no exports during January, February, March and April of 2019. There were exports under tariff code 010229 in January and February 2019. From March 2019, exports of both tariff codes 010221 and 010229 are noticeable. These exports were to the following countries: Lesotho, Mauritius, Mozambique, Swaziland, Zambia, and Zimbabwe. With the exception of Mauritius and Zambia, all are directly neighbouring countries to South Africa. From January to April 2019, live animals were certainly still moving across land borders within SADC. Movement was reduced but it was not zero.

The outbreak of FMD was confirmed on 7 January 2019, which is right at the beginning of the month. Immediate action by trading partners to ban movement is expected. In January 2019, 9,177 (units) fewer cattle were exported than in the same month in 2018. There is however an increase of 13,022 (units) in exports in January 2020 compared to January 2019 to 3,845 (units), which is more than even at pre-outbreak levels. It is true that a 3,845 units difference could be market-related⁵³² or determined by external factors; it is however not insignificant when considering the commercial value of those animals. Pure-bred breeding animals account for a very low volume of exports compared to cattle under tariff code 010229. Stud breeding is an entirely

⁵³² The market might simply not have had a demand for the specific product during this time due to factors unrelated to FMD.

different market to "commercial" breeding and this difference in units exported is therefore not surprising.⁵³³ It is impossible to know whether there was a misdeclaration of pure-bred breeding animals under 010229 instead of their declaration under 010221 during this period. As an FMD risk to the importing country, the difference in risk is debatable. Whether an animal is in a farming system of high stocking density, such as feedlotting, or low density, such as grazing on a ranch, the animal remains susceptible to FMD. There is however a different transmission risk and likelihood of spread or infection based on proximity to other animals, dependent on such farming practices.

The SARS prohibited and restricted list specifies the following with regard to animals imported under the tariff code 010221 "[i]mportation into the RSA from Malawi and Zimbabwe is prohibited, except under the permit from DG: Dept Agriculture, Marketing and Administration which is issued on the importer's request."⁵³⁴ The document further states that "RSA [may] only import live bovine animals from countries recognised by OIE to be free of FMD without vaccination." No such provisions are stated in the columns corresponding with 010229. Presumably the same requirements apply.

4.3.4.2 Buffalo

From an FMD perspective, the import and export of buffalo in trade statistics is significant. Buffalo are identified by the OIE as FMD carriers and as "the only persistently infected species."⁵³⁵ There are however buffalo that are classified as "FMD free", although this freedom from the virus does not guarantee freedom from future infection. The SARS prohibited and restricted list requires that buffalo undergo post-import quarantine and that they are imported only "from countries recognised by OIE to be free of FMD without vaccination."⁵³⁶ Buffalo also require written permission from

⁵³³ "Commercial breeding" broadly refers to the sale of non-stud animals bred for their meat bearing capacity, for example, for the stocking of feedlots, which ultimately provide abattoirs with animals for slaughter and further processing. These operations are run on specific timelines that account for optimal nutrition and weight gain in order to achieve a return on investment. Stud breeding is a longer process and does not account for as high an animal turnover as commercial breeding.

⁵³⁴ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

⁵³⁵ Article 8.8.1.6.

⁵³⁶ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

the Provincial Director of the province to which the buffalo are destined prior to import.⁵³⁷

Buffalo have increasingly become a wild bovine of choice for hobbyists, game ranchers and game ranchers breeding for hunting purposes in South Africa. In terms of trading volume, buffaloes are traded by far less by comparison to cattle. The total volume of all bovine animals traded during this period is 999,494 (units), where total bovine imports were 903,453 (units) and total bovine exports 96,041 (units). Buffalo account for 60 (units) of the total live bovines imported during the 2018 to 2020 period. Pure-bred breeding animals account for the entire total of 60 (units) as no "other" buffalo were imported under tariff code 010239 during this period. Pure-bred breeding animals accounted for 718 (units) in exports and "other" amounted to 52 (units) exports. The table showing this is table 5 in annexure 3.

Arguably there is a higher SPS focus in the case of buffalo imports, regardless of their volume as a result of the connection between FMD carrier status in buffalo and the FMD virus. The same should be true of exports. There are buffaloes bred and raised in a manner that classifies them as "FMD-free". This is however a status that can be lost if an FMD-free animal comes into contact with an infected animal. Nevertheless, as with any live bovine, the assumption is that before any import and export an array of tests and quarantine would be conducted. The table below summarises the total value (Rand) of buffaloes under the tariff codes 010231 and 010239 imported and exported between 2018 and 2020.

Table 4-8: Buffalo: Total value (Rand) imported and exported between 2018 and 2020

Trade Type	Tariff Code			Total value (Rand)
Import	010231	Buffalo	Pure-bred breeding animals	300,996
Export	010231	Buffalo	Pure-bred breeding animals	17,128,476
Export	010239	Buffalo	Other	2,140,454

⁵³⁷ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

There were no imports of tariff code 010231 during the period. The breakdown of buffalo exported between 2018 and 2020 per year is shown below. The year 2019 is highlighted again. As with cattle, exports of buffalo did not drop to zero during 2019.

Table 4-9: Buffalo: Total volume (Units) exported between 2018 and 2020 per year

Year	Tariff Code			Total volume (Units)
2018	010231	Buffalo	Pure-bred breeding animals	378
2018	010239	Buffalo	Other	14
<i>2019</i>	<i>010231</i>	<i>Buffalo</i>	<i>Pure-bred breeding animals</i>	<i>290</i>
<i>2019</i>	<i>010239</i>	<i>Buffalo</i>	<i>Other</i>	<i>15</i>
2020	010231	Buffalo	Pure-bred breeding animals	50
2020	010239	Buffalo	Other	23

The months directly after the January 2019 FMD outbreak also did not see exports drop to zero. As shown below, pure-bred breeding animals were exported during the first quarter of 2019.

Table 4-10: Buffalo: Total volume (Units) exported 2019 by month

Month	Tariff Code			Total volume (Units)
<i>02</i>	<i>010231</i>	<i>Buffalo</i>	<i>Pure-bred breeding animals</i>	<i>1</i>
<i>03</i>	<i>010231</i>	<i>Buffalo</i>	<i>Pure-bred breeding animals</i>	<i>48</i>
<i>04</i>	<i>010231</i>	<i>Buffalo</i>	<i>Pure-bred breeding animals</i>	<i>48</i>
<i>04</i>	<i>010239</i>	<i>Buffalo</i>	<i>Other</i>	<i>15</i>
08	010231	Buffalo	Pure-bred breeding animals	2
09	010231	Buffalo	Pure-bred breeding animals	2
10	010231	Buffalo	Pure-bred breeding animals	169
11	010231	Buffalo	Pure-bred breeding animals	20

Table 6 in annexure 3 shows the breakdown of destination and volume (units) of buffalo exports during 2019. Table 6 further shows that buffalo were exported to Lesotho, Mozambique, Namibia, and Zambia, during the first quarter of 2019. All exports during the first quarter were, again, to directly neighbouring countries, except for Zambia.

4.3.4.3 Other bovines - Wildlife

As quoted in the introduction above, the WCO Explanatory Notes describe the "other" live bovine animals tariff code (010290) as:

This heading covers all animals of the sub-family Bovinae, whether or not domestic and irrespective of their intended use (e.g., stock, raising, fattening, breeding, slaughter). These include, inter alia : ... (3) Other, including the four-horned antelope (*Tetracerus quadricornis*) and the spiral-horned antelopes of the genera *Taurotragus* and *Tragelaphus*.

Taurotragus refers to what is commonly known in South Africa as Eland and *Tragelaphus* to what is commonly known in South Africa as Kudu. The total value (Rand) of imported and exported animals under 010290 between 2018 and 2020 is shown in the table below.

As described above in the case of buffalo, the SARS prohibited and restricted list requires that other bovines also undergo post-import quarantine and that they are imported only "from countries recognised by OIE to be free of FMD without vaccination."⁵³⁸ These animals also require written permission from the Provincial Director of the province to which the other bovine are destined prior to import.⁵³⁹

⁵³⁸ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

⁵³⁹ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

Table 4-11: Other Bovines: Total value (Rand) imported and exported between 2018 and 2020

Trade Type	Tariff Code		Total value
Import	010290	Other	40,262,935
Export	010290	Other	64,150,548

There is not a large difference between the total number of units imported and exported during the period of investigation, as shown below.

Table 4-12: Other Bovines: Total volume (Units) imported and exported between 2018 and 2020

Trade Type	Tariff Code		Total volume (Units)
Import	010290	Other	7,717
Export	010290	Other	8,629

2019 did show a decrease in exports. The decrease is significant when compared to 2018. However, the question is whether this can reasonably be ascribed to the FMD outbreak in its entirety. Wildlife is in general a much less predictable industry than red-meat. There may be external, non-FMD related reasons for the sharp decrease, in addition to the FMD outbreak. As with the other live animals considered above, the decrease was not to zero. 1,169 live animals under tariff code 010290 were still exported from South Africa during 2019.

Table 4-13: Other Bovines: Total volume (Units) exported between 2018 and 2020 per year

Year	Tariff Code		Total volume (Units)
2018	010290	Other	5,359
2019	010290	Other	1,169
2020	010290	Other	2,101

Table 7 in annexure 3 shows the total volume (units) exported in 2019 by month. It is interesting to note that in the first quarter of 2019, more animals under tariff code 010290 were exported than in the rest of the year. The total number of animals exported under tariff code 010290 during 2019 was 1,169 (units). Of the 1,169 (units), 804 (units) were exported in the first quarter of 2019, during the period immediately following the announcement of an FMD outbreak and South Africa's loss of foot-and-mouth disease free status. Hence, 68.78% of the total exports for the year 2019 happened in the months immediately following the outbreak. The following table shows the destinations. It is unfortunate that the tariff code does not go further than the 6-digit level as it is impossible to tell, solely based on the statistics, what exactly the "other" bovines were.

Table 4-14: Other bovine: Destination and volume (Units) of exports during January to April 2019

Month	Country	Tariff Code		Total volume (Units)
01	Botswana	010290	Other	432
02	Botswana	010290	Other	96
03	Botswana	010290	Other	98
03	Kenya	010290	Other	2
04	Botswana	010290	Other	144
04	Namibia	010290	Other	2
04	Zambia	010290	Other	30

Without the benefit of more context, the reasons for the volumes exported during the first quarter of 2019 are speculation. By comparison, the volume of exports of commercial cattle (010229) in the first quarter of 2019 was 23.17% of 2019's total exports. It does however raise the question of "why" a higher percentage of other bovines were exported during these months than when compared to commercial cattle, a sector which, in as far as import value and volume is concerned, is a much

more significant industry than animals under the "other" tariff code of 010290. Is this a sign of protectionism evidenced by trade statistics? Is one product accorded grace immediately following an outbreak in a way that others are not? This might be or might not be the case. It is however peculiar that a product such as wildlife, which is presumably not really in competition among trading partners at any significant level, trades relatively normally immediately after an outbreak of FMD, whereas commercial cattle do not. It could be a matter of lack of comparable farming or ranching practice than with commercial cattle, making the difference or demand for more than one single animal at a time less likely to follow similar patterns to those of cattle.

4.3.5 Meat and edible offal

Meat and edible offal can be split into 5 categories. These are 1. Edible offal: fresh, chilled or frozen, 2. Edible offal: salted, in brine, dried or smoked, 3. Meat, offal or blood: prepared or preserved, 4. Meat: fresh or chilled, 5. Meat: frozen. The following table summarises the value of meat and edible offal imported and exported between 2018 and 2020.

Table 4-15: Meat and edible offal: Total value (Rand) imported and exported between 2018 and 2020

Trade Type		Total value (Rand)
Import	Edible offal: fresh, chilled or frozen	2,031,921,115
Import	Edible offal: salted, in brine, dried or smoked	33,132,154
Import	Meat, offal or blood: prepared or preserved	130,972,813
Import	Meat: fresh or chilled	51,544,745
Import	Meat: frozen	1,035,384,650
Export	Edible offal: fresh, chilled or frozen	356,234,487
Export	Edible offal: salted, in brine, dried or smoked	30,718,733
Export	Meat, offal or blood: prepared or preserved	507,238,187
Export	Meat: fresh or chilled	3,230,682,884
Export	Meat: frozen	2,798,537,463

By comparison, the following table shows the corresponding volume of the same products imported and exported during the same period.

Table 4-16: Meat and edible offal: Total volume (Kg) imported and exported between 2018 and 2020

Trade Type		Total volume (Kg)
Import	Edible offal: fresh, chilled or frozen	154,347,967.5
Import	Edible offal: salted, in brine, dried or smoked	210,375.9
Import	Meat, offal or blood: prepared or preserved	3,949,913.2
Import	Meat: fresh or chilled	1,297,066.3
Import	Meat: frozen	29,246,610.3
Export	Edible offal: fresh, chilled or frozen	15,617,211.4
Export	Edible offal: salted, in brine, dried or smoked	566,415.5
Export	Meat, offal or blood: prepared or preserved	408,197,171.4
Export	Meat: fresh or chilled	43,235,481.1
Export	Meat: frozen	48,086,309.5

Where relevant, each category of meat is analysed separately below. The variety of tariff codes within the categories is testament to the complicated and potentially problematic nature of generalising too broadly across an industry in an SPS event.

4.3.5.1 Meat

The trade statistics distinguish between meat with bones and boneless meat. This is also a relevant SPS consideration during and after disease outbreaks, especially from and FMD perspective since boneless meat is considered a safer commodity with which to trade where countries have been exposed to the FMD virus.

The SARS prohibited and restricted list requires that all meat, under the authority of the *Meat Safety Act*, be stopped for "state vet meat inspection" and that a veterinary import permit is required as well as a removal permit after SARS release.⁵⁴⁰

4.3.5.2 Meat (frozen) with bone in

The table below shows the trade statistics for Meat (frozen) with bone in. It shows the total volume (kg) imported and exported between 2018 and 2020. Note that there is a separate tariff code for Wagyu beef. This distinction is also seen in frozen, fresh or chilled and bone in and boneless meat in this chapter.

Table 4-17: Meat (frozen) with bone in: Total volume (kg) imported and exported between 2018 and 2020

Trade Type	Tariff Code		Total volume (Kg)
Export	020210	Carcasses and half-carcasses	952,171.68
Export	02022010	Other cuts with bone in	Wagyu beef 113,448.94
Export	02022090	Other cuts with bone in	Other 12,180,685.61
Import	020210	Carcasses and half-carcasses	64,526.30
Import	02022010	Other cuts with bone in	Wagyu beef 80,952.87
Import	02022090	Other cuts with bone in	Other 4,733,723.92

Wagyu is a collective name for the Japanese cattle breeds of Kuroge Washu, Mukaku Washu, Kage Washu or Akaushi and Nihon Tankaku Washu (or the Black, Brown, Shorthorn, and Polled breeds). In SPS or animal health terms, Wagyu is no different to any other cattle. It has split hooves and is susceptible to the same diseases as other bovidae.⁵⁴¹ The trade data start reflecting Wagyu under tariff code 02022010 from January 2015. This is an 8 digit tariff code, which means that 020210, which is the 6

⁵⁴⁰ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

⁵⁴¹ Japan Meat Information Service Centre 2022 <http://www3.jmi.or.jp/en/about.html> .

digit tariff code indicating that the product is "other cuts with bone in" frozen, was further defined by SARS to broadly specify from what type of cattle the cut with bone in originated. An application can be made to SARS for the insertion of 8 digit tariff codes such as this. This is an option available to other breeds as well and an option that exists for the industry to define cuts such as rump, fillet, sirloin etc in more detail as well. The benefit of an 8 digit tariff code is detail in trade statistics and other data for a later stage. The expansion to an 8 digit level is presumably strategic in this case, with the foreseeability of there being either specific duties applied to or removed for the import of Wagyu in the future, or the application of trade remedies. Had Wagyu been included in the tariff code 02022090 without any further distinction, it would be unknown that the percentage of the total volume allocated to Wagyu specifically is merely 1.66% or 80,952.87 kg of 4,879,203.09 kg imported produce in total between 2018 and 2020 and 0.86% or 113,448.94 kg of 13,246,306.23 kg of total exports for the period 2018 to 2020.

The following table shows the total volume of meat (frozen) with bone in exported between 2018 and 2020 per year. 2019, the year that South Africa lost FMD-free status, is highlighted.

Table 4-18: Meat (frozen) with bone in: Total volume (kg) exported between 2018 and 2020 per year

Year	Tariff Code			Total volume (Kg)
2018	020210	Carcasses and half-carcasses		673,817.74
2018	02022090	Other cuts with bone in	Other	4,609,689.76
2018	02022010	Other cuts with bone in	Wagyu beef	24,387.94
<i>2019</i>	<i>020210</i>	<i>Carcasses and half-carcasses</i>		<i>118,798.69</i>
<i>2019</i>	<i>02022090</i>	<i>Other cuts with bone in</i>	<i>Other</i>	<i>2,866,932.24</i>
<i>2019</i>	<i>02022010</i>	<i>Other cuts with bone in</i>	<i>Wagyu beef</i>	<i>66,330.01</i>
2020	020210	Carcasses and half-carcasses		159,555.25
2020	02022090	Other cuts with bone in	Other	4,704,063.61

Year	Tariff Code			Total volume (Kg)
2020	02022010	Other cuts with bone in	Wagyu beef	22,730.99

The summary of the total volume (kg) of meat (frozen) with bone in exported in 2019 by broken down by month is added to table 8 of annexure 3 and destination and volume (kg) of exports from January to April 2019 to table 9 annexure 3. If one compares the export performance of 020210, 02022010, and 02022090 between the first quarters of 2018, 2019, and 2020, then the following becomes apparent: South Africa exported 613,281.94 kg during the first quarter of 2019. That is 892,066.31 kg less than in the same period in 2018. The volume did however increase by 541,875.45 kg to 1,155,157.39 kg in total in the first quarter of 2020 from 2019.

During 2019 exports under tariff codes 020210, 02022010, and 02022090 went to the following countries: Botswana, Ghana, Lesotho, Mozambique, Nigeria, Qatar, Saint Helena, Swaziland, United Arab Emirates (UAE), Zimbabwe, Democratic Republic of Congo (DRC), "Ship or aircraft," Angola, Bahrain, China, Congo, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Guyana, Hong Kong, Kuwait, Maldives, Mali, Mauritius, Namibia, Netherlands, Senegal, Seychelles, Sierra Leone, Sudan, Tanzania, Vietnam, Zambia. What is also notable is that during 2019, 560.58 Kg was exported to the country "Ship or aircraft." This is a recurring odd observation throughout the data and across multiple tariff codes. During 2019, South Africa exported to the following SADC countries: Mozambique, Botswana, Lesotho, Zimbabwe, DRC, Namibia, Seychelles, Congo, Tanzania, Angola, Zambia, Mauritius.

4.3.5.3 Meat (frozen) boneless

The following table summarises the total volume of imports and exports of Meat (frozen) boneless imported and exported between 2018 and 2020.

Table 4-19: Meat (frozen) boneless: Total volume (kg) imported and exported between 2018 and 2020

Trade Type	Tariff Code			Total volume (Kg)
Export	02023010	Boneless	Wagyu beef	167,341.57
Export	02023090	Boneless	Other	34,672,661.67
Import	02023010	Boneless	Wagyu beef	87,771.55
Import	02023090	Boneless	Other	24,279,635.63

As with frozen bone-in meat, frozen boneless meat also defines Wagyu up to the 8 digit level. However, as with frozen bone-in cuts, it is also insignificant in volume in comparison to the volume of both imports and exports of other frozen boneless cuts for the period 2018 to 2020.

Table 4-20: Meat (frozen) boneless: Total volume (kg) imported and exported between 2018 and 2020 per year

Year	Trade Type	Tariff Code			Total volume (Kg)
2018	Export	02023090	Boneless	Other	10,873,461.44
2018	Export	02023010	Boneless	Wagyu beef	28,346.28
2018	Import	02023090	Boneless	Other	12,098,206.06
2018	Import	02023010	Boneless	Wagyu beef	31,605.25
2019	Export	02023090	Boneless	Other	8,759,686.51
2019	Export	02023010	Boneless	Wagyu beef	77,318.93
2019	Import	02023090	Boneless	Other	10,261,996.07
2019	Import	02023010	Boneless	Wagyu beef	54,554.74
2020	Export	02023090	Boneless	Other	15,039,513.72
2020	Export	02023010	Boneless	Wagyu beef	61,676.36
2020	Import	02023090	Boneless	Other	1,919,433.50
2020	Import	02023010	Boneless	Wagyu beef	1,611.56

The export of boneless Wagyu increased considerably by 48,972.65 kg between 2018 and 2019. The other tariff code shows fluctuations during this period, indicating that there was an effect on this section of the industry during the outbreak. When comparing by first quarter, boneless volumes fluctuated as follows. There was 887,088.86 kg less exported from South Africa during 2019 than during the same period in 2018, with an increase of 2,540,936.96 kg in 2020. This is also 1,653,848.10 kg more than during the same period in 2018.

There were several notable observations regarding the country of destination for products exported under the tariff codes 02023010 and 02023090 during 2019. Attention in the table below is drawn specifically to the volumes exported to the "Netherlands," "Ship or aircraft," "Unclassified," "Greece," and the "Falkland Islands."

Table 4-21: Meat (frozen) bone less: Total volume (kg) of notable non-SADC country exports during 2019

Month	Country	Tariff Code	Total Volume (Kg)
02	Netherlands	02023090	67,088.65
02	Ship or aircraft	02023090	432.56
04	Ship or aircraft	02023090	59.83
04	Unclassified	02023090	25.00
05	Unclassified	02023090	20.00
06	Netherlands	02023090	22,014.80
07	Unclassified	02023090	25,163.00
08	Ship or aircraft	02023090	25.00
08	Falkland Islands	02023090	2.00
09	Unclassified	02023090	30.00
10	Netherlands	02023090	69,565.60
10	Ship or aircraft	02023090	126.72
12	Netherlands	02023090	46,187.25
12	Greece	02023090	22,713.85

Month	Country	Tariff Code	Total Volume (Kg)
12	Ship or aircraft	02023090	38.59

A total of 204,856.30 kg was exported to the Netherlands during 2019. The country "Ship or aircraft" imported 682.70 kg and the country "Unclassified" imported 25,238.00 kg from South Africa during 2019. These findings in the trade statistics are significant. Despite the products being boneless, and therefore less of a concern in terms of FMD, these findings speak to a broader challenge in the process of importing and exporting. Countries such as "Unclassified" and "Ship or aircraft" do not exist. There is also a shared belief amongst the fieldwork interviewees that export to the EU is not possible. Yet, the volumes exported to the Netherlands are not negligible. The trade statistics show that at least one party is able to export to the Netherlands. Even more notable, however, is that the table above represents the 2019 period, and export to the Netherlands happened in February 2019, the month after the 2019 FMD outbreak.

If export for frozen boneless meat is possible to the Netherlands, for at least one party, possibly more, the assumption is that this possibility applies equally to others. The fact that industry is under the impression that it does not is a fact that supports the argument made in this research that processes such as negotiating market access in the wake of an SPS event or in the anticipation of a future one, is something that should be treated as public knowledge though a process that creates precedent for the future, for similar situations to be resolved in a similar manner. The export of frozen boneless meat to the EU is therefore possible, in that it has happened, according to the trade data.

4.3.5.4 Meat (fresh or chilled) bone in

The following table summarises the total volume of meat (fresh or chilled) with bone in imported and exported between 2018 and 2020. Fresh or chilled meat is typically more perishable than frozen meat.

Table 4-22: Meat (Fresh or chilled) with bone in: Total volume (kg) imported and exported between 2018 and 2020

Trade Type	Tariff Code		Total volume (Kg)
Export	020110	Carcasses and half-carcasses	5,173,643.3
Export	02012010	Other cuts with bone in	Wagyu beef 119,192.7
Export	02012090	Other cuts with bone in	Other 7,483,342.8
Import	020110	Carcasses and half-carcasses	684,279.5
Import	02012010	Other cuts with bone in	Wagyu beef 12.0
Import	02012090	Other cuts with bone in	Other 165,418.8

The table below shows the breakdown per tariff code for exports per year. 2019 is highlighted again as the outbreak year of FMD.

Table 4-23: Meat (fresh or chilled) with bone in: Total volume (kg) exported between 2018 and 2020 per year

Year	Tariff Code		Total volume (Kg)
2018	020110	Carcasses and half-carcasses	1,786,551.38
2018	02012090	Other cuts with bone in	Other 3,760,359.59
2018	02012010	Other cuts with bone in	Wagyu beef 36,258.70
<i>2019</i>	<i>020110</i>	<i>Carcasses and half-carcasses</i>	<i>1,175,776.92</i>
<i>2019</i>	<i>02012090</i>	<i>Other cuts with bone in</i>	<i>Other 2,022,106.69</i>
<i>2019</i>	<i>02012010</i>	<i>Other cuts with bone in</i>	<i>Wagyu beef 65,214.84</i>
2020	020110	Carcasses and half-carcasses	2,211,315.04
2020	02012090	Other cuts with bone in	Other 1,700,876.48
2020	02012010	Other cuts with bone in	Wagyu beef 17,719.16

The table above shows a total of 3,263,098.45 kg exported in 2019 versus a total of 5,583,169.67 kg in 2018. This is a decrease of 2,320,071.22 kg followed by an increase of 666,812.23 Kg in 2020 from a total of 3,263,098.45 kg in 2019. The destination of these exports in the SADC region is shown in the table below.

Table 4-24: Meat (fresh or chilled) with bone in: Total volume (kg) SADC country exports during January and February 2019

Month	Country	Total volume (Kg)
01	Mozambique	63,841.55
01	Lesotho	1,913.32
01	Botswana	94.15
02	Mozambique	49,909.47
02	Botswana	22,057.60
02	Lesotho	16,272.24
02	Zimbabwe	70.00
02	Congo	20.00

Mozambique continued importing significant quantities throughout the period immediately following the FMD outbreak. What is concerning, as with frozen boneless meat above and other products below, are the odd observations and incorrect recording of countries of destination. This is shown in summary for 2019 below.

Table 4-25: Meat (fresh or chilled) with bone in: Total volume (kg) of notable non-SADC country exports during 2019

Month	Country	Tariff Code	Total Volume (Kg)
01	Ship or aircraft	02012090	209.25
04	Ship or aircraft	020110	40.00
04	Ship or aircraft	02012090	160.00
08	Ship or aircraft	02012090	70.00

Month	Country	Tariff Code	Total Volume (Kg)
08	Unclassified	02012090	12.40
10	Falkland Islands	02012090	1,871.66
10	Ship or aircraft	02012090	230.00
11	Ship or aircraft	02012090	79.71

The country "ship or aircraft" does not exist. Where did this meat go? From an FMD perspective this is of particular concern since the meat is both chilled (not frozen) and bone in, which entails a much higher FMD risk. More so, what is the reason for such an odd description of country of destination? Is this a deliberate attempt to hide the true destination, is it an administrative error at the border or is there another reason? This is not the first odd observation noted, and not the last. Throughout, the questions posed above remain the same.

4.3.5.5 Meat (fresh or chilled) boneless

The table below shows the total volume of fresh or chilled, boneless meat imported and exported between 2018 and 2020.

Table 4-26: Meat (fresh or chilled) bone less: Total volume (kg) imported and exported between 2018 and 2020

Trade Type	Tariff Code			Total volume (Kg)
Export	02013010	Boneless	Wagyu beef	208,042.2
Export	02013090	Boneless	Other	30,251,260.1
Import	02013010	Boneless	Wagyu beef	799.8
Import	02013090	Boneless	Other	446,556.3

As with other meat, the overwhelming share of value is imported and exported under the "other" tariff code 0201390, not Wagyu.

Table 4-27: Meat (fresh or chilled) bone less: Total volume (kg) exported between 2018 and 2020 per year

Year	Tariff Code		Total volume (Kg)
2018	02013090	Boneless Other	8,415,799.89
2018	02013010	Boneless Wagyu beef	63,859.18
2019	02013090	Boneless Other	9,327,947.84
2019	02013010	Boneless Wagyu beef	5,228.76
2020	02013090	Boneless Other	12,507,512.34
2020	02013010	Boneless Wagyu beef	138,954.30

2019 is highlighted, showing an increase of 853,517.53 kg exported between 2018 and 2019. In other words, *more* fresh or chilled boneless meat was exported during the 2019 period than in the year before and even more in 2020, the year following the loss of South Africa's FMD-free status. There was an increase of 3,313,290.04 kg exported between 2019 and 2020, with both tariff codes seeing significant increases in volume exported. Notable export destinations in 2019 were the Netherlands, Norway, Ship or aircraft, and Unclassified. A total of 300,840.40 kg was exported to the Netherlands during 2019 and 263,405.85 kg to Norway in the same year.

4.3.5.6 Edible offal (Fresh, chilled or frozen)

The following tariff codes are included in the analysis of edible offal below: 02061010, 02061090, 020622, 020629, and 020621. The table below shows the total volume of imports and exports for the period of review for fresh, chilled and frozen edible offal.

Table 4-28: Edible offal (total fresh, chilled or frozen): Total volume (kg) exported between 2018 and 2020 per year

Trade Type	Total volume (Kg)
Export	15,617,211
Import	154,347,967

South Africa imported considerably more edible offal than it exported during the period 2018 to 2020, with there being 138,730,756.10 kg more edible offal under tariff codes 02061010, 02061090, 020622, 020629, 020621 imported than exported. The following table breaks this down per year.

Table 4-29: Edible offal (fresh, chilled or frozen): Total volume (kg) exported between 2018 and 2020 per year

Year	Tariff Code			Total volume (Kg)
2018	02061010	Of bovine animals, fresh or chilled	Livers	400,544.78
2018	02061090	Of bovine animals, fresh or chilled	Other	593,658.31
2018	020622	Of bovine animals, frozen	Livers	1,432,534.35
2018	020629	Of bovine animals, frozen	Other	2,509,936.79
2018	020621	Of bovine animals, frozen	Tongues	15,783.90
2019	02061010	<i>Of bovine animals, fresh or chilled</i>	<i>Livers</i>	<i>613,558.66</i>
2019	02061090	<i>Of bovine animals, fresh or chilled</i>	<i>Other</i>	<i>597,540.28</i>
2019	020622	<i>Of bovine animals, frozen</i>	<i>Livers</i>	<i>1,814,965.02</i>
2019	020629	<i>Of bovine animals, frozen</i>	<i>Other</i>	<i>2,385,254.07</i>
2019	020621	<i>Of bovine animals, frozen</i>	<i>Tongues</i>	<i>11,005.20</i>
2020	02061010	Of bovine animals, fresh or chilled	Livers	417,505.58
2020	02061090	Of bovine animals, fresh or chilled	Other	544,097.92
2020	020622	Of bovine animals, frozen	Livers	1,881,601.97
2020	020629	Of bovine animals, frozen	Other	2,374,167.15
2020	020621	Of bovine animals, frozen	Tongues	25,057.41

During 2019 South Africa imported a total of 2,173,875.02 kg less than in 2018. The volume decreased again between 2019 and 2020 by another 304,959.87 kg. The tariff code 020622 (frozen bovine livers) is one of the few tariff codes that saw an increase in imports between 2018 and 2019. In 2019, 1,000,061.27 kg more frozen bovine livers were imported than in 2018. 2020 also saw an increase in imports of the same

tariff code by a further 2,993,918.38 kg vis-à-vis 2019. Exports of the same tariff code continued to increase despite the FMD outbreak, as did exports for tariff code 02061010 (fresh or chilled bovine livers). The table below shows the countries from which imports of frozen livers (020622) originated during 2019, a tariff code that showed an increase in imports during 2019 despite there likely being more local products available during that time.

Table 4-30: Frozen Bovine Livers (020622): Countries imported from 2019

Country	Tariff Code			Total volume (Kg)
USA	020622	Of bovine animals, frozen	Livers	13,809,612.14
Australia	020622	Of bovine animals, frozen	Livers	8,358,002.31
New Zealand	020622	Of bovine animals, frozen	Livers	2,762,027.50
UK	020622	Of bovine animals, frozen	Livers	2,270,581.36
Ireland	020622	Of bovine animals, frozen	Livers	2,047,974.00
France	020622	Of bovine animals, frozen	Livers	1,499,844.43
Namibia	020622	Of bovine animals, frozen	Livers	137,149.05
Spain	020622	Of bovine animals, frozen	Livers	66,975.39
Netherlands	020622	Of bovine animals, frozen	Livers	25,756.73
Germany	020622	Of bovine animals, frozen	Livers	25,164.00

It is notable that a large quantity of frozen livers has been imported from countries in the Global North. By contrast, the table below shows the counties of destination for export of the same tariff code during 2019. These exports are all to directly neighbouring countries, with the exception of Angola and the Seychelles.

Table 4-31: Frozen Bovine Livers (020622): Countries Exported to in 2019

Country	Tariff Code			Total volume (Kg)
Botswana	020622	Of bovine animals, frozen	Livers	1,206,350.92
Namibia	020622	Of bovine animals, frozen	Livers	324,201.08
Swaziland	020622	Of bovine animals, frozen	Livers	221,792.39
Lesotho	020622	Of bovine animals, frozen	Livers	33,710.34
Mozambique	020622	Of bovine animals, frozen	Livers	25,635.71
Zimbabwe	020622	Of bovine animals, frozen	Livers	2,000.00
Angola	020622	Of bovine animals, frozen	Livers	1,228.84
Seychelles	020622	Of bovine animals, frozen	Livers	45.74

Fresh or chilled bovine livers (02061010) were also predominantly exported to directly neighbouring countries. However, the countries of destination "Unclassified" and "Ship or aircraft" sneak back into the picture. The quantity exported to "Ship or aircraft" is negligible; however, the 16 350 kg exported to "Unclassified" is not.

Table 4-32: Fresh or chilled Bovine Livers (02061010): Countries Exported to in 2019

Country	Tariff Code			Total volume (Kg)
Lesotho	02061010	Of bovine animals, fresh or chilled	Livers	351,678.18
Botswana	02061010	Of bovine animals, fresh or chilled	Livers	127,066.00
Swaziland	02061010	Of bovine animals, fresh or chilled	Livers	55,625.51
Mozambique	02061010	Of bovine animals, fresh or chilled	Livers	30,321.96
Namibia	02061010	Of bovine animals, fresh or chilled	Livers	28,977.75

Country	Tariff Code			Total volume (Kg)
<i>Unclassified</i>	<i>02061010</i>	<i>Of bovine animals, fresh or chilled</i>	<i>Livers</i>	<i>16,350.00</i>
Zimbabwe	02061010	Of bovine animals, fresh or chilled	Livers	3,500.00
Saint Helena	02061010	Of bovine animals, fresh or chilled	Livers	24.75
<i>Ship or aircraft</i>	<i>02061010</i>	<i>Of bovine animals, fresh or chilled</i>	<i>Livers</i>	<i>14.51</i>

Offal is a product or group of products that is used for several purposes. An animal is not slaughtered for the purposes of retrieving offal. It is therefore a by-product of the commercial slaughter of animals for meat. It is also a group of products that one could reasonably expect to be in higher demand in a country where the average income is low and many people cannot afford to buy more expensive cuts of meat for which an animal is primarily slaughtered.

4.3.6 Hides and skins

Hides and skins are for the most part a by-product of the meat trade. Animals in this regard are not generally slaughtered for their hides. Hides are utilised in an attempt to make some money from a useable by-product that would otherwise be discarded. Resultantly, trouble in the broader red-meat industry, or a delay in slaughtering or the ability to export has, as with offal, a direct impact on business operations in the leather industry. The table below shows the total value (Rand) of hides and skins imported and exported between 2018 and 2020. Contrary to what one might expect, South Africa also imports a total value of hides and skins that appears to be significant relative to the value exported.

Table 4-33: Hides and skins: Total value (Rand) imported and exported between 2018 and 2020

Trade Type		Total value (Rand)
Import	Hides and skins: raw hides and skins	104,014,962
Import	Hides and skins: tanned or crust hides and skins	529,327,496
Import	Leather: further prepared after tanning or crusting	889,580,329
Export	Hides and skins: raw hides and skins	322,710,021
Export	Hides and skins: tanned or crust hides and skins	1,983,197,207
Export	Leather: further prepared after tanning or crusting	2,465,661,088

The total volume (Kg) imported and exported between 2018 and 2020 shows that exports are more predominant in volume terms than imports.

Table 4-34: Hides and skins: Total volume (kg) imported and exported between 2018 and 2020

Trade Type		Total volume (kg)
Import	Hides and skins: raw hides and skins	13,334,631
Import	Hides and skins: tanned or crust hides and skins	6,515,272
Import	Leather: further prepared after tanning or crusting	5,331,190
Export	Hides and skins: raw hides and skins	43,205,297
Export	Hides and skins: tanned or crust hides and skins	85,964,684
Export	Leather: further prepared after tanning or crusting	7,982,728

As seen above, the totals of hides and skins are presented as one of three categories: raw, tanned or crust and leather. Their preparation, use and destinations vary significantly and, as such, each tariff code can be seen as a separate and distinct product.

4.3.7 Genetic material

Genetic material is a product that is easily left out of an analysis of the impact of FMD on imports or exports, despite the OIE's specific reference to it in the Terrestrial Code. Genetic material, in this case bovine semen, plays an important role in the development of any national herd. The practice of artificial insemination is one that allows for the introduction of "new genes" into the herd without necessitating the physical import or export of a bull. The SARS prohibited and restricted list states no requirements corresponding to this tariff code. It is highly unlikely that there is no documentary burden related to this product. This is more likely an indication that information is inaccessible as opposed to there being no requirements. The table below shows the total volume of genetic material imported and exported during the review period.

Table 4-35: Genetic material: Total volume (kg) imported and exported between 2018 and 2020

Trade Type		Total volume (Kg)
Import	Genetic material	39,849.64
Export	Genetic material	16,743.25

South Africa imported just more than double what it exported in volume terms during the review period.

4.3.8 Unusual findings in the trade statistics

During the exploratory analysis it became apparent that there are a number of country descriptions in the trade statistics that are a cause of concern from an SPS perspective. The extent of such discrepancies increases with each year added to the review period and they go back much earlier than 2018. To an extent, human error could have been singled out as the root cause of such findings. However, the sheer volume and repetition of these unusual findings require an explanation other than that of a capturing error. The following country descriptions have been identified as describing either country of origin or destination for imports or exports of red-meat products from

and to South Africa, "Ship or aircraft," "Unclassified," "South Africa," and "Origin Unknown." In theory, there is no reason to describe the country of origin or destination for a South African import or export in the way that it has been done in the trade statistics. The countries "Ship or aircraft," "Unclassified," and "Origin Unknown" obviously do not exist as sovereign states.

During the review period, South Africa exported an array of red-meat related products to the country declared as "Ship or aircraft." These were Meat: fresh or chilled, Meat: frozen, Edible offal: fresh, chilled or frozen, Meat, offal or blood: prepared or preserved, Hides and skins: raw hides and skins, Hides and skins: tanned or crust hides and skins, Leather: further prepared after tanning or crusting. The detail thereof is contained in table 13 of annexure 3.

There have also been both imports and exports from and to the country "Unclassified." The detail of this is contained in table 18 of annexure 3. What is a particular SPS concern is the fact that there have been 11,117 (units) live animals classifiable under 010229 imported during the 2018 to 2020 period and 122 (units) classifiable under 010290 imported during this period. The table below shows the detail of these imports. There are significant volumes imported during each of the three years under review.

Table 4-36: Import: Live bovine animals from Country Unclassified in the period 2018 to 2020

Year	Country	Tariff Code	Total Volume per unit	
2018	Unclassified	010229	Cattle	Other
				6,313
2019	Unclassified	010229	Cattle	Other
				4,237
2019	Unclassified	010290	Other	
				122
2020	Unclassified	010229	Cattle	Other
				567

The presence of an odd observation such as this in import statistics is concerning. It raises the question of the efficiency of the system at the particular points of entry through which these live animals entered. A live animal on its own is difficult to miss at a border post. It is unimaginable that 6,313 units in one year could be allowed to enter South Africa without there being any reliable record of their origin in the trade

statistics. With this knowledge, it is not surprising that trading partners are perceived as sceptical of South Africa's SPS controls by interviewees in the fieldwork data. If capturing data as crucial as the origin of an import has been omitted, what guarantee is there that other crucial information, controls or processes were followed? This is of particular concern considering the fact that the SARS prohibited and restricted list specifically lists these products as products that are prohibited or restricted and that can only be imported from FMD free countries.⁵⁴²

Although there were no exports to the country "Origin Unknown" during the 2018 to 2020 review period, there were imports to South Africa from such a destination. The table below shows varying volumes during all three years.

Table 4-37: Import from country: Origin Unknown

Year	Country	Tariff Code			Unit	Total Volume
2018	Origin Unknown	020622	Of bovine animals, frozen	Livers	kg	24,085.71
2018	Origin Unknown	02013090	Boneless	Other	kg	150.60
2018	Origin Unknown	16025090	Of bovine animals	Other	kg	24.00
2019	Origin Unknown	41015090	Whole hides and skins, of a mass exceeding 16 kg	Other	kg	10.00
2020	Origin Unknown	16025090	Of bovine animals	Other	kg	0.06
2020	Origin Unknown	41071190	Whole hides and skins	Full grains, unsplit	kg	12.80
2020	Origin Unknown	41071190	Whole hides and skins	Full grains, unsplit	kg	38.00

⁵⁴² SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

A persistent question that arises when considering odd observations is what is practically happening if consignments as large as those reflected in the odd observations are entering or exiting the country and not captured correctly? Does this imply that there was also not the necessary or corresponding SPS documentation? Does this mean that there was no thorough testing or inspection done at the border? If we are to assume that, for argument's sake, there was accompanying SPS documentation, why would the SARS record of origin or destination be as inaccurate as to repeatedly declare the country of origin or destination as "unclassified" etc.? There does not appear to be any obvious, legitimate explanation as to why, in the trade data, the origin of products is recorded as "unclassified."

4.3.9 Conclusion – trade statistics

The section above has provided an overview of the potential breadth and scope of products within the red-meat industry. The red-meat industry is also protected by SPS measures taken in the sense that these measures facilitate the trade in animals and animal products and can proactively prevent SPS events that affect trade.

Each category of product is potentially negatively affected by an SPS measure, or SPS-related barrier, whether the measure taken is justified or not. The trade data provide new insight that to test the existing assumption that, immediately following an FMD outbreak, there should usually be a decrease in export activity. In this regard, a conclusion that can be derived from the trade data above is that not all products suffer from the same decline in export volume immediately after an SPS event such as an FMD outbreak. The industry, as a whole did see a decline immediately after the 2019 outbreak, but the statistics somewhat challenge the assumption that immediately following an FMD outbreak, or any other SPS event, the export volumes fall to zero across all products. An example is live cattle exported under tariff code 010229 where there are exports recorded in January and February 2019 immediately after the FMD outbreak in South Africa, as opposed to zero.

A curious finding, related to the assumption that trade falls to zero after an SPS event such as FMD, is the fact that wildlife,⁵⁴³ which is presumably not really in competition

⁵⁴³ Tariff code: 010290.

among trading partners at any significant level, trades relatively normally immediately after an outbreak of FMD, whereas commercial cattle⁵⁴⁴ do not. The finding that the volume of exports of commercial cattle in the first quarter of 2019 was 23.17% of 2019's total exports compared to 010290 where 68.78% of the total exports for the year 2019 happened in the months immediately following the outbreak is at least enough to raised concerns surrounding protectionism potentially evidenced by trade statistics. The data suggests that one product, potentially seen as less competition in the domestic industry of importing trading partners, was accorded grace immediately following an outbreak in a way that others are not.

The trade data both confirms and challenges the assumption that the EU is not open as an export destination for South African red-meat products, even during the outbreak of a disease as an SPS event. There was a general perception amongst the interviewees that exports to the EU are not possible. The data shows that there are exports that have occurred where the country of destination was declared as the Netherlands. These exports are, however, limited relative to other volumes. It is unclear from the statistics alone what the reasons for this finding are and from who in South Africa the exports originated. The low volume of exports does not in itself negate the perspective of interviewees. It likely suggests that in general, the perception that export to the EU is impossible is true, but that limited exceptions have been made, that are either unknown to the interviewees or unavailable to them for other reasons.

The trade data has provided new information that is relevant in an SPS context in that the data captures odd declarations of country of origin or destination for a variety of products. The implications of this, on SPS grounds, is potentially significant as it indicates a weakness in protecting human, animal and plant life and health due to lack of verifiable data regarding origin and destination of products. The odd observations support the views and sentiment shared across interviewees related to a lack of trust in the SPS control at South African borders. As described in part one above, trust directly relates to how interviewees have described what they believe to be the perception that South Africa's trading partners have of South Africa's SPS controls.

⁵⁴⁴ Tariff code: 010229.

CHAPTER 5 AN ANALYSIS OF SOUTH AFRICAN LEGISLATION IN THE CONTEXT OF SANITARY AND PHYTOSANITARY MEASURES

5.1 Introduction and overview of chapter

The following chapter analyses the South African SPS-related legislation in the context of SPS-related non-tariff barriers to trade. During the fieldwork conducted as part of this research, interviewees were asked semi-structured questions relating to legislation. The interviews included a general discussion relating to legislation interacted with or applied by the specific interviewee, as well as legislation as it related to international obligations. There were also instances where in other categories of talking points, such as standards, barriers, dispute resolution and the 2019 FMD outbreak in which interviewees referred to legislation. In Chapter 4 the following points, relevant to Chapter 5, which are fundamental to the overarching themes of trust, or lack thereof, and communication, were identified.

Interviewees shared views that the legislation within their experience is limiting and does not provide an enabling environment in which to adequately address SPS-related requirements. It was also apparent in the fieldwork data that the existing legislation has caused substantial uncertainty across the group of interviewees and there is a perception that legislation is a limiting factor as far as making progress on matters related to SPS is concerned. There were views, within this context, expressed that related to the documents called VPNs and SOPs, as well as their legitimacy and legal status in specific circumstances. Interviewees expressed limited trust in the usefulness of the existing legislation and that this adds to the breakdown in communication, particularly when matters concerning disputed regulations or requirements arise. Interviewees raised concerns that, in their understanding, regulations are frequently beyond the scope of the legislation under which they are created. Interviewees were concerned about the process of and options related to dispute resolution and there exists a common sentiment of disillusion in the ability of legislation to effect any relief or change in the individual's or group's situation. As far as enforcement is concerned, interviewees expressed the view that legislation, regulations and controls were not enforced equally across the formal and informal sectors. Part of the conclusion made

in Chapter 4 is also that there is a need for trust in the transparency and necessity of the process, trust in the implementation mechanisms and institutions, and trust in the equal application of the law and the existence of the rule of law.

Chapter 5 turns to the legislation itself and analyses the identified SPS-related legislation in the context of sanitary and phytosanitary measures. As stated in Chapter 1, this research has undertaken the following:

With a focus on the role of legislation and the perspectives of selected actors in the red-meat industry, the primary objective of this research is to identify and explore persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. Related to this is the objective to recommend potential solutions to the identified challenges with specific focus on SPS-related barriers or disputes that are beyond the scope of the World Trade Organization (WTO), that are not necessarily related to science, and SPS matters that affect private parties without recourse to the WTO.

This chapter contributes to answering the main research question by providing insight into the legislative framework as a barrier to SPS regulation. It also provides an analysis of what options are practically available to an aggrieved party, there being no recourse for private parties to the WTO. These are typically non-governmental parties, or private actors within the industry. The chapter contains a doctrinal analysis and an exploratory content analysis, and it is split into two parts. The chapter adds to the insight from which the conclusions and recommendations in Chapter 6 are derived.

Part one: South Africa's SPS-related legislative framework. Part 1 starts with the contextualisation of SPS-related legislation within the broader South African legal order and provides an overview of the role of administrative law alongside SPS legislation as well as the roles of relevant government departments charged with administering SPS legislation. Part 1 defines the scope and limitations of the legislation analysed in this research. The scope and limitations apply to the legislation considered in part two as well. Part 1 is largely focused on the analysis of SPS-specific legislation, its suitability specifically as an SPS-specific legislative framework and the dispute resolution options that it provides to affected persons in South Africa. The analysis

primarily focuses on the pieces of legislation applicable to red meat and makes reference where relevant to the views or guidelines of the OIE.

Part two: An exploratory content analysis of SPS-related rights, obligations and principles in the SPS-related framework. Part 2 is a non-typical analysis of legislation and an exploration of South Africa's SPS-related legislation in relation to the content of international rights and obligations. There are two different analyses done. The first analysis is one that searches for an indication of WTO-SPS, SADC-SPS and AfCFTA-SPS-related rights and obligations within the South African SPS-related legislative framework. The second is an analysis of the OIE core terms related to the OIE's Terrestrial Code, Terrestrial Manual and Core FMD-related terms. The data focuses on the concentration of unique combinations of specific rights and specific obligations identified in the three agreements (WTO, SADC and AfCFTA) and the OIE data.

5.2 Part One: South Africa's SPS-related legislative framework

5.2.1 Criteria applied in the selection of legislation

Certain criteria were applied in the selection of specific pieces of legislation within the scope of this part. There are pieces of legislation that are on the periphery of the criteria, yet, where relevant, these are also included in analysis. The chapter also includes a discussion of the relevant Constitutional provisions and aspects of administrative law.

In South Africa, different types of legislation are recognised by the Constitution. These are national legislation and provincial legislation.⁵⁴⁵ Various online resources exist listing both current and repealed South African agriculture laws, including veterinary laws.⁵⁴⁶ In the identification of SPS-related legislation, in the broad sense, the application of criteria was purposefully not limited to red meat. As legislation is divided

⁵⁴⁵ The Constitution of the Republic of South Africa, 1996 s239.

⁵⁴⁶ The Library of the University of the Witwatersrand <https://libguides.wits.ac.za/c.php?g=145268&p=952475>, The Library of the University of Pretoria <https://up-za.libguides.com/c.php?g=426995&p=6787376>.

into categories of SPS-related legislation, legislation specific to the red-meat industry is identifiable in the red-meat-specific category - RM.

Four categories were used to filter relevant agriculture-related legislation into SPS-related legislation. An Act qualified to form part of the SPS-related framework analysed in this research if the Act satisfied one of the following criteria:

- (i) On a reading of the Act's long title, the wording provided a *prima facie* indication that the Act was concerned with either human health, human life (in as far as it relates to matters within the scope of SPS law), human food safety, plant health, plant life, animal health, animal life, animal food safety, import or export of agricultural products or livestock, additives or contaminants, SPS standards, or standards in general that potentially fall within the scope of SPS law;
- (ii) On a reading of the Act, a specific section of the Act may potentially authorise or in itself be considered a measure related to either human health, human life (in as far as it relates to matters within the scope of SPS law), human food safety, plant health, plant life, animal health, animal life, animal food safety, import or export of agricultural products or livestock, additives or contaminants, SPS standards, or standards in general that potentially fall within the scope of SPS law;
- (iii) The Act specifically describes a purpose or objective in a specific section which qualifies the Act as being within the scope of SPS law;
- (iv) The Act falls within the periphery of SPS law in that it does not directly relate to any of the categories in points one and two, but it potentially serves as supporting measure and is thus related to the technical support and implementation of any of the categories above, or if it was included in a Department of Agriculture, or WTO Trade Policy Review's list of relevant SPS legislation.

The outcome of this process is the following list of SPS-related legislation,⁵⁴⁷ divided into the categories defined in the table below:

Legislation	Category of legislation
Genetically Modified Organisms Act 15 of 1997	Broader SPS-related legislation (BR)
Liquor Products Act 60 of 1989	Broader SPS-related legislation (BR)
Tobacco Products Control Act 83 of 1993	Broader SPS-related legislation (BR)
Agricultural Pests Act 36 of 1983	Core red-meat-related SPS legislation (RM)
Animal Diseases Act 35 of 1984	Core red-meat-related SPS legislation (RM)
Animal Health Act 7 of 2002 (not in use yet)	Core red-meat-related SPS legislation (RM)
Meat Safety Act 40 of 2000	Core red-meat-related SPS legislation (RM)
Animal Improvement Act 62 of 1998	Legislation on the periphery of SPS (PER)
Conservation of Agricultural Resources Act 43 of 1983	Legislation on the periphery of SPS (PER)
National Environmental Management Biodiversity Act 10 of 2004	Legislation on the periphery of SPS (PER)
National Environmental Management Protected Areas Act 57 of 2003	Legislation on the periphery of SPS (PER)
Plant Improvement Act 53 of 1976	Legislation on the periphery of SPS (PER)
Animals Protection Act 71 of 1962	Legislation on the periphery of SPS (PER)
Agricultural Product Standards Act 119 of 1990	Legislation related to inputs and technical requirements (ITR)
Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947	Legislation related to inputs and technical requirements (ITR)
Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972	Legislation related to inputs and technical requirements (ITR)
Medicines and Related Substances Act 101 of 1965	Legislation related to inputs and technical requirements (ITR)
National Regulator for Compulsory Specifications Act 5 of 2008	Legislation related to inputs and technical requirements (ITR)
Agricultural Produce Agents Act 12 of 1992	Legislation supporting control, inspection and approval procedures (SCI)
Consumer Protection Act 68 of 2008	Legislation supporting control, inspection and approval procedures (SCI)

⁵⁴⁷ Relevant regulations under the Acts identified are automatically included in the second part of this chapter. Part one is predominantly limited to enabling legislation, and for the most part does not include regulations in general.

Legislation	Category of legislation
Disaster Management Act 57 of 2002	Legislation supporting control, inspection and approval procedures (SCI)
Fencing Act 31 of 1963	Legislation supporting control, inspection and approval procedures (SCI)
Marketing of Agricultural Products Act 47 of 1996	Legislation supporting control, inspection and approval procedures (SCI)
Stock Theft Act 57 of 1959	Legislation supporting control, inspection and approval procedures (SCI)
Animal Identification Act 6 of 2002	Legislation supporting control, inspection and approval procedures (SCI)
Perishable Products Export Control Act 9 of 1983	Legislation supporting control, inspection and approval procedures (SCI)

The list differs from that of the Department of Agriculture⁵⁴⁸ and that of the WTO's Trade Policy Reviews⁵⁴⁹ in that it is longer and thus the analysis benefits both by being broader in scope and by retaining the benefit of detail. It is beyond the scope of this research to analyse every aspect of each act critically. The scope is that of dispute resolution, barriers and the SPS needs of the red-meat industry, specifically in the context of foot-and-mouth disease.

⁵⁴⁸ The Daff Food Import and Export Standards Draft Sanitary and Phytosanitary Strategy 2014 lists the following SPS legislation: *Agricultural Pests Act* 36 of 1983; *Agricultural Product Standards Act* 119 of 1990; *Animal Diseases Act* 35 of 1984; *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947; *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972; *Liquor Products Act* 60 of 1989; *Meat Safety Act* 40 of 2000; *Medicines and Related Substances Act* 101 of 1965; *National Regulator for Compulsory Specifications Act* 5 of 2008.

⁵⁴⁹ The WTO Trade Policy Review Report by the Secretarate Southern African Customs Union (Revision) Wt/Tpr/S/324/Rev.1 306 lists the following legislation: *Agricultural Pests Act* 36 of 1983; *Agricultural Product Standards Act* 119 of 1990; *Animal Diseases Act* 35 of 1984; *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947; *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972; *Liquor Products Act* 60 of 1989; *Meat Safety Act* 40 of 2000; *Medicines and Related Substances Act* 101 of 1965; *National Regulator for Compulsory Specifications Act* 5 of 2008.

5.2.2 The contextualisation of SPS-related legislation within the broader South African legal order

5.2.2.1 Introduction

There are three official governmental departments in South Africa that share responsibility for sanitary and phytosanitary related matters and measures. These are the Department of Agriculture, Land Reform and Rural Development (DALRRD), the National Regulator for Compulsory Specifications (NRCS), which falls under the Department of Trade, Industry and Competition (DTIC), and the Department of Health (DOH). Each department has at least one specific directorate within it responsible for different aspects of SPS regulation. These range from animal health and food safety to compulsory specifications. The Department of Agriculture has the majority share of responsibility in terms of the number of directorates within the department that are involved. There are six directorates under the Department of Agriculture that serve different but overlapping purposes in terms of SPS regulation. These are the directorates of Animal Health (AH), Veterinary Public Health, Plant Health, Food Safety and Quality Assurance (DFSQA), Food Import and Export Standards, and Inspection Services. There is an overlapping mandate between two of the Department of Agriculture Directorates, namely those of Food Safety and Quality Assurance and Veterinary Public Health, with the Department of Health and the National Regulator for Compulsory Specifications, when it comes to SPS matters related to food safety.

The Department of Agriculture has in the past quoted section 27(1)(b) of the Constitution as providing it a constitutional mandate, quoting the section as follows:

regarding health care, food, water & social security, [section 27(1)(b)] states that every citizen should have access to sufficient, safe food & water.⁵⁵⁰

The above quotes section 27(1)(b) incorrectly, however. The section does not refer to "safe food and water" but to "sufficient food and water."⁵⁵¹ Presumably, the fact that food should be safe is implied. Assuming this to be a correct interpretation and to

⁵⁵⁰ Machedi "Import and Export Inspection and Certification of Animal and Animal Products: Directorate Inspection Services (DALRRD)".

⁵⁵¹ The Constitution of the Republic of South Africa, 1996 s27(1)(b).

constitute justification for the actions which the department undertakes in the context of SPS-related decisions, the implication is that this does not only apply to negative clauses, rights, or obligations, but positive ones too. What "safe food" is, is objective through an SPS lens. It is untainted by political policy, perception or preference. It is based on facts, in particular scientific facts, and in the case of SPS regulation, international rights, obligations, principles and guidelines.

There are however principles, rights and obligations applicable to the realisation of safe trade in food, animals and animal products. These are contained in the WTO-SPS and include basic rights and obligations, such as the right of WTO Members to take measures and only to the extent necessary, basing them on science without arbitrarily or unjustifiably discriminating against similar conditions.⁵⁵² The Agreement also addresses harmonisation of SPS measures;⁵⁵³ acceptance of the equivalence of other Members' SPS measures;⁵⁵⁴ the basis of SPS measures on a risk assessment appropriate to the context;⁵⁵⁵ adaptation of SPS measures to the sanitary and phytosanitary characteristics of the specific area;⁵⁵⁶ transparency and notification of

⁵⁵² Article 2 states that: "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)."

⁵⁵³ Article 3.

⁵⁵⁴ Article 4.

⁵⁵⁵ Article 5.

⁵⁵⁶ Article 6 states: "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 consider, 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 organisations. 2) Members shall, in particular, recognise the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall

changes in measures;⁵⁵⁷ and principles related to control, inspection and approval procedures involved in checking Member fulfilment of SPS measures.⁵⁵⁸ These are elaborated on in more detail in part two of this chapter.

The WTO-SPS also recognises the role of the standard setting bodies, OIE, IPPC and Codex Alimentarius in attaining these goals, and in particular the requirement that "Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."⁵⁵⁹

This research, as other chapters have also emphasised, is not concerned with what *must* be contained in a legislative framework, but rather poses questions such as is there an SPS-specific legislative framework? Whether the answer is yes or no, to what extent is it enabling or prohibitive in terms of providing an avenue for the resolution of SPS or SPS-related disputes at a national level? The chapter also explores the options available to private parties in the SPS chain who do not have recourse to the WTO on account of not being a "Member" who are actually engaging in trade. This research has sought to emphasise that there are real consequences to national action or inaction in an SPS context, and that the outcome of either is felt more broadly than just by exporters or importers.

5.2.2.2 Administrative law and the Promotion of Administrative Justice Act 3 of 2000

In South Africa, the Constitution is supreme.⁵⁶⁰ The Constitutional Court (CC) makes decisions relating to constitutional matters and decides on the constitutionality of legislation or executive/administrative action.⁵⁶¹ In terms of the Constitution, there are a number of functional areas regarding which the national and provincial levels have concurrent legislative competence. Agriculture is one of them, as is trade, animal

be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls..."

⁵⁵⁷ Article 7.

⁵⁵⁸ Article 8.

⁵⁵⁹ Article 2(3).

⁵⁶⁰ S2 of The *Constitution of the Republic of South Africa, 1996* states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

⁵⁶¹ The Constitution of the Republic of South Africa, 1996 S167.

control and diseases, disaster management, consumer protection, and environment.⁵⁶² Provinces have exclusive competence over abattoirs and veterinary services.⁵⁶³

Another "layer" or field of law with which most other fields of law co-exist and interact, is administrative law.⁵⁶⁴ This is a field of law that is rooted in the Constitution and that finds broader application in South African society through the *Promotion of Administrative Justice Act* (PAJA). PAJA defines a "decision" as:

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing of an administrative nature,
- and a reference to a failure to take a decision must be construed accordingly.⁵⁶⁵

From an SPS perspective, there are obvious sections which would bring decisions within the SPS context within the definition of a "decision" in terms of administrative law. In particular, sub-sections (b), (c), (d) and (g). are relevant here. The empowering provisions under which such decisions are made can be any one of the provisions in the SPS-related legislative framework. What is an empowering provision in the SPS context? It is defined in PAJA as:

a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.⁵⁶⁶

⁵⁶² The Constitution of the Republic of South Africa, 1996 Part A of Schedule 4.

⁵⁶³ The Constitution of the Republic of South Africa, 1996 , Part A of Schedule 5.

⁵⁶⁴ Geo Quinot in a presentation to conlutants in industry, 2021.

⁵⁶⁵ Promotion of Administrative Justice Act 3 of 2000 s1.

⁵⁶⁶ Promotion of Administrative Justice Act 3 of 2000 s1.

Of significance in an SPS context is the inclusion of "an agreement, instrument or other document in terms of which an administrative action was purportedly taken". This would potentially include SPS-related decisions made on the authority of a VPN or SOP and in terms of OIE rights or obligations for example, or the guidelines of any of the other ISSBs which provide guidance in terms of, for example, control, inspection, approval or testing where relevant. This is a field of law that can get very technical and the application of guidelines will always be determined by the circumstances.

Action in the sphere of SPS regulation will often qualify as administrative action within the meaning of section 1 of PAJA. For an action to amount to administrative action under PAJA, the elements identified in *Defence and Military Veterans v Motau and Others* are guiding. The Constitutional Court stated in this case that:

The unwieldy definition [of section 1 PAJA] can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.⁵⁶⁷

⁵⁶⁷ *Defence and Military Veterans V Motau and Others* 2014 (5) SA 69 (CC) Para 33. According to S1 of PAJA: "'administrative action' means any decision taken, or any failure to take a decision, by- fa) an organ of state, when- (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4) , 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution; (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2) , 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution; (cc) the executive powers or functions of a municipal council; (dd) the legislative functions of Parliament, a provincial legislature or a municipal council; (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law; (ff) a decision to institute or continue a prosecution; (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law; [Para, (gg) substituted by s. 26 of Act 55 of 2003 (wef 31 March 2005).] (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or (ii) any decision taken, or failure to take a decision, in terms of section 4 (1)."

Quinot and Maree suggest that "from a strategic point of view it would be sensible to start with the last element, since an action can never qualify as administrative action if it is expressly excluded by the definition regardless of whether it complies with all the elements".⁵⁶⁸ The court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* held that:

In s 33 the adjective 'administrative', not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.⁵⁶⁹

The approach described above is what is referred to as the "functional approach" and is entrenched by this decision, thus moving away from an institutional approach.⁵⁷⁰ Private entities can also find their activities being subject to administrative law under the functional approach in terms of the precedent of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*.⁵⁷¹ The court held in this case that:

The fact that the Minister passed on the regulatory duty means that the function performed must, at least, be a public function.⁵⁷² The extent of the control exercised by the Minister over the functioning of the Council also shows that the function is public rather than private.⁵⁷³

⁵⁶⁸ Quinot and Maree "Administrative Action" 82.

⁵⁶⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) Para 141. Section 33 of the Constitution states: "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration."

⁵⁷⁰ Quinot and Maree "Administrative Action" 76.

⁵⁷¹ Quinot and Maree "Administrative Action" 78.

⁵⁷² *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 43.

⁵⁷³ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 44.

The implication of this judgement is that, in an SPS context, the functions of official or unofficial assignees in the sphere of control, inspection or other duties are public functions, even if performed by private parties. Hence, under the functional approach, they are subject to administrative law. PAJA also creates the possibility through the definition of administrator including "any natural or juristic person taking administrative action".⁵⁷⁴ As far as policy is concerned, in *Permanent Secretary, Department of Education and Welfare, Eastern Cape, And Another v Ed -U-College*, Justice O'Regan stated the following:

It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.⁵⁷⁵

This distinction is of particular importance in SPS regulation. SPS-related policy should, for the most part, fall into the latter category of policy, policy which is formulated in the narrower sense removed from political decision-making and therefore constituting administrative action. The reason for this categorisation is the nature of SPS policy. It functions within the internationally agreed framework, balancing the interests of food safety and animal health and the right to implement such protection, with principles of free trade and fairness, guarding against the urge to protect domestic industries beyond the limits that SPS regulation is intended to provide. For political considerations to play a part in such policy would be grossly inappropriate and out of place in an SPS context. There may be political decisions of relevance to policy in broader agriculture, but, in as far as SPS-related decisions are concerned, political policy should not interfere with the unique purpose of science-based protection of human, animal and plant life and health in the trade of agricultural goods. As a discipline, SPS law is not concerned with broader policy concerns such as job creation or transformation. In an SPS context, there should be continuity and predictable, appropriate SPS protection,

⁵⁷⁴ *Promotion of Administrative Justice Act* 3 of 2000, s1, definition of "administrator".

⁵⁷⁵ *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed -U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 18.

regardless of the political regime in power, for as long as South Africa is a member of the WTO. What Justice O'Regan's quotation, and the precedent referred to above, mean for an SPSs context in South Africa is that, as far as documents such as SOPs and VPNs are concerned, they are subject to administrative law in that they are formulated as policy in the narrower sense in the implementation of legislation. They do not embody political decisions. Their formulation constitutes administrative action.

The difficulty with such documents, as already indicated in Chapter 4, is that VPNs are not defined in any of the legislation analysed in this research, nor are they referred to in the body of those Acts' text. Presumably, they are written under the authority of one of the broad, catch-all regulation sections, such as that of the *Meat Safety Act*, which empowers the Minister to make regulations:

generally with regard to any other matter which it is necessary or expedient to prescribe in order to achieve or promote the objectives of this Act.⁵⁷⁶

However, section 22 specifically grants powers to make *regulations*, which suggests they need to follow specific processes and be published in the Government Gazette and theoretically be recorded under the list of regulations of the Act, which is not the case. If it is policy, as some fieldwork participants have described it, it certainly falls into the category of policy to which administrative law applies. It is then unclear in terms of what official mandate such policy is made. Sections such as section 22(i) are problematic in that they open the door for arbitrary, non-SPS-related regulation beyond the scope of the Act to creep in which may, at some stage, include broader policy unrelated to the purpose and objectives of SPS. In any case, any administrative action taken needs to be lawful, i.e. there needs to be an empowering provision.⁵⁷⁷ The *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* case, which was heard by the Constitutional Court before the enactment of PAJA, stated the following:

It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim

⁵⁷⁶ *Meat Safety Act* 40 of 2000, s22(i).

⁵⁷⁷ Quinot and Anthony "Lawfulness", 146.

Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality...⁵⁷⁸ There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action' the principle of legality is enshrined in s 24(a). In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question.⁵⁷⁹

Fedsure essentially summarises the PAJA ground for review in the case of unlawful action.⁵⁸⁰ In the fieldwork, there were interviewees that expressed views that decisions were made beyond the scope of certain Acts or that regulations were made "ultra vires". Looking at the legislation itself, it is not difficult to imagine a scenario where these claims may be correct.

Although not intended to be a type of "safety net", administrative law is a second layer of law alongside SPS law. In a field as technical as SPS law, with a legislative framework that lacks fundamental detail, purpose and scope, administrative law is a field that provides options where they do not otherwise exist. It does not make up for their absence but it does ensure some legal recourse that would otherwise not be there.

5.2.3 An overview of South Africa's SPS related legislative framework in the context of the red meat industry and OIE FMD-specific guidelines

5.2.3.1 Introduction

For an animal or animal product to enter or exit South Africa, there are multiple documents involved. These are the Veterinary Import Permit (VIP), the Veterinary Health Certificate (VHC), the Animal Improvement Permit (AIP), the Bill of Entry and the Customs Notification (CN 1 and CN 2) forms.⁵⁸¹ At the border, the original VIP, VHC

⁵⁷⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58.

⁵⁷⁹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 59.

⁵⁸⁰ Quinot and Anthony "Lawfulness" 147.

⁵⁸¹ Machedi "Import and Export Inspection and Certification of Animal and Animal Products: Directorate Inspection Services (DALRRD)".

and other documents are presented.⁵⁸² In a 2021 online SPS workshop, the Department of Agriculture was vocal about the fact that legislation is fragmented and cited this in multiple presentations as contributing to challenges related to SPS.⁵⁸³

South African SPS-related legislation is notoriously vague in its description of who an executive officer and what exactly their job description is. It is common for the words "executive officer" to be defined no more than it "means an officer designated in terms of" whichever specific section of the Act deals with delegation or administration of the Act.⁵⁸⁴ For example, in the *Agricultural Pests Act*, an executive officer is defined as "an officer designated in terms of section 2 (1)" in section 1. Section 2(1) states:

The Minister shall designate as many officers of the department as he may deem necessary as executive officers, who shall, subject to the instructions of the Minister, exercise the powers and perform the duties conferred or imposed upon an executive officer under this Act.⁵⁸⁵

Section 2(1) does not clarify the identity of the executive officer. It may be clear to a legal professional with experience in the language of legislation.⁵⁸⁶ It is potentially not clear to an individual who is immediately affected by the Act and who does not have similar experience with either the language of law or the Department of Agriculture. Another example is the *Meat Safety Act*⁵⁸⁷ which does not define an executive officer in the definitions, but in section 2(1)(a) states that "[t]he Minister must designate an officer of the Department who is a veterinarian as national executive officer." The lack of clarity and certainty for a lay person in the wording of legislation and the description of persons involved in administering it is a matter of importance for two reasons. The first relates to the importance of access to justice in the form of legal certainty and the clarity of legislation that can reasonably be expected from agricultural legislation.

⁵⁸² Cele "Import Procedures for Animals and Animal Products: Directorate: Food Import and Export Standards".

⁵⁸³ Department: Agriculture Land Reform and Rural Development (DALRRD) "National Sanitary and Phytosanitary (Sps) Workshop".

⁵⁸⁴ See for example: *Agricultural Pests Act* 36 of 1983, section

⁵⁸⁵ *Agricultural Pests Act* 36 of 1983, s2(1).

⁵⁸⁶ Section 2(2) adds to the uncertainty of who an executive officer is and what they are expected to do by stating "An executive officer may delegate any power conferred upon him by or under this Act to an officer, except the power to order under section 7 that something be destroyed."

⁵⁸⁷ *Meat Safety Act* 40 of 2000.

The second is to prevent a lack of accountability that the vague nature of the identity of such officers enables.

The discussion of dispute resolution is core to this chapter given the fact that part of the objective of this research seeks to establish what options exist for private parties with no recourse to the WTO. Seeking answers in relevant national legislation is an obvious place to start. This should, in theory, provide a basis on which to access courts or internal appeal and review procedures. Ideally, this should also be clear and transparent.

The majority of SPS-related legislation analysed in this research falls within the scope of the Minister of Agriculture, especially that categorised as red-meat specific (RM). What is of relevance in the context of an analysis of the options available to private parties that finds themselves in an SPS-related dispute is the identity of the person whose decision may be appealed. The options vary from Act to Act, but the decisions, actions or directions, as the case may be, of the following are appealable: the Minister, the Director General (DG), the executive officer, or an officer or anyone with delegated powers, an assignee of the executive officer, an authorised person, the registrar, the relevant council, the relevant board. Appeals are usually made to the Minister, but in some instances, they are made to the Director General (DG), a Member of the Executive Council (MEC) or the Director of a specific directorate. An appeal board does not exist as part of the process under every piece of legislation. What is odd is the presence of such a board in some instances⁵⁸⁸ and the absence in others,⁵⁸⁹ despite the legislation falling within the mandate of the same Ministry, in this particular instance the Ministry of Agriculture.

5.2.3.2 Animal Diseases Act 35 of 1984 and Animal Health Act 7 of 2002

The purpose of the *Animal Diseases Act* is described in the long title of the Act as "[t]o provide for the control of animal diseases and parasites, for measures to promote animal health, and for matters connected therewith." The SARS prohibited and

⁵⁸⁸ For example the Agricultural Products and Standards Act 119 of 1990 and Animal Improvement Act 62 of 1998.

⁵⁸⁹ For example the *Meat Safety Act* 40 of 2000.

restricted list cites this Act as the authority under which live bovine animals are imported and in terms of which "[i]mportation into the RSA from Malawi and Zimbabwe is prohibited, except under the permit from DG: Dept Agriculture, Marketing and Administration which is issued on the importer's request."⁵⁹⁰ This Act will be repealed once the *Animal Health Act* commences. The following are examples of typical decisions or actions taken under the authority of Act.

The director⁵⁹¹ approves quarantine stations and appoints quarantine masters to such stations.⁵⁹² Quarantine masters confirm the availability of a quarantine station to persons that require the use thereof in writing, the applicant is then responsible for the payment of the relevant fee.⁵⁹³ The Act prescribes certain requirements for the importation of "controlled animals or things".⁵⁹⁴ In this regard, the Act states that:

No person shall import into or convey in transit through the Republic any animal, parasite or contaminated or infectious thing except under the authority of a permit and in compliance with any condition imposed in such permit.⁵⁹⁵

The approval of such permit is not guaranteed and will be issued on the satisfaction of relevant SPS requirements. An animal cannot be imported into South Africa without such a permit, as section 6(1)(a) clearly states. In the case of pure-bred animals, within the mandate of the *Animal Improvement Act* (which repealed the *Livestock Improvement Act*) the importation thereof requires additional approval in writing from the registrar of that Act.⁵⁹⁶ The Act also provides for the removal and further detention

⁵⁹⁰ SARS 2021 <https://www.sars.gov.za/customs-and-excise/prohibited-restricted-and-counterfeit-goods/>.

⁵⁹¹ As per s2(1): "The director of the Directorate of Animal Health of the department, who shall be a veterinarian, shall exercise the powers and perform the duties conferred or imposed upon the director by or under this Act."

⁵⁹² S5(3).

⁵⁹³ S5(4).

⁵⁹⁴ Section 6. The Act defines animal as: "'animal' means any mammal, bird, fish, reptile or amphibian which is a member of the phylum vertebrates, including the carcass of any such animal." Infectious thing is defined in Annexure one of the *Animal Disease Regulations GN R2026 in GG 10469 of 26 September 1986 (Animal Diseases Act)* and the definition includes "The carcass of an animal which died or suspectedly died of a controlled animal disease or which is infected or suspectedly infected with such disease or any portion of such carcass, including the viscera, organs, glands, hair, wool, feathers, skin, hide, hoofs, horns, teeth, bones, eggs, blood, milk, feces, semen, ova, urine and any other fluid, secretions or excretions of such animal."

⁵⁹⁵ S6(1)(a).

⁵⁹⁶ *Animal Diseases Act 35 of 1984*, S6(1)(b)(ii) in reference to the *Animal Improvement Act 62 of 1998* S16. This includes genetic material as well.

of imported animals or things.⁵⁹⁷ Of particular interest to this research, in the context of FM, is section 9 of the Act. Section 9 deals with the application of control measures.

Control measures, such as those imposed on the movement of animals during the 2019/202 FMD outbreak,⁵⁹⁸ are measures that have, in the past, resulted in disagreement between the Department of Agriculture and actors within the SPS chain. Control measures referred to will not necessarily be in respect of diseases of such international interest such as FMD. They are prescriptible across a number of diseases and parasites. In this regard, the Minister of Agriculture prescribes the "general control measures, or particular control measures in respect of particular animal diseases and parasites" and may prescribe the measure "in respect of the whole of the Republic, or in respect of a particular defined area."⁵⁹⁹ These measures relate to a variety of matters, and section 9(2) is quoted in full below on account of the importance of control measures in the context of this research:

Control measures may relate to (a) the powers and duties of owners and managers of land, and owners of animals, in respect of infectious or contaminated things, or of animals or things which can on reasonable grounds be suspected of being infected with or contaminated by any controlled animal disease or parasite, with regard to controlled veterinary acts, or any other examinations or acts in connection with such animals or things; (b) the certificates or other documents which shall be issued, given, obtained, kept or produced as proof of, or in connection with, the performance of such examinations or acts; (c) restrictions on and control of the slaughter, killing, hunting or catching and the movement and removal of such animals or things on, over, from or to land where a controlled animal disease or parasite occurs, or is suspected to be present; (d) subject to applicable provisions of any other law, restrictions on and control of the movement of conveyances and persons on, over, from or to land where any animal or thing referred to in paragraph (a) is or was present, or is suspected to be or to have been present, and the decontamination or other manner of treatment of any person, conveyance or other object; (e) the powers and duties of owners in respect of such animals or things, or of the director in relation to the establishment or construction of fences or other temporary or permanent structures or appliances, together with the required equipment and appurtenances, on land, and the use, maintenance and removal thereof; (f) particulars and information which are required to be recorded by owners in respect of such animals or things in registers or other documents; (g) the powers and duties of the director, including powers to require the performance, or the abstaining from the performance, of acts by owners in respect of such animals and things, or by owners or managers of land; and (h) any other matter which the Minister deems expedient or necessary in respect of the relevant controlled purpose, such animals and things, or any animal

⁵⁹⁷ S8.

⁵⁹⁸ For example, the restriction on movement and banning of gatherings, such as auctions.

⁵⁹⁹ S9(1)(a)&(b).

disease or parasite, the generality of the powers conferred by this paragraph not being limited by the provisions of the preceding paragraphs.

The director may also "whenever he deems it necessary for any controlled purpose" assume control over a specific piece of land "for such period as the director may deem necessary."⁶⁰⁰ There are also circumstances in which animals may be destroyed on account of the control measure that was decided in light of the specific diseases that have occurred. In such circumstances compensation may be applied for.⁶⁰¹ The amount payable is however subject to various considerations and is not necessarily market value, although fair market value is one of the considerations.⁶⁰² From the discussion above, it is possible to identify a number of potential points of conflict within the Act that could reasonably place an individual or government official in a position where they are dissatisfied with an Act or decision made in terms of the Act's authority.

The *Animal Diseases Act* allows for the appeal of decisions by "authorised persons" to the Minister of Agriculture and the DG or Director of the Directorate Animal Health. This is to be done "within the period and manner prescribed". What this period and manner is, is not clear in the Regulations. The Regulations refer to objections in terms of section 23(1), which is a prohibition for non-authorised persons to make an incision into an infected carcass.⁶⁰³ There is moreover an option to request the review of a decision in writing with the State Veterinarian within five days after it was made.⁶⁰⁴ However, neither of these sections apply to the Act in general and are limited to specific provisions in the Regulation. It would be challenging to have recourse for a technical SPS dispute to a court of law by relying on this particular Act.

⁶⁰⁰ S14(1).

⁶⁰¹ S19(1).

⁶⁰² S19(2) which states that: "(2) The director may, taking into consideration- (a) the applicable compensation, based on a fair market value of the animal or thing, which has been prescribed for purposes of this section or, where no compensation has been so prescribed, any amount fixed by him in accordance with any criterion deemed applicable by him; (b) the value of anything which has in connection with the animal or thing been returned to the owner; (c) any amount which is due by the owner pursuant to any provision of this Act in respect of the animal or thing to the State; and (d) any amount which may accrue to the owner from any insurance thereof, fix a fair amount as compensation."

⁶⁰³ Animal Disease Regulations GN R2026 in GG 10469 of 26 September 1986 (Animal Diseases Act) 33.

⁶⁰⁴ Animal Disease Regulations GN R2026 in GG 10469 of 26 September 1986 (Animal Diseases Act) 5.

A discussion of the situation surrounding the commencement of the *Animal Health Act* is relevant in the discussion of dispute resolution and the importation and exportation of animals since the *Animal Health Act* is set to repeal the *Animal Diseases Act*. Any recourse to challenging or requesting the creation or amendment of technical SPS measures under the *Animal Health Act* are not useful at this stage as the Act remains in a state of limbo. It was assented to on 24 July 2002 and published in GG 23675 of 30 July 2002 but it has not been proclaimed and thus does not (yet) repeal the *Animal Diseases Act*. The Act states, "date of commencement: to be proclaimed." The effect is that the Act has been lying dormant for almost 20 years. Assent means parliamentary "approval."⁶⁰⁵ It is a strange phenomenon of South African law that this is a possible outcome of the process. The question then arises as to why the Act was never promulgated? The reason for an absence of proclamation by the President is unclear. The President in 2002 was Thabo Mbeki and there have since been two other presidents that have not proclaimed the commencement of this Act, Jacob Zuma and Cyril Ramaphosa. The Minister of Agriculture, Land Reform and Rural Development, who would in theory be the person to write to the president to encourage the proclamation of the *Animal Health Act* is Minister Thoko Didiza, who was also Minister of Agriculture, Forestry and Fisheries in 2002. There appears to be no obvious reason in the *Animal Health Act* itself why its commencement is clearly undesirable to the Ministry. It makes little sense to have undergone the exercise of essentially writing a slightly newer version of the *Animal Diseases Act*, only to let it hang at the last step.

The *Animal Health Act* is not, in the researchers' view, a model piece of animal health legislation, nor one that is sufficient in terms of its SPS relevance. A particular point of criticism is the fact that the *Animal Health Act* legislates into existence the excuse of there being a lack of capacity, and thus an excuse for not rendering services such as examination of an animal or the issuing of a prescribed certificate of health,⁶⁰⁶ at section 18(2), which states that:

⁶⁰⁵ See generally: Parliament of the Republic of South Africa 2021 <https://www.parliament.gov.za/how-law-made>.

⁶⁰⁶ S18(1) lists the services referred to in s18(2) as: "(1) Subject to subsection (2), and whenever the owner or user, as the case may be, of any land, or the owner of an animal or thing applies in the prescribed manner to the national executive officer- (a) for the

The national executive officer is not obliged to render any service referred to in subsection (1) if the required officers, equipment or accommodation for the animal or thing at a place, institution or quarantine station necessary for the purpose is not available to the national executive officer.⁶⁰⁷

The same provision also exists in the *Animal Diseases Act*. The difference is that in the *Animal Diseases Act* the Act refers to the Director as opposed to the National Executive Officer as is the case in the *Animal Health Act*, which quoted above.⁶⁰⁸

The two Acts discussed in this section, the *Animal Diseases Act* and the *Animal Health Act*, are limited in their scope and ability to address substantive SPS matters, particularly in the context of SPS measures and their technical content or application.

5.2.3.3 Meat Safety Act 40 of 2000

The purpose of the *Meat Safety Act* is:

To provide for measures to promote meat safety and the safety of animal products; to establish and maintain essential national standards in respect of abattoirs; to regulate the importation and exportation of meat; to establish meat safety schemes; and to provide for matters connected therewith.⁶⁰⁹

In the case of the *Meat Safety Act*, disputes may arise at multiple points. The potential points of disagreement are, for example, related to the appointment and functions of assignees as well as the assignment of functions to provinces, creating a split in competence between the national and the provincial tiers on certain matters. Meat cannot be imported into South Africa unless done so from a registered facility in the exporting country and with the required permit.⁶¹⁰ The Department of Agriculture hosts a website listing registered abattoirs and de-boning plants approved in terms of the

rendering of advice by the national executive officer to such person regarding the fitness or the health of; (b) to effect or perform any examination or controlled veterinary procedure or any other act connected with a controlled purpose, in respect of; or (c) for a prescribed certificate of fitness or health in respect of, that land, animal or thing, as the case may be, the national executive officer may render such advice, effect or perform such examination or performance, or issue such certificate or refuse to issue it, as the case may be."

⁶⁰⁷ S18(2).

⁶⁰⁸ S13(2).

⁶⁰⁹ *Meat Safety Act* 40 of 2000, Long title.

⁶¹⁰ As confirmed in the National SPS Workshop presentation in 2021 by Drs Molefe and Magwedere "Meat Safety Act".

Meat Safety Act.⁶¹¹ These facilities have been approved by the Director of Animal Health. The meat products that this list covers are red meat, poultry, horse meat, ostrich meat, kangaroo, mince and mince preparations, deer meat and pet food. The facilities are categorised as either cutting plants or abattoirs and the list of approved countries is relatively short.⁶¹² Restrictions relating to the importation of meat, such as those in section 13 of the Act, is a typical example decision where disputes may arise, or where disagreement with the decision made by the relevant officer may arise. For example, the refusal by the national executive officer to issue a permit, or the conditions attached to a permit issued by a national executive officer,⁶¹³ are decisions that an individual may dispute. In both examples reason for the individual's disagreement may be based on science.

The Act also lists the essential national standards that apply to abattoirs.⁶¹⁴ These standards are SPS in nature and include, for example, requirements that:

(l) any person suspecting that an animal is infected with a controlled animal disease as prescribed by or under the Animal Diseases Act, 1984 (Act 35 of 1984), must convey that suspicion without delay to a veterinarian in the employ of the Department or a province... (n) meat may only be removed from an abattoir if it is duly marked and the method of removal thereof poses no risk to the safety of the meat for human and animal consumption.⁶¹⁵

The Act specifically includes the species *bubalus bubalis* and *bison* in the description of bovines in the list of animals to which the Act applies.⁶¹⁶ Multiple split hooved wildlife are also currently included in schedule 1 as under the ambit of this Act, including buffalos, impala and kudu. It is an Act in terms of which regulations specifically pertaining to meat, including for both import and export, can be made.⁶¹⁷ Section 7 of the Act may be a contributing factor to the strong sense of the existence of a dual

⁶¹¹ Department of Agriculture 2021
<http://webapps.daff.gov.za/VetWeb/abbatoirsEstabliment.do;jsessionid=d47a5411044d2a746d1bc379f142>.

⁶¹² Argentina, Australia, Austria, Belgium, Brazil, Botswana, Canada, China, Chile, Denmark, France, Germany, Hungary, India, Israel, Italy, Lesotho, Namibia, Netherlands, New Zealand, Paraguay, Poland, Portugal, Spain, Swaziland, Switzerland, Republic of Ireland, Thailand, United Kingdom, United States, Uruguay, Zimbabwe.

⁶¹³ *Meat Safety Act 40 of 2000*, S 11(1)(a) and s11(3).

⁶¹⁴ *Meat Safety Act 40 of 2000*, S 11.

⁶¹⁵ *Meat Safety Act 40 of 2000*, S 11(1)(l) & (n).

⁶¹⁶ *Meat Safety Act 40 of 2000*, Schedule 1.

⁶¹⁷ *Meat Safety Act 40 of 2000*, S22.

system of regulation and application of law in the fieldwork data. To the extent that slaughter takes place for own consumption or for cultural or religious purposes, the requirement that this must be done at an abattoir does not apply.⁶¹⁸ This meat may however not be *sold*.⁶¹⁹ In the event that such meat *is* sold, which is illegal, and action is not taken by the relevant authorities, is where the claims and concerns about the existence of a dual system are justified. A contravention of section 7 in this manner is an offence with which an individual may be charged with under the authority of the Act.⁶²⁰

The *Meat Safety Act* allows for the appeal of decisions made by the national executive officer, an assignee, provincial executive officer or authorised person. The appeal is made to the Minister or the relevant Member of the Executive Council, depending on whether the matter falls within the ambit of national or provincial decision-making competency.⁶²¹ The Minister or MEC decides the appeal. Persons who made the initial decision and also the appellant in the matter may be requested to appear before the decision-making body, entitled to legal representation if they so wish.⁶²²

5.2.3.4 The Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

The purpose of the *Foodstuffs, Cosmetics and Disinfectants Act* is "[t]o control the sale, manufacture, importation and exportation of foodstuffs, cosmetics and disinfectants; and to provide for matters connected therewith." The Act prescribes prohibited substances that may not be contained in, amongst other products, foodstuffs.⁶²³ The requirements for the inspection of foodstuffs are regulated under the Act, and where relevant authority is given to defined persons to dispose of or destroy

⁶¹⁸ *Meat Safety Act* 40 of 2000, S7(2)(a).

⁶¹⁹ *Meat Safety Act* 40 of 2000, S7(2)(b).

⁶²⁰ *Meat Safety Act* 40 of 2000, S 19(1)(a).

⁶²¹ *Meat Safety Act* 40 of 2000, s18.

⁶²² *Meat Safety Act* 40 of 2000, s18(3)(b).

⁶²³ *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*, The Act defines foodstuffs in s1 as: "'foodstuff' means any article or substance (except a medicine as defined in the Medicines and Related Substances Act, 1965 (Act 101 of 1965)) ordinarily eaten or drunk by a person or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as a part or ingredient of any such article or substance."

unsafe foodstuffs. Veterinarians qualify to perform the functions of an inspector upon receipt of written authorisation from a local authority with jurisdiction, where relevant, under the Act.⁶²⁴ The Minister responsible for the administration of this Act is the Minister of Health.

An example of a situation arising from the decisions or actions taken by persons under the authority of the Act that, in an SPS context, may lack dispute resolution options under the Act are the provisions related to analysts in section 12. Section 12 states that:

An analyst shall for the purpose of analysing or examining any such sample or reporting the result, employ or use such methods or forms, or complete such certificates or reports as may be prescribed by regulation, and shall be vested with such other powers, duties or functions as may be so prescribed.⁶²⁵

There is a possibility that a person aggrieved by the outcome may disagree with, for example, the methodology applied or the analysis of the results and conclusion of the analysis. The disagreement may or may not be justified, regardless, a process through which to evaluate the validity of such claims is important in an SPS context.

The Foodstuffs, Cosmetics and Disinfectants Act focuses on criminal matters and courts, not appeals. There would be very limited circumstances where this context applies to SPS matters as understood in the context of this research. It is therefore limited in its usefulness as a means through which to achieve dispute resolution on SPS grounds.

5.2.3.5 Animal Identification Act 6 of 2002

The purpose of the *Animal Identification Act* is "[t]o consolidate the law relating to the identification of animals and to provide for incidental matters."⁶²⁶ Animal identification is an important component of the broader set of tools that a country has to control the spread of disease and the control of animal movement. It is linked to concepts such

⁶²⁴ Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, S 10(3)(b).

⁶²⁵ Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, S12(2).

⁶²⁶ Animal Identification Act 6 of 2002 Long title.

as traceability which is focused on in detail by the OIE in Chapter 4.2 of the Terrestrial Code. The OIE states that:

Animal identification and animal traceability are tools for addressing animal health (including zoonoses) and food safety issues. These tools may significantly improve the effectiveness of activities such as: the management of disease outbreaks and food safety incidents, vaccination programmes, herd or flock husbandry, zoning or compartmentalisation, surveillance, early response and notification systems, animal movement controls, inspection, certification, fair practices in trade and the utilisation of veterinary drugs, feed and pesticides at farm level.⁶²⁷

The *Animal Identification Act* places a significant duty on owners to mark animals.⁶²⁸ This is an important component of traceability. The *Act* requires owners to apply for a registration mark and to mark their animals visibly and distinctly.⁶²⁹ The *Act*, although a tool in the control and identification of animals, is not intended to provide for technical matters of a scientific SPS nature. Its role in the SPS-related activities of disease management, zoning, compartmentalisation and vaccination programmes, for example, does make it an SPS-related and SPS-relevant *Act*. Although the *Act* does not constitute a traceability scheme and does not concern itself with inputs such as medicines and farm feeds which would typically also be a component of a traceability scheme,⁶³⁰ it is a useful piece of legislation as far as movement of animals and subsequent control is concerned.

In terms of dispute resolution options available, the *Animal Identification Act* is vague and simply allows for the appeal of decisions of the registrar to the Minister of Agriculture "within the period and in the manner prescribed upon payment of the prescribed fees".⁶³¹ This is a matter of concern considering not only the importance of animal identification and subsequent traceability in the SPS context, but also the significant hope that fieldwork participants place in the successful implementation of traceability to access export markets.

⁶²⁷ OIE Terrestrial Animal Health Code, Article 4.2.1.1.

⁶²⁸ Animal Identification Act 6 of 2002, S7.

⁶²⁹ Animal Identification Act 6 of 2002, S 7.

⁶³⁰ These are important in terms of traceability in that traceability includes "inputs" into animals, such as medicines and feed, as far as food safety is concerned.

⁶³¹ Animal Identification Act 6 of 2002, S13.

5.2.3.6 Agriculture Produce Agents Act 12 of 1992

The *Agriculture Produce Agents Act* falls within the mandate of the Minister of Agriculture. The purpose of the Act is "[t]o provide for the establishment of an Agricultural Produce Agents Council and fidelity funds in respect of agricultural produce agents; for the control of certain activities of agricultural produce agents; and for matters connected therewith."⁶³² The Act falls within the category of legislation that supports the implementation of SPS matters. In a sense, the existence of an appeal in the context of SPS measures is unexpected as the Act is primarily concerned with the behaviour of agents rather than SPS measures as such. Yet, the power of the council⁶³³ to act against misconduct of agents would suggest that there is scope for indirectly prohibiting actions of agents contrary to SPS control requirements or measures. An example is the regulation *Biosecurity Rules for Livestock Agents*,⁶³⁴ adopted under the Act, which contains SPS-related provisions such as those concerning biosecurity, inspection, disinfection of vehicles and the reporting of clinical signs indicative of FMD or another controlled disease.

The *Biosecurity Rules for Livestock Agents*, states that:

Auction facilities are the second level of detection for animal diseases for animals that are traded through this very critical marketing section of the livestock production value chain and therefore should play a very important role in reducing the spread of animal disease(s) through transactional business activities conducted within the auction facilities. This document aims to establish an auditable and traceable system, while at the same time minimising the spread of animal disease(s) because of auction activities.⁶³⁵

In the spread of diseases, auctions can be described as comparable to "super spreader events" as understood in a 2020/2021 COVID-19 context, but for animals. This is true of multiple animal diseases, but in particular diseases such as FMD. Essentially, animals are transported from multiple destinations, to one central location, auctioned and sold to new owners, who then proceed to remove them to new locations after having been in contact with unfamiliar animals, in what is usually relatively confined spaces at

⁶³² Agricultural Produce Agents Act 12 of 1992 , Long title.

⁶³³ *Animal Identification Act 6 of 2002*, s1 defines the council as "The Agricultural Produce Agents Council" established in terms of s2 of the Act.

⁶³⁴ *Biosecurity Rules for Livestock Agents* BN 135 in GG 43900 of 13 November 2020

⁶³⁵ *Biosecurity Rules for Livestock Agents* BN 135 in GG 43900 of 13 November 2020, s2.

auction pens and through auction rings. Biosecurity measures have the ability to limit such introduction and spread of diseases and the OIE defines biosecurity as "means a set of management and physical measures designed to reduce the risk of introduction, establishment and spread of animal diseases, infections or infestations to, from and within an animal population."⁶³⁶ This is in essence what the *Biosecurity Rules for Livestock Agents* aims to implement and achieve.

The Act makes provision for disciplinary procedures relating to the actions of agents before the Agricultural Produce Agents Council,⁶³⁷ which may act "either of its own accord or as a result of a complaint, charge or allegation lodged with it."⁶³⁸ The Act specifically includes livestock, meat, and cured hides and skins within the definition of "agricultural product".⁶³⁹ An agent in this context is someone who:

for the acquisition of gain on his or her own account or in a partnership, in any manner holds himself or herself out as a person who, either directly or indirectly advertises that he or she, on the instructions of or on behalf of any other person, purchases or sells agricultural produce or negotiates in connection therewith or canvasses or undertakes or offers to canvass a purchaser or seller therefor.⁶⁴⁰

The practice of using agents is common in South Africa's red-meat industry. The Act also specifically defines livestock agents, as a narrower group of agents, as:

an agent acting as such with regard to any agricultural product specified in Part B of Schedule 1, and for purposes of section 3 (1) (b) includes any director of a company, trustee of a trust or a member of a close corporation which acts as a livestock agent as aforesaid⁶⁴¹

The Act does not have a specific appeal provision in relation to the actions of the persons empowered to act under the Act.

5.2.3.7 National Regulator for Compulsory Specifications Act 5 of 2008

The purpose of the *National Regulator for Compulsory Specifications Act* is:

⁶³⁶ OIE Terrestrial Animal Health Code, Glossary of terms.

⁶³⁷ Agricultural Produce Agents Act 12 of 1992, s25.

⁶³⁸ Agricultural Produce Agents Act 12 of 1992, s24.

⁶³⁹ *Agricultural Produce Agents Act* 12 of 1992, schedule 1 part B.

⁶⁴⁰ Agricultural Produce Agents Act 12 of 1992, s1.

⁶⁴¹ Agricultural Produce Agents Act 12 of 1992, s1.

To provide for the establishment of the National Regulator for Compulsory Specifications of South Africa; to provide for the appointment of the Board of the National Regulator; to provide for the administration and maintenance of compulsory specifications in the interests of public safety and health or for environmental protection; and to provide for matters connected therewith.⁶⁴²

The *National Regulator for Compulsory Specifications Act* (NRCS) applies to situations where the Minister of Trade and Industry is empowered to gazette South African National Standards (SANS) (or a provision in a SANS) as compulsory specifications in respect of public safety, health or the environment.⁶⁴³

The Act applies to agricultural products and defines a product as "any commodity that is manufactured or any agricultural product, including fish and fish products." Despite the indication that the definition provides, the regulations listed under the Act do not appear to be SPS in nature. However, the standards related to food and beverages listed on the South African Bureau of Standards (SABS) website are SPS in nature.⁶⁴⁴

The resolution of disputes under the Act is uncertain and vague, and on this basis is essentially non-existent. The Act specifies that comment procedure must be followed in order to publish the final notice to implement, amend or withdraw a compulsory specification which achieves a level of transparency.⁶⁴⁵

5.2.3.8 Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act

The purpose of the *Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act* is:

To provide for the appointment of a Registrar of Fertilizers, Farm Feeds and Agricultural Remedies; for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest control operators; to regulate or prohibit the importation, sale, acquisition, disposal or use of fertilizers, farm feeds, agricultural remedies and stock remedies; to provide for the designation of technical advisers and analysts; and to provide for matters incidental thereto.⁶⁴⁶

⁶⁴² National Regulator for Compulsory Specifications Act 5 of 2008.

⁶⁴³ National Regulator for Compulsory Specifications Act 5 of 2008, S13.

⁶⁴⁴ SABS 2021 https://www.sabs.co.za/Sectors-and-Services/Sectors/Food/food_sp.asp.

⁶⁴⁵ National Regulator for Compulsory Specifications Act 5 of 2008, S13(4).

⁶⁴⁶ Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, Long title.

In an SPS context, farm feeds and stock remedies⁶⁴⁷ are of particular relevance in the context of this research. The safety of animal feed is a point focused on specifically by the OIE, which states that "animal feed is a critical component of the food chain that has a direct impact on animal health and welfare and also on food safety and public health".⁶⁴⁸ In as far as regulatory safety standards in the context of animal feed are concerned, the OIE states that:

All feed and feed ingredients should meet regulatory safety standards. Scientific evidence, including the sensitivity of analytical methods and on the characterisation of risks, should be taken into account in defining limits and tolerances for hazards.⁶⁴⁹

The Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act does require that farm feeds and agricultural remedies be registered and the Act regulates the sale thereof and importation of such products. It is possible that an individual may feel aggrieved at the decision to refuse approval of a farm feed or stock remedy for example and that such a person may wish to challenge the decision based on science at their disposal. This is also an example of a matter to which an application for the recognition of equivalence of standards may be sought by an importer, without the support of their national government. The Act allows for appeal to the Minister of Agriculture with regard to decisions made by the registrar.⁶⁵⁰ The Minister is then required to refer the matter to a board consisting of a chairman, with knowledge of law, and two persons with sufficient knowledge of the matters likely to arise (in the opinion of the Minister).⁶⁵¹ The board is then tasked with completing the hearing and

⁶⁴⁷ *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947, defined in s1 as: "a substance intended or offered to be used in connection with domestic animals, livestock, poultry, fish or wild animals (including wild birds), for the diagnosis, prevention, treatment or cure of any disease, infection or other unhealthy condition, or for the maintenance or improvement of health, growth, production or working capacity, but excluding any substance in so far as it is controlled under the Medicines and Related Substances Control Act, 1965 (Act 101 of 1965)."

⁶⁴⁸ *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947, Article 6.4.1.

⁶⁴⁹ OIE Terrestrial Animal Health Code, Article 6.4.4.2.

⁶⁵⁰ *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947, S2(1) states that "The Minister shall designate an officer in the Department of Agricultural Technical Services as the Registrar of Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies who shall, subject to any instructions issued by the Minister, exercise the powers, perform the functions and carry out the duties conferred upon, assigned to or imposed upon the registrar under this Act."

⁶⁵¹ *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947, S6(2).

confirming, setting aside or varying the decision and to order the registrar to execute the board's decision.⁶⁵²

5.2.3.9 Perishable Products Export Control Act 9 of 1983

The purpose of the *Perishable Products Export Control Act* is "[t]o provide for the control of perishable products intended for export from the Republic of South Africa and for matters connected therewith." The Act is administered by the Minister of Transport which is a surprising Ministry to find involved in matters related to SPS. The Act's purpose correctly suggests that there are SPS-related considerations that would be relevant under the Act. The regulations which the Minister can make under the Act confirm this.⁶⁵³

The Perishable Products Export Control Board⁶⁵⁴ makes decisions relating to a variety of SPS-related matters such as the handling of perishable products and determining the suitability of ships for the conveyance of perishable products.⁶⁵⁵ The *Perishable Products Export Control Act*, places a time limit on the dispute resolution process, which allows for the appeal of an act or decision to the Minister of Transport within 30 days for acts or decisions of the board. The board is then required to furnish the Minister with reasons for such act or decision within 14 days.⁶⁵⁶

This unexpected involvement of the Ministry of Transport is discussed in Chapter 6 as support for the recommendation made in this research that there should be core SPS legislation from which other legislation, dependent on core rights, obligations and principles, can then develop.

5.2.3.10 Marketing of Agricultural Products Act 47 of 1996

The purpose of the *Marketing of Agricultural Products Act* is:

⁶⁵² Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, S6(9).

⁶⁵³ Perishable Products Export Control Act 9 of 1983, S25.

⁶⁵⁴ According to *Perishable Products Export Control Act 9 of 1983*, s3, "The object of the board shall be to bring about the orderly and efficient export of perishable products from the Republic."

⁶⁵⁵ Perishable Products Export Control Act 9 of 1983, S10(b)&(h).

⁶⁵⁶ Perishable Products Export Control Act 9 of 1983, S15.

To authorise the establishment and enforcement of regulatory measures to intervene in the marketing of agricultural products, including the introduction of levies on agricultural products; to establish a National Agricultural Marketing Council; and to provide for matters connected therewith.⁶⁵⁷

The Act establishes the National Agricultural Marketing Council made up of 10 people⁶⁵⁸ and fulfils functions such as preparing, submitting or monitoring statutory measures (levies) and the success thereof.⁶⁵⁹ The Act is primarily concerned with the objectives of:

(a) the increasing of market access for all market participants; (b) the promotion of the efficiency of the marketing of agricultural products; (c) the optimisation of export earnings from agricultural products; (d) the enhancement of the viability of the agricultural sector.⁶⁶⁰

These matters are not directly SPS measures, but rather function in support of broader structures within the SPS chain in which SPS measures apply. The Act resolves matters differently to other Acts discussed. The Minister of Agriculture's decision to prohibit the importation or exportation of a product or class of products is not appealed to the Minister. An advisory committee may be established to consider the objections or representations of affected groups in terms of the *Marketing of Agricultural Products Act*.⁶⁶¹ This piece of legislation specifically recognises that South Africa is bound by international obligations in the context of prohibitions of imports and exports of agricultural products.⁶⁶² Such prohibitions may, however, only occur as follows:

In extraordinary circumstances and bearing in mind the Republic's international obligations, the Minister may, after consultation with the Council, by notice in the *Gazette* prohibit the importation into the Republic of any agricultural product or class thereof, or the export of any agricultural product or class thereof from the Republic, or impose conditions, specified in such notice, with regard to any such importation or export.⁶⁶³

⁶⁵⁷ Marketing of Agricultural Products Act 47 of 1996, Long title.

⁶⁵⁸ Marketing of Agricultural Products Act 47 of 1996, S3&4.

⁶⁵⁹ Marketing of Agricultural Products Act 47 of 1996, S9.

⁶⁶⁰ Marketing of Agricultural Products Act 47 of 1996, S2(2).

⁶⁶¹ Marketing of Agricultural Products Act 47 of 1996, S22(b).

⁶⁶² Marketing of Agricultural Products Act 47 of 1996, S22.

⁶⁶³ Marketing of Agricultural Products Act 47 of 1996, S22(1).

The same Act also requires transparency of meetings of the National Agricultural Marketing Council, except where reasons are given for a decision otherwise.⁶⁶⁴

5.2.3.11 Other legislation supplementary to the understanding of dispute resolution in the South African SPS related framework

5.2.3.11.1 Animal Improvement Act 62 of 1998

The purpose of the *Animal Improvement Act* is "[t]o provide for the breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals in the interest of the Republic; and to provide for matters connected therewith."⁶⁶⁵ This Act applies to the importation and exportation of pure-bred breeding animals and animal genetics. Importers are required to obtain permission from the registrar⁶⁶⁶ prior to importation or exportation of such animals or genetics along with other relevant documentation prescribed under other Acts.⁶⁶⁷ The SPS relevance of the Act is limited to the supporting nature of the Act in that it is an additional control in terms of safety of products, such as genetic material, and it prevents the entry or exit of potentially harmful animal improvement practices.

The *Animal Improvement Act* sets out a relatively clear appeal procedure. The decisions or directions of the registrar may be appealed.⁶⁶⁸ An appeal is lodged with the Director-General (DG), who appoints an appeal board. There is a 90 day time limit within which a decision must be made by the appeal board. Three persons serve on the appeal board. The Act specifies that one should have legal knowledge, who will also act as the chairman. Two should have specific expert knowledge in the field, as determined by the DG. This particular Act grants the chairman clear powers to call, subpoena and "interrogate" witnesses. It also explicitly states that a person is entitled

⁶⁶⁴ Marketing of Agricultural Products Act 47 of 1996, S23.

⁶⁶⁵ *Animal Improvement Act* 62 of 1998, Long title.

⁶⁶⁶ *Animal Improvement Act 62 of 1998*, S3(1) states that: "The Minister shall designate an officer in the Department, who has an appropriate tertiary qualification in the field of animal improvement, as Registrar of Animal Improvement, who shall exercise the powers and perform the duties conferred or imposed upon the registrar under this Act."

⁶⁶⁷ *Animal Improvement Act* 62 of 1998, S16.

⁶⁶⁸ *Animal Improvement Act* 62 of 1998s23.

to legal representation. The registrar and the appellant must be furnished with a written decision and reasons therefor.⁶⁶⁹

5.2.3.11.2 Agricultural Pests Act 36 of 1983

The purpose of the *Agricultural Pests Act* is to "[t]o provide for measures by which agricultural pests may be prevented and combated; and for matters connected therewith."⁶⁷⁰ The *Agricultural Pests Act* does not apply to animal diseases as the name might suggest, but to what can be understood as agricultural pests. It is however useful as part of the discussion on how South Africa regulates or requires notification of pests, prescribes control measures and provides for dispute resolution. It therefore supplements the understanding of legislation within the broader SPS framework. This Act applies to "exotic animals" described as "any vertebrate member of the animal kingdom which is not indigenous to the Republic and includes the eggs of such a Member..."⁶⁷¹ The Act does not apply to animals covered within the scope of the *Livestock Improvement Act*,⁶⁷² which has since been repealed by the *Animal Improvement Act*, nor does it apply to fish.⁶⁷³ The Minister has the power to prescribe measures that control "pathogens, red-billed quelea, and exotic animals" by a number of means, including destruction, cleansing, and prohibitions.⁶⁷⁴ In the *Agricultural Pests Act*,⁶⁷⁵ the following dispute resolution options apply. Persons have the right to receive reasons in writing for an executive officer's decisions with regard to actions under their⁶⁷⁶ powers, or amendment to permit conditions for example.⁶⁷⁷ An individual has the option to appeal to the Minister of Agriculture in "the prescribed manner and upon the payment of the prescribed amount" in the event that they "feel aggrieved" by the

⁶⁶⁹ *Animal Improvement Act* 62 of 1998 s23(9).

⁶⁷⁰ *Agricultural Pests Act* 36 of 1983 ,Long title.

⁶⁷¹ *Agricultural Pests Act* 36 of 1983 ,S1.

⁶⁷² *Livestock Improvement (Repealed) Act* 25 of 1977 25

⁶⁷³ *Animal Improvement Act* 62 of 1998

⁶⁷⁴ *Agricultural Pests Act* 36 of 1983, s6.

⁶⁷⁵ *Agricultural Pests Act 36 of 1983*, This Act is included in this discussion due to the overlap of Ministerial power with other SPS-related legislation, as well as its role in the broader, commodity non-specific, SPS-related legislative framework.

⁶⁷⁶ The Act uses the term "his" in reference powers. The current Minister of Agriculture is female, yet the reference in this specific section is one to a male Minister of Agriculture.

⁶⁷⁷ *Agricultural Pests Act* 36 of 1983, s11(1).

conduct or refusal to act of an executive officer.⁶⁷⁸ In this particular Act, the process is short and limited to the Minister, "after considering the prescribed documents, [to] confirm the refusal or conduct or make such other order as he may think fit..."⁶⁷⁹ It is common in South African SPS-related legislation for there to be an option for an appeal in "the prescribed manner and upon the payment of the prescribed amount" without it being immediately clear what the prescribed manner is or where to find it. This speaks to one of the conclusions reached in this research that the legislative framework is not accessible or enabling. This type of uncertainty can and should be avoided, as it is not lawyers or researchers who use this Act on a daily basis.

5.2.3.11.3 Genetically Modified Organisms Act 15 of 1997

Although not falling within one of the categories of legislation that the analysis here is based on, the *Genetically Modified Organisms Act* is of some relevance in the dispute resolution discussion on account of its requirement that decisions be made public. The Act allows for an appeal to the Minister of Agriculture of decisions made by the council, registrar or an inspector.⁶⁸⁰ The appeal board must be established within 60 days and consist of two people who the Minister considers experts. What makes this Act unique is the requirement that the decision be made public within 30 days.⁶⁸¹

5.2.3.11.4 Conservation of Agricultural Resources Act 43 of 1983

The *Conservation of Agricultural Resources Act* is an example of how matters of SPS regulation may be found in legislation not expected to be SPS-specific. The purpose of the Act is:

To provide for control over the utilisation of the natural agricultural resources of the Republic in order to promote the conservation of the soil, the water sources and the vegetation and the combating of weeds and invader plants; and for matters connected therewith.⁶⁸²

⁶⁷⁸ *Agricultural Pests Act* 36 of 1983, s11(2).

⁶⁷⁹ *Agricultural Pests Act* 36 of 1983, s11(3).

⁶⁸⁰ Genetically Modified Organisms Act 15 of 1997

⁶⁸¹ Genetically Modified Organisms Act 15 of 1997, s19(6).

⁶⁸² Conservation of Agricultural Resources Act 43 of 1983 ,Long title.

Therefore, it appears to be beyond the scope of what is typically considered SPS-related matters. However, this Act specifically states that, in the context of prohibiting the spread of disease that:

if any weed adheres to an animal which is driven on a public road, conveyed in a vehicle or offered for sale at a livestock auction, the executive officer may issue an order that the weed concerned be removed from that animal.⁶⁸³

During the transport of animals to and from auctions for example, there are inevitably weeds and seeds etc that stick to animals and travel with them. There may even be weeds and seeds in the bedding or animal fodder put down to provide comfort for the animal during transport. It is undesirable to introduce invasive plants for example as a by-product of a red-meat industry activity such as an auction. For this reason, and since plant health and safety is in that way also connected to animal health and the trade in animals, there are requirements such as the one above to remove weeds and dispose of them.

5.2.3.12 The role of legislation in the process of the recognition of FMD-free status

The focus on red-meat related legislation and the red-meat context evolved from the repeated outbreaks of FMD occurring and the persistent public sentiment that "something" needs to change. South Africa can regain recognition of FMD-free status. This is a time-consuming process that involves a process of self-declaration. It is not an ideal situation to be in. Having lost this status in the first place leaves a lasting impression on trading partners, regardless of whether or not it is regained. It also affects the ability of South Africa to re-enter certain markets, a reality that has lasting consequences.

Chapter 1.11 of the OIE Terrestrial Animal Health Code describes the process of "application for the official recognition by the OIE of free status for foot and mouth disease".⁶⁸⁴ Article 1.11.1 specifically describes the process where vaccination is not practiced. The dossier to be complied with requires a significant amount of detail. What

⁶⁸³ Conservation of Agricultural Resources Act 43 of 1983, S5(3)(a).

⁶⁸⁴ OIE Terrestrial Animal Health Code.

is required is dependent on whether vaccination is practiced or not. The information required where vaccination is not practiced ranges from livestock and wildlife demographics to geography and details regarding the veterinary system. Within the broader information sought about the veterinary system is a specific requirement that information be provided related to veterinary legislation:⁶⁸⁵

Provide a table (and when available a weblink) listing all relevant veterinary legislation, regulations and Veterinary Authority directives in relation to FMD and a brief description of the relevance of each. The table should include, but not be limited to, the legislation on disease control measures and compensation systems.⁶⁸⁶

The chapter on self-declaration further asks of the Member to "Describe the actions available under national legislation" under the heading of *Animal Identification*⁶⁸⁷ and, in terms of FMD eradication, to:

Provide a description of the legislation, organisation and implementation of the eradication campaign. Outline the legislation applicable to the eradication and how the campaign was organised at different levels. Indicate if detailed operational guidelines exist and give a brief summary.⁶⁸⁸

When considering the requirements of Chapter 1.11, one could say that there is a body of texts that to some extent satisfies the legislation requirements. The *Animal Diseases Act's* Regulations in particular are of relevance to this process as they specifically refer to matters of FMD. This body of texts must be considered sufficient as South Africa has been officially recognised as FMD-free in the past. There is however room for an enhancement of these texts. As repeated elsewhere in this research, the appearance of an SPS legislative framework in place is not equal to an adequate SPS legislative framework in place. Despite there being a body of texts that are sufficient for purposes of the OIE, an SPS-enabling environment is limited by the lack of specific focus in the South African SPS legislative framework.

⁶⁸⁵ Veterinary legislation is defined in the OIE *Terrestrial Animal Health Code* as: "means laws, regulations and all associated legal instruments that pertain to the veterinary domain."

⁶⁸⁶ OIE *Terrestrial Animal Health Code*, Article 2(a).

⁶⁸⁷ OIE *Terrestrial Animal Health Code*, Article 2(e).

⁶⁸⁸ OIE *Terrestrial Animal Health Code*, Article 3(d).

5.2.3.13 Additional observations of the SPS-related legislation

The majority of Acts discussed above fall under the responsibility of the Minister of Agriculture. There are a number of issues with the current state of legislated dispute resolution mechanisms in the SPS-related framework. The first is inconsistency in form, period and processes of dispute resolution within the same ministry, inevitably leading to uncertainty. The functionary or body with whom the appeal is lodged varies, so does the process that this procedure may take. Often timelines within which the appeal is to be concluded either vary or are unknown. The types of appeal or review are also administrative in nature.

As discussed above, SPS-related administrative actions are already subject to administrative law, which provides a safety net of sorts for the appeal or review of decisions made under empowering legislation where there is no clear process. There is also very narrow or no scope for the proactive or reactive resolution of technical SPS disputes either internally or through the courts.

The legislation lacks a clear commitment to rights, obligations and principles of SPS. There is for example, no obligation on the Director of Animal Health to notify the OIE of an FMD outbreak. Therefore, there is no ground on which, at a national level, to hold the director accountable in the event of no notification, a delay or a lack of action in the application for recognition of disease-free status. Another example is the fact that the legislation does not situate science and justification of measures on the grounds of science within the national framework. The legislative framework does not create a network of relationships between the fields of SPS (human, animal and plant life or health) that supports co-operation and coordinated standard making. These actions may, in practice, take place⁶⁸⁹ in the absence of legislation requiring them, but that is a matter that severely limits transparency of process, reproducibility, certainty and accountability. The conclusion reached from the analysis of the SPS-related legislation in this research is that it *looks* like SPS legislation, but it does not *function* as such. The legislation looks like SPS legislation in as far as it requires permits to

⁶⁸⁹ For example, South Africa does notify the OIE and WTO of changes in measures, but how, when and by whom is not apparent from the legislative framework.

import animals and provides guidance in terms of additives to food or farm feeds and broadly includes elements animal health, plant health and food safety. It does however not function as SPS legislation as it lack specific SPS purposes such as science-based measure-taking, guidelines for emergence measures, recognition of the principles of SPS such as equivalence and harmonisation as well as matters related to pest- or disease-free areas and the process of risk assessment. The legislation also appears to treat matters of import and export separate to those related to internal trade despite the different forms of trade being linked directly to the same principles of science and the protection of human, animal and plant life or health. It is fair to conclude that there is an *SPS-related* legislative framework as opposed to an SPS legislative framework. The framework overemphasises punishment for offences under the Acts but it does not generally elaborate on the responsibility, in an SPS context, on government actors. The framework lacks any clarity on technical aspects related to science or notification, for example, that can be expected in an SPS legislative framework. There is both scope and need for a clearer legislative framework. Recommendations in this regard are made in Chapter 6.

5.2.3.14 Legislation as a barrier to trade and dispute resolution

A reality with which SPS regulation is faced is an over-reliance on administrative law solutions to problems that require an additional context-specific set of options. Administrative law is an added layer of protection, but it cannot be the entire solution. This sets the industry up for reactivity as opposed to proactivity, which is in itself a barrier to trade. By its nature, a reactive response is a delayed response and a delay can have significant consequences for the individual or for an entire industry. Applying an SPS framework that already incorporates and concretises the core principles of administrative law in an unambiguous and accessible manner is trade-facilitating.

It is necessary to consider the effect that the existing legislation has in practice. If the effect is inefficiency and the action is felt in a way that is of a non-tariff barrier nature, then this must be seen as a non-tariff barrier, even if the particular decision or the lack thereof otherwise is taken on the basis of science. The fieldwork data, as described in Chapter 4, supports this finding in that there was a strong sense of disillusion, lack of

trust and scepticism about the legislative framework amongst interviewees. The experience of an inadequate legislative framework, or lack of capacity or incoherence of policy, etc. amounts to an SPS-related barrier to trade if it has the effect of acting as such a barrier.

Administrative law is limited in the extent to which it can provide remedies that are tailor-made to properly address SPS concerns. It should also not be seen as *the* source of remedies for SPS-related matters. At this stage, there is no official, legislated forum through which to resolve technical SPS-related disputes. There is no avenue through which to apply formally for the introduction of new science or evidence into the amendment of existing measures or their removal, or the introduction of new ones. There is also no formal, legislated route through which to pursue the application of principles, rights and obligations such as equivalence at the national or international level.

Legislation is in many respects a tool in trade. In the context of SPS it is of particular importance as a tool that places rights and obligations on private parties and government in the application of principles that are aimed at the justified protection of human, animal and plant life or health. It is also a tool through which law regulates the grounds on which decisions, often based in science, are made and applied as well as the development of standards in that regard. Legislation has the ability to provide certainty and clarity to trade in a manner that facilitates the safe and fair trade of a variety of agricultural products. As a tool in the pursuit of trade, law's usefulness is limited to the extent that its design fits the purpose that it is intended to serve. Given the vagueness and limited scope of the SPS-related legislation and the lack of dispute resolution options as far as technical SPS matters are concerned, the South African SPS-related legislation is a trade-inhibiting factor on both an international trade and national trade level. To a greater extent, the scepticism and criticism that interviewees shared is justified.

Purely domestic matters are by their nature beyond the scope of the WTO. That is not to say that they are beyond the reach of rights, obligations and principles that find their application at a national level. It is however also unclear how a dispute in this

field involving actors in other WTO members would officially reach a point where it can be brought before the WTO. Presumably, it would only be in the event that the industry can exert enough pressure on the Department to raise a specific trade concern or to action a request for consultation. Based on the lack of detail in the SPS-related legislative framework it is possible that actors in the SPS chain are 1) not aware that there are grounds on which they can in theory challenge an SPS-related decision with which they are aggrieved, 2) that their Member government is charged with representing the country's interests in that regard. The practical steps of how an individual, at a national level, approaches the relevant department and what information they may be required to produce to initiate a national level investigation into the matter is not formalised. The result is, as interviewees describe in the fieldwork data, a situation where any such negotiation or discussion is done informally, often without record and without precedent. Practically, recourse to the WTO through South Africa as a "Member" of its own motion is unlikely, even if there is evidence of an unjustified barrier being imposed as there is no legislated obligation on the relevant Department to hear the matter, nor is there sufficient basis in law to force the relevant Department to act through a court where inaction is unjustified. There is also no independent tribunal nor commission dedicated to hearing matters related to SPS.

A broader concern in the context of South African SPS-related disputes that do reach the WTO during the existence of the current legislative framework is the matter of who is behind the initiation thereof. In the South African context, private parties (either individual enterprises or, as would likely be the case in South Africa, industry or product specific representative bodies) are likely the driving force behind initiations as they have access to the information and funding necessary to drive such initiation, via the national government who is the Member.⁶⁹⁰ The lack of *publicly* available or clear rules and regulations, with only private parties directly participating likely being aware of most of these rules and regulations is a concern.⁶⁹¹ These are of course also potentially the same private parties with an incentive to encourage barriers as well.⁶⁹² The

⁶⁹⁰ Mshomba *Africa and the World Trade Organisation*, 67; van Den Bossche and Zdouc "WTO Dispute Settlement" 177-178.

⁶⁹¹ Mshomba *Africa and the World Trade Organisation* 68.

⁶⁹² Mshomba *Africa and the World Trade Organisation* 67.

"instigators" are therefore granted indirect access only.⁶⁹³ The implication is that there is a situation where, regardless of the developmental state of the country, influential firms or private parties have the political capital or power to influence either implementation of barriers or the pursuit of WTO-level dispute resolution. This is an undesirable scenario. The author contends that this is an example of where clear SPS-specific legislation can, to a certain extent, minimise such a scenario from arising. Recommendations in this regard are elaborated on in Chapter 6.

5.3 Part two: An exploratory content analysis of SPS related legislation

5.3.1 Introduction

The overall focus of this research is to identify and explore persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. There is a specific focus on SPS-related barriers or disputes that are beyond the strict terms of dispute resolution available at the World Trade Organization (WTO). These barriers or disputes are within WTO concern, despite being beyond such terms of dispute resolution available, and are not necessarily limited to disputes relating to the science on which measures are based,⁶⁹⁴ but include SPS matters that affect private parties⁶⁹⁵ who do not have legal recourse to the WTO to resolve disputes. In this second part of Chapter 5, an exploratory content analysis provides for an additional view and analysis of the South African SPS-related framework.

The preceding chapters highlight persistent challenges and themes in the red-meat industry through an analysis of qualitative fieldwork data and the outcome of a doctrinal analysis of the legislation. Concerns surrounding the substance of the legislative framework have been a recurring theme in these chapters. Chapter 4 identified themes in the fieldwork data that are relevant in deriving value from the

⁶⁹³ van Den Bossche and Zdouc "WTO Dispute Settlement" 177-178.

⁶⁹⁴ I.e. it is not limited to the dispute regarding the scientific justification of a particular measure taken, but includes broader, related sources of SPS-related disputes, including, for example, control inspection and approval procedures or a reliance on reactive as opposed to proactive measures.

⁶⁹⁵ Private parties are, for example, natural or juristic persons, that are local importers (South African), local exporters (South African) or manufacturers (South African).

findings of the content analysis described below. The fieldwork data presented in Chapter 4 pointed to a lack of trust in both the scope and content of the SPS-related legislative framework in South Africa. The doctrinal analysis of the first part of Chapter 5 pointed towards a lack of legal recourse to dispute resolution through enabling legislation and therefore court or internal review-based dispute resolution is not broadly available to resolving SPS-related matters arising. Both chapters indicate a lack in proactive and enabling SPS-related legislation and describe a grim reality where matters directly relevant to principles, rights and obligations associated to SPS are limited to reactive and often ill-fitting grounds based on administrative law to formally resolve disputes at a national level in South Africa. There was a strong sentiment shared amongst participants that, for different reasons, the legislative framework was prohibitive in pursuit of avoiding, resolving or controlling adverse SPS events which is a sentiment that is closely linked to the prevalent theme of trust, or lack thereof, that emerged in the fieldwork data.

Chapter 4 described a sense of frustration across the industry relating to the implementation or possibility of enforcing approaches such as zoning, compartmentalisation, a basis for measures in science, standards and a variety of other related concepts and terms core to SPS. This content analysis adds to the understanding of the root of that frustration in as far as the legislation is concerned.

The main challenges identified and findings analysed in Chapter 4 and the first part of Chapter 5 emphasise the importance of the following categories of SPS rights and obligations. The first is the right to take only measures that are "necessary"⁶⁹⁶ and the associated obligations of basing such measures on principles of science, non-discrimination and least trade restrictive means. These are the basic rights and obligations⁶⁹⁷ and they are closely linked to the concepts of equivalence⁶⁹⁸ and harmonisation.⁶⁹⁹ The second is the right to apply emergency measures and the

⁶⁹⁶ Article 2 states that "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."

⁶⁹⁷ See para 5.3.3 and 5.3.6.1.1.

⁶⁹⁸ See para 5.3.3 and 5.3.7.3.

⁶⁹⁹ See para 5.3.3.

process of implementing and reviewing such measures.⁷⁰⁰ The third is the adaptation to regional conditions and pest- or disease-free areas and areas of low pest or disease prevalence.⁷⁰¹ These three main categories are of most relevance to the context of the research and are analysed in more detail in the findings of the content analysis that follows.

This second part of Chapter 5 limits itself within the context of the specific substance of the legislative framework in the analysis of findings from the exploratory content analysis and the conclusions reached. The specific focus and scope of the findings analysed is guided by the pertinent themes that emanated from Chapter 4 and the first part of Chapter 5. Limitations of and recommendations for the improvement of the methodology are addressed in Chapter 6. Subsection 5.3.3, below, provides an overview of the content and main purpose of the categories of rights and obligations potentially identified by means of the content analysis.

5.3.2 Why search for rights and obligations in national legislation?

Private parties are involved in the daily acts associated with "trade". These range from primary production, further processing and manufacturing to the development of inputs such as farm feeds, veterinary medicines, and control, inspection and approval procedures. It is the collection of private parties⁷⁰² that the competent authority in government represents at the WTO. It is a misnomer to say "South Africa trades with country X, Y, Z". South Africa does not trade in goods. Private parties, including legal persons in South Africa⁷⁰³ trade (both import and export) in products that are collectively recorded in trade statistics as either originating from South Africa or entering into South Africa from a specified country of origin. A collection of private parties, including legal persons and other related parties create an industry and a collection of industries result in the "South African" trading position. The rights of the Member are by association the rights of the industries and domestic constituencies

⁷⁰⁰ See para 5.3.3.

⁷⁰¹ See para 5.3.3 and 5.3.7.4.

⁷⁰² The term "private parties" used in this context includes private parties, legal persons, consumers, and other interested or affected parties.

⁷⁰³ Both South Africans and citizens from other countries as the case may be.

that they purport to represent at this multilateral level. The translation⁷⁰⁴ of such benefits, or in some circumstances SPS restraints, a result of international negotiation and agreement, is the responsibility of the Member to facilitate through national legislation.⁷⁰⁵ It is the responsibility of the Member, or government, towards the population (and therefore industries) which it represents at an international level to do so.

Therefore, for a private party in South Africa to benefit from the rights and obligations accruing to or borne by their government, the Member of the WTO, in its capacity as an elected representative of the private parties at international forums such as the WTO, national legislation is the most direct route through which to "gain access" to these beneficial rights and obligations. In the context of SPS a private party⁷⁰⁶ can reasonably expect that a country such as South Africa, observes the right to protect human, animal or plant life or health and takes measures in accordance with the obligation to base and maintain such decisions on principles of science. An example of a private party requiring recourse to a national court in the context of explicit and implied rights emanating from the WTO-SPS, is a rejection of a consignment of a perishable animal product at the border. Hypothetically, if the justification therefore is based on an outdated understanding of the relevant science, or where there is reason to believe that the rejection is motivated by reasons unrelated to the cited measures, e.g. that the act of delaying or entirely rejecting the consignment is an intentional restriction on trade under the guise of food safety, the private party may consider recourse to a national court. They can only do so if they are empowered to do so

⁷⁰⁴ The word 'translation' is used deliberately. International agreements, their wording, phrasing and their content (principles, rights and obligations) are in many respects a different language. There is a necessary "translation" that goes beyond the simple rephrasing of such principles, rights and obligations when introducing them into the national legal system in a manner that enables private parties to rely on such principles, rights and obligations before national courts. There are of course, certain principles, rights and obligations that are not suitable for national legislation on account of their Member to Member design, such as dispute resolution at a WTO level. These are however limited in the SPS context.

⁷⁰⁵ This may vary from country to country depending on the manner in which WTO law is enforced or of direct effect in their own national legal system. See generally: Ruppel and Hoppe 2021 *The Indian Journal of International Economic Law*.

⁷⁰⁶ An importer of red-meat is a good example of such a private party.

through national legislation, and indeed are aware that this is a right that they hold and can enforce through its existence in national legislation.

At this stage, private parties in South Africa cannot rely on the direct effect of WTO-SPS provisions in a national court in the country, even though the agreement has been ratified by Parliament.⁷⁰⁷ Despite there being a short trail of Constitutional Court cases that have dealt with the matter, and the *International Trade Administration Commission v SCAW South Africa*⁷⁰⁸ decision that departed from the views of *Progress Office Machines CC v South African Revenue Services*⁷⁰⁹ and *Azanian People's Organization v President of the Republic South Africa*,⁷¹⁰ for which it faced academic criticism, the general consensus is that the WTO agreements and the rights that they contain to the benefit of the private party, are not enforceable by private parties in South African courts.⁷¹¹

Ruppel and Hoppe make the point that in the interpretation of South African national legislation in South African jurisprudence, there is evidence of an influence of the WTO's instruments.⁷¹² They do however caution that this is not equivalent to a "back door" direct effect of WTO law in the South African system.⁷¹³ Even if direct effect of the WTO-SPS was available to the private party in South Africa, would this be an outcome that is, on its own, capable of addressing the challenges identified in Chapter 4 and earlier in Chapter 5? Potentially yes, provided there is the required expertise to bring such a matter before a court and challenge the existing legislation (or a specific SPS measure taken under the authority of enabling legislation) or its provisions. It would however remain limited given the lack of substance in the national legislative framework required to support such an outcome or application. This research

⁷⁰⁷ See Ruppel and Hoppe Ruppel and Hoppe 2021 The Indian Journal of International Economic Law 42-43 in discussion of the Azanian Peoples Organization v President of the Republic South Africa (1996) 4 SA 672 (CC) case.

⁷⁰⁸ International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) (hereafter SCAW).

⁷⁰⁹ Progress Office Machines CC v South African Revenue Service and Others 2008 (2) SA 13 (SCA) (hereafter Progress Office Machines).

⁷¹⁰ Azanian Peoples Organization v President of the Republic South Africa (1996) 4 SA 672 (CC) (hereafter AZAPO).

⁷¹¹ Ruppel and Hoppe 2021 The Indian Journal of International Economic Law 46.

⁷¹² Ruppel and Hoppe 2021 The Indian Journal of International Economic Law 46.

⁷¹³ Ruppel and Hoppe 2021 The Indian Journal of International Economic Law 47.

recommends, in Chapter 6, that the appropriate solution is a purpose-driven incorporation of SPS-related rights and obligations into the national legislative framework of South Africa to make them enforceable domestically.

Therefore, the search for WTO-SPS rights and obligations in national legislation is a means through which to gain insight into the state of the national legislation as far as the SPS (as a field of WTO/trade law) specific substance of the SPS legislative framework is concerned. The content analysis is not concerned with what *must*⁷¹⁴ be contained in a legislative framework, but rather what *is* (or what is clearly not) contained in the legislative framework. This is done by primarily focusing on what is absent in the data and whether or not such an absence is one that can or cannot be justified in the context of this research and the role of SPS-related rights, obligations and principles in national and international trade. The absence of key components of a framework when at the outset being interested in its content, or what is in the framework, is revealing of the state of the frameworks content. In that sense, the robustness of the substantive SPS content is tested. For this reason, given the context of the research and the purpose of this section, the presence and high saturation of specific categories is not focused on.

As explained in Chapter 3, SPS measures and the South African SPS legislative framework are addressed in the South African TPRs. The content of the reports are however limited in length and detail and there has been no significant review of the SPS legislation over the past 25 years. The TPRs repeatedly record the claim that review is in progress, by both the secretariat and by South Africa, since 1998,⁷¹⁵ however the evidence of such a review in practice has been absent. The findings below contribute to the understanding of what the absence of the reform of SPS-related

⁷¹⁴ I.e. it is not concerned with whether the international agreements *require* a translation of rights and obligations into national legislation in terms of a specific provision of the agreement itself.

⁷¹⁵ The most recent is 2015/2016. There are currently four reviews and one revision by the secretariat: WTO Trade Policy Review Republic of South Africa Report by Secretariat WT/TPR/S/34; WTO Trade Policy Review Report by the Secretariat Southern African Customs Union (Revision) WT/TPR/S/324/REV.1, WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/114/ZAF. WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/222; WTO Trade Policy Review Southern African Customs Union (SACU) Report by Secretariat WT/TPR/S/324.

legislation could potentially mean for a private party, and for South Africa as a country. It does so by first considering general findings and then turns to more specific findings in the categories of rights and obligations and the specific FMD context.

For every right that a party holds, there is possibly an associated obligation to a private party or another Member state, and for every obligation on a Member, there is possibly an associated right that a private party or another Member state holds that could be given effect through national legislation. Rights and obligations can also be either explicit or implicit and obligations are not necessarily punitive. The nature of the obligation will determine the punitive or other nature thereof.⁷¹⁶ The following sub-section provides an overview of the categories of rights and obligations that the WTO-SPS, SADC-SPS and AFCFTA-SPS create.⁷¹⁷

5.3.3 Overview: core principles, rights and obligations in SPS agreements

*Basic rights and obligations.*⁷¹⁸ In Article 2, the WTO-SPS⁷¹⁹ entrenches the right to take justifiable measures, based on science and necessity that are non-discriminatory in nature and the application of which is not a disguised restriction on trade. The content of Article 2 is as follows:

- (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,

⁷¹⁶ This research does not assume that interstate rights would likely be accounted for in the national legislation and in the visualisation of the findings, the data is limited to rights and obligations that are not exclusively between Members.

⁷¹⁷ The logical order of the discussion of these categories corresponds with the flow of the WTO-SPS.

⁷¹⁸ Category BRO as visualised by the heatmaps.

⁷¹⁹ For purposes of this sub-section the *WTO-SPS* is the agreement primarily referred to as the source of the categories of rights and obligations. The reason therefore is that both the *SADC-SPS* and *AFCFTA-SPS* make specific reference to the guiding nature of the provisions in the *WTO-SPS*. The *AFCFTA-SPS* contains categories of rights and obligations that differ from phrasing in the *WTO-SPS* and *SADC-SPS*. These are related specifically to Audit and verification; Import or export inspections and fees; Technical consultations; Emergency SPS measures; and Co-operation and technical assistance.

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).⁷²⁰

South Africa's trading partners, as Members of the WTO and therefore also party to the WTO-SPS, are bearers of the same rights and obligations. The right to take such SPS measures as necessary comes with the corresponding obligations to do so in a manner consistent with the broader provisions of the agreement and in this section in particular, the obligation to do so in a manner that is not arbitrary or unjustifiably discriminatory. The justification on scientific grounds is not limited to the initial act of taking a measure, but extends to its justifiability in as far as maintaining the measure is concerned. The private party would, therefore, also have an interest in the principles, rights and obligations that this Article provide for. Bearing in mind the lack of legal standing that a private party⁷²¹ has at the WTO and their subsequent reliance on the interpretation of national law as it is in domestic courts, there is a level of reasonable expectation (held by an private party) that is created by the wording of this Article.

⁷²⁰ Article 2.

⁷²¹ As stated above, "private party" as used in this context includes private parties, legal persons, consumers, and other interested or affected parties.

The SADC-SPS reaffirms SADC Members' existing rights under the WTO-SPS.⁷²² The AfCFTA does not contain a heading with equivalent wording, but it does require, as a guiding principle, that State Parties be guided by the WTO-SPS and its provisions.⁷²³ Therefore, the principles and basic rights and obligations reasonably expected by a member trading under either of these two agreements should follow the same guidelines as the WTO-SPS.

*Equivalence.*⁷²⁴ The term "equivalence" is not defined by the WTO-SPS. Article 4 places an obligation on Members stating that:

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.⁷²⁵

In a national legislation context a private party, for example one importing a particular product, can reasonably expect that in South Africa, their objective demonstration of equivalent SPS protection will be accepted as sufficient and that their product will not be unnecessarily rejected or destroyed upon importation. The objective demonstration may include subjecting the product to "inspection, testing and other relevant procedures."⁷²⁶ If the private party is not satisfied that the correct procedure was followed or objective consideration to their request was given, such a private party would require recourse in national law to challenge, review or litigate the matter, if necessary. The Member Government is, according to WTO dispute resolution, the correct bearer of the right to equivalence, or the duty bearer, as the case may be. However, given the potential individual or case-by-case nature of such a demonstration,⁷²⁷ and the challenges related to resolving such matters at a WTO level, there is a strong argument in favor of directly incorporating rights and obligations enforceable by and against both private parties and their relevant government

⁷²² Article 5.

⁷²³ Article 3.

⁷²⁴ Category E as visualized by the heatmaps.

⁷²⁵ Article 4.1.

⁷²⁶ Article 4.1.

⁷²⁷ The objective demonstration by the exporting Member to the importing Member that the measures in question achieve the same appropriate level of SPS protection as the importing Members.

departments at a national level. The OIE, in Chapter 5.3, also specifies general recommendations and prerequisites for the determination of equivalence in the context of animal health matters, which should include matters related to FMD.⁷²⁸

*Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection.*⁷²⁹ Private parties can reasonably expect a number of specific rights and obligations related hereto in a national legislative framework.⁷³⁰ Article 5.1 of the WTO-SPS states that:

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, considering risk assessment techniques developed by the relevant international organisations.⁷³¹

Assessment of risk and what the appropriate level of SPS protection is has been the subject of a number of WTO panel and appellate body reports.⁷³² Matters such as the standard of review, the definition of risk assessment, causality and techniques of risk assessment are examples of the topics with which WTO panels have grappled in the past. The WTO treatment demonstrates the extent to which this category of rights and obligations can get complicated, especially when considered in terms of its relationship with other requirements in the agreement as well.

Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence. Article 6.1 and 6.2 of the WTO-SPS states:

- (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

⁷²⁸ See specifically article 5.3.2-5.3.6 of the OIE *Terrestrial Animal Health Code*.

⁷²⁹ Category ARC as visualised by the heatmaps.

⁷³⁰ Annexure A5 defines it as: "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."

⁷³¹ Article 5.1.

⁷³² For example: Appellate Body *Japan- Apples* , Panel Report *Japan - Apples* , Panel Report *Korea — Bovine Meat (Canada)* , Panel Report *Russia — Pigs (EU)* , Appellate Body *Russia — Pigs (EU)*.

eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organisations.

- (2) Members shall, in particular, recognise 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.

It is in the recognition of disease-free areas⁷³³ or areas of low prevalence⁷³⁴ in which the concepts of zoning⁷³⁵ and compartmentalisation⁷³⁶ anchor their support in the WTO-SPS.⁷³⁷ This is a matter of particular importance to private parties that took part in the qualitative fieldwork interviews described in Chapter 4. Article 6.3 of the WTO-SPS states:

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.⁷³⁸

It therefore places the onus of proof on the exporting Member in proving the likelihood of an area being and remaining disease- or pest-free or with low disease or pest prevalence.

⁷³³ Annexure A6: "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."

⁷³⁴ Annexure A7: "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."

⁷³⁵ The term "zone" in the context of animal health means "means a part of a country defined by the Veterinary Authority, containing an animal population or subpopulation with a specific animal health status with respect to an infection or infestation for the purposes of international trade or disease prevention or control." See OIE *Terrestrial Animal Health Code*, glossary.

⁷³⁶ The terms "compartment" in the context of animal health "means an animal subpopulation contained in one or more establishments, separated from other susceptible populations by a common biosecurity management system, and with a specific animal health status with respect to one or more infections or infestations for which the necessary surveillance, biosecurity and control measures have been applied for the purposes of international trade or disease prevention and control in a country or zone." See OIE *Terrestrial Animal Health Code*, glossary.

⁷³⁷ See in particular article 5.3.7 of the OIE *Terrestrial Animal Health Code*.

⁷³⁸ Article 6.3.

*Transparency.*⁷³⁹ Transparency in the WTO-SPS relates to the notification of SPS measures in accordance with Annexure B of the agreement. Annexure B requires the establishment of one enquiry point⁷⁴⁰ and prompt publication⁷⁴¹ of SPS regulations, and stipulates detail of the process.⁷⁴² The OIE also specifically refers to the transparency requirement of the WTO-SPS in Chapter 5.3, entitled "OIE procedures relevant to the agreement on the application of sanitary and phytosanitary measures of the World Trade Organization" in the context of animal health matters.⁷⁴³

*Harmonisation.*⁷⁴⁴ Harmonisation is a principle of SPS that contains both rights and corresponding obligations as well. The duty bearer in this case is the national government. The duty is defined by the WTO-SPS as "[t]he establishment, recognition and application of common sanitary and phytosanitary measures by different Members."⁷⁴⁵ Article 3 of the WTO-SPS also contains the requirement to base SPS measures on international standards:⁷⁴⁶

⁷³⁹ Category T as visualised by the heatmaps.

⁷⁴⁰ Annex B.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."

⁷⁴¹ Annex B.1.

⁷⁴² Footnote five of the agreement states that regulations in this context mean "Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally."

⁷⁴³ See Chapter 5.3.

⁷⁴⁴ Category H as visualised by the heatmaps.

⁷⁴⁵ Annexure A2.

⁷⁴⁶ International standards are defined in Annex 1 as "(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 organisations operating within the framework of the International Plant Protection Convention; and (d) for matters not covered by the above organizations, appropriate

To harmonise 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...⁷⁴⁷

Inevitably there are situations in which international standards do not exist or where a higher level of SPS protection than the recommended international guideline is justifiable. The application and justification of such measures are guided by Article 3⁷⁴⁸ and Article 5⁷⁴⁹ of the WTO-SPS.

*Control, Inspection and Approval Procedures.*⁷⁵⁰ Both Article 8 and Annexure C of the WTO-SPS provide guidance and provisions and therefore associated rights and obligations (in terms of private parties and other Members) related to control, inspection and approval procedures. Article 8 of the WTO-SPS lists specific examples of the scope of application of these provisions stating that:

Members shall observe the provisions of Annexure 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.⁷⁵¹

The interpretation of the core categories of the principles, rights and obligations and further detail of specific requirements has been the subjects of a number of panel and appellate body reports. The detailed discussion and analysis of such panel reports are beyond the scope of this research. This research is focused on identifying potential

standards, guidelines and recommendations promulgated by other relevant international organisations open for membership to all Members, as identified by the Committee."

⁷⁴⁷ Article 3.1.

⁷⁴⁸ Article 3.3 "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. 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."

⁷⁴⁹ Article 5: Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

⁷⁵⁰ Category CIAP as visualised by the heatmaps.

⁷⁵¹ Article 8.

gaps or otherwise in the national legislation and retains specific focus as described in paragraph 2.4.3.1 above and subsections 5.3.4 and 5.3.5 that follow.

5.3.4 Purpose and scope of Part two of Chapter 5

The following sub-sections describe the results and contribution of an exploratory content analysis of South African legislation dealing with SPS matters. The exploratory content analysis was introduced as a third perspective from which to analyse the SPS-related legislative framework in the context of SPS measures as barriers to trade. A content analysis such as the one conducted in this research is a non-typical method for the analysis of legislation in South African legal research.

The researcher's hypothesis is that one can accept words as data which is measurable, analysable and quantifiable, therefore that viewing the content of legislation (i.e. the individual words in the text) as data which is extractable and interpretable, and that a content analysis can be useful in exploring the relationship between the legislation as it is and the purpose which it is intended to serve in an SPS context. The content analysis therefore tests the researcher's further hypothesis that the presence or absence of certain terms or concentrations thereof across the legislative framework, could be a *prima facie* indication of the suitability of the framework itself. A content analysis provides an alternative perspective, a type of bird's eye view, of the content of a legislative framework that can reasonably be expected to contain purpose- or field-specific language.

This content analysis searches for evidence of SPS-specific rights and obligations that have been derived from three SPS-specific international agreements within South Africa's SPS-related national legislation. These agreements are the WTO-SPS, SADC-SPS and AFCFTA-SPS. The analysis is limited to a general overview of the categories of rights and obligations as they relate to legislation groups. Annexure 4 contains a schedule detailing the contents of the rights and obligations identified and identifies the corresponding categories of private parties who are predominantly holders of rights or bear duties related to a specific right or obligation. This first application of the content analysis and subsequent analysis of the data is limited to enabling or primary legislation and excludes regulations. Because of the nature of rights and obligations

derived from the agreements being core to the field of SPS as a whole and not product specific, in a legislative environment such as South Africa's the existence of such provisions is suited to inclusion in enabling, primary legislation. In a second application of the methodology, the content analysis also searches for evidence of FMD and animal health specific provisions derived from the OIE's Terrestrial Code and Manual⁷⁵² within South Africa's SPS-related national legislation and regulations. This application and its analysis is to a greater extent a method which tests the disease-specific (FMD) robustness of the legislative framework. Regulations are therefore included in the second application of the methodology to the OIE and FMD specific terms and its analysis.

5.3.5 Specifics of the methodology

Chapter 2 details technical aspects of the methodology and situates it within the broader context of this research. The entire content analysis, from data extraction to the point of visual representation of findings was conducted using Rstudio programming.⁷⁵³ The use of Rstudio provides a reproducible form of data collection and in that sense it is a methodology that potentially offers the ability to do a comparison across different jurisdictions as the context of the text and broader legal system is removed and the language is treated as data within the context of a specific field of research instead. It is therefore a third corner to the triangle of inquiry in this particular research and it is reproducible. It is also context specific⁷⁵⁴ in that the content analysed is specific to SPS and the language specific to the field of SPS and

⁷⁵² The OIE is the ISSB that provides the international standards and guidelines as far as FMD is concerned and this is done through the provisions of the OIE Terrestrial Manual and OIE Terrestrial Codes.

⁷⁵³ The packages of particular importance, also credited in the bibliography, are: library(quanteda), library(readtext), library(tidytext), library(tidyverse), library(ggplot2), library(readxl), library(writext), library(textclean), library(flextable), library(patchwork).

⁷⁵⁴ The word "context" is used in this instance as referring to a field of trade law, veterinary law and animal law within which certain terms are universally understood as carrying specific meaning attributed to their origin in international agreements and international standard setting bodies.

FMD as the disease used in the further context-specific inquiry employed in this research.⁷⁵⁵

Each right or obligation identified per agreement was assigned a unique ID code matched to a corresponding list of identifying terminology specific to the description of that right or obligation. The content thereof was searched for in the text of the legislation (corpus) and extracted. The result is a data set that records the unique ID code of the specific right or obligation and the specific key word that indicated a positive match. In instances where more than one key word was a positive match, these are also recorded. In the analysis of the data collected, the data was "cleaned" and "tidied"⁷⁵⁶ as a first step to enable its analysis. During analysis, the `distinct()` function from the `dplyr` package⁷⁵⁷ was used to retain only unique rows or unique combinations of the unique ID and the matching key word. This enables an analysis of the concentration of unique combinations⁷⁵⁸ as opposed to the number of times that a particular word identifying a particular unique ID was recorded. The concentration of unique combinations is a more appropriate method for this particular methodology as it attributes weight to a unique ID proportional to the number of times unique words indicate its potential presence. The higher the concentration of unique combinations i.e. different words connected to the same unique ID (right or obligation) the more likely that there is a genuine presence of that right or obligation. The lower the concentration of unique combinations per category of rights or obligations, the less

⁷⁵⁵ It is however a method of data collection that is devoid of the influence of context such as the political, legal or social climate within which the legislation exists at the time of collection.

⁷⁵⁶ This is Rstudio-specific terminology, where data tidying can be understood to mean "structuring datasets to facilitate analysis". See: Wickham 2014 *Journal of Statistical Software* 1.

⁷⁵⁷ Wickham *et al* 2022 <https://dplyr.tidyverse.org>, <https://github.com/tidyverse/dplyr>. Overview: "dplyr is a grammar of data manipulation, providing a consistent set of verbs that help you solve the most common data manipulation challenges."

⁷⁵⁸ "Unique combinations" between Unique ID Code, Key word extracted and the specific piece of legislation from which it was extracted. Therefore, if word "a" matches as identifying unique ID code WTO10000 more than once, only one unique combination of "a" corresponding with WTO10000 is recorded. If however, words "c" and "d" also identify WTO10000, but there is only one hit each, they are also recorded as they are unique combinations two and three for that unique ID code, indicating that there is a higher probability that the right or obligation that WTO10000 identifies may be present.

likely their existence. The findings, discussed within the scope of the section as described above in the introductory sections, are as follows.

The set of data extracted and analysed based on the key words relevant to the *WTO-SPS*, *SADC-SPS* and *AfCFTA-SPS* is therefore a set of data extracted and analyses in the content analysis to the OIE and FMD. What remains the same is the legislation, and subsequent categories of legislation, from which the content is extracted and the R programming method used to do so.

Before presenting the actual findings for the first part of the analysis (SPS rights and obligations in legislation), a short description of the method followed in the visualisation of the findings is necessary. On the one hand, legislation groups are visualised on the X axis and described by acronyms as detailed in Table 5-1. On the Y axis, acronyms as descriptors for categories of rights and obligations are used as detailed in Table 5-2. What is then presented is a visual representation of the relationship between a category or legislation and a category of rights or obligations by showing how strong the presence of certain categories of rights and obligations are for different groups of legislation. The darker saturation of a meeting point between categories of the Y and X axis is therefore an indication of a high concentration of overlap between the key words and subsequent rights and obligations in the category per group of legislation. The discussion in this part identifies the general trends for certain categories of rights or obligations and their relationship with categories of legislation, in particular where the saturation is low as this indicates a potential absence or gap in the content of rights or obligations in the legislation. Trends will be indicated by recourse to typical examples of words, and thus rights or obligations, missing. All the necessary detail related to the wording, parties involved, specific agreement and article from which the right or obligations were derived is contained in Annex X.

Legislation is visualised according to category of legislation as described in the first part of Chapter 5 at subsection 5.2.1.⁷⁵⁹ Table 5-1, below provides a description of the

⁷⁵⁹ As per 5.2.1 above, the Acts in each category of legislation are as follows: Core red meat-related SPS legislation (RM): Agricultural Pests Act 36 of 1983, Animal Diseases Act 35 of 1984, Animal Health Act 7 of 2002 (not in use yet), Meat Safety Act 40 of 2000; Legislation on the periphery of SPS (PER): Animal Improvement Act 62 of 1998, Conservation of

acronyms for the categories of legislation. The rights and obligations related to SPS are visualised according to the categories within which they are associated within the three international agreements focused on in this research.

Table 5-1: Description of legislation groups in heatmaps

Acronym	Category of RSA SPS related Legislation
BR	Broader RSA SPS legislation
ITR	Input and technical requirement related RSA SPS legislation
PER	Peripheral RSA SPS legislation
RM	Core red meat-related RSA SPS legislation
SCI	Support control and implementation RSA SPS legislation

Table 5-2, below, shows both the description of the category acronyms for the categories of SPS rights and obligations, as well as a list of agreements in which the specific category is found. To the greater extent, the wording of descriptive categories are the same or similar across all three agreements. However, there are exceptions, for example in the categories Basic Rights and Obligations (BRO) and Guiding principle[s] (GP), which are similar in purpose. Categories such as Audit and verification (AV), Emergency measures (EM) and Cooperation and technical assistance

Agricultural Resources Act 43 of 1983, National Environmental Management Biodiversity Act 10 of 2004, National Environmental Management Protected Areas Act 57 of 2003, Plant Improvement Act 53 of 1976, Animals Protection Act 71 of 1962; Legislation related to inputs and technical requirements (ITR): Agricultural Product Standards Act 119 of 1990, Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, Medicines and Related Substances Act 101 of 1965, National Regulator for Compulsory Specifications Act 5 of 2008; Legislation supporting control, inspection and approval procedures (SCI): Agricultural Produce Agents Act 12 of 1992, Consumer Protection Act 68 of 2008, Disaster Management Act 57 of 2002, Fencing Act 31 of 1963, Marketing of Agricultural Products Act 47 of 1996, Stock Theft Act 57 of 1959, Animal Identification Act 6 of 2002, Perishable Products Export Control Act 9 of 1983; Broader SPS related legislation (BR): Genetically Modified Organisms Act 15 of 1997, Liquor Products Act 60 of 1989, Tobacco Products Control Act 83 of 1993.

(CTA)⁷⁶⁰ are categories within the *AfCFTA-SPS* that are examples of categories of rights and obligations that are absent (as categories in themselves) in the *WTO-SPS* and the *SADC-SPS*.⁷⁶¹ Where heatmaps are generated for purposes of visualisation, these differences in categories per agreement are also visible. It is for this reason that the Y axis of the heatmaps slightly differ per agreement.

Table 5-2: Description of category codes of groups of rights and obligations in the international agreements as visualised in the heatmaps

Category Acronym	Description	Agreement Concerned
ARAP	Assessment of risk and determination of the appropriate level of sanitary or phytosanitary protection	WTO, SADC, AfCFTA
ARC	Adaptation to regional conditions, including pest- or disease-free areas and areas of low pest or disease prevalence	WTO, SADC, AfCFTA
AV	Audit and verification	AfCFTA
BRO	Basic rights and obligations	WTO, SADC
CIAP	Control, inspection and approval procedures	WTO, SADC
CTA	Cooperation and technical assistance	AfCFTA
E	Equivalence	WTO, SADC, AfCFTA
EM	Emergency measures	AfCFTA
GP	Guiding principle	AfCFTA
GPRO	General provisions, rights and obligations	WTO
H	Harmonisation	WTO, SADC, AfCFTA

⁷⁶⁰ The category of TA although differently worded is, for example, comparable with CTA.

⁷⁶¹ Emergency, or urgent measures, although not categorised on its own in the *WTO-SPS* and *SADC-SPS* are provided for in both agreements (primarily in articles related to the transparency of notifications in the implementation of urgent measures). However, the *AfCFTA-SPS* provides more specific procedural provisions and guidance in Article 13 than what is provided for in the *WTO-SPS* and *SADC-SPS* agreements as far as emergency measures are concerned.

Category Acronym	Description	Agreement Concerned
IEIF	Import or export inspections and fees	AFCFTA
IM	Implementation	WTO, SADC
SDT	Special and differential treatment	WTO
T	Transparency	WTO, SADC, AFCFTA
TA	Technical assistance	WTO, SADC, AFCFTA
TC	Technical consultations	AFCFTA
TR	Transparency of sanitary and phytosanitary regulations	WTO, SADC

The content analysis extracts keywords by searching for a match in each specific Act listed in 5.2.1. Where there is a match, the word is stored in a data frame corresponding with one (or several) unique ID codes,⁷⁶² which stands for a certain right or obligation in the agreements,⁷⁶³ that are also associated with a specific right or obligation category. These are all captured in Annexure 4. An extract of Annexure 4 is shown below:

⁷⁶² The key words for which are pre-programmed into the script as identifying that unique ID code. There are cases where a word potentially identifies more than one right or obligation.

⁷⁶³ The key words for which are pre-programmed into the script as identifying that unique ID code. There are cases where a word potentially identifies more than one right or obligation.

Table 5-3: Extract from Annexure 4

Unique ID	Category	Agreement	Article Nr	Right or obligation	Description	Rationale	Actor
WTOR01	BRO	WTO	2.1	R	The Members right to take measures to protect human, animal or plant life or health	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOOB01	GPRO	WTO	1	OB	The obligation on Member states to develop and apply SPS measures in accordance with the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures	This is a unique obligation with associated rights that a category of private parties (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

As explained in 5.3.5 above, unique combinations are retained and duplicates are discarded in the visualisation so as to avoid a distortion in the heatmap visualisation (specifically saturation) with the focus being on the "count" of occurrences (typical more common words such as animal) as opposed to the number of different key words (as specific words) that match with a unique ID code.

5.3.6 Findings and analysis: An overview of literal gaps in the legislative framework

5.3.6.1 A broad overview and analysis of the legislative framework in relation to the categories of rights and obligations

5.3.6.1.1 Rights and obligations: general findings related to the content of specific categories of rights and obligations in categories of the South African SPS legislation

The heatmaps below in Figure 5-1 visualise literal gaps (where there is little or no evidence of keywords identifying rights and obligations) in the categories of SPS legislation.

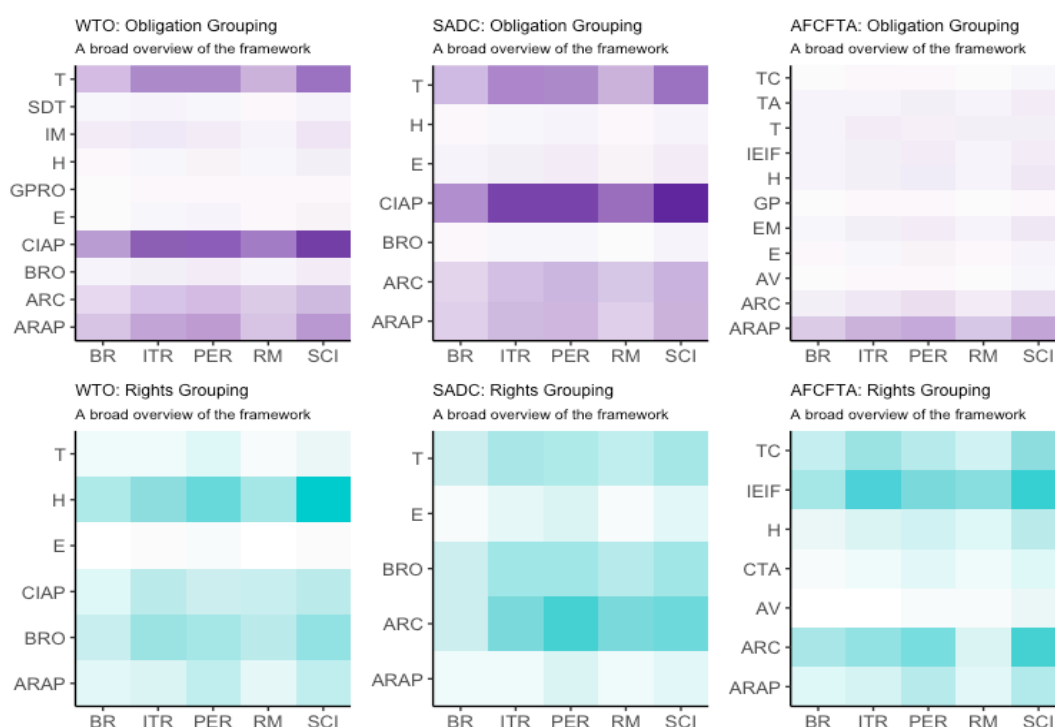


Figure 5-1: A heatmap showing the saturation of unique combinations of rights and obligations per category in South African SPS-related legislation

In the categories describing rights and obligations related to equivalence (E) and basic rights and obligations (BRO), there appears to be a literal gap in the existence of associated rights and obligation in the legislative framework. The heatmaps show a low or non-existent saturation of unique combinations related to these categories in the legislative framework which is an indication of their likely absence across the

categories of legislation. This is more pronounced when focusing on the category of legislation providing for the red-meat industry where there is generally an even lower concentration than for the other categories, as shown in the subsections below.⁷⁶⁴

The presence or absence of certain terms or concentrations thereof across the legislative framework is at first glance an indication of the shortcomings of the framework in the specific categories of equivalence (E) and basic rights and obligations (BRO). This initial conclusion will be tested by looking at these categories of rights and obligations as they relate to the unique IDs (unique/specific rights and obligations) associated with each category as well as considering the existence as well as location in legislation of a selection of key words inseparable from the field of SPS.

5.3.7 A focused view and analysis of the content and findings in selected categories of rights and obligations in relation to categories of legislation

5.3.7.1 General provisions, basic rights and obligations

There are basic rights and obligations that are key to the successful application of SPS measures, in terms of protecting human, animal and plant life and health, as well as in terms of not allowing it to become an unjustifiable barrier or one used as a disguised restriction on trade. Core to this is the reliance on science, international standards, reasonableness, non-discrimination and the avoidance of arbitrariness in decision-making. The heatmap below shows the saturation of groups of rights and obligations potentially held or carried by private parties or the Member state related to these basic rights and obligations and the principles core to them.⁷⁶⁵

⁷⁶⁴ For purposes of visualisation in Figure 5-1, given the connectedness between Article 7 of the *WTO-SPS Transparency* (T) and Annex B, *Transparency of SPS Regulations* (TR), the two categories have been combined as one category represented by T. In the data extraction part of the methodology they were treated as two separate categories so as to enable the possibility either to visualise them separately, or to combine them, as has been done in this case, where context requires a combined visualisation. In Annexure 4 they are listed separately as T and TR.

⁷⁶⁵ The category of BRO is not present in the same wording in the AFCFTA, the category of guiding principles is the AFCFTA equivalent of BRO and GPRO.

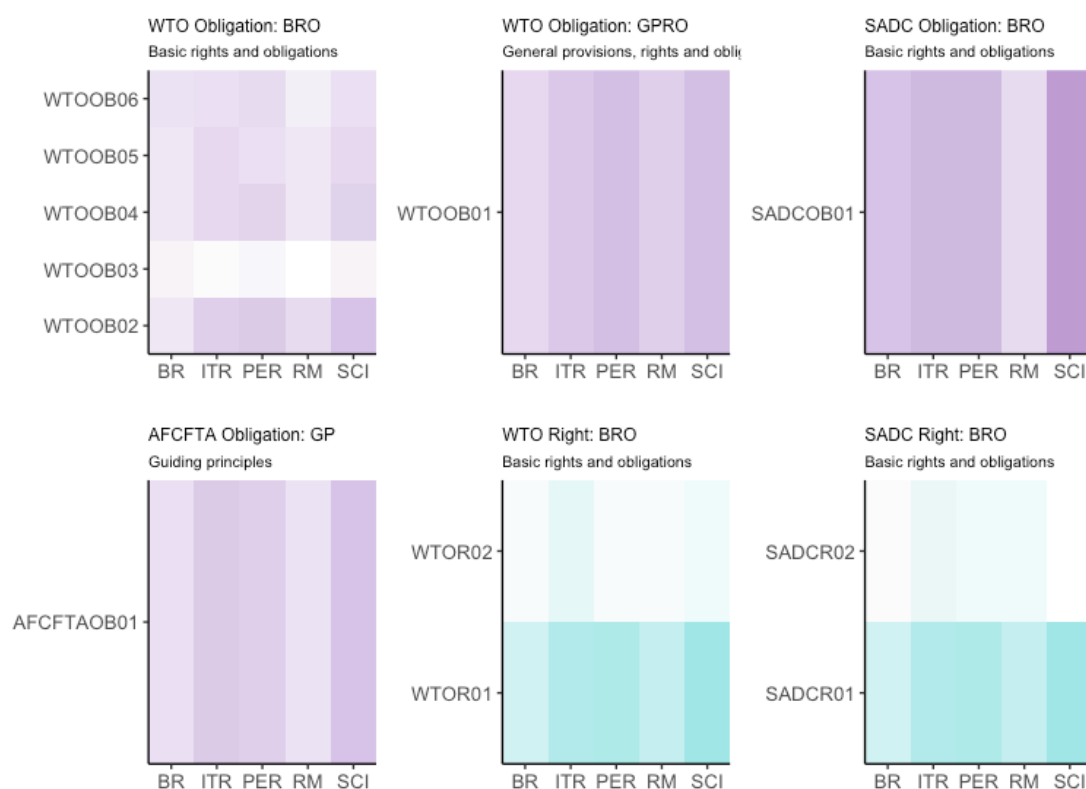


Figure 5-2: Basic rights, obligations and general provisions

Unique ID WTOOB03, which identifies the obligation on Members to base measures on principles of science, is strikingly low in saturation, particularly in the category of red-meat-related legislation. This is a unique obligation with associated rights that a category of private parties (dependent on their role in the SPS chain) can reasonably expect in national legislation.⁷⁶⁶ Importers, in particular, stand to benefit from the specific incorporation of the associated rights to rely on science, for example, as the basis on which decisions related to specific measures are made. The results of refining the search and investigation into the content of the basic rights and obligations related to SPS in the legislative framework were the following:

When searching specifically for the terms "science", "scientific", "sanitary", "phytosanitary", "phyto", "oie", "codex", "ippc", and "cac", the result clearly shows a legislative framework in which there is an undeniable absence of even the most basic

⁷⁶⁶ A detailed more description is provided in Annexure 4.

rights and obligations.⁷⁶⁷ This is not an exhaustive list of the search terms used in the content analysis. However, these do form part of the collection of terms searched in the content analysis that resulted in the heatmaps above. They are a representation of further extraction of data that represents an even more refined collection of terms, extracted on account of their relevance in order to test robustness of the more general findings visualised in the heatmap. Exact terms as in the quotation marks were searched, not truncated terms. These terms focused upon, as displayed in the table below, are distinct identifying terms in the context of the basic rights and obligations related to SPS.⁷⁶⁸ What is immediately clear from the results shown in the table below is that none of these words are present in any of the legislation specific to the red-meat industry. Notable is the absence of any matches found in the Meat Safety Act.⁷⁶⁹

Table 5-4: Key words present in legislation – basic rights and obligations (BRO) category

Legislation	Key word
Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972	sanitary
Genetically Modified Organisms Act 15 of 1997	science
Consumer Protection Act 68 of 2008	scientific
Disaster Management Act 57 of 2002	scientific
Genetically Modified Organisms Act 15 of 1997	scientific
Medicines and Related Substances Act 101 of 1965	scientific
National Environmental Management: Biodiversity Act 10 of 2004	scientific
National Environmental Management: Protected Areas Act 57 of 2003	scientific

⁷⁶⁷ The search covers all three agreements as the specific terms identified are not agreement specific but rather category specific.

⁷⁶⁸ The following terms "oie", "codex", "ippc", "cac" identify the international standard setting bodies on which SPS measures shall be based.

⁷⁶⁹ The purpose of the Meat Safety Act is "[t]o provide for measures to promote meat safety and the safety of animal products; to establish and maintain essential national standards in respect of abattoirs; to regulate the importation and exportation of meat; to establish meat safety schemes; and to provide for matters connected therewith." Given the role that this Act plays in the SPS chain, the absence of any reference to science or scientific principles is relevant to the conclusions reached in this research.

The absence of the words "sanitary", "science", or "scientific" in an SPS context and in an SPS-related legislative framework is a significant flaw.⁷⁷⁰ A legislative framework cannot be an SPS legislative framework and not contain the words "science" or "scientific" in a provision specific to an SPS context. The lack of content of science-related provisions in the content analysis of the SPS related legislative framework places persons dependent on national legislation in a position where there are no legal grounds on which to base legal arguments in the event of a dispute related to an SPS measure that is flawed in its scientific basis nor is there scope to enforce a right proactively, through legislative procedures or guidance, against a competent body to act for example.

The findings related to the absence of key terms that govern the application of SPS measures in the legislative framework lead to the conclusion that, in general, the SPS-related framework in South Africa is not fit for purpose.

5.3.7.2 Transparency

Transparency relates to the notification of changes that Members make to SPS measures. The *WTO-SPS* provides a detailed exposition of the transparency of SPS regulations in Annexure B.⁷⁷¹ Transparency is a category of obligation with an associated right, of particular relevance to private parties within the SPS chain, and is of importance in the national legislation context. A South African importer, importing a product into South Africa, for example, is a category of private party that could be disadvantaged by the absence of a requirement, or mandate on the competent body responsible for a particular category of products, to effect such notifications where required. An importer could be disadvantaged in that he or she could be surprised by measures. Without a clear provision in the law of what the circumstances would be that classify a change as notifiable or not, there are no grounds on which the South African importer could hold a competent body accountable for the failure to notify such a change to trading partners or interested parties. This can result in a refusal or

⁷⁷⁰ As stated earlier, the exact terms as in the quotation marks were searched, not truncated terms.

⁷⁷¹ Since the agreement separates transparency (T) from transparency of SPS measures in Annexure B (TR), the analysis does so as well.

complication of importation (presumably detention at the border) of goods that could otherwise have been rectified. If a remedy to the problem is unavailable and the importer is unable to rectify the situation, the importer may also have taken steps to source alternative products for example, had the change been transparently notified in terms of WTO commitments. The South African importer is an example of a party that does not have standing at the WTO who is only able to apply the law as it is available in the national legislation of South Africa, that is potentially disadvantaged by the absence of clear transparency provisions. The example is not a closed list of potentially affected persons limited to the dispute resolution options available to them at a national level.

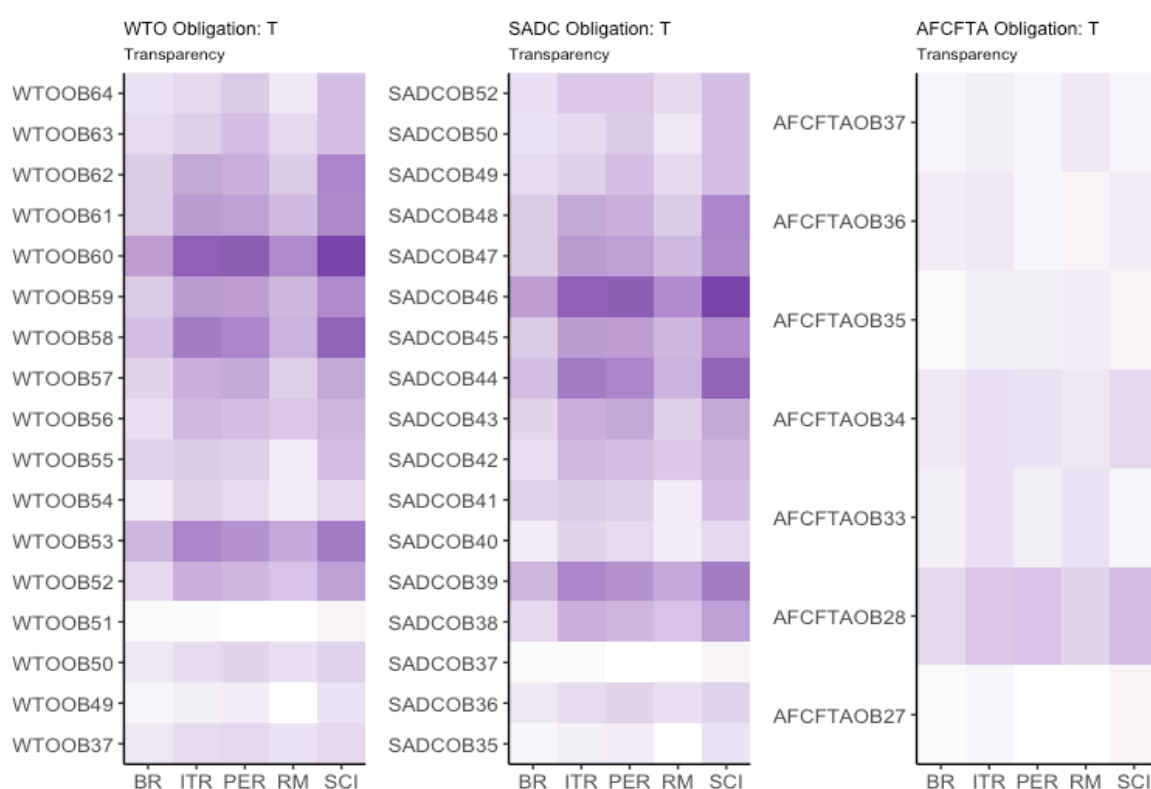


Figure 5-3: Transparency

The heatmaps above⁷⁷² show a particularly low saturation in the Unique ID's WTOOB51,⁷⁷³ WTOOB49 (in the red-meat category),⁷⁷⁴ SADC0B37,⁷⁷⁵ SADC0B35 (in the red-meat category)⁷⁷⁶ and AFCFTA0B27.⁷⁷⁷ These obligations are specifically concerned with the matter of enquiry points and prompt publication of regulations in a manner that is accessible to others.

As explained earlier in this section, the content analysis is not concerned with whether rights enjoyed or obligations borne by private parties *must* be contained in a legislative framework,⁷⁷⁸ but rather with what *is* (or what is clearly not) contained in the legislative framework. The content analysis is therefore also not trying to establish whether or not there *is* an existing enquiry point in South Africa, but rather whether or not there is evidence that the legislation provides for the description of the competencies, role and scope of responsibility, for example, of such an enquiry point by searching for specific text-based evidence in the legislation. Therefore, and considering the importance of the use and meaning of the word "transparency" itself in international trade, it would be telling whether or not transparency, as it related to SPS notifications and WTO commitments, is present in the legislation and in what context.⁷⁷⁹ The word "transparency" is an unavoidable inclusion when placing an obligation on the competent body in national legislation to act in a way that satisfies the transparency provisions of the WTO-SPS (or other agreements). It is therefore

⁷⁷² There were only "matches" to unique obligations in the category of obligations, not rights and so a heatmap containing rights, as has been done in other sections, is not shown.

⁷⁷³ The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents. See Annexure X for more detail.

⁷⁷⁴ The obligation on Members to publish regulations promptly which have been adopted in an accessible manner. See Annexure X for more detail.

⁷⁷⁵ The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents. See Annexure X for more detail.

⁷⁷⁶ The obligation on Members to publish regulations promptly which have been adopted in an accessible manner. See Annexure X for more detail.

⁷⁷⁷ The obligation on State parties to comply with transparency obligations in accordance with the procedures developed by the SPS Sub-Committee. See Annexure X for more detail.

⁷⁷⁸ I.e. it is not concerned with whether the international agreements *require* such inclusion in national legislation in terms of a specific provision of the agreement itself.

⁷⁷⁹ More than one work may provide a positive "match" between the legislation and the unique ID, since the articles from which the rights and obligations are derived consist of multiple identifying words. There are however more and less SPS-specific words and therefore it is useful to limit such an analysis further by searching for a specific key word.

reasonable to consider the results of such a content search. Table 5-5 below shows a summary of the specific legislation in which key words "transparency" or "transparent" were found.⁷⁸⁰

Table 5-5: Key words present in legislation – transparency (T) and transparency regulations (TR)

Legislation	Key word
Marketing of Agricultural Products Act 47 of 1996	transparency
Consumer Protection Act 68 of 2008	transparent
Disaster Management Act 57 of 2002	transparent
Genetically Modified Organisms Act 15 of 1997	transparent
Medicines and Related Substances Act 101 of 1965	transparent

The term "focal" as in "focal point" was also searched for as it is the language used in the *AfCFTA-SPS* in reference to an enquiry point. None of the Acts listed are Acts that are categorised within the red-meat category. This implies that there is no *SPS-specific* transparency or notification procedure described in the legislation relevant to the red-meat industry in South Africa. The finding is significant given that 1) South Africa does indeed notify other WTO members of changes to SPS measures through the e-ping system; 2) in the absence of a clear mandate on a competent body to execute functions in terms of transparency-related notifications and the description of what matters are or are not notifiable, there are no grounds on which to hold anyone accountable in the event of such a function not being satisfactorily executed; and 3) core SPS-related matters require continuity in application regardless of the political party in power. The absence of specific provisions such as transparency-related requirements in legislation ensuring such continuity leaves persons affected by the consequences of inaction or selective action in this regard vulnerable to suffering damages.

⁷⁸⁰ Terms searched for: "transparent", "transparency", "focal".

As far as the red-meat-related category of legislation is concerned, there is no indication of any provision specific to notification procedures nor the circumstances under which such procedures should or would occur. This leaves a significant gap in terms of accountability of the competent body as far as their duty towards the specific industry is concerned in this regard, as well as continuity through political and institutional change. This is however a matter of broader relevance and concern to the agricultural industry in general than just to the red-meat industry.

5.3.7.3 Equivalence

Equivalence is the process or act of accepting another party's measures as providing the same or similar protection to the same product provided that the latter party can prove that this same or similar protection is objectively the case. The recognition or acceptance of measures as equivalent, especially if the possibility exists to apply for such recognition as an private party importing into South Africa, has the potential to be trade facilitating, especially to importers of products from countries where the country as a whole is not necessarily able to provide such reassurance, but the private party is, for example because he or she is an early adopter of self-regulating measures or other methods which facilitate equivalent SPS protection. Figure 5-4 below shows the saturation of equivalence in the SPS-related legislation.

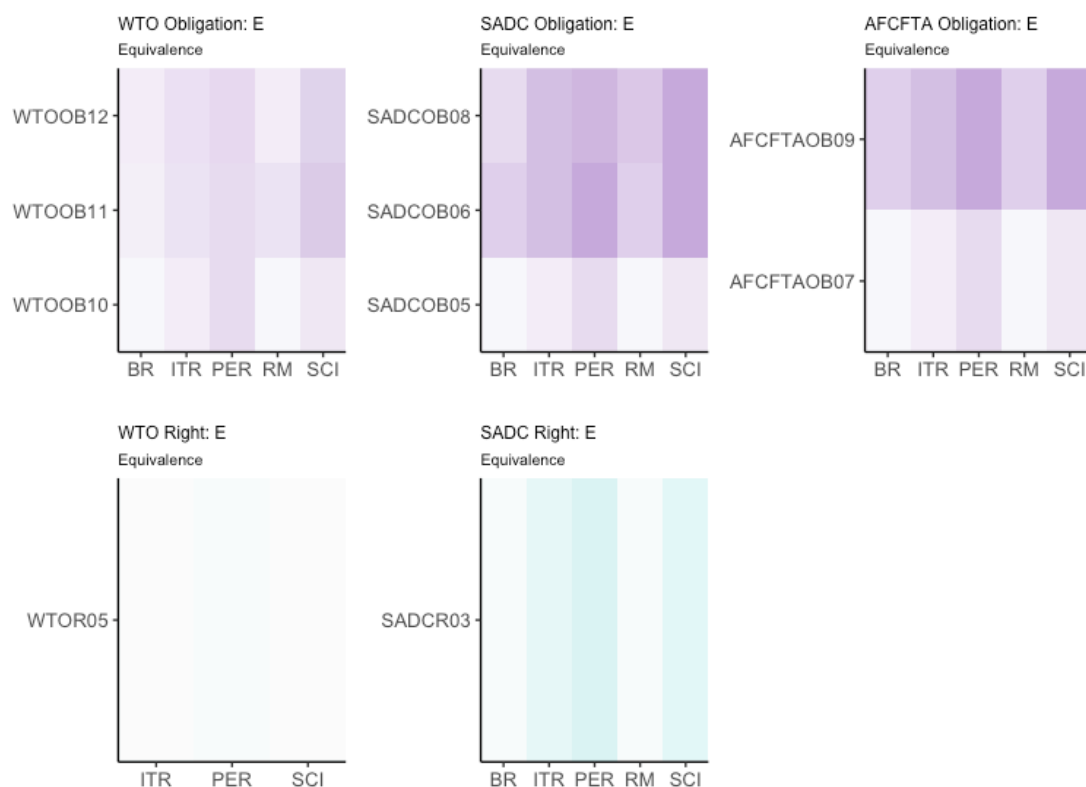


Figure 5-4: Equivalence

In the red-meat category, WTOOB12,⁷⁸¹ SADCOB05,⁷⁸² AFCFTA07⁷⁸³ and WTOR05⁷⁸⁴ are visibly low in saturation and obvious gaps appear to exist. An absence in matches relating to these particular rights and obligations reflect a lack of focus or opportunity to pursue the route of requesting or granting recognition of equivalent protection for goods imported into South Africa in national legislation. This finding confirms to a great extent the validity of the concerns in Chapter 4 that the industry has as far as the lack of suitability and non-enabling nature of the legislative framework is concerned. This is particularly true considering this in conjunction with the absent content of terms key to the basic rights and obligations.

⁷⁸¹ The obligation on importing Members to accept equivalence where appropriate protection is objectively demonstrated. See Annexure 4 for more detail.

⁷⁸² The obligation on importing Member States to accept equivalence where appropriate protection is objectively demonstrated by an exporting member. See Annexure 4 for more detail.

⁷⁸³ The obligation on the importing State Party to accept equivalence where appropriate protection is objectively demonstrated by an exporting State Party. See Annexure 4 for more detail.

⁷⁸⁴ The Exporting Members right to equivalence. See Annexure 4 for more detail.

Similar to the situation described in search of the specific descriptive words for transparency, the search for the specific words "equivalence" or "equivalent" are telling of the content of the SPS-specific content of the legislation.⁷⁸⁵ The table below shows the results of the legislation in which these words are present.

Table 5-6: Key words present in legislation – equivalence (E)

Legislation	Key word
Medicines and Related Substances Act 101 of 1965	equivalence
Consumer Protection Act 68 of 2008	equivalent
National Environmental Management: Biodiversity Act 10 of 2004	equivalent
National Environmental Management: Protected Areas Act 57 of 2003	equivalent

The legislation in which the words "equivalence" or "equivalent" are present is again not red-meat-specific. When returning to the specific Acts identified, the matches do not indicate the use of the words in an SPS-specific context.⁷⁸⁶ There appears to be no content in the SPS-related legislative framework that specifically provides for matters related to the recognition of or application for the recognition of equivalence. Private parties would therefore have no right to enforce the recognition of equivalent standards and are vulnerable to discrimination and arbitrary decision-making as far as differing measures achieving the same level of protection are concerned, with no legally enforceable rights or obligations available to provide grounds for dispute

⁷⁸⁵ As stated earlier, this is not an exhaustive list of the search terms used in the content analysis, these do form part of the collection of terms searched in the content analysis that results in the heatmaps above. They are however a representation of further extraction of data that represents an even more refined collection of terms, extracted on account of their relevance in order to test robustness of the more general findings visualised in the heatmap. Exact terms as in the quotation marks were searched, not truncated terms.

⁷⁸⁶ In the *Medicines and Related Substances Act 101 of 1965*, the word "equivalence" matches a part of the definition of "interchangeable multi-source medicine" and the context of "therapeutic equivalence" not sanitary or phytosanitary measure equivalence, although the principle appears to be the same in the general sense that equivalence means a similar level of protection, or in this case standard.

resolution – or avoidance of the situation entirely. The text of the legislation, when read in context, supports this finding.

5.3.7.4 Adaptation to regional conditions

There is a feeling amongst participants in the fieldwork data that the application of concepts such as zoning, compartmentalisation, traceability and increased biosecurity measures are the answer to dealing with challenges of animal health and the associated hurdles that the industry faces in controlling disease outbreaks and periodic interruptions in trade as a result. These are matters on which the OIE provides guidance.⁷⁸⁷ However, the origin of these associated rights and obligations, for which there is potential application in primary legislation, in the interests of South African (local) importers, exporters and producer, can be linked to the *WTO-SPS* and other agreements. Matters on which the OIE provides specific guidance are not visualised through the heatmaps above as the OIE-specific terms, which are contained in the OIE Terrestrial Animal Health Code and OIE Terrestrial Manual, not the text of the *WTO-SPS*, *SADC-SPS* or *AfCFTA-SPS*. The OIE specific terms, beyond the scope of the *WTO-SPS*, *SADC-SPS* or *AfCFTA-SPS* are addressed separately, as the focus and contents of the documents and the analysis are separate, found below at 5.3.8.

In the control of an FMD outbreak and the process of re-opening of markets as soon as possible, recognition of disease-free areas or areas of low pest or disease prevalence become important. Certain systems need to be in place to ensure these recognitions are granted, such as epidemiological surveillance, traceability, biosecurity or eradication programmes. The characteristics of a region and the geography thereof play a role in the determination of an area's risk as far as the presence of diseases or pest is concerned. This is also influenced by how effective the controls in place are in objectively demonstrating the country's ability to maintain the status. The table below shows the result of focusing on key words associated with adaptation to regional conditions. Terms were selected based on their unique association with concepts such

⁷⁸⁷ See in particular Chapter 5.3. of the OIE *Terrestrial Animal Health Code*.

as zoning and compartmentalisation, core to the FMD matter, and Article 6.2 of the WTO-SPS that states:

Members shall, in particular, recognise 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.⁷⁸⁸

The terms specifically searched for and extracted from the data (where they exist) were "zoning", "zone", "epidemiology", "terrestrial", "geographic", "ecosystem", "eradicate", "compartmentalisation", "compartmentalization", and "compartment."⁷⁸⁹

The list of terms investigates the presence or absence of core, or basic terms, the presence of or absence of which is relevant to the understanding of the content of the legislative framework. It is a refined collection of terms, but not a broad and necessarily exhaustive list. The results follow.

Table 5-7: Key words present in legislation

Legislation	Key word
Disaster Management Act 57 of 2002	ecosystem
National Environmental Management: Biodiversity Act 10 of 2004	ecosystem
National Environmental Management: Protected Areas Act 57 of 2003	ecosystem
Medicines and Related Substances Act 101 of 1965	epidemiology
National Environmental Management: Biodiversity Act 10 of 2004	eradicate
National Environmental Management: Protected Areas Act 57 of 2003	eradicate
National Environmental Management: Biodiversity Act 10 of 2004	geographic

⁷⁸⁸ Article 6.2.

⁷⁸⁹ In the content analysis the word "terrestrial" refers to the OIE terrestrial code; As stated earlier, this is not an exhaustive list of the search terms used in the content analysis, these do form part of the collection of terms searched in the content analysis that results in the heatmaps above. They are however a representation of further extraction of data that represents an even more refined collection of terms, extracted on account of their relevance in order to test robustness of the more general findings visualised in the heatmap. Exact terms as in the quotation marks were searched, not truncated terms.

Legislation	Key word
National Environmental Management: Protected Areas Act 57 of 2003	geographic
National Environmental Management: Biodiversity Act 10 of 2004	terrestrial
National Environmental Management: Protected Areas Act 57 of 2003	terrestrial
National Environmental Management: Biodiversity Act 10 of 2004	zone
National Environmental Management: Protected Areas Act 57 of 2003	zone
National Environmental Management: Protected Areas Act 57 of 2003	zoning

The terms "zone" and "zoning" are two that participants in the fieldwork used frequently in their discussion of the 2019/2020 FMD outbreak, as was "compartmentalisation".⁷⁹⁰ The results of the content analysis show that these words are limited in their use to the National Environmental Management Biodiversity Act and the *National Environmental Management: Protected Areas Act*. The reference to a "zone" in the *National Environmental Management: Biodiversity Act* is not in an SPS context. The reference to a "zone" in the National Environmental Management Protected Areas Act is in the context of "a buffer zone for the conservation and protection of a special nature reserve, national park, marine protected area, world heritage site or nature reserve"⁷⁹¹ and the word "zoning" is used in the context of management plans,⁷⁹² activities in marine protected areas⁷⁹³ and internal rules.⁷⁹⁴ The occurrence of the words is therefore not relevant in an SPS context. "Zoning" as a concept directly related to

⁷⁹⁰ The OIE *Terrestrial Animal Health Code* defines a zone as "mean[ing] a part of a country defined by the Veterinary Authority, containing an animal population or subpopulation with a specific animal health status with respect to an infection or infestation for the purposes of international trade or disease prevention or control." The OIE defines a compartment as "mean[ing] an animal subpopulation contained in one or more establishments, separated from other susceptible populations by a common biosecurity management system, and with a specific animal health status with respect to one or more infections or infestations for which the necessary surveillance, biosecurity and control measures have been applied for the purposes of international trade or disease prevention and control in a country or zone."

⁷⁹¹ S 28(2)(a).

⁷⁹² S41.

⁷⁹³ S48A.

⁷⁹⁴ S52.

the recognition of and adaptation to regional conditions is therefore not defined nor introduced through effective legislation and therefore unavailable for proactive legal action or accountability for its implementation. That is not to say areas are not recognised as zones, but rather that their recognition in terms of FMD containment, for example, is done without guidance from national legislation. The extent to and manner in which OIE guidelines or recognition are applied in such a situation is therefore entirely at the discretion of the department making such a decision.

In the field work described in Chapter 4, private parties described the consequences of losing disease-free status from the OIE and the varying incentives and motivations either to self-regulate or enforce existing regulations in the prevention or control of disease outbreaks. The principle⁷⁹⁵ of recognising characteristics of an area as potentially different in terms of risk to another area in the same country, is important to private parties. There is currently no legal guidance to a private party as to how to go about obtaining official recognition of such an area in the existing South African legislation, beyond the registration of a quarantine zone, which serves an entirely different purpose.

The results of this section indicate a lack of legislative support for the implementation of concepts core to facilitating trade during and after outbreaks of notifiable diseases. Without the legislated option and guidance to pursue such options as either an area or region recognised as free of a specific disease or pest or as a private party implementing self-regulatory measures to ensure the same, there is reason to conclude that future outbreaks of notifiable diseases will continue to disrupt the industries in which they occur as will a lack of legal recourse for private parties wishing to enforce related rights or obligations at a national level. Private parties in South Africa do not have legal recourse to regional legislation or dispute resolution on account of the disbandment of the SADC tribunal and the ensuing amendments. These are described in subsection 3.1.11.1 of Chapter 3.

⁷⁹⁵ Principles are understood in this research to refer to values or guides directing interpretation of provisions and actions with the spirit in which the agreement was created.

5.3.8 Terms Core to the OIE Terrestrial Code, OIE Terrestrial Manual and FMD Virus

The analysis of the OIE specific data ties in closely with the analysis of the international agreements in the national legislation above. It provides a disease-specific (FMD) view and speaks to aspects of the outcome of the fieldwork data. The heat maps below show the comparative density of unique combinations of keywords in categories of legislation as per the Terrestrial Code, Terrestrial Manual and FMD specific terms. The terms of the Terrestrial Code and Terrestrial Manual used in the content analysis were extracted directly from the glossaries of both. They are broader animal health terms not limited to FMD terms. Some do have an interface with FMD.⁷⁹⁶ "

This section includes heatmaps displaying data captured from both legislation and regulations. As explained in 5.3.5 above, regulations are included in the OIE section on account of the expectation that disease specific provisions in South Africa are found in regulations. This section takes a focused view of the FMD and animal health specific substance in the framework. The broader terminology that is suitable to core, enabling legislation was already analysed in 5.3.7 above. The heatmaps below, at Figure 5-5,

⁷⁹⁶ Specific terms searched to identify content related to the OIE Terrestrial Animal Health Code were: "antimicrobial", "artificial", "biosecurity", "border", "captive", "casings", "commodity", "compartment", "competent", "container", "containment", "death", "disinfection", "disinfestation", "emerging", "epidemiological", "eradication", "euthanasia", "exporting", "hazard", "importing", "incidence", "incubation", "infected", "infection", "infective", "infestation", "international", "laboratory", "lairage", "loading", "unloading", "monitoring", "notifiable", "notification", "outbreak", "pathological", "population", "pre-journey", "prevalence", "qualitative", "quantitative", "quarantine", "restraint", "sanitary", "slaughter", "stamping-out", "stocking", "stray", "stunning", "subpopulation", "surveillance", "terrestrial", "transit", "unit", "vaccination", "vector", "vehicle", "vessel", "veterinarian", "veterinary", "zone", "identification", "traceability", "welfare", "insemination", "trade", "slaughterhouse", "abattoir", "policy", "density", "code", "manual", "medicinal", "paraprofessional", "breeding", "status", "certificate", "shipment", "rearing". Terms searched to identify content related to the OIE Terrestrial Manual were: "absorbance", "assay", "biohazard", "biological", "biosafety", "biosecurity", "biorisk", "cell", "centrifugation", "comparability", "cross-reaction", "ct", "threshold", "dilutions", "efficacy", "false-negative", "false-positive", "harmonisation", "incidence", "inter-laboratory", "laboratory", "optical", "phylogeography", "potency", "predictive", "prevalence", "proficiency", "purity", "qualitative", "quantitative", "repeatability", "reproducibility", "sensitivity", "specificity", "specimen", "standard", "international", "sterility", "test", "tests", "confirmatory", "thermotolerant", "vaccine", "validation", "analysis", "assessment", "management", "reaction", "checks", "control", "seed", "density", "characteristic", "cells", "testing", "terrestrial", "temperature", "analytical", "diagnostic", "relative", "pathogen", "reagents", "standards", "detection", "equivalency", "virus", "lod", "strain", "roc", "spf", "oie", "neutralisation", "stock", "code".

show the results of the analysis run using the key terms listed above where only primary legislation is considered and not the subordinate regulations.

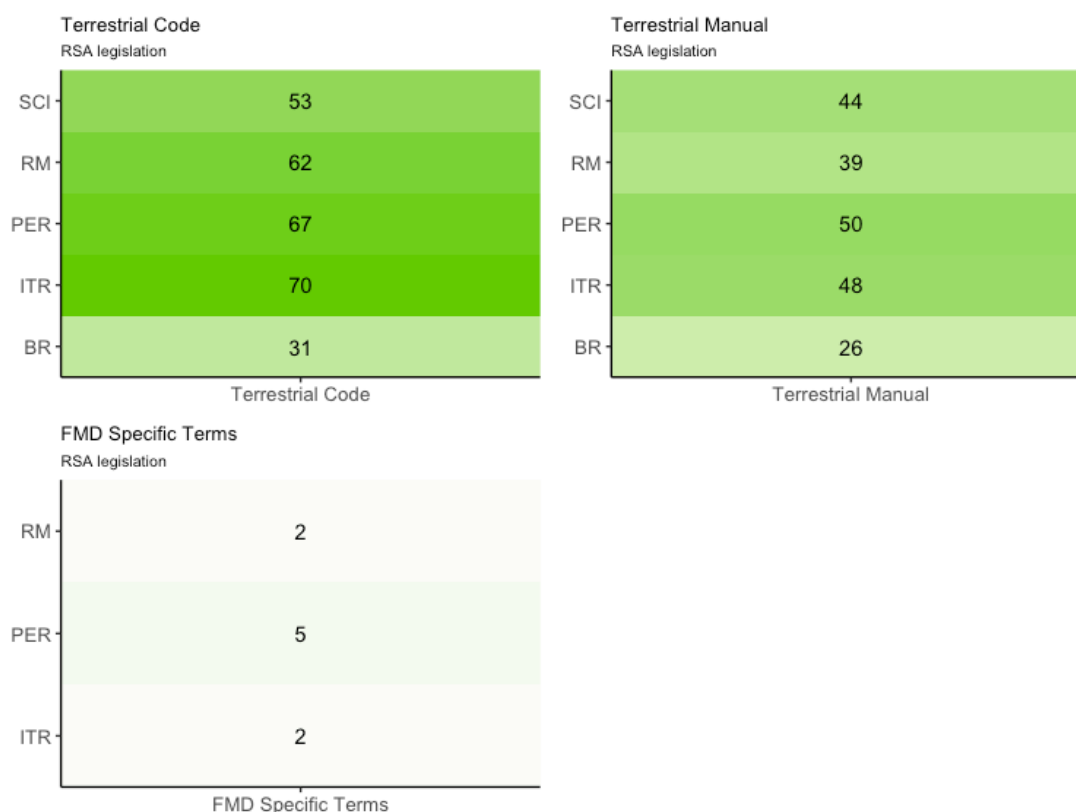


Figure 5-5: Terms key to the OIE terrestrial code, OIE terrestrial manual and terms specific to FMD virus

In all three categories visually represented above in the heatmaps, primary legislation was searched for matches with the specific terms associated with each category. The results therefore reflect outcomes for each group separately, having search the same legislation. There is a high saturation of matches corresponding with key terms from both the OIE terrestrial manual and the OIE terrestrial code. The FMD-specific terms however are limited.⁷⁹⁷ This outcome – where product-specific terminology, in this case of a disease specific to the products that fall within the broad category of "red meat" in this research, is limited in primary legislation – is expected. Enabling legislation lays the foundation for the further defining, within the scope of the enabling legislation, of more detailed regulations related to a specific product, or in this case a disease

⁷⁹⁷ FMD-specific terms were derived from the OIE Terrestrial Animal Health Code and OIE Terrestrial Manual and selected based on their specific connection to FMD.

affecting live bovine animals like FMD. When the regulations are included in the analysis, it is expected that there would be more matches in the regulations than what was seen in the enabling legislation.

The same search and visualisation were done where regulations were included in the scope of the search in addition to the enabling legislation. The OIE content analysis searched for the following FMD-specific words in the corpus:

"foot-and-mouth", "foot", "mouth", "fmd", "ruminantia", "suidae", "artiodactyla", "viral", "antigen", "ribonucleic", "virological", "serological", "pharynx", "lymph", "biosecurity", "zone", "zoning", "subpopulation", "OIE", "terrestrial", "compartment", "containment", "incubation", "stamping-out", "straw", "forage", "elisa", "vnt", "nsp", "3abc", "sp"

The terms above are derived from the OIE Terrestrial Animal Health Code and are, objectively, FMD-specific words that can reasonably be expected to be present in a legislative framework that includes special provisions, in either legislation or regulations, for an OIE disease of importance such as FMD. The search terms "elisa", "vnt", "nsp", "3abc", "sp" are acronyms for laboratory tests or terms. They signify enzyme-linked immunosorbent assay (ELISA), virus neutralisation test (VNT), non-structural protein(s) of foot and mouth disease virus (FMDV), NSP antibody test (3ABC) and structural protein of foot and mouth disease virus (SP). Therefore, the "search terms" for these scientific tests in the content analysis are the acronyms of "elisa", "vnt", "nsp", "3abc", "sp" thanks to them being generally understood and context-specific acronyms as opposed to the full word.

The heatmap below, Figure 5-6, shows the occurrence of unique combinations of keywords of FMD-specific terms in the various categories of legislation as supplemented by the regulations. The heatmap on the left shows the outcome of a content analysis focusing on the empowering legislation only whereas the one on the right shows the outcome of the content analysis of the regulations.

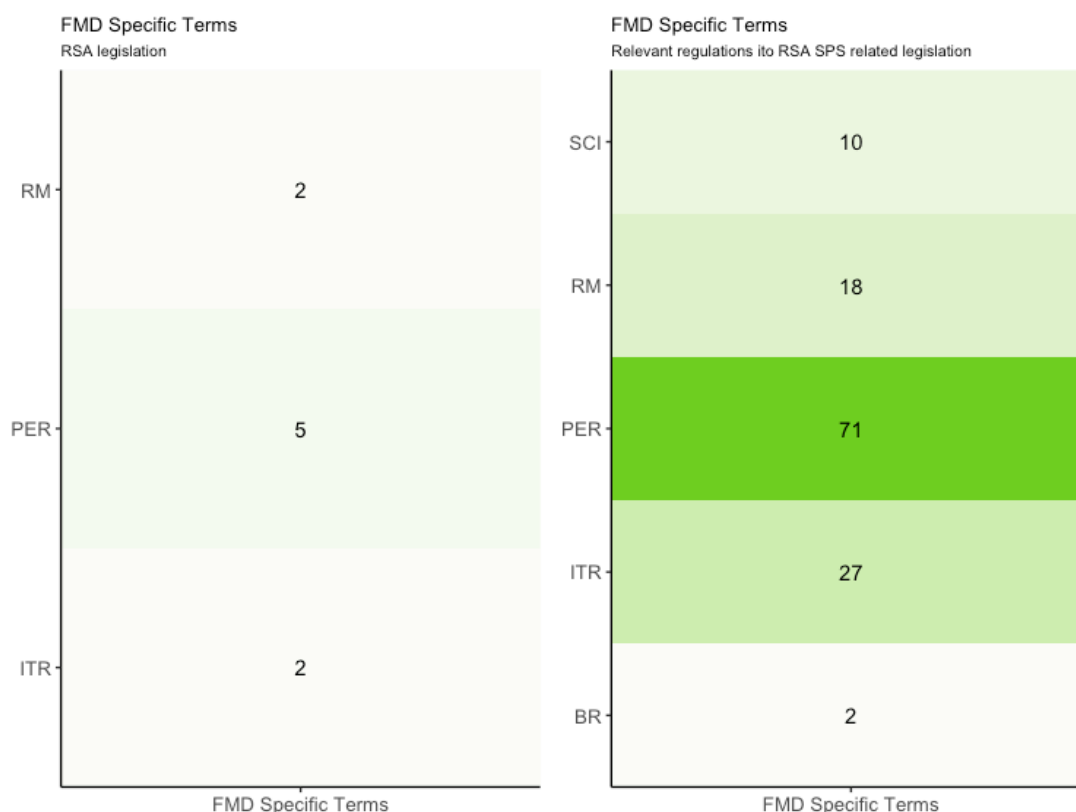


Figure 5-6: The content of FMD-specific terms present in enabling legislation versus regulations made in terms of the same enabling legislation per category of SPS-related legislation

The tables that follow below show the key words identified in the number of unique combinations illustrated in the heatmaps above. These indicate the potential existence of an FMD-specific provision in the legislation or regulations, recalling that the heatmaps show unique combinations, not unique words. The number 71 recorded for the category PER on the regulation heatmap above is therefore indicative of 71 unique combinations relating to one, more or all of the key words below, present in one or more pieces of legislation within the category. This is also why a low or non-existent result is telling of the state of the legislative framework in the specific context.

The scope of regulations considered in the analysis of relevant regulations is broader than what might be expected. The set of regulations in the corpus were selected based on their potential application to SPS regulation as a whole, while maintaining a distinction between categories of legislation. The rationale was that it is better to cast the net wider across regulations to account for the possibility that there might be an FMD- or animal health-related provision in an unexpected regulation under one of the

qualifying Acts that is at first glance not obviously red-meat related. An example of a regulation that would have fallen through the gaps had this approach not been taken is the *Directions Regarding Livestock Actions* (repealed),⁷⁹⁸ made in terms of section 27(2) of the *Disaster Management Act*⁷⁹⁹, which is classified in this research as peripheral legislation,⁸⁰⁰ not core to SPS (i.e. not created to fulfil a specific SPS purpose) and not one of the more expected Acts such as the *Animal Diseases Act* or the *Animal Pests Act*. The repealed *Directions Regarding Livestock Actions* (repealed) which is subordinate legislation was included in the analysis as it was created during and related directly to the 2019/2020 FMD outbreak and the steps taken to control the spread of the disease at the time. It is therefore relevant to the context referred to by interviewees in this research at the time of the start of the FMD outbreaks and therefore retains relevance despite its current state as repealed subordinate legislation. The table below lists the key words identified and their correlating legislative or regulation categories. This specific table is limited to the categories of RM, ITR and SCI to limit the focus of the analysis to red-meat-specific legislation. These were therefore the only terms found in the legislation when the focus of the analysis is limited to the categories of RM, ITR and SCI legislation. Categories PER and BR are excluded as they are too far removed from the context of this specific example.

Table 5-8: Primary legislation where key word is identified as present

Legislation	Key words identified	Category of legislation
Animal Diseases Act 35 of 1984	antigen	FMD-Specific Terms RM
Animal Health Act 7 of 2002	antigen	FMD-Specific Terms RM

⁷⁹⁸ Directions Regarding Livestock Actions (repealed) – BN 85 of 2020.

⁷⁹⁹ Disaster Management Act 57 of 2002.

⁸⁰⁰ See 5.2.1 for an explanation of categorisation of legislation.

Legislation	Key words identified	Category of legislation
Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947	straw	FMD-Specific Terms ITR
Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972	foot	FMD-Specific Terms ITR

Although included in the analysis, the *Animal Health Act*, as detailed above, is not an Act that has commenced yet.⁸⁰¹ The *Animal Disease Act* is therefore not yet repealed. The effect is that "antigen"⁸⁰² is in reality only present in one active Act in the red-meat specific legislative framework. For argument's sake, even if the Animal Health Act had commenced, when returning to the Act itself, it is clear that the context in which "antigen" is used in the Act is irrelevant to the FMD-specific context. The Act contains two references in section 7, which is the section prescribing "Limitations on investigations, experiments and research with, and manufacture and evaluation of, certain products." The same is true of the context in which the Animal Disease Act captures and uses the term "antigen", where section 20 is almost identical to the *Animal Health Act's* section 7.⁸⁰³

The *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* does contain an occurrence of "straw" in its text.⁸⁰⁴ There is however another provision that potentially refers to FMD where the word "straw" is not used. The word occurs in the definition of a "farm feed", which specifically excludes "straw".

Farm feed does not include straw, chaff, unground hay, silage, any cereal in the grain or any substance which would otherwise be a farm feed but has been ground,

⁸⁰¹ The reason for inclusion is explained at 5.3.8 above.

⁸⁰² According to the *Oxford English Dictionary* "Antigen, *N.*" means "[a] foreign substance which, when introduced into a living organism, stimulates the production of an antibody".

⁸⁰³ Animal Health Act 7 of 2002

⁸⁰⁴ The word "straw" is relevant given its role in the spread of animal-related diseases through its use as bedding in the transport of animals.

crushed, gristed or prepared for any person, in accordance with his directions for his own use, unless the Minister has by notice in the Gazette declared such substance a farm feed for the purposes of this Act.⁸⁰⁵

Therefore, the above match does not confirm the existence of an FMD-specific provision in the legislative framework. Similarly, the reference to "foot" in the Foodstuffs, Cosmetics and Disinfectants Act is not remotely relevant to the context of foot and mouth disease. The conclusion therefore is that, based on the specific terms selected as indicators of the existence of an FMD related provision in the *primary legislation* under analysis, there is no confirmed specific content in the legislation.

Regulations may perhaps contain positive occurrences that are confirmed by the context. Categories of regulations are shown in the table below. See Annexure 5 for the breakdown per word and category. As above, the categories PER and BR are excluded as they are too far removed from the context of this specific example.

Table 5-9: Category of regulations where key word is identified as present

Key words identified	Category of regulations
antigen	RM
biosecurity	RM
biosecurity	SCI
compartment	ITR
containment	RM
elisa	ITR
elisa	RM
fmd	RM
fmd	SCI
foot	ITR
foot	RM

⁸⁰⁵ Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, definitions.

Key words identified	Category of regulations
foot	SCI
forage	ITR
incubation	ITR
incubation	RM
lymph	ITR
lymph	RM
mouth	ITR
mouth	RM
mouth	SCI
nsp	ITR
serological	ITR
sp	ITR
straw	ITR
straw	RM
terrestrial	SCI
viral	RM
viral	SCI
zone	ITR
zone	RM
zoning	SCI

Hence, to take the word "antigen" as an example: The results indicate that there is potentially a provision present in the Animal Disease Regulations gazetted under the *Animal Diseases Act*. The in context analysis again disproves that this is related to FMD in a red meat specific SPS-related way. The term "antigen" is used in reference to a service rendered in the context of section 27(2)(b) on "fees for services rendered" and

in Annexure 1 of the same regulation in the definition of an "infectious thing".⁸⁰⁶ The Animal Disease Regulations similarly refer to "biosecurity"; however, this reference is specific to measures required to keep ostriches.⁸⁰⁷

However, there is a confirmation of an FMD-specific provision with the positive occurrences of "foot" and "mouth" in the Animal Disease Regulations. Sections 19, 20, 20A, 21, 23, and 24 all contain FMD-specific provisions. The Regulation also lists foot-and-mouth disease as one of the listed controlled diseases to which controlled veterinary acts⁸⁰⁸ apply.⁸⁰⁹ It is however not on the Regulations' list of notifiable diseases.⁸¹⁰ An animal marked with an "F" on the right side of the neck is identified as one to which a foot and mouth disease control measure applies.⁸¹¹

The Regulations published under the *Agricultural Pests Act*⁸¹² have a positive reference to the enzyme-linked immunosorbent assay (ELISA) test, as indicated by the content analysis. However, the context in which this reference is made is that of fees payable for laboratory tests and does not specify, for example, under what circumstances beyond for "imported controlled goods" it would apply and whether there are any specific diseases for which South Africa requires application of this test.⁸¹³

Other regulations in which there was positive confirmation of FMD-related provisions are the *Biosecurity Rules for Livestock Agents*,⁸¹⁴ the *Red-Meat Regulations*,⁸¹⁵ the

⁸⁰⁶ *Animal Disease Regulations* GN R2026 in GG 10469 of 26 September 1986 (*Animal Diseases Act*).

⁸⁰⁷ *Animal Disease Regulations* GN R2026 in GG 10469 of 26 September 1986 (*Animal Diseases Act*), 20C(3).

⁸⁰⁸ Controlled veterinary acts in this context are acts done under the authority of the Animal Disease Regulations which are carried out in respect of a controlled animal diseases or controlled animals.

⁸⁰⁹ *Animal Disease Regulations* GN R2026 in GG 10469 of 26 September 1986 (*Animal Diseases Act*), Table 2.

⁸¹⁰ *Animal Disease Regulations* GN R2026 in GG 10469 of 26 September 1986 (*Animal Diseases Act*), Annexure 3. According to the Terrestrial Animal Health Code, notifiable diseases "means a disease listed by the Veterinary Authority, and that, as soon as detected or suspected, should be brought to the attention of this Authority, in accordance with national regulations."

⁸¹¹ *Animal Disease Regulations* GN R2026 in GG 10469 of 26 September 1986 (*Animal Diseases Act*), Table 3, regulation 29.

⁸¹² *Regulations* GN R111 in GG 9047 of 27 January 1984 (*Agricultural Pests Act*) .

⁸¹³ Table 1 "Fees Payable".

⁸¹⁴ See in particular s8.2 and 8.3.

⁸¹⁵ *Red Meat Regulations* GN 1072 in GG 26779 of 17 September 2004 .

Directions Regarding Livestock Auctions (repealed),⁸¹⁶ and the Regulations relating to the *Importation of Live Cloven Hoofed Animals from Countries or Zones Not Recognised as Free from Foot and Mouth Disease by the World Organization for Animal Health*.⁸¹⁷

There are, therefore, regulations that contain provisions related to FMD. They are limited, however. The FMD-specific analysis does provide insight into the potential of the methodology for significantly narrowing the time required to do a comparative context analysis of two or more jurisdictions and to introduce a level of reproducibility ("apples to apples" comparison) that is lost in a purely or highly context driven doctrinal analysis. This section also shows that, when using a content analysis as part of the methodology, the addition of a contextual analysis based on the information gathered is more accurate.

5.3.9 Evaluating the results of the exploratory content analysis: How robust is the South African SPS-related framework?

There is a considerable amount of insight that can be deduced from the existence of, or in the case of the approach in this analysis, the absence of field-specific terminology in the content extracted and analysed from the SPS-related legislation. SPS is a field which relies to the greater extent on the very specific understanding of key terms. Language as a tool in the application of SPS is key to the success of the legislative framework.

The legislation does not contain words that indicate the existence of either an application or description of rights and obligations core to SPS. This is in itself a fact that substantiates the sentiment described in Chapter 4, that of a lack of trust in the legal framework and its perception as prohibitive as opposed to supportive of SPS controls and application. To the extent that core aspects related to science as the basis

⁸¹⁶ *Directions Regarding Livestock Auctions BN 85 in GG 43571 of 31 July 2020* . Although repealed, the regulations remain relevant to the discussion given their active role during the 2020 FMD outbreak.

⁸¹⁷ *Importation of Live Cloven Hoofed Animals from Countries or Zones Not Recognised as Free from Foot and Mouth Disease by the World Organization for Animal Health GN 364 in GG 35331 of 11 May 2012.*

of SPS are absent, the findings of the content analysis do support the findings in the fieldwork data and they provide quantifiable evidence of the extent to which the legislative framework lacks purpose appropriateness as far as an SPS legislative framework is concerned.

The findings of the content analysis lead to the conclusion that, given the lack of content supporting basic rights and obligations, the framework will not, without substantial reform, decrease the vulnerability that the formal sector faces in as far as their ability to export during and after adverse SPS events is concerned. The absence of certain core terms and essentially a substance-less SPS-related legislative framework places South Africa in the position where situations, such as disruptions related to equivalence of measures or a lack of clarity regarding the substance of zoning and compartmentalisation in South Africa for example, which are largely avoidable with the existence of clear provisions in legislation relating thereto, are bound to recur. The absence of core terms also places South Africa in a position where there is a limited scope for proactive standard setting or industry-driven (transparent) standard setting for example and the result is an over-reliance on self-regulation and private standards as well as primarily reactive action post outbreak.

As interviewees rightly indicated in the fieldwork data, South Africa does have options through the application of OIE guidelines and the principles of science for example, in the creation of trust with trading partners. It does however not have the legislative capacity in practice to facilitate this with the current legislative framework. The limited references to the OIE in the South African regulations are not based on the authority of enabling primary legislation and therefore certainty and accountability in future applications are absent.

An important contribution that the content analysis makes is the emphasis that it places on the importance of language in a field heavily reliant on technical and universally defined terms, concepts and interpretations of rights, obligations and principles. Throughout this research the importance of language has been emphasised. This has ranged from the dangers of "othering" language displacing responsibility in terms of adherence to SPS guidelines and restrictions, to the lack of robustness that

the framework presents when stripping it of the aesthetics of legalese and focusing on core terms connected to rights and obligations. A purpose-driven legislative framework as reliant on language as SPS is, should at a minimum contain the terms and phrases core to the discipline. In the same way that the conclusion was made in Chapter 4 that a SPS legislative framework that is not purpose-driven in design cannot function as a SPS legislative framework in practice either, neither can a legislative framework devoid of a convincing saturation in key SPS terms function as an appropriate and enabling SPS legislative framework. In a field where synonyms do not exist for the terms core to the discipline, the literal gaps in the heatmaps presented previously speak volumes, in as far as the inadequacy of the framework as a SPS legislative framework is concerned.

5.4 Conclusion

Chapter 5 consists of a doctrinal legal research component and an exploratory content analysis. Both challenged the robustness and suitability of the SPS-related legislative framework in South Africa. The doctrinal analysis led to the conclusion that there is an over-reliance, to the detriment of those subject to the authority of the legislation along the SPS chain, on administrative law as an avenue of pursuing dispute resolution in a SPS context. This is largely attributable to the fact that such persons are limited to relying on what is available to them in law. In the absence of SPS-specific substance in the legislation and unclear, overlapping or an absence of dispute resolution methods as an alternative to internal appeal or court procedures, often the only legal recourse available is to pursue litigation on grounds of administrative law principles, if possible. In the fieldwork data described in Chapter 4, there was a common sentiment amongst participants that, whose dispute is resolved and how it is resolved depends to some extent on who has a seat at the table. This is not surprising given the lack of transparency that legislation offers in terms of publishing reasons and basing decisions on principles of SPS, in particular science and non-discrimination.

The content analysis gives support to the credibility of the claims made by participants that the framework is not purpose-specific or enabling in terms of its ability to address SPS concerns proactively and adequately support the implementation of matters such

as emergency measures, zoning, compartmentalisation and standard making in a trade-facilitating (both national and international) manner. SPS-specific content is lacking in the legislative framework.

The overall conclusion of this chapter is that as far as persistent challenges to the prevention and resolution of trade barriers or disputes connected to SPS measures are concerned, there is reason to be concerned about the ability of national legislation to provide an avenue for the resolution thereof to persons that do not have standing at the WTO and where disputes that are beyond the strict terms of dispute resolution available at the World Trade Organization (WTO) arise. As Chapter 4 notes, SPS-related barriers and disputes co-occur with other matters, and may be masked by unrelated points of contention. This fact in itself is support for the need to operate within a SPS-specific legislative framework in pursuit of minimising disruption to those in the SPS chain and the effective resolution of disputes and avoidance of barriers related to SPS. South Africa has a SPS-*related* framework that, at best, facilitates the minimum application of SPS protection in both SPS terms and also to South Africans with associated rights and obligations involved in import, export and local production manufacturing of agricultural goods. The legislative framework is not SPS-specific and therefore is not accurately described as an SPS legislative framework. Based on the findings of Chapter 5, the SPS legislative framework, in its current form, amounts to a barrier to trade and the resolution of matters arising from the application of international rights, obligations and principles of SPS, in itself.

CHAPTER 6 SANITARY AND PHYTOSANITARY MEASURES AS NON-TARIFF BARRIERS TO TRADE: A SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

6.1 An overview of the preceding chapters

With a focus on the role of legislation and the perspectives of selected actors in the red-meat industry, the primary objective of this research is to identify and explore persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. Related to this is the objective to recommend potential solutions to the identified challenges with specific focus on SPS-related barriers or disputes that are beyond the scope of or resolution by the World Trade Organization (WTO), that are not necessarily related to science, and SPS matters that affect individuals without recourse to the WTO procedures.

In pursuit of the primary research objective a mixed methodology approach is taken by means of doctrinal analysis of relevant literature and legislation, qualitative research field work in the red-meat industry with a focus on foot-and-mouth disease and a quantitative content analysis of the SPS-related legislative framework.

Chapter 1 introduces the main purpose and objectives of the research and provides an introduction to SPS measures and their role in international trade as well as an introduction to the SPS provisions of the three international agreements analysed in this research. These agreements are the World Trade Organisation's *Agreement on The Application of Sanitary and Phytosanitary Measures* (WTO-SPS), the *Sanitary and Phytosanitary Annex* to the *SADC Protocol on Trade* (SADC-SPS) and Annex 7 of the African Union's *Agreement Establishing the African Continental Free Trade Area* (AfCFTA-SPS). Chapter 1 provides an introductory overview of the international trade and national trade challenges associated with an SPS event and in particular an FMD outbreak.

Chapter 2 is a detailed description of the methodology applied in this research.

Chapter 3 consists of an analysis of SPS law relevant to the research conducted and contextualises the SPS Agreement within the broader context of international trade under the WTO. The chapter also reviews the regional and continental commitments with regard to SPS measures that South Africa is bound by. It contextualises the matter of FMD as a transboundary animal disease (TAD) that results in a disturbance of trade in the event of an outbreak in a previously disease-free area. The chapter also reviews some of the broader South African, context-specific socio-economic, political and economic challenges. Disciplines such as SPS law are not far removed, from these challenges as far as their effect on the actors within the SPS chain and the effect that actors have on the SPS chain are concerned as well.

Chapter 4 consists of an analysis of the fieldwork conducted in the red-meat industry. It includes an analysis of official import and export data related to the red-meat products. The chapter contributes insight into the South African red-meat industry and identifies themes and persistent challenges, obstacles, barriers and perceptions that recur in the fieldwork data.

Chapter 5 consists of a contextualisation of SPS-related legislation within the broader South African legal order and provides an overview of the role of administrative law alongside SPS legislation as well as the roles of relevant government departments charged with administering SPS legislation. The analysis primarily focuses on the pieces of legislation applicable to red meat, and makes reference where relevant to the views or guidelines of the OIE. Chapter 5 also analyses the findings of an exploratory content analysis of SPS-related rights, obligations and principles in the SPS-related legislative/regulatory framework. The content analysis is not concerned with what *must* be contained in a legislative framework, but rather what *is* contained in the legislative framework. In that sense the robustness of the substantive SPS content in the legislation is tested.

6.2 A summary of the main objectives of this study

The main objectives of this study are to identify the nature and extent of persistent challenges to the prevention of barriers and disputes identified in the context of sanitary and phytosanitary measures and their role in trade in South Africa and to

identify impediments to the resolution of barriers and disputes in the same context. The following section provides an overview of the main findings, which contribute comprehensively answering the main research question. The focus is therefore largely on:

- The main findings core to the understanding of the nature and extent of persistent challenges to the prevention of barriers and disputes identified in the context of sanitary and phytosanitary measures in South Africa;
- The main findings relevant to persistent challenges to the resolution of barriers and disputes in the context of sanitary and phytosanitary measures in South Africa

In Chapter 4 it is explained that government and industry are often posed as being two parties on different sides to each other in the practice of international trade. In this research, one of the findings has been that it is not beneficial to generalise perception as either being a private industry view or a government view as the distinction oversimplifies the challenges within the industry. The terms "red-meat industry" or "industry" therefore refer to a combined view of research participants from government and private parties interviewed during the research unless specifically stated otherwise.

6.3 Essential findings

6.3.1 The contribution of an overlap of significant social, political and legal complexity to the persistent challenges identified

In Chapter 3, in the discussion of the broader context within which SPS measures exist and are applied in South Africa, the following quotation is shared:

It is a Janus-faced nation – diverse and divided; harmonious and confrontational - that defies simple explanations.⁸¹⁸

The quotation above describes South Africa as the "Janus-faced nation." It is not possible to distance the findings of this research from the reality that this quotation so

⁸¹⁸ du Plessis and Plaut *Understanding South Africa* 3.

accurately captures. Chapter 4 presents further evidence of this in an SPS context. In this same country, there are agricultural industries, the one in focus being the red-meat sector and more broadly the agricultural sector. These are sectors fraught with contradiction and contrast, including diversity and division. The part of this quotation that strikes a particular chord of resonance is the reality that South Africa, and in this research the red-meat industry and field of SPS, "defies simple explanations." This fact is one that adds to the complexity of resolving the current challenges identified in this research. In particular, the role that politics and political will contribute to resolving these challenges, is significant.

To repeat the quotation of Mcebisi Jonas in Chapter 3:

Many of the key decisions we take as leaders have less to do with the evidence-based correctness of a particular choice, and more to do with narrow and short-term political expediency.⁸¹⁹

This quotation is in many ways, a warning. The recommendations made further below are not short-term solutions. Political expediency and a purely aesthetic reform will not address the SPS-related challenges to either the red-meat industry or the broader agricultural industry. The recommendations at paragraph 6.7 rely on the contextual understanding of the research conducted. The reliance on further evidence-based research as described below, before implementation of the recommendations further, is therefore emphasised as is the necessity to consider the practical effect of any action taken on the actors directly and indirectly affected by these actions in the SPS chain.

The main finding that the overlap of significant social, political and legal complexity contributes to the persistent challenges to the prevention of barriers and disputes identified in the context of sanitary and phytosanitary measures in South Africa supports recommendation one in particular, to the effect that there must be a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into practical use at a national level.

⁸¹⁹ Jonas After Dawn: Hope after State Capture 47.

6.3.2 The significant absence of SPS-specific content and substance in the SPS-related legislative framework

Chapter 5 emphasises that SPS is a field which relies to a greater extent on the very specific understanding of key terms for which there are no synonyms and that the absence of key terms is an indication of a legislative framework not fit for purposes of regulating SPS-related matters. The outcome of the content analysis is that the SPS-related legislation does not contain words that indicate the existence of either an application or description of rights and obligations core to SPS.

A significant finding of Chapter 5 is that terms key to core concepts such as science are absent in the legislative framework, even when examined doctrinally. As such, the findings of the content analysis do support the findings in the fieldwork data analysed in Chapter 4 by providing quantifiable evidence of the extent to which the legislative framework lacks purpose and appropriateness as far as an SPS-specific legislative framework is concerned. This lack of clear content of key terms indicates weakness in the definition of SPS-related rights, obligations and principles in the legislative framework.

This research provides quantifiable evidence of the extent of the legislative framework's shortcomings by means of the Chapter 5 content analysis. This finding supports recommendation one below⁸²⁰ to the effect that a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level is proposed.

6.3.3 There is a recurrent theme of trust – or lack thereof – in qualitative data corroborated by the findings of the doctrinal analysis and content analysis

In Chapter 4 the recurrent theme of trust in the fieldwork data is presented as one of the two core, broad, themes contributing to the understanding of persistent SPS-related challenges and the nature of SPS-related barriers and disputes from the

⁸²⁰ Recommendation one: A legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level. See para 6.7.1.

perspective of participants in the industry. The other is communication. In particular, the lack of trust emerged as central to the understanding of the complexity of these persistent challenges as it is not limited to a lack of trust in one particular thing, but rather a lack of trust in multiple things through which the theme developed. This has been summarised in the context of significant social, political and legal complexity above⁸²¹ and is therefore not repeated here.

This research proposes that the recurrent theme of trust – or lack thereof - that emerges from the qualitative research data and which is a theme that is corroborated by the findings of the doctrinal analysis and content analysis is largely the result of a culmination of the significant social, political and legal complexity described above as well as the inadequacy of the legislative framework. This research further proposes that the practical recommendations detailed in sub-section 6.7 below may contribute to addressing the persistence of this theme. The lack of trust manifests itself in multiple forms, and the main categories are identified below.

6.3.4 A lack of trust in the SPS focus and trade-enabling potential of the South African legislative framework

From the research conducted, it is possible to conclude that there is limited trust placed in the trade-enabling potential of the South African legislative framework by participants in the red-meat industry. This relates directly to the perception held by participants in the industry that there is a limited ability to proactively prevent the future outbreaks of significant SPS events.

The doctrinal analysis of the SPS-related legislation specific to the red-meat industry concludes that there is a clear lack of commitment to rights, obligations and principles of SPS in the legislative framework. An example of particular concern is the fact that the legislation does not situate science and justification of measures on the grounds of science within the national framework and that it does not create a network of relationships between the fields of SPS (human, animal and plant life or health) that supports co-operation and coordinated standard making. Another example is related

⁸²¹ See 6.3.1.

to international transparency requirements where, in the legislation, there is no obligation on the Director of Animal Health to notify the OIE of an FMD outbreak, despite notification happening in practice. The effect of such an absence however is that there is also no legislated ground on which, at a national level, to hold the director accountable in the event of no notification, or a delay or a lack of action in the application for recognition of disease-free status. As stated in Chapter 5, these actions, in practice, do take place,⁸²² despite the absence of legislation regulating this. That is a matter that severely limits transparency of process, reproducibility, certainty and accountability.

The doctrinal analysis in Chapter 5 concludes that the SPS-related legislation specifically available to the red-meat industry is limited in its scope and ability to address substantive SPS matters, particularly in the context of SPS measures and their technical content or application. Chapter 5 addresses the fact that, although not intended to be a type of "safety net", administrative law is a second layer of law alongside SPS law. In effect however, given the lack of fundamental detail, purpose and scope of technical SPS provisions in the SPS-related framework, administrative law is a field that has in practice provided limited dispute resolution options to private parties where they do not otherwise exist. As emphasised in Chapter 5, administrative law does not make up for the absence of SPS-specific provisions and a purpose specific technical legal framework. It does however ensure some legal recourse for aggrieved private parties.

The doctrinal analysis in Chapter 5 concludes that the SPS-related legislative framework in this research *looks* like SPS legislation, but it does not *function* as such. This is confirmed by the findings of the content analysis in Chapter 5 where it is found that key terms that identify rights, obligations and principles core to the field of SPS are absent or limited and that those that are present do not rectify the deficiency to the extent that the legislative framework can be described as an SPS legislative

⁸²² For example, South Africa does notify the OIE and WTO of changes in measures, but how, when and by whom is not apparent from the legislative framework.

framework. Rather, the legislative framework can be described as being a legislative framework that is *SPS-related*.

This research opines that recommendation one, a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level and recommendation two, the establishment of an independent One Health Commission and an Agriculture and Related Matters Tribunal, will contribute to establishing trust in the SPS focus and trade-enabling potential of the South African legislative framework and the ability to proactively prevent the future outbreaks of significant SPS events.

6.3.5 A lack of trust in the process of standard setting and regulation of SPS-related matters in South Africa

In paragraphs 6.3.1 and 3.4 above, which describes the overlap of significant social, political and legal factors and their contribution to the persistent challenges to the prevention of barriers and disputes identified in the context of sanitary and phytosanitary measures in South Africa, this main finding is also introduced.⁸²³

South Africa is in a situation where SPS-related trade disruptive situations are bound to recur. These are avoidable with the existence of clear provisions in legislation relating thereto. The current SPS related legislative framework leaves limited scope for proactive standard setting or industry driven (transparent) standard setting. The result is that private parties are forced into a situation of over reliance on self-regulation and private standards and the red-meat industry is limited to primarily reactive action following disease outbreak.

The process of standard setting and regulation of SPS-related matters in South Africa should be transparent, reproducible, clear and accessible. Standards should also be possible to implement and should apply to all persons that either have an effect on the SPS status of the country by means of their actions along the SPS chain or who are affected by such standards. This research proposes recommendation two to the

⁸²³ See 6.3.1 and 3.4.

effect that an independent One Health Commission and an Agriculture and Related Matters Tribunal is of particular importance in addressing the lack of trust that exists in the process of standard setting and regulation of SPS-related matters in South Africa.

6.3.6 A lack of trust in the ability of the government to formalise the informal sector and preserve South Africa's international SPS credibility

Chapter 3 describes the situation where in the regulation of SPS matters an unofficial dual system of enforcement and consequences exists. Regulation under, or the enforcement of, the SPS-related legislation is heavily focused on "formal" categories of actors in the SPS chain. There are areas of trade in which, to varying degrees, regulation or enforcement does not take place. These are described by participants as spheres of trade that are "informal" spheres of trade. Chapter 4 notes that there is a group of actors in the SPS chain who have a desire to export but are constrained by the government's limited ability to facilitate that, as far as overcoming SPS events in a timely manner are concerned. As also noted in Chapter 4, the origin of an SPS event, i.e. the outbreak originating in either a formal or informal scenario, is irrelevant in the determination of loss of disease-free status. An informal or unregulated environment is logically the environment which poses the highest risk for the outbreak of a trade-disruptive disease. The effect is loss of disease-free status which does potentially have significant implications for formal sector actors, in particular exporters. The government does not appear to have the capacity to formalise the informal sector either. This leaves exporters who are reliant on overseas trading partners trusting South Africa's processes and SPS safety vulnerable to the loss of markets and loss of relevance as exporters in the event of increasing SPS events originating in the informal sector, thus causing disruptions in the trade of agricultural commodities.

The formal sector is vulnerable to fluctuation in disease-free status and other SPS concerns. There is support in the data collected in this research for the conclusion that, in the absence of the government's ability to transform an agricultural sector and society into one that accepts SPS measures as binding, that the situation will remain unchanged regardless of the quality of the legislation available. Therefore, unless

government is willing and able to eliminate informal and unregulated activity and or provide viable options to decrease such vulnerability the current disruptions experienced during SPS events will continue.

The research proposes that a formalised version of a "dual system" may be an option, but also emphasises the fact that there are existing proposals, such as commodity-based trade,⁸²⁴ already available to policy makers for the South African context. This can be achieved through recommendation one which recommends a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level.

6.3.7 Language use and the classification of participants in the SPS chain

A significant finding, especially in the context of international trade and the role that SPS measures play in the ability of private parties to import or export products subject to SPS measures, is the concern that participants share that South Africa may lose its international SPS credibility on account of what was described as a "dual system," whereby informal and formal sectors co-exist in close proximity. The lack of trust identified in this context is in the ability of the government to formalise the informal sector. There is a belief amongst actors, which almost equates to an accepted status quo, unlikely to change, that there is not an equal application of the law in both formal and informal markets in South Africa as far as SPS-related matters such as movement, slaughter, processing and sale of animals and animal products are concerned.

This research posits that the colloquial and official use of "othering" language in reference to classification of farming enterprises based on size or scale of their farming operation has the effect of distancing groups from compliance and SPS-related responsibility in an SPS context. This is language such as "small scale", "small holder", "commercial", "vemerging", or "subsistence" to categorise farmers when, regardless of

⁸²⁴ Commodity-based trade is defined by Thomson *et al* 2013 *Transboundary and Emerging Diseases* 503 as "[a]n array of alternatives that can be used individually or in combination to ensure that the production and processing of a particular commodity or product are managed so that identified food safety and animal health hazards are reduced to appropriate risk levels."

scale of farming operations, it is more accurate to draw a division between formal and informal operations. The effect of othering language has been the creation of distance between the problem, the problem solver and the persons affected by the problem; politicisation of the language in pursuit of political or commercial agendas; stereotyping and the creation of tiers of political social importance. The consequences thereof are significant and contribute to the environment of distrust between actors. Given the complexity of socio-economic, political and other contributing realities in South Africa there may be merit in adopting a partially, yet legislated, formalised dual system – taking care not to alienate groups based on the size of their farming operations – in terms of clear criteria and guidelines that are compatible with OIE recognised concepts such as "zoning" and "compartmentalisation". This research therefore supports further pursuit of existing solutions such as commodity-based trade⁸²⁵ provided the application of such a system is clearly defined and does not further increase the vulnerability of the export market.

6.3.8 Barriers related to SPS are understood beyond the strict definition of the WTO-SPS

Chapter 3 affirms that all interviewees that participated in the research have an understanding of what SPS regulation is on a practical level even though a number used different language to describe and relate to the concept. During interviews, the immediate discussion following a question regarding what a participant perceived as SPS barriers did not usually focus directly on the science aspect of it. The discussion that followed varied significantly across the spectrum of interviewees. However, most interviewees understood that science is the basis of SPS measures under the WTO but did not immediately connect their challenges and barriers to the WTO. This research proposes that this is an indication in itself of the existence of a broader reach of SPS-related barriers than the strict confines of the WTO-SPS agreement and its definition of SPS-measures.

⁸²⁵ See: Cassidy, Thompson and Barnes Establishing Priorities through Use of Multi-Criteria Decision Analysis for a Commodity Based Trade Approach to Beef Exports from the East Caprivi Region of Namibia; Thompson et al 2013 Transboundary and Emerging Diseases.

Barriers cannot be limited to a single definition or closed list of scenarios and the nature of SPS related barriers are specific to the context in which they arise, the specific product in question and, in many instances, the specific private party or government department involved.⁸²⁶ There were participants that described a barrier as a situation where products can either not be traded nationally or internationally on account of an SPS-related event. It is also deduced from the responses from participants that a barrier is in their view also a scenario where there is urgency for new standards or proactive prevention or detection of future SPS events or where there is disagreement with either the manner in which a standard was created or its content. Negative perceptions within the industry combined with a lack of trust hinders co-operation in and acceptance of controls in the prevention and control of SPS events and these manifest themselves as barriers. There is a lack of co-operation within the industry on matters related to food safety, animal health or any other SPS-related point. In terms of the adoption of standards, there is an apparent transactional nature of co-operation, where evidence of future benefit before SPS-related co-operation is often sought. The unfortunate result is that in some respects the industry is its own barrier to trade and this has an effect on the ability of the industry as a collective to prevent and resolve SPS-related barriers and disputes.

Based on the qualitative data analysed in Chapter 3, the conclusion is reached that some SPS-related barriers that South Africa faces cannot exclusively be attributed to the country's developing country status. To a great extent they are self-inflicted through ineffective legislation and other related inefficiencies. This challenges one of the predominant assumptions that South Africa's SPS-related challenges are directly related to problems of a developmental nature by virtue of the country's developing country status. These findings are supported by chapters four and five as well.

6.3.9 The South African SPS-related legislative framework as a barrier in itself to trade and the resolution of SPS related barriers and disputes

The findings of Chapters 3, 4 and 5 support the conclusion that the South African SPS-related legislative framework is a barrier in itself to trade. The findings also support

⁸²⁶ This is not a closed list, however these were the main, recurring views in the data.

the conclusion that the South African SPS-related legislative framework is in itself a barrier to the resolution of SPS-related barriers and disputes. These findings primarily relate to the theme of a lack of trust and the challenges related to communication detailed above. As described in Chapter 4, they are also supported by the existence of an informal and uncodified system of dispute resolution methods that poses a risk to transparency and the replicability of decisions. There is further an over-reliance on administrative law as a means of dispute resolution, limited recourse to dispute resolution of SPS-related barriers for private parties on account of the absence of technical SPS provisions on which private parties and government departments could rely, a lack of resources to respond to and manage SPS events in the relevant departments, and the lack of broader political accountability and consequence codified in the legislation which have an effect on the potential to implement or enforce SPS-related legislation, controls or decisions. The finding that the legislative framework is a barrier to trade in itself is a finding that supports recommendation one to the effect that recommendation one proposes the creation of a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level.

6.3.10 An informal and uncodified system of dispute resolution methods poses a risk to transparency and the replicability of decisions

In Chapter 5, through doctrinal analysis of the SPS-related legislative framework, it is found that there is inconsistency in provisions related to the form, period and processes of dispute resolution within the purview of the Ministry of Agriculture, inevitably leading to uncertainty. There is variation across the legislation with regard to the functionary or body with whom the appeal is lodged and the process that this procedure may take. There are also uncertainties, where the timeline within which the appeal is to be concluded either varies or is unknown. Significantly, the types of appeal or review are also administrative in nature and not of a technical SPS nature.

Negotiation exists as a dispute resolution method in practice. The accessibility to such negotiations varies and as noted in Chapter 4, depends to a great extent to the ability to get a seat at the table. In the context of this particular research and given the

broader political, transparency and accountability challenges that the country faces, negotiation is a dispute resolution method that is limited to non-technical SPS disputes. It is not suitable to highly technical disputes that rely on transparency and replicability.

This finding negatively affects private parties affected by SPS-related barriers or disputes that are beyond the strict terms of dispute resolution available at the WTO and that typically emerge at a national level where such parties would reasonably expect an available solution. This finding also negatively affects government departments vulnerable to accusations of special treatment of specific private parties or an inability to justify a decision taken. This finding supports recommendation two which proposes the establishment of an independent One Health Commission and an Agriculture and Related Matters Tribunal.

6.3.11 There is limited recourse to dispute resolution of SPS-related barriers for actors

The doctrinal analysis of SPS-related legislation in Chapter 5 concludes that there is no official, legislated forum through which to resolve technical SPS-related disputes. Private parties have no formal, legislated, way in which to apply for the introduction of new science or evidence into the amendment of existing measures or their removal, or for the introduction of new measures. This finding supports recommendation one, a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level and recommendation two, an independent One Health Commission and an Agriculture and Related Matters Tribunal.

6.3.12 Administrative law is not a substitute for the lack of dispute resolution options available in the SPS-related legislative framework

Private parties engaged in SPS-related disputes are by necessity faced with over-reliance on administrative law solutions to problems that require an additional context-specific set of legal options. Administrative law cannot be the sole legal recourse in pursuit of a solution to relevant SPS-related disputes. The red-meat industry is largely

limited to reactive measures as opposed to proactive measures,⁸²⁷ which is in itself a barrier to trade. As emphasised in Chapter 5, a reactive response is a delayed response and a delay can have significant consequences for the individual or for an entire industry. This research opines that an SPS framework that already incorporates and concretises the core SPS-related principles, rights and obligations in an unambiguous and accessible manner is trade-facilitating. This finding supports recommendation one which recommends a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level.

6.3.13 A lack of resources to respond to and manage SPS events in the relevant departments becomes the burden of participants in the SPS chain

This research, in Chapter 4, finds that a lack of resources to respond to and manage SPS events in the relevant government departments becomes the burden of the individuals in private industry and to government individuals tasked with relevant portfolios in the relevant government departments.

6.3.14 A lack of broader political accountability and consequence has an effect on the potential to implement or enforce SPS-related legislation, controls or decisions

There is a significant gap between the accepted rights, obligations and principles (theory) of SPS and what the law can facilitate in South Africa. The substance of the legislation lacks SPS-related mandates, clarity regarding accountability and consequence related to, for example, the basis of SPS measures in principles of science, or a mandate to consider the objective of minimising negative trade effects when determining the appropriate SPS measures to take.⁸²⁸

⁸²⁷ Proactive measures are primarily legally enforceable SPS measures taken to prevent or decrease the risk of an SPS event (disease outbreak) and may relate to control measures put in place for example where foreseeable damage associated with SPS events are identified. These are measures that would ideally prevent an occurrence of FMD at all and avoid the resultant financial and reputational damage that occurs during and immediately post outbreak.

⁸²⁸ *WTO-SPS* Article 5.4.

The lack of proactive reform of the South African SPS-related legislation is a dereliction of a duty borne by the Ministers responsible for the protection of human, animal and plant life or health in the SPS context. As Chapter 3 details, in the 2015 TPR South Africa led the Secretariat to believe that a review is underway:

The legislative framework is characterised by a large number of laws and regulations... This situation bears the risk of overlapping jurisdictions and may lead to unnecessary complexity. The authorities indicated that several pieces of SPS legislation are under review to ensure consistency with good practices.⁸²⁹

In the list of legislation analysed in this research⁸³⁰ not a single new piece of legislation exists that is created after 2015. "Review" could have included the subsequent amendments to the legislation. However, any of the amendments that have been made have not meaningfully reformed the legislation. This finding supports recommendation one and two. Recommendation one proposes a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level and recommendation two proposes an independent One Health Commission and an Agriculture and Related Matters Tribunal.

⁸²⁹ WTO Trade Policy Review Report by the Secretariat Southern African Customs Union (Revision) WT/TPR/S/324/REV.1, 306.

⁸³⁰ As described in Table 5-1 and 5.2.1 in Chapter 5, the Acts in each category of legislation are as follows. Core red-meat related SPS legislation (RM): Agricultural Pests Act 36 of 1983, Animal Diseases Act 35 of 1984, Animal Health Act 7 of 2002 (not in use yet), Meat Safety Act 40 of 2000; Legislation on the periphery of SPS (PER): Animal Improvement Act 62 of 1998, Conservation of Agricultural Resources Act 43 of 1983, National Environmental Management Biodiversity Act 10 of 2004, National Environmental Management Protected Areas Act 57 of 2003, Plant Improvement Act 53 of 1976, Animals Protection Act 71 of 1962; Legislation related to inputs and technical requirements (ITR): Agricultural Product Standards Act 119 of 1990, Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, Medicines and Related Substances Act 101 of 1965, National Regulator for Compulsory Specifications Act 5 of 2008; Legislation supporting control, inspection and approval procedures (SCI): Agricultural Produce Agents Act 12 of 1992, Consumer Protection Act 68 of 2008, Disaster Management Act 57 of 2002, Fencing Act 31 of 1963, Marketing of Agricultural Products Act 47 of 1996, Stock Theft Act 57 of 1959, Animal Identification Act 6 of 2002, Perishable Products Export Control Act 9 of 1983; Broader SPS related legislation (BR): Genetically Modified Organisms Act 15 of 1997, Liquor Products Act 60 of 1989, Tobacco Products Control Act 83 of 1993.

6.3.15 Trade data provides a novel perspective through which to explore assumptions surrounding disease outbreaks and the formal control of imports and exports of animals and their products

The use of trade data (import and export statistics) provides a novel perspective through which to explore assumptions surrounding disease outbreaks and the formal control of imports and exports of animals and their products.

Country of origin or destination descriptions for imports or exports of red-meat products from and to South Africa such as "Ship or aircraft, " "Unclassified, " "South Africa, " and "Origin Unknown" have been identified in the trade data during the period of review. This finding in an SPS context is significant as it indicates a weakness in protecting human, animal and plant life and health thanks to a lack of verifiable data regarding the origin and destination of products at the points of entry or exit of South Africa. The trade statistics also show that contrary to interviewee perception, trade in animals and animal products does not necessarily drop to zero after an SPS event such as FMD. During the period reviewed, wildlife⁸³¹ traded relatively normally immediately after an outbreak of FMD, whereas commercial cattle⁸³² did not. Wildlife as an export commodity is presumably not in as much competition with trading partners as cattle. This suggests, but does not confirm, that wildlife, potentially seen as entailing less competition in the domestic industry of importing trading partners, was accorded grace immediately following an outbreak in a way that other more trade competitive categories of bovine animals were not.

Amongst interviewees there is a general perception that exports to the EU are not possible. However, the data analysed shows that there are exports, limited relative to other export volumes, to the Netherlands. The exports to the Netherlands, given their low volume and the lack of an explanation that the data in itself can provide for this apparent exception, do not in themselves negate the perspective of interviewees that the EU is not a possible export destination for red-meat during FMD.

⁸³¹ Tariff code: 010290.

⁸³² Tariff code: 010229.

6.3.16 Miscommunication is the thread that binds together the main findings

Based on the findings in this research it is clear that there are a number of overlapping issues that lead to the conclusions made in this chapter. These findings also support the recommendations made further below. The common thread that binds these findings together is miscommunication.

South Africa does not have a purpose-specific legislative framework that defines core terms such as "sanitary or phytosanitary measure" or "equivalence". South Africa also does not have a purpose-specific legislative framework that identifies the parties responsible for the application of principles, rights and obligations such as those related to equivalence, transparency of notifications, and the mandate that focal points or enquiry points have in their service of SPS needs. Without the requisite language in legislation to translate the international rights, obligations and principles of SPS into national rights, obligations and principles – and thus to communicate them domestically – the main findings detailed above are not surprising.

Without the very basis supporting the definition and communication of the relationships between a private party and government or a private party and another private party, as far as SPS-related rights and obligations are concerned, the miscommunication between these parties that has manifested itself in the form of barriers, distrust of processes and people as well as a hesitancy to co-operate on matters related to SPS within these groups, is likely to continue.

In the context of the significant social, political and legal complexity that contributes to the persistent challenges to the prevention of barriers and disputes identified in the context of sanitary and phytosanitary measures in South Africa described above, and the other main findings that follow, the role of legislation as the basis for communication is evident. This research proposes that legislation that is purpose-specific and clear in its application is a means through which to maintain legitimacy of South Africa's legal SPS capacity by providing consistency during periods of change in government or departmental leadership. Communicative legislation is expected to remove the potential abuse of non-transparent actions taken with an SPS-related purpose or effect. Such legislation is potentially an outcome that can serve as external

evidence of the importance of the agricultural sector in South Africa, and also the importance that South Africa places on maintaining SPS protections for local and international trade. Provided the rule of law persists, a clear and concise purpose-driven SPS legislative framework is a potential solution to the broader challenges faced by South Africa resulting from the persistence of state capture, unclear policy positions and the resultant distrust of authority, at least in the agricultural industry. For this reason, recommendation one which recommends a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level.

6.4 Reflection and relevance of research and findings in a broader context – to other countries

The findings of this research are of relevance in a broader context and to other countries. The research finds that identifying and exploring persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in a country specific context there are multiple manifestations of barriers or disputes that, despite being within WTO concern, are beyond the strict terms of dispute resolution available at the WTO, not necessarily being limited to disputes relating to the science on which measures are based.

This research is also of relevance in a broader context and to other countries in that it details the potential consequences of a SPS-related legislative framework that *looks* like an SPS legislative framework but does not upon deeper investigation amount to one that adequately translated international SPS-related rights and obligations into the national legislative framework where it is of practical benefit to private parties. It also provides a methodology through which to identify problematic areas within the legislative framework.

6.5 Reflection on methodology

6.5.1 Doctrinal analysis of SPS law and related literature

Doctrinal research and analysis of legislation is a method that is well suited to the mixed methodology design of this particular research. The primary benefit of the doctrinal analysis of legislation in this research was the in context understanding of the legislation that this method provides and the ability to engage with the literature and legislation on a deeper level than with the other methods.

A challenge of the doctrinal research method in this research was the difficulty in limiting the scope of the doctrinal analysis of legislation. The inability to include everything is a calculated limitation but a limitation nonetheless. A second challenge was maintaining objectivity in the writing up of the findings of the doctrinal analysis despite having conducted qualitative field research during which participants expressed views and made judgements of the legislation (both positive and negative) that were informed by their own perception, reality or agenda.

6.5.2 Qualitative research by means of semi-structured interviews in the "industry"

Designing and planning qualitative research well in advance of conducting it cannot be over-emphasised. The qualitative aspect of this research was time consuming in both the data collection and the data analysis. This aspect of the research depended greatly on a clear view of what the purpose of the research interviews was and what could realistically be achieved in the time available. The design of the interviews was done mindful of the restrictions of time and the essential talking points that needed to be covered. The design also took into account the differences in interviewees and the necessity to understand the nuances in these differences as far as the interview data collected was concerned.

This method contributes to the overall research in multiple ways. It provides insight that is otherwise not available in published texts. It allows for clarification and exploration of themes that were often unexpected and new to the researcher's understanding of the industry. This method also emphasises the importance of making

room in research for the perspectives, perceptions, experiences and views of persons practically involved in the industry being researched and practically affected by the rights, obligations and principles that co-exist in an industry that is not isolated from broader social, political and economic considerations. The experience of conducting semi-structured interviews was one that forced the researcher to think critically about the research problem in light of the practical findings and to focus on practical solutions to the challenges identified.

An observation worth noting in the context of semi-structured interviews is the dynamic between interviewee and interviewer. The vast majority of interviewees appeared to engage sincerely with the speaking points and answered in earnest. There were however instances where interviewees came across as performative in the sense that their body language and attitude towards the talking points were clearly of a nature where a personal (or group) agenda was being narrated, as if to try and steer the outcome of the research towards their specific views or objectives. In as far as those interviews are concerned, it is a limiting factor to the research data collected. The being that the amount of valuable data that was collected during such interviews was limited to what could be reasonably triangulated with other interviewees or verified through other means.

6.5.3 Content analysis: extraction and analysis of data using Rstudio programming

The content analysis was used to both gather or extract data and to analyse it. The goal of the content analysis methodology was simple. Its purpose in the first application was to identify unique rights and obligations derived from the *WTO-SPS*, *SADC-SPS* and *AFTCA-SPS* in the national SPS-related legislation of South Africa. The purpose in the second application was to identify key terms specific to the OIE Terrestrial Code, OIE Terrestrial Manual and FMD in the national SPS-related legislation and regulations of South Africa. This method was also intended as one that should be reproducible with the potential to compare outcomes with other jurisdictions.

In this research the analysis of the data collected was conducted in such a way where it was not intended for use as a stand-alone methodology but as part of a mixed methodology approach to answering the specific research question. There are

therefore multiple further options available to the researcher to further present or analyse findings from a different perspective to the approach taken in this research. In this particular analysis, the data represented distinct or unique combinations, not a count of all occurrences. For a different perspective, for example a focus on the most frequently occurring matching word for example, the count of occurrences may be a more suitable approach. The approach taken depends on the purpose of the analysis. The key-words that identify the unique IDs and corresponding rights or obligations have been refined and as far as possible non-specific and potentially distorting words have been excluded. Where relevant both the British and American spelling of words were included in the list of search terms.

The social, political and economic context of the text and broader legal system is removed leaving the field- (or SPS-) specific context as the guiding factor in the collection of the data. As a methodology, the content analysis has the ability to collect data and facilitate a comparison between not only the three international agreements subject to this research, but also between the legislation in different jurisdictions. The rationale for the methodology, as emphasised and described in Chapter 2 and 5 in detail, can be applied in assessing the robustness of rights and obligations specific to other WTO instruments by adapting the Rmarkdown script to the specific agreement. One would do this by following the same logic of identifying specific rights and obligations, allocating them unique codes and assigning terms that identify these rights and obligations before searching for their presence in legislation or other documentation, as the case may be.

The OIE analysis demonstrates how a further manual, context-driven step where the researcher analyses the actual wording to verify the meaning of the finding, could lead to more definitive answers. This step was beyond the scope of the first application in which the content of the rights and obligations of the unique IDs in the three international agreements was analysed. This method makes a further manual, context-driven focus on specific legislation possible, since sentence numbers, the specific key words, and article numbers are extracted and stored in the original data. This methodology is one that carries significant potential as far as comparison across multiple jurisdictions is concerned. Chapter 5 shows that the methodology is

particularly useful when collecting large data sets and repeating the collection and analysis across different documents.

This methodology has limitations. In its current form the content analysis does not exclude the title and amendment information in the first few sentences of the Act. The decision to refrain from doing so was to present a "best case scenario" in as far as key words may be present in the title which, if removed, would affect the validity of claims such as those made regarding the absence of core terms such as "science". It is therefore possible that in limited cases this may lead to a false indication of a unique combination and corresponding provision being present, but in this particular analysis the difference that this would make was evaluated as being minimal, on account of unique combinations being the focus as opposed to count of occurrences.

This method of data collection cannot account for spelling mistakes made in the legislation analysed. In this research there is a specific example that can be found in the Regulations under the Animal Diseases Act where "control" was misspelt as "conrol" in the version of the official text downloaded from Juta and used in this analysis.⁸³³ There would therefore be no match with that specific misspelling where the specific word "control" is extracted using this methodology.

It is possible that in the process of conversion of documents from PDF to text that errors in conversion may occur. This methodology does not account for that and extracts what matches in the text data and does not search for truncated terms or variations in spelling. This is only a significant limiting factor if these types of errors are pervasive in the legislation of the jurisdiction being analysed.

This methodology will certainly undergo further refinement in future research. The implication of this is positive. Refinement will narrow or broaden the search field more than it already is, dependent on the reasons for doing so. In the event of the outcome being a narrower view than the relatively broad one presented in this research, the answers sought may present a starker contrast than this current research does. The

⁸³³ If there are known spelling mistakes before the analysis is done, then it is possible to account for them by adding the misspelt words by adding them to the script as separate words to search for.

foreseeable further refinement is positive in the sense that it could potentially become more specific or broad dependent on what the context of future research is and broaden the scope of application. Provided the script for such research is made available and comparable to this current one, the refinement in the future does not negate any findings described below. What does not change is that if, even at a broad level, as shown below, certain core or central terms that define the field of SPS are absent, a more refined methodology will produce the same answer, but with more detail.

Some broad recommendations for future refinement and development of the methodology are as follows. One is to approach the analysis from a text mining perspective, where focus is term frequency (tf) and the terms inverse document frequency (idf) using tidy data principles and adapting it as appropriate for the type of data analysed. Tf-idf is the combination of the two to measure word importance in a corpus. Another is sentiment analysis and a third is exploring relationships between n-grams, or bi-grams and using correlations.⁸³⁴ This methodology has already applied the method of tokenization by word. These methods have their own contexts in which they are appropriate, benefits, challenges and limitations. They are however potentially beneficial to provide a further alternative perspective on the content of the SPS legislative framework of any given jurisdiction.

6.5.4 The role of mixed -methodology research

This research is evidence of the value of applying a mixed-methodology approach to a field of WTO law such as SPS where, despite the predominant focus on law, the combination of methods and the variety of data and perspectives that such methods allow for is beneficial to the outcome of the research. The use of a mixed-methodology in this research contributes to the robustness of the conclusions reached as it has allowed for the triangulation of data and forced a deep engagement with the subject matter that in this research may not have been achieved otherwise. On this basis, the

⁸³⁴ See: Silge and Robinson "Analyzing word and document frequency: tf-idf" para 3.

use of mixed methodology research is recommended for application in future research pursuits.

There will be contexts in which the mixed methodology approach is not suitable. Despite the role of mixed methodology research being advocated in this research, it comes with limitations and challenges. It is not a methodology recommended if research is being conducted by a single researcher with a limited time frame. Mastering each method is time consuming and requires a significant commitment to additional learning and reflection. There are methods that are not compatible with each other and it is important that time be dedicated to establishing the compatibility of these methods in advance of committing to data collection.

6.6 Recommendations for future research

There is substantial potential for further research of matters related to this topic that were beyond the scope of this research. It is suggested that further research be undertaken in the following areas in particular:

- There is a lack of legal research in the field of SPS with a specific focus on South Africa. A general recommendation is that a concerted effort be made to encourage academic research in this field of WTO law in context-driven⁸³⁵ projects.
- It is recommended that future research be conducted to include qualitative research interviews with a mixture of medium-sized, smallholder farmers farming with cloven hooved animals exclusively or involved in mixed-crop farming with livestock and for example seasonal crops or orchards with varying incentives related to export or local trade of their produce. This can be contrasted with the findings of Chapter 4 in this research.

⁸³⁵ The circumstances specific to the South African SPS and agricultural environment.

- It is recommended that future research critically evaluates the role of provincial legislation during the urgent control of SPS events in the context of SPS where national and provincial levels have concurrent legislative competence.
- It is recommended that further research be conducted into the alternative methods of dispute resolution suitable to the main findings in this research beyond the recommendations made below and mindful of the limitations in terms of access that mainstream alternative dispute resolutions methods often pose in practice.

6.7 Practical Recommendations for South Africa

This research has identified and explored persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. The question is what potential solutions to the challenges identified can be recommended. From the outset, there has been a focus in this research on the practical consequences of the application of rights and obligations in terms of international law for which significant theoretical literature exists. As such, the recommendations are of a practical nature and are intended to clearly outline a potential solution to the challenges that link back to the inadequacy of the SPS-related legislative framework and the effect that this has on various forms of trust, communication and the ability to trade. Based on the findings in this research the following recommendations are thus made:

- The first recommendation is that South Africa prioritizes the design and implementation of a legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level;
- The second recommendation is that an independent One Health Commission be established in pursuit of the effective prevention and resolution of SPS-related barriers and disputes as well as an Agriculture and Related Matters Tribunal.

Both recommendations are described and discussed in detail further below. In as far as other countries face similar challenges based on the outcome of a similar analysis or need, the recommendations below are relevant to those countries too. This is particularly true given the universality of the rights and obligations related to SPS and their role in international trade.

6.7.1 Recommendation one: A legislative framework designed for the purpose of translating international SPS-related rights, obligations and principles into law and policy at the national level

It is recommended that a legislative framework specifically translating international SPS-related rights, obligations and principles into law and policy at the national level be designed and implemented. The wording of the provisions should account for the associated rights and obligations that follow from the rights and obligations identified in Annex 4 derived from the WTO-SPS, SADC-SPS and AfCFTA-SPS. The provisions should clearly identify the bearers of rights and the scope, definition and application of such rights as well as the same in the case of duty bearers and duties. The framework should consist of the following:

(1) A central or core piece of legislation that defines:

- SPS measures and their role and application in international and national trade;
- The direct application of WTO-SPS related panel reports and findings in the interpretation and understanding of SPS matters at a national level;
- Guiding principles related to the scientific basis on which measures are based. This should include specific reference to the role and extent of direct application of international organisations. In particular the role and extent of direct application of the guidelines or standards of the OIE, IPPC and Codex Alimentarius should be stated;
- Assessment of risk and the general processes followed in the determination of the appropriate level of sanitary or phytosanitary protection. This should include specific provisions related to necessity and proportionality of measures;

- The scope and recognition of the concept of adaptation to regional conditions;
- The definition of and process in determining the identification and declaration of pest- or disease-free areas and areas of low pest or disease prevalence in South Africa;
- The powers, scope, purpose and processes related to the general SPS requirements in terms of control, inspection and approval procedures;
- The direct applicability of cooperation and technical assistance requirements committed to in regional, bilateral and multilateral agreements;
- Recognition of equivalence and the process of requesting such recognition as well as the grounds on which it may reasonably be granted or denied;
- The process of the creation of emergency SPS measures and the grounds which justify such actions as well as limitations in terms of scope and duration of such measures;
- The definition of harmonization and process through which the relevant competent body is reasonably expected to pursue harmonization;
- Provisions related to the fair determination of import or export inspections and fees;
- Provisions placing a duty on the competent body in terms of transparency requirements as well as detailed provisions specific to the transparency of sanitary and phytosanitary regulations, in particular the designation of an enquiry point and the duty that such an enquiry point is expected to perform;
- The definition of plant health, food safety and animal health as well as the concept of one health.⁸³⁶

⁸³⁶ World Health Organization (WHO). 2021 <https://www.who.int/news/item/01-12-2021-tripartite-and-unep-support-ohhlep-s-definition-of-one-health>. Definition: "One Health is an integrated, unifying approach that aims to sustainably balance and optimize the health of people, animals and ecosystems. It recognizes the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent."

- (2) An Act directly connected to the core legislation above with the purpose of defining the grounds, scope and related detail for the resolution of barriers related to SPS measures through transparent, certain and consultative dispute resolution methods. The latter should not be limited to administrative internal appeals and reviews and include methods other than litigation.
- The Act should establish/designate an independent One Health Commission and an Agriculture and Related Matters Tribunal.
 - The Act should define the grounds on which an individual may apply to the competent body for the consideration of a matter for further action by the Member as representative on a Member to member level as well as the grounds on which a refusal to act may be justified.
- (3) An Act dedicated to detailed SPS-related matters specific to animal health and the overlapping matters to be read in conjunction with the plant health and food safety Acts;
- (4) An Act dedicated to detailed SPS-related matters specific to plant health and the overlapping matters to be read in conjunction with the animal health and food safety Acts;
- (5) An Act dedicated to detailed SPS-related matters specific to food safety and the overlapping matters to be read in conjunction with the animal health and plant health Acts;
- Where necessary there should be detailed regulations that provide guidance, as required, for the scope, application, or other related matters supporting the application of the provisions prioritized in the central or core piece of legislation;
 - Where key agricultural products are identified there should be separate, detailed regulations that specify or provide detail, as required, for the scope, application, or other related matters supporting the application of the provisions prioritised in the central or core piece of legislation.

6.7.2 Recommendation two: An independent One Health Commission and an Agriculture and Related Matters Tribunal

6.7.2.1 Introduction

One Health is a concept that embodies the protection of human, animal or plant life or health as inseparable and complimentary to one another. The One Health High Level Expert Panel (OHHLEP) defines one health as:

One Health is an integrated, unifying approach that aims to sustainably balance and optimise the health of people, animals and ecosystems. It recognizes the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent.⁸³⁷

This research has highlighted the importance of a framework that embraces and supports the inter-dependence of rights and obligations that support the protection of human, animal or plant life or health at a national level in particular.

The second recommendation is split into two. One is the recommendation for an independent One Health Commission and the second is the recommendation for a Tribunal for Agriculture and Related Matters. The rationale and recommended structure, competences and requirements for each are discussed below.

The difference between a commission and a tribunal is essentially the mandate under which they operate and the nature of the remedies or decisions that they make. In these recommendations, the distinction is as follows. The One Health Commission should operate under the core SPS legislation as described above, with the mandate from that Act specifying the list of functions that the One Health Commission is expected to carry out. Functions would typically relate to the application for the creation of measures, the amendment of measures, the investigation into matters related thereto and ultimately the adjudication on SPS-specific matters. These defined

⁸³⁷ World Health Organization (WHO). 2021 <https://www.who.int/news/item/01-12-2021-tripartite-and-unep-support-ohhlep-s-definition-of-one-health>. According to the WHO, the OHHLEP's focus is providing "1) policy relevant scientific assessment on the emergence of health crises arising from the human-animal-ecosystem interface; and 2) guidance on the development of a long-term strategic approach to reducing the risk of zoonotic pandemics, with an associated monitoring and early warning framework, and synergies needed to institutionalise and implement the One Health approach, including in areas that drive pandemic risk."

functions would be SPS-specific and highly technical in nature. The Tribunal for Agriculture and Related Matters is envisioned to operate more as a court of first instance in the context of highly specialised SPS disputes with powers similar to those of a court. The decisions of both the One Health Commission and the Tribunal for Agriculture and Related Matters should be appealable to a high court on specified grounds. During the normal course of events the Commission and Tribunal should in general deal with all technical and other SPS-related disputes and applications.

The recommendation for a One Health Commission and Tribunal for Agriculture and Related matters is intended to provide a single, central and independent commission for SPS-specific matters, but, in the event that a matter is beyond the scope of the commission or requires consideration in the broader context of agricultural matters, for example, if it is related to national policy on the allocation of resources to veterinary public health, then the Tribunal is responsible. It will enable consultative and transparent dispute resolution. It would also be a court of first instance that has the capacity to treat SPS matters finally and with the level of urgency that is absent in the general court process. It does however not abolish currently available legal recourse such as administrative appeal and review procedures for matters that are better addressed by means of administrative law through the normal course of South African law system. It is intended to avoid the over reliance on administrative law that has resulted from there being limited legal provisions that provide SPS specific legal recourse to aggrieved parties.

6.7.2.2 The rationale for an independent One Health Commission

It is recommended that South Africa develops an independent One Health Commission. The reasons for such a tribunal are strongly related to the findings in the research and are as follows:

First, the process by which SPS measures are taken is a highly specialised responsibility and requires a highly specialised, independent body to dedicate expertise and resources to the successful creation, application and assessment of SPS measures, able to ensure that their intended functions on a national level are achieved.

Second, the field of SPS is one that relies on specialised understanding in the fields of science (plant, animal and food science), law (international trade law and administrative law), and economics.

Third, there should be an independent forum through which to apply to protect rights, obligations and principles in the application of SPS measures.

Fourth, existing commissions, such as the International Trade Administration Commission, are not suited to investigating or deciding on matters of an SPS nature.

Fifth, the current SPS-related legislative framework does not provide effective dispute resolution options.

6.7.2.3 Inspiration provided by the existing International Trade Administration Commission (ITAC), the International Trade Administration Act 71 of 2002 and an existing proposal for an International Trade Tribunal

The need for an International Trade Tribunal was expressed by Brink and van Heerden in 2016.⁸³⁸ In their argument in favour of the creation of an international trade tribunal, the authors noted the existence of the National Consumer Commission and the National Consumer Tribunal, the Competition Commission and the Competition Tribunal, and the International Trade Administration Commission, with no related tribunal.⁸³⁹ Their rationale was linked to the close connection between anti-dumping and competition law, and they found that an independent international trade tribunal should be established as a forum to review and appeal ITAC findings. The ITAC must be "impartial and must perform its functions without fear, favour or prejudice"⁸⁴⁰ and exist with the specific functions to:

- Investigate and evaluate customs duties, anti-dumping duties, countervailing duties and safeguard measures;⁸⁴¹

⁸³⁸ Brink and van Heerden 2016 *SALJ*.

⁸³⁹ Brink and van Heerden 2016 *SALJ* 409.

⁸⁴⁰ International Trade Administration Act 71 of 2002S7(2)(b)

⁸⁴¹ International Trade Administration Act 71 of 2002 S16.

- Investigate, evaluate and determine applications and issue or recommend the issuing of rebate permits or certificates and drawback provisions;⁸⁴²
- Monitor trade and other matters;⁸⁴³
- Share and request information in terms of Southern African Customs Union (SACU) rights and obligations.⁸⁴⁴

None of the functions listed above are specifically SPS-related. The ITA Act defines the investigation, evaluation and adjudication procedures for import or export control permits,⁸⁴⁵ rebate permits or certificates,⁸⁴⁶ the amendment of customs duties,⁸⁴⁷ anti-dumping duties,⁸⁴⁸ countervailing duties,⁸⁴⁹ safeguard duties,⁸⁵⁰ and the imposition of safeguard measures.⁸⁵¹ The commission created in terms of the ITA Act is required to provide the public with information and report the results of any investigation, monitoring or review carried out to the Minister in a prescribed manner.⁸⁵²

Persons aggrieved by the decisions in terms of, for example, anti-dumping may approach the relevant High Court for a review of that determination, recommendation or decision⁸⁵³ which may further be appealed to the Supreme Court of Appeal (SCA), or the Constitutional Court (CC).⁸⁵⁴ The ITA Act clearly defines the rights that individuals have to apply to ITAC for a variety of trade-related purposes. These are for example related to import and export control permits,⁸⁵⁵ rebate permits or certificates,⁸⁵⁶ the imposition of safeguard duties,⁸⁵⁷ customs duty applications,⁸⁵⁸ or the

⁸⁴² International Trade Administration Act 71 of 2002 S17.

⁸⁴³ International Trade Administration Act 71 of 2002 S18.

⁸⁴⁴ International Trade Administration Act 71 of 2002 S19.

⁸⁴⁵ International Trade Administration Act 71 of 2002 S27- 29.

⁸⁴⁶ International Trade Administration Act 71 of 2002 S27- 29.

⁸⁴⁷ International Trade Administration Act 71 of 2002 S30-32.

⁸⁴⁸ International Trade Administration Act 71 of 2002 S32.

⁸⁴⁹ International Trade Administration Act 71 of 2002 S26.

⁸⁵⁰ International Trade Administration Act 71 of 2002 S26.

⁸⁵¹ International Trade Administration Act 71 of 2002 S26.

⁸⁵² International Trade Administration Act 71 of 2002 S22.

⁸⁵³ International Trade Administration Act 71 of 2002 S46.

⁸⁵⁴ International Trade Administration Act 71 of 2002 S47.

⁸⁵⁵ International Trade Administration Act 71 of 2002 S26 & 27.

⁸⁵⁶ International Trade Administration Act 71 of 2002 S26 & 27.

⁸⁵⁷ International Trade Administration Act 71 of 2002 S16 & 26.

⁸⁵⁸ International Trade Administration Act 71 of 2002 S16 & 26.

consideration of alleged dumping or subsidised imports.⁸⁵⁹ Import and export control in the context of the application of the ITA Act does not refer to SPS matters, with the exception of products under Chapter 03 "fish and crustaceans, molluscs and other aquatic invertebrates" which includes fish products.⁸⁶⁰ The "safety" aspects with which it is concerned relates to matters such as those concerned with technical safety of second hand equipment. This is unrelated to SPS in that it is not concerned with human, animal or plant life or health.

Even though the ITA Act's definition of "goods" includes "all wares, articles, merchandise, animals, currency, material or objects of whatsoever nature" it is not an Act that is reasonably definable as forming part of the SPS legislative framework. Its usefulness for SPS matters is related to the extent to which it supplements the understanding of how other fields of trade, such as trade remedies (anti-dumping, safeguard duties and countervailing measures), are applied in South Africa, and in particular of the role and function of the ITAC. Even if Brink and van Heerden's call for an International Trade Tribunal⁸⁶¹ is eventually heeded, if the focus is on trade remedies, it does not appear to be a forum that would reasonably be able to address the needs of SPS. It is further submitted that the significant technical differences between these two fields of WTO law is of such a nature that the two Tribunals would serve two very different and distinct functions with a limited overlap.

6.7.2.4 Recommendations for structure, subject competence and jurisdiction of a One Health Commission

The One Health Commission should be established under the recommended Act directly connected to the core legislation above described as one that exists for the purpose of defining the grounds, scope and related detail for the resolution of barriers related to SPS measures. The jurisdiction of the One Health Commission, in particular its importance in the context of imports into the country, exports of relevant products

⁸⁵⁹ International Trade Administration Act 71 of 2002 S16 & 26.

⁸⁶⁰ *International Trade Administration Commission of South Africa: Import Control* No. R. 91 1 0 February 2012 GG No. 35007 lists the following tariff codes that describe fish: 03.02, 03.03, 03.04, 03.05, 03.06, 03.07, 03.08.

⁸⁶¹ Brink and van Heerden 2016 *SALJ*.

and national standards in South Africa should be clearly defined in the empowering legislation. The provisions of the ITA Act, in as far as they relate to the ITAC, have been heavily drawn on in the design of the recommendations below on structure, subject competence and jurisdiction of a One Health Commission.

Similar to the ITAC the One Health Commission should require a Chief and Deputy chief commissioner which are both qualified SPS-related experts. It is recommended that the commission consist of 10 persons (commissioners) of which at least seven are experts, with advanced qualifications in:

- Public health or food safety;
- Animal health (preferably with a specialty in zoonosis and veterinary public health);
- Plant health and the environment;
- A natural scientist with relevant qualifications in a field such as microbiology, entomology or food science;
- International trade law in the context of the multilateral trading system;
- South African constitutional and/or administrative law;
- Economics or agricultural economics.

It is recommended that the eighth person be a primary agricultural producer nominated by interested persons in response to a call for the nomination of expressions of interest in the Government Gazette and voted in on account of their experience in imports or exports or experience in trade under national standards.

Given the nature of the commission and the a-political nature of a scientific basis on which to base measures and decisions related thereto, it is recommended that commissioners not be permitted to bear office if that person is an office-bearer of any party, movement, organisation or body of a partisan political nature.⁸⁶²

⁸⁶² This is also a provision in the *International Trade Administration Act 71 of 2002* at section 9(2)(a) which states that "A person may not be a member of the Commission if that

It is further recommended that the prescribed matters on which the commission must act by means of evaluation or investigation be:

- The application for recognition of equivalent measures;
- The application for the amendment of relevant SPS certificates;
- The application for the amendment of relevant SPS procedures (control, inspection and approval);
- The application for the evaluation of a matter related to SPS that the applicant believes requires recourse to a regional, continental, multilateral or other forum on their behalf;
- The application for the resolution of a dispute on SPS grounds between an individual, organisation, group of persons or organizations and a relevant department;
- Investigation into the non-compliance with international notification or transparency requirements;
- Advanced rulings (made prior to importation) on equivalent standards, procedures or other relevant matters related to imported products that are subject to SPS control.

The decisions of the commission should be binding, with there being clear consequences for the non-adherence to such binding decisions. Regulations that clearly define the scope, processes and exceptions to the functions of the commission are recommended. For purposes of transparency, certainty and continuity, it is recommended that the commission be required to adhere to standards of public reporting in a defined manner and at defined intervals. These reports should be available to the public and carry precedent.

person- (a) is an office-bearer of any party, movement, organisation or body of a partisan political nature.”

It is recommended that the commission be mandated to act in a manner compatible with the rights, obligations and principles of the WTO-SPS and that duties be performed in the same spirit as the agreement.

6.7.2.5 Recommendations for structure, subject competence and jurisdiction of an Agriculture and Related Matters Tribunal

It is recommended that an administrative tribunal in terms of recommended Act directly connected to the core legislation above, described as one that exists for the purpose of defining the grounds, scope and related detail for the resolution of barriers related to SPS measures is established. The Tribunal should at least:

- Adjudicate matters related to protectionist behavior in South Africa including private standards;
- Adjudicate on matters where an incorrect or unjustified decision was made by the commission;
- Adjudicate matters referred to the tribunal from the commission;
- Provide a route through which to seek urgent interim relief during adverse SPS events.

6.8 The academic contribution that this research makes

There are several important areas where this study makes an original contribution. This research provided an opportunity to advance the understanding of the role of legislation and the perspectives of selected actors in the red-meat industry. The primary objective of this research was to identify and explore persistent challenges to the prevention and resolution of trade barriers or disputes connected to sanitary and phytosanitary (SPS) measures in the South African context. The findings of this research make an important contribution to the field of SPS and in particular to South African specific international trade law scholarship.

The methodology applied is original in terms of both data collection and analysis and also in the specific field in which it was conducted. It extends the knowledge of the

practical manifestations of SPS-related barriers in the red-meat industry in South Africa and the resolution thereof. The level of detail in data collection and analysis that this methodology facilitates is a contribution of data that has not previously been available in the context of SPS measures as barriers to trade in the South African context. This research identifies the shortcomings of the legislative framework and the different perspectives from which the legislative framework can be researched. This research demonstrates the benefit of applying a mixed-methodology approach in legal study and demonstrates the benefit to legal scholars in South Africa to pursue methods such as qualitative research interviews and learning a programming language such as Rstudio. The content analysis employed in Chapter 5 is particularly novel in legal research in South Africa and contributes to the knowledge in the area of research methodology available for application by legal scholars. This contribution is not limited to South Africa.

In conclusion, this research has maintained focus on the real consequences that principles, rights and obligations of international trade law, in particular SPS, have on participants within the SPS chain. It has emphasized the fact that in solving problems and recommending solutions the experiences and perspectives that persons practically affected have are essential to identifying the potential origin of the specific problems of challenges. It is also essential to engage with participants to challenge existing assumptions about what their experiences or challenges are and in doing so. Law is only as useful as its ability to protect those persons or industries that it purports to protect. It does not benefit anyone to have legislation that *looks* sufficient, but is either not applied equally or is in terms of subject-specific substance-deficient. As partly quoted in Chapter 4:

[J]ustice is not confined to legal justice. While justice in a broader sense may be so elusive as to be an ideal or utopian, it is the diagnosis of injustice that is crucial, as justice is more likely to move people in its absence than it is as an academic or rhetorical exercise that fails to convince. It is injustice that motivates and propels action, and the highlighting of injustice does its own work.⁸⁶³

The sentiment expressed above is equally translatable to the context of this research. South Africa's membership of the WTO and OIE is "an academic or rhetorical exercise

⁸⁶³ Douglas-Scott "Introduction: Beyond 'Degree Zero' of Law after Modernity" 24.

that fails to convince" participants in this research of adequate protection of their livelihoods during SPS events. The action taken in terms of translating international SPS-related rights, obligations and principles into practical use at a national level also fails to convince. This runs the risk of WTO and OIE Membership amounting to a largely aesthetic political and academic exercise as opposed to one which facilitates the protection of human, animal or plant life or health in a manner beneficial and cognisant of the associated rights and obligations held by relevant private and government participants in the SPS chain. In conclusion, it is proposed that this research highlights the complexity of sanitary and phytosanitary measures as barriers to trade in South Africa and that the recommendations detailed above provide a framework for action.

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Specific Trade Concern Number: 27 (1997) *Citrus canker* Maintained by European Union raised by Argentina. Status: R

Specific Trade Concern Number: 39 (1998) *Maximum levels for certain contaminants (aflatoxins) in foodstuffs* Maintained by European Union raised by Argentina, Australia, Bolivia, Plurinational State of, Brazil, India, Indonesia, Malaysia, Philippines, Senegal, Thailand, The Gambia. Status: R

Specific Trade Concern Number: 43 (1998) *Prohibition on bone-in beef imports from EC member States* Maintained by South Africa raised by European Union. Status: R

Specific Trade Concern Number: 60 (1999) *Import restrictions on bovine semen and embryos, milk and milk products* Maintained by Argentina raised by European Union. Status: R

Specific Trade Concern Number: 135 (2002) *Restrictions on beef and pork* Maintained by South Africa raised by Brazil. Status: R

Specific Trade Concern Number: 161 (2003) *EC Directive 2001/661/EC regarding foot and mouth disease* Maintained by European Union raised by South Africa. Status: NR

Specific Trade Concern Number: 219 (2005) *EurepGAP requirements for bananas* Maintained by European Union raised by Saint Vincent and the Grenadines. Status: R

Specific Trade Concern Number: 287 (2009) *Import restrictions on fresh pork meat and beef* Maintained by South Africa raised by Brazil. Status: R

Specific Trade Concern Number: 326 (2011) *Restrictions on table grapes, apples and pears* Maintained by Thailand raised by South Africa. Status: PR

Specific Trade Concern Number: 330 (2012) *Indonesia's port closures* Maintained by Indonesia raised by China, European Union, New Zealand, United States of America. Status: PR

Specific Trade Concern Number: 356 (2013) *EU phytosanitary measures on citrus black spot* Maintained by European Union raised by South Africa. Status: NR

Specific Trade Concern Number: 362 (2013) *Import restrictions on beef due to BSE* Maintained by South Africa raised by Brazil. Status: R

Specific Trade Concern Number: 382 (2014) *European Union legislation on endocrine disruptors* Maintained by European Union raised by Argentina, China, Ecuador, Guatemala, India, Panama, Paraguay, United States of America. Status: NR

Specific Trade Concern Number: 394 (2015) *Costa Rica's suspension of the issuing of phytosanitary import certificates for avocados* Maintained by Costa Rica raised by Guatemala, Mexico. Status: NR

Specific Trade Concern Number: 404 (2016) *South Africa's revised veterinary health certificates for the import of cattle, sheep and goats from Botswana, Lesotho, Namibia and Swaziland* Maintained by South Africa raised by Namibia. Status: R

Specific Trade Concern Number: 431 (2017) *South Africa's import restrictions on poultry due to highly pathogenic avian influenza* Maintained by South Africa raised by European Union. Status: NR

ANNEXURE 1: LIST OF TARIFF CODES ANALYSED IN THIS RESEARCH

Table 1: Summary of Tariff Codes Analysed in this Research

Tariff Code	SARS Unit of Measure	Heading		
010221	u	Live bovine animals	Cattle	Pure-bred breeding animals
010229	u	Live bovine animals	Cattle	Other
010231	u	Live bovine animals	Buffalo	Pure-bred breeding animals
010239	u	Live bovine animals	Buffalo	Other
010290	u	Live bovine animals	Other	
020110	kg	Meat of bovine animals, fresh or chilled	Carcasses and half-carcasses	
02012010	kg	Meat of bovine animals, fresh or chilled	Other cuts with bone in	Wagyu beef
02012090	kg	Meat of bovine animals, fresh or chilled	Other cuts with bone in	Other
02013010	kg	Meat of bovine animals, fresh or chilled	Boneless	Wagyu beef
02013090	kg	Meat of bovine animals, fresh or chilled	Boneless	Other
020210	kg	Meat of bovine animals, frozen	Carcasses and half-carcasses	
02022010	kg	Meat of bovine animals, frozen	Other cuts with bone in	Wagyu beef
02022090	kg	Meat of bovine animals, frozen	Other cuts with bone in	Other
02023010	kg	Meat of bovine animals, frozen	Boneless	Wagyu beef
02023090	kg	Meat of bovine animals, frozen	Boneless	Other

Tariff Code	SARS Unit of Measure	Heading		
02061010	kg	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen	Of bovine animals, fresh or chilled	Livers
02061090	kg	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen	Of bovine animals, fresh or chilled	Other
020621	kg	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen	Of bovine animals, frozen	Tongues
020622	kg	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen	Of bovine animals, frozen	Livers
020629	kg	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen	Of bovine animals, frozen	Other
02102011	kg	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal	Meat of bovine animals	Dried
02102012	kg	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal	Meat of bovine animals	Dried
02102090	kg	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal	Meat of bovine animals	Other
051110	kg	Animal products not elsewhere specified or included; dead animals of Chapter 1 or 3, unfit for human consumption	Bovine semen	

Tariff Code	SARS Unit of Measure	Heading		
16025030	kg	Other prepared or preserved meat, offal or blood	Of bovine animals	Tripe
16025040	kg	Other prepared or preserved meat, offal or blood	Of bovine animals	Other, dehydrated, in immediate packings of a content of 5 kg or more
16025090	kg	Other prepared or preserved meat, offal or blood	Of bovine animals	Other
41012010	kg	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	Of bovine animals of a unit surface area exceeding 2,15 m ² which have undergone a tanning process (including a pre-tanning process) which is reversible
41012090	kg	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	Other
41015010	kg	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split	Whole hides and skins, of a mass exceeding 16 kg	Which have undergone a tanning process (including a pretanning process) which is reversible
41015090	kg	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split	Whole hides and skins, of a mass exceeding 16 kg	Other

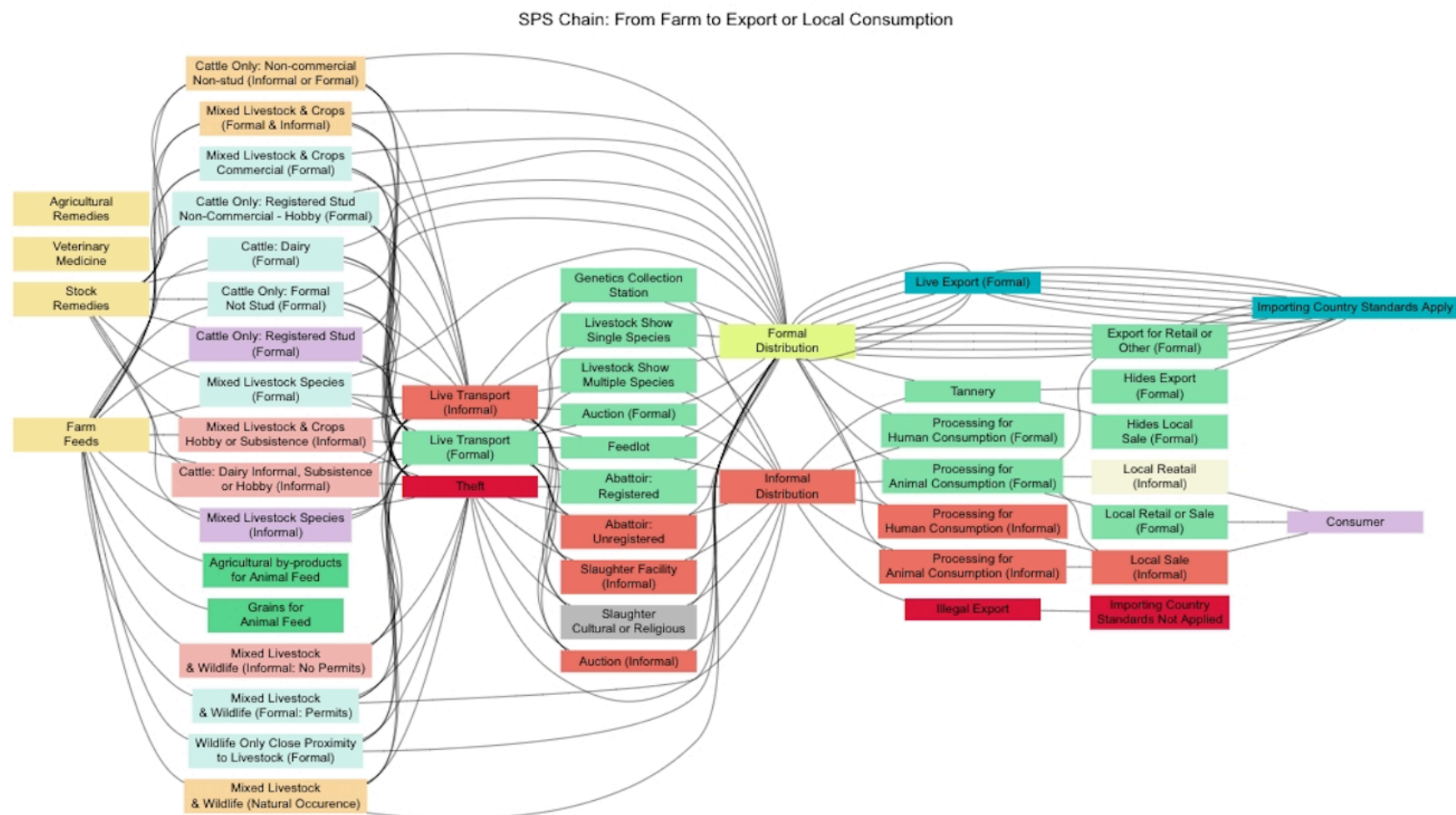
Tariff Code	SARS Unit of Measure	Heading		
41019010	kg	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split	Other, including butts, bends and bellies	Which have undergone a tanning process (including a pretanning process) which is reversible
41019090	kg	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split	Other, including butts, bends and bellies	Other
41041110	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the wet state (including wet-blue)	Full grains, unsplit; grain splits
41041190	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the wet state (including wet-blue)	Full grains, unsplit; grain splits
41041910	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the wet state (including wet-blue)	Other
41041990	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the wet state (including wet-blue)	Other

Tariff Code	SARS Unit of Measure	Heading		
41044110	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the dry state (crust)	Full grains, unsplit; grain splits
41044190	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the dry state (crust)	Full grains, unsplit; grain splits
41044910	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the dry state (crust)	Other
41044990	kg	Tanned or crust hides and skins of bovine (including buffalo) or equine animals, without hair on, whether or not split, but not further prepared	In the dry state (crust)	Other
41071110	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Whole hides and skins	Full grains, unsplit
41071190	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Whole hides and skins	Full grains, unsplit

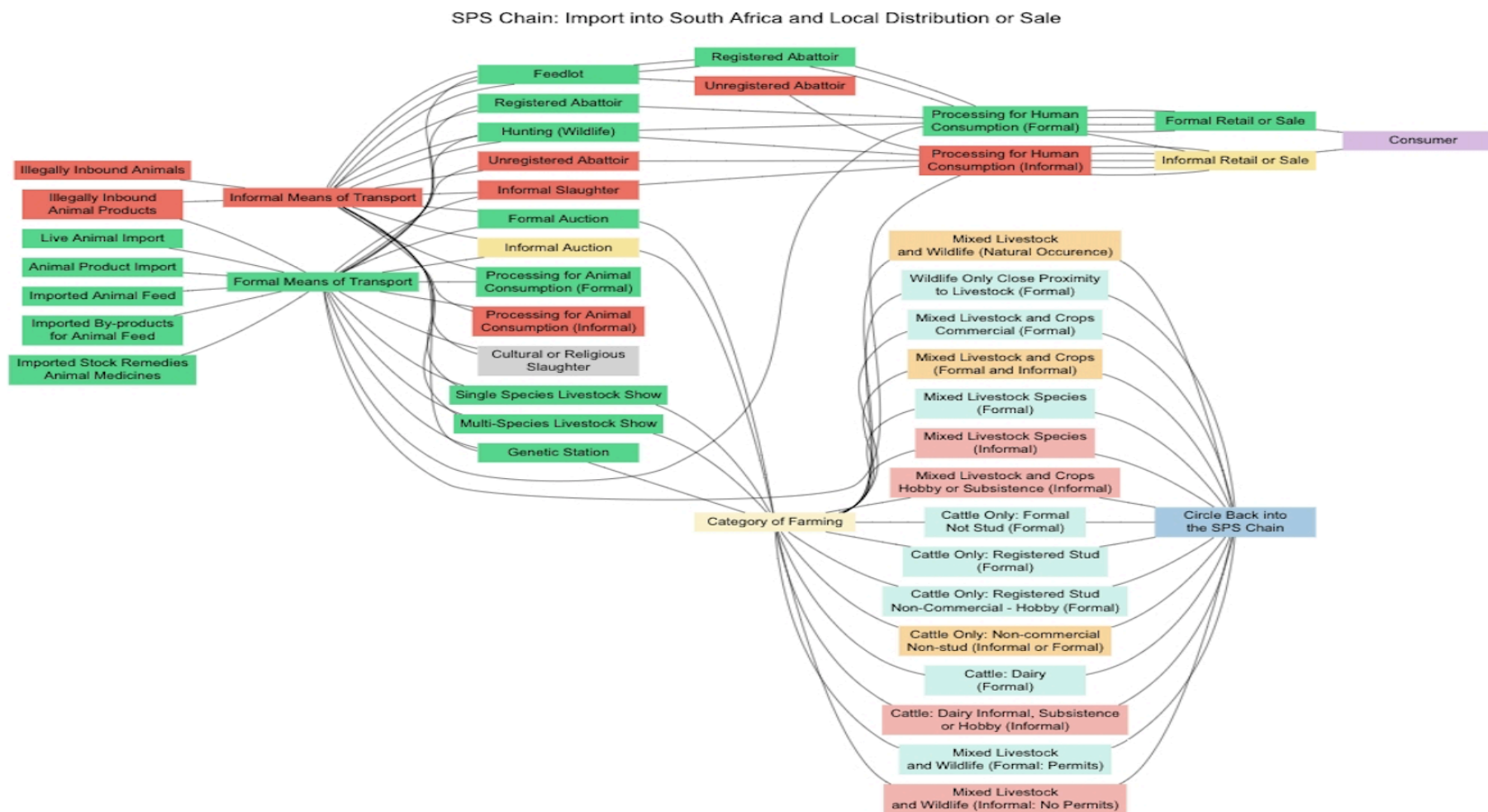
Tariff Code	SARS Unit of Measure	Heading		
41071210	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Whole hides and skins	Grain splits
41071290	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Whole hides and skins	Grain splits
41071910	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Whole hides and skins	Other
41071990	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Whole hides and skins	Other
410791	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Other, including sides	Full grains, unsplit

Tariff Code	SARS Unit of Measure	Heading		
410792	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Other, including sides	Grain splits
410799	kg	Leather further prepared after tanning or crusting, including parchment-dressed leather, of bovine (including buffalo) or equine animals, without hair on, whether or not split (excluding leather of heading 41.14)	Other, including sides	Other

ANNEXURE 2-1: THE SPS CHAIN - FROM FARM TO EXPORT OR LOCAL CONSUMPTION



ANNEXURE 2-2: THE SPS CHAIN – IMPORT INTO SOUTH AFRICA AND LOCAL DISTRIBUTION OR SALE



ANNEXURE 3: ADDITIONAL TRADE DATA SUPPORTING THE ANALYSIS IN CHAPTER FOUR PART TWO

The total volume of live bovine animal exports from 2018 to 2020 per tariff code

Table 1: The total volume of live bovine animal exports from 2018 to 2020 per tariff code

Year	Tariff Code		Total Volume (Units)
2018	010229	Cattle Other	29,379
2018	010290	Other	5,359
2018	010221	Cattle Pure-bred breeding animals	1,279
2018	010231	Buffalo Pure-bred breeding animals	378
2018	010239	Buffalo Other	14
2019	010229	Cattle Other	18,112
2019	010221	Cattle Pure-bred breeding animals	3,369
2019	010290	Other	1,169
2019	010231	Buffalo Pure-bred breeding animals	290
2019	010239	Buffalo Other	15
2020	010229	Cattle Other	32,948
2020	010290	Other	2,101
2020	010221	Cattle Pure-bred breeding animals	1,555
2020	010231	Buffalo Pure-bred breeding animals	50
2020	010239	Buffalo Other	23

The total volume of live bovine animal imports from 2018 to 2020 per tariff code

Table 2: The total volume of live bovine animal imports from 2018 to 2020 per tariff code

Year	Tariff Code		Total Volume (Units)
2018	010229	Cattle Other	310,352
2018	010290	Other	3,401
2018	010221	Cattle Pure-bred breeding animals	1
2019	010229	Cattle Other	307,832
2019	010290	Other	3,478
2019	010221	Cattle Pure-bred breeding animals	15
2020	010229	Cattle Other	272,207
2020	010221	Cattle Pure-bred breeding animals	5,269
2020	010290	Other	838
2020	010231	Buffalo Pure-bred breeding animals	60

Cattle: Total volume (Units) exported 2019 by month

The italics highlights the months January, February, March and April, the first quarter of 2019 and also the month of outbreak and the three following it directly after the confirmed FMD outbreak.

Table 3: Cattle: Total volume (Units) exported 2019 by month

Month	Tariff Code		Total volume (Units)
01	010229	Cattle Other	756
02	010229	Cattle Other	323
03	010221	Cattle Pure-bred breeding animals	13

Month	Tariff Code			Total volume (Units)
03	010229	Cattle	Other	924
04	010221	Cattle	Pure-bred breeding animals	65
04	010229	Cattle	Other	2,194
05	010221	Cattle	Pure-bred breeding animals	9
05	010229	Cattle	Other	939
06	010221	Cattle	Pure-bred breeding animals	3
06	010229	Cattle	Other	2,642
07	010221	Cattle	Pure-bred breeding animals	60
07	010229	Cattle	Other	3,759
08	010221	Cattle	Pure-bred breeding animals	202
08	010229	Cattle	Other	1,299
09	010221	Cattle	Pure-bred breeding animals	414
09	010229	Cattle	Other	1,698
10	010221	Cattle	Pure-bred breeding animals	262
10	010229	Cattle	Other	1,203
11	010221	Cattle	Pure-bred breeding animals	2,341
11	010229	Cattle	Other	1,375
12	010229	Cattle	Other	1,000

Cattle: Destination and volume (Units) of exports during January to April 2019

Table 4: Cattle: Destination and volume (Units) of exports during January to April 2019

Month	Country	Tariff Code		Total volume (Units)
01	Lesotho	010229	Cattle Other	718
01	Swaziland	010229	Cattle Other	35
01	Zambia	010229	Cattle Other	2

Month	Country	Tariff Code				Total volume (Units)
01	Zimbabwe	010229	Cattle	Other		1
02	Lesotho	010229	Cattle	Other		322
02	Zambia	010229	Cattle	Other		1
03	Lesotho	010221	Cattle	Pure-bred animals	breeding	13
03	Lesotho	010229	Cattle	Other		306
03	Mauritius	010229	Cattle	Other		550
03	Zambia	010229	Cattle	Other		56
03	Zimbabwe	010229	Cattle	Other		12
04	Lesotho	010221	Cattle	Pure-bred animals	breeding	4
04	Mozambique	010221	Cattle	Pure-bred animals	breeding	61
04	Lesotho	010229	Cattle	Other		815
04	Mauritius	010229	Cattle	Other		1,100
04	Zimbabwe	010229	Cattle	Other		279

Buffalo: Total volume (Units) imported and exported between 2018 and 2020

Table 5: Buffalo: Total volume (Units) imported and exported between 2018 and 2020

Trade Type	Tariff Code				Total volume (Units)
Import	010231	Buffalo	Pure-bred breeding animals		60
Export	010231	Buffalo	Pure-bred breeding animals		718
Export	010239	Buffalo	Other		52

Buffalo: Destination and volume (Units) of exports during 2019

Table 6: Buffalo: Destination and volume (Units) of exports during January to April 2019

Month	Country	Tariff Code				Total volume (Units)
02	Lesotho	010231	Buffalo	Pure-bred animals	breeding	1
03	Namibia	010231	Buffalo	Pure-bred animals	breeding	48
04	Namibia	010231	Buffalo	Pure-bred animals	breeding	48
04	Zambia	010239	Buffalo	Other		15
08	Lesotho	010231	Buffalo	Pure-bred animals	breeding	2
09	Lesotho	010231	Buffalo	Pure-bred animals	breeding	2
10	Lesotho	010231	Buffalo	Pure-bred animals	breeding	60
10	Mozambique	010231	Buffalo	Pure-bred animals	breeding	109
11	Mozambique	010231	Buffalo	Pure-bred animals	breeding	20

Other bovines: Total volume (Units) exported 2019 by month

Table 7: Other bovines: Total volume (Units) exported 2019 by month

Month	Tariff Code		Total volume (Units)
01	010290	Other	432
02	010290	Other	96
03	010290	Other	100
04	010290	Other	176

Month	Tariff Code	Total volume (Units)	
05	010290	Other	185
06	010290	Other	2
07	010290	Other	9
08	010290	Other	1
09	010290	Other	85
10	010290	Other	45
11	010290	Other	38

Meat (Frozen) with bone in: Total volume (Kg) exported in 2019 by month

Table 8: Meat (Frozen) with bone in: Total volume (Kg) exported in 2019 by month

Month	Tariff Code		Total volume (Kg)
01	020210	Carcasses and half-carcasses	36,243.20
01	02022010	Other cuts with bone in	Wagyu beef1,320.38
01	02022090	Other cuts with bone in	Other130,657.29
02	020210	Carcasses and half-carcasses	2,677.96
02	02022010	Other cuts with bone in	Wagyu beef583.90
02	02022090	Other cuts with bone in	Other165,660.60
03	020210	Carcasses and half-carcasses	391.10
03	02022010	Other cuts with bone in	Wagyu beef262.00
03	02022090	Other cuts with bone in	Other145,932.07
04	020210	Carcasses and half-carcasses	4,049.32
04	02022010	Other cuts with bone in	Wagyu beef57.90
04	02022090	Other cuts with bone in	Other125,446.22
05	020210	Carcasses and half-carcasses	7,405.88
05	02022010	Other cuts with bone in	Wagyu beef280.00
05	02022090	Other cuts with bone in	Other137,563.11

Month	Tariff Code		Total volume (Kg)
06	020210	Carcasses and half-carcasses	10,429.17
06	02022010	Other cuts with bone in	Wagyu beef 46.65
06	02022090	Other cuts with bone in	Other 92,127.92
07	020210	Carcasses and half-carcasses	13,194.00
07	02022010	Other cuts with bone in	Wagyu beef 1,386.60
07	02022090	Other cuts with bone in	Other 139,464.31
08	020210	Carcasses and half-carcasses	60.00
08	02022010	Other cuts with bone in	Wagyu beef 57,123.20
08	02022090	Other cuts with bone in	Other 157,936.44
09	020210	Carcasses and half-carcasses	8,900.57
09	02022010	Other cuts with bone in	Wagyu beef 178.00
09	02022090	Other cuts with bone in	Other 280,342.29
10	020210	Carcasses and half-carcasses	17,628.00
10	02022010	Other cuts with bone in	Wagyu beef 4,401.38
10	02022090	Other cuts with bone in	Other 517,239.53
11	020210	Carcasses and half-carcasses	10,402.86
11	02022010	Other cuts with bone in	Wagyu beef 541.00
11	02022090	Other cuts with bone in	Other 522,317.90
12	020210	Carcasses and half-carcasses	7,416.63
12	02022010	Other cuts with bone in	Wagyu beef 149.00
12	02022090	Other cuts with bone in	Other 452,244.56

Meat (Frozen) with bone in: Destination and volume (Kg) of exports during January to April 2019

Table 9: Meat (Frozen) with bone in: Destination and volume (Kg) of exports during January to April 2019

Month	Country	Tariff Code			Total volume (Kg)
01	Ghana	020210	Carcasses and half-carcasses		664.00
01	Mozambique	020210	Carcasses and half-carcasses		1,800.00
01	Nigeria	020210	Carcasses and half-carcasses		600.00
01	Swaziland	020210	Carcasses and half-carcasses		33,179.20
01	Lesotho	02022010	Other cuts with bone in	Wagyu beef	10.00
01	Mozambique	02022010	Other cuts with bone in	Wagyu beef	1,310.38
01	Bahrain	02022090	Other cuts with bone in	Other	83.00
01	China	02022090	Other cuts with bone in	Other	54,721.37
01	Côte d'Ivoire	02022090	Other cuts with bone in	Other	170.00
01	DRC	02022090	Other cuts with bone in	Other	24.00
01	Ghana	02022090	Other cuts with bone in	Other	379.00
01	Guyana	02022090	Other cuts with bone in	Other	9,483.15
01	Lesotho	02022090	Other cuts with bone in	Other	3,050.00
01	Mali	02022090	Other cuts with bone in	Other	15.00
01	Mozambique	02022090	Other cuts with bone in	Other	55,705.30
01	Namibia	02022090	Other cuts with bone in	Other	28.08
01	Nigeria	02022090	Other cuts with bone in	Other	1,359.00
01	Saint Helena	02022090	Other cuts with bone in	Other	200.00
01	Seychelles	02022090	Other cuts with bone in	Other	816.00
01	Sierra Leone	02022090	Other cuts with bone in	Other	4,623.39

Month	Country	Tariff Code		Total volume (Kg)
02	Botswana	020210	Carcasses and half-carcasses	368.36
02	UAE	020210	Carcasses and half-carcasses	2,309.60
02	Mozambique	02022010	Other cuts with bone in Wagyu beef	583.90
02	Egypt	02022090	Other cuts with bone in Other	1,188.00
02	Hong Kong	02022090	Other cuts with bone in Other	60.25
02	Lesotho	02022090	Other cuts with bone in Other	24,734.84
02	Maldives	02022090	Other cuts with bone in Other	515.00
02	Mozambique	02022090	Other cuts with bone in Other	69,151.42
02	Nigeria	02022090	Other cuts with bone in Other	5,462.00
02	Saint Helena	02022090	Other cuts with bone in Other	10.00
02	Senegal	02022090	Other cuts with bone in Other	193.00
02	Seychelles	02022090	Other cuts with bone in Other	5,476.00
02	Ship aircraft or	02022090	Other cuts with bone in Other	505.38
02	UAE	02022090	Other cuts with bone in Other	33,364.71
02	Vietnam	02022090	Other cuts with bone in Other	25,000.00
03	Lesotho	020210	Carcasses and half-carcasses	391.10
03	Lesotho	02022010	Other cuts with bone in Wagyu beef	15.00
03	Mozambique	02022010	Other cuts with bone in Wagyu beef	247.00
03	Bahrain	02022090	Other cuts with bone in Other	78.00
03	Congo	02022090	Other cuts with bone in Other	1,094.70
03	DRC	02022090	Other cuts with bone in Other	9,699.57
03	Kuwait	02022090	Other cuts with bone in Other	14,507.00
03	Lesotho	02022090	Other cuts with bone in Other	10,207.33

Month	Country	Tariff Code			Total volume (Kg)
03	Mozambique	02022090	Other cuts with bone in	Other	60,982.55
03	Namibia	02022090	Other cuts with bone in	Other	1,664.47
03	Nigeria	02022090	Other cuts with bone in	Other	878.00
03	Seychelles	02022090	Other cuts with bone in	Other	2,860.00
03	Swaziland	02022090	Other cuts with bone in	Other	32,492.00
03	UAE	02022090	Other cuts with bone in	Other	11,468.45
04	Lesotho	020210	Carcasses and half-carcasses		1,350.30
04	Mozambique	020210	Carcasses and half-carcasses		2,180.00
04	Qatar	020210	Carcasses and half-carcasses		519.02
04	Lesotho	02022010	Other cuts with bone in	Wagyu beef	15.00
04	Mozambique	02022010	Other cuts with bone in	Wagyu beef	42.90
04	Bahrain	02022090	Other cuts with bone in	Other	57.00
04	Hong Kong	02022090	Other cuts with bone in	Other	106.59
04	Kuwait	02022090	Other cuts with bone in	Other	1,906.00
04	Lesotho	02022090	Other cuts with bone in	Other	3,127.46
04	Mozambique	02022090	Other cuts with bone in	Other	74,431.75
04	Namibia	02022090	Other cuts with bone in	Other	10,515.11
04	Nigeria	02022090	Other cuts with bone in	Other	1,756.00
04	Qatar	02022090	Other cuts with bone in	Other	1,825.00
04	Saint Helena	02022090	Other cuts with bone in	Other	1,297.49
04	Seychelles	02022090	Other cuts with bone in	Other	13,677.00
04	Ship aircraft	or 02022090	Other cuts with bone in	Other	20.00
04	Swaziland	02022090	Other cuts with bone in	Other	68.59
04	Tanzania	02022090	Other cuts with bone in	Other	17.00

Month	Country	Tariff Code				Total volume (Kg)
04	UAE	02022090	Other cuts with bone in	Other		16,641.23

Meat (Frozen) bone less: Total volume (Kg) exported in 2019 by month

Table 10: Meat (Frozen) bone less: Total volume (Kg) exported in 2019 by month

Month	Tariff Code				Total volume (Kg)
01	02023010	Boneless	Wagyu beef		11.00
01	02023090	Boneless	Other		186,643.10
02	02023010	Boneless	Wagyu beef		350.00
02	02023090	Boneless	Other		456,163.54
03	02023010	Boneless	Wagyu beef		300.00
03	02023090	Boneless	Other		355,910.35
04	02023010	Boneless	Wagyu beef		30,843.17
04	02023090	Boneless	Other		464,409.08
05	02023010	Boneless	Wagyu beef		3,340.00
05	02023090	Boneless	Other		498,691.79
06	02023010	Boneless	Wagyu beef		928.71
06	02023090	Boneless	Other		432,396.81
07	02023010	Boneless	Wagyu beef		2,067.46
07	02023090	Boneless	Other		452,518.02
08	02023010	Boneless	Wagyu beef		34,830.84
08	02023090	Boneless	Other		514,040.38
09	02023010	Boneless	Wagyu beef		1,305.12
09	02023090	Boneless	Other		1,107,239.82
10	02023010	Boneless	Wagyu beef		1,215.52
10	02023090	Boneless	Other		1,558,980.21
11	02023010	Boneless	Wagyu beef		1,033.75

Month	Tariff Code		Total volume (Kg)
11	02023090	Boneless Other	1,315,673.42
12	02023010	Boneless Wagyu beef	1,093.36
12	02023090	Boneless Other	1,417,019.99

Raw hides and skins: Total volume (Kg) exported between 2018 and 2020

Table 11: Hides and skins: Total volume (Kg) imported and exported in the period 2018 to 2020

Year	Tariff Code	Total volume (Kg)
2018	41012010	96,438.30
2018	41012090	1,106,363.03
2018	41015010	487,956.00
2018	41015090	6,621,879.90
2018	41019010	28,242.73
2018	41019090	404,549.09
2019	41012010	22,952.44
2019	41012090	678,620.65
2019	41015010	56,047.00
2019	41015090	6,663,877.50
2019	41019010	141,250.00
2019	41019090	783,923.77
2020	41012010	84,742.55
2020	41012090	1,543,894.00
2020	41015010	25,319.87
2020	41015090	23,111,311.00
2020	41019010	85,056.00
2020	41019090	1,262,873.48

Tanned or crust hides and skins: Total volume (Kg) Exported between 2018 and 2020

Table 12: Tanned or crust hides and skins: Total volume (Kg) Exported in the period 2018 to 2020

Year	Tariff Code	Total volume (Kg)
2018	41041110	6,971,017.00
2018	41041190	15,387,446.49
2018	41041990	6,072,912.00
2018	41044110	49,157.00
2018	41044190	2,405,199.58
2018	41044910	20.00
2018	41044990	13,451.41
2019	41041110	3,583,641.65
2019	41041190	17,715,364.55
2019	41041910	126,058.00
2019	41041990	9,286,316.00
2019	41044190	1,128,174.69
2019	41044990	16,647.59
2020	41041110	3,397,501.00
2020	41041190	9,480,452.51
2020	41041910	91,884.00
2020	41041990	8,499,773.70
2020	41044110	632,628.00
2020	41044190	1,100,197.40
2020	41044990	6,841.80

**Leather (further prepared after tanning or crusting): Total volume (Kg)
exported between 2019 and 2020**

*Table 13: Leather (further prepared after tanning or crusting): Total volume (Kg)
exported in the period 2018 to 2020*

Year	Tariff Code	Total volume (Kg)
2018	41071110	49,208.70
2018	41071190	57,701.51
2018	41071210	20,288.50
2018	41071290	1,161,280.28
2018	41071990	44,354.32
2018	410791	5,207.50
2018	410792	1,244,525.60
2018	410799	617,773.00
2019	41071110	41,612.65
2019	41071190	27,370.17
2019	41071210	237.40
2019	41071290	1,100,676.56
2019	41071910	355.97
2019	41071990	58,601.02
2019	410792	1,168,007.00
2019	410799	251,346.01
2020	41071110	28,515.00
2020	41071190	23,735.29
2020	41071210	53.00
2020	41071290	648,381.50
2020	41071910	8.00
2020	41071990	16,852.74
2020	410791	54,014.00
2020	410792	1,176,005.00

Year	Tariff Code	Total volume (Kg)
2020	410799	186,617.03

SADC: breakdown of total volume per tariff code per country exported to SADC countries during general period of review

Table 14: Export to SADC 2018 to 2020

Tariff Code	Country		Unit	Total Volume
010221	Botswana	Cattle	u	102.00
010221	Lesotho	Cattle	u	2,593.00
010221	Mauritius	Cattle	u	72.00
010221	Mozambique	Cattle	u	1,500.00
010221	Namibia	Cattle	u	48.00
010221	Tanzania	Cattle	u	146.00
010221	Zambia	Cattle	u	212.00
010221	Zimbabwe	Cattle	u	693.00
010229	Angola	Cattle	u	58.00
010229	Botswana	Cattle	u	2,871.00
010229	DRC	Cattle	u	500.00
010229	Lesotho	Cattle	u	38,280.00
010229	Madagascar	Cattle	u	1.00
010229	Malawi	Cattle	u	20.00
010229	Mauritius	Cattle	u	27,942.00
010229	Mozambique	Cattle	u	1,019.00
010229	Namibia	Cattle	u	433.00
010229	Tanzania	Cattle	u	550.00
010229	Zambia	Cattle	u	316.00
010229	Zimbabwe	Cattle	u	5,887.00
010231	Lesotho	Buffalo	u	152.00

Tariff Code	Country		Unit	Total Volume
010231	Mozambique	Buffalo	u	422.00
010231	Namibia	Buffalo	u	144.00
010239	Zambia	Buffalo	u	38.00
010290	Botswana	Other	u	2,048.00
010290	Madagascar	Other	u	1.00
010290	Mauritius	Other	u	2,312.00
010290	Mozambique	Other	u	596.00
010290	Namibia	Other	u	1,527.00
010290	Zambia	Other	u	80.00
010290	Zimbabwe	Other	u	245.00
020110	Botswana	Carcasses and half-carcasses	kg	311.51
020110	DRC	Carcasses and half-carcasses	kg	216.34
020110	Lesotho	Carcasses and half-carcasses	kg	731,994.48
020110	Mauritius	Carcasses and half-carcasses	kg	2,028.00
020110	Mozambique	Carcasses and half-carcasses	kg	1,272,714.50
020110	Namibia	Carcasses and half-carcasses	kg	77,421.00
020110	Zambia	Carcasses and half-carcasses	kg	647.38
020110	Zimbabwe	Carcasses and half-carcasses	kg	20.00
02012010	Botswana	Other cuts with bone in	kg	1,769.86
02012010	DRC	Other cuts with bone in	kg	73.61
02012010	Lesotho	Other cuts with bone in	kg	14,284.00
02012010	Mauritius	Other cuts with bone in	kg	16.00
02012010	Mozambique	Other cuts with bone in	kg	75,729.39
02012010	Namibia	Other cuts with bone in	kg	16,893.88
02012010	Seychelles	Other cuts with bone in	kg	161.00
02012010	Zimbabwe	Other cuts with bone in	kg	1,103.20
02012090	Angola	Other cuts with bone in	kg	4,063.00
02012090	Botswana	Other cuts with bone in	kg	46,167.74

Tariff Code	Country		Unit	Total Volume
02012090	Congo	Other cuts with bone in	kg	8,577.35
02012090	DRC	Other cuts with bone in	kg	96,027.27
02012090	Lesotho	Other cuts with bone in	kg	348,216.06
02012090	Mauritius	Other cuts with bone in	kg	233,723.59
02012090	Mozambique	Other cuts with bone in	kg	1,729,019.42
02012090	Namibia	Other cuts with bone in	kg	81,559.11
02012090	Seychelles	Other cuts with bone in	kg	59,488.72
02012090	Tanzania	Other cuts with bone in	kg	32,489.00
02012090	Zimbabwe	Other cuts with bone in	kg	4,834.00
02013010	Botswana	Boneless	kg	195.16
02013010	Lesotho	Boneless	kg	56,511.62
02013010	Mauritius	Boneless	kg	34,656.41
02013010	Mozambique	Boneless	kg	30,406.41
02013010	Namibia	Boneless	kg	53,142.00
02013010	Zimbabwe	Boneless	kg	2,741.00
02013090	Angola	Boneless	kg	189,561.08
02013090	Botswana	Boneless	kg	49,855.80
02013090	Comoros	Boneless	kg	292.43
02013090	Congo	Boneless	kg	2,080.38
02013090	DRC	Boneless	kg	65,267.44
02013090	Lesotho	Boneless	kg	758,295.49
02013090	Malawi	Boneless	kg	122.00
02013090	Mauritius	Boneless	kg	430,105.39
02013090	Mozambique	Boneless	kg	2,684,081.89
02013090	Namibia	Boneless	kg	961,858.13
02013090	Seychelles	Boneless	kg	52,756.07
02013090	Tanzania	Boneless	kg	16,275.00
02013090	Zambia	Boneless	kg	1,990.33

Tariff Code	Country		Unit	Total Volume
02013090	Zimbabwe	Boneless	kg	117,868.00
020210	Angola	Carcasses and half-carcasses	kg	4,713.66
020210	Botswana	Carcasses and half-carcasses	kg	13,480.36
020210	DRC	Carcasses and half-carcasses	kg	19,937.10
020210	Lesotho	Carcasses and half-carcasses	kg	176,952.47
020210	Mozambique	Carcasses and half-carcasses	kg	159,654.61
020210	Namibia	Carcasses and half-carcasses	kg	22,899.56
020210	Zimbabwe	Carcasses and half-carcasses	kg	15.00
02022010	Botswana	Other cuts with bone in	kg	46.65
02022010	DRC	Other cuts with bone in	kg	400.00
02022010	Lesotho	Other cuts with bone in	kg	80,228.48
02022010	Mozambique	Other cuts with bone in	kg	25,243.39
02022010	Namibia	Other cuts with bone in	kg	4,106.22
02022010	Seychelles	Other cuts with bone in	kg	452.14
02022010	Zimbabwe	Other cuts with bone in	kg	3.00
02022090	Angola	Other cuts with bone in	kg	242,867.11
02022090	Botswana	Other cuts with bone in	kg	70,975.78
02022090	Congo	Other cuts with bone in	kg	2,887.70
02022090	DRC	Other cuts with bone in	kg	73,011.22
02022090	Lesotho	Other cuts with bone in	kg	963,142.48
02022090	Malawi	Other cuts with bone in	kg	1,504.24
02022090	Mauritius	Other cuts with bone in	kg	97,433.83
02022090	Mozambique	Other cuts with bone in	kg	1,234,711.14
02022090	Namibia	Other cuts with bone in	kg	86,925.56
02022090	Seychelles	Other cuts with bone in	kg	205,131.81
02022090	Tanzania	Other cuts with bone in	kg	51.97
02022090	Zambia	Other cuts with bone in	kg	37.00
02022090	Zimbabwe	Other cuts with bone in	kg	3,412.27

Tariff Code	Country		Unit	Total Volume
02023010	Angola	Boneless	kg	351.30
02023010	Botswana	Boneless	kg	5,912.42
02023010	DRC	Boneless	kg	3,457.32
02023010	Lesotho	Boneless	kg	80,033.08
02023010	Malawi	Boneless	kg	140.00
02023010	Mauritius	Boneless	kg	25.00
02023010	Mozambique	Boneless	kg	5,841.93
02023010	Seychelles	Boneless	kg	626.60
02023010	Zambia	Boneless	kg	6,500.00
02023010	Zimbabwe	Boneless	kg	350.00
02023090	Angola	Boneless	kg	983,566.78
02023090	Botswana	Boneless	kg	209,569.38
02023090	Congo	Boneless	kg	92,188.29
02023090	DRC	Boneless	kg	99,636.58
02023090	Lesotho	Boneless	kg	3,905,421.69
02023090	Malawi	Boneless	kg	8,306.59
02023090	Mauritius	Boneless	kg	639,736.90
02023090	Mozambique	Boneless	kg	1,868,830.91
02023090	Namibia	Boneless	kg	319,489.31
02023090	Seychelles	Boneless	kg	227,446.30
02023090	Tanzania	Boneless	kg	1,372.03
02023090	Zambia	Boneless	kg	6,117.43
02023090	Zimbabwe	Boneless	kg	6,079.16
02061010	Botswana	Of bovine animals, fresh or chilled	kg	139,051.00
02061010	DRC	Of bovine animals, fresh or chilled	kg	8,607.51
02061010	Lesotho	Of bovine animals, fresh or chilled	kg	750,565.00

Tariff Code	Country		Unit	Total Volume
02061010	Malawi	Of bovine animals, fresh or chilled	kg	1,100.00
02061010	Mozambique	Of bovine animals, fresh or chilled	kg	126,670.67
02061010	Namibia	Of bovine animals, fresh or chilled	kg	206,681.36
02061010	Zimbabwe	Of bovine animals, fresh or chilled	kg	3,550.00
02061090	Angola	Of bovine animals, fresh or chilled	kg	2,002.07
02061090	Botswana	Of bovine animals, fresh or chilled	kg	68,261.40
02061090	Congo	Of bovine animals, fresh or chilled	kg	76.90
02061090	Lesotho	Of bovine animals, fresh or chilled	kg	1,215,866.56
02061090	Mozambique	Of bovine animals, fresh or chilled	kg	354,088.78
02061090	Namibia	Of bovine animals, fresh or chilled	kg	32,087.32
02061090	Seychelles	Of bovine animals, fresh or chilled	kg	254.90
02061090	Zimbabwe	Of bovine animals, fresh or chilled	kg	4,000.00
020621	Angola	Of bovine animals, frozen	kg	1,215.36
020621	Botswana	Of bovine animals, frozen	kg	1,984.90
020621	DRC	Of bovine animals, frozen	kg	2,525.77
020621	Lesotho	Of bovine animals, frozen	kg	10,899.10
020621	Malawi	Of bovine animals, frozen	kg	100.00
020621	Mozambique	Of bovine animals, frozen	kg	13,800.68
020621	Namibia	Of bovine animals, frozen	kg	20,098.56
020621	Zambia	Of bovine animals, frozen	kg	255.14
020622	Angola	Of bovine animals, frozen	kg	5,331.08

Tariff Code	Country		Unit	Total Volume
020622	Botswana	Of bovine animals, frozen	kg	3,094,689.72
020622	DRC	Of bovine animals, frozen	kg	1,000.10
020622	Lesotho	Of bovine animals, frozen	kg	69,257.67
020622	Malawi	Of bovine animals, frozen	kg	18,736.30
020622	Mozambique	Of bovine animals, frozen	kg	104,754.73
020622	Namibia	Of bovine animals, frozen	kg	991,495.77
020622	Seychelles	Of bovine animals, frozen	kg	107.42
020622	Zambia	Of bovine animals, frozen	kg	8,744.16
020622	Zimbabwe	Of bovine animals, frozen	kg	3,900.00
020629	Angola	Of bovine animals, frozen	kg	7,763.15
020629	Botswana	Of bovine animals, frozen	kg	776,508.64
020629	DRC	Of bovine animals, frozen	kg	74,041.00
020629	Lesotho	Of bovine animals, frozen	kg	1,410,563.20
020629	Malawi	Of bovine animals, frozen	kg	50.00
020629	Mauritius	Of bovine animals, frozen	kg	526.72
020629	Mozambique	Of bovine animals, frozen	kg	259,107.73
020629	Namibia	Of bovine animals, frozen	kg	388,525.74
020629	Seychelles	Of bovine animals, frozen	kg	4,678.68
020629	Zambia	Of bovine animals, frozen	kg	3,967.80
020629	Zimbabwe	Of bovine animals, frozen	kg	19.00
02102011	Botswana	Meat of bovine animals	kg	261.85
02102011	Mozambique	Meat of bovine animals	kg	655.92
02102011	Namibia	Meat of bovine animals	kg	128.91
02102011	Zimbabwe	Meat of bovine animals	kg	100.00
02102012	Angola	Meat of bovine animals	kg	2.00
02102012	Botswana	Meat of bovine animals	kg	239.00
02102012	Congo	Meat of bovine animals	kg	31.00
02102012	DRC	Meat of bovine animals	kg	236.55

Tariff Code	Country		Unit	Total Volume
02102012	Lesotho	Meat of bovine animals	kg	545.00
02102012	Malawi	Meat of bovine animals	kg	1.60
02102012	Mauritius	Meat of bovine animals	kg	876.09
02102012	Mozambique	Meat of bovine animals	kg	198.00
02102012	Namibia	Meat of bovine animals	kg	58.91
02102012	Seychelles	Meat of bovine animals	kg	71.00
02102012	Tanzania	Meat of bovine animals	kg	6.00
02102012	Zambia	Meat of bovine animals	kg	2,737.08
02102012	Zimbabwe	Meat of bovine animals	kg	1,215.00
02102090	Angola	Meat of bovine animals	kg	20.69
02102090	Botswana	Meat of bovine animals	kg	16,026.33
02102090	Congo	Meat of bovine animals	kg	1,375.35
02102090	DRC	Meat of bovine animals	kg	677.50
02102090	Lesotho	Meat of bovine animals	kg	3,113.00
02102090	Madagascar	Meat of bovine animals	kg	0.89
02102090	Malawi	Meat of bovine animals	kg	1,283.89
02102090	Mauritius	Meat of bovine animals	kg	1,954.19
02102090	Mozambique	Meat of bovine animals	kg	5,389.59
02102090	Namibia	Meat of bovine animals	kg	3,929.82
02102090	Zimbabwe	Meat of bovine animals	kg	250.00
051110	Angola	Bovine semen	kg	2.75
051110	Botswana	Bovine semen	kg	1,816.00
051110	DRC	Bovine semen	kg	306.00
051110	Malawi	Bovine semen	kg	255.25
051110	Mozambique	Bovine semen	kg	0.75
051110	Namibia	Bovine semen	kg	646.31
051110	Tanzania	Bovine semen	kg	150.00
051110	Zambia	Bovine semen	kg	203.00

Tariff Code	Country		Unit	Total Volume
16025030	Angola	Of bovine animals	kg	16,971.40
16025030	Botswana	Of bovine animals	kg	109,334.00
16025030	Lesotho	Of bovine animals	kg	498,041.88
16025030	Malawi	Of bovine animals	kg	91.72
16025030	Mozambique	Of bovine animals	kg	22,506.89
16025030	Namibia	Of bovine animals	kg	2,559.22
16025030	Zambia	Of bovine animals	kg	8,640.00
16025030	Zimbabwe	Of bovine animals	kg	3,042.67
16025040	Angola	Of bovine animals	kg	40.00
16025040	Botswana	Of bovine animals	kg	1,856.80
16025040	Lesotho	Of bovine animals	kg	3,207.00
16025040	Malawi	Of bovine animals	kg	178,915.15
16025040	Mozambique	Of bovine animals	kg	520.00
16025040	Namibia	Of bovine animals	kg	23,118.69
16025040	Zambia	Of bovine animals	kg	66,096.00
16025040	Zimbabwe	Of bovine animals	kg	1,240.00
16025090	Angola	Of bovine animals	kg	49,239.67
16025090	Botswana	Of bovine animals	kg	399,229,921.22
16025090	Congo	Of bovine animals	kg	5.00
16025090	DRC	Of bovine animals	kg	41,976.04
16025090	Lesotho	Of bovine animals	kg	632,114.43
16025090	Malawi	Of bovine animals	kg	284,479.92
16025090	Mauritius	Of bovine animals	kg	163,309.45
16025090	Mozambique	Of bovine animals	kg	321,117.19
16025090	Namibia	Of bovine animals	kg	1,931,331.10
16025090	Seychelles	Of bovine animals	kg	55,115.09
16025090	Tanzania	Of bovine animals	kg	335.00
16025090	Zambia	Of bovine animals	kg	436,188.59

Tariff Code	Country		Unit	Total Volume
16025090	Zimbabwe	Of bovine animals	kg	124,413.29
41012010	Botswana	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	120.00
41012010	DRC	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	32.00
41012010	Lesotho	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	734.20
41012010	Namibia	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	21,897.41
41012090	Botswana	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	11,626.00
41012090	Lesotho	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	230.71
41012090	Mauritius	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	4.00

Tariff Code	Country		Unit	Total Volume
41012090	Namibia	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	618,101.06
41012090	Zambia	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	20.00
41012090	Zimbabwe	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	620.00
41015010	Botswana	Whole hides and skins, of a mass exceeding 16 kg	kg	319.87
41015010	Namibia	Whole hides and skins, of a mass exceeding 16 kg	kg	700.00
41015090	Botswana	Whole hides and skins, of a mass exceeding 16 kg	kg	1,960.00
41015090	Mozambique	Whole hides and skins, of a mass exceeding 16 kg	kg	620.00
41019010	Mozambique	Other, including butts, bends and bellies	kg	250.00
41019090	Botswana	Other, including butts, bends and bellies	kg	2,311.00
41019090	DRC	Other, including butts, bends and bellies	kg	1.00
41019090	Lesotho	Other, including butts, bends and bellies	kg	250.00
41019090	Mozambique	Other, including butts, bends and bellies	kg	80.00
41019090	Namibia	Other, including butts, bends and bellies	kg	549,319.71

Tariff Code	Country		Unit	Total Volume
41019090	Tanzania	Other, including butts, bends and bellies	kg	39.00
41019090	Zambia	Other, including butts, bends and bellies	kg	1.49
41019090	Zimbabwe	Other, including butts, bends and bellies	kg	12,175.10
41041110	Namibia	In the wet state (including wet-blue)	kg	12,377.15
41041190	Botswana	In the wet state (including wet-blue)	kg	40.00
41041190	DRC	In the wet state (including wet-blue)	kg	1.11
41041190	Lesotho	In the wet state (including wet-blue)	kg	70.00
41041190	Mozambique	In the wet state (including wet-blue)	kg	142.00
41041190	Namibia	In the wet state (including wet-blue)	kg	34,929.05
41041190	Zambia	In the wet state (including wet-blue)	kg	29,230.00
41041990	Botswana	In the wet state (including wet-blue)	kg	516.00
41041990	Mozambique	In the wet state (including wet-blue)	kg	10.00
41041990	Namibia	In the wet state (including wet-blue)	kg	35,628.70
41044910	Botswana	In the dry state (crust)	kg	20.00
41044990	Botswana	In the dry state (crust)	kg	688.59
41044990	Lesotho	In the dry state (crust)	kg	62.42
41044990	Namibia	In the dry state (crust)	kg	441.10
41044990	Zambia	In the dry state (crust)	kg	265.69
41044990	Zimbabwe	In the dry state (crust)	kg	240.00
41071110	Lesotho	Whole hides and skins	kg	116,964.00

Tariff Code	Country		Unit	Total Volume
41071110	Mozambique	Whole hides and skins	kg	1,150.00
41071190	Botswana	Whole hides and skins	kg	103.15
41071190	DRC	Whole hides and skins	kg	21.52
41071190	Lesotho	Whole hides and skins	kg	5,602.00
41071190	Mozambique	Whole hides and skins	kg	50.00
41071190	Namibia	Whole hides and skins	kg	4,408.16
41071190	Zambia	Whole hides and skins	kg	79.00
41071190	Zimbabwe	Whole hides and skins	kg	11,666.00
41071210	Botswana	Whole hides and skins	kg	31.40
41071210	Namibia	Whole hides and skins	kg	3.00
41071210	Zimbabwe	Whole hides and skins	kg	50.00
41071290	Botswana	Whole hides and skins	kg	2.87
41071290	Lesotho	Whole hides and skins	kg	907.00
41071290	Mauritius	Whole hides and skins	kg	44.00
41071290	Namibia	Whole hides and skins	kg	10.00
41071910	Botswana	Whole hides and skins	kg	8.00
41071910	Namibia	Whole hides and skins	kg	81.74
41071990	Botswana	Whole hides and skins	kg	3,991.35
41071990	Lesotho	Whole hides and skins	kg	628.00
41071990	Mauritius	Whole hides and skins	kg	23.00
41071990	Mozambique	Whole hides and skins	kg	1,500.00
41071990	Namibia	Whole hides and skins	kg	29,914.27
41071990	Zimbabwe	Whole hides and skins	kg	10,904.00
410791	Botswana	Other, including sides	kg	68.00
410799	Angola	Other, including sides	kg	567.00
410799	Botswana	Other, including sides	kg	1,979.37
410799	DRC	Other, including sides	kg	85.18
410799	Lesotho	Other, including sides	kg	673.72

Tariff Code	Country		Unit	Total Volume
410799	Madagascar	Other, including sides	kg	264.96
410799	Malawi	Other, including sides	kg	200.00
410799	Mauritius	Other, including sides	kg	217.00
410799	Mozambique	Other, including sides	kg	2,419.33
410799	Namibia	Other, including sides	kg	35,220.82
410799	Zambia	Other, including sides	kg	711.94
410799	Zimbabwe	Other, including sides	kg	36,326.79

SADC: breakdown of total volume per tariff code imported from SADC countries during general period of review

Table 15: Import into RSA From SADC Countries 2018 to 2020

Tariff Code	Country		Unit	Total Volume
010221	Botswana	Cattle	u	1.00
010221	Lesotho	Cattle	u	5,260.00
010221	Namibia	Cattle	u	15.00
010229	Botswana	Cattle	u	100,514.00
010229	Lesotho	Cattle	u	26,972.00
010229	Namibia	Cattle	u	751,778.00
010231	Lesotho	Buffalo	u	60.00
010290	Botswana	Other	u	178.00
010290	Namibia	Other	u	7,417.00
020110	Botswana	Carcasses and half-carcasses	kg	57,182.90
020110	Namibia	Carcasses and half-carcasses	kg	627,087.56
02012010	Namibia	Other cuts with bone in	kg	12.00
02012090	Lesotho	Other cuts with bone in	kg	2,200.00

Tariff Code	Country		Unit	Total Volume
02012090	Namibia	Other cuts with bone in	kg	162,808.79
02013090	Botswana	Boneless	kg	283,709.90
02013090	Namibia	Boneless	kg	158,994.82
020210	Namibia	Carcasses and half-carcasses	kg	31,697.00
02022010	Namibia	Other cuts with bone in	kg	80,952.87
02022090	Botswana	Other cuts with bone in	kg	1,071,452.81
02022090	Namibia	Other cuts with bone in	kg	2,518,295.94
02023010	Botswana	Boneless	kg	9.00
02023010	Namibia	Boneless	kg	50,087.56
02023090	Botswana	Boneless	kg	12,062,826.05
02023090	Namibia	Boneless	kg	6,285,644.18
02061010	Lesotho	Of bovine animals, fresh or chilled	kg	7,621.00
02061010	Namibia	Of bovine animals, fresh or chilled	kg	16,462.00
02061090	Namibia	Of bovine animals, fresh or chilled	kg	412,096.85
020621	Namibia	Of bovine animals, frozen	kg	81,489.52
020622	Namibia	Of bovine animals, frozen	kg	215,060.50
020629	Botswana	Of bovine animals, frozen	kg	1,567,075.42
020629	Namibia	Of bovine animals, frozen	kg	2,325,859.15
02102012	Namibia	Meat of bovine animals	kg	171,821.34
02102090	Namibia	Meat of bovine animals	kg	37,019.87
051110	Namibia	Bovine semen	kg	106.00
16025030	Namibia	Of bovine animals	kg	91,854.50
16025040	Botswana	Of bovine animals	kg	1.00

Tariff Code	Country		Unit	Total Volume
16025040	Namibia	Of bovine animals	kg	26.15
16025090	Botswana	Of bovine animals	kg	24.00
16025090	Lesotho	Of bovine animals	kg	698.00
16025090	Namibia	Of bovine animals	kg	3,673,205.51
41012010	Botswana	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	80,553.80
41012090	Botswana	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	6,025,463.38
41012090	Lesotho	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	24,850.00
41012090	Mozambique	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	1.00

Tariff Code	Country		Unit	Total Volume
41012090	Namibia	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	437,451.00
41012090	Zambia	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	27,000.00
41012090	Zimbabwe	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	kg	182,005.17
41015010	Namibia	Whole hides and skins, of a mass exceeding 16 kg	kg	66.53
41015010	Zimbabwe	Whole hides and skins, of a mass exceeding 16 kg	kg	76,594.00
41015090	Botswana	Whole hides and skins, of a mass exceeding 16 kg	kg	81,000.00
41015090	Mozambique	Whole hides and skins, of a mass exceeding 16 kg	kg	221,818.00
41015090	Namibia	Whole hides and skins, of a mass exceeding 16 kg	kg	127,246.00
41015090	Zimbabwe	Whole hides and skins, of a mass exceeding 16 kg	kg	28,103.52

Tariff Code	Country		Unit	Total Volume
41019010	Namibia	Other, including butts, bends and bellies	kg	5.00
41019090	Botswana	Other, including butts, bends and bellies	kg	2,000,629.00
41019090	Lesotho	Other, including butts, bends and bellies	kg	16,604.00
41019090	Namibia	Other, including butts, bends and bellies	kg	64,400.00
41041190	Namibia	In the wet state (including wet-blue)	kg	917.00
41041190	Zambia	In the wet state (including wet-blue)	kg	90,744.00
41041910	Namibia	In the wet state (including wet-blue)	kg	300.00
41041910	Zambia	In the wet state (including wet-blue)	kg	111,200.00
41041990	Namibia	In the wet state (including wet-blue)	kg	47,940.00
41041990	Zimbabwe	In the wet state (including wet-blue)	kg	680,454.00
41044190	Namibia	In the dry state (crust)	kg	3,400.82
41044990	Botswana	In the dry state (crust)	kg	175.00
41044990	Namibia	In the dry state (crust)	kg	29,936.06
41071190	Namibia	Whole hides and skins	kg	383,897.80
41071190	Zimbabwe	Whole hides and skins	kg	26.18
41071290	Namibia	Whole hides and skins	kg	12.00
41071910	Namibia	Whole hides and skins	kg	7,198.00
41071990	Botswana	Whole hides and skins	kg	1,444.00
41071990	Namibia	Whole hides and skins	kg	243,560.14
410799	Namibia	Other, including sides	kg	807,305.75
410799	Zambia	Other, including sides	kg	13.60

Export to country: ship or aircraft

Table 16: Export to country: ship or aircraft in the period 2018 to 2020

Year	Country	Tariff Code	Unit			Total Volume per unit
2018	Ship or aircraft	02012090	kg	Other cuts with bone in	Other	63.20
2018	Ship or aircraft	02013090	kg	Boneless	Other	2,073.25
2018	Ship or aircraft	02022090	kg	Other cuts with bone in	Other	753.60
2018	Ship or aircraft	02023090	kg	Boneless	Other	1,971.36
2018	Ship or aircraft	020621	kg	Of bovine animals, frozen	Tongues	840.00
2018	Ship or aircraft	16025090	kg	Of bovine animals	Other	240.00
2019	Ship or aircraft	020110	kg	Carcasses and half-carcasses		40.00
2019	Ship or aircraft	02012090	kg	Other cuts with bone in	Other	748.96
2019	Ship or aircraft	02013090	kg	Boneless	Other	1,159.65
2019	Ship or aircraft	02022010	kg	Other cuts with bone in	Wagyu beef	5.00
2019	Ship or aircraft	02022090	kg	Other cuts with bone in	Other	555.58
2019	Ship or aircraft	02023090	kg	Boneless	Other	682.70
2019	Ship or aircraft	02061010	kg	Of bovine animals, fresh or chilled	Livers	14.51
2019	Ship or aircraft	020629	kg	Of bovine animals, frozen	Other	27.97
2019	Ship or aircraft	16025090	kg	Of bovine animals	Other	44.94

Year	Country	Tariff Code	Unit			Total Volume per unit
2019	Ship or aircraft	41012090	kg	Whole hides and skins, unsplit, of a mass per skin not exceeding 8 kg when simply dried, 10 kg when dry-salted, or 16 kg when fresh, wet-salted or otherwise preserved	Other	4.00
2019	Ship or aircraft	41041190	kg	In the wet state (including wet-blue)	Full grains, unsplit; grain splits	3.00
2019	Ship or aircraft	410799	kg	Other, including sides	Other	120.00
2020	Ship or aircraft	02012090	kg	Other cuts with bone in	Other	2,282.55
2020	Ship or aircraft	02013090	kg	Boneless	Other	1,288.33
2020	Ship or aircraft	02022090	kg	Other cuts with bone in	Other	86.56
2020	Ship or aircraft	02023090	kg	Boneless	Other	2,459.39
2020	Ship or aircraft	02061010	kg	Of bovine animals, fresh or chilled	Livers	10.00
2020	Ship or aircraft	020622	kg	Of bovine animals, frozen	Livers	0.98
2020	Ship or aircraft	16025090	kg	Of bovine animals	Other	138.49
2020	Ship or aircraft	41071290	kg	Whole hides and skins	Grain splits	20.00
2020	Ship or aircraft	41071990	kg	Whole hides and skins	Other	0.40

Import from Country of Origin: Unclassified

Table 17: Import from country: Unclassified in the period 2018 to 2020

Year	Country	Tariff Code	Unit		Total Volume per unit
2018	Unclassified	02012090	kg	Meat: fresh or chilled	10.00
2018	Unclassified	02013090	kg	Meat: fresh or chilled	95.00
2018	Unclassified	02023090	kg	Meat: frozen	19,866.80
2018	Unclassified	02102012	kg	Edible offal: salted, in brine, dried or smoked	604.00
2018	Unclassified	02102090	kg	Edible offal: salted, in brine, dried or smoked	419.00
2018	Unclassified	16025090	kg	Meat, offal or blood: prepared or preserved	53,456.80
2018	Unclassified	41012090	kg	Hides and skins: raw hides and skins	50,586.00
2018	Unclassified	41019090	kg	Hides and skins: raw hides and skins	23,000.00
2018	Unclassified	41041190	kg	Hides and skins: tanned or crust hides and skins	700.00
2018	Unclassified	41041990	kg	Hides and skins: tanned or crust hides and skins	68,431.00
2018	Unclassified	41044990	kg	Hides and skins: tanned or crust hides and skins	1,142.00
2018	Unclassified	41071190	kg	Leather: further prepared after tanning or crusting	2,249.00

Year	Country	Tariff Code	Unit		Total Volume per unit
2018	Unclassified	41071990	kg	Leather: further prepared after tanning or crusting	4,795.00
2018	Unclassified	410799	kg	Leather: further prepared after tanning or crusting	2,581.00
2018	Unclassified	010229	u	Live bovine animals	6,313.00
2019	Unclassified	02012090	kg	Meat: fresh or chilled	400.00
2019	Unclassified	02013090	kg	Meat: fresh or chilled	40.00
2019	Unclassified	02022090	kg	Meat: frozen	22,438.76
2019	Unclassified	02023090	kg	Meat: frozen	14,700.00
2019	Unclassified	02061010	kg	Edible offal: fresh, chilled or frozen	9,967.12
2019	Unclassified	020629	kg	Edible offal: fresh, chilled or frozen	23,379.52
2019	Unclassified	02102012	kg	Edible offal: salted, in brine, dried or smoked	450.20
2019	Unclassified	02102090	kg	Edible offal: salted, in brine, dried or smoked	2.00
2019	Unclassified	16025090	kg	Meat, offal or blood: prepared or preserved	121,913.60
2019	Unclassified	41012090	kg	Hides and skins: raw hides and skins	28,000.00
2019	Unclassified	41019090	kg	Hides and skins: raw hides and skins	44,710.00

Year	Country	Tariff Code	Unit		Total Volume per unit
2019	Unclassified	41044990	kg	Hides and skins: tanned or crust hides and skins	70.00
2019	Unclassified	41071190	kg	Leather: further prepared after tanning or crusting	1,082.00
2019	Unclassified	41071990	kg	Leather: further prepared after tanning or crusting	847.69
2019	Unclassified	410799	kg	Leather: further prepared after tanning or crusting	3,349.00
2019	Unclassified	010229	u	Live bovine animals	4,237.00
2019	Unclassified	010290	u	Live bovine animals	122.00
2020	Unclassified	02022090	kg	Meat: frozen	695.00
2020	Unclassified	02061090	kg	Edible offal: fresh, chilled or frozen	25,223.00
2020	Unclassified	02102012	kg	Edible offal: salted, in brine, dried or smoked	3.33
2020	Unclassified	16025090	kg	Meat, offal or blood: prepared or preserved	803.00
2020	Unclassified	41012010	kg	Hides and skins: raw hides and skins	6.00
2020	Unclassified	41019090	kg	Hides and skins: raw hides and skins	25,000.00
2020	Unclassified	41041990	kg	Hides and skins: tanned or crust hides and skins	24.00

Year	Country	Tariff Code	Unit		Total Volume per unit
2020	Unclassified	410799	kg	Leather: further prepared after tanning or crusting	930.00
2020	Unclassified	010229	u	Live bovine animals	567.00

Export to the Country Unclassified in the period 2018 to 2020

Table 18: Export to the Country Unclassified in the period 2018 to 2020

Year	Country		Unit	Total Volume per unit
2018	Unclassified	Meat: fresh or chilled	kg	273.63
2018	Unclassified	Meat: fresh or chilled	kg	6.49
2018	Unclassified	Meat: fresh or chilled	kg	247.78
2018	Unclassified	Meat: frozen	kg	57.68
2018	Unclassified	Meat: frozen	kg	2.98
2018	Unclassified	Meat: frozen	kg	13,408.61
2018	Unclassified	Edible offal: fresh, chilled or frozen	kg	25,002.47
2018	Unclassified	Edible offal: fresh, chilled or frozen	kg	87,222.59
2018	Unclassified	Meat, offal or blood: prepared or preserved	kg	6,919.00
2018	Unclassified	Leather: further prepared after tanning or crusting	kg	1.00
2018	Unclassified	Live bovine animals	u	2.00
2018	Unclassified	Live bovine animals	u	46.00

Year	Country		Unit	Total Volume per unit
2019	Unclassified	Meat: fresh or chilled	kg	12.40
2019	Unclassified	Meat: fresh or chilled	kg	355.20
2019	Unclassified	Meat: frozen	kg	25,238.00
2019	Unclassified	Edible offal: fresh, chilled or frozen	kg	16,350.00
2019	Unclassified	Meat, offal or blood: prepared or preserved	kg	978.37
2020	Unclassified	Meat: frozen	kg	85.00
2020	Unclassified	Live bovine animals	u	1.00

ANNEXURE 4: CONTENT ANALYSIS - RIGHTS AND OBLIGATIONS DERIVED FROM THE WTO-SPS, SADC-SPS AND AFCFTA-SPS

Explanatory Note

In the following annexure reference is made to private parties as holders of rights or bearers of duties. Reference to "individuals" is meant to include private parties and third parties, other than the government or "Member" and includes natural or juristic persons that are local importers (South African), local exporters (South Africa) or manufacturers (South African) and other affected parties in the SPS chain.

The whole of annexure 4, in particular the "description" column in the following tables paraphrases the content of the specific article in the specified agreement corresponding to that description. The specific article paraphrased is cited in the "Article" column which refers to the article number in the specific agreement.

WTO: Rights and Obligations

Table 19: WTO- Content analysis reference table

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB01	The obligation on Member states to develop and apply SPS measures in accordance with the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures	1	GPRO	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB02	The obligation on Members to limit the extent of SPS measures to what is necessary to protect human animal and plant life or health	2.2	BRO	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB03	The obligation on Members to base measures on principles of science	2.2	BRO	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB04	The obligation on Members to maintain measures only where sufficient science exists to justify necessity	2.2	BRO	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB05	The obligation on Members to not take measures that arbitrarily and unjustifiably discriminate between members where identical/similar conditions prevail	2.3	BRO	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB06	The obligation on Members to not apply SPS measures in a manner that constitutes a disguised restriction on trade	2.3	BRO	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB07	The obligation on Members to ensure the consistency of measures of a higher level of protection with other provisions of the WTOO-SPS	3.3	H	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB08	The general obligation on Members to base measures on international standards guidelines or recommendations	3.1	H	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB09	The obligation on Members to participate in international organizations and their subsidiary bodies, within their resource limits	3.4	H	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB10	The obligation on importing Members to accept equivalence where appropriate protection is objectively demonstrated by an exporting member	4.1	E	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB11	The obligation on the exporting Member to provide reasonable access to inspection, testing and other relevant procedures for the Importing Member to determine an objective demonstration of equivalence by the exporting Member	4.1	E	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB12	The obligation on Members to enter into consultations with other members on bilateral and multilateral levels with the objective of reaching an agreement on specified SPS measures upon request to do so from another Member	4.2	E	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB13	The obligation on Members to base measures on risk assessment appropriate to the circumstances and in account of techniques developed by international organizations in the assessment of risk and determination of appropriate level of SPS protection	5.1	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB14	The obligation on Members to take available scientific evidence into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB15	The obligation on Members to take relevant processes and production methods into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB16	The obligation on Members to take relevant inspection sampling and testing methods into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB17	The obligation on Members to take prevalence of specific diseases or pests into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB18	The obligation on Members to take the existence of pest- or disease-free areas into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB19	The obligation on Members to take relevant ecological and environmental conditions into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB20	The obligation on Members to take quarantine or other treatment into account in the assessment of risk	5.2	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB21	The obligation on Members to take into account three specific relevant economic factors in the assessment of risk and determination of appropriate level of SPS protection	5.3	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer
WTOOB22	The obligation on Members to take into account the objective of minimising negative trade effects in determining appropriate level of SPS protection	5.4	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB23	The obligation on Members to avoid arbitrary or unjustifiable distinctions in what is considered appropriate levels of protection in the assessment of risk and determination of appropriate level of SPS protection	5.5	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB24	The obligation on Members to co-operate with the Committee	5.5	ARAP	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB25	The Committees obligation to take into account all relevant factors including the exceptional character of human health risks to which people voluntarily expose themselves	5.5	ARAP	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB26	The obligation on Members to ensure that SPS measures are not more trade-restrictive than required to achieve appropriate SPS protection	5.6	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB27	The obligation on Members to obtain additional information to more objectively assess and review risk upon the adoption of provisional measures within a reasonable period of time	5.7	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB28	The obligation on Members to provide reasons when requested to do so while maintaining a constraining measure not based in international standards guidelines or recommendations	5.8	ARAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB29	The obligation on Members to adapt measures to the sanitary and phytosanitary characteristics of an area which can be a country, part of a country, or all or parts of several countries	6.1	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB30	The obligation on Members to take into account various factors such as disease prevalence in the assessment of SPS characteristics of a region	6.1	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB31	The obligation on Members States, in the assessment of SPS characteristics of a region to take eradication or control programmes into account	6.1	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB32	The obligation on Members States, in the assessment of SPS characteristics of a region to take appropriate criteria or guidelines developed by the relevant international organizations into account	6.1	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB33	The obligation on Members to recognise disease free areas and low pest or disease prevalence areas	6.2	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB34	The obligation on Members to base determinations of areas of disease free or low pest or disease prevalence on factors such as geography ecosystems epidemiological surveillance and effectiveness of SPS controls	6.2	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB35	The obligation on exporting Members to provide evidence (objectively demonstrate) to substantiate claims of disease free or low pest prevalence	6.3	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB36	The obligation on exporting Members to provide reasonable access to importing members for inspection testing and other relevant procedures where claims of disease free or low pest prevalence are made	6.3	ARC	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB37	The obligation on Members to facilitate transparency through notification of changes in SPS measures	7	T	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB38	The obligation on Members to observe the provisions of control inspection and approval procedures in the agreement including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs and to ensure consistency with the provisions of the agreement	8	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB39	The obligation on Members to facilitate technical assistance to members bilaterally or through international organizations	9.1	TA	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB40	The obligation on Members to consider providing such technical assistance that will permit the exporting Member to maintain and expand its market access opportunities for the product involved where substantial investment is required in order for an exporting Member to fulfil the sanitary or phytosanitary requirements of the importing Member	9.2	TA	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB41	The obligation of developed country members to take into account special needs of developing and least-developed members in preparation and application of SPS measures	10.1	SDT	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB42	The obligation of developed country Members to consider longer time frames where phased introduction is possible for developing countries	10.2	SDT	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB43	The obligation on Members to encourage and facilitate the active participation of developing country members in the IPPC OIE and Codex	10.4	SDT	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB44	The obligation on Members to observe all obligations in the WTO-SPS agreement	13	IM	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB45	The obligation on Members to formulate and implement positive measures and mechanisms in support of the observance of the provisions of the WTO-SPS	13	IM	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB46	The obligation on Members to ensure within reason that NGO's regional bodies in which relevant entities within their territories are members comply with the relevant provisions of the WTO-SPS	13	IM	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
WTOOB47	The obligation on Members to 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 WTO-SPS	13	IM	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB48	The obligation on Members to only rely on NGO's for implementation of SPS measures if they comply with the provisions of the WTO-SPS	13	IM	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
WTOOB49	The obligation on Members to promptly publish regulations which have been adopted in an accessible manner	AB.1	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB50	The obligation on Members to allow reasonable time between publication and entry into force of regulations	AB.2	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB51	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents	AB.3.a	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB52	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically SPS measures proposed or adopted	AB.3.a	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB53	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically control and inspection procedures production and quarantine treatment pesticide tolerance and food additive approval procedures	AB.3.b	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB54	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically risk assessment procedures factors taken into consideration as well as the determination of the appropriate level of sanitary or phytosanitary protection	AB.3.c	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB55	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically 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	AB.3.d	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB56	The obligation on Members to provide copies of documents to other members at the same price if any as to nationals of the member concerned	AB.4	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB57	The obligation on Members to publish measures where an international guideline recommendation or standard does not exist at an early stage to enable members to acquaint themselves	AB.5.a	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB58	The obligation on Members to 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	AB.5.b	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB59	The obligation on Members to provide upon request to other Members copies of the proposed regulation	AB.5.c	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB60	The obligation on Members to whenever possible identify the parts which in substance deviate from international standards guidelines or recommendations	AB.5.c	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB61	The obligation on Members to without discrimination allow reasonable time for other Members to make comments in writing and take them into account	AB.5.d	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB62	The obligation on Members in the event of urgent SPS threats to immediately notify other Members if usual steps are omitted due to such urgency	AB.6.a	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB63	The obligation on Members in the event of urgent SPS threats to provide copies of the regulation to other Members upon request if usual steps are omitted due to such urgency	AB.6.b	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer
WTOOB64	The obligation on Members in the event of urgent SPS threats to allow other members to make comments and have comments discussed and taken into account if usual steps are omitted due to such urgency	AB.6.c	TR	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer
WTOOB65	The obligation on Members to make notifications in either English French or Spanish	AB.7	TR	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB66	The obligation on developed country Members to make notifications in either English French or Spanish and make summaries if voluminous	AB.8	TR	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB67	The obligation on Members to designate a single central government body responsible for the implementation on the national level to implement the obligations of 5 6 7 and 8 of Annex B	AB.10	TR	WTO	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
WTOOB68	The Obligation on Members to ensure that procedures undertaken in control inspection and approval procedures are undertaken and completed without undue delay and in an equally favourable manner for imported and domestic like products	AC.1.a	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB69	The obligation on Members to ensure that competent bodies publish the standard processing period or anticipated processing period if requested of control inspection and approval procedures	AC.1.b	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB70	The obligation on Members to ensure that competent bodies inform the applicant in a precise and complete manner of all deficiencies after receiving and examining an application in procedures related to control inspection and approval procedures	AC.1.b	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB71	The obligation on Members to ensure that competent bodies transmit 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 in procedures related to control inspection and approval procedures	AC.1.b	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB72	The obligation on Members to ensure that the competent bodies proceed as far as practicable with the procedure if the applicant so requests in procedures related to control inspection and approval procedures even where deficiencies exist	AC.1.b	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB73	The obligation on Members to ensure that competent bodies inform the applicant of the stage of the procedure with any delay being explained in procedures related to control inspection and approval procedures	AC.1.b	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB74	The obligation on Members to limit information requirements to what is necessary for control for appropriate control inspection and approval procedures	AC.1.c	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB75	The obligation on Members to respect confidentiality of information and the protection of legitimate commercial interests	AC.1.d	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB76	The obligation on Members to ensure that any requirements for control inspection and approval of individual specimens of a product are limited to what is reasonable and necessary	AC.1.e	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB77	The obligation on Members to ensure that any fees are equitable and no higher than the actual cost of the service	AC.1.f	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB78	The obligation on Members to ensure that the same criteria be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products	AC.1.g	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOOB79	The obligation on Members to ensure that procedures for modified products are limited to what is necessary to determine confidence that the product still meets the regulations concerned where specifications are changed	AC.1.h	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB80	The obligation on Members to ensure a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified	AC.1.i	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB81	The obligation on Importing Members to consider the use of a relevant international standard as the basis for access until a final determination is made where domestic approval for access is required	AC.1.i	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOOB82	The obligation on the Member in whose territory production take place to provide the necessary assistance to facilitate control and the work of controlling authorities where SPS measures specify control at the level of production	AC.2	CIAP	WTO	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
WTOR01	The Members right to take measures to protect human, animal or plant life or health	2.1	BRO	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOR02	The Members right to the assumption that measures are in accordance with GATT 1994	2.4	BRO	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
WTOR03	The Members right to the assumption that measures conforming with international standards are necessary and consistent with the WTO-SPS and GATT 1994	3.2	H	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOR04	The Members right to introduce or maintain measures of a higher level	3.3	H	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOR05	The Exporting Members right to equivalence	4.1	E	WTO	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
WTOR06	The Members right to adopt provisional measures	5.7	ARAP	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOR07	The Exporting Members right to request reasons for a measure presumed to be constraining or potentially constraining and not based on international standards or guidelines	5.8	ARAP	WTO	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
WTOR08	The Members right to resort to dispute resolution mechanisms under other agreements	11.3	DS	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOR09	The Importing Members right to address urgent problems of health protection by omitting steps where urgent problems arise	AB.6	TR	WTO	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
WTOR10	The Importing Members right to carry out reasonable inspection	AC.3	CIAP	WTO	This is a right that the government holds and can reasonably enforce against an individual through national legislation	South African (local) Importer and (local) Exporter

SADC: Rights and Obligations

Table 20: SADC- Content analysis reference table

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB01	The obligation on Member States to apply and respect existing rights and obligations under the WTO-SPS	5.1	BRO	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB02	The obligation on Member States to work towards harmonization of mandatory requirements where appropriate	6.1	H	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB03	The general obligation on Member States to base measures on international standards guidelines or recommendations	6.1	H	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB04	The obligation on Member States to participate in international organizations, within their resource limits	6.2	H	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB05	The obligation on importing Member States to accept equivalence where appropriate protection is objectively demonstrated by an exporting member	7.2.a	E	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB06	The obligation on Member States to consult on matters of equivalence within the guidelines of the WTO SPS Committee, OIE, IPPC and Codex	7.1	E	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB07	The obligation on Member States to enter into consultations with other members on bilateral and multilateral levels with the objective of reaching an agreement on specified SPS measures where practicable	7.1	E	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB08	The obligation on the importing Member State to provide written reasons for refusing equivalence of an exporting Member States Measures	7.2.c	E	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB09	The obligation on Member States to base SPS measures on appropriate assessments in accordance with international rights and obligations	8.1	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB10	The obligation on Member States to take relevant scientific evidence into account in the assessment of risk and determinate of appropriate level of protection	8.2.a	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB11	The obligation on Member States to take relevant processes and production methods into account in the assessment of risk	8.2.c	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB12	The obligation on Member States to take relevant inspection, sampling and testing methods into account in the assessment of risk	8.2.d	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB13	The obligation on Member States to take the prevalence of pests or diseases into account in the assessment of risk including low prevalence or free areas	8.2.e	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB14	The obligation on Member States to take relevant ecological and environmental conditions into account in the assessment of risk	8.2.f	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB15	The obligation on Member States to take quarantine or other treatment into account in the assessment of risk	8.2.g	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB16	The obligation on Member States to take into account three specific, relevant economic factors in the assessment of risk and determination of appropriate level of SPS protection	8.2.h	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer
SADCOB17	The obligation on Member States to take relevant risk assessment techniques and methodologies developed by the OIE, IPPC and Codex into account in conducting risk assessment and determination of appropriate level of protection	8.2.b	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB18	The obligation on Member States to obtain additional information to more objectively assess and review risk upon the adoption of provisional measures within a reasonable period of time	8.3	ARAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB19	The obligation on Members States to ensure adaptation of SPS measures to the SPS characteristics of an area which can be a country, part of a country, or all or parts of several countries	9.1	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB20	The obligation on Members States, in the assessment of SPS characteristics of a region, to take prevalence of specific pests of diseases into account	9.2.a	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB21	The obligation on Members States, in the assessment of SPS characteristics of a region, to take eradication or control programmes into account	9.2.b	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB22	The obligation on Members States, in the assessment of SPS characteristics of a region, to take criteria or guidelines developed by the IOE, IPPC, Codex or SADC SPS committee into account	9.2.c	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB23	The obligation on Members to recognise disease free areas and low pest or disease prevalence areas	9.3	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB24	The obligation on Members to base determinations of areas of disease free or low pest or disease prevalence on factors such as geography ecosystems epidemiological surveillance and effectiveness of SPS controls	9.3	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB25	The obligation on exporting Members to provide evidence (objectively demonstrate) to substantiate claims of disease free or low pest prevalence	9.4	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Exporter

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB26	The obligation on Member States accord equally favourable treatment to Member states with regard to SPS measures adopted maintained or applied to products from pest-free or disease free areas of the same level of risk as other countries	9.6	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB27	The obligation on Member States to adopt and use equivalent risk assessment guidelines developed by CAC, OIE and IPPC to evaluate relevant conditions and controls in the pest-free or disease-free area where appropriate	9.7	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB28	The obligation on Member States to take into account any relevant conditions, including those relating to transportation and handling in the evaluation of relevant conditions and controls in the pest-free or disease-free areas of Member States	9.7	ARC	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB29	The obligation on Member States to notify information in accordance with both Appendix A of the SADC-SPS and the WTO transparency guidelines	10.1	T	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB30	The obligation on Member States to copy the same notification to the SADC Secretariat as was notified to the World Trade Organization	10.2	T	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB31	The obligation on Exporting Member States to consider providing such technical assistance that will permit the exporting Member State to maintain and expand its market access opportunities for the product involved where substantial investment is required in order for an exporting Member State to fulfil the sanitary or phytosanitary requirements of the importing Member State	12.1	TA	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB32	The Obligation on the SADC Secretariat in consultation with the SADC Sanitary and Phytosanitary Coordinating Committee to facilitate resource mobilisation for technical assistance to enhance Member States capacity to implement and monitor sanitary and phytosanitary measures including promoting greater use of international standards	12.2	TA	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB33	The obligation on Member States to implement all obligations in the SADC-SPS	15	IM	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB34	The obligation on Member States to formulate and take available measures to enforce positive mechanisms to support the implementation of the provisions of the SADC-SPS	15	IM	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB35	The obligation on Members to promptly publish regulations which have been adopted in an accessible manner	AA.1	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB36	The obligation on Member States to allow at least 6 months between publication and entry into force of regulations	AA.2	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB37	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents	AA.3.a	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB38	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically SPS measures proposed or adopted	AA.3.a	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB39	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically control and inspection procedures production and quarantine treatment pesticide tolerance and food additive approval procedures	AA.3.b	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB40	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically risk assessment procedures factors taken into consideration as well as the determination of the appropriate level of sanitary or phytosanitary protection	AA.3.c	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB41	The obligation on each Member to appoint one enquiry point to answer all reasonable questions asked by members and provide relevant documents specifically 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	AA.3.d	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB42	obligation on Members to provide copies of documents to other members at the same price if any as to nationals of the member concerned	AA.4The	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB43	The obligation on Members to publish measures where an international guideline recommendation or standard does not exist at an early stage to enable members to acquaint themselves	AA.5.a	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB44	The obligation on Members to 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	AA.5.b	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB45	The obligation on Members to provide upon request to other Members copies of the proposed regulation	AA.5.c	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB46	The obligation on Members to whenever possible identify the parts which in substance deviate from international standards guidelines or recommendations	AA.5.c	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB47	The obligation on Members to without discrimination allow reasonable time for other Members to make comments in writing and take them into account	AA.5.d	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer
SADCOB48	The obligation on Members in the event of urgent SPS threats to immediately notify other Members if usual steps are omitted due to such urgency	AA.6.a	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB49	The obligation on Members in the event of urgent SPS threats to provide copies of the regulation to other Members upon request if usual steps are omitted due to such urgency	AA.6.b	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB50	The obligation on Members in the event of urgent SPS threats to allow other members to make comments and have comments discussed and taken into account if usual steps are omitted due to such urgency	AA.6.c	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB51	The obligation on Members to make notifications in either English French or Spanish	AA.7	TR	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB52	The obligation on a Member States National Committee on Sanitary and Phytosanitary Measures, in cooperation with its WTO SPS National Notification Authority and Enquiry Point(s), to implement at the national level provisions concerning notification procedures	AA.8	TR	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB53	The Obligation on Members to ensure that procedures undertaken in control inspection and approval procedures are undertaken and completed without undue delay and in an equally favourable manner for imported and domestic like products	AB.1.a	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB54	The obligation on Members to ensure that competent bodies publish the standard processing period or anticipated processing period of requested of control inspection and approval procedures	AB.1.b	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB55	The obligation on Members to ensure that competent bodies inform the applicant in a precise and complete manner of all deficiencies after receiving and examining an application in procedures related to control inspection and approval procedures	AB.1.b	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB56	The obligation on Members to ensure that competent bodies transmit 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 in procedures related to control inspection and approval procedures	AB.1.b	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB57	The obligation on Members to ensure that the competent bodies proceed as far as practicable with the procedure if the applicant so requests in procedures related to control inspection and approval procedures even where deficiencies exist	AB.1.b	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB58	The obligation on Members to ensure that competent bodies inform the applicant of the stage of the procedure with any delay being explained in procedures related to control inspection and approval procedures	AB.1.b	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB59	The obligation on Members to limit information requirements to what is necessary for control for appropriate control inspection and approval procedures	AB.1.c	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB60	The obligation on Members to respect confidentiality of information and the protection of legitimate commercial interests	AB.1.d	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB61	The obligation on Members to ensure that any requirements for control inspection and approval of individual specimens of a product are limited to what is reasonable and necessary	AB.1.e	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB62	The obligation on Members to ensure that any fees are equitable and no higher than the actual cost of the service	AB.1.f	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB63	The obligation on Members to ensure that the same criteria be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products	AB.1.g	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB64	The obligation on Members to ensure that procedures for modified products are limited to what is necessary to determine confidence that the product still meets the regulations concerned where specifications are changed	AB.1.h	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB65	The obligation on Members to ensure a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified	AB.1.i	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB66	The obligation on Importing Members to consider the use of a relevant international standard as the basis for access until a final determination is made where domestic approval for access is required	AB.1.i	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB67	The obligation on the Member in whose territory production take place to provide the necessary assistance to facilitate control and the work of controlling authorities where SPS measures specify control at the level of production	AB.2	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB68	The obligation on Member States to give consideration with a view to accepting the relevant control, inspection and approval procedures of another Member State upon request and following relevant procedures	11.1	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB69	The obligation on Member states to review its inspection testing certification and other relevant import and export approval systems or procedures to ensure these are reasonable and necessary	11.2	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB70	The obligation on Member States to adopt guidelines set out in SADC Seed Import/Export Procedures Manual as the relevant import and export approval systems for seed	11.3	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCOB71	The obligation on Member States to adapt the guidelines set out in SADC Seed Import/Export Procedures Manual as the relevant import and export approval systems for all other commodities subject to sanitary or phytosanitary measures	11.4	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
SADCOB72	The obligation on Member States to cooperate on a product trace back system for the notification of non-compliance of imported consignments for commodities subject to sanitary or phytosanitary measures	11.5	CIAP	SADC	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
SADCOB73	The obligation on Member States to settle disputes in terms of the rules and procedures of Article 32 of the SADC Protocol on Trade	13	DS	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCOB74	The obligation on Member States to establish a National Committee on Sanitary and Phytosanitary Measures and appoint two representatives on the SADC Sanitary and Phytosanitary Coordinating Committee no later than 60 days after the adoption of the SADC SPS	14.2	ADMIN	SADC	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
SADCR01	The Member States right to rely on rights and obligations under the WTO-SPS	1	BRO	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
SADCR02	The Member States right to adopt and maintain measures necessary to achieve appropriate levels of SPS protection	2	BRO	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCR03	The Member States right to refuse an exporting Member States measures as equivalent	2.b	E	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
SADCR04	The Member States right to adopt provisional measures	8.3	ARAP	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
SADCR05	The Exporting Member States right to request a phased application or specific exceptions from measures	8.4	ARAP	SADC	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
SADCR06	The Importing Member States right to address urgent problems of health protection by omitting steps where urgent problems arise	AA.6	TR	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
SADCR07	Member States right not to disclose confidential information	AA.9	TR	SADC	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
SADCR08	The Importing Member States right to carry out reasonable inspection	AB.3	TR	SADC	This is a right that the government holds and can reasonably enforce against an individual through national legislation	South African (local) Importer and (local) Exporter
SADCR09	The Member States right to conduct different risk assessment procedures depending on the pest status of an area	9.5	ARC	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
SADCR10	The Member States right to make a different final determination for the disposition of a product dependent on the disease or pest free nature of the area it is produced in	9.5	ARC	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
SADCR11	The Exporting Member States right to pursue an agreement with and importing Member State on specific requirements for a product produced in an area of low pest or disease prevalence	9.8	ARC	SADC	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member

AFCFTA: Rights and Obligations

Table 21: AFCFTA - Content analysis reference table

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B01	The obligation on State Parties to guide their preparation, adoption and application of SPS measures in terms of the provisions of the WTO-SPS	3	GP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B02	The obligation on State Parties to ensure the consistency of measures of a higher level of protection with other provisions of the Annex	8.2	H	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B03	The obligation on State Parties to co-operate in the development and harmonisation of SPS measures taking into account the harmonisation of sanitary or phytosanitary measures at the regional level	8.1	H	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B04	The general obligation on State Parties to base measures on international standards guidelines or recommendations	8.1	H	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B05	The obligation on State Parties to fully participate in international organizations and their subsidiary bodies with respect to all aspects of SPS measures	8.3	H	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B06	The obligation on State Parties to establish harmonised SPS import requirements for priority commodities	8.4	H	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B07	The obligation on the importing State Party to accept equivalence where appropriate protection is objectively demonstrated by an exporting State Party	7.1	E	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B08	The obligation on State Parties to enter into consultations with other members on bilateral and multilateral levels with the objective of reaching an agreement on specified SPS measures upon request to do so from another Member	7.2	E	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B09	The obligation on State Parties to follow the procedures for determining the equivalence of sanitary or phytosanitary measures developed by the WTO SPS Committee, the CAC, the OIE and the IPPC	7.3	E	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B10	The obligation on State Parties to base measures on risk assessment appropriate to the circumstances and in account of techniques developed by international organizations in the assessment of risk and determination of appropriate level of SPS protection	5.1	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B11	The obligation on State Parties to take available scientific evidence into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B12	The obligation on State Parties to take relevant processes and production methods into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B13	The obligation on State Parties to take relevant inspection sampling and testing methods into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B14	The obligation on State Parties to take prevalence of specific diseases or pests into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B15	The obligation on State Parties to take the existence of disease or pest free areas into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B16	The obligation on State Parties to take relevant ecological and environmental conditions into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B17	The obligation on State Parties to take quarantine or other treatment into account in the assessment of risk	5.2	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B18	The obligation on State Parties to take into account three specific relevant economic factors in the assessment of risk and determination of appropriate level of SPS protection	5.3	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer and Producer
AFCFTA0B19	The obligation on Members to obtain additional information to more objectively assess and review risk upon the adoption of provisional measures within a reasonable period of time as agreed	5.4	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B20	The obligation on State Parties to provide reasons when requested to do so while maintaining a constraining measure not based in international standards guidelines or recommendations	5.5	ARAP	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B21	The obligation on State Parties to recognize to recognise the concept, principles and guidelines of regionalisation and zoning as outlined in the Terrestrial and Aquatic Animal Health Codes of the OIE, and agree to apply this concept to prescribed diseases to be determined by consensus	6.a	ARC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B22	The obligation on State Parties in the implementation of regionalisation and zoning, to base their SPS measures on the zoning decision of the exporting State Party provided the zoning decision satisfied that it is based on relevant international standards, guidelines and recommendations	6.b	ARC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B24	The obligation on State Parties to recognise regional conditions	6.e	ARC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B25	The obligation on importing State Parties to recognise the pest status of an area in the exporting State Party	6.f	ARC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B26	The obligation on exporting state Parties claiming a specific pest status of an area, to provide reasonable access to the territory for inspection testing and other relevant procedures	6.g	ARC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Exporter
AFCFTA0B27	The obligation on State parties to comply with transparency obligations in accordance with the procedures developed by the SPS Sub-Committee	11.1.a	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B28	The obligation on State parties to designate a National Focal Point for fulfilling the notification obligations	11.1.b	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B29	The obligation on State parties to notify the Secretariat of any draft, revised or adopted SPS measures	11.1.c	T	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B30	The obligation on State Parties to endeavour exchange information on other SPS issues	11.2	T	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B31	The obligation on State Parties to endeavour exchange information specifically on significant changes to the structure or organisation of a State Party's Competent Authority	11.2.a	T	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B32	The obligation on State Parties to endeavour exchange information upon request specifically on the results of a State Party's official controls and a report on the implementation of the controls	11.2.b	T	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B33	The obligation on State Parties to endeavour exchange information specifically on the results of an import inspection provided for in Article 10 of this Annex in case of a rejected or a non-compliant consignment	11.2.c	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B34	The obligation on State Parties to endeavour exchange information upon request specifically on a risk analysis or scientific opinion that a State Party has produced in accordance with Article 5 of this Annex	11.2.d	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B35	The obligation on State Parties to endeavour exchange information specifically on pest or disease status, including the evolution of a new disease or new pest	11.2.e	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B36	The obligation on State Parties to endeavour exchange information specifically on any food safety issue related to a product traded between the State Parties, that poses a food safety risk	11.2.f	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B37	The obligation on State Parties to endeavour exchange information specifically on import requirements such as quarantine restrictions	11.2.g	T	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B38	The obligation on State Parties to cooperate on technical assistance in the exchange of information and sharing of expertise and experience among State Parties	14.1.a	TA	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B39	The obligation on State Parties to cooperate on technical assistance in the adopting harmonised common positions while participating in international SPS fora relevant to the AfCFTA	14.1.b	TA	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B40	The obligation on State Parties to cooperate on technical assistance in the development and harmonisation of SPS measures at regional and continental levels, on the basis of established scientific data or relevant international standards	14.1.c	TA	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B41	The obligation on State Parties to cooperate on technical assistance in the development of infrastructure such as testing laboratories	14.1.d	TA	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B42	The obligation on State Parties to cooperate on technical assistance in the capacity building for public and private sector stakeholders, including through information sharing and training	14.1.e	TA	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer, Exporter and Producer
AFCFTA0B43	The obligation on State Parties to cooperate on technical assistance in the identification or establishment of SPS centres of excellence	14.1.f	TA	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B44	The obligation on State Parties to settle disputes accordance with the Protocol on Rules and Procedures on the Settlement of Disputes	16	DS	AFCFTA	This is a unique obligation with corresponding rights that is at a Member to Member level and would unlikely be captured in national legislation	Member
AFCFTA0B45	The obligation on an importing State Party to bear their own costs associated with the audit and verification of the control programme of the exporting states competent authority	9.1	AV	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B46	The obligation on importing State Parties to abide by principles and guidelines established by international standards bodies in conducting audits or verifications as agreed between the State Parties	9.2	AV	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B47	The obligation on State Parties to abide by principles and guidelines established by international standard setting bodies in the conduct of inspections	10.1	IEIF	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B48	The obligation on State Parties that fees collected for inspections not exceed the recovery of the costs reasonably incurred in the conduct of the inspection	10.2	IEIF	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B49	The obligation on the importing State Party to base action taken in reaction to non-compliance revealed in inspections on relevant international standards or an assessment of the risk involved and not be more trade-restrictive than required to achieve the State Party's appropriate level of sanitary or phytosanitary protection	10.3	IEIF	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B50	The obligation on importing State parties to notify the importer and the Competent Authority of the exporting State Party of a non-compliant consignment and the reason for non-compliance and action to be taken	10.4	IEIF	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B51	The obligation on importing State parties to consider any relevant information submitted to assist in the review if the exporter was granted an opportunity for the decision to be reviewed	10.4	IEIF	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B52	The obligation on State Parties to respond to a request for technical consultation request within thirty (30) days of receipt of the request	12.2	TC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B53	The obligation in State Parties in technical consultation to provide the information necessary to avoid a disruption to trade	12.3	TC	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B54	The obligation on State Parties to notify emergency SPS measures within forty-eight(48) hours of the decision to implement the measure	13.1	EM	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B55	The obligation on State Parties where technical consultation is requested after the notification of emergency measures to hold technical consultations within ten (10) working days of the notification of the emergency SPS measure	13.1	EM	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTA0B56	The obligation on State Parties where technical consultation is requested after the notification of emergency measures to consider any information provided through the technical consultations	13.1	EM	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTA0B57	The obligation on Importing State parties to base their decision regarding consignments in transit for which timely information was provided by the exporting Member on the principles of risk assessment	13.2	EM	AFCFTA	This is a unique obligation with associated rights that a category of individuals (dependent on their role in the SPS chain) can reasonably expect in national legislation	South African (local) Importer
AFCFTAR01	A State Parties right to introduce or maintain measures of a higher level	8.2	H	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
AFCFTAR02	The State Parties right to adopt provisional SPS measures	5.4	ARAP	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
AFCFTAR03	A State Parties right to request reasons for a measure presumed to be constraining or potentially constraining and not based on international standards or guidelines	5.5	ARAP	AFCFTA	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
AFCFTAR04	A State Parties right to request a review of the measure if not satisfied with the explanation provided for the application of a constraining or potentially constraining non-science based measure	5.5	ARAP	AFCFTA	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
AFCFTAR05	An Importing State Parties right to apply additional measures based on scientific evidence to achieve appropriate SPS protection	6.b	ARC	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
AFCFTAR06	The Exporting Member States right to request recognition of special status- diseases not subject to zoning	6.c	ARC	AFCFTA	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTAR07	The Importing State Parties right to request additional guarantees for specific products for which special status where zoning is not subject, was requested	6.c	ARC	AFCFTA	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
AFCFTAR08	The Importing States right to conduct an audit and verification on the control programme of the Exporting State	9.1	AV	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
AFCFTAR09	The Exporting States right to expect inspections in accordance with international guidelines	10.1	IEIF	AFCFTA	This is a right that the government holds and can reasonably enforce against an individual through national legislation	South African (local) Importer and (local) Exporter
AFCFTAR10	The Importing State Parties right to charge a fee for inspection	10.2	IEIF	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
AFCFTAR11	The Exporting State Parties right to be notified of a non-compliant consignment and the reason for non-compliance and action to be taken	10.4	IEIF	AFCFTA	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
AFCFTAR12	An Importing State Parties right to provide the Exporting State with the opportunity for a review of the decision for non-compliant assignments and action taken	10.4	IEIF	AFCFTA	This is a right that reasonably translates into a right enforceable by an individual as the right holder through national legislation	South African (local) Importer
AFCFTAR13	The State Parties right to request technical consultations where a significant concern exists regarding food safety, plant health or animal health, or any other SPS measure	12.1	TC	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member
AFCFTAR14	The State Parties right to approach the SPS sub-committee where a mutually acceptable solution is not found	12.4	TC	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member

Unique ID code	Description	Article	Category	Agreement	Comment	Broad category of Actor in SPS chain
AFCFTAR15	The State Parties right to collaboration with regional and international SPS bodies	14.2.2	CTA	AFCFTA	This is a right at a Member to Member level that cannot reasonably be expected to be enforced through national legislation	Member

ANNEXURE 5: CONTENT ANALYSIS – DETAIL OF WHERE IN REGULATIONS SPECIFIC KEY WORDS ARE PRESENT

OIE Content Analysis

Table 22: Detail of where in regulations specific key words are present

Regulation	Key words identified		Category of legislation
Animal Diseases Regulations – GN R2026 of 1986	antigen	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	biosecurity	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	foot	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	incubation	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	lymph	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	mouth	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	straw	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	viral	FMD Specific Terms	RM
Animal Diseases Regulations – GN R2026 of 1986	zone	FMD Specific Terms	RM
Consumer Protection Act Regulations – GN R293 of 2011	mouth	FMD Specific Terms	SCI

Regulation	Key words identified		Category of legislation
Consumer Protection Act Regulations – GN R293 of 2011	zoning	FMD Specific Terms	SCI
Control Measures Relating To Asian Citrus Psyllid (Dihorina Citri) And Citrus Greening Asian And American Strains (Candidatus Liberibacter Asiaticus And Candidatus Liberibacter Americanus) – GN 121 of 2021	containment	FMD Specific Terms	RM
Control Measures Relating To Honey-Bees – GN R858 of 2013	viral	FMD Specific Terms	RM
Control Measures To Prevent and Combat The Spraying of Pathogens, Insects And Exotic Animals – GN R110 of 1984	elisa	FMD Specific Terms	RM
Directions Regarding Livestock Auctions – BN 85 of 2020	mouth	FMD Specific Terms	SCI
Farm Feeds Regulations Relating To Farm Feeds – GN R1087 of 2006	forage	FMD Specific Terms	ITR
Farm Feeds Regulations Relating To Farm Feeds – GN R1087 of 2006	straw	FMD Specific Terms	ITR
Food-Gre Salt Regulations – GN R184 of 2007	mouth	FMD Specific Terms	ITR
Fortification of Certain Foodstuffs Regulations – GN R504 of 2003	mouth	FMD Specific Terms	ITR
General Regulations – GN 859 of 2017	mouth	FMD Specific Terms	ITR
Guideline On Conducting A Comprehensive Risk Assessment, Part 1 Hazard Analysis, Identification And Prioritisation – GN 1363 of 2016	terrestrial	FMD Specific Terms	SCI
Importation of Live Cloven Hoofed Animals From Countries Or Zones Not Recognised As Free From Foot And Mouth Disease By The World Organization For Animal Health – GN 364 of 2012	fmd	FMD Specific Terms	RM

Regulation	Key words identified	Category of legislation
Importation of Live Cloven Hoofed Animals From Countries Or Zones Not Recognised As Free From Foot And Mouth Disease By The World Organization For Animal Health – GN 364 of 2012	foot	FMD Specific Terms RM
Importation of Live Cloven Hoofed Animals From Countries Or Zones Not Recognised As Free From Foot And Mouth Disease By The World Organization For Animal Health – GN 364 of 2012	mouth	FMD Specific Terms RM
Labelling Advertising of Foodstuffs Regulations – GN R146 of 2010	elisa	FMD Specific Terms ITR
Labelling Advertising of Foodstuffs Regulations – GN R146 of 2010	nsp	FMD Specific Terms ITR
Maximum Limits For Pesticide Residues Regulations – GN R246 of 1994	straw	FMD Specific Terms ITR
Meat Safety Act Red Meat Regulations, 2004 – GN 1072 of 2004	lymph	FMD Specific Terms RM
Meat Safety Act Red Meat Regulations, 2004 – GN 1072 of 2004	mouth	FMD Specific Terms RM
Medicines Control Council Schedules – GN R509 of 2003	foot	FMD Specific Terms ITR
Medicines Control Council Schedules – GN R509 of 2003	mouth	FMD Specific Terms ITR
Medicines Control Council Schedules – GN R509 of 2003	straw	FMD Specific Terms ITR
Microbiological Standards For Foodstuffs And Related Matters Regulations – GN R692 of 1997	incubation	FMD Specific Terms ITR
Milk And Dairy Products Regulations – GN R1555 of 1997	incubation	FMD Specific Terms ITR

Regulation	Key words identified	Category of legislation
Milk And Dairy Products Regulations – GN R1555 of 1997	zone	FMD Specific Terms ITR
National Disaster Management Framework – Genn 654 of 2005	zoning	FMD Specific Terms SCI
Regulations – GN R111 of 1984	elisa	FMD Specific Terms RM
Regulations Governing General Hygiene Requirements For Food Premises, The Transport of Food And Related Matters – GN 638 of 2018	compartment	FMD Specific Terms ITR
Regulations Governing General Hygiene Requirements For Food Premises, The Transport of Food And Related Matters – GN 638 of 2018	mouth	FMD Specific Terms ITR
Regulations Regarding Fertilizers – GN R732 of 2012	nsp	FMD Specific Terms ITR
Regulations Regarding Fertilizers – GN R732 of 2012	sp	FMD Specific Terms ITR
Regulations Relating To Sterilizing Plants – GN R1086 of 2006	foot	FMD Specific Terms ITR
Regulations Relating To Sterilizing Plants – GN R1086 of 2006	sp	FMD Specific Terms ITR
Regulations Relating To Trans-Fat In Foodstuffs – GN R127 of 2011	sp	FMD Specific Terms ITR
Stock Remedies, Regulations Regarding – GN R956 of 2006	serological	FMD Specific Terms ITR
Biosecurity Rules For Livestock Agents – BN 135 of 2020	biosecurity	FMD Specific Terms SCI

Regulation	Key words identified	Category of legislation
Biosecurity Rules For Livestock Agents – BN 135 of 2020	fmd	FMD Specific Terms SCI
Biosecurity Rules for Livestock Agents – BN 135 of 2020	foot	FMD Specific Terms SCI
Biosecurity Rules for Livestock Agents – BN 135 of 2020	mouth	FMD Specific Terms SCI
Biosecurity Rules for Livestock Agents – BN 135 of 2020	viral	FMD Specific Terms SCI
Canned Fruit 272800	sp	FMD Specific Terms ITR
Regulations Regarding the Classification, Packing and Marking of Processed Meat Products Intended for Sale in The Republic of South Africa – GN R1283 of 2019	lymph	FMD Specific Terms ITR
Regulations Regarding the Grading, Packing and Marking of Eggs Intended For Sale in The Republic of South Africa – GN R345 of 2020	forage	FMD Specific Terms ITR
Regulations Relating to The Classification, Packing and Marking of Fruit Juice and Drink Intended for Sale in The Republic of South Africa – GN R286 of 1980	mouth	FMD Specific Terms ITR
Regulations Relating to The Grading, Packing and Marking of Citrus Fruit Intended for Sale in The Republic of South Africa – GN R963 of 2012	mouth	FMD Specific Terms ITR

ANNEXURE 6: GLOSSARY OF TERMS

Glossary of selected technical terms

Actor	An actor can either be a participant as described below, or may refer to private parties or other relevant parties involved in or affected by the SPS chain.
Bovine	Bovids are members of the artiodactyl family <i>Bovidae</i> , comprising cattle, antelopes, goat antelopes, gazelles, sheep, and goats. ⁸⁶⁴
Cattle	Domesticated farm animals of the <i>Bovidae</i> family, ungulate ruminants. They are kept for milk and meat. ⁸⁶⁵ In this research cattle refers to domesticated bovines and does not refer to water buffalo and domesticated buffalo.
CAQDA	Computer-Assisted Qualitative Data Analysis.
CAQDAS	Computer-Assisted Qualitative Data Analysis Software e.g. Atlas.ti, rstudio, Nvivo etc.
CADA	Computer-Assisted Data Analysis.
Coding	The process of categorising, describing, evaluating, judging, or measuring descriptively undifferentiated units of analysis, thereby rendering them analysable in well-defined terms. ⁸⁶⁶
Commercial breeding	Broadly refers to the sale of non-stud animals bred for their meat-bearing capacity, for example, for the stocking of feedlots, which ultimately provide abattoirs with animals

⁸⁶⁴ Quoted or adapted directly from: Park and Allaby, *Bovids* (Oxford University Press 2017)

⁸⁶⁵ Quoted or adapted directly from: Manley, Foot and Davis, *Cattle* (Oxford University Press 2019)

⁸⁶⁶ Quoted or adapted directly from: Krippendorff *Content Analysis : An Introduction to Its Methodology*, 381.

for slaughter and further processing. These operations are run on specific timelines that account for optimal nutrition and weight gain in order to achieve a return on investment.

Commodity-based trade	An array of alternatives that can be used individually or in combination to ensure that the production and processing of a particular commodity or product are managed so that identified food safety and animal health hazards are reduced to appropriate risk levels. ⁸⁶⁷
Compartmentalisation	Compartment means an animal subpopulation contained in one or more establishments, separated from other susceptible populations by a common biosecurity management system, and with a specific animal health status with respect to one or more infections or infestations for which the necessary surveillance, biosecurity and control measures have been applied for the purposes of international trade or disease prevention and control in a country or zone. ⁸⁶⁸
Content analysis	A research technique for making replicable and valid inferences from texts to the contexts of their use. ⁸⁶⁹
Formal sector	This refers to individuals or groups of individuals either permanently engaged in acts that are regulated by the law and in doing so are legally compliant and to a greater extent traceable and identifiable in their farming or related practices. It may be a single act or a continuous act that contributes to the formal sector of the economy.

⁸⁶⁷ Quoted or adapted directly from: Thomson *et al* 2013 *Transboundary and Emerging Diseases* 503.

⁸⁶⁸ Quoted or adapted directly from: OIE *Terrestrial Animal Health Code* Glossary.

⁸⁶⁹ Quoted or adapted directly from: Krippendorff *Content Analysis : An Introduction to Its Methodology*

Grounded theory	Grounded theory is a research approach in which data collection and analysis take place simultaneously. Each part informs the other, in order to construct theories of the phenomenon under study. ⁸⁷⁰
Industry organisation	A voluntary association of individuals into a representative group that usually focuses on one or more defined agricultural products or a sector of products. An industry organisation is represented by elected individuals who present the views of the group and or lobby on their behalf. There is usually also an advisory component to their mandate. Membership fees are usually required.
Informal sector	This refers to individuals or groups of individuals either permanently engaged in acts that are not regulated by the law or in opposition to such regulations. It may be a single act or a continuous act that contributes to the informal sector of the economy.
National legislation	Legislation enacted in terms of the legislation-making authority and procedures of a specific country. In South Africa this refers to legislation that has been passed by the South African Parliament and any subordinate regulations made in terms of the empowering national legislation.
National Treatment	The equal treatment of imported and locally-produced goods once it enters the market. ⁸⁷¹

⁸⁷⁰ Quoted or adapted directly from: Thornberg and Charmaz "Grounded Theory and Theoretical Coding"153.

⁸⁷¹ Quoted or adapted directly from: World Trade Organization 2020 https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

Mixed Methodology Research	In this research mixed methodology research is the synthesis of doctrinal, qualitative and quantitative research methods.
Most Favoured Nation	In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong. ⁸⁷²
Participant	In this research participants are individuals that were interviewed for purposes the qualitative research fieldwork conducted.
Private Party	Private parties are, for example, natural or juristic persons, that are local importers (South African), local exporters (South African) or manufacturers (South African).
Red-meat industry	In this research the term refers to the list of products identified by the tariff codes listed in Annexure 1. It includes live bovine animals and bovine products such as meat and hides derived from the live animals as well as genetic material along the SPS chain.
Protectionism	In this research protectionism refers to the intention of a government intentionally or knowingly taking a SPS measures beyond what is reasonably required, or taking one that is discriminatory.

⁸⁷² World Trade Organization
https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

Proactive measures	Proactive measures are primarily legally enforceable SPS measures taken to prevent or decrease the risk of an SPS event (disease outbreak) and may relate to control measures put in place for example where foreseeable damage associated with SPS events are identified.
Rstudio/R programming	R is a programming language and an environment for statistical computing and graphics ⁸⁷³ and RStudio is an integrated development environment (IDE) for R. ⁸⁷⁴
Reactive measures	These are measures that are taken after an SPS event in response to an outbreak of a disease. Reactive measures typically include measures related to movement control or other restrictions, prohibitions or actions to prevent further spread of the disease.
Saturation	In the qualitative fieldwork: Theoretical saturation is the point beyond which further data centered on a specific category fails to reveal additional properties or theoretical insights relevant to the developing grounded theory. ⁸⁷⁵
Saturation	In the content analysis: high concentration refers to the level of overlap between the key words and subsequent rights and obligations in the category

⁸⁷³ Quoted or adapted directly from: The R Foundation 2022 <https://www.r-project.org/about.html>.

⁸⁷⁴ Quoted or adapted directly from: RStudio 2022 <https://www.rstudio.com/products/rstudio/>.

⁸⁷⁵ Quoted or adapted directly from: Bryant "The Grounded Theory Method" 110.

per group of legislation indicating high or low occurrences of unique IDs.

SPS When used in this context SPS is used as a noun that identifies the research field concerned with sanitary and phytosanitary measures, including relevant rights, obligations and principles in context.

SPS event This refers to incidents such as disease outbreaks or other significant occurrences related to SPS which would potentially require reactive measures to be implemented and which are either notifiable or significant in another way related to the health and wellbeing of plants, humans and animals.

SPS control This is the act of either preemptively managing the likelihood of an SPS event, or in the event of one, the reactive management and prevention of further spread, for example, of a disease.

Stud breeding Commercial breeding broadly refers to the sale of non-stud animals bred for their meat-bearing capacity, for example, for the stocking of feedlots, which ultimately provide abattoirs with animals for slaughter and further processing. These operations are run on specific timelines that account for optimal nutrition and weight gain in order to achieve a return on investment. Stud breeding is a longer process and does not account for as high an animal turnover as commercial breeding.

Tariff code Tariff code or HS code refers to the World Customs Organisation's Harmonised System (HS). These codes uniquely identify products or groups of

products during import and export especially in the determination of applicable duties. Tariff codes are universally comparable up to the 6-digit level. South Africa, as is allowed, defines tariff codes further to the 8-digit level on some products.

Terrestrial Code

The OIE *Terrestrial Animal Health Code* (the Terrestrial Code) provides standards for the improvement of animal health, and veterinary public health worldwide. These standards should be used by veterinary services to set up measures for the early detection, reporting and control of pathogenic agents, including zoonotic agents, and preventing their spread.⁸⁷⁶

Terrestrial manual

The OIE's *Manual of Diagnostic Tests and Vaccines for Terrestrial Animals* that provides internationally agreed diagnostic laboratory methods and requirements for the production and control of relevant vaccines and other biological products.⁸⁷⁷

Trade remedies

Anti-dumping duties, countervailing duties, safeguard duties, and tariffs.

Unique combination

"Unique combinations" between Unique ID Code, Key word extracted and the specific piece of legislation from which it was extracted. Therefore, if word "a" matches as identifying unique ID code WTO10000 more than once, only one unique

⁸⁷⁶ OIE *Terrestrial Animal Health Code* available at <https://www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online/access/?id=169&L=1&htmfile=preface.htm>

⁸⁷⁷ OIE *Manual of Diagnostic Tests and Vaccines for Terrestrial Animals*, available at https://www.oie.int/fileadmin/Home/eng/Health_standards/tahm/0.01_FOREWORD_2018.pdf

combination of “a” corresponding with WTO10000 is recorded. If, however, words “c” and “d” also identify WTO10000 but there is only one hit each, they are also recorded as they are unique combinations two and three for that unique ID code, indicating that there is a higher probability that the right or obligation that WTO10000 identifies may be present.

Unique ID code

Each right or obligation identified per agreement was assigned a unique ID code matched to a corresponding list of identifying terminology specific to the description of that right or obligation.

Zone

A part of a country defined by the Veterinary Authority, containing an animal population or subpopulation with a specific animal health status with respect to an infection or infestation for the purposes of international trade or disease prevention or control.⁸⁷⁸

⁸⁷⁸ OIE Terrestrial Animal Health Code Glossary.