

# **Sanitary and phytosanitary measures in the SADC region: a South African legal perspective**

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Mini Dissertation submitted in partial fulfillment of the requirements for the degree *Masters of Laws* in Import and Export Law at the Potchefstroom Campus of the North-West University

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November 2014

## **Acknowledgements**

I was fortunate to have lovely study supervisors. Michelle Schoeman who was also my LLB study supervisor (2012), and Prof Stephen De la Harpe. I cannot thank you enough for your encouragement and positive feedback throughout my LLM studies, not only with my dissertation but also the various unrelated questions with which I usually came to meetings. It was a pleasure being your LLM student and partaking in the LLM Import and Export program. Thank you.

I am uniquely blessed with parents who have supported me in all aspects of my life from day one. Without their love, encouragement and support I would not have been writing an acknowledgements page for an LLM today. They have consistently provided me with an example of true love, endurance, dedication and optimism towards all situations based on a solid foundation in the belief that all things are possible through Christ. For this I will be eternally grateful. Ouma Julie, Ouma Ceylonia, Oupa Cois and Zacharias –thank you for your love. Lallie and Oom De Waal, thank you for making me feel like I always had a home to go to when home was 1200km and Beitbridge border post away! Throughout LLB and LLM I have been in your house as an additional family member and I appreciate your love.

Ronel, thank you.

A sincere thank you to the NWU Faculty of Law and the NWU as an institution. The NWU Faculty of Law has made studying LLB and LLM under its supervision a pleasure. Thank you to every lecturer that has during the course of my studies helped shape my legal career into what it will become. Thank you to every administrative assistant or secretary at the NWU Faculty of Law.

## **Abstract**

Sanitary and phytosanitary (SPS) measures are measures aimed at the protection of human, animal and plant life and health within specified territories from the risks associated with the introduction and spread of pests and diseases through trade. The World Trade Organisation (WTO) developed an agreement on the application of SPS measures. South Africa is a member of both the WTO and the Southern African Development Community (SADC). In SADC, SPS measures are provided for in the SADC Sanitary and Phytosanitary Annexure to the Protocol on Trade of 1996.

International Standard Setting Bodies (ISSBs) facilitate the effective application of the main elements of the relevant SPS agreements, especially harmonization and equivalence by establishing scientifically justified standards on which members may base their SPS measures. The relevant ISSB's in terms of SPS measures are the OIE, IPPC and Codex Alimentarius. SPS measures have the potential to become or be used as non-tariff barriers to trade (NTBs). The SADC Protocol on Trade 1996 stipulates that policies and measures are to be implemented by members to eliminate existing forms of NTBs. Additionally members may not enforce new NTBs affecting or related to intra-SADC trade.

The most relevant South African legislation in the context of SPS measures and this study is as follows: *Agricultural Pests Act 36 of 1983*, the *Agricultural Products Act 119 of 1990*; the *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947*, the *Liquor Products Act 60 of 1989*, *Meat Safety Act 40 of 2000*, *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*, *Medicines and Related Substances Act 101 of 1965* and *National Regulator for Compulsory Specifications Act 5 of 2008*.

The purpose of this study is to establish to what extent the South African legal framework complies with its obligations in terms of the SADC SPS Annexure to the Protocol on Trade

**Key Words:** Sanitary and phytosanitary measures; SPS; WTO; SADC; South Africa; NTB; ISSB.

## Opsomming

Sanitêre en fitosanitêre (hierna "SFS") maatreëls is maatreëls gemik op die beskerming van mens-, dier- en plantlewe, en gesondheid binne aangewese gebiede teen die gevare wat geassosieer word met die bekendstelling en verspreiding van peste en siektes deur middle van handel. Die Wêreldhandelsorganisasie (hierna "WHO") het 'n ooreenkoms op die toepassing van SPS maatreëls ontwikkel. Suid-Afrika is 'n lid van beide die WHO en die Suider-Afrikaanse Ontwikkelingsgemeenskap (hierna "SAOG"). In SAOG word daar voorsiening gemaak vir SFS maatreëls in die SAOG Sanitêre en Fitosanitêre Aanhangsel tot die Protokol op Handel van 1996.

Internasionale standaardstellingsliggame (hierna "ISSL's") fasiliteer die effektiewe toepassing van die hoofelemente van die toepaslike SPS ooreenkomste, veral harmonisering en ekwivalensie deur die vestiging van wetenskaplikeregverdigde standaarde waarop lede hul SFS maatreëls kan baseer. Die ter sake ISSB's in terme van SPS maatreëls is die Wêreld Organisasie vir Dieregesondheid, Internasionale Plant-besekermingskonvensie en die Codex Alimentarius. SFS maatreëls het die potensiaal om gebruik te word as nie-tarief versperrings tot handel. Die SADC Protokol op Handel van 1996 stipuleer dat lede beleid en maatreëls moet toepas ten einde bestaande vorme van nie-tarief versperrings tot handel uit te skakel. Verdermeer mag lede ook nie nuwe nie-tarief versperrings tot handel wat verband hou met inter-SAOG handel of dit beïnvloed, afdwing nie.

Die mees toepaslike Suid-Afrikaanse wetgewing in die konteks van SFS maatreëls en in hierdie studie is as volg: *Agricultural Pests Act* 36 of 1983; *Agricultural Products Act* 119 of 1990; die *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947; *Liquor Products Act* 60 of 1989; *Meat Safety Act* 40 of 2000; *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972; *Medicines and Related Substances Act* 101 of 1965; en die *National Regulator for Compulsory Specifications Act* 5 of 2008.

Die doel van hierdie studie is om vas te stel tot watter mate die Suid-Afrikaanse regsraamwerk voldoen aan die vereistes in terme van die SADC SPS Aanhangsel tot die Protokol op Handel.

**Sleutelwoorde:** Internasionale standaardstellingsliggame (ILL's); nie-tarief versperrings tot handel; sanitêre- en fitosanitêre maatreëls (SFS); Suid-Afrika; Suider-Afrikaanse Ontwikkelingsgemeenskap (SAOG); Wêreldhandelsorganisasie (WHO).

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## Abbreviations

APHFS	Agricultural Production, Health and Food Safety [a branch of the Department of Agriculture Forestry and Fisheries]
CAC	Codex Alimentarius Commission
CCAFRICA	Codex Alimentarius Committee for Africa
CCFFFP	Codex Alimentarius Committee on Fish and Fishery Products
CCFICS	Codex Alimentarius Committee on Food Import and Export Inspection and Certification Systems
DAFF	Department of Agriculture, Forestry and Fisheries
DAIC	Department of Agriculture, Forestry and Fisheries Directorate: Agricultural Input Control
DIRCO	Department of International Relations and Cooperation
DoH	Department of Health
DPH	Directorate Plant Health
DTI	Department of Trade and Industry
EU	European Union
FAI	Food and Associated Industries
FAO	Food and Agriculture Organization
FMD	Foot-and-mouth disease
FSQA	Food Standard Quality Assurance
GATT	General Agreement on Tariffs and Trade
GMO	Genetically modified organism

HACCP	Hazard Analysis and Critical Control Points
IAPSC	Inter-African Phytosanitary Council
IPPC	International Plant Protection Convention
ISSB	International standard-setting body
NEP	National enquiry point
NNA	National Notification Authority
NPPOZA	National Plant Protection Organisation of South Africa
NRCS	National Regulator for Compulsory Specifications
NTB	Non-tariff barrier to trade
NTM	Non-tariff measure
OIE	World Organisation for Animal Health
PRA	Pest risk analysis
RPPO	Regional Plant Protection Organisation
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADC PT	Southern African Development Community Protocol on Trade
SADC SPSCC	Southern African Sanitary and Phytosanitary Coordinating Committee
SADC SPS	Southern African Development Community Sanitary and Phytosanitary Annexure to the Protocol on Trade
SARS	South African Revenue Service
SCTF	SADC Sub-Committee on Trade Facilitation

SPS	Sanitary and phytosanitary measures
SPS NTM	Sanitary and phytosanitary and non-tariff measure
TAHAC	Terrestrial Animal Health Code
TIDCA	Trade, Investment and Development Cooperation Agreement
UN	United Nations
WAHID	World Animal Health Information Database
WHO	World Health Organization
WTO	World Trade Organization
WTO SPS	World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measure
WTO TBT	World Trade Organization technical barrier to trade agreement

## 1 Introduction to Sanitary and Phytosanitary measures

Sanitary and Phytosanitary measures<sup>1</sup> are measures aimed at the protection of human, animal and plant life and health within specified territories from the risks associated with the introduction and spread of pests and diseases into such territories through trade. The World Trade Organisation<sup>2</sup> developed an agreement on the application of SPS measures, the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures,<sup>3</sup> to which the majority<sup>4</sup> of countries are bound. "SPS measures" is a very broad term defined by the WTO as:

Any measure applied:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.<sup>5</sup>

'SPS measures' are, therefore, defined in terms of the purpose of the measure.<sup>6</sup> South Africa is a member of the Southern African Development Community known as 'SADC'. In SADC, SPS measures are provided for in the SADC Sanitary and Phytosanitary Annexure to the Protocol on Trade of 1996.<sup>7</sup> The SADC SPS measures are measures, as in the case of the WTO, aimed at the protection of human, animal and plant life. In terms of the aforementioned annexure, the protection afforded by these measures includes protection against the risks that may arise through the entry and spread of pests, disease, disease-carrying organisms or disease-causing organisms into a territory of a member state.<sup>8</sup> The international framework in terms of SPS measures is encapsulated in the interrelation between

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1 Hereinafter SPS measures.

2 Hereinafter WTO.

3 Hereafter WTO-SPS.

4 As of 26 June 2014 there were 160 members; WTO Date Unknown [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

5 WTO-SPS Annexure A (1).

6 McNeil DE "The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban" *Virginia Journal of International Law* Volume 39 112.

7 Hereinafter "SADC SPS".

8 SADC SPS A1(16)(a).

the WTO SPS and the international standard-setting bodies<sup>9</sup> of the Codex Alimentarius Commission<sup>10</sup>, World Organisation for Animal Health<sup>11</sup> and International Plant Protection Convention.<sup>12</sup> These ISSBs facilitate the effective application of the main elements of the relevant SPS agreements, especially harmonisation and equivalence, by establishing scientifically justified standards on which members may base their SPS measures. One of the purposes of the WTO-SPS and SADC-SPS agreements is to avoid a situation in which, under the guise or pretence of health, food and animal safety standards, international trade is unjustifiably hindered<sup>13</sup> or actual damage is done.

Reduction in trade, trade diversion and import prohibition are three ways in which SPS measures may negatively affect trade.<sup>14</sup> SPS measures, quantitative restrictions, rules of origin, customs procedures, technical standards, poor infrastructure, state trading enterprises and dumping and safeguard measures are the main measures misused to serve as NTB's in the SADC Free Trade Area.<sup>15</sup> Members of SADC are required to promote competition and prohibit unfair business practices within the community.<sup>16</sup> NTB's are measures other than import and export duties which act as barriers to trade. SPS measures should not be a means by which to capriciously provide protection for domestic industries through excluding imported products with unattainably, or impractically high and unjustifiable measures. SPS measures also apply to domestically produced products which affect the health, life or wellbeing of plants animals and humans.

The SADC Protocol on Trade 1996<sup>17</sup> stipulates that policies and measures are to be implemented by members to eliminate existing forms of NTBs. Additionally members may not enforce new NTB's affecting or related to intra-SADC trade.<sup>18</sup>

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9 Hereinafter ISSBs.

10 Hereinafter Codex.

11 Hereinafter OIE.

12 Hereinafter IPPC.

13 Osiemo *Harmonization of Sanitary and Phytosanitary Standards* 4.

14 Osiemo *Harmonization of Sanitary and Phytosanitary* 4.

15 Ephraim *The Regulation of Non-Tariff Barriers to Trade* 24 – 37.

16 SADC-PT A25.

17 Hereafter SADC-PT.

18 SADC-PT A6.

The purpose of this study is to establish to what extent the South African legal framework complies with its obligations in terms of the SADC SPS Annexure to the Protocol on Trade.

### **1.1 Overview of Dissertation**

In order to answer the research question, this dissertation begins with an overview of the WTO-SPS, NTBs and ISSBs in Chapter 1. The reason for this is that the SADC SPS is, to some extent, both in purpose and in wording, almost identical to the WTO SPS. One of the objectives of the SADC-SPS is to enhance member state implementation of the WTO-SPS.<sup>19</sup> It is therefore necessary first to provide context to the WTO-SPS. This overview is followed by the role and function of ISSBs. ISSBs and their role are essential to an understanding of how SPS measures are established and their potential role as an NTBs. Therefore, Chapter 1 also explains what NTBs are. Chapter 2 deals with the SADC-SPS in depth, and identifies the obligations and commitments with which South Africa has to comply. Chapter 3 summarises the South African legislation related to SPS measures. Areas in which there is clear compliance or non-compliance are identified and discussed, as is the *Draft Sanitary and Phytosanitary Strategy of 2014*. Chapter 4 briefly discusses the situation regarding SPS measures, NTBs and technical barriers to trade (TBT). The chapter also deals with the scientific justification of SPS measures, especially in risk determination, because of the importance of this justification in SPS measures and the emphasis placed on it in the agreements. The preceding chapters provide context to the issues raised in Chapter 4. That is why this discussion is included only after the legislative framework has been examined. Chapter 5 deals with SPS measures as NTBs and South Africa's commitment as a SADC member state to removing existing NTBs.

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<sup>19</sup> SADC-SPS A2(2).

## **1.2 The World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures**

### **1.2.1 Brief History of the WTO SPS**

The WTO was established in 1995 and is based in Geneva. It was established to provide an administration framework for the General Agreement on Tariffs and Trade (GATT)<sup>20</sup> which had, since 1947, facilitated trade and promoted the efficient exchange of goods through the rules it provided.<sup>21</sup> GATT is:

Part of a wider post Second War effort to establish key multilateral institutions that would contribute to more harmonious relations across nations.<sup>22</sup>

The WTO's main objective is to ensure that trade flows predictably and freely.<sup>23</sup> The WTO serves as a multilateral trade negotiation forum,<sup>24</sup> and is often central in the facilitation of agreements among members<sup>25</sup> and the administration of dispute settlement.<sup>26</sup> It has secured trade-related rules at a global level.<sup>27</sup> All the members of SADC are also members of the WTO.<sup>28</sup> The WTO-SPS is a product of the GATT Uruguay Round.

### **1.2.2 Overview of the basic rights and obligations of Member States under the WTO-SPS**

Local or regional SPS measures may not be inconsistent with the provisions of the WTO-SPS. To the extent that they comply with the WTO requirements, SPS measures may be implemented by members to protect human, animal or plant life and/or health.<sup>29</sup> Specific elements make up the basic rights and obligations under the WTO-SPS, which apply to the signatories to the agreement.

Members have a right to implement SPS measures. The application of this right is limited to *necessary* measures based on scientific principles for which there is

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20 Kelly *The Impact of the WTO* 1.

21 Schroder *Harmonisation* 10.

22 Mavroidis *Trade in Goods* 1.

23 Schroder *Harmonisation* 1.

24 Oosthuizen *The Southern African Development Community* 153.

25 Oosthuizen *The Southern African Development Community* 153.

26 Oosthuizen *The Southern African Development Community* 153.

27 Schroder *Harmonisation* 1.

28 Oosthuizen *The Southern African Development Community* 152.

29 WTO-SPS A2(1) and (2).

sufficient scientific evidence<sup>30</sup> and may not be inconsistent with the provisions of the agreement.<sup>31</sup> There is a duty to ensure that the SPS measures applied do not amount to disguised trade restrictions on international trade<sup>32</sup> and are not arbitrarily applied or unjustifiably discriminatory.<sup>33</sup> An SPS measure applied by WTO members in conformity with the provisions under the WTO SPS is:

presumed to be in accordance with the obligations of the members under the provisions of GATT 1994 which relate to the use of SPS measures in particular the provisions of Article XX(b).<sup>34</sup>

The full responsibility of observing the measures within the WTO-SPS agreement lies with the members.<sup>35</sup> Positive measures and mechanisms are to be implemented and the development of non-governmental entities within the territory and regional bodies are required to be compliant with the provisions of the agreement.<sup>36</sup> NGOs may only be relied on if their standards and procedures are in accordance with the agreement.<sup>37</sup> In the event of a dispute, the provisions of Article 11<sup>38</sup> of the WTO-SPS apply. This is discussed in 1.1.3.9 hereunder.

### 1.2.3 *The main principles of the WTO-SPS*

The WTO SPS contains a number of principles fundamental to the successful application of the concept of SPS measures and the harmony that the treaty strives

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30 WTO SPS A2(2).

31 WTO SPS A2(1).

32 WTO SPS A2(3).

33 WTO SPS A2(3).

34 WTO SPS A2(4); GATT 1994 XX (b) Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health.

35 WTO-SPS A13.

36 WTO-SPS A13.

37 WTO-SPS A3.

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

to bring about in terms of economic functionality and protection of animals, human and plant life and health. The principles of the treaty most pertinent to the theme of this dissertation are discussed briefly below. The extent to which the South African legal framework complies with and fulfils South Africa's commitments under the Sanitary and Phytosanitary Annexure to the SADC Protocol on Trade, including its commitment not to use SPS measures as NTBs to trade, is the further context within which the principles are discussed.

### 1.2.3.1 Harmonization

Members are required to *base* their SPS measures either on international standards, guidelines or recommendations.<sup>39</sup> There is a rebuttable presumption<sup>40</sup> that SPS measures are consistent with GATT 1994 if they *conform* to the required standards required by WTO-SPS.<sup>41</sup> These standards are found in the relevant ISSBs (ie, Codex, OIE and IPPC). Guidelines, recommendations and the role of ISSBs will be discussed in more detail below.

It is important that the purpose of harmonisation is understood.

The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both "necessary to protect" human life or health and "based on scientific principles", and without requiring them to change their appropriate level of protection.<sup>42</sup>

The WTO SPS agreement was first tested in the case concerning hormone-treated beef imports and exports between the European Union, Canada and the United States.<sup>43</sup> The European Union<sup>44</sup> had placed a ban on the import of hormone-treated beef.<sup>45</sup> The dispute had already begun in 1987 but the ban remained after the GATT dispute resolution process had not resolved the matter.<sup>46</sup> Only in 1996 was the issue

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39 WTO SPS A3(1).

40 *Appellate Body Report, Canada – Continued Suspension and US – Continued Suspension* WT/DS321/AB/R page 223 para 532; WTO date unknown  
[http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm).

41 WTO SPS A3(2).

42 EC-Hormones para 177.

43 Kelly *The Impact of the WTO* 68.

44 Hereinafter EU.

45 Kelly *The Impact of the WTO* 68.

46 Kelly *The Impact of the WTO* 68.

re-challenged at the WTO.<sup>47</sup> Ultimately, the matter ended up before an Appellate Body of the WTO, which clarified a number of issues regarding the interpretation and understanding of the WTO SPS. It held that hormones fell under the classification of matters within the scope of SPS measures, since SPS measures included:

[m]easures applied 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.<sup>48</sup>

Higher SPS measures are allowed, despite the objective of harmonization, where scientific justification exists.<sup>49</sup> Such measures should be in accordance with Article 5 (1) to (8)<sup>50</sup>, and not inconsistent with other provisions of the agreement.<sup>51</sup> Members

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47 Kelly *The Impact of the WTO* 68.

48 WTO-SPS, Annexure A, "Definitions" (1); SADC-SPS A 1 (16).

49 WTO-SPS A 3(3).

50 *Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection*: 1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations. 2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment. 3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks. 4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects. 5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of A 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves. 6. Without prejudice to paragraph 2 of A 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility. 7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time. 8. When a

are required to promote the development and review of standards, guidelines and recommendations of international organisations, especially but not limited to Codex, IPPC and OIE.<sup>52</sup> The implementation of this requirement is dependent on the member's resources.<sup>53</sup>

### 1.2.3.2 Equivalence

The difference between harmonisation and equivalence is clearly illustrated by Schroder:<sup>54</sup>

Harmonization is one way of facilitating trade and its goal of uniformity of trade measures. Equivalence, by contrast, is based on the fact that regulatory goals in relation to, for example, safety and health, may be fulfilled by the use of different kinds of measures. Thanks to this tool trade barriers can be removed and products can be accepted on the basis that they fulfil the regulatory objectives of the country of destination.<sup>55</sup>

The equivalence element of the agreement is relatively straightforward and easily understood. It requires that:

[m]embers shall accept the sanitary and 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 members appropriate level of sanitary and phytosanitary protection.<sup>56</sup>

Therefore, South Africa as an importer of an agricultural commodity from another WTO member state, for example, is required to accept the SPS standards of that member state for the specific commodity as equivalent if the member state can objectively prove that the same SPS levels and resultant protection are provided by its standards. It is likely that the process of accepting another state's measures as equivalent is a slow process. The importing member may request access to

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

51 WTO-SPS A 3(3).

52 WTO-SPS A 3(4).

53 WTO-SPS A 3(4).

54 Schroder *Harmonization*.

55 Schroder *Harmonization* 3.

56 WTO-SPS A 4(1).

information and an opportunity for testing and inspection where, for purposes of equivalence, a dispute or query arises.<sup>57</sup> Members are encouraged to enter into bilateral and multilateral agreements that recognise the equivalence of specific SPS measures.<sup>58</sup>

The WTO SPS committee stated in the "Decision on Equivalence", which was last revised in 2004, that equivalence required<sup>59</sup> "acceptance of alternative measures that meet an importing members appropriate level of sanitary or phytosanitary protection" in the preamble.<sup>60</sup> The decision goes on to state:

Equivalence can be accepted for a specific measure or measures related to a certain product or categories of products, or on a system-wide basis. Members shall when so requested, seek to accept the equivalence of a measure related to a certain product or category of products.<sup>61</sup>

Paragraphs 1 to 4 of the Decision on Equivalence set out the procedure involved in recognising equivalence.<sup>62</sup> The importer is expected to respond "in a timely manner" in its consideration of the exporters' potentially equivalent measures.<sup>63</sup> Six months is normally accepted as the timeframe.<sup>64</sup> It is the exporters' duty to provide the information, which is based on scientific and technical facts in the exporters' objective demonstration of equivalence.<sup>65</sup> The importer should analyse the information with which it is presented.<sup>66</sup>

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57 WTO SPS A 4(1).

58 WTO SPS A 4(2).

59 Decision on Equivalence 23 July 2004 (G/SPS/19/Rev.2); WTO Date Unknown [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm).

60 WTO Preamble Date Unknown [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm); Decision on Equivalence, 23 July 2004 (G/SPS/19/Rev.2).

61 WTO Date Unknown [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/sps\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/sps_01_e.htm); Decision on Equivalence, 23 July 2004 (G/SPS/19/Rev.2) Para 1.

62 Decision on Equivalence 23 July 2004 (G/SPS/19/Rev.2).

63 Decision on Equivalence 23 July 2004 (G/SPS/19/Rev.2) Para 3.

64 Decision on Equivalence 23 July 2004 (G/SPS/19/Rev.2) Para 3.

65 Decision on Equivalence 23 July 2004 (G/SPS/19/Rev.2) Para 4.

66 Decision on Equivalence 23 July 2004 (G/SPS/19/Rev.2) para 7.

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

SPS measures can be provisionally adopted where there is not sufficient scientific evidence.<sup>67</sup> The requirement for provisional adoption is that the provisional SPS measure must be reviewed within a reasonable time. This is done once the necessary additional information has been obtained, allowing for an effective review process.<sup>68</sup> Certain risk assessment techniques exist to determine the need for protection of an importing country. Techniques have been developed by OIE, IPPC and Codex, and should be taken into account.<sup>69</sup> The WTO-SPS lists the following as factors to consider in the assessment of risk:

available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.<sup>70</sup>

Article 5(3) again lists the following three sub-factors under the heading "relevant economic factors":

the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.<sup>71</sup>

One of the objectives of the WTO-SPS is to minimise negative trade effects.<sup>72</sup> Furthermore, it aims to avoid arbitrary or unjustifiable distinctions if they result in discrimination or disguised trade restrictions on international trade.<sup>73</sup> Taking into account technical and economic feasibility,<sup>74</sup> SPS measures may not be more trade restrictive than required.<sup>75</sup> This does not, however, prejudice Article 3(2).<sup>76</sup>

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67 WTO SPS A 5(7).

68 WTO SPS A 5(7).

69 WTO SPS A 5(1).

70 WTO-SPS A 5(2).

71 WTO-SPS A 5(3).

72 WTO SPS A 5(4).

73 WTO SPS A 5(5).

74 WTO SPS A 5(6).

75 WTO SPS A 5(6).

76 WTO SPS A 3(2): Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect

A member may request an explanation if it believes that there is an unjustified constraint on its exports due to the SPS measure imposed by another member.<sup>77</sup>

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

Members are required to adapt SPS measures according to specific area characteristics in which they function. Specific

diseases, pests, the existence of eradication or control programmes and appropriate criteria or guidelines which may be developed by the relevant international organizations<sup>78</sup>

are factors to be taken into account in establishing SPS measures of a specific region.<sup>79</sup> Pest- and disease-free areas are recognised and determined by the specific factors indicating the area in which such a state of affairs exists. This can be done through the use of, for example, geography, ecosystems, epidemiological surveillance and the effectiveness of SPS controls.<sup>80</sup>

Exporters bear the onus of proving the disease- or pest-free nature of their territory. Evidence in proof thereof must be provided, along with reasonable access to the necessary information and documentation to the importing member. Such access is granted upon request.<sup>81</sup>

#### 1.2.3.5 Transparency

Transparency is dealt with extensively in Annexure B of the SADC-SPS. The annexure contains detailed provisions regarding the publication of regulations, notification procedures and general reservations. Members need to issue notifications of changes in SPS measures in accordance with the annexure.<sup>82</sup>

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human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

77 WTO SPS A 5(8).

78 WTO-SPS A 6(1).

79 WTO SPS A 6(1).

80 WTO SPS A 6(2).

81 WTO SPS A 6(3).

82 WTO SPS A 7.

### 1.2.3.6 Control, Inspection and Approval Procedures

Annexure C of the SADC-SPS details the provisions relating to control, inspection and approval. Members are required to observe such procedures.<sup>83</sup>

### 1.2.3.7 Technical assistance

More developed members of the WTO provide developing member states with technical assistance through bilateral agreements or international organisations. The developed member provide technical assistance to less developed members through, for example, advice, credits, donations and grants, including the establishment of national regulatory bodies processing technology, research and provision of infrastructure.<sup>84</sup>

### 1.2.3.8 Special and Differential treatment

Developing countries, especially those that are least developed, have special needs. This must be taken into account in preparing and applying SPS measures.<sup>85</sup> Timeframes within which to comply should be longer for developing countries.<sup>86</sup> Upon request, developing countries may apply for time limit exceptions in whole or in part.<sup>87</sup> This may be granted by the Committee on Sanitary and Phytosanitary Measures. Developing countries are encouraged to participate actively in the international organisations relevant to SPS measures.<sup>88</sup> The purpose thereof is to have a broader representation of the interests of developing countries. If developing countries are active in the ISSBs, their interests will be better represented, and potential issues will be dealt with more fittingly.

### 1.2.3.9 Dispute resolution

Unless otherwise provided, articles XXII<sup>89</sup> and XXIII<sup>90</sup> of GATT 1994 apply to dispute resolution and consultations.<sup>91</sup> In the event that the dispute concerns scientific or

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83 WTO-SPS A 8.

84 WTO SPS A 9.

85 WTO SPS A 10(1).

86 WTO SPS A 10(2).

87 WTO SPS A 10(3).

88 WTO SPS A 10(4).

89 A XXII: Consultation 1 Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such

technical issues, experts – in consultation with the parties involved – advise the panel. The WTO SPS does not impair the rights of its members. The agreement states that:

Nothing in this agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organisations or established under any international agreement.<sup>92</sup>

An advisory technical experts group may be established if requested by the parties.<sup>93</sup> Alternatively, the ISSB relevant to the dispute may be consulted (ie, Codex, OIE or IPPC).<sup>94</sup> On 16 October 2014 South Africa raised the citrus black spot issue between South Africa and the EU with the WTO's SPS Committee.<sup>95</sup> South Africa alleges that there is no scientific consensus supporting the EU's argument, and that the EU is

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representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement. 2. The contracting parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

90 A XXIII: Nullification or Impairment: 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it. 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this A, the matter may be referred to the contracting parties. The contracting parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The contracting parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the contracting parties consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

91 SPS-WTO A 11(1).

92 SPS-WTO A 11(3).

93 SPS-WTO A 11(2).

94 SPS-WTO A 11(2).

95 DTI 16 October 2014 <http://www.thedti.gov.za/editmedia.jsp?id=3161>.

being protectionist.<sup>96</sup> If the matter becomes official, South Africa will be the first African country to act as a complainant at the WTO. In the past a number of African countries have been involved as third parties.

### 1.3 International Standard Setting Bodies

#### 1.3.1 Introduction

The WTO-SPS does not define the term 'standard'. It only defines 'international standards, guidelines and recommendations'.<sup>97</sup> SPS measures are divided into three focus areas, each covered by a different ISSB. The three main ISSBs are OIE (animals), IPPC (plants) and Codex (food safety), and each ISSB deals with a different form of SPS measure. SPS measures are decided on by a member state, usually under the guidelines set out by the ISSB concerned. Applying an international standard is not compulsory, either in the direct wording of the WTO-SPS or implied through the interpretation thereof.<sup>98</sup> The reason why the WTO relies on ISSBs OIE, IPPC and the Codex as its SPS standard-setting bodies is because "the WTO is not a scientific and technical organisation".<sup>99</sup> It only provides the legal framework.<sup>100</sup>

The Appellate Body made the distinction in the *EC Hormones*<sup>101</sup> case between the terms 'based on' and 'conforms to'. The Appellate Body stated as follows:

The ordinary meaning of 'based on' is quite different from the plain or natural import of 'conform to'. A thing is commonly said to be 'based on' another thing when the

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96 DTI 16 October 2014 <http://www.thedti.gov.za/editmedia.jsp?id=3161>.

97 Schroder *Harmonization* 8; WTO SPS Annexure A (3): International standards, guidelines and recommendations (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice; (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics; (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

98 Schroder *Harmonization* 8.

99 Thiermann *Preventative Veterinary Medicine* 67 (2005) 102.

100 Thiermann *Preventative Veterinary Medicine* 67 (2005) 102.

101 *Appellate Body Report EC Hormones* para 163.

former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter. In contrast, much more is required before one thing may be regarded as 'conform[ing] to' another: the former must 'comply with', 'yield or show compliance' with the latter. The reference of 'conform to' is to 'correspondence in form or manner', to 'compliance with' or 'acquiescence', to 'follow[ing] in form or nature'. A measure that 'conforms to' and incorporates a Codex standard is, of course, 'based on' that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.<sup>102</sup>

SPS measures are rightfully used by member states as a means of protecting a territory from the spread or risk of pests and disease affecting the wellbeing of animal, plant and human life, through the application of scientifically based standards as a requirement for entry into a territory. This is, of course, done under the simultaneous consideration of international and regional obligations to which the country is required to adhere. Focus in this research is on WTO-SPS, SADC-PT, SADC-SPS. Additionally, there is the consideration of SPS measures in the context of the promotion of competition and prohibition of unfair business practices within the community.<sup>103</sup> Both regionally and internationally, sectors of industry and trade, especially those directly related to import and export of goods, are affected through the application of different SPS measures. This is more specifically of relevance in the discussion on SPS measures as possible NTBs. From an international standpoint, one centralised website, information centre or place of reference does not exist that answers any of the enquiries related to SPS measures all at once. The different ISSBs are discussed separately.

### 1.3.2 World Organisation for Animal Health (OIE)

The OIE was initially known as the 'Office of International des Epizooties' but has since become known as the 'World Organisation for Animal Health' and the abbreviation 'OIE' has retained its use in practice.<sup>104</sup> The OIE's decisions are based exclusively on scientific findings.<sup>105</sup> Member countries designate delegates to represent them in the organisation, which is controlled by, and under the authority of, a World Assembly of Delegates.<sup>106</sup> Africa's OIE Regional Commission consists of

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102 Appellate body Report EC-Hormones para 163.

103 SADC PT A25.

104 OIE Date Unknown <http://www.oie.int/about-us/>.

105 OIE Date Unknown <http://www.oie.int/about-us/director-general-office/>.

106 OIE Date Unknown <http://www.oie.int/about-us/>.

52 members. South Africa and the other SADC Members are OIE members.<sup>107</sup> A conference at which technical items and regional co-operation in the control of animal diseases are discussed is held every second year.<sup>108</sup> The term of office of the bureaux is three years. The last election was held in May 2012.<sup>109</sup> At present Dr Neo Maitse (Botswana) is the OIE Sub-Regional Representative of the SADC countries.<sup>110</sup> The president for Africa's Regional Commission is currently Dr Marosi Molomo (Lesotho).

The OIE's main mission is

to improve the health and the welfare of animals all over the world regardless of the cultural practices or the economic situations in member countries.<sup>111</sup>

The OIE has six objectives. These are (i) transparency, (ii) scientific information, (iii) international solidarity, (iv) sanitary safety, (v) promotion of veterinary services, and (vi) food safety and animal welfare.<sup>112</sup> The standards set by OIE are, to a great extent, geographic.<sup>113</sup> They also apply foremost to live animals and the products originating from them.<sup>114</sup>

### 1.3.2.1 Transparency

The OIE website is relatively user-friendly and contains all the information required to make an informed decision regarding animal health; for example, the site provides links to the World Animal Health Information Database (WAHID), which is used for dissemination,<sup>115</sup> and an e-mail link.<sup>116</sup> Transparency is an integral part of both the WTO SPS and the SADC SPS. As a member of OIE, South Africa undertakes to

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107 OIE Date Unknown  
[http://www.oie.int/fileadmin/Home/eng/About\\_us/docs/pdf/2010\\_Commission\\_Afrique\\_A.pdf](http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/2010_Commission_Afrique_A.pdf).

108 OIE Date Unknown <http://www.oie.int/about-us/wo/regional-commissions/>

109 OIE Date Unknown  
[http://www.oie.int/fileadmin/Home/eng/About\\_us/docs/pdf/2010\\_Commission\\_Afrique\\_A.pdf](http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/2010_Commission_Afrique_A.pdf).

110 OIE Date Unknown <http://www.oie.int/about-us/wo/regional-representations/>.

111 OIE Date Unknown <http://www.oie.int/about-us/director-general-office/>.

112 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

113 Thompson et al "Balancing Livestock Production and Wildlife Conservation in and Around Southern Africa's Transfrontier Conservation Areas" 2013 *Transboundary and Emerging Diseases* 498.

114 Thompson et al 2013 *Transboundary and Emerging Diseases* 498.

115 Spreading of information to other countries upon the receipt of a report of a disease in a territory.

116 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

report the detection of an animal-related disease and provide information that includes its transmissibility to humans.<sup>117</sup> Examples of such diseases that were reported are rabies or foot-and-mouth disease in areas in which they have previously been unreported. Transparency as a principle applies regardless of whether the disease is one that occurs naturally or was introduced into the area deliberately.<sup>118</sup>

#### 1.3.2.2 Scientific information

Worldwide there are 277 laboratories and centres collaborating with the OIE which prepare guidelines for the control and eradication of diseases.<sup>119</sup> Three times a year a scientific and technical review is published further disseminating important scientific information relating to the eradication of animal diseases and disease control.<sup>120</sup>

#### 1.3.2.3 International Solidarity

International solidarity refers to the assistance provided to developing countries who do not have resources, among other things, for example in the form of technical expertise to apply the technical requirements associated with control and eradication operations. The purpose is to prevent or minimise loss of livestock from diseases that are controllable. This is especially important if such diseases also pose a risk to human health.<sup>121</sup>

#### 1.3.2.4 Sanitary Safety

Sanitary barriers must be justified, and protection from the introduction of pathogens and diseases should be allowed, within the bounds of such justifications.<sup>122</sup> The OIE publishes four main normative works. These are the (i) Terrestrial Animal Health Code; (ii) Manual of Diagnostic Tests and Vaccines for Terrestrial Animals; (iii) Aquatic Animal Health Code; and the (iv) Manual of Diagnostic Tests for Aquatic

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117 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

118 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>

119 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>

120 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>

121 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>

122 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>

Animals.<sup>123</sup> Through these publications the world trade of safe animal products is aided.<sup>124</sup>

#### 1.3.2.5 Promotion of Veterinary services

The OIE's focus in promoting veterinary services is to enable greater benefit from the WTO SPS, while simultaneously preventing animal and public health threats through the provision of support in the form of infrastructure and resources to developing countries.<sup>125</sup>

#### 1.3.2.6 Food Safety and Animal Welfare

There is an interrelationship and synergy between the OIE and Codex. The focus of the OIE is on protecting consumers from sources of risk at the time of or before the primary processing of animal products. It further endeavours to eliminate hazards prior to the slaughter of animals, ensuring a better guarantee of food safety.<sup>126</sup>

#### 1.3.3 *International Plant Protection Convention (IPPC)*

The IPPC "aims to protect cultivated and wild plants by preventing the introduction and spread of pests".<sup>127</sup> It was established in 1952 and there are 181 signatories to the agreement.<sup>128</sup> South Africa falls under the Regional Plant Protection Organisation (RPPO) of the Inter-African Phytosanitary Council (IAPSC).<sup>129</sup> South Africa has the National Plant Protection Organisation of South Africa (NPPOZA) which functions within the Department of Agriculture Forestry and Fisheries DAFF (Directorate: Plant Health). The UN's Agriculture Organization makes provision for the IPPC Secretariat.<sup>130</sup>

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123 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

124 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

125 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

126 OIE Date Unknown <http://www.oie.int/about-us/our-missions/>.

127 IPPC Date Unknown <https://www.ippc.int/about>.

128 IPPC Date Unknown <https://www.ippc.int/about>.

129 IPPC Date Unknown <https://www.ippc.int/partners/regional-plant-protection-organizations/inter-african-phytosanitary-council>.

130 IPPC Date Unknown <https://www.ippc.int/about>.

### 1.3.4 Codex Alimentarius Commission (Codex)

The Codex is focused on international food standards. It is described on its website<sup>131</sup> as follows:

The Codex Alimentarius Commission, established by FAO and [World Health Organization] WHO in 1963 develops harmonised international food standards, guidelines and codes of practice to protect the health of the consumers and ensure fair practices in the food trade. The Commission also promotes coordination of all food standards work undertaken by international governmental and non-governmental organizations.<sup>132</sup>

The Codex texts are available to the public on the Codex website.<sup>133</sup> A list of standards is available and downloadable from the same website. Food additives, veterinary drugs maximum residue levels, pesticide maximum residue levels and thermatic compilations are also available under "standards" on the official Codex website. Food fit for human consumption is essentially the focus of the Codex.<sup>134</sup> The Codex allows the use of Hazard Analysis Critical Control Points (HACCP) as a means of managing potential risks that would affect humans through the consumption of products to which they are exposed.<sup>135</sup>

### 1.4 SPS Measures as Potential Non Tariff Barriers to Trade

SPS measures are measures aimed at the protection of human, animal and plant life and health within specified territories from the risks associated with the introduction and spread of pests and diseases into such territories through trade. The definition extends to

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.<sup>136</sup>

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131 Codex Alimentarius Date Unknown <http://www.codexalimentarius.org>.

132 Codex Alimentarius Date Unknown <http://www.codexalimentarius.org/about-codex/en/>.

133 Codex Alimentarius Date Unknown <http://www.codexalimentarius.org/standards/en/>.

134 Thompson et al 2013 *Transboundary and Emerging Diseases* 498.

135 Thompson et al 2013 *Transboundary and Emerging Diseases* 498.

136 SADC SPS A1.

The nature of SPS measures is such that they are not uncommon and, in fact, it is quite likely that such measures may potentially become NTBs.<sup>137</sup> This is attributable to the nature of SPS measures, and the fact that their main purpose of protecting animal, plant and human life from the risks of pests and diseases. This makes them restrictive and, inevitably, a barrier to trade. SPS measures are barriers but whether they fall within the ambit of the definition of a NTB depends on the purpose of the specific SPS measure or the intention of the state imposing such a measure. It would be counter-productive for a country to allow the entry of risk-carrying goods that would possibly damage its own industry or population. Although SPS measures act as barriers in the usual grammatical sense of the word in that they require a certain standard to be satisfied before, for example, certain goods or animals may move into or within a territory, it does not necessarily make an SPS measure an NTB.

The WTO-SPS does not define an 'NTB'. An 'NTB' is defined in the SADC-PT as "any barrier to trade other than import and export duties".<sup>138</sup> The definition given by the SADC SPS is relatively simple. It is also potentially very wide. SPS measures are by their very nature protectionist in that their purpose is aimed at ensuring the protection of human, animal and plant life and health within a territory. It is widely accepted that whether or not they amount to NTBs depends on their scientific justification. For this reason, in the literature discussions surrounding SPS measures as NTBs are predominantly limited to the confines of scientific justification, and the concept of equivalence and harmonisation of SPS measures. Discussions in the literature are usually along the lines of the nature of the SPS measure of prohibiting trade through inexplicably high or unjustifiable measures. SPS measures are therefore very seldom discussed in a context extending further than the actual measures themselves.

Removing SPS measures as NTBs entirely is a requirement under the SADC PT.<sup>139</sup> In terms of the SADC PT, members of SADC should "refrain from imposing any new NTBs"<sup>140</sup> in terms of intra-SADC trade and:

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137 Defined in SADC PT as "any barrier to trade other than import and export duties".

138 SADC PT, "Definitions".

139 SADC PT A3(1)(b): *Elimination of Barriers to Intra-SADC Trade*. The process and modalities for the phased elimination of tariffs and non-tariff barriers shall be determined by the Committee of Ministers responsible for trade matters (CMT) having

Except as provided for in this Protocol, Member State shall, in relation to intra-SADC trade: (a) Adopt policies and implement measures to eliminate all existing forms of NTB's<sup>141</sup>

Accurately identifying NTBs and making the distinction between what is an NTB and what is an NTM are potentially obstacles to understanding their relation to SPS measures. An SPS measure is an NTM. The difference between an SPS measure remaining an NTM and or becoming an NTB is simply whether such a barrier can be justified scientifically by the state enforcing it or not. If the NTM is scientifically unjustifiable, it is an NTB. The SADC-SPS agreement and WTO-SPS agreement both acknowledge the fact that situations are likely to arise where one country has a higher standard than another and that in such circumstances the fairness of such measures can be proven through scientific evidence.

## **2 The SADC Sanitary and Phytosanitary Annexure to the Protocol on Trade.**

### **2.1 The development of SADC**

SADC was preceded by the Southern African Development Co-Ordination Conference (SADCC).<sup>142</sup> SADC was established in 1992 and in 2001 the SADC treaty of 1992 was amended.<sup>143</sup> There are now 14 SADC Member States.<sup>144</sup> The main objectives of SADC are:

The promotion of economic growth and socio economic development, aimed at eventually eradicating poverty, and the promotion and maintenance of peace, security, and democracy through regional co-operation and integration.<sup>145</sup>

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due regard for the following: (b) That the elimination of barriers to trade shall be achieved within a timeframe of eight (8) years from entry into force of this Protocol; SADC PT A6: *Non-Tariff Barriers*. Except as provided for in this Protocol, Member State shall, in relation to intra-SADC trade: (a) Adopt policies and implement measures to eliminate all existing forms of NTB's (b) Refrain from imposing any new NTB's.

140 SADC PT A6(b).

141 SADC-PT A6(a).

142 Pauwelyn J 2004 "Going Global, Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions" 2004 *Minnesota Journal of Global Trade* 231.

143 Oosthuizen *The Southern African Development Community* 99.

144 Oosthuizen *The Southern African Development Community* 39. SADC Member States: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

145 Oosthuizen *The Southern African Development Community: The Organisation, its policies and prospects* 39.

Originally, South Africa was not included in SADC, this has since changed and South Africa, along with three other Southern African Countries, became members of SADC after 1992.<sup>146</sup> The reason for South Africa's exclusion from the treaty was that during the apartheid era members intended to reduce their dependence on South Africa.<sup>147</sup> The SADC treaty is the "preferred arrangement" for southern African states that has emerged in Southern Africa and coexists with the Southern African Customs Union (SACU).<sup>148</sup>

### 2.1.1 South Africa and the SADC Protocol on Trade of 1996

South Africa is the dominant member state in terms of intra-SADC imports and exports.<sup>149</sup> The SADC-PT is an "instrument of implementation"<sup>150</sup> and carries the same force as the SADC treaty.

The Protocol intends to further liberalise intra-regional trade by creating mutually beneficial trade arrangements, thereby improving investment and productivity in the region. It advocates that Member States eliminate barriers to trade, ease customs procedures, harmonise trade policies based on international standards, and prohibit unfair business practices. The Protocol also sets out institutional arrangements for implementation and contains annexes detailing policies on Rules of Origin, customs cooperation, harmonisation of trade documentation, transit facilities, and trade development.<sup>151</sup>

In terms of the protocol, members had eight years from the date of entry into force in which to eliminate barriers to trade.<sup>152</sup> Article 6 of the SADC PT states that members shall in relation to intra-SADC trade:

- (a) Adopt policies and implement measures to eliminate all existing forms of NTB's.
- (b) Refrain from imposing any new NTB's.<sup>153</sup>

In the context of SPS measures, the WTO principles of harmonization, and equivalence are echoed in the SADC-PT.<sup>154</sup> Included in the SADC-PT is a direct

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146 Pauwelyn 2004 *Minnesota Journal of Global Trade* 231.

147 Pauwelyn 2004 *Minnesota Journal of Global Trade* 231.

148 Ng'ong'ola *Regional Integration and trade Liberalisation in the Southern African Development Community* 2000 *Journal of International Economic Law* 3 486.

149 Oosthuizen *The Southern African Development Community* 251-252.

150 SADC Treaty A 1: "protocol" means an instrument of implementation of this treaty, having same legal force as this treaty.

151 SADC Date Unknown [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Trade1996.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Trade1996.pdf).

152 SADC PT A 3(1)(b).

153 SADC-PT A 6.

154 SADC-PT A 16.

provision that members “shall implement measures within the community that prohibit unfair practices and promote competition.”<sup>155</sup> The SADC-PT came into force on the 25<sup>th</sup> of January 2001 although it had already been signed in 1996. There are various annexures to the Protocol, but the SADC-SPS on which this dissertation is focused was signed on the 7<sup>th</sup> of December 2012 and came into force late 2013.

## **2.2 Introduction to the SADC-SPS**

At first glance the SADC SPS resembles the WTO SPS. The SADC SPS<sup>156</sup> has five main objectives:

- (a) to facilitate the protection of human, animal or plant life or health in the territory of the Member States;
- (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 SPS matters;
- (e) to provide a forum for resolving trade related SPS issues.<sup>157</sup>

All SADC member states are also members of the WTO. The majority of the SADC-SPS provisions correspond almost directly with that of the WTO-SPS. Those provisions that overlap are those relating to harmonisation; equivalence; assessment of risk and determination of the appropriate level of SPS protection; adaptation to regional conditions, including pest- or disease-free areas or low pest or disease prevalence; transparency; control inspection and approval procedures; technical assistance; and dispute settlement. The administration of the SADC-SPS is different from that of the WTO-SPS, as are the provisions relating to transparency<sup>158</sup> and control, inspection and approval procedures.<sup>159</sup> These aspects will be discussed in Chapter 2.3. The SADC-SPS does not in any way affect SADC members’ rights in terms of the WTO-SPS regarding measures outside the scope of the annexure.<sup>160</sup>

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155 SADC-PT A 25.

156 SADC SPS A 2.

157 SADC-SPS A 2.

158 SADC SPS Appendix A.

159 SADC SPS Appendix B.

160 SADC SPS A 4.

The SADC-SPS applies to SADC member states where SPS measures directly or indirectly affect intra-SADC trade.<sup>161</sup> The SADC-SPS has two appendices, namely the "Transparency of Sanitary and Phytosanitary Regulations" (Appendix A) and "Control Inspection and Approval Procedures" (Appendix B). Both form an integral part of the SADC-PT and the SADC-SPS.<sup>162</sup> The SADC-SPS makes reference to the WTO-SPS three times. The WTO is first referred to in the objectives, where the SADC-SPS is introduced as a means of enhancing the implementation of the WTO-SPS in the SADC region.<sup>163</sup> It is mentioned for the second time in the general provisions regarding rights of members in which measures outside the scope of the SADC-SPS that fall within the WTO-SPS are excluded from being affected by the agreement.<sup>164</sup> In the third instance members affirm their rights and obligations that are already in existence under the WTO-SPS.<sup>165</sup>

### **2.3 Essential elements of the SADC-SPS**

The essential provisions of the SADC-SPS are largely identical in wording and in purpose to those of the WTO-SPS. The essential provisions, in the context of this dissertation, are harmonisation; equivalence; assessment of risk and determination of the appropriate level of SPS protection; adaptation to regional conditions, including pest- or disease-free areas or low pest or disease prevalence; transparency; control inspection and approval procedures; technical assistance; and dispute settlement.

#### *2.3.1 Harmonisation*

The SADC-SPS requires members to "where appropriate, work towards harmonisation of their mandatory requirements".<sup>166</sup> International standards guidelines and recommendations are incorporated into the provision on harmonisation. During the harmonisation of mandatory requirements, they are also to be taken into account "in accordance with their (the SADC members') international rights and

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161 SADC SPS A 3.

162 SADC SPS A 4(1).

163 SADC SPS A 2.

164 SADC SPS A 4(2).

165 SADC SPS A 5(1).

166 SADC SPS A 6(1).

obligations".<sup>167</sup> The wording is different from the WTO-SPS, which requires that members "shall base their SPS measures on international standards, guidelines or recommendations where they exist".<sup>168</sup> However, in essence, there is little difference in the practical requirements of the provision. Since all the SADC members, including South Africa, are members of the WTO, whether the SADC provision regarding harmonisation is followed or reference is made to the WTO-SPS, in both instances international standards, recommendations and guidelines will form the basis for their members' SPS measures.

SADC members are required to "make every effort to participate in relevant international organisations".<sup>169</sup> The SADC-SPS encourages the review of SPS measures and standards periodically and the presentation of a "common SADC position in these (international) organisations".<sup>170</sup> Member states may be mandated to embark on such participation.<sup>171</sup>

### 2.3.2 *Equivalence*

Bilateral and regional agreements between SADC members are encouraged in pursuance of equivalence of SPS measures.<sup>172</sup> The SADC SPS makes specific reference to the importing member state, taking the provision further into a more detailed and specific direction than that in the WTO SPS. Article 7 of the SADC SPS<sup>173</sup> states that the importing member state:

- (a) shall accept a sanitary or phytosanitary measure adopted or maintained by an exporting Member State as equivalent to its own where the exporting Member State, in cooperation with the importing Member State, provides to the importing Member State scientific evidence or other information, in accordance with risk assessment methodologies agreed on by the Members, to demonstrate objectively, that the exporting Member State's measures achieve the importing Member State's appropriate level of protection;
- (b) may, refuse to accept a sanitary or phytosanitary measure adopted or maintained by an exporting Member State as equivalent to its own where it has scientific basis to determine that the exporting Member State's measures does not achieve the importing Member State's appropriate level of protection; and

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167 SADC SPS A 6(1).

168 WTO SPS A 3.

169 SADC SPS A 6(2).

170 SADC SPS A 6(2).

171 SADC SPS A 6(2).

172 SADC SPS A 7(1).

173 SADC SPS A 7(2).

- (c) shall provide to the exporting Member State, on request, its reasons in writing for a determination made under subparagraph (b).<sup>174</sup>

The example used in explaining the WTO SPSs requirement relating to equivalence in paragraph 1.1.3.2 may be extended to illustrate the SADC SPS equivalence requirement. South Africa as the importing member state importing an agricultural commodity from, for example, Zambia (or any other SADC member) may require a certain SPS measure to be observed before allowing the commodity to be imported into South Africa. The SADC SPS article that focuses on equivalence is more extensively worded than the WTO SPS article.<sup>175</sup> An objective demonstration is required, but the objective demonstration is supposed to be based on agreed-upon risk assessment methodologies related to scientific or other information.<sup>176</sup> In the literature relating to SPS measures there is considerable support for the incorporation of "other information" to be used in conjunction with scientific justification in determining risk.<sup>177</sup> The onus of proving equivalence in the SADC SPS is still on the exporting member state (ie, Zambia in the above example). The risk assessment methodologies that have to be agreed upon by the members in the demonstration of equivalence should, in theory, reduce disputes regarding the outcome of the assessment at a later stage, since the assessment methodologies are mutually agreed on beforehand. Therefore, if, for example, Zambia cannot objectively demonstrate through the agreed-upon methodologies that their measures for the specific commodity are equivalent, then their only choice in exporting to South Africa is to meet the South African requirements. If, however, there is an objective demonstration of equivalence, South Africa seems to have no choice but to allow the import. The requirement in the SADC SPS is that a member state shall accept<sup>178</sup> the SPS measure equivalent if Zambia can objectively demonstrate its equivalence based on the agreed upon risk assessment methodologies.

### *2.3.3 Assessment of risk and determination of the appropriate level of SPS protection*

Risk assessment is defined as:

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174 SADC-SPS A 7(2).

175 SADC SPS A7; WTO SPS A4.

176 SADC SPS A 7(2).

177 Peel, Scott and Walker – discussed in Chapter 4.

178 SADC SPS A 7(2)(a).

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member State according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.<sup>179</sup>

SPS risk assessment and resultant SPS measures applied are required to be appropriate to the circumstances, and in accordance with international rights and obligations.<sup>180</sup> Therefore, risk assessment is dependent on the type of commodity or product in question, and the potential effects thereof. Risk assessment cannot be one standard procedure. It is adapted based on the commodity or product being assessed. The eight factors that are to be taken into consideration when determining what the risk to human, animal or plant life or health are as follows:

- (a) relevant scientific evidence;
- (b) relevant risk assessment techniques and methodologies developed by international organisations;
- (c) relevant processes and production methods;
- (d) relevant inspection, sampling and testing methods;
- (e) the prevalence of relevant diseases or pests, including the existence of pest-free or disease-free areas or areas of low pest or disease prevalence;
- (f) relevant ecological and other environmental conditions;
- (g) relevant treatments, such as quarantines;
- (h) relevant economic factors such as the potential damage in terms of loss of production or sales in the event of entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing member; and the relative cost-effectiveness of alternative approaches to limiting risks.<sup>181</sup>

Provisional SPS measures may be adopted where there is a lack of scientific evidence, and such measures may provisionally be based on the evidence that is available.<sup>182</sup> Information obtained from the relevant ISSBs may be used to form the basis for such provisional measures along with the available information.<sup>183</sup> A reasonable period<sup>184</sup> is allowed for review, revision and completion of the risk

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179 SADC-SPS A 1(15).

180 SADC SPS A 8.

181 SADC-SPS A 8(2).

182 SADC SPS A 8(3).

183 SADC SPS A 8(3).

184 SADC SPS A 8(3).

assessment after sufficient<sup>185</sup> information has been presented to complete the assessment.<sup>186</sup>

Phased application<sup>187</sup> of SPS measures and also specified exceptions for limited periods are allowed.<sup>188</sup> Phased application is typically allowed where a member would be able to achieve its appropriate level of SPS protection<sup>189</sup> but has not and where another member has requested it.<sup>190</sup> The export interests of the requesting member will be considered in reaching the decision to allow phased application.<sup>191</sup>

#### *2.3.4 Adaptation to regional conditions including pest or disease free areas or low pest or disease prevalence*

Different geographical areas have different SPS characteristics. SPS measures should be adapted accordingly.<sup>192</sup> Where the product originated and the area to where it is destined fall within the ambit of the consideration: "SPS characteristics of the area".<sup>193</sup> An area or region's SPS characteristics are assessed by examining various contributing factors to the region. These are, among others, the following:

- (a) the level of prevalence of specific diseases or pests;
- (b) the existence of eradication or control programmes; and
- (c) appropriate criteria or guidelines which may be developed by the relevant international organizations or by the SADC Sanitary and Phytosanitary Coordinating Committee.<sup>194</sup>

Similar to the requirement under the WTO SPS, factors such as "geography, ecosystems, epidemiological surveillance and the effectiveness of SPS controls in that area"<sup>195</sup> are used in the decision upon which SPS measures related to pest- and disease-free areas are based.<sup>196</sup> The onus of proving a pest- or disease-free area within a territory is on the exporting member state. The test is an objective one and,

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185 SADC SPS A 8(3).

186 SADC SPS A 8(3).

187 SADC SPS A 8(4).

188 SADC SPS A 8(4).

189 SADC SPS A 8(4).

190 SADC SPS A 8(4).

191 SADC SPS A 8(4).

192 SADC SPS A 9(1).

193 SADC SPS A 9(1).

194 SADC-SPS A 9(2).

195 SADC SPS A 9(3).

196 SADC SPS A 9(3).

additionally, the likelihood of these areas remaining disease- and pest-free has to be demonstrated.<sup>197</sup>

Testing, inspection and "other relevant procedures" may be executed by the importing state and the exporting state is required to give "reasonable access to its territory" to the importing member to conduct such tests.<sup>198</sup> Members are not barred from choosing to "adopt, maintain or apply different risk assessment procedures for a pest-free or disease-free area than for an area of low pest or disease prevalence."<sup>199</sup> The only provision is that it must be in accordance with the SADC SPS. Final determinations made relating to products from disease- and pest-free areas that differ from final determinations on products produced in low pest- and low disease-prevalent areas are allowed; again, so long as they are in conformity with the SADC SPS.<sup>200</sup> Additionally, the conditions relating to transportation and handling must be taken into account.

Products produced in areas that are pest or disease-free may not be given less favourable treatment than a product produced in another member states territory also produced in a pest- or disease-free area<sup>201</sup> where the level of risk posed by such product is the same.<sup>202</sup> An agreement whereby two member states set specific requirements in terms of products produced in areas considered low pest- or low disease-prevalent is permissible. The exporting member may request such an agreement from an importing member.<sup>203</sup>

Both regionally and internationally pest and disease-free areas or low pest- or disease-free-prevalent areas are frequently under debate among the industries or markets that they affect. Although pests and diseases are present in some states they are often under control in certain areas of that state and completely absent in others. For example, regionally the prevalence in certain SADC countries of foot-and-mouth disease (FMD) affects the movement of cattle and wildlife between areas, especially across borders. Some countries have both FMD-free areas and areas with

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197 SADC SPS A 9(4).

198 SADC SPS A 9(4).

199 SADC SPS A 9(5)(a).

200 SADC SPS A 9(5)(b).

201 SADC SPS A 9(6).

202 SADC SPS A 9(6).

203 SADC SPS A 9(7).

FMD prevalence within them.<sup>204</sup> South Africa and Zimbabwe have effectively used vaccination as a means of creating barrier zones.<sup>205</sup> This is effective in reducing the movement of FMD from FMD-infected zones into FMD-free zones.<sup>206</sup>

### 2.3.5 Transparency

Member states need to notify the SADC Secretariat of "laws, regulations, procedures, and requirements and any changes in their SPS measures".<sup>207</sup> The provisions required for notification and information are discussed in section 2.4 hereunder. The National Committee of the SADC Secretariat (Gaborone, Botswana) must also to be notified and informed of enquiry points.<sup>208</sup> The notifications are then circulated by the SADC Secretariat to the SADC SPS Coordinating Committee and the National Enquiry points.<sup>209</sup>

### 2.3.6 Control inspection and approval procedures

If requested, member states, under the procedures set down by international organisations, shall consider the relevant control, inspection and approval procedures of the other member state with a view to accepting them,<sup>210</sup> provided that these control, inspection and approval procedures would achieve the same outcomes as its own regulations.<sup>211</sup> Member states are required to review their "inspection, testing, certification and other relevant import and export approval systems or procedures".<sup>212</sup> These are to be reviewed so as to ensure reasonability and necessity to further the facilitation of traded products into their territory.<sup>213</sup>

SADC maintains a *SADC Seed Import/Export Manual*. Member states are required to adopt guidelines from it where appropriate.<sup>214</sup> The manual may be adapted to suit

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204 Henson and Loader "Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements" 2001 *World Development* 29(1) 94.

205 Smith JF "From Frankenfood to Fruitflies: Navigating the WTO/SPS" 2000 *UC Davis Journal of International Law* 6(1) 29.

206 Smith *UC Davis Journal of International Law Policy* 2000 6(1) 29.

207 SADC SPS A 10(1).

208 SADC SPS A 10(2).

209 SADC SPS A 10(3).

210 SADC SPS A 11(1).

211 SADC SPS A 11(1).

212 SADC SPS A 11(2).

213 SADC SPS A 11(2).

214 SADC SPS A 11(3).

other commodities that are subject to SPS measures.<sup>215</sup> A "product trace-back system" exists for the "notification of non-compliance of imported consignment for commodities subject to SPS measures".<sup>216</sup> Members are required to co-operate with this system, which draws on the guidelines of international organisations.<sup>217</sup>

### *2.3.7 Technical assistance and dispute settlement*

Technical assistance may be provided or "considered" by the importing member. This is often necessary where, due to the substantial investment required, the exporting member needs assistance if market access for this product is to be maintained or expanded.<sup>218</sup> Furthermore:

[t]he SADC Secretariat shall in consultation with the SADC Sanitary and Phytosanitary Coordinating Committee 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.<sup>219</sup>

Disputes regarding SPS measures are settled through the provisions of Article 32 of the SADC PT. The article provides as follows:

- (1) Member States shall endeavour to agree on the interpretation and application of this Protocol, and shall make every effort, through co-operation and consultation, to arrive at a mutually satisfactory agreement.
- (2) The settlement of any dispute among Member States shall, whenever possible, imply removal of a measure not conforming with the provisions of this Protocol or causing mollification or impairment of such provision.
- (3) Failing a settlement as provided in paragraph 2 of this Article, withdrawal of equivalent concession may be implemented by the Member State suffering the injury.
- (4) In case of disagreement, the Member States may take recourse to a panel of trade experts.
- (5) The appointment, composition, powers and functions of the panels of trade experts shall be determined by the CMT
- (6) As a last resort, disputes regarding the interpretation and application of this Protocol shall be settled in accordance with Article 32 of the Treaty.<sup>220</sup>

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215 SADC SPS A 11(4).

216 SADC SPS A 11(5).

217 SADC SPS A 11(5).

218 SADC SPS A 12(1).

219 SADC-SPS A 12(2).

220 SADC PT A 32 (1)-(6).

## **2.4 Administration of the SADC-SPS and its implementation**

In order to facilitate the administration of the SADC SPS and its provisions, a SADC Sanitary and Phytosanitary Coordinating Committee<sup>221</sup> was established. Its purpose is to:

promote transparency in the area of SPS measures, including overseeing the implementation of the SADC notification and counter notification process, with a view of identifying and resolving SPS problems between member states in order to prevent formal disputes.<sup>222</sup>

The SADC-SPS CC acts:

as a consultative forum for promoting the objectives of the Annex<sup>223</sup> and for strengthening cooperation between the regulatory agencies having responsibility for SPS measures.<sup>224</sup>

It is made up of a representative of every member states' National Committee on SPS Measures.<sup>225</sup> The SADC SPS CC has 19 specific functions, and reports to the SADC Trade Negotiating Forum. These functions are as follows:

- (a) To act as a forum for consultations and exchange of technical information relating to sanitary or phytosanitary issues;
- (b) Reviewing progress and monitoring the implementation of this Annex;
- (c) Cooperation and collaboration in the transfer of expertise in sanitary or phytosanitary issues amongst Member States;
- (d) Overseeing the implementation of SADC regional programs related to sanitary and phytosanitary measures;
- (e) Collaboration among interested Member States on specific sanitary or phytosanitary projects;
- (f) Identification of technical problems which might form the subject of joint projects on sanitary or phytosanitary issues;
- (g) Coordination, endorsement and harmonisation of SADC regional training and development activities in sanitary and phytosanitary related areas;
- (h) Provision of information on regional sanitary and phytosanitary related resources and services;
- (i) Coordinating the region's liaison with corresponding regional and international organisations in the field of sanitary and phytosanitary protection;
- (j) Coordinate, liaise and participate in SADC SQAM structures as necessary to facilitate accomplishment of standardization, conformity assessment and accreditation needs in regional sanitary and phytosanitary issues;
- (k) Establishment of communication channels and dissemination of information on regional sanitary and phytosanitary resources and services through the national enquiry points;

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221 Hereinafter: SADC SPS CC.

222 SADC-SPS A 14(4).

223 SADC-SPS.

224 SADC –SPS A 14(5).

225 SADC SPS A 14(1).

- (l) Establishment of Expert Working Groups in specific fields related to sanitary or phytosanitary Measures;
- (m) Organisation, coordination and promotion of regional conferences, workshops, seminars and exhibitions on subjects relevant to any SADC regional programme related to sanitary or phytosanitary standards;
- (n) Participation in international and regional standards setting organizations, where possible and coordinate efforts to present common SADC positions irrelevant international organizations;
- (o) Promotion and facilitation of greater private sector/industry participation in SADC sanitary and phytosanitary related activities;
- (p) Follow up international and regional developments on sanitary and phytosanitary measures that might have potential consequences on trade of SADC Member States and submit regular updates to Members through the SADC Trade Negotiating Forum.
- (p) Develop the guidelines and procedures for determining the equivalence of sanitary or phytosanitary measures;
- (q) Develop guidelines and procedures for determining the equivalence of risk assessment techniques and methodologies; and
- (r) Develop procedures to assist and monitor the process of harmonisation among Member States.<sup>226</sup>

After they have adopted the SADC SPS, members have 60 days within which to appoint their representative and establish their National Committee on SPS Measures,<sup>227</sup> including national enquiry points.<sup>228</sup> Decisions made by the SADC SPS CC are reached by consensus and meetings are scheduled as required.<sup>229</sup> South Africa has established its National SPS Committee and the Directorate: International trade within the DAFF is both the National Enquiry Point (NEP) and the National Notification Authority (NNA).<sup>230</sup> This was done in terms of South Africa's obligations under the WTO SPS. The SPS contact point is the Sub-Directorate: Sanitary and Phytosanitary Co-ordination, under the Directorate: Food and Export Standards of the DAFF.<sup>231</sup>

The SADC SPS is implemented by member states that are responsible for all the obligations under the annexure. Members are specifically required to "formulate and

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226 SADC SPS A 14(6).

227 SADC SPS A 14(2).

228 SADC SPS A 14(3).

229 SADC SPS A 14(7).

230 DAFF Date Unknown <http://www.daff.gov.za/daffweb3/Branches/Agricultural-Production-Health-Food-Safety/Food-Import-Export-Standards/> WTO SPS-Co-ordination.

231 DAFF Date Unknown <http://www.daff.gov.za/daffweb3/Branches/Agricultural-Production-Health-Food-Safety/Food-Import-Export-Standards/> WTO SPS-Co-ordination.

take available measures to enforce positive mechanisms to support the implementation of the provisions"<sup>232</sup> of the SADC SPS.

## **2.5 Transparency of SPS Regulations (Appendix A)**

### *2.5.1 Publication of Regulations and Enquiry points*

Regulations must be published promptly.<sup>233</sup> The time between publication and entry into force should be reasonable, unless urgent circumstances exist.<sup>234</sup> An enquiry point providing answers to interested members from other states should exist in every member state. The enquiry points should be able to provide information regarding relevant documentation related to the following:

- (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 State, 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 Annex, and the texts of such agreements and arrangements.<sup>235</sup>

It is, however, not clear exactly how accessible the information should be; for example, with what ease of access should an importer or exporter be able to access the information? Should an application be made or is it necessary in the modern use of websites and applications on devices that information be accessible on the Internet?

#### 2.5.1.1 Notification procedures

All notifications made to the SADC Secretariat must be made in English, Portuguese or French.<sup>236</sup> The SADC Secretariat must circulate copies of such notifications to all the SADC member states and international organisations that would be interested in

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232 SADC SPS A 15.

233 SADC SPS Appendix A 1

234 SADC SPS Appendix A 2.

235 SADC SPS Appendix A 3.

236 SADC SPS Appendix A 7.

their content.<sup>237</sup> Implementation at national level is the responsibility of each member state's National Committee on SPS Measures. The committee works in co-operation with NEPs in terms of this responsibility to implement the notification procedures set out in this appendix.<sup>238</sup> There is only one general reservation relating to confidentiality and the notification procedure and it reads as follows:

Nothing in this Annex shall be construed as requiring Member States to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.<sup>239</sup>

In the event of a situation where there is no guideline or the content thereof is "not substantially the same" as that of the international standards and guidelines or recommendations, the following is to be done: in the event that "the regulation may have a significant effect on trade of other member states"<sup>240</sup> the member state with the deficient guideline shall:

- (a) publish a notice at an early stage in such a manner as to enable interested Member States to become acquainted with the proposal to introduce a particular regulation;
- (b) notify other Member States, through the SADC Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
- (c) provide upon request of other Member States copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
- (d) without discrimination, allow reasonable time for other Member States to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.<sup>241</sup>

The above-mentioned steps may be omitted in the event that circumstances arise or threaten to arise urgently related to the protection of plant, animal or human health in a member state. The necessary omissions may be made, provided that the member state doing so:

- (a) immediately notifies other Member States, through the SADC Secretariat of the particular regulation and the products covered, with a brief indication of the

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237 SADC SPS Annexure A 8.

238 SADC SPS Annexure A 9.

239 SADC-SPS Annexure A 10.

240 SADC SPS Annexure A 5.

241 SADC SPS Annexure A 5.

- objective and the rationale of the regulation, including the nature of the urgent problem(s);
- (b) provides, upon request, copies of the regulation to other Member States;
  - (c) allows other Member States to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.<sup>242</sup>

## **2.6 Control inspection and Approval Procedures (Appendix B)**

Annexure B consists primarily of a list of requisites with respect to procedures in which SPS measures are checked to ensure their fulfilment.<sup>243</sup> The member states are required to ensure that with respect to those procedures that:

- (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
- (b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the applicant has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request the applicant is informed of the stage of the procedure, with any delay being explained;
- (c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances levels for contaminants in food, beverages or feedstuffs;
- (d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;
- (e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;
- (f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member State and should not be higher than the actual cost of the service;
- (g) the same criteria should be used in the setting up of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;
- (h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and

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242 SADC SPS Annexure A 6.

243 SADC SPS Annexure B 1.

- (i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified. Where an importing Member State operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants to food, beverages or feedstuffs, which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member State shall consider the use of a relevant international standard as the basis for access until a final determination is made.<sup>244</sup>

Assistance to facilitate production-level control of SPS measures is to be provided by the member state in whose territory such production takes place.<sup>245</sup>

### **3 The legislative framework in terms of SPS measures in South Africa**

South Africa's legislative framework relating to SPS measures consists of a number of Acts, the majority of which were in existence long before the WTO-SPS and SADC-SPS. There have been amendments to some of them, which update them to an extent, but there have been no substantial changes indicating a clear alignment with current developments in terms of the commitments and obligations under the WTO-SPS and SADC-SPS, and demand in the import and export industry. Chapter 2 provided an overview of the entire SADC-SPS. There are a number of requirements and obligations under the agreement that a member state is required to observe, adhere to or strive to meet. At the end of this chapter there is a summary of what is still outstanding and an analysis of the *Draft SPS Strategy of 2014* and its address of the outstanding obligations.

The most relevant legislation that will be discussed in Chapter 3, together with the elements of the SADC-SPS in the context of the commitments or obligations that South Africa is required to comply with, are the *Agricultural Pests Act* 36 of 1983; the *Agricultural Products Act* 119 of 1990; the *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947; the *Liquor Products Act* 60 of 1989; the *Meat Safety Act* 40 of 2000; the *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972; the *Medicines and Related Substances Act* 101 of 1965; and the *National Regulator for Compulsory Specifications Act* 5 of 2008

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244 SADC SPS Annexure B 1.

245 SADC SPS Annexure B 3.

### 3.1 Summary of SPS related legislation

#### 3.1.1 Agricultural Pests Act 36 of 1983

The *Agricultural Pests Act 36 of 1983*<sup>246</sup> operates on a national level, and is administered by the DAFF under the Directorate: Plant Health (DPH). The Act is implemented through the administration of executive officers designated by the Minister of Agriculture. The Act has been in existence since 1983, with 1992 being the most recent date of amendment.

The Act provides "for measures by which agricultural pests may be prevented and combated; and for matters related therewith".<sup>247</sup> Except under the specific provisions listed in the Act, the following may not be imported into South Africa without a permit:

- (a) Any plant, pathogen, insect, exotic animal, growth medium, infectious thing, honey, beeswax or used apiary equipment;
- (b) Anything determined by the minister by notice in the Gazette.<sup>248</sup>

Pests are prevented and combated by requiring, among other things, that a permit<sup>249</sup> for the specified controlled goods mentioned above be obtained, but also through the requirement that the presence of certain pests be reported.<sup>250</sup> There are consequences<sup>251</sup> and resultant sanctions if goods are imported contrary to the requirements of the Act. It is an offence to contravene the provisions of the Act or to fail to comply with an order made in terms thereof. Both fines and imprisonment are possible upon conviction.<sup>252</sup> There are circumstances under which exotic animals, pathogens or insects may be imported into South Africa.<sup>253</sup> This is when, according to the Minister, importation thereof is:

- (a) desirable in order to combat the occurrence of plants, pathogens, insects or exotic animals of a specified kind in the Republic;
- (b) otherwise in the interest of a specified branch of agriculture.<sup>254</sup>

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<sup>246</sup> Act 36 of 1983.

<sup>247</sup> *Agricultural Pests Act 36 of 1983*, Aim.

<sup>248</sup> *Agricultural Pests Act 36 of 1983*, s3.

<sup>249</sup> *Agricultural Pests Act 36 of 1983*, s3.

<sup>250</sup> *Agricultural Pests Act 36 of 1983*, s5.

<sup>251</sup> *Agricultural Pests Act 36 of 1983*, s4.

<sup>252</sup> *Agricultural Pests Act 36 of 1983*, s13.

<sup>253</sup> *Agricultural Pests Act 36 of 1983*, s3(5).

<sup>254</sup> *Agricultural Pests Act 36 of 1983*, s3(5).

Allowing the introduction of exotic animals or pathogens, is a manner in which the legislative framework meets the SADC SPS objective of facilitating the protection of human, animal or plant life or health<sup>255</sup> in South Africa. The purpose of an SPS measure is ultimately to protect animal or plant life or health within the territory.<sup>256</sup>

The Act specifically identifies certain pests that are to be reported if found to be present on land. These are flying locusts or *voetgangers* and red-billed quelea.<sup>257</sup> The minister prescribes the control measures<sup>258</sup> and may make regulations dealing with the following:<sup>259</sup>

- (a) the manner in which application shall be made for any permit or authority;
- (b) the ports of entry through which controlled goods shall be imported in terms of section (3) (a);
- (c) fees payable in terms of this Act;
- (d) the manner in which any notice, order or other document mentioned in this Act shall be or may be served;
- (e) the manner in which and the period within which an appeal shall be noted in terms of section 11, the officer by whom and the manner in which the refusal or conduct in question shall be investigated, the manner in which an appellant may submit information or evidence or make representations, whether personally or through a legal representative, and the preparation and submission of a report and recommendation to the Minister;
- (f) any matter required or permitted to be prescribed under this Act;
- (g) generally any matter which he may deem necessary or expedient to prescribe in order to further the objects of this Act, and the generality of the power conferred by paragraph (g) shall not be limited by the preceding paragraphs<sup>260</sup>

The following are regulations under the Act in place to regulate certain aspects related to the Act and SPS measures:

- Importation of controlled goods without permits: GNR. 109 of 27 January 1984
- Control measures to prevent and combat the spreading of pathogens, insects, and exotic animals: GNR. 110 of 27 January 1984
- Regulations: GNR. 111 of 27 January 1984
- Controlled goods in respect of which permits for importation may not be issued: GNR. 846 of 12 April 1985
- Control measures relating to cotton: GNR. 1902 of 12 September 1986
- Importation of controlled goods without a permit: GNR. 1013 of 26 May 1989

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255 SADC SPS A 2.

256 WTO SPS Annexure A (1).

257 *Agricultural Pests Act* 36 of 1983, s5.

258 *Agricultural Pests Act* 36 of 1983, s6.

259 *Agricultural Pests Act* 36 of 1983, s16.

260 *Agricultural Pests Act* 36 of 1983, s16 (a) to (g).

- Imports – Determination of genetically manipulated organisms as controlled goods: GNR. 584 of 22 March 1991
- Controlled goods in respect of which organisms may not be issued: GNR. 448 of 11 March 1994
- Control measure relating to fresh water crayfish: GNR. 1451 of 19 August 1994
- Tariffs for services provided by the Directorate: Plant Quality Control: GN 2814 of 27 November 1998
- Tariffs for services provided by the Directorate: Plant Production, Health and Quality: GNR. 636 of 21 May 1999
- Importation of controlled goods without a permit: GNR. 276 of 5 March 2004
- Proposed control measures: Amendment: GN 48 of 5 February 2010 (Government Gazette No. 32916)

Therefore, the Act contributes to the fulfilment of obligations and duties of South Africa under the SADC-SPS in the following ways: it helps facilitate the protection of plant, human and animal health<sup>261</sup> from pests. Although specifically related to agricultural pests – which would directly affect plants – animals and humans are also protected indirectly as the destruction of agricultural plants by pests will have an effect on animal and human food security. The Act specifically singles out locusts, *voetgangers* and red-billed quelea.

### 3.1.2 *Agricultural Product Standards Act 119 of 1990*

The *Agricultural Products Act 119 of 1990* falls under the administering department of the DAFF, namely the Directorate: Food Safety and Quality Assurance (FSQA).

The Act aims:

To provide for control over the sale and export of certain agricultural products, control over the sale of certain imported agricultural products; and control over other related products; and for matters connected therewith.<sup>262</sup>

The Act was recently amended in 1998 in terms of the *Agricultural Product Standards Amendment Act 63 of 1998*<sup>263</sup> and operates at a national level. The Minister of Agriculture is responsible for the regulations for the Act.<sup>264</sup>

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261 SADC SPS A 2(1)(a).

262 *Agricultural Product Standards Act 119 of 1990*.

263 Amends s1 of the *Agricultural Product Standards Act 119 of 1990* as follows: paragraph (a) inserts the definition of 'conveyance'; paragraph (b) inserts the definitions of 'import' and 'management control system'; and paragraph (c) substitutes the definition of 'officer'.

264 *Agricultural Product Standards Act 119 of 1990*, s15.

The Act grants the minister control over the sale of products,<sup>265</sup> exportation of products<sup>266</sup> and the prescription of distinctive marks.<sup>267</sup> These are the sections most

265 *Agricultural Product Standards Act* 119 of 1990, s3(1): Control over sale of products(1) The Minister may- (a) prohibit the sale of a prescribed product- (i) unless that product is sold according to the prescribed class or grade; (ii) unless that product complies with the prescribed standards regarding the quality thereof, or a class or grade thereof; (iii) unless the prescribed requirements in connection with the management control system, packing, marking and labelling of that product are complied with; [Sub-para. (iii) substituted by s. 3 (a) of Act 63 of 1998.] (iv) if that product contains a prescribed prohibited substance or does not contain a prescribed substance; and (v) unless that product is packed, marked and labelled in the prescribed manner or with the prescribed particulars; (b) determine that a prohibition referred to in paragraph (a) shall apply only to a prescribed category of persons or in a prescribed area, or exclude a prescribed category of persons or a prescribed area from such prohibition, or determine that a prohibition shall only apply under such other prescribed circumstances as the Minister deems necessary; and (c) authorize only the executive officer to exempt any person in writing, either entirely or partially, on the conditions which the executive officer deems necessary, from a prohibition referred to in paragraph (a), and the executive officer may grant such exemption either in general or in respect of a particular quantity of a product.

266 *Agricultural Product Standards Act* 119 of 1990, s4(1): Control over export of products (1) The Minister may- (a) prohibit the export from the Republic of a prescribed product unless each quantity of that product, intended for export, has been approved by the executive officer for that purpose; (b) determine that a prohibition referred to in paragraph (a) shall only apply to the export of a prescribed product to a prescribed country or for a prescribed purpose, or in a prescribed form or quantity, or under such other prescribed circumstances as the Minister deems necessary; and (c) exclude the export of a prescribed product to a prescribed country or for a prescribed purpose, or in a prescribed form or quantity, from a prohibition referred to in paragraph (a).

267 *Agricultural Product Standards Act* 119 of 1990, s5: Distinctive marks (1) The Minister may prescribe a distinctive mark for use in connection with-(a) the sale of a product referred to in section 3 (1) (a), the export of a product referred to in section 4 (1), or a particular class or grade of such products, so as to certify the correctness of the indication of the class or grade or, in the case of organically produced products, the production method concerned; and (b) a particular management control system. [Sub-s. (1) substituted by s. 7 (a) of Act 63 of 1998.] (2) No person shall in connection with the sale or the export of a product, or the management control system, or a class, grade or production method of that product, use a distinctive mark, or any name, word, expression, reference, particulars or indication which creates or is likely to create the impression that it is a distinctive mark, unless- (a) it is a distinctive mark prescribed by the Minister in terms of subsection (1); (b) such product, management control system, or class, grade or production method of that product, complies with the requirements prescribed in terms of section 3 (1) (a) for the sale, or in terms of section 4 (1) for the export, of the product concerned; and (c) that person has been authorized in writing by the executive officer to use the distinctive mark concerned in connection with the sale or the export of his or her product, or the management control system, or a class, grade or production method of that product, as the case may be. [Sub-s. (2) substituted by s. 7 (b) of Act 63 of 1998.] (3) An application for an authorization referred to in subsection (2) (c) shall be made in the prescribed manner, and the Minister may, if he or she deems it necessary in the case of a product, or the management control system, or a class, grade or production method thereof, prescribe the fees payable in respect of such application: Provided that the Minister may prescribe different amounts in respect of the distinctive products, management control systems, or classes, grades or production methods of those products. [Sub-s. (3) substituted by s. 7 (c) of Act 63 of 1998.] (4) Subject to the provisions of subsection (2) (b), the executive officer shall issue an authority referred to in subsection (2) (c) subject to such conditions as he or she may determine and specify in the authorization. [Sub-s. (4) amended by

relevant to SPS measures, along with the "prohibition of false or misleading descriptions of products".<sup>268</sup>

### 3.1.3 *Animal Diseases Act 35 of 1984 and Animal Health Act 7 of 2002*

Despite reference being made to the *Animal Diseases Act 35 of 1984* in the January 2014 Draft Sanitary and Phytosanitary Strategy, listed under "applicable legislation",<sup>269</sup> the entire Act has been repealed by the *Animal Health Act 7 of 2002* whose date of commencement is yet to be proclaimed. The *Animal Health Act* aims:

To provide for measures to promote animal health and to control animal diseases; to assign executive authority with regard to certain provisions of this Act to provinces; to regulate the importation and exportation of animals and things; to establish animal health schemes; and to provide for matters connected therewith.<sup>270</sup>

The Act falls under the Directorate: Animal Health of the DAFF and operates at a national level. Throughout the Act reference is made to any "animal" and at times "animal or thing". An "animal" is defined as:

[a]ny mammal, bird, fish, reptile or amphibian which is a member of the phylum vertebrates, including the carcass thereof; any invertebrate which is prescribed as an animal for the purpose of this Act.<sup>271</sup>

An "animal or thing" is defined as "any animal, infectious thing, contaminated thing, animal product and any progeny or product in respect thereof."<sup>272</sup> The Act places

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Act 63 of 1998.] (5) A person to whom an authority referred to in subsection (2) (c) has been issued, and in respect of whom fees have been prescribed in terms of subsection (3), shall pay the prescribed fees within the prescribed period in order to maintain the authorization for the use of the distinctive mark concerned. (6) An authority referred to in subsection (2) (c)- (a) shall lapse if the holder thereof fails to pay the fees referred to in subsection (5); and (b) may be withdrawn by the executive officer if he or she is satisfied that the holder thereof refuses or fails to comply with the requirements referred to in subsection (2) (b) or that the conditions referred to in subsection (4) are not being complied with.[Para. (b) amended by s. 17 of Act 63 of 1998.]

<sup>268</sup> *Agricultural Product Standards Act 119 of 1990*, s6: Prohibition of false or misleading descriptions for products: No person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a product in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the nature, substance, quality or other properties, or the class or grade, origin, identity, or manner or place of production, of that product.

<sup>269</sup> *Draft Sanitary and Phytosanitary Strategy 2014*, 9.

<sup>270</sup> *Animal Health Act 7 of 2002*.

<sup>271</sup> *Animal Health Act 7 of 2002*, s1.

<sup>272</sup> *Animal Health Act 7 of 2002*, s1.

limitations on "investigations, experiments, and research with and manufacture and evaluation of certain products".<sup>273</sup> Unless acting on written authority, no person may:

- (a) conduct any investigation, experiment or research with any vaccine, serum, toxin, antitoxin, antigen or other biological product that consists of or originates wholly or partially from any animal or thing;
  - (b) use any vaccine, serum, toxin, antitoxin, antigen or other biological product referred to in paragraph (a) for the manufacture or evaluation of a product or remedy used for or intended to be used for the testing, diagnosis, prevention, treatment or cure of any animal disease or parasite or for the maintenance or improvement of the health, growth, production or working capacity of any animal; or
  - (c) for the purpose of any investigation, experiment or research referred to in paragraph (a) or for the manufacture or evaluation of a product or remedy referred to in paragraph (b) infect or contaminate any animal or thing with any animal disease or parasite.
- (2) Subsection (1) does not apply to any substance in so far as it is controlled under the Medicines and Related Substances Control Act, 1965 (Act 101 of 1965) and the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947 (Act 36 of 1947).<sup>274</sup>

The Act further states that:

no person may export any animal or thing from the Republic unless the national executive officer has issued an export health certificate to such person.<sup>275</sup>

There is a list of information which the certificate is required to contain; this falls directly within the definition of what an SPS measure is. The required information in this regard is as follows:

- (a) the health status of the animal or thing to be exported;
- (b) the occurrence or non-occurrence of particular animal diseases in the republic or in the area of origin of the animal or thing to be exported; and
- (c) any other information that may be required by such authority.<sup>276</sup>

This restriction<sup>277</sup> however does not apply:

to the exportation of any animal or thing to a country in respect of which the competent authority does not require a certificate referred to in that subsection if the exporter can provide the national executive officer with written proof thereof.<sup>278</sup>

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<sup>273</sup> *Animal Health Act 7 of 2002*, s7.

<sup>274</sup> *Animal Health Act 7 of 2002*, s7.

<sup>275</sup> *Animal Health Act 7 of 2002*, s8.

<sup>276</sup> *Animal Health Act 7 of 2002*, s8 (2).

<sup>277</sup> *Animal Health Act 7 of 2002*, s8 (1).

<sup>278</sup> *Animal Health Act 7 of 2002*, s8 (4).

The national executive officer may prohibit exportation in the event that he or she is of the opinion that the circumstances are of such a nature that:

- (i) from a veterinary point of view, the export thereof would be detrimental to the animal health status of the country to which it is intended for export; or
- (ii) it is not possible, where applicable, to certify compliance with the conditions specified in the document referred to in subsection (3)(a)(ii).<sup>279</sup>

Importation is also subject to a number of requirements. Since this would be the introduction of foreign animals or things into the country, it is not surprising that there is much focus on the provisions related thereto, especially from an SPS point of view. Animals in transit also pose a threat to animal health in South Africa and, as such, are also regulated by the Act. For importation or movement in transit through South Africa, a permit is required for any animal or thing,<sup>280</sup> except where an international agreement binds South Africa and the country of export.<sup>281</sup> The permit is generally only valid for one consignment,<sup>282</sup> although it is possible to obtain a permit for consecutive<sup>283</sup> consignments as well. It is a requirement that the permit is obtained before the animal or thing enters<sup>284</sup> South Africa and that the animal or thing be kept at a quarantine station or camp on arrival.<sup>285</sup> Regardless of which permit has been issued, the following applies:

- Any animal or thing in respect of which a permit referred to in subsection (1) or (4) has been issued may-
- (a) only be introduced into the Republic through the place of entry specified in the permit in question;
  - (b) be introduced within the period specified in such permit;
  - (c) be detained in the prescribed manner at the relevant place of entry;
  - (d) be made available to the national executive officer at such place of entry for the purpose of performing such controlled veterinary procedures or other acts on or in connection therewith as the national executive officer may deem necessary; and
  - (e) not be removed from such place of entry without the written authority of the national executive officer, or contrary to any condition referred to in section 10 (1).<sup>286</sup>

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279 *Animal Health Act 7 of 2002*, s8(5)(b).

280 *Animal Health Act 7 of 2002*, s9(1).

281 *Animal Health Act 7 of 2002*, s9(8).

282 *Animal Health Act 7 of 2002*, s9(3)(c).

283 *Animal Health Act 7 of 2002*, s9(4).

284 *Animal Health Act 7 of 2002*, s9(3)(a).

285 *Animal Health Act 7 of 2002*, s9(3)(b).

286 *Animal Health Act 7 of 2002*, s9(5).

The national executive officer has the authority to direct that an animal or thing be destroyed or disposed of in a certain manner should he or she suspect that, or in the event that it has been determined that, the animal or thing is, in fact, "infected with an animal disease or poses a health risk".<sup>287</sup> It is also only upon the written authority of the national executive officer that an animal or thing may be removed from the quarantine station or camp<sup>288</sup> or from the place of entry into South Africa where the animal or thing is being detained.<sup>289</sup> Considering the detrimental effect of, for example, FMD on the cattle industry, it is not surprising that there is such an extensive quarantine and permitting procedure.

### 3.1.4 *Fertilizers, Farm, Agricultural Remedies and Stock Remedies Act 36 of 1947*

The Act is administered under the DAFF by the Directorate: Agricultural Input Control (DAIC). The Aim of the 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, sterilizing 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.

The use of animal substances in the sale and manufacture of farm feeds and fertilisers is regulated by the Act. In order for animal substances to be used, the "bone or other substance"<sup>290</sup>

- (a) has been sterilized in such a manner as may be prescribed; or
- (b) has, subject to the provisions of section 16, been imported in terms of a permit issued under the Animal Diseases and Parasites Act 13 of 1956.<sup>291</sup>

Importation of fertilisers, farm feeds, agricultural remedies or stock remedies is also an area that the Act covers.<sup>292</sup> It is obvious that the importation of such goods poses a threat to the life and health of plants, humans and animals if there is no proper control over their contents, especially if animal and chemical substances are

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287 *Animal Health Act 7 of 2002*, s10(4).

288 *Animal Health Act 7 of 2002*, s10(3).

289 *Animal Health Act 7 of 2002*, s10(1).

290 *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947*, ss7 and 12.

291 *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947*, s12.

292 *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947*, s16.

involved. The minister formulates a number of regulations under the Act; for example, in terms of the Act, regulations were issued to deal with the following, among other things:

- Prohibition of the sale, acquisition, disposal or use of certain agricultural remedies and stock remedies GNR.1061 of 15 May 1987
- Prohibition of the sale, acquisition, disposal, or use of the agricultural remedy – monocrotophos GNR.154 of 25 February 2005.

### 3.1.5 *Liquor Products Act 60 1989*

The *Liquor products Act 60* of 1989 is administered by the DAFF, and enforced by the Directorate: FSQA. The Aim of the Act is:

[t]o provide for control over the sale and production for sale of certain alcoholic products, the composition and properties of such products and the use of certain particulars in connection with the sale of such products; for the establishment of schemes; for control over the import and export of certain alcoholic products; and for matters connected therewith.

The Act was last amended in 2008 and requires that the Wine and Spirit Board consists of

at least eight persons with the relevant knowledge, skills or expertise in viticulture, oenology, distilling, regulatory environment of the liquor industry, liquor production, food safety or microbiology.<sup>293</sup>

Neither an "alcoholic fruit beverage", spirits nor wine may contain "a particular prescribed substance to a greater extent than that prescribed".<sup>294</sup> Labelling in terms of packaging is also regulated by the Act.<sup>295</sup> The following are a number of regulations that fall under the Act:

- Limitation on the use of certain particulars in connection with the sale of liquor products: Amendment: GNR. 1432 of 29 June 1990
- Regulations: GNR. 1433 of 29 June 1990
- Wine of origin scheme: GNR. 1434 of 29 June 1990
- Authorisation to sell mead: GNR. 321 of 6 March 1998
- Regulations relating to fees: GNR 624 of 12 July 2001
- Reservation with regard to indication of origin of grapes in connection with sale of wine: GNR. 6 of 4 January 2002
- Regulations: amendment: GNR. 10717 of 18 July 2003

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293 *Liquor Products Act 60* of 1989, s2(2).

294 *Liquor Products Act 60* of 1989, ss5(2), 6(2) and 7(2).

295 *Liquor Products Act 60* of 1989, s11.

### 3.1.6 Meat Safety Act 40 of 2000

The Meat Safety Act is administered by the DAFF and enforced by the Directorate: Veterinary Public Health. The main aim of the 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.

The Act states the following:

- (1) No person may—
  - (a) slaughter any animal at any place other than an abattoir;
  - (b) permit the slaughter of any animal at any place under his or her control, unless the place is an abattoir; or
  - (c) sell or provide meat for human and animal consumption unless it has been slaughtered at an abattoir.
- (2)(a) Subsection (1) does not apply to slaughter for own consumption or for cultural or religious purposes.
- (b) No meat or animal product obtained from an animal slaughtered as contemplated in paragraph (a) may be sold to any person.<sup>296</sup>

The Act specifies national standards for abattoirs<sup>297</sup> and specifically states that:

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<sup>296</sup> Meat Safety Act 40 of 2000, s7.

<sup>297</sup> *Meat Safety Act* 40 of 2000, s11 (1) The following essential national standards apply to all abattoirs: (a) A slaughter facility may only be registered as an abattoir if it complies with the prescribed requirements relating to throughput, structural requirements, hygiene management practices and related matters; (b) the owner of an abattoir must procure a meat inspection service for that abattoir; (c) meat inspection services may only be performed by the national executive officer, a provincial executive officer, an authorised person or an assignee, who must perform that function independently from the abattoir; (d) a person contemplated in paragraph (c) must be a veterinarian, meat inspector, meat examiner, animal health technician or such other duly qualified person as may be prescribed; (e) an abattoir must be managed in accordance with a prescribed hygiene management and evaluation system; (f) any person entering an abattoir must adhere to the prescribed hygiene requirements; (g) water used in an abattoir must conform to the prescribed standard;(h) an animal presented for slaughter at an abattoir must be handled humanely during loading, transportation, off-loading, housing, immobilising and killing as prescribed in accordance with the requirements of the *Animals Protection Act*, 1962 (Act No. 71 of 1962); (i) no dead animal or animal suffering from a condition that may render the meat unsafe for human and animal consumption may be presented at an abattoir for slaughter; (j) an animal presented for slaughter must be examined by a person contemplated in paragraph (c) before slaughter, and must be accompanied by information as to its ownership; (k) an animal presented for slaughter in accordance with an animal health scheme in terms of the *Animal Diseases Act*, 1984 (Act No. 35 of 1984), may only be accepted for slaughter if the animal is identified in accordance with the requirements of the scheme in question;(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 No. 35 of 1984), must convey that suspicion without delay to a veterinarian in the employ of the Department or a province; (m) meat and animal products must be inspected, marked

no dead animal or animal suffering from a condition that may render the meat unsafe for human and animal consumption may be presented at an abattoir for slaughter.<sup>298</sup>

The Act further places restrictions on the importation<sup>299</sup> and exportation<sup>300</sup> of meat. Some of the regulations under the Act further promote meat safety, especially where human consumption of that meat is likely. The regulations to that effect under the Act are:

- Red meat regulations: GN 1072 of 17 September 2004
- Poultry regulations: GNR.153 of 24 February 2006
- Ostrich regulations: GNR.54 of 2 February 2007

The proposed regulations under the Act are:

- Publication of the proposed game meat scheme for limited throughput game slaughter facilities and harvesting processes for public comments: GN 769 of 28 September 2012 (Government Gazette No. 35706)
- Proposal for a meat inspection service in South Africa for public comments: GN 4 of 4 January 2014 (Government Gazette No.36050)
- Publication of the proposed abattoir rating scheme for public comments: GN 341 or 5 April 2013 (Government Gazette No. 36307)

The Act therefore focuses on the health and safety of humans who consume the meat.

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and dealt with in accordance with the prescribed methods by a person contemplated in paragraph (c); (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; (o) the owner of an abattoir must keep the prescribed records relating to the number of animals slaughtered, the origin of animals slaughtered, details of examinations carried out while the animals were alive and inspections carried out after the animals had been slaughtered and the destination of the meat and animal products, and must at the request of a person contemplated in paragraph (c) furnish such information to that person; (p) the owner of an abattoir with prescribed laboratory facilities must ensure access to the laboratory by the national executive officer, a provincial executive officer, an authorised person and an assignee; (q) the use, application and presence of specified substances and residues in meat and animal products must be detected and monitored in accordance with the prescribed methods; (r)the treatment, removal or disposal of condemned material, effluent, refuse and emissions must be carried out in accordance with the prescribed procedures; and (s)animals may not be slaughtered for research purposes unless a research protocol has been submitted and approved by the national executive officer.

298 *Meat Safety Act* 40 of 2000, s11(1)(i).

299 *Meat Safety Act* 40 of 2000, s13.

300 *Meat Safety Act* 40 of 2000, s14.

### 3.1.7 *Medicines and Related Substances Act 101 of 1965 and South African Medicines and Medical devices regulatory Authority Act 132 of 1998*

Only sections 1 (Definitions), 15B (Transfer of Certificates of Registration), 18 (Labels and Advertisements), 22B (Director-General to Cause Certain Information to be Furnished), 24 (Appeal Against Decision of Director-General), 34A (Delegation of Powers) and 40 (Short Title) of this Act are still in operation. The rest have been repealed by section 50 of the *South African Medicines and Medical devices regulatory Authority Act 132 of 1998*. The Act is administered by the Department of Health (DoH) and the Directorate: Medicines Regulatory Affairs.

### 3.1.8 *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*

This Act is administered by the DoH and enforced by the Directorate: Food Control. The Act aims:

To control the sale, manufacture and importation of foodstuffs, cosmetics and disinfectants; and to provide for incidental matters.<sup>301</sup>

The Act focuses on foodstuffs, cosmetics and disinfectants. All three categories are used by humans and directly impact on human life, health and wellness. The Act defines "foodstuffs" as:

Any article or substance (except a drug as defined in the Drug Control Act 101 of 1965) ordinarily eaten or drunk by man 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.<sup>302</sup>

A "cosmetic" is defined as:

Any article or substance (except a drug as defined in the Drug Control Act 101 of 1965) intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body for purposes of cleansing, beautifying, promoting attractiveness or improving or altering the appearance, and includes any part or ingredient of any such article or substance.<sup>303</sup>

A "disinfectant" is defined as:

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301 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972.

302 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, s1 Definitions.

303 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, s1 Definitions.

Any article or substance used or applied as a germicide, preservative, or antiseptic or as a deodorant or cleansing material which is not a cosmetic.<sup>304</sup>

The Act is a good example of a piece of South African legislation that provides the framework for effective SPS protection. It prohibits the sale, manufacture and importation of certain foodstuffs, cosmetics and disinfectants. The Act, for example, prohibits the sale, manufacture or importation of goods that "contain or has been treated with a prohibited substance".<sup>305</sup> Misrepresentation on packaging regarding the composition of a foodstuff is also prohibited.<sup>306</sup> The Minister of Health, Welfare and Pensions makes the regulations under which the objectives of the Act are met.<sup>307</sup> Some of the regulations made by the Minister, which relate to SPS measures and further illustrate the means by which an Act can create an effective framework in terms of SPS measures, are as follows:

- Regulations Regarding Food, Drugs and Disinfectants GNR.575 of 28 March 1930
- Marine Food GNR.2064 of 2 November 1973
- Restriction on the sale of food additives containing nitrite and/or nitrate and other substances GNR.219 of 7 February 1975
- Mineral hydrocarbons in foodstuff GNR.230 of 18 February 1977
- Preservatives and antioxidants GNR.965 of 3 June 1977
- Regulations governing the additives and amounts as well as the tolerances, for certain substances in wine, other fermented beverages and spirits GNR.2870 of 31 December 1981
- Regulations relating to anti-caking agents and the amounts thereof that may be used in foodstuffs GNR. 2507 of 19 November 1982
- Regulation governing irradiated foodstuffs GNR. 1600 of 22 July 1983

Some of the proposed regulations that have been made under the Act are following:

- Regulations governing the maximum limits for pesticide residues that may be present in foodstuffs GNR.722 of 22 July 2005
- Regulations relating to the fortification of certain foodstuffs: Amendment GNR.900 of 16 September 2005 (Government Gazette No.27788)
- Regulations relating to microbiological standards for foodstuffs and related matters: Amendment GNR.1111 of 19 November 2005 (Government Gazette No.28217)
- Regulations relating to food grade salt GNR.114 of 20 February 2006 (Government Gazette No.284553)
- Regulations relating to the power and duties of inspectors and analysts on inspections and investigations conducted on foodstuffs and at food premises GNR.186 of 3 March 2006 (Government Gazette No.28553)

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304 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, s1 Definitions.

305 *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972, s2(1)(a)(i).

306 *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972, s3.

307 *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972, s15.

- Regulations governing the maximum limits for veterinary medicine and stock residues that may be present in foodstuffs GNR.215 of 10 March 2006 (Government Gazette No.28584)
- Regulations governing certain solvents in foodstuffs GNR.315 of 7 April 2006 (Government Gazette No.29792)

The Act also deals with the powers and duties of inspectors;<sup>308</sup> and with the liability of employers and principles for the acts or omissions of their employees, managers or agents.<sup>309</sup> It further confers liability on importers, manufacturers and packers in terms of the labelling of articles and subsequent sale, importation and packaging.<sup>310</sup> Special defences are available to persons charged with contravening the Act.<sup>311</sup>

### 3.1.9 National Regulator for Compulsory Specifications Act 5 of 2008

The National Regulator for Compulsory Specifications (NRCS), which is a directorate that falls under the Department of Trade and Industry (DTI) enforces the Act. The Act aims:

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.<sup>312</sup>

The DTI administers the *National Regulator for Compulsory Specifications Act 5 of 2008*. South Africa is represented by the NRCS internationally and regionally on the Codex Alimentarius Commission (CAC); the Codex Committee on Fish and Fishery Products (CCFFP); the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS); and the Codex Committee for Africa (CCAFRICA).<sup>313</sup> The Food and Associated Industries (FAI) inspection body serves on the WTO SPS Committee and the National Codex Committee (NCC).<sup>314</sup>

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308 *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*, ss10 and 11.

309 *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*, s8.

310 *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*, s9.

311 *Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972*, s6.

312 National Regulator for Compulsory Specifications Act 5 of 2008.

313 NRCS Date Unknown <http://www.nrsc.org.za/content.asp?subID=27>.

314 NRCS Date Unknown <http://www.nrsc.org.za/content.asp?subID=27>.

### **3.2 Which SADC-SPS obligations are being complied with and which not?**

The legislation that creates the SPS framework in South Africa is not the source of the standards, neither is the SADC-SPS nor the WTO-SPS. ISSBs, regulations under national Acts and committees are the sources of SPS measures. Legislation, for example, prescribes procedures and requirements for permits to be issued and processes such as quarantine. This then, in effect, gives force to the agreements that harmonise SPS standards internationally and regionally and, for example, the requirement that science be the basis for SPS justification. It is impossible for an Act to make provision for every standard related to the level of pesticides used on every type of vegetable, for example, or for the irradiation of every type of fruit imported into the country. That is what regulations under the Acts and standards set by ISSBs are for.

To a large extent, it is clear that animal, plant and human health is important, and that certain legislative measures are in place to ensure its continued protection. Essentially, animal and plant importation or exportation is regulated through the requirement that permits should be applied for before entry, and certificates before exit from the Republic of South Africa. Therefore, general control, inspection and approval take place before products are introduced to new areas. Transparency is promoted through the requirement that reasons for refusal must be in writing. Broadly, the obligations under Articles 2,<sup>315</sup> 8,<sup>316</sup> 9,<sup>317</sup> 10<sup>318</sup> and 11<sup>319</sup> of the SADC SPS are fulfilled by the legislative framework.

Assessment of risk is, to a lesser extent, required in all the Acts, through different departments. The wording of the Acts, however, do not place a great amount of emphasis on the scientific basis for decisions. Ministers are given wide discretion in terms of the decisions that they are required to make under each Act. Scientific evidence as a basis for decisions related to SPS measures is an internationally recognised yardstick. South Africa is not only bound by scientific evidence as a basis

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315 Objectives.

316 Assessment of Risk and Determination of the Appropriate Level of Sanitary and Phytosanitary protection.

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

318 Transparency.

319 Control Inspection and Approval.

for SPS measures through the SADC SPS but also the WTO SPS. Further, little emphasis is placed on the use of international standards through co-operation with ISSBs and, in fact, limited reference is made to ISSBs at all. The Acts with the most satisfactory approaches to risk assessment are the *Animal Health Act 7* of 2002 and the *Foodstuffs, Cosmetics and Disinfectants Act 54* of 1972.

The framework creates little opportunity for equivalence or harmonisation. In fact, nowhere in any of the Acts are the words 'harmonisation' or 'equivalence' used. There is no suggestion in the wording of the Acts that these are objectives or concepts that may be of importance.

The articles that are least addressed by the legislative framework are the following: Article 5<sup>320</sup> of the SADC SPS, which relates to the affirmation of obligations under the WTO. No mention of such obligations, all of which are very similar to those of the SADC SPS, is made in any of the Acts, although they are applied to some extent in any case. Harmonisation (Article 6) and equivalence (Article 7) are not specifically mentioned either. The researcher does, however, believe that despite no specific mention being made of harmonisation and equivalence as aims of any of the Acts, most of them do, in fact, indirectly encourage them. These are both important focus areas of both the SADC-SPS and the WTO-SPS. Although transparency<sup>321</sup> is present in terms of the written reasons requirement, there is no definite answer as to whether the requirement of notifications being sent to the SADC Secretariat is being met or where exactly the different enquiry points are. The framework also does not deal with technical assistance<sup>322</sup>.

The objectives of the SADC-SPS<sup>323</sup> are:

- (a) to facilitate the protection of human, animal or plant life or health in the territory of the Member States;
- (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 SPS matters;
- (e) to provide a forum for resolving trade related SPS issues.

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320 Basic Rights and Obligations.

321 SADC SPS A 10.

322 SADC SPS A 12.

323 SADC SPS A 2.

The South African legislative framework generally promotes the facilitation of human, animal and plant life protection. It does not, however, effectively enhance South Africa's implementation of the WTO-SPS. There is very little promotion of international standards. Technical capacity within South Africa has been enhanced through the legislative framework. All five the SADC-SPS objectives are beneficial to South Africa. Through its effective implementation SPS-related trade disputes can be minimised and the trade in southern Africa can benefit from it, while simultaneously providing the required protection for human, plant and animal health and life from diseases.

### **3.3 The Administrative Framework**

The National SPS Committee was established in 2012. The committee is made up of directorates from within the DAFF; DoH; DTI; International Relations and Cooperation (DIRCO); the South African Revenue Service (SARS); and the NRCS.<sup>324</sup> The DAFF publishes a biannual newsletter that reports on SPS issues in South Africa. The latest newsletter was issued in September 2014.

The DAFF administers the *Agricultural Pests Act* 36 of 1983; *Agricultural Products Act* 119 of 1990; *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947; *Liquor Products Act* 60 of 1989; and the *Meat Safety Act* 40 of 2000. The DoH administers the *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972 and the *Medicines and Related Substances Act* 101 of 1965. The DAFF is the custodian of the WTO SPS in South Africa.<sup>325</sup> The Agricultural Production, Health and Food Safety (APHFS) branch of the DAFF is in charge of the administration of the legislative mandate in terms of SPS measures.<sup>326</sup>

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<sup>324</sup> SPS South Africa June 2013 Newsletter.

<sup>325</sup> *Draft Sanitary and Phytosanitary Strategy 2014*, 10.

<sup>326</sup> *Draft Sanitary and Phytosanitary Strategy 2014*, 10.

### **3.4 Draft Sanitary and Phytosanitary Strategy, January 2014 – Department: Agriculture, Forestry and Fisheries for the Directorate: Food Import and Export Standards**

#### *3.4.1 Introduction*

The Draft SPS Strategy was compiled by the Directorate: Food Import and Export Standards for the DAFF in January 2014. The aim is as follows:

Provide for an overarching national framework that aims to enhance and strengthen the ability of SA to satisfy its obligations in terms of the WTO-SPS Agreement, to provide adequate protection against risk threatening human, animal, plant life and to enhance SA's competitiveness to fully benefit from market access opportunities.<sup>327</sup>

It goes on to list seven "focus areas for implementation" or objectives.<sup>328</sup> These are harmonised legislative reform; enhanced integration between implementing agencies at national, local and provincial levels; integration and strengthening of compliance capacities under international agreements; stakeholder engagement; improved communication and awareness; strengthening of SPS capacity and skill levels; and enhanced SPS diplomacy.<sup>329</sup> The strategy specifically excludes private standards and genetically modified organisms (GMOs) that have been approved in South Africa.<sup>330</sup>

#### *3.4.2 The Proposed Implementation Framework*

The strategy addresses all seven of the focus areas suggested "strategic interventions". In the introductions to the focus areas a number of recurring issues related to SPS measures are pointed out. The Directorate: Food Import and Export Standards (within DAFF) is responsible for driving the implementation of the strategy.<sup>331</sup> The strategic interventions under each focus area are as follows:

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327 Draft Sanitary and Phytosanitary Strategy 2014, 2.

328 Draft Sanitary and Phytosanitary Strategy 2014, 3.

329 Draft Sanitary and Phytosanitary Strategy 2014, 3.

330 Draft Sanitary and Phytosanitary Strategy 2014, 4.

331 Draft Sanitary and Phytosanitary Strategy 2014, 31.

*Advancing SPS legislative reform, coordination and clarification of organisational mandates and responsibilities*<sup>332</sup>

- Review of the SPS legislative mandate
- Enhance coordination and collaboration amongst SPS implementing agencies
- Strengthen oversight of delegated SPS functions

Advancing co-ordination and collaboration, as proposed, among agencies charged with implementing SPS-related measures is a step in the right direction in terms of harmonisation of SPS measures. Review of the SPS legislative mandate is well overdue. The Acts were written before the current international SPS regime, and the amendments updating them have largely been superficial and have not addressed the obligations under the international and regional agreements.

*Improving SPS institutional capacity to ensure consistency and compliance with international commitments*<sup>333</sup>

- Enhancing SPS diplomacy
- Promote international benchmarking of SPS measures
- Improve rationalisation and development of SPS capacity
- Promote transparency through SPS notification and enquiry points
- Build and maintain existing SPS coordination mechanisms

The above strategic interventions are well founded. The concern is, however, that the incentive to apply such interventions is not very strong. All five will require considerable financial input and this alone is likely to create a delay in their implementation. Further, fulfilment of such plans relies largely on political will. The strategic intervention to "promote transparency through SPS notification and enquiry points" is one of the more important in terms of South Africa's international and regional obligations. Something as simple as being aware of what an enquiry point is is unclear; as are under what circumstances an enquiry point should be approached by an individual or the circumstances under which an enquiry point is required to make information available. Without the aforementioned awareness and information that enquiry points are supposed to disseminate, they become a burden on trade.

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332 Draft Sanitary and Phytosanitary Strategy 2014, 23.

333 Draft Sanitary and Phytosanitary Strategy 2014, 24.

### *Exploiting opportunities for SPS technical assistance*<sup>334</sup>

- Identify areas for SPS capacity development
- Improve decisions on SPS capacity development
- Adequate financial support for SPS capacity development

There is a need for SPS capacity development. It is, however, unclear how the identification of such areas will be done, as no further detail is given. The idea that opportunities for SPS technical assistance should be exploited is equally ambiguous. What is meant by "opportunities"? Technical assistance is usually given by more developed states to the less developed states. In the SADC region it can be argued that the duty to provide assistance to other member states may rest on South Africa. This is true even in applying the principles of technical assistance. Under WTO SPS obligations South Africa is still one of the more developed countries in Africa.

### *Enhancing market access through SPS compliance*<sup>335</sup>

- Strengthen SPS capacity
- Market prioritisation to ensure efficient utilisation of scarce SPS resources
- Improve SPS compliance for sustained market access
- Provide SPS market access support for developing sector producers

Both of the above strategic interventions and the sub-focus areas under them are politically worded. Neither says anything definite about what exactly is needed. In neither the WTO SPS nor the SADC SPS is mention made of "SPS resources" or "SPS capacity". It is therefore not clear what exactly the aim is, considering the fact that the ultimate aim of the strategy is to:

Provide for an overarching national framework that aims to enhance and strengthen the ability of SA to satisfy its obligations in terms of the WTO-SPS Agreement, to provide adequate protection against risk threatening human, animal, plant life and to enhance SA's competitiveness to fully benefit from market access opportunities.<sup>336</sup>

This strategic intervention, if clearly defined and executed, may be extremely beneficial to South Africa. Compliance with regional and international agreements,

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334 Draft Sanitary and Phytosanitary Strategy 2014, 25.

335 Draft Sanitary and Phytosanitary Strategy 2014, 27.

336 Draft Sanitary and Phytosanitary Strategy 2014, 2.

and the use of ISSBs is paramount. This cannot be achieved without effective communication and awareness regarding SPS measures. This strategic intervention of "enhancing market access through SPS compliance" potentially ties in very well with the strategic intervention "effective SPS communication and awareness".

*Opportunities for SPS stakeholder partnerships*<sup>337</sup>

- Improving stakeholder engagement through partnerships
- Exploiting opportunities within multilateral or bilateral agreement to advance SPS issues

Multilateral and bilateral trade agreements and the potential for including equivalence of SPS measures in such agreements will benefit South Africa greatly.

*Effective SPS communication and awareness*<sup>338</sup>

- Raise awareness on the importance of SPS issues
- Mainstreaming SPS subject matter into the formal curriculum

Without the knowledge of what an SPS measure is, and an understanding of the purpose and the effect of properly applying the essential elements of SPS measures to protect human, animal and plant life and health, there is likely to be little progress. Mainstreaming of SPS subject matter into formal curriculums, including law and commerce, will be beneficial to trade and should make the application of an effective SPS framework more likely. SPS measures are already part of the animal science and veterinary curriculum, but SPS measures require a multidisciplinary approach to be effective.

*Promoting regional SPS cooperation*<sup>339</sup>

- Active participation in regional SPS coordination mechanisms or institutions

South Africa's draft SPS Strategy highlights some of the current shortfalls of the SPS regime in South Africa and the areas in which general improvement is required. It does not give a deadline as to when the strategy would be implemented should it be

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337 Draft Sanitary and Phytosanitary Strategy 2014, 28.

338 Draft Sanitary and Phytosanitary Strategy 2014, 29.

339 Draft Sanitary and Phytosanitary Strategy 2014, 30.

accepted as the final strategy. Political will is a factor that affects the implementation of such strategies. A strategy is not law and its implementation relies largely on the parties tasked with its implementation's will to do so. Lack of resources for the effective implementation of SPS measures is often the first excuse for developing countries' non-compliance. In the case of South Africa the departments concerned and their structures are already established. Control and inspection points, for example, are already there. Overall, the strategy is a positive move. The areas in which it lacks are mostly due to linguistic ambiguity and a reliance on political will. Very little detail is provided. Statements without explanation are made and no further detail or ideas as to what exactly or, for that matter, what in brief terms, the proposal entails.

South Africa has made progress in terms of harmonising SPS measures. The OIE, IPPC and Codex are accepted as the ISSB's to which South Africa is a member. The *Draft Sanitary and Phytosanitary Strategy 2014* is proof of a desire to harmonise SPS measures further. It identifies harmonisation and its implications under "improving SPS institutional capacity to ensure consistency and compliance with international commitments" as a specific focal point.<sup>340</sup> The draft comes relatively soon after South Africa had signed the SADC-SPS but well within the timeframe of the WTO-SPS. Positive action is being taken in this regard through the delegation of the responsibility to implement the strategy, and the formulation of the implementation framework and related plans to the Directorate: FSQA. South Africa also participates in SADC and WTO-SPS committees

### **3.5 Conclusion**

It is clear that an existing SPS regime is being administered in South Africa. This was the case long before the WTO-SPS and the SADC-SPS. However, the mere existence of such a system does not amount to compliance under the current obligations that South Africa has freely agreed to under the various agreements. Focus in this research is specifically on the SADC-SPS. The term 'overarching' in the aim of the strategy suggests that the core elements of SPS measures should, at the very least, be addressed.

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<sup>340</sup> *Draft Sanitary and Phytosanitary Strategy 2014*, 24.

One of the main issues regarding the effective compliance with SPS-related obligations is the fact that there a centralised control mechanism for SPS measures does not exist. The DAFF is the NEP for SPS measures, but the implementation of SPS measures over all three areas of plant, animal and human health and wellbeing are not centralised. When importers begin the process of gathering documentation and information related to a commodity, for example, that they intend to import, where do they find the answer to the simple questions of: "Are there applicable SPS measures that need to be met with regard to the specific commodity and, if so, what are the applicable SPS measures and where do I get a hold of the exact requirements?". This can, of course, be followed by further questions such as how adherence to the measures is proven. These questions are relatively basic, considering that South Africa relies greatly on imported products. However, finding the answers to these questions is not as straightforward as would be ideal.

As with the OIE, IPPC and Codex, situations arise where a product subject to SPS measures falls under two different directorates or departments at the same time. The problem with a system that functions under the guidance of different authorities can be illustrated through the state of affairs in the meat industry as an example.<sup>341</sup> Both the OIE and Codex apply. OIE's standards are made up of two codes.<sup>342</sup> (i) the Terrestrial Animal Health Code (TAHAC) and (ii) the Code for Aquatic Animals.<sup>343</sup> Both are available online on the OIE website.<sup>344</sup> The WHO and the Food and Agriculture Organization (FAO) work jointly with Codex in the assurance of food safety in relation to agricultural products.<sup>345</sup> The Codex Alimentarius is available online.<sup>346</sup> Both sets of standards (those of OIE and the Codex) are applicable in importing meat, as meat importation poses not only a risk to the animal health and wellness in a country in terms of the possible introduction of contagious diseases or pests related to livestock, but also risks to human life and wellness if imported for human consumption. The matter of SPS measures being a limitation or barrier has

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341 Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497

342 Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497.

343 Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497.

344 OIE Date Unknown <http://www.oie.int/international-standard-setting/terrestrial-code/access-online/> and OIE Date Unknown <http://www.oie.int/international-standard-setting/aquatic-code/access-online/>; Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497.

345 Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497.

346 Codex Alimentarius Commission Date Unknown [www.codexalimentarius.net\\_web/standard\\_list.jsp](http://www.codexalimentarius.net_web/standard_list.jsp).

been raised in the context of scientific concerns surrounding biodiversity and transfrontier conservation (in southern Africa).<sup>347</sup> It has been suggested that ease of access to the international standards and the complications surrounding the use of different ISSBs are the reasons for the adoption of higher standards set by the EU, for example.<sup>348</sup> In practice the existence of SPS measures creates a situation where a considerable amount of confusion and uncertainty exist, especially among importers.

South Africa is currently involved in a Trade, Investment and Development Cooperation Agreement (TIDCA) with the United States, through SACU, which covers SPS measures, among other matters.<sup>349</sup> The SACU–US TIDCA does not, however, relate to products. It creates a platform for the negotiation of SPS and TBT-related agreements between the parties.<sup>350</sup> The agreement is a co-operative framework agreement. Furthermore, South Africa has a bilateral trade agreement with the US that addresses "issues of interest, including AGOA, TIDCA, trade and investment promotion, NTBs, SPS and others".<sup>351</sup> These are, however, non-SADC states. The SADC Free Trade Agreement (SADC–FTA) relates to "most products" and involves 12<sup>352</sup> of the SADC members states.<sup>353</sup>

Equivalence of SPS measures in terms of the SADC SPS is a requirement, unless the objective demonstration by the state challenging the importing state's SPS measures is on scientific grounds or through "other" information is unsuccessful.<sup>354</sup> Whether the requirement of equivalence under the SADC SPS is being fulfilled by South Africa depends on each specific case. A general "yes" or "no" cannot be given. The use of private certification systems such as HACCP has increased.

The legislative framework is outdated, relatively unsystematic and generally confusing. Essentially, only the basic requirements are observed. However, South

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347 Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497.

348 Thompson *et al* 2013 *Transboundary and Emerging Diseases* 497.

349 dti Date Unknown [http://www.dti.gov.za/trade\\_investment/ited\\_trade\\_agreement.jsp](http://www.dti.gov.za/trade_investment/ited_trade_agreement.jsp).

350 dti Date Unknown [http://www.dti.gov.za/trade\\_investment/ited\\_trade\\_agreement.jsp](http://www.dti.gov.za/trade_investment/ited_trade_agreement.jsp).

351 dti Date Unknown [http://www.dti.gov.za/trade\\_investment/ited\\_trade\\_agreement.jsp](http://www.dti.gov.za/trade_investment/ited_trade_agreement.jsp).

352 Angola, Democratic Republic of Congo and Seychelles are not involved in the SADC FTA. SADC Date Unknown <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/>.

353 dti Date Unknown [http://www.dti.gov.za/trade\\_investment/ited\\_trade\\_agreement.jsp](http://www.dti.gov.za/trade_investment/ited_trade_agreement.jsp).

354 SADC SPS A 7(2)(a).

Africa is making positive moves towards attempting to meet its obligations in terms of SPS measures under the SADC SPS.

#### 4 The WTO-SPS, the WTO-TBT and SPS measures

The WTO TBT agreement is not applicable to SPS measures.<sup>355</sup> McNeil<sup>356</sup> describes a hypothetical scenario in which he suggests that there may be situations that present problems where measures serve more than one purpose, such as a situation where, in theory, a measure can fall under the TBT or SPS agreements. The hormone ban,<sup>357</sup> it was submitted by McNeil, is an example of a situation that is relatively close to the hypothetical. His question was: What happens when:

A purported measure was found not to be based on scientific evidence of a risk to human, animal or plant life or health, would the measure nonetheless be exempt from the TBT Agreement because of its alleged health-related purpose?<sup>358</sup>

The *purpose* of the measure is the focus of his argument. McNeil describes a situation in which he asks questions regarding the objectives of the WTO-TBT and WTO-SPS agreements.<sup>359</sup> The objectives or purposes of the agreements are the crux of the problem identified.<sup>360</sup> What makes a TBT or an SPS measure legitimate or unjustifiable are very different things. The TBT agreement is not applicable to SPS measures.<sup>361</sup> TBTs relate to non-public, health-related measures.<sup>362</sup> SPS measures only relate to the protection of "animal or plant life or health within the territory"<sup>363</sup> despite the measure in question possibly being exactly the same measure.<sup>364</sup> If there is no science-based objective for the measure in question, but it would be legitimate as a TBT if the measures objective was not public health-related, McNeil asks whether a "member would be obliged to abandon the measure if it lacked any scientific basis for its purported health objectives?"<sup>365</sup> He does not answer the question, but points out that the panel in *EC Hormones* did not wish to speculate on

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355 McNeil 1998 *Virginia Journal of International Law* 115.

356 McNeil 1998 *Virginia Journal of International Law* 89-134.

357 *EC Hormones*.

358 McNeil (1998) *Virginia Journal of International Law* 116.

359 McNeil 1998 *Virginia Journal of International Law* 116.

360 McNeil 1998) *Virginia Journal of International Law* 116.

361 McNeil 1998 *Virginia Journal of International Law* 116.

362 McNeil *Virginia Journal of International Law* 116.

363 WTO SPS Annexure A (1).

364 McNeil 1998 *Virginia Journal of International Law* 116.

365 McNeil 1998 *Virginia Journal of International Law* 116.

this point either but it remains a problem that could potentially arise.<sup>366</sup> Neither the TBT nor WTO-SPS provides an answer.<sup>367</sup>

More recently, Mavroidis<sup>368</sup> agrees that "a transaction can, in principle, be subject to the disciplines of either the GATT, or the WTO-TBT or the WTO SPS". Although this is slightly different from McNeil's hypothetical example above, Mavroidis<sup>369</sup> explains with the assistance of *EC Sardines*<sup>370</sup> what the "order of analysis" of the three agreements is. He states that (in terms of what the panel reported in *EC Sardines*) that:

In a nutshell, it is by now settled that the legal hierarchal relationship between the three agreements, or in WTO parlance, the *order of analysis* is as follows: SPS over TBT over GATT 1994.<sup>371</sup>

International standards also often arise in academic discussions relating to the understanding of the obligations under the WTO-SPS. The *US – Continued Suspension*<sup>372</sup> report by the Appellate Body of the WTO stated that:

While use of international standards is encouraged, the *SPS Agreement* recognizes the right of WTO Members to introduce or maintain an SPS measure which results in a higher level of protection than would be achieved by measures based on such international standards. Where a Member exercises its right to adopt an SPS measure that results in a higher level of protection, that right is qualified in that the SPS measure must comply with the other requirements of the *SPS Agreement*, including the requirement to perform a risk assessment. However, the Appellate Body has found that the adoption of an SPS measure that does not conform to an international standard and results in a higher level of protection does not give rise to a more exacting burden of proof under the *SPS Agreement*.<sup>373</sup>

McNeil<sup>374</sup> submits with reference to the *EC-Hormones* case that:

one of the central features of the SPS agreement- the obligation to base SPS measures on existing international standards- has been converted into an idealistic but wholly unenforceable objective.<sup>375</sup>

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366 McNeil 1998 *Virginia Journal of International Law* 116.

367 McNeil 1998 *Virginia Journal of International Law* 116.

368 Mavroidis PC *Trade in Goods* 288.

369 Mavroidis PC *Trade in Goods* 288.

370 *EC Sardines*.

371 Mavroidis PC *Trade in Goods* 288.

372 *US – Continued Suspension*

373 *US-Hormones* para 532.

374 McNeil 1998 *Virginia Journal of International Law* 89-134.

375 McNeil (1998) *Virginia Journal of International Law* 123.

He reached this conclusion after analysing the case. I do not agree with him entirely. The *WTO Analytical Index: Sanitary and Phytosanitary Measures*<sup>376</sup> offer the following quotations as the authority in reference to the mentioned burden of proof:

The initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.<sup>377</sup>

In a different case<sup>378</sup> it was stated that:

It is a generally- accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.<sup>379</sup>

These quotations taken from the *US Wool and Blouses*<sup>380</sup> case and the *Japan Measures Affecting Agricultural Products*<sup>381</sup> case (both Appellate WTO reports) are relatively simple to understand and are not a deviation from the normal legal rules.

#### **4.1 Science as the "neutral arbiter" in justifying SPS measures**

The preceding chapters have given an outline of South Africa's commitments and obligations under the SADC-SPS and the WTO-SPS. It is clear how a scientifically unjustifiable SPS measure can become an NTB. It is also clear that an SPS administrative system that is ineffective and inefficient is also a means by which SPS measures can effectively act as NTBs.

The WTO-SPS is an example of the way in which science has been used to justify SPS measures at a global level<sup>382</sup> and as a means of seeking "the acceptance of

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376 *Japan Measures Affecting Agricultural Products Appellate Body Report* para 122.

377 *Japan Measures affecting Agricultural Products Appellate Body Report* Para 122.

378 *Japan Measures affecting Agricultural Products Appellate Body Report* Para.

379 *US- Measures Affecting Imports of Woven Wool Shirts and Blouses from India* p14.

380 *US- Measures Affecting Imports of Woven Wool Shirts and Blouses from India*.

381 *Japanese Measures Affecting Agricultural Products*.

382 Peel *Science and Risk Regulation in International Law* 171; Walker *The Myth of Science as a "Neutral Arbiter" for Triggering Precautions* 2003 *International and Comparative Law review* 26 197.

determinations as neutral and universally valid".<sup>383</sup> The SADC-SPS places as much emphasis on scientific justification as the WTO-SPS does. Scientific evidence as a reasonable basis for the justification of a SPS measure can be debated endlessly, and is met with mixed opinions in the literature surrounding SPS measures. To some extent, the certainty that scientific justification provides has been seen as a positive. However, authors such as Scott<sup>384</sup> and Peel,<sup>385</sup> who are in agreement with Walker,<sup>386</sup> suggest that scientific justification is not necessarily the "neutral arbiter" it appears to be. The principles of harmonisation and equivalence in the WTO-SPS seem to depend almost entirely on scientific justification as their base. Peel<sup>387</sup> states that:

[the WTO SPS]<sup>388</sup> standards invoke scientific evidence and risk assessment as arbiters of the WTO compatibility of trade-restrictive SPS risk regulatory measures, regardless of whether the measures concerned are discriminatory in nature.<sup>389</sup>

Peel<sup>390</sup> further agrees with Scott's<sup>391</sup> submission that the WTO SPS articulates SPS standards based on scientific evidence "in a form so loose to be essentially unworkable in their own terms".<sup>392</sup> Peel<sup>393</sup> concludes that there is arguably an existence of:

[s]ubstantial scope for the SPS agreement to recognise a diversity of regulatory approaches for the use of science in risk assessment and to function as a site for debating the merits of alternative approaches.<sup>394</sup>

Adopting a "zero risk" approach to preventing the introduction of diseases is an approach that has:

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383 Peel *Science and Risk Regulation in International Law* 171; Walker 2003 *International and Comparative Law review* 197-8.

384 Scott *The WTO Agreement on Sanitary and Phytosanitary Measures*.

385 Peel *Science and Risk Regulation in International Law* 171; Walker 2003 *International and Comparative Law review* 197-8.

386 Walker 2003 *International and Comparative Law review*.

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

388 Own Emphasis.

389 Peel *Science and Risk Regulation in International Law* 171; Pauwelyn J "The WTO Agreement on Sanitary and Phytosanitary Measures as Applied in the first SPS Disputes EC Hormones, Australia Salmon, Japan Varietals" 1999 *Journal of International Economic Law* 644.

390 Peel *Science and Risk Regulation in International Law* 171-172; Scott *The WTO Agreement on Sanitary and Phytosanitary Measures* 44.

391 Scott *The WTO Agreement on Sanitary and Phytosanitary Measures*.

392 Scott *The WTO Agreement on Sanitary and Phytosanitary Measures* 44.

393 Peel *Science and Risk Regulation in International Law* 171-172.

394 Peel *Science and Risk Regulation in International Law* 171-172; Scott *The WTO Agreement on Sanitary and Phytosanitary Measures* 185.

often led to unnecessarily stringent measures that frequently had no scientific basis and were in fact used as barriers to trade.<sup>395</sup>

The authors have expressed these views in their analysis of the precautionary principle and risk assessment in relation to SPS measures. There is support for Walker's<sup>396</sup> thesis that when making a decision about risk "that such a determination cannot be a matter of 'pure science'". He does accept that science plays a considerable role, but it is not, according to Walker,<sup>397</sup> the 'neutral arbiter' it appears to be.

Deeper discussion of the suitability of scientific-based decisions in risk determination and in applying the precautionary principle goes beyond the scope of this dissertation. It is, however, necessary that the concerns with the current determination of SPS measures be noted in the context of NTBs. The researcher agrees that there are certain cases where the use of "non scientific decisions inherent in the logical structure of findings about risk"<sup>398</sup> and "non-scientific decisions inherent in the scientific warrant for findings about risk". This is also true in proving the existence of an NTB. The researcher's earlier argument that an inefficient and ineffective legislative framework could amount to SPS measures becoming NTBs could gain support from this type of argument. However, "cold" reliance on scientific justification in determining, in the normal understanding of, what an NTB is gives a legal certainty to decisions about SPS NTBs. Like any other legal issue, if an SPS measure is challenged and the scientific justifiability of that measure can be challenged with the presentation of other evidence, then other non scientific decisions may play a role.

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395 Zepeda *et al* "International Trade, Animal Health and Veterinary Epidemiology: Challenges and Opportunities" 2001 *Preventative Veterinary Medicine* 48 263.

396 Walker 2003 *International and Comparative Law review* 197-198.

397 Walker 2003 *International and Comparative Law review* 198.

398 Walker 2003 *International and Comparative Law review* 199.

## **5 NTB's and the promotion of competition in the SADC region**

### **5.1 *The main obstacles in South Africa in terms of Promotion of Competition and removal of NTB's in the context of SPS measures***

South Africa has committed itself under the SADC-PT to:

- (a) Adopt policies and implement measures to eliminate all existing forms of NTB's.
- (b) Refrain from imposing any new NTB's.<sup>399</sup>

When an SPS measure is implemented with the main purpose of protecting a domestic industry from outside competition; plant, animal and human safety becomes secondary to the purpose; and the SPS measure is used rather as a means to an unjustifiable end, they can be referred to as an NTB. NTBs and NTMs were discussed in Chapter 1 of this dissertation. A NTB is a barrier to trade, other than a tariff. From the discussion in Chapter 1 it is clear that an SPS measure is an NTM and becomes an NTB if or when the SPS measure is not scientifically justifiable or the SPS measure is more protectionist than required, thus becoming an obstacle or barrier to trade. This is as opposed to performing the function of SPS measures within the bounds of scientific justification.

The researcher is of the opinion that SPS measures are not only potentially NTBs when scientifically unjustifiable. When the legal and administrative frameworks related to SPS measures are outdated and inefficient, it may act as an NTB under the SPS concept. Further, an out dated or ineffective legislative and administrative framework (whether due to confusion or lack of in depth provisions and mandates), does not promote competition in the region. There are clearly still NTBs, and specifically SPS-related NTBs, in the region and internationally.

Lack of SPS-related information and understanding creates a situation in which the unintentional creation of SPS NTBs may arise. It can also lead to the uninformed accusation that NTBs are created. Thus, an understanding of the SPS concepts of equivalence and harmonisation is important. Equivalence and harmonisation in the context of NTBs and SPS measures are discussed in this chapter. No SADC cases have been heard on the matter, but there are WTO cases that may cast light on the interpretation and understanding of these concepts.

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399 SADC-PT A 6.

As the SADC SPS is still relatively new, the SADC Tribunal had not heard cases before it was disbanded. In the SADC region SPS-related complaints have been made. Some have been resolved, a number are still pending but, generally, little has been done in terms of clarification of terms used in the agreement, the interpretation of the agreement and, specifically, its obligations and rights. Understanding the linguistic element of an agreement of this nature is vital to its effective application. One of the objectives of the SADC-SPS is to "enhance the Member States' implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures".<sup>400</sup> Therefore, it is rational to expect that the decisions made by the WTO regarding scientific justification, for example, would apply in the same manner when the SADC-SPS is interpreted as that of the WTO-SPS.

South Africa is a large importer, both from within the region and internationally. However, the rest of the region is not dependent on South Africa's importation to such an extent that exportation to an alternative market is not an option should SPS measures act as barriers, whether justifiable or not. The current situation regarding the importation of honey into South Africa from Zambia illustrates the point being made about SPS measures potentially becoming NTBs. Recently, the Zambian honey sector lodged a complaint related to irradiation of organic honey, specifically related to the potential presence of the American Foulbrood disease.<sup>401</sup> The complaint was made in 2011. By 6 September 2013, South Africa had not made a pest risk analysis (PRA) nor had the Zambian government or the affected company received any communication.<sup>402</sup> The SADC Secretariat submitted the IPPC contact point in South Africa's report on 7 November 2013, for 1 November 2013.<sup>403</sup> Essentially, the problem has been passed on to the SADC Sub-Committee on Trade Facilitation (SCTF), and the matter "should continue to be addressed bilaterally".<sup>404</sup> The example of the Zambian honey sector illustrates how, on a practice-orientated level, SPS measures are potentially a barrier. The main issue is the irradiation, or the actual SPS measure itself. The delay in reviewing the measure and conducting an investigation or, at the very least, the DAFF communicating with the parties involved is an example of how, under the broader interpretation of what an SPS NTB is, lack

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400 SADC SPS A 2.

401 Anon 2011 [http://www.tradebarriers.org/active\\_complaints/page](http://www.tradebarriers.org/active_complaints/page); Ref: NTB-000-400.

402 Anon 2011 [http://www.tradebarriers.org/active\\_complaints/page:4](http://www.tradebarriers.org/active_complaints/page:4); Ref: NTB-000-400.

403 Anon 2011 [http://www.tradebarriers.org/active\\_complaints/page:4](http://www.tradebarriers.org/active_complaints/page:4); Ref: NTB-000-400.

404 Anon 2011 [http://www.tradebarriers.org/active\\_complaints/page:4](http://www.tradebarriers.org/active_complaints/page:4); Ref: NTB-000-400.

of co-operation and the lapse of a few years in the administration of the complaint are additional barriers to trade in itself.

At the Cattleman's Conference 2013: South African Feedlot Association a presentation was made entitled "Overcoming non-tariff barriers to beef trade". The presentation addressed issues relating to, among others, SPS measures and the concepts related thereto in terms of the management of risk. The competitiveness of southern Africa's meat trade was discussed within the context of its competitiveness under current risk management through the use of disease-free zones for diseases such as FMD under the ISSBs' Codex and OIE with the conclusion being reached that the future "does not look promising".<sup>405</sup> The author of the presentation was of the opinion that "non-geographical standards" are potentially more viable in the management of risk associated with the meat trade in southern Africa.<sup>406</sup> If trade in commodities such as meat is not adapted to the markets concerns or the necessary requirements, competition is quite simply not being promoted.

The administrative framework, dealt with in Chapter 3 of this dissertation, and its practical implementation are potentially a barrier to trade. Extracting basic SPS-related information other than superficial explanations of obligations under the WTO SPS is a trying experience. Furthermore, there is currently no real incentive to meet the objectives and obligations in terms of SPS measures. There is no threat of action, other than reporting on the website "trade barriers"<sup>407</sup> for example. An effective SADC tribunal or regional dispute settlement body similar to the WTO's system for dealing with SPS and other trade related complaints is necessary. Although not out-rightly discouraging trade, SPS measures in South Africa or the aggravation surrounding them are a potential factor that could hinder the promotion of competition in the region.

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405 Thomson "Overcoming Non-Tariff Barriers to Beef trade".

406 Thomson "Overcoming Non-Tariff Barriers to Beef trade".

407 <http://www.tradebarriers.org>.

## **5.2 Is there a breach of international obligations?**

SPS measures are existing NTBs in both South Africa and the SADC region. Eliminating them is not only achieved through accepting or implementing levels that are attainable by the majority of stakeholders bound by them. The legal obligations flowing from the SADC-SPS and the SADC-PT are not currently being observed on a satisfactory level. The SPS system as a whole can, in certain circumstances, be considered an SPS-related NTB, even if the measures themselves are scientifically justifiable.

Without incentives to comply, the SPS system is unlikely to change. A positive incentive would be to make trade more accessible by minimising SPS-related delays. Alternatively, a sanction, especially of a financial kind for non-compliance, is likely to act as an incentive that encourages co-operation. Compliance is also stunted by lack of information about SPS measures, and its purpose and function. If SPS measures are perceived to be more of an asset than a barrier to trade, compliance with, for example, notification procedures and enquiry points is likely to increase.

It was pointed out in Chapter 3 of this dissertation that the legislative framework is lacking in various aspects surrounding SPS measures. In fact, nowhere in the legislation examined is the term 'SPS measure' even mentioned or defined. The *Draft Sanitary and Phytosanitary Strategy* addresses a few, but not all those aspects that are lacking. There is no outright breach in international and regional obligations nor is there clear compliance.

The fact that NTBs still exist is a breach of regional obligations. Not amending the framework so as to meet SADC-SPS conformity is an obvious disregard of the SADC-PT requirement that existing NTBs be removed and that new NTBs not be created. Compliance with the WTO-SPS does not equal compliance with the SADC-SPS.

SPS agreements such as the SADC-SPS and the WTO-SPS have the potential to assist a member state in promoting competition and facilitating trade effectively and efficiently between countries. This is, however, only possible with a concerted effort to apply and incorporate the provisions of the SADC-SPS and the WTO-SPS into legislation and into practice. The only reason why a SPS legislative framework could

end up being more of a barrier than an asset is if the essential elements of SPS measures and agreements are ignored or misunderstood and not applied effectively. Harmonisation and equivalence being the two of the most important concepts to apply in this sense are not currently given enough attention in the legislative framework. However, they cannot function on their own and therefore the rest of the agreements that have articles relating to, among other things, control, inspection and approval or dispute resolution, for example, also need to be incorporated effectively and clearly into the same framework. If this is done, the likelihood of SPS measures becoming NTBs is less, and the identification of NTBs is likely to be easier and resolved faster.

## **6 Conclusion**

Sanitary and phytosanitary (SPS) measures are measures aimed at the protection of human, animal and plant life and health within specified territories from the risks associated with the introduction and spread of pests and diseases into such territories through trade. The international framework in terms of SPS measures is encapsulated in the interrelation between the WTO SPS and the ISSBs of Codex, OIE and IPPC. Regionally, the SADC SPS<sup>408</sup> has been established to guide the application of members regional SPS matters and

enhance the Member States' implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

The SADC-PT stipulates that member states must implement policies and measures to eliminate existing forms of NTBs to trade. Additionally, members may not enforce new NTBs affecting or related to intra-SADC trade.<sup>409</sup>

The most important elements related to SPS agreements are harmonisation, equivalence; assessment of risk and determination of the appropriate level of SPS protection; adaptation to regional conditions, including pest- or disease-free areas or low pest or disease prevalence; transparency; control inspection and approval procedures; technical assistance; and dispute settlement. The interrelationship between them and their application in a legal framework facilitates an effective SPS regime.

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408 SADC SPS A 2(1)(b).  
409 SADC PT A6.

South Africa has established its National SPS Committee and the Directorate: International Trade within the DAFF is both the NEP and the NNA.<sup>410</sup> The SPS contact point is the Sub-Directorate: Sanitary and Phytosanitary Co-ordination, which falls under the Directorate: Food and Export Standards of the DAFF.<sup>411</sup> The legislative framework in South Africa consists of the following Acts: the *Agricultural Pests Act* 36 of 1983; *Agricultural Products Act* 119 of 1990; *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947; *Liquor Products Act* 60 of 1989; *Meat Safety Act* 40 of 2000; *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972; *Medicines and Related Substances Act* 101 of 1965; and *National Regulator for Compulsory Specifications Act* 5 of 2008. The Acts forming the legislative framework related to SPS measures encourage a broad SPS related protection. It is largely clear that animal, plant and human health is important, and that certain legislative measures are in place to ensure their continued protection.

The South African legislative framework generally promotes the facilitation of human, animal and plant life protection. It does not, however, effectively enhance South Africa's implementation of the WTO-SPS. Very little promotion of international standards is present. The legislative framework has enhanced technical capacity in South Africa. All five the SADC-SPS objectives are beneficial to South Africa. Through their effective implementation, SPS-related trade disputes can be minimised and the trade in Southern Africa can benefit thereby, while simultaneously providing the required protection for human, plant and animal health and life from diseases.

The Draft SPS Strategy was compiled by the Directorate: Food Import and Export Standards for the DAFF in January 2014. It lists seven "focus areas for implementation" or objectives.<sup>412</sup> These objectives are harmonised legislative reform; enhanced integration between "implementing agencies" at national local and provincial levels; integration and strengthening of compliance capacities under international agreements; stakeholder engagement; improved communication and

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410 DAFF Date Unknown <http://www.daff.gov.za/daffweb3/Branches/Agricultural-Production-Health-Food-Safety/Food-Import-Export-Standards/> WTO SPS-Co-ordination.

411 DAFF Date Unknown <http://www.daff.gov.za/daffweb3/Branches/Agricultural-Production-Health-Food-Safety/Food-Import-Export-Standards/> WTO SPS-Co-ordination.

412 *Draft Sanitary and Phytosanitary Strategy 2014*, 3.

awareness; strengthening of SPS capacity and skill levels; and enhanced SPS diplomacy.<sup>413</sup>

Clearly, an existing SPS regime is being administered in South Africa. This was the case long before the WTO SPS and the SADC SPS. However, the mere existence of such a system does not amount to compliance in terms of the current obligations that South Africa has freely agreed to under the various agreements. The legislative framework is outdated, relatively unsystematic and quite confusing. Essentially, only the basic requirements are observed. However, South Africa is largely making positive moves towards meeting its obligations in terms of SPS measures under the SADC-SPS. The fact that NTBs still exist is a breach of regional obligations. Not amending the framework so as to meet SADC-SPS conformity is an obvious disregard of the SADC-PT requirement that existing NTBs be removed and that no new NTBs be created. Compliance with the WTO-SPS does not equal compliance with the SADC-SPS.

SPS agreements such as the SADC SPS and the WTO SPS have the potential to assist a member state in promoting competition and facilitating trade effectively and efficiently between countries. This is, however, only possible if a concerted effort is made to apply and incorporate the provisions of the SADC SPS and the WTO SPS into legislation and into practice. The only reason why a SPS legislative framework could end up being more of a barrier than an asset is if the essential elements of SPS measures and agreements are ignored or misunderstood and not applied effectively.

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413 *Draft Sanitary and Phytosanitary Strategy 2014*, 3.

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