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RESEARCH PAPER

Name of candidate: Crispin Muller

Student number: 2730572

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Counteracting the misuse and abuse of subsidies and SPS measures in the EU and USA: Solutions for South Africa

Supervisor: Professor R Wandrag

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Acronyms and abbreviations

ACP	African, Caribbean and Pacific Countries
AMS	Aggregate Measures of Support
AoA	Agreement on Agriculture
Brics	Brazil, Russia, India, China and South Africa
CAC	Codex Alimentarius Commission
CBS	Citrus black spot
CEM	Commercial export milk
COP	Average total cost of production
EC	European Commission
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
IPPC	International Plant Protection Convention
Itac	International Trade Administration
OIE	International Office of Epizootics
PTAs	Preferential Trade Agreements
RSA	South Africa
SADC	Southern African Development Community
SCM Agreement	Agreement on Subsidies and Countervailing Measures

SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS measures	Sanitary and phytosanitary measures
SSG	Special agricultural safeguards
TDCA	Trade development and co-operation agreement
USA	United States of America
WTO	World Trade Organisation

Key words

Agricultural trade; Trade Protectionism; Developed nations; EU; USA; Trade distortion; Subsidies; Reducing the trade distorting effects of agricultural subsidies; SPS measures; Barriers to trade

Chapter outline

Chapter 1: Introduction

This chapter will provide a brief background into the trade relations between South Africa (RSA), the European Union (EU) and the United States of America (USA). It will further provide an overview of the purpose and objectives of the Agreement on Agriculture (AoA) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and explore the circumstances which necessitated their creation in the World Trade Organisation (WTO).

Chapter 2: Domestic support (subsidies)

This chapter will serve as an introduction to the concept of subsidies and how they are regulated within the AoA. This discussion will focus on the continued misuse and abuse of subsidies in the EU and USA and the consequences for international agricultural trade. The intended outcome of this part of the research is to provide possible remedies which could and should be implemented by the South African government to enable it to reduce the negative impacts of the abuse of trade protection (through the use of subsidies) on its agricultural exports.

Chapter 3: Sanitary and phytosanitary measures

This chapter will explore the concept of sanitary and phytosanitary measures (SPS measures) and explain why and how such measures are used and should be used within the context of the SPS Agreement. The purpose of this section of the research is to highlight the improper use of SPS measures by the EU and USA as barriers to trade and to determine whether enough has been done to regulate the use of such measures in the WTO.

Chapter 4: conclusion and recommendations

In light of the aforementioned research it must be established whether there is a practical solution which can be put into operation by the South African government to enable it to resist the trade distorting effects of subsidised agricultural imports and SPS measures put in place as barriers to agricultural trade in the EU and USA.

Chapter 1

1.1. Research Question

How can South Africa counteract the use of subsidies and SPS measures as barriers to agricultural trade in the EU and USA?

1.2. Literature review

1.2.1 Regulating agricultural subsidies

It has been held that agricultural domestic support would not be such a contentious issue if its only effect was the benefit of local farmers, but this is not the case.[1] It was found that several forms of domestic support have the effect of distorting the patterns of agricultural production and trade at an international level, leaving non-supported farmers elsewhere worse off.[2] It was thus concluded that such support measures may indeed nullify the benefits which accrue from trade liberalisation and explains how the AoA[3] regulates these measures in a way that reduces their trade distorting effects.[4]

It has been noted that the agricultural sector only accounted for a small percentage of the developed world's Gross Domestic Product (GDP), yet the regulation of international agricultural trade was not an easy task.[5] Smith explains that numerous attempts were made to implement some form of regulation, including a half-hearted effort in the General Agreement on Tariffs and Trade (GATT) and the subsequent AoA upon the creation of the WTO in 1995.[6] According to Smith, the successful regulation of international agricultural trade remained elusive, despite hopes for liberalising trade in the sector.[7]

Desta MG and McMahon JA explain that the WTO is not very concerned with countries that provide domestic support to their agricultural sectors, as this only matters to the extent that it

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[1] Desta MG 'Legal Issues in International Agricultural Trade: The evolution of the WTO Agreement on Agriculture from its Uruguay round origins to its post-Hong Kong directions' (2006) available at http://www.fao.org/legal/prs-ol/paper-e.htm (accessed on 20 May 2012). (Hereinafter referred to as Desta MG 'Legal Issues in International Agricultural Trade' (2006))

[2] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.

[3] Uruguay Round Agreement – Agreement on Agriculture.

[4] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23-24.

[5] Smith F (ed) *Agriculture and the WTO: Towards a New Theory of International Agricultural Trade* (2009) Edward Elgar Publishing Ltd UK and Edward Elgar Publishing Inc USA at page 25. (Hereinafter referred to as Smith F(ed) *Agriculture and the WTO* (2009))

[6] Smith F (ed) *Agriculture and the WTO* (2009) 26.

[7] Smith F (ed) *Agriculture and the WTO* (2009) 27.

affects trade in that sector.[8] It is further observed that the AoA balances out the freedom to provide domestic support with the need to reduce or eliminate the trade distortive effects thereof and note that the AoA has essentially made all forms of domestic support more transparent and easier to deal with.[9] A party is therefore unlikely to be challenged, successfully, if domestic support is given in accordance with the provisions of the AoA.[10]

The aforementioned views only seem to address the merits of the AoA and the way in which it regulates the use of agricultural subsidies. It should however be noted that the literature fails to address the fact that the WTO has not enforced the provisions of the AoA very effectively against the EU and the USA, in light of the continued misuse of subsidies within both parties.

In this regard it must be ascertained whether the WTO should impose stricter penalties as a means to deter its member states, especially the EU and USA, from using subsidies in an abusive way. In addition to this, it must be determined which types of penalties can and should be imposed.

1.2.2 The misuse of sanitary and phytosanitary measures

The protection of human, animal and plant life and health is a sovereign duty of all governments.[11] For this purpose, governments have in place regulatory measures aimed at protection against risks contained in food and agricultural products.[12] The SPS Agreement[13] represents the regulation of these measures at an international level as regards the potential risks for human, animal and plant life, while ensuring that such measures are not misused under the guise of agricultural food protection.[14] However, SPS measures represented a challenge for

[8] McMahon JA and Desta MG (ed) *A Research Handbook on the WTO Agriculture Agreement: New and Emerging issues in International Agricultural Trade Law* (2012) Edward Elgar Publishing Ltd UK and Edward Elgar Publishing Inc USA at page 3. (Hereinafter referred to as McMahon JA and Desta MG *A Research Handbook on the WTO Agriculture Agreement* (2012)

[9] McMahon JA and Desta MG *A Research Handbook on the WTO Agriculture Agreement* (2012) 7.

[10] McMahon JA and Desta MG *A Research Handbook on the WTO Agriculture Agreement* (2012) 11.

[11] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 1 available at http://www.tralac.org (accessed on 20 May 2012) (Hereinafter referred to as Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004))

[12] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 1.

[13] Uruguay Round Agreement – Agreement on the Application of Sanitary and Phytosanitary Measures.

[14] Isaac GE 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier'(2004) 5(1) *The Estey Centre Journal of International Law and Trade Policy* (hereinafter referred to as Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004)

agricultural trade policy due, in part, to the ambiguity surrounding the wielding of the agreement's power, as there was uncertainty as to what constituted a legitimate SPS measure.[15]

Reference is made to disputes involving the EU and Japan, where both parties were challenged for impeding market access to agricultural food products based on different SPS measures.[16] For example, the EU regulations prohibiting the use of growth-promoting hormones in beef production were a market access barrier preventing the export of beef from Canada and the USA to the EU.[17] Canada and the USA both challenged the EU regulations as a violation of the SPS Agreement obligations and the WTO agreed, however, the EU effectively ignored the ruling and the market access barriers remained.[18] This shows that when domestic SPS regulations and international trade rules overlap, it is at the cost of the multilateral trading system.[19]

When a member initiates a trade measure alleging public health reasons the measure must be proportional to the level of risk and be based on "international standards, guidelines or recommendations, where they exist.[20] Therefore, a member can only institute trade measures based on higher sanitary or phytosanitary standards when such measures are justified by scientific evidence.[21]

As aforementioned, the EU has ignored WTO rulings concerning the fact that it (the EU) incorrectly relied on SPS measures. Despite this apparent disregard for the authority of the WTO and the rule of international trade law, the WTO failed to impose any penalty on the EU and the misuse of SPS measures continued.

In light of these facts the question arises as to what sanitary or phytosanitary standards must be complied with and what "scientific evidence" must be produced to prove as such. The proposed research will also address the issue of penalties (as with subsidies) in regard to the improper use of SPS measures and the deliberate disregard of WTO rulings in respect thereof.

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[15] Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004) 44.

[16] See Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004) 45 and Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 6-10.

[17] Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004) 45.

[18] Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004) 45.

[19] Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004) 45.

[20] Vesilind PA 'Continental Drift: Agricultural Trade and the Widening Gap Between European Union and United States Animal Welfare Laws' (2011) 12 *Vermont Journal of Environmental Law* (Hereinafter referred to as Vesilind PA 'Continental Drift' (2011).

[21] Isaac GE 'The SPS Agreement and Agri-food Trade Disputes' (2004) 45.

1.3. Objectives

In the first instance this paper will present an overview of the reasons behind the creation of the AoA and SPS Agreement, and provide a background to South Africa's trade relations with the EU and USA.

It is the purpose of the proposed research to highlight the misuse and abuse of agricultural subsidies and SPS measures by the EU and USA, with a view to providing possible solutions for counteracting the negative effects of such measures on agricultural trade in South Africa. It must therefore be established whether the WTO should adopt a stricter approach in enforcing the rules of international trade law which apply to the use of subsidies and SPS measures by its member states.

Once the aforementioned objectives have been completed it is intended that a practical solution is submitted, which can be put into operation by the South African government to enable it to resist the effects of trade protectionism in the EU and USA.

1.4. Background

The liberalisation of agricultural trade between developed and developing countries has been an important topic of discussion since the late 1990s[22], when the Cotonou Agreement[23] was signed and the EU made a commitment to develop trade relations with the African, Caribbean and Pacific (ACP) countries through the establishment of preferential trade agreements (PTAs).[24]

Upon entering the era of democracy, eighteen years ago, South Africa sought to create a trade policy framework with the objective of making its economy competitive in the international market.[25] In an effort to develop trade relations on a global level, South Africa became a signatory to GATT in 1994, and established a free trade agreement (FTA) with the EU in 2000.[26] Through establishing such a powerful trade relationship, South Africa hoped to create a basis for

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[22] McDonald S; Walmsley T 'Preferential Trade Agreements and the Optimal Liberalisation of Agricultural Trade' (2003) 3 *Sheffield Economics Research Paper Series* 3-4 (hereinafter referred to as McDonald S; Walmsley T 'Preferential Trade Agreements' (2003))

[23] The Cotonou Agreement has been the most comprehensive partnership agreement between developing countries and the EU since 2000 and the framework for the EU-ACP trade relations. It was revised for a second time in March 2010. Available at http://ec.europa.eu (Accessed on 21 May 2012)

[24] McDonald S; Walmsley T 'Preferential Trade Agreements' (2003) 3-4.

[25] Kalaba M 'South African Trade with developing and developed Partners: Do the same principles apply?' (2007) available at www.tips.org.za/files/Principles_of_Trade_M_Kalaba.pdf (accessed on 20 May 2012) (hereinafter referred to as Kalaba M 'South African Trade with developing and developed Partners' (2007)).

[26] Kalaba M 'South African Trade with developing and developed Partners' (2007) 1.

lowering trade barriers and liberalising trade amongst developed and developing nations, thus transforming its market from one that was the most protected and distorted, to one that reflected openness.[27] However, it became apparent that the EU was not as supportive of the idea of liberalisation, especially in regard to trade in agriculture.[28]

Historically, it is has been noted that the EU is a very reluctant trade partner and would give less preference to agricultural commodities, as opposed to other non-agricultural commodities if it did become party to any kind of trade agreement.[29] This was an issue of contention in the RSA-EU FTA where the EU retained protection over certain 'sensitive' agricultural commodities.[30] The EU has been criticised and challenged for employing protectionist measures to curb the flow of agricultural exports from developing nations.[31]

The Brics (Brazil, Russia, India, China and South Africa)[32] nations spoke out against such behaviour from the EU as well as the USA, and stated that trade protectionism had the effect of distorting international trade and impeding the development potential of developing nations.[33] According to Brics, it is essential that developing nations resist the continued use of protectionist measures from developed parties like the EU and USA, especially at a time when the global economy is undergoing difficult times.[34]

1.5. Understanding the purpose behind the WTO Agreement on Agriculture

Before WTO negotiations resulted in the creation of the AoA, there were very few rules which governed the conduct of international trade in agriculture and for many years there was no effective regulation of this sector.[35] Although GATT did attempt to make provision for some regulation, there were still many loopholes, which opened the door for countries to use non-tariff measures, such as import quotas and subsidies without the fear of any consequences

[27] Kalaba M 'South African Trade with developing and developed Partners' (2007) 1.
[28] McDonald S; Walmsley T 'Preferential Trade Agreements' (2003) 4.
[29] McDonald S; Walmsley T 'Preferential Trade Agreements' (2003) 4.
[30] McDonald S; Walmsley T 'Preferential Trade Agreements' (2003) 4.
[31] Sharma YS 'Brics slams US, EU proxy steps to curb imports' (2012) available at www.mydigitalfc.com (accessed on 28 March 2012). (Hereinafter referred to as Sharma YS 'Brics slams US, EU' (2012))
[32] Sandry R 'South Africa's way ahead: are we a BRIC?' (2011) available at www.tralac.org (accessed on 30 August 2012).
[33] Smith F (ed) *Agriculture and the WTO* (2009) 25-27.
[34] Sharma YS 'Brics slams US, EU' (2012).
[35] Smith F (ed) *Agriculture and the WTO* (2009).

attaching thereto.[36]

As a result trade in agriculture became highly distorted, especially so with the use of export subsidies, which would not normally have been permitted in the case of trade in other sectors.[37] In an effort to resolve this issue the WTO created the first multilateral agreement dedicated to the regulation of trade in the agricultural sector.[38] This was a significant first step towards order, fair competition and a less distorted sector.[39]

Agriculture was placed at the core of negotiations following the GATT Ministerial Declaration that "there [was] widespread dissatisfaction with the application of GATT rules and the degree of liberalisation in relation to agricultural trade"[40] and acknowledgment that there was an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions, so as to reduce the uncertainty, imbalances and instability that were present in world agricultural markets.[41]

Less than twenty years ago the AoA came into existence as one of the several agreements annexed to the Marrakesh Agreement, which established the WTO.[42] The AoA declares in its preamble that the long-term objective of WTO Members is "to establish a fair and market oriented agricultural trading system."[43] The agricultural negotiations that took place at the WTO were part of the mission to bring this objective one step closer to becoming a reality.[44]

The AoA significantly changed the way in which international agricultural trade and production was regulated by the WTO, and brought to an end a period in which agriculture was all but excluded from the rules of GATT, especially those dealing with export subsidies and export restrictions.[45] The AoA was considered one of the most fundamental steps in creating a strong

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[36] Smith F (ed) *Agriculture and the WTO* (2009).
[37] Smith F (ed) *Agriculture and the WTO* (2009.)
[38] Smith F (ed) *Agriculture and the WTO* (2009).
[39] Smith F (ed) *Agriculture and the WTO* (2009).
[40] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 3.
[41] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 3.
[42] Desta MG 'Legal Issues in International Agricultural Trade (2006) 1.
[43] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 1.
[44] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 1.
[45] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 4.

set of rules within which to regulate agriculture.[46] The AoA was created as an agreement which was specific to the sphere of agricultural trade and production and which did not subject agricultural products to the same rules as applied in the rest of the trading sectors.[47] The reasoning behind this special and differential treatment of agricultural trade was the unwillingness of members to liberalise trade in that sector as easily as they did for the other commodities.[48]

1.6. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures

As much as the use of subsidies (both export and domestic) have had a negative impact on the agricultural sector, the effects are also being felt through the increased imposition of regulations and requirements which are meant to protect human, animal and plant life.[49]

The negotiators of the WTO agreements knew that there was a possibility that progress towards lowering traditional trade barriers in the agricultural sector could prove fruitless as a result of the increased use of SPS measures for protectionist purposes.[50] Apart from those SPS measures that were based on legitimate health concerns; there were some measures which had more questionable grounds.[51]

The SPS Agreement therefore aimed to balance the rights of member governments to implement measures for the protection of human, animal and plant life[52] with the Liberalisation of trade in agricultural and food products.[53] The SPS Agreement attempted to balance these interests by acknowledging the right of Members to enact SPS measures and determine the level of health protection they want to ensure in their territories, while setting certain parameters for the exercise of these rights.[54]

[46] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 4.
[47] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 4.
[48] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 4.
[49] McMahon JA and Desta MG *A Research Handbook on the WTO Agriculture Agreement* (2012) 170.
[50] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 4
[51] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 4
[52] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 5.
[53] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 5.
[54] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 5.

The SPS Agreement thus provides "that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade."[55]

[55] See the Preamble to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures

Chapter 2: Agricultural Support

2.1. General Definition

The concept of agricultural domestic support refers to subsidies which are awarded to agricultural producers regardless of whether or not their products are exported.[56] This has a dual effect in distorting trade, by providing false incentives for excess production and making the use of import barriers and export subsidies necessary and unavoidable.[57]Agricultural domestic support would not be such a contentious issue if its only effect was the benefit of local farmers, but this is not the case.[58]

It was found that several forms of domestic support have the effect of distorting the patterns of agricultural production and trade at an international level, leaving non-supported farmers elsewhere worse off.[59] It was thus concluded that such support measures may indeed nullify the benefits which accrue from trade Liberalisation.[60]

The AoA was created with the knowledge that the use of market access restrictions and export subsidies had been made necessary as a result of the provision of domestic support by developed nations.[61] It therefore intended to eliminate the link between the provision of subsidies and the incentives associated with increased agricultural production.[62] The abundance of domestic support measures, especially in the developed countries and the determination to justify their use meant that the long-term objective of trade reform and fair market practices had to be put aside to enable such activities to continue, to the prejudice of the international market.[63]

[56] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 22.
[57] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.
[58] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.
[59] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.
[60] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.
[61] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.
[62] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23.
[63] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 23-24.

The Uruguay Round negotiations established the "three pillars"[64] of agricultural support: market access, export subsidies, and domestic support.[65] The domestic support provisions outlined various types of support, classified them by their apparent trade effects, and limited those programs deemed to be the most trade distorting.[66] Under the provisions of the AoA trade-distorting domestic support measures are prohibited unless specifically permitted.[67] In this regard Article 1 of the AoA declares that "[d]omestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal trade-distorting effects on production."[68]

The negotiators of the AoA recognised that trade reform would not lead to the elimination of subsidies, as wealthy nations would always have the means to provide support via subsidies.[69] It was therefore essential that the various methods of support were classified properly and strictly to ensure that payments were kept honest.[70] In this context "honest payments"[71] are defined as those payments which should not have the effect of shifting Africa's comparative advantage in agriculture and the crucial role that agriculture plays in the development of the African continent.[72]

2.2. Classifying and "boxing" agricultural subsidies

The original GATT provisions did not impose very strict regulation on the use of export or domestic subsidies, except to oblige members to notify such measures and enter into discussions for the limitation thereon in circumstances where there were negative impacts on the trade interests of other countries.

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[64] Hart C E and Beghin C J 'Rethinking Agricultural Domestic Support under the World Trade Organization' in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 221.

[65] Hart C E and Beghin C J 'Rethinking Agricultural Domestic Support under the World Trade Organization' in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 221.

[66] Hart C E and Beghin C J 'Rethinking Agricultural Domestic Support under the World Trade Organization' in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 221.

[67] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 24.

[68] Article 1 of the WTO Agreement on Agriculture

[69] Zunkel M H 'The Future of the 'Boxes' under the WTO Agreement on Agriculture' – Suggestions from an African Perspective' (2004) ILEAP Background Brief No.2 2 (Hereinafter referred to as Zunkel M H The Future of the 'Boxes' (2004)).

[70] Zunkel M H The Future of the 'Boxes' (2004) 2.

[71] Zunkel M H The Future of the 'Boxes' (2004) 2.

[72] Zunkel M H The Future of the 'Boxes' (2004) 2.

To better regulate the use of the different measures of support under the WTO, they were placed into three separate "Boxes" and classified according to the colours of a traffic light, namely, green (permitted), amber (slow down — i.e. be reduced) and red (forbidden), in order to identify their distortive effects on trade.[73] In respect of trade in agriculture, the classification is slightly different, as the AoA has no Red Box and is only focused on domestic support measures which are provided in the so-called Amber Box and the Green Box categories.[74]

Therefore, the amber box comprises all those domestic support measures which are provided in excess of reduction commitment levels and are considered to distort agricultural production and trade.[75] In this regard Article 6.1 of the AoA provides as follows:

"1. The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement."[76]

Subsidies that fall within in the green box are not subject to restrictions under the AoA because they are not considered trade distorting.[77] The green box measures of support are regulated by Paragraph 1 of Annex 2 to the AoA, which stipulates that all measures for which an exemption from reduction is claimed must meet the following basic criteria:

> "(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question shall not have the effect of providing price support to producers;"[78]

These categories of support were not free from criticism, especially in regard to their use (and abuse) by developed WTO nations. These measures will now be dealt with individually and in more detail.

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[73] Agriculture Negotiations: Background Fact Sheet – Domestic support in agriculture: The Boxes available at *www.wto.org*.
[74] Agriculture Negotiations: Background Fact Sheet – Domestic support in agriculture: The Boxes available at *www.wto.org*.
[75] Agriculture Negotiations: Background Fact Sheet – Domestic support in agriculture: The Boxes available at *www.wto.org*.
[76] Article 6.1 of the WTO Agreement on Agriculture.
[77] Agriculture Negotiations: Background Fact Sheet – Domestic support in agriculture: The Boxes available at *www.wto.org*.
[78] Paragraph 1 of Annex 2 to the WTO Agreement on Agriculture.

2.2.1 The problem with the Red Box

The so-called "Red Box"[79] measures of support refer to the provision of export subsidies, which are the most distortive type of support which can be employed by a WTO member.[80] For this reason the AoA prohibits the provision of subsidies under the red box, unless said subsidies have been notified and scheduled in terms of its provisions.[81] The term Red Box, as used in relation to the AoA, is understood to have the same meaning as the 'Red Light'[82] subsidies which are prohibited under Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[83]

Before going further, it is important to provide a brief explanation of what a subsidy is. Export subsidies are defined in Article 1(e) of the AoA as ".....subsidies contingent upon export performance."[84] This definition provides little clarity on the subject, which means that the answer is to be found elsewhere. In this case reference is made to Article 1(a) of the SCM Agreement, which provides that a subsidy is deemed to exist if there is a financial contribution made by a government or any public body within the territory of a Member as defined in paragraph 1(a) 1 (i)-(iv) or if there is any kind of income or price support in terms of Article XVI of GATT 1994[85], either of which must confer a benefit.[86]

Article 2 of the SCM Agreement further provides that a subsidy shall be considered as being specific to a certain enterprise or group of enterprises "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises;...."[87]

Where there are reasons to believe that a subsidy may in fact be specific, despite the appearance of non-specificity, Article 2 provides for other factors that may be taken into account in determining specificity, such as:"...use of a subsidy programme by a limited number of certain

[79] Zunkel M H The Future of the 'Boxes' (2004) 3.
[80] Zunkel M H The Future of the 'Boxes' (2004) 3.
[81] Zunkel M H The Future of the 'Boxes' (2004) 3.
[82] Zunkel M H The Future of the 'Boxes' (2004) 2.
[83] See Article 3:1 of the WTO Agreement on Subsidies and Countervailing Measures, which prohibits the use of subsidies which are conditional on the excess production of exports; also see Zunkel M H The Future of the 'Boxes' (2004) 2.
[84] Article 1(e) of the WTO Agreement on Agriculture.
[85] Article 1(a) of the WTO Agreement on Subsidies and Countervailing Measures.
[86] Paragraph 1.1 (b) of Article 1(e) of the WTO Agreement on Agriculture.
[87] Article 2.1(a) of the WTO Agreement on Subsidies and Countervailing Measures.

enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy."[88]

The AoA provided that 25 WTO Members (a mere 16 percent) could subsidise their exports in respect of products for which commitments had been made under the AoA regarding the maximum value and quantities of farm exports that could be subsidised.[89] Commitments set limits on a member's capacity to subsidise their agricultural exports.[90] Other WTO Members may not subsidise their agricultural exports at all.[91] South Africa is the only African country to have notified and scheduled any export subsidies and was permitted to use any of 62 different measures, but chose not to implement any of them.[92]

According to the Members of the African continent, a measure which has such a trade distorting effect should not be kept for use by a minority of the WTO Membership, especially since no African countries had used export subsidies.[93] For Africa, the correct approach was to have a complete prohibition on the provision of export subsidies.[94] The view was that the 'phasing out' of subsidies had to be the priority and that 'reduction' as a means to this end had to be swift.[95]

Both the Uruguay Round and the Doha Round negotiations highlighted the need to strengthen the regulation of export subsidies.[96] A lot of effort was focused on reaching an agreement to ban these subsidies in the agricultural sector, in order to bring it in line with other sectors.[97] The elimination of export subsidies was ultimately accepted by those (WTO) Members that

[88] Article 2.1(a) of the WTO Agreement on Subsidies and Countervailing Measures.

[89] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 197.

[90] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 197.

[91] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 197.

[92] Zunkel M H The Future of the 'Boxes' (2004) 3.

[93] Zunkel M H The Future of the 'Boxes' (2004) 3.

[94] Zunkel M H The Future of the 'Boxes' (2004) 3.

[95] Zunkel M H The Future of the 'Boxes' (2004) 3.

[96] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 195.

[97] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 195.

employed such measures more intensively than the others, which included the EU.[98]

This need for regulation formed the subject matter of a dispute brought by Brazil against the USA regarding its cotton exports.[99] The WTO Dispute panel in that case ruled that three of the subsidies provided by the USA had the effect of distorting the international market, with a high cotton production during a period when international prices were at a low.[100]

The first category of subsidies, which had been provided to domestic producers,[101] was found to have been prohibited under the SCM Agreement[102] (the "Red Light" subsidies). The panel further ruled that the provision of certain export subsidies by the USA (The so called Phase 2 Subsidies)[103] was prohibited as no such subsidies were found to have been scheduled.[104]

The final ruling dealt with a set of export credit guarantees that were awarded to local producers in respect of goods sold on the international market in economies where credit risks existed.[105] The panel ruled that the export credit guarantees made available to cotton producers constituted a type of export subsidy, which was prohibited, once again, as no such subsidy had been scheduled.[106] The panel gave the USA 6 months to do away with their export subsidies.[107]

Shortly after the conclusion of the aforesaid dispute, the USA again found itself on the other side of a complaint by the Canadian government.[108] This time, the complaint was focused on the provision of subsidies and domestic support in the USA's corn industry.[109]

Canada requested consultations and argued that the subsidies and domestic support which had been provided to the corn sector in the USA negatively affected Canadian corn producers

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[98] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 195.

[99] Josling T 'Agricultural Trade Disputes in the WTO', Elsevier Series on Frontiers of Economics and Globalization 22 (Hereinafter referred to as Josling T 'Agricultural Trade Disputes in the WTO').

[100] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[101] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[102] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[103] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[104] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[105] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[106] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[107] Josling T 'Agricultural Trade Disputes in the WTO' 23.

[108] U.S.-Canada WTO Corn Trade Dispute (Canada v U.S.) (Dispute Settlement) [2007] CRS Report RL33853 1 (Hereinafter referred to as U.S.-Canada WTO Corn Trade Dispute [2007]).

[109] U.S.-Canada WTO Corn Trade Dispute [2007] 1.

through serious prejudice and the threat of serious prejudice to the interests of Canada, which was a violation of Articles 5(c) and 6:3(c) of the WTO's SCM Agreement.[110] Article 5(c) stipulates that the provision of subsidies should not result in serious prejudice to the interests of another member,[111] while article 6:3(c) provides that such prejudice could manifest itself through the price undercutting, suppression or depression of like products of other Members in the international market.[112]

A second argument put forward by Canada referred to the Brazil/USA cotton subsidy dispute and the issue of export credit guarantees.[113] Canada submitted that the USA's export credit guarantee program constituted an illegal subsidy in respect of the WTO rules.[114] This argument followed the ruling of the WTO dispute panel which declared that export credit guarantees essentially constituted export subsidies[115] due to the fact that the financial return from these programs failed to cover their long-run operating cost.[116] Furthermore, this rule was held to apply to all commodities for which export guarantees were awarded and not only cotton.[117]

2.2.2. The new red – why Amber means stop!

Falling slightly lower on the scale are the "Amber Box" or domestic support measures, which are deemed to have a substantial or more than minimal trade-distorting impact.[118] The use of these types of measures is prohibited, with the exception of 35 Members[119] that have been permitted to employ such measures of support within the limits set by their Aggregate Measures of Support (AMS).[120] An aggregate measure of support is defined as an indicator of the amount of support found in this box category.[121] Once again it appears that this is a category of support

[110] U.S.-Canada WTO Corn Trade Dispute [2007] 1 8-9; see also Article 5(c) and 6:3(c) of the WTO Agreement on Subsidies and Countervailing Measures.
[111] U.S.-Canada WTO Corn Trade Dispute [2007] 1 9; see also Article 5(c) of the WTO Agreement on Subsidies and Countervailing Measures.
[112] U.S.-Canada WTO Corn Trade Dispute [2007] 1 8-9; see also Article 6:3(c) of the WTO Agreement on Subsidies and Countervailing Measures.
[113] U.S.-Canada WTO Corn Trade Dispute [2007] 1 10
[114] U.S.-Canada WTO Corn Trade Dispute [2007] 1 10
[115] U.S.-Canada WTO Corn Trade Dispute [2007] 1 10
[116] U.S.-Canada WTO Corn Trade Dispute [2007] 1 10
[117] U.S.-Canada WTO Corn Trade Dispute [2007] 1 10
[118] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 24.
[119] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 24.
[120] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 24.
[121] Jensen H Gand Zobbe H 'Consequences of Reducing Limits on Aggregate Measurements of Support' in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 246.

made available only to a select group of Members, with South Africa as one of the two African countries forming part of this minority.[122] It is no surprise therefore that the African contingent submitted a proposal for substantial reductions in the amber box measures of support, with a view to eventually having said measures eliminated along with the Red Box.[123]

Although its elimination was not seen as a viable solution,[124] it was held that a reduction in amber box measures had to occur if there was to be a complete ban on red box subsidies.[125] This follows from the view that the elimination of export subsidies should be a key consequence of reducing the gap between domestic and world prices created by border barriers and domestic support programs.[126]

This point was demonstrated when New Zealand and the USA took issue with Canada's new dairy policy and called for consultations.[127] The matter was thereafter referred to WTO dispute settlement proceedings.[128]This new policy was implemented by the Canadian government with the purpose of aiding exporters of dairy products (mainly cheese) made with expensive domestic milk.[129] A separate "export" category of milk was identified and sold at a lower price than that sold for domestic use[130]. This category was known as "commercial export milk" ("CEM") and was sold to Canadian processors by Canadian producers for the processing thereof into various dairy products for export[131] In creating the policy it was assumed that, as no government funds were involved, such a scheme would not be seen by trading partners as an export subsidy.[132]

This assumption proved to be incorrect when the dispute panel found in favour of New Zealand and the USA and ruled that Canada's dairy scheme constituted an export subsidy as it was a

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[122] Zunkel M H The Future of the 'Boxes' (2004) 4.

[123] Zunkel M H The Future of the 'Boxes' (2004) 4.

[124] Zunkel M H The Future of the 'Boxes' (2004) 4.

[125] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 196.

[126] Hoekman B and Messerlin P 'Removing the Exception of Agricultural Export Subsidies'in Anderson K and Martin W (ed) *Agricultural Trade Reform under the Doha Development Agenda* (2006) 196.

[127] Josling T 'Agricultural Trade Disputes in the WTO' 21.

[128] Josling T 'Agricultural Trade Disputes in the WTO' 21.

[129] Josling T 'Agricultural Trade Disputes in the WTO' 21.

[130] Josling T 'Agricultural Trade Disputes in the WTO' 21.

[131] Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (2002) WT/DS103/AB/RW2 & WT/DS113/AB/RW2 at para 14. (Hereinafter referred to as referred to as Canada – Measures Affecting the Importation of Milk (2002))

[132] Josling T 'Agricultural Trade Disputes in the WTO' 21.

consequence of government intervention,[133] this was despite the fact that no funds had been provided by the Canadian government.[134]

On appeal Canada argued that the panel had erred in finding that CEM involved payments[135] under Article 9.1 (c)[136] of the AoA. In response the panel affirmed the initial view that the term "payments" in relation to CEM included what are known as "payments in kind". It held further that in determining whether such payments in kind existed, it was necessary to compare CEM prices with an objective standard which would reflect the proper value of milk to producers.[137]

For the purposes of the case before it the panel noted that the appropriate standard to use was that of the *average total cost of production* ("COP standard") and had to determine whether said standard should be based on the production costs for individual producers or an industry-wide average.[138]

The panel dismissed Canada's assertion that the COP standard had to be determined on the basis of the cost of production incurred by individual producers,[139] and opined that although the conduct of private parties did have an important role to play in the application of Article 9.1(c) of the AoA[140], the obligations imposed there under remained obligations which Canada had to fulfil[141]. It was therefore expressed that the standard for determining whether payments were made (in the context of Article 9.1(c)) ought to reflect the fact that the obligation in question is an international one imposed on Canada, as a Member of the WTO[142].

Therefore, the question which arose was not whether private milk producers sold CEM at a price above or below their individual costs of production, but rather whether Canada, as a nation, had

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[133] Josling T 'Agricultural Trade Disputes in the WTO' 21.

[134] Josling T 'Agricultural Trade Disputes in the WTO' 21.

[135] Canada – Measures Affecting the Importation of Milk (2002) at para 78.

[136] Under Article 9.1 of the AoA export subsidies include"payments on the export of an agricultural product that are financed by virtue of governmental action..." under Article 9.1(c) thereof.

[137] Canada – Measures Affecting the Importation of Milk (2002) at para 80.

[138] Canada – Measures Affecting the Importation of Milk (2002) at para 80.

[139] Canada – Measures Affecting the Importation of Milk (2002) at para 93.

[140] Canada – Measures Affecting the Importation of Milk (2002) at para 95 – the panel noted that Article 9.1(c) makes provision for an unusual type of export subsidy, whereby payments can be made and funded by private parties, and not only government. Therefore, it was held that the conduct of WTO Members was not the only relevant factor to consider in the application of Article 9.1(c).

[141] Canada – Measures Affecting the Importation of Milk (2002) at para 95.

[142] Canada – Measures Affecting the Importation of Milk (2002) at para 96.

respected its obligations under the WTO, specifically its commitment levels under Article 9.1(c).[143]

In light of these considerations, it was concluded that the benchmark for determining compliance with Article 9.1(c) should be one figure which reflects an industry wide cost of production, rather than an unascertainable amount of figures in respect of the cost of production for each individual producer.[144]

Even though Canada revisited its trade policies, New Zealand and the USA did not believe that a change in policy was enough to remedy the situation and the panel was called in once more to rule on the new policy.[145] The policy (although improved) was still found to have violated Canada's export subsidy commitments[146], as domestic milk prices were still controlled by the government and that alone could be seen as the subsidising of exports.[147]

In this regard the panel turned to consider the phrase "financed by virtue of governmental action, as used in the context of Article 9.1(c) of the AoA. In particular it held that the use of the words "by virtue of" indicated that there must be a causal link or nexus between the *governmental action* at issue and the *financing* of payments, such that it can be shown that payments have been financed as a consequence of the governmental action.[148]

It was held, therefore, that the use of the word "financed" had to be interpreted to mean that governments did not have to fund payments directly to fall into the scope of Article 9.1(C).[149] However, it was still required that governments played an important role in the process through which "payments" were funded by private parties, so that the requisite nexus existed between "governmental action" and "financing" for the purposes of article 9.1(c).[150]

The case was subsequently resolved following changes in the Canadian export policies,[151] but

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[143] Canada – Measures Affecting the Importation of Milk (2002) at para 96.
[144] Canada – Measures Affecting the Importation of Milk (2002) at para 96.
[145] Josling T 'Agricultural Trade Disputes in the WTO' 21.
[146] Josling T 'Agricultural Trade Disputes in the WTO' 21.
[147] Josling T 'Agricultural Trade Disputes in the WTO' 21.
[148] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113.
[149] Canada – Measures Affecting the Importation of Milk (2002) at para 132.
[150] Canada – Measures Affecting the Importation of Milk (2002) at para 133.
[151] Josling T 'Agricultural Trade Disputes in the WTO' 22.

the rulings of the panel and the Appellate Body[152] were significant, and the impact thereof was clear for the other WTO Members who had an interest in using export subsidies.[153] As a result exports would be considered as having been subsidised where the COP[154] exceeded the price for which the products had been sold or processed for exportation.[155] This is but one example of how domestic support and export subsidies are linked.

Following the Canada dairy dispute, the European Commission (EC) came under fire for its provisions of subsidies in the EU sugar sector.[156] High domestic prices once again had a crucial role in distorting the market, through providing a benefit to farm producers.[157] The WTO panel observed that producers were given specific quotas, in terms of the quantity of sugar that had to be produced for the domestic market,[158] and where production exceeded the permitted quota the amount in excess could not be sold on the domestic market.[159] The panel observed further that prices in the EU's domestic market were high and the returns from the sale of sugar were more than sufficient to help farm producers meet their production costs, with no need to subsidise that amount of sugar that was exported.[160]

The WTO dispute panel held (and the Appellate Body agreed) that the quantity of sugar produced in excess of the provided quota, and thus destined for exportation, did indeed benefit from the high price of sugar sold on the domestic market.[161] Because the excess sugar was solely destined for exports, the effect was to cross-subsidise.[162] In addition, the implicit financial benefits to producers were not notified as export subsidies and were de facto prohibited regardless of their market impact.[163]

[152] Josling T 'Agricultural Trade Disputes in the WTO' 22.
[153] Josling T 'Agricultural Trade Disputes in the WTO' 22.
[154] Canada – Measures Affecting the Importation of Milk (2002) at para 80.
[155] Josling T 'Agricultural Trade Disputes in the WTO' 22.
[156] Josling T 'Agricultural Trade Disputes in the WTO' 25.
[157] Josling T 'Agricultural Trade Disputes in the WTO' 26.
[158] Josling T 'Agricultural Trade Disputes in the WTO' 26.
[159] Josling T 'Agricultural Trade Disputes in the WTO' 26.
[160] Josling T 'Agricultural Trade Disputes in the WTO' 26.
[161] Josling T 'Agricultural Trade Disputes in the WTO' 26.
[162] Josling T 'Agricultural Trade Disputes in the WTO' 26.
[163] Josling T 'Agricultural Trade Disputes in the WTO' 26.

The above rulings were significant in demonstrating how high domestic prices provide security for domestic producers with regard to meeting their production costs, which in turn enables said producers to export more goods at much lower prices. This form of price support and the benefit it affords acts as an indirect subsidy to exports, which has the potential to harm the trading interests of other Members.

This confirms the view expressed previously that domestic support measures under the amber box have to be reduced if a complete ban on export subsidies is to occur.

2.3. Remedies

2.3.1. Special agricultural safeguards

Special agricultural safeguards (SSG) were introduced as a remedy to enable Members to impose further import duties on products which were already subject to tariffs, in the event of an unexpected surge in imports or a drop in prices below the cost of production.[164] Under the AoA, SSGs act as transition measures which allow countries to adapt to changing trade practices.[165]

As is the case with subsidies, SSGs can only be applied in respect of products for which Members have included the SSG symbol in their schedule of commitments.[166] 39 Members subsequently reserved the right to use SSGs for hundreds of products; but only 10 Members invoked said right between 1995 and 2001.[167] South Africa has recently added its name to that list.

At the start of this discussion it was noted that the RSA/EU trade development and co-operation agreement (TDCA) was founded on the basis of liberalising trade between the two Members, especially in regard to trade in agriculture.[168] It was also noted that the EU was not comfortable with the idea of liberalising trade in agriculture, this despite the fact that South Africa had agreed to allow the entry of EU agricultural imports on a duty free basis.[169]

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[164] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 17.

[165] Fulponi, L, Shearer M and Almeida J 'Regional Trade Agreements - Treatment of Agriculture' (2011) *OECD Food, Agriculture and Fisheries Working Papers, No. 44, OECD Publishing* 41.

[166] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 17.

[167] Desta MG 'Legal Issues in International Agricultural Trade' (2006) 17.

[168] McDonald S; Walmsley T 'Preferential Trade Agreements' (2003 4.

[169] McDonald S; Walmsley T 'Preferential Trade Agreements' (2003)4.

As a consequence of this commitment South Africa has been flooded with agricultural imports from the EU, which has had a negative impact on local agricultural producers.[170]

In order to protect the local agricultural sector from this surge in imports from the EU, the International Trade Administration (Itac) put guidelines in place for the application of SSG measures.[171] This was the first time that Itac had taken such action since the conclusion of the RSA/EU TDCA in 1999.[172]

Naturally, the effect of the trade agreement on the local agricultural sector has evoked a lot of anger from agricultural producers.[173] Trade Law Chambers director, Rian Geldenhuys said that applications against the EU were expected to rise, which could lead to fewer agricultural imports or more expensive imports coming from the EU.[174] However, experts say the uncertainty relating to the process for using SSGs led to only two such applications being brought since the RSA/EU TDCA was concluded.[175]

Even though South Africa has a legal framework which allows for the imposition of SSG measures, it has been of little help to the agricultural industry.[176] This was due to the fact that the TDCA established a different method for the application of SSGs in respect of agricultural trade between South Africa and the EU[177], and as there was no guidance as to how this would work, no one has applied until recently.[178] In addition, the requirement that there must be a surge in imports would not necessarily be fulfilled in respect of the TDCA, as tariff liberalisation was a slow process and no such surge would have occurred.[179]

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[170] Visser A 'SA moves to protect agriculture from EU imports' (11 April 2013) 1 available at http://za.news.yahoo.com/sa-moves-protect-agriculture-eu-imports-041947097--finance.html (accessed on 17 June 2013) (Hereinafter referred to as Visser A 'SA moves to protect agriculture from EU imports').

[171] Visser A 'SA moves to protect agriculture from EU imports' 1.

[172] Visser A 'SA moves to protect agriculture from EU imports' 1.

[173] Visser A 'SA moves to protect agriculture from EU imports' 1.

[174] Visser A 'SA moves to protect agriculture from EU imports' 1.

[175] Visser A 'SA moves to protect agriculture from EU imports' 1.

[176] Visser A 'SA moves to protect agriculture from EU imports' 1.

[177] Visser A 'SA moves to protect agriculture from EU imports' 1.

[178] Visser A 'SA moves to protect agriculture from EU imports' 2.

[179] Geldenhuys R 'Safeguards against EU agricultural imports' (11 April 2013) available at www.internationaltradelaw.co.za (accessed on 2 March 2014) (Hereinafter referred to as Geldenhuys R 'Safeguards against EU agricultural imports')

According to Mr Geldenhuys the draft guidelines should be welcomed as a way to reduce the amount of time that Itac took to investigate SSG applications.[180] As an added benefit, applicants would no longer have to prove that there has been a surge in imports[181] (as was required under article 24 of the trade agreement) or that the EU has been dumping agricultural products.[182]Applicants need only prove that said imports have caused harm.[183]

Article 16 of the TDCA therefore makes provision for an alternative remedy, whereby it is not required that there be a surge or sudden surge in imports coming from the EU, but merely that such imports cause or threaten to cause a serious disturbance to the markets in SA.[184]. In terms of the draft guidelines provisional measures may be implemented immediately should an applicant show that there are "exceptional circumstances" which warrant as such.[185] If the applicant is successful, the SSG measures would apply pending a final decision on the matter.[186]

In 2013, former director-general of the WTO, Pascal Lamy[187], advised that it (the use of protectionist measures) would be worse than expected, especially due to the risks arising from the euro crisis[188] and countries attempting to restrict trade in a desperate attempt to increase their own economic growth.[189] Mr Lamy stated that "The threat of protectionism may be greater now than at any time since the start of the crisis — other policies to restore growth have been tried and found wanting."[190]

2.3.2. Countermeasures and countervailing duties

i) Countermeasures

While it can be agreed that the AoA has created a good foundation for the regulation of trade in the international agricultural market, it must be noted that the Agreement is still lacking in some

[180] Visser A 'SA moves to protect agriculture from EU imports' 1.
[181] Visser A 'SA moves to protect agriculture from EU imports' 1
[182] Visser A 'SA moves to protect agriculture from EU imports' 1
[183] Visser A 'SA moves to protect agriculture from EU imports' 1
[184] Geldenhuys R 'Safeguards against EU agricultural imports'.
[185] Visser A 'SA moves to protect agriculture from EU imports' 1
[186] Visser A 'SA moves to protect agriculture from EU imports' 1.
[187] Visser A 'SA moves to protect agriculture from EU imports' 2.
[188] Visser A 'SA moves to protect agriculture from EU imports' 2.
[189] Visser A 'SA moves to protect agriculture from EU imports' 2.
[190] Visser A 'SA moves to protect agriculture from EU imports' 2.

respects. Perhaps the most important loophole is the failure of the AoA to make provision for any effective remedies, apart from its safeguard measures under Article 5,[191] which can applied to counteract the negative effects of unauthorised subsidies.

Under Article 7[192] of the SCM Agreement, a determination by a dispute panel or Appellate Body that a subsidy has had adverse effects on the interests of another Member would result in the non-compliant Member having to remove the adverse effects thereof or withdraw the subsidy in its entirety.[193]

Should the non-compliant Member fail to remove the adverse effects or withdraw the subsidy within a period of six months from the date that said ruling was passed, and in the absence of any compensation being given, the complaining Member shall be allowed to take countermeasures which are appropriate in relation to the nature and degree of the adverse effects determined to exist.[194]

There seems to be no indication that Article 7 is limited in its application, except in respect of Article 13[195] of the AoA, and there can therefore be no reason why the remedy provided in this provision could not and should not be employed in respect of subsidies provided in the agricultural sector which have the potential to harm the interests of other agricultural producers. This would indeed provide affected Members with a mechanism to curb the use of such measures for protectionist purposes.

ii) Countervailing duties

In this respect Article VI[196] of GATT provides that '[t]he term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise'.[197]

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[191] Article 5 of the WTO Agreement on Agriculture.
[192] Article 7 of the WTO Agreement on Subsidies and Countervailing Measures.
[193] Paragraph 7.8 of Article 7 of the WTO Agreement on Subsidies and Countervailing Measures.
[194] Paragraph 7.9 of Article 7 of the WTO Agreement on Subsidies and Countervailing Measures.
[195] Article 13 of the WTO Agreement on Agriculture.
[196] Article VI of the WTO General Agreement on Tariffs and Trade 1994.
[197] Paragraph 3 of Article VI of the WTO General Agreement on Tariffs and Trade 1994.

Article 10[198] of the SCM Agreement provides that countervailing duties must be imposed in accordance with the provisions of the AoA, which in this instance refers to Article 13 of the AoA as the only provision which deals with this trade remedy.

Article 13 of the AoA provides that export subsidies and domestic support measures provided in compliance with its provisions will be exempt from the imposition of countervailing duties, unless there is a determination as to the injury or threat of injury thereof in respect of Article VI of GATT and Part V of the SCM Agreement.[199]

Countervailing duties can therefore only be imposed in respect of the provision of subsidies (direct or indirect) which cause or threaten to cause material injury to an established domestic industry,[200] or materially hinder the establishment of a new domestic industry and must be levied in an amount which is equivalent to the subsidy provided.[201]

An investigation in respect of the effects of an alleged subsidy can only commence in terms of a written application by or on behalf of the domestic industry which is alleging the injury.[202] Sufficient evidence must be provided to prove that there was an actual subsidy provided and what the amount of that subsidy was.[203] A complaining Member must prove that the alleged subsidy is causing injury or is threatening to cause injury within the meaning of Article VI of GATT and there must be a causal nexus which connects the subsidised imports to the alleged injury.[204]

A mere allegation without substantiated evidence is insufficient to prove that a subsidy is causing injury to a Member's territory.[205]

2.3.3. SADC-EU Economic Partnership Agreement

In a further attempt to strengthen its agricultural market, South Africa joined six other members of the Southern African Development Community (SADC) in negotiations with the EU for the

[198] Article 10 of the WTO Agreement on Subsidies and Countervailing Measures.
[199] Article 13 of the WTO Agreement on Agriculture.
[200] Paragraph 3 of Article VI of the WTO General Agreement on Tariffs and Trade 1994.
[201] Paragraphs 3 and 6 of Article VI of the WTO General Agreement on Tariffs and Trade 1994.
[202] Paragraph11.1 of Article 11 of the WTO Agreement on Subsidies and Countervailing Measures.
[203] Paragraph11.2 of Article 11 of the WTO Agreement on Subsidies and Countervailing Measures.
[204] Paragraph11.2 of Article 11 of the WTO Agreement on Subsidies and Countervailing Measures.
[205] Paragraph11.2 of Article 11 of the WTO Agreement on Subsidies and Countervailing Measures.

creation of an Economic Partnership Agreement (EPA),[206] this despite its efforts to safeguard the market against excess EU imports. Although South Africa and the EU have had a longstanding free trade agreement, it has been noted that a SADC/EU EPA would lead to increased access for both Members to each other's markets.[207]

The Minister of Trade and Industry, Rob Davies, advised that South Africa was keen to strengthen its investment partnership with the European Union (EU), despite the fact that there were some issues that needed to be tackled.[208] The Minister said that negotiations on the EPA between the EU and the African, Caribbean and Pacific (ACP) countries would be among the summit's deliberations.[209]

Among other things, agricultural trade received the most attention with the EU requesting greater access for at least 14 of its agricultural products, after having allowed access for 29 such products from SADC.[210] In addition, the parties reached agreement on the exclusive use of names for those products which are linked to certain geographic areas, such as honeybush and rooibos tea for South Africa.[211]

It was not all smooth sailing though, as the EU also had some criticism for South Africa's trade and investment policies. The EU's trade commissioner, Karel De Gucht, stated that the scrapping of investment treaties with EU nations and proposed export taxes by South Africa was not the correct way to boost the economy and could lead to investors pulling out of the country.[212]

De Gucht branded this as protectionism and noted that the EU had already offered South Africa more access in respect of its agricultural goods than what South Africa had offered the EU.[213] De Gucht said that he was not prepared to return to the EU with nothing to offer to companies in

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[206] Fabricius P 'EU-SA spar over "trade protection"' *The Cape Times* 18 July 2013 15 (Hereinafter referred to as Fabricius P 'EU-SA spar over "trade protection"' (2013)).

[207] Fabricius P 'EU-SA spar over "trade protection"' (2013).

[208] 'SA keen to strengthen ties with EU' (17 July 2013) available at www.southfrica.info (accessed on 12 January 2014). (Hereinafter referred to as 'SA keen to strengthen ties with EU')

[209] 'SA keen to strengthen ties with EU'.

[210] Fabricius P 'EU-SA spar over "trade protection"' (2013).

[211] Fabricius P 'EU-SA spar over "trade protection"' (2013).

[212] Fabricius P 'EU-SA spar over "trade protection"' (2013).

[213] Fabricius P 'EU-SA spar over "trade protection"' (2013).

the face of renewed trade competition from South Africa.[214]

South African Trade and Industry Minister Rob Davies said that South Africa was hoping that this new EPA would assist in addressing the country's increasing trade deficit with the EU, which rose from R47 billion in 2008 to R95 billion in 2012.[215]

CHAPTER CONCLUSION

In light of the findings above it is apparent that farmers are still heavily dependant on subsidies for their profits, which, as discussed above, have the effect of distorting trade in the international agricultural market and putting exporters and producers from developing countries at a disadvantage[216]. In this regard it is suggested that Agricultural trade reform and a reduction in trade barriers may assist farmers in industrial and developing sectors to get a more cost-effective and beneficial deal.[217]

However, achieving trade reform in the agricultural sector is not an easy task, as it was discovered that the misuse of export subsidies was not the sole cause of the major inequality between trade in developed and developing countries. The WTO Dispute Panel concluded that domestic support under the so-called amber box was also to blame, as high domestic prices provided some security for producers and enabled them to meet their production costs with ease, and produce more goods for export at a much lower cost.[218] Therefore, the benefits which accrue from this kind of price support are said to indirectly subsidise exports and this can indeed be more harmful.

Therefore, the goal of achieving a complete ban on export subsidies will never come to fruition whilst some Members still insist on providing domestic support in excess of their reduction commitments under Article 6 of the AoA, instead of working toward creating an equal trading system.

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[214] Fabricius P 'EU-SA spar over "trade protection"' (2013).

[215] Fabricius P 'EU-SA spar over "trade protection"' (2013).

[216] Cahill C, Brooks J 'Why agricultural trade liberalisation Matters' (undated) available at www.oecdobserver.org (accessed on 4 June 2012). (Hereinafter referred to as Cahill C, Brooks J 'Why agricultural trade liberalisation Matters').

[217] Cahill C, Brooks J 'Why agricultural trade liberalisation Matters'

[218] Josling T 'Agricultural Trade Disputes in the WTO' 26.

Chapter 3: Sanitary and Phytosanitary Measures

3.1. Too much power from the SPS Agreement?

Sanitary and phytosanitary measures have continued to create significant problems for exports of agricultural products from developing countries.[219] Surveys have shown that a lot of developing countries view SPS measures as the most important barrier to their agricultural exports to the European Union.[220]

This is attributed in part to the power that the SPS Agreement bestows on member countries,[221] as Members can unilaterally ban any type of product from any source where legitimate SPS measures are relied upon,[222] and this right cannot be challenged under international trade law.[223]Another contributing factor is the vagueness of the SPS agreement regarding the way in which the power is supposed to be used,[224] and uncertainty as to what a legitimate SPS measure consists of.[225] As a result Members have continued to seek the definition of what constitutes a legitimate justification in order to use the wealth of power provided by the SPS Agreement.[226]

3.2. Scientific Justification

A legitimate justification for the use of SPS related barriers to trade must be based in science.[227] Article 2:2 of the SPS Agreement therefore permits Members to apply SPS measures only to the extent that those measures are based on scientific principles and are not thereafter maintained without sufficient scientific evidence.[228]The measures which are used must also be proportional

[219]Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 1 http://www.tralac.org (accessed on 20 May 2012) (Hereinafter referred to as Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004)).

[220]Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 1.

[221]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 5 *The Estey Centre Journal of International Law and Trade Policy* 43 44 (Hereinafter referred to as Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004)).

[222]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 44.

[223]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 44.

[224]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 44.

[225]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 44.

[226]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 44.

[227]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[228]Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48; see also Article 2:2 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

to the risk against which the measures are employed.[229]

3.2.1. "Scientific evidence"

In this regard it is important to make reference to the Japan-Apples dispute,[230] which was reported as the first case in which the dispute panel examined the meaning of "scientific evidence" as used in Article 2.2 above.[231] In this case, the USA requested consultations on the basis that Japan had been applying quarantine restrictions on apples from the USA, imported into Japan, to protect against the introduction of a disease known as fire blight.[232] The USA argued that Japan's SPS requirements violated Article 2:2 as they were not supported by scientific evidence.[233] After they failed to reach settlement on the matter a dispute panel was established and the matter was referred for dispute resolution.[234]

According to the Panel evidence was held to be "scientific" if it was gathered through scientific methods.[235] The Panel further established that both direct and indirect evidence could be regarded as "scientific",[236] with the only difference being the degree of the relationship of the evidence to the facts that were intended to be proved with said evidence.[237] Therefore indirect evidence may be scientific, even if it does not directly prove the facts.[238] It was further noted that scientific evidence may also include evidence of the possible occurrence of a risk[239] (e.g., the entry, establishment or spread of the bacteria that caused the fire blight disease),[240] as well

[229] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[230] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R.

[231] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 8.

[232] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 1.2; also see Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 6.

[233] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 7.

[234] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 1.3-1.4.

[235] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 8.

[236] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 8; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.91.

[237] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 8; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.91.

[238] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 8; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.91.

[239] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.92.

[240] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.92.

as evidence that a particular requirement could result in the reduction or elimination of said risk.[241]

However, the term "evidence" was also seen as significant, as negotiators could have used the term "information", as in Article 5.7,[242] if they were to consider that any material could be used.[243] The use of the term "scientific evidence" in Article 2.2, therefore excludes insufficiently substantiated information and non-demonstrated hypotheses.[244] The requirement of "scientific evidence" in the SPS agreement does not limit the availability of said evidence to Members to use in support of their measures.[245] It was accepted that direct or indirect evidence may be equally considered,[246] as the difference is not related to the scientific quality, but to the probative value of the evidence within the legal meaning of the term.[247] It is generally acknowledged that evidence which does not directly prove a fact might not carry as much weight as evidence which directly proves it.[248]

The Panel concluded that all relevant evidence that could be considered "scientific" should be taken into account,[249] and did not abandon the notion that "indirect" evidence could be essential to their assessment, provided that it was scientific in nature.[250]

3.2.2. "Sufficient" scientific evidence

Further to its findings above, the Panel also had to determine when scientific evidence would be regarded as "sufficient" for the purpose of Article 2.2 of the SPS Agreement.[251]

In this regard the term "sufficient" was understood to mean that an objective or rational relationship must exist between the scientific evidence and the SPS measure at issue.[252] As

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[241] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.92.

[242] Article 5:7 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.93.

[243] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.93.

[244] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.93; see also Article 2:2 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[245] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.98.

[246] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.98.

[247] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.98.

[248] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.98.

[249] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.98.

[250] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.99.

[251] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 8.

scientific evidence relates to the assessment of risk, it must be linked to the concept of sufficiency to the extent to which it indicates the existence of said risk.[253]

Therefore, the term "sufficient" deals with the link between the SPS measure in dispute and the "scientific evidence" relating to the risk that the SPS measure was employed to address.[254] The existence of a rational relationship between SPS measures and scientific evidence must be determined on a case-by-case basis and will be dependent upon the circumstances of each particular case, as well the characteristics of the measure at issue and the quality and quantity of the scientific evidence produced.[255]

3.3. Risk assessment

Article 2:3[256] prohibits unjustifiable discrimination in circumstances where the same or similar SPS conditions are present between Members, including the case where the conditions exist between a member's own territory and the territory of the member against which it has applied SPS measures.[257] SPS measures must not be used in a manner which would constitute a disguised restriction on international trade.[258] Article 2:3 can therefore be interpreted to mean that a member would be permitted to discriminate where different SPS conditions are found to be present,[259] as the SPS agreement acknowledged that different regions with different environmental conditions and agricultural practices were not faced with the same levels of pests and diseases.[260]

Consequently, it was not possible or even necessary to put uniform SPS measures in place which could be applied to all exporters.[261] Therefore, trade measures were focused on those imports that could contaminate the local food supply, while other agricultural imports were not subject

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[252] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 9.

[253] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 9.

[254] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.102.

[255] The Japan Apples Dispute (Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.103.

[256] Article 2:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[257] Article 2:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[258] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47; see also Article 2:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[259] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47; see also Article 2:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[260] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

[261] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

to the same practices.[262] The SPS agreement therefore placed no obligation on Members to apply the rules of national treatment or most-favoured nation where imported products were likely to contaminate the domestic food supply.[263]

The SPS Agreement does however place a positive obligation on Members to perform the requisite assessment of the risk which is thought to be present before applying any SPS measures against imports coming into their territory.[264] Paragraph 4 of Annex A[265] to the SPS Agreement defines a risk assessment as "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; ....."[266]

At this juncture it is important to note that the WTO does not determine whether sufficient scientific evidence exists in assessing risk, but rather defers this practice to three separate international organisations,[267] which set the standards for scientific evidence.[268] The institutions are the Codex Alimentarius Commission (CAC), which regulates food safety; the International Office of Epizootics (OIE), which regulates animal safety; and the International Plant Protection Convention (IPPC), which regulates plant safety.[269] Under Article 5:1 of the SPS Agreement Members have to ensure that their use of SPS measures is based on the appropriate risk assessment techniques as developed by these three organisations.[270]

Where a member reasonably believes that a specific SPS measure employed or maintained by another member is constraining, or has the potential to constrain its exports and said measure is not in line with the relevant international standards and guidelines of the above mentioned

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[262] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

[263] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

[264] Article 2:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

[265] Annex A, paragraph 4 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[266] Annex A, paragraph 4 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[267] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[268] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[269] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[270] Article 5:1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

organisations,[271] or such standards and guidelines do not exist, then the member being challenged must provide reasons for its maintenance of the SPS measure in dispute upon being requested to do so.[272]

In dealing with matters such as the above, the WTO Dispute Settlement Panel would seek the scientific advice of the relevant international organisation to assist it in making the appropriate assessment of the risk against which the SPS measure is being employed.[273] If no acceptable scientific justification is provided, the dispute settlement panel or an appellate body would be unlikely to make a decision in favour of the application of that SPS measure.[274]In line with Article 3:1 of the SPS Agreement it is therefore essential that SPS regulations are based on guidelines established by recognised international organisations[275] in order to "...harmonise sanitary and phytosanitary measures on as wide a basis as possible".[276]

However, the SPS Agreement also recognised that the international guidelines did not necessarily reflect the needs and preferences of every region.[277] Thus, Article 3:3 allows Members to establish or maintain SPS measures which would lead to a higher level of protection than would ordinarily be achieved through international standards.[278] Once again, these higher levels of protection may only be maintained where they are supported by sufficient scientific evidence or based on the relevant risk assessment as provided for in terms of Article 5.[279]

3.3.1. Risk assessment in the context of the USA-EU Beef Hormone Dispute[280]

The EU yet again found itself in a long and bitter trade dispute with the USA regarding its (the

[271] Article 5:8 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also Article 5:8 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[272] Article 5:8 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 48.

[273] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 49.

[274] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 49.

[275] Article 3:1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[276] Article 3:1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[277] Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

[278] Article 3:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures; see also Isaac G E 'The SPS Agreement and Agri-food Trade Disputes: The Final Frontier' (2004) 47.

[279] Article 3:3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[280] U.S.-EU Beef Hormone Dispute (U.S. v EU) (Dispute Settlement) [2010] CRS Report R40449 1 (Hereinafter referred to as U.S.-EU Beef Hormone Dispute [2010]).

EU's) decision to place a ban on hormone-treated meat in the 1980s.[281] In response to this action the USA imposed high sanctions on imports from the EU whilst the ban was implemented.[282]

After numerous attempts at resolution the USA (later joined by Canada) eventually called for the matter to be referred to the WTO Dispute Settlement Panel.[283] The ban imposed by the EU was seen as a barrier to trade, as it prevented the export of beef from the USA into its territory.[284] The dispute settlement panel held that the ban violated, among others, Article 5:1 of the SPS Agreement[285] in that the EU had not performed a proper risk assessment to justify the implantation of said ban, as contemplated by this provision.[286]Despite this ruling the ban was not lifted.[287]

Following the completion of a number of studies and reviews, the EU maintained its argument that hormone-treated meat from the USA (and Canada) posed possible risks to human health in light of the fact that there was a lack of scientific data on growth hormones on which to conduct a proper assessment.[288] The EU held that this conclusion was based on a number of scientific reviews and studies, although there was no conclusive assessment performed which supported this claim.[289] The USA argued that there was in fact international scientific consensus that the hormones in their meat were safe when used in line with accepted veterinary methods.[290]

The final decision of the WTO Dispute Panel was one which did not really favour either of the parties to the dispute, as the EU was permitted to maintain its ban on Beef from the USA, and the USA was permitted to keep its sanctions in place.[291] In essence the Panel was not able to

[281] U.S.-EU Beef Hormone Dispute [2010] 1.
[282] U.S.-EU Beef Hormone Dispute [2010] 1.
[283] U.S.-EU Beef Hormone Dispute [2010] 5.
[284] U.S.-EU Beef Hormone Dispute [2010] 1.
[285] U.S.-EU Beef Hormone Dispute [2010] 5; see also Article 5:1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.
[286] U.S.-EU Beef Hormone Dispute [2010] 5.
[287] U.S.-EU Beef Hormone Dispute [2010] 5.
[288] U.S.-EU Beef Hormone Dispute [2010] 7.
[289] U.S.-EU Beef Hormone Dispute [2010] 7.
[290] U.S.-EU Beef Hormone Dispute [2010] 7.
[291] U.S.-EU Beef Hormone Dispute [2010] 6.

resolve the matter and the EU and USA eventually concluded an agreement between themselves,[292] which would be implemented over a few years.[293]

Many in the USA saw the EU's ban as an example of how SPS measures are used as a disguised form of trade protectionism, for the purpose of curbing imports from other countries.[294]

3.3.2. Japan Apples dispute

The question as to what constitutes a proper risk assessment was addressed in the Japan-Apples dispute.[295] The USA argued, as they did about the EU, that Japan had failed to justify the use of its SPS measure with an appropriate risk assessment[296] and had thus not complied with its obligations under Article 5:1 of the SPS Agreement.[297]

Article 5:1 requires that a risk assessment be ".....appropriate to the circumstances, of the risks to human, animal or plant life or health....."[298] Because Japan's measure was phytosanitary in nature, their assessment had to be focused the on risks related to plant life and health.[299] In this context, the requirement that the risk assessment be "appropriate to the circumstances" means that assessments must be conducted on a case by case basis,[300] having regard to the type of product being imported, as well as the origin and destination of said product in respect of imports from a specific country.[301]

In the case of Japan its territory was considered to be fire blight-free, and the specific climatic conditions made it a potentially favourable environment for the spread of fire blight, if said

[292] U.S.-EU Beef Hormone Dispute [2010] 1.

[293] U.S.-EU Beef Hormone Dispute [2010] 1.

[294] U.S.-EU Beef Hormone Dispute [2010] 1.

[295] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004); see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R.

[296] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 13.

[297] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 13.

[298] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 13; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.235 and Article 5:1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[299] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 14; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.238.

[300] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.239.

[301] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.239.

disease was allowed enter the country.[302] Therefore, this was considered a relevant circumstance to take into account in Japan's risk assessment. [303]

Article 5:1 provides that Members should take into account the risk assessment techniques which have been developed by international organisations.[304] Considering the wording of Article 5:1 the Dispute Panel concluded that the term "taken into account", cannot be interpreted to mean that a risk assessment must be "based on" or "in conformity with" internationally developed techniques.[305]

Therefore, such techniques should be considered relevant, but a failure to conform to each one would not necessarily constitute a violation of Article 5:1.[306] However, the Panel held that reference to these techniques could provide very useful guidance as to whether the risk assessment at issue constitutes a proper risk assessment within the meaning of Article 5:1.[307]

Finally, a risk assessment must be conducted in line with the definition in paragraph 4 to Annex A.[308] The Dispute Panel made reference to previous cases where it was provided that risk assessments conducted under Article 5:1 should be sufficiently specific to the risk at issue.[309]

In conducting its risk assessment the Japanese government failed to evaluate the risks posed by apples separately from those posed by other hosts,[310] which did not meet the requirement of

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[302] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 14; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.240.

[303] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 14; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.240.

[304] Article 5:1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[305] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 14; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.241.

[306] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 14; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.241.

[307] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 14; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.241.

[308] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also Annex A, paragraph 4 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[309] Particular reference was made to the U.S.-EU-Beef Hormone Dispute [2010], in which it was held that general studies relating to the carcinogenicity of certain hormones, without evaluating the specific potential for carcinogenic effects from food or meat products, were insufficient to support the disputed SPS measure.

[310] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.268-8.271.

specificity.[311] The SPS Agreement does not limit the methods of risk assessment which may be used (e.g. in relation to pests or diseases, the imported commodity or a host),[312] provided that the likelihood of entry, establishment or spread of the disease can be attributed to each agent specifically.[313] It was emphasised that the risk to be specified in a risk assessment is the harm that may be caused, as well as the exact agent that is likely to cause the harm.[314]

In addition to the requirement of specificity, the definition of risk assessment in Annex A makes reference to SPS measures that "might be applied".[315] This implies that a member should not conduct a risk assessment based solely on the SPS measure(s) it has in place at the time of conducting said assessment.[316] In this respect, it must be noted that Japan had not considered any alternative measures which it could employ against the threat of fire-blight apart from those which already existed at the time of its assessment.[317]

The Japanese government provided a general overview of the potential measures which could be employed to mitigate the possible risks posed by the introduction of fire-blight by imported apples, but failed to perform a substantial assessment as to the effectiveness of each measure in reducing the risk.[318]

It would therefore be insufficient to provide a conclusion on the overall efficiency of a number of different measures, without analysing the effectiveness of the measures individually,[319] and assessing whether all of them in combination are required in order to reduce or eliminate the possibility of entry, establishment or spread of the disease.[320]

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[311] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.268-8.271.

[312] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.268-8.271.

[313] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.268-8.271.

[314] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.268-8.271.

[315] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.281 and Annex A, paragraph 4 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

[316] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 15; see also The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.283.

[317] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.285.

[318] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.288.

[319] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.288.

[320] The Japan Apples Dispute(Measures Affecting the Importation of Apples) (2003) WT/DS245/R at para 8.288.

3.4. Transparency

In addressing the issue of transparency, the panel in the Japan Apples Dispute held that the relevant factor to be considered is whether a phytosanitary measure has affected the conditions necessary for market access.[321] It must therefore be determined if the measure results in more onerous or time consuming requirements with regard to packaging, production, and other administrative formalities.[322] If it is determined that a proposed new phytosanitary measure would have an actual or potential effect on the conditions necessary for market access then it must be notified.[323]

The lack of transparency and certainty regarding SPS measures presented a major challenge for agricultural exporters.[324] The obligation to publish and notify new and changed measures in terms of Article 7 and Annex B[325] of the SPS Agreement allows interested parties to familiarise themselves with any proposed SPS measures in advance and submit their comments and concerns at a stage when same would still be taken into account.[326]

In this way Members would be able to identify whether the proposed SPS measure is legitimate or subject to challenge through bilateral discussions; at the SPS Committee; or through dispute settlement.[327]

3.5. The implications for the future of South African Trade

The ruling in the Japan Apples dispute provided a lot of clarity as to the application of the SPS Agreement and tightened the disciplines therein, making it easier to challenge the SPS measure of a trading partner, where such measure is not in line with the provisions of the Agreement.

These developments will have a significant consequence for South Africa's agricultural trade policies, especially in light of the attempts by the EU to again curb the export of South African

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[321] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 17.
[322] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 17.
[323] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 17.
[324] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 17.
[325] Article 7 and Annex B of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.
[326] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 17.
[327] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 17.

commodities, specifically citrus fruits, into its territories.[328] This action by the EU was attributed to a decrease in citrus production, which has resulted in at least 40% of South Africa's citrus exports going to the EU.[329]

South Africa's citrus exporters fear they may lose their lucrative access to the European Union (EU) because of new regulations that a representative of the R6bn industry says amount to "market closure".[330]

Citrus imports were halted after it was discovered that some shipments of fruit appeared to have been infected with the so-called citrus black spot (CBS) disease. The spot is described as a fungal disease which affects the external appearance of fruit and was declared as a phytosanitary measure to be placed on a trade watch-list at EU borders.[331] If any spotty fruit was found in a consignment it would be impounded. This naturally reduced the quantity of citrus exports flowing into to the EU territories.[332]

EU spokesman Frank Oberholzer advised that these restrictions were put in place to reduce "the risk of the fungus from spreading from affected areas".[333] He Confirmed that the "threshold" would be five infected shipments, with the European Commission proposing a ban on South Africa's exports to the EU if it was exceeded[334]

According to Mr. Justin Chadwick, CEO of the Citrus Growers Association of Southern Africa it would be impractical to limit interceptions to only five shipments.[335] The lowest number of inceptions recorded before this was 12 in 2008.[336]

One of the major concerns associated with this new phytosanitary measure is the increased

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[328] Sapa 'EU Wants To Stop Imports From SA' (10 June 2013) 1 available at http://businessnews.howzit.msn.com/eu-wants-to-stop-imports-from-sa(accessed on 10 June 2013) (Hereinafter referred to as Sapa 'EU Wants To Stop Imports From SA').

[329] Sapa 'EU Wants To Stop Imports From SA'.

[330] Sherry S 'Black spot fears squeeze citrus exports' (9 July 2013) available at www.bdlive.co.za (accessed on 6 January 2014). (Hereinafter referred to as Sherry S 'Black spot fears squeeze citrus exports').

[331] Sapa 'EU Wants To Stop Imports From SA'.

[332] Sapa 'EU Wants To Stop Imports From SA'.

[333] Sherry S 'Black spot fears squeeze citrus exports'.

[334] Sherry S 'Black spot fears squeeze citrus exports'.

[335] Sherry S 'Black spot fears squeeze citrus exports'.

[336] Sherry S 'Black spot fears squeeze citrus exports'.

costs being incurred by farmers in getting rid of the spots, which include the cost of spraying, earlier replanting, inspection and storage of the impounded fruit.[337] Earnings from exports make up 80 to 90 percent of a citrus farmer's income and there is fear that a blacklisting of that commodity could have terrible consequences for the sector.[338]

South Africa is said to export up to 1.5-million tons of citrus a year, making it the world's second-biggest exporter after Spain, which exports up to 3.6-million tons. However, the EU's threat has resulted in a decline of citrus exports as the local industry adopted a "zero tolerance" policy on shipments.[339]

Mr. Chadwick and others in the industry are convinced that the EU's measures are motivated by "protectionism" rather than by phytosanitary concerns. According to them, the aim seemed to be to protect the citrus industries of Spain and, to a lesser extent, Italy and Greece.[340] The industry has therefore called for the withdrawal of the phytosanitary measure whilst further research is conducted in respect of the so-called citrus black spot.[341]

Before it declared CBS as a phytosanitary measure the EU never expressed any concern for spotty fruit coming into its borders, so its sudden ban on South African citrus could invite the inference that the EU is using this phytosanitary measure as a mere tool for protectionism.[342]

Having regard to the principles established by the WTO Dispute Panel, South Africa need only provide a prima facie case for the removal of the phytosanitary measure by the EU on the basis of the negative effects which have been felt on trade in the South African citrus sector.

In the first instance, the stricter trading conditions placed on South African farmers and the considerable cost incurred as a result thereof raises the question as to whether the EU has adequately notified its phytosanitary measure as required by Article 7 and Annex B to the SPS Agreement.

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[337] Sapa 'EU Wants To Stop Imports From SA'.
[338] Sapa 'EU Wants To Stop Imports From SA'.
[339] Sherry S 'Black spot fears squeeze citrus exports'.
[340] Sherry S 'Black spot fears squeeze citrus exports'
[341] Sapa 'EU Wants To Stop Imports From SA'.
[342] Sapa 'EU Wants To Stop Imports From SA'.

The first case of CBS was recorded in 1929 and there have been no recorded problems with citrus exports into the EU until now. The question thus arises as to whether there is sufficient scientific evidence available on CBS to justify the use of the EU phytosanitary measure and, if so, whether a proper risk assessment has been conducted to determine the most effective method of reducing the possible risks thereof.

The EU phytosanitary measure may therefore be subject to challenge by South Africa should any of these requirements not have been complied with adequately.

Chapter conclusion

It is agreed that all governments have a right and a duty to protect their human, animal and plant life and health.[343] In order to protect against the risks contained in food and agricultural products governments had regulatory measures put in place known as SPS measures.[344]

In this regard the SPS Agreement provided an effective mechanism to enable Members to curb the spread of pests and diseases within their territories, as a result of infected agricultural and agri-food products. However, there was still a lack of understanding in respect of the proper implementation of its provisions, which presented a big problem, as Members were given the freedom to impose SPS Measures against agricultural imports on a unilateral basis and that amount of power without the proper understanding was very dangerous.

Developed country Members, such as the EU and Japan began imposing SPS measures for reasons other than the protection of their human, animal and plant life. SPS measures were thus being employed as a form of protectionism to curb imports coming from the territories of developed country Members. This blatant abuse of the powers granted by the SPS Agreement was heavily criticised and seen as a threat to agricultural trade.

In an effort to remedy this situation, the WTO Dispute examined the SPS Agreement and provided some clarification as to how the rules and regulations therein were supposed to be applied.

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[343] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 1.

[344] Prevost D 'The Japan-Apples Dispute: Implications for African Agricultural Trade' (2004) 1.

In this way, affected Members were provided with a means to challenge SPS measures which were not maintained in line with the requirements set out in the SPS Agreement and caused harm or threatened to cause harm to their markets.

Chapter 4: Conclusion and recommendations

The Agreement on Agriculture was the first agreement of its kind to be negotiated in the WTO. The AoA subjected the agricultural sector to its own set of special rules and regulations and provided the foundation upon which international trade in agriculture was to be conducted. Complementing the AoA, was the Agreement on the Application of Sanitary and Phytosanitary measures, which was created in an effort to regulate the methods used by Members to protect their human, animal and plant life.

Over the years both of these agreements have been at the center of numerous trade disputes and the WTO Dispute Panel has endeavored to provide some clarity as to the proper application of the rules in said Agreements with moderate success. It soon became clear that the problem did not lie with the understanding of the rules, but with the effective enforcement thereof against Members.

The various WTO cases which have been cited above demonstrate how the EU, USA and some other Members have simply ignored the rules of the AoA and SPS Agreements and have shown a complete lack of respect for the rulings of the WTO Dispute Panel, without fear of any consequences attaching to their actions. From South Africa's perspective there are some remedies which could prove useful in counteracting the problem with the rules and aid in strengthening South Africa's position, and indeed the position of the entire African continent in the international agricultural market. In this regard some of the following solutions have been identified:

Special Safeguards

As discussed above, South Africa is one of 39 countries that have included Special Safeguards in its schedule of commitments under Article 5[345] of the AoA and has recently invoked its right to make use of said measures, adding its name to a list of 10 such countries.

To this end the International Trade Administration (Itac) has put guidelines in place for the application of Safeguards in response to a surge in Agricultural products coming

[345] Article 5 of the WTO Agreement on Agriculture.

from the EU. The guidelines in question make it easier for parties to apply for safeguard measures to be put in place, as Article 16 of the TDCA provides that they need only prove that the imports from another territory are causing harm or threatening to cause harm to their markets.[346]

As discussed above, South Africa does have the legal framework to put safeguard measures in place, but trade liberalisation was a slow process and South Africa was not able to prove that there had been a surge in imports as previously required in terms of the TDCA.[347]The new guidelines therefore made it easier for South Africa to impose safeguard measures of its own, where it was not able to before.

Countermeasures

Another useful tool available to South Africa is to found under Article 4 of the SCM Agreement.[348]

Where a Member maintains a prohibited subsidy that has a negative impact on the market of another Member, a panel shall, under Article 4.7 to the Agreement, request that Member to withdraw said subsidy within a specified time period, failing which the panel shall authorise the affected Member to impose appropriate counter measures.[349]

In terms of the SCM Agreement, appropriate counter measures would include the countervailing duties which can be imposed under Part V thereof. In respect of agricultural trade, Paragraph (b) and (c) to Article 13 of the AoA provides that domestic support measures and export subsidies that conform fully to the provision of the Agreement shall be:

"(i) subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of

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[346] Geldenhuys R 'Safeguards against EU agricultural imports'.

[347] Visser A 'SA moves to protect agriculture from EU imports' 1.

[348] Article 4 of the WTO Agreement on Subsidies and Counter-veiling Measures.

[349] Article 4.7 of the WTO Agreement on Subsidies and Counter-veiling Measures.

GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations"[350]

The AoA therefore seems to make provision for the application of countermeasures as a remedy which can be used by South Africa to alleviate the negative impact of the trade barriers put in place by the EU and USA, provided that the proper investigation is completed in respect of the domestic support measures and export subsidies which are maintained by the parties.

Sanctions

In regard to its citrus dispute with the EU, South Africa could follow the example of the USA in the EU/USA Beef Dispute[351].

In that case, the USA imposed sanctions on a number of EU imports coming into its territory in response to the EU's ban on American beef as an SPS measure and to alleviate the negative effects thereof.[352]

This action from the USA received a prompt response from the EU, as it became increasingly clear that this was having an equally negative effect on trade its (the EU's) territory.[353] In that instance, the USA imposed sanctions of its own accord, with no limit on the number of products that were affected.

It would be wise to suggest that should South Africa (or other affected Members) choose to follow such a route, provision should be made for the imposition of sanctions in the SPS Agreement. In this way sanctions would only be permitted to the extent equivalent to the harm caused to a Member and in accordance with that Members commitment levels, as would ordinarily be the case in the AoA.

SADC-EU Economic Partnership Agreement

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350 Paragraph (b) and (c) to Article 13 of the WTO Agreement on Agriculture.

351 U.S.-EU Beef Hormone Dispute [2010] 1.

352 U.S.-EU Beef Hormone Dispute [2010] 1.

353 U.S.-EU Beef Hormone Dispute [2010] 1.

In addition to its efforts to curb the overflow of EU imports into its territory, South Africa has sought to increase its trade with the Member by entering into negotiations for an Economic Partnership Agreement as part of SADC.

The Minister of Trade and Industry, Rob Davies advised that the EPA would be a good way for the Members to increase market access into each other's territories.[354] It could also help alleviate the negative effect of the trade deficit between South Africa and the EU.

However, South Africa has not been free from criticism as a result of the fact that it unilaterally severed ties with some of its EU trading partners. The EU's trade commissioner, Karel De Gucht warned that South Africa's actions could have serious consequences for the future of its trade with the EU, as many EU countries would be much more wary when trading with South Africa.

In light of the above, it is clear that increased market access for South Africa would be beneficial in resisting the negative impacts of the trade barriers put in place by the EU (Both subsidies and SPS measures). However, it is up to South Africa to stop provoking its EU trading partners.

It is important to re-iterate that the AoA was negotiated as an Agreement specific to trade in agriculture, so much so that it provided a special set of rules which applied primarily to that sector. However, it is significant to note that the AoA still makes reference to the basic principles of trade set out by GATT and the SCM Agreement, to the extent that those rules find application in the regulation of agricultural trade.

These three Agreements are inextricably linked, and it is therefore appropriate that provision has been made for some of the remedies, mentioned above, which would apply specifically to the abuse of subsidies and domestic support measures in the agricultural sector.

Similarly, the inclusion of such remedies in the SPS Agreement would provide traders with a better means of effectively enforcing their rights against those Members that refuse to comply with the disciplines of the Agreement and thus help to counteract the materially harmful effects

[354] Fabricius P 'EU-SA spar over "trade protection"' (2013).

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