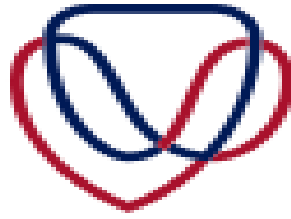


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**Liberalising intra-African trade: exploring prospects and challenges for the
regulation of sanitary and phytosanitary measures under the Africa
Continental Free Trade Agreement**

By

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List of abbreviations.

AU -African Union

AfCFTA-Africa Continental Free Trade Area

AANZFTA - Agreement Establishing The ASEAN – Australia – New Zealand Free Trade Area

EAC- East African Community

ECOWAS- Economic Community of West African States

EU -European Union

FAO - Food and Agriculture Organization of the United Nations

FTA-Free Trade Area

GATT-General Agreement on Tariffs and Trade

IGAD- Intergovernmental Authority on Development

ITO -International Trade Organization

MFN- Most Favoured-Nation

NEPAD New Partnership for Africa's Development

NT-National Treatment

NTB- Non-Tariff Barriers

OECD- Organisation for Economic Cooperation and Development

OIE- World Organisation for Animal Health

RTA- Regional trade agreement

SADC - Southern African Development Community

STDF- Standards and Trade Development Facility .

SPS- sanitary and phytosanitary

TF – Trade Facilitation

TBT – Technical Barriers to Trade

WTO- World Trade Organization

UNCTAD- United Nations Conference on Trade and Development

USMCA -United States-Mexico-Canada Agreement.

DECLARATION

I **Cebo Lihlikamvalakhe Sicwebu** declare that this is my mini dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International economic law, at the University of Free State, is my own work and all sources that have been used or quoted have been indicated and acknowledged by means of complete references. I further declare that it has not been previously submitted for the award of a degree at this or any other tertiary institution and that this work represents the law as at 3 September 2024.

DEDICATION

This work is first and foremost dedicated to my study supervisor Dr Shelton Tapiwa Mota Makore whose intellectual brilliance is only overshadowed by his humility. My Mother Joyce Nontobeko Sicwebu who constantly inspires me to dream and whose work ethic is relentless and to the blue-collar workers of South Africa who gave me the best advice insofar as the journey of education is concerned and for whom I hope this study will help attain a better standard of living.

Last but not least ,a word of gratitude goes to the head of the mercantile law department at the University of Free State Professor Elizabeth Snyman–Van Deventer, who had the rare ability to present me with an opportunity to put my best foot forward.

Chapter one

Background and overview of study

1.1. Introduction

The Africa Continental Free Trade Area (hereinafter AfCFTA) is the world's largest free trade area bringing together the 55 countries of the African Union (AU) and eight (8) Regional Economic Communities (RECs).¹ The overall objective of the AfCFTA is to create a single continental market with a population of about 1.3 billion people and a combined Gross Domestic Product (GDP) of approximately US\$ 3.4 trillion.² Meanwhile, since its inception in 1995, the World Trade Organisation (hereinafter WTO) has been the facilitator of international trade.³ The subsequent Africa Continent Free Trade Agreement (hereinafter AfCFTA) resembles the WTO by introducing a regulatory regime which reduces tariffs and non-tariff barriers between states.⁴ The AfCFTA is designed to achieve broader economic cooperation and integration which have been Africa's aspiration since the days of Kwame Nkruma (former president of Ghana),⁵ the realisation of which has now been boosted by the advent of the AfCFTA.⁶ The agreement was signed by forty-nine African countries on 21 March 2018 in Kigali, Rwanda. Implementation, which was originally scheduled to

¹ African Union "Brief Overview", https://jobs.au.int/AfCFTA/content/About-AfCFTA/?locale=en_US (accessed on 10 October 2023).

² African Union "Theme of The Year 2023: "Acceleration Of AfCFTA Implementation" <https://au.int/en/theme/2023/acceleration-of-afcfta-implementation> (accessed on 10 September 2023): AfCFTA is rooted in the Abuja Treaty of 1991, in which Member States of the former Organisation of African Unity, the predecessor of the African Union ("AU"), "agreed on a roadmap for the creation of a common African market .see Ndula 2022:62

³ Ndula 2022: 61

⁴ International Monetary Fund "How Lowering Trade Barriers Can Revive Global Productivity and Growth" <https://www.imf.org/en/Blogs/Articles/2016/06/20/how-lowering-trade-barriers-can-revive-global-productivity-and-growth> (Accessed on 20 September 2023)

⁵ Other African statesmen who share the same vision include; Tafawa Balewa of Nigeria, Sekou Toure of Guinea, and Julius Nyerere of Tanzania.

⁶ See the African Union "Agreement Establishing the Africa Continental free trade area." https://au.int/sites/default/files/treaties/36437treatyconsolidated_text_on_cfta_.en.pdf. (accessed on 10 July 2023); Sibanda 2021:217.

begin in July 2020, commenced in January 2021 largely because of the Corona virus pandemic. After initial reluctance by some countries, such as Nigeria, all fifty-four African countries that are members of the African Union, except Eritrea, have now signed the agreement. When the AfCTA is fully implemented, it will create the world's largest free trade area by number of countries.⁷

While the role of tariffs agreements came to the fore as measures linked to such agreements and indeed have become widely used in world trade and quotas decreased, other types of trade barriers came into being and others are still emerging. With the growth of their importance, instances of misusing SPS and TBT norms for various purposes ranging from political to protectionist can be observed.⁸

All countries including members of the African Union maintain measures to ensure that food is safe for consumers, and to prevent the spread of pests or diseases among animals and plants.⁹ These sanitary and phytosanitary measures can take many forms, such as requiring products to come from a disease-free area, inspection of products, specific treatment, or processing of products, setting allowable maximum levels of pesticide residues or limiting the permitted use of additives in food.¹⁰ Sanitary (human and animal health) and phytosanitary (plant health) measures apply to domestically produced food or local animal and plant diseases, as well as to products coming from other countries.¹¹ This can present an obvious barrier to free trade.¹²

Among the AfCFTA's numerous objectives, the agreement seeks to promote industrial development through diversification and regional value chain development, agricultural development, and food security. One of the main driving forces behind the agreement is its promise to increase intra-African trade and secure socio-

⁷ African Union "Africa Continental Free Trade Area", <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched> (accessed on 17 October 2023).

⁸ Svoboda 2021: 66.

⁹ African Union, "SPS policy framework", https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf (accessed on 16 October 2023).

¹⁰ African Union, "SPS policy framework", https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf (accessed on 16 October 2023).

¹¹ World Trade Organization "The WTO Agreements Series Sanitary and Phytosanitary Measures", https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf (accessed on 17 October 2023).

economic benefits for the continent. It aims to achieve this by eliminating tariffs, reducing non-tariff barriers, and boosting trade facilitation.¹³ Non-tariff barriers are instruments of trade policy that became dominant in the second half of the 20th century. With the sharp decrease in tariff rates across the world and across the different sectors, non-tariff barriers became predominant as protectionist measures. Even if tariff rates went down, countries were unwilling to lower their barriers toward foreign competition.¹⁴

Broadly speaking, the WTO Agreement on Sanitary and Phytosanitary Measures (hereinafter the SPS Agreement) focuses on ensuring that a country's consumers are supplied with food that is safe to eat in line with the general principle of non-discrimination. It also aims to ensure that strict health and safety regulations are not used as an excuse to protect domestic producers.¹⁵ The SPS objectives aim to protect human and animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food, and feedstuffs.¹⁶ The agreement covers a range of measures that are taken by countries to ensure the safety of these items, and for the protection of countries from the spread of pests or diseases. It also recognises the right of members to adopt SPS measures but stipulates that they must be based on a risk assessment, should be applied only to the extent necessary to protect human, animal or plant life or health, and should not arbitrarily or unjustifiably discriminate between countries where similar conditions prevail.¹⁷

Additionally, Sanitary and Phytosanitary (SPS) is a procedure to protect human, animal, or plant life or health set in Article XX(b) of the General Agreement on Tariffs and Trade (GATT). This Agreement authorises the government to arrange a policy,

¹³ Ndonga *et al* 2020:778.

¹⁴ Marković 2021:602.

¹⁵ World Bank Group "The African Continental Free Trade Area economic and distributional effects", <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bda63e-75f2c3ff0f43/content> (accessed on 1 August 2024).

¹⁶ World Trade Organization, "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)", https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (accessed on 10 July 2024).

¹⁷ Strydom *et al* 2016:430.

but this domestic measure often results in trade disputes. SPS is a substantial way taken in the WTO Agreement in resolving conflicts of interest between states in bridging security and freedom issues in the trade because the social responsibility to protect citizens by the state from threats and risks is the state's responsibility.¹⁸

1.2. Research problem

Sanitary and phytosanitary measures, by their very nature, may result in restrictions on trade.¹⁹ All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, governments are sometimes pressured to go beyond what is needed for health protection and use sanitary and phytosanitary restrictions to shield domestic producers from economic competition.²⁰ Technical measures such as sanitary and phytosanitary (SPS) regulations are important for many food and agricultural products due to the sensitive nature of issues such as food safety and the protection of plant and animal health.²¹ Since the mid-1990s, the number of NTMs in force has tripled, and sanitary and phytosanitary (SPS) measures have grown exponentially in terms of products coverage and number of implementing countries.²²

The continued existence of non-tariff barriers (NTBs) has the potential to maintain the “impenetrable walls” on African borders, thereby threatening to erode the anticipated tariff liberalisation welfare gains. Several empirical studies in different regional integration arrangements have proven beyond reasonable doubt that eliminating NTBs to trade results in more welfare gains.²³ NTBs remain more prevalent in Africa than in other regions. NTBs remain more prevalent in Africa than

¹⁸ Adiwibowo 2020:170.

¹⁹ Stanton Understanding the GATT agreement on the application of sanitary and phytosanitary measures”,
<https://www.fao.org/4/T4660t/t4660t0h.htm#:~:text=Sanitary%20and%20phytosanitary%20measures%2C%20by,reflected%20in%20existing%20GATT%20rules.> (accessed on 18 October 2023).

²⁰ The WTO Agreement Series Sanitary and Phytosanitary Measures
https://www.wto.org/english/res_e/booksp_e/agrmtseries4_sps_e.pdf (Accessed on 18 October 2023).

²¹ Peterson et al 2013:844.

²² Santeramo & Lamonaca 2022:3110.

²³ Vhumbunu & Rudigi 2021:135

in other regions. Already, sub-Saharan Africa has the highest cost to export compared to other regions and it also has the highest cost to import based on border compliance.²⁴ It is therefore important that agreement establishing the Continental Free trade agreement effectively regulate SPS measures.

1.3. Research questions /sub problems

The primary research questions underlying this study are.

- What are sanitary and phytosanitary measures?
- Does the AfCFTA effectively regulate sanitary and phytosanitary measures?
- What recommendations can be made to strengthen the regulation of sanitary and phytosanitary measures under the AfCFTA?

1.4. Motivation/Rationale

The facilitation and regulation of intra African Trade is the cornerstone of the Africa Continental Free Trade Agreement, however the European Union takes a “lion’s share” of African trade. NTBs are raising the cost of doing business on the African continent, which directly affects the competitiveness of African goods and services trade. They remain more prevalent in Africa than in other Regions.²⁵ In terms of the Agreement Establishing the Africa Continental Free Trade Area, NTBs are defined as, barriers that impede trade through mechanisms other than the imposition of tariffs.²⁶ SPS measures that are stricter than necessary may lead to questionable impediments to trade and cause economic losses for importing Countries.²⁷ Furthermore SPS measures are negotiated and applied at sectoral level; thus, their trade effects are likely to be heterogeneous across sectors.²⁸

²⁴ Vhumbunu & Rudigi 2021:136

²⁵ Vhumbunu & Rudigi 2021:136.

²⁶ Vhumbunu & Rudigi 2021:132.

²⁷ Liu *et al* 2020:197.

²⁸ Santeramo & Lamonaca 2022:3116

The purpose of free-trade areas should be to facilitate trade between their members and not raise trade barriers with other WTO members.²⁹ This lends further impetus to our need to study these measures. This study is therefore necessary as it serves to explore the efficacy of these measures in the context of trade liberalisation under the agreement establishing the AfCFTA.

1.5. Limitations of study

The study limits itself to The AfCFTA and certain aspects of the multilateral regulation of sanitary and phytosanitary measures" This is because the AfCFTA mirrors the WTO trade regime. In terms of article 26 of the AfCFTA, provision is made for its registration and notification by its determination that the depositary shall upon the entry into force of this Agreement, register it with the United Nations Secretary General in conformity with Article 102 of the Charter of the United Nations furthermore State Parties shall, where applicable notify this Agreement to the WTO individually or collectively.³⁰ finally, similar to the WTO's objective of trade liberalisation,³¹ The AfCFTA provides in its preamble that The members of the African Union are committed to expanding intra-African trade through the harmonisation, coordination of trade liberalisation and implementation of trade facilitation, instruments across Africa, and cooperation in the area of quality infrastructure, science and technology, the development and implementation of trade related measures.³²

²⁹ Ndulo 2022:96-97.

³⁰ African Union," Agreement establishing the Africa Continental Free trade Area", https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 30 January 2024)

³¹ World Trade Organization. "Understanding the WTO,What we https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm (accessed on 30 November 2023).

³² African Union "Agreement establishing the Africa Free Trade Area", https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed on 30 January 2024).

1.6. Overview of literature.

A plethora of academic literature pertaining to the AfCTA has emerged in recent years. The history, philosophy, and ideas underlying SPS measures can be obtained from a perusal of a variety of academic sources and international trade agreements. The most relevant and controlling primary sources consulted include the WTO's agreement on the application of sanitary and phytosanitary measures, the AU SPS policy Framework, and the Agreement establishing the AfCTA itself.

AfCFTA is viewed as a beacon of hope for Africa's development. But before Africa over-celebrates the Agreement, it must be acknowledged that free trade in as much as it has benefits for member countries, can present difficulties in implementation.³³ Böschmeier focuses on the difficulty surrounding the implementation of the Agreement. He sheds some light on the potential for liberalisation, the current state of negotiations, and arising problems of the implementation. Ordinarily, SPS disputes are perceived as particular expressions of the conflict between trade liberalisation and protectionism.³⁴ Adiwibowo maintains that article XX (b) of GATT which authorises the government to set standards in technical regulations, which must be adjusted to the Agreement on the Sanitary and Phytosanitary (SPS).³⁵ SPS and TBT agreements fully acknowledge any state's or trading bloc's right to defend its market from dangerous foodstuffs and plants or to set its own technical standards, to provide its population with the health protection it deems appropriate, within the scope of SPS and TBT guidelines³⁶. Article 2.2 of the above-mentioned SPS agreement stipulates that all norms must be scientifically based and must not create unnecessary trade barriers beyond those reflecting specificities of the country. However, the agreement does not specifically require a deep analysis and scientific grounding of such measures. This leaves space for disputes.³⁷

³³ Sibanda 2021:217.

³⁴ Burkard 2015:18.

³⁵ Adiwibowo 2020:174.

³⁶ World Trade Organization" Sanitary and phytosanitary measures :introduction Understanding the WTO Agreement on Sanitary and Phytosanitary Measures" [wto.org/english/tratop_e/sps_e/spsund_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm) (accessed on 19 October 2023).

³⁷ Svoboda 2021:66

The SPS Agreement aims to discipline national SPS standards relating to the protection of plant, animal and human health, The agreement disciplines SPS standards and TBT regulations by requiring *inter alia* that these are: based on scientific principles and are not maintained without sufficient scientific evidence; do not create unnecessary obstacles to trade; are transparent, justifiable, non-discriminatory; and are based on international standards whenever possible.³⁸

Sanitary and phytosanitary measures, by their very nature, may result in restrictions on trade. All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, governments are sometimes pressured to go beyond what is needed for health protection and use sanitary and phytosanitary restrictions to shield domestic producers from economic competition.³⁹ A sanitary or phytosanitary restriction which is not actually required for health reasons can be a very effective protectionist device, and because of its technical complexity, a particularly deceptive and difficult barrier to challenge.⁴⁰

Many free-trade agreements have contributed to abolishing and reducing tariffs across countries; however, concerns regarding trade promotion have shifted from tariff to non-tariff measures (NTMs). The literature suggests that the effects of SPS and TBT are likely to be negative however, some evidence of positive effects has also been found.⁴¹ NTMs are significantly relevant to agricultural trade policies, especially since trade negotiations have significantly decreased tariffs. Countries impose Sanitary and Phytosanitary Measures (SPS), a technical NTM, to protect

³⁸ Osiemo 2015:175.

³⁹ World Trade Organization “The WTO Agreements Series Sanitary and Phytosanitary Measures”, https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf (accessed on 27 August 2023).

⁴⁰ World Trade Organization.” understanding the WTO agreement on sanitary and phytosanitary measures”.https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm#:~:text=protecting%20domestic%20producers%3FThe%20Agreement%20on%20the%20Application%20of%20Sanitary%20and%20Phytosanitary%20Measures,must%20be%20based%20on%20science. (Accessed on 27 August 2023).

⁴¹ Akune 2023:133

human, animal, and plant health by regulating specific food quality and safety aspects.⁴²

The problem is further exacerbated by the fact that there is a precipitous argument that the unqualified reliance of the SPS Agreement on scientific evidence as a conclusive benchmark of risk assessment is not free from the inherent limitations of science. These concerns have become pressing issues for the SPS Agreement as a result of surging consumer awareness and vigilance concerning environmental protection and food safety.⁴³

1.7. Method and approach

This study is a desktop literature review based on a qualitative approach which explains the efficacy of the agreement establishing the Africa Continental Free Trade Area in regulating sanitary and Phytosanitary measures. It endeavours to describe and explain this phenomenon or position within a wider context. The data collection will include a review of literature, case law, statutes and other sources of black letter law.⁴⁴ A combination of legal comparative and legal historical approaches will be employed in that the study entails how the research topic /issue is dealt with by different legal systems, rules and institutions of the world with the aim of obtaining critical insights. A legal historical approach will be employed in the sense that SPS regulation as it relates to trade liberalisation has been identified and its origins and development over time is traced and investigated.⁴⁵

1.8. Structure

The study is structured as follows.

Chapter 1:

The first chapter is the is the serves to provide a descriptive analysis of the most salient matters insofar as the regulation of sanitary and phytosanitary measures under the Africa Continental free Trade agreement is concerned.

⁴² Boza et al 2023:75.

⁴³ Islam 2021:548.

⁴⁴ Du Plessis 2007:28.

⁴⁵ Du Plessis 2007:28.

Chapter 2

The second chapter investigates the origins and theoretical framework that underpins SPS regulation.

Chapter 3

Chapter three explores the efficacy of SPS measures regulation under the agreement establishing the Africa Continental Free Trade Area.

Chapter 4

The penultimate chapter considers how sanitary and phytosanitary measures are regulated by the World Trade Organization and determines international best practice.

Chapter 5

The concluding chapter provides recommendations to ensure effective regulation of SPS measures under the agreement establishing the AfCTA.

CHAPTER TWO

The history and theoretical perspectives of SPS regulation

2. Introduction

A thorough understanding of the regulation of sanitary and phytosanitary (Hereinafter SPS) measures under the AfCFTA requires an exposition of the historical context and subsequent investigation of the theory which informs such regulation. The historical discussion, in part one of the present chapter, traces the topic of SPS regulation since World War II before proceeding with a discussion of the adoption of the General Agreement on Tariffs and Trade (GATT) and⁴⁶ the formation of the World Trade Organization until the contemporary establishment of the AfCTA.⁴⁷ Insofar as the theoretical perspectives are concerned, this chapter endeavours to determine the theoretical framework which informs the regulation of SPS measures through a comparison the AfCTA principles and objectives *vis-à-vis*, those of the World Trade Organization. This inquiry is undertaken with the aim of providing sufficient comprehension of the next chapter which deals with international best practice. The present chapter concludes with a consideration of the emerging issues under the present topic and draws lessons to be deduced from the history.

2.1. Definition of Sanitary and Phytosanitary measures

Sanitary refers to human and animal health, including food safety, and “phytosanitary” means plant health. For the purposes of the SPS Agreement, sanitary and phytosanitary measures are defined as any measures applied : to protect human or animal life from risks arising from additives, contaminants, toxins or

⁴⁶ The World Trade Organization came into being in 1995. One of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War. https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm (accessed on 11 January 2024).

⁴⁷ See “Agreement Establishing the Africa Continental Free Trade Area”. (https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (Accessed on 11 January 2024).

disease-causing organisms in their food or beverages, to protect human life from plant or animal carried diseases (known as “zoonosis”), to protect animal or plant life from pests, diseases, or disease-causing organisms, to prevent or limit other damage to a country from the entry, establishment or spread of pests.⁴⁸

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.⁴⁹ It is noted that the impact of non-tariff barriers on the effectiveness of the AfCTA is a key concern surrounding its implementation. Such non-tariff barriers include logistics performance and deficits, infrastructure deficits, access to credit, border processes, and customs practices. Other non-tariff barriers include restrictive regulations and procedures concerning "quotas, licenses, and complex or dissimilar rules of origin-as well as sanitary, phytosanitary, and technical barriers.⁵⁰

In its preamble to the discussion of Sanitary and phytosanitary measures as they pertain to possible free trade barriers, The World Trade Organization points out that SPS measures are aimed to ensure that one’s country’s consumers are being supplied with food that is safe to eat "safe" by the standards they consider appropriate. At the same time, ensure that strict health and safety regulations are not being used as an excuse for protecting domestic producers.⁵¹ It is therefore apparent that the definition poses a myriad of difficulties in the harmonisation of SPS

⁴⁸ World Trade Organization” The WTO Agreements Series Sanitary and Phytosanitary Measures Agreement on the regulation of Sanitary and phytosanitary measures https://www.wto.org/english/docs_e/legal_e/15-sps.pdf (accessed on 11 January 2024).

⁴⁹ World Trade Organization” The WTO Agreements Series Sanitary and Phytosanitary Measures Agreement on the regulation of Sanitary and phytosanitary measures https://www.wto.org/english/docs_e/legal_e/15-sps.pdf (accessed on 11 January 2024).

⁵⁰ Ndulo 2022:69.

⁵¹ The WTO Agreements Series Sanitary and Phytosanitary (accessed on 16 January 2024).

regulation. The WTO then proceeds by directing our attention to its agreement on the application of sanitary and phytosanitary measures which sets out the basic rules for food safety and animal and plant health standards.⁵²

In terms of the agreement, a sanitary or phytosanitary measure is any measure applied to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms, to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs, to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests or to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.⁵³

In an attempt to systematically assess the relevance of different SPS measures applied for various safety purposes on trade in agriculture and food. The above definition is echoed by academia that hold that SPS measures pose methods partly regulated under the SPS Agreement of the World Trade Organization (WTO), but their design and use are less rigid and rather flexible (compared to other NTMs (Non-Tariff Measures) such as quotas or prohibitions). In principle, SPS measures are meant to provide countries with a possibility to protect the health of animals, humans and plants. Due to their design, SPS measures may also be used as instruments to achieve certain policy objectives, such as protecting domestic producers.⁵⁴

⁵² World Trade Organization Understanding the WTO Agreement on Sanitary and Phytosanitary Measures. https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm Accessed on 11 January 2024)

⁵³ World Trade Organization, Agreement on the regulation of Sanitary and phytosanitary measures https://www.wto.org/english/docs_e/legal_e/15-sps.pdf (accessed on 11 January 2024).

⁵⁴ Crivelli & Groeschl 2016:444.

2.2. A Historical overview of the regulation of SPS measures

2.2.1. SPS regulation since World War II

The world trading system with the institutional framework, as it functions today, can be traced back to the end of World War II when the disastrous effects of the worldwide economic depression of the 1930s and trade battles had to be overcome. Difficulties of currency exchange, protectionist tariffs and truculent international trade policies were motivation to convene a meeting in Bretton Woods, New Hampshire in July 1944. The aim was to create a new international monetary system and an international organisation to oversee that system.⁵⁵

Leaders of the Allied countries, particularly the United States and Britain, suggested a post-war multilateral trading system based on consensual decision making and co-operation to negotiate lower customs duties and the reduction or elimination of other trade barriers and to stimulate expansion in world trade. The Bretton Woods Conference envisaged three pillars to build an economic structure.⁵⁶

In the first instance, The International Monetary Fund, tasked with maintaining exchange stability and creating a stable climate for international trade by harmonising its members' monetary policies and which would be able to provide temporary financial assistance to countries encountering difficulties with their balance of payments.⁵⁷

Second, the International Bank for Reconstruction and Development, which is today part of the World Bank Group and which was designed to improve the capacity of countries to trade by lending money to impoverished and war-ravaged countries for reconstruction and development projects and third,⁵⁸ an international organisation to

⁵⁵ Mikesel. "The Bretton woods debate memoir", <https://ies.princeton.edu/pdf/E192.pdf> (accessed on 18 June 2024).

⁵⁶ Chen "Bretton Woods Agreement and the Institutions It Created Explained" <https://www.investopedia.com/terms/b/brettonwoodsagreement.asp#toc-what-was-the-bretton-woods-agreement-and-system> (accessed on 3 May 2023)

⁵⁷ Strydom *et al* 2016:423

⁵⁸ See: World Bank Group. "<https://www.worldbank.org/en/who-we-are/ibrd> (accessed on 18 June 2024)

develop and co-ordinate international trade (today the World Trade Organization, the WTO).⁵⁹

After the United Nations (UN) was founded in 1945, multilateral trade negotiations were conducted within the framework of the UN Economic and Social Council. In 1946, this council adopted a resolution in favour of forming the International Trade Organization (ITO). Furthermore it was decided to prepare a multilateral treaty containing general principles of trade (the General Agreement on Tariffs and Trade, GATT), and schedules of tariff reductions. While the work on the GATT and the tariff schedules was completed by the end of 1947, the ITO in fact never materialised. Through adoption of the Protocol of Provisional Application, the GATT and its tariff schedules came into force on 1 January 1948.⁶⁰

For present purposes, it is essential to place the necessary impetus on the role of the World Trade Organization. The WTO's creation on 1 January 1995 marked the biggest reform of international trade since the end of the Second World War. Whereas the GATT mainly dealt with trade in goods, the WTO and its agreements also cover trade in services and intellectual property. The birth of the WTO also created new procedures for the settlement of disputes.⁶¹

The WTO sees itself primarily as a forum for governments where international trade agreements are negotiated. The WTO provides a system of trade rules covering goods, services and intellectual property, as well as a legal and institutional framework for the implementation and monitoring of these agreements, and a venue for settling disputes arising from the interpretation and application of WTO agreements. Administering WTO trade agreements, monitoring national trade policies, providing technical assistance and training for developing countries and co-operating in among other things negotiating the reduction or elimination of obstacles to trade (import tariffs and other barriers to trade) and agreeing on rules governing the conduct of international trade (such as antidumping, subsidies and product

⁵⁹ See, World Trade Organization. "History of the multilateral trading system", https://www.wto.org/english/thewto_e/history_e/history_e.htm (accessed on 18 June 2014)

⁶⁰ Strydom *et al* 2016:423.

⁶¹ World Trade Organization. "History of the multilateral trading system" (accessed on 18 June 2024).

standards), administering and monitoring the application of the WTO's agreed rules for trade in goods and services, and trade-related intellectual property rights and monitoring and reviewing the trade policies of members, as well as ensuring transparency of regional and bilateral trade agreements. Importantly, the WTO is concerned with reducing trade barriers and eliminating discriminatory treatment in international trade. However, nowadays world trade law is also framed by the concept of sustainable development.⁶²

2.2.2. The adoption of the General Agreement on Tariffs and Trade (GATT)

The General Agreement on Tariffs and Trade (GATT) covers international trade in goods. This Agreement was signed in 1947 and aimed at a reduction of tariffs and other trade barriers. The GATT developed rules for a multilateral trading system through a series of trade negotiations or rounds. The last GATT round (known as the Uruguay Round) lasted from 1986 to 1994 and led to the establishment of the WTO in 1995. The Uruguay Round of Multilateral Trade Negotiations was concluded with the adoption of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. This Final Act includes the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement).⁶³

On 15 December 1993, 117 countries concluded a seven-year effort to negotiate improved rules and conditions for world trade under the auspices of the General Agreement on Tariffs.⁶⁴ The round of multilateral trade negotiations, which had opened in Punta del Este, Uruguay, in September 1986, was considerably more ambitious in its scope than any of the previous seven rounds of GATT multilateral negotiations.⁶⁵ The Final Act of the Uruguay Round of negotiations, which was

⁶² Strydom *et al* 2016:424-426.

⁶³ Strydom *et al* 2016:429.

⁶⁴ The 23 countries that signed the General Agreement on Tariffs and Trade (GATT) in 1947 accounted for roughly 60 per cent of global trade and were evenly balanced between developed and developing countries. By 2020, membership in the GATT's successor, the World Trade Organization (WTO), had expanded to 164 countries, with 24 new members since 2001 (including China and the Russian Federation) accounting for roughly 98 per cent of world trade.

⁶⁵ Seade J "An Overview of the Uruguay Round 10" <https://www.elibrary.imf.org/display/book/9781557756213/C10.xml>

formally adopted in Marrakesh, Morocco on 15 April 1994 and came into effect in 1995, established a new World Trade Organization (WTO).⁶⁶ The WTO oversees the implementation of more than 20 trade agreements which cover a vast range of trade issues, from agriculture to trade in services and trade-related intellectual property rights. The results of the Uruguay Round provide expanded trade opportunities for goods and services, as well as strengthened trade rules and disciplines.⁶⁷ To address the problems with agricultural trade, delegates to the Uruguay Round which lasted from 1986 to 1994, managed to craft an agreement focused on three policy areas that came to be referred to as “pillars.”⁶⁸

Firstly, market access for imports which required the replacement of non-tariff barriers with equivalent tariffs that were to be lowered by 36% over six years (24% for low-income countries over ten years) and a number of other trade policy constraints. Second, Export subsidies which were to be reduced by 36% in value and 21% in volume over six years. And third Trade-distorting domestic support as measured by an Aggregate Measure of Support (AMS) which was to be reduced by 20% over six years.⁶⁹

2.2.3. Adoption of the WTO agreement on the regulation of SPS measures.

The roots of the WTO SPS agreement can be traced as far as Article XX (b) of GATT, which allows governments to act on trade to protect human, animal or plant life or health, provided they do not discriminate or use these measures as disguised protectionism. In light of this, the WTO has two specific agreements meant to protect human, animal, and plant life as applied to its members: the Agreement on Technical

<https://www.elibrary.imf.org/display/book/9781557756213/C10.xml> (Accessed on 17 September 2024).

⁶⁶ World Trade Organization “Understanding the WTO: basics The Uruguay Round”, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (Accessed on 17 September 2024)

⁶⁷ Stanton,” Understanding the GATT agreement on the application of sanitary and phytosanitary measures. <https://www.fao.org/4/T4660t/t4660t0h.htm> (Accessed on 10 December 2023).

⁶⁸ World Trade Organization” Understanding the WTO: Basics The Uruguay Round” https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (Accessed on 19 December 2023).

⁶⁹ Petersen & Wesley 2015:1.

Barriers to Trade (TBT) and (more importantly for our present purposes) the Agreement on Application of Sanitary and Phytosanitary measures (SPS).⁷⁰

The reason for delving into the negotiating history of the SPS Agreement is that the genesis of the agreement provides evidence for its general purpose, as its framers had it in mind. It provides a response to the question why there is an SPS Agreement at all by reconstructing the specific political environment during the period of negotiations and, in addition, may confirm the explanations provided by economic theory.⁷¹

The SPS Agreement is a child of the Uruguay Round. By contrast to its 'sister' agreement, the TBT Agreement, it did not have a predecessor in GATT law or practice but evolved as an entirely new agreement. Initial negotiations on the regulation of SPS matters primarily focused on amendments to and clarifications of Article XX (b) GATT. Only later during the negotiations was the idea of a 'stand-alone code' on SPS measures introduced.⁷²

2.3. The theoretical perspectives informing SPS measure regulation

It *prima facie* appears that the cardinal theoretical perspectives underpinning the regulation of SPS measures are informed by ideas such as; policy harmonisation, trade liberalisation, economic sustainability and the promotion of fair trade practices.⁷³ Ever since the seminal works of Adam Smith and David Ricardo,⁷⁴ economists have agreed almost unanimously that international trade is globally

⁷⁰ Ndobyia "The Africa Continental Free Trade Area and the SPS Agreement: Insights for Africa", <https://www.afronomicslaw.org/category/analysis/africa-continental-free-trade-area-and-sps-agreement-insights-africa> (accessed on 13 December 2023).

⁷¹ World Trade Organization Agreement on the application of sanitary and phytosanitary measures 15-sps.wpf (wto.org) (accessed on 16 December 2023).

⁷² Rigod 2013: 505.

⁷³ World Trade Organization, agreement on the regulation of sanitary and phytosanitary measures https://www.google.com/url?esrc=s&q=&rct=j&sa=U&url=https://www.wto.org/english/docs_e/legal_e/15-sps.pdf&ved=2ahUKEwiopKCw-96DAxX2QEEAHav8DXgQFnoECAoQAQ&usg=AOvVaw0reFLy8dks8PNGaXhl3_JV (accessed on 7 January 2024).

⁷⁴ With the Wealth of Nations Adam Smith installed himself as the leading expositor of economic thought & after reading ADAM SMITH's *The Wealth of Nations*, Ricardo got excited about economics. He wrote his first economics article at age thirty-seven and then spent the following fourteen years as a professional economist.

welfare enhancing. Against the background of Ricardo's seminal model of comparative advantage, the existence of trade agreements is therefore a puzzle.⁷⁵ In the framework of the theory there is no room for trade agreements because unilateral liberalisation is always the first best, at least if governments preside over small countries and seek to maximize national income. When international trade is always beneficial, then the only logical choice should be to abolish any import barriers.⁷⁶ Free trade, however, is not what one observes in the real world. Some countries do unilaterally liberalise international trade, but others do not, moreover, many states are signatories to at least one trade agreement.⁷⁷

2.3.1. Harmonisation

The principles and objectives of the GATT Agreement include among other things, the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less developed contracting parties.⁷⁸ This vision is bolstered by the WTO whose overall objective is to help its members use trade as a means to raise living standards, create jobs and improve people's lives. The WTO operates the global system of trade rules and helps developing countries build their trade capacity.⁷⁹

In terms of the Sanitary and Phytosanitary (SPS) Policy Framework for Africa,⁸⁰ Parties should cooperate in the development and harmonisation of sanitary or phytosanitary measures based on international standards, guidelines and recommendations taking into account the harmonisation of sanitary or phytosanitary

⁷⁵ Rigod 2013: 516.

⁷⁶ International Monetary Fund "Global trade liberalisation and developing countries" <https://www.imf.org/external/np/exr/ib/2001/110801.htm> (accessed on 7 January 2024).

⁷⁷ Rigod 2013:516-517.

⁷⁸ General Agreement on Tariffs and Trade. https://www.wto.org/english/docs_e/legal_e/gatt47.pdf ((accessed on 9 January 2024).

⁷⁹ World Trade Organization," <https://www.wto.org/> (accessed 9 January 2024).

⁸⁰ It noteworthy that the SPS Policy Framework for Africa does not contain a strict definition Sanitary and Phytosanitary measures. see African Union, "SPS policy framework ", https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf(accessed on 16 October 2023).

measures at the regional level furthermore its primary objective is establish harmonised Science-Based SPS Systems .⁸¹These contentions mirror the WTO Agreement on the application of sanitary and phytosanitary measures in terms of which member states are required to harmonise sanitary and phytosanitary measures on as wide a basis as possible.⁸²

These ideas can be further presumed to be echoed by the preamble of the agreement establishing the AfCFTA which articulates that it's member states are committed to expanding intra-African trade through the harmonisation, coordination of trade liberalisation and implementation of trade facilitation instruments across Africa, and cooperation in the area of quality infrastructure, science and technology, the development and implementation of trade related measures and recognise the different levels of development among the State Parties and the need to provide flexibilities, special and differential treatment and technical assistance to State Parties with special needs.⁸³

2.3.2. Trade Liberalisation

The Kigali Declaration that launched the establishment of AfCFTA noted the need and critical importance of creating an expanded and secure market for the goods and services of member states of the AU through adequate infrastructure and the reduction or progressive elimination of tariffs, and elimination of non-tariff barriers to trade and investment .Thus, trade facilitation (TF) and liberalisation are important for the development agenda of AfCFTA through intra-trade.⁸⁴ Traditionally, TF is considered from aspects such as infrastructure development, taxation, customs and excise, customs clearance systems, trade security and breaking down of trade

⁸⁴ CDH Incorporated "CDH Insights on the African Continental Free Trade Area", dekkerhofmeyr.com/export/sites/cdh/sectors/downloads/CDH-Insights-on-the-African-Continental-Free-Trade-Area.pdf (accessed on 17 September 2024).

barriers. AfCFTA and development will be served better by TF with less unreasonable strictures.⁸⁵

The above contention is supported by the perambulatory statement of the WTO SPS agreement in which it is held 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.⁸⁶ Whereas the Agreement establishing the Africa Continental Free Trade area requires member states to progressively eliminate tariffs and non-tariff barriers to trade in goods; progressively liberalise trade in services; cooperate on investment, intellectual property rights and competition policy; and cooperate on all trade-related areas.⁸⁷

2.3.3. Economic sustainability

In the first place, the WTO is concerned with the reduction of trade barriers and eliminating discriminatory treatment in international trade. However, nowadays world trade law is also-framed by the concept of sustainable development.⁸⁸ The New Partnership for Africa's Development NEPAD provides a framework for development on the African continent and aims to pursue sustainable growth and development. As such, NEPAD constitutes a 'blueprint' for the sustainable development of Africa. Furthermore, the NEPAD Programme for Action identifies the conditions for sustainable development as peace and security, economic and political governance, and sub-regional and regional approaches to development. Several other AU instruments affirm the central role of sustainable development on the African continent.⁸⁹

⁸⁵ Sibanda 2021:221

⁸⁶ World Trade Organization Agreement on the application of sanitary and phytosanitary measures. https://www.wto.org/english/docs_e/legal_e/15-sps.pdf (accessed on 12 January)

⁸⁸ Strydom et al 2016:429.

⁸⁹ Strydom et al 2016:512.

One such document is the Agreement establishing the Africa Continental Free trade area wherein it is explicated that one of the protocol's objectives is to promote unlocking Africa's trade and industrialization potential,⁹⁰ the free trade area is expected to provide citizens with much needed jobs and income that strengthen resilience of national and regional economies and contribute to inclusive development, in line with the AU Agenda 2063 and the 2030 Agenda for Sustainable development in accordance with the Sustainable Development Goals (SDGs).⁹¹

2.3.4. Promotion of fair trade practices

The AfCFTA Protocol on Competition Policy was adopted by the AU Assembly during its 36th Ordinary Session held from 18 to 19 February 2023 in Addis Ababa, Ethiopia. The Protocol will enter into force 30 days after the deposit of the 22nd instrument of ratification of the Protocol. Only State Parties to the AfCFTA Agreement can ratify or accede to the Protocol. The Protocol is an agreement by State Parties to ensure that competition contributes to trade, inclusive growth, industrialisation, innovation and sustainable economic development in Africa.⁹² The Protocol will help to create a fair and competitive business environment in Africa by promoting competition and addressing restrictive business practices.⁹³ The WTO's agreements are the legal foundation for the international trading system that is used by the bulk of the world's trading nations. The SPS is "constitutive text" of the WTO that establishes the requirements for all sanitary and phytosanitary measures that may, directly or indirectly affect international trade.⁹⁴

⁹⁰ Agreement Establishing the Africa Continental Free Trade Area. https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed on 10 January 2024)

⁹¹ United Nations UNCTAD Africa Regional Forum on Sustainable Development 2022 Virtual Side Event jointly organized by UNDP, UNECA and UNCTAD towards enhanced partnerships to support an inclusive AfCFTA 28 February 2022. https://unctad.org/system/files/information-document/ARFSD-2022-concept-note_en.pdf (accessed on 19 January 2024)

⁹² Tralac infographics AfCFTA Protocol on Competition Policy: Factsheet 05 Oct 2023 <https://www.tralac.org/resources/infographic/16150-afcfta-protocol-on-competition-policy-factsheet.html> (accessed on 12 January 2023).

⁹³ Tralac infographics AfCFTA Protocol on Competition Policy: Factsheet 05 Oct 2023 <https://www.tralac.org/resources/infographic/16150-afcfta-protocol-on-competition-policy-factsheet.html> (accessed on 12 January 2023).

⁹⁴ Vinti & Makapela 2016:456.

Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and have to do the same for all other WTO members. This principle is known as most-favoured-nation (MFN) treatment.⁹⁵

The concept of non-discrimination is at the core of the trading system. It consists of two fundamental principles – namely, the most-favoured-nation (MFN) principle and the principle of national treatment (NT). The MFN principle entails that WTO members may in principle not treat one WTO trading partner less favourably than any other country. According to the NT principle, once a product, service or item of intellectual property has entered the market, it should be treated in the same way as a domestically sourced like product, service or item of intellectual property. The concept of non-discrimination is at the core of the trading system. It consists of two fundamental principles – namely, the most-favoured-nation (MFN) principle and the principle of national treatment (NT). The MFN principle entails that WTO members may in principle not treat one WTO trading partner less favourably than any other country. According to the NT principle, once a product, service or item of intellectual property has entered the market, it should be treated in the same way as a domestically sourced like product, service or item of intellectual property. The WTO asserts that the opening of national markets to international trade, with justifiable exceptions or with adequate flexibilities, will encourage and contribute to sustainable development, improve people's welfare, reduce poverty, and foster peace and stability. At the same time, such market opening must be accompanied by sound domestic and international policies that contribute to economic growth and development according to each member's needs and aspirations.⁹⁶

2.4. Emerging issues and Historical lessons

There are two glaring issues where the present discussion is concerned. In the first instance, it is argued that Annex 7 of the Agreement establishing the AfCFTA is a copy-and-paste of the WTO SPS Agreement, disregarding Africa's unique

⁹⁵ World Trade organization, Understanding The WTO Basics, principles of the trading system,
⁹⁶ Strydom *et al* 2016:424.

challenges and opportunities. Whereas the African Union SPS policy framework lays down various ways of operationalising the measures in the AfCFTA, it does not consider the effects of the replicated WTO SPS agreement in law, implementation and interpretation in Africa.⁹⁷

WTO members discussed and adopted the proposed process for the Sixth Review of the SPS Agreement at the November 2023 meeting of the SPS Committee. The Committee will work on the Review of the Agreement throughout 2024. The process is scheduled to be s scheduled to be completed in early 2025.⁹⁸

From a theoretical perspective, the global welfare effects of SPS measures are ambiguous and case dependent. The immediate effect of a higher quality standard is to raise production costs which, in equilibrium, will reduce the quantity demanded of the now regulated product and thus reduces both consumer and producer surpluses relative to the *status quo ante*. Apart from protecting humans, animals, and plants from risks, many SPS measures fulfil the important function of addressing information asymmetries between consumers and producers. Commodities that fall under the purview of SPS regulations are mainly agricultural products and foodstuffs, such as human and animal food, seeds, plants, and the like. All these products display the feature that their health and safety implications are not always ascertainable prior to consumption. In economic terms, they are 'experience goods'. Experience goods' quality is revealed only once the transaction is completed and the goods consumed.⁹⁹

2.5. Conclusion

In summary, this chapter found it apt to consider the history and philosophy which inform the regulation of sanitary and phytosanitary measures. It also served to explicate the role of the World Trade Organisation in trans-national trade and thus

⁹⁷ Ndobyia "The Africa Continental Free Trade Area and the SPS Agreement: Insights for Africa", <https://www.afronomicslaw.org/category/analysis/africa-continental-free-trade-area-and-spsagreement-insights-africa> (accessed on 13 December 2023)

⁹⁸ World Trade Organization, "Review of Operation and Implementation of SPS Agreement", https://www.wto.org/english/tratop_e/sps_e/review_sps_agreement_e.htm (accessed on 9 January 2024).

⁹⁹ Rigod 2013:514.

provided the background and context of the need of SPS regulation in trade facilitation and the elimination of these measures as protectionist tools.

Chapter Three

Regulation of SPS measures under World Trade Organization

3.1. Introduction

The primary objective of the current chapter is to explore the World Trade Organization's (hereinafter WTO's) regime in SPS measure regulation and determine its potential impact on intra African trade liberalisation. International free trade is based on Adam Smith's theory of competitive advantage and the natural division of labour,¹⁰⁰ as well as David Ricardo's theory of comparative advantage.¹⁰¹ Both Smith and Ricardo later emphasised the numerous benefits of trade liberalisation, greatly influencing the global trend of bilateral and multilateral trade treaties.¹⁰² The majority of African Union Member states are also parties to the WTO's SPS agreement;¹⁰³ consequently, they therefore incur the burden of having to adhere to the obligations of both the aforementioned agreement and the one establishing the Africa Continental Free trade Area.¹⁰⁴ *The AU* has been given the mandate by its Member States as per its policy organs, to coordinate and harmonise the position of African countries and regions, with a view to speak with one voice in international trade negotiations and fora.¹⁰⁵

As elucidated in the preceding chapter, The World Trade Organization is the primary custodian overseeing all matters concerning the facilitation of transnational and

¹⁰⁰ Adam Smith (1723-1790).

¹⁰¹ Ricardo first gained notice among economists over the "bullion controversy." In 1809 he wrote that England's INFLATION was the result of the Bank of England's propensity to issue excess banknotes

¹⁰² Son & Vang-Phu 2023:148.

¹⁰³ The AU, "*attaches great importance to the enhancement of trade performance of its Member States of which 44 are Members of the World Trade Organization.*

¹⁰⁴ On 17 November 2019, Mr Moussa Faki Mahamat, Chair of the African Union Commission (AUC), sent a letter to Ms Sunanta Kangvalkij, Chair of the General Council of the World Trade Organization (WTO) and Mr Roberto Azevêdo, WTO Director-General, requesting that the AU be granted observer status in the WTO.

¹⁰⁵ Erasmus "Observer status for the African Union at the WTO", <https://www.tralac.org/blog/article/14343-observer-status-for-the-african-union-at-the-wto.html> (accessed on 15 January 2024).

global trade. Its most controlling principles include *inter alia*; Trade without discrimination, predictability, transparency and promoting fair competition.¹⁰⁶

Since the historical and theoretical perspectives which inform the WTO's regulation of SPS measures were discussed in the previous chapter, it becomes pivotal to explore the role of this organisation in trade regulation and determine its stance on SPS regulation insofar as it presents a protectionist tool in respect of domestic economies. This will be done through a perusal of specific policy regulating SPS measures in the WTO followed by a brief comparison of the SPS agreement and its "sister agreement", the Agreement on Technical Barriers to Trade (TBT) (Both agreements are annexures to the Agreement establishing the World Trade Organization) in the first part of the present chapter, before a summation of the relationship between the WTO SPS agreement and protectionism in the second part. The latter part of the chapter will conclude with a detailed exposition of the WTO Charter and the General Agreement on Tariffs and Trade (GATT) as they inform the premise of SPS regulation in the AfCTA and indicate emerging issues from WTO agreement and developing countries concerns.

3.2. Discussion of specific policy regulating SPS measures under the WTO

The SPS Agreement has 14 Articles, containing the rights and obligations that WTO members have agreed to. The SPS Agreement also has three annexes giving definitions of various terms, and elaborating on certain obligations in the body of the SPS Agreement. The basic rights and obligations of WTO members are covered in Article 2 of the SPS Agreement.¹⁰⁷

¹⁰⁶ World Trade Organization" Principles of the trading system https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed on 15 January 2024).

¹⁰⁷ Australian Government Department of Agriculture, Fisheries and Forestry. AusAID "Sanitary and Phytosanitary Capacity Building Program, The WTO Sanitary and Phytosanitary (SPS) Agreement Why you need to know. Sanitary and Phytosanitary Capacity Building Program https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/animalplant/plant-health/publications/taxonomy/wto_sps_agreement_booklet.pdf (accessed on 17 June 2024).

In terms of the abovementioned, members have the right to take SPS measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement. Second, Members shall ensure that any SPS measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.¹⁰⁸ Third, Members shall ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. SPS measures shall not be applied in a manner which would constitute a disguised restriction on international trade and finally SPS measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of SPS measures, in particular the provisions of Article XX (b).¹⁰⁹

Additionally, annexure B aids the transparency of SPS regulations by providing for the publication of regulations, enquiry points, notification procedures and general reservations.¹¹⁰

3.3. The WTO SPS agreement and Protectionism

Sanitary and phytosanitary measures by their very nature may result in restrictions on trade. All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant protection, however governments are sometimes pressured to go beyond what is needed for health protection and use sanitary and phytosanitary restrictions to shield domestic

¹⁰⁸ World Trade Organization “Sanitary and Phytosanitary measures : text of the agreement), The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm#:~:text=Members%20shall%20ensure%20that%20any,paragraph%207%20of%20Article%205.

¹⁰⁹ World Trade organization “The WTO agreements Series” https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf (accessed on 16 January 2024).

¹¹⁰ WTO agreement series on sanitary and phytosanitary measures. https://www.wto.org/english/res_e/publications_e/sps_agreement_series_e.htm (accessed on 18 January 2024)

producers from economic competition.¹¹¹ A sanitary or phytosanitary restriction which is not actually required for health reasons can be a very effective protectionist device and because of its technical complexity, it can be a particularly deceptive and difficult barrier to challenge.¹¹²

According to the SPS Agreement, the appropriate level of protection (hereinafter ALOP) is the level of protection deemed appropriate by the WTO member to protect human, animal or plant life or health within its territory. It is important to clearly distinguish between the ALOP established by a WTO member and the SPS measures. The ALOP is a broad objective. The SPS measures are established to attain that objective.¹¹³ The determination of the ALOP logically precedes the establishment of an SPS measure. Each WTO member has the right to determine its own ALOP. However, in determining their ALOP, WTO members should consider the objective of minimising negative trade effects. In addition, WTO members are required to apply the concept of ALOP consistently,¹¹⁴ i.e., they must avoid arbitrary or unjustifiable distinctions that result in discrimination or a disguised restriction on international trade.¹¹⁵

3.4. Relationship between the SPS agreement and the TBT agreement

The Agreement on Technical Barriers to Trade (the TBT) deals with product and industrial standards. It attempts to ensure that regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade. Technical

¹¹¹ Stanton " Understanding the GATT agreement on the application of sanitary and phytosanitary measures", <https://www.fao.org/4/T4660t/t4660t0h.htm> (accessed on 18 January 2024)

¹¹² WTO agreement series on sanitary and phytosanitary measures. https://www.wto.org/english/res_e/publications_e/sps_agreement_series_e.htm (accessed on 18 January 2024).

¹¹³ Australian Government department of Agriculture, Fisheries and Forestry Ausaid. https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/animal-plant/plant-health/publications/taxonomy/wto_sps_agreement_booklet.pdf. (accessed on 19 January 2024).

¹¹⁴ Wilson "The appropriate level of protection" https://www.ipcc.int/static/media/files/publications/en/2013/06/05/1156321210600_11_Wilson_sess5_HOOD.pdf (Accessed on 3 May 2024).

¹¹⁵ Australian Government department of Agriculture, Fisheries and Forestry Ausaid. https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/animal-plant/plant-health/publications/taxonomy/wto_sps_agreement_booklet.pdf.(accessed on 3 May 2024).

regulations and product standards may vary from country to country. Having many different regulations and standards not only complicates systems for producers and exporters, but if regulations are set arbitrarily, they could be used as an excuse for protectionism.¹¹⁶ The TBT thus aims to avoid unnecessary obstacles to trade through uniformity measures. Product specifications (known as technical regulations and standards), whether mandatory or voluntary, as well as procedures to assess compliance with those specifications (known as conformity assessment procedures), should not create unnecessary obstacles to trade.¹¹⁷ Article 2.2 provides for legitimate objectives whereby countries can pursue the protection of human health or safety; the protection of animal or plant life; and the protection of the environment.¹¹⁸

Conversely, the SPS Agreement covers any measures which set acceptable levels of pesticide or veterinary drug residues, quarantine provisions, regulation of permitted levels of fertilizer residue in food and animal feed, regulations which prohibit or limit the types of acceptable food additives and regulations mandating labelling on food or animal feed that gives health, use or dosage information.¹¹⁹ To distinguish whether a measure is regulated by the SPS, or the TBT Agreement depends on the declared objective of the measure. The type of the measure is less important. If the measure is stated to be a sanitary or phytosanitary measure it comes within the SPS Agreement. If it does not come within the SPS Agreement, then the standard automatically comes within the TBT Agreement.¹²⁰

¹¹⁶ World Bank "Ensuring Quality to Gain Access to Global Markets" <https://thedocs.worldbank.org/en/doc/907541553265335870-0090022019/original/Part2.Module7TechnicalRegulation.pdf> (accessed on 7 June 2024).

¹¹⁷ United Nations Conference on Trade and Development, "Dispute settlement ,World Trade Organization" 3.10 Technical barriers to trade" https://unctad.org/system/files/official-document/edmmisc232add22_en.pdf (accessed on 7 June 2024).

¹¹⁸ Strydom 2016:430.

¹¹⁹ Weiler *et al.*, "Unit X: Sanitary and Phytosanitary Measures (SPS)" <https://www.jeanmonnetprogram.org/wp-content/uploads/WTO-Unit-10-SPS-2017-edition.pdf> (Accessed on 24 January 2024).

¹²⁰ CTA international seminar "Meeting the challenge of effective ACP participation in agricultural trade negotiations: the role of Information and Communication" Brussels (Belgium), 27-29 November 2002. https://www.tcd.ie/Economics/staff/amtthews/FoodPolicy/CourseMaterials/Readings/O%27Connor_SPS_barriers.pdf (accessed on 25 January 2024).

3.5. The World Trade Organization Charter on SPS Regulation.

In terms of the preamble in the protocol establishing the WTO, the multilateral trading system is a vehicle through which parties who wish to attain higher living standards ensure full employment, a large and steadily growing volume of real income and effective demand and expand the production of and trade in goods and services while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development. The main instruments to achieve the WTO objectives include the reduction of tariff barriers and other barriers to trade and the elimination of discriminatory treatment in international trade relations, and thus the rejection of the use of protectionism.¹²¹

In the Agreement establishing the WTO, its members have resolved to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade (GATT), the results of past trade liberalisation efforts, and all the results of the Uruguay Round of multilateral trade negotiations. Article II of the agreement provides for the scope of the WTO, by virtue of this article, The WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement. One such agreement is the Agreement on the Application of Sanitary and Phytosanitary Measures ¹²²

The WTO SPS Agreement is essentially about health and international trade. International trade and travel have expanded significantly in the past 50 years. This has increased the movement of products that may pose health risks. The SPS Agreement recognises the need for WTO members to protect themselves from the

¹²¹ Strydom 2016:424.

¹²² World Trade Organization "Agreement establishing the WTO, https://www.google.com/url?esrc=s&q=&rct=j&sa=U&url=https://www.wto.org/english/ress_e/booksp_e/agrmtseries1_wto_e.pdf&ved=2ahUKEwi88962quGDaxUIWUEAHWmEBn4QFnoECAoQA g&usg=AOvVaw1xqWlpCX0q4gBoH1V8gQbl (Accessed on 16 January 2024).

risks posed by the entry of pests and diseases, but also seeks to minimise any negative effects of SPS measures on trade. The health aspect of the SPS Agreement basically means that WTO members can protect human, animal or plant life or health by applying measures to manage the risks associated with imports. The measures usually take the form of quarantine or food safety requirements. The measures that WTO members apply can be classified as sanitary (relating to human or animal life or health) or phytosanitary (relating to plant life or health). They are commonly known as SPS measures. The international trade aspect of the SPS Agreement basically means that, in seeking to protect health, WTO members must not use SPS measures that are: unnecessary, not science-based, arbitrary, or which constitute a disguised restriction on international trade.¹²³

The major rationale underpinning the development of the SPS Agreement was to secure the market access negotiated under the WTO Agreement on Agriculture by limiting the role of domestic SPS measures to act as *de facto* protectionist measures that exclude agricultural products from entering foreign markets, especially those coming from developing countries. Despite this early rationale, the SPS Agreement extends to goods beyond those covered by the Agreement on Agriculture.¹²⁴ To do so, it links the development of domestic SPS measures to a scientific risk assessment whereby WTO members decide on the 'appropriate level of protection.'¹²⁵ Helping to develop and least-developed countries secure a share in the growth of international trade commensurate with the needs of their economic development has steadily gained importance in recent years. Developing and least-developed country members can gain access to a range of special provisions and assistance contained in the rules of the WTO – in general, referred to as special and

¹²³ Food and agriculture organization of the United Nations," Preparing a national phytosanitary capacity development strategy A phytosanitary capacity development training tool for PPOs <https://www.fao.org/3/i7766en/i7766en.pdf> (Accessed on 16 January 2024).

¹²⁴ Mavroidis 2016:456.

¹²⁵ United Nations Conference on trade and Development Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations. <https://unctad.org/webflyer/implications-african-continental-free-trade-area-trade-and-biodiversity> (accessed on 16 January 2024).

differential treatment.¹²⁶ Since the majority of least developing countries are found on the African continent,¹²⁷ it is worthy of our attention to consider the methods employed by the WTO in supporting their economic development. Among them, being the Most Favoured Nation (MFN) principle.¹²⁸

The WTO allows member countries to discriminate against goods from member countries not included in bilateral or multilateral agreements and exempts them from MFN obligations.¹²⁹ If the exporting country is a developing country, the importing country may offer special access rights to its market or raise barriers to products from countries that violate “fair trade” obligations,¹³⁰ which in international trade is essential for ensuring a level playing field between all trading partners and is therefore the central pillar of the international trading system.¹³¹ Non-discrimination is a fundamental principle of the WTO, which promotes global trade with the goal of eradicating hunger, reducing poverty, and ensuring global prosperity. According to the WTO rules, members are required to give other members most-favoured-nation and national treatment.¹³² However it is crucial to realise that within the context of the Agreement establishing the Africa continental free Trade area. The principle does not apply to a free-trade zone or customs union, according to Article XXIV of GATT 1994. Hence, regional economic integration, such as free-trade zones and customs unions, are thus considered an exception to the MFN principle.¹³³

¹²⁶ Strydom 2016: 442.

¹²⁷ United Nations UN “list of least developed countries” <https://unctad.org/topic/least-developed-countries/list> (accessed 16 January 2024).

¹²⁸ See, World Trade Organization, GATS training module : chapter 1 Basic purpose and concepts” https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm (accessed on 17 January 2024).

¹²⁹ World Trade Organization, GATS training module : chapter 1 basic purpose and concepts” https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm (accessed on 17 January 2024).

¹³⁰ This may present challenges as the AU is constitutes by developing and least developing countries

¹³¹ United Nations Conference on Trade and development “Most favoured Nation Treatment”, https://unctad.org/system/files/official-document/diaeia20101_en.pdf (accessed on 16-January-2024).

¹³² Son & Vang-Phu 2023:147.

¹³³ Son & Vang-Phu 2023:150.

3.6. The WTO Charter and SPS regulation under the GATT

The General public policy exceptions espoused in the GATT and consequently AfCFTA can briefly be postulated as follows.

In terms of Article XX of GATTs and subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health and relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. This applies *mutatis mutandis* in terms of Article 26 of the Africa Continental Free Trade Agreement.¹³⁴

The workings of the GATT agreement are the responsibility of the Council for Trade in Goods (Goods Council), which is made up of representatives from all WTO member countries. GATT 1994's articles I and III deal with non-discrimination.¹³⁵

The primary standard-setting organizations for food safety, animal health and plant health are the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE) and the Secretariat of the International Plant Protection Convention (IPPC), respectively. The Agreement encourages the use of in standards, guidelines and recommendations of the FAO/WHO Codex Alimentarius Commission (Codex), the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC). SPS measures which conform to the international standards are presumed to be consistent with the WTO rules. However, Members may use more

¹³⁴ GATT ARTICLE XX general exceptions https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf (accessed on 25 January 2024).

¹³⁵ Strydom 2016:428.

stringent measures when they have a scientific justification, or to meet the level of protection they deem appropriate as justified by a risk assessment.¹³⁶

The SPS Agreement is administered by the Committee on Sanitary and Phytosanitary Measures (the 'SPS Committee'), in which all WTO members can participate. The SPS Committee is a forum for consultations where WTO members regularly come together to discuss SPS measures and their effects on trade, to oversee implementation of the SPS Agreement, and to seek to avoid potential disputes.¹³⁷

3.7. The WTO Charter and SPS regulation in AfCTA

The Committee on Trade and Development (UNTCAD) is the main WTO body working on matters relating to developing countries. The mandate of the Committee is wide ranging and includes work on how provisions favouring developing countries are being implemented, guidelines for technical cooperation and increased participation of developing countries in the trading system, and the position of least-developed countries.¹³⁸

The Agreement on the application of sanitary and phytosanitary measures makes provision of the regulation of these measures, In article 10 it provides that in the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members, Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities

¹³⁶ Magalhães REGIONAL SANITARY AND PHYTOSANITARY FRAMEWORKS AND STRATEGIES IN AFRICA Report for the Standards and Trade Development Facility (STDF). https://standardsfacility.org/sites/default/files/STDF_Regional_SPS_Stategies_in_Africa_0.pdf (accessed on 25 January 2024).

¹³⁷ Australian Government Department of Agriculture, Fisheries and Forestry. AusAID "Sanitary and Phytosanitary Capacity Building Program, The WTO Sanitary and Phytosanitary (SPS) Agreement Why you need to know. Sanitary and Phytosanitary Capacity Building Program https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/animalplant/plant-health/publications/taxonomy/wto_sps_agreement_booklet.pdf

¹³⁸ Strýdom 2016:433.

for their exports and with a view to ensuring that developing country Members are able to comply with the provisions of the Agreement, the Committee is enabled to grant to such countries, upon request, specified, time limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs .lastly Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.¹³⁹

3.8. Emerging issues from the WTO agreement's regulation of SPS

A precipitous challenge of all regional frameworks is to guarantee their alignment with the SPS Agreement. Three regional frameworks (COMESA, EAC and SADC) are clearly based on the text of the SPS Agreement. Because these frameworks tend to draw considerably from the SPS Agreement, using at times extensively its language out of the original context, the risk of overlap, or even contradiction with the Agreement, is evident.¹⁴⁰

3.9. Developing countries concerns

The General Agreement on Tariffs and Trade (GATT) covers international trade in goods.¹⁴¹ Article XXXVI of the GATT makes provision for trade development and enumerates its principles and objectives. In terms of this Article, there is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties and there is need for positive efforts designed to ensure that less developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.¹⁴²

The debate on free trade has tended to be controversial as developed countries tended to support free trade when they were advancing their export interests and support protectionism to defend their domestic interests. GATT therefore tended to be imbalanced in favour of the developed countries. The GATT/ WTO system

¹³⁹ See Agreement on the application of sanitary and phytosanitary measures.

¹⁴⁰ Magalhães 2010: 22.

¹⁴¹ Strydom 2016:428

¹⁴² See GATT Article XXXVI.

incorporated the concept of special and differential treatment (hereinafter S&DT) partly to ameliorate this anomaly in the trading system. However, developing countries criticised the implementation of S&DT for not addressing their fundamental development concerns related to the need for structural transformation and industrialisation of their economies and argued that S&DT was insufficient and inadequate and called for development to be mainstreamed in the WTO.¹⁴³

The preamble of the SPS enjoins the developed contracting parties to be considerate towards the developing country members and assist them in their attempts to comply with SPS measures to enhance their market access. Article 10.1 begins of the SPS in the same vein essentially provides states that members shall take account of the special needs of developing country members.¹⁴⁴

3.10. Conclusion

Policy harmonisation is obviously convoluted and cumbersome in the context of the world's largest free trade area; this is particularly pronounced in the arena of SPS measures regulation. A study of the available literature on the topic suggests that a direct interpretation and application of these measures as they appear in World Trade Organization agreements is inadequate or problematic in addressing the concerns of developing African Union Member states. This is evidenced by the fact that members have the right to take SPS measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of the WTO SPS Agreement.¹⁴⁵ Furthermore A notable challenge of all regional frameworks is to guarantee their alignment with the SPS Agreement and the debate on free trade has tended to be controversial as developed countries tend to support free trade when advancing their export interests and support protectionism to defend their domestic interests.¹⁴⁶

¹⁴³ Ismail PDF (www.tips.org.za) (accessed on 16 January 2024).

¹⁴⁴ Vinti & Makapela 472:2016.

¹⁴⁵ World Trade organization "The WTO agreement Series" https://www.wto.org/english/res_e/booksp_e/agrmtseries1_wto_e.pdf (accessed on 16 January 2024).

¹⁴⁶ Ismail PDF (www.tips.org.za) (accessed on 16 January 2024).

The next chapter serves to examine the regulation of SPS measures in other free trade areas in an attempt to borrow from international best practice in this regard.

Chapter Four

The regulation of SPS measures Under the AfCFTA

4.1 Introduction

The examination of the regulation of Sanitary and phytosanitary (hereinafter SPS) regulation through the lens of the World Trade Organisation's (hereinafter WTO's) legal framework presented in chapter three shows that such regulation is insufficient in addressing the concerns of developing and least developed countries which predominantly constitute the African Union.¹⁴⁷ This chapter will explore the regulation of SPS under the Agreement establishing the Africa Continental Free Trade Area (hereinafter AfCFTA). The second part of this chapter will present a comparative analysis of the regulation of SPS under the AfCFTA and other regional Free Trade Areas (hereinafter FTAs), such as the agreement establishing the Association of Southeast Asian Nations, (Asean)-Australia -New Zealand Free Trade Area,¹⁴⁸ The United States –MEXICO Canada (USMCA) Agreement and more crucially the regime of the European union.¹⁴⁹

An examination of the literature pertaining to SPS regulation under other FTAs illustrates that such measures present ubiquitous obstacles in this area of

¹⁴⁷ United Nations "LDC Portal - International Support Measures for Least Developed Countries" <https://www.un.org/ldcportal/content/african-continental-free-trade-area-agreement-what-expected-ldcs-terms-trade-liberalisation#:~:text=They%20are%20Ethiopia%2C%20Madagascar%2C%20Malawi,15%2Dyear%20phase%20down%20period>. (Accessed on 5 August 2024).

¹⁴⁸ The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) is an agreement between ASEAN Member States (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), Australia and New Zealand, See Australian Government Department of Foreign Affairs and Trade <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/asean-australia-new-zealand-free-trade-agreement> (accessed on 17 September 2024).

¹⁴⁹ The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020. The USMCA, which substituted the North America Free Trade Agreement (NAFTA) is a mutually beneficial win for North American workers, farmers, ranchers, and businesses. And the European Union (EU), international organization comprising 27 European countries and governing common economic, social, and security policies. Originally confined to Western Europe, the EU undertook a robust expansion into central and eastern Europe in the early 21st century.

regulation.¹⁵⁰The SPS Agreement permits countries to give food safety, animal and plant health priority over trade, provided they can demonstrate that their food safety and health requirements are based on science.¹⁵¹ While there is demonstrated political will to expand intra-regional trade, African countries face several challenges to achieving this objective. Although significant progress has been made with regard to regional integration, which has contributed to reductions in tariffs, the application of non-tariff measures (NTMs), such as Sanitary and Phytosanitary (SPS) measures, remains a major impediment to free trade.¹⁵²

SPS are a form of Non-tariff Barriers (NTBS). AN NTB is any obstacle to international trade that is not an import or export duty. They may take the form of import quotas, subsidies, customs delays, technical barriers, or other systems preventing or impeding trade.¹⁵³ NTBs remain more prevalent in Africa than in other regions. Already, sub-Saharan Africa has the highest cost to export compared to other regions and it also has the highest cost to import based on border compliance (except Latin America and the Caribbean) and Asia based on documentary compliance (UNCTAD Economic Development in Africa Report, 2019). Thus, NTBs are raising the cost of doing business on the African continent, which directly affect the competitiveness of African goods and services trade.¹⁵⁴

Although SPS are a form on NTB's, they include a wider set of measures than non-tariff barriers. Furthermore, the term "non-tariff barriers" is generally used to describe discriminatory (protectionist) measures, while NTMs do not necessarily reduce trade

¹⁵⁰ As mentioned in a previous chapter of the work. The Agreement establishing the Africa Continental Free Trade Area is modelled on the North American Free Trade Agreement (NAFTA), see Sibanda.

¹⁵¹ World Trade Organization. "Agreement series on sanitary and phytosanitary measures" <https://au.int/en/documents/20191004/sanitary-and-phytosanitary-sps-policy-framework-africa>(accessed on 27 January 2024).

¹⁵² African Union. "SPS Policy framework" <https://au.int/en/documents/20191004/sanitary-and-phytosanitary-sps-policy-framework-africa>(Accessed on 25 January 2024).

¹⁵³ Vanzetti *et al* 2016:1

¹⁵⁴ Vhumbunu & Rudigi 2021:136.

and welfare. NTMs can in fact be trade and/or welfare-enhancing.¹⁵⁵ The Technical barriers to trade (TBT) agreement on the other hand, deals with product and industrial standards, it attempts to ensure that regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade.¹⁵⁶

According to the United Nations Conference Trade And Development (UNCTAD),

Different types of NTMs, SPS measures and TBTs are the most predominant. Together, SPS measures and TBTs cover more products and trade value than price- and quantity-control measures. Furthermore, TBTs are more prevalent than SPS measures.¹⁵⁷ A further study of both the WTO SPS agreement and the latter mentioned TBT agreement reveals that the regulation of SPS measures ought to occur under the purview of both agreements.

4.1 Discussion of specific provisions regulating SPS measures under AfCFTA

Annexure 1 of the AFCFTA-Annex 7(Sanitary and Phytosanitary (SPS) Policy Framework for Africa) provides for transparency in Article 11. In terms of this Article, State Parties, recognising that transparency is essential in ensuring clarity, predictability and trust in order to foster intra Africa-trade shall comply with transparency obligations in accordance with the procedures developed by the SPS Sub-Committee designate a National Focal Point for fulfilling the notification obligations established under this Article; and (c) notify the Secretariat of any draft, revised or adopted SPS measures for further distribution to State Parties.¹⁵⁸

¹⁵⁵ UNCTAD Chapter 1: Non-tariff measures: definitions and basic facts chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://unctad.org/system/files/official-document/ditctab2019d4_ch1_en.pdf (accessed on 27 January 2024).

¹⁵⁶ Strydom et al 2016:430.

¹⁵⁷ UNCTAD chapter 1: Non-tariff measures: definitions and basic facts https://unctad.org/system/files/official-document/ditctab2019d4_ch1_en.pdf(accessed on 5 (May 2024).

¹⁵⁸ African Union “Sanitary and Phytosanitary (SPS) Policy Framework for Africa” https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf (accessed on 7 July 2024).

The second paragraph provides that state parties shall endeavour to exchange information on other SPS issues including any significant change to the structure or organisation of a State Party's Competent Authority, upon request, the results of a State Party's official controls and a report on the implementation of the controls carried out with respect to the provisions of this Annex, the results of an import inspection provided for in Article 10 of this Annex in case of a rejected or a non-compliant consignment, upon request, a risk analysis or scientific opinion that a State Party has produced in accordance with Article 5 of this Annex, pest or disease status, including the evolution of a new disease or new pest, any food safety issue related to a product traded between the State Parties, that poses a food safety risk and import requirements such as quarantine restrictions.¹⁵⁹

4.2. Similarities in the regulation of SPS under the AfCFTA and Agreements Establishing the AANZFTA, the USMCA and the EU

4.2.1. The Africa Continental Free Trade Area

In terms of the AfCTAs preamble, the member states of the African Union are determined to strengthen their economic relationship and build upon our respective rights and obligations under the Constitutive Act of the African Union of 2000, the Abuja Treaty and, where applicable, the Marrakesh Agreement Establishing the World Trade Organization of 1994 and have regard to the aspirations of Agenda 2063 for a continental market with the free movement of persons, capital, goods and services, which are crucial for deepening economic integration, and promoting agricultural development, food security, industrialisation and structural economic transformation.¹⁶⁰ Additionally, Article 9 of the agreement makes provision for Institutional Framework for the Implementation of the AfCFTA and holds that the institutional framework for the implementation, administration, facilitation, monitoring

¹⁵⁹ African Union "Sanitary and Phytosanitary (SPS) Policy Framework for Africa" https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf (accessed on 7 July 2024).

¹⁶⁰ See, African Union "Agreement establishing the Africa Continental Free Trade Area" https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta__en.pdf (accessed on 08 August 2024).

and evaluation of the AfCFTA shall consist of the Assembly, the Council of Minister, the Committee of Senior Trade Officials and the Secretariat.¹⁶¹

4.2.2. The Asean-Australia-New Zealand Free trade Area

The general objectives of the AfCFTA are posited in its Article 3 which provides that the general objectives of the AfCFTA are to create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063, create a liberalised market for goods and services through successive rounds of negotiations contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs.¹⁶²

In late November 2004, leaders from ASEAN,¹⁶³ Australia and New Zealand agreed to launch negotiations for an FTA involving the 10 countries of the Association of Southeast Asian Nations(hereinafter ASEAN) as well Australia and New Zealand. Much like the AfCFTA and other FTA’S in general, a core objective of the New Zealand trade policy is to broaden and deepen the opportunities available to exporters by removing and reducing barriers to trade and investment, as well as establish frameworks through which trade and investment linkages can evolve and expand. The ASEAN FTA, by removing trade and investment barriers, therefore advances New Zealand’s trade policy objectives with a group of key trading

¹⁶¹ See, African Union “Agreement establishing the Africa Continental FreeTradeArea”https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta__en.pdf (accessed on 08 August 2024).

¹⁶² See, African Union “Agreement establishing the Africa Continental FreeTradeArea”https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta__en.pdf accessed on 08 August 2024).

¹⁶³ The Association of Southeast Asian Nations, or ASEAN, was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN: Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam joined ASEAN on 7 January 1984, followed by Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, making up what is today the ten Member States of ASEAN. See <https://asean.org/>

partners.¹⁶⁴The FTA establishes a platform for enhanced regulatory co-operation to better facilitate trade in goods between the parties. The mechanisms include exchange of information, cooperation, regular meetings and working groups on specific issues for regulators, other officials and technical experts.¹⁶⁵In addition there are provisions for greater transparency and information sharing which are designed to facilitate trade, reduce transaction costs for people doing business between the parties and strengthen risk management systems¹⁶⁶

Chapter 5 of the agreement provides for SPS measures and article 1 of this chapter enumerates its objectives .By virtue of this Article. The objectives of this Chapter are to: firstly, facilitate trade among the Parties while protecting human, animal or plant life or health in the territory of each Party. Second, to provide greater transparency in and understanding of the application of each Party's regulations and procedures relating to sanitary and phytosanitary measure. Third, to strengthen co-operation among the competent authorities of the Parties which are responsible for matters covered by this Chapter and finally, to enhance practical implementation of the principles and disciplines contained within the SPS Agreement.¹⁶⁷

Provision is made for the equivalence of SPS measures under the Asean-Australia-New Zealand Free Trade Area in Article 5 of chapter 5 of this agreement. In terms of this Article, The Parties shall strengthen co-operation on equivalence in accordance with the SPS Agreement and relevant international standards, guidelines and recommendations, in order to facilitate trade among the Parties. To facilitate trade, the competent authorities of the relevant Parties may develop equivalence arrangements and make equivalence decisions, in particular in accordance with

ASEAN main portal "Agreement Establishing the ASEAN Australia-New Zealand Free TradeArea <https://asean.org/wp-content/uploads/2012/05/AANZFTA-legal-text-PRINTED-Signed.pdf>).(accessed on 10 May 2024).

¹⁶⁵ ASEAN main portal "Agreement Establishing the ASEAN Australia-New Zealand FreeTradeArea <https://asean.org/wp-content/uploads/2012/05/AANZFTA-legal-text-PRINTED-Signed.pdf>).(accessed on 10 May 2024).

¹⁶⁶ Agreement Establishing the ASEAN Australia-New Zealand Free Trade Area <https://asean.org/wp-content/uploads/2012/05/AANZFTA-legal-text-PRINTED-Signed.pdf>.(Accesed on 10 MAY 2024).

¹⁶⁷ aanzfta.asean.org" Chapter 5. Sanitary and Phytosanitary Measures" <https://aanzfta.asean.org/chapter-5-sanitary-and-phytosanitary-measures/> (accessed on 6 August 2024).

Article 4 of the SPS Agreement and with the guidance provided by the relevant international standard setting bodies and by the WTO Committee on Sanitary and Phytosanitary Measures established pursuant to Article 12 of the SPS Agreement and a Party shall, upon request, enter into negotiations with the aim of achieving bilateral recognition arrangements of the equivalence of specified sanitary or phytosanitary measures.¹⁶⁸

4.2.3. The United States-Mexico-Canada agreement

In terms of chapter 9 of the States-Mexico-Canada agreement (USMCA) agreement, Article 9.3 provides for the agreement's general objectives insofar as SPS regulation is concerned. This article enumerates *inter alia* the following objectives; the protection of human, animal, or plant life or health in the territories of the Parties while facilitating trade between them, the reinforcement and building upon the SPS Agreement, strengthening communication, consultation, and cooperation between the Parties, and particularly between the Parties' competent authorities, ensuring that SPS measures implemented by a Party do not create unnecessary barriers to trade and enhancing transparency in and understanding of the application of each Party's sanitary and phytosanitary measures.¹⁶⁹

Article 9.9 of the abovementioned chapter provides for the equivalence of SPS regulation. According to this article, The Parties recognise that a positive determination of equivalence of sanitary and phytosanitary measures is an important means to facilitate trade. Additionally, Further to Article 4 of the SPS Agreement, the Parties shall apply recognition of equivalence to a specific SPS measure, or to the extent feasible and appropriate, to a group of measures or on a systems-wide basis. In determining the equivalence of a specific SPS measure, group of measures, or measures on a systems-wide basis, each Party shall take into account the relevant

¹⁶⁸ aanzfta.asean.org" Chapter 5. Sanitary and Phytosanitary Measures" <https://aanzfta.asean.org/chapter-5-sanitary-and-phytosanitary-measures/> (accessed on 6 August 2024).

¹⁶⁹ Government of Canada "Canada-United States-Mexico Agreement (CUSMA) – Chapter 9 – Sanitary and phytosanitary measures" <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/09.aspx?lang=eng> accessed on 6 August 2024)

guidance of the WTO SPS Committee and relevant international standards, guidelines, and recommendations.¹⁷⁰

4.2.4. The European Union

The EU's approach to SPS measures is governed by several key principles: these include *inter alia*. Harmonisation, risk Assessment, transparency and international standards similar to the AfCFTA.¹⁷¹ The EU strives for harmonisation of SPS measures among member states to create a consistent regulatory framework and ensure a level playing field for producers and traders within the EU.¹⁷²

The stated objective of the EU regulatory framework with respect to agricultural imports is to minimise related risks and to guarantee a high level of safety for food products marketed within the EU. For this purpose the EU relies on a regulatory regime that comprises a complex and comprehensive set of SPS measures.¹⁷³ The overreaching regulatory framework laying down the EU's agricultural SPS measures resides in the General Principles of Food Law (EC) No 178/2002 which was adopted in January 2002 by the European Parliament and the Council.¹⁷⁴ This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the

¹⁷⁰ Government of Canada "Canada-United States-Mexico Agreement (CUSMA) – Chapter 9 – Sanitary and phytosanitary measures <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/09.aspx?lang=eng> accessed on 6 August 2024).

¹⁷¹ Trinity College Dublin "Lecture 37 Food standards and international trade" <https://www.tcd.ie/Economics/staff/amthhews/FoodCourse/LectureTopics/FoodSafety/Frameset37.htm>(Accessed on 3 May 2024).

¹⁷² United Nations Conference on Trade and Development, Policy issues in international trade and commodities research study series NO. 68 (accessed on 15 June 2024).

¹⁷³ REGULATION (EC) No 178/2002 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (Accessed on 15 May 2024).

¹⁷⁴ United Nations Conference on Trade and Development" Policy issues in international trade and commodities research study series NO. 68 "https://unctad.org/system/files/official-document/itctdtab70_en.pdf (accessed on 15 May 2024).

effective functioning of the internal market.¹⁷⁵ It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.¹⁷⁶

4.3. The anatomy of the AfCTA *vis-a-vie* the AANZFTA and USMCA.

4.3.1. The Africa Continental Free Trade Area

Africa faces a host of SPS challenges, including: the inadequate implementation of a uniform set of standards for animal and plant disease control, or food safety; low level of compliance with international animal and plant health and food safety standards; lack of sufficient incentives for the private sector to engage in formal regulated trade; the limited capacity and capability of government officials to carry out proper monitoring and enforcement of SPS standards; the difficulty in implementing SPS policies and procedures and in a consistent manner; the lack of transparency of SPS standards and regulations; inadequate science-based systems to gather, analyse and disseminate information on the presence and prevalence of high-risk diseases, pests, or food safety hazards in the region; the difficulty in retaining SPS personnel once trained; and the lack of capacity within the private sector to comply with SPS measures or to participate in the development of new regulations.¹⁷⁷ Whereas the abundant literature on SPS regulation in first world countries which constitute other FTAs suggests that such these difficulties have been overcome in those agreements.¹⁷⁸

¹⁷⁵ United Nations Conference on Trade and Development” Policy issues in international trade and commodities research study series NO. 68 “ https://unctad.org/system/files/official-document/itcdtab70_en.pdf(accessed on 15 May 2024).

¹⁷⁶ Regulation (EC) No 178\2002 of the European parliament and of CoUNCILof 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (Accessed on 15 May 2024).

¹⁷⁷ African Union “sps policy Framework “<https://au.int/en/documents/20191004/sanitary->

¹⁷⁸ Henson J *et al*, Impact of sanitary and phytosanitary measures on developing countries” [https://www.ceintelligence.com/files/documents/AlanSwinbankSPSFINALREPORT\(1\).pdf](https://www.ceintelligence.com/files/documents/AlanSwinbankSPSFINALREPORT(1).pdf) (accessed on 17 September 2024).

4.3.2. The Asean-Australia -New Zealand Free trade Area

In the realm of sanitary and Phytosanitary measures regulation, The ASEAN FTA establishes a range of mechanisms -such as regular meetings and working groups on specific issues-for regulators, other officials and technical experts to work together more effectively to address barriers to trade in the SPS area. The overall objective is to better facilitate trade in goods by ensuring that SPS measures are no more restrictive than necessary and to provide a means to improve transparency, communication and consultation on SPS issues.¹⁷⁹The agreement establishing the Africa Continental free trade Area on the other hand does not strictly speaking cater for the involvement of such regulators, officials and technical experts. Therefore the AfCFTA, through its specialised Technical Offices AU-Inter-African Bureau for Animal Resources (AU-IBAR) and the Inter-African Phytosanitary Council (IAPSC) need to develop better systems that guarantee compliance and a uniform equivalence regime that facilitate access of international markets by African goods.¹⁸⁰

4.3.3. The United States-Mexico-Canada agreement

It is regrettably notable that the Sanitary and Phytosanitary (SPS) Policy Framework for Africa does not make explicit provision for the regulation of biotechnology,¹⁸¹Whereas Biotechnology provisions in USMCA affecting agriculture include : transparent and timely application and approval process for crops using biotechnology, procedures for import shipments containing a low-level presence of

¹⁷⁹ Agreement establishing the ASEAN Australia-New Zealand Free Trade Area. <https://aanzfta.asean.org/agreement-establishing-the-aanzfta> (accessed on 10 May 2024).

¹⁸⁰ Afronomics law The Africa Continental Free Trade Area and the SPS Agreement: Insights for Africa”<https://www.afronomicslaw.org/category/analysis/africa-continental-free-trade-area- and-sps-agreement-insights-africa> (accessed on 15 May 2024).

¹⁸¹ See, African Union “Sanitary and Phytosanitary (SPS) Policy Framework “2019. SPS Policy framework”<https://au.int/en/documents/20191004/sanitary- and-phytosanitary-sps-policy-framework-afric>African(accessed on 25 January 2024).

an unapproved crop produced with biotechnology and establishment of a working group on agricultural biotechnology.¹⁸²

The previous NAFTA's Committee on SPS measures On SPS measures promoted the harmonisation and equivalence of SPS measures between the three parties and facilitates cooperation, including consultations regarding disputes involving SPS measures. The Committee met periodically to review and resolve SPS issues.¹⁸³ whilst , As of 2019, four of the eight RECs had operating regional SPS Committees/working groups; four had existing SPS policy frameworks for the region; six had WTO ad-hoc observer status on a meeting-by-meeting basis, and six including SADC, EAC, ECOWAS, IGAD, COMESA and CEN-SAD had CODEX observer status. This shows the bold steps taken but also indicates that half of the AU member states still have a long way to go.¹⁸⁴

4.3.4. The European Union

Issues related to developing countries' compliance with the EU SPS measures are more precisely addressed in bilateral preferential trade agreements (PTA). Such agreements usually incorporate specific clauses on SPS measures with the purpose of either harmonization or mutual recognition of standards between the PTA members as well as technical assistance programs, which essentially are aimed to build the capacity of the EU PTA's partners to apply the EU regulations. For instance, the EU-Morocco agreement specifically calls for wider use of the EU technical rules and regulations for agricultural products and certification procedures by the Moroccan exporters.¹⁸⁵

¹⁸² Congressional Research Service "The United States-Mexico-Canada Agreement. <https://crsreports.congress.gov/product/pdf/IF/IF10997> (accessed on 15 May 2024).

¹⁸³ United states Trade representative 2014 Report on Sanitary and phytosanitary measures <https://ustr.gov/sites/default/files/FINAL-2014-SPS-Report-Compiled.pdf> (accessed on 3 May 2024).

¹⁸⁴ Ndoby G " The Africa Continental Free Trade Area and the SPS Agreement: Insights for Africa" <https://www.afronomiclaw.org/category/analysis/africa-continental-free-trade-area-and-sps-agreement-insights-africa> (Accessed on 15 May 15, 2024).

¹⁸⁵ United Nations Conference on trade and development https://unctad.org/system/files/official-document/itcctab70_en.pdf (accessed on 15 May 2024).

It can therefore be argued that the AfCFTA ought to be itself interpreted to construe a PTA in order to avoid regulatory ambiguity, however the regional Economic Communities of the African continent have a significant role in this regard, evidence of which can be found in the East African Community. In 2013, EAC Partner States adopted the SPS protocol. The principal objective of the Protocol is to enforce sanitary and phytosanitary measures, standards and promote intra- and inter-regional trade. In laying the foundation for effective implementation and enforcement of the Protocol, a number of key instruments have been developed.¹⁸⁶4 WTO jurisprudence on Sanitary and Phytosanitary measures

In global trade, the inadequacy of the WTO's SPS regulatory framework is evidenced by South Africa's initiation of a WTO dispute complaint challenging EU citrus fruit measures. South Africa is challenging recently enacted changes to EU phytosanitary requirements for the importation of oranges and other citrus products related to the pest *Thaumatotibia leucotreta*, known as false codling moth. South Africa claims the EU measures appear to be inconsistent with various provisions of the WTO's Agreement on the Application of SPS Measures and the General Agreement on Tariffs and Trade 1994.¹⁸⁷

South Africa has made significant progress in this matter in that the initial requests for the establishment of the panels made on 24 June 2024 were not accepted by the EU.¹⁸⁸ In line with the WTO dispute settlement understanding, the second round of

¹⁸⁶ East African Community "Sanitary and phytosanitary measures" [https://www.eac.int/agriculture/sanitary-and-phytosanitarymeasures#:~:text=In%202013%2C%20EAC%20Partner%20States,%2D%20and%20inter%2Dregional%20trade.\(accessed on 15 May 2024\).](https://www.eac.int/agriculture/sanitary-and-phytosanitarymeasures#:~:text=In%202013%2C%20EAC%20Partner%20States,%2D%20and%20inter%2Dregional%20trade.(accessed%20on%2015%20May%202024).)

¹⁸⁷ World Trade Organization "South Africa initiates WTO dispute complaint challenging EU citrus fruit measures" https://www.wto.org/english/news_e/news22_e/ds613rfc_29jul22_e.htm (accessed on 6 August 2024)

¹⁸⁸ Business Day "SA makes progress at WTO on disputes over citrus exports" [https://www.businesslive.co.za/bd/national/2024-07-28-sa-makes-progress-at-wto-on-disputes-over-citrus-exports/#:~:text=Panels%20to%20be%20set%20up,spot%20and%20false%20codling%20moth&text=SA%20is%20moving%20forward%20in,on%20citrus%20exports%20from%20SA.\(Accessed on 6 August 2024\).](https://www.businesslive.co.za/bd/national/2024-07-28-sa-makes-progress-at-wto-on-disputes-over-citrus-exports/#:~:text=Panels%20to%20be%20set%20up,spot%20and%20false%20codling%20moth&text=SA%20is%20moving%20forward%20in,on%20citrus%20exports%20from%20SA.(Accessed%20on%206%20August%202024).)

panel requests made on the 26th of July 2024 were automatically approved by the chair of the Dispute Settlement Body (DSB).¹⁸⁹

South Africa has asked for justified, proportionate and appropriate measures. The Citrus Growers' Association of SA (CGA) has previously identified the dispute with the EU about these phytosanitary regulations as one of the main challenges to growing exports in line with the industry's expected expansion. The legal basis of South Africa's complaint includes its contention the measures are not based on scientific principles and are maintained without sufficient scientific evidence; the EU fails to apply the measures in a uniform, impartial and reasonable manner and the measures are more trade restrictive than required.

Elsewhere on the African continent, Agricultural economist Wandile Sihlobo points attention to the fact that a measured response is needed to Botswana and Namibia's continued ban on South African agricultural products.¹⁹⁰ The ban has had a financial impact on the South African farmers who have, for many years, produced for the domestic market and the region at large. Botswana and Namibia regularly close their borders to South African vegetables. However, the prolonged ban started in December 2021 and has been in place since then. The rationale for it, from both Botswana and Namibia's side, is that it would incentivise domestic production of vegetables in these countries and lower their dependence on South Africa. Their target products include tomatoes, carrots, potatoes, cabbage, lettuce, garlic, onions, ginger and fresh herbs.¹⁹¹

In December 2023, Botswana announced the ban would be extended for another two years. At the time, many in South Africa were unhappy about this decision. The source of frustration arises from the appreciation that these countries are members

¹⁸⁹ The General Council convenes as the Dispute Settlement Body (DSB) to deal with disputes between WTO members. See World Trade Organization "Dispute Settlement Body" https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (Accessed on 6 August 2024).

¹⁹⁰ See [a48ab713?utm_source=share&utm_campaign=share_via&utm_content=profile&utm_medium=android_app](https://www.dailymaverick.co.za/opinionista/2024-07-28-a-measured-response-is-needed-to-botswana-and-namibias-continued-ban-on-sa-agricultural-products/) (accessed on 6 August 2024).

¹⁹¹ Sihlobo "A measured response is needed to Botswana and Namibia's continued ban on SA agricultural products" <https://www.dailymaverick.co.za/opinionista/2024-07-28-a-measured-response-is-needed-to-botswana-and-namibias-continued-ban-on-sa-agricultural-products/> (accessed on 6 August 2024).

of the Southern African Customs Union (Sacu), a bloc encouraging free trade and economic integration. Still, the Sacu agreement has a loophole allowing such restrictions. An article by researchers at South Africa's Department of Trade and Industry citing the Sacu Agreement states that "Article 18 (2) ... notes that Member States have the right to impose restrictions on imports or exports for the protection of: health of humans, animals or plants, the environment, treasures of artistic, historic or archaeological value, public morals, intellectual property rights, national security and exhaustible natural resources". Viewed in this context, one can only presume that Botswana and Namibia would argue they are boosting their domestic production of vegetables for "national security".¹⁹²

On 8 March 2017, Mexico requested consultations with Costa Rica with respect to certain measures imposed by Costa Rica that allegedly restrict or prohibit the importation of fresh avocados for consumption from Mexico.¹⁹³ Insofar as the standard of review under the SPS Agreement and a WTO Member's obligation to explain is concerned, the growing number of the WTO dispute settlement cases related to SPS measures, the appropriate standard of review and the specific legal standards to be applied under the provisions of the SPS Agreement have been gradually established and clarified by the WTO panels and Appellate Body. With respect to the obligations relating to a risk assessment and the principle of non-discrimination, the case law has focused mainly on the 'reasoning' or 'justification' provided by the regulating WTO Member and the panel's examination in this regard centers on whether the Member has successfully provided 'reasoned' and 'reasonable' explanations. In keeping with this trend, the panel in *Costa Rica – Avocados* considered whether Costa Rica,¹⁹⁴ the regulating Member, has provided

¹⁹² Sihlobo "A measured response is needed to Botswana and Namibia's continued ban on SA agricultural products" <https://www.dailymaverick.co.za/opinionista/2024-07-28-a-measured-response-is-needed-to-botswana-and-namibias-continued-ban-on-sa-agricultural-products/> (accessed on 6 August 2024).

¹⁹³ DS524: Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds524_e.htm (accessed on 6 August 2024).

¹⁹⁴ See, DS524: Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds524_e.htm (accessed on 6 August 2024).

reasoned and reasonable explanations with scientific basis for the risk assessment and the SPS measure at issue, concluding finally that Costa Rica acted inconsistently with the SPS Agreement.¹⁹⁵

One of the reasons advanced and which results in trade restriction is the protection of the Environment.¹⁹⁶(The *locus classicus* in this regard was the case of the United States prohibition of imports of Tuna and Tuna products from Canada (GD/110 - United States – Prohibition of Imports of Tuna and Tuna Products from Canada (L/5198, BISD 29S/91)).¹⁹⁷In this matter, An import prohibition was introduced by the united States after Canada had seized 19 fishing vessels and arrested US fishermen for harvesting albacore tuna without authorisation from the Canadian Government in waters that were considered by Canada to be under its jurisdiction ,The United States did not recognise this jurisdiction and introduced an import prohibition in retaliation against Canada under the United States Fishery and Conservation Management Act of 1976.The GATT panel found that the import prohibition was contrary to GATT's article XI:I (which deals with the elimination on quantitative restrictions) and was not Justified under either XI;2 (which under certain conditions allows for import restrictions on agricultural or fisheries product necessary to the enforcement of governmental measures) or article XX(g) (one of the general exceptions relating to conservation of exhaustible natural resources).¹⁹⁸

¹⁹⁵ Research institute of economy, trade and industry” WTO Case Review Series No.39] Costa Rica” Measures Concerning the Importation of Fresh Avocados from Mexico (WT/DS524): The standard of review under the SPS Agreement and a WTO Member's obligation to explain” <https://www.rieti.go.jp/en/publications/summary/22110005.html> (accessed on 6 August 2024).

¹⁹⁶ Strydom et al 2016:437

¹⁹⁷ Strydom et al 2016:437

¹⁹⁸ Strydom et al 2016:437.

4.3.5. Conclusion

This chapter departed with a discussion of specific provisions regulating SPS measures under AfCFTA before examining the efficacy of the SPS regulatory framework of the AfCFTA through a comparison of the anatomy of the aforementioned agreement and that of AANZFTA, the USMCA and the EU. The apparent similarities in all these agreements include; the strengthening of the Member states economic relationships, the creation of single markets for goods and objectives such as the protection of human, animal, or plant life or health in the territories of the Parties while facilitating trade between them where SPS regulation is concerned.

The chapter then conversely considered the differences in the abovementioned agreements and found that Africa faces a variety of SPS other challenges while other FTA's establish a range of mechanisms to address barriers to trade in the SPS area and Issues related to developing countries' compliance with the EU SPS measures are more precisely addressed in bilateral preferential trade agreements (PTA).

Chapter five

Conclusion and recommendations

5.1 Introduction

The preceding chapters have demonstrated the need to develop an effective SPS regulatory regime to ensure free trade under the Africa Continental Free Trade Agreement (hereinafter AfCTA). It has been argued that sanitary and phytosanitary (hereinafter SPS) measures are necessary in ensuring that a country's consumers are supplied with food that is safe to eat in line with the general principle of non-discrimination.¹⁹⁹ However, they can be an obstacle for trade liberalisation.²⁰⁰ This chapter will provide recommendations to strengthen the regulation of SPS measures in the context of the AfCTA to ensure that they do not become barriers to free trade. This concluding chapter enumerates the necessary recommendations in aiding the *status quo*. Such recommendations include among other things: the adoption of policies similar to those found in other FTA's, the establishment of regulatory authorities similar to those found elsewhere and the harmonisation of regulations taking cognisance of indigenous knowledge systems and the establishment of committees or agencies similar to those found elsewhere.²⁰¹

The first two chapters of this dissertation demonstrated the need to develop rules which govern SPS measures under the AfCFTA. They have provided an exposition of the historical and theoretical perspectives underpinning the regulation of SPS measures and elaborated on some of the emerging issues where SPS regulation is concerned. In the third chapter, an exposition of SPS regulation from a WTO perspective was proffered and the relationship between the WTO SPS agreement

¹⁹⁹ World Bank Group "The African Continental Free Trade Area economic and distributionaleffects", <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bda63e-75f2c3ff0f43/content> (accessed on 1 August 2024).

²⁰⁰ Vhumbunu & Rudigi 2021:136.

²⁰¹ See for example, the United States Canada Mexico Agreement Office and the United States Trade Representative <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/strengthening>. (Accessed on 17 May 2024). and The ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) <https://aanzfta.asean.org/aanzfta-overview>. (Accessed on 17 May 2024).

and other WTO protocols was examined. The chapter then concluded by indicating the emerging issues from the WTO agreement and noted developing countries concerns. The chapter preceding the current one ascertained international best practices through a comparison of the AfCTA with SPS regulation in other FTA's by examining the differences and similarities in the anatomy of the AfCTA and the aforementioned agreements.

5.2. Recommendations

5.2.1. The adoption of policy similar to other FTA's

It can be submitted that to improve the regulation of SPS under the AfCFTA, there is a need to provide the equivalence of SPS in the EU's general principles for food law (EC) No 178/2002 to AfCFTA which establishes common principles and responsibilities as well as the means to provide a strong science base, the efficient organisational arrangements and procedures to support decision-making in matters of food and food safety.²⁰² Chapter II of the Regulation consists of four sections, namely: General Principles of Food Law (risk analysis, precautionary principle, protection of consumers' interest), Principles of Transparency (public consultation and information during the preparation or revision of food law, access to public information), General Obligations of Food Trade (imports and exports of food and feed and international standards) and General Requirements of Food Law (food and feed safety requirements, presentation, responsibilities of food and feed business operators, traceability of food, feed, food-producing animals, and any other substance intended to be, or expected to be, incorporated into a food or feed and liability for defective products).²⁰³

²⁰² Food and Agriculture Organization of the United Nations
<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC034771/#:~:text=This%20Regulation%20lays%20down%20the,in%20particular%20the%20di%20iversity%20in>(accessed on 17 May 2024).

²⁰³ Food and Agriculture Organization of the United Nations
<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC034771> (accessed on 17 May 2024).

Elsewhere, The United States, Mexico and Canada have reached an agreement to benefit American farmers, ranchers, and agribusinesses²⁰⁴ While agriculture has generally performed well under NAFTA, important improvements in the agreement will enable food and agriculture to trade more fairly, and to expand exports of American agricultural products.²⁰⁵ The United States, Mexico, and Canada agreed to several provisions to reduce the use of trade distorting policies, including, avoiding the usage of export subsidies or World Trade Organization (WTO) special agricultural safeguards for products exported to each other's market, improved commitments to increase transparency and consultation regarding the use of export restrictions for food security purposes. If supporting producers, to consider using domestic support measures that have minimal or no trade distorting or production effects and ensure transparency of domestic support programs.²⁰⁶

5.2.2. Oversight committee and agencies on the application of SPS

In order to strengthen the regulation of SPS under the AfFTA, there is a need to establish committees and agencies to provide oversight on the application of SPS as part of international best practices. Such committees and agencies are abundant in other Free Trade Areas. For example, In 2017, the AANZFTA Economic Cooperation Support Programme (AECSP) set in motion a project entitled the 'ASEAN Regional Guidelines for the Implementation of International Standards related to Sanitary and Phytosanitary Measures.' The project aimed to assist ASEAN Member States in developing their national SPS standards in line with international standards, guidelines, and recommendations. Two immediate objectives of the project were to enhance understanding and recommend solutions for the challenges encountered by

²⁰⁴ Office and the United States Trade Representative <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/strengthening>. (Accessed on 17 May 2024).

²⁰⁵ Office and the United States Trade Representative <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/strengthening>. (Accessed on 17 May 2024).

²⁰⁶ Office and the United States Trade Representative <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/strengthening>. (Accessed on 17 May 2024).

Asean Member states (AMS)²⁰⁷ in developing national SPS standards based on international standards and guidelines and to develop a regional guideline to assist AMS in their practical implementation of international standards related to SPS measures.²⁰⁸

Article 6 in chapter 5 of this agreement provides for competent authorities and contact points. In terms of this Article Each Party shall provide each other Party with a description of its competent authorities and their division of responsibilities, Each Party shall provide each other Party with a contact point to facilitate distribution of requests or notifications made in accordance with this Chapter and each Party shall ensure the information provided is kept up to date.²⁰⁹ International standards are often so stringent that many countries have difficulties implementing them. But being encouraged to use international standards does not mean that countries have to accept them as a floor or ceiling for national standards. National standards do not violate the SPS Agreement simply by differing from international norms. Governments can set requirements that are stricter than the international standards. However, if governments do set their own standards, they may be required to justify their higher standards if the difference gives rise to a trade dispute. Their justification must be based on an analysis of scientific evidence and the risks involved.²¹⁰

²⁰⁷ The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) is an agreement between ASEAN Member States (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), Australia and New Zealand: See; <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/aseanaustraliaandnewzealandfreetradeagreement#:~:text=The%20Agreement%20Establishing%20the%20ASEAN,%2C%20Australia%20and%20New%20Zealand> (accessed on 17 May 2024).

²⁰⁸ ASEAN - Australia - New Zealand Free Trade Area (AANZFTA) Economic Cooperation Support Programme (AECSP) https://aanzfta.asean.org/uploads/2021/09/AECSP%20Communications%20Package%202021/2.%20AECSP%20Case%20Study%20ASEAN%20SPS%20Guideline%20%20Summary%20Report_.pdf (accessed on 17 May 2024).

²⁰⁹ ASEAN Australia and New Zealand Free Trade Area chapter 5 <https://aanzfta.asean.org/chapter-5-sanitary-and-phytosanitary-measures> (accessed on 17 April 2024).

²¹⁰ World Trade Organization "The WTO Agreements Series Sanitary and Phytosanitary" Measures https://www.wto.org/english/res_e/booksp_e/agrmntseries4_sps_e.pdf (accessed on 16 May 2024).

With reference to food Safety, The *Codex Alimentarius*, or "Food Code" is a collection of standards, guidelines and codes of practice adopted by the Codex Alimentarius Commission. The Commission, also known as CAC, is the central part of the Joint Food and Agriculture Organization of the United Nations /World Health Organization (FAO and WHO) Food Standards Programme and was established by FAO and WHO to protect consumer health and promote fair practices in food trade.²¹¹

The term "Codex Alimentarius" is Latin and means "food code". Codex standards are international food texts, i.e. standards, codes of practice, codes of hygienic practice, guidelines and other recommendations, established to protect the health of the consumers and to ensure fair practices in the food trade. The collection of food standards and related texts adopted by the Codex Alimentarius Commission is known as the Codex Alimentarius.²¹² It is however noteworthy that Codex texts are voluntary and do not have binding effect on national food legislation. In this regard, WTO Agreements on Sanitary and Phytosanitary Measures (SPS Agreement) and on Technical Barriers to Trade (TBT Agreement) encouraged WTO members to harmonise national regulations with the international standards.²¹³

In the area of flora, the International Plant Protection Convention (IPPC) is an intergovernmental agreement signed by over 180 countries, aiming to protecting the world's plant resources from the spread and introduction of pests, and promoting safe trade. The Convention introduced International Standards for Phytosanitary Measures as its main tool to achieve its goals, making it the sole global standard setting organization for plant health. The IPPC is one of the "Three Sisters" recognized by the World Trade Organization's (WTO) Sanitary and Phytosanitary Measures Agreement, along with the Codex Alimentarius Commission for food

²¹¹ Food and Agriculture Organization of the United Nations Codex Alimentarius international food standards <https://www.fao.org/fao-who-codexalimentarius/en/> (accessed on 17 May 2024).

²¹² Food and Agriculture Organization of the United Nations Codex "Alimentarius international food standards" <https://www.fao.org/fao-who-codexalimentarius/about-codex/faq/faq-detail/en/c/454750/>. (accessed on 17 May 2024).

²¹³ Food and Agriculture Organization of the United Nations "Codex Alimentarius International food standards" <https://www.fao.org/fao-who-codexalimentarius/about-codex/faq/faq-detail/en/c/454753/> (accessed on 17 May 2024).

safety standards and the World Organization for Animal Health (OIE) for animal health standards²¹⁴ whereas in the arena of fauna the World Organisation for animal health previously known as The International Office of Epizootics (Office International des Epizooties – OIE) Created in 1924, the International Office of Epizootics is an intergovernmental organisation, based in Paris, engaged in the prevention and control of the spread of zoonoses (animal diseases). Its mandate is to promote transparency and knowledge of the world’s animal health situation, collect, analyse and disseminate veterinary scientific information, provide expertise and strengthen international cooperation and coordination. It develops standards and guidelines for use by its 164 Member countries to protect themselves against incursions of diseases or pathogens during trade in animals and animal products, while, at the same time, avoiding unjustified trade barriers.²¹⁵

The Standards and Trade Development Facility (STDF) is a global partnership that facilitates safe, inclusive trade and development outcomes in support of the UN’s 2030 agenda. Established by the Food and Agriculture Organization of the United Nations (FAO), the World Organisation for Animal Health (OIE), the World Bank Group (WBG), the World Health Organization (WHO) and the WTO, the STDF promotes improved food safety and animal and plant health capacity in developing countries, to help imports and exports to meet SPS requirements for trade based on international standards.²¹⁶ In 2020, the STDF launched a new five-year strategy (2020-24) under which countries in Africa will continue to be eligible to apply for SPS project and project preparation grants.²¹⁷

It therefore becomes apparent that the harmonisation of SPS regulations under the AfCFTA rests on the establishment of analogous organisations that can effectively

²¹⁴ Food and Agriculture Organization of the United Nations. <https://www.fao.org/policy-support/mechanisms/mechanisms-details/es/c/428539/>(accessed on 17 May 2024).

²¹⁵ United Nations Conference on Trade and Development.” Training module on the WTO agreement on sanitary and phytosanitary measures https://unctad.org/system/files/officialdocument/ditctncd20043_en.pdf(accessed on 16 May 2024).

²¹⁶ World Trade Organization” Strengthening Africa’s capacity to trade” (https://www.wto.org/english/res_e/booksp_e/strengthening_africas_capacity_to_trade_e.pdf (accessed on 16 May 2024).

²¹⁷ See: https://standardsfacility.org/sites/default/files/STDF_Strategy_2020-2024.pdf.

ensure that these measures are suitable in for least developed countries which dominate membership in the African Union and consequently the AfCFTA.²¹⁸

5.2.3. Use of Indigenous Knowledge

Indigenous knowledge can be useful in the area of SPS regulation under the AfCFTA. There is no single definition of indigenous knowledge (Ik) but words such as native, traditional and local have sometimes been used to describe it. Ik includes the unique traditional and local knowledge existing within, and developed around the specific conditions of men and women who are indigenous to a particular geographical area. Closely related to IK is indigenous knowledge systems (IKS) which is related to local communities interactions with their environment, their knowledge, stories, beliefs, rites and rituals developed over long periods of time and passed on through one socialization from one generation to the next.²¹⁹

The misuse of pesticides and their overdose on vegetables has an impact on people's health.²²⁰In Burkina Faso, A survey on cultural and phytosanitary practices was carried out among 25 tomato producers at Loumbila and Ouahigouya vegetable growing sites. Results show that 16% of producers use dams and 80% traditional wells as a source of water supply. The inputs used are mainly organic (cow's mouth, household waste) and chemical (NPK, urea) fertilizer. The frequency of use of chemical fertilizer is once a week at the Loumbila site and only once a month in the Ouahigouya site. All the producers surveyed used pesticides and 67% do not respect the deadlines for indicated on the packaging labels.²²¹

In South Africa, there are several pests of economic importance that have been identified in the previous studies as constraints in potato production. In many parts of Southern Africa, little is known about farmers' knowledge and management

²¹⁸ 33 African states are considered least developed countries by the United Nations. see <https://unctad.org/topic/least-developed-countries/list>. (accessed on 16 May 2024).

²¹⁹ Ngxabi et al 2023:6

²²⁰ European Parliament" The use of pesticides in developing countries and their impact on health and the right to food <https://www.europarl.europa.eu/cmsdata/219887/Pesticides%20health%20and%20food.pdf> (accessed on 17-May-2024).

²²¹ Oboulbiga *et al* 2023:304.

practices. A growing body of literature suggests that many farming communities possess traditional knowledge of pests that affect their crops and alternative approaches to their control. In recent years, there is a resurgence of interest in reviving the age-old farming system through scientific approach which is known by modern humans as organic farming, because of hazardous effect of excessive chemicals.²²²The major limiting factor to the use of IK in pest management in the community is the lack of documentation. Indigenous knowledge is transferred by word of mouth, it is not scientifically documented and therefore, difficult to access.²²³

In their critical assessment of the legality of European Union sanitary and phytosanitary regime against citrus produce from South Africa. Vinti and Makapela posed the question whether there is scientific basis for the EU SPS regime and the attendant legal issue of whether there is a rational link between the EU SPS regime and the science informing it and found through a careful study of the United States of America and various international experts, as well as the Appellate Body Reports of the WTO, that the EU SPS regime lacks a scientific basis and lacks a causal nexus with the relevant scientific findings. They also discussed whether the measures are aimed at disguised discrimination and found through a study of the SA PRAs that the EU SPS regime has a semblance of protectionist intent.²²⁴

This is a pivotal reminder of the need to absorb and codify Indigenous knowledge systems in regulating Sanitary and Phytosanitary measures in the Africa Continental Free Trade Agreement. The convulsion of the current regime can be ameliorated through policy making that encompasses indigenous knowledge systems. Ignorance of this recommendation will prove a fatal flaw and thus detrimental to intra-African trade.

5.2.4 Incorporation of PTAs and RTAs SPS regulatory standards in AfCTA

Strengthening the regulation of SPS under the AfCFTA requires the consideration of regulatory standards found in Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs).PTAs in the WTO are unilateral trade preferences. They

²²² Ngxabi *et al* 2023:2.

²²³ Ngxabi *et al* 2023:7.

²²⁴ Vinti & Makapela 2016:473

include generalised System of Preferences schemes (under which developed countries grant preferential tariffs to imports from developing countries), as well as other non-reciprocal preferential schemes granted a waiver by the General Council.²²⁵ Traditionally, trade benefits have been most apparent in FTAs where countries have vastly different economic structures. Comparative advantage in different areas of production allows both partner countries to gain as a result of specialisation.²²⁶

In many trade agreements today, negotiations go beyond tariffs to cover multiple policy areas that affect trade and investment in goods and services, including behind-the-border regulations such as competition policy, government procurement rules, and intellectual property rights. RTAs that cover tariffs and other border measures are “shallow” agreements; RTAs that cover a larger set of policy areas, at the border and behind the border, are “deep” agreements. Deep trade agreements are important institutional infrastructure for regional integration. They reduce trade costs and define many rules in which economies operate. If efficiently designed, they can improve policy cooperation across countries, thereby increasing international trade and investment, economic growth and social welfare.²²⁷

5.3. Conclusion

This study has provided an exposition of the definition of SPS measures and indicated the inherent challenges insofar as their implementation in the purview of the AfCTA is concerned before exploring the historical context and theory which inform the regulation of SPS measures. Due to the fact that African Union member have dual obligations under both the AfCTA and the WTO and also considering that Annex 7 of the Agreement establishing the AfCFTA is a copy-and-paste of the WTO

²²⁵ World Trade Organization.” Preferential trade arrangements” https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm.(accessed on 16 May 2024).

²²⁶ Australian Government Department of Foreign Affairs and Trade <https://www.dfat.gov.au/sites/default/files/Chapter3-2.pdf> (accessed on 16 May).

²²⁷ World Bank Group “Regional Trade Agreements” <https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements> (accessed on 6 August 2024).

SPS Agreement.²²⁸ The first part of this study examined the regulation of SPS measures in the context of the WTO. The latter portion of the part demonstrated the importance of SPS measures as barriers to free and fair multilateral trade and provided a discussion on WTO jurisprudence in SPS regulation. It indicated among other things, the ongoing dispute between South Africa and the European Union concerning where South Africa challenge to recently enacted changes by the EU on phytosanitary requirements for the importation of oranges and other citrus products.²²⁹ Furthermore, attention was drawn to the fact that a measured response is needed to Botswana and Namibia's continued ban on South African agricultural products.²³⁰

In exploring the similarities and differences in the regulation of SPS under the AfCFTA and other Free Trade Areas, It was discovered that the scant protocol on SPS regulation in the context of the AfCFTA presents a glaring *lacuna* where the present discussion is concerned. This defect ought to be remedied through a consideration of other Free Trade Agreements and the indigenous knowledge that already prevails within the continent. This study has demonstrated that SPS measures at the regional level within the RECs and at the continental level under the AfCFTA are largely founded on the WTO SPS Agreement, however there remain notable differences, which raise regulatory concerns and impact the implementation of SPS measures at the national level, considering that most countries have overlapping membership in the RECs.²³¹

<https://www.afronomicslaw.org/category/analysis/africa-continental-free-trade-area-and-sps-agreement-insights-africa> (accessed on 13 December 2023)

²²⁹ World Trade Organization" South Africa initiates WTO dispute complaint challenging EU citrus fruit measures" https://www.wto.org/english/news_e/news22_e/ds613rfc_29jul22_e.htm (accessed on 6 August 2024).

²³⁰ Sihlobo "A measured response is needed to Botswana and Namibia's continued ban on SA agricultural products" <https://www.dailymaverick.co.za/opinionista/2024-07-28-a-measured-response-is-needed-to-botswana-and-namibias-continued-ban-on-sa-agricultural-products/> (accessed on 6 August 2024)

²³¹ Feed the Future The U.S government's global hunger and food initiative" African Continental and Regional Sanitary and Phytosanitary Approaches and Alignment with SPS Good Regulatory Practices Literature Review" https://www.newmarketlab.org/assets/legal_guide/1.pdf(Accessed on 15 May 2024).

It has been demonstrated that the AfCTA largely resembles other FTAs in its objectives but lacks nuance insofar as the provision for the equivalence of SPS measures in the area is concerned. For instance, it was that the SPS Policy Framework for Africa does not make explicit provision for the regulation of biotechnology.²³² Furthermore, in the EU, issues related to developing countries' compliance with the EU SPS measures are more precisely addressed in bilateral preferential trade agreements.²³³

It is therefore recommended that the AfCTA provides for the adoption of policy similar to other FTA's, establishes committees and agencies to provide oversight on the application of SPS as part of international best practices, makes use of indigenous knowledge systems in its SPS regulatory framework and incorporates PTAs and RTAs SPS regulatory standards into the AfCTA.²³⁴ If these recommendations are considered, the harmonisation and equivalence of SPS regulation under the AfCTA will be ensured and thus provide efficacy in ameliorating such regulations as a potential barrier to free trade.²³⁵

²³² See African Union, "SPS policy framework ", https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf(accessed on 16 October 2023).

²³³ See, United Nations Conference on Trade and Development. Trading with conditions; the effect of sanitary and phytosanitary measures on lower income countries' agricultural exports," https://unctad.org/system/files/official-document/itcctab70_en.pdf (accessed on 17 September 2024).

²³⁴ In 2014 the A Continental SPS Committee was established, see/AU%20SPS%20POLICY%20FRAMEWORK-compressed.pdf (accessed on 17 September 2024).

²³⁵ African Union, "SPS policy framework ", https://au.int/sites/default/files/documents/40036-doc-au_sps_policy_framework_-_full_document.pdf(accessed on 17 September 2024).

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