# HELP OR HINDRANCE? A CRITICAL ANALYSIS OF THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES, AND ITS EFFECTS ON DEVELOPING COUNTRIES

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## ABSTRACT

WHILE it is accepted that the category of "developing country" is a broad one, it can nevertheless be acknowledged that the countries which fall within this categorisation share several common features. Such common features include their lack of financial resources and scientific capacity, and their reliance on trade in primary agricultural goods.

The Agreement on Sanitary and Phytosanitary Measures was originally created to regulate trade in primary agricultural goods, and so its provisions are of great significance to developing countries. In its Preamble the Agreement acknowledges both the unique circumstances of developing countries and its desire to assist them in entering into and expanding within the international trading markets. As part of this endeavour, several provisions were included in the Agreement which purport to protect and provide for the interests of developing countries. In its inception, its Preamble, and the very nature of its content, the Agreement shows a desire to assist developing countries wherever possible.

Unfortunately, a close analysis of the provisions of the Agreement shows that this desire has not been fulfilled. Many of the provisions of the Agreement are heavily skewed toward the interests of importing Members, often at the expense of developing Members – particularly those that export primary agricultural goods. Even the provisions of the Agreement which purport to provide protection and special and differential treatment specifically for developing countries frequently fall short, either as a result of ambiguous phrasing or poor textual interpretation by the dispute settlement bodies of the World Trade Organization. As a result, there exists a potential within the Agreement to have a significant detrimental impact on the international trading opportunities of exporting developing countries.

In this thesis I analyse the provisions of the Agreement to determine where, why and how they are likely to have, or are having, a detrimental impact on developing countries (particularly exporting developing countries). After identifying these problems I examine and discuss several potential solutions and how they may be implemented to minimise - or even remove - the negative impact on developing countries and their international trading markets.

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## PREFACE

This thesis is presented in fulfilment of the requirements for the degree of Master of Laws at Rhodes University, Grahamstown. The research contained herein was completed under the supervision of Ms Vicky Heideman in the Faculty of Law at Rhodes University, and was conducted from January 2015 to December 2016.

This research is the original work of me, Tayla Waterworth, except where reference has been made to other works. Neither this thesis nor any substantially similar work by me has been submitted in fulfilment of any other higher degree, diploma, or the like. To my knowledge, none of the research contained herein has been published.

A version of Chapter II of this thesis was presented at the South African Law Teachers' Conference in July 2015.

T Waterworth

# CHAPTER I – INTRODUCTION

## 1.1. Introduction

In 1793, a disease caused by the bacteria *Erwinia amylovora* – commonly known as 'fire blight' – was first noted by William Denning.[1] Thought to be indigenous to North America, this disease was found to have devastating effects on rosaceous plants such as apple and pear trees.[2] One effect of the disease is the appearance of lesions on the fruit of the infected tree, which give off a bacterial "ooze",[3] while severely affected fruits simply shrivel.[4] In 2003 the United States (hereafter referred to as the "US") entered into an international trade dispute with Japan, after Japan placed trade restrictions on the import of apples from the US.[5] The reason for the imposed restrictions was an alleged fear of fire blight spreading to rosaceous plants within Japan's territory.[6]

Around 1920, Dr Hans Gerhard Creutzfeldt and Dr Alfons Maria Jakob uncovered a pathology known as spongiform encephalopathy, which caused neurodegeneration in humans.[7] In the 1980s the same disease was found in cows in the United Kingdom, giving rise to the discovery of bovine spongiform encephalopathy – commonly known as 'mad cow disease'.[8] To prevent the disease from spreading to its territory, the US imposed trade restrictions on beef from the United Kingdom (hereafter referred to as the "UK").[9] After a cow from Canada was found to have bovine spongiform encephalopathy, various countries – including Japan and South Korea – prohibited the import of beef from the US for fear of a spread of infection.[10]

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[1] T van der Zwet and HL Keil "Fire Blight: A bacterial disease of rosaceous plants" 510 (1979) *Agriculture Handbook* 2.
[2] *Ibid*.
[3] KB Johnson "Fire blight of apple and pear" (2000) *American Phytopathological Society* https://www.apsnet.org/edcenter/intropp/lessons/prokaryotes/Pages/FireBlight.aspx (accessed 16 April 2015).
[4] *Ibid*.
[5] See PR, *Japan – Measures Affecting the Importation of Apples* WT/DS245/R (15 July 2003) para 1.2.
[6] *Ibid*.
[7] L Boatman "Problematic prions and the history of Mad Cow Disease" (May 2012) *Berkeley Science Review* http://berkeleysciencereview.com/problematic-prions-and-the-history-of-mad-cow-disease/ (accessed 16 April 2015).
[8] *Ibid*.
[9] *Ibid*.
[10] Unknown "Beef Trade" (November 2012) *United States Department of Agriculture* http://www.ers.usda.gov/topics/animal-products/cattle-beef/trade.aspx (accessed 16 April 2015).

In 1997, a highly pathogenic avian virus known as A(H5N1) infected a human in Hong Kong for the first time.[11] The virus spread rapidly, infecting millions of poultry and a considerable number of humans, and was acknowledged by the World Health Organisation as having "pandemic potential".[12] An outbreak of the virus in 2003-2004 led to various trade restrictions, such as China imposing restrictions on poultry imports from a variety of potentially infected territories.[13] Early in 2015 a new outbreak of avian flu in the US allegedly led to a number of nations, including the European Union (hereafter referred to as the "EU"), South Korea and South Africa, refusing to import poultry products from the US.[14]

These three anecdotes are examples of the extreme reactions that sovereign states can exhibit when a threat to their own territories arises. In each of the above situations, states were prepared to impose restrictions on international trade in order to protect the humans, animals and plants within their own borders from pest or microorganism risks. However, by imposing such restrictions the states in question may have, or have had, a substantial impact on international trade – in this case, particularly trade in agricultural products. This is because agricultural products, such as beef, poultry and crops,[15] are the ones most likely to be affected and infected by pests and microorganisms. If trade in these goods is limited by major importers, their exporting partners may suffer significant economic loss as a result.

In 1995 the Agreement on Sanitary and Phytosanitary Measures (hereafter referred to as "the SPS Agreement") was established to regulate the imposition of such restrictions. The Preamble

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[11] Unknown "Avian influenza" (March 2014) *World Health Organization* http://www.who.int/mediacentre/factsheets/avian_influenza/en/ (accessed 16 April 2015).
[12] *Ibid*.
[13] DP Fidler "Global Outbreak of Avian Influenza A(H5N1) and International Law" Vol 8(1) (2004) *Insights* para 11.
[14] "Avian flu outbreak results in international trade bans" *Tri-City Herald* 10 January 2015 http://www.tri-cityherald.com/2015/01/10/3352861/avian-flu-outbreak-results-in.html (accessed 16 April 2015); see also "Japan, Taiwan impose trade restrictions on Ontario poultry because of avian flu" *iPolitics* 7 April 2015 http://www.ipolitics.ca/2015/04/07/bird-flu-found-in-southern-ontario/ (accessed 16 April 2015).
[15] Note that these are just a few examples of what may constitute "agricultural products". For the purposes of this thesis, the term "agricultural products" will refer to any primary and derivative products that are produced by agricultural industries. Primary products will include meat from cattle and poultry, eggs and milk, and raw crops (such as grains, vegetables and fruit). Derivative products refers to products created directly from primary products, such as flour derived from wheat, maize meal derived from corn or cheese derived from milk. Derivative products do not include manufactured products – for example, the production of glue may require the use of primary products such as animal cartilage, but the addition of multiple other ingredients and the complexity of the creation process will mean that glue is classified as a manufactured products rather than a derivative product.

to the SPS Agreement acknowledges the importance of sovereign states' abilities to impose measures to protect those within its borders from pest and microorganism risks.[16] However, the Preamble also acknowledges other objectives including the need to harmonize SPS measures as far as possible on an international level,[17] and the need to make special provision for developing countries, their entry into, and their continued participation in, international markets.[18]

The main aim of this thesis is to determine whether the balance which the SPS Agreement purports to achieve between the rights of importing countries to protect their territories, and the special needs and interests of exporting developing countries in international trade liberalisation, is skewed against exporting developing countries or against developing countries as a whole.[19]

In this chapter I will consider the historical context of the World Trade Organization ("the WTO") and the development of the SPS Agreement as one of its core multilateral treaties. I will then look briefly at the SPS Committee, an integral structure that may have significant effects on the SPS Agreement.[20] I will also look at the concept of a "developing country" and why a homogenous definition may prove harmful to those countries classified under it.

However, the goals and methodology of this research will first be laid out to show how the primary research question of this thesis is to be examined: whether the SPS Agreement is biased in favour of importing countries, and whether it may, in fact, be harmful to developing countries – particularly those who are primarily exporters of their agricultural products.

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[16] See Recital 1 of the Preamble to the SPS Agreement.
[17] See Recital 6 of the Preamble to the SPS Agreement.
[18] See Recital 7 of the Preamble to the SPS Agreement.
[19] It is important to draw a distinction between importing and exporting developing countries. Throughout this thesis, any references made to "importing countries" can be taken as a reference to both developed *and* developing importing countries. Similarly, any reference to "developing countries" can be taken as a reference to both importing *and* exporting developing countries. Where an argument is made in respect of exporting developing countries alone, such will be clearly demarcated.
[20] Note that these first three sections will be largely explanatory, as little analysis can be done on the historical context of an international agreement. The purpose of providing this context is merely as a background to the discussions that will follow in later chapters. The effects of the SPS Committee structure will also become apparent in later chapters, where their recommendations and suggested procedures will be discussed in greater detail.

## 1.2. Goals and methodology

### 1.2.1. Primary objective and specific goals

As stated above, the primary objective of this thesis is to determine whether the SPS Agreement achieves its proposed balance between the rights of importing countries to impose SPS measures and protect their territories on the one hand, and the needs of exporting developing countries to gain and maintain a presence in the international trading market on the other. This imbalance may arise due to the Agreement granting excessive power to importing countries at the expense of exporting countries (and developing country exporters in particular). This may be attributed not only to the wording of the SPS Agreement itself, but also to the subsequent interpretations of the wording by bodies such as Panels, the Appellate Body, and the SPS Committee.[21]

The provisions of the SPS Agreement that I intend to analyse can be divided into two broad categories. The first category is provisions that do not *prima facie* appear to promote or support any particular type of Member above another. An example of this would be Article 5 of the SPS Agreement, which requires that all countries prepare risk assessments upon which their SPS measures must be based. Although these provisions do not appear to be biased towards either developing or developed countries, I will examine whether their interpretation and practical application mean that they grant importing – usually developed – countries extensive power over exporting – often developing – countries.

The second category is provisions which purport to favour developing countries by granting them some form of special and differential treatment. An example of this would be Article 10 of the SPS Agreement, which states that the special needs of developing Members should be taken into account by all Members when preparing and implementing SPS measures. Such provisions specifically refer to developing countries and attempt to ensure that their unique needs and interests are considered in SPS matters. I will examine whether these provisions provide sufficient protection, or whether they only profess to provide protection and do not in reality provide sufficient – or in some cases, any – practical protection to developing country Members.

[21] Each of these structures will be discussed in more detail further on in this thesis. For the moment, it is only necessary to note that the Panels and the Appellate Body are bodies which handle disputes that arise between WTO Members. The SPS Committee will be discussed in further detail below in this chapter.

The specific research goals that I intend to achieve in this thesis are as follows:

- To determine whether the provisions of the SPS Agreement which fall into the first category (as outlined above) are biased in favour of importing countries at the expense of exporting developing country interests. This will be done through a textual and interpretive analysis, which will examine whether Articles 2, 3, and 5 of the Agreement grant importing countries excessive power. Should such excess power be found to exist, it will be shown how such will make it difficult for exporting developing countries to comply with the SPS measures of importing countries, leading to a reduction in their international trading opportunities or even their exclusion from the relevant international trade markets.
- To determine whether the provisions of the SPS Agreement which fall into the second category (as outlined above) grant the trade liberalisation interests of developing countries sufficient – if any – special protection. This will be done through a textual and interpretive analysis of Articles 9 and 10, which will examine the meaning given to these provisions and determine whether the applicable interpretations have rendered them ineffective in practical application.

### 1.2.2. Methodology

As this thesis focuses on the interpretation and application of an international agreement, I have used pure desktop research. The arguments that I will be putting forward below will be largely based on wording, semantics, contextual interpretations, and the implementation of the SPS Agreement as shown through reports from the Panels and Appellate Body. As these arguments are largely based on the interpretation of written word, empirical research will not be necessary and will not be used. The primary sources that I will be using are agreements of the WTO, reports of the Panels and Appellate Body, leading textbooks, and journal articles from various scholarly journals.

As empirical research has not been used, and as all of the sources that I have used are available in the public domain, there are no ethical concerns.

### 1.3. Historical context

In order to understand the provisions and objectives of the SPS Agreement I shall begin by outlining the historical context in which it was created. Critiquing an agreement without first understanding where it came from and why it developed will render the criticism shallow, incorrect and pointless. In this section a brief history of the World Trade Organization will be outlined, followed by a history of the development of the SPS Agreement itself.

#### 1.3.1. History of the WTO

Although the official inception of the World Trade Organization (hereafter referred to as "the WTO") occurred in 1995, the idea of creating an organisation dedicated to the regulation of international trade first appeared almost fifty years before. In 1945, during wartime negotiations for the creation of the General Agreement on Tariffs and Trade[22] (hereafter referred to as "the GATT"), the US proposed the creation of a regulatory international organisation.[23] This proposal was most likely inspired by the purpose of the Bretton Woods Conference, which was to establish a new international system to overcome the various adverse economic and political effects of World War II.[24]

In line with the US's proposal, a preparatory committee was established in February of 1946.[25] It met for the first time eight months later, and negotiations began on the charter for the proposed international trade organisation.[26] Two years later these negotiations came to an end in Havana, and a complete charter was successfully created.[27] The charter provided for the establishment of the International Trade Organization, as well as various rules and disciplines relating to international trade.[28] Some believed that the ITO would exist to regulate and control international trade; some hoped that it would join with other international organisations to form

[22] 1947.
[23] P van den Bossche and W Zdouc *The Law and Policy of the World Trade Organization* 3 ed (2013).
[24] MA Crowley "An Introduction to the WTO and GATT" 40 (2003) *Economic Perspectives* 42 at 42.
[25] Van den Bossche and Zdouc *Law and Policy* 76.
[26] *Ibid*.
[27] Van den Bossche and Zdouc *Law and Policy* 78.
[28] *Ibid*.

a kind of "global governance".[29] Regardless of its ultimate purpose, the ITO was ready to come into existence.

However, an unexpected setback occurred. The US – which had originally proposed the creation of the ITO – struggled to have the charter accepted by Congress. In 1950 the US formally withdrew from the ITO discussions,[30] leading to a rapid decline in interest from other states. At the time, the US was the largest international economic and trading power, and no state was willing to accept the restrictions that an international trade organisation would inevitably bring if the US was not party to it as well.[31] As a result, the ITO simply fell away.

For several years the international trade negotiations focused on the development of the GATT, leading to the conception of its various versions. In the Uruguay Round of Negotiations, which began in 1986, it was specifically recognised that a reform of the international trade institutional structure was needed.[32] Up until this point, the GATT had been used as the primary source of international trade regulation. However, a number of problems arose in the 1980s that the GATT was unable to solve – for example, the dispute resolution mechanisms of the GATT were proving to be ineffective and it had no provision for the burgeoning international trade in services.[33] It was clear that an institutional overhaul was required.

In 1990, the idea of an international trade organisation was raised again in the Uruguay round.[34] The idea did not receive unanimous support – surprisingly, the US opposed the establishment of such an institution despite the fact that the original 1947 proposal had been its idea.[35] A number of developing countries were also unsupportive.[36] This lack of support can be attributed to a number of possible factors, but the most common factor appears to have been a fear of "supranationalism".[37] According to van Grasstek,[38] many states may have been unwilling to

[29] C van Grasstek *The History and Future of the World Trade Organization* (2013) 10.
[30] Crowley 2003 *Economic Perspectives* 43.
[31] Van den Bossche and Zdouc *Law and Policy* 78.
[32] Van den Bossche and Zdouc *Law and Policy* 79.
[33] Crowley 2003 *Economic Perspectives* 43-44.
[34] Van den Bossche and Zdouc *Law and Policy* 80.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*.
[38] Van Grasstek *History and Future* 13.

subject their sovereignty to the over-arching power of an international body that would be able to regulate their international dealings – a power that an international trade organisation would no doubt be granted. Van Grasstek also mentions that this hostility towards international governance appears frequently from the US, and less so from associations such as the EU[39] - an analysis which may provide some explanation as to why the US was unexpectedly opposed to the idea of an international trade organisation.

In 1993 the United States withdrew its opposition to the establishment of an international trade organisation, possibly due to the fact that the majority of other participants had accepted the drafted charter.[40] It then suggested the name "World Trade Organization" as an alternative to the allegedly less-appealing "Multilateral Trade Organization".[41] The name change was accepted. In Marrakesh, in April 1994, the Agreement Establishing the World Trade Organization (hereafter referred to as "the WTO Agreement") was signed and on 1 January 1995 the WTO officially came into being.

### 1.3.2. History of the SPS Agreement

When the WTO Agreement was created, various multilateral treaties were annexed to it with the intention of these treaties becoming binding on the signatories of the WTO Agreement.[42] One of the treaties included in Annex 1A was the SPS Agreement. However, the SPS Agreement did not spring from nowhere; it had a long and detailed history of negotiations before its inception.

Like the WTO, the SPS Agreement came out of the Uruguay Round of Negotiations.[43] One of the primary purposes of this round was to diminish barriers to agricultural trade, and so the Agreement on Agriculture was created.[44] However, there were fears that the provisions of such an agreement could be circumvented by the implementation of legitimate non-tariff barriers

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[39] Van Grasstek *History and Future* 13.
[40] Van den Bossche and Zdouc *Law and Policy* 81.
[41] *Ibid*.
[42] Article II:2 of the WTO Agreement specifically states that the Multilateral Trade Agreements included in the first three annexes are binding on all Members of the WTO.
[43] B Rigod "The Purpose of the WTO agreement on the Application of Sanitary and Phytosanitary Measyres (SPS)" Vol. 24(2) (2013) *European Journal of International Law* 503 at 506.
[44] M Spreij "The SPS Agreement and Biosafety" (March 2007) *FAO Legal Papers Online* 8.

such as SPS measures.[45] To account for this problem, the Punta del Este Declaration, which began the Uruguay Round, specifically acknowledged the need to minimise "the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture".[46]

The initial purpose of the SPS-related negotiations was simply to clarify the position in terms of Article XX(b) of the GATT,[47] which states that Members may deviate from their obligations in terms of the GATT if such deviation is necessary for the protection of human, animal or plant life or health. However, as the negotiations continued it became clear that the SPS-related issues were too extensive to be dealt with in a simple clarification to Article XX(b), and so a separate agreement was needed.[48] Various reasons are given for this. Van den Bossche and Zdouc suggest that the negotiators in the Uruguay Round gave SPS measures "special attention" as a means of acknowledging the importance of two separate aspects: the sovereign rights of states to protect their own territories from SPS threats, and the importance of liberalising international trade.[49] Rigod states that the reason for dealing with SPS measures as a separate concern was due to their potential to act as non-tariff trade barriers in the international agricultural market;[50] a reason that is echoed by Spreij.[51] Scott[52] points to the Preamble of the SPS Agreement as an indication that the SPS Agreement exists to elaborate on the rules and regulations of Article XX(b) of the GATT.

From these sources we can identify the three main purposes of the SPS Agreement. Firstly, the Agreement exists as a barrier against protectionism; it establishes a way of preventing Members from using SPS measures to circumvent the provisions of the Agreement on Agriculture and create protectionist restrictions on international agricultural trade. Secondly, the Agreement exists to provide further clarification to the basic regulation of SPS measures set out in Article XX(b) of the GATT. Finally, the Agreement exists to assist in balancing the sovereign rights of

[45] Spreij 2007 *FAO Legal Papers Online* 8.
[46] Part I(D) of the Punta del Este Declaration, 1986.
[47] Rigod 2013 *European Journal of International Law* 506.
[48] *Ibid*.
[49] Van den Bossche and Zdouc *Law and Policy* 895.
[50] Rigod 2013 *European Journal of International Law* 507.
[51] Spreij 2007 *FAO Legal Papers Online* 8.
[52] J Scott *The WTO Agreement on Sanitary and Phytosanitary Measures: A commentary* (2007) 29.

Members to protect their own territories with the need for liberalisation of international trade, particularly with regard to those countries that are extensively involved in international trade in agricultural products such as developing countries.

It is interesting to note at this point that certain aspects of the SPS Agreement received more attention than others during the negotiation period. One such aspect was the need for harmonization and the importance of international standards.[53] If the SPS Agreement did not provide for some form of international harmonization it would be easy for Members to impose widely varying levels of protection, leading to uncertainty and potential economic loss for exporters.[54] However, the negotiators also acknowledged that complete harmonization on an international scale would be impossible.[55]

Another aspect frequently under discussion during negotiations was the need for transparency and effective notification procedures.[56] In November 1990 the Working Group on Sanitary and Phytosanitary Regulations acknowledged in a draft text that transparency was a significant aspect of standard-setting.[57] While some of the disputes relating to transparency were settled, it remains a contentious point to this day. In 2008 the SPS Committee put forward the Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement,[58] a document intended to clarify the transparency obligations contained in Article 7 of the SPS Agreement.[59] It remains to be seen whether these recommended procedures will prove effective in assisting in the implementation of transparency obligations.

One can see, then, that the SPS Agreement contained contentious issues from the outset. The majority of these issues were settled during the drafting of the Dunkel Text in 1991, a document

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[53] Rigod 2013 *European Journal of International Law* 507.
[54] The issues relating to harmonization will be discussed in more detail in later chapters.
[55] Rigod 2013 *European Journal of International Law* 508.
[56] S Zarrilli "WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries" (1999) *Division on International Trade in Goods and Services, and Commodities* 3.
[57] R Griffin "History of the Development of the SPS Agreement" in *Multilateral Trade Negotiations on Agriculture: A Handbook* (2000) para 1.4.
[58] Committee on Sanitary and Phytosanitary Measures "Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)" G/SPS/7/Rev.3 (20 June 2008).
[59] Committee on Sanitary and Phytosanitary Measures G/SPS/&/Rev.3 para 1.

that would eventually form the basis of the SPS Agreement.[60] However, certain issues such as that of the precautionary principle[61] were never fully settled,[62] and issues that were allegedly settled – such as the transparency procedures – are still debated today.

### 1.4. The SPS Committee

Another integral introductory aspect relating to the SPS Agreement that must be outlined here is that of the Committee on Sanitary and Phytosanitary Measures (hereafter referred to as "the SPS Committee"). The SPS Committee is established by Article 12.1 of the SPS Agreement, and is broadly governed by the provisions of Article 12 as a whole. The Committee is made up of representatives from various WTO Members; it is up to the governments of the Members to decide who is most appropriate to be sent as a representative to the SPS Committee meetings.[63] It is interesting to note, as Scott points out, that African representatives are less in attendance than those from other regions[64] – this could possibly be due to a lack of the financial resources needed to send representatives to participate in such meetings.[65] The Committee also welcomes representatives from international organisations as observers to its meetings, either regularly or on an *ad hoc*, meeting-by-meeting basis.[66] Regular observers include those mentioned in Annex A(3) of the SPS Agreement[67] as well as others such as the World Health Organisation (hereafter referred to as "WHO") and the United Nations Conference on Trade and Development (hereafter referred to as "UNCTAD").[68] *Ad hoc* observers include the Organization for Economic Co-

[60] Rigod 2013 *European Journal of International Law* 511; see also Zarrilli 1999 *Division on International Trade in Goods and Services, and Commodities* 4.
[61] To be discussed in later chapters.
[62] Rigod 2013 *European Journal of International Law* 511.
[63] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.2.
[64] Scott *A commentary* 49.
[65] The problem of lack of resources and non-participation by developing countries will be developed further in Chapter III.
[66] Scott *A commentary* 49.
[67] The three international standardising organisations mentioned in Annex A(3) are: the Codex Alimentarius Commission; the International Office of Epizootics; and the International Plant Protection Convention. All three are acknowledged as regular observers of SPS Committee meetings.
[68] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.2.

operation and Development (hereafter referred to as "OECD") and the Regional International Organization for Plant Protection and Animal Health.[69]

The primary purpose of the SPS Committee is to supervise the implementation and practical applications of the SPS Agreement.[70] This supervision can be broken down into two broad areas, namely: information exchange and peer review; and norm elaboration.[71] Each purpose will be discussed in turn.

Information exchange and peer review refers to the SPS Committee's function of reviewing and reporting on developments relating to the SPS Agreement, as well as identifying areas of the Agreement and its implementation that may prove – or are proving – problematic. For example, at an SPS Committee meeting Members could highlight their need for technical assistance and problems that they have had in acquiring this assistance. This could indicate that the technical assistance provisions in Article 9 of the Agreement are problematic in implementation, and require further clarification. Members are also allowed to raise specific trade concerns.[72] For example, if Member A has imposed a restriction on the importation of bananas, Member B may indicate that it is a prolific banana exporter and is being affected by this restriction. Where specific trade concerns such as this are raised, Members are expected to exchange information and engage in bilateral consultations to attempt to find a solution.[73] In this way, the SPS Committee's information exchange function could help prevent the need for disputes to be solved by a Panel.

The second function of the SPS Committee is norm elaboration. The Committee puts forwards suggested procedures and guidelines to elaborate on how the obligations in the SPS Agreement

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[69] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.2.
[70] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.3.
[71] Scott *A commentary* 48.
[72] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.5.
[73] *Ibid*.

should be performed or carried out.[74] The provision of these guidelines and suggested procedures may help to provide certainty in terms of the SPS Agreement, as they dictate a normalised method for Members to utilise when carrying out their SPS obligations. These guidelines are usually couched in deferential language, using terms such as "suggested" or "recommended".[75] The purpose of this deferential language is presumably to acknowledge the sovereignty of the Members and to avoid turning the SPS Committee into an obligatory standardising body. At the time of writing, the SPS Committee had already presented guidelines on various aspects of the SPS Agreement, including transparency,[76] special and differential treatment,[77] and the practical application of Article 5.5,[78] among others.

The SPS Committee meets three times per year, with special meetings being arranged where necessary to discuss particular issues.[79] Certain items frequently appear on the agenda at these meetings, such as specific trade concerns, the SPS Agreement and developing countries, and the use of international standards.[80] The nature of these items is such that frequent and continued discussion on their particular issues is required. Article 12.7 of the SPS Agreement required that the SPS Committee review the Agreement within three years of its coming into force. This was accordingly done in 1999, and a few key issues were identified.[81] At the Doha Ministerial Conference, it was decided that the implementation and application of the SPS Agreement should be reviewed every four years. The First Review occurred in 1999; the Second Review was completed in July 2005 and the Third Review report was completed in March of 2010.[82] A Fourth

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[74] Scott *A commentary* 69.
[75] Scott *A commentary* 70.
[76] Committee on Sanitary and Phytosanitary Measures G/SPS/&/Rev.3 para 1.
[77] SPS Committee "Report on Proposals for Special and Differential Treatment" G/SPS/35 (7 July 2005).
[78] SPS Committee "Guidelines to Further the Practical Implementation of Article 5.5" G/SPS/15 (18 July 2000).
[79] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.4.
[80] *Ibid*.
[81] Unknown "Implementation – the SPS Committee" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c4s1p1_e.htm (accessed 7 May 2015) para 4.3. The identified issues will not be discussed here, as the purpose of this section is merely to provide an outline of the functions of the SPS Committee – there is no need to discuss the problems found in early versions of the SPS Agreement.
[82] Committee on Sanitary and Phytosanitary Measures "Review of the Operation and Implementation of the SPS Agreement" G/SPS/53 (3 May 2010) para 1-2 and para 4.

Review report was completed in March 2014.[83] These reviews have dealt with myriad issues, covering transparency, technical assistance, the use of international standards, and special and differential treatment, to name but a few.[84]

To summarise, the SPS Committee is an international structure that is intended to be representative of all Members affected by the SPS Agreement. It looks to provide guidelines and recommended procedures for the implementation of the SPS Agreement, as well as identifying problematic areas of the SPS Agreement and encouraging information exchange between affected Members. The Committee has set meeting times, with flexibility to handle special concerns, and an obligation to periodically review the SPS Agreement and its continued implementation.

### 1.5. "Developing countries"

Having looked at the historical context of the WTO and the SPS Agreement, and having examined the SPS Committee structure, I now turn to the final concept that I wish to discuss in this introductory chapter: developing countries.

The term "developing country" will be familiar to anyone who has studied, or worked with, almost any form of law or economics. As I intend to analyse the SPS Agreement in relation to developing country interests, it is important to determine exactly what a developing country is and what its interests might entail. However, although the term is frequently used in WTO Agreements, reports of the SPS Committee, and decisions by Panels and the Appellate Body, there is no one definition of a developing country. In fact, the term "developing country" appears to cover a very broad and varied group of countries with widely differing interests.

To begin with, the WTO does not have a particular definition of a developing country. WTO Members declare themselves to be 'developing' or 'developed' as they see fit, and can change from one to the other and back again as necessary.[85] At first glance, this is problematic.

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[83] Committee on Sanitary and Phytosanitary Measures "Fourth Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures" G/SPS/W/278 (8 May 2014) para 1.1.
[84] Committee on Sanitary and Phytosanitary Measures G/SPS/53 para 5.
[85] Unknown "Who are the developing countries in the WTO?" *World Trade Organization* https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (accessed 13 May 2015). Note that the Fourth Review was the latest available at the time of writing.

Developing countries are accorded various benefits in terms of WTO agreements,[86] and so one would imagine that the categorisation of such countries would be carefully regulated. However, the WTO does not appear to have any specific criteria that have to be met before a country can declare itself to be 'developing'. The WTO does allow a Member to challenge the status of another Member, presumably if it feels that the status is undeserving.[87] For example, if the United States were to classify itself as a developing country it is likely that another country would challenge this declaration. While this may provide some form of safeguard against undeserving countries receiving developing country benefits, it places the onus of identifying undeserving countries on other WTO Members.

How, then, can we classify developing countries? The Oxford Dictionary of English[88] defines a developing country as "a poor agricultural country that is seeking to become more advanced economically and socially".[89] The Cambridge Business English Dictionary[90] gives the definition as "a country with little industrial and economic activity and where people generally have low incomes", while the Collins English Dictionary[91] refers to "a nonindustrialized poor country that is seeking to develop its resources by industrialization". From these definitions we can identify a handful of common elements.

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[86] For example, Article 10 of the SPS Agreement provides that the interests of developing countries must be taken into account when creating and implementing SPS measures, while Article 9 singles out developing countries as being in need of technical assistance facilitation. Similarly, Article 11 of the Agreement on Technical Barriers to Trade identifies developing countries as being in special need of technical assistance. Article 4(10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes also creates an obligation to take the particular interests of developing countries into account during consultation procedures between Members. These are just a few examples of WTO agreements that specifically acknowledge and provide benefits for those Members falling within the 'developing country' classification.

[87] Unknown "Who are the developing countries in the WTO?" *World Trade Organization* https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (accessed 13 May 2015).

[88] A Stevenson *Oxford Dictionary of English* 3 ed (2010) Oxford University Press: published online.

[89] According to Unknown "Social Development" *The World Bank* http://data.worldbank.org/topic/social-development (accessed 12 May 2015), social development statistics include aspects such as the number of children in employment, the labour force participation rate, the prevalence of HIV and the number of students enrolled in various levels of educational institutions.

[90] Unknown *Cambridge Business English Dictionary* (2011) http://dictionary.cambridge.org/dictionary/business-english/ (accessed 12 May 2015).

[91] Unknown *Collins English Dictionary* http://www.collinsdictionary.com/dictionary/english (accessed 12 May 2015).

Firstly, the dictionaries define a developing country as one that is at a financial disadvantage. Terms such as "poor" and "low incomes" imply that the people in these countries do not have excessive – or possibly even sufficient – financial resources. Secondly, the use of terms like "agricultural" and "nonindustrialized" imply that these countries are largely given over to agricultural practices rather than manufacture-based industries. This indicates that such countries may be substantially affected by an agreement that regulates trade in primary agricultural goods, such as the SPS Agreement. Thirdly, terms such as "seeking to become more advanced" and "seeking to develop" indicate that these countries are looking to improve their situation and – ultimately – achieve developed country status.

Having looked at the basic textual meaning of the term "developing country", we can now look for a contextual meaning by considering the use of the term within WTO documents, decisions and agreements. Firstly, the concept of a developing country can be contrasted with that of least-developed countries (hereafter referred to as "LDCs"). LDCs are often seen as a sub-category of developing countries, and so share some – but not all – of their characteristics. Like developing countries, LDCs receive a significant number of benefits in terms of WTO agreements. For example, Article 66 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter referred to as "TRIPS") allows LDCs a longer transitional period in which to implement the provisions of TRIPS. However, unlike developing countries, LDCs are categorised according to certain criteria. The WTO uses the United Nations system of classifying LDCs, a system which weighs up three particular elements: gross national income per capita, human asset index, and economic vulnerability.[92] Any country that falls within the required categorisation is added to the UN's list of LDCs, which at the time of writing sat at 48 countries. This means that the UN holds a comprehensive list of countries which fall within the LDC category, and so can keep track of the countries that are genuinely eligible for the benefits that such a status accrues. In contrast, the

[92] Unknown "UN Recognition of Least Developed Countries (LDC)" *United Nations Conference on Trade and Development* http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx (accessed 12 May 2015).

fact that there is no selection criteria for developing countries means that countries which do not truly need certain benefits may nevertheless receive them due to their 'developing' status.[93]

Another way of analysing what the term "developing country" may mean in the context of the WTO is to look at how WTO agreements treat developing countries. The oldest of the WTO agreements, the GATT, is an ideal example. Although the term "developing countries" does not appear anywhere in the text of the GATT, certain provisions make reference to a category of country that would correlate with the dictionary definitions. Article XVIII of the GATT, for example, makes several such references. In Article XVIII(1), reference is made to facilitating the development of countries "the economies of which can only support low standards of living and are in the early stages of development". Article XVIII(2) grants these countries certain benefits not granted to other countries, such as flexibility in tariff structures. Assuming that such benefits are not arbitrarily granted, they bear a close resemblance to the special and differential treatment provisions that developing countries benefit from in other WTO agreements.[94] Article XVIII(4)(a) refers to countries whose economies are "in the early stages of development", which links to the idea of continuing economic development .

If we combine the textual and contextual interpretations of "developing country", we can create a definition of a developing country as one that is financially disadvantaged, has a large agricultural industry, and requires significant development in the social, economic and industrial spheres. Such countries are entitled to certain benefits and exemptions under WTO agreements in order to account for and acknowledge their difficulties. But is it really possible to create such a definition of "developing country"? What level of financial disadvantage would one have to reach in order to be considered 'developing'? Would a financially disadvantaged country that does not have a large agricultural industry have the same concerns as one that does? And are all

[93] It should be noted here that the WTO website frequently states that a country's classification of itself as 'developing' will not necessarily be accepted in terms of all WTO agreements. For example, the Generalised Schedule of Preferences will not automatically accord advantageous preferences to a self-classified developing country (see Unknown "Who are the developing countries in the WTO?" *World Trade Organization* https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (accessed 13 May 2015)). However, as a significant number of WTO agreements simply refer to 'developing countries' in their provisions without further clarification, there is a very real possibility of future disputes involving developing countries who should perhaps be classified as developed.

[94] See footnote 86 above.

developing countries looking to develop their social, economic and industrial spheres in the same way?

Prévost points out that developing countries are not a homogenous group, and yet all appear to receive the same treatment in terms of broad special and differential treatment provisions in WTO agreements.[95] In an attempt to avoid this problem, the Swedish Board of Agriculture published a paper suggesting that the category of developing countries should be further divided into five sub-categories for the purposes of agriculture-related trade agreements: [96]

1. Least-developed countries (LDCs)
2. Food insecure countries
3. Net agriculture exporting countries
4. Advanced developing countries
5. Countries with a particular need for rural development

LDCs, as discussed above, are already seen as a distinct sub-category of developing countries. The term "least-developed" implies that these countries have the farthest to go in terms of their economic, industrial and social development in order to reach 'developed country' status. The use of the term "least-develop*ed*" as opposed to "least-develop*ing*" also indicates that these countries are not necessarily in the process of development – perhaps pointing to a severe dearth of resources available for such development. From this we can assume that the LDC category will include countries that fall within the ordinary UN classification of LDCs, and will possibly include countries that sit at the lowest levels of development without the resources to begin the process of moving towards 'developed' status.

The second category is that of food insecure countries. The definition of food security can be given as "when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life".[97]

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[95] D Prévost "'Operationalising' special and differential treatment of developing countries under the SPS Agreement" 30 (2005) *SAYIL* 82 at 94.
[96] J Kasteng *et al*. "Differentiation between Developing Countries in the WTO" 14E (2004) *Swedish Board of Agriculture: International Affairs Division* 5.
[97] An FAO definition as quoted in Kasteng *et al.* 2004 *SAYIL* 21.

In other words, a country can be considered to be food insecure if its people do not have access to sufficient food to sustain an ordinary lifestyle. While the majority of the countries that would fall into this category are LDCs, it would also cover several non-LDC countries that are in a food insecure position.[98] Special and differential treatment provisions relating to the import, export and production of primary food products could be allocated to this category alone. This would allow these countries to receive assistance in the area that it is most required, while also preventing food secure countries from receiving trade-related benefits that they do not require.

The third category is net agriculture exporting countries. This category covers those countries which have significant or substantial exports of agricultural products. As 'agricultural products' covers a very broad range of products, Kasteng *et al.* suggest that determining which countries fall into this category could be based on the country's share in total world exports.[99] Developing countries with substantial net agricultural exports would have significant interest in any agreements or treaties that could limit or lower their export rate. As most developing countries are in need of economic development, limiting the international trade of countries that may be dependent on their agricultural exports could have serious adverse consequences. The inclusion of this group as a separate category acknowledges the particular trade interests of such countries.

The fourth category is that of advanced developing countries. These countries often have high incomes in comparison to other developing countries, and their agricultural sectors do not contribute as extensively to their GDPs as they do in other developing countries.[100] Because of these advantages, such countries would be treated in much the same manner as developed countries with regard to agricultural trade agreements.[101] This again prevents undeserving countries from receiving extensive special and differential treatment benefits, while still acknowledging their developing country status in other areas.

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[98] Kasteng *et al.* 2004 *SAYIL* 23.
[99] Kasteng *et al.* 2004 *SAYIL* 25.
[100] Kasteng *et al.* 2004 *SAYIL* 24.
[101] Kasteng *et al.* 2004 *SAYIL* 25.

The final category is countries with a particular need for rural development. Kasteng *et al.* acknowledge that poverty in rural areas is often more prevalent than in urban areas, and could be reduced by significant rural development.[102] Countries falling within this category have high rural and agricultural populations,[103] and presumably small urban areas. Despite differences in their food security position, the study indicates that these countries often have homogenous trading and agricultural interests.[104] By grouping them together, special and differential treatment provisions relating specifically to rural development could be applied to this category, excluding those developing countries who may have areas to focus on above and beyond rural development.

While these five categories may not necessarily be the only option for the further categorisation of developing countries,[105] they nevertheless indicate the advantages that may be found in such a system. By dividing the broad category of 'developing countries' into smaller categories with similar interests, this categorisation system acknowledges and provides for the varying interests of each category while preventing undue benefits from overly-broad special and differential treatment provisions being applied homogenously.

For the purpose of this thesis I shall use the broad definition of 'developing country' and its three component elements as outlined above: financial disadvantage, an extensive agricultural industry, and currently ongoing social, economic and industrial development. The reason for this is that the definition of 'developing country' as used in the SPS Agreement leans towards the common, broad definition. However, it is important to acknowledge the problems that a broad definition may create, and to consider the potential sub-categories that may be developed at a later stage to prevent such problems.

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[102] Kasteng *et al.* 2004 *SAYIL* 27.
[103] *Ibid*.
[104] *Ibid*.
[105] For example, the World Bank classifies 'developing economies' according to their gross national income per capita per year (see Unknown "New Country Classifications" *The World Bank* http://data.worldbank.org/news/new-country-classifications (accessed 15 May 2015)), while the Agreement on Agriculture distinguishes between LDCs and Net-Food Importing Developing Countries (see Kasteng *et al.* 2004 *SAYIL* 6).

## 1.6. Conclusion

The concepts introduced in this chapter were included for the purpose of providing background and context to the proposed research. The history of the WTO and the SPS Agreement indicates the reason for their creation and, through this, suggests some of the important values that came out of the extensive negotiations involved in their development – values such as transparency and harmonization, which will become integral in later discussions. The discussion on the SPS Committee provides a basic outline of the purpose, structure and function of this body – as several of the SPS Committee reports will be used in this research, it is important to understand their academic weight and the effect of their recommendations and guidelines. Finally, the discussion on the concept and definition of the term "developing country" is included because this thesis purports to critique the alleged balance in the SPS Agreement between the interests of developing countries and the sovereign rights of WTO Members. For this reason, an analysis of the definition and interests of "developing country" appears necessary. In this thesis a broad definition of 'developing country' will be used, with particular focus on the importance and extent of the agricultural industries of such countries alongside their lack of adequate finances. Due to this interpretation, developing country interests will be assumed to include the liberalisation of the international agricultural products market, and increased technical assistance for participation in international trade affairs.

Having concluded the introductory aspects, we now move to consider the substantive provisions of the SPS Agreement and their interpretations by various sources.

# CHAPTER II – RISK ASSESSMENTS

## 2.1. Introduction

As with any governmental process, the imposition of SPS measures is expected to follow a certain procedure. One of the primary, and possibly most integral, steps in this procedure is the undertaking of what is known as a 'risk assessment'. Regulated by Article 5 of the SPS Agreement, the risk assessment process exists to ensure that SPS measures are put in place for a rational and reasonable purpose, and not to alleviate unfounded paranoia on the part of a particular Member's governing body.

How does this process work? Risk assessment procedures are all but entirely based in science and scientific methodologies – a requirement which helps to ensure an independent evaluation of each particular risk. According to Scott,[106] some authors believe that this scientific basis forces risk assessment procedures to be more rigid than is necessary – presumably leading to infringements on state sovereignty by strictly regulating the manner in which Members are permitted to assess SPS risks. However, this 'rigid' adherence to a scientific approach might not necessarily be problematic. As Scott points out, the scientific approach of the SPS Agreement – particularly in relation to Article 5 risk assessments – is only rigid in relation to procedural aspects.[107] This means that, although the Agreement regulates the *manner* in which the risk assessment procedure is carried out, it does not regulate the ultimate *findings* that may come out of the assessment. In this way, the Agreement does not restrict a Member's ability to impose an SPS measure. Instead, it creates a methodology based on rationality which will theoretically ensure that SPS measures are based on justifiable scientific discoveries and not used for protectionist purposes.

It is important at this early stage to acknowledge the distinction between risk *assessment* and risk *management*. In both the Appellate Body report on *EC – Hormones*[108] and the Appellate Body

[106] Scott *A commentary* 77.
[107] Scott *A commentary* 78.
[108] ABR, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R (16 January 1998) para 181.

report on *US/Canada – Continued Suspension*[109] the Appellate Body pointed out that the term 'risk management' was not used anywhere in the text of the Agreement. Gruszczynski[110] refers to this as an integrated approach, assuming that the Appellate Body intended to have risk assessment and risk management viewed as overlapping concepts, with both involving scientific *and* non-scientific considerations. He argues that this "interpretation goes too far",[111] as its implication of risk assessment techniques not being based primarily in science is not supported by later case law. The blurred line between the two concepts goes against the ultimate purpose of the risk assessment: to depart from policy issues and focus on the scientifically-evaluated likelihood of a risk eventuating.

Van den Bossche and Zdouc[112] also criticise the Appellate Body's interpretation, stating that it is "undeniable" that the Agreement deals with risk assessment and risk management obligations separately. They define risk assessment as a science-based process of identifying and evaluating the likelihood of a risk eventuating, taking into consideration possible measures that could be used to prohibit such an occurrence.[113] Risk management, on the other hand, is a policy-based process that deals with the setting of a Member's appropriate level of protection and the choice of which SPS measure should be imposed in order to achieve that desired level.[114] Risk management therefore deals with the process whereby a *particular* Member develops policies to determine its *own* level of protection and the measures that it *personally* intends to impose.[115] In this way, a risk management process is likely to consider or take into account any relevant risk assessments;[116] however, the two processes do appear to be treated as separate by most authors.

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[109] ABR, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* WT/DS321/AB/R (16 October 2008) para 541.
[110] L Gruszczynski "Science in the Process of Risk Regulation under the WTO Agreement on Sanitary and Phytosanitary Measures" (2006) 7 *German Law Journal* 371 at 379.
[111] *Ibid*
[112] Van den Bossche and Zdouc *Law and Policy* 914 footnote 85.
[113] Van den Bossche and Zdouc *Law and Policy* 914.
[114] *Ibid*.
[115] Van den Bossche and Zdouc *Law and Policy* 920.
[116] It is interesting to note here that "relevant risk assessments" do not include only those risk assessments undertaken by the particular Member – relevant risk assessments by other Members may be taken into account as well. This will be discussed in more detail below.

In this chapter I will examine the various provisions of Article 5 and how the risk assessment process is regulated. I will also analyse the procedures that Members are intended to follow, and show that the excessive freedom granted to importing countries in relation to their SPS measure creation is likely to negatively impact exporting developing countries in an unfair and frequently unjustifiable manner.

### 2.2. Article 5 critical analysis

Before beginning an analysis of Article 5, it is necessary to briefly consider the related Article 2.2 and its impact on the interpretation of Article 5.

Article 2.2 reads as follows:

> "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."[117]

From this, it can be seen that there are three requirements which must be fulfilled:[118]

(1) The measure must only be applied where **necessary**;
(2) The measure must be based on **scientific principles**
(3) The measure must not be maintained without **sufficient scientific evidence**.[119]

The use of the word "necessary" in this provision is interesting, as it is the same term that is used in Article XX(b) of the GATT. As discussed in Chapter I, the SPS Agreement was created partially as a means to help give effect to the exemption provided for in Article XX(b). However, in this attempt to expand on the position regarding measures that were necessary for such protection, the SPS Agreement has turned what was originally an exemption into a right. Under the GATT, Article XX(b) was an exception from the general GATT obligations and so the burden of proving that the measure was indeed necessary fell to the country imposing the measure. Now under

[117] Art. 2.2 of the SPS Agreement.
[118] Scott *A commentary* 84.
[119] It can be noted here that the SPS Agreement does include a possible exception to this third requirement – to wit, Article 5.7 – but such will be discussed in more detail later on in this chapter.

Article 2.1 of the SPS Agreement a Member has a *right* to impose SPS measures where necessary. While this may not have altered the weight of the burden of proof, it has shifted this burden to the country alleging that the measure is in violation. In other words, the Member imposing the measure does not have to prove that it was necessary; rather, the Member alleging a violation of the SPS Agreement has to prove that the measure was *not* necessary.[120]

Here we can already start to see the link between Article 2.2 and Article 5 – especially Article 5.1 – as both deal with the underlying requirement of scientific procedures being used as a basis for the creation of an SPS measure. But how are the two viewed in application? In *EC - Hormones*[121] the Appellate Body confirmed the view of the Panel that Article 5.1 should be seen as the specific application of the general Article 2.2 requirements. A strong emphasis was placed on the 'togetherness' of these two provisions; in general Article 2.2 gives meaning to Article 5.1, and the two must be read together.[122] In *EC - Biotech*[123] the Panel referred to and agreed with the *EC – Hormones* decision, stating that Article 5.1 was the specific application of the second and third requirements of Article 2.2.[124] Scott notes that this implies a circularity in the link between Articles 5.1 and 2.2 – while Article 2.2 gives meaning to Article 5.1, Article 5.1 in turn helps to define what constitutes 'sufficiency' under Article 2.2.[125] In *Australia - Salmon*[126] the Appellate Body further stated that the inherent link between Articles 5.1 and 2.2 means that a measure which is found to be inconsistent with Article 5.1 must automatically be deemed to be

[120] This distinction will become more important later on in this chapter.
[121] Para 180.
[122] *Ibid.*
[123] PR, *European Communities – Measures Affecting the Approval and marketing of Biotech Products* WT/DS291/R (29 September 2006) para 7.1439.
[124] The second and third requirements being that the measure must be based on scientific principles and that the measure must not be maintained without sufficient scientific evidence.
[125] Scott *A commentary* 82.
[126] ABR, *Australia – Measures Affecting Importation of Salmon* WT/DS18/AB/R (20 October 1998) para 138

inconsistent with the second and third requirements of Article 2.2.[127] This view appears to have been tacitly confirmed in *EC – Hormones*,[128] although in an admittedly less direct approach.

In summary, the Appellate Body seems to favour the view that Article 2.2 is a general provision that creates the right of a Member to impose SPS measures, while Article 5.1 is the specific application of the second and third requirements of Article 2.2. Because of this, the three requirements of Article 2.2 should be borne in mind while interpreting and applying both Article 5.1 and the other Article 5 provisions in general. In turn, Article 5.1 – and Article 5.7 - help to give meaning to Article 2.2 by providing context for the definition of "sufficient scientific evidence". Therefore, as this chapter proceeds with the Article 5 analysis, it must be kept in mind that Article 2.2 may have an effect on the interpretation and application of the risk assessment provisions.

2.2.1. Articles 5.1 and 5.2.

Having considered the inclusion of Article 2.2 as a contextual interpretive tool, we turn now to the first provision of Article 5.1. Article 5.1 requires Members to ensure that their SPS measures are "based on" risk assessments that are appropriate to the circumstances. It further requires that Members "take into account" the techniques used by relevant international organisations. Article 5.2 then provides a list of scientific factors that should be taken into account by Members during the risk assessment procedure.

It should be noted here that the scientific factors given in Article 5.2 apply to all forms of risk assessments. Article 5.3 also provides a list of factors to be taken into account, but these are economic factors that need only be taken into account where the risk is to animal or plant life or health. If the risk is to human life or health, it appears that the Article 5.3 factors do not need to

[127] It should be noted that the reverse presumption does not necessarily apply. In *Australia – Salmon* para 138 the Appellate Body confirmed the Panel's finding that an inconsistency with Article 2.2 does not necessarily imply an inconsistency with Article 5.1. Interestingly, Scott does not agree with these presumptions. She states at 84 that the fact that a measure is not based on a risk assessment does not automatically mean that there is no scientific foundation for it. In terms of Scott's argument a measure may violate Article 5.1 by not being based on a risk assessment, while still being based on scientific principles and so fulfilling the Article 2.2 requirement. It is submitted that Scott's response appears to be accurate with regard to direct textual interpretation. However, there also appears to be no practical purpose to this argument. If a measure violates Article 5.1 then it is in violation of the SPS Agreement, regardless of any further violations or inconsistencies. As the purpose of the SPS Agreement is partially to regulate the methodologies used in creating SPS measures, applying Scott's argument would serve no real purpose.

[128] Para 350.

be taken into account during the risk assessment process. Van den Bossche and Zdouc point out that non-scientific factors should be taken into account in all risk assessments, as one has to consider how the risk will play out in a real-world setting.[129] This view developed out of *EC – Hormones*[130] and *US/Canada – Continued Suspension*,[131] both of which imply that administrative factors may be taken into account. From this we can take the interpretation that scientific factors *have* to be taken into account for any risk; economic factors *have* to be taken into account only where animal or plant life or health is concerned; and economic or administrative factors *may* be taken into account where they are considered to be relevant.[132]

Looking more closely at the wording of Article 5.1 there appear to be two particular requirements. Firstly, a Member's measure must be "based on" a risk assessment. Secondly, the Member must "take into account" existing procedures during the risk assessment. But what obligations do these requirements actually impose?

The term "based on" was extensively discussed by the Appellate Body in *EC – Hormones*. Here the Appellate Body held that a measure would be based on a risk assessment if there was "a rational relationship between the measure and the risk assessment".[133] At first glance, this appears to be fair and appropriate. Requiring a rational relationship between the risk assessment and the measure would ensure that a measure could not be disproportionate in terms of the risk and the protection achieved. It would also ensure that the measure reflected the outcome of the assessment. For example, in the case of *Japan – Apples* the Appellate Body found that the prohibition Japan had imposed on the importation of apples far exceeded what was necessary to

[129] Van den Bossche and Zdouc *Law and Policy* 916.
[130] Para 187.
[131] Para 535.
[132] Scott points out at 102-103 that the definition of "risk assessment" in Annex A of the Agreement does not exactly correlate with Articles 5.2 and 5.3. Under Annex A, a risk assessment concerning the spread of pests or disease must always take economic consequences into account. If such a risk assessment were related to human life or health, economic consequences would still have to be considered as a factor. The economic factors in Article 5.3, however, only have to be taken into account if the risk concerns plant or animal life or health. Scott suggests at 104 that Article 5.3 be taken as an expansion on the Annex A definition – if the Annex A definition requires that this particular risk assessment take economic consequences into account, then the factors in Article 5.3 would provide a definitive list of economic consequences that should be considered.
[133] *EC – Hormones* para 193.

prevent the spread of fireblight into its territory.[134] In this way, the risk assessment procedure helped to ensure that Japan could not place a broad restriction on trade for a risk that was not likely to eventuate.

However, the Appellate Body in *US/Canada – Continued Suspension* added to the interpretation of "based on" by stipulating that a measure could be based on a divergent or minority scientific view.[135] In *EC – Hormones* a single divergent scientific study was not seen as sufficient to indicate a divergent scientific view,[136] but the Appellate Body nevertheless also acknowledged that a minority scientific view may be used as the basis for the risk assessment.[137] In *EC – Biotech*[138] the Panel went a step further by indicating that a Member may deviate from the outcomes of the risk assessment even where there is no divergent scientific view, as long as they could show "how and why they assess the risks differently" and later provide an updated risk assessment. From this it appears that the most widely-accepted view of the WTO dispute settlement bodies is that Article 5.1 does not mandate basing a risk assessment on a majority scientific view – it only requires that the assessment be based on a scientific view.

How, then, is the use of a minority or divergent view regulated? The Appellate Body has ruled that it must come from a qualified and respected source, and that the rational link between the risk assessment and the measure must still be shown to exist.[139] It has also stated that "…while the correctness of the views need not have been accepted by the broader scientific community, the views must be considered to be legitimate science according to the standards of the relevant scientific community."[140] In this way, the Appellate Body has qualified the use of divergent

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[134] ABR, *Japan – Measures Affecting the Importation of Apples* WT/DS245/AB/R (26 November 2003) para 209, where the Appellate Body quoted and confirmed the Panel's finding that "Japan has not…properly evaluated the likelihood of entry" according to the possible available SPS measures.
[135] Para 677.
[136] Para 198-200.
[137] Para 194. However, it should be noted that in this paragraph there is an implicit requirement that a risk assessment must set out both the mainstream and divergent scientific views, even if there is an intention to base the measure on the divergent view.
[138] Para 7.3062. This interpretation went further regarding the potential to implement precautionary measures as a means of deviating from a risk assessment – this will be discussed in relation to Article 5.7 and the precautionary principle later in this chapter.
[139] *EC – Hormones* para 194.
[140] *US/Canada – Continued Suspension* para 591.

scientific views. A Member cannot simply present a single scientific paper and base its entire measure on this view that the rest of the scientific community does not share; however, due to the dynamic nature of scientific study Members are permitted to use divergent views that stem from respected sources and have been accepted as legitimate by the relevant scientific field. Gruszczynski interprets the Appellate Body's position as meaning that the divergent view must be based in sound science, as well as being "specific and supported by some evidence".[141] He goes further to criticise the position adopted in *EC – Hormones*, indicating that he believes that the acceptance of a divergent view should be avoided where possible, mostly due to an inability to show true scientific quality.[142]

Wagner,[143] on the other hand, criticises the *EC – Hormones* interpretation as being too restrictive. In *EC – Hormones* the Appellate Body indicated that a divergent scientific view was more likely to be accepted as the basis for an SPS measure where the risk involved was "life-threatening" or "constitute[d] a clear and imminent threat to public health and safety".[144] Wagner believes that this is an unfair restriction on the ability of Members to protect their own territories, and that the fact that one could inquire into the scientific methodologies used to obtain the evidence would be enough to prevent divergent views from being used to create disguised restrictions on trade.[145] He also points out that the *EC – Hormones* case dealt with the carcinogenic potential of hormone-treated meat, which could be viewed as a life-threatening risk, and yet the divergent scientific opinion was not considered acceptable.[146]

Gruszczynski and Wagner's views are a clear example of the tensions present in the SPS Agreement. On the one hand, the Agreement needs to acknowledge the inherent right that Members have to protect their own territory – a right that Wagner appears to believe may be threatened by the *EC – Hormones* findings. On the other hand, the Agreement needs to prevent

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[141] Gruszczynski 2006 *German Law Journal* 388.
[142] Gruszczynski 2006 *German Law Journal* 389.
[143] JM Wagner "The WTO's Interpretation of the SPS Agreement has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk" 31 (2000) *Law & Policy in International Business* 855 at 857.
[144] *EC – Hormones* para 194 as quoted by Wagner 2000 *Law & Policy in International business* 857.
[145] *Ibid.*
[146] *Ibid.*

SPS measures from being used for protectionist purposes or as a disguised restriction on trade – something that Gruszczynski fears may arise if divergent scientific views are allowed as the basis of an SPS measure. Lee *et al.*[147] take a middle road between Gruszczynski and Wagner, stating that allowing Members to use divergent views where the risk is life-threatening or a threat to public health and safety allows "a substantial degree of flexibility", meaning that "the science-based requirements…have not been too strictly or improperly applied."[148] In this way Lee *et al.* have acknowledged that the SPS Agreement cannot cater unequivocally for one position or the other. Instead, it has to strike a balance between the competing needs.

Does this mean that Article 5.1 has achieved the necessary balance and is problem-free? Unfortunately not. It is submitted that Gruszczynski is correct, and that allowing divergent scientific views to be used when performing risk assessments will create the possibility of disguised restrictions on trade arising.

To use an example, the Codex Alimentarius[149] standards state that the amount of aspartame in dried fruit should not exceed 2 000mg/kg.[150] Aspartame is an artificial sweetener that is often used by diabetics and persons looking to lose weight.[151] The majority of scientific studies show that consumption of aspartame is not harmful to health, with the exception of persons suffering from a disease known as phenylketonuria.[152] However, aspartame is a hugely controversial additive and some studies indicate that it could have harmful effects such as neurodegeneration.[153] There is clearly scientific uncertainty on this topic: some respected sources such as the FDA state that aspartame is not harmful for human consumption, while

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[147] ES Lee *et al.* "Scientific Principle under the SPS Agreement" 3 (2011) *IEPDR* 148.
[148] Lee *et al.* 2011 *IEPDR* 153.
[149] The *Codex Alimentarius* is mentioned in Annex A 2(a) of the SPS Agreement as an acknowledged organisation for providing international standards, guidelines and recommendations on food safety.
[150] Unknown "Aspartame (951)" (2014) *GSFA Online* http://www.codexalimentarius.net/gsfaonline/additives/details.html?id=90 (accessed 18 February 2015).
[151] Unknown *Aspartame Information Centre* http://www.aspartame.org/ (accessed 18 February 2015).
[152] Unknown "Aspartame" (2014) *American Cancer Society* http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/aspartame (accessed 18 February 2015); see also Unknown "Expert Opinions" *Aspartame Information Centre* http://www.aspartame.org/expert-opinions/ (accessed 18 February 2015).
[153] K Rycerz *et al*. "Effects of aspartame metabolites on astrocytes and neurons" (2013) *Folia Neuropathologica* 10 at 16.

others such as the *Folia Neuropathologica* indicate that it is. The two options are mutually exclusive, and neither has been proven. In terms of Article 5.1, a Member could base its risk assessment on either scientific opinion.[154] This grants importing Members excessive power as the Member may essentially decide whether or not it wishes to import a certain aspartame-containing product, and then justify its measure based on either scientific opinion. The scientific evidence would not be used to determine which measure is best; it would merely be used to justify a measure that a Member already intended to impose. In the aspartame example, a Member could choose to prohibit the importation of any products containing high amounts of aspartame in dried fruit, and support it with a risk assessment based on Rycerz's study on the negative effects of aspartame on neural activity.[155] Alternatively, it could allow the importation of all aspartame-containing products on the basis of the American Cancer Association's research, which states that aspartame is safe for consumption by any persons who do not suffer from phenylketonuria.[156] The two scientific opinions are mutually exclusive, and yet a measure could be based on either.

The example above demonstrates two different but related problems that arise from the *EC – Hormones* principles. Firstly – and most obviously – it shows the possibility of disguised restrictions on trade arising. Where there is scientific uncertainty on the existence of a particular risk, a Member could choose whether it wants to prohibit or allow the importation of the related product and then base its risk assessment on the corresponding scientific view. To use the aspartame example, we can imagine a country that produces large amounts of sugar. Over time its citizens become more health conscious and start using aspartame-based sweeteners instead of sugar, and so the sale of sugar goes down. The country decides that, in order to increase sugar sales, it has to limit the availability of sweeteners. It therefore decides to impose an SPS measure that prohibits the import of sweeteners, and bases this prohibition on the divergent scientific view that aspartame contributes to neurodegeneration. The measure is not actually based on the

[154] Note that Article 3.3 of the SPS Agreement may allow a Member to deviate from the standard set by the *Codex Alimentarius* as there appears to be scientific justification for imposing a higher standard of protection in this example.
[155] See footnote 153.
[156] See footnote 152.

risk assessment; rather, the divergent scientific view is used in the risk assessment to support a prohibition that the country intended to impose for an ulterior purpose. Although the SPS Agreement requirements have been *prima facie* complied with, an SPS measure is nevertheless being used specifically to restrict international trade and to protect domestic production.[157]

One could argue that the SPS Agreement provides for such a situation. In Article 2.3 it is stated that "[s]anitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade". The actions outlined above – of using a divergent scientific view to justify a prohibition on imports to protect domestic production – would be prohibited by Article 2.3. But how would one prove this? The wording of Article 2.3 could be interpreted in two ways. Firstly, the use of the phrase "shall not be *applied*"(emphasis added) and "which would constitute" could indicate that any measure which has the effect of creating a restriction on trade that is desirable or advantageous to the importing country would be prohibited. It is submitted that such an interpretation is unlikely to be accepted by Panels or the Appellate Body. The reason for this submission is that such an interpretation would mean that genuinely applied measures which happen to create an advantage for the importing or imposing Member would be prohibited for appearing to be disguised restrictions on trade, even if they achieved the desired level of protection from the particular risk. This would drastically limit a Member's right to impose SPS measures for the protection of their territory.

The alternative interpretation would be that the complaining country would have to prove that the measure is intended as a disguised restriction on trade. One interpretation given by a Panel was that, in order to prove the existence of a disguised restriction on trade, one would have to show that the restriction has a disguised ulterior purpose or that it looks to further some hidden objective.[158] Under this interpretation a complaining Member would have to prove that the

[157] It should be noted here that this example is not intended to imply that all importing countries will or do use the SPS Agreement as a means of imposing protectionist measures or measures that are a disguised restriction on trade. Instead, it indicates that there is a loophole in the SPS Agreement and that Article 5.1 allows for the possibility of such a situation arising.

[158] PR, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/R (18 September 2000) para 8.236. This report considered the definition of a disguised restriction on trade in terms of Article XX of the GATT, rather than in terms of the SPS Agreement. However, given that the terms used are identical and that the definition given by the Panel speaks to the ordinary textual interpretation of "disguised

measure was imposed with the intention of adding to or furthering an objective beyond protection against the particular risk. This would prevent the heavy restriction on a Member's right to protect its territory, while still theoretically protecting against disguised restrictions on trade. This interpretation would also speak to an ordinary textual interpretation of the phrase "disguised restriction on trade".

Assuming that the second interpretation is followed, Article 2.3 would allow a complaining Member to prove that a measure based on a divergent scientific opinion is actually a disguised restriction on trade, thus preventing the possibility of protectionism. Article 2.3 thus appears to overcome the problems created by the *EC – Hormones* principles. So where is the problem?

The problem will arise where the complaining country is an exporting developing country. As discussed in Chapter I, developing countries are often exporters of primary agricultural products and so are likely to be affected by an SPS Agreement provision that grants excessive power to an importing country. Article 5.1 could allow an importing country to place a prohibition on a particular type of product and then support the prohibition with a risk assessment based on one of two mutually-exclusive scientific opinions.[159] This creates the possibility of divergent scientific views being used to support measures that are actually imposed as disguised restrictions on trade. If an importing country imposed such a measure that prohibited the import of products exported by a developing country, that developing country could theoretically approach a dispute settlement body to allege a violation of Article 2.3 of the SPS Agreement. The developing country would then have to prove that the importing country imposed the measure with the subjective intention of furthering an ulterior objective – such as protecting domestic production and sale of domestically-produced products – *despite* the fact that the importing country has a scientifically-based risk assessment to support its measure.

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restriction on trade", it is submitted that the same interpretation can be applied to Article 2.3 of the SPS Agreement.

[159] To use the example above, the scientific opinions on the safety of human consumption of aspartame are mutually exclusive. One opinion says it is unsafe for human consumption. The other says it is safe for human consumption. Aspartame cannot be simultaneously safe *and* unsafe for human consumption, hence the opinions are mutually exclusive.

As discussed in Chapter I, developing countries frequently lack economic and social resources. Notwithstanding the costs involved in bringing the matter to a dispute settlement body, the developing country would have to prove that a measure supported by science was actually imposed for an ulterior purpose. This is a very heavy burden to prove, particularly considering the subjective element, and may simply become a case of "he said, she said". The developing country could indicate that the measure is having the effect of creating a barrier to trade or creating an advantage for the importing country in some way, but as shown above such an interpretation of Article 2.3 could constitute a violation of a Member's right to impose SPS measures based on divergent scientific views. Because of this, it is unlikely that simply showing such an effect would be sufficient to discharge the burden of proof. With their limited financial and social resources, developing countries would struggle to prove that a measure had been put in place for an ulterior purpose. In this way, it would be not only possible but fairly easy for an importing country to impose an SPS measure based on a divergent scientific view but imposed for an ulterior protectionist purpose.

The second problem that arises from the *EC – Hormones* principles[160] is a form of legal uncertainty. If Members were required to always base their measures on the majority scientific view, or even to always base their measures on international standards,[161] it would make it easier for an exporting Member to determine whether its products are likely to be accepted into the importing country. For example, if a country were exporting aspartame-based sweeteners it could easily determine what the majority of the scientific community believes about the safety of human consumption of aspartame. If the majority scientific view was that aspartame was safe for human consumption, the exporting country would know that its products are likely to be accepted. If the majority view was that aspartame consumption was unsafe, the exporting Member would know that its products were unlikely to be accepted and could avoid the unnecessary costs of packaging and transporting its products only to be stopped at the border of the importing country.

[160] These principles being that Members are allowed to base their SPS measures on a divergent scientific view.
[161] International standards and harmonization will be dealt with in more detail in the next chapter.

In other words, the legal uncertainty created by allowing importing Members to base their SPS measures on divergent scientific views may lead to exporting countries facing an extra layer of costs – costs that many net agricultural exporting countries would struggle to meet. This may lead to such countries being unable to expand their international trading positions, and thus will limit their participation in international markets. Gebrehiwet *et al*. note that border rejection of developing country products by developed countries is relatively high,[162] and list factors that could contribute to wasted costs. These factors include transport costs and loss of product value.[163] Gebrehiwet *et al.* also make reference to several other sources which indicate that SPS measures are the primary obstacle to international trade in agricultural goods.[164]

So although Article 5.1 requires that a Member wishing to impose or maintain an SPS measure must base it on a scientific risk assessment, this does not necessarily prevent Members from using SPS measures for protectionist purposes. The inclusion of divergent scientific views as a valid basis for a risk assessment in the *EC – Hormones* dispute grants importing Members a very broad power, and – despite the inclusion of Article 2.3 as an attempt to protect against disguised restrictions on trade – may make it significantly more difficult for developing countries to enter into and remain in the international trading markets as exporters.

### 2.2.2. Article 5.4

Like Article 5.1, Article 5.4 is relatively short and yet packed with potential consequences. Article 5.4 states:

> "Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects."

Unlike Article 5.1, Article 5.4 refers to the appropriate level of protection rather than to the SPS measure. Once a risk has been defined, it is up to the Member to decide on the level of protection that it deems appropriate for the situation.[165] In this way, the Member's appropriate level of

[162] Y Gebrehiwet *et al* "Quantifying the Trade Effect of Sanitary and Phytosanitary Regulations of OECD Countries on South African Food Exports" 46 (2007) *Agrekon* 23 at 27.
[163] *Ibid*.
[164] *Ibid*.
[165] Van den Bossche and Zdouc *Law and Policy* 921.

protection can be seen as the ultimate goal that the Member wishes to achieve, while the SPS measure to be imposed is the instrument that the Member uses to achieve that goal. The SPS measure is therefore usually expected to achieve the Member's appropriate level of protection in some manner.

According to the definition in Annex A(5) of the SPS Agreement, an appropriate level of protection is a level of protection "deemed appropriate by the Member" for protection against SPS-related risks. This emphasises the fact that the Member has a broad power when it comes to setting an appropriate level of protection – it is up to the Member to decide what is appropriate under the circumstances. In the Appellate Body report on *Australia – Salmon* the Appellate Body interpreted the SPS Agreement as including an explicit obligation on Members to determine their own level of protection.[166] Thus if a Member intends to impose an SPS measure, it must first determine a level of protection that can be described in sufficiently clear terms.[167] The Panel in the *Australia – Salmon* matter also indicated that a Member need not perform a risk assessment when setting their appropriate level of protection.[168] From this we can see just how broad the importing Member's power is. Although the Member is obliged to set their appropriate level of protection, they can set any level that they deem appropriate and they do not have to base their level on a scientific risk assessment.[169]

However, the SPS Agreement does attempt to qualify this power by imposing certain conditions through various provisions, and Article 5.4 is one of these. As shown above, Article 5.4 simply

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[166] Para 206.

[167] In *Australia – Salmon* at para 203 the Appellate Body indicated that the determination of an appropriate level of protection would 'logically precede' the creation and imposition of an SPS measure. The Appellate Body also stipulated at para 206 that, although the level of protection need not be described quantitatively, it may not be vague or unclear.

[168] PR, *Australia – Measures Affecting Importation of Salmon* WT/DS18/R (12 June 1998) para 8.125.

[169] It should be noted here that, although a Member is obliged to set its own appropriate level of protection, a dispute settlement body is not automatically expected to accept the appropriate level of protection that a Member claims it has set. As discussed in PR, *Russian Federation – Measures on the Importation of Live Pigs, Pork and other Pig Products from the European Union* WT/DS475/R (19 August 2016) at para 7.739, a dispute settlement body is expected to determine the Member's level of protection by weighing up the available evidence. In this particular matter, the Panel examined Russia's various measures as well as the prevalence of the relevant disease in Russian territory before coming to the conclusion that Russia's appropriate level of protection under the circumstances was a "high or conservative" one (*Russia – Pigs* para 7.752).

requires a Member to take into account the objective of minimising negative trade effects when setting its appropriate level of protection. This provision is one that does not *appear* to negatively affect developing countries; if anything, it should work in their favour by requiring importing Members to consider the potential trade effects before setting a level of protection. But what is Article 5.4 really asking Members to do?

Firstly, it uses the term "should". Unlike "must" or "shall", "should" gives the provision a exhortatory tone rather than an obligatory one. When we say that a person *should* get to the office on time or that a person *should* eat more healthy food, the implication is that it would be a preferable course of action but it is not mandatory. Similarly, Article 5.4 indicates that it would be preferable if Members took the given objective into account, but that it is not strictly necessary. This already takes away from the protection it may have afforded exporting – particularly developing – countries. If Members are not strictly required to consider the potential negative trade effects of their levels of protection, then is there any reason for them to do so beyond altruism?

Secondly, Article 5.4 uses the term "take into account". What does this mean? The Panel in *EC – Hormones* ruled that the term "take into account" did not confer any obligation on the importing Member.[170] This implies that, although the Member should consider the implications that its level of protection may have on international trade, this consideration does not have to reflect in the final chosen level. The Panel did, however, acknowledge that the potential negative trade effects should certainly be taken into account.[171] If we put these two interpretations together, it appears that an importing Member looking to set its appropriate level of protection *should* consider the potential negative trade effects of the level, but does not have to ensure that this consideration be reflected in the final level that it chooses to impose.

This interpretation clearly takes away from the protection that Article 5.4 is meant to provide. The wording of Article 5.4 implies that its purpose is to prevent overly trade restrictive levels of protection from being set by importing countries. However, the fact that the provision is

[170] PR, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/R/USA (18 August 1997) para 8.166.
[171] *Ibid*.

exhortatory rather than mandatory, and that the consideration (if performed) does not have to reflect at all in the final level, means that a Member could easily bypass this provision without violating the Agreement. A Member could impose an excessively high level of protection that it deems appropriate. It could then assert – or even show – that it had taken the potential negative trade effects into account, but found other factors that weighed more heavily than the potential trade effects. This would be enough to fulfil any potential obligation in terms of Article 5.4 while still allowing the Member to impose a very high – and very trade-restrictive – appropriate level of protection. As with Article 5.1, this would allow SPS measures to be used for protectionist purposes. A Member wishing to protect the domestic production of a particular agricultural product could impose an excessively high appropriate level of protection to a risk affecting this product. The Member would then be permitted to impose strict SPS measures, as the measures should achieve the level of protection that the Member has deemed appropriate. Exporting countries – particularly developing countries with their limited financial and scientific resources – would then be unlikely to be able to comply with these strict SPS measures. This could lead to less imports coming into the Member's territory, and thus more sales of domestically-produced products on their market at the expense of imported products.

It should be noted here that this submission is not intended to imply that *all* importing countries would leap at the opportunity to squeeze other countries out of the international market. Rather, it is intended to show that Article 5.4 (and other provisions to be discussed) have loopholes that could potentially be exploited by importing countries as a way of providing protection to domestic production at the expense of imported products. Such exploitative practices could potentially lead to exporting countries finding it difficult to export their products. For exporting developing countries, whose industries are often largely centred around the export of their primary agricultural products, these exploitative practices could be hugely detrimental to the development of their economies. And, as mentioned in Chapter I, the ideal behind the term "*developing* countries" is that they are in the process of transforming into *developed* countries. Exploitative practices such as those that appear to be possible under Article 5.4 could prevent or hinder this transformation process.

In summary, the wording of Article 5.4 does not only render it optional, but also does not stipulate that the consideration of the potential negative trade effects must reflect in the final chosen level of protection. This interpretation allows for the possibility of importing Members imposing excessively high levels of protection for the purpose of protectionism, but still fulfilling the requirements of Article 5.4. Developing exporting countries may find it difficult to comply with these high levels, and as a result may find it difficult to participate and expand in international markets.

### 2.2.3. Article 5.5

Like Article 5.4, Article 5.5 deals with the Member's appropriate level of protection rather than with the SPS measures imposed by the Member. Article 5.5 has two main objectives:

1. To encourage consistency in the levels of protection imposed by Members; and
2. To prevent Members from using different levels of protection in different situations as a cover for disguised restrictions on trade.

The idea behind Article 5.5 is that Members should use the same level of protection in comparable or similar situations, and are entitled to use differing levels of protection where the situation is significantly different and so calls for a different approach. In *EC – Hormones* the Appellate Body acknowledged that to expect complete consistency amongst the levels of protection applied by a Member was not only impractical but also highly unlikely.[172] Therefore the purpose of Article 5.5 is not to mandate complete consistency, but to encourage it where possible.

The Appellate Body in *EC – Hormones*[173] put forward a three-tier test that was later used in the *Australia – Salmon*[174] dispute as well. For the purposes of this section we will not need to go beyond the first tier of the test, for reasons that will soon become apparent.

The first tier of the test is to ask whether the Member in question had imposed different levels of protection in different situations. In *EC – Hormones* the Appellate Body stated that the

[172] Para 213.
[173] Para 214.
[174] Para 140

situations must be different but "comparable", as it would not be possible to determine the existence of arbitrariness if one were comparing situations that have nothing in common.[175] Van den Bossche and Zdouc give a couple of examples of situations that may be viewed as "comparable", such as where the same economic or biological consequences could result from the situation in question.[176] The SPS Committee also suggested that, when considering whether a situation is comparable, both the likelihood and the magnitude of the risk in question should be compared and contrasted.[177]

This first tier of the test is already problematic for exporting countries. As indicated, Article 5.5 will only apply to the levels of protection a Member applies to differing but comparable situations. But what if a Member chooses to impose an excessively high appropriate level of protection to all situations? As mentioned previously, the definition of an appropriate level of protection in the SPS Agreement is one that the Member in question considers to be appropriate. No risk assessment is required – the importing Member may deem it appropriate to protect its territory from all levels and types of risks equally. This would also speak to the objective of achieving consistency in levels of protection, as required by Article 5.5. Not only would the level of protection be consistent between similar risks; it will be consistent across all risks. As the chosen level of protection will not differ between situations, Article 5.5 will not apply and one would not be able to challenge the arbitrariness of the level based on the three-tier test.

The use of a single level of protection for all situations appears to be indirectly supported by the SPS Committee. In its report on the practical application of Article 5.5 it indicated that Members should identify where lowered exceptions to the usual level of protection are allowed.[178] This seems to imply that a situation to which a Member applies a different level of protection is an exception to the rule, and should be treated as such. Therefore, all other situations should receive the same level of protection.

[175] Para 216.
[176] Van den Bossche and Zdouc *Law and Policy* 922.
[177] SPS Committee G/SPS/15 para A4.
[178] SPS Committee G/SPS/15 para A8.

The SPS Committee also stated that Members are not required to harmonize their level of protection with the level of protection imposed by other Members, although considering the level of protection of other Members in similar situations may prove useful.[179] This speaks to the Member's right to determine its own level of protection – a right that is relatively unconstrained, despite provisions such as Articles 5.4 and 5.5 which purport to constrain it.

Where does this leave exporting countries? If an importing country is able to set and apply excessively high levels of protection to all SPS risk-related situations, it will also be able to set highly stringent and restrictive SPS measures. Exporting countries, especially those with developing status, may struggle to abide by such measures. One could argue that it is the importing Member's prerogative to decide how it wants to protect its territory, and such an assertion is not disputed here. However, permitting Members to set such high levels of protection without requiring some kind of justification or scientific support could open the door to such levels of protection being used as a cover for protectionist practices. A Member could easily set a high level of protection without challenge, and then use it to support the imposition of strict SPS measures. Such measures would severely curtail exports being brought into the Member's territory, and so the domestic market would have fewer exported products to compete with.[180]

### 2.2.4. Article 5.6

Unlike Articles 5.4 and 5.5, Article 5.6 deals with the SPS measure to be imposed rather than with the appropriate level of protection. Like Articles 5.4 and 5.5, it purports to impose a qualification. Article 5.6 requires that Members ensure that their SPS measures are not more trade restrictive than necessary, taking into account economic and technical feasibility. *Prima facie* it appears to support developing countries – a less restrictive measure means that developing exporters are more likely to be able to enter into and maintain a presence in the international markets. But as

[179] SPS Committee G/SPS/15 para A6.

[180] This problem is very similar to the one faced by Article 5.4. Both Articles 5.4 and 5.5 deal with the setting of appropriate levels of protection by Members, and both allegedly create some kind of qualification or condition applicable to the procedure. However, due to the vague phrasing of the provisions and the interpretations given by the Appellate Body, both fail to adequately impose qualifications on a Member's right to determine its level of protection. As a result, both ultimately lead to the same problematic consequences.

with many of the provisions of the SPS Agreement, Article 5.6 does not necessarily achieve its desired goal.

A footnote in the SPS Agreement defines what it means for a measure to be less trade restrictive. In the *Australia – Salmon* dispute the Appellate Body confirmed the three tier test that the Panel developed from this footnote.[181] Firstly, there must a reasonably available alternative measure. Secondly, the alternative measure must achieve the Member's appropriate level of protection. Thirdly, the alternative measure must be less trade restrictive than the measure proposed by the Member. While the third step speaks to the objective of preventing trade restriction where possible, the first two steps may prove problematic.

The first step requires the existence of a reasonably available alternative measure. Van den Bossche and Zdouc state that the duty of proving the existence of a feasible and reasonably available alternative measure falls on the complainant in the matter.[182] This means that the onus is on the complainant to prove: a) that the measure exists as an alternative to the proposed measure; b) that the measure is reasonably available; c) that the measure is economically feasible; and d) that the measure is technically feasible. This already appears to be a heavy burden, as the complainant is required to prove many elements that depend on facts about the territory and infrastructure of the Member imposing the measure. The complainant would therefore need to access information about the Member imposing the measure. Does the imposing Member have the financial resources to impose the alternative measure? Does it have the technical resources? Does it have a means of enforcing the alternative measure? And so on.

Of course the complainant could request that the Member imposing the measure provide the necessary information to help speed up the dispute settlement process. However, the Member imposing the measure could simply refuse. There does not appear to be any obligation in the SPS Agreement to assist a Member who is bringing a complaint against oneself. The Member

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[181] Para 194.

[182] Van den Bossche and Zdouc *Law and Policy* 924. Van den Bossche and Zdouc indicate in footnote 136 that this view was developed from the Appellate Body's statements in ABR, *Japan – Measures Affecting Agricultural Products* WT/DS76/AB/R (22 February 1999) at para 124-125. The Appellate Body clearly stated in para 125 that the United States as the complaining party was expected to show that the alternative measure met the requirements of Article 5.6.

imposing the measure would not gain anything from assisting the complainant, and the international relations between the two Members are likely to be strained.[183] If the Member imposing the measure therefore refuses to provide the requested information, it will fall to the complainant to investigate or research the imposing Member's current situation. Such an investigation would require significant financial and social resources;[184] the complainant would have to present substantial information to prove that the alternative measure is feasible. If the complainant were a developing country, investigating and eventually providing such information would be highly difficult if not impossible. This provision thus allows for the possibility of an importing Member imposing a measure that would severely curtail a developing exporter's participation in the international market, and the developing exporter being unable to prove the violation of Article 5.6 during dispute settlement proceedings.

The second step of the test in *Australia – Salmon* is proving that the alternative measure meets the imposing Member's appropriate level of protection. In the *Australia – Apples*[185] dispute the Appellate Body stated that the alternative measure can either meet *or* exceed the imposing Member's appropriate level of protection; the implication from this is that only a measure which falls below this level would fail the second step of the test. However, this step then sets the Member's appropriate level of protection as the standard against which potential measures are tested. As shown above, there are very few qualifications attached to a Member's determination of its appropriate level of protection; therefore, a Member would easily be able to set a high level of protection without challenge. By requiring that the measure meets the Member's level of protection, Article 5.6 is acknowledging the Member's right to determine its own protection for its territory whilst also allowing a Member to impose a highly trade restrictive measure provided that there are no less trade restrictive alternatives to achieve that high level of protection. As long as a Member has imposed a high level of protection the measure is likely to be trade

[183] This assertion is based on the assumption that the dispute settlement in question is not friendly or that the Member imposing the measure is not open or responsive to changing its proposed measure to an alternative.
[184] In Legal Affairs Division, World Trade Organisation "Agreement on the Application of Sanitary and Phytosanitary Measures" in *WTO Analytical Index* 3 ed (2012) 1 at para 260 it is stated that the complainant would have to use scientific evidence to support its assertions under Article 5.6. A risk assessment is not required, but some form of supporting scientific evidence would be necessary.
[185] ABR, *Australia – Measures Affecting the Importation of Apples from New Zealand* WT/DS367/AB/R (29 November 2010) para 344.

restrictive. Even if the least trade restrictive measure is chosen, a high level of protection is still likely to result in measures that impose stringent standards or severe importation restrictions.

In *Australia – Salmon* the Appellate Body stated that a Member could set its appropriate level of protection at 'zero risk'.[186] This allows a Member to set a very high level of protection indeed. Its SPS measures would therefore have to be formed in such a way that they ensured any ascertainable risk was reduced to zero. Although it would be possible to impose SPS measures that were more or less trade restrictive, achieving a zero risk level of protection would nevertheless require quite high standards or severe restrictions on trade. For example, a Member exporting beef to a zero risk importer may have to subject its beef products to various processes and tests in order to ensure that the bovine spongiform encephalopathy pathogen is not present in the meat.[187] There may be various ways in which the exporting Member could do this, but the high standard of the importing Member would place a heavy financial burden on the exporting Member. Even though the least trade restrictive measure is used, the high level of protection would make it difficult for developing exporters to export their goods – the same problem seen in Articles 5.4 and 5.5 above.

### 2.2.5. Article 5.7

Article 5.7 can be seen as way of directly including the precautionary principle in the text of the SPS Agreement. The precautionary principle, according to Van den Bossche and Zdouc, is "when governments act with precaution without waiting for the collection of sufficient scientific information to assess the risks conclusively".[188] In other words, the precautionary principle allows for situations where the risk has not been conclusively proven or disproved. Governments are allowed to put measures in place to protect their territories as a means of precaution or 'just in

[186] Para 125. Note that this is not the same as 'zero risk' in terms of risk assessments. The Appellate Body made a point of stating that, in order to perform a risk assessment, there must be an ascertainable risk. However, a Member may choose to set its appropriate level of protection at 'zero risk', meaning that a high level of protection will be put in place to ensure that the ascertainable risk does not eventuate.

[187] For the purposes of this example, we can assume that bovine spongiform encephalopathy has been documented in the exporting Member's territory.

[188] Van den Bossche and Zdouc *Law and Policy* 926.

case'. In a similar vein Article 5.7 allows a Member to impose a temporary SPS measure where there is insufficient scientific evidence for an objective risk assessment.

What does this mean? It means that a Member may impose a temporary measure to protect its territory where there is not enough information to objectively prove whether or not the risk is worth protecting the territory against. The Appellate Body stated in the *Japan – Apples* dispute that the purpose of Article 5.7 was to provide for a situation where there was little or no scientific evidence available about a particular risk.[189] In such a situation, a Member could act proactively by imposing a temporary measure to protect its territory so that, in the event that the risk does eventuate, the Member does not suffer significant harm. Van den Bossche and Zdouc also point out that the existence of a relevant international standard does not necessarily mean that there is sufficient scientific evidence.[190] This is supported by Scott, who points out that "[t]he body of available scientific knowledge will be continuously altered or augmented in the light of the latest research findings".[191] The dynamic nature of science means that our scientific understanding of the world is constantly shifting and changing as we find new ways to research, discover new pathogens, and disprove what we previously believed to be true. Because of this dynamic state, international standards may reflect older scientific beliefs and so may not always truly reflect the risks that a Member faces. Therefore, although a complainant may present an international standard to support an assertion that there is sufficient scientific evidence, the existence of such a standard will not be conclusive proof in and of itself.

In the *Japan – Agricultural Products II* dispute the Appellate Body set out a cumulative four part test for determining compliance with the requirements of Article 5.7.[192] The four elements are:

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[189] ABR, *Japan – Measures Affecting the Importation of Apples* WT/DS245/AB/R (November 26, 2003) para 184. Note here that in this matter the Appellate Body distinguished between scientific uncertainty (as discussed in terms of Article 5.1) and an insufficiency of scientific evidence. Scientific uncertainty refers to a situation where the scientific community have differing opinions about the risk (such as whether the consumption of aspartame is harmful to humans). An insufficiency of scientific evidence is where there is not enough information available for a Member to perform an objective risk assessment.

[190] Van den Bossche and Zdouc *Law and Policy* 928-929.

[191] Scott *A commentary* 123.

[192] Para 89. See also *Russia – Pigs* at para 7.632, where the Panel also pointed out that the first of these four elements "triggers" the applicability of Article 5.7. In other words, Article 5.7 only becomes applicable where there is insufficient relevant scientific evidence.

1. There must be insufficient relevant scientific evidence;
2. The proposed measure must be based on the available pertinent information;
3. The Member cannot maintain the measure without seeking further relevant information; and
4. The measure must be reviewed within a reasonable time.

From these elements it appears clear that the measure is intended to be a temporary one, and that the Member imposing the measure is expected to continue to seek relevant information so that a proper objective risk assessment can be performed as soon as possible. However, two potential problems arise from these elements.

Firstly, in the *EC – Biotech* dispute the Panel viewed Article 5.7 as a qualified right rather than as an exception from the Article 2.2 obligations.[193] The Panel went on to explain that the implication from this is that the burden of proving a violation of Article 5.7 falls on the complainant in the matter.[194] As with the previous provisions, this places a heavy burden on the complaining Member. For example, the Member imposing the precautionary measure may actively seek further information to support the measure but at a leisurely pace. The complainant would have to prove that one of the elements outlined above has not been fulfilled, and as such it could allege that the Member imposing the measure is not actively seeking the information necessary to maintain the measure. The Member imposing the measure could then show that it had taken steps to undertake the necessary research, but that it was facing problems finding the information or some such similar claim. Such a claim would account for the delay. In this way the Member imposing the precautionary measure is technically in compliance with the requirements of Article 5.7 while being able to maintain a potentially unjustifiably trade restrictive measure against a risk that may never actually materialise. As with previous positions, this opens up the possibility of protectionist practices.

Secondly, the final element of the test states that the measure must be reviewed within a reasonable period of time. In *Japan – Agricultural Products II* the Appellate Body stated that there

[193] Para 7.2976.
[194] *Ibid*.

was no set 'reasonable period'; what could be considered reasonable would depend on the situation in question.[195] Van den Bossche and Zdouc give examples of factors that may be taken into account in determining whether the period is reasonable or not, including the characteristics of the measure and the difficulties in acquiring further information.[196] Further, in *Russia – Pigs* the Panel stated that where a Member's own actions led to continuous delays in acquiring further information, the resultant extended time period would not be considered reasonable.[197] While one can understand the reasoning behind this,[198] the fact that there is no set way of determining what constitutes a 'reasonable' period leaves the procedure open to abuse. Even a minor standard, such as stipulating an average time period that would be considered reasonable for a newly discovered risk, would provide some sort of basis on which to make such determinations. As it stands, a Member could potentially keep a precautionary measure in place for years whilst slowly researching the risk involved. If the precautionary measure is a particularly trade restrictive one, exporters who are affected by the measure would have to go through years of economic disadvantage, particularly if they are financially and socially unable to comply with the measure's requirements. And this would be done in the name of a risk that may never actually eventuate.

### 2.2.6. Concluding remarks on Article 5 critical analysis

Two main conclusions can be drawn from the above analysis of the Article 5 provisions.

Firstly, the provisions have been worded in such a way as to ensure that state sovereignty is infringed as minimally as possible. The provisions are largely drafted in broad language, creating quite wide parameters within which Members can implement their own laws and policies as a means of compliance. For example, Members are implicitly required to set their own

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[195] Para 93.

[196] Van den Bossche and Zdouc *Law and Policy* 931.

[197] Para 7.1186. Here the Panel found that Russia had made "excessive information requests", which had led to delays in acquiring the information. The delays had extended the time period within which Russia could have acquired the necessary additional information for a proper risk assessment, and so the resultant time period was considered to be unreasonable (see para 7.1187).

[198] The reasoning behind this would presumably be that no two situations can be treated alike. The concept of an insufficiency of scientific evidence would not be a static point, but rather a spectrum ranging from no evidence at all (such as where a new pathogen is discovered) to just below there being sufficient evidence for an objective risk assessment. Therefore these situations could not be treated alike, as the amount of research to be done, the amount known about the risk and the potential harm will differ greatly from one situation to the next.

ascertainable appropriate level of protection, but there is no true limit on what level of protection a Member may choose to set.[199] Another example would be that the Agreement requires Members to base their risk assessments on scientific data, but allows such scientific data to exclude international standards and include minority or divergent scientific opinions as the Member deems reasonable or appropriate.[200] There is a strong emphasis on allowing the Member itself to determine what is reasonable or appropriate according to the circumstances it is facing.

Secondly, and more pertinently for current purposes, the emphasis on state sovereignty leaves the Agreement open to being interpreted in such a way as to allow for protectionist practices. It has the potential to restrict or hinder developing exporters from trading their products in the international market by permitting importers to set measures and levels of protection that developing countries are simply unable to comply with. The lack of financial, social and even academic resources in developing countries may lead to them being slowly – and even unintentionally – edged out of international markets. Due to the fact that many developing countries rely heavily on their agricultural industries and the related export markets for income, their exclusion from international markets due to non-compliance with SPS measures may have devastating effects on their economies.

However, so far this analysis has been purely theoretical, and the suggested potential problems are based simply on interpretation of the provisions of Article 5. The question then arises: are the provisions of Article 5 of the Agreement *actually* causing negative financial effects on the economies of developing countries?

### 2.3. Are these theoretical problems actually occurring?

It is one thing to claim that potential problems are present in the SPS Agreement, but in order for this analysis to have purpose it should be shown that these problems go beyond mere potentiality. This is not to say that the given problems should *all* be present in the exact form(s) discussed above, but rather that evidence should exist to show that risk assessments and Article

[199] See section 2.2.2 above.
[200] See section 2.2.1 above. International standards and harmonization are discussed in more detail in the following chapter.

5 of the Agreement are indeed causing restrictions on developing countries and their participation in international trade.[201]

A case study may be performed to determine:

a) Whether the exported products of developing countries are being rejected by importers due to non-compliance with the importers' SPS measures and levels of protection; and
b) Whether developing countries themselves have identified problems that they are experiencing regarding compliance with the SPS measures and levels of protection of importers

In this way, it will be shown that developing countries are indeed struggling to participate in international markets as a result of importers exercising their rights and obligations under Article 5 of the Agreement. For the purpose of this case study, the focus with regard to developing exporters will be on South Africa and other developing African countries. I have chosen an African focus as many African countries are largely involved in agriculture, and many export their agricultural produce as a means of bringing money into their countries. It was necessary to limit the scope of the case study as approximately 100 of the WTO Member states are classified as developing countries – attempting to analyse the exports of all of these countries would far exceed the scope of this chapter.[202]

In order to determine whether the developing countries are experiencing difficulties as a result of Article 5 provisions, it is necessary to include an importing country in this analysis. I have

[201] The reason for this statement is that the problems outlined in this chapter so far are intended as an extensive discussion on the *potential* problems that may arise from the wording and current interpretations of the Article 5 provisions. It would be incorrect to state that the analysis would be rendered redundant if these problems are not *all* present in practice. However, the analysis would also be rendered redundant if it appeared that developing countries were not being hindered in any way by the Article 5 provisions, as this would indicate that the potential problems or loopholes that have been outlined are not actually creating a negative effect at all. By presenting evidence to show that developing countries are experiencing negative trade effects as a result of the Article 5 provisions, the case study will give weight to the idea that the provisions of Article 5 can be and are problematic beyond a mere theoretical position.

[202] According to Unknown "Understanding the WTO: Developing Countries https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (accessed 9 December 2015), approximately two-thirds of its 150 Member states are classified as developing countries.

chosen to focus on the United States of America (USA) for this case study. The USA has been one of the leading importers of food products for many years, and has been ranked by the WTO as the second-highest food importing country in the world in 2011, 2013 and 2014, with a brief position as the third-highest food importing country in 2012.[203] As the USA imports such a large volume of food products, it should provide sufficient data for the purposes of this case study.

2.3.1. Are African products being detained/rejected at the borders of importing countries?

The first question to be answered is whether the exports of developing countries are indeed being rejected by importing countries – for the purpose of this case study, the question is whether the exports of developing African countries are being rejected by the US. I have chosen to include five countries in total in an attempt to cover north, east, south and west Africa. These five countries are South Africa, Ghana, Ethiopia and Kenya,[204] and Egypt.[205] All five of these countries export agricultural products to the US, as shown in Table 1 (below).

*Table 1: Monetary value of agricultural exports to the US from 2012-2014 (^$1000)* [206]

| **Country** | **2012** | **2013** | **2014** |
|---|---|---|---|
| Egypt | No data | 92 000 | No data |
| Ethiopia | 98 941 | 106 300 | 96 752* |
| Ghana | 190 516 | 198 185 | 184 360* |

[203] "II. Merchandise Trade" in H Escaith and A Maurer (eds) *International Trade Statistics 2015* (2015) 81; "II. Merchandise Trade" in H Escaith and A Maurer (eds) *International Trade Statistics 2014* (2014) 71; "II. Merchandise Trade" in H Escaith and A Maurer (eds) *International Trade Statistics 2013* (2013) 72; and "II. Merchandise Trade" in H Escaith and A Maurer (eds) *International Trade Statistics 2012* (2012) 74.

[204] I have included two east African countries for two reasons. Firstly, Ethiopia is classified by the UN as a least-developed country, which implies that it is not likely to have extensive exports (see chapter 1 above). For this reason I felt it necessary to include a second east African country to provide more comprehensive data. Secondly, Kenya is occasionally classified as a central African country rather than an east African country, and so its inclusion will again provide more comprehensive data from a wider geographical range.

[205] There appears to be some debate regarding whether Egypt falls into the Middle East or Africa. However, the UN appears to accept that Egypt is a part of North Africa (see for example "Statistical Annex" *World Economic Situation and Prospects 2012* (2012) http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf (accessed 10 December 2015)), and so for current purposes it is assumed that Egypt is an African country.

[206] Data taken from "Egypt" *Office of the United States Trade Representative* (9 May 2015) https://ustr.gov/countries-regions/europe-middle-east/middle-east/north-africa/egypt (accessed 10 December 2015); "Country info: Ethiopia" *Agoa.info* http://agoa.info/profiles/ethiopia.html (accessed 10 December 2015); "Country info: Ghana" *Agoa.info* http://agoa.info/profiles/ghana.html (accessed 10 December 2015); "Country info: Kenya" *Agoa.info* http://agoa.info/profiles/kenya.html (accessed 10 December 2015) and "Country info: South Africa" *Agoa.info* http://agoa.info/profiles/south-africa.html (accessed 10 December 2015).

| | | | |
|---|---|---|---|
| Kenya | 89 285 | 115 361 | 103 425* |
| South Africa | 306 465 | 301 535 | 315 410 |

**Data given is from January-September.*

From this table it appears that the country's status may affect its ability to export products. South Africa, a country that could fall within the definition of 'advanced developing country',[207] receives a relatively large amount of income from its exports to the USA. A least-developed country such as Ethiopia will export fewer products, and so receives a significantly smaller income from such exports. However, all five countries do export significant amounts of agricultural product to the US. The question which then arises is: how many of these exports are rejected, and how many are rejected due to SPS-related reasons?

*Table 2: Border rejections of products from African countries by the US, 2015* [208]

| **Country** | **Total number of border rejections by the USA in 2015** | **Total number of SPS-related rejections by the USA in 2015** |
|---|---|---|
| Ghana | 137 | 102 |
| Egypt | 80 | 51 |
| South Africa | 40 | 10 |
| Kenya | 12 | 1 |
| Ethiopia | 8 | 2 |
| **Total:** | **277** | **166** |

*Table 3: Reasons for border rejection of products from African countries by the US, 2015* [209]

| **Reason for rejection** | **Number of rejections** |
|---|---|
| Salmonella contamination | 90 |
| Unsanitary processes | 40 |
| Contamination with pesticides | 23 |
| "Filth" (i.e. contamination with dirt, decomposition etc) | 8 |
| Unsafe additives | 4 |
| Contamination with unnamed poisonous substance | 1 |

[207] See Chapter I above.

[208] Unknown "Import refusal report" *U.S. Food and Drug Administration* http://www.accessdata.fda.gov/scripts/importrefusals (accessed 7 December 2015). This data covers the USA border rejections of exported food products from Egypt, Ethiopia, Kenya, Ghana and South Africa for the period January 2015 to November 2015.

[209] *Ibid.*

| | |
|---|---|
| Non-SPS-related reason or product (e.g. untested new drug; misbranding) | 111 |

There are several conclusions that can be drawn from these tables. Firstly, Table 2 shows that more than half of the products exported from these countries were rejected by the US for SPS-related reasons.[210] This implies that the primary reason for the rejection of most exports from these five countries to the US is because of non-compliance with the SPS Agreement or the US's SPS measures. Looking at the data for individual countries, we see that Ghana – the country whose exports are second-highest in terms of monetary value[211] - receives by far the highest number of rejections, the majority of which are SPS-related. Interestingly, the most common reason for Ghana's SPS-related rejections was contamination with Salmonella or *salmonella typhimurium,*[212] a bacteria that can cause food poisoning in humans.[213] This was also the most common SPS-related reason for rejection in 2015 overall, as shown in Table 3. Egypt experienced the second highest number of rejections, despite exporting products of a much lower monetary value.[214] The majority of Egypt's SPS-related rejections were due to contamination with pesticides,[215] a contamination that could fall within the definition of "toxins" in Annex A 1(b) of the SPS Agreement.

South Africa, the country that ranked highest with regard to the monetary value of its USA exports,[216] only comes third with regard to border rejections. The majority of South Africa's rejections were non-SPS-related, and consist mostly of:

a) Pharmaceutical products and "new drugs" that had not yet been approved in the USA; and

[210] "SPS-related reasons" refers to any SPS-related product (e.g. food and beverages as mentioned in Annex A 1(b) of the Agreement) that is rejected for a reason that would be justifiable under the SPS Agreement. Such reasons would include those outlined in Annex A of the Agreement such as protecting from contaminants or toxins in products for consumption (1(b)) or preventing the spread of diseases or pests (1(a)).
[211] See Table 1.
[212] Unknown "Import refusal report" *U.S. Food and Drug Administration* http://www.accessdata.fda.gov/scripts/importrefusals (accessed 7 December 2015).
[213] S Freeman *Biological Science* 4 ed (2011) 979.
[214] See Table 1.
[215] Unknown "Import refusal report" *U.S. Food and Drug Administration* http://www.accessdata.fda.gov/scripts/importrefusals (accessed 7 December 2015).
[216] See Table 1.

b) Misbranded or mislabelled products.[217]

However, as mentioned above, South Africa could fall within the definition of 'advanced' developing country. It was previously – albeit briefly – classified as a developed country, and later reverted back to "developing" status.[218] As an 'advanced' developing country, South Africa has more extensive financial resources as well as agricultural resources, making it easier for the South African agricultural producers to comply with SPS measures than it would be for those in a least-developed country such as Ethiopia. This could provide a reason as to why South African products were mostly rejected for non-SPS reasons.

To answer the question posed at the beginning of this section,[219] it appears that products exported from these five developing – or least-developed – countries are indeed being rejected by the US for SPS-related reasons. From a holistic perspective, more than half of the border rejections of products from these five countries are due to SPS-related reasons.[220] This implies that an inability to comply with SPS measures does have a negative effect on the export trade of these countries; such negative effects include not only the loss of the sale, but also other wasted costs such as the costs of transporting the product from the exporting country to the importing country's border.[221] The two most common reasons for these border rejections,[222] namely Salmonella contamination and the use of unsanitary processes or unsanitary conditions, both indicate a possible lack of adequate hygiene standards in the preparation of the products. The fourth highest, "filth", would also indicate a lack of such standards. This speaks to the view of Gebrehewit *et al* that an inability to comply with basic hygiene standards indicates that developing and least-developed countries are unlikely to be able to comply with the more

[217] Unknown "Import refusal report" *U.S. Food and Drug Administration* http://www.accessdata.fda.gov/scripts/importrefusals (accessed 7 December 2015).
[218] "Reclassification saves SA over R70m" *IOL* 8 February 2001 www.iol.co.za/news/politics/reclassification-saves-sa-over-r70m-60526 (accessed 1 March 2017); see also Giles Merrit "South Africa: Both Developed and Undeveloped" *The New York Times* 30 November 1992 www.nytimes.com/1992/11/30/opinion/30iht-edgi.html (accessed 1 March 2017) for a discussion on the reclassification prior to it taking place.
[219] The question being: are products from certain developing or least-developed African countries being rejected at the border of the US for SPS-related reasons?
[220] See Table 2.
[221] See Gebrehiwet *et al* 2007 *Agrekon* 27.
[222] See Table 3.

complex standards set by developed countries.[223] The fact that 138 of the 166 SPS-related border rejections indicate a lack of adequate hygiene standards,[224] combined with the view of Gebrehewit *et al*, gives credence to the idea that these developing African countries will not be capable of complying with more stringent or more sophisticated SPS measures.

From an individual perspective, the position of the individual developing country appears to affect its ability to comply with SPS measures. An 'advanced' developing country such as South Africa, with its more extensive resources, has minimal SPS-related border rejections as its extensive financial and agricultural resources put it in a better position to ensure that its products meet the required standard. A developing country such as Ghana is able to export a large volume of agricultural products – as indicated by its large export income – but receives a large number of rejections as well (approximately 75% of its border rejections from the US are for SPS-related reasons).[225] A least-developed country such as Ethiopia exports a much smaller volume of agricultural products but also receives fewer SPS-related rejections (approximately 25% of its border rejections from the US are for SPS-related reasons).[226] This leads to the interesting conclusion that:

1. 'Advanced' developing countries are more capable of complying with SPS measures due to their more extensive resources, and so can export large volumes of products with fewer SPS-related rejections
2. Least-developed countries export much smaller product volumes, and have a lower rate of SPS-related rejections
3. 'Ordinary' developing countries – those that fall somewhere on the spectrum between advanced and least-developed – can export large volumes of products, but experience extensive border rejections due to non-compliance with SPS measures. The majority of these rejections appear to be related to hygiene standards.

[223] Gebrehiwet *et al* 2007 *Agrekon* 27.
[224] Taken from Table 3 by combining the number of rejections for Salmonella contamination, unsanitary processes, and filth contamination.
[225] Calculated using the data in Table 2 above.
[226] Calculated using the data in Table 2 above.

How, then, does this relate to Article 5 of the Agreement? As discussed throughout this chapter, the provisions of Article 5 relate largely to the determination of a Member's appropriate level of protection and the ways in which it may develop, impose and maintain its SPS measures in order to achieve its chosen level. A large number of these provisions grant importing Members a broad set of powers, allowing them to set high levels of protection and stringent SPS measures with very little restriction. The data analysed in this section indicates that developing Members – particularly those that fall between least-developed country status and 'advanced' developing country status on the spectrum – are currently struggling to comply with basic hygiene standards during the production of agricultural goods. This implies that they are unlikely to be able to comply with higher levels of protection or more stringent SPS measures. This in turn leads to an increase in the border rejections of their products, a negative impact on their international markets, and ultimately creates a barrier to the participation of such countries in such markets.

But are there any solutions to this problem? The most obvious solution would be to limit the importing Member's powers, but this could lead to unsafe foodstuffs – for example, meat contaminated with Salmonella bacteria – being sold within the importing Member's territory. Most, if not all, Members would not consent to putting their own citizens, plant and animal life at risk in this way. One could even question whether it would truly be fair to the importing Member to expect it to lower its own quality standards in order to assist another less financially and socially stable Member to participate in international markets. This question will be discussed in more detail in Chapter V below.[227] For the moment it is sufficient to simply acknowledge that Article 5, read alongside Article 2, does indeed appear to be having a negative impact on developing countries and their participation in international markets.

### 2.3.2. What are some identified problems that developing countries are facing?

As discussed in the section above, developing countries do appear to be struggling to comply with SPS measures as a result of the Article 5 provisions – but why? Several theoretical reasons

[227] Chapter V deals with the special and differential treatment of developing and least-developed countries, and so is a more appropriate place for such a discussion.

for problems with compliance have been outlined earlier in this chapter, and now we will look at the problems that the developing countries themselves have identified.

Firstly, the South African Department of Agriculture has identified several areas in which South Africa is lacking the necessary expertise, leading to difficulties in complying with SPS measures of importing countries.[228] The first problem relates to monitoring and surveillance, which affects the ability to collect the necessary data to ensure compliance with importers' SPS measures.[229] The example given in the report relates to the spread of the African Invader fruit fly – a pest which attacks fruits such as mangos and guavas.[230] South Africa exports such fruits to several Members, including the European Union, and so would have to ensure that the fruits were not contaminated or negatively impacted by invasions of these flies. A program has been put in place to survey and monitor the spread of these flies, in an attempt to prevent them from contaminating the fruit exports; however, the report implies that the resources and expertise necessary for efficient monitoring and surveillance is not available in South Africa.[231] The report also states that surveillance should not be purely reactive, the implication being that it currently is so.[232] This means that surveillance is currently only used in response or reaction to the outbreak of a pest or disease rather than in advance as a preventative measure. Rather, surveillance should be used proactively so as to "[improve] SA's state of readiness to address the actualisation of any potential risks".[233] In other words, surveillance and monitoring should be used on a more ongoing basis so that the country will be prepared to address any risk as and when it arises. However, the dearth of available resources and expertise renders this difficult.

A second area in which South Africa is lacking expertise is diagnostic or analytical laboratory services; in other words, it is lacking in the scientific resources used to analyse the collected data

[228] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014).
[229] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014) 12.
[230] *Ibid.*
[231] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014) 12.
[232] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014) 13.
[233] *Ibid.*

and diagnose the potential problems which may arise or even have arisen.[234] This includes a lack of "adequate infrastructure and suitable instrumentation, access to the latest scientific technology and protocols, upgrading technical competencies for specialized testing services" and several others.[235] The majority of the listed resources appear to deal with developments in technology; in other words, South Africa seems to be lacking in modern scientific resources rather than lacking in resources entirely. While this may seem less dire that a complete lack of resources, the use of outdated resources – such as outdated technology or scientific protocols – could lead to less accurate or unreliable analyses. Such analyses could be rejected by importing Members as being insufficiently accurate to prove compliance with their SPS measures. The report suggests that such analysis and diagnostics could be outsourced to the private sector if governmental organisations are not capable of performing the relevant tests.[236] However, the report does indicate that there is a lack of standardised testing between various reference laboratories. Such a problem could be exacerbated by outsourcing, as it would then be required that both the governmental organisations *and* the private research laboratories or universities comply with the same standardised testing methods. When one considers that standardised testing is already problematic without outsourcing, it becomes clear that outsourcing may solve some problems but create others.

A second developing country that has identified problems it faces with regard to SPS measure compliance is Ghana. As shown in the tables above, Ghana has some of the highest volumes of exported products while also having the highest number of border rejections of products to the USA in 2015.[237] This implies that Ghana exports large amounts of agricultural produce, but struggles to comply with the SPS measures put in place by importing Members. A report by Van

[234] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014) 14.
[235] *Ibid*.
[236] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014) 14.
[237] See Tables 1 and 2 respectively in section 2.3.1 above.

der Maden *et al.*[238] outlines a large number of issues that Ghana faces with regard to compliance with SPS measures.

Firstly, Van der Maden *et al*. point out that food safety in general does not appear to be regulated in Ghana.[239] There is no national program in place for monitoring of food safety, and no domestic standards.[240] While there have been sporadic studies on food safety in Ghana these are few and far between, and the legislation is unclear regarding who or which public institutions are responsible for monitoring food safety and developing the relevant standards and programs.[241]

A second issue that Ghana faces is a lack of awareness or education regarding SPS-related issues amongst the local farmers.[242] A lack of knowledge about SPS restrictions or standards will contribute to the difficulties that the Ghanian producers experience when exporting to international markets, as one cannot be expected to comply with SPS measures and requirements if one knows nothing about them. Van der Maden *et al*. indicate that this lack of awareness is particularly prevalent amongst the smallholders, who do tend to provide mostly for domestic markets.[243] However, a significant number of exporters source their products from smallholders,[244] which may lead to these exporters exporting products that do not comply with SPS requirements due to the lack of knowledge or awareness on the part of the smallholder producers.

A third problem, which partly relates to a lack of knowledge on the part of the local farmers, is the incorrect use of pesticides[245] as well as the use of low-quality water for irrigation.[246] It appears that the local farmers are not knowledgeable about the proper use of pesticides, leading to pesticides being used for the wrong purpose or wrong crop; unnecessarily high dosages or

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[238] E van der Maden, J Glover-Tay and I Koomen "Food Safety and Plant Health in Ghana: Analysis of the Sanitary and Phytosanitary Status of the Vegetable Sector" (2014).
[239] Van der Maden *et al* "Food Safety" 25.
[240] *Ibid*.
[241] *Ibid*.
[242] Van der Maden *et al* "Food Safety" 27.
[243] Van der Maden *et al* "Food Safety" 27.
[244] Van der Maden *et al* "Food Safety" 28.
[245] Van der Maden *et al* "Food Safety" 29.
[246] Van der Maden *et al* "Food Safety" 31.

frequent applications being used; or even pesticides being mixed together.[247] Van der Maden *et al*. also state that pests are occasionally incorrectly identified or diagnosed, further contributing to the use of the incorrect pesticide.[248] All of these may contribute to the produce being contaminated with pesticide residue, which was the second highest reason for the border rejections of African products from the US in 2015.[249] The use of low-quality water for irrigation can lead to microbial contamination of the produce, as irrigation systems occasionally use water from waste systems.[250] Such systems could lead to contamination of the produce with bacteria such as Salmonella – the most common reason for border rejections of African products in the US in 2015.[251]

These examples from South Africa and Ghana are just some of the problems that these two countries have experienced when attempting to comply with stringent SPS measures. A lack of resources, insufficient education/awareness, and a lack of national legislation or infrastructures all contribute to their struggles to comply with the SPS measures of importing Members and thus contribute to their struggles to participate in the international agricultural markets. One can therefore see that the theoretical problems discussed in section 2.2 of this chapter are not merely theoretical; developing countries themselves have identified internal problems resulting from their financial and social status which make it difficult for them to comply with the stringent SPS measures that Article 5 permits importing countries to impose.

### 2.3.3. Concluding remarks on theoretical problems

Identifying the theoretical problems that may arise due to the phrasing and interpretations of Article 5 would be acceptable for the purposes of a semantic study; however, in order to determine whether Article 5 will negatively impact developing countries one has to look at the real-life situation of such countries. The discussions and analyses in this section have shown that developing countries such South Africa, Ghana, Egypt, Ethiopia and Kenya are indeed having their exported products rejected at the border of importing Members due to non-compliance with SPS

[247] Van der Maden *et al* "Food Safety" 29 – 30.
[248] Van der Maden *et al* "Food Safety" 29.
[249] See Table 3 in section 3.1 above.
[250] Van der Maden *et al* "Food Safety" 31.
[251] See Table 3 in section 3.1 above.

measures. Their inability to comply with such measures stems in large part from their status as developing countries. Their internal issues, such as a lack of awareness and education, a lack of governmental infrastructures, non-existent or insufficient food safety standards, and a lack of expertise and scientific resources contribute to their struggles to comply with both stringent SPS measures and – in some cases – basic hygiene standards. One can then confidently conclude that, according to the data analysed and discussed above, developing countries do indeed appear to be struggling to comply with the SPS measures of importing Members.

### 2.4. Conclusion

From the above discussions, two general conclusions may be drawn. Firstly, Article 5 is, in itself, problematic. The manner in which its provisions have been phrased, as well as its subsequent interpretations in various WTO Panel reports and scholarly articles, have led to importing Members being granted excessive power in the determination, imposition and maintenance of their appropriate levels of protection and accompanying SPS measures. Secondly, the collection and analyses of available data indicates that developing country Members are indeed having their agricultural products rejected in the international markets for non-compliance with SPS measures. The developing country Members themselves have identified internal problems – most of which relate to their developing country statuses – which contribute to their struggles to comply with SPS measures.

How are these two conclusions related? By allowing importing Members to set excessively high appropriate levels of protection, Article 5 also permits such Members to impose stringent SPS measures in order to ensure that their levels of protection are met. The available data has shown that developing country Members struggle to comply with stringent SPS measures; in certain cases they may even struggle to comply with basic hygiene standards. From this it can be seen that, by allowing importing Members to impose stringent SPS measures with little restriction, Article 5 assists in hindering developing country Members from entering into or maintaining a presence in the international agricultural markets. Article 5 also opens up the possibility of importing Members abusing its provisions for protectionist purposes. By imposing unnecessarily excessive SPS measures, importing Members can protect domestic production and effectively remove developing country Members from the international markets altogether. If they are

unable to comply with the SPS measures set by importers, developing country Members will be unable to export their products and thus will be unable to participate in the international markets. This in itself will hinder the development of their economies.

However, as mentioned briefly above, the situation is not easily resolved. One cannot expect importing Members to lower their standards and accept inferior quality products simply to assist developing country Members in participating in the international market. Many of the rejected products, such as those contaminated with Salmonella, filth or pesticides, would pose a significant risk to the health and life of the importing Member's citizens. The questions which then arise are: are there particular standards of quality that all Members should be expected to abide by? How should these standards be determined? And is there a way in which developing country Members can be assisted if they struggle to comply with such standards? In the following chapter I will analyse Article 3 of the Agreement to determine how it deals with and responds to these issues.

# CHAPTER III – HARMONIZATION AND INTERNATIONAL STANDARDS

## 3.1. Introduction

In the previous chapter we examined the multitude of problems present in the provisions of Article 5. The majority of these problems relate to the determination of a Member's appropriate level of protection, as – despite many alleged restrictions – Members are granted relatively broad power when performing this determination. In this chapter we will be considering a potential restriction on the Member's power to determine its appropriate level of protection through the concept of harmonization. It will be shown that the WTO's attempts at harmonization do not truly protect developing countries from the ramifications of the abovementioned broad power, despite attempts to codify harmonization "obligations" in Article 3 of the SPS Agreement.

To begin with, we will briefly consider the definition of an "international standard", followed by an analysis of the individual provisions of Article 3 and the obligations that they do or do not place on Members.

## 3.2. International standards

What is an international standard? The concept of harmonization is largely based on the concepts of international standards, recommendations and guidelines, thus it is important to define these terms before we can determine their impact on international trade. The SPS Agreement does not give an explicit definition of an international standard, but does recognise particular bodies as being capable of creating international standards. For purposes of the Agreement,[252] international standards, recommendations and guidelines relating to food safety are determined by the Codex Alimentarius Commission ("the Codex"); those relating to animal health and zoonoses[253] by the International Office of Epizootics ("the IOE"); and those relating to plant health by the International Plant Protection Convention ("the IPPC"). The Agreement then goes further to state in Annex A (3)(d) that "appropriate standards, guidelines and recommendations promulgated by other relevant international organisations open for membership to all

[252] As set out in Annex A (3) of the SPS Agreement.

[253] Zoonoses are defined by the World Health Organisation as "diseases and infections that are naturally transmitted between vertebrate animals and humans". Examples would include the H5N1 virus (also known as bird flu), and rabies. See Unknown "Neglected Zoonotic Diseases" *World Health Organisation* http://www.who.int/neglected_diseases/diseases/zoonoses/en/ (accessed 1 March 2016).

members"[254] will be considered to be international standards, recommendations and guidelines where such is not dealt with by the three explicitly mentioned organisations.

While providing for potential future matters not covered by the Codex, IOE and IPPC, the generalised provision in Annex A (3)(d) widens the scope of the concept of "international standards, recommendations and guidelines" to a problematic extent. According to Scott,[255] the specifications given in Annex A include standards that were determined by majority rather than consensus *and* those that were determined prior to the coming into effect of the SPS Agreement, which once again widens the scope of the definition. Provided that the matter in question does not fall within the standards promulgated by the Codex, IOE or IPPC, it could essentially be subject to international standards promulgated by any international organisation, as long as membership of the organisation is open.[256]

This already points towards two potential problems. To illustrate these problems, let us imagine that there is an organisation called Animal Safety. Animal Safety is an international organisation that dictates international standards relating to the use of hormones in cattle, sheep and poultry that are intended for human consumption. In particular, they regulate the amount of Hormone X that may be present in beef, a hormone that has not yet been included in the food safety standards of the Codex. Animal Safety has open membership, and Country A is a member.

Country B wishes to export its beef products to Country A. Country A refuses to accept the products on the basis that the products do not comply with Animal Safety's international standards. The matter comes before a WTO Panel, wherein Country B argues that its risk assessment procedures *are* based on international standards as they are based on Codex standards which do not provide specific regulation for Hormone X. Country B argues further that

[254] Annex A (3)(d) of the SPS Agreement.

[255] Scott *A commentary* 246.

[256] It may be interesting to note here that the SPS Committee has acknowledged an original intention to expand the list of specified organisations under Annex A (3)(a) to (c); see Committee on Sanitary and Phytosanitary Measures "Revision of the Procedure to Monitor the Process of International Harmonization" G/SPS/11/Rev.1 (15 November 2004) para 4. It appears, however, that this expansion to include other specific organisations was never performed.

this is sufficient to fulfil the requirements of the SPS Agreement. Country A argues that they are not, as they are not based on the existing international standards of Animal Safety.

How, then, can the Panel make a ruling on this matter? If it rules in favour of Country B, it is refusing to acknowledge Animal Safety's standards as international standards despite them falling within the definitions of Annex A (3)(d). If it rules in favour of Country A, then it is subjecting Country B to the standards promulgated by an organisation that Country B is not a member of. Such a ruling would constitute a drastic infringement of Country B's sovereign right to decide which international organisations it wishes to be party to. This problem could potentially even be worsened if Animal Safety's standard regarding Hormone X is extremely high or stringent, as there would be no other standard to which it could be compared in order to ascertain its legitimacy.[257] By allowing international standards to be created by any international organisations open to Members of the WTO, the Agreement is opening up the potential dilemma of either:

(a) Subjecting WTO Members to standards imposed by an international organisation that they are not members of; or
(b) Having to go against the standards set by said international organisation, despite Annex A (3)(d) acknowledging such standards as legitimate international standards.

The second problem which may arise is the question of what will constitute a valid international organisation. Annex A (3)(d) does not specify any particulars regarding the structure of the organisation, save that it must be open to Members of the WTO. To use the above example, what if Animal Safety was only a small organisation with ten member countries? Would the standards it promulgates still be considered to be international standards? As far as the Annex A (3)(d) definition is concerned, yes it would. What if there were only five member countries? Or three? Annex A (3)(d) does not invoke a minimum membership requirement, thus making it theoretically

[257] One could argue here that Animal Safety's standard relating to Hormone X could be compared to Codex standards relating to the presence of other hormones in beef. A similar situation was seen in *EC - Hormones*, where the Appellate Body dealt with a matter relating to the presence of hormones in beef. The Appellate Body found that the Codex only had standards relating to five of the six hormones in question; the question which arose was whether the five standards could be seen as *relevant* to the sixth hormone. See ABR *EC - Hormones* 252 - 253. However, for current purposes we assume that there is no Codex standard which could be viewed as relevant to the presence of Hormone X in beef products.

possible for the standards imposed by a small - but nevertheless international - organisation to constitute legitimate international standards for the purposes of the SPS Agreement.

Thus by using the term "international standard" as one of the core concepts under harmonization, and then failing to define the concept beyond a broad and vague statement regarding which organisations may create international standards, the SPS Agreement has left another provision open to interpretation.[258] For the purposes of this chapter we will be focusing mostly on existing international standards - those created by the Codex, IOE and IPPC - and so this dilemma should not have a significant impact on the discussion below. However, considering that one of the principle purposes of this thesis is a textual analysis of the SPS Agreement, it is important to bear in mind that the ambiguous phrasing seen in Article 5 in the previous chapter appears to be prevalent in more than just one provision of the Agreement.

Having considered the indeterminate definition of "international standard" in relation to the SPS Agreement, we turn now to the substantive harmonization provisions.

### 3.3. Article 3 of the SPS Agreement

Article 3 of the Agreement is an expansion on the principles mentioned in the preamble, specifically the recognition of the use of bilateral agreements to regulate SPS measures and the desire to "further the use" of harmonized SPS measures through the implementation of international standards, recommendations and guidelines.[259] The latter desire can be attributed to various issues. Van den Bossche and Zdouc point out that the wide variety of SPS measures used by Members imply higher costs for exporters, as exporters have to ensure that their products comply with the standards of each importing country.[260] The use of harmonized standards could reduce the differences between SPS measures of importers and thus lower costs of compliance for exporting countries. In *EC - Hormones* the Appellate Body acknowledged another purpose of harmonization as preventing Members from using SPS measures as a means for discrimination or disguised restrictions on trade, while still allowing Members to impose

[258] It can be noted here that at the time of writing neither the Appellate Body nor any Panel had considered the definition in Annex A(3) in light of international standards promulgated by bodies other than those named.
[259] Recitals 3 and 6 of the Preamble to the SPS Agreement.
[260] Van den Bossche and Zdouc *Law and Policy* 910.

legitimate, science-based measures.[261] Mayeda[262] gives fair competition as a potential argument in favour of harmonization, presumably as compliance with the same international standards would then place the competitive focus on the merits of the product rather than on its country of origin. Even Bacchus,[263] who appears to focus mostly on standardisation in the production of parts for manufactured goods, gives the legitimate view that standardisation allows for more efficient and cost-effective production.[264]

It seems clear, therefore, that harmonization has many potential benefits and is a desirable concept to include in the SPS Agreement. However, I submit that the manner in which it has been implemented in Article 3 - much like Article 5 above[265] - renders it less beneficial and even detrimental, particularly to developing country Members.

In the following sections I will consider the specific provisions of Article 3. It will be shown that their vague wording, and their apparent excessive attempts to preserve state sovereignty, do not only render this attempt at harmonization ineffective but may also have a negative impact on developing country exporters.

### 3.3.1. Articles 3.1 and 3.2

Both Articles 3.1. and 3.2 have been the subject of much discussion in the WTO, mostly due to their similar but subtly distinct terminology. Article 3.1. states that:

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[261] Para 177. By requiring that Members base their measures on international standards, it becomes more difficult for a Member to impose a measure for an ulterior, negative purpose such as to discriminate against a particular country's products.

[262] G Mayeda "Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries" *Journal of International Economic Law* 7(4) (2004) 737 at 738 (footnote 3).

[263] J Bacchus "A Common Gauge: Harmonization and International Law" *Boston College International and Comparative Law Review* 37:1(2014) 1 at 1.

[264] See Bacchus 2014 *Boston College International Comparative Law Review* 6. Although Bacchus does focus more on standardisation in the manufacturing industry, his assertion speaks to the point made by Van den Bossche and Zdouc: standardisation means that exporting Members do not have to adjust their products and production methods to suit the standards of each individual importing Member's standards. By only having to comply with one standard, Members can lower their production costs and thus produce and export their products to a larger number of foreign markets on a more efficient basis.

[265] See Chapter II above.

> "…Members shall **base** their sanitary or phytosanitary measures **on** international standards, guidelines or recommendations, where they exist, except as otherwise provided for…" (emphasis added).

Article 3.1 can thus be seen as the general obligation placed on Members to have their measures "based on" existing international standards insofar as possible. Article 3.1 also acknowledges the broader ideal of "harmoniz[ing] sanitary and phytosanitary measures on as wide a basis as possible". Therefore Article 3.1 contains both the broader ideological principle of harmonization as well as a concrete, albeit general, obligation placed on Members as a means to achieve the principle.

Article 3.2, on the other hand, encourages harmonization and compliance with international standards by creating a presumption that any "sanitary or phytosanitary measures which **conform to** international standards, guidelines or recommendations" (emphasis added) are consistent with the SPS Agreement and with the 1994 GATT. It does not explicitly acknowledge the ideal of harmonization, as this has already been done in Article 3.1. Rather it encourages compliance by providing an incentive for Members to conform their SPS measures to international standards.[266]

At first glance, the difference between the two provisions is not immediately apparent. Both appear to encourage Members to harmonize their measures with international standards - Article 3.1 makes this an obligation, while Article 3.2 creates an advantageous presumption in favour of a Member who has harmonized their measures. In *EC - Hormones* the Panel interpreted "based on" to mean "conform to",[267] thus essentially conflating the meaning of the two phrases. However, this interpretation was later overturned by the Appellate Body, who saw a definite distinction between the meaning of "based on" in the Article 3.1 obligation and "conform to" in the Article 3.2 presumption requirements.

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[266] The incentive here being that the Member's measure is presumed to be consistent with the requirements of the SPS Agreement. See further discussion below.
[267] PR *EC - Hormones* para 8.72.

According to the Appellate Body in *EC - Hormones*, the "obligation" in Article 3.1 was never intended to be truly mandatory.[268] The preamble to the SPS Agreement gives one of its founding ideals as "further[ing] the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations" while Article 3.1 itself states that it desires to "harmonize sanitary and phytosanitary measures *on as wide a basis as possible*" (emphasis added). Both of these provisions emphasise the importance of harmonization whilst also implying that full harmonization - whereby all countries use the exact same standards - is merely an ideal. Phrases such as "on as wide a basis as possible" imply that harmonization is desirable but only to the extent possible - not necessarily entirely. Thus, the Appellate Body in *EC - Hormones* disagreed with the Panel and stated that "conform to" held more onerous implications than "based on".[269]

How, then, would one define these two terms? In *EC - Hormones* the Panel stated that a measure could be seen to be based on an international standard if it gave rise to the same level of protection as the standard.[270] From this it seems that a measure which is based on an international standard will perhaps give effect to the spirit of the standard, or even use the standard as the basis for its risk assessment, but will not necessarily embody the standard in its entirety. A measure which conforms to a standard, on the other hand, "will embody the international standard completely and, for practical purposes, [convert] it into a municipal standard".[271] Conformity thus implies equivalence in the purely textual sense of the word; to conform to an international standard would be to include it in the measure as it stands, with no alterations.

To expand on the above example: let us imagine that Animal Safety has promulgated an international standard which states that beef for human consumption should not contain more than 5mg of Hormone X per 100g of beef. Country A imposes an SPS measure which states that

[268] ABR *EC - Hormones* para 165.
[269] ABR *EC - Hormones* para 165.
[270] PR *EC - Hormones* para 8.73. See also Scott *A commentary* at 254, where Scott points out that the Appellate Body in *EC - Hormones* neither confirmed nor overturned the Panel's interpretation; they chose instead not to "pass judgment" on it.
[271] ABR *EC - Hormones* para 170.

it will not accept beef products with "excessive levels of Hormone X present in the meat". This measure could be seen as being based on the Animal Safety standard, as it gives effect to the idea that Hormone X can safely be consumed by humans but only in very small amounts. However, this measure does not conform to the Animal Safety standard. Country C, on the other hand, imposes a measure which states that it will not accept beef products where "the amount of Hormone X present in the meat exceeds 5mg per 100g of product". The wording of the measure essentially converts the standard into a domestic standard, as it is imported into Country C's measure all but word-for-word. Country C's measure thus conforms to the Animal Safety standard. However, Country C's measure is also based on the Animal Safety standard as it gives effect to the ideals of the standard as well.

Thus, a measure which conforms to an international standard will, by definition, be based on the international standard as well; on the other hand, a measure which is based on an international standard will not necessarily conform to the standard.[272] Interestingly, the Panel in the recent report on *Russia - Pigs* stated that, even where a part of a measure deviates from the international standard, the parts which do not deviate may nevertheless be viewed as being "based on" the measure.[273] I submit that this would only apply to the concept of "based on" and not to "conform to", due to the definitions from *EC – Hormones* as outlined above: a measure could not be said to "embody the international standard completely" if parts of it deviate.

It appears, then, that "based on" can be viewed as the broader overarching phrase under which "conform to" falls. In this light, the difference between the two provisions becomes clearer. Article 3.1 is intended as a general "obligation" which requires Members to use international standards as a foundation for their SPS measures. Article 3.2, on the other hand, provides a non-binding incentive for Members to implement the standards in their entirety in domestic

[272] A measure which conforms to the standard by implementing it word-for-word would clearly have the standard as an integral part of its foundation, thus fulfilling the requirements for "based on" as well. However, a measure which gives effect to the spirit of the standard or uses it as a foundation will not necessarily implement the standard word-for-word; thus it will not necessarily conform to the standard. To use a simile: all thumbs are fingers, but not all fingers are thumbs. Similarly, all measures which conform to a standard are based on that standard; but not all measures which are based on a standard will conform to the standard. See ABR *EC - Hormones* para 163.
[273] Para 7.256.

measures. This incentive is the presumption that the measure is compliant with the SPS Agreement and the GATT, provided it conforms to international standards. In this way the Agreement theoretically gives effect to the harmonization ideal in the Preamble and encourages Members to support harmonization while still refraining from infringing on state sovereignty any further than absolutely necessary.

The question which then arises is: is this enough? As shown above, the harmonization of SPS measures through the use of international standards has the potential to be hugely beneficial. If all Members were to abide by international standards when creating their SPS measures then exporting Members would not have to use financial resources to ensure that their export products complied with widely differing measures of individual importers.[274] This would assist in lowering the costs involved in exporting such products. Such an effect would be beneficial to exporting Members in general, but particularly to exporting developing Members who are already lacking in the financial resources needed to export their products. However, in order for such a form of harmonization to be effective there would have to be some form of obligation to ensure that it is implemented.

I submit that no such obligation exists in the SPS Agreement, despite the existence of Articles 3.1 and 3.2. To begin with, Article 3.2 is clearly not mandatory and exists only to provide an incentive for Members to align their domestic policies with international standards in their entirety. Members are *not* obliged to ensure that their domestic measures conform to international standards; however, it will theoretically work in their favour if they do. For example, we can imagine that Country C has conformed its SPS measure to Animal Safety's international standard as in the example given above. This will create the presumption that Country C's measure is consistent with the requirements of the GATT 1994 and the SPS Agreement.[275] If Country A

[274] See footnotes 260 and 264, and associated discussion, above.

[275] The reasoning behind this presumption appears to be as follows: the creation of an international standard necessarily involves an analysis of the available scientific evidence and a form of risk assessment. For example, if the Codex were to create a standard regarding the amount of aspartame that may be present in dried fruit then it would have to first perform a scientific analysis to determine the amount of aspartame that a human can safely consume over a certain period of time, the amount of aspartame a human can safely consume in a single meal/snack, the risks associated with excessive consumption of aspartame, and so on. Where a measure then conforms to the international standard, it can be presumed that the measure was created in line with the risk assessment requirements of the SPS Agreement, as it incorporates the exact international standard which was

wishes to then prove that Country C's measure violates one of these agreements, it will be under a heavier burden of proof than if the presumption did not exist. Thus there is an incentive to comply, which in itself indicates that the provision is not mandatory. If a legislature promulgates a set of binding laws on a country, they do not provide incentives for compliance;[276] they expect citizens to comply because compliance is mandatory. In contrast, an incentive is provided for in Article 3.2 so that Members are encouraged to comply but not forced to do so, thus avoiding the potential issue of infringement on state sovereignty.

It is submitted that, despite its wording, Article 3.1 does not create a mandatory obligation either. According to the Appellate Body in *US/Canada - Continued Suspension*[277] Article 3 as a whole encourages harmonization but also recognises state sovereignty. Van den Bossche and Zdouc interpret this to mean that Article 3 encourages but does not oblige harmonization.[278] If we accept that Article 3 as a whole does not oblige harmonization, it logically follows that Article 3.1 cannot oblige Members to base their measures on international standards.

Alternatively, let us assume that Article 3.1 is indeed a mandatory provision. What, then, does it oblige a Member to do? Firstly, it obliges a Member to base its measures on international standards. As shown above, "based on" is a broad concept which can be - and previously has been - construed simply to mean that the Member's measure must achieve the same level of protection as implementation of the relevant standard would.[279] This means that a Member does

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developed through scientific analysis. Thus the measure is indirectly based on a risk assessment and can be presumed to be consistent with the ordinary GATT and SPS Agreement requirements. See *US/Canada - Continued Suspension* para 694.

[276] One could argue that compliance with any domestic law is not obligatory but merely based on the incentive of not being imprisoned/forced to pay a fine. This is an argument better suited to a jurisprudence thesis, and will not be discussed here. For current purposes, we assume that it is possible for compliance to be mandatory without necessitating an associated incentive.

[277] Para 692.

[278] Van den Bossche and Zdouc *Law and Policy* 910.

[279] It is important to note at this point that "relevance" has not formed an integral part of our discussion thus far. The term "relevant" does not actually appear in Article 3, thus on a purely textual level Article 3 would encourage or alternatively oblige Members to consider *all* international standards when developing and implementing its measures. This is clearly an inefficient, highly difficult and generally absurd idea that would burden the Member imposing the measure with unnecessarily extensive research. Scott points out, however, that "common sense tells us that relevance must, in effect, be a pre-condition for the existence of an international standard within the meaning of Article 3.1" (Scott *A commentary* 252). In other words, when a Member is obliged to consider all

not have to utilise the standard in its exact form - and thus does not have to use the exact measurements as the standard - provided that it achieves the same level of protection.[280] Secondly, Article 3.1 looks to give effect to the general ideal of harmonising SPS measures on "as wide a basis *as possible*" (emphasis added). As stated by the Appellate Body in *EC - Hormones* this implies that the provision is a guideline rather than a firm obligation.[281] It also means that the extent of the possible harmonization would have to be decided on a case-by-case basis. This is due to the fact that what is possible for one Member may not be possible for another, and so one Member may be obliged to harmonize its SPS measures to a greater extent than another. The logical consequence of this is that Article 3.1 cannot be construed as creating a mandatory obligation on Members to always base their measures on international standards, as the ideal it seeks to fulfil is to harmonize only as far as possible. The implication from this is that a Member is encouraged to base its measures on international standards where they exist, but only insofar as is possible for that Member.

In the *Russia – Pigs* matter the Panel found that the measure at issue[282] did indeed violate Article 3.1 as it was not based on the OIE's Terrestrial Code.[283] In this particular matter, it appears that the Panel viewed Article 3.1 as including a mandatory obligation that Russia had not complied with. However, it should be noted that Russia did not appear to raise any claims that they were complying with the standard insofar as possible or that it was not possible for them to comply with the standard fully. If we assume that there was no reason why Russia would not be able to base their measure on the Terrestrial Code, then we can accept that they were obliged to do so (as the extent to which they were able to base their measure on the standard is the full extent).

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"existing" international standards, a common sense approach would imply this to include only those which are relevant to the measure at issue.

[280] See the example above, wherein Country A promulgates a measure based on Animal Safety's international standard regulating the presence of Hormone X in beef.

[281] Para 165.

[282] The measure at issue in this matter was one implemented by Russia which regulated the trade in live pigs and various pork products. The measure banned imports from both Poland and Lithuania as well as from the EU as a whole. See *Russia – Pigs* para 2.9.

[283] See para 7.493 - 7494. In this matter the provisions of the relevant international standard (the Terrestrial Code) allowed for the possibility of disease-free zones. The fact that Russia had implemented a general ban on imports without allowing for disease-free zones was found to be a "fundamental departure" from the international standard.

If, however, Russia had raised the argument that it was not able to base its measure on the international standard to its full extent, then based on a textual interpretation of Article 3.1 the Panel may have ruled that Russia was not in violation of the provision. This is further supported by the Panel's acknowledgement that part of a measure may be viewed as based on the standard while other parts are not; the piecemeal approach to measures would allow for an interpretation that Article 3.1 had been complied with even though the measure *as a whole* was not 'based on' the relevant standard.

In summary, neither Article 3.1 nor Article 3.2 appear to impose mandatory obligations. Article 3.2 provides a favourable incentive for Members to take the more extreme step of conforming their measures to international standards, but does not oblige them to take any action. Article 3.1 theoretically obliges a Member to base its measures on international standards, but only insofar as is possible for that Member. It therefore appears that neither provision will cause Members to implement international standards to the extent necessary to achieve the desired outcomes, namely a more favourable trading environment for developing country exporters.[284]

### 3.3.2. Article 3.3

Having dealt with the alleged "obligation" in Articles 3.1 and 3.2, I turn now to what is possibly the most problematic provision in Article 3: the "exception" in Article 3.3.

Article 3.3 states that a Member is permitted to deviate from an existing international standard where that standard does not achieve the level of protection that the Member has deemed appropriate for its situation. In other words, a Member may impose a very high level of protection and then deviate from the relevant international standard on the basis that such standard is insufficient. The second part of Article 3.3 then states that a measure which applies a different level of protection to that of the relevant international standard will not be deemed inconsistent

[284] For example, if a Member states in its SPS measure that it will not import products that have excessive amounts of Hormone X, this measure would fulfil the requirements of Article 3.1 in that the measure is based on the Animal Safety standard. However, the phrasing of the measure is vague enough to be open to interpretation. This makes it more difficult for exporting countries to ensure that their products comply with the measure, thus removing many - if not all - of the potential financial advantages of the alleged harmonization.

with the Agreement as long as it fulfils the requirements of the other provisions of the Agreement.[285]

At first glance, this provision appears to be an exception to Article 3.1 as it gives the Member a reason to deviate from the exhortation to base its SPS measures on existing international standards. However, the Appellate Body in *EC - Hormones* specified that the provision of Article 3.3 was a *right* rather than an exception.[286] By allowing a Member to implement a measure that imposed a higher level of protection than that given by the relevant international standard, Article 3.3 gives effect to Members' sovereign right to protect their human, animal and plant life and health. It was also viewed by the Appellate Body as a reflection of the precautionary principle,[287] presumably because it allows Members to exercise precautionary measures in the protection of their domestic human, animal and plant life and health by going beyond what the international standard dictates as acceptable. One could therefore view Article 3.3 as an addition or extension to the right contained in Article 2.2.

Why, then, is it problematic? The primary problem with Article 3.3 is that it essentially permits a Member to avoid complying with existing international standards, particularly if the Member has imposed a higher level of protection than the standards allow for.[288] As discussed in detail in the previous chapter, the SPS Agreement as a whole places very little restriction on the determination and implementation of a Member's appropriate level of protection.[289] This lack of restriction would allow importing Members to impose very high or stringent levels of protection, and as a consequence they would be permitted to impose stringent SPS measures. Where a Member's chosen level of protection is higher than that achieved by the international standards,

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[285] Scott states that this means that, where a Member imposes a measure which gives rise to a higher standard of protection than the relevant international standard, the measure will not be deemed inconsistent as long as it complies with the other requirements of the Agreement - for example, the requirement of being based on a risk assessment. (Scott *A commentary* 256).

[286] Para 104.

[287] ABR *EC - Hormones* para 124.

[288] Despite the use of the term "higher level of...protection" in the **first** sentence of Article 3.3, some authors such as Scott believe that the **second** sentence of the provision would permit a Member to deviate from the international standard if the level of protection it had imposed was either higher *or* lower than that achieved by the standard. This is discussed in more detail below.

[289] See Chapter II above.

the Member would not have to harmonize its measure with the relevant standard. The various harmonization advantages that could potentially accrue to developing Members, such as decreased compliance costs, would then be lost.[290]

At this point it is important to acknowledge that Article 3.3 does attach a condition to the right of Members to deviate from international standards insofar as the Member has imposed a higher level of protection. This condition is that there must be (a) scientific justification for the deviation; or (b) the higher appropriate level of protection must have been determined in line with the requirements of Article 5. If one considers that the requirements of Article 5 are strongly based on providing a scientific basis, foundation or justification for one's measures and level of protection, it becomes apparent that these two conditions are in fact the same condition couched in slightly differing language. In *EC - Hormones* the Appellate Body acknowledged that the distinction between these two conditions may be more apparent than real, and possibly the result of poor drafting rather than the result of a true desire to distinguish between the two.[291] This point appears to have been accepted by leading scholars.[292] In light of this it is submitted that Article 3.3 allows a Member to deviate from relevant international standards where the provisions of Article 5 have been complied with *and* the Member's resultant appropriate level of protection is higher than that achieved by the international standard. Unfortunately, this interpretation would then not place any restrictions or qualifications on a Member's broad and relatively uninhibited power to impose any level of protection it desires.[293]

Some authors argue that Article 3.3 turns international standards into an obligatory minimum, as it only permits deviation where the Member's level of protection is *higher* than the level achieved by the standard.[294] This would mean that where a Member's appropriate level of

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[290] See section 3.3 above for general advantages that harmonization could bring to developing exporters; see below in this section for a more detailed discussion of the possible advantages that could accrue to developing exporters.

[291] Para 175 - 176.

[292] See, for example, Van den Bossche and Zdouc *Law and Policy* 913.

[293] See discussions in the previous chapter.

[294] See Scott *A Commentary* 261 footnote 73 and the associated discussion at 261-262. Scott shows that statements made by J Pauwelyn and R Howse imply a belief that international standards constitute a "floor" or "minimum level".

protection was lower than that achieved by the standard, the Member would nevertheless have to comply with the standard. According to Scott this would mean that Article 3.3 encourages measures that are more trade restrictive.[295] This is presumably because lower standards are easier to comply with, and thus more Members would be able to participate and maintain a presence in the market. If Article 3.3 is acknowledged as turning international standards into obligatory minimums, Members with lower levels of protection would have to increase the stringency - and thus the restrictive effects - of their measures.

Scott argues against the idea that Article 3.3 sets international standards as obligatory minimums, and bases this argument on four central points. Firstly, she points out that the decision of the Appellate Body in *EC - Hormones* clearly stated that international standards are not obligatory, and function more as guidelines than as hard-and-fast rules.[296] If international standards are not obligatory as a whole, then to view them as setting obligatory minimums would clearly be an illogical conclusion. Secondly, Scott emphasises that the second sentence of Article 3.3 states that any measure which imposes a *different* level of protection to that imposed by a relevant standard will not be considered inconsistent with the Agreement provided that it complies with the other Agreement requirements, such as the risk assessment requirements in Article 5.[297] This would mean that a Member could deviate from the international standards where its level of protection was *lower* than that achieved by the standard, provided that the requirements of the Agreement were complied with when determining and maintaining the level of protection. This would obviously mean that the international standards cannot be viewed as constituting an obligatory minimum. Thirdly, Scott shows a link between Article 3.3 and Article 2.2 of the Agreement.[298] The latter contains the basic right of a Member to impose a measure "where necessary" to protect human, animal or plant life and health. If one were to view international standards as an obligatory minimum that Members must abide by, one could end up in a situation where a Member is imposing a measure that goes beyond what is reasonably necessary simply because they could not implement a level of protection lower than that set by

[295] Scott *A Commentary* 262.
[296] Scott *A Commentary* 263; see also *EC - Hormones* para 165.
[297] Scott *A Commentary* 264.
[298] *Ibid*.

the international standard. Article 3.3 would then be permitting or even causing violations of Article 2.2. Finally, Scott presents what she appears to believe is her most compelling argument: to view international standards as obligatory minimums would go against the Agreement's inherent desire to provide for the lack of financial resources available to developing Members.[299] Provisions such as Article 9,[300] Article 10,[301] and even Article 5.6[302] all point to the Agreement's intention to acknowledge and provide for those countries who may struggle to comply with the Agreement or with the measures of other Members. Compelling developing and least-developed Members to comply with international standards as obligatory minimums would not take account of their differing financial status and infrastructural capacities, and so would go against this ideal.

Interestingly, Mayeda takes a very different view to Scott's fourth point: he posits that the implementation of international "standards" would still allow for institutional differences between Members.[303] He explains that the use of "standards" rather than narrower, more stringent "rules" will allow for more variation in the policies that could be said to be consistent with the standard.[304] In other words, two Members could develop very different domestic policies that could nevertheless be interpreted to comply with the same international standard. An international rule, on the other hand, will usually be less flexible and would require the Members to implement much more similar domestic policies in order for compliance to be effected. In this way, Mayeda says, the implementation of standards may actually be to the benefit of developing countries, as it would be less costly for them to comply with an international standard than with an international rule.[305] Mayeda's submissions do not touch on the question of international standards being obligatory; however, it is submitted that

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[299] Scott *A Commentary* 265.

[300] Article 9 deals with the provision of technical assistance to financially disadvantaged countries, and will be dealt with in more detail in Chapter IV below.

[301] Article 10 deals with the special and differential treatment that should be granted to developing and least-developed countries, and will be dealt with in more detail in Chapter V below.

[302] See previous chapter. Article 5.6 requires Members to ensure that their measures are no more trade restrictive than necessary, "taking into account technical and economic feasibility".

[303] Mayeda (2004) *JIEL* 751.

[304] *Ibid.*

[305] *Ibid.*

international standards being interpreted as mandatory minimums would not necessarily affect his argument.[306]

Scott and Mayeda differ widely in their views regarding whether the use of standards will be advantageous or disadvantageous to developing Members. Regardless, Scott's remaining three points present a compelling argument in favour of the interpretation that Article 3.3 allows for deviations from international standards where a Member wishes to implement *either* a lower *or* higher level of protection than that achieved by the standard. Scott's argument therefore appears to imply that international standards can be largely circumvented, provided those standards do not achieve the exact level of protection required by the Member. But is this what developing Members need? In other words: is it in the interests of developing Members to have international standards viewed as obligatory (as Article 3.1 unsuccessfully attempts), or is it in their interest to have them circumvented (as Article 3.3 may allow)?

### 3.3.4 Advantages and disadvantages of harmonization for developing countries

As mentioned briefly above, the harmonization of SPS measures through the use of international standards does appear to be in the best interests of developing Members for various reasons. Firstly, while there is a fear amongst developed Members that harmonization may force them to accept "inferior" products,[307] the use of international standards as a basis for proving equivalence of SPS measures may work in favour of developing exporters. If the exporter is able to show that its measure does achieve the level of protection required by the standard, the importing country may be forced to accept the exporter's domestic measure as equivalent to its own.[308] This could in turn lower compliance costs for developing countries, as they will only have to prove

[306] Assuming that Mayeda is correct in his assertions that international standards allow for institutional differences, Scott's point that the interpretation of international standards as obligatory minimums goes against the ideals of the SPS Agreement falls away. This is because interpreting standards as obligatory would not place a higher financial burden on developing Members, as - according to Mayeda's argument - "standards" are usually broad enough to allow for the effect of institutional differences on domestic policies.

[307] Mayeda (2004) *JIEL* 738.

[308] This based on the assumption that true harmonization has occurred, and that the importer's measures are also obliged to be consistent with the relevant international standard.

compliance with the relevant standard and not with the measures of each individual importing country.[309]

Secondly, the use of international standards for harmonization may help to protect the public good.[310] In terms of the SPS Agreement, relevant international standards promulgated by the specified international organisations are assumed to have been determined through assessment and testing methods.[311] By requiring Members to base their measures on these international standards, the Agreement would ensure that all SPS-related products are safe and do not affect human, animal or plant life or health detrimentally. This would also decrease costs of compliance, as Members would not be required to perform their own risk assessments to determine what level of protection is necessary for the protection of their domestic human, plant and animal life and health. For financially-lacking developing exporters, any decrease in compliance costs is naturally advantageous.

Thirdly, as discussed above, the use of international "standards" for harmonization purposes may allow for institutional differences between Members.[312] Standards tend to be quite broad in their phrasing, and intended to provide a guideline rather than a rigid rule for Members to comply with. This breadth naturally allows for flexibility in interpretation, which means that Members can implement differing domestic policies while still complying with the level of protection set by the standard. Not only does this provide for Members' sovereign right to protect their own territory from SPS threats but it may also allow more flexibility for developing countries, who have drastic institutional differences when compared to developed countries.[313] This would then

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[309] As discussed in the previous section, it is possible that Article 3.3 could be used by the importer to circumvent this advantage. However, for the purposes of this section, *potential* as well as actual advantages of harmonization will be considered.

[310] J Kurtz "A Look Behind the Mirror: Standardisation Institutions and the WTO SPS and TBT Agreements" 30:2 (2007) *UNSW Law Journal* 504 at 512.

[311] This is assumed based on the fact that a measure which is consistent with the international standard is presumed to be in compliance with the Article 5 risk assessment requirements, according to Article 3.2. This implies that the organisations which determine the standards are essentially expected to perform the risk assessment while determining the standard necessary for the protection of human, animal and plant life and health.

[312] Mayeda (2004) *JIEL* 751; see also section 3.3.3 above.

[313] These drastic differences - such as lower quality scientific research, fewer research facilities, and lack of certification procedures - can be attributed in the majority to the difference in financial status that developing countries experience.

make it easier and more cost-effective for developing Members to harmonize their SPS measures with those of other Members. This, in turn, would make it easier for exporting developing Members to comply with the measures of importing Members as they will already have domestic policies in place to achieve the same level of protection.

Unfortunately, harmonization is not without its disadvantages. Firstly, Kurtz points out that the requirement of harmonization may actually raise costs for Members.[314] This, he argues, is because Members will have to put various assessment and certification procedures in place in order to regulate and record how their SPS measures comply with the international standard.[315] Developing and implementing these procedures, as well as monitoring their effectiveness, would obviously increase the costs involved in complying with the standard. As they are already lacking in financial resources, developing countries would clearly be negatively prejudiced by the increased costs.[316]

Kurtz expands this point to say that the higher compliance costs would thereafter restrict developing Members from participating in international trade.[317] If a developing Member could not afford to implement the necessary procedures to prove compliance with the international standards, it would have to either (a) find an alternative way of proving equivalence with its prospective importers' SPS measures; or (b) only trade with non-WTO countries that are not expected to harmonize their measures. The first option is unlikely to be viable, as a Member who is already struggling to afford compliance costs would no doubt struggle to afford the necessary certifications and assessment procedures needed to prove equivalence.[318] The second option

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[314] Kurtz *UNSW Law Journal* 2007 512.

[315] *Ibid.*

[316] One possible solution to this problem would be for developing Members who are in similar situations to join together and pool their resources in order to develop and implement the necessary processes. For example, two developing Members who both export citrus fruits could combine their resources to develop assessment and certification processes whereby the citrus fruits could be tested for compliance with international standards. Not only would this lower compliance costs for these countries, it could also potentially have effects in transparency (as the participating countries would have to fully disclose their available information to one another) and in political relations (as countries who are financially involved and dependent on one another for the maintenance of such processes would also have to maintain a strong, secure political relationship).

[317] *Ibid.*

[318] Note here that Article 4.1 of the SPS Agreement states that a Member must view another Member's SPS measures as equivalent to its own where the two measures achieve the same level of protection. Therefore, if a Member wished to prove equivalence it would have to be able to present evidence to prove that its measure

would restrict the exporting developing Member's potential import market to a very small number of countries, and thus drastically restrict its ability to participate in international trade. In short, either option would be disadvantageous to developing Members.

The second - and greater - disadvantage of harmonization through international standards is that international standards are often developed to reflect the interests of those parties who are able to participate extensively in the creation procedure. Unfortunately, this means that the interests of developed countries are usually more strongly represented in international standards, and the concerns of developing countries are largely excluded.[319] This disadvantage is one that the SPS Agreement attempts to overcome through the inclusion of Article 3.4, and will be discussed in more detail in the following section.

It is clear, then, that harmonization could be either beneficial or detrimental to developing country interests depending on the manner in which it is interpreted and the extent to which Members are required to abide by the Article 3 provisions. The manner in which the international standards are developed will also have an enormous impact on the effects of harmonization, as the interests that the standards reflect will affect the category of Members that may be benefitted or otherwise by harmonization. In the following section we will consider this aspect through an analysis of Article 3.4 and the ability of Members to participate in international standard setting procedures.

### 3.3.5. Article 3.4 and participation in standard-setting procedures

Article 3.4 of the SPS Agreement requires that:

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achieved the level of protection required by the importing Member - a process that would no doubt require research, assessment, and the presentation of sufficient scientific justification. Such a process would be equally - if not more - costly than proving compliance with a single international standard.

[319] Mayeda (2004) *JIEL* 751. At present, the participation of developing countries in international standard setting is increasing in a physical-representation sense, but not necessarily in a capacity sense. This means that while there is an increase in their physical representation at the meetings of the relevant organisations, their continuing lack of scientific and research capacity often means that they are not able to adequately present their concerns. As a result, their interests are still largely excluded from international standards.

> "Members shall play a full part, within the limits of their resources, in the relevant international organizations...to promote within these organizations the development and periodic review of standards, guidelines and recommendations..."[320]

In other words, Article 3.4 requires Members to participate in, and promote, the standard-setting procedures of international standard setting bodies insofar as is possible. While it specifically refers to the Codex, the IOE and the IPPC, it does not limit the obligation to these three organisations.[321] However, participating in the standard-setting procedures is not always possible for developing Members, and various reasons for this difficulty have been identified.[322]

*3.3.5.1. Difficulties facing developing Members*

The difficulties preventing or hindering developing Members from participating in international standard-setting procedures have been discussed in depth by various authors, and comprise a very lengthy list. The breadth of these difficulties is most likely due to the vast differences between developing countries; for example, the method of governance (democracy, monarchy, autocracy), the division of administrative responsibilities, and even the cultural background of a particular developing country may subject it to difficulties that other developing countries do not experience. Because of this, this section will focus on the most commonly-shared difficulties, or those that affect a broad range of Members within the "developing country" category. However, a small number of more country-specific difficulties will be identified and briefly discussed as well.

The three most common difficulties faced by developing Members appear to be:

1. Lack of financial resources
2. Lack of scientific resources

[320] Article 3.4 of the SPS Agreement.

[321] All three of these organisations are mentioned by name in Article 3.4. This section of the quote has been omitted for length reasons.

[322] It should be noted here that a lack of participation on the part of developing countries may not necessarily always be attributed to an inability to participate. Some countries may have an aversion to the international organisations, while others may have the necessary funds but feel that such funds would be better utilized in another area. However, studies have shown that there are indeed definitive difficulties that developing countries have experienced when attempting to participate in international organization activities.

3. Lack of domestic awareness and communication

The first difficulty is, at this point, a common refrain and is the most basic difference apparent between developing Members and developed Members. As mentioned previously, developing Members are often lacking in sufficient financial resources to participate in international trade matters.[323] With regard to standard-setting procedures, the direct result of this lack of funds is that developing Members are occasionally unable to afford to send representatives to meetings of international standard-setting organisations.[324] Without representation at these meetings, developing Members are not able to present their own trade, economic and scientific interests and concerns for consideration. This then leads to a lack of representation of developing Member interests in international standards, and the creation of standards which are skewed towards the interests of those Members who were able to attend the meetings. In other words, an indirect result of the lack of financial resources available to developing Members is that international standards are unfairly skewed towards the interests of developed Members.[325] This would naturally make it more difficult for developing Members to comply with international standards, as they may have to put their own interests aside in favour of those reflected in the standards.

The second difficulty stems, in a sense, from the first. Developing Members often do not have the necessary financial resources to fund scientific institutions and research.[326] This can have several consequences. Firstly, developing Members may be unable to perform scientific research into their own agricultural situations in order to determine what exactly their trading interests and agricultural positions are. To use an example from an earlier chapter,[327] the African Invader Fruit Fly constitutes an SPS risk in South Africa, as it attacks various types of fruit that are

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[323] See previous chapters. See also SA Slorach *et al* "Options for enhancing developing country participation in Codex and IPPC activities" http://www.fao.org/fileadmin/user_upload/agns/pdf/FAO_Project_Report_FINAL_enhancing_participation_in_Codex_and_IPPC.pdf (accessed 29 March 2016) at 50, as well as Prévost 2005 *SAYIL* at 103, and Scott *A Commentary* at 271.

[324] Slorach *et al* "Options for enhancing developing country participation"51.

[325] This based on the assumption that developed Members have the funds to send representatives to the meetings of international standard-setting organisations.

[326] Slorach *et al* "Options for enhancing developing country participation"51; see also Mayeda (2004) *JIEL* at 752, where he acknowledges that Members may lack "technical capability". From the context it appears that the "technical capabilities" referred to by Mayeda would include institutional capability, such as lack of scientific expertise and research facilities.

[327] See section 2.3.2 of Chapter II.

frequently exported to Europe, such as mangoes.[328] If the Codex were to consider implementing a standard regarding the acceptable state or contamination of mangoes for human consumption, South Africa would have a trade interest in this standard. However, in order to effectively participate in the standard-setting process, the South African representatives would have to be able to present scientific data to support the current situation in South Africa; studies done on the potential spread of the insect; the impact that a restrictive standard could have on the South African exports of mangoes; and so on. In order to do this, it would need to have sufficient scientific expertise, human resources and monitoring programmes to present credible and legitimate data - resources that most developing Members simply do not have.[329]

Secondly, developing Members may be unable to perform research into the safety and effect of a particular standard. To continue with the above example, South Africa would have to be able to present information regarding the safety of consuming mangoes that had been contaminated in any way by the African Invader fly. As the protection of one's own human, animal and plant life and health is an explicit right of states, the developing Member opposing the standard - such as South Africa in the given example - would have to show that the standard is *not* necessary or that there is an alternative, equally acceptable, and less trade-restrictive standard that could be implemented. This will also require extensive scientific research by credible institutions and researchers, which is often costly and beyond the reach of developing Members.

The third major issue, lack of domestic awareness and communication, often makes it difficult for developing Members to participate in international standard setting. This can further be attributed to a lack of two particular domestic institutions, namely Notification Authorities and Enquiry Points. A Notification Authority is defined as a designated governmental authority within

[328] South African Dept. of Agriculture, Forestry and Fisheries "Draft Sanitary and Phytosanitary Strategy January 2014" (2014) 12.

[329] Scott refers to a recommendation by the SPS Committee that the Food and Agricultural Organization of the United Nations ("FAO") ensure the collection and retention of a 'wider' range of data relating to diet and the production methods of food. The purpose of this would be, according to Scott, a means to ensure that data relating to developing country situations is available. This could then help to alleviate some of the problems facing developing Members with regard to research and monitoring expenses. See Scott *A Commentary* 273.

a country, which deals with the notification requirements under the SPS Agreement.[330] This governmental authority is then responsible for various functions, including notifying other countries of proposed SPS regulations and ensuring that the proposed regulations are published timeously for public comment.[331] In other words, the Notification Authority is the branch of government within a particular country which handles international SPS-related notifications. An Enquiry Point, on the other hand, is a governmental department or agency within a country which provides SPS-related information and documents.[332] For example, if an exporting company within the country wishes to check the domestic inspection procedures relating to its product, or perhaps is looking to confirm whether any domestic SPS regulations apply to its product, then it should be able to obtain this information from the domestic Enquiry Point. Together, these two institutions keep their own country updated on SPS regulations as well as notifying other countries of their proposed or implemented SPS regulations.

Developing Members, however, have historically appeared to struggle with the implementation and/or maintenance of these institutions. For example, at the end of 2001, 29 countries of the 31 who had not yet reported information on their Notification Authorities were developing countries.[333] Similarly, 22 of the 23 countries who had not established Enquiry Points by the end of 2001 were developing countries.[334] However, as shown below, the data indicates that the situation has improved since then.

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[330] SPS Handbook Training Module "Establishing an SPS Notification Authority and Enquiry Point" *World Trade Organization* https://www.wto.org/english/tratop_e/sps_e/sps_handbook_cbt_e/signin_e.htm (Accessed 3 April 2016).

[331] *Ibid.*

[332] *Ibid.*

[333] W Jones and P Walkenhorst *The Impact of Regulations on Agro-Food Trade The Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreements: The Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreements* (2003) at 28.

[334] Jones and Walkenhorst *The Impact of Regulations* 29.

*Table 4: LDCs and SPS Institutions* [335]

| **LDCs with no Notification Authority information in 2016** [336] | **LDCs with no Enquiry Point in 2016** [337] |
|---|---|
| Bhutan * | Afghanistan * |
| Cambodia | Bhutan |
| Chad | Cambodia |
| Comoros * | Chad |
| Ethiopia * | Ethiopia |
| Liberia * | Liberia |
| Niger | Sao Tome |
| Sao Tome * | Sudan and South Sudan |
| Sudan * and South Sudan | Vanuatu |
| Vanuatu | |

Although this table refers to the subset of LDCs rather than developing countries as a whole,[338] the statistics that it shows are encouraging. As discussed in previous chapters,[339] LDCs are a subset of "developing country" and are considered to be those countries which are severely lacking in economic and human resources. Of the 48 countries currently categorised by the UN as LDCs, only ten are both members/observers to the WTO *and* have not yet given the WTO information on their National Authorities. Even more encouraging is that only nine WTO Member/observer LDCs have not yet established an Enquiry Point. When one considers that less than a quarter of the most severely financially disadvantaged countries in the world have not yet

[335] Note: for the purposes of this table, data on LDCs was taken from Department of Economic and Social Affairs Development Policy and Analysis Division Committee for Development Policy "List of Least Developed Countries (as of 16 February 2016)" *United Nations* http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf (accessed 3 April 2016). Those marked with stars (*) are not members of the WTO; rather, they had observer status at the time of writing.

[336] Committee on Sanitary and Phytosanitary Measures "National Notification Authorities: Note by the Secretariat" G/SPS/NNA/8 (accessed 3 April 2016). Note that this document appears to be updated periodically. It should also be noted that, according to Jones and Walkenhorst at 28, by 2001 all WTO Members had allegedly *established* National Authorities. However, not all of these countries had provided detailed information about the National Authorities that they had allegedly put in place.

[337] Committee on Sanitary and Phytosanitary Measures "National Enquiry Points: Note by the Secretariat" G/SPS/ENQ/26 (March 2011).

[338] Unfortunately no definitive list of developing WTO Members appears to exist. As LDCs constitute a subset of the "developing country" category, it is submitted that to consider LDCs and the status of their National Authorities/Enquiry Points will give at least an idea of the current state of affairs of developing Members with respect to these two institutions.

[339] See section 1.5 of Chapter I above.

fully embraced and implemented these institutions, it appears possible that the issue of lack of communication and awareness is not as extensively problematic as it once seemed.

It seems, then, that a lack of economic and scientific resources is currently the largest barrier to developing countries participating in international standard-setting activities, while a lack of communication and awareness is steadily becoming a less concerning (and more easily overcome) barrier. However, it is important to remember that these three major barriers are not necessarily the only impediments for developing Members. For example, problems with domestic structures such as a lack of any form of domestic SPS regulation or the non-centralisation of SPS regulation[340] can aggravate a developing Member's difficulties with data capture.[341] Another example would be problems with domestic administration, which may lead to direct practical consequences such as travel visas not arriving on time.[342] This, of course, would prevent national representatives from travelling internationally to represent their country at the international standard-setting meeting in question.

There are myriad problems facing developing Members, some of which go beyond economic difficulties but most of which stem from the former. A startling number of these have a direct or indirect impact on the Member's ability to participate in standard-setting procedures on an international level, which consequently leads to developing country interests not being adequately represented in promulgated international standards. Luckily, it appears that all is not lost; there are a number of potential (and currently implemented) solutions that may assist developing Members in ensuring that international standards are properly reflective of their interests.

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[340] Non-centralisation of SPS regulation refers to the fact that, in some countries, there are multiple institutions that are responsible for handling SPS regulation on a domestic level. This can lead to conflicts between regulations put forward by different institutions, or alternatively, a situation where no regulations are put forward as none of the institutions are certain about what falls within their own realm of authority. A Member cannot participate in international standard setting if its institutions are presenting different data or if its institutions are presenting no data at all.

[341] Slorach *et al* "Options for enhancing developing country participation" 50.

[342] Slorach *et al* "Options for enhancing developing country participation" 51.

*3.3.5.2. Possible solutions to difficulties faced by Members*

In this section, a number of solutions which could help to encourage or facilitate developing Member participation in international standard setting will be considered. Some of these solutions speak directly to the problems outlined in the previous section; some solutions are more generalised and could potentially assist in alleviating a number of developing Member problems beyond mere participation in standard-setting. It should also be noted that some of these solutions are merely proposed, or have been proposed but not yet implemented. Other solutions have already been implemented, or are already available as a possible means for developing Members to overcome the barriers that they are facing.

The first potential solution would be to assist in building up the capacity of developing Members through international involvement. This solution would imply the creation of international organisations dedicated to assisting developing countries to increase their financial and/or scientific capacities as a means of helping them to participate in international standard setting. It could be a specialised solution - such as having an organisation which is dedicated to increasing scientific research facilities in developing countries - or a general solution, such as an organisation which simply provides funds or expertise after analysis of what the country in question requires.

An example of an organisation that would fall into the "general solution" category is that of the Standards and Trade Development Facility ("STDF"). The STDF looks to assist developing countries to regulate their SPS risks and comply with international standards through a wide range of capacity-building functions.[343] Increasing awareness of SPS issues and the related information exchange required for this increase in awareness appear to make up a significant part of the STDF's capacity-building initiatives. Collaboration between countries is also strongly encouraged as a means of sharing information and overcoming issues relating to a lack of scientific resources.[344] In this manner the STDF assists developing countries to build up the capacities required for participation in international standard setting, while also encouraging and facilitating solutions that the countries can implement amongst themselves.

[343] Unknown "STDF at a glance" *STDF* http://www.standardsfacility.org/stdf-glance (accessed 08 April 2016).
[344] *Ibid.*

A second potential general solution would be the creation of trust funds, whose funds would then be used to assist developing countries with the financial requirements involved in participation in standard setting, as well as with capacity building.[345] Such trust funds have been implemented by the Codex, the IPPC and the OIE, and perform the function of providing funds to developing countries who wish to present proposals to the relevant organisation for consideration during their standard-setting procedures.[346] Another example of a function of these funds is to present seminars on topical issues in order to facilitate awareness and information flow.[347]

These trust funds appear to have been successful in their implementation. By 2015 the Codex Trust Fund had assisted more than 2 300 country representatives to participate in international activities,[348] and a second trust fund was launched in January 2016.[349] The trust fund developed by the IPPC provided funds to assist representatives from 45 countries with travel costs in 2009, a significant portion of which was supplemented by funds from a trust fund created by the European Commission for similar purposes.[350] The latest reports from the IPPC indicate that this assistance is ongoing.[351] Finally, the OIE has developed various initiatives to assist developing countries with capacity building. An example of this would be the Performance of Veterinary Services Pathway, which was developed as a means to assist countries in complying with international standards and to assist them to prepare applications for financial assistance for compliance where necessary.[352] It is apparent from this that these international organisations are indeed assisting developing countries - where possible - with their scientific capacities, their

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[345] Scott *A commentary* 271.

[346] *Ibid*.

[347] *Ibid*.

[348] Unknown "FAO/WHO Codex Trust Fund" *Codex Alimentarius* http://www.fao.org/fao-who-codexalimentarius/ctf/en/ (accessed 9 April 2016).

[349] Unknown "Codex Trust Fund" *World Health Organisation* http://www.who.int/foodsafety/areas_work/food-standard/codextrustfund/en/ (accessed 9 April 2016).

[350] Slorach *et al* "Options for enhancing developing country participation" 78.

[351] See, for example, the strategic objectives of the IPPC as identified in IPPC Secretariat "2015 Financial Report - Financial Report and Mobilization"CPM2016/31 (8 April 2016) 10.

[352] Unknown "Bridging WHO and OIE Tools to better control global health risks at the human-animal interface" World Organisation for Animal Health (2014) http://www.oie.int/for-the-media/press-releases/detail/article/bridging-who-and-oie-tools-to-better-control-global-health-risks-at-the-human-animal-interface/ (accessed 9 April 2016).

awareness of SPS issues, and even with their travel costs for international standard-setting meetings.

A third potential solution would be to target specific problems on a domestic or bilateral level. Certain problems, such as country representatives not having the necessary language or negotiating skills,[353] may actually be better solved on a domestic level. To expand on this example, countries could potentially provide a mandatory training course in international relations and negotiation to any persons intended to represent the country in SPS matters. However, such a course would require financial resources and would have to be given by someone with the necessary expertise in such skills. This creates a circular problem: a country needs representatives with language and negotiating skills so the country needs someone with language and negotiating skills to teach representatives. But the country does not have anyone with language and negotiating skills, hence the need to teach its representatives.

Domestic problems could also be overcome via bilateral agreements. For example, Country A is a developing country which has excellent English-speaking negotiators but little domestic scientific research. Country B is also a developing country, which has no English-speaking negotiators, but extensive domestic research on entomology. Countries A and B could enter into a bilateral agreement whereby Country A trains Country B's domestic representatives, and Country B provides Country A with scientific researchers to investigate and report back on Country A's problems with the African invader fly. Both countries benefit from the agreement - Country A receives the scientific data that it needs to present its interests at the standard-setting body meetings, while Country B's representatives receive the training that they need in order to represent Country B at the aforementioned meetings. Alternatively, if Countries A and B are experiencing similar SPS issues, they could pool their resources[354] so that Country A provides the necessary data and Country B provides the representatives. Both of these options would not only allow the countries in question to alleviate some of their capacity difficulties, but would also

[353] Slorach *et al* "Options for enhancing developing country participation" 51.

[354] Pooling resources to present a united representation at meetings of international standard setting bodies appears to be a common suggestion amongst scholars for alleviating the burden on developing countries. See Scott *A commentary* 273 and Mayeda (2004) *JIEL* 754.

encourage and facilitate the building of international relationships between developing Members.

A fourth solution put forward by Mayeda is to make use of Multilateral Recognition Agreements ("MRAs").[355] Provided for in Article 4.2 of the SPS Agreement, MRAs are agreements wherein two or more Members agree to recognise the SPS measure(s) of the other participants to the agreement as equivalent to their own. In other words, Members who are participants in an MRA will recognise that the relevant measures of other participants are equivalent to their own measure, and accordingly are understood to achieve the same appropriate level of protection. MRAs could be used by Members to effectively exempt developing Members from having to comply with international standards, as they would recognise the developing Members' measures as equivalent to those of other participants regardless of the measures' inconsistency with international standards. However, Mayeda points out that developing countries are rarely members to MRAs - once again due to lack of capacity - and so MRAs could also potentially be used by developed countries to create "closed trading blocks".[356] He provides a potential solution to this problem by stating that members of existing MRAs could be encouraged to accept new members to the MRA,[357] which would presumably allow for developing countries who have increased their capacities since the implementation of the particular MRA to enter into it *ex post facto*. However, this does not provide a solution for those countries who are still severely lacking in financial and scientific resources, such as LDCs.

Although not all of these potential solutions are necessarily viable - and some of them have kinks that would require ironing out - it must be acknowledged that developing Member participation in international standard setting does appear to be on the rise.[358] According to Slorach, between 2001 and 2008 there were more developing countries represented at meetings of the Code

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[355] Mayeda (2004) *JIEL* 756.

[356] This appears to be Mayeda's fear at 755-756. "Closed trading blocks" appears to refer to groups of countries who enter into MRAs, and thereafter trade only with one another as they have confirmation that products from other countries within the MRA will comply with their own standards. Mayeda seems to state that this will be used by developed countries to exclude developing countries from the international trade markets – a possible, if unlikely, theory.

[357] Mayeda (2004) *JIEL* 755-756.

[358] See, for example, Table 4 and the related discussion in section 3.3.5.1 above.

Alimentarius Commission than there were "industrialised" countries, and the number of developing countries represented at these meetings almost doubled in the aforementioned seven years.[359] Organisations such as the Codex, the OIE and the IPPC have made generous contributions towards assisting developing countries to participate in international standard setting, and developing Members themselves appear to have increased awareness of SPS-related issues on both a domestic and an international level. Thus, although developing Members may still struggle with participation in international standard-setting procedures, the data indicates that these struggles are decreasing and that the solutions already put in place to assist in developing country participation are having the desired effect: developing country participation is steadily rising.

### 3.4. Conclusion

While this chapter has focused strongly on the problem of developing country participation in international standard-setting, it should not be forgotten that this is not necessarily the most problematic part of Article 3 for developing countries. The first question one should ask is: is harmonization and conformity with international standards actually desirable for developing Members and their interests? And if so, does Article 3 as a whole actually cause or encourage Members to conform to international standards when developing and maintaining their SPS measures?

The answer to the first of these questions appears to be yes. While some scholars may gesture endlessly toward the potential compliance costs of conforming to international standards, it is submitted that these compliance costs are unlikely to be any more onerous than those associated with compliance with another country's SPS measures. By harmonising and centralising SPS measures, international standards may in fact lower the cost of compliance for exporters. Why? Because exporters will only have to ensure that their products comply with the international standards; they will not have to expend funds ensuring that their products comply with the

[359] Slorach *et al* "Options for enhancing developing country participation" 46. It should be noted that this report also pointed out that the rate of attendance (determined by the number of attending countries over the number of countries in total) was lower for developing countries. However, when one considers that the current concern is a lack of representation of developing Member interests, it is submitted that the number of developing countries in attendance is of more concern than the rate of attendance.

varying SPS measures of each individual importer. This is clearly in favour of developing countries, as any saving on financial resources assists with their lack in this area. As Mayeda points out, international standards may also allow for institutional differences between countries,[360] thus creating a flexibility that will allow for the reduced economic and scientific resources available to developing countries.

Further to this, it appears that developing country interests may be more strongly represented in international standards in the near future. The given data indicates that developing country participation in international standard setting is on the rise, with extensive assistance and solutions being catered for by various organisations. As developing country participation in the meetings of international standard-setting bodies increases, the interests of developing countries will be better reflected in international standards. Harmonization and compliance with these international standards will resultantly become more in favour of developing Members, as compliance with international standards will mean that the compliant country is inadvertently considering and catering for developing Member interests. It does, therefore, appear that international standards and harmonization are in favour of developing Members.

Assuming that harmonization is in favour of developing Members, what does Article 3 do to encourage conformity with international standards? The answer appears to be: very little. The phrasing and interpretation of Articles 3.1 and 3.2 imply a vague obligation on Members to "base" their measures on standards, but render full "conformity" unnecessary unless one wishes to acquire the advantage presented as an incentive under Article 3.2. Article 3.3 goes even further, allowing Members to deviate from international standards entirely if their appropriate level of protection requires it. And, as has been discussed in the previous chapter, Members are unconstrained in the development and implementation of their appropriate levels of protection. It appears, therefore, that if developing Members are to benefit from the concept of harmonization, it will need to be more carefully and effectively implemented.

Up to this point this thesis has focused on the problems that the SPS Agreement appears to have created for developing Members, with particular focus on the risk assessment provisions of

[360] Mayeda (2004) *JIEL* 751; see also section 3.3.4 above.

Article 5 and the harmonization provisions of Article 3. But has any attempt been made to provide for the differing circumstances and the common difficulties experienced by developing countries in the Agreement? In the following chapters I will examine the technical assistance provisions of Article 9, as well as the special and differential treatment provisions of Article 10, in order to determine whether the protection allegedly provided by the Agreement to developing countries is sufficient.

# CHAPTER IV – TECHNICAL ASSISTANCE AND SDT

## 4.1. Introduction

Up until this point, I have focused on those provisions of the SPS Agreement that cause difficulties for developing Members without those provisions actually referring to developing Members, such as the risk assessment provisions of Article 5. In this chapter, however, I will turn to a provision of the Agreement which purports to provide advantages specifically for developing Members. Article 9 of the Agreement is the technical assistance provision, which allows for the provision of technical assistance to countries that struggle to comply with SPS measures and SPS requirements. It will be shown that this provision is a mere façade to create the impression of effecting the WTO objective of providing for developing Members while not actually providing significant assistance.

## 4.2. What is "technical assistance"?

Article 9 of the Agreement provides for the provision of technical assistance to *any* other Member, but with a specific focus on developing Members. The key segment of the provision reads:

> "Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organisations."[361]

Article 9 then goes further to specify what will occur in a situation where an exporting developing Member experiences specific problems with a particular SPS measure put in place by an importing Member, and the required provision of technical assistance under such circumstances.[362] Article 9 can thus be seen as a codified regulation of the obligations on Members to provide technical assistance in SPS-related matters.

But what is "technical assistance"? The SPS Agreement itself does not define the term in its definition section in Annex A. Zarilli appears to indicate that "technical assistance" does not include capacity building, the upgrade of technical skill, and other similar purposes, but states

[361] Article 9.1 of the SPS Agreement.
[362] Article 9.2 of the SPS Agreement.

that she believes the definition should be expanded to include such.[363] This is a rather narrow and somewhat absurd interpretation of "technical assistance", as to preclude items such as the upgrade of technical skill from the scope of technical assistance would severely limit the basic resources that developing Members may require assistance to obtain or develop.[364]

Van den Bossche and Zdouc give a wider, and I would argue more accurate, definition. They describe "technical assistance" as providing assistance to help developing Members to:

1. Understand the provisions and operation of the SPS Agreement;
2. Develop "soft infrastructure" such as training people to perform effective scientific research, and developing national regulatory frameworks; and
3. Develop "hard infrastructure" such as laboratories or pest-free areas.[365]

This clearly describes a much broader definition than that envisioned by Zarilli. The definition outlined by Van den Bossche and Zdouc encompasses three major areas: understanding of the technical provisions of the SPS Agreement; development of intangible resources such as effective, coherent frameworks and experts in technical SPS provisions; and the development of physical resources such as laboratories to help the Member carry out the technical provisions of the Agreement.

This definition is also in line with the wording of Article 9.1. In this provision, the Agreement gives examples of *areas* of technical assistance, *forms* of technical assistance, and *purposes* of technical assistance. For example, a Member may provide technical assistance in the *form* of a donation for the *purpose* of seeking technical expertise, to assist in the *area* of processing research.[366] This would fall within the "development of soft infrastructure" of Van den Bossche and Zdouc's definition, as it would pertain to the development of intangible human resources. It could fall

[363] S Zarilli "WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries" (1999) 29. It should be noted that Zarilli uses the term "technical co-operation" but makes reference to Article 9 and its provisions in relation to this definition. It is therefore submitted that Zarilli appears to view the terms "technical assistance" and "technical co-operation" as interchangeable.
[364] Note that this refers to the definition that Zarilli appears to accept as currently in use, rather than a definition including her suggested expansions.
[365] Van den Bossche and Zdouc *Law and Policy* 946.
[366] Note that these are examples taken directly from Article 9.1.

within the "understanding of the provisions of the SPS Agreement" as well, depending on the nature of the technical expertise that the donation was aimed at.[367] As the definition given by Van den Bossche and Zdouc is in line with the examples of technical assistance given in Article 9.1, it is assumed that this is the correct definition. As such, the definition given by Van den Bossche and Zdouc will be used in this thesis.

We can therefore accept that the term "technical assistance" in an SPS context refers to various forms of assistance, ranging from monetary to information-based, that may be given to a Member in order to assist it in directly or indirectly increasing its capacity to comply with the technical requirements of the SPS Agreement. But why should technical assistance be granted to Members, developing or otherwise? In what ways would technical assistance be advantageous to either the giving or receiving Member?

### 4.3. Advantages of technical assistance

Henson *et al.*[368] give a list of potential advantages that technical assistance would provide to a developing Member *receiver*. Firstly, the provision of technical assistance can improve the Member's scientific expertise.[369] This will have far-reaching effects in terms of SPS-related issues. For example, an increase in scientific expertise may increase the Member's ability to evaluate another Member's SPS measures and determine whether there is an adequate scientific foundation for the measure.[370] Alternatively, it may assist the developing Member itself to perform legitimate risk assessments with strong scientific foundations when it wishes to implement its own SPS measures. This potential advantage thus speaks to a primary consideration of SPS regulation – the need for legitimate scientific justification.

Secondly, technical assistance can assist in enhancing awareness of SPS issues and legislation, and can in turn assist in the development of national regulatory frameworks.[371] As information

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[367] For example, if the donor intended the donation to be used to train developing country citizens in understanding the exact requirements of an SPS risk assessment, it could fall within both segments of the definition given by Van den Bossche and Zdouc. This is because it would be development of technical expertise (soft infrastructure) while also contributing to an increased understanding of the Agreement's provisions.
[368] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" (1999) 69 – 70.
[369] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 69.
[370] *Ibid*.
[371] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 70.

and advice can form a part of technical assistance, developed Members will be able to share their knowledge and technical understanding of the SPS Agreement with developing Members through conferences and seminars. An increase in the understanding of SPS issues and technicalities will assist developing Members in developing their own regulatory frameworks, as they will have a better understanding of the relevant SPS issues. They will also have a better understanding of their own obligations under the SPS Agreement, as well as their own right to implement SPS measures and the necessary procedures to be followed.

Thirdly, technical assistance can be given to facilitate developing Member participation in meetings and procedures that they were not previously able to participate in, such as standard-setting meetings of organisations such as the IPPC, or meetings of the SPS Committee.[372] This will give developing Members the chance to present their own interests at such meetings, and thus ensure that developing Member interests are adequately represented on an international level.[373]

It is clear, then, that technical assistance is in the interests of developing Members, as it is a way of providing for the lack of resources that they face. But is it in the interests of developed Members to *provide* technical assistance? According to Hellqvist, the transfer of information and knowledge is "rewarding for both the recipient and contributor" in an international trade context.[374] This is presumably because an increase in knowledge for developing Members means that they will be more capable of complying with SPS standards and measures of other Members, leading to a larger international market and increased opportunities for trade for all Members who trade in international markets. Another possible reason for this statement is that technical assistance could assist developing countries to produce higher quality products, leading to developed countries having more choice of quality import products. Henson *et al.* point to the possibility of developing Members making reciprocal commitments to provide technical assistance to other Members at a later stage.[375] This would naturally be advantageous for those

[372] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 70.
[373] This has been discussed in detail in the previous chapter, and so will not be discussed further here.
[374] M Hellqvist "Trade Facilitation from a Developing Country Perspective" (2003) 24.
[375] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 71.

Members who are categorised as "developed" but who may nevertheless require some form of assistance due to a lack of particular resources or a need for increased SPS-related knowledge.[376] It should be noted here that a lack of financial resources will not necessarily preclude developing Members from making reciprocal commitments; where, for example, a developing Member has received technical assistance in the form of seminars on SPS technicalities, its reciprocal commitment may be to pass the information and knowledge on to an LDC or even to a developed country that has financial resources but is lacking in SPS expertise.

Although technical assistance will provide greater benefit to the receiving developing Member than it would to the providing Member, it nevertheless appears that both Members will benefit from the transaction. The question which should then be asked is: is there any obligation on Members – or even organisations – to provide technical assistance? And if not, does the available data indicate that they are providing adequate technical assistance of their own free will?

### 4.4. Article 9 of the SPS Agreement

#### 4.4.1. Article 9.1 and the Doha Ministerial Conference

Article 9.1 is the general provision of Article 9, and provides that Members "agree to facilitate the provision of technical assistance" to others, with a specific emphasis on developing Members. The provision also makes reference to two different forms of technical assistance, which can be labelled as 'bilateral' and 'multilateral'. Bilateral assistance refers to a situation where one Member provides technical assistance to another Member.[377] The technical assistance 'agreement' is thus concluded between two different parties. Multilateral assistance refers to a situation where an organisation, such as the WTO or the STDF,[378] provides technical assistance to one or more Members.[379] In this instance the 'agreement' is concluded between the

[376] For example, South Africa was briefly classified as a "developed" country rather than as a developing country, and has since returned to developing country status. Such Members, who straddle the line between developed and developing, may benefit from reciprocal commitments by developing countries who may later be able to provide technical assistance to other "developed" countries.
[377] Van den Bossche and Zdouc *Law and Policy* 102.
[378] See previous chapter for a brief discussion on the STDF.
[379] Van den Bossche and Zdouc *Law and Policy* 102.

organisation and the Member receiving the assistance, but the organisation will provide assistance to multiple Members at any given time – hence *multi*lateral.

The use of the term "agree" renders this section mandatory, as it implies that Members have unwaveringly bound themselves to comply. However, by "agreeing" to this provision, Members have not bound themselves to *provide* technical assistance. Rather, they have bound themselves to *facilitate the provision* of technical assistance. Not only does this mean that the Member itself does not have to provide the technical assistance, but it also does not give a concrete idea of what the Member actually has to do.

The term "facilitate" is defined by the Oxford Dictionary of English as to "make easy or easier".[380] Article 9.1 could therefore be said to require Members to 'make it easier' for technical assistance to be provided to others. This is a very broad ideal. On one end of the spectrum, a Member could "make it easier" for another to acquire technical assistance by providing that technical assistance itself. On the other end of the spectrum, merely providing information to another Member about how it could apply to an organisation for technical assistance could theoretically fall within the idea of making the provision of such assistance easier.[381] Alternatively, encouraging a particular organisation to provide assistance to another Member could also fall within the definition of "facilitating the provision of technical assistance" as the Member performing the encouragement is then making it easier for the other Member to receive technical assistance. This provision does not require any particular outcome or consequence; merely helping where one can could be sufficient to fulfil the Article 9.1 obligation.

A similar problem was identified in the Doha Ministerial Decision on *Implementation-Related Issues and Concerns*, given in 2001. Here special consideration was given to the needs of LDCs,

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[380] See Oxford University Press "facilitate" *Oxford Living Dictionaries* https://en.oxforddictionaries.com/definition/facilitate (accessed 20 November 2016). See also Cambridge University Press "facilitate" http://dictionary.cambridge.org/dictionary/english/facilitate (accessed 20 November 2016).

[381] In this example, the 'receiving' Member would find it easier to acquire the assistance as it would know which procedures to follow, while the organization would find it easier to provide the assistance once the correct channels had been followed by the receiver. In this way, the Member who provides the information is fulfilling its Article 9.1 obligations by making the provision of technical assistance easier for both the receiver and the giver.

and Members were "urged" to provide technical assistance to LDCs "to the extent possible".[382] The use of the term "urged" implies that the behaviour is preferable – even desirable – but no actual obligation is placed on the Members concerned. The technical assistance is also only to be provided "to the extent possible". While it is important to acknowledge that this allows for the differing resources and quantities of resources available to each Member, it also provides a form of escape for Members. A Member who does not wish to provide technical assistance, or who only wishes to provide miniscule amounts, can do so and blame its inefficient provision on alleged lack of resources, internal difficulties, economic fluctuations, and so on. The Decision does not appear to stipulate what factors should be considered when determining the extent to which the Member is able to provide assistance, which again widens the possible excuses that a Member can use to avoid its 'obligations'. However, if one considers that this Decision merely "urges" Members to provide assistance, there is no real obligation on a Member to provide assistance regardless.

Scott describes Article 9 as "conspicuously weak, though it is expressed in mandatory form", and makes reference to the use of non-binding terms such as "facilitate" in Article 9.1.[383] She also makes reference to the term "urge" in the Doha Decision, and states resignedly that the Decision "can do no more".[384] This could speak to the fact that the Agreement and any other instrument – such as the Decision – are limited in their power. They cannot stipulate a qualitative or quantitative amount that is to be provided, as each Member will only be able to provide technical assistance according to its economic strength and internal structures. They also cannot place an obligation on all Members to provide technical assistance, as those who are at a severe disadvantage in terms of finances and SPS expertise – such as LDCs – will simply not be capable of compliance. It seems, therefore, that the general provision contained in Article 9.1 may be lacking the strength necessary to ensure the provision of technical assistance – but it may nevertheless be all that the Agreement is capable of obliging Members to do.

[382] Van den Bossche *Law and Policy* 947.
[383] Scott *A commentary* 296.
[384] Scott *A commentary* 297.

### 4.4.2. Article 9.2

Unlike Article 9.1, Article 9.2 provides a specific procedural obligation. However, this obligation only comes into force under particular circumstances. Where an importing Member has implemented an SPS measure and an exporting developing Member requires "substantial investment" in order to comply with the measure, the importing Member must *consider* supplying the technical assistance necessary to enable the developing Member to comply. This creates very specific conditions for the application of Article 9.2:

1. The importing Member must have implemented a particular SPS measure[385]
2. The exporting Member must be incapable of complying with the measure without "substantial investment"
3. The exporting Member must be a developing country

Interestingly, the provision also gives a broad specification of the quantity of technical assistance required: it must be sufficient to allow the developing Member "to maintain and expand its market access opportunities for the product involved".[386] The use of the term "maintain *and* expand" (emphasis added) implies that providing sufficient assistance for the developing Member to maintain its access to the market will not be enough; the assistance must make it possible for the developing Member to expand its access as well.

Does this mean that all importing Members imposing SPS measures are obliged to provide this assistance? Unfortunately not. The obligation that this provision places on Members – the action that it *must* perform – is to "consider" providing the assistance. As mentioned in the previous section, it seems possible that the purpose of this is to prevent Members such as LDCs from being forced to comply with obligations that they cannot fulfil. However, it also has the consequence of significantly decreasing the effectiveness of the provision as it appears to be exhortatory rather than mandatory – by requiring Members to *consider* providing assistance, it implies that the provision of assistance is desirable but not obliged.

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[385] It is interesting to note here that Article 9.2 does not specify that the importing Member must be a developed country. If a developing Member implemented a measure that had the required effect on another developing Member, the obligation under Article 9.2 would – it appears – still apply.
[386] Article 9.2 of the SPS Agreement.

Scott points out that Article 9.2 is essentially a procedural provision,[387] as it requires Members to include a procedural step of considering the potential provision of technical assistance. This then means that the Member *must* include the consideration in its SPS processes, but does not have to actually *provide* the assistance – even if developing exporters are unable to comply with the SPS measure it has implemented. It is also interesting to note that the Agreement does not specify which factors should be taken into account during the consideration process. This then gives the Member a broad discretion to refuse to provide assistance on the basis of almost any factor that it can prove to be viable, ranging from a lack of economic resources to a justified belief that the developing Member does not require the assistance.[388] Therefore, although Article 9.2 may create a procedural obligation, it does not create a mandatory substantive obligation.

Several solutions to this problem have been suggested. The SPS Committee proposed that the words "shall consider providing" in the provision be changed to "shall provide".[389] Scott points out that this would change Article 9.2 from a procedural provision to a substantive provision,[390] which would then place an obligation on any and all Members to provide assistance where developing exporters are unable to comply with their SPS measures. The SPS Committee further proposed that, where the developing Member identifies specific problems relating to technology and infrastructure, the importing Member must provide the relevant facilities "on preferential and non-commercial terms, preferably free of cost",[391] and that a section imposing this obligation be added to Article 9.2.[392] This would lower, or even remove, the costs that a developing Member

[387] Scott *A commentary* 297.
[388] Note that the term "justified belief" is used here as it is unlikely that a dispute settlement body would consider the provisions of Article 9.2 to have been fulfilled if the Member simply stated that it did not believe technical assistance was necessary, without providing any evidence or justification to back up this claim. While Article 9.2 does not limit the factors that should be taken into consideration, I submit that a dispute settlement body such as a Panel convened under the WTO Dispute Settlement Understanding would not be willing to accept a mere "belief" as sufficient to justify a Member in not providing assistance where it would otherwise be both possible and necessary.
[389] Committee on Sanitary and Phytosanitary Measures "Report on Proposals for Special and Differential Treatment" G/SPS/35 (7 July 2005) para 9.
[390] Scott *A commentary* 297.
[391] This is assumed to mean that the provision of the facilities would not occur through a normal commercial contract – in other words, providing the facilities at a competitive commercial price that looks to cover the cost of the facility and provide for some form of profit for the owner. Rather, such a contract would be concluded on terms that are favourable towards the developing Member.
[392] Committee on Sanitary and Phytosanitary Measures G/SPS/35 para 9.

faces in such a situation by obliging the importing Member to provide technical assistance in the form of preferential contracts or preferably in the form of free provision of relevant facilities.

One problem which arises from this proposed solution is that it would indirectly place a restriction on the SPS measures that LDCs – and possibly some developing countries – could implement. Such countries are unlikely to be capable of providing technical assistance. This would mean that, should a situation arise where a developing Member was unable to comply with their SPS measure, they would be forced to either withdraw the measure or violate the obligation under Article 9.2 as they would not be able to provide the required assistance. This in turn would place a limitation on such Members' right to protect their human, animal and plant life and health from SPS risks, as they could be unable to implement necesssary SPS measures for fear of it leading to them having to violate Article 9.2 in the future.[393]

Another proposal allegedly put forward by African delegates to the SPS Committee[394] required that, where the importing Member does not provide the assistance required by Article 9.2, it would be obliged to "withdraw the measures immediately and unconditionally", or alternatively compensate the exporting developing Member for any loss resulting from the measure in question.[395] I submit that this would then render the provision of technical assistance under Article 9.2 optional, as an importing Member could then choose to either:

1. Provide the required technical assistance; or
2. Immediately withdraw the measure in question; or
3. Retain the measure and compensate the exporting developing Member for its losses.

Both option two and three may prove problematic. Imposing option 2 would place a severe restriction on the importing Member's right to protect its territory from SPS risks, as it would essentially require any Member who is unable to provide either technical assistance or

[393] This problem only applies to the proposed solution of altering the provision to read "shall provide" rather than "shall consider providing". This is because the altered provision would apply to all Members regardless of whether they were developed or developing. The additional paragraph proposed by the SPS Committee, which would oblige Members to provide facilities on a preferential basis, would only be applicable to "importing developed country Members". See Committee on Sanitary and Phytosanitary Measures G/SPS/35 para 9.
[394] See Scott *A commentary* 298.
[395] Committee on Sanitary and Phytosanitary Measures G/SPS/35 para 9.

compensation to remove their SPS measure, regardless of the fact that the measure may have been implemented with no ulterior motive other than protection from SPS risk. This would take away from the original purpose of the SPS Agreement, and turn SPS protection into a luxury only available to wealthy Members who can provide the necessary assistance or compensation. While this may work in favour of exporting developing countries, *importing* developing countries would be adversely affected by it.

Imposing option 3, on the other hand, would be difficult in practice. The proposed interpretation would require the importing Member to compensate the developing exporting Member for both direct and indirect losses resulting from the measure. Proving the loss, both in terms of quantity[396] and causation,[397] would require extensive and in-depth consideration by dispute settlement bodies such as WTO Panels. It would also potentially require the development of new legal tests to determine which losses may be claimed for and to what extent. While this would be theoretically possible to do, I submit that this interpretation of the text would create unnecessary difficulties when violations are alleged in real life.[398]

Zarilli puts forward a similar proposal in her paper.[399] She proposes that, where an exporting developing Member is experiencing a specific problem with a measure, it should be mandatory for the importing Member to reconsider the measure.[400] If the importing Member then confirms the measure – by which I assume she means the importing Member does not withdraw or alter the measure – then the importing Member should be obliged to provide the necessary technical assistance.[401] Unfortunately, this would create the same problems as those created by the proposals made by the SPS Committee. Under Zarilli's suggestions, an importing Member faced

[396] For example, proving the value of future sales lost as a result of the measure would be difficult due to the extensive variety of factors involved, such as predicting future supply and demand for the product in question or the potential fluctuation or stability of the developing exporting Member's economy and circumstances.
[397] As the proposed alteration provides for *indirect* losses as well as direct, proving that the measure caused a certain indirect loss could become difficult.
[398] Here the phrase "interpretation of the text" is used as the SPS Committee did not propose adding to or altering the actual text of the Agreement to include this particular sanction. It appears that the Committee rather intended Article 9.2 to be altered to read "shall provide", creating the obligation, and then that the other two options would be viewed as interpreted sanctions on Members who did not perform their obligations.
[399] Note that Zarilli was writing in 1999, and so made these suggestions prior to the SPS Committee report.
[400] Zarilli "Issues for Developing Countries" 29.
[401] *Ibid*.

with an exporting developing Member who has experienced problems with its measure would have two options: withdraw/alter the measure, or confirm the measure and provide technical assistance. For an importing developing Member, providing technical assistance may not always be possible, and so a restriction would be placed on its right to protect its territory from SPS risks through the implementation of SPS measures. If the Member was unable to provide the required financial assistance, it would have to choose between withdrawing the measure and losing the SPS protection it offered, altering the measure and possibly having to go below its appropriate level of protection, or violating Article 9.2. None of these options are particularly enticing.

Unfortunately, it seems that finding a way to phrase Article 9.2 that would please all parties is likely to be highly challenging. As it stands, the importing Members are obliged to consider providing technical assistance as a procedural step but are under no obligation to actually provide the assistance. This could potentially leave exporting developing Members unable to maintain or expand their market access in respect of certain products. Altering the provision to place a mandatory substantive obligation on importing Members would not only be unfair to the importing Members,[402] but would also place a potentially impossible burden on importing developing Members, who may be forced to withdraw necessary SPS measures simply because they lack the resources to provide the required technical assistance.

One alternative would be to alter Article 9.2 so that only importing *developed* Members were obliged to provide the required technical assistance, while importing *developing* Members were not. However, it could be argued that this could create quite extensive and potentially unfair benefits for developing Members who both import and export. For example, Country A is a developing Member who imports beef from developing Country B, and exports coffee to developed Country C. When Country C imposes an SPS measure that Country A cannot comply with, Country C would be obliged to provide Country A with technical assistance.[403] When Country A then imposes an SPS measure that Country B cannot comply with, Country A is under

[402] As there is no actual requirement for exporting developing Members to engage in reciprocal commitments, importing Members would be obliged to provide technical assistance to developing Members without any guarantee that they would receive a benefit, advantage or generally positive return.
[403] In this example, we are assuming that Article 9.2 has been altered so that importing developed countries must provide the technical assistance; not that they must "consider" providing.

no obligation to provide technical assistance as it is not a developed country. Country C, as an importer, has to provide technical assistance while Country A does not. Country B, as an exporter, does not receive technical assistance while Country A does. Country A is then placed in a strong position when compared with either Country B or Country C, despite the fact that Country B is also a developing exporter, and Country C is also an importer. *Prima facie* this situation appears very unfair to both Country B and Country C, and so is not a desirable solution either.

With the implementation of Articles 9.1 and 9.2, developing countries should theoretically be receiving the technical assistance that they require in order to impose their own SPS measures and to comply with the SPS measures of others. However, neither provision renders the provision of technical assistance obligatory, nor do the proposed alterations and solutions provide a satisfactory answer. But how imperative is it that technical assistance be codified as an SPS Agreement obligation? One could argue that mere encouragement, and the requirement to consider providing technical assistance, may be enough to convince Members to provide assistance to those fellow Members who are in need.

### 4.5. Has technical assistance been provided to developing countries?

When one considers that Article 9 does not seem to place any substantive obligation on Members, one would assume that Members would have no incentive to provide technical assistance. However, despite the lack of obligation it does appear that some technical assistance has been provided to developing countries when and where they were in need.

According to Henson *et al.*, the European Union ("EU") provided technical assistance to Egypt in 1999, with the purpose of assisting Egypt in preparing documents to certify certain areas of potato crops as pest-free to the Plant Protection Committee.[404] Previously, in 1997, the EU had also provided technical assistance to Ghana as a means to assist Ghana in complying with EU regulations on fish imports.[405] Although both of these examples are historical rather than contemporary, they indicate that the technical assistance provisions were indeed complied with from the early days of the SPS Agreement's inception.

[404] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 36.
[405] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 44.

While these are just two examples of bilateral technical assistance, multilateral assistance from organisations is frequently offered. For example, in October of 2014 the WTO offered an SPS Thematic Workshop for the purpose of providing training and information to country representatives.[406] The primary purpose of this workshop was to allow representatives to converge and discuss technical aspects of the SPS Agreement, with a focus on risk analysis.[407] A more specific secondary purpose of the workshop was to allow representatives to discuss how the outcomes of risk analyses should be factored into national risk management policies.[408] In other words, the purpose of the workshop was to allow representatives to share information about the interpretation of Article 5 of the SPS Agreement and how the required risk analyses should play a part in the development of national regulations. As with much of the WTO technical assistance, this form of assistance falls under the category of provision of soft infrastructure, as it contributes to the training and development of human resources.

A significant portion of funds for the WTO's technical assistance activities arise from the Doha Development Agenda Global Trust Fund ("GTF"), a trust fund developed in the early 2000s.[409] The GTF is funded by the WTO Members themselves, who are able to voluntarily contribute donations.[410] Although there is no obligation on Members to contribute, Van den Bossche and Zdouc note that in 2011 there were "sufficient" funds to meet the needs of the WTO's various technical assistance activities.[411] The WTO Annual Report for 2015 notes that the timing of contributions from Members have "regrettably become less predictable in recent years".[412] Of the thirteen Members who contributed to the fund in 2014, eight contributed less than they had

[406] Committee on Sanitary and Phytosanitary Measures ""WTO Technical Assistance Activities in 2014: General Information, Selection Process and Application Form" GN/SPS/GEN/997/Rev.4/Add.1 (1 May 2014).
[407] Committee on Sanitary and Phytosanitary Measures GN/SPS/GEN/997/Rev.4/Add.1 para 1.2.
[408] Committee on Sanitary and Phytosanitary Measures GN/SPS/GEN/997/Rev.4/Add.1 para 1.3.
[409] Van den Bossche and Zdouc *Law and Policy* 102.
[410] *Ibid*.
[411] *Ibid*. Note that the latest edition of *Law and Policy*, from which this information was obtained, was published in 2013. According to footnote 141 on 102, this information was obtained from the WTO Annual Report of 2012. I assume, therefore, that Van den Bossche and Zdouc refer to 2011 as it was the latest information available at the time that they were writing.
[412] World Trade Organization *WTO Annual Report 2015* (2015) https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep15_e.pdf (accessed 8 May 2016).

the previous year, while the total number of contributing countries also decreased from 15 in 2013.[413]

Further examples of technical assistance from the WTO can be seen in its recent workshops of 2015. These included regional workshops; another thematic workshop;[414] national seminars; and the electronic learning courses available online.[415] The so-called "e-learning" course is of particular interest, as it provides a means of training Member representatives at a distance, thus cutting the costs of travelling to seminars. However, it should be noted that the courses are only offered in the official WTO languages of English, Spanish and French, which may be a barrier to access by developing country representatives who are not fluent in these languages.[416] At the time of writing, a number of similar courses were planned for 2016, including an "Advanced SPS Course".[417] However, this course is an attendance course to be held in Geneva, Switzerland, and is to be presented only in French.[418] While the WTO does offer to pay for flights, accommodation and subsistence for participants,[419] the language requirements may once again provide a barrier to access for those non-francophone developing countries who are unlikely to have representatives that are able to communicate fluently in French.

Other examples of organisations that provide multilateral technical assistance include the STDF and the trust funds set up by the Codex, IPPC and OIE. While these funds may have a specific purpose – such as the trust funds directed towards facilitating developing country participation in standard setting – they would nevertheless fall within the Article 9 definitions of technical

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[413] World Trade Organization *WTO Annual Report 2015* (2015) https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep15_e.pdf (accessed 8 May 2016).
[414] In 2015 the Thematic Workshop focused on transparency in relation to SPS matters.
[415] Committee on Sanitary and Phytosanitary Measures "WTO Technical Assistance Activities in 2015: General Information, Selection Process and Application Form" G/SPS/GEN/997/Rev.5 (3 March 2015) para 3.
[416] Committee on Sanitary and Phytosanitary Measures G/SPS/GEN/997/Rev.5 para 7. It is acknowledged that English is frequently seen as an international medium of communication, and many representatives on a national level are likely to be able to communicate in English. However, communicating in English and studying the technical aspects of an international agreement in English are two very different matters. There is perhaps room here for improvement in the form of national interpreters being used to present the course materials in a local language, such as in Xhosa or Zulu in South Africa.
[417] Committee on Sanitary and Phytosanitary Measures "WTO Technical Assistance Activities in 2016: General Information, Selection Process and Application Form" G/SPS/GEN/997/Rev.6 (23 February 2016) para 3.
[418] Committee on Sanitary and Phytosanitary Measures" G/SPS/GEN/997/Rev.6 para 30.
[419] Committee on Sanitary and Phytosanitary Measures G/SPS/GEN/997/Rev.6 para 38.

assistance. These have already been discussed in detail in the previous chapter, and so will not be expanded upon further here.[420]

It seems, then, that the WTO has made great efforts to provide technical assistance to improve soft infrastructure in developing countries, and has also attempted to eradicate financial barriers to assistance. Other organisations, such as the Codex, IPPC and OIE, provide technical assistance in the form of soft infrastructure by financially assisting developing country Members who wish to engage in capacity-building activities. These organisations also encourage international relations between developing countries and the sharing of scientific resources, which could be seen as a way of encouraging bilateral technical assistance between developing country Members themselves.

While language barriers continue to exist, there are simple ways to overcome such problems. For example, organisations such as the WTO could implement language training courses in English and French,[421] wherein trade representatives from developing countries would be taught basic and advanced language. These representatives could then undergo the SPS training courses, and take their knowledge back to their own countries where they could arrange local training courses in local languages. This would allow for the spread of SPS-related knowledge and thus increase local human resources, while avoiding a potential problem where only English and French speakers would be able to obtain further training and information on SPS issues.

Despite the non-obligatory language of Articles 9.1 and 9.2, it appears that multilateral technical assistance has been taken up by international organisations, albeit with an apparent focus on soft infrastructure. The extent of bilateral technical assistance, on the other hand, is slightly more difficult to determine. However, there is evidence that it was implemented soon after the promulgation of the SPS Agreement, and further that there is encouragement from international organisations for developing countries to engage in bilateral assistance amongst themselves as a means of capacity building and information distribution. Together, this points to technical assistance being provided to developing country Members as a means of overcoming the various

[420] See section 3.3.5.2 of Chapter III above.
[421] These appearing to be the most common languages for WTO courses.

difficulties they may face under the SPS Agreement. It therefore appears that the non-obligatory language of Article 9 has not prevented or discouraged the provision of technical assistance.

However, the mere existence of technical assistance does not necessarily fulfil the primary purpose of Article 9. Is the current provision of technical assistance sufficient? And if not, is this due to the non-obligatory force of Article 9, or due to policy factors?

### 4.6. Is this provision of technical assistance adequate?

Although there does appear to be provision of technical assistance despite the wording of Article 9, Scott describes bilateral assistance as "extremely modest".[422] Writing in 2007, she indicates that the provision of technical assistance appears to be focused on crisis management rather than prevention.[423] One would assume that management rather than prevention is likely to be less sustainable in the long-term, as without preventative measures being put in place, developing Members will continue to require intermittent technical assistance over longer periods due to the fact that no attempts are made to prevent problems from arising. For example, teaching government representatives from developing countries about the technical requirements of risk assessments *after* companies within their territories have already suffered unnecessary costs from border rejections of their products will not alleviate the problem or make up for what has already occurred. It should, however, be noted that Scott places the blame for this 'modest' technical assistance on the "political context" around recommendations and guidelines relating to Article 9 rather than on the provision itself. [424] She appears to believe that a change in procedural aspects, such as the transparency and communications between countries, may go some way to helping mitigate the problem.[425] While this theory does hold merit, I submit that it will not be sufficient on its own. As Article 9 stands, with its non-obligatory language, it does not seem likely that implementing more stringent procedural recommendations – which are, by their nature, substantively non-obligatory – will help to increase the provision of technical assistance to developing Members.

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[422] Scott *A commentary* 297.
[423] *Ibid*.
[424] Scott *A commentary* 301 - 302.
[425] Scott *A commentary* 302.

Interestingly, Henson *et al*. echo and expand on Scott's concerns about crisis management by pointing out that technical assistance is given in response to *perceived* problems within developing countries rather than in response to *actual* problems.[426] This view, they state, is held by many developing countries who view the provision of technical assistance from various sources as a mere attempt to offset criticisms aimed at the SPS Agreement rather than as a genuine attempt to alleviate the problems faced by themselves.[427] The potential solution to this is simple: developed countries or organisations who intend to provide technical assistance to a developing country should first approach the developing country to determine what issues it may require assistance with. The authors do, however, level their own criticism at this claim by pointing out that it is not enough for developed countries and organisations to provide the technical assistance; there is a concurrent responsibility on the part of the developing countries to *accept* the assistance, to receive the advice, and to be prepared to change their "traditional" structures to become compliant with the SPS Agreement.[428] Thus the blame is two-fold: developed countries and organisations are quick to provide assistance without first determining *what* assistance is required, while developing countries are resistant to advice and occasionally hostile about changing their internal structures and SPS methods.

Multilateral technical assistance is also not without its problems. As discussed above, the majority of the WTO's technical assistance activities are funded by the GTF, which had "sufficient" funds in 2011. However, the WTO Annual Report for 2015 notes that the timing of contributions from Members has "regrettably become less predictable in recent years".[429] Of the thirteen Members who contributed to the fund in 2014, eight contributed less than they had the previous year, while the total number of contributing countries also decreased from fifteen in 2013. [430] This in itself is a marked decrease from the nineteen countries who contributed in 2011.[431] It should also be noted that of the thirteen countries who contributed in 2014, nine of

[426] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 70.
[427] *Ibid*.
[428] Henson *et al*. "Impact of Sanitary and Phytosanitary Measures" 71.
[429] World Trade Organization *WTO Annual Report 2015* (2015) https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep15_e.pdf (accessed 8 May 2016) 123.
[430] *Ibid*.
[431] *Ibid*.

them contributed less than they had in 2011.[432] The total value of contributions has decreased from 16 108 999 CHF in 2011 to 7 793 406 CHF in 2014 – a decrease of more than fifty percent. Considering that the contributions by nineteen countries in 2011 was viewed as merely "sufficient",[433] it is highly unlikely that the contributions from thirteen countries – the majority of which are contributing less than previous years – will be "sufficient" to supply the need for technical assistance activities.

However, hope still remains as the total value of contributions increased in 2015 to 9 105 068 CHF, with the same thirteen countries making contributions in both 2014 and 2015.[434] Interestingly, nine of these countries contributed less in 2015 than they had in 2014.[435] However, marked increases in the contributions from Australia (61 370 CHF in 2014 to 2 162 382 CHF in 2015) and the EU (317 592 CHF in 2014 to 1 658 552 CHF in 2015) dramatically affected the overall annual contribution.[436] Unfortunately, when one considers the data as a whole it does appear that the majority of contributing countries are still contributing less than they had in previous years.[437] This decrease in financial contribution, coupled with the already existing language barriers and the need to implement language training workshops, indicates that the sufficiency and efficacy of the existing multilateral technical assistance activities is in decline.

One then has to ask: is this inadequacy due to Article 9 itself? Or is it, as Scott posits, due to the political context and policy-related problems?

I submit that the existence of this inadequacy cannot be exclusively attributed to one factor or the other; rather, it is a two-fold problem. With regard to the decline in contributions to the GTF, for example, such a problem could not necessarily be resolved simply by altering the wording of Article 9. The GTF is designed as a recipient of voluntary contributions, and if Members are not volunteering then this reticence could be attributed to any number of factors: insufficient

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[432] World Trade Organization *WTO Annual Report 2015* (2015) https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep15_e.pdf (accessed 8 May 2016) 123.
[433] See discussion from Van den Bossche and Zdouc above.
[434] World Trade Organization *WTO Annual Report 2016* (2016) https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf (accessed 20 November 2016) 135.
[435] *Ibid*.
[436] *Ibid*.
[437] *Ibid*.

national funds, poor relations with a developing country,[438] or even merely a national focus on different policy objectives.[439] Similarly, a Member may refuse to enter into bilateral technical assistance agreements simply on the basis of poor international relations with a particular country or countries, or a need to expend the money on other objectives. These appear to be policy issues, and cannot necessarily be attributed to Article 9.

That being said, Article 9 purports to assist Members – with a particular emphasis on developing Members and LDCs – by providing for the provision of technical assistance. However, the non-obligatory format of its wording is what permits Members to turn their policy objectives away from technical assistance and in favour of other pursuits. This is not to say that alternative pursuits are any less deserving of attention; rather, it is to point out that Article 9 does *not* provide the assistance that it was originally aimed toward in and of itself. Once again, we find the uncomfortable tension between the need to ensure an accessible international market for both developed and developing countries, and the need to acknowledge and avoid any unnecessary infringements on state sovereignty.

There are various 'obvious' solutions that one could implement here, such as rewording Article 9.1 to state that Members *must* provide technical assistance rather than must *consider* providing technical assistance. This, however, would place a very heavy burden on Members as it would require *all* Members to provide technical assistance where required. Extensive limitations could be developed by the SPS Committee, such as mandatory minimum quantities that must be provided or a process by which it could be determined what technical assistance is required and how severe the need is. Unfortunately, the nature of technical assistance is such that it is difficult to quantify unless one is considering financial technical assistance. For example, how can one determine the quantity of human resources? Should one look at the number of representatives to be trained? The depth of the knowledge that they require? Should the extent of the need be

[438] If, for example, Country A has been involved in a political skirmish with developing Country B, there is a possibility that Country A may develop a bias against developing countries as a whole. This could lead to Country A decreasing its contributions to the GTF, or even refusing to contribute at all.

[439] For example, a country may decide to focus its expendable financial resources on environmental preservation and environmental concerns rather than on trade access issues. Unless an environmental objective can be identified in the current technical assistance requirements, the country may choose to expend its resources on furthering its environmental objectives rather than contributing to the GTF.

based on the population size of the country? The per capita trade income? The country's net worth? To render the provision of technical assistance mandatory would require in-depth specifications of the extent of the obligation, an endeavour that may actually prove impossible due to the individualised nature of technical assistance itself.

As discussed briefly above, Article 9.2 could be adapted to provide that only *developed* countries need provide technical assistance where their measure creates a specific problem for a developing exporter. However, this would place developing *importers* in a very strong position, to the detriment of both developed importers and developing exporters.[440] Similarly, changing the wording of either Article 9.1 or Article 9.2 to render the provision of technical assistance mandatory may result in a situation where a developing country is obliged to provide technical assistance. For many developing countries, particularly those that fall into the LDC category, this would simply not be possible. Such countries would then have no option but to violate their SPS Agreement obligations, potentially leading to hearings in the WTO's dispute settlement bodies. Even then, a decision in favour of the country seeking the assistance would not necessarily be helpful, as a developing Member who does not have the funds to provide technical assistance *cannot* provide technical assistance – regardless of the existence of an Appellate Body decision directing them to do so.

It appears that the provision of technical assistance, both bilaterally and multilaterally, is woefully inadequate – and that a portion of this inadequacy should be attributed to the wording and subsequent interpretations of the Article 9 provisions.

### 4.7. Conclusion

Despite its attempts to provide technical assistance to developing countries, the non-obligatory wording of Article 9 renders its assistance relatively ineffective. Members are only required to "facilitate" the provision of assistance under Article 9.1, and are only required to "consider" providing assistance where the situation outlined in Article 9.2 arises. Neither provision places a genuine substantive obligation on Members. The use of the term "facilitate" in Article 9.1 is vague and would allow for a Member to fulfil its obligations through any number of broad and

[440] See discussion in section 4.2.2 above.

inconsequential actions. Article 9.2 creates a procedural obligation by requiring Members to engage in a consideration of the provision of technical assistance where their measure creates a specific problem for a developing country; however, Members are not obliged to provide technical assistance at all. From this it is clear that neither Article 9.1 nor Article 9.2 mandates the provision of technical assistance by any Member or organisation.

The collected data indicates that technical assistance is indeed being provided, both bilaterally and multilaterally, albeit with an apparent focus on soft infrastructure. However, the data also indicates that the current bilateral assistance is inadequate – possibly due to hostility and disinterest on the part of both the giving and receiving countries. Multilateral assistance also appears to be inadequate, particularly in situations like that of the GTF where the provision of assistance is reliant on Members voluntarily contributing to financial resources. Although this inadequacy cannot be attributed in its entirety to Article 9 itself, I submit that the non-obligatory wording and interpretation of Article 9 does play a significant part in the lack of technical assistance provision. As long as Members have a broad discretion to choose whether to provide technical assistance or not, it is unlikely that sufficient technical assistance will be provided to meaningfully contribute to developing Members participating more fully in international markets. Without sufficient technical assistance, the spread of SPS-related knowledge and desperately-needed SPS infrastructures such as research laboratories is unlikely to eventuate, leaving developing Members underprepared and unable to fulfil their SPS obligations.

Does this mean that developing countries are without any protection under the SPS Agreement? Not necessarily. In the following chapter I will examine Article 10 of the SPS Agreement, which provides for the special and differential treatment of developing countries. I will further analyse whether the provisions of Article 10 are sufficient to protect developing Members from the problems outlined in the thesis thus far.

# CHAPTER V – SPECIAL AND DIFFERENTIAL TREATMENT

## 5.1. Introduction

Much like Article 9, Article 10 looks to provide direct protection for developing country Member interests. This protection is provided through a concept known as "special and differential treatment". As the name suggests, special and differential treatment refers to an act of providing unique treatment to certain categories of country in order to allow for their specialised needs and difficulties. It is most commonly applied for the protection of the interests of developing countries and LDCs, and appears in various agreements of the WTO. For example, the Agreement on Technical Barriers to Trade requires that Members "take into account the special development, financial and trade needs of developing country Members",[441] while the General Agreement on Trade in Services allows developing countries "flexibility" in complying with the required conditions for trade liberalization agreements.[442] By including these special and differential treatment provisions, these Agreements attempt to provide a direct and explicit means for the protection of developing country interests and needs.

But how effective are these provisions in practice? In this chapter I will analyse the special and differential treatment provisions found in Article 10 of the SPS Agreement. I will examine how these provisions have been interpreted by the SPS Committee and by dispute settlement Panels, and from there determine whether these provisions actually place effective and useful obligations on Members. Before we move to analysis, however, we should first consider the importance and potential benefits of special and differential treatment.

## 5.2. Why is special and differential treatment important?

As discussed in previous chapters, developing countries frequently experience issues that developed countries are not faced with. The most common issue is a lack of financial resources, which is often the root of further issues such as a lack of infrastructure. For example, developing Country A wants to export its fish products to developed Country B. Country B has extensive SPS measures in place regarding the cleaning process that its imported fish products must undergo,

[441] Article 12.2 of the Agreement on Technical Barriers to Trade.
[442] Article 5.1 of the General Agreement on Trade in Services.

in order to protect its people from salmonella outbreaks. Due to Country A's lack of available finance, it is not able to build proper processing plants for its fish products. As a result, it does not have the necessary infrastructures in place to allow it to comply with Country B's SPS measures, and its fish product exports to Country B are accordingly severely limited.

How could Country A's problem be overcome? The first – and possibly most obvious answer – from the previous chapter would be for Country B, a third country or an international organisation to provide Country A with financial or infrastructural technical assistance so that Country A can build its processing plants. In this sense, technical assistance forms a part of special and differential treatment, as it entails providing unique treatment and assistance to certain categories of country. However, special and differential treatment is a broader concept that goes beyond technical assistance alone.

An example of special and differential treatment that would not entail technical assistance is the provision for longer time periods for compliance for developing countries and LDCs. To use the above example, let us imagine that Country B imports 90% of its fish products from developed countries and only 10% from developing countries. As Country B's imports from developing countries are minimal, it could potentially allow for a phased introduction of its measure – wherein developed countries are granted six months to ensure that their fish products are processed according to Country B's measure, while developing countries are granted 18 months to reach the same standard. This would mean that the majority of Country B's imports will be in compliance with its new standard within 6 months of the implementation, while its developing trade partners such as Country A will have more time to gather the necessary resources and bring their products up to the required standard.[443]

[443] There are, of course, potential problems with phased introductions such as this. For example, some of Country B's developed trade partners might not be able to comply with Country B's standards either. Once the six month period has passed, Country B would stop importing from the developed trade partners who did not comply. If it then experienced a shortfall in its fish product imports, it may turn to the developing trade partners who are still providing fish products that do *not* comply with the measure. Developing countries would be able to expand their position in this market, but Country A would be importing more products that do not comply with its measure – going against the original purpose of the measure.

Another common special and differential treatment provision, mentioned briefly in section 5.1 above, is the requirement of taking developing country interests into account. In terms of the SPS Agreement, this would mean taking developing country interests into account when devising, implementing and maintaining one's SPS measures. The purpose here would be to ensure that the special difficulties faced by developing countries are carefully considered by Members during the process of creating new measures, and thus measures will be created that do not unduly disadvantage or negatively affect developing countries.

In theory, special and differential treatment provisions have the potential to make compliance with SPS measures and the SPS Agreement itself significantly more achievable for developing countries and LDCs. However, in order to be effective such provisions would have to be obligatory and capable of enforcement on a practical level. As we will now see, the special and differential treatment provisions in Article 10 do not appear to match up to these requirements, rendering them relatively ineffective in the protection of developing country interests.

### 5.3. Article 10

As mentioned previously, the special and differential treatment provisions in the SPS Agreement are contained in Article 10. In this section, I will analyse the wording, interpretation, and practical effect of these provisions in order to show that their practical effect is not likely to provide much in the way of protection for developing countries. It should be noted that Article 10.3 will not be discussed here, as that provision deals with assisting developing countries to comply with the provisions of the SPS Agreement while this thesis focuses instead on the difficulties that developing countries experience in complying with SPS measures put in place by others.

#### 5.3.1. Article 10.1

Article 10.1 contains the most basic special and differential treatment provision, and states 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."

As with most of the SPS Agreement provisions, this provision appears *prima facie* to be fairly straightforward. On a cursory reading its purpose is to ensure that a Member wishing to

implement an SPS measure will consider the difficulties and particular interests of developing countries and LDCs, so that the measure that it eventually implements is not difficult or impossible for such countries to comply with. By taking the time to examine developing country interests and difficulties, the implementing Member can determine what measures such countries should and should not be able to comply with. As a result, developing country Members would be able to comply with newly implemented SPS measures, and their access to and positions in the international markets would not be unduly hampered by the introduction of such measures.

However, in order to be effective Article 10.1 would have to impose some form of mandatory obligation on Members to ensure that developing country interests are indeed carefully considered and included in the process of developing new SPS measures. Has Article 10.1 created such an obligation? And if so, how has it been interpreted by the WTO Panels?

In this context, we can immediately see that the term "shall take account of" will be of vital importance to this analysis. Terms such as "shall", "should" and "ought to" dictate the difference between a mandatory obligation and one that is merely exhortatory – as such, "*shall* take account of" will help us to determine whether Article 10.1 is indeed mandatory.

Prévost,[444] writing in 2005, discusses the possible interpretations of Article 10.1 in light of the *EC – Biotech* matter that was pending before a WTO Panel at the time. In this matter, Argentina accused the European Communities of not taking developing country interests into account after the European Communities implemented a measure relating to the regulation of trade in biotechnology products.[445] Argentina argued that the phrasing of Article 10.1 created an obligation to "positive action",[446] implying that Article 10.1 places a positive obligation on the implementing Member to ensure that the developing country's needs and interests are actively reflected in the final measure. Argentina's position on the matter spoke to the point raised above:

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[444] Prévost 2005 *SAYIL*.

[445] See *EC – Biotech* para 3.6. It can be noted here that this was not the only complaint raised in this matter, nor the only complaint raised by Argentina in this matter. However, this is the only complaint that is relevant for current purposes. It should further be noted that the *EC – Biotech* dispute was the first time that Article 10 was analysed by a WTO Panel.

[446] *EC – Biotech* para 7.1607.

in order to be effective, Article 10.1 must necessarily create a mandatory obligation to ensure that it is possible for developing countries to comply with implemented measures.

Prévost performs a comparative analysis, looking at how similarly worded SDT provisions in other WTO agreements have been interpreted by Panels. She points out that in both *EC – Bed Linen* and *US – Steel Plate*, special and differential treatment provisions in Article 15 of the Anti-Dumping Agreement were considered and found not to impose any positive obligations on Members.[447] Although Article 15 is worded somewhat differently to Article 10.1 of the SPS Agreement, one can see that both provisions intend to create a general obligation on Members to consider the needs and interests of developing country Members.[448]

Prévost agrees that such provisions do not require a particular concrete outcome or action, but argues that this is to be expected when one considers the nature of special and differential treatment.[449] The fact that developing countries are not homogenous in nature would render an inflexible interpretation of such provisions – such as requiring a specific, denoted outcome to prove fulfilment of the obligation – relatively ineffective in providing assistance for developing countries.[450] The natural conclusion that could be drawn from this is that special and differential treatment provisions are intentionally vague, in order to provide for the differing needs of developing countries. For example, one could imagine Article 10.1 being interpreted by the Panel as including a positive obligation to ensure that a Member's measure would not decrease a developing Member's trade in that particular product. This positive obligation would clearly be to the advantage of developing Members, but what about developing Members who are trying to enter the market? A measure which prevented them from establishing a presence in the market would not violate this positive obligation, as such a Member's trade could not be

[447] Prévost 2005 *SAYIL* 93 – 94.

[448] Article 15 uses the phrase "special regard must be given…to the special situation of developing country Members…". While the use of the term "must" renders this particularly provision clearly mandatory, the similarity to Article 10.1 can be seen in the fact that this provision does not provide a concrete action to be taken or outcome to be achieved in order for the obligation to be fulfilled.

[449] Prévost 2005 *SAYIL* 94.

[450] See Prévost 2005 *SAYIL* 95. See also Chapter I for a discussion on the non-homogenous nature of developing countries.

decreased by the measure – it is already non-existent. In this example, the inflexible positive outcome would not provide for the differing circumstances of the developing Members.

Although Prévost reluctantly acknowledges the likelihood of the Panel in *EC – Biotech* interpreting Article 10.1 in the same manner as previous Panels interpreted *EC – Bed Linen* and *US – Steel Plate*,[451] she puts forward the argument that such an interpretation would conflict with the principle of effective treaty interpretation present in the Vienna Convention.[452] This principle requires that the interpretation of any international law instrument should not be done in such a way as to render the instrument unenforceable.[453] By interpreting Article 10.1 in the same manner as previous Panels, she argues that the Panel would render this provision ineffective and unenforceable – a clear conflict. By not imposing an obligation on Members, Article 10.1 would not dictate a clear requirement for compliance – leading to loopholes in interpretation, fewer Members taking developing country interests into account, and a loss of the protection that Article 10.1 was intended to provide.

When the report was handed down in 2006, the Panel accepted that Article 10.1 did place a mandatory obligation on Members to take developing country interests into account during the process of creating and implementing measures; however, it did not agree with Argentina's submissions that the provision required positive action. Rather, the Panel stated that Article 10.1 merely requires Members to take developing country interests into account alongside any and all other factors to be considered in the creation and implementation of a measure.[454] Article 10.1 did not place an obligation on the implementing Member to give more weight to developing

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[451] As mentioned previously, Prévost was writing *before* the *EC – Biotech* decision was released.

[452] Prévost 2005 *SAYIL* 95. Note that Prévost points out that this principle has previously been applied by the WTO Appellate Body, and cites the matter of *US – Gasoline* as an example. Other examples would include *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R (19 December 1997) para 46, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other items* WT/DS56/AB/R (27 March 1998) para 42, and *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* WT/DS213/AB/R (28 November 2002) para 61 amongst others.

[453] See M Fitzmaurice *et al. Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (2010) at 180, where this principle is described as "…each of [the treaty's] provisions must be taken as intended to achieve some result; and that an interpretation which would disable the text to achieve this objective is similarly incorrect."

[454] Para 7.1620.

country interests;[455] thus, developing country interests would hold the same weight in a Member's considerations as other factors, such as environmental concerns or consumer interests.

One can already see how this diminishes the potential effects of Article 10.1. As with Article 5.4,[456] a Member could impose a measure that severely disadvantages developing countries. The Member could then claim that developing country interests were taken into account, but that a combination of other factors and concerns led to developing country interests being excluded from the final measure. The Member would still be able to show compliance with Article 10.1, as it could produce proof that developing country interests were considered during the creation process; however, the original purpose of Article 10.1 would be entirely circumvented.

This argument, of course, presupposes that Article 10.1 does not require that developing country interests be reflected in the final measure. Unfortunately, this is the view that the Panel in *EC – Biotech* took. The Panel stated that the fact that the implementing Member did *not* grant special and differential treatment to developing countries does *not* automatically mean that Article 10.1 has been breached, and that Article 10.1 "does not prescribe a specific result to be achieved".[457] To rephrase, the fact that the implemented measure does not reflect any developing country interests does not necessarily mean that Article 10.1 has been violated. As with Article 5.4, Article 10.1 appears to impose a procedural obligation rather than a substantive one;[458] Members are required to include a consideration of developing country interests in the process of creating

[455] Para 7.1620.

[456] See discussion in Chapter II above.

[457] Para 7.1620. In the particular circumstances of *EC – Biotech*, the Panel held that Article 10.1 cannot be said to oblige Members to provide special and differential treatment where the measure in question has led to a decrease or merely lack of increase in developing country exports i.e. where it has had a negative effect on developing country exports. In other words, Members are not obliged to provide special and differential treatment simply because their measure has had a negative impact on a developing country's trade.

[458] See discussion in Chapter II above. It can be noted here that the wording of Article 5.4 and Article 10.1 are very similar, with the former using the phrase "take into account" and the latter using the phrase "take account of". However, where Article 10.1 looks to regulate the creation of the measures, Article 5.4 looks to regulate the determination and imposition of appropriate levels of protection. While the two are certainly comparable in their interpretation and effect, this distinction should nevertheless be borne in mind.

measures, but no particular substantive result is required. This is further supported by the Panel's statement in relation to the European Communities' implemented measure:

> "…the absence of a reference to developing country needs in the text of the EC [measure] does not demonstrate that that [measure] itself fails to take account of these needs, or that the European Communities is precluded from taking account, or has not taken account, of these needs when applying that [measure]."[459]

To summarise, Article 10.1 requires Members to consider developing country interests amongst a plethora of other possible factors when developing and applying their measures. It does not require that the measure refer to developing country interests, or that developing country interests be reflected in the measure; it does not even require that special and differential treatment be granted to developing countries where the proposed measure has or is likely to have a negative impact on developing country trade. It is merely a procedural obligation, with very little practical effect. As Scott describes, it is "more than merely exhortatory, but vague".[460] By imposing a procedural obligation it goes beyond being exhortatory, but still does not create a solid obligation with a necessarily required outcome.

Despite this, we can acknowledge that it does at least create a mandatory procedural obligation that will – in theory – force Members to bear in mind the difficulties faced by developing countries while they are developing their measures. But how can this be enforced? If a Member implements a measure that does not reflect developing country interests, how can it prove that it did take developing country interests into account? And conversely, how can a developing country prove that the implementing Member did not? According to the Panel in *EC – Biotech*, the burden of proof falls on the complainant.[461] In other words, it falls to the complaining Member to prove that the implementing Member did not take developing country interests into account. I submit that this is problematic for two primary reasons.

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[459] Para 7.1622.
[460] Scott *A commentary* 285.
[461] Para 7.1622.

Firstly, the complaining Member in such a situation is likely to be a developing country. This statement is premised on the fact that a measure which negatively affects developing countries but does not have the same effect on developed countries is unlikely to be taken to a Panel by a developed country, for the simple fact that the process of taking a matter to the WTO is a lengthy and expensive one. A developed country Member that is not being affected by the measure is thus highly unlikely to bring another Member before the WTO for violations of Article 10.1.[462] Therefore, assuming for the moment that the complaining Member is a developing country, it will immediately face the same problem that has been raised throughout this thesis: a lack of funds. While I accept that there is a possibility of technical assistance and other forms of special and differential treatment that may assist a developing Member to bring its matters before a Panel or the Appellate Body, the fact remains that most developing Members – especially those of LDC status – are unable to afford litigation of trade disputes when they have more pressing domestic matters requiring their financial resources. This presents a problem from the beginning, as developing Members who are negatively affected by a measure, and who genuinely believe that the implementing Member has failed to take developing country interests into account, may struggle to obtain relief from the usual WTO processes.

Secondly, the burden of proving that the implementing Member has not complied with Article 10.1 is incredibly difficult to discharge. An assertion alone was seen by the *EC - Biotech* Panel to be insufficient,[463] and so any allegation of a violation of Article 10.1 would have to be supported by evidence in some form. As the provision does not impose a positive action, the complaining Member cannot simply provide evidence that the positive action was not performed. Showing that no special and differential treatment was granted to the developing country in question also would not be sufficient, as the Panel in *EC - Biotech* found that not providing special and

[462] There is the possibility of a developed Member's trade being indirectly affected by a measure that disadvantages developing countries, in which case it is plausible that a developed Member could bring a claim to the WTO regarding a violation of Article 10.1. However, I submit that this is likely to be the exception rather than the rule, and as such for current purposes it is worth considering that the complaining Member in such matters is likely to be a developing country.

[463] See Scott *A commentary* 286.

differential treatment does not create a presumption that Article 10.1 has been violated.[464] What, then, is the complaining country to do? It has no access to the deliberation process of the implementing country, and has no way of knowing or proving to what extent the implementing country considered and weighed up developing country interests.

Scott proposes that the complaining country could request that the implementing country provide proof of its compliance with Article 10.1, and that a *prima facie* case could be created if the implementing country refuses to provide such proof.[465] She appears to suggest that Argentina could have been successful in the *EC - Biotech* matter if it had first approached the European Communities for proof of compliance, and then presented a refusal from the European Communities as evidence before the Panel. However, I submit that the Panel is unlikely to accept such a suggestion as it would have the practical effect of reversing the burden of proof.

By requesting proof of compliance from the European Communities, Argentina would have essentially been requesting that the European Communities prove that they complied with the requirements of Article 10.1. Upon receipt of such a request, the European Communities would have two options: either they would have to prove that they did comply, or they could refuse to prove it. If the European Communities could not or refused to provide such evidence, Argentina would be taken to have discharged a *prima facie* case and the burden would still fall on the European Communities to prove that they had complied with the provision. In either situation, the European Communities would have to prove their compliance in order to avoid the Panel finding that they had violated Article 10.1.

On the other hand, it could be argued in favour of this suggestion that the burden of 'proof' falls on the complaining country, as the process would not be triggered unless the complaining country requested proof of compliance. If Argentina had requested proof from the European

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[464] Para 7.1620; see also Scott *A commentary* 286. One could potentially raise an argument here that the converse is also true - proving that special and differential treatment was provided may not be sufficient to prove that one discharged their obligation in terms of Article 10.1. Such an argument would work in favour of developing countries, as it would require that the Member implementing the measure go beyond merely supplying special and differential treatment, and perhaps actively engage in a discussion on developing country issues. However, this would place a very heavy and no less vague obligation on the implementing country, and I submit that it is unlikely that any WTO panel would interpret Article 10.1 in this manner.

[465] Scott *A commentary* 286.

Communities of its compliance with Article 10.1, the European Communities would then have had to prove such to avoid the establishment of a *prima facie* case. But if - as happened in this matter - Argentina did *not* request proof of compliance, then the Panel would hold that it had not discharged its burden of proof.

I admit, however, that the above argument is not particularly compelling. The 'burden' on a complaining country of requesting proof of compliance is neither a difficult nor a heavy one, particularly in comparison with the burden of proof that would then fall on the implementing country. It is therefore likely that the implementation of Scott's suggestion would have the practical effect of reversing the burden of proof. Whether or not the reversal of the burden of proof is desirable will be discussed in more detail below.

Having considered the interpretation of Article 10.1 in *EC - Biotech* it appears that this provision - which was designed with the purpose of creating a general obligation regarding special and differential treatment in SPS matters - is not effective in its implementation. The interpretation of the provision as not requiring any specific positive outcome, alongside the procedural phrasing of "shall take into account", makes it difficult not only for complaining countries to prove that a violation has occurred, but also for implementing countries to ascertain what obligations Article 10.1 places on them. However, as Article 10.1 is intended to stand as a general provision which gives meaning and context to the other provisions of Article 10,[466] it is possible that its lack of practical effect is compensated by the effects of the specific provisions that follow it. In order to determine this, I turn now to Article 10.2 - the first of the 'specific' special and differential treatment provisions in the SPS Agreement.[467]

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[466] See Prévost 2005 *SAYIL* 99

[467] It appears common amongst WTO agreements for a provision to include one general provision that gives meaning and effect to the provisions which follow; for example, Article 9.1 of the SPS Agreement is a general provision which gives context to the specific obligation in Article 9.2. Similarly, Article 12.1 of the TBT Agreement gives meaning to the specific special and differential treatment provisions found in the rest of Article 12, and Article 18.1 of the GATT provides a contextual interpretive tool for the rest of Article 18 by requesting that Members recognise the importance of the development of economies, particularly those in developing countries. Therefore, the use of the term "specific" in this context should be taken to refer to the fact that, unlike the general and vaguer phrasing of Article 10.1, Article 10.2 (and later, Article 10.4) create specific, concrete obligations to be followed by Members.

5.3.2. Article 10.2

Unlike Article 10.1, Article 10.2 is more explicit in its creation of an obligation. It provides that "longer time-frames for compliance [with a measure] should be accorded on products of interest to developing country Members", with the purpose of "maintain[ing] opportunities" for their trade in SPS-related products.[468] It further includes the condition that this obligation is only applicable where a "phased introduction" is possible in light of the particular measure.[469]

Article 10.2 therefore requires Members to grant a longer time period for compliance with measures affecting products of interest to developing countries where such is possible in light of the particular measure.[470] This longer time period will theoretically take pressure off developing countries to implement new infrastructures necessary for compliance, and essentially will allow them a little "breathing room". According to the SPS Committee, developing countries have themselves indicated that the longer time periods allowed by Article 10.2 are indeed needed in respect of new measures that affect the products they export.[471]

But what constitutes a "longer time-frame"? Would granting one additional day for compliance be sufficient? One month? One year? Or is the implementing Member obliged to consult with the developing Member to determine the necessary length of time?

According to the Doha Ministerial Decision on *Implementation-Related Issues and Concerns*, the implementing Member should be obliged to grant developing countries an additional period of at least six months.[472] Interestingly, the same Decision stated that there should be at least six months between the notification of a measure and its entry into force, implying that all countries will be given at least six months to comply before the measure is actually implemented. If

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[468] Article 10.2 of the SPS Agreement.

[469] *Ibid*.

[470] It may be interesting to note here that Article 10.2 does not require that longer time periods be granted to developing countries alone; it requires that longer time periods be granted where the measure affects products that are of interest to developing Members. This implies that where a measure affects products that are of interest to a developing Member, the measure itself must allow for a longer period of compliance for *all* Members - not only the developing Members.

[471] Committee on Sanitary and Phytosanitary Measures G/SPS/35 para 23.

[472] Van den Bossche and Zdouc *Law and Policy* 940; see also Committee on Sanitary and Phytosanitary Measures G/SPS/35 para 25.

developing countries are then granted an additional six months, this would mean that developing countries are given at least one year from the date of notification of the measure to comply with its requirements. While this may not seem like much in the grander scheme of developing and implementing new infrastructure and processes, I submit that it is infinitely more desirable than expecting developing countries to be able to comply with a new measure within the same time-frame as developed countries. It should also be noted that the Decision specified the time period as "at least" six months, leaving it open for the implementing Member to determine the exact extended period that it intends to grant. If the nature of the measure is amenable to a phased introduction over a longer period of time, then there is nothing to prevent an implementing Member from granting developing countries a longer time-frame for compliance.[473]

However, the problem with this provision arises once more in the question of whether it is obligatory or merely exhortatory. The provision uses the term "should" rather than "shall", which Van den Bossche and Zdouc take to mean that the provision "encourages but does not oblige" compliance.[474] This would render Article 10.2 incapable of enforcement, as it would not place a mandatory obligation on implementing Members to provide longer time-frames for compliance - which would, in turn, remove the benefit that developing countries themselves believe that they need.

Prévost, on the other hand, suggests that the term "should" in Article 10.2 should be interpreted as obligatory rather than exhortatory. She points out that in *Canada - Aircraft*,[475] the Appellate Body interpreted the word "should" in a provision of the Dispute Settlement Understanding to

[473] It could of course be argued that, since there is no obligation on the implementing Member to grant a longer time-frame, then there is no *reason* for a longer time-frame to be granted. Such an argument would imply that developing countries are unlikely to receive an extended time-frame for compliance of longer than six months. However, if one considers that developed Members have been willing to grant technical assistance to developing Members in the past, then this argument has less merit. The nature of political and trade relations between countries could in themselves create reasons or incentives for developed Members to assist their developing counterparts, including providing longer time-frames for compliance where possible. Naturally one could not say that this would apply to every relationship between developed and developing Members, but the potential for incentives does exist. It would be remiss to assume that developed Members would *never* be willing to provide assistance to their developing Member trading partners in this way.

[474] Van den Bossche and Zdouc *Law and Policy* 940.

[475] ABR, *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (2 August 1999).

have an obligatory effect.[476] Although the word was not used in a special and differential treatment provision, the Appellate Body believed that the context of the provision indicated that it intended to create an obligation despite the use of a non-obligatory term.[477] Prévost believes that the fact that Article 10.2 exists to give effect to the general obligation in Article 10.1 suggests that Article 10.2 was intended to create an obligation to positive action.[478] To interpret it otherwise, she suggests, would render Article 10.2 illusory and without purpose.[479]

While Prévost's argument is not without merit, it should again be noted that she was writing prior to the decision being taken in *EC - Biotech*. Her suggestion that Article 10.2 creates a mandatory obligation on the basis that it should be interpreted in light of the general obligations in Article 10.1 may lose weight when it is considered that the Panel in *EC - Biotech* interpreted Article 10.1 as *not* creating any mandatory obligation. If Article 10.1 does not create a mandatory obligation of positive action - even a general or vague one - can the use of the term "should" in Article 10.2 be interpreted as creating an obligation in light of its context?

To answer this, let us compare the current situation to that faced by the Appellate Body in the matter of *Canada - Aircraft*, as this is the report that Prévost uses to support her contention. In *Canada - Aircraft*, the Appellate Body considered Article 13.1 of the DSU, the relevant third sentence of which reads as follows:

> "...a Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

As with Article 10.2, the provision uses the apparently exhortatory term "should" and Canada argued in this matter that the term "should" meant that it was not under a legal duty to provide the requested information.[480] However, the Appellate Body pointed out that the word "should" had been interpreted as "expressing a "duty"" in other provisions of the DSU.[481] It also referred

[476] Prévost 2005 *SAYIL* 98.
[477] *Ibid*.
[478] Prévost 2005 *SAYIL* 99.
[479] Prévost 2005 *SAYIL* 98.
[480] Section VII para 6.
[481] Section VII para 7.

to the first sentence of Article 13.1, which granted the Panels a *right* to "seek information and technical advice from any individual or body which it deems appropriate",[482] and pointed out that this right would be "rendered meaningless" if the third sentence was interpreted as not conferring an obligation.[483] It went on to list various potential consequences of reading the third sentence as exhortatory, including that Members would be "legally free" to prevent a Panel from performing its mandate as they would be able to prevent it from accessing the information it needed, and that it would go against the duty of Members to act in good faith when attempting to settle disputes.[484] The Appellate Body came to the conclusion that the term "should" in this context thus created a valid legal duty.[485]

In light of the *EC - Biotech* decision, the Appellate Body's decision in *Canada - Aircraft* cannot be applied to Article 10.2. Much of the Appellate Body's argument rested on the fact that to interpret the term "should" as exhortatory would take away from the right of Panels that had been expressly and explicitly laid out in the first sentence of Article 13.1. To rephrase, the argument was based on the fact that the third sentence of Article 13.1 gave meaning and effect to the broader right contained in the first sentence. In contrast, the Panel in *EC - Biotech* specifically stated that the general provision in Article 10.1 does *not* require any positive action and does *not* create any specific obligation.[486] Without an obligation to give effect to, the term "should" in Article 10.2 cannot be interpreted in the same manner as it was in *Canada - Aircraft*.

To conclude, Article 10.2 is a provision which could, if effectively implemented, provide some much-needed assistance to developing countries by obliging Members implementing measures to allow developing countries additional time to gather the necessary resources and develop the necessary infrastructure for compliance. However, the use of the exhortatory term "should" in this provision renders it idealistic rather than mandatory, particularly in light of the Panel's interpretation of Article 10.1 in *EC - Biotech*. Some Members may follow the suggestion of Article 10.2 and permit developing countries the additional time, for reasons of altruism, political

[482] Article 13.1 of the DSU.
[483] Section VII para 7 - 8.
[484] Section VII para 9 - 10.
[485] Section VII para 17.
[486] See discussion on Article 10.1 in previous section.

relations or even trade - however, there is no obligation on them to do so. As a result, the potentially useful addition of this special and differential treatment provision has been rendered relatively ineffective.

### 5.3.3. Article 10.4

Similar to Article 3 discussed in Chapter III above, Article 10.4 looks to assist developing countries with participating in the activities of international organisations. It provides that:

> "Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations".

Unlike Article 3, Article 10.4 does not focus on the standard setting function of the international organisations, but instead provides a broader ideal of participating in the general activities of the international organisations. This being said, and in light of the discussion in the previous section, it is immediately apparent that the use of the term "should" in this provision may prove to be as problematic as it is in previous sections.

Van den Bossche and Zdouc take the term "should" in this provision to be read in its ordinary textual meaning as "purely hortatory".[487] This interpretation agrees with the argument in the previous section that the term "should" should be interpreted as exhortatory unless compelling reasons exist to interpret it otherwise - as existed in *Canada - Aircraft*. In contrast, Prévost believes that "should" in Article 10.4 should be interpreted as obligatory, but uses the same reasoning as she does for Article 10.2 - that the provision gives effect to the general obligation contained in Article 10.1.[488] As discussed above, the reasoning in this argument is significantly undermined by the *EC - Biotech* decision.

However, the SPS Committee appears to take Prévost's side, and recommends that the term "should" in Article 10.4 be interpreted "to express "duty" rather than mere exhortation".[489] The report does not go further regarding the rationale behind this recommendation, other than to suggest that such an interpretation would "help achieve the intended objective of this S&D

[487] Van den Bossche and Zdouc *Law and Policy* 940.
[488] Prévost 2005 *SAYIL* 104.
[489] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(c) para 1.

provision".[490] This appears to mirror Prévost's argument that the specific 'obligations' in Articles 10.2 and 10.4 exist to give meaning to the general ideals of Article 10.1, and that interpreting Article 10.4 as obligatory would assist in achieving this objective. While this interpretation has not been formally adopted despite its recommendation by the SPS Committee, it is nevertheless relevant to note that it has been included as a formal recommendation.

In the previous section, a significant amount of time was spent on the arguments around the meaning of the word "should". But are they as important in this provision? If we were to assume that the term "should" in Article 10.4 implied an obligation rather than a mere exhortation, would this have a significant consequence to the effect of the provision as a whole?

I submit that it would not. If we go back to Article 10.2, we see that it either mandates or encourages the positive action of granting longer compliance periods - a specific, concrete, positive outcome that would either be obliged or exhorted, depending on the interpretation of "should". Article 10.4, in contrast, will either mandate or exhort the 'encouragement and facilitation" of developing country participation in international organisations. If "encouragement and facilitation" constitutes a concrete, positive action, then the interpretation of "should" as either mandatory or exhortatory will necessarily have an effect on Members' obligations. But if it does *not* constitute a positive action, then the question of whether "should" is mandatory or exhortatory becomes less significant.

So what exactly are Members obliged/exhorted to do in terms of Article 10.4? The provision requires them to "encourage and facilitate" the participation of developing Members in international organisations.[491] It is immediately clear that the term "encourage" is merely

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[490] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(c) para 1.The Committee goes further to suggest that such an interpretation "could be" adopted in terms of Article IX(2) of the Marrakesh Agreement. Article IX(2) allows a particular interpretation of a trade agreement provision to be adopted if it is recommended by the overseeing Council and adopted by three-fourths of the Members. In this case, the overseeing Council - the SPS Committee - has made the recommendation. However, to the writer's knowledge, no adoption of this interpretation by the Members had occurred at the time of writing.

[491] In this context, participating in the relevant international organisations is taken to mean participating in the activities of the organisation(s). For example, such would include attending meetings of the SPS Committee, participating in standard-setting procedures of the Codex, IOE and IPPC, participating in the negotiation rounds of the WTO, and so on. It is important to note here that although the SPS Agreement makes specific reference to the Codex, IOE and IPPC, it does not limit the concept of "relevant international organizations" to these three. For this

exhortatory, as the ordinary textual definition of exhortatory is to encourage but not oblige. Members can encourage developing Members to participate, but there is clearly no obligation on them to force developing Members to participate. This understanding ties in closely with the idea of state sovereignty and the right of states to make their own decisions. Requiring Members to force or even ensure the participation of developing Members would be a violation of the developing Members' rights to state sovereignty.

What, then, of "facilitation"? In terms of Article 9.1, Scott describes the term "facilitate" as non-binding,[492] implying that there is no final concrete outcome that must be reached. Prévost reaches a similar conclusion, stating that Article 10.4 does not specify a concrete obligation of how 'encouragement and facilitation' are to be achieved.[493] It appears, then, that Article 10.4 faces the same interpretive problem as Article 9.1: the vague term "facilitate" is used because the provision cannot stipulate the nature, quantity or quality of facilitation without taking into account the developing Member's needs and the providing Member's resources. For example, one developing Member may be in need of financial resources in order to attend a Codex standard-setting meeting while another developing Member may be in need of training and scientific research support in order to present its trade concerns at a meeting of the SPS Committee. Both of these problems relate to the developing Members' ability to participate in the international organisations, but would require very different forms of facilitation assistance. With the first problem, one assisting Member may be able to provide funds for developing representatives to attend the meeting while another may only be able to assist by presenting the developing Member's concerns at the meeting on its behalf. Similarly with the second problem, one assisting Member may be able to provide training but no actual research assistance; another Member may be able to pool its research resources with the developing Member, while a third Member may be able to draw the trade concerns to the SPS Committee's attention at the

reason I submit that Article 10.4 intends to encompass a broader category of international organisations beyond those which are responsible for international standard-setting.

[492] Scott *A commentary* 296. See also discussion in Chapter IV above.

[493] Prévost 2005 *SAYIL* 104.

meeting. These are all very different forms of facilitation, in response to the very different problems faced by the developing Members.

According to the SPS Committee, there is an expectation gap between Members in respect of special and differential treatment provisions in that developing and developed Members expect different obligations and consequences from such provisions.[494] This could provide an explanation as to the vagueness of provisions such as Article 10.4 and their open-ended exhortations: such provisions are an attempt to provide for the obligations that Members are willing to accept, as well as developing Members' expectations of assistance. However, it also creates the problem that to reword the provisions in such a way as to mandate a particular concrete action would take away from the inherent flexible nature of special and differential treatment provisions - and in turn, limit the beneficial treatment that they seek to provide.

Unfortunately, this creates a "Catch-22" situation. If Article 10.4 is worded to create a concrete obligation like that included in Article 10.2, then it would lose the flexibility needed in developing country assistance. On the other hand, by not disclosing a specific obligation the current vague phrasing of Article 10.4 does not truly mandate any action on the part of Members. It could be argued that Members would be expected to "encourage and facilitate" participation insofar as possible within their available resources, and with significant recourse to the needs of the particular developing Member. But where would such an obligation end? Would a Member have discharged its obligation if it were to provide a developing Member with financial assistance to send a representative to a particular meeting of an international organisation? Would it have to provide an undertaking to assist in sending representatives of that developing Member to all meetings of that organisation - or all meetings of any relevant international organisation? If it is already facilitating the participation of one developing Member, would it further be obliged to assist other developing Members as well (provided it was within the Member's available resources to provide such assistance)?[495]

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[494] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section VI para 4.

[495] The reader may have noted that the questions in this paragraph - and much of this section - focus on the term "facilitate" rather than the term "encourage". The reason for this focal point is that Article 10.4 refers to "encourage *and* facilitate" (emphasis added), implying that it is a cumulative obligation. As "encourage" is merely

Thus Article 10.4 requires both flexibility and specificity in order to provide effective assistance to developing countries - an inherent contradiction that will be very difficult to balance. Further, unlike the other provisions of Article 10, Article 10.4 is not limited to the time-frame of the development or implementation of a measure - it is an ongoing, and *prima facie* unending, obligation. It is highly unlikely that a mere rewrite of the text would be able to accommodate a nuanced balance between these two positions - but perhaps an alternative solution may be available.

## 5.4. Proposed solutions to the problems of Article 10

### 5.4.1. Article 10.1 solutions

As discussed above, the primary problem contained in Article 10.1 is that it has been interpreted as exhortatory rather than obligatory, and was said by the Panel in *EC - Biotech* not to require any specific, positive action.[496] This naturally takes away from the protection afforded by Article 10.1 to developing countries. Two potential solutions to this problem have been identified: the consultation recommendations of the SPS Committee, and/or a shift in the applicable burden of proof.[497] Each of these will be discussed in turn.

#### *5.4.1.1. The SPS Committee's consultation recommendations*

The consultation recommendations were put forward by the SPS Committee in its report on Special and Differential treatment, and set out a suggested procedure to be followed when a developing Member identifies specific problems created by another Member's measure.[498] The recommendation is that, where a developing Member identifies a specific problem with a developed Member's measure, the developing Member may request consultations with the

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exhortatory and will not result in a concrete obligation, it is the term "facilitate" that we must turn to when determining whether or not Article 10.4 creates a mandatory obligation.

[496] See discussion in section 5.3.1 above.

[497] Note that neither of these solutions require a change in the phrasing of the text. When presenting solutions to issues such as this it is often preferable to find an interpretive solution, in order to avoid the administrative nightmare of re-negotiating and rewriting the phrasing of the provision.

[498] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(b) para 1. The SPS Committee recommends that this particular procedure be included in the text of Article 10.1; however, there is no reason that this procedure cannot be used *without* its inclusion in the text.

developed Member. The developed Member would be obliged to enter into these consultations in order to find a "mutually satisfactory solution".[499]

While this provision does not actually oblige the parties to find a mutually satisfactory solution, it does give the developing Member the power to oblige the developed Member to discuss potential solutions. Developing Members would then be able to bring their problems to the attention of the developed importers, while the developed Member will not be unduly burdened with examining all possible effects of its measure in advance - as the onus of instituting consultations would fall on the developing Member. Although the inclusion of this procedure would not guarantee that a mutually satisfactory solution would be found, it would be a positive step towards encouraging Members to co-operate in providing for developing Member needs. It would also give the developing Members a chance to outline the exact problems that they are facing in light of the particular measure - an issue which is of particular importance as developing Members have indicated that they believe developed Members do not take the time to identify the problem before trying to provide a solution.[500]

The SPS Committee recommendation then goes further to provide examples of the 'special needs' of developing Members mentioned in Article 10.1, such as improving developing country infrastructure and maintaining their presence in the particular market.[501] The term "include" is used in the recommendation, presumably to ensure that the list is seen as non-exhaustive. While not necessarily significant, the inclusion of this provision may nevertheless help to clarify what is meant by "special needs".

Interestingly, the recommendation also looks at the term "take account of", and states that it will be understood to mean that a developed Member must withdraw a particular measure *or* provide the resources needed by the developing Member if the developing Member is adversely affected by the measure.[502] This recommendation is likely to have the greatest beneficial impact for developing Members, as it would ensure that they will always be able to comply with

[499] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(b) para 1
[500] See discussions in Chapter IV above.
[501] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(b) para 1.
[502] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(b) para 2.

implemented measures - either through assistance or simply because the detrimental measure is withdrawn. Unfortunately, this is likely to be greatly disadvantageous to developed importing Members, as they will either be severely limited in their right to protect their territories by being forced to withdraw their measures, or they will have to provide financial and/or infrastructural assistance to any developing exporting Member who is affected by the measure.[503] The recommendation does not place a limit on the number of developing Members that the developed Member would have to assist - the implication from the wording is that any and all developing Members adversely affected by the measure would have the right to assistance or withdrawal. I submit that this heavy burden placed on developed importing Members is unlikely to be formally accepted due to its potential ramifications.

In respect of the recommendations put forward by the SPS Committee, I submit that the consultation procedure may go some way towards alleviating the problems of Article 10.1 and the *EC - Biotech* decision. However, I do subscribe to the belief that the interpretation of "take account of" by the SPS Committee is unlikely to be accepted by most, if any, developed importing Members due to the heavy burden that it creates.

*5.4.1.2. A shift in the burden of proof*

A second potential solution to the problems created by Article 10.1 would be to shift the burden of proof. As discussed earlier in this chapter, the current position under *EC - Biotech* is that the burden of proving non-compliance with Article 10.1 falls on the complainant. This means that developing Members such as Argentina are obliged to prove that the Member implementing the measure did not take their special needs into account. This would clearly create difficulties for the developing Member, as it would be required to present evidence of a consideration that it was not party to. One potential way of overcoming this problem would be to reverse the burden

[503] It could be argued that where a measure adversely affects a large number of developing Members then it should be withdrawn regardless. However, in order to advance such an argument one would have to determine what would constitute a sufficiently large enough number of affected Members. Five? Ten? Twenty? Although I will not be putting this argument forward here, its existence - and potential difficulties - are nevertheless acknowledged.

of proof; in other words, to require that the implementing Member prove its compliance with Article 10.1 once an allegation has been made against it.

But what effect would a reversal of the burden of proof have? From a common sense point of view, it appears *prima facie* unfair to place a burden of proof on a Member who has simply been accused of violating a provision of the Agreement. If the complainant is required only to make an allegation - not even to establish a *prima facie* case - then this would open the door to a significant number of frivolous cases being brought against implementing Members. It may also allow for implementing Members to be sanctioned for violations that they did not actually commit, simply because they were not able to discharge the burden of proof.

In a similar vein, it is not clear how an implementing Member could discharge its burden. As discussed above, Article 10.1 does not create a clear obligation - it does not specify a positive outcome or a particular action to be taken. An implementing Member would have to prove that it had complied with Article 10.1 without being clear on what it was expected to do under the provision - or even being clear on what the complainant expected it to do. For example, let us imagine that Country A wishes to implement a measure regarding the import of beef that may be infected with bovine encephalopathy (mad cow disease). It is aware that many of its developing trading partners may be affected by the new regulations. It decides to impose a strict regulation standard on the basis that the health concerns of it citizens are paramount, but undertakes to allow a four year period for compliance in order to provide for the circumstances of its developing trade partners. Country A believes that it has discharged its burden under Article 10.1, as it has taken the needs of affected developing Members into account. However, developing Country B is unable to comply with the new requirements within four years and experiences a sharp decrease in its beef exports as a result. Country B accuses Country A of violating Article 10.1.

How can Country A discharge the burden of proof? As far as it is aware, it complied with its obligations by considering the circumstances of its developing trade partners and providing the longer time frame for compliance. Country B believes that Country A should have taken developing country needs into account when developing the substantive content of the measure,

and so alleges a violation. Country A cannot disprove Country B's claim and discharge the burden of proof, even though it believed that it had fulfilled its obligation. The lack of clarity in terms of the obligation created by Article 10.1 thus affects whether a Member can prove that it complied with Article 10.1 or not.[504]

Scott appears to suggest that the burden of proof should indeed be reversed, and that the Member implementing the measure should be obliged to prove compliance if it refuses to present the complainant with proof upon request.[505] She also suggests that implementing Members be procedurally obliged to keep a record of how developing country interests are included in the process of developing new measures, to be used later as proof of their compliance with Article 10.1.[506] Although I disagree with the reversal of the burden of proof, I do fully agree with Scott's remaining proposals. If a Member believes that an implementing Member has violated Article 10.1, it should approach the implementing Member and request its records of consideration of developing country needs. If the implementing Member does *not* present the records, the complaining Member should be permitted to approach a dispute settlement Panel and present the refusal as evidence of a *prima facie* violation. The implementing Member will then have to rebut the *prima facie* case. Using such a procedure would require the complainant to present more than a mere allegation, but would also require the implementing Member to prove its compliance - which should not be difficult provided it has kept the required records.[507]

Unfortunately, this does not overcome the issues around the ambiguity of the wording of the Article 10.1 'obligations'. In order to solve such an issue - as discussed above - one would have to find a balance between the need for flexibility and the need for certainty. Such a delicate analysis would perhaps be better left to a negotiation round of the WTO rather than to interpretation by Panels and the Appellate Body, as these dispute settlement mechanisms would undoubtedly make recommendations and interpretations according to the specifics of the matter(s) before

[504] And, as discussed above, vice versa - a complaining Member will struggle to prove a violation of Article 10.1 if it is not certain what an implementing Member is obliged to do in terms of the provision.
[505] Scott *A commentary* 286; see also discussion in 5.3.1 above.
[506] Scott *A commentary* 287; see discussion in 5.3.1 above.
[507] Note: Members are not currently obliged to keep such records. I am merely agreeing with Scott's proposals that Members be obliged to do so.

them. That being said, I am not certain that a truly satisfactory interpretation and/or rewording of the text of Article 10.1 could ever be achieved.

### 5.4.2. Article 10.2 solutions

Article 10.2 is possibly the most beneficial provision to developing Members at the current time, as it discloses a concrete obligation albeit in a exhortatory manner. While the only way to truly ensure that Article 10.2 advantages developing Members would be to interpret the term "should" as obligatory, there may be other ways to improve the effectiveness of this provision.

In the Doha Ministerial Decision on *Implementation-Related Issues and Concerns*, it was suggested that the longer time-period referred to in Article 10.4 should be at least six months longer - presumably at least six months longer than the ordinary time period for a similar measure.[508] However, it specified that this was only applicable where the specific measure allowed for a phased introduction. Where the measure does *not* provide for phased introduction, the Doha Ministerial Decision suggested that the Member experiencing problems should enter into consultations with the implementing Member - much the same as the procedure set out by the SPS Committee in terms of Article 10.1. As with the SPS Committee's recommendations, the purpose of such consultations will be to find a "mutually satisfactory solution". However, the Doha Ministerial Decision adds that the solution must "continue to achieve the importing Member's appropriate level of protection".[509] In this way, it is confirmed that any solution decided upon must not violate the importing Member's chosen level of protection - an important qualifier that will ensure the protection of the implementing Member's right to protect its territory.

As with Article 10.1, these consultation procedures may go a long way to encouraging developing exporters and implementing Members to work together in providing special and differential treatment for developing Members. The fact that this procedure includes particular protection for the appropriate level of protection of the implementing Member may also make implementing Members more comfortable about engaging in the process, as they will know that

[508] Doha Ministerial Decision "Implementation-related Issues and Concerns" WT/MIN(01)/17 (20 November 2001) para 3.1.
[509] *Ibid.*

they will not have to compromise their own protection in any proposed solution. Unfortunately, the focus on the importance of the implementing Member's appropriate level of protection may restrict the range of potential solutions available to the Members through these consultations – once again taking away from the developing Member's protection, in the same way as it was seen to do through Articles 3 and 5.[510]

The fact that it does not provide for a concrete outcome may also be less desirable to developing Members, as Article 10.2 does create a specific obligation. By engaging in consultations, developing Members may feel that they are forgoing their right to a longer time-frame for compliance while not being guaranteed a solution to the problem. However, to remove this would be to not provide for situations where the particular measure is unsuited to phased introduction. This could potentially mean removing the protection for developing Members entirely in such situations, as the six month period specifically only applies to measures which are capable of phased introduction.

While not necessarily ideal, I submit that the proposal in the Doha Ministerial Decision may provide a useful procedural solution to the problems around Article 10.2. It provides for the special needs of developing Members while also protecting the rights of the implementing Member. While the consultations are only "with a view to finding a mutually satisfactory solution" without mandating that a solution be found, such a provision would still encourage co-operation and discussion between developing exporting Members and importing, measure-implementing Members - which may also go a long way to overcoming the expectations gap between Members.

### 5.4.3. Article 10.4 solutions

As discussed above, the very wording of Article 10.4 means that whether it is exhortatory or obligatory is unlikely to have much effect on the outcome of the provision. The terms "encourage" and "facilitate" do not create obligations with concrete outcomes. That being said, it could be argued that a positive obligation to encourage and facilitate participation is still preferable to an exhortation to encourage and facilitate participation, as - similar to Article 10.1

[510] See Chapter III and Chapter II respectively.

- Members may then be required to present evidence to show that they have complied with this provision.

As discussed above, Prévost[511] and the SPS Committee[512] both support the view that the term "should" in Article 10.4 should be interpreted as obligatory rather than exhortatory. However, this would give rise to an excessively broad obligation that would require Members to "encourage and facilitate" participation on a wide scale. The provision does not limit its application to particular categories of developing country, or a particular time period, or even stipulate that it would only be applicable to developing Members adversely affected by the implementing Member's measure - it has no textual limit.

Placing a limit on this obligation through the re-wording of the text is not recommended. To create a provision which both provides for a concrete obligation and places a limit on that obligation in this particular context is likely to lead to a lengthy, cumbersome, and no doubt ultimately vague or ambiguous provision. When one attempts to squeeze too much into a legal provision, one is often left with a confusing and ineffective legal instrument.

An alternative solution would be to place this issue in the hands of the Panels or Appellate Body. If one of these bodies were to analyse Article 10.4 and the extent of any obligation created thereby, they would be permitted significantly more time and space to expound on such an interpretation in a report. Such a report could be used as precedent by other bodies in the future, without resorting to trying to cram clarity into two or three lines within the provision itself. This would also allow dispute settlement bodies to apply the previous decisions to the particular matter before them, and to expand or contract the limit as necessary. In this way it could be ensured that Article 10.4 is limited to some extent, while the extent of the limitation itself remained flexible.

In order for such a remedy to be instituted, there would of course need to be an allegation of a violation of Article 10.4 put forward to a Panel or the Appellate Body. In the context of Article 10.4 alone this appears unlikely, as alleging a violation of a provision which does not create a

[511] Prévost 2005 *SAYIL* 104.

[512] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section III(c) para 1.

concrete obligation is likely to be a challenging undertaking. It would perhaps be viable for a developing Member to include Article 10.4 considerations in a matter where violations of Article 3 and/or Article 9 are alleged, as the three can be seen as intrinsically linked[513] - however, this would still mean that a remedy would not be sought until an explicit violation of the provision could be identified.

Another alternative solution - and possibly a more viable one - would be to turn the matter over to the SPS Committee. Previous reports such as the "Report on Proposals for Special and Differential Treatment" have shown that the Committee is capable of formulating concrete interpretive recommendations that could help Members and dispute settlement bodies to better understand the rights and obligations of the SPS Agreement; I see no reason why they would not be able to expand on their discussions around Article 10.4 in order to determine the nature and extent of any obligation contained therein. Any developing Member could theoretically raise this issue at a meeting of the Committee in order to initiate a discussion and recommendation process. Dispute settlement bodies may then adapt the SPS Committee's recommendations to each particular case before them, preserving the necessary flexibility of the provision without taking away from its protection.

It must unfortunately be acknowledged that the SPS Committee itself has identified several issues that have prevented it from reaching concrete proposals on special and differential treatment provisions in the past. It has noted that, in order for it to develop and discuss a way forward, it requires detailed input and concrete proposals from the Members - something that appears to have been lacking in past discussions.[514] It further points out that "formulation of precise modifications or operational recommendations...remains a challenge",[515] no doubt speaking to the genuine difficulties of clarifying the obligations present in the special and differential

[513] Where Article 10.4 deals with the facilitation of participation in international organisations, Article 3.4 encourages participation in international standard-setting and Article 9.1 exhorts Members to facilitate the provision of technical assistance. In a sense, Article 10.4 is a combination of Articles 3.4 and 9.1, as it both encourages participation in international activities such as standard-setting *and* exhorts Members to assist and facilitate such participation where possible. For this reason, I submit above that the three could be brought together in a dispute.

[514] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section VI para 1.

[515] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section VI para 3.

treatment provisions, and defining exactly how these should be put into practical effect. However, despite the SPS Committee being "unable to develop any clear recommendations"[516] at the time, it did identify a number of areas for future discussion - notably, for current purposes, "how to facilitate the effective participation of developing country Members...in the SPS Committee".[517] Although this discussion area appears to be limited to the SPS Committee in particular, any findings on how to facilitate participation of developing Members in one international organisation has the potential to provide ideas for effective participation in *all* international organisations.

We can only hope, therefore, that the SPS Committee will "expeditiously undertake discussion"[518] on this area as a means to help define the obligations and rights of Members under Article 10.4. Considering that altering the text is likely to lead to a cumbersome and ambiguous legal instrument, and that leaving the matter to dispute settlement bodies is only likely to occur in the event of an explicit violation requiring further intervention, I submit that the question of Article 10.4 obligations is perhaps best entrusted to the SPS Committee for further analysis and clarification.

### 5.5. Conclusion

Unlike most of the provisions discussed in this thesis,[519] Article 10 was developed with the explicit objective of protecting and providing for developing and LDC Members. As discussed in Chapter I above, the category of "developing country" is very broad, and so any provisions intending to provide for or protect this varied category must be inherently flexible in application. It appears that this need was forefront in the minds of the drafters during the developmental stages of the SPS Agreement, as the Article 10 provisions seem to have been drafted with the intention of being deliberately vague and open to interpretation.

Does this take away from the protection that Article 10 was intended to offer? I submit that it does. The broad phrasing of these provisions works not only in favour of the varied nature of

[516] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section VII para 1.
[517] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section VII para 3(c).
[518] Committee on Sanitary and Phytosanitary Measures G/SPS/35 section VII para 3.
[519] With the exception of Article 9.

developing country Members but also allows for situations where no concrete obligations are imposed on other Members. Without concrete obligations the developing Members do not have the associated concrete rights, and so the protection afforded to them is lessened. In particular, the interpretations of Articles 10.1 and 10.2 in the *EC - Biotech* matter have further weakened the texts of the provisions by showing them to be exhortatory and not requiring of positive action.

That being said, developing country Members can be heartened by the fact that potential - and even viable - solutions do exist that could make the Article 10 provisions stronger and more likely to supply the required protection. The SPS Committee has shown a genuine desire to assist in this regard through its recommendations of consultation procedures and further discussion around special and differential treatment issues, and it appears committed to encouraging Members to engage and facilitate discussion around these concerns. Although the Committee has to date provided relatively basic recommendations in respect of Article 10, the fact that it is willing to engage in these discussions could indicate a future possibility of more detailed analyses and concrete solutions to the inherent textual weaknesses of this provision. In summary, although the provisions of Article 10 are currently textually weak, I submit that future proposals by the SPS Committee - and possibly future interpretations of these provisions by dispute settlement bodies - have the potential to eventually find the required balance between flexibility and concretisation.

# CHAPTER VI - SUMMARY OF FINDINGS AND WAY FORWARD

## 6.1. Summary of issues in the SPS Agreement

Having examined the various provisions of the SPS Agreement in detail, it appears that the promised protection for developing Members is not as extensive as hoped for. The provisions which purport to provide protection for developing Members, such as Articles 9 and 10, are unlikely to be effective in application, while other provisions such as Article 5 may indirectly hinder developing Members' expansion and presence within the international market. But is this an inherent flaw of the Agreement? I submit not. If we analyse the problems that have been discussed in the foregoing chapters, it seems that the issues which give rise to developing Member disadvantages may be categorised into several specific areas - and such a categorisation may assist us in determining where we are able to go from here.

### 6.1.1. The emphasis on state sovereignty

As mentioned in Chapter I, the original purpose of the SPS Agreement was to expand on the exception in Article XX(b) of the GATT by creating a set of regulations that dealt specifically with threats to human, plant and animal life and health. In doing so, it turned what was once an exception into an explicit right by stating that "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health…",[520] provided that this right is exercised in accordance with the Agreement. This newly created right then grants Members the power to protect their territories - a power that is relatively unconstrained, despite the Agreement's various regulatory provisions. In this way, the Agreement places a high value on state sovereignty and the right of states to determine the way in which they will protect their territory - sometimes at the expense of other ideals, such as the protection of developing countries.

Several examples of this imbalance can be seen throughout the Agreement. Article 5 permits Members to determine their own appropriate level of protection, the definition of which is the level of protection "deemed appropriate by a Member".[521] While the Agreement does place

[520] Article 2.1 of the SPS Agreement.

[521] See discussion in section 2.2 of Chapter II above.

some restrictions on the exercise of this power, in practice Members are largely unrestricted in the determination of their appropriate levels of protection.[522] This permits Members to choose to impose high levels of protection, leading to stringent SPS measures,[523] which in turn results in developing Members being unable to comply with the measures. This emphasis on the sovereignty of states to determine a level of protection that they alone deem appropriate therefore has the potential to be exercised at the expense of developing countries' ability to compete in these markets.[524]

Another example is Article 3, which requires Members to base their measures on international standards.[525] Notably, Members can impose a higher standard than the relevant international standard if their appropriate level of protection requires such. Usually, the purpose of basing one's measure on an international standard is that it would automatically be deemed to be based on scientific evidence. By allowing deviations from international standards, the Agreement grants Members the power to impose measures that are unnecessarily stringent and go beyond what the scientific data reasonably requires. Once again, the perceived 'needs' of the importing Member - as determined by the Member itself - take precedence over any and all other factors.[526]

Is this justified by the Agreement? I submit not. While I acknowledge that the Agreement was developed for the express purpose of regulating SPS risks and preventative measures, it must be noted that the Preamble to the Agreement gives multiple goals. These include not only the belief that "no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health",[527] but also the recognition that "developing Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members" and must be assisted.[528] It is clear from this that both state sovereignty *and*

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[522] See discussion in Chapter II above.

[523] In order to achieve the Member's appropriate level of protection.

[524] I acknowledge that the emphasis on sovereignty of states may affect other factors as well, and not only developing country trade. However, for the purposes of the current discussion it is only necessary to focus on developing countries.

[525] With certain specified exceptions. See Articles 3.1 and 3.3.

[526] See Chapter III for further discussion on deviations from international standards.

[527] See Recital 1 of the Preamble to the SPS Agreement. This appears to be a direct reference to Members' rights to protect their own territories from SPS risks.

[528] See Recital 6 of the Preamble to the SPS Agreement.

developing country interests are recognised by the SPS Agreement Preamble as worthy of protection, and that neither has been singled out as being more worthy of protection than the other. Further, neither of these two often-conflicting factors have been recognised as more worthy of protection than other factors included in the Preamble; for example, the need for harmonisation.

And yet, as seen in the discussions throughout this thesis, it appears that the Agreement frequently places greater focus on state sovereignty than on the other objectives - a focus that is neither required nor endorsed by the Preamble. By placing emphasis on a single purpose, the Agreement undermines the multiple purposes included in its Preamble; and, in this way, takes away from the protection that it affords developing countries.

### 6.1.2. The use of exhortatory terminology

A second area where the Agreement frequently loses efficacy is in its use of exhortatory language. Occasionally the use of such language serves a purpose, while at other times it appears to be nothing more than an oversight on the part of the drafters, or a political compromise between Members who were unable to agree on the obligations to be imposed.

For example, Article 5.4 states that Members "should...take into account the objective of minimising negative trade effects". This provision exhorts Members to consider the possibility of negative trade effects as part of the deliberation process, without actually mandating that negative trade effects be diminished.[529] The use of the exhortatory term "should" removes the obligatory force of this provision. Similarly, Article 10.4 states that Members "should encourage and facilitate" the participation of developing Members in international organisation activities; once again, the exhortatory term "should" removes any concrete obligation from this provision.[530]

Even where the term "should" does not necessarily appear, aspirational language may take away from the obligatory nature of the provisions. Article 9.1 requires Members to "facilitate" the

[529] See Chapter II for further discussion.
[530] See discussion in Chapter V above.

provision of technical assistance to developing Members;[531] Members are not obliged to *provide* technical assistance, but rather to 'make it easier.' Similarly, Article 10.4 requires encouragement and facilitation, neither of which places a concrete obligation on the Member.[532] In both of these situations the exhortatory term "should" is not used, but the wording that is used still does not create an obligation for Members.

The use of non-obligatory terms is not necessarily an issue in all circumstances; on occasion, the Agreement cannot impose an obligation as to do so would create more problems than it would solve. For example, Article 9.1 is couched in exhortatory language as it would not be fair or even possible for the Agreement to oblige all Members to provide technical assistance to developing Members.[533] In such a scenario, placing an obligation on Members would not be effective as many Members would simply be unable to fulfil it. However, it should be noted that this is the exception to the rule; many other provisions such as Article 10.4 and Article 5.4 could easily be couched in mandatory language without negative implications.

Another interesting aspect is that some provisions in the Agreement appear to oblige an action while not actually obliging a concrete outcome. For example, Article 4.2 requires Members to enter into consultations "with the aim of achieving" agreements on equivalence of measures. While this provision does require consultations, it does not oblige the Members to come to a final agreement; it merely requires that the Members acknowledge this to be the ultimate goal of the consultations. Similarly, the Doha Ministerial Decision suggested that Members be obliged to enter into consultations with a developing Member who has identified a specific problem that it is experiencing in complying with the imposing Member's measure. However, these consultations must be entered into with the *aim* of finding a "mutually satisfactory solution".[534] Once again, there is no *obligation* to find a solution; it is merely acknowledged as the purpose of the consultations. In both of the above situations, a Member who enters into consultations and

[531] See discussion in Chapter IV.
[532] See discussion in Chapter V.
[533] See discussion in Chapter IV.
[534] See discussion in section 5.4.2 of Chapter V above.

does not come to agreement or a solution will not have violated the Agreement, despite the fact that there will be no positive or effective outcome.

In this way, the use of exhortatory language in many of the Agreement's provisions – particularly those designed to protect developing country interests – tends to render these provisions ineffective in practical application. By avoiding obligatory wording, the Agreement avoids imposing true obligations on Members, which naturally results in less effective regulation of SPS measures and a lessening in the protection that the Agreement purports to offer developing Members.

### 6.1.3. Vague wording of provisions

Much like the problems with exhortatory language, the use of vague or ambiguous phrasing in provisions within the Agreement takes away from their effectiveness. Where vague wording is used Members are left unsure of their rights and obligations, and have to approach the Panels, Appellate Body or SPS Committee for interpretive assistance.

An example of vague language is Article 10.4 - a provision which requires Members to "encourage and facilitate" the participation of developing Members in international organisation activities, but which does not quantify or limit the extent of this encouragement and facilitation.[535] Without further interpretation of this provision it is not clear what Members are required to do in order to avoid committing a violation. Does Country A provide encouragement and facilitation to developing Members who are affected by any of Country A's measures? If Country B is struggling to participate in the meetings of the SPS Committee, can it turn to any other Member and demand facilitation of its participation? If a Member is instructed by a dispute settlement body to facilitate another Member's participation, what exactly would such an obligation entail? Where does the alleged obligation - and the associated right of the developing Members - end?

A second example is the concept of "based on" in Article 5.1, and the question of whether a measure could be "based on" a divergent or minority scientific viewpoint. The Appellate Body in *US/Canada - Continued Suspension* said that a measure could indeed be based on a divergent

[535] See discussion in section 5.3.3 of Chapter V above.

scientific opinion - but what then constituted a divergent opinion? In *EC - Hormones* the Appellate Body said that a single divergent view was not sufficient, but the Panel in *EC - Biotech* stated that a Member could deviate from a risk assessment even where there was no divergent scientific view.[536] The apparent inconsistency in interpretation of this provision leads only to confusion and uncertainty - a situation that could have been avoided had the provision not been worded vaguely. Once again this kind of legal uncertainty makes it difficult for Members to determine what their obligations are under the Agreement, which in turn makes it difficult for any Member to allege a violation of the Agreement.

Unfortunately, using more rigid wording within all provisions of the Agreement will not necessarily benefit developing Members. As discussed above, the inherently flexible nature of the "developing country" category means that one developing Member may experience completely different problems and require completely different assistance to another.[537] If explicit terms were used in special and differential treatment provisions, such as Article 10.4, such provisions would become inflexible and would not be able to provide developing Members with the assistance or protection that their particular circumstances require. This leaves us in a complicated situation with regard to special and differential treatment provisions: flexible phrasing leads to legal uncertainty and difficulties in alleging violations of provisions, while inflexible phrasing may lead to some Members being unable to obtain the assistance that they require.

Therefore, it can be acknowledged that while this issue in generic provisions could be overcome by the use of clearer phrasing, those of a specific nature such as special and differential treatment provisions may require a balance between flexibility and specificity. Such a balance will not be easily acquired, but a lack thereof could have drastic effects on the protection afforded to developing Members.

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[536] See discussion in section 2.2.1 of Chapter II above.

[537] See discussion in Chapter I regarding developing country categorisation, and in Chapter V regarding the flexibility of the special and differential treatment provisions.

### 6.1.4. Conclusion on issues

While categorisation of these issues may be useful in finding solutions, it must be acknowledged that we cannot neatly categorise every problematic provision of the SPS Agreement. The research in this thesis has shown that, although the Agreement purports to provide protection for developing countries and their international trade interests, its provisions are frequently ineffective in fulfilling this promise - and occasionally even harmful towards such countries. This ineffectiveness and occasional potential harm is not only present in the special and differential treatment provisions, but also manifests in generic provisions which appear *prima facie* to not have any specific effect on developing countries at all.

Having identified and discussed these shortcomings at length, it is necessary to ask: how do we overcome these problems? Will developing countries forever be directly and indirectly disadvantaged by the provisions of the SPS Agreement? Or is it possible to identify and implement solutions which will help developing countries to enter into, and maintain a presence in, the international trade market for agricultural products?

Where do we go from here?

## 6.2. The way forward

It is challenging to identify a potential way forward in respect of the SPS Agreement, as there are so many factors that need to be taken into consideration. Although this thesis has focused primarily on developing country needs and interests, one also has to consider:

1. The explicit right of Members to protect their territories from SPS threats and the recognised importance of this right;
2. The need to balance legal certainty with flexibility;
3. The important - if not always effective - role of the Panels and Appellate Body in providing interpretive authority;
4. The functions of the SPS Committee in providing recommendations and a forum for participatory analysis; and
5. The activities of the relevant international organisations, including - but not necessarily limited to - their standard-setting functions.

Throughout this thesis I have attempted to provide solutions and to discuss solutions put forward by scholars within this field. These proposed solutions tend towards the specific, such as altering the wording of Article 9.2 to state that Members "shall provide assistance" rather than "shall consider providing",[538] or the use of Multilateral Recognition Agreements to assist developing countries who struggle to conform to the measures of other importing Members.[539] The specificity of these solutions speaks to the problem mentioned above: that the problems found within the SPS Agreement, particularly those which affect developing countries, are so widely varied that dealing with them categorically rather than individually is likely to be difficult, if not impossible.

That being said, there are two generic solutions which may assist in solving some of these problems. Each of these solutions will be briefly discussed below. It should, however, be noted here that these solutions are presented in a relatively shallow form due to the narrow parameters of this research, and that further discussion and analysis would be needed in this regard.

### 6.2.1. Binding effect of SPS Committee recommendations

At present, the recommendations put forward by the SPS Committee are not considered to be binding on Members.[540] This implies that useful recommendations such the interpretation of Article 9.2 and the consultation procedures for Article 10 do *not* have to be adhered to by Members, despite their potentially advantageous effects.[541] As with so many of the SPS Agreement provisions, a lack of binding obligation is likely to remove the effectiveness of the SPS Committee recommendations.

Before continuing, it is important to note the difference between the WTO dispute settlement bodies - such as Panels and the Appellate Body - and the SPS Committee. When a dispute comes before a Panel or the Appellate Body, each party to the dispute presents its side of the argument. The Panel or Appellate Body then provides a binding ruling on the issues before it.[542] Although

[538] See section 4.2.2 in Chapter IV above. This solution was proposed by the SPS Committee.
[539] See discussion in section 3.3.5.2 of Chapter III above.
[540] See sections 4.4.2 and 5.3.3 above regarding proposals by the SPS Committee.
[541] See discussions on these recommendations in Chapters IV and V respectively above.
[542] To clarify, when a matter comes before a Panel or the Appellate Body, that particular body will provide a binding decision *on the matter before it*. Any interpretations of WTO agreements and any obligations or rights that

each party to the dispute has the opportunity to present its own evidence and arguments, the final decision lies with the members of the Panel or Appellate Body alone.

Conversely, recommendations of the SPS Committee are usually made after extensive meetings and consultations with Members from across the globe. Any interested Member may make representations to the SPS Committee and bring their particular trade concerns forward. Because of this, I submit that the recommendations of the SPS Committee are likely to be based on a more holistic view of the situation than the decisions of the dispute settlement bodies - and as a result, are more likely to be effective in dealing with and solving the trade concerns of the Members.

However, also unlike the decisions of dispute settlement bodies, the aptly-named recommendations of the SPS Committee are indeed merely recommendations or guidelines; they may have persuasive value, but they have no binding force on Members. I submit that, if these recommendations were to have obligatory force, they could go a long way towards solving the issues inherent in the Agreement. The holistic nature of their creation is such that they are likely to achieve the required balance between flexibility and specificity, and are equally likely to please the majority of Members. This is due to the fact that any affected Member would have been granted the opportunity to present their own concerns for consideration during the discussion stage.

In many ways the recommendations of the SPS Committee may be qualitatively superior to the SPS-related decisions of dispute settlement bodies, simply due to the inclusive nature of their development. If these recommendations were rendered obligatory in force, it is likely that they would assist in overcoming the uncertainties and ineffective exhortations present in the Agreement.[543] While it is acknowledged that some procedural tweaks may be required - such as

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the body rules exist are then considered binding on the parties to that dispute in that particular matter. Dispute settlement bodies are not necessarily bound to follow the decisions of earlier bodies, thus a ruling made in one particular matter does not necessarily apply to another similar matter. More discussion on this will follow in the next section.

[543] It should be noted here that I am submitting that only the interpretive recommendations of the Committee be considered binding. Where the Committee's recommendations have included amendments of the text – such as recommendations that the term "should" be changed to "must" – it would be unwise to automatically consider them to be binding. This would grant the Committee extremely broad powers to alter the text of the SPS Agreement as they see fit, which could lead to drastic changes in the obligations of Members. It is therefore only

an explicit system of adopting recommendations[544] and a post-publication review procedure[545] - I submit that this could be a potential generic solution to the problems of the Agreement.[546]

6.2.3. A stronger use of precedence in the WTO dispute settlement system

As mentioned briefly above, dispute settlement Panels and the Appellate Body are not bound by the decisions of earlier bodies.[547] An example of such would be the panel in *EC - Biotech* concluding that Members may deviate from a risk assessment provided that they can provide an updated assessment at a later stage, in contrast to the earlier decision in *EC - Hormones* where the Appellate Body found that a single scientific study was not sufficient to justify a deviation from a risk assessment.[548] The *EC - Biotech* decision implies that a scientific study does not need to be presented in order to deviate from a risk assessment while the *EC - Hormones* decision implies that a single study is not sufficient justification for a deviation - a clear contradiction.

This kind of inconsistency leads to one of the problems outlined above: legal uncertainty. The SPS Agreement, with its attempts to balance multiple oft-conflicting ideals, includes a significant

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suggested that the Committee's interpretive recommendations be considered binding, as these interpretive recommendations would still be restricted by the actual wording of the text.

[544] For example, Members may be required to vote on or explicitly adopt the recommendations.

[545] For example, Members could be permitted to have the adopted recommendations reviewed by a dispute settlement body or even an SPS-based review panel created specifically for the purpose of reviewing SPS Committee recommendations to ensure that they do not have a significant negative impact on any particular Member or category of Members.

[546] It can be noted here that in the matter of ABR, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/AB/R (16 May 2012) at para 372 the Appellate Body held that the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 to the Agreement constituted a 'subsequent agreement' between the members of the TBT Committee. The Appellate Body further took this to mean that the Decision would be applicable to TBT matters insofar as it had a direct bearing on the particular matter in dispute. If one considers the similarity between the SPS Agreement and the TBT Agreement, it would be viable to suggest that decisions and/or recommendations of the SPS Committee be taken as agreements between the members of the Committee. As a result, the *US – Tuna II* decision can be used to support the argument that SPS Committee recommendations be applied to interpretation of the SPS Agreement during disputes, the result of which would be that the SPS Committee recommendations are indeed binding.

[547] This is explicitly acknowledged in the matter of ABR, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/AB/R (30 April 2008) at para 158.

[548] See extensive discussion on this in section 2.2.1 in Chapter II above. It can be noted that the Panel in *EC – Biotech* went so far as to state at para 7.3062 that they were "not suggesting that Members cannot rely in part on an existing risk assessment which sets out a single opinion". This statement implies that the Panel would be happy for Members to rely on an existing risk assessment that only gives one divergent scientific opinion – a contradiction to the position of the Appellate Body in *EC – Hormones*, where a single scientific opinion was seen as insufficient reason to deviate from an existing risk assessment.

amount of vague or ambiguous language - presumably to provide for interpretive flexibility. However, this interpretive flexibility combined with the lack of strict precedence in WTO dispute settlement leads to Members being uncertain as to their rights and obligations under the Agreement, such as the Article 10.4 example discussed above. If a dispute settlement body can deviate entirely from the earlier decision of another, then developing Members will never be certain of their rights: the extent of the technical assistance that they can request, the special and differential treatment due to them, or even the obligations that importing Members are required to adhere to such as providing a scientific justification for their measures. When one considers that developing countries are already disadvantaged by their limited research capacities and their deficiency of SPS-related knowledge, it is easy to see how legal uncertainty is likely to aggravate their already difficult position.

In the matter of *US – Stainless Steel (Mexico)*, the Appellate Body discussed the nature of precedence within WTO jurisprudence and the extent to which dispute settlement bodies are bound by earlier Appellate Body decisions. It stated that subsequent Panels *must* take into account the decisions and interpretive reasoning in earlier similar matters,[549] and that there is an implication in the DSU that like cases will be resolved in the same way[550] – in other words, that earlier interpretive reasoning *will* be followed. These statements were made in acknowledgement of the problem outlined above: that legal uncertainty will result if the reasoning in earlier decisions is not adhered to.[551] However, the Appellate Body in this matter did allow that deviations from earlier reasoning would be permissible for "cogent reasons".[552] In the absence of a specific definition, we can assume that the ordinary meaning will be applied here: that an Appellate Body or Panel could only deviate from earlier reasoning for logical and compelling reasons.

This presents an interesting conflict: the Appellate Body first states that decisions of the Appellate Body are not binding,[553] and then further states that subsequent Panels must take such

[549] Para 158.
[550] Para 160.
[551] Para 161.
[552] Para 160.
[553] Para 158.

decisions into account and should follow interpretive reasoning wherever possible.[554] Does this not then mean that Appellate Body decisions are binding (allowing for the exception of deviation for cogent reasons)? Despite claiming that Appellate Body decisions are not binding, the Appellate Body in *US – Stainless Steel (Mexico)* nevertheless believes such decisions should be followed in what appears to be a relatively binding manner. This is suspiciously reminiscent of the problems that have been identified in the SPS Agreement, where the stated objective appears oddly in conflict with the effect of application.

Regardless, I submit that a stronger form of precedent is required in the applicability of earlier Appellate Body decisions. If dispute settlement bodies ignore the statement of the Appellate Body that earlier decisions are not binding, and instead follow the detailed analysis of why and how earlier decisions should be relatively strictly adhered to, the problem of legal uncertainty can be avoided. However, in order to avoid further confusion I suggest that the Appellate Body should perhaps dispense with the claim that earlier decisions of the Appellate Body are *not* binding, as this appears to be in conflict with how such decisions are treated in practice.

### 6.3. Final comments

In conclusion, it has been shown that the SPS Agreement is not at all infallible. Despite the multitude of ideals present in its Preamble, it appears to place excessive emphasis on the importance of state sovereignty. This emphasis leads to many problems: the use of exhortatory language to avoid placing 'undue' burdens on Members; allowing Members a broad, relatively unlimited power to determine their own appropriate level of protection; permitting Members to deviate from scientifically-justified international standards; and many more.

Although this emphasis is not limited to benefitting developed Members,[555] the consequences thereof are more likely to have a negative impact on developing countries. Such countries are often lacking in financial resources, SPS knowledge and training, and scientific research, leaving them at a significant trade disadvantage. When one considers that agricultural goods are

[554] Para 158 and 160.

[555] Many of these problems are beneficial to importing Members as a whole, both developed *and* developing. However, the research in this thesis has shown that it is rare for the SPS Agreement to provide benefits for exporting developing Members while exporting developed Members are unlikely to be negatively impacted.

frequently traded by developing countries, and that trade in such goods is likely to have a momentous impact on their economies, it is easy to see why the SPS Agreement and its regulatory provisions are of great importance.

Overcoming the problems outlined in this thesis will not be easy, as the majority of the solutions would require a careful balance between competing rights and factors: flexibility and specificity; freedom of trade and protection of territories; the need to provide assistance without assuming the existence of specific problems; and ultimately, the rights of importing countries and the needs of exporting developing countries. Achieving such a balance may require compromises and even reciprocal commitments from exporting developing countries, and such negotiations are unlikely to be easily implemented. For example, in the recent Doha negotiations the US claimed that a stalemate had occurred because of refusals from various developing countries to take on additional obligations or to liberalise their own markets, while still demanding that developed countries submit to obligations.[556] Such refusals naturally have a negative impact on negotiations and could have the effect of stalling negotiations completely. For this reason, it would be important for developing countries to acknowledge that, if they wish to find solutions to these issues, they must be prepared to make their own commitments and compromises.

Further issues that arose out of the Doha round show us that the implementation of solutions is rarely straightforward or simple. For example, the solution outlined above of precedence being given a stronger role in WTO dispute settlement may be undermined by the recent friction amongst WTO Members with regard to the Appellate Body's dispute settlement processes. The US in particular has raised concerns over the alleged 'judicial activism' of the Appellate Body,[557] and has accused the Appellate Body of undermining the interests of the US through the inclusion

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[556] See S Bhandari "Doha Round Negotiations: Problems, Potential Outcomes, and Possible Implications" *Trade, Law and Development* Vol. 4(2) (2012) 353 at 366. According to Bhandari, the US accused several developing countries including India and South Africa of these refusals to compromise. He further points out that Brazil, China, India and South Africa required further "market openings in developed countries" while refusing to liberalise their own markets.

[557] "Judicial activism", in this case, appears to refer to a situation where the Appellate Body makes rulings that take away from the rights of Members by applying or interpreting non-WTO agreements. This naturally causes consternation amongst Members, as the rights and obligations to which they have bound themselves through ratifying the WTO agreements are being removed on the basis of international customs or agreements to which they are not party. See J Patrick Kelly "Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint" 22(2002) *Northwestern Journal of International Law and Business* 353 at 356 – 357.

of non-WTO legal instruments in its decision-making.[558] In particular, the US has recently opposed the re-appointment of Korean Appellate Body member Seung Wha Chang, accusing him of judicial activism and "[going] well beyond the issues necessary to decide the case…in order to develop the law as he saw fit".[559] The likelihood of a Member such as the US accepting the suggestion that the Appellate Body reports be treated as precedence is incredibly low, due to their apparent belief that these reports are inherently flawed in the manner of their creation. Thus, despite the fact that a stronger use of precedence in the WTO dispute settlement process may provide more legal certainty, the contemporary political relationships and lack of faith in the Appellate Body process may render such a suggestion difficult – if not impossible – to implement on a practical level.

That being said, I submit that it would not be impossible to develop effective solutions to the individual problems outlined above; and in turn, effective implementation of such solutions would ensure that developing countries are fully able to maintain and even expand their presence in SPS-related international markets. Provided that developing countries – particularly exporters – are prepared to make compromises, that the SPS Committee recommendations are granted binding effect, that some form of precedence becomes commonplace in the WTO dispute settlement bodies and that the procedure by which such bodies come to their decisions is carefully regulated, I submit that the various problems in the SPS Agreement could eventually be overcome. In turn, by overcoming these problems we can ensure that developing countries are able to enter into international markets, maintain a presence therein, and hopefully use international trade as an instrument through which they are one day able to achieve 'developed' status.

[558] See "WTO Judicial Activism vs. America" *Economy in Crisis* (15 March 2011) http://economyincrisis.org/content/wto-judicial-activism-vs-america (accessed 4 December 2016).
[559] "The USA and Re-Appointment at the WTO: A 'Legitimacy' Crisis?" *EJILTalk* (27 May 2016) http://ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/ (accessed 4 December 2016).

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