MAKING SANITARY AND PHYTOSANITARY AGREEMENT WORK IN DEVELOPING COUNTRIES OF SUB-SAHARAN AFRICA

By

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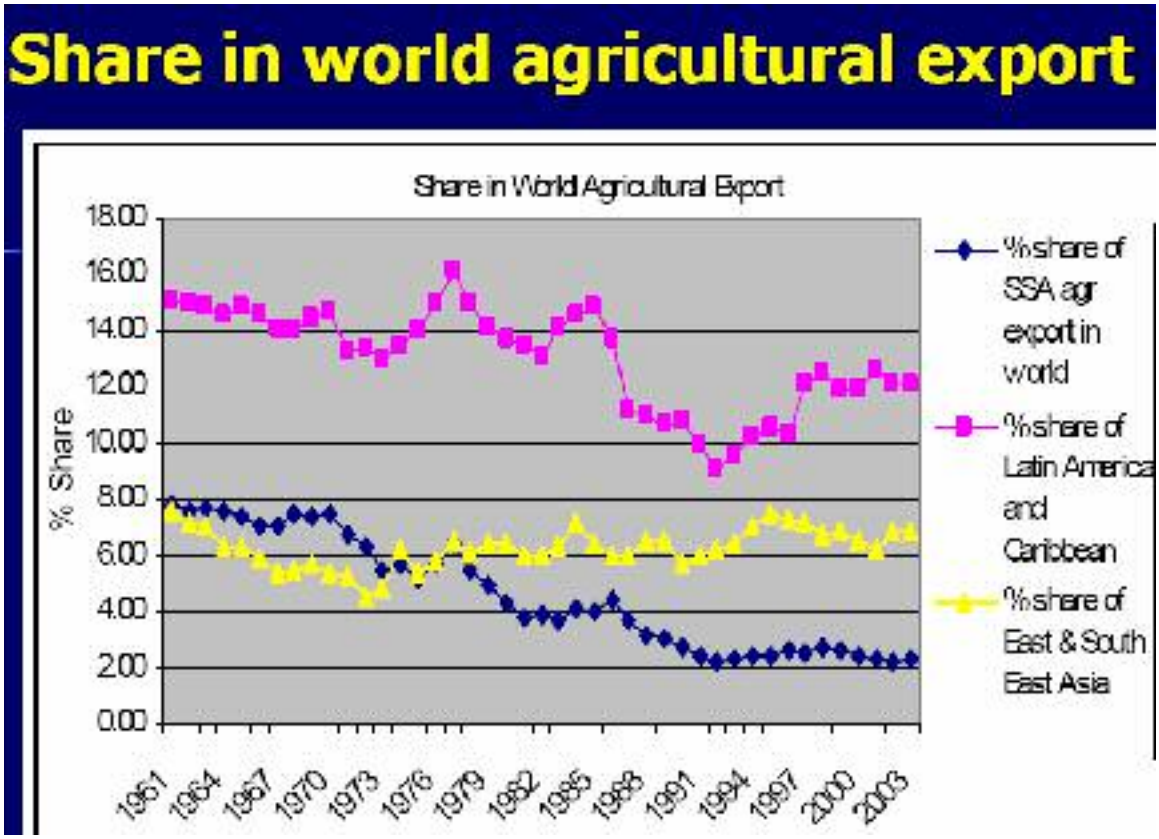
Abstract

This paper traces the participation of sub-Saharan Countries in the development of the World Trade Organization's (WTO) Sanitary and Phytosanitary Agreement (SPS) and examines the impact of the Agreement on trade in the region. It identifies the challenges faced by these countries in international norm setting and addresses the legal and structural challenges faced in the region. This paper further identifies the challenges faced by these countries which depend on agricultural products in dealing with the legal and regulatory regimes of developed countries which are complex and dynamic. It is meant to address the challenges faced by these countries in implementation and enforcement of the agreement. The paper finally proposes possible means of addressing these challenges from country level to regional level and finally at the international realm.

INTRODUCTION

Agricultural and food products account for 25 percent of total merchandise export form sub-Saharan Africa over the period 1980 to 1997.1 There is however a continuous decline in SSA'S agricultural exports. The agricultural exports have declined from 8 percent in early 1960s to 4.35 percent in 1980 and finally 2 percent in early 2000s.



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The impact of SPS on trade as been well documented in developed countries. For example, in US the total impact of technical barriers on exports of agricultural products in 1996 was $ 4907 million dollars of this 90 percent is due to measures covered by SPS

1 World Indicator Report 1998/1999. World Bank Washington DC.s see also The Agricultural Outlook, United States Department of Agriculture Economic Research Service , August 2002. Available at http://www.ers.usda.gov/publications/agoutlook/aug2002/ao293f.pdf< accessed 04/12/06

2 See http://www.fao.org/tc/TCA/work05/MRchap4.pdf Accessed 04/12/06

Agreement.3 The significance of SPS measures to developing countries market access objectives has been sparingly documented. A study was done to identify the key issues affecting the ability of developing countries to comply with SPS requirements in the European Union (EU). 4 The factor considered the most significant impediment to the export agricultural and food products were the SPS requirements.5 The main problems with the EU SPS standards were found to be compliance resources and access to SPS requirements. The cost of SPS standards to the overall agricultural exports of SSA countries has not been however been documented. But there are several studies that are based on specific sectors. During the outbreak of cholera in East Africa region the EU imposed restriction on fish imports which by two years the income of fishermen who had become dependant on export fish and fish products declined by 80 percent in Tanzania.6 In Kenya fish processing plans reduced their production and eventually some closed leading to loss of employments.7 The question we seek to answer is whether at all the SPS agreement is meant for the good of developing countries

The Article first describes the objectives of the SPS Agreement. It will further discuss the historical role played by SSA countries in the development of the existing applicable standards. I will proceed to examine the challenges faced in the implementation of the various provisions of the agreement from SSA countries' point of view and whether it facilitates or umbers market access objectives of these countries. I will finally suggest ways and means of making the agreement be of benefit to SSA not only as a catalyst for reform but also a basis of enforcing their rights provided in the agreement.

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3 Spencer Henson, Rupert Loader, Alan Swinbank and Maury Bredahl, the Impact of Sanitary and Phytosanitary measures on Developing Countries Exports of Agricultural and Food Products. http://wbln0018.worldbank.org/trade/DECagridoc.nsf/cd1d51b0730b98388525657c007c9eb2/f9bf12819fa25cbf852568a300518455/$FILE/henson_et+al.pdf Accesed 03/25/06

4 Spencer Henson, Rupert Loader, Alan Swinbank and Maury Bredahl, the Impact of Sanitary and Phytosanitary measures on Developing Countries. Department of International Development London. The Survey was carried by sending questionnaires by fax to governments through the WTO Secretariat and the Codex Alimentarious contact points. The countries surveyed in sub-Saharan countries where; Zimbabwe, Ghana, Kenya, Ethiopia, Gambia and Cameroon.

5 The others were; technical requirements, for example labeling regulations, or compositional structures and transport cost. Tariff and quantitative tariffs were considered less important restriction in trade in in agriculture and food products.

6 *Supra note 4*

7 Steven M. Jeff and Spencer Henson, Agro-Food Exports from Developing Countries: Rebalancing the Debate World Bank June 2004.

BACKGROUND

The World Trade Organization (WTO) was established and came into force on 1st of January 1995 8 with the objective of providing a forum for conducting trade relations among the member states with a view of raising standards of living, ensuring full employment, and a large and steadily growing volume of real income and effective demand , and expanding the production of and trade in goods and services, while allowing for the optimal use of the world resources in accordance with the objective of sustainable development.9 To achieve these objectives the members expressed their desires to mutually enter advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.10 In this case therefore members agreed to establish multilateral trading agreements with the determination to preserve basic principles (of trade which were developed during the General Agreement on Tariffs and Trade (GATT) and to further the above objectives.11 The members established among other multilateral agreements, the Agreement on the Application of Sanitary and Phytosanitary Measures, hereinafter referred to as the SPS Agreement.12

Sanitary and phytosanitary measures (SPS) are "border control measures necessary to protect human, health, animal or plant life or health. Popularly they are often called quarantine measures". 13 The agreement was primarily put in place to elaborate rules for the application of GATT which relate to the use of sanitary or phytosanitary measures, in particular the provision of Art XX (b). Art XX of GATT is an exception to the non-discrimination principle as provided in Arts. I and III of GATT.14 In the GATT regime

8 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.
9 Introduction to the Marrakesh Agreement Establishing the World Trade Organization, signed 1994 Marrakesh Morroca.
10 Id
11 Id
12 World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures
13 "Dictionary of Trade Policy Terms, Walter Goode, Centre for International Economic Studies University of Adelaide, 1998

14 GATT Art. I is the Most Favoured-Nation Principle which provides that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any

the term "discrimination" as indicated in the Chapeau of Art.XX was not clear. It was not clear for example, to the Appellate Body in the *US-Gasoline Case* whether it referred both to discrimination among exporting countries and to discrimination between imports and domestic products.15 The Appellate Body thus shied away from ruling on this matter. However, with the enactment of SPS agreement, it was made clear that all kind of discrimination is not condoned.16 Based on the SPS agreement, the WTO panel has declared that the agreement applies to all sanitary and phytosanitary measures that may, directly or indirectly affect international trade.17

The SPS concentrates on the provisions of Art.XX (b) which allows members to derogate from the non-discrimination principle if the measure is necessary to protect human, animal or plant health. In doing so however, the chapeau of Art. XX expects member states to uniformly apply the exceptions to all other members and not to use them as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or as a disguised restriction on international trade. The Art.XX exceptions are to be seen as a whole in determining its application. In fact the SPS agreement explicitly provides that a reference to Art XX (b) includes also reference to the chapeau of the Article.18. Applying article XX of GATT requires three steps. First does the measure violate an underlying GATT obligation, for example the provisions of Art. I, of the Most Favoured Nation Principle (MFN) or Art III, National Treatment Principle or Art. XI on prohibition of quantitative restrictions? Secondly is the measure consistent with the Chapeau to Art. XX, that is, is it discriminatory or a disguised trade restriction? Third, have the criteria been made for the specific exception being invoked for example

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other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. Art. III is the national treatment principle which requires member countries to accord equal treatment to imported and locally produced goods

15 US-Gasoline AB, PG. 23-24

16 Art. 2(3) of SPS states that members shall ensure that their sanitary and phyosanitary measures do not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail, including between their own territory and that of other members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

17 EC- Hormone Panel Report, Para 8.26

18 Introduction to SPS Agreement. *Supra note 12*.

is the measure "necessary" to protect human, animal or plant health?19 It is however important to note that SPS agreement applies to all measures affecting international trade independently from GATT.20 It is therefore not necessary for the provisions of GATT to have been violated for this agreement to be effective. However the two agreements can be applied concurrently, but incase of conflict between the two, the SPS Agreement prevails to the extent of the conflict.21 In fact in the *EC Hormones* Case, the Panel came to the conclusion that SPS Agreement is wider in scope and imposes obligation beyond the requirement of GATT Art. XX (b).22 The SPS Agreement is also wider in scope because it applies to measures that existed before the coming into force of the agreement in 1st January 1995.23

The SPS Agreement was put in place to strike a balance between health and safety regulations and liberalization of trade. The was fear after negotiation of the agricultural issues in the WTO that other members would use sanitary barriers as a device to shield domestic industries from competition and to frustrate measures to liberalize trade in agriculture.24 This added weight to the view that a self-contained agreement was needed in order to provide an expanded and clearer set of rules and principles regulating the application of sanitary and phytosanitary measures. 25 The agreement particularly applies first to measures adopted with the aim of protecting consumers and animals from food and feed-born risks26 and secondly, to measures taken to protect consumers and plants from pest or disease related risk.27 The agreement implores the WTO members to

19 US- Import Prohibitions of Certain Shrimp and Shrimp Products, Panel Report, Para. 7.27-29 and The US- Standards for Reformulated and Conventional Gasoline, Appellate Body Report.
20 EC-Hormones, Panel Reports, paras 8.24-8.28 (US Panel) and 8.39 (Canada panel)
21 General Interpretative Note to Annex 1A of the Marrakesh Agreement Establishing the WTO.
22 EC-Hormones para. 8.27-31.
23 Ibid
24 Understanding WTO
25 Understanding SPS Agreement.
26 SPS Annex a Para I (b)
27 SPS Annex A, paras. 1 (a), (c) and (d). This was paraphrased in United Nation Conference on Trade and Development Training Manual on the WT Agreement on SPS Measures. Available at http://www.unctad.org/en/docs//ditctncd20043_en.pdf.

ensure that the measures taken are based on assessment appropriate to the circumstance. This is because the risk assessment is different for each of the risk categories28

Standards setting is primarily the role of the state and it is therefore the sovereign right of every state to put in place measures that protect human, animal or plant life or health. However one of the most visible and controversial areas where trade rules constrain regulatory diversity is that of food safety.29 There is currently high profile of food safety issues. This has been caused by a number of factors which include, globalization of news media, increasing movement of people and commodities, the appearances of new diseases (such as Avian Flu, Bovine Spongiform Encephalopathy) and apparent failure of existing systems to protect consumers.30 SPS Agreement while recognizing the role of the state in regulating standards, reminds the members of their obligation to refrain from applying the measures in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail or as a disguised restriction on international trade.31 This caution is based on the history of the use of sanitary measures to provide protection against undesired imports.

To ensure this agreement is not applied in a manner that discriminates against other members, the agreement introduces the application of science as objective criteria of determining the necessity of a measure.32 First the agreement requires the WTO members to use SPS measures that are assessed based on risk assessment techniques developed by the relevant international organizations.33 There is a presumption here that standards developed by recognized international bodies are based on objective

28 Art. 5 (1) (2) and (3) SPS Agreement as discussed in UNCTAD training manual see above. See also Joost Pauwelyn, The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the first three SPS disputes, EC- Hormones, Australia-Salmon and Japan –Varientals, 2 J.Int'l Econ.L. 641 (1999)

29 Robert Howse, Democracy, Science, and Free Trade: Risk Regulation on Trial at World Trade Organization 98 Mich. L.Rev. 2329 (2000)

30 Laura J Loppacher and William A Kerr, The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America, 39 (3) Journal of World Trade 427, 430 (2005)

31 Introduction to SPS Agreement and Art. 2 of the Agreement.

32 Art 15 (1)

33 Art. 5(1) of the SPS agreement

assessment of the risk. However the agreement allows members to apply higher standards than the international standards, in this there member shall provide scientific justification for this.34

The Agreement calls for harmonization of SPS standards among WTO members. 35 It proposes steps that should be followed in pursuance of this objective. First, the members shall base36 their SPS measures on international standards, guidelines or recommendations. The agreement presumes that where standards are based on to the above, it is *prima facie* evidence that the measure is necessary to protect human, animal or plant life or health and presumed to be consistent with the provisions of the agreement. Secondly, if the international standards, guidelines or recommendations cannot achieve the desired protection, a member is permitted to introduce or maintain higher sps measures. In this case the particular member will have to provide scientific justification, as a consequence of which it has taken such a stand. In assessing the existence of such a risk, a member is also implored to use the risk assessment techniques that are developed by international organizations.

The role of International organization in achieving the international harmonization of standards is very crucial. The agreement places these organizations at a prime position. These organizations include, for food safety, the joint FAO/WHO Codex Alementarius Commission (CAC); for animal health, the Office International des Epizooties (OIE); and for plant health, the FAO international Plant Protection Convention (IPPC).37 The three organizations were chosen by the drafters of the Agreement for the high standards of their guidelines and recommendations, which are based on sound scientific analysis and

34 Art.3.3
35 Art.3 of SPS
36 The term "based on" was a subject of discussion in the EC- Hormones case. The Panel found that it means, "Conform to". The panel further stated that "for a sanitary measure to be based on international standard, in accordance with Art.3.1, the measure must reflect the same level of sanitary protection as the standard." (para 8.74-81). However, the Appellate Body disagreed. It said that "conform to" is different from "based on" and that is merely means that a thing is supported by another thing. The AB reasoned that the provisions of Art. 3 anticipated harmonization as a future goal and not a present obligation. The AB was of the view that by the look of things, "we cannot assume that the sovereign states intended to impose upon themselves the more onerous, rather than less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendation". (para 163-166)
37 Introduction to SPS Agreement.

evidence and involve a thorough review of all relevant evidence and information.38 Most of the WTO members were also parties to the above organizations and therefore they were seen to be complimentary to the WTO in so far animal, plant and human health standards are concerned. They have therefore become so crucial in the implementation of international standards to the extent that countries' interests are determined by their level of participation at these organizations. The agreement recognizes the need for countries to engage in standards setting by participating in these organizations. It indicates that countries will play "full part" in the relevant international organizations, but "within their resources".39 The ability of many developing countries, especially in sub- Saharan African countries, to engage these international organizations if dependent of the amount of resources available to them to allow them to do research and attend the meetings of the above organizations. Harmonization of standards, as is the case in the international standards setting organizations presumes taking in to consideration views of all members in decision making. It is crucial for the international standards setting organizations to ensure that scientific evidence from all regions are taken in to consideration while setting standards. The key issue in SPS measures is that risk assessment for purpose of adopting certain standards, is determined by among other things the ecological and environmental conditions.40 It is important to note from the onset that, standards that are intended to be applied to countries from SSA without taking the views and studies from the region, is a clear show of injustice to these countries.

The SPS Agreement requires members to ensure transparent application of SPS measures.41 To achieve this, the agreement provides three requirements that must be fulfilled.42 First, a member must publish such regulations (which include laws, decrees or ordinance which are applicable generally). A member shall ensure that it provides reasonable time between publication and enforcement of such regulations to enable exporters from other countries to adjust. Secondly, a member shall ensure that there is

38 UNCTAD training Model on the WTO Agreement on Sanitary and Phytosanitary Measures. UNCTAD/DICT/2004/3
39 Art.3(4) SPS Agreement.
40 Art 5(3) of SPS.
41 Art.7 of SPS
42 Annex B to SPS Agreement.

inquiry point where members can have a chance to direct their questions concerning certain measures which deal with the human, animal and plant health. Thirdly, to ensure that when a sps is introduced by a member, which is not substantially the same as the content of international standard, a member shall publish such measures in good time for recommendation by the members, within a period that allows amendment. The measure should also be notified to members via the secretariat. The Implementation of transparency provisions in this agreement is crucial to enable members know their obligations and in turn be able to achieve their objectives of market access.

The SPS Agreement encourages members to facilitate further market access using the equivalence principle. 43 Measures are considered equivalent when they are not identical but they yield the same level of SPS protection. It is an understanding reached through formal or *ad hoc* arrangements between two or more countries. It is a means by which trading partners mutually recognize that their different national SPS measures are identical in terms of health and food safety protection requirement.44 This principle is difficult to monitor and apply because the duty to accept a measure as being equivalent is entirely discretion of the party requested. However the Agreement obligates members to enter in to consultation with a member upon request.45 There is however no legal basis for a member to demand acceptance of such measures by the requested member and it therefore depends on the whims and wishes of the requested party. WTO members have expressed their concerns and especially the developing countries in the in the operationalization of this principle. The developed countries have not been keen to recognize the standards adopted by developing as being equivalent to their standards. This lead to adoption of Equivalence Decision to provide guidelines on implementation of this principle.46 This principle will be further discussed and analyzed below and in specific reference to the challenges it poses to developing countries especially in SSA.

43 Art 4 of SPS Agreement
44 UNCTAD *supra* note 38
45 SPS Agreement Art.4.2
46 The Decision on Implementation of Art.4 of SPS. Commonly referred to as Equivalence Decision.G/SPS/19,26 October 2001

The SPS committee mandated a study on the challenges faced in this area by developing countries 47

Art. 6 of the SPS Agreement provides for the regionalization principle.48 This principle is based on the premise that a country though experiencing an outbreak of certain disease or invested with certain kind of pest, can still, have a chance to sale its products that originate from the part of the country where its certified disease or pest free, as the case may be. It provides an opportunity for a country to maintain sale of its products from disease and pest free areas. This is important for developing countries for example vast countries like Sudan or Nigeria or South Africa, whose conditions vary from one end of the country to another. The process of operationalising this principle is now ongoing49 and we will further discuss this principle under the challenges face by SSA.

HISTRORICAL EVOLUTION OF SPS AGREEMENT AND THE ROLE OF SSA COUNTRIES.

During the period that preceded the Second World War, there were a lot of protectionist measures adopted by countries to protect their markets, which manifested itself by early 1930s.50 There are a few examples given. The English Carcasses Order of 1926 was used to prohibit importation of Cattle, pigs and sheep to Great Britain.51 Snyder further points out that, US used Tariff Act of 1930 to prohibit imports from all countries where rinderpest and Foot and Mouth disease exist, Another example is Argentine wrapping restriction placed upon importation of oranges from Paraguay.52 There were however instances that sanitary standards were applied for purpose of maintaining human, plant and health standards. Examples given are agreement between Finland and Iceland in

47 Ibid
48 Art 6 of SPS Agreement.
49 On 30-31 Jan the SPS Committee held an informal meeting for members to discuss their experiences in the area of regionalization and the implementation of Art. 6 of SPS Agreement.
http://www.wto.org/English/tratop_e/sps_e/meet_jan06_e/meet_jan06_e.htm acessed 03/05/06
50 WTO, GATT years: from Havana to Marrakesh, available at http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm Accesed 03/12/06
51 Richard Carlton Snyder, The Most Favoured Nation Clause, An Analysis with Particular Reference to Recent Treaty Practice and Tariff. Kings Crown Press, Columbia University, New York, 1948. pg 144
52 Id

1923 to exempt measures taken "as a safeguard infectious disease or animal or plants, an agreement between US and Japan had similar provisions for regulations "to protect useful plants and animals against disease and parasites" and a convention signed between Honduras and USA that "exempts from equality of treatment prohibitions or restrictions of sanitary character designed to protect human, animal or plant life".53 Sometimes it has been difficult to establish whether a measure is disguised restriction or genuine health concerns. Indeed the separation of legitimate measures intended for protection of human, plant and animal health from measures intended to exclude competitors from the local market remains to be a great challenge in the international trade.5455 By the end of the world war, there was need to put in place institutions to prevent occurrence of such wars in the future. In this case, International Trade Organization (ITO) as a special United Nations agency was negotiated.56 However this organization though ambitious in tariff reduction did not come into force because of political difference, especially lack of support from US.57 At this stage many African countries were not involved because they were still reeling at the claws of colonialism.58 In the mid-1960s many developing countries joined GATT. It was at this instance that issues affecting developing countries began to be recognized. At this early time many African countries had just got independence and had many other concerns at home to engage meaningfully in international trade negotiations.

Between 1947 and 1967 GATT rounds, the parties concentrated basically on mutual tariff reduction. They were also concerned on most of the part, with the tariffs of the main industrialized countries.59Based on the entrance of more developing countries, the GATT members were faced with the challenge of accommodating their interests. It was

53 Id at page 166
54 See Roberts D. and Orden D. Determinants of Technical Barriers to Trade: The Case of US Phytosanitary Restriction of Mexican Avocados, 1972-1995. (1997). In: Orden, D. and Roberts, D. (eds). *Understanding Technical Barriers to Trade*. International Agricultural Trade Research Consortium, University of Minnesota referred to by Steve above
55 Id.
56 *Supra note 50.*.
57 Id
58 South Africa was however a member of GATT though it was the apartheid government.
59 Sidney Gold, *Developing countries in the GATT System*, Thames Essay No.13 (London, Trade Policy Research Centre 1978)

at the Tokyo Round of trade negotiation that an attempt was made to discuss and accommodate the needs of the developing countries. It was also at this stage that the issues of trade and standards were given devoted attention. In London summit, heads of governments of a number of major countries declared that they will seek substantive progress on measures that will facilitate significant reduction of non-tariff barriers and declared there support for a Tokyo Agreement which will provide special benefits to developing countries.60

The commitment to deal with issues affecting developing countries was first concretized in a report of Panel of experts composed of four eminent economists. The report referred to as Haberler Report, after the name of the Chairman Godfried Harbeler called for special efforts to ensure that interests of less developed countries are addressed.61 But these commitments like the once applicable today were full of promises and generalized aspirations but not binding obligations. There were however gains made by developing countries by putting pressure on developed countries through United Nations Conference on Trade and Development (UNCTAD). These include the securing of generalized system of preference (GSP) a scheme for preferential treatment of exports from the developing countries. In the context of the standards debate, whereas the GSP was good for the developing countries then, it has now come to haunt these countries because, they did not take the initiative then to work towards attaining competitive product standards. The GSP scheme has later been used to silence developing countries especially in Africa from challenging illegal SPS standards for fear that they will loose preferential market.62 Gold argued before the conclusion of the Tokyo round that GSP militate against the long term interests of all countries and suggested that preference be given to developing countries , but as constituting an advance installment of the eventual elimination of

60 Id referring to London Summit of May 1977.

61GATT (1958). Trends in Agricultural Trade: Report by a Panel of Experts (The Haberler Report), Geneva as referred to by Gold Id .

62 James Gathii, The African Union and the New Pan-Africanism: Rushing to Organise or Timely Shift: A Critical Appraisal of of the Nepad Agenda in light of Africa's Place in World Trade Regime in the Era of Market Centerd Development.13 Transnat'l L.&Contemp. Probs, 179 c

tariffs. 63 Now, in retrospect, the developing countries should have started the process of adopting quality standards and to ensure that they upgrade their ability to compete internationally. More arguments then were not on capacity building but rather a "hands off approach", where developing countries preferred to be left out of application of agreements.

The GATT members decided to negotiate an agreement to regulate the application of standards. This agreement was negotiated between to 1973 and 1979 when it was finally adopted.64 This for the first time created rules on standards that were binding on governments. Developing countries played a key role in ensuring that their interests are accommodated. The Standards Code, as the Agreement was called, laid down the rules for preparation, adoption and application of technical regulations, standards and conformity assessment procedures. The Standards codes recognized the contribution of international standardization to the transfer of technology from developed to developing countries.65 The Code further recognized the difficulties the developing countries would face in implementation of standards and promised support to such countries. The Code implored the parties to use international standards if they exist. It however allowed parties to adopt higher standards where such standards may not exist or irrelevant to protection of human, animal and plant health and safety.66 There was however no requirement of scientific evidence in the Code.

The Standard Code made specific provisions for the developing countries. The Code mandated the developed countries to help developing countries upon request.67 The Code used the term "shall", implying a mandatory obligation on the part of developed countries. Within the period that the standards code was in existence, there was no much concern by SSA countries since this had not been identified yet as an impediment to market access. It was rather a major issue in developed countries as manifested by the

64 Agreement on Technical Barriers to Trade. Apr.12 1979, 1186 U.N.T.S.276,GATT,B.I.S.D 26th Supp. 8 (1980) otherwise referred to as Standard Code

65 Introduction to the Standard Code Id..
66 Art 2.2
67 Art 11 of the Code used the language Shall

protracted conflict between the USA and the EU. However in the SPS agreement, the language developed countries are not mandated to provide technical assistance but they "shall consider" doing so.68 In the language of the Code, technical assistance is closely tied to the fulfillment of the developing and least developed countries obligations under the Code. The code finally provided for means of treating developing countries differently through provisions on technical assistance for the countries to establish a national standard bodies and establishment of information points.69 On special and differential treatment, the standards code made a bold provision on the use of technology. The Parties recognized that developing countries may adopt certain technical regulations or standards, including test methods, aimed for preserving indigenous technology and production methods and processes compatible with their development needs.70 This provision was completely omitted in the SPS Agreement. Instead the SPS Agreement makes a general reference to assisting developing countries in among others things the areas of processing technologies.71 This must have been done in the quest for harmonization of standards and the introduction of scientific standards in the agreement. The Committee on Technical Barriers to Trade was formed and mandated to examine periodically the special and differential treatment granted to developing countries.72

Another key issue of concern of developing countries was their capacity and ability to develop in the absence of proper technology. In the mid 1960s the issue of transfer of technology was of big concern. The debate within UN was for the developed countries to undertake measures to ensure that technology was transferred to developing countries. The argument was that developed countries posses the technology necessary for development in the poor countries and should facilitate the transfer of such technology to poor countries. In response the 1979 Standard code recognized the contribution which international standardization can make to the transfer of technology from developed to developing countries and that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and methods for

68 Art 9 of SPS Agreement.
69. Art.21
70 Art 21.4 of the Code.
71 Art.9 of SPS.
72 Art 12.10

certifying conformity with technical regulations and standards. It expressed a desire to assist them in their endeavors in this regard.73 As the case is in many WTO provisions on developing countries, there is no legal obligation to enforce the wishes of these countries. They remain mere wishes and aspirations. The issue transfer of technology has remained a matter of concern for developing countries. The SPS Agreement has no provision on transfer of technology. 74 Most likely is because of the divide between the developed countries who have maintained that they have no power to force private companies to transfer technology and developing country who have demanded the need for technology transfer for equitable treatment of the weaker countries in the international sphere.75

FAILURES OF STANDARD CODE AND THE URUGUAY ROUND OF NEGOTIATION

The system as it then was in GATT was that, unlike in the WTO regime, members had the right to choose the agreement to be part to. The agreements were referred to as codes because they were not accepted by all the members but relatively a small number of the members especially from the developed countries.76 The lack of integrated rule system meant that most of the agricultural economies were not party to the standards code. This was particularly so because the GATT regime did not address agricultural issues. One of the biggest concerns for the developing countries especially in SSA, is that agriculture, the main trading commodity, is not considerably addressed at the WTO. This is a

73 Introduction to the Standards Code.*Supra* note 64

74 There is no provision in the SPS that touches expressly on technology transfer. Unlike the Standard Code, in the introduction of the SPS agreement there is not recognition of the role of developed countries in facilitating technology transfer. However technology transfer is implied by the provision of Art. 10 of the Agreement being part of aspirations of the members to facilitate such "assistance as may be *inter alia* in the areas of processing technology…"

75 See Generally the discussion by Amitav Rath, Technology Transfer and Diffusion **in** The Uncertain Quest: Science, Technology, And Development , Jean Jacques Salomon Francisco R. Sagasti, and, Céline Sachs-Jeantet (edts) United Nations University Press TOKYO - NEW YORK – PARIS 1994 aslo available at http://www.unu.edu/unupress/unupbooks/uu09ue/uu09ue00.htm#Content . Accessed 03/23/06

76 Understanding the WTO ,the GATT years from Havana to Marrakesh Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm accessed 10/03/2006

historical problem. A UN study done on mid 1960s indicated that GATT did not lead to freeing trade in agriculture products, leading to discrimination of the rich against the poor.77 The agricultural issues have been described as an area of intense international conflict, with the strongest and most entrenched domestic vested interest. 78 Sadly the situation as remained so not only in the area of Agricultural subsidies but also in the use of sanitary and phytosanitary measures by developed countries to protect their domestic agricultural products leading to a lot of loss especially in SSA. In this case almost all the Sub Saharan African Countries were not party to the Standards Code. There were only thirty nine countries who signed the Standards Code79and of the thirty nine countries, only Rwanda represented sub-Saharan Africa.

The standard Code failed to address many problems that were associated with standards. Though it was established with an objective to eliminate unnecessary obstacles in international trade,80 the agreement failed to define what unnecessary obstacles are.81 Some scholars then predicted that the term "necessary" as used in the Code is likely to give rise to considerable difficulties of interpretation in practice.82 The inadequacy of the Standard Code manifested itself in a protracted dispute between United States and the European Union over hormone treated beef. There were also the clear difficulties of applying the Standard Code. For example, there was no even one SPS measure which was successfully challenged before the GATT Dispute settlement panel after the Tokyo round and several other prominent disagreements over SPS measures remained

77 UNCTAD, E/CONF.46/36, Geneva 3 March 1964 available In Gerard, Curzon, Multilateral Commercial Diplomacy, Frederick A Praeger, Inc.Publishers 1966 pg 331

78 Sudney Golt, The GATT Negotiations 1986-1990: Origins. Issues and Prospects, British North America Committee London 1988.

79 The others were, Argentina (did not ratify), Australia, Austria, Brazil, Canada, Chile, the Czech Republic, the Slovak Federal Republic, Egypt, the European Community and its twelve member states (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom), Finland, Hong Kong, Hungary, India, Indonesia, Israel, Japan, the Republic of Korea, Malaysia, Mexico, Morocco, New Zealand, Norway, Pakistan, Philippines, Romania, Singapore, Slovenia, Sweden, Switzerland, Thailand, Tunisia, the United States and Yugoslavia.

80 Introduction to SPS Agreement

81 David Wirth, *International Decisions, European Communities-Measures Affecting Asbestos and Asbestos-Containing Products,* 96 Am. J. Int'l L. 435 (2002)..

82 See R.W Middleton, The GATT Standards Code, 14 World Trade L. 201,206 (1980) as referred to by David Wirth above.

unresolved.83 This led to the negotiation of the SPS agreement to prevent abuse of sanitary and phytosanitary measures as non tariff barriers to trade. 84 The US-EU hormone dispute was one such dispute that influenced the need for SPS Agreement. The EC maintained measures that restricted meat treated with hormones from the US. One of the problems was lack of scientific evidence. There were reports that indicating that the parties did not go to the GATT Panel because they was lack of confidence by both parties in the capacity of GATT 47 Panel to resolve the scientific dispute of this nature in the context of Art.XX (b) and the provisions of the Tokyo TBT Agreement.85

Another factor that motivated the members to adopt SPS Agreement was the close nexus between the broader agriculture issues and the sanitary and phytosanitary standards, and the fact that SPS measures were thought to have unique challenges including the importance of scientific assessment. Though there was a great effort to address SPS measures in Tokyo round, not much was harvested from it because of the failure to agree on Agriculture Agreement. With the negotiation of the Agreement on Agriculture the Uruguay round became the best moment to address these issues. At the beginning of the negotiations, a committee was set up to study trade the impact of non-tariff barriers to trade and how to address them. This was as a result of complains from the GATT members that many members were distorting trade using technical measures. On 20 September 1986 Uruguay round of trade was launched with the *punta del este* declaration.86 In this declaration, the GATT contracting parties agreed to negotiate agricultural sector with an objective of "minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture".87 The developed countries agreed not to "expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing

83 See Donna Roberts, Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations, 1 J.Int'l Econ.L. 377 (1998)
84 David Wirth.
85 Theofanis Christoforou, Settlement of Science Based Trade Dispute in the WTO: a Critical Review of the Development Case Law in the Face of Scientific Uncertainity. NYU Environmental Law Journal
86 The General Agreement on Tariff and Trade Ministerial Declaration of 20 September 1986 at Punta Del Este
87 Id

countries".88 It can be inferred from this that developing countries were not keen on their obligations on most of the areas SPS included.

In the Uruguay Round, GATT members discussed the reduction of barriers to trade in the agricultural sector. As a result of reduction , members agreed on the elimination of non-tariff barriers to trade in agriculture. There was however concern that elimination of agriculture-specific non-tariff measures and the tariff reductions would be circumvented by disguised protectionist measures in the form of sanitary or phytosanitary regulations.89 This concern provided a major driving force which led negotiators to create a separate Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), in parallel with the major agricultural trade negotiations.90 In light of the reforms resulting from the agricultural trade negotiations, it was felt that the relationship between health protection and trade measures required more specific and in-depth coverage than the Standards Code provided. 91 During the Uruguay round of negotiation, the developing countries strongly advocated for the removal of sanitary and phytosanitary measures that acted as non-tariff barriers to trade. They supported international harmonization of SPS measures to prevent developed countries from imposing arbitrarily strict standards.92 It must however be remembered that SSA participation during Uruguay round was very poor due to lack of expertise.93 Despite the enactment of the SPS Agreement, the impact of sps measures adopted especially by developed countries remains a big challenge for the SSA as it is demonstrated in the foregoing discussion.

POST MARAKKESH; WHAT ARE THE CHALLENGES

HARMONISATION

88 Id
89 Understanding SPS Agreement.. *Supra note* 76
90Ibid
91 ibid
92 R. Griffin History of the Development of the SPS Agreement, FAO, Plant Protection and Production Division http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/003/x7354e/x7354e01.htm Accessed 04/13/06
93 Supra note 76

One of the main objectives of the SPS Agreement is to ensure that members are able to distinguish genuine health measures from measures intended by members to deny others access to their market.94 The agreement therefore implores members to use international standards to harmonize sps standards on as wider basis as possible.95 To what extent this standards are binding on individual member countries is a matter of concern to the SSA who could benefit from harmonized international standards that provides predictability in food and agricultural markets . The Agreement permits individual countries to adopt higher standards where they have evidence that the existing international standards do not achieve their objectives.96 This has been a matter of concern in the WTO Dispute settlement body. The Panel in the *EC Hormones* case found that the term "based on" means that standards adopted in a country must "conform to" international standards.97 In other words a country was obliged to adopt international standards that have been put in place. However on appeal by the European Union, the WTO Appellate Panel reversed this decision as they argued that "based on" is not equal to "conform to". They said that had the drafters intended to mean conform to then they would have used that language. The AB stated "we cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligations by mandating conformity or compliance with such standards guidelines and recommendations".98

The above decision is an indication that having international standards is not a panacea to the problem of proliferation of several international standards. How strong should a link be with international standards so that a standard is based on international standard? The ruling of the AB in the hormones case leave this question unanswered. It has been argued that the interpretation of the Appellate Body in the hormones case implies that the standards guidelines and recommendations issued by International Organizations like the Codex Alimentarius Commission are not transformed in to binding norms for SPS

94 Introduction to the SPS Agreement
95 Sps Agreement Art. 3.3
96 Art SPS
97 Panel Report Para 161-162
98 AB EC-Hormones Para 163

measures.99 An effort should be made at the WTO to address this problem because developing countries especially in SSA need certainty in application of standards and would rather work with standards established by international institutions.

The agreement requires members to apply recognised international standards. The introduction of scientific standards as a requirement was expected to bring stability in to international trading regime. However many of the controversies which have occurred surround the legitimacy and appropriateness of measures in the context of scientific uncertainty.100 There is a lot of concern that although the agreement is meant to curtail protectionist it has not achieved that because some countries base their assessment on political factors like the consumer interest. As a result products from certain countries are believed to automatically be non-compliant with food safety and agricultural health requirements.101 This is dangerous for developing countries in sub Saharan Africa because their technological problems might portray an image of automatic non-compliance.

Some developed countries hide behind technical measures ostensibly to protect human, plant and animal health while realistically engaging in protectionist tactics. It has been observed that there are two ways in which illegitimate use of SPS measures manifest themselves; first there is use of these measures for protection purposes and secondly is through the politicization of health issues.102 In the second case politicians for example in Europe use healthy standards to gain political mileage by inciting the public against goods from other countries. But in other cases legitimate use of border measures for health reasons can be applied is such a way that leads to protection of internal goods. For example, the principle of Art 4.does not requires members to mandatory recognize the systems of member country. In this case a country can refuse to recognize the health standards of developing countries terming them incompetent. In effect imports from those

99 Michael Friis Jensen, Reviewing the SPS Agreement :A developing Country Perspective. The Royal Veterinary and Agricultural University Jan 2002 . < http://www.foi.kvl.dk/upload/foi/docs/publikationer/working%20papers/2002/1.pdf> Accesed 04/20/06
100 Steve Jaffe and Spencer Henson, Standards and Agro-food Exports from Developing Countries: Rebalancing the Debate
101 Id
102 Supra note 30 page 434

countries can be "legitimately" denied market access. A good example is given in the case of South Africa's citrus industry. The EU have expressed fears that "black spot", a fungus that causes black spots on citrus fruits be transferred to Europe through the export of the fruits. According to scientific experts there is no basis for such believe. This is because the fungus does not occur in any winter rainfall areas and has for example not shown up in the western cape Mediterranean climate despite fruits entering that part of the country from other parts of the country. 103 The EU Citrus black spot(CBS) are applied to South African by EU countries despite the fact that the fruits have always been exported to those countries since 1925. No explanation is given on the new standards. This has caused unnecessary expenses and it can only be termed as protectionist measures. It is estimated that the cost of complying with the certification systems created in the industry for every exporter is about $215,000.104Another abuse is occasioned on the reopening of the border after the intended threat has lapsed. One wonders why countries would take longer time than scientifically justified to open the border as was the case in the Kenya fishing industry problem. For example in this case there was a feeling that the goals were being shifted to buy more time for the EC105. This problem has been compounded by the absence of regulatory harmonization of the international standards

There SPS standards are either set by public institutions or by private sector. Increasingly, especially in developed countries, SPS measures are regulated using standards set by private companies. For example the European Retailers Produce on Good Agricultural Practices (EUREPGAP) fruits and vegetables standards.106 These measures mix social and environmental concerns with health concerns. For instance, the UK supermarket insists that farmers and pack houses have to follow the HACCP system and attain an Integrated Crop Management (ICM). This system is based on environmental management, responsible agricultural practices, responsible use of agrochemicals, integrated quality management and social aspects such as occupational health and safety

103 Andre Joste, Erik Kruger and Flip Kotze, Standards and Trade in South Africa, Paving Pathways for Increased Market Access and Competitiveness . In John Wilson and Victor Abiola (Eds) Standards and Global Trade, The Voice for Africa.
104 Benic, L.2002, Quality and Safety requirements for fruit exports " in Hand Book of South African Produce Exports. Fred Meinjtes and Associates. See reference by Andre et al Id
105 Supra Note 7
106 Supra Note 103

and worker welfare. 107 The basis of this is the influence of consumer organizations and non-governmental organizations in Europe who are interested on other issues of human rights therefore finding a leeway through trade.108 This is out rightly unfair for the sub Saharan Africa countries and it is against the SPS agreement.109 Though there is an effort to harmonize the private protocols, there still remains a plethora of private standards that are simply communicated through individual supply chains and can vary widely in their specific requirements.110 The European Union has been the most challenging export destination for sub-Saharan Africa. The reason is because most of these countries have had close ties with EU through colonial history and benefiting from the generalized system of preference that grants them preference in EU market. However EU has been subject of the largest complains by developing countries for three reasons.111 First the harmonization of SPS standards in EU resulted in the adoption of more stringent standards guided by the precautionary approach. The EU's standards are stricter than those required by international standards setting bodies.112 Secondly, is the application of precautionary principle by EU, which means adoption of protective measures even in the absence of scientific evidence. Third is because of the complex administrative structure of the EU that makes it difficult to resolve concerns by bilateral consultations.

Harmonization of standards also is linked to the ability of the developed countries to participate in international organizations. This is because they will be able to monitor new standards or give their views on whether or not certain proposed standards are necessary in their countries. It will also give them an opportunity for harmonization of standards where they have interest. There is very dismal performance by the sub-Saharan African countries in the international norm setting. In the SPS Committee meetings which provide a good forum for discussing measures being developed and maintained by other member countries, the sub Saharan countries has not been actively participating.

107 Id
108 Supra note 7
109 The agreement restricts the use of SPS measures for health reasons and does not cover social concerns.
110 Supra note 7
111 Id
112 Supra Note 4

They have not been preparing proposals like other countries. Most of the participating countries are middle income countries which include the Cairns Group (South Africa being among them) and a few others like India and Mexico113 Once a gain it is the lack of human and financial resources that affect the sub –Saharan African countries. There are no enough staff in Geneva to cover all these activities. Kenya for example has only three members working on all WTO issues in Geneva114 and it is difficult for such a small number of staff to follow all the committee discussion in the WTO. It is simply impossible. There is need for financial support for such countries to be able to sustain a fair number of staff. If these countries can also come up with a regional body on SPS, then it will be easy for them to pull resources together and enough staff to follow different committee meetings and to engage in the international standards organizations. In the quest for harmonized standards, developing countries in sub Saharan Africa should not only take defensive approach but must also be seen have be having a genuine concern for the health concerns of the citizens. There is clear indication that pursuit of better sps standards is being driven by market access concerns this trend should be reversed and a genuine effort be sort to harmonize the local standards with the international standards.

TRANSPARENCY

Lack of transparency in the application of the SPS agreement has been a matter of great concern for developing countries. The rules established by developed countries are numerous and complex This makes it difficult to distinguish between measures that are genuinely intended for health purposes and those that are disguise restrictions to trade. The SPS Agreement provides for need for transparent application of the SPS measures. Its noted that since the coming into effect of the act, there have been increased notification of SPS measures by WTO members. Between 1995 and October 2003, 85 percent of the members have established an Enquiry Point an institution through which SPS measures are notified to other WTO members. There were also 3649 notification from 89 members of the WTO. However Africa accounts for only two percent of the

113 Supra note 99
114 Supra note 62

notifications115 . The only country representing sub-Saharan Africa was South Africa with 17 notifications.

The increased number of notifications have however not necessarily lead to achievement of transparency in SPS issues. There remain considerable variations in standards between countries and widespread uncertainty over how certain countries are in fact implementing/enforcing their standards.116 For sub Saharan countries, concerns have been raised on the EU Maximum Residue Levels (MRLs) regulations. Despite efforts to harmonize the MRLs for pesticides in fresh fruits and vegetables imported to EU , there remain *de facto* wide variations in operative standards due to different country approaches to surveillance and enforcement.117 EU has been accused of choosing to ignore the Codex recommendations and for applying stricter standards leading to "back door trade protectionism".118 There remains wide variation of standards requirements from country to country especially among the developed countries. There is increased emphasis for example on the application of Hazard Analysis and Critical Control Point (HACCP) but also in addition overlapping requirements regulatory and technical requirements.119 This problem is made worse by the fact that developed countries who are the main importers of agricultural products from sub Saharan Africa adopt certain standards unilaterally without considering the exporters. Fruits exporters in South Africa have complained that European Retailers Produce on Good Agricultural Practice (EUREPGAP) protocol has created distress to growers and exporters in their market access objective. They content that the regulations are against their domestic norms and have no relation with the purported health protection. They believe it was a deliberate attempt to bury their interest under colossal weight of red tape.120 Such measures are contrary to the provisions of the SPS Agreement which requires members to only adopt higher standards where the available standards are not adequate. In such application the

115 Gretchen H. Stanton, Special Meeting on the Operation of SPS Enquiry Points, 31 October 2003 http://www.wto.org/english/tratop_e/sps_e/spec_meet_oct03_e/presentation_e.ppt#270,1,Slide 1
116 Supra note 4 In this case countries have to deal with different regulations of countries like US, EU and Japan which are varied and complex.
117 Id
118 Gumisai Mutume, New Barriers Hinder African Trade, Africa Renewal Vol 19. 4 (Jan 2006) pg 19
119 Supra Note 4
120 Supra note 103

members must ensure that they do not apply measures that are in excess of the need to achieve desired SPS protection.121

There is also concern that where developed countries notify proposed changes in their legislations of SPS, they do so as a formality without any desire to take incorporate the comments of developing countries into their final legislations. This has led to a proposal that where a developed country does not take the comments of developing countries, they should be obliged to explain. 122It's important to note that developed countries should not be allowed to continue hiding behind the incapacity of developing countries to maintain higher standards. Indeed major concerns of developed countries are on the legal structure which though as the Agreement promises provides a means of transparently notifying members, its still mired with a lot of confusion in its implementation. Malaysia has emphasized that other issues besides technical assistance were important for developing countries, for example a clear expression of the appropriate level of protection in notifications, and monitoring the use of international standards.123

The proliferation of private standards has cost implication in the developing countries. These private companies rely on certifying agencies which are usually companies in their own countries. This increases costs for developing countries. More importantly, it leads to a strain of regulatory melee because of lack of proper legal and institutional mechanism of coordinating the works of such institutions. The result is an environment that's confusing for exporters from the developing countries. The role of a sovereign state is its ability to enhance the interest of its citizens. Company appointed regulators may be used to exclude small scale farmers from business in the interest of multinational companies. There is need to ensure that a legal and regulatory framework exits that controls the activities of these private regulators.

121 GATT Art.XX and the Introduction to the SPS Agreement.
122 See Egypt's proposal SPS AND Developing Countries – Statement by Egypt at a Meeting of 7-8 July 1999. G/SPS/GEN/128. WTO Geneva.
123 SPS Meeting Id 1999

The developing countries have raised many concerns generally concerning the implementation of the SPS Agreement. These problems have grouped in to three categories.124 The first is that the way the Agreement operates carries unintended bias against developing countries. This touches on the costs of notifying and tracking notifications from other countries. It also concerns the enforcement of their rights at the WTO Dispute settlement system, which takes a lot of costs. Lack of adequate resources has also impeded these countries ability to participate in international standards setting bodies. Though Countries like Kenya are members of the above international organizations, they are often not represented in their meetings.125 It is also noted that there is lack of proactive participation by the private sector in these countries, but rather operate by reacting to measures by importing countries.126

Secondly, is that the requirement of scientific standard in the agreement has hindered the ability of these countries to harvest the benefits of the agreement that are derived from principles like Equivalence and Regionalization. The developing countries have no technical capacity to deal with the scientific standards testing. They do not have well equipped laboratories and trained personnel to undertake the task. The result is that their efforts towards implementation of regionalization are ignored and are forced to adopt standards available at the developed importing countries. Hence the Equivalence principle has no meaning for them. It is noted for example that in regionalization the OIE guidelines do not make specific provisions for developing countries. There is no recognitions of the challenges faced by these countries. Thirdly, the trend in developed countries toward more extensive regulations on quality and process attributes, rather than just on product characteristics, poses a fundamental problem for developing countries.127 This divides the market into high value product market and the low value product market.

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124 Supra Note 7

125 Hezron Nyagito, Tom Olielo and David Magwaro, *Improving Market Access Through Standards Compliance. A Diagnostic Road Map for Kenya* in Standards and International Trade ; A Voice for Africa (John S Wilson and Victor O Abiola)

126 Id

127 Id

SPECIAL &DIFERENTIAL TREATMENT, TECHNICAL ASSISTANCE AND CAPACITY BUILDING.

The SPS Agreement contains specific provisions for developing countries on special and differential treatment (S&D). The result of the Uruguay round therefore indicates a continuity of the argument by the developing countries that they were unable to participate at an equal level with the developed countries. This being true these countries seem to have concentrated on evading application of the rules than working towards adopting the rules. There S&D provisions of the SPS for the developing countries can be put in three categories. Firsts, there were provisions on delayed application of the rules. The developing countries were allowed a grace period of two years before the agreement can apply to them. The least developed countries were given a grace period of five years.128 These countries were however given a long time frame without facilitating technical support.129 There is however little evidence to show that developed countries are willing to permit additional time for compliance and or transitional arrangements.130

The second provision is in regard to technical assistance.131 The members agreed on facilitation technical assistance to developing countries either bilaterally or through appropriate international organizations. This is an important provision because developing countries need training on the understanding of the applicable rules. There is concern that many small and medium size enterprises (SME) are not aware of the existing SPS legislations because they do not have the resource to invest on modern information system.132 Though, for example, capacity building in Kenya remains a key priority for the government, there is still paucity of local analytical skills and expertise, resource a technical capacity in several areas pertaining to trade negotiations at international organizations.133 The result is that SMEs are unable to participate in the export industry because of the constraints. In Mozambique for example, a study done indicates that there

128 Art 14 of the SPS Agreement.
129
130 Spencer Henson, Rupert Loader, Alan Swinbank and Maury Bredahl, the impact of Sanitary and Phytosanitary Measures on Developing Country Exports of Agricultural and Food Products.
131 Art 9 of SPS
132 Supra note 103
133 Supra note 125

is lack of awareness on the part of both the government and the business community of the standards and the importance of using them and the consequence of not using them. 134 One of the reasons why there is a lot of ignorance is because of the disparity between the standards as applied in the national level and in the international level. The importers of goods are dealing with highly educated consumers who are aware of the kind of products they want. For example in Kenya, the standards for processed fruits and vegetables are weaker than international standards. In the fruits and vegetable industries, the international standards require the status of pest risk analysis and the amount of chemicals used. There is however no local legislation on this area.135

There is lack of enough trained lawyers and scientists who will keep tract on the standards and advice the industries in developing countries. The problem is complicated by the fact that the monitoring institutions for example Kenya Plant Health Inspectorate Services do not have technical and human capacity to conduct the analysis.136 The SMEs should be exposed to the sps issues to be able to appreciate and apply the international standards. There is an indication that in sub Saharan African countries, the adoption and implementation of standards has been driven by the importers needs. There has not been a proactive action towards adoption of relevant standards. For example when there was an import ban by the EU of fish from East Africa, the industry began to realize its weaknesses and it had to start from the scratch. In Kenya for example, Fisheries department had to be established and legislation was quickly revised in line with EU requirements. 137 In the case of Kenyan fishing sector, there is a clear show that the sector was not dealing with basic issues for example the cleanliness of the landing beaches for the fish. Although the food safety requirements were changing in the EU importing countries, the legislative framework of food safety controls remained largely unchanged in Kenya.138 This is a good example of what happens in the African countries. As long as they can still access the market, they do not keep pace with the international standards waiting for import ban to begin reforms. However there is a good

134 Id
135 Id.
136 Id.
137 Supra Note 4.
138 Ibid.

example in the Kenyan industry. The response to international standards has helped Kenya remain competitive in the international market in the horticulture sector.139 Its however important to note that this industry is driven by large multinational companies who are able to meet the standards and the SMEs still need technical support in this area.

The provision of Art 9 of SPS on technical assistance is framed in a manner that constitutes mandatory obligations on the part of the developed countries. There is need for making technical support a condition for developing countries to adapt higher standards. In the Doha declarations members were urged to provide as far as possible necessary financial and technical assistance to least developed countries to be able to address SPS measures that are adversely affecting their exports. 140 This led to the creation of Standards and Trade Development Facility (STDF). The aim of STDF is to assist developing countries enhance their capacity to meet international sanitary and phytosanitary (SPS) standards, improving the human health, animal health and phytosanitary situation, and thus gaining and maintaining market access.141 It provides grant financing for developing countries seeking to comply with international SPS. The partner agencies of the STDF are: the Food and Agriculture Organization (FAO), the World Organization for Animal Health (OIE), the World Bank, the World Health Organization (WHO) and the World Trade Organization (WTO).142 A number of African countries have presented proposals to the STDF for funding of specific projects that are crucial in their countries. The Applicants from least-developed countries must meet at least 10 per cent of the cost of the project from their own resources, while other developing countries are required to fund at least 25 per cent of the project cost.143 This is a good initiative that will go along way in building the capacity of SSA countries. So far it has received a lot monetary support from developed countries and the Sub Saharan

139 Ibid
140 "Implementation –Related Issues and Concerns" doc. WT/MIN (01) 17, 20 November 2001 http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm
141 www.standardsfacility.org
142 www.standardsfacility.org.
143 Further information on eligibility criteria, the application process and governance arrangements for the STDF can be found in document G/SPS/GEN/523.

countries of Africa should use this opportunity to build their capacity in SPS measures. There is however need to ensure that the provision of technical support should not be used to maintain unnecessary higher standards. The problem now is that there is a general consensus that the main problem is the capacity of developing countries and not the high standards maintained by the developing countries. Technical support should not be used to deny the developing countries their right to challenge the restrictive standards in the developed countries. There is need to support projects that deal with development of capacity of the developing countries to be able to address the issues affecting them in line with their overall national policies and economic plans. There is a feeling that the technical assistance going on in many of the developing countries fails to address the day to day problems faced by the developing countries. It's feared that technical assistance can be given as "knee-jerk" reaction to off set criticism of the impact of the SPS requirements on the economic interests of developing countries.144 The developing countries should therefore lead the in the identification of the problems to be addressed.

So far the provisions on technical assistance and S&D are merely dependent on the good will of the developed countries and there is no legal framework that mandates these countries to give technical support. The There need to link measures taken by importing country with technical support provided by such developed country so that any measure taken by a member shall require that member to give technical support to developing countries. However it must not dilute the objective of SPS which though is to enhance market access, is primarily for the protection of human, animal and plant health. Its important for developing countries to take advantage of the existing good will and develop their capacity to address SPS concerns. The EU have initiated a process where they co-work with developing countries when they establish a new regulation. For example recently EU has established regulations on food and feed controls which entered in to forece in 1st January 2006 which has provision on training and twinning projects where EU member experts will work closely with designated developing country

144 Henson S.J, Loader R.J, A.Bredahl, M. and Lux N., Impact of Sanitary and Phytosnitary Measures on Developing Countries, The University of Reading 2002.

to assist in meeting the requirements in the new regulations.145 The EU Commission's Food and Vertinary Office has worked on simplification of the complex regulations in their member countries to make it easy for exporters from the developed countries to understand the SPS requirements.146 There is need for African countries to put on the table their concrete request and proceed to take advantage of the good will that exists in support on technical support in SPS standards. Countries must work towards adopting international standards and avoid expecting exemptions from these standards because it will lead to their exclusion in the market. They also face competition from the other developing countries, especially the middle income countries like Brazil, India and Argentina and they cannot afford to remain with low sps standards.

Developing countries have been in the forefront arguing for implementation of the special and differential treatment. These countries have questioned the provisions of the SPS Agreement for failing to create obligations on the part of developed countries to support them. During the third ministerial conference, the developing countries questioned the provisions of S&D in the WTO agreements, indicating that they reaped no benefit from them. During the fourth ministerial conference members agreed that they shall be reviewed with a view of making them precise, effective and operational.147 In the July package,148 the SPS Committee was mandated to prepare clear recommendations on S&D. The greatest contribution of this process of SPS discussion at WTO is that it has resulted in improved technical assistance. Other than the political pressure it puts to developed countries, it is difficult to make them precise and operational. There is need to incorporate technical support and technology transfer to be part of the mandatory as a condition for developing countries to adopt SPS provisions. The developed countries in Africa should take this window of opportunity to build their capacity while the donor communities still regard SPS issues as a priority for them to support.

145 SPS News 3rd ed June 2004 http://trade-info.cec.eu.int/doclib/docs/2004/june/tradoc_117785.0.pdf
146 Ibid
147 Doha Declaration Para 44
148 Supra note 145

The problems of SSA have been pointed out at SPS Committee by South Africa out that there were not only scientific and financial challenges faced by developing countries but in addition there is also legal capacity constraints.149 The participation of the African countries in SPS meetings is not quality. There are few countries that raise issues in these meetings. The SSA countries need to engage more in the SPS norm setting. There is need to move from the non participatory regime to capacity building and more engagement in norm setting. The sub Saharan countries should not use the reactionary means of solving SPS problems, that's acting in response to crisis rather than being proactive. There should adopt a proactive approach from the national level to upgrade SPS measures to meet the challenges of the market. When the EU slapped a ban in East Africa after the out break of *salmonella* the outdated laws and policies were brought to bare. Although for a long time the food safety requirements were getting stringent in the EU, little had been done to upgrade the facilities. The legislative framework and food safety controls remained unchanged.150 There was particular concern that the existing structures in a country like Kenya for example were confusing. The responsibility of setting standards in the industry as outline in the Fisheries Act Cap 378 was split between the ministry of health, which was responsible for overseeing hygiene and sanitation, ministry of Trade and Industry which was responsible with trade issues and the ministry of Agriculture which dealt with production aspects.151 There was no legal framework outlining the relationship between the fishermen and the processors. This lead to the enactment of the 2000 legal notice providing the legal framework for fish production for export. The government has also established Fisheries Department to enforce hygiene regulations and to issue fish license and export certificates. 152 This is an indication that these countries are only responsive to crisis.

TECHNOLOGY TRANSFER

The other problem which is yet to be addressed in the process of making the S&D provisions precise and operational is the technology transfer. In the Doha Declaration

149 WTO SPS committee summary G/SPS/R/147 May 1999
http://www.wto.org/english/tratop_e/sps_e/r14.doc
150 Supra note 7
151 Supra Note 125
152 Id

there was commitment in the WTO to examine the relationship between trade and transfer of technology. 153 This matter still divides the WTO members along the rich and the poor countries. Since the lounging of the Doha round of negotiations, there have been a number of proposals from the developing countries on this matter. In their submission to the working group on trade and transfer of technology, Cuba, India, Indonesia, Kenya, Pakistan, Tanzania and Zimbabwe argued that It is "basically the technological backwardness of developing countries, which comes in the way of their meeting the required technical or SPS standard."154 They further lamented that despite the provision of Art 9 of SPS "developed countries do not seem to have initiated serious action to help developing countries in terms of these provisions."155 They proposed that the members should come up with ways of ensuring that overcoming the difficulties by facilitating technology transfer on "terms which would be considered as reasonable from the developing countries point of view."156 Besides, they asked the group to consider ways of developing early warning system with regard to standards and a mechanism to facilitate adjustment by developing countries to meet the new standards.157

The developing countries have also expressed their dissatisfaction with the way this issue is handled and in Cuban submission to WGTTT, argued that attention needs to be focused on the adoption of concrete and practical steps that should be taken within the WTO framework in order to facilitate the transfer of technology to the developing countries.158 They proposed a thorough examination of the technology transfer provisions contained in different Agreements with the objective of making them

153 Para 37 of the Doha Ministerial Declaration "we agree to an examination , in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology and any possible recommendations on steps that might be taken within the mandate of WTO to increase the flows of technology to developing countries. The General Council shall report to the fifth session of ministerial conference on progress in the examination"

154WT/WGTTT/W/67 May 2003

155 ibid
156 ibid
157 ibid

158 WT/WGTTT/W/91 July 2005

meaningful from the point of view of developing countries.159 Its however noted that this proposal though receiving overwhelming support from the developing countries was not welcomed by developed countries who still argued that the issue was complex and that there was no clear nexus between trade and transfer of technology.160

At the Hong Kong Ministerial conference, there was no agreement reached on the transfer of technology. However, the members mandated the General Council to continue working on the issues of trade and transfer of technology.161After the Hong Kong Ministerial conference, Cuba prepared a submission on the specific concerns of developing countries on the relationship between SPS, TBT and technology transfer.162 They argued that the importing developed countries should consult exporting developing countries when developing SPS prescriptions that will affect market access for the developing countries. That will enable the parties to take a full inventory of the technology and infrastructure to ensure that such countries will be able to comply. If there are difficulties in acquiring the technology needed, then the developed country should ensure that there is effective means of transferring such technology.163 As it is noted above, Sub- Saharan countries are in the fore front in the international scene in arguing for technology transfer. In addressing SPS concerns there is need to do a lot at the national level. For example there is still a very poor coordination between the work of the public and the private sector. The private sectors in these countries are still ignorant

159 Ibid

160 WT/WGTTT/M/12 20 September 2005

161 WT/MIN(05)/DEC DOHA WORK PROGRAMME Ministerial Declaration Adopted on 18 December 2005 Para 43

162 Id
163WT/WGTTT/W/12 14 March 2006

about the international laws and regulations on SPS which becomes an impediment to achieving proper standards.164

Besides making the private sector to be aware of the existing standards, the governments should work to wards establishing incentives to the private sector. There is need for public-private institutions collaboration in transfer of technology. It's important to come up with a legal framework that encourages private sector to invest in technology. These include tax incentives plus a good intellectual property protection laws that will guarantee the private sector protection of their transferred technology. There is also need to establish technology transfer focal point in the region that will coordinate technology transfer to the SSA from the large foreign companies and institutions. Such office will negotiate for transfer of appropriate technology for research on SPS issues in the region. At the international level, such office will guide the countries in arguing their position on sps issues which includes transfer of technology. It will provide the technical and legal support necessary to approach the regions negotiation on sps issues.

EQUIVALENCY PRINCIPLE.

The SPS agreement implores members to accept sps measures of another member as equivalent, even if the measures differ from their own or from those used by other members trading in the same product, if the exporting country objectively demonstrates to the importing member that's its measure achieve the importing members' appropriate level of sps.165 It asks members to enter into bilateral and multilateral agreements on recognition of the equivalence of sps measures.166 It is a means by which trading partners recognize that their different national sps measures are equivalent in terms of health and food safety protection requirements.167 Agreements acknowledging the equivalence of health protection measures enforced by different approaches are negotiated on a bilateral or regional basis, and can help, for example, overcome any lack

164 In Nigeria its noted that many private firms are not aware of the international standards available. The SMEs are especially disadvantaged because they are unable to keep up with the ever changing standards. The lack of awareness and access to information remains a big challenge. Supra note 125
165 SPS Agreement Art 4.1
166 Art 4.2
167 Supra Note38

of international standards.168 Wholesale adoption of the standards and structures available in the developed countries lead to unnecessary costs for developing countries. The Equivalence principle provides and opportunity for these countries to adopt measures within there own ability which can still achieve the desired SPS standards. The principle was put in place in recognition of the fact that health systems may differ from the exporting and the importing country.

Equivalence does not mean identical but rather that the proposed measure or set of measures should yield the same level of protection against the identified hazard(s). 169 The SPS Committee has noted that "equivalence of sanitary or phytosanitary measures does not require duplication or sameness of measures, but the acceptance of alternative measures that meet an importing Member's desired level of sanitary or phytosanitary protection". 170 Importing countries should not therefore insist that for ease of administration, proposed systems or processes need to be identical to that used in their territory.171 The objective should not be to duplicate the standards of the importing member but to ensure the protection sort by that member is achieved. The implementation of the Art.4 of depends on the members recognition of the SPS measures taken by a member country. The recognition of the equivalence as therefore dominated discussion on this principle. There is no case before the WTO so far that has shade some light on this matter. However a look at Canada-United States Free Agreement Trade Agreement(CUSFTA) decision on this principle shades some light on the difficulties of implementation.

168 Supra Note 76

169 D.W. Wilson and P.T.Beers, Global Trade Requirements and Compliance With WTO Agreements : The Role of Tracing Animals and Animal Products available at http://www.oie.int/eng/publicat/rt/2002/WILSON.PDF Accessed 9/03/2006

170 Committee On Sanitary And Phytosanitary, Measures Decision On The Implementation Of Article 4 Of The Agreement On The Application Of Sanitary And Phytosanitary Measures G/SPS/19, 26 October 2001.

171 Id

In the *UHT Milk Case* 172 the CUSFTA Panel recognized that the application of the concept of equality in a given context is always a matter of considerable difficulty and debate.173 They however concluded that "since the time of Aristotle, at least two principles have been widely recognized with respect to the definition of equality. Firstly, equal treatment involves according the same treatment to the same facts. Secondly, equal treatment of dissimilar facts will not produce equality. The interpretation of the GATT has reflected both these propositions."174 On the same note, application of SPS standards across the board on conditions that are not the same will not produce equality. This principle compliments the provisions of Art. 5.6 of the agreement which requires members to take SPS measures which are less trade restrictive. It is desired to fill the gap where international standards do not exist. It is part of the overall desire of achieved harmonized SPS standards within the trading arena. This objective was made clear in the CUSFTA Agreement which existed before the SPS.175 For purpose of judging Equivalence, SPS measures can be put into three categories. One is the infrastructure which includes the legislative base and the administrative systems. Two is the program design or implementation and the third is the specific technical requirements.176

Recognition of the equivalence , though it can open doors for market access without demanding an adoption of the same systems as the importers, has been acknowledged to be difficult and only reached in limited cases involving developed countries.177 In the CUSFTA above, Canada complained against regulations that though appeared to apply *prima facie* equaly to both domestic and imported milk, the was *de jure* application that

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172 In The Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T Milk from Quebec Final Report of the Panel, June 3, 1993.

173 Para 5.15

174 NAFTA Panel in ------referring to Aristotle, Nicomachean Ethics, Book 5, lines 1131a 21 -30 trans T. Irwin, 1985, Hackett Publishing Co; Politics, Book 3, Ch.9, lines) (See Section 337 of the U.S. Tariff Act GATT BISD 36S/345 at para. 5.10)

175 Art 708 of the Agreement and the Annex 708.1 (a) to harmonize their respective technical regulatory requirements and inspection procedures taking in to account appropriate international standards, or where harmonization is not feasible, to make equivalent their respective technical regulatory requirement and inspection procedures.(b)to establish equivalent accreditation procedures for inspection systems and inspectors.

176 Id

177 Supra note 38

denied Canadian milk to access that market.178 The reason for the inability to meet the requirements they argued, was the inflexible interpretation accorded the Regulations by Puerto Rico authorities and their refusal to adopt measures which would allow the Québec producer to demonstrate the equivalence of Québec and Puerto Rico health and safety standards for the production of milk . The result is the protection of US milk from competition from Canadian milk.179

The Equivalence principle is supposed to fill the loopholes where harmonized international standards is not possible. Canada in the above case argued that equivalence should be interpreted based on Art.117 of their FTA which defined equivalence as having the same effect. African countries not adopt wholly the standards in the developed countries if their exists a means of achieving the same result. If a country is confident of its standards it can only allege equivalence and its for the importing member to carry her own study challenging this. Meanwhile she will be acting illegally to close the borders. A critical lesson learned from the above NAFTA case is that Canada was able to invoke the dispute settlement mechanism pending determination of equivalence because US was using delaying tactics to deny them market access.

US argument in the above case was that the Panel had no capacity to determine whether whether a measure is equivalent to the other or not. Much as that may be right. US further went to assert that equivalence rests in the discretion of Puerto Rico Authorities. This was an interesting argument because it means recognition of equivalence is just a unilateral measure and not a mutual approach by parties who desire to harmonize SPS standards. The SPS Agreement however indicates that members "shall accept sanitary or phytosanitary measures of other members as equivalent". The only condition given is allowing "reasonable access" to the importing member to inspect testing and other relevant procedures. It also asks members to enter into consultation with aim of achieving bilateral or multilateral recognition of equivalence.180 Referring to a similar provision in CUSFTA, US argued that prospective equivalency of technical standards, do not

178 Supra note 174
179 Supra note 174
180 Art 4 of SPS.

constitute obligations, but long-term *desiderata.181* In other words the provision only expressed a wish and that member shall not be bound. This appears to be different cases in SPS because a party is only suppose to allege that her measure is equivalent to the one of the importer and the burden shifts to the importer to prove the allegation wrong. If developing countries used this provision in challenging measures taken by developed countries then it would be easy for them to go through. However in practice it has been the exporting member who is suppose to prove that the standards applied are equivalent to the one of the importer. These has lead in the SSA to a situation where the poor exporters to EU are required to demonstrate that measures in these countries are equivalent to the EU and because of lack of technical capacity, the EU have had the sole benefit of ruling on compliance without any contest from the SSA.182 But as discussed above, there is lack of human and technical capacity in these countries to conduct a proper scientific evaluation hence there is no confidence to follow this path.

When can a country be legitimately be accepted to have equivalent standards to another? Is it an absolute right of the importing partner to recognize the other party's standards as being equivalent or not? In the above CUSFTA case , US argued that Puerto Rico must be able to prevent access to its market until it is satisfied that Québec UHT milk is produced under equivalent standards. While accepting the US argument that equivalence principle does not impose on a member the duty to carry out equivalence study, the Panel argued that though a provision can be termed to be "best effort" provision, it does not mean that a party is free to do whatever they want , a party is expected to act in good faith and one should not engage in actions that would make the undertaking of the good faith impossible.183 At the end the Panel was unable to rule that US had violated the Agreement on the basis of failing to accept Canada's standards as equivalent to the US measures. This is because, being a best effort measures there is no explicit requirement that a party must accept and it involves a process.184 However the Panel ruled against

181 Supra Note 174
182 The COMESA, Developing a Negotiating Position on Economic Partneship Agreements Market Acess Constarints, Prepared by the Secratariat.Available at www.acp-eu-trade.org/documents/COMESA sec May 3
183 Para 5.28
184 Para 5.3

the unilateral closure of the market for the Canadian milk while the negotiation of reaching an acceptable method of determining equivalence was in the process 185 In other words the Panel was of the opinion that while equivalence study is going on between parties, one member should not unilaterally take measures that would impair the benefits derived from the Agreement. However the Panel was alive to the paradox of this arguments and rightly pointed out that:

> "closing a market in the midst of an equivalence study or of discussion of the terms of reference for such a study is disturbing, because one party could by delaying, a refusal to agree to the terms of reference exclude imports from the other party indefinitely. On the other hand if Art.708.2(a) were taken as requiring the imports be permitted until an equivalence study has been concluded , then the exporting party could by delaying or refusing to agree on terms of reference retain access to the market indefinitely without having to meet the new standards or establish equivalency"186

Whether a party is acting in contravention of a "best effort" provisions thus depends on the circumstance of the case. Such an argument should be presented by developing countries when they are faced with situations where there standards are not recognized by the developing countries. Many sub Saharan countries have been forced to adopt standards that are not necessary in their countries yet the standards they have adopted are equivalent in obtaining the standards desired for sps in developed countries. For example the EU have been accused of adopting high standards on the Maximum Residue levels while the standards affordable in the developing countries which conform with international set by Codex Alimentarious are sufficient to achieve the desired sps protection.187 The developing countries in sub Saharan Africa should enter in to bilateral and multilateral agreements of equivalence with the developed countries. This will give them the opportunity to challenge measures that are hindering their market access objective.

The equivalence principle provides an opportunity for African countries to challenge measures taken by importing countries that discriminate against exporting members. Once they have supplied evidence of existence of sufficient SPS standards, the burden of proof shifts to the importer to show reasons why he cannot recognize the member's

185 Para 5.62
186 Para 5.47
187 Gumisai Mutume, New Barriers Hinder African Trade, *The Africa Renewal Vol 19* January 2006

measures. An exporter should therefore not use SPS measure to discriminate against some exporters from countries having the equivalent measures. The Equivalence principle has been described as a breakthrough for the WTO because it recognizes that different standards, production processes and inspection procedures can achieve the same level of health and safety protection.188 Though it has a lot of challenges it provides a great opportunity for market access for sub Saharan African Countries. For instance, this principle has been used to enhance market access in fish products from the East African region.189 Where the EU recognizes the measures taken to be equivalent, there is reduced physical inspection in their border.

The other challenge for developing countries is on the cost of conducting equivalence study. The SPS agreement does not indicate who bears the cost. It's however implied in the provision that "reasonable access shall be given to importing member to conduct equivalence study. But Art 4.2 requires members to enter consultation upon request with an aim of bilateral or multilateral agreements on recognition of equivalence. This is where the technical support requirements and S&D provisions as discussed above should be applied. In the above case, the US and Canadian FTA Panel held that the costs of work undertaken in the United States, should be borne by the. United States and the costs of the work undertaken in Canada should be borne by Canada.190 However considering the difficulties based by African countries these costs should be part of the technical support and be made by the developed country where the market is sought.

There has been an effort to make the equivalence principle operational and to particularly for the developing countries.191 The SPS Committee in response to the fact that equivalence is only achieved in developed countries reiterated that equivalence can be applied to all WTO members regardless of their level of development. The committee

188 Warren H. Maruyama, A New Pillar of WTO: Science 32 Int'l Law. 651
189 After the Fish ban in the region, as from 1997 due to out break of cholera and presence of salmonella, the east African countries had to work hard to upgrade their standards. Kenya established standards based Codex stan 165 and EU Directive 91/493/EEC.(Laying Down the Health condition for Production and the Placing on the Market of Fish Products). The Standards were legislated in 2000 under legal notice No.10 as supplement to the Fisheries Act. 378. WB page 45
190 Para 7.3
191 Equivalence Decision

further acknowledges the need for members to transparently exchange documents to achieve the objective of equivalence.It requires importing members to explain certain SPS measures they undertake, what risk they are protecting and the scientific evidence therein to enable the exporting member to prove the equivalence of her measure.192 The committee also decided that the importing member should respond to an exporting member within six months on a request for consideration of its equivalence measure.193 This is important to curb unnecessary delay. The committee recognizes the challenges of developing countries in the implementation of the agreement and asks members to help developing countries through technical assistance as provided in Art.9 of SPS. It also implores the members to assist these countries to participate better in international organization.194 The importing members are required to accelerate its procedure for determining equivalence in products which it has historically imported from an exporting member.195 The Sub Saharan Countries should push for negotiation of equivalence agreement with importing countries in developed countries now that there is a legal framework for that. This is important because there exports are based on few products and can help in improving market access. In the process of pushing for the equivalence in those areas that they have strength, they will be able to identify measures that these countries are retaining that have no scientific evidence. The SSA should guard against any attempt by developed countries to use the secret bilateral equivalence agreements to discriminate against other members. Developing countries have argued that the biggest problem they face in this area is lack of access to information.196 There is need to make all equivalence agreements between members to be available to all members. For this reason the SPS Committee agreed to revise its recommended notification procedures to provide for the notification of the conclusion of agreements between Members which recognize the equivalence of sanitary and phytosanitary measures.197 SSA should support a formulation of recognition agreement on equivalence principle within the WTO.

192 Para 2 of the Decision
193 Para 3
194 Para 8&9
195 Para 5
196 Supra Note 125
197 Para 11

To achieve the benefits of equivalence principle, Sub-Saharan countries need financial and technical assistance to upgrade their facilities and to train enough personell. There is a dire need for well trained scientists, proper equipment, and a legal framework that is responsive to the changes in the industry. The countries at the regional level should strife to harmonize their standards. This will ensure that they are able to jointly address SPS issues at the regional level and that there is no opportunity for importing developed countries for discriminating against any country in the region. The Equivalence principle should be inserted in all the regional agreements. Since it's a costly process, the regional groupings should be used for the countries to pull resources. It has been proposed that each developing country should prepare a list of main agricultural products it exports (perhaps list of five to seven products) identify the principle destination and circulate among the WTO members so that whenever a new measure is developed by developing countries, it should contact the affected developing countries and ensure that the new measure will not disrupt traditional trade flows, if it does then provide aid.198 It is however important for Sub Saharan Africa to continuously work on better standards for them to earn the trust from their importers because the principle of equivalence mainly depends on the ability of the importer to recognize the standards of the exporter country.

REGIONALISATION.

The SPS Agreement recognises the fact that existence of pests and diseases are not confined in geographical boundaries of a country. In risk analysis therefore, members are required to consider prevalence of specific diseases or pests ; existence of pest-or disease free areas; relevant ecological or environmental conditions; and quarantine or other treatment.199 The agreement further also requires members to recognise eradication and control programmes or appropriate criteria or guidelines developed by international

198 Supra note 125
199 SPS Art5.2

organisations. 200This principle is based on the premise that governments should recognize disease-free areas within a country which may not correspond to political boundaries, and they should appropriately accept imports from such an area without imposing a general ban from goods from the whole country. If for example there is an out break of foot and mouth disease in Eastern part of a country, the importer should not insist that beef from the western part of the country should be excluded from its market if there is clear distance and different conditions in that part of the country. It may also happen that an out break of a disease in country is such that the effects are felt in the neighbouring country because of proximity. For one to understand the benefits of this principle, one needs to think of the world as one unified place like one country without borders in what has been referred to as "no borders case".201 In this case the diseases would have been managed without giving too much attention to the trade issues. This means animals based on low risk areas would not be affected and any ban or restriction of animal movements would be based on scientific management.202 This is because in the science of animal disease control, boundaries are artificial constructs-mere lines on a map that have no bearing on the dynamics of a disease in an animal population.203

The principle of regionalization was enshrined in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) for two purposes: (i) to incite Members to improve their sanitary and phytosanitary status; (ii) to facilitate access to foreign markets for agrifood products.204 The SPS agreement calls for consideration of geography, ecosystems, epidemiological surveillance and effectiveness of sanitary and phytosanitary controls in determining whether an area is pest free or disease-free or an area of low pest or disease prevalence. The implementation of this principle is science intensive and requires massive investment in so far us ensuring a particular area of a country is disease or pest free as opposed to the rest of the country.

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200 SPS Art 6.
201 Supra note 30 at page 432.
202 Id
203 Id
204 G/SPS/GEN/606 Communication of Argentina to the Committee on SPS . Available at < http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN606.doc>

Regionalization principle though has been around since the inception of WTO had not been operationalised. WTO members have indicated that this principle is important in enhancing market access objectives of the members. The WTO committee on SPS is now grappling with this issue.205 The WTO members have however been divided into two by this issue. There are those countries that are keen for the "-free status" of their exporting regions to be recognized by importing countries quickly and without excessive red-tape, particularly after the standards-setting organizations have done so; and countries that take a more cautious approach to recognition.206 The later countries are primarily made up of developed countries. These countries use the justification of Art.3.3 of the SPS Agreement which allows adoption of international standards as long as there is scientific evidence. Some members have faulted the use of international standards as absolute standards. There argument is that a member has a right to protect its territory from certain disease and pests. They argue that a member who refuses such recognition does so from the scientific evidence collected unlike the international bodies like OIE who base their decision on "on-desk examination of documents or data submitted" without the benefit on "on-site inspection".207 This argument undermines the role of the international organizations of achieving harmonization of SPS standards.

This principle furthers the desires of the SPS Agreement by ensuring that products produced in a particular region within a country can still access market even where there exists an out break of disease or pests in another region within the country. In this case therefore scientific evidence provides and objective standard and hence furthers trade liberalization. Regionalization therefore is a tool for furthering market access objectives of WTO. Some developing countries have argued that recognition of this principle has been delayed mainly for two reasons: (a) importing countries do not acknowledge the recognition granted by the relevant international organizations; and (b) the administrative procedures required by the importing countries are too slow and complex and deviate

205 WTO News Available at< http://www.wto.org/english/news_e/news06_e/sps_feb06_e.htm>

206 Id

207 G/SPS/GEN/605 Japan Communication to the SPS Committee. Available at < http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN605.doc>

from the procedures developed by international organizations. The process going on now provides an avenue of creating international standards on regionalization and thus removing it from the purview of individual countries. This will reduce costs for developing countries. Lack of capacity in developing countries for demonstrating the disease-free status of particular regions has however led to reluctance on the part of importers to recognize these regions as eligible for export trade. 208

The sub Saharan countries have not submitted any proposal in this process. One would argue that it is because these countries face a lot of other challenge to be able to be involved in the regionalization discussion. It is however important that these countries realize that There is need for specific regulations dealing with imports from area with low pest and disease prevalence. There is concern also over the delay by importing countries from recognizing regions that are free from pests and diseases. In their submission Argentina underscore an important point that;

> "the identification and national recognition of a region with a differential sanitary and phytosanitary status is a process that can involve several years of work and major investments in human and financial resources, which are often scarce. Moreover, once the work has been done, considerable resources are needed for the maintenance of that status as well as for surveillance and for emergency programmes to deal with any outbreaks that may occur. All of this investment can have its justification in society, which usually feels the effects in terms of domestic trade or the movement of persons, machines, animals, equipment, etc., provided there is a chance for access to markets that had hitherto been closed or subject to complex and often costly restrictions."209

In this case, Columbia adds that it is very important for the country concerned that it be recognized by other countries with which it maintains commercial relations, and by the international community.210 It is pointed out that when it comes to developing countries, developed countries are hesitant to recognise their regionalisation efforts.211 Its is

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208 Tim Josling, UN Task Force on Strategies for Meeting the Goals of the Millennium Declaration; Trade Task Force Norms and Standards. Available at< *http://www.ycsg.yale.edu/documents/papers/Josling.doc*> Acessed 11/03/06

209 Argentina supra note 204.

210 G/SPS/GEN/611 Columbia Communication to the SPS Committee Available at < http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN611.doc> Accessed 12/03/2006

211 Id

emphasized that the administrative procedures required by some importing countries for recognition of a pest- or disease-free area or area of low prevalence are not clearly defined, are very complex, expensive and slow, and there are no precise time-limits for any response.212

However developing countries have benefited from the application of this principle. For example the EU has been importing beef from South Africa, Brazil and Argentina while banning imports from part of the country where disease is present.213 The sub Saharan countries should first work towards achieving a legal framework in the region that facilitates application of this principles. Such law should address address the member countries concerns. For example the region needs to come up with proper definition of recognition of regionalization. Such instrument should define the framework under which countries can implement this principle. It should clearly respond to the health concerns of member countries by outlining obligations of the members in so far as this principle is concerned. For example if a country alleges that they have designated pest and disease free areas, and it turns out that false information was given to the detriment of the health concerns of other countries, what will be the penalty? The region may need to come up with standards certification institution that will verify measures taken by member states in enforcing this principle. There is need for sub Saharan countries to be transparent in addressing programmes on regionalisation by having legal framework that guarantees access to information to stakeholders. Quality scientific programmes that are based on international guidelines are needed. This is the only way of building trust with the importers. The must be a legal framework both at the region and within WTO that guarantees market access to countries that invest in such costly process. Such framework should at the same time not compromise the health standards sort by other countries.

The SPS committee asked the OIE and IPPC to address the problems related to implementation of the Art. 6 of SPS. In May 2005, the OIE concluded its work on a chapter within the Terrestrial Animal Health Code related to zoning and

212 Id
213 http://trade-info.cec.eu.int/doclib/docs/2004/june/tradoc_117785.0.pdf

compartmentalization. In addition, the Terrestrial Animal Health Code Commission is planning to include zoning and compartmentalization provisions within disease-specific chapters.214 On the other hand the IPPC has developed a draft guidelines related to pest free area (PFA). IPPC working group is now considering the possibilities for an international IPPC recognition system for pest free areas, similar in concept to the role that the OIE carries out in this regard. 215 So far the IPPC has commissioned a working group on the feasibility of international recognition of pest free areas.216

The working group has the task of finding the definition of international recognition, the benefits of an international recognition for importing and exporting countries and for, for developed, developing and least developing countries. It will also look at funding of the process of recognition and the liability and responsibility of the PFA.217 The team as the task of coming up with a framework that address concerns raised by members which include; What international organisation will be charged with the duty of recognising pest free area, whether it will be a one institutions or many and what will be their relationship, whether such institutions will take responsibility of the consequence of unqualified certification, the obligations of the member countries and such an institutions in relation to reporting of recognition or denial of pest free areas, Whether international recognition of pest free areas will increase the likelihood of acceptance by contracting parties of the concept, Whether international recognition of a PFA will reduce undue delays in the recognition of that PFA by trading partners, Which organizations or entities can request the international recognition of a PFA, e.g. the NPPO of the exporting contracting party in which the PFA is located (to facilitate exports), the NPPO of the importing contracting party (to recognize a PFA in an exporting country), industry

214 G/SPS/GEN/625 Communication of OIE to the SPS Committee. Available at < http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN625.doc> Acesses 12/03/2006

215 G/SPS/GEN/613 Available at accessed 12/03/2006 <http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN613.doc>

216 Ibid

217 G/SPS/GEN/626. Communication of IPPC to the SPS Committee. Available at <http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN626.doc>

representatives (to facilitate exports and/or imports), the NPPO of the importing contracting party in which the PFA is located (to recognize the PFA in its territory, to justify import requirements), a RPPO on behalf of one or more of its NPPOs, Whether liability insurance should be necessary.218

Argentina proposed three measures to be undertaken to address this problem. 219They are; i) The development of guidelines in the SPS Committee for the establishment of clear, predictable and precise rules governing procedures for the recognition of regionalization; (ii) the incorporation of these guidelines in the domestic legal systems of Members, and their proper enforcement; (iii) the establishment of cooperation programmes between Members for cases requiring adaptation of legislation or training of technicians. Columbia on the other hand has proposed that SPS Committee deal with the administrative concerns of implementation of Art.6 while the scientific and the technical issues are handled by international bodies. In this case the SPS Committee must address time limit of recognising member's efforts in regionalisation. Colombia attaches priority to establishing a harmonized recognition procedure for regionalization purposes and for recognition of pest- or disease-free areas or areas of low prevalence, leading ultimately to the effective implementation of this principle, with established time-limits for each of the stages, which is in turn recognized by the different country Members.220

Other members view the above proposal as leading to duplication and unnecessary delay considering that the technical and scientific standards are interrelated and should only be handled by the international bodies.221 This however might be an attempt by developed countries to avoid provisions that would be more binding by virtue of being administered by WTO. One can argue that the economic-political consequence of them being

218 Ibid
219 Id
220 Supra note 210

221 Japan proposes the adoption of regionalization administrative regulations be developed together with the scientific standards emulating the case of Equivalence principle .See Japan's communication above. Canada also shares the position of Japan in allowing international to deal with all the regulations, technical, scientific and Administrative. See G/SPS/GEN/613 Available at accessed 12/03/2006 <http://docsonline.wto.org/DDFDocuments/t/G/SPS/GEN613.doc>

administered by WTO is that it could be more binding and looks like an attempt to modify the SPS agreement. The international scientific standards should be accompanied by administrative guidelines which will restrain importing countries from using their domestic administrative regulations to deny members market access. It is absolutely important for the sub- Saharan countries to participate fully in the international level in presenting proposals in this area. The discussion on this principle is on and so far no sub-Saharan country has not presented any proposal.222 Once again, these countries should not miss an opportunity to influence the outcome of this process.

DISPUTE SETTLEMENT

One of the failures of the standard code is its inability to provide clear remedy for aggrieved parties. Though there was dispute settlement mechanism, there was no mandatory provision on enforcement because the ruling of a Panel established under it was not binding.223 Since the establishment of the WTO in 1995, the greatest achievement is the Dispute Settlement Body that provides a mechanism of settling disputes among the parties and its decision being binding on all the members.224 Art 11 of the SPS agreement refers the Understanding on Dispute settlement to be applicable to the agreement.

The WTO provides a mechanism of addressing trade disputes. When a party is aggrieved by measures that are adopted by a member, such member can find recourse in the WTO Dispute Settlement body. This mechanism has not been utilised by developing countries from sub Saharan countries to address violations of SPS Agreement by developed countries through measures that are not aimed at protection of human, animal and plant health. Over the past ten years since the SPS Agreement came into force, there is no sub Saharan country which has instituted a complain based on the violation of this agreement. In all the three complains that have been determined by the WTO Panel, that's is

222 The countries which have presented proposals are Mexico, Japan, Argentina, Peru Brazil, Chile Columbia, Canada, Ecuador, Egypt, United States and European Union http://www.wto.org/English/tratop_e/sps_e/meet_jan06_e/meet_jan06_e.htm

223 Standards Code Art

224 See Generally the Understanding on Rules and Procedures Governing the Settlement of Disputes . WTO

Australian Measures on Salmon, EU measures on hormone treated beef, Japanese varietals testing requirements, non involved developing countries. The only cases that involve the developing countries are the Philippines complain over certain Australian import measures on fresh fruits and vegetables and Argentina which teamed with US and Canada to complain about EU biotech regulations.225

Many reasons have been advanced to answer the reason why developing countries are not using the WTO. There is argument that the process is length and very demanding in terms of financial resources and human capacity226 To be able to institute specific challenge, the developing countries must have specific information that links the particular measures in the importing country with their market access problems. It is not easy for these countries to access information from the developed countries because their systems are complex. Beside it has been demonstrated that the private sector in developing countries have not done enough to access information on standards.227 The other problem faced by developing countries is the cost of bringing the case before the WTO. The process of collected data and research for the case is very expensive.228 The cost oh hiring a law firm to litigate a case in the WTO which as now becomes a practice is very expensive. Often these countries go for law firms in the developed countries who charge a lot of money.

The other problems are that the method of implementing an award in case a a member does not abide by a decision is by retaliation. This was the case in the hormones case where the EU refused to withdraw the measures declared illegal and instead chose to pay US monetary penalty.229 For developing countries who import essential material and food stuff for their consumption, it may be impractical way of enforcing the decision because it is likely to hurt the country more than the offender.230 Its however proposed that there should be reform and monetary compensation be given to affected

225 Supra Note 76
226 Agreement Establishing Advisory Centre on WTO law. www.itd.org.
227 Supra note 125
228 Supra note
229 Id
230 Id

members.231 Further suggestion is that preference be withdrawn by all members from a country which is at fault.232 There is need for legal Aid to African countries for institute legal; challenge of these issues.

The other concern for the developing countries is the fact that they fear loosing market access preference granted by the developed countries. EU imports 85 percent of the agricultural products from Africa.233 Besides the EU grants preferential access to African Caribbean and Pacific Countries. There is fear therefore of loosing such preference if a country engages in a dispute with the EU. Beside the preferential access, the sub Saharan African countries depend a lot on aid from the developed countries and fear that such step will lead to lose of foreign aid. In addition the SPS Agreement does not make technical assistance a mandatory obligation but it is a "best effort" provision thus depending on the good will of the developed countries who in this case are the importers. There has been an argument for aid for trade, a concept that indicates that aid should be given to the developed countries to enable them to have a fair share of participation in international trade. Since the term "aid" is used it again means that these countries will still depend on the good will of the developed countries and may be reluctant to antagonise their "masters" but would rather allow them to maintain high protectionary standards but remain in good terms for the wider benefits. The developed countries therefore still call the tune for he who pay the piper calls the tune.

However the above has been disputed following the recent *US-Subsidies on Upland Cotton* case.234 African countries, while they should focus on addressing supply issues, improvement of governance, infrastructure and business environment, should also recognize the a high cost attached to the failure of African countries from participating in dispute settlement.235 This is well demonstrated by the above case. It was a case brought by Brazil against the United States for the later maintaining high subsidies beyond the

231 Id
232 Hoekman , B. and Mavroids , C.P (2000) , WTO Dispute Settlement , Transparency and Surveillance. World Economy 23 (4) 527-542
233 EU SPS News Letter June 2004
234 DS 267
235 Calvin Manduna, Daring to Dispute: Are there shifting trends in African Participation In WTO Dispute Settlement. www.tralac.org

level requirement by the Peace Clause in the Agriculture Agreement. However Benin and Chad which are sub Saharan least developed countries joined the case as third parties. Why was it important for these countries to participate? To illustrate the importance of the case, it has been fronted that the $ 4 billion paid to relatively well-off cotton farmers by US government, exceeds the gross national incomes of Benin, Burkina Faso, the Central African Republic, Chad Mali and Togo-all Cotton producing countries.236 In the context of SPS, the EU have forced African countries to adopt low aflatoxin levels lower than required by Codex standards on cereals, dried and preserved fruits, and nuts. This has costed African Countries $400 million while if international standards were applied it the flow of these products would increase by $700 million.237 In 1997 when there was an out break cholera and food poisoning in lake Victoria, EU imposed import restrictions , although the countries concerned remain unconvinced of the scientific evidence justifying the import restriction.238 Particular concern was on the third ban in Kenya put in place for 20 months because of suspicion that fishermen were using chemicals to catch fish despite the fact that there was no detected pesticide residue on the fish caught. This ban resulted in factories operating at low capacity and many closed down, affecting an estimated 40,000 artisan fishermen.239The other challenge is in the horticulture and floriculture sector where EU have fixed Maximum Residue Levels at analytical zero levels on product-pesticide combination; phytosanitary inspections at the port of entry in to the EU resulting in increased costs and loss of quality; minimum marketing requirements, set by EC according to European climatic conditions; and zero tolerance on a number of pests.240

In the developed countries, a gap is developing between WTO/SPS and Food Safety institutional standards and private sector standards**.** Private sector standards are even more strict (many of which are not science-based and are called quality standards). Examples of these private sector standards are the British Retail Consortium (BRC),

236 Mokoena above referring to Oxfam Briefing Paper: The Impact of US Cotton Subsidies on Africa www.oxfam.org.uk/what we do/issues/trade/downloads,bp30 cotton. PDF
237 Nyagito, Post Doha African Challenges of SPS and TRIPS <http://www.kippra.org/Download/OPNo4.pdf> 3/4/04
238 Supra note 182
239 Ibid
240 Ibid

EUREPGAP, SQ2000 and Global Food Safety Initiative (GFSI). For those African companies that are exporting agricultural commodities into Europe, they are finding that these standards are very burdensome and difficult to isolate on the packing line, shipment by shipment. The GFSI is attempting to supercede all others, but the battle is still raging241 The EU is also known for their precautionary approach to issues on SPS and environment. It has been argued that the EU tends to set unnecessarily high standards because it has the capacity to test extremely high standards , a capacity SSA does not have , which result on SSA exporters being unable to conform to EU standards does loosing market in EU.242 There has been concern also that developed countries are applying higher standards on exporters than their own local suppliers. This violates the national treatment principle which require that there should be no less favourable treatment accorded to imported goods in comparison with imported goods. For example the United States has argued that some countries have a near zero tolerance for salmonella in imported poultry products , yet this pathogen is widely present in their domestic supply chains.243

The burden of proof in the application of SPS agreement first rests in the complaining party who must establish a prima facie case of the inconsistency with the particular provision of SPS.244 To be able to do thi s a party has to have enough statistics, analysed data ect which developing countries may not be able to have. The difficult is posed by the justification of higher standards by Art 3.3 of SPS which allows member to adopt higher standards if the international standards do not achieve the desired results. The question before the WTO Panel was whether Art.3.3 was an exception to Art. 3.1, the Panel held

241 William Hargraves, ACDI-VOCA Survey of Existing and Planned SPS/Food Safety Standards Activities in the COMESA Region, Jan 2005 http://www.ecatradehub.com/reports/rp.2005.survey.sps.food.safety.standards.comesa01.asp Accessed 2/4/06

242 Id
243 Supra note 7
244 Para 103-104 in AB Hormones

that indeed Art. 3.3 is an exception to the general obligation in Art 3.1.245 The panel therefore was of the opinion that once a complaining party as made prima facie case that international standards exits and that a member has not applied that standard, then the Agreement allocates "evidentiary burden" to the defending member to prove that international standards are insufficient.246 Such an interpretation would have favoured developing countries like the ones in Sub- Saharan Africa who have no capacity to disapprove higher standards in the developing countries. It would also ensure that members take seriously the role of international standards setting bodies and engage meaningfully in the process of harmonisation of standards. However the Appellate body did not agree with the Panel. The AB ruled that Art 3.3 is not an exception. The AB ruled that Art.3.1 "simply excludes from its scope of application the kinds of situation covered by Art.3.3 of the agreement".247 Perhaps the AB was alive to the argument that standards setting remains sovereign role of a state. It therefore concluded that a complaining party is not absolved of her duty to prove prima facie case of inconsistency.248

There is need for developed countries to follow the above example and institute a case in WTO against such measures. By not participating either as the main complainants or third parties, the Sub-Saharan countries will miss an opportunity to influence the development of the law in this area. They should remember that the WTO dispute settlement has come to be accepted as a means of filling loopholes in the WTO Agreements. It is also a means of putting in to test provisions of the SPS Agreement and challenging the commitment of developed countries to the provisions they agree to under the WTO. The Sub Saharan African countries should not be clouded by the pursuit of S&D and end up forgetting their rights under the WTO system. African countries have been then urged to prioritise efforts of not only negotiation of agreements, but also adjudicating issues like SPS when dispute arises.249 The challenge for these countries is to build capacity to be able to participate in trade adjudication when necessary. There is

245 Panel Para 8.87-90
246 Ibid
247 AB Para 103-104
248 Ibid
249 James Gathii supra note 62

need to train personnel that are able to monitor standards formulation and implementation in international level. There is need to build a multidisciplinary expertise in trade in Sub-Saharan Africa. It has been proposed for example that in Kenya, that there is need for partnership between Kenya Plant Inspectorate Service (KEPHIS), the ministry of trade and the University Faculty of Law's new one year Master of Laws programme.250 It's a pity for example in Kenya that there is only one faculty of law that's attempting to address trade issues. However there is poor funding on research and in many cases its difficult to get money for publishing a journal .251 There other problem is dealing with a government and public that is cynical to role of research in public decision making.252 There is need to establish institutions of higher learning to be the centre of knowledge that informs the public and the government on decision making. In the on going technical support in SPS issues in Sub-Saharan Africa, there is need for funding in this area.

The SSA countries should use the advisory Centre on WTO law to adjudicate before the WTO. This is a mechanism which was established basically with an objective of helping these countries in giving legal advice. Sub Saharan Countries should maximise the benefits derived from it. The Dispute Settlement mechanism in WTO is a better solution to developing countries who would not be able to engage in the kind of trade wars that the EU and US were engaged in the Hormones Case. These countries should therefore use the system to address their trade problems.

RECOMMENDATIONS AND CONCLUSION

The participation of the sub Saharan countries in the negotiation of the SPS Agreement was poor. These countries did not understand most of the issues and their implications. The driving force then was the interest of developed countries. The conflict between for example EU and US in the hormones case and the Canada and US conflict on UHT Milk regulations in CUSFTA were the motivating cases. The developing countries were

250 Ibid.
251 This is from my own experience as a Law Student Chairman, Editor in the University of Nairobi Law Journal and the Federation of East Africa Law Students Association Secretary General.
252 Kenya Times Editorial April 4, 2006

concentrating on S&D provisions that would exempt them from the provisions of the Agreement. However though, provisions on extended time limit of implementation and for technical support was provided in the Agreement, they have not helped sub Saharan Countries in their market access objective. Indeed they became an impediment to market access. For example by 1997 when the EU slapped a ban on fish from African Region, countries like Uganda and Mozambique, being least developed countries, still had three years to be expected to abide by the Agreement. However the ban was wakes up call on sub Saharan Africa countries to realise that the best approach is to adopt international standards.

There is another perspective to the fish ban in the region. It indicated that these countries have the potential to put in place standards that are acceptable internationally. Fort example it took less than three years for the countries to upgrade their standards, to draft new legislations, to restructure their government departments and to generally comply with the standards as required by the importers. This is an indication that African countries have the potential and should work towards upgrading their standards and should not wait to be cornered by importers to do so. There is need for the general public to be made aware of the food standards and for the governments in this region to consider proper standards for their citizens. The Non Governmental Institutions in these countries should work with the government by sensitising the public and the multinational companies of the need for proper food standard. This will lead to a situation where trust is build with the importers in the developed countries by showing them that we also care for the health of the people in developed countries.

There developed counties have also complained of lack of technical support. There is however evidence that there has been scattered funding by different international organisations and governments. The sub Saharan countries should lead the role in identifying where the funds will be directed to and should not follow the patterns of the importers blindly. Besides they should set their priorities within a national policy. These countries must have clear national policy on food standards that can guide the country in the adoption of international standards. They should now utilise the services of STDF to

ensure that the funds provided by developed countries are utilised in the establishment good facilities and in training qualified personnel. There has been general concern about corruption in these countries and there must be accountable structures that show how the finance have been utilised. To facilitate transfer of technology, these countries should adopt pragmatic approach. This includes private-public sectors collaboration. There is need to establish technology transfer offices and intellectual property protection system that will give confidence to those companies that transfer their technology. This will foster research on certain aspects in the region that will inform adoption of international standards

These countries should also reform their laws and administrative structures. There are countries that still use laws that existed before the establishment of SPS Agreement. The countries should have a team of well trained lawyers who have an understanding of the standards regulations and who can collaborate with the scientist in this area. There is need for the governments to have qualified and trained lawyers in Geneva to keep tract of the issues in the SPS Committee and possibly follow the developments in other international standards setting bodies. These lawyers can also advise the countries on the possible remedies where certain measure adopted by countries are not in conformity with the SPS Agreement. The small team in Geneva will not be able to keep tract of all the issues. There is an argument however that there is lack of finance. This can be well tackled within regional level. The sub Saharan countries should have SPS agreement within COMESA or SADC. Such Agreement will provide a system of developing applicable standards in the region. It will then be easy to send qualified persons to the different meetings in the international organisations and the SPS Committee. By pulling resources together it will be easy to pay for the cost. This will enable the region to develop strong regional body that can be able to attract attention in the international level.

The sub Saharan African countries can also use the regional body to track the internationally developed standards and up date the members. Such a body can prepare a data of standards and carry our sensitisation of the members about the required standards. The effort being made COMESA in this area is noted and should be supported and

strengthened. A regional body can also be used by the members to institute cases within the WTO where there is indication that there is a violation of the SPS Agreement. This will solve the problems related to costs but also will also ensure that a particular country is not victimised. These countries should not shy away from enforcing their rights within the WTO.

Governments and the research and academic institutions should work together. The governments in Sub-Saharan countries should use more often their universities and research centres in the region to generate information necessary for adoption of standards necessary in the region. Currently there is an effort in COMESA to establish regional integration of SPS issues. So far a company has been picked to address the SPS problems. One of the prime roles is to start with awareness campaign on SPS issues in the region.253 The issue of SPS measure remains a thorny problem for countries in Sub Saharan Countries. A government official recently in Kenya was quoted saying that SPS advocated by the EU member states was a major obstacle to trade as it placed high cost of compliance for agricultural product exporters."254 He indicated that the sub- Saharan African countries have not benefited from the generalized system of preference with the EU because these measures remain an obstacle. The Economic Partnership Agreements with the EU with present a good opportunity if the developing countries can ensure that there is a protocol on SPS. Establishment of a regional body that will be certifying companies which are exporting is important to safe costs that international institution charge. It will ensure also that smaller enterprises in the region will access these facilities thus fostering development unlike the situation now where its only multinational companies in the region are the only ones trading because they are able to meet the costs that come with standards.

253 East Africa Standard quoting Comesa's director for Investment and Private Sector Promotion, Chungu Mwila on discussion of a contract with Cab International a company located in Nairobi. 28/3/2006
254 David Nalo Permanent Secretary in the Ministry of Trade and Industry quoted in East African Standard 7/3/2006

The government should invest more resources in form of grants for the universities to engage in research. This will play dual roles. One it will generate necessary information for establishment of standards. But secondly it will ensure that young scientists and lawyers are trained to understand the issues from a practical point of view. The support granted by governments and international institutions for capacity building should be directed on such efforts. There should be interdisciplinary training in the universities that will ensure that for example lawyers get exposed to the issues in agriculture to be able to help in coming up with proper legislations. The Universities in the sub Saharan countries are performing poorly in research and publications. There is need for funding to support research and publishing. The parliaments in this region are also performing poorly. There is need to carry out training of the legislators for them to push for laws and regulations that respond to the needs of the public in so far as sps measures are concerned. Beside training, non- governmental organisations, research and academic institutions should prepare background information for the legislators, who often have very little time to engage on technical issues. Drafting and pushing bills in parliament is not an easy thing and it needs technical support from outside the parliament.