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**EXPLORING THE PHYTOSANITARY DISPUTE BETWEEN THE EUROPEAN
UNION AND SOUTH AFRICA:**

**THE POTENTIAL OF THE INTERNATIONAL PLANT PROTECTION
CONVENTION DISPUTE RESOLUTION MECHANISM AS A SUITABLE
ALTERNATIVE TO THE WORLD TRADE ORGANISATION DISPUTE
SETTLEMENT UNIT**

By

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Submitted in fulfillment of the requirements for the degree
LLM in International Trade Law and Investment in Africa

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October, 2017

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List of Abbreviations

CBS	Citrus Black Spot – disease caused by <i>Phyllostitica citricarpa</i>
CBS-RMS	The South African Citrus Black Spot Risk Management System for Citrus Fruits Exported to the EU
CGA	The Citrus Growers Association of South Africa
EFSA	European Food Safety Authority
GATT	General Agreement on Tariffs and Trade 1947
EU	European Union
IPPC	International Plant Protection Convention.1997. Rome, IPPC, FAO
IPPC SBDS	Subsidiary Body on Dispute Settlement established under the International Plant Protection Convention. 1997. Rome, IPPC, FAO
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures. 1994. Geneva, World Trade Organization.
SPS measure	Any individual Sanitary and Phytosanitary measure
TBT	Agreement on Technical Barriers to Trade 1979. Tokoyo.
UN	United Nations
US	United States of America
WTO	World Trade Organization
WTO AB	World Trade Organization Appellate Body
WTO DSB	World Trade Organization Dispute Settlement Body
WTO DSU	Dispute Settlement Understanding

Directory of cases

Australia- Measures Affecting Importation of Salmon WT/DS18/AB/R.

European Communities- Measures Concerning Meat and Meat Products WT/DS26/29.

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CHAPTER 1

INTRODUCTION

1.1 Background to the research

South Africa is the 11th largest exporter of fresh citrus fruit in the world.¹ With the total annual production of fresh citrus fruit in 2015 amounting to 2.4 million tonnes.² The European Union ('EU') is an important trade partner for South Africa as it serves as a major market for its lemons and soft citrus exports.³ South Africa has been exporting citrus fruit to Europe since 1908.⁴ Up to 70% of the citrus fruit in the European market is imported from South Africa.⁵ However, this valuable relationship has been threatened by the prevalence of Citrus Black Spot disease ('CBS') affecting South African crops.

CBS is a fungus which alters the external appearance of citrus plants.⁶ The disease causes cosmetic lesions to appear on the rind of the fruit.⁷ The EU regards CBS as a threat to its own citrus producing industry because of the blemishes the disease causes to the fruit and fears it will cause a reduction in the market value of its fruit.⁸ However, CBS does not pose any risk to human or plant health.⁹ Nonetheless, the EU declared citrus black spot a disease against which phytosanitary measures should be imposed at the border posts in 1977.¹⁰ The rationale behind this measure was to prevent infection of European crops.¹¹ As of yet, there has not been a single recorded instance of CBS within the EU territory.¹² South Africa has

¹ Key Industry Statistics for Citrus Growers 2016; Citrus Growers Association of South Africa.

² As above.

³ European Commission 'Final Report of an Audit Carried Out in South Africa from 13 June 2016 to 24 June 2016 in order to evaluate the system of official controls and the certification of citrus fruit for export to the European Union' DG(SANTE) 2016-8810 – MR.

⁴ South African Citrus Black Spot Working Group 'South African Citrus Black Spot Expert Working Group Position Document – Comments on the European Food Safety Authority's Opinion on CBS, New Information and Implications for the Pest Risk Assessment' October 2009, 4.

⁵ Zest Industry 'The EU's decision on Citrus Black Spot had ended uncertainty' 20 June 2016 <http://www.zestfruit.co.za/2016/06/20/eus-decision-on-citrus-black-spot-has-ended-uncertainty/> (accessed 13 April 2017).

⁶ Tralac 'Sanitary and phytosanitary measures: Citrus Black Spot and the American Foulbrood Disease' 14 November 2014 <https://www.tralac.org/discussions/article/6611-sanitary-and-phytosanitary-measures-citrus-black-spot-and-american-foulbrood-disease.html> (accessed 11 June 2017).

⁷ I Paul, A.S. van Jaarsveld, L. Korsten & V. Hattingh 'The potential global geographical distribution of Citrus Black Spot caused by *Giunardia citricarpa* (Kiely): likelihood of disease establishment in the European Union' (2005) 24 Crop Protection 297.

⁸ E.C. Laurenza & F Montanari 'Pest risk analysis – Recent trends in the EU and its Trade Implications: The Citrus Black Spot case' (2014) 2 EJRR 202.

⁹ As above.

¹⁰ See n 5 above.

¹¹ As above.

¹² Paul, van Jaarsveld, Korsten & Hattingh (n 7 above) 289.

been exporting citrus fruit since 1907.¹³ It is reasonable to assume that high quantities of citrus fruit from areas in South Africa, where CBS infection is prevalent, have entered the EU territory within the intervening period.¹⁴

South Africa advised the EU during the drafting phase of its new sanitary and phytosanitary ('SPS') measures that it was unnecessarily trade restrictive.¹⁵ The relevant South African authorities conducted a risk assessment and sent a consolidated report to the EU in 2000 to substantiate its request for less stringent SPS measures to be employed.¹⁶ A constant exchange of documents between South Africa and the EU ensued in the following years.¹⁷ The EU requested additional data in order to address its concerns with the evidence produced by South Africa.¹⁸ In 2007 South Africa provided the EU with the additional information it had requested and requested that the EU either resolve the issue through bilateral means or alternatively that the matter be resolved via third party intervention.¹⁹

In 2008 the EU had the documentation submitted by South Africa assessed by the European Food Safety Authority ('EFSA').²⁰ The EFSA report concluded that CBS can possibility be transferred to suitable hosts. The risk analysis revealed that citrus plants imported for purposes of planting or citrus fruit that have leaves still attached may lead to the infection of European citrus orchards.²¹ In the instance of citrus fruit destined for consumer consumption and citrus fruit without leaves, the possibility of entry and establishment of CBS into the EU territory was regarded as 'moderately likely' by EFSA.²² The scientific evidence it relied on to substantiate this claim relies on conditions which are extremely unlikely to occur.²³ In the areas where infection could take place (within the EU), the climate is only marginally suited for the spread and infection of CBS.²⁴ There are no citrus producing areas within the EU that pose ideal conditions for the development of CBS.²⁵

EFSA reported that CBS renders fruit unsuitable for sale in the fresh market.²⁶ South Africa contended that this was an incorrect statement as only heavily infected fruit would be

¹³ Paul, van Jaarsveld, Korsten & Hattingh (n 7 above) 304.

¹⁴ As above at 305.

¹⁵ See n 4 above.

¹⁶ As above.

¹⁷ As above.

¹⁸ As above.

¹⁹ As above.

²⁰ As above.

²¹ Laurenza & Montanari (n 8 above) 203.

²² As above.

²³ Laurenza & Montanari (n 8 above) 204.

²⁴ See n 4 above at page 24.

²⁵ As above.

²⁶ See n 7 above.

unsuitable for the fresh market and the severity of the infection depends on many factors which the EU failed to give due consideration to, chief among them, the climate (both in South Africa and the member states of the EU).²⁷ In South African regions that are only marginally suitable for the propagation of CBS, infections are too low to have any material impact on the fruit.²⁸ The value of the fruit on the fresh market remains unaffected.²⁹

In February 2013, the EU and South Africa had a formal consultation under the International Plant Protection Convention ('IPPC') dispute settlement system concerning the ongoing CBS dispute.³⁰ Both parties agreed to wait before further steps in the dispute settlement process are pursued, pending the outcome of scientific analysis with regards to the potential of citrus black spot infecting European citrus fruit.³¹ After the consultation took place, certain consignments of exported citrus fruit were found to be infected with CBS.³² The EU responded by only allowing imported citrus fruit from areas that have been categorised as CBS free or from production sites where an official inspection was performed and no CBS infected fruit was found.³³ A temporary ban of citrus fruit imports from South Africa was imposed until May 2014.³⁴ The ban was lifted on the condition that South Africa adheres to stricter import requirements.³⁵ The World Trade Organisation (WTO) was notified of the phytosanitary rules imposed by the European Commission in July 2014.³⁶ The rules were classified as emergency measures taken against South African imports from areas not recognised as CBS free.³⁷ The rules provide that records of chemical treatment of the fruit be kept, that all packaging houses be registered, that orchards be frequently inspected and that extensive samples of the fruit be submitted for inspection prior to entering the European market.³⁸

The European Commission later revised its import measures applicable to the regulation of CBS.³⁹ These measures came into effect in June 2016.⁴⁰ South Africa argues

²⁷ As above.

²⁸ As above.

²⁹ As above

³⁰ Food and Agricultural Organization of the United Nations 'The IPPC Dispute Settlement System: Consultation between EU and South Africa' 23 April 2013 <https://www.ippc.int/en/news/the-ippc-dispute-settlement-system-consultation-between-eu-and-sa/> (Accessed on 28 May 2017).

³¹ As above.

³² See n 6 above.

³³ As above

³⁴ As above.

³⁵ As above.

³⁶ As above

³⁷ As above.

³⁸ As above.

³⁹ See n 3 above.

⁴⁰ As above.

that the measures are essentially the same as the previous import requirements which came into effect in 2014.⁴¹ The European Commission still requires the CBS pest risk assessment of EPSA to be conducted and considers all citrus fruit imported from South Africa as a commercial risk to their local industry.⁴² The measures are in fact stricter than those prior to the formal IPPC consultation.⁴³

1.2 Research problem

South Africa argues that the measures adopted by the EU are purely protectionist in nature serving to restrict competition for the local (EU) citrus farmers.⁴⁴ The local citrus fruit farming industry in South Africa needs to undergo excessive costs and elaborate labour practises to ensure compliance with the EU's measures.⁴⁵ The Citrus Growers Association of South Africa (CGA) claims that this practice is not economically sustainable for South African farmers.⁴⁶ In the short term, South Africa will need to adhere to the measures imposed by the European Commission. However, a 'swift and amicable' resolution to this ongoing dispute is identified as a goal which the South African Ministry of Agriculture must prioritise.⁴⁷

The European Commission stated that it imposed these measures because it is of the opinion that fruit infected with CBS would cause an infection of local orchards.⁴⁸ Thus the EU argues that the restrictive measures are necessary and the threats of future bans are justified.⁴⁹

South Africa and the EU are signatories of the Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement') and the IPPC.⁵⁰ In accordance with both of these agreements, phytosanitary measures aimed at protecting plant life must be based on scientific evidence and international standards.⁵¹ South Africa alleges that the

⁴¹ Sanitary and Phytosanitary News, South Africa August 2016 Department of Agriculture, Forestry and Fishery Republic of South Africa.

⁴² As above.

⁴³ Tralac 'This dispute is about more than Black Spots on Oranges' 29 October 2014

<https://www.tralac.org/discussions/article/6519-this-dispute-is-about-more-than-black-spots-on-oranges.html> (accessed 11 June 2017).

⁴⁴ See n 6 above.

⁴⁵ As above.

⁴⁶ See n 5 above.

⁴⁷ As above.

⁴⁸ See n 6 above.

⁴⁹ As above.

⁵⁰ As above.

⁵¹ As above.

measures taken by the EU are not based on scientific merit.⁵² South Africa has informed the sanitary and phytosanitary ('SPS') Committee of the WTO about its concerns and has requested the IPPC to establish an expert committee to resolve the dispute.⁵³

There has never been a formal hearing before the IPPC expert committee; the citrus black spot dispute would thus be first case on which it deliberates. The aim of this dissertation will be to assess whether the arbitration process made available under the IPPC Dispute Settlement System is a mechanism which can deliver a swift and effective resolution to phytosanitary disputes compared to the WTO Dispute Settlement Body ('WTO DSB').

1.3 Research question

The overarching question which this study aims to answer is whether the IPPC Dispute Settlement Committee constitutes a viable alternative to the traditional WTO DSB in the adjudication of phytosanitary disputes. This research question will be answered with reference to the CBS dispute as case study. The following sub-questions will assist in addressing the primary research question:

1. Why has the agreement on sanitary and phytosanitary measures (SPS Agreement) been enacted, i.e. what are its inherent aims?
2. Are the EU SPS measures to prevent CBS from entering its territory unnecessarily trade restrictive?
3. Does the traditional avenue of referring phytosanitary disputes to the WTO DSB hold any disadvantages for developing countries?
4. Does the IPPC Dispute Settlement Committee provide an adequate response to the shortcomings of the WTO DSB?

1.4 Thesis statement

This dissertation aims to compare the procedure available under the IPPC dispute resolution system to the alternative option of referring an SPS dispute directly to the WTO DSB. The IPPC expert committee does not hand down binding decisions and does not exclude the possibility of the dispute being referred to another dispute resolution body if the dispute is not resolved. The WTO DSB will thus be available in the event that the IPPC expert committee procedure does not give rise to a resolution between South Africa and the EU.

⁵² As above.

⁵³ As above.

The IPPC expert committee decision does have persuasive value if the dispute is referred to another body. However, the expenditure of government resources on pursuing a matter at a forum that could only give rise to a ruling that is persuasive and not binding needs to be justified. A state could ultimately spend more money and time on the trade dispute if the IPPC expert committee's decision is not enforced and the matter is pursued further. The IPPC expert committee will be compared to the 'expert' scientific evidence the WTO DSB relies on when making determinations in SPS disputes. The value of having a panel constituted purely of scientific experts in the field versus the current panel of trade law experts sitting on the WTO DSB panel will be explored. In doing so the efficiency and relevance of the IPPC expert committee will be critically evaluated.

The comparative study will also highlight some of the challenges which developing states like South Africa face when referring SPS disputes to the WTO DSB. A conclusion will be drawn as to which international dispute settlement panel, the WTO DSB or the IPPC expert committee, will best serve to find a timely and effective solution to the CBS dispute.

1.5 Significance of this study

Non-tariff measures, such as phytosanitary measures, are a major concern for developing, and particularly developing African states in their trade relationships with developed states.⁵⁴ South Africa is not only making history due to its instituting a formal claim against the EU,⁵⁵ it is also the first country to refer a dispute to the IPPC Dispute Settlement Committee. Third parties may thus also be inclined to join the application to set aside the measures imposed by the EU.⁵⁶

This dissertation aims to explore whether a panel consisting of scientific experts poses a better alternative to the traditional WTO DSU by referring to the CBS dispute. The necessity and relevance of the IPPC Dispute Settlement System will thus be established. The possibility of the interests of developing countries being better served by the IPPC Dispute Settlement Committee will also be determined. In the event that South Africa achieves a resolution to its own benefit and the benefits of other potential third parties, the IPPC Dispute Settlement Committee can more confidently be utilised by other developing countries in similar circumstances.

⁵⁴ See n 38 above.

⁵⁵ As above.

⁵⁶ As above.

1.6 Research methodology

A historical approach will be taken to determine the motivating reasons for the drafting and entering into of the SPS Agreement. The situation prior to its commencement and the current status quo will be compared in order to assess whether its aims are being met and whether it has created a possibility for states to manipulate its provisions to create trade barriers. A critical approach will be employed in the assessment of the disputes arising from the implementation of phytosanitary measures to answer this question.

Thereafter, a historical approach will again be taken to the introduction of citrus black spot based restrictive measures as a phytosanitary measure and the dispute which consequently arose between the EU and South Africa. The rationality behind the adoption of the phytosanitary measures of the EU will be critically assessed and the potential that it amounts to a trade barrier will be explored. Other issues raised by South Africa such as a claim to preferential treatment on this specific issue as well as the potentially dire economic consequences which the citrus industry faces will be critically explored.

The literature exploring the inherent challenges faced by states during the WTO DSU handling of phytosanitary disputes as well as the reported cases will be critically assessed in order to determine whether there are in fact shortcomings in the system. The fact that South Africa is a developing country and that the EU is an entity comprised mostly of developed countries will also be kept in mind during this assessment and the challenges faced by developing countries when interacting with the WTO DSU be broadly outlined with reference to existing literature.

Finally, the dissertation will canvas the brief historical development of the IPPC dispute settlement system and the potential efficiency of the expert committee hearing will be theoretically assessed with reference to the CBS dispute.

1.7 Outline of chapters

Chapter 1: Introduction

Chapter 2: The adoption of the Agreement on Sanitary and Phytosanitary Measures

Chapter 3: Is the SPS Agreement preventing protectionism: The EU and South African citrus black spot dispute as a case study

Chapter 4: The limitations of the WTO DSU handling phytosanitary disputes and the IPPC Dispute Settlement System as an adequate alternative

Chapter 5: Conclusion

CHAPTER 2

THE ADOPTION OF THE AGREEMENT ON SANITARY AND PHYTOSANITARY STANDARDS

2.1 Introduction

This chapter will explore the reasons why the SPS Agreement has been enacted. This will be done to establish an understanding of the intention of the drafters and in so doing establish the meaning of the provisions relevant to the Citrus Black Spot (CBS) dispute. First, the need for a universal international regulatory framework will be considered by outlining the challenges created by a lack of coordination of health and safety standards. Thereafter, the predecessors of the SPS Agreement will be listed and the shortcomings under this previous regime highlighted. Next the adoption of the SPS Agreement at the Uruguay Round Table discussion will be discussed. The chapter will conclude with an overview of the main provisions in the SPS Agreement which aim to reduce the implementation of unnecessarily restrictive trade measures.

2.2 The need for an international regulatory framework

Most states have domestic legislation that prescribes the standards to which goods must adhere with the aim of preserving and protecting the health of citizens and the environment.⁵⁷ These standards encompass, amongst others, practices like food inspection in the interest of consumer health.⁵⁸ Ensuring that the enforcement of these standards builds confidence in the products that consumers purchase and aids the profitability of both domestically sourced and imported goods.⁵⁹

⁵⁷ M Trebilcock *et al* 'Trade policy and domestic health and safety regulation and standards' in M Trebilcock *et al* (eds) *The Regulation of International Trade* (2013) 202.

⁵⁸ Trebilcock (n 52 above) 203.

⁵⁹ OECD 'The Impact of Regulations on Agro-food Trade: The technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) agreements' (2003) 7.

These standards are particular to any given country and the lack of universality creates challenges when goods are imported or exported.⁶⁰ The health and safety standards can be manipulated in a manner that creates barriers to trade and serves to protect the domestic industry.⁶¹ A lack of co-ordination of standards between trading partners can prevent trade, even where there is an absence of protectionist intent.⁶² If a regulatory measure is more costly for importers to implement *vis-a-vis* domestic producers, it acts as an unnecessary barrier to trade.⁶³ The adoption of universal standards will thus promote import and export and benefit the global and local economies.⁶⁴

There are theorists that argue that the differences in domestic health and safety regulations is a situation that any country can legitimately exploit in order to gain an advantage in trade agreements.⁶⁵ It is arguably no different for a country to use lax health and safety standards to its advantage than it would be for it to offer lower prices for natural resources which it has in abundance.⁶⁶ However, more stringent health and safety standards pose a threat to export driven economies, especially in less developed countries. It is not that the produce from developing countries is necessarily unsafe, but they do lack the testing and certification infrastructure required to comply with the SPS measures.⁶⁷

By 1996, even the US Department of Agriculture claimed that over 12% of all American agricultural exports were made subject to ‘unjustified’ phytosanitary measures.⁶⁸ Conceivably, risk is greater for countries with less developed economies who export agricultural products, as they lack the resources necessary to comply with the health and safety standards imposed by some countries.⁶⁹ It was thus necessary for an international regulatory framework that aims to universalize standards to be created.

2.3 Preceding international legislation: the GATT and TBT

The General Agreement on Tariffs and Trade 1947 (‘GATT’), did not place any direct restrictions on an individual countries’ ability to adopt health and safety standards.⁷⁰ The only provision which could potentially place limitations on the standards which they impose is the

⁶⁰ Trebilcock (n 52 above) 202.

⁶¹ As above.

⁶² As above.

⁶³ See n 54 above.

⁶⁴ As above.

⁶⁵ Trebilcock (n 52 above) 203.

⁶⁶ As above.

⁶⁷ See n 54 above.

⁶⁸ Trebilcock (n 52 above) 204.

⁶⁹ As above.

⁷⁰ As above at 205.

National Treatment provision which was provided for under Chapter 3 of the agreement.⁷¹ In accordance with the National Treatment principle, a country could not discriminate against foreign imported products *vis-a-vis* domestically produced products.⁷² Article XX of the GATT 1947 allows general exceptions to the National Treatment principle, which include the adoption of measures ‘necessary to protect human, animal or plant life’.⁷³

During the Tokyo Round in 1979, an Agreement on Technical Barriers to Trade (‘TBT’) was adopted in response to the claim that the GATT fell short of adequately regulating trade distortions arising from differences in health and safety standards.⁷⁴ The lack of clarity in the provision created leeway for governments to use SPS measures as a means by which to protect their local industries.⁷⁵ The TBT was drafted to address this concern: It motivated countries to harmonise health and safety standards and adopt said standards, unless the protection of human, animal and plant life demanded a deviation from these standards.⁷⁶ Exceptions to the proposed harmonised standards were also allowed if it pertained to climatic and geographical factors.⁷⁷ In this way, a contracting party had the onus of proving that the standards it elected to impose qualified as an exclusion to the general rule.⁷⁸ The TBT further provided that imported products should not be subjected to testing conditions less favourable than domestic products.⁷⁹ Furthermore, that the testing procedure applicable to imported products should not be more time consuming or more complex in comparison to the testing procedure undergone by domestic products.⁸⁰ The TBT also encouraged contracting parties to adopt a policy of ‘mutual recognition’ whereby test results and certificates are recognised as valid and in conformity with that of the other parties.⁸¹

The TBT expressly provided for a prohibition on ‘standards which create an unnecessary obstacle to international trade’.⁸² It did not go as far as to provide for measures with which to determine whether an obstacle is necessary or unnecessary.⁸³ This oversight rendered the provision largely ineffective.⁸⁴ The complaining party thus had the onus of

⁷¹ As above.

⁷² As above.

⁷³ As above.

⁷⁴ Trebilcock (n 52 above) 206.

⁷⁵ See n 54 above at 130.

⁷⁶ Trebilcock (n 52 above) 206.

⁷⁷ As above.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ As above.

⁸¹ As above.

⁸² As above.

⁸³ As above.

⁸⁴ As above.

proving that a standard was adopted with ‘deliberate protectionist intent’ or at the very least that the obstacle which the standard created was ‘unnecessary’.⁸⁵ The effect of the TBT was also limited by the fact that only 39 countries ratified it.⁸⁶ Due to several reforms occurring in the area of agricultural trade, it was necessary to develop a more comprehensive and effective regulatory framework for SPS measures.⁸⁷

2.4 The Uruguay Round and the Agreement on Sanitary and Phytosanitary Standards

In the Uruguay Round, negotiations took place with the aim of reducing the barriers imposed by members to protect their local agricultural industries.⁸⁸ Some Members feared that the removal of agricultural specific barriers would result in countries using SPS mechanisms to achieve the same trade restrictive effects.⁸⁹ This led to the adoption of the SPS Agreement which was signed by 100 governments.⁹⁰ All parties to the GATT are obliged to adhere to the SPS Agreement.⁹¹ The WTO enforces the SPS Agreement, thus every Member of the WTO is a member of the SPS Agreement.⁹²

The SPS Agreement applies to standards adopted to protect human, animal and plant health.⁹³ The primary aim of the Agreement is to regulate sanitary and phytosanitary (SPS) measures in a manner that does not give rise to trade barriers.⁹⁴ The SPS Agreement aims to liberalise trade while securing the right of its members to enact and enforce public health measures.⁹⁵ The SPS Agreement does not establish substantive SPS measures.⁹⁶ Members retain the right to impose SPS measures, provided that the measures are consistent with the SPS Agreement.⁹⁷ The SPS Agreement applies to all standards that aim to prevent the damage caused by the entry of pests, diseases and disease carrying organisms into the territory of a Member State.⁹⁸ The provisions of the GATT pertaining to these measures still

⁸⁵ As above.

⁸⁶ As above.

⁸⁷ See n 54 above at 130.

⁸⁸ See n 54 above at 129.

⁸⁹ As above.

⁹⁰ As above.

⁹¹ Trebilcock (n 52 above) 207.

⁹² J Kastner & D Powell ‘The SPS Agreement: Addressing historical factors in trade dispute resolution’ (2002) 19 *Agriculture and Human Values* 289.

⁹³ Trebilcock (n 52 above) 206.

⁹⁴ As above at 207.

⁹⁵ Kastner & Powell (n 87 above) 283.

⁹⁶ K.C. Kennedy ‘Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions’ (2000) 55 *Food & Drug L.J.* 83.

⁹⁷ Article 2:1 of the SPS Agreement.

⁹⁸ Annexure A to the SPS Agreement.

apply, i.e. the same measure can violate both the SPS Agreement and the GATT.⁹⁹ The SPS Agreement affirms the content of Article XX of the GATT, but provides for additional procedures which Members should follow when formulating and implementing their SPS measures.¹⁰⁰ The procedures ensure that the rights of trade partners are respected in the process.¹⁰¹

The SPS Agreement contains procedural requirements which members must adhere to in order to ensure that an SPS measure is based on scientific evidence of a risk presented from imported goods.¹⁰² The most salient procedural requirements will be outlined below and it will be demonstrated that the SPS Agreement aims to prevent the abuse of SPS measures in the hands of states with protectionist agendas.¹⁰³ The procedures are intended to enable disputing parties to differentiate between SPS measures that are taken to safeguard a country from a health risk and measures which are employed to protect a country's local industry from foreign competitors.¹⁰⁴

2.5 An overview of the SPS Agreement

2.5.1 Harmonisation of standards

Article 3 of the SPS Agreement provides for a general obligation to base domestic SPS measures on international standards.¹⁰⁵ 'International standards' are defined in an Annex to the SPS Agreement.¹⁰⁶ When dealing with food safety, 'international standards' primarily refers to the standards contained in the *Codex Alimentarius*.¹⁰⁷ The other institutions which are expressly mentioned in the Annex are the International Office of Epizootics and the Secretariat of the IPPC.¹⁰⁸ These international standard setting organisations provide Members with established benchmarks on which to model their regulations.¹⁰⁹

The aim of the IPPC is to protect plant health by providing for the prevention of the entry and spread of plant diseases, which includes provisions regarding information exchange between states regarding pests.¹¹⁰ The IPPC develops international plant health standards that

⁹⁹ Trebilcock (n 52 above) 207.

¹⁰⁰ See n 54 above at 80.

¹⁰¹ As above.

¹⁰² Kennedy (n 90 above) at 83.

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ Trebilcock (n 52 above) at 208.

¹⁰⁶ As above.

¹⁰⁷ As above.

¹⁰⁸ As above.

¹⁰⁹ See n 54 above at 132.

¹¹⁰ Article I of the IPPC.

are applicable to imported plant products referred to as ‘the Glossary of Phytosanitary terms’.¹¹¹ The Glossary of Phytosanitary terms mainly deals with quarantine pests and provides for basic principles governing phytosanitary laws.¹¹² Under the Guidelines it is provided that Members must conduct scientific risk analysis prior to determining the appropriate level of plant protection.¹¹³ The members of the IPPC also act as observers and contributors to SPS Meetings.¹¹⁴ The members of the IPPC can also be called as scientific experts during WTO dispute settlement procedures.¹¹⁵ In the event none of the standards issued by these bodies are applicable, then the standards of any international standardization body will serve as ‘international standards’ for purposes of the SPS Agreement.¹¹⁶

In the *Hormones* case¹¹⁷ the WTO Appellate Body (‘WTO AB’) held that the obligation to base domestic measures on international standards as provided by Article 3 was merely aspirational and it did not compel a Member to bring its SPS measures in line with international standards.¹¹⁸ SPS measures which are based on international standards are presumed to be consistent with the SPS Agreement and the applicable provisions in the GATT.¹¹⁹ The other obligations provided for in the SPS Agreement are thus only applicable to measures which do not comply with international standards.¹²⁰

Members have the right to impose measures which deviate from international standards where local measures offer a higher level of protection.¹²¹ Where Members elect to impose a higher level of protection it must be in compliance with Article 5 of the SPS Agreement.¹²² In other words, there must be a scientific justification for the measures and the Member State must conduct an appropriate risk assessment. The broader objective of minimising trade restrictions should be kept in mind when a member decides on an appropriate level of SPS protection.¹²³ The requirement that a deviation from international standards should be scientifically justified is to prevent the implementation of overly strict or protectionist measures.¹²⁴

¹¹¹ See n 54 above at 133.

¹¹² As above.

¹¹³ As above.

¹¹⁴ As above.

¹¹⁵ See n 54 above at 133.

¹¹⁶ Trebilcock (n52 above) 208.

¹¹⁷ *European Communities- Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/29.

¹¹⁸ Trebilcock (n 52 above) 208.

¹¹⁹ As above.

¹²⁰ As above.

¹²¹ As above.

¹²² As above.

¹²³ See n 54 above at 9.

¹²⁴ As above.at 81.

2.5.2 Equivalence

Members are also motivated to recognise other countries' compliance procedures as equivalent to their own in the event that it achieves the same level of protection.¹²⁵ The exporting country bears the onus of proving that its measures are equivalent to the measures of the importing country.¹²⁶ The objective of this provision is to achieve the harmonization of SPS measures without a country needing to sacrifice its health and safety standards.¹²⁷ If a state wishes to reach an equivalence agreement with another, they are to enter into bilateral negotiations.¹²⁸ It is essential that members uphold transparency regarding their regulatory methods.¹²⁹ It is worth noting that equivalence does not necessarily equate to the adoption of standards that are less trade restrictive.¹³⁰

2.5.3 Risk assessment

An SPS measure must be the result of an evaluative process regarding risks that are actually involved in the importation of a product.¹³¹ If a Member elects not to make use of the international standards available to it, then it must conduct its own risk assessment to establish the level of risk a product poses.¹³² Article 5.1 of the SPS Agreement requires that where SPS measures which deviate from international norms are imposed, they must be based on an 'assessment... appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account the risk assessment techniques developed by the relevant international organisations'.¹³³ The WTO AB has held that the results of risk assessment must "sufficiently warrant" the SPS measures in question.¹³⁴ There must also be a "rational relationship" between the risk assessment and the adopted SPS measure.¹³⁵

Article 5.2 requires that members take into account 'available scientific evidence, relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest and disease-free areas; relevant ecological and environmental conditions; and quarantine and other conditions' when

¹²⁵ Article 4.1 of the SPS Agreement.

¹²⁶ See n 54 above at 134.

¹²⁷ See n 54 above at 134.

¹²⁸ As above

¹²⁹ As above

¹³⁰ See n 54 above at 81.

¹³¹ As above at 135.

¹³² As above.

¹³³ Trebilcock (n 52 above) 210.

¹³⁴ Laurenza & Montanari (n 8 above) 204.

¹³⁵ As above.

assessing risk.¹³⁶ Annex A to the SPS Agreement provides that in order to assess the risk of pests, particularly the ‘likelihood’ of entry, establishment or dissemination should be taken into account. Possible biological and economic factors can also be taken into account.¹³⁷ The economic factors in question include the potential loss of production; the costs of the control or eradication of the disease and the cost effectiveness of alternative approaches.¹³⁸ The word ‘likelihood’ implies that the probability of the entry of the pest needs to be established, as opposed to the possibility thereof.¹³⁹ There has not been any decision on whether the drafters of the SPS Agreement intentionally provided that the risk of pests affecting plant health should be measured in terms of its probability to occur.¹⁴⁰

In the *Australia Salmon* case, the Panel identified three cumulative requirements for risk assessment.¹⁴¹ The first is to identify the pest that the Member wishes to prevent from entering its territory, as well as the associated biological and economic consequences associated with the spread of the disease.¹⁴² The second is to evaluate the likelihood of entry and the associated consequences.¹⁴³ Thirdly, the Member must evaluate the likelihood of entry according to the SPS measures which might be applied.¹⁴⁴ The panel found that Article 5.1 was violated.¹⁴⁵ It was held that when a measure is not based on risk assessment, then it can be presumed not to be in accordance with scientific principles or maintained without sufficient evidence.¹⁴⁶

The aim of this article is to ensure that the measure is not stricter than necessary.¹⁴⁷ However this can be negated if the process of risk assessment is not prioritised over other important elements like consumer choice and the affordability of products.¹⁴⁸

2.5.4 Acceptable levels of risk

Once a Member has performed risk assessment and an ‘ascertainable level of risk’ is detected, the Member must make a value judgment as to whether it can accept the risk.¹⁴⁹

¹³⁶ Trebilcock (n 52 above) 210.

¹³⁷ Annex A to the SPS Agreement.

¹³⁸ As above.

¹³⁹ J Pauwelyn ‘The WTO Agreement on Sanitary and Phytosanitary Measures as Applied in the First Three SPS Disputes’ (1999) *Journal of International Economic Law* 641, 647.

¹⁴⁰ As above.

¹⁴¹ *Australia- Measures Affecting Importation of Salmon* WT/DS18/AB/R.

¹⁴² As above.

¹⁴³ As above.

¹⁴⁴ As above.

¹⁴⁵ As above.

¹⁴⁶ As above.

¹⁴⁷ See n 54 above at 81.

¹⁴⁸ As above

This decision will be made in accordance with the acceptable level of risk that the member has determined for itself.¹⁵⁰ If the Member can accept the risk then no SPS measure will be imposed.¹⁵¹ If the risk cannot be tolerated then an SPS measure will be imposed to reduce the risk to a level that the Member can indeed accept.¹⁵² The acceptable level of risk therefore plays a prominent part in determining whether or not a measure is consistent with the SPS Agreement.¹⁵³

When it can be established that there is sufficient scientific evidence and that risk assessment has taken place, a Member must prove that the SPS measure is justified in terms of its acceptable level of risk.¹⁵⁴ This requirement ensures that Members do not use measures solely to protect their local industries.¹⁵⁵ In the *Australia-Salmon* case Canada instituted a claim against Australia on the basis that it adopted arbitrary levels of protection for different situations.¹⁵⁶ Australia claimed that its restrictions on the import of salmon were based on the protection of its aquatic environment.¹⁵⁷ There were however no important restrictions on other fish that carried the same disease as the salmon.¹⁵⁸ During the dispute proceedings, it became evident that Australia adopted arbitrary ‘acceptable levels of risk’ protection due to the level of competition that imported salmon posed to its local industry.¹⁵⁹ It was revealed that states still allow economic considerations to influence their health measures.¹⁶⁰

The WTO AB held that determining the appropriate level of protection lies within the discretion of a Member and cannot be determined by the bodies of the WTO DSU.¹⁶¹ The panel in the *Australia Salmon* case implied that a Member could select an acceptable level of risk to be ‘zero risk.’¹⁶² It should however be noted that the importing country has an obligation to consider measures which are not unnecessarily trade restrictive.¹⁶³ Thus in addition to considering its aim to preserve health, the impact that a particular measure will have on trade must also be taken into account.¹⁶⁴

¹⁴⁹ Pauwelyn (n 130 above) at 651.

¹⁵⁰ As above.

¹⁵¹ As above.

¹⁵² Pauwelyn (n 130 above) at 651.

¹⁵³ As above.

¹⁵⁴ As above.

¹⁵⁵ See n 54 above at 135.

¹⁵⁶ Kastner & Powell (n 87 above) 289.

¹⁵⁷ As above.

¹⁵⁸ As above.

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ *Australia* (n 132 above).

¹⁶² Pauwelyn (n 130 above) at 652.

¹⁶³ See n 54 above at 135.

¹⁶⁴ As above.

2.5.5 Scientific justification

Article 2.2 provides that SPS measures must be based on scientific principles and applied only to the extent necessary to protect human, animal or plant life.¹⁶⁵ Furthermore, Article 2.2 stipulates that an SPS measure will not be ‘maintained without sufficient scientific evidence’.¹⁶⁶ In this way, members of the SPS Agreement are obliged to base their SPS measures on realistic health concerns, as opposed to promoting the growth of their local industries or succumbing to risk-perception bias.¹⁶⁷ The requirement of scientific justification strikes a balance between the state’s interest in protecting the health of its citizens and the environment, and the promotion of global trade.¹⁶⁸

In the *Japan – Agricultural Products II* case¹⁶⁹ the WTO AB interpreted the requirement of sufficient scientific evidence to mean that a ‘rational or objective relationship’ between the SPS measure and the scientific evidence must exist.¹⁷⁰ The relationship must be assessed on a case-by-case basis and would depend on the nature of the measure in question as well as the ‘quality and quantity’ of the scientific evidence available.¹⁷¹ However, the scientific evidence must demonstrate the existence of a risk which the SPS measure has been adopted to address.¹⁷²

In *Japan Apples* the US challenged Japanese SPS measures that restricted the import of apples on the basis that it may cause the Fire Blight bacterium to spread.¹⁷³ The WTO AB held that the measure was imposed without sufficient scientific evidence and is inconsistent with Article 2.2.¹⁷⁴ The ‘rational and objective relationship’ between the measure and potential risk indicated by the evidence was not present.¹⁷⁵ In the *Hormones* case the WTO AB also held that Article 5.1 permits a Member to base a measure on a minority scientific opinion, provided only that the minority view originates from ‘qualified and respected sources’.¹⁷⁶

¹⁶⁵ Article 2.2 of the SPS Agreement.

¹⁶⁶ As above.

¹⁶⁷ Kastner & Powell (n 87 above) 289.

¹⁶⁸ Laurenza & Montanari (n 8 above) 204.

¹⁶⁹ *Japan – Measures Affecting Agricultural Products II* WT/DS76/AB/R.

¹⁷⁰ Trebilcock (n 52 above) 208.

¹⁷¹ As above

¹⁷² Laurenza & Montanari (n 8 above) 204.

¹⁷³ *Japan- Measures Affecting the Importation of Apples* WT/DS245/AB/R.

¹⁷⁴ As above.

¹⁷⁵ As above.

¹⁷⁶ Trebilcock (n 52 above) 211.

2.5.5 Not more trade restrictive than necessary

Article 5.4 of the SPS Agreement provides that a Member take into account the objective of minimising negative effects on trade when imposing SPS measures.¹⁷⁷ In the *Hormones* case the panel held that this provision served only to encourage Members, based on the use of the words ‘should’ (as opposed to ‘shall’) and ‘objective’.¹⁷⁸ WTO Members thus have a right to impose measures with trade-restrictive consequences.¹⁷⁹

Article 5.6 provides that a Member should not impose measures which are more trade restrictive than necessary in order to achieve an appropriate level of protection.¹⁸⁰ The WTO AB further established a test to determine consistency with Article 5.6.¹⁸¹ First, there must be no alternative SPS measure which is reasonably available, with due consideration to its economic and technical feasibility.¹⁸² Second, there must be no alternative SPS measure available which can achieve the Member’s required and appropriate level of sanitary and phytosanitary protection.¹⁸³ Third, the alternative SPS measure must be significantly less trade restrictive than the SPS measure contested.¹⁸⁴ All three elements must be satisfied in order for an SPS measure to be considered a *prima facie* violation of Article 5.6.¹⁸⁵ The second requirement is difficult to establish as it goes to the core of a Member’s sovereignty and authority to select a health measure which it considers to be appropriate.¹⁸⁶ Thus far the WTO AB has not yet found an alternative measure that complies with all three of the requirements listed and it has reversed the panel’s finding of a violation on only two occasions.¹⁸⁷

The WTO AB also developed ‘warning signals’ that could cumulatively indicate arbitrary and unjustified differences in the level of protection imposed by a Member.¹⁸⁸ These warning signals would indicate that a measure is being used as a disguised trade restriction.¹⁸⁹ One of the warning signals is an extreme difference in levels of protection, e.g. a substance which poses risk is subject to import bans whereas another which poses

¹⁷⁷ As above.

¹⁷⁸ Trebilcock (n 52 above) 212.

¹⁷⁹ As above.

¹⁸⁰ *Australia* (n 132 above).

¹⁸¹ Trebilcock (n 52 above) 212.

¹⁸² *Australia* (n 132 above).

¹⁸³ As above

¹⁸⁴ As above

¹⁸⁵ *Laurenza & Montanari* (n 8 above) 205.

¹⁸⁶ *Pauwelyn* (n 130 above) 652.

¹⁸⁷ As above

¹⁸⁸ Trebilcock (n 52 above) 213.

¹⁸⁹ As above

comparable risks is not regulated at all.¹⁹⁰ Failure to conduct the risk assessment which is provided for under Article 5.1 is another warning signal that an arbitrary measure may be imposed.¹⁹¹

If a Member alleges that another Member's SPS measure is in contravention of the SPS Agreement, the complaining party bears the onus of proof.¹⁹² The complainant must demonstrate that there is a less trade restrictive alternative available for the responding Member to use.¹⁹³ The responding party is not required to adopt an alternative measure if it will make no significant impact on the trade relationship between the Members.¹⁹⁴

2.6 Concluding remarks

The SPS Agreement consists largely of provisions that provide for the adoption of certain procedures while the substantive elements of measures are left to the domestic institutions of a Member State.¹⁹⁵ Some of the procedural measures include the motivation to adopt international measures; the requirement that all measures be adopted after sufficient risk assessment has been conducted and the obligation to provide scientific justification when international norms are deviated from.¹⁹⁶ The domestic institutions should follow the prescribed process which ensures fairness and avoids protectionism.¹⁹⁷ The overarching aim of the SPS Agreement is thus to ensure that SPS measures do not amount to concealed non-tariff trade barriers. The next chapter will aim to determine whether the EU's SPS measures applicable to citrus exports from South Africa are in fact in adherence with the provisions of the SPS Agreement and the broader aim of eliminating unnecessary trade restrictions.

¹⁹⁰ As above

¹⁹¹ As above

¹⁹² Kennedy (n 90 above) 87.

¹⁹³ Kennedy (n 90 above) 87.

¹⁹⁴ As above

¹⁹⁵ Trebilcock (n 52 above) 230.

¹⁹⁶ See n 54 above at 107.

¹⁹⁷ Trebilcock (n 52 above) 231.

CHAPTER 3

DO EU PHYTOSANITARY MEASURES AMOUNT TO TRADE BARRIERS: THE EU AND SOUTH AFRICAN CBS DISPUTE AS A CASE STUDY

3.1 Introduction

This chapter will focus on whether the phytosanitary measures imposed by the EU function as an unjustifiable barrier to trade. The CBS dispute will be explored to determine whether the EU is making use the provisions of the SPS Agreement to protect its domestic industries as opposed to merely applying standards aimed at protecting the health of its plants. First, the basis of the EU's SPS measures will be challenged. Then, the allegations of discrimination between Member States due to different import regulations will be explored. Thereafter the legitimacy of the current provisional measures will be contested. The proposal made by South Africa for the implementation of a 'pest or disease-free area' within its territory will be evaluated. The overall aim being to critically analyse whether the measures imposed by the EU are indeed protectionist in nature. Thereafter, the necessity of pursuing the CBS dispute further will be emphasized.

3.2 The economic basis of the EU's phytosanitary measures

The EU adopted protective measures aimed at the 'prevention of the introduction and spread of organisms that are harmful to plants'.¹⁹⁸ These protective measures, in this case, apply to citrus that is imported into European borders.¹⁹⁹ The European Commission claims that it is imposing stricter measures because of the high incidence of interceptions (of CBS baring fruit) at EU border controls.²⁰⁰ According to the European Food Safety Authority ('EFSA'), CBS can survive during the storage and transfer of the imported citrus fruit.²⁰¹ South African citrus fruit thus poses a risk to the EU citrus industry according to EFSA.²⁰² South Africa disputes this by stating that CBS would not be able to survive to the degree claimed by the EU in the Mediterranean climate where most EU citrus is grown.²⁰³

As explored in Chapter 2, for a measure to constitute a valid SPS measure it must be adopted with the view of protecting human, animal or plant life.²⁰⁴ However, in this case an argument can be made the primary aim of the relevant SPS measures is economic. CBS does not affect the health of citrus bearing plants or the fruit it produces, nor is it harmful to those

¹⁹⁸ See n 3 above.

¹⁹⁹ As above

²⁰⁰ See n 38 above.

²⁰¹ 'Black Spot and South African Citrus Exports' *FarmBiz* June 2016 31.

²⁰² As above.

²⁰³ As above.

²⁰⁴ Annex 1 of the SPS Agreement.

consuming it. The pest only affects the appearance of the fruit, which makes it less desirable for consumers to purchase the fruit in question. As such, the prevention of the spread of CBS disease by means of the above measures intended to protect the health of EU citrus incidentally ensures that the EU citrus producing market will be protected from a reduction in sales of citrus fruit destined for the fresh market, but has no bearing on the health of the fruit or plant itself.

As of yet there has not been a case before the WTO panel where it has been argued that an SPS measure was implemented for a reason other than the preservation of health.²⁰⁵ There is thus uncertainty about whether or not a panel can examine a measure and determine whether or not a Member had the intention to create an SPS measure for reasons other than the stated purpose of preserving health.²⁰⁶ South Africa would likely raise this legal question if the case is escalated further. Non-tariff measures such as SPS measures pose a particularly difficult challenge for developing countries.²⁰⁷ SPS measures, as is the case with South Africa, pose a major impediment to trade.²⁰⁸

3.3 Allegations of discrimination

The EU's emergency SPS measures apply to fruit imported from Brazil, South Africa and Uruguay.²⁰⁹ However, the measures are not applied to citrus fruit imported from Argentina.²¹⁰ As Argentina also has a distribution of the CBS pest²¹¹ and it is unclear why the import restrictions imposed by the EU are not also extended to Argentinian fruit. It is argued that the same advantage or immunity granted by the EU to any contracting party, must be afforded to all other contracting parties immediately and unconditionally.²¹² Alternatively, the EU's emergency SPS measures applied to fruit imported from Brazil, South Africa and Uruguay should be lifted or granted the same amnesty as is afforded to Argentina so as to level the playing field.

Article 2.3 of the SPS Agreement provides that measures cannot amount to arbitrary or unjustifiable discrimination between member States in identical or similar conditions. The

²⁰⁵ Pauwelyn (n 130 above) 643.

²⁰⁶ As above.

²⁰⁷ See n 38 above.

²⁰⁸ As above.

²⁰⁹ See n 36 above.

²¹⁰ Article I of the General Agreement on Tariffs and Trade, 1986.

²¹¹ CABI 'Guignardia citricarpa (citrus black spot) datasheet' 23 January 2017

<http://www.cabi.org/isc/datasheet/26154> (accessed 12 August 2017).

²¹² See n 194 above.

prohibition against discrimination is also extended to the treatment of locally produced products and the products of another member.²¹³

The GATT also provides for the equal treatment of goods by providing for the non-discrimination of goods.²¹⁴ In order for the EU's measures to adhere to the provisions of the GATT, there must be no arbitrary or unjustifiable discrimination between the imports of countries that have the same conditions.²¹⁵ Argentina also has CBS infected citrus fruit and yet the EU's emergency measures do not apply when citrus fruit is imported from Argentina.

3.4 'New' emergency measures

Article 5.7 of the SPS Agreement provides that a Member can maintain provisional SPS measures notwithstanding the need for scientific justification or risk assessment. The WTO AB termed it a 'qualified exemption' from the general obligation not to maintain SPS measures without sufficient scientific evidence.²¹⁶ The SPS Agreement fails to define 'sufficient scientific evidence' and also offers no indication of which party bears the onus of demonstrating the sufficiency of the scientific evidence in question.²¹⁷ The EU is imposing provisional measures which must comply with the requirements of provisional measures under the SPS Agreement.

In *Japan Agricultural Products II*, the WTO AB laid down four requirements that must be met in order for a provisional measure as envisaged under Article 5.7 to be met.²¹⁸ First, the measure must be imposed only where there is insufficient evidence available.²¹⁹ Second, the measure must be adopted on 'available pertinent information.'²²⁰ Third, the Member which imposes the measure must seek more information in order to conduct an objective assessment of the risk.²²¹ Fourth, the Member that is imposing the measure must review the measure within a 'reasonable period of time'.²²²

In interpreting the first requirement the WTO AB held that 'insufficient evidence' for purposes of interpreting Article 5.7 means insufficient evidence to conduct risk assessment in

²¹³ Article 2.3 of the SPS Agreement.

²¹⁴ Kennedy (n 90 above) 81.

²¹⁵ As above.at 82.

²¹⁶ *Japan* (n 156 above).

²¹⁷ M Powell 'Sanitary and Phytosanitary Dispute Resolution' (1997) 'Resources for the Future' Discussion Paper 97-55, 2.

²¹⁸ Trebilcock (n 52 above) 209.

²¹⁹ As above.

²²⁰ As above.

²²¹ As above.

²²² As above.

accordance with Article 5.1.²²³ The EU may indeed have had insufficient evidence at the time when the emergency measures were introduced. There is a great deal of uncertainty involved in determining whether or not a pest will survive in the environment to which it is introduced.²²⁴ The survival and dispersal rate of CBS subsequent to the long-distance transport of citrus fruit may also be very difficult to predict.²²⁵ However, the traffic and commodity loads inherent to the transport route between South African and the EU can provide an indication of the CBS pest's likelihood to survive.²²⁶ It is worth noting that much of what is considered 'science' for purposes of risk assessment is a 'negotiated consensus' amongst experts in the field.²²⁷ There are few incidences of individual studies giving rise to conclusive results and attempts are made to reach consensus by weighing one conclusion against those of other studies.²²⁸ In this way accumulated evidence from different sources determines the scientific conclusions of risk analysis.²²⁹

The requirement that the provisional measure be adopted on the basis of 'available pertinent information' is yet to be interpreted by the WTO AB.²³⁰ The SPS Agreement sets out no explicit prerequisites with regards to a member state obtaining additional information.²³¹ Article 5.7 does not specify whether certain results must be achieved, the only objective is to seek to attain 'additional information'.²³² It does however specify that the information in question must assist the Member in conducting a more 'objective assessment of the risk'.²³³ As such the information in question must assist the Member State in establishing a more objective assessment of the risk in order to be pertinent.

The EU must thus prove it sought additional information so that a more objective assessment of the risk of CBS can be conducted. The available pertinent information would surely relate to determining what an adequate habitat for CBS would be and predicting its potential spread and rate of infection if it were to survive within EU territory.²³⁴ In most cases biological stressors need to reach a high population size to have a significant impact on the

²²³ *Japan* (n 156 above).

²²⁴ Powell (n 201 above) 6.

²²⁵ As above.

²²⁶ As above.

²²⁷ As above at 10.

²²⁸ As above.

²²⁹ As above.

²³⁰ Trebilcock (n 52 above) 209.

²³¹ *Measures Affecting Agricultural Products II* (n53 above).

²³² As above.

²³³ As above.

²³⁴ Powell (n 201 above) 6.

new environment to which it is introduced.²³⁵ This would include forming an understanding of the history, nature and functioning of the CBS organism as well as experimental research.²³⁶ If the proliferation rate of CBS is measurable, then it will involve expansive data collection.²³⁷ Risk assessments by internationally accredited scientists have already been conducted with the use of the most recent scientific techniques.²³⁸ The assessment demonstrates that CBS cannot spread sufficiently in the EU to yield a sustainable threat.²³⁹ Citrus fruit have been exported from South Africa to the EU since 1907.²⁴⁰ Citrus fruit infected with CBS have crossed EU borders and no infection has ever occurred.²⁴¹ If the EU wishes to impose permanent SPS measures or continue to renew its emergency measures, it needs to engage with the scientific evidence produced by these studies.

The fourth requirement ('a reasonable period of time') was interpreted by the WTO AB in *Japan Agricultural Products II*, where it held that this has to be informed on a case by case basis.²⁴² The difficulty of obtaining additional evidence should be taken into account as well as the nature of the SPS measure.²⁴³ The WTO AB concurred with the Panel in its conclusion that the testing measures applied by Japan had not been reviewed within a reasonable period of time.²⁴⁴ The provisional measures were imposed by Japan in 1995 and the Panel report circulated in 1998.²⁴⁵ Thus even if the measures in question had met the first and second requirements, the provisional measures would not be in compliance with the SPS Agreement.²⁴⁶

The measures which are currently imposed by the EU Commission will remain in force until 31 March 2019.²⁴⁷ The previous emergency measures were enforced in 2014.²⁴⁸ The EU conducted an Audit in 2016 and imposed measures essentially similar to the previous measures.²⁴⁹ In fact, the EU has introduced further measures applicable to citrus fruit destined

²³⁵ As above at 7.

²³⁶ As above at 6.

²³⁷ As above.

²³⁸ Y Gebrehiwet, S Ngqangweni & J F Kirsten 'Quantifying the Trade Effect of Sanitary and Phytosanitary Regulations of OECD Countries on South African Food Exports' (2007), *Agrekon*, 46:1, 7.

²³⁹ As above.

²⁴⁰ As above.

²⁴¹ As above.

²⁴² Trebilcock (n 52 above) 209.

²⁴³ As above.

²⁴⁴ *Measures Affecting Agricultural Products II* (n53 above).

²⁴⁵ As above.

²⁴⁶ As above.

²⁴⁷ See n 36 above.

²⁴⁸ See n 6 above.

²⁴⁹ See n 36 above.

for juicing.²⁵⁰ EFSA has suggested that the EU allow the free importation of citrus fruit destined for industrial processing such as juicing.²⁵¹ EFSA's risk assessment indicated that an officially controlled import structure which facilitates the immediate movement of the fruit to the processing facility poses virtually no threat of infection of CBS to plant hosts.²⁵²

Although the measures applicable to commercial juicing are still less onerous than the measures regulating the consumption of fresh fruit, the new measures are unnecessarily trade restrictive. The new requirement of needing to designate ports of entry specifically destined for juicing is particularly difficult for South Africa to comply with.²⁵³ Consequently, South Africa is not currently able to export fruit destined for juicing to the EU. It does not appear that the EU has 'reviewed' its emergency measures, it simply made it more onerous without conducting a risk assessment.

The 'emergency measures' are being extended and the adverse economic impact on the South African citrus export industry will be prolonged. The EU currently requires South Africa to record both pre- and post-harvest chemical treatment of citrus fruit, all packaging houses need to be registered and official inspections of orchards are to take place.²⁵⁴ The South African government will need to conduct sample testing on 600 individual fruits out of every 30 tonnes of each type of citrus fruit.²⁵⁵ All fruit displaying symptoms of CBS will also need to be tested.²⁵⁶ The long-term effect of the EU's SPS measures on the South African citrus industry are still uncertain.²⁵⁷ Although South Africa is willing to adhere to the SPS measures for a short-term, it is simply not economically feasible for a protracted period of time.²⁵⁸ The CGA has reported that South African citrus farmers have spent more than R 1 billion per annum over the last three year period in order to comply with the EU's CBS prevention standards.²⁵⁹

²⁵⁰ See n 36 above.

²⁵¹ Laurenza & Montanari (n 8 above) 206.

²⁵² As above.

²⁵³ See n 36 above.

²⁵⁴ See n 6 above.

²⁵⁵ As above.

²⁵⁶ As above.

²⁵⁷ As above.

²⁵⁸ As above.

²⁵⁹ See n 184 above.

3.5 The availability of less trade-restrictive measures

South Africa has suggested that the EU take an alternative approach to the current regulatory measures it has adopted.²⁶⁰ This alternative approach would entail market division, where the stricter import regulations only apply to the southern parts of the EU that produce citrus fruit.²⁶¹ EFSA's risk analysis indicates that plants susceptible to CBS infection do not grow throughout the entire EU region, nor are the climatic conditions favourable for the spread of CBS throughout the entire EU region.²⁶² The citrus orchards in the EU are located in the south of the continent, whereas the majority of South African citrus imports are designated to the northern parts.²⁶³ European areas where there are citrus orchards, such as Cyprus; Greece; Italy; France (particularly Corsica); Portugal and Spain would thus be 'protected zones'.²⁶⁴ A 'protected zone' is defined as an area within the EU "where there is a danger that certain harmful organisms will establish, given propitious ecological conditions [...] despite the fact that these organisms are not endemic or established [...]".²⁶⁵

If the SPS measures relating to CBS could only apply to areas where there is a possibility of infection, South Africa's access to the EU market will be improved and undue restrictions greatly diminished. Furthermore, the EU will be protected from any possible risk of CBS infection.²⁶⁶ Article 6 of the SPS Agreement and the consultations which facilitate its implementation have given rise to domestic regulatory reform before.²⁶⁷ EFSA has considered this approach, but is critical of its technical feasibility because of it would entail monitoring systems being established and maintained within the EU to ensure the imports do not enter the 'protected zones'.²⁶⁸

The SPS measures should be specific to the region and not be based on political boundaries.²⁶⁹ Article 6 of the SPS Agreement provides that Members must adapt their SPS Measures to characteristics particular to a specific area of the country, part of the country or parts of several countries.²⁷⁰ This provision has been drafted with the view of reducing unnecessary restrictions on trade.²⁷¹ It is thus necessary for the EU to ensure that its SPS

²⁶⁰ See n 38 above.

²⁶¹ As above.

²⁶² Laurenza & Montanari (n 8 above) 205.

²⁶³ See n 4 above at 21.

²⁶⁴ Laurenza & Montanari (n 8 above) 204.

²⁶⁵ Article 2 (1) (h) of Directive 2000/29/EC.

²⁶⁶ Laurenza & Montanari (n 8 above) 205.

²⁶⁷ See n 54 above at 38.

²⁶⁸ Laurenza & Montanari (n 8 above) 206.

²⁶⁹ See 54 above at 36.

²⁷⁰ Article 6 of the SPS Agreement.

²⁷¹ Laurenza & Montanari (n 8 above) 206.

Measures are necessary for the protection of plants in all areas of the countries which form part of the union. The particular climate and the likelihood of the spread of CBS in each of the areas is thus of relevance and needs to inform the SPS measures imposed by the EU.

The US allowed uncooked beef imports from regions that have been declared free of foot and mouth disease.²⁷² Contrary to past US legislation which provided for a blanket ban on all uncooked beef products that were sourced from countries that were not wholly declared free of the disease.²⁷³ This type of change inspires confidence that countries can review their SPS measures according to the same logic.²⁷⁴ Arguably, if exports can be allowed from regions where there are no infections, then the recipient country should also adapt the commensurate SPS measures relating to its own regions.

The current EU SPS measures relating to CBS are unnecessarily trade restrictive as other less restrictive measures which achieve the same level of protection are available.²⁷⁵ The least trade-restrictive SPS measure must be economically and technically feasible.²⁷⁶ EFSA's argument that 'protected zones' in the instance of CBS related measures is not technically feasible fails to take into account that the EU already applies internal trade restrictions between different regions under a mechanism which has already been established by Directive 2000/29/EC.²⁷⁷ Furthermore, the EU has developed the concept of 'protective zones' under its own directive, and cannot raise low technical feasibility when a trade partner suggests they make use of it.²⁷⁸

Considering the detrimental economic consequences of the SPS measures, it may be in South Africa's best interest to assist the EU in implementing these new import controls.²⁷⁹ In 2011 the European Commission ('EC') adopted a decision which derogated from an import ban on potato seeds.²⁸⁰ The decision provided for labelling (a colour-coded system indicating where the importer was located within the EU region) and testing requirements which it was the responsibility of the exporting country (Canada) to adhere to.²⁸¹ The potato seeds were designated to specific ports within the EU territory and provided for post-

²⁷² See 54 above at 38.

²⁷³ As above.

²⁷⁴ As above.

²⁷⁵ Laurenza & Montanari (n 8 above) 205.

²⁷⁶ As above.at 206.

²⁷⁷ As above.

²⁷⁸ As above.

²⁷⁹ As above.

²⁸⁰ As above.

²⁸¹ As above.

importation requirements which the importing countries needed to comply with.²⁸² The economic and technical burden of these measures were not cumbersome, as the relevant EU State authorities had already been established and is maintained under Directive 2000/29/EC.²⁸³ This example illustrates that, contrary to the argument raised by EFSA, the EU may indeed find the alternative SPS measures suggested by South Africa to be technically feasible.²⁸⁴

3. 6 The future of the CBS dispute

South Africa has elected to institute legal action in order to address the fact that the EU's SPS measures lack scientific basis and thus have arbitrary negative impacts on its exporting industry.²⁸⁵ As prescribed under the IPPC Convention, the process was initiated via consultations. These consultations were instated to ensure that the applicable law, the SPS Agreement and the general provisions of the GATT, are adhered to.²⁸⁶ The consultation resulted in both parties agreeing that the matter ought to be postponed until more scientific evidence is available.

However, now that the EU has issued its Final Audit Report based on scientific evidence it procured the process can reconvene. The measures currently imposed by the EU on citrus fruit do not deviate from the measures which originally gave rise to South Africa's compliant. The decision taken by the European Commission does not provide for automatic bans in the event that a certain threshold of CBS interventions has been met.²⁸⁷ However, provision has been made for 'additional measures' to be taken in the event that there are more than five interceptions.²⁸⁸

The matter must be pursued further by means of an objective third party determining whether or not the SPS measures in question are in violation of the EU's international obligations.²⁸⁹ The South African Minister of Trade has declared that he will ensure that international trade law is respected by pursuing further steps in the CBS dispute.²⁹⁰ As of yet there have been no further steps taken in terms of the IPPC process.²⁹¹ A letter from the South African Department of Trade and Industry and the Department of Agriculture, Forestry

²⁸² As above.

²⁸³ As above.

²⁸⁴ As above.

²⁸⁵ See n 38 above.

²⁸⁶ As above.

²⁸⁷ See n 6 above

²⁸⁸ As above.

²⁸⁹ See n 36 above.

²⁹⁰ See n 38 above.

²⁹¹ As above.

and Fisheries was sent to the relevant EU commissioners requesting technical discussions regarding the CBS dispute.²⁹²

3.7 Concluding remarks

South Africa's access to the EU market is limited by its ability to comply with the SPS measures which are imposed on foreign imports.²⁹³ The EU's SPS measures relating to CBS are more trade-restrictive than necessary.²⁹⁴ The reason the EU could be employing a non-tariff trade barrier may be due to its desire to protect its local citrus industry from competition.²⁹⁵ As discussed, there is no available evidence that indicates that there is a risk of CBS significantly affecting European citrus orchards. There does not appear to be any scientific justification for the measures the EU is employing.²⁹⁶ Although emergency measures do allow Members to impose SPS standards without scientific justification, it does not appear that the EU is in compliance with the requirements of emergency measures. The EU has not demonstrated that it has tried to gain sufficient additional information in order to conduct an objective risk assessment. Even in the event that it has attempted to do so, the emergency measures have been in place without undergoing a review for an unreasonably long period of time.

The EU also has not engaged with South Africa's request to apply a regionalised approach to the CBS related SPS measures so that it applies exclusively to 'protected zones'. The EU has also imposed import restrictions on citrus fruit destined for industrial processing, without any sufficient scientific basis. The EU has not acted within the realms of the SPS Agreement which provides for the minimising of trade restrictive effects when SPS measures are imposed.²⁹⁷ The regionalised approach as well as applying no import restrictions on fruit destined for juicing are both alternative least-trade restrictive measures which are available.²⁹⁸ These alternative measures will allow the EU to maintain its appropriate level of protection and are technically feasible to implement.²⁹⁹ In conclusion the EU does appear to

²⁹² As above.

²⁹³ L Botha 'Addressing Sanitary and Phytosanitary Disputes' 12 September 2012 <http://www.tradelaw.co.za/index.php/addressing-sanitary-and-phyto-sanitary-disputes-through-the-mechanisms-provided-for-under-the-ioe-and-the-ippc> (Accessed 13 April 2017).

²⁹⁴ Laurenza & Montanari (n 8 above) 206.

²⁹⁵ J.R. Lupien 'The Precautionary Principle and Other Non-Tariff Barriers to Free and Fair International Food Trade' (2010) *Critical Reviews in Science and Nutrition* 42 (4) 403, 410.

²⁹⁶ Gebrehiwet, Ngqangweni & Kirsten (n 222 above) 7.

²⁹⁷ Laurenza & Montanari (n 8 above) 206.

²⁹⁸ As above.

²⁹⁹ As above at 207.

be intent on imposing measures which exceed the boundaries of what could be potentially necessary to protect its citrus orchards from the CBS pest.

CHAPTER 4

THE LIMITATIONS OF THE WTO DSB HANDLING PHYTOSANITARY DISPUTES AND THE IPPC DISPUTE SETTLEMENT COMMITTEE AS AN ADEQUATE ALTERNATIVE

4.1 Introduction

This chapter aims to assess whether the WTO DSB can effectively deal with SPS disputes in light of the above circumstances. This is relevant for the broader consideration of whether the IPPC Dispute Settlement Committee would be a viable and more efficient dispute resolution alternative for developing countries such as South Africa. First, a brief overview of the role of the WTO DSB in SPS disputes will be provided. Secondly the extent to which the WTO DSB relies on expert evidence will be explored. In doing so, it will be determined whether a body of scientific experts may not be better suited towards resolving SPS disputes. Then, the feasibility of the IPPC Dispute Settlement Committee hearing the CBS dispute as alternative to the WTO DSB will be explored. Finally, the unique position South Africa is in as a developing country will be taken into account in the comparative assessment of both dispute resolution mechanisms.

4.2 The WTO DSB and SPS disputes

An SPS dispute occurs when an SPS measure is challenged due to it allegedly being trade restrictive and/or without scientific justification.³⁰⁰ One of the primary aims of the SPS Agreement is to provide a structure for SPS disputes.³⁰¹ As the SPS Agreement forms part of WTO law, the dispute can be referred to the WTO DSB.³⁰² However, the drafters of the SPS Agreement did not indicate that members are obliged to make use of the WTO DSB.³⁰³ In fact, it is entirely within the discretion of the disputing parties to determine which dispute settlement forum is best suited to resolve their dispute.³⁰⁴ In terms of the WTO Dispute Settlement Understanding, Members are required to institute bilateral negotiations to solve the dispute prior to referring the dispute to the WTO DSB.³⁰⁵

The first stage of the WTO dispute settlement process consists of formal consultations.³⁰⁶ If the consultation phase fails to give rise to a solution within 60 days, then

³⁰⁰ See n 54 above at 139.

³⁰¹ Kastner & Powell (n 87 above) 283.

³⁰² See n 260 above.

³⁰³ Kastner & Powell (n 87 above) 289.

³⁰⁴ As above.

³⁰⁵ See n 54 above at 139.

³⁰⁶ As above.at 32.

either party can request the intervention of the WTO panel.³⁰⁷ The panel will then determine whether or not the measure adheres to the provisions of the SPS Agreement.³⁰⁸ If necessary, the WTO AB will review the decision made by the panel.³⁰⁹ The complainant bears the onus of establishing a *prima facie* case that the defending party has violated a provision in the SPS Agreement.³¹⁰ Once a *prima facie* case is made, the defending party must refute the inconsistency.³¹¹

When the WTO panel or the WTO AB hands down a decision it is final and binding through a process of reserve consensus.³¹² Once a decision is made, the WTO requires Members who are in violation of the SPS Agreement to modify their SPS measures so that they are compliant, or alternatively to withdraw said measures.³¹³ Although the WTO does not have an enforcement mechanism against Members who do not adhere to its rulings, it does have the ability to authorise Members who are negatively affected by the violating SPS measures to retaliate.³¹⁴ Retaliation can involve the suspension of trade concessions once made in favour of the violating member, which commonly takes place by raising tariffs on that member's exports.³¹⁵

WTO members are not permitted to make use of other dispute settlement mechanisms once a dispute has been referred to the WTO DSB. It would thus be logical for the parties in the CBS dispute to keep the WTO DSB as a last resort. This also provides the benefit of having a decision that is legally enforceable.³¹⁶ When parties engage in the WTO dispute settlement system they are only responsible for their own litigation costs.³¹⁷ The costs of the establishment of the panel and the possible review process performed by the WTO AB falls within the financial responsibility of the WTO.³¹⁸

4.3 The role of expert evidence in the WTO DSB

The WTO dispute resolution panel or appellate body is not composed out of scientific experts. The panel ordinarily consists of academics or former trade diplomats who have

³⁰⁷ Article 4, Dispute Settlement Understanding.

³⁰⁸ See n 54 above at 32.

³⁰⁹ As above.

³¹⁰ *European Communities- Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/29.

³¹¹ As above.

³¹² Article 23 2 (a) of the WTO Dispute Settlement Procedures.

³¹³ Kastner & Powell (n 87 above) 289.

³¹⁴ As above.

³¹⁵ As above.

³¹⁶ See n 260 above.

³¹⁷ As above.

³¹⁸ As above.

either an economic or legal background.³¹⁹ SPS disputes frequently involve complex scientific issues.³²⁰ As such the panel makes regular use of scientific experts who are appointed in their individual capacity.³²¹ The experts are appointed from a list which has either been provided by a relevant international organization or by the parties themselves.³²² The appointment is only made once both parties have been consulted with.³²³

The panel addresses questions to each expert who delivers an individual response.³²⁴ The parties to the dispute are free to comment on the expert's opinions.³²⁵ A meeting is also arranged where the experts, the panel and the parties can discuss and present answers.³²⁶ The opinions of scientific experts are not binding on the panel and are only used to inform their decision.³²⁷ The panel has a 'significant investigative authority' in that it can seek its information from external sources.³²⁸ The evidence submitted by experts can however not be used by the panel in order to come to the conclusion that the SPS Agreement has not been adhered to, unless one of the disputing parties have established a *prima facie* case to that effect.³²⁹ The parties themselves may be assisted by scientific experts of their choice.³³⁰ The expert can also be joined in the proceedings as a member of a party's delegation.³³¹

As referred to earlier in Chapter 2, the SPS Agreement provides that measures cannot be maintained without sufficient scientific evidence. In order to determine whether or not there is sufficient scientific evidence for a measure, the 'rational connection test' is applied. In the *Japan- Apples* case³³² the WTO AB ruled that the 'rational connection' test does not require that the WTO Panel show deference to the local authorities in the WTO Member State, even in the event where it handled the scientific evidence in a reasonable manner.³³³ Instead the WTO Panel is tasked with considering the scientific evidence and its relationship to the measure afresh and objectively.³³⁴

³¹⁹ Pauwelyn (n 130 above) 661.

³²⁰ As above.

³²¹ As above.

³²² As above.

³²³ As above.

³²⁴ As above.

³²⁵ As above.

³²⁶ As above.

³²⁷ As above.

³²⁸ *Measures Affecting Agricultural Products II* (n53 above).

³²⁹ Pauwelyn (n 130 above) 662.

³³⁰ As above.

³³¹ As above.

³³² *Measures Affecting Agricultural Products II* (n53 above).

³³³ Trebilcock (n 52 above) 208.

³³⁴ As above.

The approach of having a panel constituted out of lawyers bearing the responsibility of substantively examining scientific evidence and its relationship to the measure which has been adopted is questionable. The WTO Panel cannot purport itself to be an arbiter of scientific methods and the substantive elements of the decision reached by a standardization body.³³⁵ It may have been more fitting for the WTO Panel to determine whether the procedural approach employed by the standardization body was reasonable, objective and unbiased.³³⁶ This would entail an assessment of the manner in which it obtained, weighed and used the scientific evidence it was presented with.³³⁷ However, the approach of considering this relationship *de novo* by a panel composed of scientific experts with experience in the relative field which the disputed measure pertains to appears to be more legitimate and effective. By this reasoning it is then possible that the IPPC Dispute Settlement Committee may be preferable to the WTO DSB when the substantive scientific nature of the measure is to be assessed.

However, some may argue that a tribunal which can show appreciation for the considerations taken into account by persons who aren't scientists is beneficial.³³⁸ In the *Hormones* case³³⁹ the WTO AB needed to determine whether a measure was consistent with Article 5.5 of the SPS, i.e. whether the levels of protection which were established were not arbitrary and trade restrictive.³⁴⁰ The United States (US) argued that the import bans placed on produce that received synthetic growth hormones was unjustifiable in light of the fact that no measures were taken against the even higher instances of growth hormones prevalent in plants like broccoli.³⁴¹ The WTO AB recognised a 'fundamental distinction' between hormones which are added and hormones which are naturally occurring in food.³⁴² It was held that the EC's decision not to take measures against naturally occurring hormones is justified due to the fact that the scale of intervention which that would require would be massive.³⁴³

The only arbitrary and unjustified measure the WTO AB identified was that certain hormones were banned in beef production but not in swine production.³⁴⁴ The WTO AB did

³³⁵ Trebilcock (n 52 above) 209.

³³⁶ As above.

³³⁷ As above.

³³⁸ As above.at 213.

³³⁹ *European Communities* (n 172 above).

³⁴⁰ Trebilcock (n 52 above) 213.

³⁴¹ As above.

³⁴² As above.

³⁴³ As above.

³⁴⁴ As above.

not however consider this arbitrary distinction to amount to a disguised restriction on trade and as such the third requirement of the test under Article 5.5 was not met.³⁴⁵ The reasons for the inconsistency were not attributed to protectionism, but rather to the complex exercise of harmonising regulation in a federal political structure.³⁴⁶ The WTO AB ignored the fact that beef farmers within the EU had been lobbying for the imposition of bans on imported beef as a protectionist measure and instead focussed on the documentation which reflected the ‘anxieties’ which exist around general scientific studies regarding hormones in meat.³⁴⁷

It can be argued that the WTO AB demonstrated a concern for the ‘real world of democratic regulation’.³⁴⁸ It is indeed likely that a local producer would lobby for protectionist regulatory measures to be imposed on imported goods.³⁴⁹ Mere domestic producer support for a health measure which has the effect of protecting the local industry does not in itself render a measure protectionist.³⁵⁰ However, the SPS Agreement was enacted because the previous regime allowed countries free reign to enact SPS measures which had intentional trade distorting effects. The SPS Agreement has various provisions which require the use of scientific evidence when measures are adopted. This is done to ensure that the broader objective of not having arbitrary measures which are unnecessarily trade restrictive is met. To place more emphasis on a country’s sovereign right to impose measures which it sees fit based on unscientific reasoning is to undermine the very objective of the SPS Agreement.

In *Japan Agricultural Products II* the US claimed that Japan did not use the least trade restrictive measure at its disposal to reach its indicated objective.³⁵¹ The US argued that Japan ought to have conducted a ‘testing by product’ in order to ensure that its objective was met.³⁵² The WTO panel sought expert scientific advice in order to determine whether Japan had chosen the least trade restrictive measure.³⁵³ The panel did not opt for ‘testing by product’ but rather used ‘absorption levels’ which was not proposed by the US.³⁵⁴ The panel’s decision was appealed on the basis that it exceeded the scope of its powers by seeking experts who did not employ a method proposed by the US.³⁵⁵

³⁴⁵ Trebilcock (n 52 above) 213.

³⁴⁶ As above.

³⁴⁷ As above.

³⁴⁸ As above.

³⁴⁹ As above.

³⁵⁰ As above.

³⁵¹ *Measures Affecting Agricultural Products II* (n53 above).

³⁵² Trebilcock (n 52 above) 214.

³⁵³ As above.

³⁵⁴ As above.

³⁵⁵ As above.

The WTO AB held that Article 13 of the Dispute Settlement Understanding (DSU) allows the panel to seek information from any relevant source and to consult with experts on any aspects of the matter before it.³⁵⁶ Article 11.2 of the SPS Agreement explicitly instructs panels in disputes involving scientific and technical issues to seek advice from experts.³⁵⁷ WTO adjudicating bodies are thus allowed to select experts in consultation with the disputing Members.³⁵⁸ It is a routine practice during SPS disputes because the panellists are not accustomed to address scientific issues themselves.³⁵⁹

In the *Hormones* case, the panel asked both parties to name one expert each.³⁶⁰ Then it named two experts selected from a list prepared by the Codex Commission and the International Agency for Research on Cancer.³⁶¹ It also named an additional expert in the area of the carcinogenic effects of hormones.³⁶² The EC appealed this due to the fact that one of the experts was a national of a disputing party or a third party that had links to the pharmaceutical industry.³⁶³ The WTO AB distinguished between the selection of expert witnesses in an expert review group (as provided for in Appendix 4 to the DSU) and expert witnesses in the context of the SPS.³⁶⁴ Due to this distinction the WTO AB dismissed the EU's complaint, stating that the panel is able to draw up *ad hoc* rules for such particular proceedings.³⁶⁵

In the *Australia-Salmon* case, the panel chose four experts after consultations with the Office International des Epizooties (OIE).³⁶⁶ In the *Japan-Agricultural Products II* dispute, the panel chose three experts soliciting suggestions from the Secretariat of the IPPC.³⁶⁷ The WTO Panel will thus, in consultation with the parties to the dispute, seek expertise from outside sources, following suggestions by organisations mentioned in the SPS Agreement such as the IPPC.³⁶⁸

In these cases, there was some confusion about the appropriate role of scientific expertise in the adjudicatory process.³⁶⁹ Some critics of the SPS Agreement challenge the

³⁵⁶ As above.

³⁵⁷ *Measures Affecting Agricultural Products II* (n53 above).

³⁵⁸ Trebilcock (n 52 above) 214.

³⁵⁹ As above.

³⁶⁰ As above.

³⁶¹ As above.

³⁶² As above.

³⁶³ As above.

³⁶⁴ As above.

³⁶⁵ As above.

³⁶⁶ As above.

³⁶⁷ As above.

³⁶⁸ As above.

³⁶⁹ As above at 215.

notion that science should outweigh all of the factors a regulatory institution should take into account.³⁷⁰ In the *Australia-Salmon* case, panel members asked scientists questions about the costs and benefits of alternative regulations, which is inherently economic and political in nature.³⁷¹ The expertise required in an SPS case will not always emanate from natural scientists alone.³⁷² Expertise with regards to the consequences and the effectiveness (the economic, social or potentially cultural impacts) of risk management and intervention may be appropriate.³⁷³ However, the panel itself cannot make determinations with regards to either the scientific or political reality of a particular country without the input of an expert.

4.5 The IPPC Expert Committee

The IPPC dispute settlement process is only available to members of the IPPC, and its jurisdiction is limited to disputes which involve the transnational movement of plants or plant products.³⁷⁴ As in the case of referring a dispute to the WTO DSB, parties are motivated to resolve the dispute amongst themselves prior to pursuing formal dispute resolution procedures.³⁷⁵ If the informal negotiations fail then the formal consultation process will ensue.³⁷⁶ The formal consultation process between South Africa and the EU has already taken place. No resolution between the parties has been reached.

The parties can now discuss the most appropriate step with the IPPC Secretariat.³⁷⁷ The parties can immediately proceed to request a formal hearing.³⁷⁸ The Director General of the Food and Agricultural Organisation of the United Nations will appoint a committee of experts which includes experts designated by each of the parties.³⁷⁹ There will also be three independent experts on the committee which the parties will select from a list issued by the IPPC Secretariat.³⁸⁰ One of the independent experts will act as the chairperson.³⁸¹ The expert committee and the parties will agree upon the period of time the procedures will take, as well as the procedure that is to be followed.³⁸²

³⁷⁰ Trebilcock (n 52 above) 230.

³⁷¹ As above at 215.

³⁷² As above.

³⁷³ As above.

³⁷⁴ The Subsidiary Body on Dispute Settlement Brochure 2006 <https://www.ippc.int/en/publications/?page=4> (Accessed on 25 April 2017).

³⁷⁵ International Plant Protection Convention, Article XIII.

³⁷⁶ See n 332 above.

³⁷⁷ As above.

³⁷⁸ International Plant Protection Convention, Article XIII 2.

³⁷⁹ See n 332 above.

³⁸⁰ As above.

³⁸¹ As above.

³⁸² See n 260 above.

The aim of the expert committee will be to resolve the dispute on a technical level, not to engage in the legally complex processes inherent to the WTO dispute settlement procedures.³⁸³ The CBS dispute in this case does not only involve technical biological issues, but also economics and knowledge about SPS measures and pest management in export and import practice.³⁸⁴ The CBS dispute, like any other SPS dispute, involves the application of international standards. It is thus challenging to determine how a purely technical approach would stand to facilitate the resolution of the dispute.³⁸⁵ If the South African government believes that there are complex legal issues that form part of the dispute or there is a very severe impact on the export industry, then the WTO DSB may be a superior option.³⁸⁶ However, if it considers the dispute to be resolvable on grounds of a technical interpretation of an SPS Agreement provision then the IPPC will be a suitable alternative.³⁸⁷

The IPPC expert committee will hear the matter and then hand down a non-binding report on the technical issues of the dispute.³⁸⁸ The expert committee report is reviewed by the IPPC Secretariat in respect of the technical reasoning employed, and handed to the Food and Agricultural Organisation of the UN for legal review.³⁸⁹ The Subsidiary Body on Dispute Settlement ('SBDS') needs to approve the report and verify that the expert committee followed the correct procedure.³⁹⁰ Only once all of the respective bodies have approved the report, will the IPPC Secretariat then submit the final report to the Committee on Phytosanitary Measures and the Director General of the Food and Agricultural Organisation of the UN, who will in turn distribute it to the disputing parties.³⁹¹

The IPPC dispute resolution process offers parties a non-binding alternative to the WTO dispute settlement process.³⁹² Although there has as of yet not been any formal IPPC expert committee hearing, the process stipulated in the brochure of the SBDS will likely prove to be less costly and more time efficient.³⁹³ If this does prove to be true it may be hugely beneficial as the WTO dispute settlement system has been criticised for taking

³⁸³ See n 332 above.

³⁸⁴ J Hedley 'Procedures for the settlement of disputes concerning phytosanitary' (1999) Bulletin OEPP/ EPPO Bulletin 29 11, 15.

³⁸⁵ As above at 12.

³⁸⁶ See n 260 above.

³⁸⁷ As above.

³⁸⁸ See n 332 above.

³⁸⁹ As above.

³⁹⁰ As above.

³⁹¹ As above.

³⁹² As above.

³⁹³ As above.

inordinately long.³⁹⁴ The average time for a case to run its course at the WTO DSB is 2.5 years.³⁹⁵ Considering that the CBS dispute has been going on for more than a decade, seeking a potentially more time efficient dispute resolution system is essential. Parties are required to share the costs of a dispute settlement process that occurs under the IPPC.³⁹⁶

If the parties have not reached a resolution after the report that the IPPC expert committee has handed down, the matter can still be referred to the WTO DSB.³⁹⁷ The expert committee report will play an essential part in the documentary evidence considered by the WTO panel.³⁹⁸ The parties also have the option of making use of a different mechanism provided for in the IPPC Supplementary Agreement.³⁹⁹ This mechanism can be made use of in the event where the dispute involves plant protection which requires special attention or action.⁴⁰⁰ If South Africa and the EU enter into a Supplementary Agreement then the findings of the dispute settlement committee will be binding.⁴⁰¹

4.6 The precarious position of developing countries in SPS disputes

South Africa has elected to make use of the IPPC dispute resolution procedure, as opposed to referring the dispute to the WTO Panel. This is not uncharacteristic of a developing African country – African countries do not generally participate in the dispute settlement system of the WTO.⁴⁰² In the case of SPS disputes, the local export industry will petition for the government to pursue dispute settlement.⁴⁰³ Only governments have standing in the WTO dispute resolution process and as such the export industry must act via the government.⁴⁰⁴ This plays a role in the disputes that are referred to the WTO DSB, as exporters are only incentivised to petition if there is a likelihood that the government will pursue the case.⁴⁰⁵ Developing countries have been apprehensive to refer case to the WTO due to the possibility

³⁹⁴ Anyiwe, LN & Ekhatior EO 'Developing Countries and the WTO Dispute Resolution System: A legal assessment and review' (2013) Vol. 2 Iss. 1 Afe Babalola University: Journal of Sustainable Development Law and Policy 121, 136.

³⁹⁵ Hoekman & Mavroidis (n 402 above) 531.

³⁹⁶ See n 260 above.

³⁹⁷ See n 332 above.

³⁹⁸ As above.

³⁹⁹ Article XVI of the IPPC (1997) Supplementary Agreement.

⁴⁰⁰ As above.

⁴⁰¹ See n 260 above.

⁴⁰² See n 38 above.

⁴⁰³ B.M. Hoekman & P.C. Mavroidis 'WTO Dispute Settlement, Transparency and Surveillance' (2000) Blackwell Publishers Ltd 527, 529.

⁴⁰⁴ As above.

⁴⁰⁵ As above.

that the country which they institute the case against will withdraw their assistance in other areas, e.g. by withdrawing financial aid.⁴⁰⁶

This general aversion to dispute settlement is detrimental, as an important element of rules-based trade negotiations is having enforceable and legally binding outcomes when a dispute arises.⁴⁰⁷ The fear that developing states harbour of disrupting a relationship with an important trade partner nullifies the existence of the WTO DSB to a certain extent, as the very reason for the WTO DSB is the promotion of a rule based system as opposed to a system that allows the most powerful nations to control the outcome of a dispute.⁴⁰⁸

Another reason for this aversion is that African countries lack the technical knowledge to adequately address disputes.⁴⁰⁹ Although this is true for some African countries, it does not hold true of all of them.⁴¹⁰ Some African countries do lack the expertise and skills to adequately address matters relating to specialized areas of international trade law.⁴¹¹ South Africa however has many national lawyers who are capable of arguing most of the matters which can arise from a trade dispute.⁴¹² If South Africa wishes to engage in the WTO dispute settlement processes, it would need to incur the cost of building the knowledge of WTO procedures and establishing institutions that assist in its participation.⁴¹³ One way in which it can build its knowledge is by engaging in the WTO dispute settlement process.⁴¹⁴ In this way South Africa will become familiar with the WTO processes and identify which domestic institutional support it requires.⁴¹⁵ The economic damage that South Africa is suffering due to the trade restrictive measures the EU is implementing merits the expense of appearing in front of an international tribunal.⁴¹⁶

Currently South Africa has yet to institute a complaint at the WTO DSB and has limited experience as a respondent.⁴¹⁷ There will be considerable costs involved if South Africa were to pursue the matter in front of the WTO panel.⁴¹⁸ It will also be challenging for South Africa to place economic or political pressure on the EU to ensure that it complies with

⁴⁰⁶ As above at 530.

⁴⁰⁷ See n 38 above.

⁴⁰⁸ Hoekman & Mavroidis (n 402 above) 530.

⁴⁰⁹ See n 38 above.

⁴¹⁰ As above.

⁴¹¹ As above.

⁴¹² As above.

⁴¹³ Anyiwe & Ekhatior (n 352 above) 129.

⁴¹⁴ As above.

⁴¹⁵ As above.

⁴¹⁶ As above at 131.

⁴¹⁷ WTO 'South Africa and the WTO' https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm (Accessed on 26 September 2017).

⁴¹⁸ Anyiwe & Ekhatior (n 352 above) 133.

a ruling that declares the measures incompatible with the SPS Agreement.⁴¹⁹ It is also possible that South Africa could be apprehensive about the economic or political pressure that the EU may place on it in respect of ruling in favour of the EU.⁴²⁰ In any event, the IPPC expert committee cannot hand down a binding decision thus South Africa will need to institute a claim at the WTO DSB or enter into a Supplementary Agreement with the EU in order to obtain a legally enforceable ruling.

4.7 Concluding remarks

The WTO DSB provides countries with a forum to resolve their disputes using a rule based system as opposed to what was previously only a power based system.⁴²¹ Such systems are invaluable to developing nations who require predictability and security in their trade relationships.⁴²² As discussed throughout this chapter, there are still obstacles in the way of developing countries making full and effective use of the system.⁴²³ Alternative forums like the IPPC expert committee presents the possibility of solving SPS disputes on a basis of technical knowledge, without any knowledge about WTO law or the institutional structures which facilitate WTO dispute settlement being a prerequisite. Its potential for reducing the financial and temporal expenditure that a WTO dispute settlement process would encompass serves as an additional incentive. However, the IPPC expert committee can only review the technical aspects of the claim and the dispute in question does go beyond a contention about scientific evidence alone. The South African government will need to decide whether or not the dispute can be resolved on a technical basis, and if not, whether a Supplementary Agreement under the IPPC or the WTO DSB will be better suited towards the resolution of the CBS dispute.

⁴¹⁹ As above.

⁴²⁰ As above at 134.

⁴²¹ As above at 136.

⁴²² As above.

⁴²³ As above.

CHAPTER 5

FINAL CONCLUSION AND RECOMMENDATIONS

5.1 Summary of findings

The SPS Agreement establishes processes which allow states to develop their own substantive SPS measures in a fair way that is not unnecessarily trade restrictive.⁴²⁴ The drafters of the SPS Agreement wished to ensure that SPS measures are aimed at the protection of human, animal and plant life as opposed to being used as non-tariff trade barriers. SPS measures have the potential to have a significant impact on the trade relationship between states. A Member's access to another Member's market is restricted in terms of its ability to adhere to the applicable SPS Measures.⁴²⁵

The aim of this dissertation is to determine whether or not the EU is using its SPS measures (relating to the regulation of CBS) in a way that amounts to covert protectionism. There has not been any available scientific evidence since 2001 when South Africa started conducting risk assessment which substantiates the severity of the SPS measures which the EU is implementing to prevent the infection of CBS.⁴²⁶ The EU is using the SPS measure to allow its local citrus industry to thrive by employing arbitrary SPS measures.⁴²⁷ Although emergency measures do allow Members to impose SPS standards without scientific justification, it does not appear that the EU is in compliance with the requirements of emergency measures.

After a close consideration of the requirements laid down in the *Japan Agricultural Products II* case, it appears that the emergency SPS measures employed by the EU are not in compliance with the SPS Agreement. The EU has not demonstrated that it has attempted to gain the additional information it requires to conduct a thorough risk assessment. Further, the EU also has not attempted to resolve this deficit within a reasonable period of time. By continuing to employ SPS measures which do not have to be scientifically justified (as emergency measures are regarded as a 'qualified exemption'), the EU can impose inordinately strict measures without consequence.

It is evident that the SPS measures relating to CBS are more trade restrictive than necessary.⁴²⁸ The EU is also not susceptible to reasonable requests made by South Africa to

⁴²⁴ Trebilcock (n 52 above) 231.

⁴²⁵ See n 260 above.

⁴²⁶ Gebrehiwet, Ngqangweni & Kirsten (n 222 above) 7.

⁴²⁷ Lupien (n 261 above) 410.

⁴²⁸ Laurenza & Montanari (n 8 above) 206.

restrict the application of the SPS measures to areas which are actually susceptible to the risk of infection, i.e. areas where the EU's citrus orchards are located. The EU has also imposed measures on fruit destined for juicing, instead of opting to develop a process where the fruit would be immediately transported to the juicing facility. Clearly, the EU has not acted to minimise the negative trade effects of their SPS measures on the South African export industry.⁴²⁹ Two viable alternative less trade restrictive measures that will maintain the EU's appropriate level of protection have been identified and communicated to the EU.⁴³⁰ The EU has not altered its SPS measures accordingly.

Taking the above into consideration, it is in South Africa's interest to pursue the matter further. Thus far the bilateral consultations between the parties have failed and the EU's reluctance to respond to the scientific evidence or reasonable suggestions submitted by South Africa indicates that it would be ideal to have a third party involved. South Africa has already initiated a dispute resolution process under the IPPC. The IPPC dispute settlement process has never been made use of before and is only confined to decision making on the technical grounds of the dispute. If South Africa proceeds to request the Secretariat to compose an expert committee, the decision will not be binding. However, if there is still no resolution South Africa can always approach the WTO DSB.

There are several obstacles inherent to a developing country such as South Africa making use of the WTO DBS, such as the fact that it has no experience initiating disputes at the WTO panel.⁴³¹ Considerations such as time, money and South Africa's comparative lack of ability to exert economic pressure should also be taken into account. An alternative forum such as the IPPC expert committee may equalise the playing field between South Africa and the EU. The dispute will be reduced to the technical validity of the EU's emergency measures. South Africa will not require extensive knowledge about WTO law nor would it need to create institutional structures within its government to co-ordinate the WTO dispute resolution process.

The IPPC presents both South Africa and the EU with an opportunity for a more cost and time effective process. It may however fall short in some areas, considering that it cannot make decisions on questions of law. It may find that it is extremely unlikely for CBS to spread from imported South African citrus fruit, but it will not be able to find that the EU's SPS measures do not comply with the requirements of emergency SPS measures. The South

⁴²⁹ As above.

⁴³⁰ As above at 207.

⁴³¹ Anyiwe & Ekhaton (n 352 above) 136.

African government will need to decide whether it will be more logical to first attempt to resolve the dispute on a technical basis. If it concludes that they would prefer a binding decision that addresses questions of law and is legally enforceable, then they could directly refer the matter to the WTO DSB. There is also the option of entering into a Supplementary Agreement under the IPPC. This will however require the consent of the EU and the decision-making scope of the panel may not be as broad under the IPPC in comparison to the WTO panel.

5.2 Conclusion

Upon a closer consideration of the facts of the ongoing CBS dispute between South Africa and the EU, it is evident that South Africa's averments have legal merit. The measures have not been reviewed within a reasonable period of time and the EU has not attempted to find additional information in order to formulate permanent scientifically justifiable SPS measures. The EU's 'new' emergency measures are not new in essence, nor do they display a willingness on the part of the EU to engage with South Africa's suggestions. In the meantime, the South African citrus producing industry needs to incur inordinate costs to ensure that it has some access to the EU market.⁴³² South Africa needs to take steps to address this financial burden on its local industry because it is not economically feasible for it to continue incurring the relevant costs in the long term.⁴³³ Considering that the SPS measures have been employed since 2001 and South Africa has communicated its apprehension regarding the measures during its drafting phases, the time efficiency of the dispute should be prioritised.⁴³⁴

The European Commission identifies CBS as a risk to the economic prosperity of their local citrus producing market.⁴³⁵ The EU will have to demonstrate that there is a risk of CBS not only transferring from a South African host to its orchards but that it will be able to replicate in a sufficiently high quantity to affect the economic value of its fruit on the fresh market. Only in such an instance can the restrictive measures and the potential for the return of future import bans be scientifically justified.⁴³⁶

The EU is a member of both the WTO and by consequence the SPS Agreement. The SPS measures imposed by the EU must as such be in compliance with the SPS Agreement,

⁴³² See n 6 above.

⁴³³ See n 5 above.

⁴³⁴ As above.

⁴³⁵ See n 6 above.

⁴³⁶ As above.

and *inter alia* be based on scientific merit and determined in accordance with a risk assessment procedure. It cannot merely continue to impose emergency measures. South Africa does have a valid legal argument and the necessary grounds to further escalate the CBS dispute. South Africa has initiated a dispute settlement process under the IPPC. Formal consultations have already taken place and it now needs to decide whether it will continue with the process under the IPPC, or refer the matter elsewhere.

It is as of yet uncertain whether or not the IPPC expert committee will prove to be a suitable alternative forum to the WTO DSB. This dissertation has weighed up the benefits and shortcomings of both the WTO DSB and the IPPC expert committee as a forum for South Africa to present its case to. Although the CBS dispute bears the potential of being resolved on purely technical grounds, the non-binding nature of the decision may leave room for the dispute to be protracted even further. Furthermore, although the IPPC expert committee process will be more cost effective in theory, the IPPC expert committee has yet to be constituted to decide on an SPS dispute. The only way to establish the success of the IPPC expert committee process will be to participate in it in first hand. There is some risk involved – it may not be more cost effective, as further costs may need to be invoked in the event that the parties do not adhere to the non-binding decision it has reached and need to refer the matter to the WTO DSB.

5.3 Recommendations

The WTO DSB has been characterised as expensive and protracted. In Chapter 4 the specific challenges developing countries encounter when wishing to institute claims at the WTO DSB were clearly outlined. However, South Africa can build its knowledge of WTO law by participating in the process and it has a number of learned trade lawyers whose services it can enlist for purposes of this dispute. Furthermore, the financial burden placed on citrus farmers justifies the cost of escalating the matter to the WTO panel. Even if the South African government is not immediately inclined to refer the matter to the WTO DSB, it should not discredit the possibility of referring the matter there in the event that the IPPC dispute settlement process fails.

The economic strain this unresolved dispute has placed on South Africa's citrus producing industry demands to be addressed in a timely fashion. Citrus farms and all of the employees that participate in the citrus producing industry are suffering a loss of income while the problem remains unaddressed. There will likely be no claim for the restitution of

the economic loss suffered by the citrus farmers in the dispute settlement process, regardless of whether the IPPC expert committee or the WTO DSB entertains the matter. The damage to the South African economy cannot be repaired but further loss can be prevented if the South African government obtains an order declaring the SPS measures imposed by the EU invalid. Furthermore, the EU has demonstrated a lack of willingness to find a bilateral solution to the CBS dispute. It may not be amenable to adhering to a non-binding decision. However, the IPPC expert committee decision will prove to be of value in a WTO dispute, as the panel will rely on its recommendations. Therefore, there is merit in requesting the IPPC expert committee to hear this dispute. South Africa will however need to act to resolve this matter before the EU revises its emergency measures in 2019. It may be that the EU is not planning on implementing permanent SPS measures and thus evading the more extensive requirements of 'scientific justification', 'based on risk assessment' and 'not unnecessarily trade restrictive' encapsulated in the SPS Agreement, a course of action which will only perpetuate the negative impact on the South African economy.