

**PARTICULAR LEGAL ISSUES IN INTERNATIONAL TRADE: A CRITIQUE OF  
THE MULTILATERAL AGREEMENT ON AGRICULTURE FROM THE  
PERSPECTIVE OF SOUTH AFRICA AND BRICS**

**By**

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## DECLARATION

I hereby declare that ‘Particular legal issues in international trade: a critique of the multilateral Agreement on Agriculture from the perspective of South Africa and BRICS’ is my own work, and that all of the sources that I have used and quoted have been indicated and acknowledged by means of references.

*Aslam Moolla*

## **DEDICATION**

This thesis is dedicated to my parents. You have helped me become the person that I am today.

## **ACKNOWLEDGEMENT**

Thank you to my supervisor, Mrs. C E Stevens - your passion for excellence has helped me to remain focused, disciplined and determined throughout this year.

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# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND TO THE STUDY

International trade can be defined as the mutual exchange of goods and services between countries.<sup>1</sup> The benefits of international trade are well documented and include consumers gaining access to foreign goods and services, increased competition that stimulates demand and supply, and the promotion of foreign direct investment.<sup>2</sup> Despite these benefits, a number of countries impede the flow of international trade by imposing trade barriers. This is known as protectionism.<sup>3</sup> On the other hand, liberalisation refers to deregulation and a decrease in trade barriers.<sup>4</sup> There has been on-going debate on protectionism and liberalisation since the inception of the General Agreement on Tariffs and Trade (GATT) in 1948.<sup>5</sup>

This debate is even more important in international agricultural trade. On the one hand, countries have entered into the Agreement on Agriculture (AoA) with the purpose of liberalising international agricultural trade, whereas on the other, export subsidies, and high tariffs continue to act as forms of protectionism. This study critically analyses the main elements of the AoA and its impact on South Africa. This chapter provide a useful background and an overview of the structure of the thesis.

### 1.2 IMPORTANCE OF AGRICULTURE TO SOUTH AFRICA

The South African Constitution<sup>6</sup> promotes basic human values such as dignity, equality and freedom.<sup>7</sup> The Constitution also provides for ‘food security rights’.<sup>8</sup> It mentions food in three sections: section 27(1)(b) on the state’s obligation to achieve the progressive realisation of

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<sup>1</sup>Reem Heakal ‘What is international trade?’ available at <http://www.investopedia.com/articles/03/112503.asp>, accessed on 25 April 2014.

<sup>2</sup>Ibid.

<sup>3</sup>BM Hoekman & PC Mavroidis *Global Institutions: The World Trade Organisation Law, Economics, and Politics* (2007) 20.

<sup>4</sup>Ibid 20.

<sup>5</sup>Ibid 20.

<sup>6</sup>Constitution of the Republic of South Africa, 1996.

<sup>7</sup>South African Human Rights Commission ‘The Right to Food’ (2014) 5<sup>th</sup> Economic and Social Rights Report Series 2002/2003, 1.

<sup>8</sup> Ibid 1.



the right to access to sufficient food and water, section 28(1)(c) on a child's right to basic nutrition and section 35(2)(e) on a prisoner's right to adequate nutrition.<sup>9</sup>

With this background in mind, agriculture is an important contributor to the South African economy as it creates jobs and boosts incomes in rural communities.<sup>10</sup> The South African agricultural industry employs approximately 750 000 people<sup>11</sup> with a further 320 000 employed seasonally.<sup>12</sup> Furthermore, six million South Africans depend on subsistence agriculture.<sup>13</sup> According to Statistics South Africa, one in every two Rand spent by South African households goes towards housing and food.<sup>14</sup> Therefore, the South African agricultural industry promotes the basic food security rights enshrined in the Constitution.

### **1.3 GLOBAL SIGNIFICANCE OF AGRICULTURE**

Like South Africa, agricultural industries in other countries promote job creation and rural development. Food security has also taken a front seat in world affairs. Many countries are feeling the pressure to feed their growing populations. China is currently researching methods to produce its own food in urban areas. One proposal is to build skyscrapers known as 'farm scrapers'.<sup>15</sup> These are futuristic, tall urban buildings that provide space to residents to grow food crops.<sup>16</sup> This proposal demonstrates how significant agriculture is to the global economy.

Furthermore, many primary agricultural products can be processed into useful secondary products. For example, a primary product such as milk can be processed into a secondary product such as cheese. More importantly, maize, a primary food product, is being processed into an energy source, bio fuels. Therefore the impact of agricultural regulation is felt across different industries, affecting employment and international trade in those industries as well.

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<sup>9</sup> Ibid 1.

<sup>10</sup>Ministry for Agriculture and Land Affairs 'Agricultural policy in South Africa, A Discussion Document' (1998) available at <http://www.nda.agric.za/docs/policy/policy98.htm>, accessed on 24 April 2014.

<sup>11</sup>TRADE Research Niche Area 'Diagnostics of South Africa's Agricultural Trade Competitiveness' (2013) prepared by the Faculty of Economic and Management Sciences North-West University, 104.

<sup>12</sup>Centre for Rural Studies 'Briefing Paper: Agricultural Trade, Globalisation and Farm Workers' (2003), 2.

<sup>13</sup>Ibid 2.

<sup>14</sup>StatsSA 'What do South Africans spend their money on' available at <http://beta2.statssa.gov.za/?p=944>, accessed on 25 April 2014.

<sup>15</sup>IO9 'China's farm scrapers are high-rises that will generate their own food' available at <http://io9.com/5988573/chinas-farmscrapers-will-generate-their-own-food>, accessed on 25 April 2014.

<sup>16</sup>Ibid.

## 1.4 SOUTH AFRICA AS A GLOBAL AGRICULTURAL CONTRIBUTOR

In addition to providing food to millions of South Africans, the country's agricultural sector exports many products to other parts of the globe. South Africa's total agricultural exports increased from US\$3.2 billion in 1992 to US\$9.6 billion in 2011.<sup>17</sup> This demonstrates that exports provide valuable income to the South African agricultural industry.

Since the advent of democracy, South Africa's agricultural products have been exported to more destinations. From 1995 to 2011, the sector's export destinations increased from 14 to 78,<sup>18</sup> an increase of 64 in 16 years. Furthermore, annual growth in South Africa's agricultural sector has kept pace with global growth rates<sup>19</sup> with the country ranked the 32<sup>nd</sup> biggest global producer of agricultural products.<sup>20</sup> This demonstrates that the South Africa agricultural industry is a significant contributor to global trade.

## 1.5 AGRICULTURE AND THE WTO

The World Trade Organisation (WTO) is an international forum where member countries negotiate international trade rules and resolve trade problems with one another. The entire system of international trade is referred to as the 'multilateral trading system' (MTS).<sup>21</sup> This is a consensus based system, meaning that every member country at the WTO has to agree for a particular rule to be adopted. This ensures free and fair trade between member countries.<sup>22</sup>

South Africa's trade policy with regard to the agricultural sector is export-oriented.<sup>23</sup> Whilst this approach enhances access to foreign currency, it also binds the country to the rules of international trade because South Africa is a member of the WTO. South Africa's legal obligation to comply with international trade rules is significant due to the 'single undertaking' principle that underlies state commitments to the WTO. This principle forms

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<sup>17</sup>TRADE Research Niche Area (note 11 above) 28.

<sup>18</sup>Ibid 39.

<sup>19</sup>Ibid 28.

<sup>20</sup>Ibid 26.

<sup>21</sup>World Trade Organisation 'How the negotiations are organised' available at [www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm), accessed on 22 May 2014.

<sup>22</sup>Ibid.

<sup>23</sup>D.B Wilkins *et al* 'Animal Welfare: The Role of Non-Governmental Organizations' (2005) 24 (2) *Scientific and Technical Review* 625, 627.

part of the WTO process and refers to the fact that every item on the agenda must be negotiated and agreed to between WTO members as a package, as opposed to each item being separately negotiated and agreed.<sup>24</sup>

Since agriculture plays a key role in South Africa and across the globe, it is important to establish how the WTO regulates this sector. The WTO has recognised the significance of agriculture by establishing a separate agreement, the AoA.<sup>25</sup> The preamble to the AoA declares that the long-term objective of WTO members is ‘to establish a fair and market oriented agricultural trading system.’<sup>26</sup> However, historically, agriculture has been a thorny issue between developed and developing nations. This is possibly due to the complexity of agriculture negotiations at the WTO, with some member countries arguing that some areas of agriculture are over regulated, and others arguing that there is not sufficient regulation.<sup>27</sup>

## 1.6 PROBLEM STATEMENT

As noted above, the long-term objective of the AoA is ‘to establish a fair and market oriented agricultural trading system.’ Therefore, by implication, the Agreement aims to foster international agricultural trade and reduce current barriers.

This study critically analyses the core components of the AoA in order to understand its underlying concepts as well as the positive views and criticisms levelled against this Agreement. In order to contextualise the AoA, the study highlights the development of the AoA through the various WTO negotiations.

Although the AoA was a milestone in the history of the WTO some aspects of this Agreement have left a bad taste in member countries’ mouths. These include the way the Agreement deals with dumping agricultural products and its provisions on food aid to

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<sup>24</sup>World Trade Organisation (note 21 above).

<sup>25</sup>Agreement on Agriculture in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Marrakesh, 15 April 1994.

<sup>26</sup>Preamble to Agreement on Agriculture in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Marrakesh, 15 April 1994.

<sup>27</sup>M.G Desta ‘Legal Issues in International Agricultural Trade: The Evolution of the WTO Agreement on Agriculture from its Uruguay Round Origins to its Post-Hong Kong Directions’ (2006) *FAO Legal Papers Online* #55 available at <http://www.fao.org/legal/prs-ol/paper-e.htm>, accessed on 16 April 2014, 9.

developing countries. This study will also critically examine criticisms directed against developed countries for providing agricultural subsidies to domestic farmers.

Furthermore, it offers a critical analysis of the AoA's impact on South Africa's agricultural import and export policy. Finally, the thesis analyses the outcome of the Bali Conference and provides an indication of possible future developments for the AoA.

## **1.7 RESEARCH OBJECTIVES**

Five research objectives were formulated:

- 1.7.1 To critically reflect on the history and development of agricultural regulation within the International Trade Organisation, GATT and the WTO;
- 1.7.2 To critically examine the core components of the AoA;
- 1.7.3 To investigate and examine positive views and criticisms of the AoA;
- 1.7.4 To critically describe the extent to which the AoA has impacted agricultural trade in South Africa and its trade partners with a focus on BRICS<sup>28</sup>;
- 1.7.5 To analyse the Ninth Ministerial Conference in Bali with a view to determining the extent to which decisions taken at the Conference will affect the AoA.

## **1.8 STRUCTURE OF THE THESIS**

This thesis consists of six chapters:

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<sup>28</sup>BRICS is the acronym for the economic partnership between Brazil, Russia, India, China and South Africa. The acronym was developed by Goldman Sachs, who forecast that the first four developing countries will be major economies by the year 2050. This study submits that the BRICS alliance is of enormous significance to South Africa. The fact that South Africa was invited to join BRICS demonstrates the political stature the country has attained in the eyes of the international community and the South African economy's potential in the years to come. Investopedia defines 'BRICS' available at <http://www.investopedia.com/terms/b/brics.asp> accessed on 22 May 2014.

1.8.1 Chapter one presents the background to the study, the problem statement and the objectives.

1.8.2 Chapter two explores the history and development of the MTS, focusing on the development of global agricultural regulation through each of the various negotiation rounds of GATT and the WTO.

1.8.3 Chapter three explains and critically analyses the main elements of the AoA with an emphasis on market access, domestic support and export subsidies.

1.8.4 Chapter four studies the AoA in the context of the South African agricultural industry, and explores how this sector may be impacted by the country's relationship with BRICS.

1.8.5 Chapter five identifies the key decisions of the 2013 Bali Ministerial Conference, and critically analyses how the Conference impacted the AoA.

1.8.6 Chapter six concludes the thesis and offers recommendations based on the research findings.

## CHAPTER 2

### LEGAL HISTORY AND THE DEVELOPMENT OF INTERNATIONAL AGRICULTURAL TRADE WITHIN THE FRAMEWORK OF THE MULTILATERAL TRADE SYSTEM

#### 2.1 INTRODUCTION

The rivalry between developed and developing countries is more pronounced in agriculture than any other global industry.<sup>29</sup> It has been argued that developed countries have built powerful agricultural industries through years of domestic support and investment<sup>30</sup>, while developing countries such as India who now have the resources to invest in domestic agriculture are hampered by objections from developed countries.<sup>31</sup> As a result, agriculture negotiations have been and continue to be an extremely contentious issue in multilateral trade negotiations.

This chapter examines the various stages of development of the Multilateral Trade System (MTS), focusing on agricultural negotiations. It is divided into three sections:

- i) Section A introduces the MTS and its main institutions;
- ii) Section B presents a detailed discussion on the current principles that bind the MTS; and
- iii) Section C hones in on the agriculture negotiations during the various General Agreement on Tariffs and Trade (GATT) rounds and World Trade Organisation (WTO) Ministerial Conferences.

This chapter is useful in contextualising the formation of the Agreement on Agriculture (AoA). Furthermore, the identification and critical analysis of important events in respect of

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<sup>29</sup>World Trade Organisation ‘WTO negotiations: agriculture and developing countries’ available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm47\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm47_e.htm), accessed on 17 October 2014.

<sup>30</sup>Timothy Wise ‘Will the WTO fast-track trade at the expense of food security?’ available at <http://www.aljazeera.com/indepth/opinion/2014/07/wto-negotiations-food-security-20147237431402983.html>, accessed on 10 September 2014.

<sup>31</sup> Ibid.

the development of the AoA prepare the reader for the legal analysis of this Agreement in chapter 3.

## **2.2 SECTION A: INSTITUTIONS OF THE MULTILATERAL TRADE SYSTEM**

The MTS has been described as a political process for the complex negotiation of trade rules between member countries.<sup>32</sup> The idea of an MTS to govern trade originated with the USA; it later developed into the GATT and finally the WTO. The WTO regulates international trade by facilitating trade negotiations and encouraging the development of the least developed economies. From the USA's proposal of the International Trade Organisation (ITO) in 1945 to the WTO's Bali Ministerial Conference in 2013, the MTS has developed over 68 years. This section provides a brief historical account of the development of these institutions within the MTS. Details on GATT and WTO rounds follow in section C.

### **2.2.1 The International Trade Organisation (ITO)**

By 1945, the ravages of World War Two (WWII) had resulted in poor economic growth for many major economies. Governments used forms of protectionism to protect domestic industries from foreign competition.<sup>33</sup> This naturally caused a decrease in international trade and there were fears of a global recession.

The USA took the lead and proposed the formation of a trade organisation to regulate international trade. It referred to this proposed organisation as the 'International Trade Organisation' (ITO) which would stand alongside the remaining two Bretton Woods organisations- the International Monetary Fund (IMF) and the World Bank.<sup>34</sup> A committee was established in 1946 and met to work on a charter for the proposed organisation. Within two years, the Havana Charter was complete.

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<sup>32</sup>Chapter 2: The multilateral trade system available at [http://www.unc.edu/~toatley/poli140/Chapter\\_2.pdf](http://www.unc.edu/~toatley/poli140/Chapter_2.pdf) accessed on 17October 2014.

<sup>33</sup>Barkema *et al* 'Agriculture and the GATT: A Time for Change' (1989) Economic Review, 22.

<sup>34</sup>R Bhala '*International Trade Law: Theory and Practice*' (2001) pg 257-259.

However, after the formulation of the Charter, the ITO encountered major opposition, ironically from the USA<sup>35</sup> which objected to its formation on the grounds that it could not persuade its legislature to accept it.<sup>36</sup> It was later discovered that the reason why the USA legislature rejected the ITO was because of its interest in the GATT being negotiated in Geneva at the time.

Eight countries, including the USA, agreed to the GATT.<sup>37</sup> With the withdrawal of US support for the ITO, other nations followed. The ITO was scrapped and the GATT regulated international trade. However, all was not lost, as elements of the Havana Charter would later become part of the GATT.

### **2.2.2 The General Agreement on Tariffs and Trade (GATT)**

The failure of the ITO led to the development of an instrument that would regulate international trade for four decades.<sup>38</sup> The GATT came into being in 1948 and was driven by political bargaining at government and non-governmental level.<sup>39</sup> The preamble of the GATT stated that its purpose was the ‘substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis’.<sup>40</sup> Procedurally, members agreed on binding principles and that negotiations under the GATT should take place as a series of trade rounds where issues could be debated between member countries.<sup>41</sup>

The GATT also contained international trade rules that were agreed between signatory countries and was mainly known for its default tariffs that members could impose. These were useful to companies who intended doing business overseas as it helped them to calculate their cost of sales when accessing foreign markets.

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<sup>35</sup>D Drache ‘The Short but Significant Life of the International Trade Organization: Lessons for Our Time’ (2000) CSGR Working Paper No. 62/00 Centre for Canadian Studies, York University, 2.

<sup>36</sup>Ibid 2.

<sup>37</sup>The other countries were the United Kingdom, Canada, Australia, France, Belgium, the Netherlands, and Luxembourg. Available at [http://en.wikipedia.org/wiki/International\\_Trade\\_Organization](http://en.wikipedia.org/wiki/International_Trade_Organization) accessed on 2 June 2014; and D Drache ‘The Short but Significant Life of the International Trade Organization: Lessons for Our Time’ (2000) CSGR Working Paper No. 62/00 Centre for Canadian Studies, York University, 37.

<sup>38</sup>World Trade Organisation ‘The GATT years: from Havana to Marrakesh’ available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) accessed on 16 October 2014.

<sup>39</sup>Hoekman & Mavroidis (note 3 above) 20.

<sup>40</sup>World Trade Organisation (note 38 above).

<sup>41</sup>Ibid.



The historical development of the GATT demonstrates that agriculture was regulated differently from other industries. A possible reason could be the context and role of agriculture in the early GATT years, and how certain countries dealt with agriculture.<sup>42</sup>

For example, in 1933, the USA passed its Agricultural Adjustment Act which gave the government wide powers of control over the domestic agricultural industry. These included imposing quantitative restrictions, providing farm subsidies and increasing tariffs for imported agricultural products.<sup>43</sup> The objective of the Act was to promote a healthy domestic agricultural industry.

In 1957, the European Economic Community (EEC) adopted a Common Agricultural Policy (CAP).<sup>44</sup> This was similar to the USA Agricultural Adjustment Act. Farm incomes were ensured through subsidies and tariffs.<sup>45</sup> This meant that two of the world's largest economies at the time had domestic agricultural support programs in place. This placed agriculture in a politically delicate position which resulted in its special treatment. This study focuses on two main aspects of special treatment, i) agricultural subsidies and ii) agricultural quantitative restrictions.<sup>46</sup>

### **i) Agricultural Subsidies**

While GATT's general rules prohibited export subsidies for other industries, in the original wording of the GATT, agricultural subsidies were permitted as long as parties reported them. Article XVI stated that 'any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory,[must be reported] to other parties'.<sup>47</sup>

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<sup>42</sup>Sharma 'Agriculture in the GATT: A Historical Account' available at <http://www.fao.org/docrep/003/x7352e/x7352e04.htm> accessed on 2 June 2014.

<sup>43</sup>Ibid.

<sup>44</sup>Barkema *et al* (note 33 above) 23.

<sup>45</sup>Sharma (note 42 above).

<sup>46</sup>Ibid.

<sup>47</sup>Ibid.

In 1955 the original wording was extended to the following:

‘Contracting parties should seek to avoid the use of export subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of the primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any such special factors which may have affected or may be affecting such trade in the product’<sup>48</sup>(emphasis added).

This increased the complexity of this issue as certain terms were not defined.<sup>49</sup> While terms such as ‘equitable share of world export trade’ and ‘representative base period’ were discussed and negotiated during GATT trade rounds<sup>50</sup>, attempts to clarify their meaning were unsuccessful.<sup>51</sup> This further entrenched the special treatment afforded to agriculture within the GATT framework.<sup>52</sup>

## ii) Quantitative Restrictions

Article XI:2 of the GATT allowed for certain exceptions<sup>53</sup> that were effectively import restrictions that a government could impose in order to restrict foreign agricultural products that competed with domestic agricultural products.<sup>54</sup> In essence Article XI made it legitimate for governments to apply strict import restrictions without necessarily restricting domestic industry. This was a clear violation of the principle we now understand as ‘national treatment’.

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<sup>48</sup>Ibid.

<sup>49</sup>Ibid.

<sup>50</sup>Sharma & Pearce ‘Export Subsidies’ available at <http://www.fao.org/docrep/003/x7353e/x7353e03.htm> accessed on 3 March 2015.

<sup>51</sup>Ibid.

<sup>52</sup>Ibid.

<sup>53</sup>‘Import restrictions can be applied on any agricultural or fishery product imported in any form necessary to the enforcement of governmental measures that operate to: restrict the production or marketing of the like domestic product or of a domestic product that is a close substitute; remove a temporary surplus of a like domestic product by making the surplus available to groups of domestic consumers free or at reduced prices; restrict the quantities produced of any animal product that is directly dependent wholly or mainly on the imported product.’ More available at Sharma ‘Agriculture in the GATT: A Historical Account’ available at <http://www.fao.org/docrep/003/x7352e/x7352e04.htm> accessed on 2 June 2014.

<sup>54</sup>Barkema *et al* (note 33 above) 23.

Barkema stated the position succinctly: under the GATT, most industries' domestic policy had to conform to international trade law, but with agriculture, international trade law had to conform to a developed nation's domestic policy, specifically the USA domestic policy on agriculture.<sup>55</sup>

In summary, GATT provided for agricultural subsidies and strict border control. This hampered the liberalisation of agricultural trade. GATT made it possible for developed countries to fully support their agricultural industries, limit the quantity of imported agricultural products and to export their agricultural surplus to developing countries with little regard for their domestic industries.<sup>56</sup> It is thus not surprising that the AoA addresses these three major areas: subsidies, domestic support and market access.

### **2.2.3 The World Trade Organisation (WTO)**

In April 1994, 123 countries met in Marrakesh and signed an agreement which changed the face of international trade.<sup>57</sup> The WTO officially came into existence on 1 January 1995 and is the successor to and incorporates the GATT.<sup>58</sup> With the introduction of the WTO, the original GATT 1947 was not legally binding as most of its provisions and legal instruments were transferred to GATT 1994.<sup>59</sup> Further GATT 1994 is set out in Annex 1A of the WTO Agreement.<sup>60</sup> The general purpose of the WTO is to 'facilitate the implementation, administration and operation as well as to further the objectives of the WTO agreements'<sup>61, 62</sup>.

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<sup>55</sup> Ibid.

<sup>56</sup> Sharma (note 42 above).

<sup>57</sup> World Trade Organisation 'The Uruguay Round' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm), accessed on 16 October 2014.

<sup>58</sup> Ibid.

<sup>59</sup> H Löberbauer 'Questions on International Economic Law and Institutions' available at <http://www.grin.com/en/e-book/58631/questions-on-international-economic-law-and-institutions>, accessed on 17 October 2014.

<sup>60</sup> Ibid.

<sup>61</sup> WTO members bind themselves to three kinds of agreements: i) Single multilateral agreements which bind all members upon entry to the WTO. These agreements are thus compulsory; ii) Plurilateral agreements that bind only those members that accede to corresponding WTO legal instruments. These are thus optional; and iii) Bilateral agreements that bind those members who voluntarily enter into trade relationships with each other. These are thus also optional.

<sup>62</sup> Article III of Marrakesh Agreement.

The WTO consists *inter alia* of the Ministerial Committee and the General Council.<sup>63</sup> The Ministerial Committee consists of representatives of all WTO members and meets every two years. It is considered the organisation's main body as it makes all decisions on trade related matters.<sup>64</sup> On the other hand, the General Council is policy orientated and includes the dispute settlement body and trade monitoring mechanisms.<sup>65</sup> The main functions of the WTO include: implementing multilateral trade agreements, providing a forum for trade negotiations between its members, administering trade disputes and finally co-operation with the World Bank and the IMF on fiscal policy.<sup>66</sup>

At this point it is important to note that individuals and companies do not have jurisdiction before the WTO. For example a South African citizen or company cannot appear before the WTO and make submissions. Only government ministers from member countries may participate in WTO negotiations and disputes.<sup>67</sup> Thus citizens and companies must lobby their government to voice their issues at WTO level.<sup>68</sup>

The WTO also served as a fresh alternative to a *la carte* system. Under the GATT, there were several different instruments, with different parties linked to each agreement.<sup>69</sup> The problem was that each agreement provided its own dispute resolution mechanism with a different adjudication body.<sup>70</sup> The WTO introduced the single undertaking principle<sup>71</sup> whereby all members accept the same rights and obligations and a single dispute resolution mechanism.<sup>72</sup>

In addition to the creation of the WTO, the Uruguay Round facilitated the AoA which came into effect in January 1995.<sup>73</sup> The preamble to the AoA states that its long-term objective is to

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<sup>63</sup>Hoekman & Mavroidis (note 3 above) 20.

<sup>64</sup>Ibid 25.

<sup>65</sup>Ibid 25.

<sup>66</sup>Ibid 20.

<sup>67</sup>Ibid 20.

<sup>68</sup>Ibid 25.

<sup>69</sup>Centre For Studies and Research In International Law and International Relations 'The World Trade Organization' (1997) 60.

<sup>70</sup>Ibid 60.

<sup>71</sup>Article II of Marrakesh Agreement: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members.'

<sup>72</sup>Centre For Studies and Research In International Law and International Relations (note 69 above) 61.

<sup>73</sup>WTO Secretariat 'Booklet on Agriculture' in the World Trade Organisations' *WTO Agreements Series* (2003) 3.

establish a fair, market-oriented agricultural trading system.<sup>74</sup> Chapter three of this thesis presents a comprehensive legal analysis of main areas of the AoA.

## **2.3 SECTION B: PRINCIPLES OF THE MULTILATERAL TRADE SYSTEM**

Five principles underlie the MTS: a) non-discrimination, b) reciprocity, c) enforceable commitments, d) transparency, and e) safety valves. Each principle is analysed below.

### **a) Non-discrimination**

As noted in chapter one, protectionism in international trade means that a country has policies in place that promote the production and consumption of domestic goods over foreign goods.<sup>75</sup> The non-discrimination principle is broken up into two elements: the most-favoured-nation (MFN) rule and the national treatment (NT) principle. Both ensure that discrimination does not impact a member country's market access.

The MFN rule is part of the WTO policy on non-discrimination and is embedded in article I of GATT.<sup>76</sup> This rule essentially states that all foreign products should be treated the same at a country's borders. In other words, every foreign product should be treated equally by a WTO member. For example, if South Africa were to raise tariffs against Ireland for no particular reason, it would have to raise tariffs for its other trade partners across the board. Therefore any condition imposed by a country must be imposed on an MFN basis, i.e. any advantage or disadvantage will be immediately and unconditionally extended to all WTO members.<sup>77</sup>

However, the MFN rule is not absolute. Exceptions include free trade areas, customs unions, preferential treatment of developing countries and the WTO non-application clause.<sup>78</sup> A further exception is the use of an anti-dumping tariff by a WTO member.<sup>79</sup>

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<sup>74</sup>Ibid 3.

<sup>75</sup>Hoekman & Mavroidis (note 3 above) 16.

<sup>76</sup>See also Article III, Article IV and Article V.

<sup>77</sup>Hoekman & Mavroidis (note 3 above) 34.

<sup>78</sup>Ibid 16.

<sup>79</sup>Ibid 49.

The NT principle is embedded in article III of GATT. This rule essentially states that once a foreign product has satisfied a country's border requirements, it should be treated no less favourably than domestic products.<sup>80</sup> In other words, foreign products and domestic products should be treated equally within a WTO member country.<sup>81</sup> However, two policies are specifically exempt from NT obligations, i) subsidies- government schemes that grant benefits to specific entities and ii) government procurement- government entities purchasing goods with no intention of reselling them.<sup>82</sup>

This study is of the opinion that South Africa's black economic empowerment (BEE) legislation may violate the NT principle as it awards businesses points for purchasing local goods over foreign goods.<sup>83</sup> These are used to rate tender applications and can attract various tax incentives. The effect of BEE legislation is that foreign goods are discriminated against within South Africa's borders.

#### **b) Reciprocity**

The principle of reciprocity is part of WTO negotiation practice. Reciprocity can be defined as 'the practice of exchanging things with others for mutual benefit, especially privileges granted by one country or organization to another'.<sup>84</sup> In other words reciprocity represents the *quid pro quo* in WTO negotiations.<sup>85</sup> For example, if Malawi extends favourable trade terms on cattle to South Africa, the principle of reciprocity ensures that South Africa will offer favourable trade terms on a product that Malawi imports from South Africa. Therefore reciprocity ensures that every country has an opportunity to gain from trade negotiations at the WTO.

#### **c) Enforceable Commitments**

The MTS comprises member countries that have committed themselves to the various instruments regulating international trade. These aim to promote fairness and equity in

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<sup>80</sup>Ibid 49.

<sup>81</sup>Ibid 16.

<sup>82</sup>Ibid 39.

<sup>83</sup>The Broad-Based Black Economic Empowerment Amendment Act No. 46 of 2013.

<sup>84</sup>Oxford Dictionary 'Reciprocity' available at <http://www.oxforddictionaries.com/definition/english/reciprocity>, accessed on 7 June 2014.

<sup>85</sup>Hoekman & Mavroidis (note 3 above) 17.

international trade. If a country dishonours its commitments, the system must ensure that fairness and equity are restored. It is on the basis of this principle, that the WTO has established a dispute settlement procedure. This reinforces the organisation's credibility in regulating international trade.

As an example, if South Africa identifies actions or policies adopted by Zimbabwe that have the effect of undermining Zimbabwe's commitments under the WTO, South Africa must first notify the government of Zimbabwe and request that the policy or action be rectified.<sup>86</sup> Should Zimbabwe fail to address this request, South Africa may use the WTO dispute settlement procedure. An independent panel will be appointed and both parties will have the opportunity to state their case. As noted above, only governments have jurisdiction to appear before the WTO. Therefore private parties would have to call upon their governments to intervene in international trade related disputes.

In summary, the principle of enforceable commitments ensures the legitimacy and credibility of the WTO as the main body governing international trade rules and disputes.

#### **d) Transparency**

Transparency has been defined as the 'degree to which trade policies and practices, and the process by which they are established, are open and predictable'.<sup>87</sup> The principle of transparency is part of the WTO's function to promote fair trade. Companies and individuals can make informed decisions on whether or not to take advantage of a business opportunity when they have access to a member country's trade regulations, administrative decisions, and trade policies. The WTO has reinforced the principle of transparency by making it a legal obligation.<sup>88</sup>

The WTO also prepares periodic country-specific reports (Trade Policy Reviews) in order to promote transparency. This benefits global trade as it prevents member countries from

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<sup>86</sup>Ibid 18.

<sup>87</sup>World Trade Organisation 'Transparency' available at [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm), accessed on 16 October 2014.

<sup>88</sup> This is contained in Article X of GATT.

circumventing their commitments under the WTO. Transparency is also useful in removing uncertainty regarding foreign trade policy.

#### e) Safety Valves

The final principle of the MTS is safety valves.<sup>89</sup> The WTO appreciates that in certain situations governments may need to take action to restrict international trade. Hoekman identified three types of situations when this might occur:

- Situations where trade measures are taken to attain non-economic objectives<sup>90</sup>;
- Situations aimed at ensuring fair competition<sup>91</sup>; and
- Situations where intervention is necessary for economic reasons<sup>92</sup>.

In summary, by being a WTO member, each member country agrees to the following set of principles:

- i) To avoid discriminating against foreign products at its borders;
- ii) To avoid discriminating against foreign products within its borders;
- iii) To use the principle of reciprocity in trade negotiations;
- iv) To abide by its commitments to the WTO;
- v) To publish all laws including case decisions that will generally affect trade as a transparency measure; and
- vi) To take measures, where necessary, to protect its domestic industries.

## 2.4 SECTION C: AGRICULTURE NEGOTIATIONS DURING THE VARIOUS GATT ROUNDS AND WTO MINISTERIAL CONFERENCES

The Havana Charter focussed primarily on labour law rather than international trade law. Even more unfortunately, the charter contained no substantial discussion on agriculture.

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<sup>89</sup>Hoekman & Mavroidis (note 3 above) 19.

<sup>90</sup>Includes measures to protect public health or national security and to protect industries that have been seriously injured by competition from imports.

<sup>91</sup>Includes the right to impose countervailing duties on imports that have been subsidised and antidumping duties on imports that have been dumped (sold at a price below that charged in the home market).

<sup>92</sup>Includes provisions that allow action to be taken in cases of serious balance of payments difficulties or if a government desires to support an infant industry.



Agriculture was therefore left to the domain of domestic policy. This section explores the negotiations on agriculture under the GATT through the various rounds, and thereafter considers the negotiations on agriculture under the WTO.

#### **2.4.1 Negotiations on Agriculture under the GATT**

With a membership of 95 countries in 1989, the GATT was a force to be reckoned with.<sup>93</sup> It contained fundamental rules on international trade and a dispute settlement mechanism to enforce its rules. However, the GATT's failure to address trade distorting practices negatively impacted agriculture.<sup>94</sup>

For example, Article XI of the GATT allowed governments to restrict foreign products that competed with domestic products. This resulted in governments using tariffs and quotas to restrict the quantity of foreign goods. In addition, Article XVI of the GATT allowed governments to provide subsidies to their farmers. This resulted in trade imbalances where subsidising nations had an unfair advantage over those that could not afford to subsidise their farmers. Therefore despite GATT's large membership, it failed to effectively regulate agriculture in both developed and developing nations.

The objective of the GATT was to reduce trade barriers and improve the conditions of international trade.<sup>95</sup> In order to achieve this, it provided for negotiating rounds where members could share their views on trade liberalisation. There were nine rounds of trade negotiations.<sup>96</sup>

Having introduced the GATT, this section now turns to negotiations on agriculture within the GATT framework. It is important to note that during the first three negotiation rounds, the focus was on liberalising the manufacturing industry.<sup>97</sup> This meant that agriculture was largely left to domestic regulation.

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<sup>93</sup>Barkema *et al* (note 33 above) 22.

<sup>94</sup>Ibid 22.

<sup>95</sup>Sharma (note 42 above).

<sup>96</sup>World Trade Organisation 'GATT bilateral negotiating material by Round' available at [http://www.wto.org/english/docs\\_e/gattbilaterals\\_e/indexbyround\\_e.htm](http://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm), accessed on 17 October 2014.

<sup>97</sup> These negotiation rounds took place in France, England, and Switzerland.

### **Geneva Round, 1947**

This first round of GATT multilateral trade negotiations took place in Geneva and began in April 1947.<sup>98</sup> In addition to the signing of the GATT 1947, negotiations at this round centred on the reduction of tariffs through the principle of the Supplier Rule.<sup>99</sup> This states that concessions may be granted if a member country that supplies the largest part of the product makes a request for a tariff reduction.<sup>100</sup> At the end of the round, a total of 45 000 concessions had been granted.

### **Annecy Round, 1949**

This second round of GATT multilateral trade negotiations took place in Annecy<sup>101</sup> and began in April 1949.<sup>102</sup> In addition to tariff reductions, this round facilitated the accession of new member countries.

### **Torquay Round, 1950**

This third round of GATT multilateral trade negotiations took place in Torquay<sup>103</sup>.<sup>104</sup> A total of 38 member countries participated and over 8 700 tariff concessions were approved.<sup>105</sup>

### **Geneva Round, 1956 to 1959**

This fourth round of GATT multilateral trade negotiations took place in Geneva.<sup>106</sup> It is estimated that \$2.5 billion worth of concessions were approved under the GATT at this round.<sup>107</sup> An important event during this round was the formation of the Common

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<sup>98</sup>World Trade Organisation (note 96 above).

<sup>99</sup>Ibid.

<sup>100</sup>Rushantha Chetty *A Critical Appraisal of the Role of Aid for Trade in the Achievement of a Global Partnership for Development in respect of Kenya and Tanzania* (Masters in Business Law Thesis, University of KwaZulu-Natal, 2013) 21.

<sup>101</sup> France.

<sup>102</sup>The World Trade Review: 2nd Round (Annecy Tariff Conference, 1949) available at <http://worldtradereview.com/webpage.asp?wID=433> accessed on 3 March 2015.

<sup>103</sup> England.

<sup>104</sup>World Trade Organisation 'The Multilateral Trading System: 50 Years of Achievement' available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min98\\_e/slide\\_e/slide007.htm](https://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/slide007.htm), accessed on 3 March 2015.

<sup>105</sup>Ibid 21.

<sup>106</sup>Ibid 21.

<sup>107</sup>Ibid 21.

Agricultural Policy (CAP) by the European Economic Community (EEC) in 1957. The CAP's objective was to protect the EEC's domestic agricultural industry through the use of tariffs and promote its agricultural products through the use of farm subsidies.<sup>108</sup>

### **Dillon Round, 1960 to 1962**

This fifth round of GATT multilateral trade negotiations also took place in Geneva and began in September 1960.<sup>109</sup> This round is known as the Dillon round because Mr Douglas Dillon, former US Treasury Secretary, proposed its formation.<sup>110</sup> An estimated \$4.9 billion worth of concessions were approved under the GATT at this round.<sup>111</sup>

During the Dillon Round, the USA argued for the disbandment of the EEC's CAP, as it claimed that the policy fell short of the rules agreed upon in GATT.<sup>112</sup> Eventually, however, the USA accepted the policy.

### **Kennedy Round, 1963 to 1967**

This sixth round of GATT multilateral trade negotiations took place in Geneva and began in May 1963.<sup>113</sup> This round is named after former US President, John F Kennedy.<sup>114</sup> It followed the passing of the USA Trade Expansion Act of 1962 which gave the government the power to negotiate international trade rules. During the Kennedy Round progress was made in reducing tariffs in general areas, although agricultural tariffs and farm subsidies were ignored.<sup>115</sup>

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<sup>108</sup>Sharma (note 42 above).

<sup>109</sup>World Trade Organisation 'The Multilateral Trading System: 50 Years of Achievement' available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min98\\_e/slide\\_e/slide008.htm](https://www.wto.org/english/thewto_e/minist_e/min98_e/slide_e/slide008.htm) accessed on 3 March 2015.

<sup>110</sup>Ibid 21.

<sup>111</sup>Ibid 21.

<sup>112</sup>Sharma (note 42 above).

<sup>113</sup>Chetty (note 100 above) 21.

<sup>114</sup>Ibid 21.

<sup>115</sup>Sharma (note 42 above).

## **Tokyo Round, 1973 to 1979**

This seventh round of GATT multilateral trade negotiations took place in Tokyo and began in September 1973.<sup>116</sup> A total of 102 member countries participated and over 8 700 tariff concessions were approved under the GATT.<sup>117</sup> During the Tokyo Round agriculture received unprecedented attention. For the first time, members agreed that agriculture should receive equal treatment.<sup>118</sup> Furthermore, the USA proposed a set of agricultural trade reforms to convert non-tariff barriers to tariff equivalents.<sup>119</sup> The EU argued against such major trade reforms in agriculture to defend its CAP. In the end, the EU won a procedural vote. This meant that the CAP was safe until the next round of GATT negotiations.

## **Uruguay Round, 1986 to 1994**

This eighth round of GATT multilateral trade negotiations took place in various cities due to the length and breadth of negotiations. It began in Uruguay in September 1986, and continued in Geneva, Brussels, Washington and Tokyo.<sup>120</sup> As a result of its long lifespan it is not possible to cover every detail of the agricultural negotiations during this round. This study focuses on the five major developments that changed the history of international agricultural regulation: i) the Punta del Este Declaration, ii) the main agricultural negotiators during the round, iii) the Dunkel Draft, iv) the Blair House Accord, and v) the formation of the AoA.

### **i) The Punta del Este Declaration**

During the 1980s the world experienced rapid fluctuations in food prices. This put pressure on countries to address agricultural trade issues. The Punta del Este Ministerial Declaration in 1986 reflected this urgency when agriculture was put on the negotiation agenda for the Uruguay Round. An important issue was the impact of domestic agricultural policies as studies had claimed they had a significant impact on international agricultural trade.<sup>121</sup>

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<sup>116</sup>Chetty (note 100 above) 21.

<sup>117</sup>Ibid 21.

<sup>118</sup>Sharma (note 42 above).

<sup>119</sup>A process referred to as 'tariffication'. Sharma (note 42 above)..

<sup>120</sup>Chetty (note 100 above) 21.

<sup>121</sup>Sharma (note 42 above).

**ii) The main agricultural negotiators during the round**

During the early GATT years, the main agricultural negotiators were the USA and the EU. As discussed above, these two powers had significant domestic agricultural programs in place and were wary of trade reforms. During the Uruguay Round, the number of agricultural negotiators increased. The list included the USA, the EU, the Cairns Group, Japan, and the Republic of Korea.<sup>122</sup>

The US again argued for greater agricultural reform during the Uruguay Round with the EU opposing this.<sup>123</sup> The EU argued that GATT should be more compatible with its CAP. It also voiced concern over wholesale agricultural reform, and campaigned for reform on a commodity by commodity basis.<sup>124</sup>

The Cairns Group's arguments were similar to those of the USA. The group argued for improved market access to developed countries and the reduction of domestic support programs.

The Japanese and Koreans, who had strong farmer support programs opposed the Cairns Group and the USA's proposals, and took a position similar to that of the EU. Rice was an important agricultural commodity for Japan and Korea and they sought to protect their domestic industries from harsh foreign competition.

On the other hand, the developing world hoped for agricultural reform that would offer them improved market access. Developing countries argued for special and differential treatment, noting that agriculture was the core of their economic development, and that new international rules should not impose excessive demands that would inhibit economic growth.<sup>125</sup>

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<sup>122</sup>Ibid.

<sup>123</sup>Ibid.

<sup>124</sup>Ibid.

<sup>125</sup>Ibid.

### iii) **Dunkel Draft**

Following the launch of the Uruguay Round in 1986, the next important breakthrough was the 1988 mid-term review in Montreal. The review revealed that parties were deadlocked on agriculture reforms. However the deadlock was finally broken in April 1989 by the Geneva Accord. This introduced a number of short term measures, including a freeze on domestic support, export subsidies and border protection.

Due to its commitment to the CAP, the EU opposed reform in these three key areas, particularly export subsidies. Negotiations nonetheless proceeded in the hope that an agreement could be reached by December 1990. This deadline came and went as the EU once again rejected the draft agreement.<sup>126</sup> This demonstrates the complexity of MTS negotiations.

Finally, in 1991 all parties agreed to liberalise the three main areas of international agricultural trade. With this common vision in mind, the next goal was to establish the level of specific concessions that each country would make. This required further negotiation and two years passed before any agreement was reached.<sup>127</sup>

In 1991, the Dunkel Draft was finally produced, with the expectation of concluding the Uruguay Round. This included quantitative measures with respect to concessions in each of the three major agricultural areas. Unfortunately within three days, the EU rejected the Dunkel Draft claiming that it should be 're-negotiated'.<sup>128</sup> No specific reasons were given. The following year, the EU unexpectedly revised its CAP to bring it closer to what was negotiated in the Dunkel Draft. This led to the development of the Blair House Accord.

### iv) **Blair House Accord**

Once the EU had reformed its CAP, the USA sought bilateral negotiations with the EU in the hope that all three major areas could be successfully negotiated. This led to the development of the Blair House Accord<sup>129</sup>. The primary objective of this Accord was to amend the Dunkel Draft.

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<sup>126</sup>Ibid.

<sup>127</sup>Ibid.

<sup>128</sup>Ibid.

<sup>129</sup>Ibid.

These amendments, which are now in the Final Agreement, included the following:

- ‘the volume of subsidized exports be reduced to 21 percent from the original proposal of 24 per cent;
- the base period used for establishing the baseline from which export subsidies would be cut was made more flexible, and had the effect of initially raising the level of permitted export subsidies;
- direct income payments made under production limiting programmes such as EU's scheme under the reformed CAP and the USA's deficiency payments were made exempt from domestic support reduction commitments; and
- commitments to reduce domestic support on a product-by-product basis were replaced by a commitment to reduce overall support to the agricultural sector.’<sup>130</sup>

#### **v) Formation of the Agreement on Agriculture**

The Blair House Accord facilitated the eventual conclusion of the Uruguay Round in 1993 with all parties reaching agreement. The AoA became an annexure to the main agreement establishing the WTO. After 46 years, agriculture had its first taste of trade liberalisation. However, this was simply a ‘taste’ as the Agreement still allowed for the use of domestic and export subsidies.

The formation of the WTO and its AoA in 1995 led to many changes in agriculture regulation. The following section discusses the history and development of international agriculture regulation under the WTO.

#### **2.4.2 Negotiations on Agriculture under the WTO**

Article 20 of the AoA<sup>131</sup> is the first point to consider in discussing the role of agriculture negotiations under the WTO. It is important because it appreciates that agricultural trade

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<sup>130</sup>Ibid.

<sup>131</sup>Article 20: Continuation of the Reform Process: 1- Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:(a) the experience to that date from implementing the reduction commitments;(b) the effects of the reduction commitments on world trade in agriculture;(c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and (d) what further commitments are necessary to achieve the above mentioned long-term objectives.’

liberalisation is an on-going process that enables continued negotiation in order to reform this sector.

### **Singapore WTO Ministerial Conference, 1996**

The WTO scheduled the first Ministerial Conference in Singapore in 1996.<sup>132</sup> Four issues were highlighted: i) government procurement, ii) trade facilitation, iii) trade and investment and iv) trade and competition.<sup>133</sup> Together these are referred to as the ‘Singapore Issues’.<sup>134</sup> During trade negotiations, developing countries argued that the Singapore Issues favoured developed countries.<sup>135</sup> This led to the collapse of the Seattle Ministerial Conference in 1999.

### **Seattle WTO Ministerial Conference, 1999**

As discussed above, the Singapore Issues led to the collapse of the Seattle Ministerial Conference in 1999.<sup>136</sup>

### **GATT Doha Round, 2001**

During January 2000 the WTO appointed its Agriculture Committee to head up the Doha Round of trade reform.<sup>137</sup> The first agriculture meeting under the WTO took place on 23 and 24 March, 2000. The Committee received 45 agriculture proposals from interested countries. These reflected each country’s position on issues identified in earlier negotiations. Once the proposals were received, further negotiations took place to find common ground between the parties.

The 2001 Ministerial Conference took place in Doha, Qatar. The AoA has identified agricultural reforms in three main areas: i) to improve market access to developed countries,

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<sup>132</sup>World Trade Organisation ‘The Doha Round’ available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm#development](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development), accessed on 17 October 2014.

<sup>133</sup>Chetty (note 100 above) 21.

<sup>134</sup>World Trade Organisation (note 132 above)

<sup>135</sup>Chetty (note 100 above) 25.

<sup>136</sup> Ibid.

<sup>137</sup>Mihaela-Daniela Tancu *US’ and EU’s Agricultural Policies in the Context of GATT/WTO* (Post-Doctoral Thesis, University of Aarhus, 2010) 34.



ii) to reduce domestic support and iii) to reduce farm subsidies. The Doha negotiations have therefore centred on these areas of agricultural reform.<sup>138</sup> This round is yet to be completed.

It should be noted that during the earlier Uruguay Round, the USA, EU and the Cairns Group were the main parties in agriculture negotiations. This changed during the Doha Round. There was a political ‘revival’ within the WTO as more developing countries took the initiative to participate in agriculture negotiations. As Tancu notes ‘developing countries are well organized; they know what they need and what to ask for in exchange of their support in certain areas’.<sup>139</sup>

### **Cancun WTO Ministerial Conference, 2003**

At the Cancun Conference in 2005, some member countries formed partnerships to strengthen their position in the agriculture negotiations. The EU and the USA collaborated while other members chose to make their own submissions.<sup>140</sup> The immediate impact of this partnership was that, as WTO spokesperson, Keith Rockwell noted, it ‘galvanized the process in a way that we have not seen in three-and-a-half years of agriculture negotiations’.<sup>141</sup> Indeed, this partnership was reminiscent of the Blair House Accord during the Uruguay Round of negotiations.

This prompted other WTO members to form their own coalitions. Brazil, India, China and 20 other developing countries came together, to strengthen their proposals on reducing export subsidies and increasing market access. This group was referred to as the ‘G20 countries’ and they submitted joint proposals.<sup>142</sup>

Despite the new draft declaration known as the ‘Derbez text’, the Cancun negotiations did not yield success in terms of agricultural liberalisation.<sup>143</sup> On the contrary, countries acknowledged that the Cancun Ministerial Conference resulted in a deadlock. This was not the first time this had happened during multilateral negotiations and will probably not be the

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<sup>138</sup>Ibid 34.

<sup>139</sup>Ibid 34.

<sup>140</sup>Ibid 34.

<sup>141</sup>Desta (note 27 above) 7.

<sup>142</sup>Ibid 7.

<sup>143</sup>Tancu (note 137 above) 35.

last.<sup>144</sup> The Uruguay Round also reached a deadlock, and this was the same round that in the end produced the AoA.<sup>145</sup> Therefore it could be argued that deadlocks are a typical consequence of the WTO negotiation process that are often broken with time and further negotiations.

True to form, the Cancun deadlock broke in July 2004. The parties approved a package of agreements that would be used to establish the modalities in agriculture.<sup>146</sup> This was referred to as the ‘July package’<sup>147</sup> while the official WTO document called it the ‘August Framework’ as it was ‘promulgated’ by the WTO in August 2004.<sup>148</sup> The August Framework contained the Modalities in Agriculture, and established when the next Ministerial Conference would take place.

### **Hong Kong WTO Ministerial Conference, 2005**

At the subsequent Ministerial Conference held in Hong Kong in 2005, members decided that the next goal was to agree on formulas that would determine the scale of reduction in agricultural tariffs and on farm subsidies.<sup>149</sup> However members could not reach agreement.

A deadline to complete negotiations on agriculture was set for January 2005. Due to the consensus-building style of WTO negotiations, deadlines are seldom met. This was the case for agriculture, as member countries could not agree and a new deadline was set.

### **Negotiations from 2006 to 2008**

In July 2006 another deadlock was reached. The negotiators did not even manage to produce a draft.<sup>150</sup> Members attempted to break the deadlock in July 2007.<sup>151</sup> Chairperson Falconer presented a revised draft on the modalities.<sup>152</sup> Some member countries believed that this draft

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<sup>144</sup>Ibid 35.

<sup>145</sup>Ibid 35.

<sup>146</sup>Ibid 35.

<sup>147</sup>Ibid 35.

<sup>148</sup>Ibid 35.

<sup>149</sup>Ibid 36.

<sup>150</sup>Ibid 37.

<sup>151</sup>Ibid 38.

<sup>152</sup>Ibid 38.

did not reflect their interests.<sup>153</sup> As a result, the Chairperson announced a three-week schedule of intensive negotiations in order to iron out any differences and to at least produce a draft for consideration.<sup>154</sup> A revised draft on modalities was eventually produced that was the result of a series of meetings in Geneva. This is known as the ‘July 2008 Package’.<sup>155</sup>

During 2008, the major agricultural reports centred on the stalemate between the USA and India on the use of the Special Safeguard Mechanism on agriculture.<sup>156</sup> This Mechanism essentially allows countries to raise tariffs in response to surges in imported agricultural products. India sought to protect its local industry by proposing the unlimited use of the Special Safeguard Mechanism. However, the USA was concerned that India’s proposal might result in increased tariffs beyond the levels agreed in Uruguay.

The Chairman of the Committee on Agriculture noted the following reasons for this stalemate:

‘It is perhaps worth underlining that such differences were not some purely technical matter. Of course, like all fundamental political differences, there are consequent technical differences, but the impasse was not technical. It was political. The fundamental issues were, on the one hand, whether you can breach pre-Doha bound rates and, if so, on what terms and conditions and, on the other hand, how you can make a SSM mechanism genuinely operational for developing country Members if there is an a priori ceiling constraint of such a kind. These issues remained-as they have throughout the negotiations - substantive, and essentially political, divisions. SSM was always going to be one of the three or four potential deal-breaker items and so, alas, it proved to be.’<sup>157</sup>

Negotiations in 2008 lead to revised draft modalities. This was the result of the most intensive phase of negotiations the Doha Round had ever seen.<sup>158</sup> The revised draft contains figures in square brackets, signifying that these have not yet been agreed to.<sup>159</sup> Having drafted and revised the modalities for agriculture, the next step was to schedule a Ministerial Conference.

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<sup>153</sup>Ibid 38.

<sup>154</sup>Ibid 38.

<sup>155</sup>Ibid 38.

<sup>156</sup>Ibid 38.

<sup>157</sup>Ibid 38.

<sup>158</sup>Ibid 39.

<sup>159</sup>Ibid 39.

### **Geneva WTO Ministerial Conference, 2009**

The next Ministerial Conference took place in Geneva from 30 November to 2 December 2009. The theme was ‘The WTO, the Multilateral Trading System and the Current Global Economic Environment’.<sup>160</sup> The Director-General, Mr Pascal Lamy stated that the objective was to review the functioning of the WTO on the major issues confronting it.<sup>161</sup> These included ‘monitoring and surveillance to disputes, accessions, Aid for Trade, technical assistance and international governance.’<sup>162</sup> The deadline for the conclusion of the Doha Round was set at 2010.

### **Geneva WTO Ministerial Conference, 2011**

At this Ministerial Conference, member countries agreed that the draft modalities of December 2008 should remain the basis for future agriculture negotiations. However in 2011, Mr Lamy declared the Doha Round effectively dead.<sup>163</sup> Despite this comment, Panagariya has argued that there is still hope for the Doha Round because none of the member countries have withdrawn from the talks.<sup>164</sup>

### **Bali WTO Ministerial Conference, 2013**

The next phase of agricultural negotiations took place at the ninth Ministerial Conference in Bali. The focus of this Conference was to obtain agreement on a range of specific issues. Chapter five of this study critically analyses the outcome of the Bali Conference and outlines possible future developments for the AoA.

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<sup>160</sup>Ibid 39.

<sup>161</sup>Ibid 39.

<sup>162</sup>Ibid 39.

<sup>163</sup>PC Mavroidas ‘Doha, Dohalf or Dohaha? The WTO Licks Its Wounds’ (2011) 3 *Trade Law and Development* No 2, 368.

<sup>164</sup>A Panagariya, ‘Challenges to the Multilateral Trading System and Possible Responses’ (2013) 7 *Economics: The Open Access, Open Assessment E-Journal* available at: <http://www.economics-ejournal.org/economics/discussionpapers/2013-3>, accessed on 17 October 2014, 10.

## 2.5 CONCLUSION

This chapter has shown that, in the early GATT years agriculture was left to domestic regulation by member countries which created imbalances in agricultural trade and fluctuations in food prices. However during the Tokyo Round of negotiations, countries recognized the need for effective international agricultural regulation. The Uruguay Round delivered this by producing a much needed AoA which covered market access, domestic support and export subsidies.

Article 20 of the AoA promotes continued negotiations in this sector. This prompted agriculture negotiations during the Doha Round. The Doha Round began in 2000 and should have been concluded by now, but due to disagreements between members, talks are still in progress. WTO Members are now negotiating the revised draft modalities from December 2008. Similar to the stalemates at Uruguay and Cancun, there is hope that the Doha Round will eventually be concluded.

This study notes that agriculture trade deals are mainly brokered by developed countries like the USA and the EU. As a result, agriculture is a politically sensitive industry and issues such as food security and rural development are key priorities for both developed and developing nations, respectively. Despite the AoA, this thesis submits that agriculture has not witnessed the same level of trade reform as other industries. This supports Desta's observation that:

‘although the Agreement (on Agriculture) certainly represents a significant breakthrough in the history of international trade regulation, it is also possible to say that the same Agreement is a standing symbol of continued failure to integrate agricultural trade into the mainstream system.’<sup>165</sup>

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<sup>165</sup>Desta (note 27 above) 5.

## CHAPTER 3

### CRITICAL LEGAL ANALYSES OF THE AGREEMENT ON AGRICULTURE

#### 3.1 INTRODUCTION

The Agreement on Agriculture (AoA) came into being at the conclusion of the Uruguay Round in January 1995.<sup>166</sup> Its long-term objective is to establish a fair and market-oriented agricultural trading system.<sup>167</sup> In order to achieve this, the AoA focuses on three main elements of agricultural reform:

- improving global market access,
- reduced domestic support, and
- eliminating export subsidies.

These areas were intended to redress the flaws that existed under GATT.<sup>168</sup> As discussed in chapter two, this resulted in agricultural trade distortions and fluctuations in world food prices.

This chapter address two of the study's research objectives: a) critically examine the core components of the AoA; and b) investigate and examine positive views and criticisms of the AoA. In order to achieve these objectives, this chapter is divided into three sections:

- i) Section A presents a comprehensive legal analysis of the three main areas of agricultural reform, namely, market access, domestic support and export subsidies;
- ii) Section B considers the relationship between the AoA and other WTO agreements. The WTO agreements discussed under this section include the GATT, GATS<sup>169</sup>, SPS<sup>170</sup>, and TBT<sup>171</sup> Agreements; and

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<sup>166</sup>WTO Secretariat (note 73 above) 3.

<sup>167</sup>Ibid 3.

<sup>168</sup>Destra (note 27 above) 6.

<sup>169</sup>General Agreement on Trade in Services.

<sup>170</sup>Agreement on Sanitary and Phyto-Sanitary Measures.

<sup>171</sup>Agreement on Technical Barriers to Trade.

- iii) Section C critically discusses positive views and criticisms of the AoA. As the only sector-specific agreement of the WTO, the AoA is subject to some controversy. While some<sup>172</sup> believe that it has made a positive difference for WTO members, others<sup>173</sup> believe that the AoA promotes inequality between developed and developing countries. This section examines various opinions from the perspective of developing countries.

This chapter paints a picture of the main reform elements of the AoA. The critical analysis of the AoA lays the foundation for chapter 4 that examines the AoA in the context of the South African agricultural industry, and BRICS.

## **3.2 SECTION A: MAIN ELEMENTS OF THE AGREEMENT ON AGRICULTURE**

### **3.2.1 Market Access**

Market access refers to the ease or difficulty with which foreign products can be imported into a country.<sup>174</sup> It is the result of government policy. In other words, a government could choose to restrict market access by imposing high tariffs or employing non-tariff barriers. As discussed in chapter one, governments may do so in order to shield their domestic industries from foreign competition; this is known as protectionism.

The measures a government could employ to restrict market access include *inter alia* the following:

- a) Tariffs- a tax imposed on an imported agricultural product which is added on to the selling price. This raises the price of the imported agricultural product, thereby making it less attractive to the consumer<sup>175</sup>;

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<sup>172</sup>J Grant and K Boys 'Agricultural Trade and the GATT/WTO: Does membership make a difference?' (2011) 94 (1) *American Journal of Agricultural Economics* 1, 1.

<sup>173</sup>ActionAid 'The WTO Agreement on Agriculture: Fighting Poverty Together' available on [www.actionaid.org](http://www.actionaid.org), accessed on 20 June 2014, 4.

<sup>174</sup>MG Desta 'The Bumpy Ride towards the Establishment of a Fair and Market Oriented Agricultural Trading System at the WTO: Reflections following the Cancun setback' (2003) 8 *Drake Journal of Agricultural Law* 490, 498.

<sup>175</sup>World Trade Organisation 'Tariffs' available at [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm), accessed on 20 October 2014.

- b) Quantitative restrictions- a policy that limits the quantity of agricultural products that can be imported into a country. This restricts market access because only a limited quantity of foreign products are sold on the domestic market<sup>176</sup>; and
- c) Standards- specific criteria which an agricultural product must meet before it can be imported into a country. The Sanitary and Phyto-Sanitary Agreement is an example of such ‘standards’ as it imposes health and safety requirements for imported products.

As noted earlier, the AoA’s long-term objective is ‘to establish a fair and market oriented agricultural trading system’. By implication, the Agreement aims to foster and encourage international agricultural trade by improving market access and removing the barriers that hamper trade. However Glipo argued that developed countries have asked for improved market access to developing countries, without a reciprocal opening up of their markets.<sup>177</sup> This thesis submits that the AoA is quite clear in its purpose: to establish a fair, market orientated system; thus, the AoA itself cannot justify the position held by Glipo.

#### **i) Market Access in terms of the AoA**

Market access is defined as the conditions or tariff and non-tariff measures, agreed to by members for the entry of specific goods into their domestic markets.<sup>178</sup> In other words, market access is government policy that regulates the import of foreign goods. In order to improve market access, the AoA provides the following:

Article 4.1: Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein;

Article 4.2: Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.

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<sup>176</sup>World Trade Organisation ‘QR’ available at [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm), accessed on 20 October 2014.

<sup>177</sup>A Glipo ‘The WTO-AoA: Impact on Farmers and Rural Women in Asia’ (2003) Asia-Pacific Network for Food Sovereignty,3.

<sup>178</sup>World Trade Organisation ‘Market Access’ available at [http://www.wto.org/english/tratop\\_e/markacc\\_e/markacc\\_e.htm](http://www.wto.org/english/tratop_e/markacc_e/markacc_e.htm), accessed on 20 October 2014.



In order to understand these two articles, it is necessary to examine the context at the time the AoA came into effect. As discussed in chapter two, the AoA took effect at the end of the Uruguay Round of WTO negotiations. Prior to this, many countries had resorted to non-tariff barriers to protect their agricultural sectors from foreign competition.<sup>179</sup> The impact of these non-tariff barriers were noted by the WTO:

‘The result of all this (non-tariff barriers) was a proliferation of impediments to agricultural trade, including by means of import bans, quotas setting the maximum level of imports, variable import levies, minimum import prices and non-tariff measures maintained by state trading enterprises. Major agricultural products such as cereals, meat, dairy products, sugar and a range of fruits and vegetables have faced barriers to trade on a scale uncommon in other merchandise sectors.’<sup>180</sup>

Non-tariff barriers were a major impediment to improved market access. This resulted in increased efforts to eliminate such barriers during the Uruguay Round. The result of these negotiations was a process referred to as ‘tariffication’.

Tariffication is a process where pre-existing non-tariff barriers are converted into tariff equivalents.<sup>181</sup> In other words, if a member country had import quotas (non-tariff barrier) on products, these were converted into a form of tariff that could be paid by importers.<sup>182</sup> The benefit of tariffication was that importers could import products without facing any non-tariff barriers.

The AoA itself does not provide any specific details on tariffication. The process was set out in a document entitled ‘Modalities for the Establishment of Specific Binding Commitments under the Reform Programme’.<sup>183</sup> In terms of this document, the first step required of all Uruguay Round members was to tariffify their agricultural tariff lines by converting all non-tariff barriers into simple tariffs.<sup>184</sup> The conversion was calculated as the difference between the average domestic price and the average world market price.<sup>185</sup> However the calculation

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<sup>179</sup>WTO Secretariat (note 73 above) 2.

<sup>180</sup>Ibid 2.

<sup>181</sup>Destra (note 27 above) 11.

<sup>182</sup>World Trade Organisation ‘Tariffication’ available at

[http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm), accessed on 20 October 2014.

<sup>183</sup>Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, MTN.GNG/MA/W/24, 20 December 1993.

<sup>184</sup>O’Connor ‘Module on Agriculture’ *United Nations Dispute Settlement Course* (2003), 7.

<sup>185</sup>Ibid 6.

was complex as it was not easy to determine what the world market price or domestic market price was at the time, how these prices should be measured and over what period the measurement should take place.<sup>186</sup>

Once the process of tariffication was complete, the second step was tariff reduction.<sup>187</sup> The Uruguay Round Modalities Agreement established different rules for different agricultural products and set minimum tariff reduction requirements at two levels: the level of individual tariff lines; and the overall averages for all agricultural products to be implemented over a six-year implementation period commencing in 1995.<sup>188</sup> WTO Members agreed to reduce tariffs over time starting on the date of the coming into effect of the Marrakesh Agreement in 1995.<sup>189</sup> Developed countries agreed to reduce their tariffs on agricultural products by an average 36 per cent over six years, with a minimum of 15 per cent for any product.<sup>190</sup> For developing countries, the cuts were 24 and 10 per cent, respectively, to be implemented over a longer period of ten years.<sup>191</sup> Least-developed countries were not required to undertake any tariff reductions.<sup>192</sup> These tariff reductions were fixed at the conclusion of the Uruguay Round and are set out in each WTO Member's Country Schedule.<sup>193</sup>

In addition to tariffs, the Modalities document<sup>194</sup> addressed the issue of special safeguard measures in agriculture.<sup>195</sup> These are measures that WTO Members can take in order to protect their domestic industries from injury caused by cheap imports.<sup>196</sup> This is achieved by means of an additional tariff that is imposed on products marked with the 'SSG' symbol in a country member's schedule.<sup>197</sup>

However, certain criteria must be met to impose the additional tariff. These are based on two potential scenarios. The additional tariff can be imposed if:

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<sup>186</sup>Ibid 7.

<sup>187</sup>Ibid 7.

<sup>188</sup>Ibid 7.

<sup>189</sup>Ibid 14.

<sup>190</sup>Ibid 14.

<sup>191</sup>Ibid 14.

<sup>192</sup>Ibid 14.

<sup>193</sup>Ibid 14.

<sup>194</sup>Modalities (note 183 above).

<sup>195</sup>WTO Secretariat (note 73 above) 9.

<sup>196</sup>Desta (note 27 above) 20.

<sup>197</sup>World Trade Organisation 'Special Safeguard' available at [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm), accessed on 20 October 2014.

- i) there is surge in the volume of imports of the SSG marked product (volume trigger); or
- ii) the price of the SSG marked product falls below a specified reference price (price trigger).<sup>198</sup>

Importantly, article 5 of the AoA does not require any proof of injury as is required under normal GATT rules.<sup>199</sup> This means that a country can impose the additional tariff under either of the above scenarios. Because of this uncertainty, member countries such as the United States of America (USA) and the Cairns Group have proposed that special safeguard measures be removed from the AoA.<sup>200</sup> However Japan and the European Union (EU) have argued against such removal due to their products being marked with the ‘SSG’ symbol.<sup>201</sup>

## ii) The Role of Country Schedules in Market Access

Once each member had undergone the tariffication and calculated their reduction commitments, these figures had to be inserted into their draft Country Schedules.<sup>202</sup> If another WTO Member did not object to the figures in the draft Country Schedules by the conclusion of the Uruguay Round on 15 April 1994, they were incorporated into the final Schedules.<sup>203</sup> The significance of the final Country Schedules was reflected in the *Korea – Various Measures on Beef* decision.<sup>204</sup> In essence this decision stated that a country’s Schedule demonstrates its commitment to the WTO, and the document is thus considered to have international legal status.<sup>205</sup> Therefore the final Country Schedules underline a member country’s legal commitments to the WTO.

Once the Country Schedules were finalised, WTO Members further agreed to ‘bind’ their tariffs. In other words, they could not impose higher tariffs than those agreed in their

<sup>198</sup>WTO Secretariat (note 73 above) 9.

<sup>199</sup>Desta (note 27 above) 20.

<sup>200</sup>Ibid 20.

<sup>201</sup>Ibid 20.

<sup>202</sup>Country Schedules can be described as additional documents relating to the AoA that specify a country’s obligations in terms of the AoA. More available at O’Connor (note 184 above) 7.

<sup>203</sup>O’Connor (note 184 above) 7.

<sup>204</sup>Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (‘Korea – Various Measures on Beef’), WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, para. 526.

<sup>205</sup>The key statement that emerged from this decision was that ‘Korea’s Schedule does not constitute an exception to other GATT provisions, but rather qualifies Korea’s obligations under the WTO Agreement.’ Available at O’Connor (note 184 above) 7.

Schedule.<sup>206</sup> However these ‘bound’ tariffs may be amended at a later stage. If a country decides to raise its ‘bound’ tariffs, the principle of reciprocity must be considered. If, for example, South Africa chooses to raise its bound tariffs on avocados, it must lower its tariff on another product in order to ensure that the principle of give and take is maintained.

The second element of agricultural reform is domestic support.

### 3.2.2 Domestic Support

Domestic support can be defined as government ‘subsidies and other programmes, including those that raise or guarantee farm gate prices and farmers’ incomes’.<sup>207</sup> In other words, it is the level of support a government provides to its farmers in order to raise or guarantee their income. The amount of domestic support a government can offer depends on available resources. It is for this reason that the WTO has regulated domestic support in order to ensure that international trade is not distorted in favour of countries that can afford to provide domestic support. Many have argued<sup>208</sup> that the AoA has failed to regulate domestic support due to the fact that it still exists. This is discussed in section C below.

The AoA domestic support measures can be grouped into three distinct categories based on their impact on agricultural trade and production:

- i) The first category includes forms of domestic support that have a direct impact on trade and production.<sup>209</sup> These measures are subject to reduction commitments by WTO members. This form of domestic support is referred as ‘amber box’ support. It is expressed in numerical terms as the ‘total aggregate measure of support’.<sup>210</sup> This involves calculating a country’s total amber box support into one composite figure,<sup>211</sup>

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<sup>206</sup>O’Connor (note 184 above) 13.

<sup>207</sup>World Trade Organisation Information and External Relations Division *Understanding the WTO* 5 ed (2011) 27.

<sup>208</sup>See Glipo (note 177 above); Desta (note 27 above) and ActionAid (note 173 above).

<sup>209</sup>ActionAid (note 173 above) 5.

<sup>210</sup>O’Connor (note 184 above) 27.

<sup>211</sup>ActionAid (note 173 above) 5.

- ii) The second category includes forms of domestic support that also have a direct impact on trade and production. However the difference is that farmers that receive these forms of domestic support are expected to limit their agricultural production in exchange for support.<sup>212</sup> Because production is limited, domestic support measures in this category are permitted by the WTO. These are called ‘blue box’ support measures;<sup>213</sup>
- iii) The final category includes forms of domestic support that have minimal direct impact on trade and production<sup>214</sup> and are therefore permitted by the WTO. These are referred to as ‘green box’ support measures.<sup>215</sup>

Articles 6 and 7 of the AoA regulate the use of domestic support. Both categorise domestic support into the three categories discussed above: i) permitted domestic support (green box measures), ii) domestic support subject to reduction commitments (amber box measures) and iii) domestic support with production limiting programmes (blue box measures).<sup>216</sup> As noted previously, the WTO allows green and blue box measures because they are deemed to have minimal impact on trade and production in comparison with amber box measures. However, there are requirements for a measure to qualify as green box or blue box.

### **i) Requirements for Green Box Domestic Support**

The importance of green box measures is that the WTO recognises that these measures have minimal direct impact on agricultural trade and production. As a result, any measure that is deemed a green box measure cannot be challenged before the WTO.

The United Nations (UN) has identified the following two requirements for domestic support to qualify as a green box measure:

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<sup>212</sup>O’Connor (note 184 above) 27.

<sup>213</sup>Ibid 27.

<sup>214</sup>Ibid 27.

<sup>215</sup>Ibid 27.

<sup>216</sup>The colour for each measure symbolises a traffic light: i)The amber box represents a high trade distorting impact and thus countries should ‘slow down’ the use of such domestic support measures; ii) The blue box represents a potentially high trade distorting impact; however, as these policies require production to be limited, countries can ‘proceed with caution’; iii) Finally, the green box represents a low trade distorting impact and countries can hence ‘continue’ the use of such domestic support measures. It is important to note that the colours are not used in the actual WTO text. WTO Secretariat (note 73 above).

- i) ‘the support must be provided through a publicly funded government programme, not involving a transfer from consumers; and
- ii) the support may not have the effect of providing price support to producers.’<sup>217</sup>

In addition to these requirements, annexure 2 of the AoA provides a non-exhaustive list of accepted green box measures.<sup>218</sup> However, even though a measure may be listed under annexure 2, it may still have to fulfil further criteria for that particular nature of that measure which are set out in the annexure.<sup>219</sup>

## ii) Requirements For Blue Box Domestic Support

The importance of blue box measures is that the WTO conditionally permits these measures as long as production limiting programmes are also in place.<sup>220</sup> Although blue box measures are permitted under the AoA, the UN submits that such measures may still be challenged under the WTO for distorting trade.<sup>221</sup>

The UN has identified the following criteria in order for a measure to qualify as a blue box measure:

- i) ‘payments are directly paid out from the government budget to the producers; (and)
- ii) payments are conditional upon some form of production-limiting requirement imposed on the recipient of the support, which include:
  - a. payments based on fixed area and yields, or
  - b. payments made on 85 per cent or less of the base level of production;
  - c. livestock payments made on a fixed number of head.’<sup>222</sup>

Glipo argues that blue box measures facilitate the manipulation of domestic support commitments.<sup>223</sup> Glipo accuses developed countries such as the USA and EU of manipulating

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<sup>217</sup>O’Connor (note 184 above) 25.

<sup>218</sup>An example is payment relief for a natural disaster.

<sup>219</sup>O’Connor (note 184 above) 25.

<sup>220</sup>Article 6.5 of the AoA.

<sup>221</sup>O’Connor (note 184 above) 27.

<sup>222</sup>Ibid 27.

<sup>223</sup>Glipo (note 177 above) 5.

prohibited amber box domestic support into acceptable blue box domestic support.<sup>224</sup> The basis of Glipo's argument is the fact that spending on blue box measures has increased considerably since the introduction of the AoA: 'thus, while subsidies under the AMS (amber box) decreased, there was a corresponding increase in subsidies under the green and blue boxes.'<sup>225</sup> Glipo does not raise any arguments besides this single statement.<sup>226</sup> This thesis disagrees with Glipo's viewpoint due to the fact that a mere increase in blue box support by developed countries does not imply manipulation on their part, since the AoA does not place a limit on the level of permissible blue box support. Therefore Glipo's argument that a mere increase in blue box domestic support, with a decrease in amber box support, implies manipulation by developed countries could be invalid, based on the fact that it is not outlawed by the AoA.

### **iii) Requirements for Amber Box Domestic Support**

Amber box measures are not prohibited by the WTO, but are subject to reduction commitments by members.<sup>227</sup> This means that amber box measures may be challenged before the WTO if a country can prove that its trade has been distorted.<sup>228</sup> Domestic support measures which do not fall in either the green or blue box categories are automatically considered amber box measures.

Article 6 of the AoA requires developed countries to reduce their total aggregate measure of support by 20 per cent over a six-year period, while developing countries are required to reduce their total aggregate measure of support by 13.3 per cent over a ten-year period.

Opportunities for domestic support are also provided to developing countries by means of article 6.2. This allows developing countries to use domestic support measures to promote rural development which of special relevance to least-developed countries. In other words developing countries are permitted to provide:

- i) agricultural investment subsidies,
- ii) support to low-income or resource-poor farmers, and

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<sup>224</sup>Ibid 5.

<sup>225</sup>Ibid 5.

<sup>226</sup>Ibid 5.

<sup>227</sup>O'Connor (note 184 above) 21.

<sup>228</sup>Ibid 27.

- iii) support to prevent domestic farmers from growing illicit narcotic crops.<sup>229</sup>

Having thoroughly analysed domestic support under the AoA, the focus now turns to the remaining main area of the AoA, export subsidies.

### 3.2.3 Export Subsidies

Export subsidies are financial incentives provided by governments to domestic farmers in order to develop and encourage an increase in agricultural exports.<sup>230</sup> The level of subsidies depends on available resources.<sup>231</sup> As noted previously, the WTO has regulated export subsidies in order to ensure that international trade is not distorted in favour of countries that can afford to offer their farmers export subsidies.

Chapter two highlighted that the GATT permitted member countries to provide export subsidies to their domestic farmers to export agricultural products. The only restriction under the GATT was that members should ensure that their export subsidies did not result in their country 'having more than an equitable share of world trade.'<sup>232</sup> This changed under the WTO regime. The Agreement on Subsidies and Countervailing Measures<sup>233</sup> (SCM) prohibits all forms of export subsidies.<sup>234</sup> However, as an exception to the SCM Agreement, export subsidies are still permitted under the AoA.<sup>235</sup>

It is important to note that the AoA does not actually define the term 'subsidy'. One has to refer to the SCM Agreement that is the only WTO agreement that defines this term.<sup>236</sup> The Agreement defines a subsidy as 'a financial contribution made by a government or any public

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<sup>229</sup>Ibid 28.

<sup>230</sup>Ibid 29.

<sup>231</sup>Export subsidies are generally provided in one or more of the following forms: 'cash payments, disposal of government stocks at below-market prices, subsidies financed by producers or processors as a result of government actions such as assessments, marketing subsidies, transportation and freight subsidies; and subsidies for commodities contingent on their incorporation in exported products.' Adapted from O'Connor (note 184 above) 29.

<sup>232</sup>Sharma (note 42 above).

<sup>233</sup>The SCM Agreement regulates the use of government subsidies. In terms of the agreement, a country can approach the WTO Dispute Settlement Panel to apply for a withdrawal of a member country's subsidy. More information on the SCM Agreement is available at World Trade Organisation 'Subsidies and Countervailing Measures' [http://www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/scm_e.htm) accessed on 22 October 2014.

<sup>234</sup>Article 3 of SCM Agreement.

<sup>235</sup>O'Connor (note 184 above) 29.

<sup>236</sup>Desta (note 174 above) 512.



body conferring a benefit on the recipient'.<sup>237</sup> This is a broad definition and terms such as 'benefit' and 'recipient' are subject to interpretation.

In the *Canada - Dairy* case<sup>238</sup> the panel established the link between the application of the AoA and the definition of 'subsidy' under the SCM Agreement. It found that in order for a subsidy to qualify under the AoA, it must first be demonstrated that the subsidy in question fits the definition of 'subsidy' in the SCM Agreement.<sup>239</sup> Once this has been determined, the next step is to determine whether the subsidy in question is subject to reduction commitments under the AoA.

Article 9.1 of the AoA lists the export subsidies that are subject to reduction commitments.<sup>240</sup> These commitments are based on reducing the amount of products that receive export subsidies, and the overall budget for export subsidies. The base period for the calculation was 1986 to 1990<sup>241</sup>:

- Developed countries were required to reduce the amount of money they spend on export subsidies by 36 per cent<sup>242</sup>, and the quantity of subsidised products exported by 21 per cent;<sup>243</sup>
- Developing countries were required to reduce the amount of money they spend on export subsidies by 24 per cent<sup>244</sup>, and the quantity of subsidised products exported by 14 per cent;<sup>245</sup>
- Least-developed countries were not obliged to make any reduction commitments.<sup>246</sup>

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<sup>237</sup>Ibid 512.

<sup>238</sup>*Appellate Body Report, Canada – Measures Affecting the Importation of Dairy Products* WT/DS103/AB/R and Corr.1, WT/DS/113/AB/R and Corr.1, adopted 27 October 1999.

<sup>239</sup>Ibid para. 85.

<sup>240</sup>Article 9.1 of the AoA sets out the various export subsidies that are subject to reduction commitments: 'direct export subsidies, government exports of non-commercial stocks at a price lower than comparable prices for such goods on the domestic market, export payments financed by virtue of government action, including payments financed by a levy on the product, subsidies to reduce the cost of marketing exports, including cost of handling, upgrading and other processing costs and, costs of international transport and freight, internal transport and freight charges on terms more favourable than for domestic shipments, if provided or mandated by government and, subsidies on agricultural products contingent on their incorporation in export products.' Adapted from O'Connor (note 184 above) 31, 32.

<sup>241</sup>Desta (note 27 above) 20.

<sup>242</sup>Below levels were specified during the base period.

<sup>243</sup>Desta (note 27 above) 20.

<sup>244</sup>Below levels were specified during the base period.

<sup>245</sup>Desta (note 27 above) 20.

<sup>246</sup>Ibid 20.

Article 9 is also significant because it prohibits the use of further export subsidies. In other words the only export subsidies applicable are those that were in place between 1986 and 1990.<sup>247</sup> Twenty-five WTO countries, including South Africa<sup>248</sup> had export subsidies in place during that period. Therefore, only these 25 members are allowed to use export subsidies as long as they abide by their reduction commitments. Article 10 of the AoA imposes the only limitation. It states that export subsidies may not be used in a manner that would circumvent members' commitments to the WTO.

Having analysed the main elements of the AoA, this chapter now highlights the relationship between the AoA and other WTO Agreements.

### **3.3 SECTION B: RELATIONSHIP BETWEEN THE AoA AND OTHER WTO AGREEMENTS**

This section briefly compares the AoA and other relevant WTO agreements. Among the agreements that relate to the AoA are the General Agreement on Tariffs and Trade and Tariffs (1994), General Agreement on Tariffs and Trade, the Agreement on Sanitary and Phyto-Sanitary Measures and the Agreement on Technical Barriers to Trade (TBT). The main WTO Agreement is known as the 'Marrakesh Agreement'.<sup>249</sup> This was the foundation for the establishment of the WTO. From this main Agreement, four annexures follow:

- Annexure 1- contains the multilateral trade agreements that regulate various aspects of international trade,<sup>250</sup>
- Annexure 2- provides the mechanism for resolving disputes at the WTO;
- Annexure 3- contains a variety of policy reviews in international trade;
- Annexure 4- contains plurilateral agreements entered into by WTO members.

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<sup>247</sup>O'Connor (note 184 above) 29.

<sup>248</sup>The other 24 countries are: Australia, Brazil, Bulgaria, Canada, Colombia, Cyprus, Czech Republic, the EC, Hungary, Iceland, Indonesia, Israel, Mexico, New Zealand, Norway, Panama, Poland, Romania, Slovak Republic, Switzerland-Liechtenstein, Turkey, the United States, Uruguay, and Venezuela. Adapted from Desta (note 27 above) 20.

<sup>249</sup>Marrakesh Agreement establishing the World Trade Organisation, Marrakesh (1994).

<sup>250</sup>Further annexure 1, which contains the multilateral trade agreements, is split into three sections: 1A- General Agreement on Tariffs and Trade (GATT 1994); 1B-General Agreement on Tariffs and Trade (GATS); 1C-Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

### 3.3.1 The AoA and the General Agreement on Tariffs and Trade (GATT) 1994

The GATT covers all measures relating to trade in goods and is thus a wider agreement than the AoA.<sup>251</sup> Article XX (b) of the GATT provides that measures can only be applied if they are non-discriminatory in nature.<sup>252</sup> This thesis argues that the AoA complements Article XX (b), of the GATT as it highlights that its long-term objective is to establish a fair and market-oriented agricultural trading system.<sup>253</sup>

Further Article 21 of the AoA strengthens the relationship between GATT 1994 and itself by stating that, ‘The provisions of GATT 1994 and of other multilateral trade agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.’ Since agricultural products are classified as ‘goods’ for the purposes of international trade, they fall under Annexure 1A of the WTO Marrakesh Agreement. This is because products that are identified as ‘goods’ are regulated by the GATT 1994. Agricultural products are classified as ‘goods’; therefore they are regulated by the GATT 1994.

### 3.3.2 The AoA and the General Agreement on Trade in Services (GATS)

In the *EU Bananas* dispute, the WTO panel established found that the General Agreement on Trade in Services (GATS) could also be applied to international trade in agricultural products. The EU argued that this was not the case because the restrictions in place did not affect trade in services which is required in terms of Article I:1 of the GATS.<sup>254</sup> However the panel disagreed and stated that there was no legal justification to exclude the EU licensing import regime from GATS. In arriving at this conclusion, the panel stated the following regarding the applicability of GATS and the AoA:

‘(...) Article I:1 of the GATS provides that ‘[t]his Agreement applies to measures by Members affecting trade in services’. In our view, the use of the term ‘affecting’ reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word

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<sup>251</sup>Muhsin Serwadda *An Assessment of the Application of the Sanitary and Phytosanitary Agreement of the WTO and its Impact On International Trade: A Sub-Sahara African Perspective* (Master of Laws Thesis University of the Western Cape 2006) 17.

<sup>252</sup>*Ibid* 17.

<sup>253</sup>WTO Secretariat (note 73 above) 3.

<sup>254</sup>*Appellate Body Report, European Communities – Regime for the Importation, Sale, and Distribution of Bananas* WT/DS27/AB/R, adopted 25 September 1997, para. 218.

‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term ‘affecting’ in the context of Article III of the GATT is wider in scope than such terms as ‘regulating’ or ‘governing.’<sup>255</sup>

### 3.3.3 The AoA and the Agreement on Sanitary and Phyto-Sanitary Measures

With increased awareness of the need for food security and environmental protection, consumers are becoming more conscious of the products they consume. As a result, the WTO has regulated the minimum levels of quality, health and safety standards expected of imported products. These form the basis of the Sanitary and Phyto-Sanitary Measures (SPS) Agreement. The purpose is to protect human, animal and plant life and health.<sup>256</sup>

In order to avoid SPS Measures developing into trade barriers, the SPS Agreement provides that WTO members may set their own health and safety standards based on an assessment of risks.<sup>257</sup> It permits members to impose different SPS requirements on food, animal or plant products sourced from different countries, provided that these requirements ‘do not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail’.<sup>258</sup>

In interpreting the SPS Agreement, one also needs to consider the precautionary principle which states that members are allowed to adopt SPS measures on a provisional basis if there is insufficient scientific evidence to support such measures.<sup>259</sup> The rationale is to mitigate the

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<sup>255</sup>Ibid para. 220.

<sup>256</sup>Article 2.1 of the SPS Agreement: ‘members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement’.

<sup>257</sup>Article 5.1 of the SPS Agreement: ‘members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations’.

<sup>258</sup>Serwadda (note 251 above) 16, and Article 2.1 of the SPS Agreement: ‘members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles’.

<sup>259</sup>Article 5.7 of the SPS Agreement: ‘in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time’.

risk of irreversible damage due to the spread of pests and diseases in the case of trade in animals, plants and their products, when limited information is available.<sup>260</sup>

Furthermore, Article 1.4 of the SPS Agreement<sup>261</sup> provides that nothing in the agreement shall affect the rights of members under the TBT Agreement with regard to measures that fall within the scope of that Agreement.<sup>262</sup> In other words the SPS and TBT Agreements are mutually exclusive; they cannot apply to the same measure at the same time.<sup>263</sup>

Article 14 of the AoA<sup>264</sup> provides that members agree to give effect to the Agreement on the Application of SPS Measures. Therefore the AoA complements the SPS Agreement.<sup>265</sup> Serwadda submits that, should a conflict arise between the AoA and the SPS Agreement, the AoA will prevail.<sup>266</sup> However, he does not give any reasons for this submission.

Furthermore, the SPS Agreement encourages the use of international standards to determine SPS Measures. International standards can be obtained from the *Codex Alimentarius* Commission (food standards), the *Office International des Epizooties* (animal health standards) or the Secretariat of the International Plant Protection Convention (plant life). These serve as useful guides for health and safety standards, especially those relating to agricultural products.

Although this thesis submits that such health and safety standards should incorporate the needs of both developing and developed countries. In other words, health and safety standards take into account whether or not a member country has the necessary resources to meet such standards. By way of example, if the *Office International des Epizooties* decide to raise standards on animal handling during long-distance transport, a feasibility study could be conducted to determine how this would impact on trade with developing countries such as South Africa and Brazil.

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<sup>260</sup>Serwadda (note 251 above) 16.

<sup>261</sup>Article 1.4 of the SPS Agreement: ‘Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.’

<sup>262</sup>Serwadda (note 251 above) 15.

<sup>263</sup>Ibid 15.

<sup>264</sup>Article 14 of the AoA: ‘Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.’

<sup>265</sup>Serwadda (note 251 above) 17.

<sup>266</sup>Ibid 17.

### **3.3.4 The AoA and the Agreement on Technical Barriers to Trade**

The TBT Agreement provides for regulations and voluntary standards, and procedures to ensure that standards are met, save for when they are SPS measures.<sup>267</sup> It has been observed that the provisions of the TBT Agreement are not as strict as those in the SPS Agreement, as member countries can decide which international standards are appropriate for a number of other reasons, which are not necessarily found in the SPS Agreement. An example is national security.<sup>268</sup>

Article 1.5 of the TBT Agreement specifically provides that the Agreement does not apply to SPS measures as defined in the SPS Agreement. Therefore the SPS and TBT Agreements are mutually exclusive, in that, they cannot apply at the same time to the same measure.<sup>269</sup> The difference lies in the fact that the TBT Agreement does not make compliance with international standards as mandatory as the SPS Agreement.<sup>270</sup> The latter requires the use of international standards unless scientific proof is produced which justifies otherwise while the former permits countries to use their own standards without the added burden of scientific proof.

## **3.4 SECTION C: POSITIVE VIEWS AND CRITICISMS OF THE AoA**

Thus far this chapter has analysed the three reform elements contained in the AoA, and considered the relationship between the AoA and other WTO agreements. This section presents arguments on the effectiveness of the AoA, beginning with positive views on the impact of the AoA, followed by a critique.

### **3.4.1 Positive Commentary on the Impact of the AoA**

The single most positive comment on the AoA is the fact that it recognised the importance of agriculture and brought it into the fold of the multilateral trading system.<sup>271</sup> International agricultural trade is now subject to WTO negotiations and reform packages. Considering the

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<sup>267</sup>Serwadda (note 251 above) 15.

<sup>268</sup>Ibid 15.

<sup>269</sup>Ibid 15.

<sup>270</sup>O'Connor (note 184 above) 79.

<sup>271</sup>Desta (note 27 above) 6.

lack of adequate recognition under the GATT, this had a significant impact on global agriculture.

The literature on the impact of the AoA is by and large negative. However Grant and Boys argued that the AoA made a positive difference to WTO members' agricultural trade.<sup>272</sup> They applied an economic formula to calculate *inter alia* members' agricultural trade statistics based on accession to the GATT and WTO. Their findings demonstrate that membership of the GATT and WTO increased members' agricultural trade by an average 161 per cent.<sup>273</sup>

Grant and Boys attribute this high percentage to the following:

- a) Trade procedures reduce uncertainty in international transactions<sup>274</sup>;
- b) Trade rules bring about transparency of members' trade policies<sup>275</sup>;
- c) Avoidance of discriminatory trade between members<sup>276</sup>; and
- d) The WTO facilitates trade coordination and, in so doing, provides clear incentives for members to invest in trading relationships.<sup>277</sup>

Grant and Boys further argue that,

‘Agricultural trade is often at the forefront of multilateral trade negotiations, and the Doha Development Agenda (DDA) is no exception. Yet if the GATT/WTO has been unable to solve the problem of agricultural protection, why does membership yield such tantalizing benefits? Several possible explanations exist. First, since the 1980s many developing countries have progressively reduced their own agricultural export taxes. While this domestic policy change was not a function of GATT/WTO membership, it is possible that membership made nations more disposed, in general, to undertake trade reform. Second, the assumption that membership promotes trade through tariff cuts alone misses other channels through which the multilateral organization has an impact. The GATT/WTO establishes procedures that reduce uncertainty in international transactions, makes rules that exemplify transparency among members about their trade policies, and provides legal means to circumvent

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<sup>272</sup>Grant & Boys (note 172 above) 1.

<sup>273</sup>Ibid 19.

<sup>274</sup>Ibid 3.

<sup>275</sup>Ibid 3.

<sup>276</sup>Ibid 3.

<sup>277</sup>Ibid 3.

discriminatory action. Membership also gives governments the power to oppose pressure from domestic interests who are resistant to their borders opening to further imports.<sup>278</sup>

They conclude that, ‘Despite all the rancor and roadblocks in the reform of observable agricultural policies, participation in the GATT/WTO still yields big rewards’.<sup>279</sup>

Nonetheless, Grant and Boys acknowledged that the WTO has failed to lower tariffs in the agricultural sector. They note that, ‘The initial results support the claim that membership in the GATT/WTO has delivered significant positive effects on members’ AG trade even if it has failed to lower tariffs in this sector to any substantial degree’.<sup>280</sup>

This thesis questions the 161 per cent gain found by Grant and Boys as this is the average increase<sup>281</sup> among all WTO members. It does not clarify whether developed country members or developing country members experienced this increase in agricultural trade. Furthermore, Grant and Boys do not adequately address the issue of agriculture in developing countries. They merely note that, ‘Middle and low income developing and least developed economies - those that have a vested interest in expanding agricultural exports - gain substantially from membership in the GATT/WTO’.<sup>282</sup> No further statistics are provided in this regard.

Balding<sup>283</sup> and Subramanian<sup>284</sup> found that developing members’ total merchandise trade only experienced a slight increase in trade flows when compared with non-member countries.<sup>285</sup> Therefore, whilst the WTO and AoA can be praised for bringing agriculture to a trade forum, the fact of the matter is that developing countries need to share economic agricultural growth.

### 3.4.2 Criticism of the Impact of the AoA

Having discussed the positive views of the AoA, this section considers critiques of this agreement. Criticism of the AoA can be categorised into: a) criticism relating to the actual

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<sup>278</sup>Ibid 20.

<sup>279</sup>Ibid 3.

<sup>280</sup>Ibid 11.

<sup>281</sup>Emphasis added.

<sup>282</sup>Grant & Boys (note 172 above) 19.

<sup>283</sup>C Balding ‘Joining the World Trade Organization: What is the Impact?’ (2010) 18(1) *Review of International Economics* 193–206.

<sup>284</sup>Subramanian A& Wei SJ ‘The WTO Promotes Trade Strongly but Unevenly’ (2007) 72(1) *Journal of International Economics* 151–175.

<sup>285</sup>Grant & Boys (note 172 above) 20.



provisions of the AoA, and b) criticism directed towards the implementation of the AoA. Both are considered with a view to arguing that the AoA has failed to assist developing countries.

### **a) Criticism Relating to the Provisions of the AoA**

This section focuses on four major inadequacies relating to the provisions of the AoA. These are: i) the failure of the AoA to take different agricultural needs into account; ii) the complexity of domestic support provisions; iii) shortfalls in the special safeguard provisions and iv) design flaws in the export subsidy provisions.

#### **i) Failure of the AoA to take Different Agricultural Needs into account**

It is common knowledge that agricultural needs differ amongst developed and developing countries because of the state of each type of economy. In developed countries, the agricultural system is export orientated.<sup>286</sup> Producers in developed countries generally enter this field for commercial reasons. However, research indicates that, in developing countries, agriculture is more subsistence based.<sup>287</sup> Producers in developing countries enter this field to sustain their daily livelihoods.

Bearing these agricultural needs in mind, it has been argued that the AoA has failed to accommodate the socio-economic needs of developing countries by adopting a ‘one size fits all’ approach.<sup>288</sup> For example, the AoA does not allow developing countries the flexibility to implement policies consistent with their individual development goals. It merely allows them a little more time to implement the agreement.<sup>289</sup>

The AoA’s failure to recognise that some developing countries have unique needs is well-illustrated by the case of South Africa. Apartheid prevented many black South Africans from

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<sup>286</sup>S Simpson ‘Top Agricultural Producing Countries’ available at <http://www.investopedia.com/financial-edge/0712/top-agricultural-producing-countries.aspx>, accessed on 20 October 2014.

<sup>287</sup>ActionAid (note 173 above).

<sup>288</sup>Ibid.

<sup>289</sup>Ibid.

participating in agriculture.<sup>290</sup> As a result, they now require support in the form of additional funding and training to compete in the international market. However this support may be challenged before the WTO as the government would compensate black farmers for their participation in agriculture. It could be argued that the direct link between compensation and production would constitute ‘amber-box’ domestic support. However as discussed in chapter two, many countries such as those in the EU had such domestic support policies under the GATT.

## ii) Complexity of Domestic Support Provisions

As noted earlier, the AoA categorises domestic support into three boxes, depending on the level of trade distortion: amber (prohibited due to high trade distortions), blue (permitted but also trade distorting, and hence challengeable) and green (permitted and unchallengeable due to low trade distortions).

The blue box is arguably the most contentious.<sup>291</sup> This is because such support includes ‘decoupled payments’. Thus blue box support is supposedly linked to production limiting programmes. In other words, governments ironically support their farmers if they limit agricultural production. A simile would be a person receiving a government firearm and being given a limited number of bullets; regardless of the number of bullets, a firearm is still sponsored. In the same way, regardless of production limiting programmes, at the end of the day farmers still receive direct support from government.

Blue box support originated during the Uruguay Round. The EU persuaded other WTO members that due to their Common Agricultural Policy (CAP), any reductions in amber box support would have a serious impact on their agricultural production.<sup>292</sup> Article 6.5 of the AoA therefore allows for domestic support if it is tied to production limiting programmes, i.e., blue box support.

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<sup>290</sup>Black Economic Empowerment Commission presentation prepared for the Portfolio Committee on Trade and Industry September 13, 2000 available at <http://www.pmg.org.za/docs/2000/appendices/000913BEE.htm> accessed on 20 October 2014.

<sup>291</sup>Desta (note 174 above) 521.

<sup>292</sup>ActionAid (note 173 above).

However it has been submitted that due to the highly technical nature and advanced administrative requirements of this provision, developing countries simply do not have the resources to gain from blue box measures.<sup>293</sup> This places them at a significant disadvantage in supporting their farmers. The end result is agricultural trade distortions as developed countries with access to legal and administrative skills pools can better compete within WTO rules.<sup>294</sup>

### iii) Shortfalls of the Special Safeguard Provisions

The research on the use of special safeguards in agriculture has been well summarised by ActionAid International.<sup>295</sup> In order to provide a concise account, the following paragraph on the use of special safeguards in agriculture is reproduced:

‘The special safeguard (SSG) provision was introduced to allow countries to impose additional duties in order to protect them from sudden import surges in terms of volumes or low prices. However, in order to qualify for SSG, countries had to have non-tariff barriers (quantitative restrictions on imports) in place at the time tariffication took place under the Uruguay Round. Only 22 developing countries had non-tariff barriers that enabled them to qualify. In contrast, 16 developed and eastern European countries qualified. It is pertinent to note that out of the total number of SSG products (6072) that are available to all 38 countries, only 31.8% products (1930) are available to developing countries as against 68.2 % (4142) to developed countries. Of these, the EU can use SSG against 539 products, the US against 189 products, Canada against 150 products, Australia against 10 products and Switzerland against an astounding 961 products.’<sup>296</sup>

In other words, countries with non-tariff barriers in place during the tariffication process can call upon special safeguard measures. Therefore the AoA actually ‘rewarded’ countries for their use of non-tariff barriers by giving them the exclusive right to use special safeguard measures.<sup>297</sup>

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<sup>293</sup>Ibid.

<sup>294</sup>Glipo (note 177 above) 4.

<sup>295</sup>ActionAid (note 173 above) 4.

<sup>296</sup>Ibid 5.

<sup>297</sup>Thirty-nine WTO members have reserved the right to use special safeguards on agricultural products. The numbers in brackets show how many products are involved. South Africa has reserved this right and 166 products are involved. The list of countries is: Australia (10); Barbados (37); Botswana (161); Bulgaria (21); Canada (150); Colombia (56); Costa Rica (87); Czech Republic (236); Ecuador (7); El Salvador (84); EU (539); Guatemala (107); Hungary (117); Iceland (462); Indonesia (13); Israel (41); Japan (121); Korea (111); Malaysia

Furthermore, ActionAid has argued that the AoA has failed to consider the countries that require special safeguard measures the most, namely, developing countries. Many developing countries do not have the option of invoking special safeguard measures, as many did not use complex non-tariff barriers prior to the tariffication process. This thesis recommends that the WTO Agriculture Committee review this provision and allow special safeguard measures to be used by all WTO members, especially developing countries.

#### iv) Design Flaws in the Export Subsidy Provisions

As indicated above, the AoA provides for the use of export subsidies on condition they are subject to reduction commitments. However, only a small number of countries are allowed to use export subsidies.<sup>298</sup> This is determined by whether or not they provided export subsidies during the base period.<sup>299</sup> In other words if a country had export subsidies prior to the Uruguay Round, they are allowed to continue as long as they abide by their reduction commitments.

Countries that did not provide export subsidies during the base period (mostly developing countries) are thus barred from providing export subsidies.<sup>300</sup> In other words, the provisions promote inequity by allowing developed countries to continue providing export subsidies, whereas developing countries are barred from doing so.

Recent developments paint a gloomy picture as the USA Congress has approved the USA Farm Bill<sup>301</sup> which provides for US\$175 billion in financial assistance over a period of ten

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(72); Mexico (293); Morocco (374); Namibia (166); New Zealand (4); Nicaragua (21); Norway (581); Panama (6); Philippines (118); Poland (144); Romania (175); Slovak Republic (114); South Africa (166); Swaziland (166); Switzerland-Liechtenstein (961); Chinese Taipei (84); Thailand (52); Tunisia (32); United States (189); Uruguay (2); and Venezuela (76). Available at [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd11\\_ssg\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm) accessed on 20 October 2014.

<sup>298</sup>Twenty-five WTO members can subsidize exports, but only on products on which they have commitments to reduce the subsidies. Those without reduction commitments cannot subsidize agricultural exports at all. South Africa can subsidise exports on 62 products. The numbers in brackets are the number of products for each country. The list of countries is: Australia (5); Brazil (16); Bulgaria (44); Canada (11); Colombia (18); Cyprus (9); Czech Rep (16); EU (20); Hungary (16); Iceland (2); Indonesia (1); Israel (6); Mexico (5); New Zealand (1); Norway (11); Panama (1); Poland (17); Romania (13); Slovak Rep (17); S Africa (62); Switzerland-Liechtenstein (5); Turkey (44); United States (13); Uruguay (3); and Venezuela (72). Available at [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd08\\_export\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd08_export_e.htm) accessed on 20 October 2014.

<sup>299</sup>Prior to the Uruguay Round.

<sup>300</sup>Destat (note 27 above) 19.

<sup>301</sup>United States Farm Bill of 2002.

years for domestic farmers.<sup>302</sup> This will mainly take the form of guaranteed prices for agricultural products produced within the USA.<sup>303</sup> Furthermore, in 2002 the EU agreed on plans to increase its domestic support programmes from €43 billion to €49 billion by 2013.<sup>304</sup> American and EU agricultural producers therefore have an unfair advantage on the international market because they can sell their products at lower prices than other countries as their farmers receive guaranteed prices from the government.

As discussed above, a significant disadvantage arises among developing countries because they cannot subsidise their exports even if they have the available financial resources. This thesis therefore calls for a ban on all export subsidies in the next five years.

Having analysed criticisms of the provisions of the AoA, the focus turns to criticism of the implementation of the AoA.

## **b) Criticism of the Implementation of the AOA**

This section argues that the AoA has failed to live up to its main reform provisions. It focuses on: i) abuse of food aid, ii) the AoA's failure to regulate the dumping of agricultural goods, and iii) the fact that developing countries are not given an adequate voice in agricultural negotiations at the WTO.

### **i) Abuse Of Food Aid**

As discussed above, as two of the largest agricultural exporters amongst developed countries, the USA and EU continue to subsidise their farmers.<sup>305</sup> The EU has argued that, through the distribution of food aid, the USA has manipulated the provisions of the AoA via export credits.<sup>306</sup> In turn, the USA has criticised the EU for its blatant provision of export subsidies through the CAP.

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<sup>302</sup>ActionAid (note 173 above) 7.

<sup>303</sup>Ibid 7.

<sup>304</sup>Ibid 7.

<sup>305</sup>J Clapp 'WTO Agricultural Trade Battles and Food Aid' (2004) 25 *Third World Quarterly* 1439, 1439.

<sup>306</sup>Ibid.

Research suggests that food aid does result in international trade distortions.<sup>307</sup> Barrett found that ‘food aid clearly displaces commercial sales of food’ in countries that receive it.<sup>308</sup> As one of the main distributors of food aid, the USA provides such aid on the basis of its Trade and Development Assistance Act.<sup>309</sup> This allows the USA to essentially ‘sell’ food aid to developing countries under the guise of longer repayment periods<sup>310</sup> and below market interest rates.<sup>311</sup> In other words, food aid is actually sold to developing countries. Kevin Watkins of OXFAM concluded ‘In all but name, it (Act) is a subsidised export credit program.’<sup>312</sup> It is estimated that total food aid based on the Act amounts to \$100million per year.<sup>313</sup> This is in stark contrast to many developing countries that cannot afford to subsidise their exports to such an extent.

In addition, Clapp notes that ‘the amounts allocated to different countries do not seem to correlate all that closely with need. Some countries which are not in food deficit receive large amounts of food aid, while others which are in food deficit receive much less.’<sup>314</sup> Clearly food aid is not the rosy picture that is portrayed in the media.

Other WTO members are prepared to negotiate major areas of agricultural reform if food aid is stopped.<sup>315</sup> For example, the EU has argued that the sale of food aid and export subsidies have an equally negative impact on global agricultural trade.<sup>316</sup> It has indicated that it would be prepared to reduce its export subsidies provided the USA cut back on ‘food aid’. The EU has proposed that food aid be provided in the form of cash to countries that declare an international emergency.<sup>317</sup> It remains to be seen whether or not the USA and the EU will reach a joint solution or whether the voices of developing countries will rise up to demand greater rights under the AoA.

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<sup>307</sup>Ibid.

<sup>308</sup>Barrett ‘Food Aid and Commercial International Food Trade’ (2002) OECD background paper Trade and Markets Division, Paris. Information obtained from Clapp (note 305 above) 1442.

<sup>309</sup>Trade and Development Assistance Act 1954.

<sup>310</sup>Repayment periods of up to 30 years may be negotiated.

<sup>311</sup>Clapp (note 305 above) 1442.

<sup>312</sup>Ibid 1442.

<sup>313</sup>Ibid 1442.

<sup>314</sup>Ibid 1442.

<sup>315</sup>Ibid 1443.

<sup>316</sup>Ibid 1443.

<sup>317</sup>Taylor and Pruzin ‘Top trade officials announce convergence on points related to WTO agriculture talks’ (2004) 21 (25) International Trade Reporter and Clapp (note 305 above) 1443.

## ii) Failure of the AoA to Regulate Dumping of Agricultural Goods

Dumping can be defined as exporting agricultural products at a significantly lower price in the receiving country, than would be charged in the exporting country.<sup>318</sup> The following case study further explains the concept and effects of dumping:

### Case study 1: The concept and effects of Dumping

- The cost of producing a kilo of apples in South Africa is R50, while the international price for a kilo of apples is R40. A South African apple farmer exporting a kilo of apples would thus suffer a shortfall of R10.
- In order to promote exports, the government contributes R30 per kilo of apples exported from South Africa.
- This means that South African farmers who export apples would receive a total of R70 (R40 on the world market plus R30 from the government).
- This yields a guaranteed profit of R20 per kilo (R70 received minus the cost of production of R50).
- Because of the guaranteed profit many farms across South Africa decide to produce apples for export. The result is a surplus of apple stocks.
- In order to recoup the cost, this surplus stock is sold on the international market at a much cheaper price. South African apple farmers sell their apples on international markets for R20 per kilo. They still break even as they receive R30 from the government (R30) and the actual cost of production is R50.
- Therefore the government subsidy results in farmers selling apples on the international market at a significantly lower price (R20), than the price in South Africa (R50+). This is referred to as 'dumping'.

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<sup>318</sup>Investopedia defines 'Dumping' available at <http://www.investopedia.com/terms/d/dumping.asp> accessed on 8 July 2014.

Dumping causes many agricultural producers in developing countries to cease operations because they cannot compete with artificially cheap imports.<sup>319</sup> This is reflected in an account by Mr Ayariga, a rice farmer from Ghana:

‘Rice farming is no longer lucrative because imported rice is cheaper than locally produced rice. We cannot make ends meet. The field we used to plant rice in is now lying fallow and it’s being used to play football. We are being forced to compete in foreign markets – it’s like our under- 20 football team facing Manchester United. Tell me, is this equal? Is this fair? It is a big shame to be a farmer now.’<sup>320</sup>

As a further example, during the 1990s the demand for dairy products increased dramatically in the Dominican Republic.<sup>321</sup> EU milk powder was an estimated 25 per cent cheaper than Dominican milk powder due to the fact that the EU subsidised producers.<sup>322</sup> This led to a large increase in the volume of subsidised milk powder exported from the EU. Farmers in the Dominican Republic could not compete with this cheap imported product and closed down. An investigation revealed that EU farmers, in particular the Scandinavian company, ‘Arla Foods’ had received an estimated €17.5 million in subsidies.<sup>323</sup>

In summary the consequences of the AoA’s failure to regulate dumping are felt by developing countries due to their inability to compete with cheap subsidised imports. Many developing countries simply do not have the financial resources to offer their agricultural producers the same level of domestic support. As a result, farmers like Mr Ayariga are driven out of business.

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<sup>319</sup>Clapp (note 305 above) 1442.

<sup>320</sup>John Ayariga- A rice farmer from Ghana. Quote accessed from ActionAid International ‘A Guide to the Hong Kong WTO Ministerial’ *Trade Justice Campaign* accessed from [www.actionaid.org](http://www.actionaid.org) on 20 June 2014, 4.

<sup>321</sup>ActionAid (note 173 above) 9.

<sup>322</sup>Ibid 9.

<sup>323</sup>Ibid 9.



### **iii) Developing Countries are not given an Adequate Voice in Agricultural Negotiations at the WTO**

Article 20 of the AoA<sup>324</sup> appreciates that agricultural trade liberalisation is an on-going process and provides for continued negotiations to reform this sector. However as noted above, the two main powers in agricultural negotiations are the USA and the EU.<sup>325</sup> This has been the norm for over 60 years, as far back as when the USA refused to ratify the charter of the International Trade Organisation and when the EU introduced the CAP to subsidise its farmers. The effect of these two ‘superpowers’ on developing countries is observed by Clapp:

‘Developing countries are profoundly affected by these (US and EU) trade battles at the WTO ... in the WTO's deliberations over agriculture, these (developing) countries in practice have little voice, and by and large are at the mercy of the deals brokered between the big agricultural players, particularly the US and the EU.’<sup>326</sup>

Therefore, this thesis argues that the lack of participation by developing countries in agricultural negotiations represents a violation of article 20 of the AoA because they do not have negotiating power at the WTO to broker deals that would be favourable in comparison with their developed counterparts. This reflects the continued marginalisation of developing countries at the WTO.

## **3.5 CONCLUSION**

The AoA came into existence at the end of the Uruguay Round. It sought to achieve reform in three main areas: to improve market access through the tariffication of non-tariff barriers, to reduce the level of amber box domestic support, and to reduce export subsidies.

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<sup>324</sup> Article 20 of the AoA: ‘Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account: (a) the experience to that date from implementing the reduction commitments; (b) the effects of the reduction commitments on world trade in agriculture; (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and (d) what further commitments are necessary to achieve the above mentioned long-term objectives.’

<sup>325</sup> Clapp (note 305 above) 1442.

<sup>326</sup> Ibid 1440.

Some important benefits are available to countries after acceding to the AoA. These include access to a forum to negotiate agricultural trade rules that did not exist under GATT 1947, agreed upon procedures to resolve disputes, the introduction of transparency in members' agricultural policies and continued negotiations on the reform of agricultural trade.

Despite these benefits, this thesis criticises the AoA for its design and implementation issues. With regard to design, the thesis argues that the AoA i) failed to take the different agricultural needs of its members into account, ii) has complex domestic support provisions; iii) has shortfalls in its special safeguard provisions and iv) shows a design flaw in its export subsidy provisions.

Furthermore, this thesis argues that the AoA has failed to live up to its main reform provisions. This chapter focussed on i) how food aid was used to circumvent commitments under the AoA, ii) the fact that the dumping of agricultural goods continues and iii) how developing countries have been marginalised in agricultural negotiations at the WTO.

Therefore the overall argument of this chapter is that the AoA has failed to assist developing countries. This argument is proven by the many criticisms directed at the AoA and by the fact that developed countries are allowed to provide export subsidies and amber box domestic support to their agricultural producers. In essence this chapter supports Desta's view that:

'... whatever governments may say in this respect, the issue about agriculture is one of principle. If the multilateral trading system claims to be based on any principle, it is fairness, transparency and equal opportunities for all on the basis of the economic law of comparative advantage. The current rules of agricultural trade are only an embodiment of sheer hypocrisy in global economic relations.'<sup>327</sup>

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<sup>327</sup>Desta (note 174 above) 535.

## CHAPTER 4

### SOUTH AFRICAN AGRICULTURAL POLICY AND BRICS

#### 4.1 INTRODUCTION

As noted in chapter one, South Africa is a member of the World Trade Organisation (WTO) and a signatory to its Agreement on Agriculture (AoA). It is therefore bound to ensure that its municipal laws reflect the principles that govern the WTO and the AoA.<sup>328</sup> This chapter examines the AoA in the context of the South African agricultural industry, and further explores the possible impact of the country's membership of BRICS on this sector. The chapter is divided into three sections:

- iv) Section A provides a background to the agricultural industry in South Africa;
- v) Section B presents a detailed discussion of agricultural law and policy in South Africa; and
- vi) Section C analyses the possible impact of South Africa's membership of BRICS on the agricultural sector.

To recap, BRICS is the acronym for the economic partnership between Brazil, Russia, India, China and South Africa. The acronym was developed by Goldman Sachs, who forecast that the first four developing countries would be major economies by the year 2050.<sup>329</sup> This thesis submits that South Africa's membership of BRICS offers significant development potential in a number of areas, particularly agriculture. The fact that South Africa was invited to join BRIC demonstrates the political stature the country has attained in the international community, as well as the potential benefits for South Africa's economy in the years to come.

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<sup>328</sup>Example Article X of GATT 1994 specifies the publication and administration of international trade regulations.

<sup>329</sup>Investopedia defines 'BRICS' available at <http://www.investopedia.com/terms/b/brics.asp> accessed on 22 May 2014.

## 4.2 SECTION A: BACKGROUND TO THE AGRICULTURAL INDUSTRY IN SOUTH AFRICA

This section is divided into two parts. Part one discusses the forms of agriculture found in South Africa, and part two explores the unique factors characterising this sector in South Africa.

### 4.2.1 Forms of agriculture found in South Africa

The agricultural industry in South Africa is comprised of field crops, horticulture, livestock, forestry and fishing.<sup>330</sup> Unlike other countries in Africa, South Africa is considered to be a dual agricultural economy.<sup>331</sup> This means that the country's agricultural production derives from a mix of commercial and subsistence farmers.<sup>332</sup> Commercial farming entails intensive crop and livestock production with the objective of realising a profit, whereas subsistence farming involves meeting the daily nutritional needs of individuals within a small family unit.<sup>333</sup> The advantage of a dual agricultural economy is that commercial farmers promote trade in agricultural products whilst resource-poor families are able to provide for themselves through subsistence farming.

Furthermore, South African farmers produce a wide variety of agricultural products. These include maize<sup>334</sup>, wheat<sup>335</sup>, barley<sup>336</sup>, citrus<sup>337</sup>, avocados<sup>338</sup>, pineapples<sup>339</sup>, litchis<sup>340</sup>, and an assortment of vegetables and wines.<sup>341</sup> South Africa is also a major sugar<sup>342</sup> producer and is ranked the 13<sup>th</sup> largest sugar producer in the world.<sup>343</sup>

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<sup>330</sup>Chitiga *et al* 'Agricultural trade policy reform in South Africa' (2008) (47) 1 *Agrekon* 76, 76.

<sup>331</sup>SouthAfrica.Info 'South African Agriculture' available at [http://www.southafrica.info/business/economy/sectors/agricultural-sector.htm#.U9uJ\\_VBsuo](http://www.southafrica.info/business/economy/sectors/agricultural-sector.htm#.U9uJ_VBsuo) accessed on 1 August 2014.

<sup>332</sup>Ibid.

<sup>333</sup>M Cunningham 'Types of Agriculture: Industrialized and Subsistence Agriculture' available at <http://education-portal.com/academy/lesson/types-of-agriculture-industrialized-and-subsistence-agriculture.html> accessed on 24 October 2014.

<sup>334</sup>South Africa produces large quantities of maize as it is the most consumed form of carbohydrate in the country. South Africa is also regarded as the primary producer of maize within the SADC region. This information was obtained from: SouthAfrica.Info 'South African Agriculture' (note 329 above).

<sup>335</sup>Wheat is produced mainly in the Western Cape and Free State regions.

<sup>336</sup>Barley is produced mainly in the Western Cape region.

<sup>337</sup>Citrus is produced mainly in Limpopo, Eastern Cape and KwaZulu-Natal regions.

<sup>338</sup>Avocados are produced mainly in Mpumalanga and Limpopo regions.

<sup>339</sup>Pineapples are produced mainly in Limpopo, Eastern Cape and KwaZulu-Natal regions.

<sup>340</sup>Litchis are produced mainly in Mpumalanga and Limpopo regions.

<sup>341</sup>SouthAfrica.Info (note 331 above).

In addition to crop farming, the South African livestock industry has an estimated population of 14 million cattle<sup>344</sup> and 29 million sheep<sup>345, 346</sup>. Cattle are especially important in South Africa as they are considered symbols of wealth in the local Zulu culture.<sup>347</sup> In addition, South Africa accounts for 65 per cent of the world's demand for ostrich products.<sup>348</sup> The country also produces milk and an estimated 60 000 workers are employed in the dairy industry alone.<sup>349</sup>

South African has also ventured into game farming that entails intensive production of valuable game species such as water buffalo and springbok with the intention of realising a profit.<sup>350</sup> On 1 September 2012, a single buffalo bull was auctioned by a South African farmer for R26 million at Bela-Bela.<sup>351</sup> The bull, named Horizon, was the most expensive game species ever sold in South Africa.<sup>352</sup>

As noted above, the South African agricultural sector consists of both commercial and subsistence farming, with a wide variety of agricultural production. The following section examines the unique characteristics of South African agriculture.

#### **4.2.2 Unique characteristics of South African agriculture**

Despite the positive picture painted above, South African farmers confront unique challenges when compared with their global counterparts. These include government's policy on land redistribution, the prescription of black economic empowerment, minimum wages in the

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<sup>342</sup>Sugar is produced mainly in the Eastern Cape and KwaZulu-Natal regions.

<sup>343</sup>SouthAfrica.Info (note 331 above).

<sup>344</sup> Cattle breeds vary from traditional Nguni to Brahman with an assortment of cross-breeding at rural level.

<sup>345</sup> Sheep breeds also vary from the European Merino to the distinct Zulu breed.

<sup>346</sup>SouthAfrica.Info (note 331 above).

<sup>347</sup>Encyclopedia 'Zulu' available at <http://www.encyclopedia.com/topic/Zulu.aspx> accessed on 24 October 2014.

<sup>348</sup>SouthAfrica.Info 'South Africa's farming sectors' available at <http://www.southafrica.info/business/economy/sectors/542547.htm> accessed on 1 August 2014.

<sup>349</sup>SouthAfrica.Info (note 331 above).

<sup>350</sup>Ibid.

<sup>351</sup>Times Live 'Buffalo bull fetches record R26 million' available at <http://www.timeslive.co.za/scitech/2012/09/04/buffalo-bull-fetches-record-r26-million> accessed on 1 August 2014.

<sup>352</sup>Ibid.

agricultural sector, and the impact of HIV/Aids on the labour force.<sup>353</sup> These challenges are briefly discussed below.

Due to the discriminatory nature of the apartheid regime, many black South Africans were excluded from commercial participation in the agricultural sector.<sup>354</sup> The African National Congress (ANC)-led government aimed to redress past imbalances by introducing agricultural broad-based black economic empowerment (AgriBEE).<sup>355</sup> The goal was to transfer 30 per cent of commercial agricultural land to previously disadvantaged people by 2014.<sup>356</sup>

Faced with the risk of losing their land, many commercial farmers are hesitant to invest capital and new technologies in their operations.<sup>357</sup> The effect is a decrease in commercial production and innovation in the agricultural sector. The ultimate result is that food has to be imported to meet basic demand.<sup>358</sup> This may result in greater competition within the industry, which further impacts domestic farmers.<sup>359</sup>

Government's lack of clarity on its BEE policy in the agricultural sector further undermines commercial producers' confidence.<sup>360</sup> Ortman remarks that, 'the outcomes of numerous conferences and workshops held in the country indicate that there is still considerable uncertainty among stakeholders (such as commercial farmers, organized agriculture, commercial banks, NGOs, and even the government) about what AgriBEE entails and how to achieve its goals'.<sup>361</sup>

The minimum wage for farm workers is a further challenge. In the 1980s, farm labourers had little protection under the law. Only after 1994 did they fall within the ambit of labour law. The Labour Relations Act of 1995, Basic Conditions of Employment Act of 1997, Skills

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<sup>353</sup>Ortmann 'FR Tomlinson Commemorative Lecture: Promoting the Competitiveness of South African Agriculture in a Dynamic Economic and Political Environment' (2005) (44) 3 *Agrekon* 286, 290.

<sup>354</sup>The Land Act of 1936 had divided South African agricultural land according to racial groups.

<sup>355</sup>Ortmann (note 353 above) 290.

<sup>356</sup>*Ibid* 290.

<sup>357</sup>*Ibid* 291.

<sup>358</sup>*Ibid* 291.

<sup>359</sup>Oxford Business Group 'Closing the gap: The rising cost of rice imports is driving change in domestic production' available at <http://www.oxfordbusinessgroup.com/analysis/closing-gap-rising-cost-rice-imports-driving-change-domestic-production> accessed on 24 October 2014.

<sup>360</sup>D Pressly 'SA's agricultural reform programme failing' available at <http://www.kwanalu.co.za/default.asp?action=news&Id=407>, accessed on 24 October 2014.

<sup>361</sup>Ortmann (note 353 above) 292.

Development Act of 1998 and Employment Equity Act of 1998 also apply to farm labourers. This led to the introduction of a minimum wage. This is expected to reduce employment on farms since the legislated wage is above the market rate.<sup>362</sup> The issue of wages came to the fore in the Western Cape during 2013 when farm workers went on strike demanding an increase in the minimum wage from R69 to R150 a day.<sup>363</sup> The strike left three farm workers dead and caused R160 million in insurance claims by farmers.<sup>364</sup> Ultimately, the Minister of Labour, Mildred Oliphant, posted a new sectoral wage determination at R105 a day.<sup>365</sup> However, the strike remains a symbol of the political tension between AgriBEE and large scale commercial farming.<sup>366</sup>

Arndt and Lewis<sup>367</sup> research on the impact of HIV/Aids on the South African labour force found that the pandemic has negatively affected productivity and increased production costs as employers spend valuable time on recruitment and training.<sup>368</sup> Moreover, the impact of HIV/Aids on subsistence farmers is considerable as the death of key members creates a vacuum in agricultural skills.<sup>369</sup> The greater the number of South Africans that die from HIV/Aids the fewer the consumers available to purchase agricultural products.<sup>370</sup> In the long term, a decrease in demand will result in a decrease in supply, which will force South African farmers out of business.<sup>371</sup>

Having briefly identified the characteristics that are unique to South African agriculture, the focus now turns to the policies introduced to address these factors. These policies frame the agricultural sector at national and international level.

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<sup>362</sup>Ibid 293.

<sup>363</sup>R Davis 'Western Cape farm strikes: one year on, still a political football' available at <http://www.dailymaverick.co.za/article/2013-10-28-western-cape-farm-strikes-one-year-on-still-a-political-football/#.VEolzcmH-KA> accessed on 24 October 2014.

<sup>364</sup>Ibid.

<sup>365</sup>Ibid.

<sup>366</sup>Ibid.

<sup>367</sup>Arndt & Lewis 'The macro implications of HIV/AIDS in South Africa: A preliminary assessment.' (2000) 68(5) *The South African Journal of Economics* 856-887.

<sup>368</sup>Ortmann (note 353 above) 294.

<sup>369</sup>Ibid 294.

<sup>370</sup>Ibid 294.

<sup>371</sup>Ibid 294.

## 4.3 SECTION B: AGRICULTURAL LAW AND POLICY IN SOUTH AFRICA

This section is divided into two parts. The first examines the history and development of agricultural law and policy in South Africa, while part two investigates the implementation of the AoA in South Africa.

### 4.3.1 History and development of agricultural law and policy in South Africa

This section draws heavily on the work of Ntshephe<sup>372</sup>, a leading researcher in the field of South African agricultural policy. The historical development of agricultural policy is divided into two phases: i) pre-deregulation, and ii) deregulation. Each is critically analysed as part of the legal development of agriculture in South Africa.

As noted earlier, South African agricultural regulation has undergone many changes. These include land reform, minimum wages, the deregulation of agricultural boards, liberalization of tariffs, and a reduction in domestic support provided to farmers.<sup>373</sup> However, as Soko notes, when South Africa signed the Marrakesh Agreement, it sent two messages to the world: 1) South Africa was prepared to liberalise its trade policies in accordance with international norms, and 2) South Africa sought to establish itself in the world trading system.<sup>374</sup>

Realising these commitments meant that the country (that had been excluded from major international spheres) had to undergo particular changes. These are best understood by analysing the period from 1937 to 1996, the so called pre-deregulation phase.

#### i) Pre-Deregulation Phase (1937-1996)

A common global feature during the early stages of this phase was significant state regulation of domestic industries, especially agriculture. This can be attributed to the economic

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<sup>372</sup>Lulama Ntshephe *Marketing Information Needs of Smallholder Livestock Farmers In the Moretele Area In The Bojanala Platinum District Municipality Of The North West Province* (Masters in Commerce thesis, University of South Africa, 2011).

<sup>373</sup>R Sandrey *et al* 'Agriculture and the World Trade Organisation' (2006) TRALAC Working Paper No. 1, 1, 13.

<sup>374</sup>Soko 'Thrown in at the deep end: South Africa and the Uruguay Round of multilateral trade negotiations, 1986–1994' (2010) 29 *Politeia* Unisa Press 4, 4.



uncertainty of the time.<sup>375</sup> The world was experiencing the Great Depression, and countries had to ensure a stable food supply at reasonable prices. This led to significant regulation of the agricultural industry.

During this period South Africa passed legislation that had a major impact on land ownership. The Land Act of 1936 divided South African agricultural land according to racial groups.<sup>376</sup> Black smallholder farmers were allotted 8 per cent in order to engage in agricultural production, whilst the remainder was reserved for white commercial farmers.<sup>377</sup> The next major development was the formation of the Land and Agricultural Bank of South Africa.<sup>378</sup> The bank's primary function was to finance farmers who could not access regular banking services. The Agricultural Credit Board was created later to finance farmers deemed to be high-risk.

The first significant piece of South African legislation governing agriculture was the Marketing Act of 1937. The Act sought to robustly regulate market access to South African agricultural products through forms of state protectionism. The Act arose from the recommendations of the Viljoen Committee<sup>379</sup> that 'argued that the inelastic demand for farm products, including livestock, the adverse climate in South Africa, the lack of information and the risks inherent to a free market justified state intervention.'<sup>380</sup>

Furthermore, the Viljoen Committee believed 'that the agricultural problem had become too complicated to be handled by thousands of ill-organised and financially weak individuals with conflicting interests. With respect to pricing, the committee could not see why this could not be done equally well, if not better, by a small body of responsible men equipped for the task and in possession of all the statistical facts necessary to determine a fair price justified by the circumstances of the day.'<sup>381</sup>

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<sup>375</sup>Ntshephe (note 372 above) 53.

<sup>376</sup>Ibid 51.

<sup>377</sup>Ibid 54.

<sup>378</sup>Ibid 51.

<sup>379</sup>Ibid 53.

<sup>380</sup>Ibid 53.

<sup>381</sup>Ibid 53.

A major criticism of the Marketing Act was the imbalance in the level of support it provided to full scale commercial farmers compared with basic subsistence farmers.<sup>382</sup> This resulted in increased poverty in South Africa's rural areas. The Marketing Act of 1937 was amended in 1968. The amendments allowed for the development of agricultural schemes to regulate particular agricultural products; management of the scheme was vested in a board of administrators.<sup>383</sup>

The Marketing Act of 1968 also vested the following powers in the Minister of Agriculture, with respect to international agricultural trade:

- (i) the power to ban the import or export of a product altogether<sup>384</sup>;
- (ii) the power to confer the sole right to import or export a product<sup>385</sup> on the Director-General or a Control Board, and
- (iii) the power to prohibit the import or export of a product, except by a Control Board or a person authorised by the Board, under conditions determined by the Board.<sup>386</sup>

Therefore the Marketing Act and various subsidiary pieces of legislation were promulgated to control the domestic agricultural industry. In 1978, the government introduced the Sugar Act.<sup>387</sup> This contained a price fixing mechanism, and went as far as to suggest a procedure to divide profits from price fixing between growers and millers.<sup>388</sup>

The next major development occurred in 1992, when the Department of Agriculture appointed a committee to determine whether the Marketing Act of 1968 would be suitable to address the needs of a new democratic era.<sup>389</sup> The committee's investigation revealed *inter alia* the following:

- (i) The system of marketing agricultural products in South Africa was ineffective because farmers developed new channels to promote their products;<sup>390</sup> and

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<sup>382</sup>Ibid 56.

<sup>383</sup>Ibid 57.

<sup>384</sup>Ibid 60.

<sup>385</sup>Ibid 60.

<sup>386</sup>Ibid 60.

<sup>387</sup>Sugar Act, Act 9 of 1978.

<sup>388</sup>Ntshephe (note 372 above) 57.

<sup>389</sup>Ibid 61.

<sup>390</sup>Ibid 62.

- (ii) The Marketing Act aimed to ‘create fair and equal access to as many producers as possible’ but apartheid legislation ensured that minority large-scale commercial farmers dominated the industry.<sup>391</sup>

The committee *inter alia* made the following recommendations:

- (i) Schemes should operate as private and voluntary organisations outside of the Marketing Act,<sup>392</sup>
- (ii) An Agricultural Marketing Council should be created that should be representative of the demographics of South Africa;<sup>393</sup>
- (iii) The Agricultural Marketing Council should advise the Minister of Agriculture on international and domestic trade issues such as competition and tariff policies.<sup>394</sup>

The committee’s report played a critical role in shaping the future of agriculture regulation in South Africa. Ntshephe observes that, ‘between the release of the Kassier (committee) report in January 1993 and the promulgation of (the) new legislation, ten of the existing Boards were abolished’.<sup>395</sup> With the advent of the new constitutional dispensation, change in this particular sector was inevitable.

## **ii) Deregulation Phase (1996 ONWARDS)**

After the first democratic elections in 1994, South Africa began the process of reforming its domestic legislation to fit the new constitutional dispensation. The Marketing of Agricultural Products Act was promulgated in 1996.<sup>396</sup> This took the recommendations of the committee into account as regards empowering previously disadvantaged South Africans’.<sup>397</sup> The new Act paved the way for the National Agricultural Marketing Council (NAMC), a variant of the recommended National Marketing Council.<sup>398</sup> The NAMC has the power to conduct investigations and advise the Minister on agricultural market access.<sup>399</sup> With regard to

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<sup>391</sup>Ibid 62

<sup>392</sup>Ibid 63.

<sup>393</sup>Ibid 64.

<sup>394</sup>Ibid 64.

<sup>395</sup>Ibid 65.

<sup>396</sup>Ibid 65.

<sup>397</sup>Ibid 65.

<sup>398</sup>Ibid 66.

<sup>399</sup>Ibid 68.

international trade, the NAMC is required to consider international trends and developments in advising the Minister on agricultural market access.<sup>400</sup>

Backed by the Department of Agriculture, the Strategic Plan for South African Agriculture was formulated in 2001, with one of its goals being to increase the sector's global competitiveness.<sup>401</sup> In pursuit of this goal, the Agricultural Marketing Information System was launched in 2007. This further deregulated agricultural markets, encouraging South African farmers to export their products<sup>402</sup> and thus fulfilling one of the cornerstones of the AoA- developing market access.

However Ntshephe argues that a particular consequence of deregulation was that farmers had to adapt to international standards and were required to become business-minded entrepreneurs who could decide what to produce, and how and for whom to produce, in line with contemporary market requirements.<sup>403</sup> Coupled with the lack of finance and modern technology, Ntshephe concludes that emerging farmers have had difficulty competing with imported products.<sup>404</sup>

Ntshephe's<sup>405</sup> research on the history and development of agricultural policy in South Africa provides a holistic understanding of South Africa's agricultural policy. Attention now turns to how the AoA has been implemented in South Africa.

### **4.3.2 Implementation of the AoA in South Africa**

In contrast to Ntshephe<sup>406</sup>, Sandrey<sup>407</sup> grouped South African agricultural policy under four pillars. This thesis submits that the 'pillar' approach is a useful framework for accurately analysing South Africa's agricultural policies and regulation.

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<sup>400</sup>Ibid 68.

<sup>401</sup>Ibid 26.

<sup>402</sup>Ibid 28.

<sup>403</sup>Ibid 29.

<sup>404</sup>Ibid 29.

<sup>405</sup>Ibid.

<sup>406</sup>Ibid.

<sup>407</sup>R Sandrey 'The four pillars of South African Agricultural Trade Policy' (2007) tralac Trade Brief No.TB08/2007 1, 1.

The first pillar involves unilateral policies that govern domestic agriculture. Sandrey briefly covers the deregulation of the South African agricultural sector and emphasises that deregulation took place via reduced tariffs and export subsidies, changes in marketing institutions and labour policy and land-reform initiatives.<sup>408</sup> Sandrey concludes that, compared with the rest of the world, South Africa's agricultural sector is not highly regulated.<sup>409</sup>

The second pillar involves bilateral policies that govern South Africa and one other country. Sandrey cites the example of the Trade, Development and Corporation Agreement<sup>410</sup>(TDCA).<sup>411</sup> The TDCA was entered into between South Africa and the EU on 1 January 2000. The objective of the TDCA is to make trade between South Africa and the EU duty free.<sup>412</sup>

The third pillar involves regional policies that govern a group of countries including South Africa. Sandrey cites the example of the South African Customs Union Agreement of 2002. This agreement facilitates trade between South Africa and regional African partners through a common trade policy.<sup>413</sup>

The final pillar involves multilateral policies that govern all members of the WTO. Sandrey cites the example of GATT 1994 and the AoA.<sup>414</sup>

It is submitted that Sandrey's<sup>415</sup> categorisation of South Africa's agricultural policies into four pillars provides a sound explanation of the economic impact of agricultural policy in the country. These pillars are a useful framework to understand how international trade policy has affected South Africa.

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<sup>408</sup>Ibid 2.

<sup>409</sup>Ibid 2.

<sup>410</sup>The TDCA is an international agreement entered into between the EU and South Africa regulating aspects related to trade and development. South Africa ratified this agreement into municipal law on 1 May 2001. The agreement effectively creates a free trade area between South Africa and the EU. More available at <http://www.dfa.gov.za/foreign/saebilateral/tdca.html> accessed on 22 May 2014.

<sup>411</sup>Sandrey (note 407 above) 3.

<sup>412</sup>Ibid 3.

<sup>413</sup>Ibid 3.

<sup>414</sup>Ibid 5.

<sup>415</sup>Ibid 1.

After joining the WTO in 1995, South Africa began the process of reforming its domestic legislation in order to fall in line with WTO provisions, particularly the AoA.<sup>416</sup> The Marketing of Agricultural Products Act of 1996 (The Act) was enacted in order to implement the AoA and limit state intervention in agricultural trade.<sup>417</sup> It aimed to improve market access and promote export trade.<sup>418</sup> The remaining part of this section discusses South Africa's commitments in light of market access, domestic support and export subsidies.

With regard to market access, as a developing nation, South Africa undertook to convert all non-tariff barriers into tariff equivalents and thus completed its tariffication process as required by the WTO.<sup>419</sup> Ad valorem tariffs<sup>420</sup> apply to agricultural products while a tariff quota of 20 per cent applies to agricultural products which are under minimum market access.<sup>421</sup> Specific products like milk, butter, sugar, cheese, bovine meat, and cigarettes, tobacco and sheep meat have tariffs of more than 15 per cent, in order to protect the value-adding processing industry in South Africa.<sup>422</sup>

In addition, South Africa has committed to maintain and improve market access opportunities at between 3 per cent and 5 per cent of its domestic consumption of agricultural products.<sup>423</sup> The country is therefore compliant with the AoA with regard to improving agricultural market access.<sup>424</sup>

With regard to domestic support, as discussed in chapter three, each country had to commit to reducing its Aggregate Measure of Support (AMS) to agriculture. A total AMS reduction of 13 per cent was applied to South Africa to be implemented over a period of ten years, from 1995 to 2004.<sup>425</sup> Ani-Oluchi observes that that approximately 96 percent of the support currently in place in South Africa takes the form of Market Price Support (MPS), a tool used

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<sup>416</sup>Ifeoma Ani-Oluchi *The World Trade Organisation's Trade Agreement on Agriculture: A Comparative Analysis of South Africa and Nigeria* (unpublished LLM thesis, University of KwaZulu-Natal, 2013) 39.

<sup>417</sup>Ibid 39.

<sup>418</sup>Ibid 39.

<sup>419</sup>Ibid 39.

<sup>420</sup>A tariff rate charged as a percentage of the price' World Trade Organisation 'ad valorem tariff' available at [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm) accessed on 30 October 2014.

<sup>421</sup>Ani-Oluchi (note 416 above) 40.

<sup>422</sup>Ibid 40.

<sup>423</sup>Simbi 'Agricultural policy in South Africa' Ministry for Agriculture and Land Affairs available at <http://www.nda.agric.za/docs/Policy/policy98.htm> accessed on 24/04/2014.

<sup>424</sup>Ibid.

<sup>425</sup>Ani-Oluchi (note 416 above) 42.

to maintain domestic prices of farm products.<sup>426</sup> These products include sugar, wheat, maize, milk, meat, and fruit.<sup>427</sup> However, South Africa is still regarded as compliant with the AoA in respect of domestic support because it has reduced its total AMS since 1995.<sup>428</sup>

With regard to export subsidies, South Africa's total export subsidy outlay commitment in 1995 was R842 million.<sup>429</sup> This was built up during the 1980s when the government provided export incentives.<sup>430</sup> However in July 1997, the General Export Incentive Scheme was discontinued due to South Africa's reduction commitments to the WTO.<sup>431</sup> Since the abolition of the Scheme, South Africa has provided no agricultural export subsidies.<sup>432</sup> The country is therefore fully compliant with the AoA with regard to export subsidies.

Therefore South Africa is compliant in all three areas of AoA reform; this is reflected in the Ministry for Agriculture and Land Affairs' statement that, 'South Africa's priority is to ensure compliance with agricultural commitments in the WTO'.<sup>433</sup> The Ministry further notes that South Africa made concessions during the Uruguay Round to various agricultural lobbies in developed countries, which have resulted in high levels of domestic support and export subsidies in these countries.<sup>434</sup> South African agricultural producers are therefore disadvantaged because the government does not provide equivalent domestic support or export subsidies.<sup>435</sup> South Africa has argued for a reduction in export subsidies and a framework that will assist developing countries.<sup>436</sup> This thesis submits that whilst South Africa has affirmed its commitment to the AoA, the country must continue to strive for agricultural liberalisation, especially for developing countries. It further argues that South Africa can use BRICS to lobby for agricultural trade liberalisation for developing countries.

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<sup>426</sup>Ibid 43.

<sup>427</sup>Ibid 43.

<sup>428</sup>Ibid 42.

<sup>429</sup>Simbi (note 423 above).

<sup>430</sup>Ani-Oluchi (note 416 above) 44.

<sup>431</sup>Ibid 44.

<sup>432</sup>Simbi (note 423 above).

<sup>433</sup>Ibid.

<sup>434</sup>Ibid.

<sup>435</sup>Ibid.

<sup>436</sup>Ibid.

## 4.4 SECTION C: SOUTH AFRICA'S AGRICULTURAL SECTOR AND BRICS

South Africa is *inter alia* a member of the Cairns Group, the African and Caribbean and Pacific Countries Group, G-90, G-20, G-33 and W52.<sup>437</sup> In addition to these international groups, South Africa is a member of the BRICS group.<sup>438</sup> This section analyses the effect of South Africa's agricultural law and policy on its trading partners, particularly BRICS. It is divided into four parts: 4.4.1 Background to BRICS, 4.4.2 The role of South Africa in BRICS, 4.4.3 Agriculture within BRICS, and 4.4.4 Issues at the BRICS level.

### 4.4.1 Background to BRICS

The acronym 'BRIC' was first used Goldman Sachs in 2001, during their economic forecast exercise.<sup>439</sup> It was forecast that the four BRIC nations would play a major role in the global economy for the next 50 years. This startled the international community, as the four BRIC nations had contributed a meager 4 per cent of world trade during 1990.<sup>440</sup>

At the time the Goldman Sachs report was released, the BRIC nations were already undergoing major internal changes. Brazil adopted a drastic economic stabilisation plan to counter hyperinflation and India introduced sweeping economic reforms in the early 1990s.<sup>441</sup> While China emerged unscathed from the Asian economic crisis of the late 1990s, Russia put a strategy in place to rebuild and regain its economic status.<sup>442</sup> The Goldman Sachs exercise assumed that these nations would continue the impetus achieved through structural reforms.

However the exercise did not assume that the four countries would formalise a relationship. In 2006, ministers from the BRIC nations met to discuss the possibility of forming a group.<sup>443</sup> The BRIC group was finalised in Russia when Ministers from each of the four nations

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<sup>437</sup>Ani-Oluchi (note 416 above) 45.

<sup>438</sup>Investopedia defines 'BRICS' available at <http://www.investopedia.com/terms/b/brics.asp> accessed on 22 May 2014.

<sup>439</sup>S Singh & M Dube 'BRICS and the World Order: A Beginner's Guide' available at [www.saiia.org.za](http://www.saiia.org.za) 3.

<sup>440</sup>Ibid 3.

<sup>441</sup>Ibid 3.

<sup>442</sup>Ibid 6.

<sup>443</sup>Ibid 6.



attended the first official summit on 16 June 2009.<sup>444</sup> The group expanded to ‘BRICS’ when South Africa was invited to join in 2010.<sup>445</sup>

#### 4.4.2 The role of South Africa in BRICS

South Africa’s invitation to join BRICS was extended by the Chinese Minister of Foreign Affairs. This offered opportunities for increased trade and investment as well as a platform for an African voice on the international stage.<sup>446</sup> Collectively the countries called for a review of international financial mechanisms and a combined effort towards global trade cooperation.<sup>447</sup>

In March 2013, South Africa hosted the fifth BRICS Summit at the Durban International Convention Centre (ICC).<sup>448</sup> This summit strengthened South Africa’s international recognition as a BRICS member, and reinforced its leverage as a possible gateway into Africa.<sup>449</sup> Minister of Trade and Industry, Mr. Rob Davies highlighted South Africa’s role within BRICS with regard to the African continent:

‘We continue to be a significant gateway into the African continent. We make a distinction between being a gateway and a gatekeeper. We do not try to say that all trade and investment relations from other BRICS countries must come through us. It would be a lost cause if we tried to do that. But we know that many companies from BRICS and from elsewhere find it convenient to work with South Africa and South African institutions in terms of their broader continental programmes. In one way or another, our fellow BRICS members realise that in choosing us.’<sup>450</sup>

However, there are two sides to this coin. On the one hand, the BRIC nations have been criticized for including South Africa and on the other hand, there have been positive arguments supporting South Africa’s position in BRICS. Besada questions South Africa’s

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<sup>444</sup>Ibid 7.

<sup>445</sup>Ibid 7.

<sup>446</sup>Ibid 7.

<sup>447</sup>H Besada *et al* ‘South Africa in the BRICS: Opportunities, Challenges and Prospects’ (2013) 42(4) *Africa Insight* Africa Institute of South Africa 1.

<sup>448</sup>Hoepli, ‘Economic Conditions and Business Environment in BRICS’ 2014 *Professional Accountant* 12.

<sup>449</sup>Ibid 12.

<sup>450</sup>Fynn ‘South Africa’s role in BRICS: We talk with DTI Minister Dr Rob Davies’ (2012) *Management Today* 12.

‘worthiness’ to fit into the BRIC structure.<sup>451</sup> As noted above, Goldman Sachs predicted that the BRIC nations would be the leading economies by 2050. This has been supported by the fact that China, India and Brazil have experienced phenomenal economic growth over the past decade. By 2010, Chinese GDP had grown by 10.3 per cent, India’s by 9.7 per cent and Brazil’s by 7.5 per cent. This is in stark contrast to the meager 2.8 per cent growth posted by South Africa during the same period. Adding to this anomaly is the fact that South Africa, with a population of 50 million is diminutive compared with China and India with populations of 1.3 billion and 1.2 billion, respectively.<sup>452</sup>

Furthermore, South Africa has the highest unemployment rate amongst the BRICS nations. According to Hoeppli, ‘Although Brazil and Russia achieved rather modest GDP growth rates in the last quarter of 2012 (in a BRICS comparison), unemployment rates are just over 5%. China, whose economy grew by about 10% every year since the beginning of the century, reports an official unemployment rate of 4.1%. This is in stark contrast with South Africa, whose unemployment rate is about 25%. Significant economic growth, well above current growth, will be required to absorb a large number of additional people into the active workforce’.<sup>453</sup>

Despite South Africa’s poor performance in comparison with other BRICS members, the country has the highest market capitalization ratios in the world. It has been argued that South Africa entered BRICS not as a Goldman Sachs prediction, but as the most developed economy on the African continent.<sup>454</sup> Besada describes the country as ‘characterised by an abundant supply of mineral resources; well-developed legal, energy, financial, and communications and transportation sectors; a modern infrastructure that supports an efficient distribution of goods and services to major urban centres throughout the country; and an active stock exchange that ranks among the top 20 in the world’.<sup>455</sup>

Another positive factor in South Africa’s favour is its global ranking in terms of how easy it is to start a small business. Again, Hoeppli notes that ‘entrepreneurship and small businesses are important for growth and employment; yet, starting and successfully running a business is

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<sup>451</sup>Besada (note 447 above) 2.

<sup>452</sup>Ibid 2.

<sup>453</sup>Hoeppli (note 448 above) 13.

<sup>454</sup>Besada (note 447 above) 3.

<sup>455</sup>Ibid 3.

a challenging endeavour – in some countries even more so than in others. In the 2013 World Bank report *Doing Business 2013 – Smarter Regulations for Small and Medium-Size Enterprises*, South Africa obtained the best ranking among the BRICS countries in terms of ease of doing business (rank 39), with a fair distance to China (ranked 91). The World Bank ranked the remaining three BRICS countries in the bottom half of all the countries considered (Russian Federation (112), Brazil (130) and India (132)).<sup>456</sup>

South African Trade and Industry Minister, Rob Davies, also indicated that the BRICS countries would benefit from direct trade in their own currencies, which would protect them from volatile international convertible currencies such as the US Dollar.<sup>457</sup> In support of this objective development banks from each member of the group signed a framework agreement on cooperation among their national financial development institutions to establish mutual credit lines to be denominated in local currencies.<sup>458</sup> These funds are likely to be channeled to investment in infrastructure, reflected by China's intention to contribute 10 billion Yuan to the group for oil and gas projects.<sup>459</sup>

Banking and finance also play a significant part in the BRICS group. South Africa's largest bank, Standard Bank, has sold 20 per cent of its shares to the International Commercial Bank of China (ICBC).<sup>460</sup> This allows these banks to access investment opportunities in both Asia and Africa and also creates a platform for intercontinental agriculture projects.<sup>461</sup> Further developments include the decision by the leaders of the member countries at the fifth BRICS summit to establish a BRICS Development Bank to help finance infrastructure programs and sustainable development in BRICS.<sup>462</sup>

While there are arguments for and against South Africa's worthiness to sit at the BRICS table, this thesis holds the view that South Africa is worthy of being a member of BRICS. Despite the fact that South Africa's population might not be as big as her BRICS counterparts, this thesis submits that, as a fledgling democracy, South Africa has the potential

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<sup>456</sup>Hoepli (note 448 above) 14.

<sup>457</sup>Besada (note 447 above) 2.

<sup>458</sup>Ibid 2.

<sup>459</sup>Ibid 2.

<sup>460</sup>Ibid 4.

<sup>461</sup>Ibid 4.

<sup>462</sup>Hoepli (note 448 above) 12.

to be a gateway to Africa. As such, the country is a significant African partner for the BRICS group.

#### 4.4.3 Agriculture within BRICS

Interestingly, the first round of BRICS meetings revolved around agriculture. Singh notes that the immediate focus was to ease the burden of soaring global food prices.<sup>463</sup> Ministers from each of the BRIC nations met in 2010 and agreed to: i) create an agricultural information-based system; ii) develop a general strategy to ensure access to food for the most vulnerable sections of the community; iii) reduce the negative impact of climate change on food security and adapt agriculture to climate change; and iv) enhance agricultural technology co-operation and innovation.<sup>464</sup> This was followed by the formation of a BRICS Agricultural Co-operation Working Group that formulated a 2012 to 2016 action plan for Agricultural Cooperation of BRICS Countries.<sup>465</sup> This plan involved five activities, each to be co-ordinated by a different BRICS member.<sup>466</sup> The first is the creation of a basic agricultural information system for BRICS countries, to be co-ordinated by China; the second is the development of a general strategy to ensure access to food for the most vulnerable population, to be coordinated by Brazil; the third is addressing the negative impact of climate change on food security and adaptation of agriculture to climate change, to be co-ordinated by South Africa; the fourth is enhancing agricultural technology co-operation and innovation, to be co-ordinated by India; and the fifth is trade and investment promotion, to be co-ordinated by Russia.<sup>467</sup> It is submitted that this represents a holistic approach to agricultural development as it includes trade, finance and technological aspects of food security.<sup>468</sup>

Within the BRICS group, statistics show that Brazil is the biggest exporter of agricultural products to the world with estimated revenue of \$81.5 billion for 2011 alone.<sup>469</sup> Brazil is followed by China, India, Russia and finally South Africa with \$7.2 billion.<sup>470</sup> Brazil is also

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<sup>463</sup>Singh & Dube (note 439 above) 7.

<sup>464</sup>Ibid 26.

<sup>465</sup>Ibid 26.

<sup>466</sup>Ibid 26.

<sup>467</sup>Ibid 26.

<sup>468</sup>Ibid 26.

<sup>469</sup>R Sandrey *et al* 'The BRICS and agricultural exports to Africa: are they a threat to South African interests?' (2013) *tralac* 4.

<sup>470</sup>Ibid 4.

the main exporter to Africa, with an estimated \$8.4 billion in agricultural exports to the continent.<sup>471</sup>

The main agricultural items exported by BRICS nations to Africa are sugar, cereals, and meat.<sup>472</sup> Although South Africa is considered a major sugar producer with exports of \$189 million in 2011, Brazil leads the African sugar market with a total export value of \$4399 million.<sup>473</sup> Further Brazil dominates meat exports to the continent with a value of \$1390 million in 2011.<sup>474</sup> This is in stark contrast to South Africa's \$41 million in meat exports for the same period.<sup>475</sup> Russia is the leading exporter of cereals to the continent.<sup>476</sup> In total, sugar, cereals and meat form 65.8 per cent of the agricultural products exported from BRICS to Africa.<sup>477</sup>

Unlike the EU, Brazil's agricultural growth has not been spurred by domestic support.<sup>478</sup> This is reflected in the OECD calculation for Producer Support Estimate which has been an average 5.0.<sup>479</sup> To put this figure into perspective, the EU's average for Producer Support Estimate is 22.0.<sup>480</sup> Since deregulation, South Africa, like Brazil, has a low Producer Support Estimate<sup>481</sup> with a rating of 2.2 in 2011.<sup>482</sup>

If Producer Support has not driven agricultural growth in Brazil, what has? This question is answered by Sandrey; 'The Real Plan brought about the budgetary restraints needed to bring the notorious Brazilian inflation under control and provided (initially) a relatively undervalued exchange rate that contributed to exports, structural reforms such as a privatization programme and the deregulation of domestic markets, and policy changes that included deep tariff cuts and a large reduction in non-tariff barriers'.<sup>483</sup> Despite its lack of

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<sup>471</sup>Ibid 4.

<sup>472</sup>Ibid 10.

<sup>473</sup>Ibid 10.

<sup>474</sup>Ibid 10.

<sup>475</sup>Ibid 10.

<sup>476</sup>Ibid 10.

<sup>477</sup>Ibid 9.

<sup>478</sup>R Sandrey *et al* 'The Rise and Rise of Brazilian Agriculture: what does it mean for South Africa?' (2013) *tralac* 12.

<sup>479</sup>Ibid 12.

<sup>480</sup>Ibid 12.

<sup>481</sup>Ibid 12.

<sup>482</sup>'Agricultural Producer Support' available at [http://www.oecd-ilibrary.org/economics/oecd-factbook-2013/agricultural-producer-support-estimate-by-country\\_factbook-2013-table220-en](http://www.oecd-ilibrary.org/economics/oecd-factbook-2013/agricultural-producer-support-estimate-by-country_factbook-2013-table220-en) accessed on 25 August 2014.

<sup>483</sup>Sandrey (note 478 above) 12.

arable land, China has established a thriving agricultural industry. The country achieved growth through intensive agricultural research and effective communication with farmers.<sup>484</sup> Sandrey suggests that the South African agricultural industry could benefit from studying how China has built her agricultural sector.

Sandrey and Fundira conducted research on non-tariff measures in place with respect to agriculture in each of the BRIC nations<sup>485</sup>:

- A number of internal measures assist agricultural production in Brazil including guaranteed producer prices and credit for producers at preferential rates.<sup>486</sup> Furthermore, the agricultural sector receives various domestic support measures from the government in the form of price support and stabilisation, option contracts, and a guaranteed minimum price, even though the level of these support measures is low<sup>487</sup>;
- Agricultural support policies in India promote domestic production at the expense of imported goods.<sup>488</sup> Import restrictions are in place to ensure domestic supply of specific products, and are removed or applied as circumstances require<sup>489</sup>;
- The Chinese domestic agricultural sector obtains domestic support in the form of direct subsidies, input subsidies and market price support<sup>490</sup>;
- The Russian Government regularly adjusts its national import regulations including tariffs and licensing without notice<sup>491</sup>;
- India's import regime remains complex, especially its licensing and permit system, as well as its tariff structure which has multiple exemptions that vary according to product, user, or specific export promotion programs.<sup>492</sup> Furthermore, products that were subject to quantitative restrictions are now considered sensitive products and are

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<sup>484</sup>R Sandrey *et al* 'Agriculture in Russia, India and China' (2013) *tralac*.

<sup>485</sup>R Sandrey *et al* 'South African Agricultural Export Prospects to the BRICS' (2013) *tralac*.

<sup>486</sup>*Ibid* 18.

<sup>487</sup>*Ibid* 19.

<sup>488</sup>*Ibid* 19.

<sup>489</sup>*Ibid* 19.

<sup>490</sup>*Ibid* 20.

<sup>491</sup>*Ibid* 18.

<sup>492</sup>*Ibid* 19.

therefore subject to above average tariff rates.<sup>493</sup> Examples include bamboo, cocoa, copra, cotton, milk and milk products, edible oils, good grains, fruits and vegetables, poultry, tea and coffee, spices and sugar.<sup>494</sup> In addition, there is a wide gap between bound and applied tariffs, which allows the government to modify its tariffs substantially while still complying with WTO requirements<sup>495</sup>;

- Chinese state trading enterprises restrict the imports of certain agricultural products, and have exclusive rights to import certain products.<sup>496</sup> Furthermore, price distortions arise as these entities have the monopoly on agricultural products.<sup>497</sup>

Sandrey and Fundira's research demonstrates that barriers to agricultural trade still exist, especially amongst the BRICS nations. In light of these findings and bearing in mind the earlier discussion in section B, this thesis submits that South Africa is exceptionally compliant with the AoA when compared with its BRICS counterparts. Furthermore, it argues that South Africa should use its compliance with the AoA as a tool to further its agricultural objectives at the next Ministerial Conference.

#### 4.4.4 Issues at BRICS level

However, there are issues that need to be resolved at BRICS level. The World Bank's *Doing Business 2012* highlighted several issues with respect to BRICS.<sup>498</sup> These include inadequate infrastructure; a lack of institutionalisation; the heterogeneous nature of the BRICS group and a lack of cohesive identity; the fragile nature of trade and investment linkages among the BRICS countries; and differences within the group on values, economics, political structures and geopolitical interests.<sup>499</sup> As Singh points out, if these issues are not addressed, they 'could pose serious challenges to the realisation of what was predicted by Goldman Sachs'.<sup>500</sup>

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<sup>493</sup>Ibid 19.

<sup>494</sup>Ibid 19.

<sup>495</sup>Ibid 19.

<sup>496</sup>Ibid 20.

<sup>497</sup>Ibid 20.

<sup>498</sup>Singh & Dube (note 439 above) 7.

<sup>499</sup>Ibid 3.

<sup>500</sup>Ibid 3.

Recently agricultural products from the EU destined for Russia have been stopped<sup>501</sup> due to the retaliatory embargo imposed by Russia on EU and US products as part of the ‘tit-for-tat’ sanctions on the Ukraine crises.<sup>502</sup> It has been estimated that 700 000 tons of apples from Poland have been refused access due to the embargo.<sup>503</sup> Furthermore, 250 truckloads of peaches and nectarines already en route to Russia had to be stopped when the embargo began.<sup>504</sup>

Agricultural products that cannot be sold are returned to their host country and destroyed<sup>505</sup> as an oversupply would drastically affect the market price, forcing producers to reduce their prices.<sup>506</sup> This embargo has led to a surplus of agricultural products in the EU.<sup>507</sup> The EU is one of South Africa’s strongest export markets and South Africa and Russia are both members of BRICS. Whether Russia will influence South Africa to reduce its trade with the EU through BRICS remains to be seen.<sup>508</sup>

Whilst BRICS seems to offer South Africa lucrative prospects, this thesis submits that the country should be wary of losing its foothold on the African continent. As noted earlier, Brazil, Russia, India and China have bigger populations and better GDPs. The BRICS alliance could result in increased agricultural exports from these countries that could threaten South African agricultural exports in the long run. Besada agrees with this view:

‘If the planned free-trade agreements with India, Brazil and China come to fruition, South Africa could be faced with increased BRIC-manufactured exports. Chinese exports have already ‘decimated’ the textile sector in South Africa and the shoe industry in Brazil, while India has resorted to applying antidumping duties on various Chinese goods.’<sup>509</sup>

Therefore South Africa should identify how its membership of BRICS will influence its role in Africa.<sup>510</sup>

Sandrey’s analysis of the impact of agricultural exports from BRICS into Africa<sup>511</sup> demonstrated that South Africa has lost market share to the original BRIC members in

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<sup>501</sup> Reuters ‘Russian Sanctions create surpluses’ Daily News 19 August 2014 at 6.

<sup>502</sup> Ibid 6.

<sup>503</sup> Ibid 6.

<sup>504</sup> Ibid 6.

<sup>505</sup> Ibid 6.

<sup>506</sup> Ibid 6.

<sup>507</sup> Ibid 6.

<sup>508</sup> Ibid 6.

<sup>509</sup> Besada (note 447 above) 7.

<sup>510</sup> Ibid 7.



virtually all African markets except Zimbabwe in recent years, and in all products except fats and oils.<sup>512</sup> This is unsurprising considering that Brazil ranks third in the developing world in terms of public agricultural research and development investments, after China and India.<sup>513</sup> South Africa can therefore benefit from its BRICS alliance by investigating agricultural technologies researched by its BRICS counterparts.<sup>514</sup>

Furthermore, Brazil faces a shortage of agricultural land. Of a total of land area of 851 million hectares,<sup>515</sup> 496 million hectares is protected due to the Amazon rainforest.<sup>516</sup> However, with deregulation and increased global demand for Brazilian soybean, producers are caught between production and conservation.<sup>517</sup> Sandrey reports that pasture land currently used by livestock farmers is being converted to crop farms.<sup>518</sup> This forces livestock into protected areas such as the Amazon to feed<sup>519</sup> and endangers the Amazonian ecosystem including local plant and animal life.<sup>520</sup> Therefore the social and environmental impact of Brazilian agriculture will be an important aspect for leaders to consider at the next BRICS summit.<sup>521</sup> This thesis submits that the environment should be regarded as an important stakeholder when considering agriculture policies. Adverse agriculture policies that destroy a local ecosystem should be renegotiated in order to find methods that can still produce agricultural products but without damaging the environment.

Brazil aside, the issue of agricultural land is a collective BRICS issue. Amongst the BRICS nations, India has the most arable land (157923 hectares), followed by Russia (121750 hectares), China (109999 hectares), Brazil (61200 hectares) and South Africa (14350 hectares).<sup>522</sup> This demonstrates that South Africa has to plan its use of arable land carefully in order to achieve maximum gains with minimal environmental impact.<sup>523</sup>

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<sup>511</sup>Sandrey *et al* (note 478 above) 20.

<sup>512</sup>Ibid 20.

<sup>513</sup>Ibid 20.

<sup>514</sup>Ibid 20.

<sup>515</sup>Ibid 18.

<sup>516</sup>Ibid 18.

<sup>517</sup>Ibid 18.

<sup>518</sup>Ibid 18.

<sup>519</sup>Ibid 18.

<sup>520</sup>Ibid 18.

<sup>521</sup>All figures are in millions of hectares. Sandrey *et al* (note 478 above) 18.

<sup>522</sup>Ibid 19.

<sup>523</sup>Ibid 19.

Another recent issue has been poultry imports from Brazil. The South African poultry industry is estimated to be worth R27 billion.<sup>524</sup> There is huge demand for poultry as it is a cheap source of protein and is part of a nutritious diet for many South Africans.<sup>525</sup> However the landing cost of imported Brazilian poultry was considerably cheaper than South African producers' production costs. Rising input costs in South Africa such as electricity and feed costs could not be passed on to the consumer. For example the cost of electricity rose by 100 per cent between 2008 and 2011.<sup>526</sup> At the same time, local poultry producers had to suppress their prices in order to compete with the low price of imported poultry. This resulted in many large poultry companies reporting annual losses and forecasting the downsizing of their operations.<sup>527</sup>

In March 2013, the South African Poultry Association (SAPA) submitted an application to the International Trade Administration Commission (ITAC), requesting an increase in import tariffs on selected frozen poultry products.<sup>528</sup> The application was based on three grounds: (1) the domestic poultry production industry was being destroyed by foreign products; (2) the high risk of job losses linked to reduced domestic demand; and (3) a lack of food security within the Southern African Customs Union (SACU) region.<sup>529</sup>

In response to the SAPA application, the Minister of Trade and Industry, Rob Davies announced on 30 September 2013 that South Africa would increase import duties on five categories of frozen poultry. The decision came into effect the same day through Notice 715 in Government Gazette No 36876.<sup>530</sup> The increased poultry tariffs apply to all countries that export to South Africa, except those that have signed trade agreements with the Republic, such as the EU.<sup>531</sup>

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<sup>524</sup>H Fourie 'Not a Free Lunch: The Implications of Increased Import Tariffs on South Africa's Chicken Market' (2013) Research Note 3 *Econex*, 5.

<sup>525</sup>Ibid 6.

<sup>526</sup>K.A. Abdu-Raheem *et al* 'Household food security in South Africa: evaluating extension's paradigms relative to the current food security and development goals' (2011) *South African Journal of Agricultural Extension* volume 39 no 2, 91, 92.

<sup>527</sup>Business Day Live 'Rob Davies Raises Chicken Import Tariffs' available at <http://www.bdlive.co.za/business/trade/2013/09/30/rob-davies-raises-chicken-import-tariffs> accessed on 16 May 2014.

<sup>528</sup>Fourie (note 524 above) 1.

<sup>529</sup>Ibid 1.

<sup>530</sup>Ibid 1.

<sup>531</sup>Ibid 1.

Fourie argues that increased tariffs will not assist the domestic poultry industry because they are a short term fix for a long term problem.<sup>532</sup> He notes that inefficiencies in domestic poultry production such as high input costs lead to expensive domestic products and a demand for cheaper foreign poultry products.<sup>533</sup> Fourie supports his argument by noting that from 2001 to 2010, the average annual increase in the production and consumption of chicken was 6.2 per cent and 7.1 per cent, respectively. The gap between production and consumption was filled by imported chickens.<sup>534</sup> Furthermore Fourie observes that:

‘It is anticipated that the immediate impact of the increase in import duties will lead to an even greater shift in imports. While the tariffs will impose heavy penalties on Latin American producers, for example, imports from European countries will be unaffected by the tariff increase, meaning that European chicken imports will in all likelihood substitute chicken imports from elsewhere’.<sup>535</sup>

In other words, there will always be constant demand for imported poultry in South Africa, and if this demand is not met by Brazil, it will be met from elsewhere, such as the EU.<sup>536</sup>

The Chief Executive of the South African Poultry Association, Mr. Kevin Lovell disagreed with Fourie and stated that if the domestic poultry industry is not protected, South Africa’s national food security will be at risk because it will not be able to feed its own population.<sup>537</sup> He cautioned that poultry imports would ‘only last as long as the exporting countries are happy with the prices paid; the minute they are able to get a better price elsewhere, they will sell their poultry to that country.’<sup>538</sup>

Consultations are taking place between South Africa and Brazil at the WTO on increased poultry tariffs.<sup>539</sup> Brazil argues that the imposition of anti-dumping duties is inconsistent with South Africa’s obligations under GATT 1994.<sup>540</sup> In the interests of fostering better trade

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<sup>532</sup>Ibid 2.

<sup>533</sup>Ibid 4.

<sup>534</sup>Ibid 2.

<sup>535</sup>Ibid 4.

<sup>536</sup>Ibid 4.

<sup>537</sup>Lovell ‘Poultry imports slaughter industry’ available at: <http://mg.co.za/article/2013-05-31-00-poultry-imports-slaughter-industry> accessed on 16 May 2014.

<sup>538</sup>Ibid.

<sup>539</sup>World Trade Organisation ‘South Africa Anti-Dumping Duties on Frozen Meat of Fowls from Brazil’ available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds439\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds439_e.htm) accessed on 29 October 2014.

<sup>540</sup>Brazil cites violations based on 29 different articles. More available at *ibid*.

relations, this thesis submits that South Africa and Brazil should come up with a mutually beneficial solution that will enable them to present a unified front at the next Ministerial Conference. The benefit of this win-win approach is that it will foster ties between two developing countries that are part of the BRICS group.

Based on the evidence, this thesis submits that it is paramount that the Minister of Trade and Industry together with the South African Poultry Association iron out inefficiencies in the domestic industry, particularly high input costs and poor disease control. Furthermore, it argues that failure to remedy these inefficiencies will result in South Africa being vulnerable to the volatility of global prices, as it would continue to be a net-importer of poultry products.

#### 4.5 CONCLUSION

This chapter examined the AoA in the context of the South African agricultural industry, and explored the potential impact of the country's membership of BRICS on this sector. Based on the evidence, this thesis argues that South Africa is compliant with the provisions of the AoA. Nonetheless, the country is experiencing rapidly increasing rates of household food insecurity.<sup>541</sup> Fourteen million South Africans suffer hunger and inadequate nutrition on a daily basis.<sup>542</sup> This thesis therefore concludes that the AoA has not benefited South African consumers.

The BRICS group must work together to achieve food security within the group. Based on the Goldman Sachs prediction, this thesis argues that BRICS has the potential and the resources to feed their populations. Trade statistics for 2011 support the Goldman Sachs prediction, with the BRICS nations' share of global trade growing to 15 per cent.<sup>543</sup> As Singh notes, this represents a 150 per cent increase in trade activity over the past 20 years.<sup>544</sup> It is therefore submitted that South Africa is fortunate to be part of BRICS and should use this group as a platform to promote and achieve food security for its people.

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<sup>541</sup>Abdu-Raheem *et al* (note 526 above) 91.

<sup>542</sup>*Ibid.*

<sup>543</sup>Singh & Dube (note 439 above) 7.

<sup>544</sup>*Ibid* 3.

This chapter concludes with a quote from Sandrey highlighting how Brazil used its agricultural industry as a tool to improve socio-economic rights; this could inspire South Africa to do likewise:

‘Brazil’s ability to raise more than 40 million people into middle-class income categories and the lowering of abject poverty levels from 23% to 8% in less than two decades should serve as a source of inspiration for South Africa.’<sup>545</sup>

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<sup>545</sup>Sandrey *et al* (note 478 above) 18.

## CHAPTER 5

### THE 2013 BALI MINISTERIAL CONFERENCE AND ITS IMPACT ON THE AoA

#### 5.1 INTRODUCTION

The Ninth Ministerial Conference of the World Trade Organisation (WTO) took place in Bali, Indonesia, from 3 to 7 December 2013. The Conference resulted in a series of decisions<sup>546</sup> that impacted global trade facilitation, food security and the least-developed countries.<sup>547</sup> Das argues that the Bali Ministerial Conference established the WTO as the pre-eminent forum for negotiating global trade rules<sup>548</sup>, since many countries had recently opted to negotiate trade rules outside of the WTO, through various free trade agreements (FTAs).<sup>549</sup> The Conference was a major step towards the possible completion of the Doha Round of WTO negotiations that began in early 2001.

Having said this, it is important to place this conference in the context of current multilateral trade negotiations. Prior to the 2013 WTO Ministerial Conference in Bali, members agreed to select issues that have the potential to be agreed more quickly than complex issues that require detailed negotiations.<sup>550</sup> The rationale for this approach was to speed up the Doha Round in order to achieve some success under the WTO.<sup>551</sup> With this in mind, members submitted proposals on three areas that impact agriculture: phasing out agricultural export subsidies (export subsidies), regulations on import quotas (market access) and promoting food security (domestic support).<sup>552</sup> The most controversial decision at the Bali Ministerial Conference relates to food security. As a result of the controversy, more research has been conducted on the impact of the food security decision than on the other two aspects.

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<sup>546</sup>Tralac ‘Bali Package – Trade Multilateralism in the 21st Century’ available at <http://www.tralac.org/news/article/5418-bali-package-trade-multilateralism-in-the-21st-century.html>, accessed on 11 September 2014.

<sup>547</sup>Ibid.

<sup>548</sup>A Das (Mint) ‘WTO back in business with Bali deal, but difficult road ahead’ available at <http://search.proquest.com/docview/1467548781?accountid=11921>, accessed on 11 September 2014.

<sup>549</sup>Ibid.

<sup>550</sup>World Trade Organisation ‘Briefing Note: Agriculture Negotiations’ available at [http://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/brief\\_agneg\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_agneg_e.htm), accessed on 10 September 2014.

<sup>551</sup>Ibid.

<sup>552</sup>Ibid.

This chapter critically analyses this Ministerial Conference with a view to determining the extent to which particular decisions taken at the Conference will affect the AoA. It is divided into four sections:

- i) Section A provides the background to the Bali Ministerial Conference;
- ii) Section B presents a detailed discussion of the main elements of the Bali Package;
- iii) Section C discusses developments relating to market access and export subsidies;  
and
- iv) Section D analyses the Bali Package's relevance to South Africa.

## 5.2 SECTION A: BACKGROUND TO THE BALI MINISTERIAL CONFERENCE

In the days leading up to the Bali Ministerial Conference, the credibility of the multilateral trading system was at stake.<sup>553</sup> Some<sup>554</sup> believed that Bali would produce another stalemate, which would lead to the permanent collapse of the Doha Development Round. Besides the risk of another stalemate, others saw the WTO competing with outside trade interests such as bilateral and regional preferential trade agreements.<sup>555</sup> However, the four days of negotiations resulted in a breakthrough not only for member countries but for the WTO itself. The Bali Ministerial Conference produced the first global agreement on trade facilitation in almost 20 years.<sup>556</sup> This led to the EU Trade Commissioner, Mr Karel De Gucht announcing that, 'We have saved the WTO'.<sup>557</sup> This offered new hope for the future of both the WTO and multilateral trade negotiations.

As noted above, pre-negotiations for the Bali Ministerial Conference began in November 2013, when the first set of draft texts was circulated between members.<sup>558</sup> The goal was to produce final versions in respect of selected issues for ministers to consider in Bali.<sup>559</sup> After the draft texts were circulated, intensive consultations followed, and some difficult compromises were struck in order to produce the texts that were forwarded to the ministers in

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<sup>553</sup>WTO post Bali – new hope for multilateralism' available on <http://www.die-gdi.de/en/the-current-column/article/wto-post-bali-new-hope-for-multilateralism-1/> accessed on 9 October 2014.

<sup>554</sup>'South Africa and the Post-Bali Global Architecture' Available at <http://www.saiia.org.za/opinion-analysis/south-africa-and-the-post-bali-global-trading-architecture> accessed on 15 October 2014.

<sup>555</sup>An example is the Trans Pacific Partnership Agreement spearheaded by the USA that specifically excludes China. More on this can be found at *ibid.*

<sup>556</sup>WTO post Bali (note 553 above).

<sup>557</sup>*Ibid.*

<sup>558</sup>World Trade Organisation (note 550 above).

<sup>559</sup>*Ibid.*

Bali.<sup>560</sup> The WTO notes that, even then, some members had reservations either with respect to some parts of the texts themselves, or on how they would fit into the overall package of issues for Bali.<sup>561</sup>

WTO members commenced negotiations with the 2008 modalities that were compiled by New Zealand Ambassador, Crawford Falconer who chaired the talks at that time.<sup>562</sup> The 2008 modalities were the result of eight years of tough negotiations<sup>563</sup>, and represent progress during the Doha Round.<sup>564</sup>

### **5.3 SECTION B: MAIN ELEMENTS OF THE BALI PACKAGE**

After four days of negotiations, WTO members successfully concluded a deal that would come to be known as the ‘Bali Package’.<sup>565</sup> This marked the first occasion that a multilateral trade deal was agreed to by WTO members since the organisation was formed two decades before.<sup>566</sup> In essence, the final agreement consists of a three-page declaration reflecting decisions on three pillars: (i) agreement on trade facilitation, (ii) public stockholding for food security purposes<sup>567</sup>, and (iii) selected development-focused provisions.<sup>568</sup> Each of these pillars is examined below.

#### **5.3.1 Agreement on Trade Facilitation**

Trade facilitation has been defined as the ‘simplification and harmonisation of border trade procedures with respect to activities, practices and formalities involved in collecting, presenting, communicating and processing data and other requirements for cross-border

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<sup>560</sup>Ibid.

<sup>561</sup>Ibid.

<sup>562</sup>Ibid.

<sup>563</sup>Ibid.

<sup>564</sup>Tralac (note 546 above).

<sup>565</sup>Das (note 548 above).

<sup>566</sup>R Bendini ‘WTO back on track after Bali’ (2013) European Parliament: Directorate-General for External Policies- Policy Department1, 1.

<sup>567</sup>Includes a decision on the cotton industry: ‘Ministers also consented to improve market access for cotton products from least-developed countries, and to offer greater assistance for production in those countries.’ Ibid.

<sup>568</sup>Bendini (note 566 above) 1.



movement of goods'.<sup>569</sup> In other words trade facilitation is about making the transfer of goods between different countries as simple as possible, without complicated administrative work. Whilst this is not a new concept, the increased emphasis accorded it prior to the Bali Ministerial Conference led members to adopt the Agreement on Trade Facilitation.<sup>570</sup> This Agreement is expected to reduce the cost of international trade by simplifying customs procedures and regulations. The Agreement itself is split into two sections: procedural aspects related to trade facilitation (such as border cooperation) and technical aspects (such as upgrading of infrastructure).<sup>571</sup>

Furthermore, the Agreement on Trade Facilitation is expected to benefit the global economy. Some analysts have estimated that the gain in trade emanating from the Agreement to be in the region of a trillion dollars. It is clear that after years of collapsed conferences, the Bali Ministerial Conference restored faith in the multilateral trading system.<sup>572</sup> Furthermore, it has been recognised as an important step towards the completion of the Doha Round.<sup>573</sup>

Despite its perceived benefits, it has been argued that the Agreement on Trade Facilitation favours developed over developing countries because developing countries could experience an increased flow of imports that will have a spill-over effect into their domestic industries.<sup>574</sup> Furthermore, this thesis submits that developed countries do not confront the same infrastructure and technology challenges faced by developing countries.<sup>575</sup> It therefore criticises the Agreement on Trade Facilitation for not taking the developmental needs of developing countries into account, especially in light of import and export capacity to compete with developed countries.

Although the Agreement on Trade Facilitation does not deal directly with agriculture, it is relevant as it covers trade in all goods.<sup>576</sup> Furthermore, the agreement states that perishable goods must be released in the shortest possible time, even if government officials have to

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<sup>569</sup>A Jatkar & C Mukumba 'Unpacking the Bali Package A Snapshot of the Bali Ministerial Decisions of the WTO Members' (2014) Discussion Paper CUTS Centre for international Trade, Economics & Environment available at [www.cuts-international.org](http://www.cuts-international.org) 2.

<sup>570</sup>Ibid 2.

<sup>571</sup>Ibid 3.

<sup>572</sup>Ibid 1.

<sup>573</sup>Ibid 1.

<sup>574</sup>Ibid 6.

<sup>575</sup>Ibid 1.

<sup>576</sup>J Morrison 'The Bali Package - implications for trade and food security' (2014) FAO Trade Policy Briefs on issues related to the WTO negotiations on agriculture 2.

work outside business hours.<sup>577</sup> This thesis submits that, by implication, this will have an effect on agricultural trade as most agricultural products are perishable.

### 5.3.2 Public Stockholding for Food Security Purposes

Historically, domestic support has been a thorny issue at the WTO. As noted above, this was the most controversial issue at the Bali Ministerial Conference. Members debated whether or not to increase the limit of amber box support. One of the issues at hand was whether governments should be allowed to procure food from low income farmers at a fixed price in order to subsidise these farmers' livelihoods.<sup>578</sup> A government's ability to provide domestic support depends on available resources.<sup>579</sup> Whilst domestic support encouraged agricultural production, the consequence was often a surplus of products that needed to find its way onto the world market.

This viewpoint is substantiated by Desta who explains that, compared with other sectors in agriculture a country's national domestic support policies effectively dictate its foreign trade policy.<sup>580</sup> For example, countries with resources and technical and institutional capacity have successful agricultural domestic support policies that lead to surplus production, which requires export subsidies in order to dispose of this surplus production on the world market.<sup>581</sup> This thesis agrees with Desta's views and cites the example of the Common Agricultural Policy (CAP) adopted by the EU<sup>582</sup>. The CAP provides for significant domestic support that has resulted in a surplus of agricultural products, which are then dumped on global markets.<sup>583</sup>

Of interest, is that other authors believe that the domestic support decision taken at the Bali Ministerial Conference represents a shift in focus from developed countries to developing

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<sup>577</sup>Ibid 2.

<sup>578</sup>T Wise 'Will the WTO fast-track trade at the expense of food security?' available at <http://www.aljazeera.com/indepth/opinion/2014/07/wto-negotiations-food-security-20147237431402983.html>, accessed on 10 September 2014.

<sup>579</sup>Resources such as technical know-how and financial contributions made by government. For more on resources, refer to the discussion regarding domestic support in chapter three.

<sup>580</sup>MG Desta 'The WTO Negotiations on Agriculture: What Next After Bali?' in SJ Evenett and A Jara *Building on Bali A Work Programme for the WTO* (2013) 111, 115.

<sup>581</sup>Ibid.

<sup>582</sup>For more on this, refer to chapter two of this thesis.

<sup>583</sup>For more on this, refer to chapter two of this thesis.

countries.<sup>584</sup> Since the advent of the AoA, domestic support had been a restraint on developed countries as it limited how much could be given to their farmers in terms of the three boxes of domestic support.<sup>585</sup> However with the rise of developing economies such as India, countries that previously could not afford domestic support are now able to do so.<sup>586</sup> Therefore Josling argues that domestic support decisions are now more likely to constrain developing countries from spending on their farmers than developed countries,<sup>587</sup> representing a major shift from developed to developing countries.

Furthermore, the nature of negotiating leverage has changed with regard to domestic support. At previous Ministerial Conferences, developed country members used domestic support as a trade off in order to gain market access in developing countries.<sup>588</sup> In other words, developed countries would barter a decrease in domestic support in exchange for better market share in developing countries. However with more resources now available to developing countries and thus opportunities to compete in providing domestic support, the negotiating leverage has changed. Exchanging greater market access for cuts in domestic support may no longer be feasible when developing countries can match or exceed developed countries' domestic support levels.<sup>589</sup> Therefore as Josling points out, early agreement in this area is in the interests of the developed countries (particularly the USA and the EU).<sup>590</sup>

The G33 proposal, led by India, was the main negotiating issue regarding domestic support at the Bali Ministerial Conference.<sup>591</sup> Häberli describes this proposal as 'the most politically controversial issue up to the very end of the Bali Conference.'<sup>592</sup> In essence, the G33 proposed to put more money in the hands of poor farmers by buying their crops at a stable and higher price, and to use these government purchases to feed the hungry, many of them the same farm families, with free or subsidised food distribution.<sup>593</sup> However the problem was that under the AoA, the difference between the administered price and the market price is

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<sup>584</sup>See T Josling 'A Post-Bali Agenda for Agriculture' in SJ Evenett and A Jara *Building on Bali A Work Programme for the WTO* (2013) 105, 107; and Desta (note 580 above).

<sup>585</sup>Amber Box, Blue Box and Green Box support. For more on this please refer to chapter 3.

<sup>586</sup>Josling (note 584 above) 107.

<sup>587</sup>Ibid 107.

<sup>588</sup>Ibid 107.

<sup>589</sup>Ibid 107.

<sup>590</sup>Ibid 107.

<sup>591</sup>C Häberli 'After Bali: WTO Rules Applying to Public Food Reserves' (2014) Prepared for the Expert meeting on reserves/stocks and specifically their potential role in market/price stabilization: FAO Rome, 30–31 January 2014 6.

<sup>592</sup>Ibid.

<sup>593</sup>Wise (note 578 above).

considered a subsidy, and there is a limit to how much is permitted.<sup>594</sup> In other words, this would be considered amber box domestic support on which the WTO has imposed a spending limit.

Morrison notes that the main argument behind the original G33 proposal was that the current WTO Agreement does not allow developing countries sufficient policy space to address food security, whereas developed country members can continue to use trade distorting policies with very few limitations.<sup>595</sup>

On the other hand, the USA took the view that any loosening of price and product support discipline would run counter to the agricultural reform process initiated in the AoA.<sup>596</sup> It added that current green box subsidies allowed for stockpiles and domestic food aid which could accommodate food security programmes without market distorting effects.<sup>597</sup> Pakistan argued that the Indian programmes were a taxpayer-financed measure that fitted into the amber box.<sup>598</sup> However, it seems that Pakistan's views were based on concerns that India's stockpiling may lead to rice exports that competed with Pakistan basmati rice.<sup>599</sup>

The USA also argued at the Bali Ministerial Conference, that India's expanded programme exceeded its limit and constituted a trade-distorting subsidy since the government could dump its surpluses on international markets.<sup>600</sup> However not everyone agreed with this view. Mr Oliver De Schutter, the United Nations Special Rapporteur on the Right to Food pointed out that the Indian Food Security Bill was aimed at purchasing stocks from low income farmers for domestic distribution, rather than for export to foreign markets.<sup>601</sup> Even though this thesis has not considered the Indian Food Security Bill, it agrees with the views held by Mr De Schutter that the logic of the G33 proposal is not to subsidise agricultural exports, but to increase domestic food security. As a result, it submits that fears that the Indian programme and the G33 proposal might lead to international dumping were unfounded.

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<sup>594</sup>Ibid.

<sup>595</sup>Morrison (note 578 above) 1.

<sup>596</sup>Häberli (note 591 above) 6.

<sup>597</sup>Ibid 6.

<sup>598</sup>Ibid 6.

<sup>599</sup>Ibid 6.

<sup>600</sup>Wise (note 578 above).

<sup>601</sup>Targeted News Service "Bali package must allow ambitious food security policies" - UN expert on WTO summit' available at <http://search.proquest.com/docview/1462911609?accountid=11921>, accessed on 11 September 2014.

Wise correctly criticised the stance taken by the USA at the Bali Ministerial Conference by arguing that the: ‘The hypocrisy<sup>602</sup> of long time USA agricultural dumpers accusing developing countries of dumping is bad enough. But this particular USA complaint is even more cynical’.<sup>603</sup> Wise adds that ‘India's support prices are only slightly higher than current market prices, but they appear much higher because of the AoA stipulation that administered prices be compared not to current prices but to the average international prices in 1986-88. Those are roughly one-sixth of current market prices, so any price the government pays today would seem to be a huge subsidy’.<sup>604</sup> This view was supported by the Indian Union Minister of Commerce and Industry, Mr Shri Anand Sharma who insisted that the G33 proposal on food security aims to address the problems faced by developing countries due to out-dated WTO rules which base the agriculture subsidy calculation on external reference prices of 1986-88, despite significant increases in global food prices during this period.<sup>605</sup> The Minister concluded that ‘it is surely reasonable that we (developing countries) should not be asked to peg farm support calculations on prices which were prevailing thirty years ago!’<sup>606</sup>

After considering the G33 proposal, WTO Ministers reached an interim decision on 7 December 2013 that food stockholding would be permitted even if it infringed amber box commitments, as long as several conditions were met. The wording of the decision is as follows:

‘support provided for traditional staple food crops in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision will be exempt from dispute settlement challenges before the WTO’<sup>607</sup>

In addition, beneficiaries of the peace clause who exceed their amber box commitments have to first fulfil certain conditions: i) detailed notification obligations, ii) reporting and monitoring by the Committee on Agriculture, iii) acceptance of consultations on request by another member, and their programmes must be consistent with the criteria of paragraph 3,

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<sup>602</sup>Wise goes on to argue that the USA used similar programmes in its early domestic policies. See Wise (note 578 above).

<sup>603</sup>Wise (note 578 above).

<sup>604</sup>Ibid.

<sup>605</sup>MENA Report ‘India : Public Stockholding for Food Security Must be Protected from All Challenges, Anand Sharma Tells G-33 at Bali on Eve of WTO Ministerial’ available at <http://search.proquest.com/docview/1464411275?accountid=11921>, accessed on 11 September 2014.

<sup>606</sup>Ibid.

<sup>607</sup>Häberli (note 591 above) 6. In addition, see World Trade Organisation ‘General Council Decision’ available at [https://www.wto.org/english/news\\_e/news14\\_e/gc\\_rpt\\_27nov14\\_e.htm](https://www.wto.org/english/news_e/news14_e/gc_rpt_27nov14_e.htm) accessed on 6 March 2015.

footnote 5, and footnote 5 and 6 of Annex 2 to the AoA.<sup>608</sup> Paragraph 4 specifies that the beneficiaries of the Decision ‘shall ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members’.<sup>609</sup>

As noted above, certain conditions are attached to this interim decision. A further condition is that the peace clause will only cover existing public stockholding programmes. Morrison indicates that this may be a challenge considering that the definition of the word ‘existing’ is not been clear.<sup>610</sup> However Morrison supports these supplementary conditions as they limit the potential negative effect of the stocks acquired on the food security of other members and on global markets.<sup>611</sup> Nonetheless, he cautions that it is not clear how compliance will be monitored and enforced.<sup>612</sup>

This thesis submits that these conditions have weakened the purpose of the food stockholding decision. On the eve of the Bali Ministerial Conference, Mr Oliver De Schutter<sup>613</sup> indicated that ‘trade rules must be shaped around the food security policies that developing countries need, rather than policies having to tiptoe around WTO rules’.<sup>614</sup> This thesis is of the view that, on the one hand, it seems as if the WTO is allowing developing countries to build food security policies by adopting a temporary waiver; however, at the same time the WTO is discounting a large number of developing countries from building food security policies by imposing such strict conditions. This thesis echoes the views held by Mr De Schutter that ‘food reserves are a crucial tool, not just in humanitarian crises but in the everyday struggle to provide a stable income to farmers and to ensure a steady flow of affordable foodstuffs to poor consumers, many of whom lack a basic social safety net’.<sup>615</sup> It is therefore concluded

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<sup>608</sup>3. Public stockholding for food security purposes Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme. The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.’

<sup>609</sup>Häberli (note 591 above) 6.

<sup>610</sup>Morrison (note 576 above) 1.

<sup>611</sup>Ibid.

<sup>612</sup>Ibid.

<sup>613</sup>The United Nations Special Rapporteur on the right to food.

<sup>614</sup>Targeted News Service ‘Bali package must allow ambitious food security policies’ - UN expert on WTO summit’ available at <http://search.proquest.com/docview/1462911609?accountid=11921>, accessed on 11 September 2014.

<sup>615</sup>Ibid.

that by imposing strict conditions on the food security decision at Bali, the WTO failed to deliver on the G33 proposal.

It is important to note that the Bali decision is an interim decision that will remain in force until a permanent decision is made at the next Ministerial Conference in 2017.<sup>616</sup> Some developed countries have raised the objection that an interim decision will hamper progress as it will reduce incentives for countries such as India to negotiate a permanent solution.<sup>617</sup> However, Ranjan argues that the interim decision will be useful as it provides ample time for a country such as India to conduct an empirical analysis of whether any trade distortions result from the food stockholding program.<sup>618</sup> However, Ranjan cautions that India should plan its program carefully to ensure that it can make a better case for protecting its program before the Committee on Agriculture at the WTO.<sup>619</sup> This thesis submits that the interim decision has set the ball rolling for developing countries to have a greater impact at the next Ministerial Conference. If Bali produced a peace clause in favour of developing countries, the next Ministerial Conference could have even greater potential to expand their interests.

However the Bali Ministerial decision on food stockholding can be criticised for its silence on how a dispute on amber box support would be handled should a member country demonstrate that a food stockholding policy has caused trade distortions.<sup>620</sup> The normal protocol for a dispute before the WTO consists of an initial formal consultation between member countries, and, should that fail, the establishment of a dispute panel.<sup>621</sup> The question is whether such a dispute panel has the power to reject a complainant's right to bring such a case, and decline to rule on the basis of the Bali Decision even though a member may have established trade distortions.<sup>622</sup> These vital issues would need to be addressed by a Dispute Settlement Body.<sup>623</sup>

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<sup>616</sup>World Trade Organisation 'Agriculture negotiators edge into substantive discussion for post-Bali work programme' available at [http://www.wto.org/english/news\\_e/news14\\_e/agng\\_23jul14\\_e.htm](http://www.wto.org/english/news_e/news14_e/agng_23jul14_e.htm), accessed on 11 September 2014.

<sup>617</sup>Morrison (note 576 above) 1.

<sup>618</sup>R Ranjan 'Reasons vs. Principles: India at the WTO' available at <http://thediomat.com/2014/07/reasons-vs-principles-india-at-the-wto/>, accessed on 10 September 2014.

<sup>619</sup>Ibid.

<sup>620</sup>Häberli (note 591 above) 8.

<sup>621</sup>Ibid 8.

<sup>622</sup>Ibid 8.

<sup>623</sup>Ibid 8.

It is encouraging that, at the end of the Bali Conference, both India and Pakistan, along with the rest of the WTO Membership, have accepted and even praised the Bali Decision on food security.<sup>624</sup> The South African trade envoy stated that some progress was made for developing countries at the Conference, but that there is substantial technical work that needs to be done in order to follow up on the decision taken at Bali.<sup>625</sup> Indian Trade Minister Sharma claimed that India had achieved its goal of ensuring that its stockholding programs are shielded from challenge until a permanent solution is reached to modify WTO rules in a way that reduces the chances that India's programs would breach its limits on trade-distorting subsidies.<sup>626</sup>

### 5.3.3 Selected Development-Focused Provisions

Least-developed countries (LDCs) are considered to be the poorest members of the global trading community.<sup>627</sup> LDCs are estimated to be home to around 12 per cent of the world's population, yet account for only 1 per cent of the global trade in goods.<sup>628</sup> The WTO has recognised that LDCs require special assistance to achieve their development objectives.<sup>629</sup> Therefore most WTO agreements, including the AoA<sup>630</sup>, provide for minimal obligations on LDCs and allow them flexibility in implementing WTO rules.<sup>631</sup> This promotes LDCs' participation in the multilateral trading system.<sup>632</sup>

At the Hong Kong Ministerial Conference in 2005, WTO members agreed that members who could provide duty free and quota free market access to products that originate in LDCs should do so. The effect of this decision was to make exports from LDCs cheaper, thereby compensating for their inability to compete with other countries.<sup>633</sup>

Prior to the Bali Ministerial Conference, members entertained the idea of imposing 97 per cent duty free and quota free market access to products that emanated from LDCs on all

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<sup>624</sup> Häberli (note 591 above) 7.

<sup>625</sup> K Raja 'WTO DG reports on latest round of talks on Bali issues' available at <http://www.twn.my/title2/twe/2013/554/1.htm> accessed on 15 October 2014.

<sup>626</sup> Häberli (note 591 above) 7.

<sup>627</sup> World Trade Organisation 'Brief on LDCs' available on [http://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/brief\\_ldc\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_ldc_e.htm), accessed on 9 October 2014.

<sup>628</sup> Ibid.

<sup>629</sup> Ibid.

<sup>630</sup> LDC exceptions are discussed in chapter 3 of this thesis.

<sup>631</sup> World Trade Organisation (note 627 above).

<sup>632</sup> Ibid.

<sup>633</sup> View held by the thesis.



WTO members.<sup>634</sup> However members could not reach agreement. Unfortunately the Bali Ministerial Conference continued this trend, as the decision in Bali merely encourages developed and developing countries to grant increased duty free and quota free market access to products from LDCs.<sup>635</sup> In other words, there is no legally binding commitment to grant duty free and quota free market access to LDCs.

However a positive decision at the Bali Ministerial Conference is that members agreed that the WTO Committee on Trade and Development should conduct annual reviews of members' efforts to provide LDCs with duty free and quota free market access.<sup>636</sup> Jatkar describes this as a political commitment on the part of WTO members to promote LDCs' integration into the multilateral trading system.<sup>637</sup> This thesis criticises the Bali decision, on the grounds that negotiations on market access negotiations for LDCs commenced in 2005, and almost 10 years on, members have not committed to duty free and quota free market access.

In addition to market access, the Bali Ministerial Conference sought to make Rules of Origin easier for LDCs.<sup>638</sup> Rules of Origin can be defined as an 'economic nationality on products traded across borders, and define how much processing must take place locally before goods are considered to be the product of the exporting country.'<sup>639</sup> In other words Rules of Origin describe the origin of products from different countries. In the past, LDCs have argued that Rules of Origin have inhibited their exporters due to the high costs of compliance.<sup>640</sup> At the Bali Ministerial Conference, members agreed on a set of draft guidelines that make Rules of Origin simpler for exporters from LDCs. However, it remains to be seen whether or not members will adopt these draft guidelines as they are considered non-binding by the WTO.

#### **5.4 SECTION C: DEVELOPMENTS RELATING TO MARKET ACCESS AND EXPORT SUBSIDIES**

As noted in chapter three, the main elements of the AoA are: market access, domestic support and export subsidies. Having examined how the Bali Ministerial Conference has affected

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<sup>634</sup>Jatkar & Mukumba (note 569 above) 14.

<sup>635</sup>Ibid 14.

<sup>636</sup>World Trade Organisation (note 627 above).

<sup>637</sup>Jatkar & Mukumba (note 569 above) 14.

<sup>638</sup>Ibid 18.

<sup>639</sup>Ibid 18.

<sup>640</sup>Ibid 18.

domestic support, the analyses now turns to how it affected the remaining two elements in respect of the AoA, namely, market access and export subsidies.

#### 5.4.1 Market Access

As discussed in chapter three, prior to the Uruguay Round, many countries adopted forms of non-tariff barriers that inhibited market access. As a result, tariffication was introduced to convert all non-tariff barriers to tariff equivalents.<sup>641</sup> This ensured greater market access as exporters could reach foreign markets even though they were paying more in tariffs.<sup>642</sup> The Uruguay Round also introduced tariff-rate quotas.<sup>643</sup> These set an in-quota and an out-quota rate. If the total imported goods fall below a specific in-quota number, a lower tariff is paid, whereas if the total imported goods are higher than a specific out-quota number, a higher tariff is paid.<sup>644</sup> The WTO has historically given members the opportunity to administer tariff-rate quotas in a variety of ways<sup>645</sup> and methods chosen by members.<sup>646</sup>

However, in many instances, tariff-rate quotas are unfilled because member countries are unfamiliar with the rules of an importing country.<sup>647</sup> As a result the G20 submitted a proposal at the Bali Ministerial Conference to oblige members to provide more detailed rules on tariff-rate quotas.<sup>648</sup> The G20 proposal essentially comprised of two parts: i) provisions on procedural issues relating to tariff-rate quotas and ii) should a tariff-rate quota remain consistently under filled, a WTO member could ask the country to change the administration process for that specific tariff-rate quota for a trial period to see if the quota is filled.<sup>649</sup> Interestingly, the second part of the G20 proposal applied to developed countries only.<sup>650</sup> In other words, according to the G20 proposal, the under fill mechanism would exempt all developing countries from the recommended process.

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<sup>641</sup>Ibid 11.

<sup>642</sup>Ibid 11.

<sup>643</sup>Discussed further in chapter three.

<sup>644</sup>Jatkar & Mukumba (note 569 above) 11.

<sup>645</sup>Some of the ways include a first come, first served policy, and through state trading enterprises.

<sup>646</sup>Jatkar & Mukumba (note 569 above) 11.

<sup>647</sup>Ibid 11.

<sup>648</sup>Ibid 11.

<sup>649</sup>Ibid 11.

<sup>650</sup>Ibid 11.

In Bali, Ministers decided that each member country should consider their allocation of tariff-rate quotas and if quotas were under filled, they should ask the quota holders whether they would make them available to other potential users.<sup>651</sup> Ministers also discussed the impact of the cotton industry on developing countries and took a decision to improve development assistance to cotton producers.<sup>652</sup>

Prior to the Bali Ministerial Conference, a proposal was submitted by the G20<sup>653</sup> countries on agricultural market access. This aimed to improve the administration of tariff-rate quotas.<sup>654</sup> Tariff-rate quotas refer to a situation where import duties are lower on quantities within the quotas and higher for quantities outside.<sup>655</sup> Tariff quotas were agreed during the 1986–94 Uruguay Round of negotiations to allow exporters access to foreign markets when the normal (out-of-quota) tariffs on imports were high.<sup>656</sup>

At Bali Ministers agreed that where it is manifest that a tariff quota is under-filled but there appears to be no reasonable commercial reason for this, an importing member should ask private operators holding unused entitlements whether they would be prepared to make them available to other potential users.<sup>657</sup> Where the tariff quota is held by a private operator in a third country, e.g. as a result of country-specific allocation arrangements, the importing member should transmit the request to the holder of the allocation concerned.<sup>658</sup>

Desta<sup>659</sup> argues that the Bali Ministerial Conference had both a progressive and regressive impact on agricultural market access:

‘The ambitious proposal to apply a tiered and harmonising formula to reduce tariffs, to convert all specific and compound tariffs into their *ad valorem* equivalents, to reduce the in-quota tariffs within TRQs and to enhance their use through more effective methods of

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<sup>651</sup>Ibid 11.

<sup>652</sup>Ibid 11.

<sup>653</sup>Coalition of developing countries calling for ambitious reforms in the agricultural sectors of developed countries, with greater flexibility for developing countries (this is not the G20 of ministers of finance and governors of central banks and is not related to the summit meetings the latter have held recently. The IICA member countries that belong to the G20 are Argentina, Bolivia, Brazil, Chile, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay and Venezuela. Accessed from AC Azofeifa ‘The WTO Conference in Bali: potential agriculture- related topics for discussion’ *CAESPA Technical Bulletin* (2013) 1, 2.

<sup>654</sup>AC Azofeifa ‘The WTO Conference in Bali: potential agriculture- related topics for discussion’ *CAESPA Technical Bulletin* (2013) 1, 2.

<sup>655</sup>World Trade Organisation (note 546 above).

<sup>656</sup>Ibid.

<sup>657</sup>Ibid.

<sup>658</sup>Ibid.

<sup>659</sup>Desta (note 580 above) 118.

administration, and the effort to simplify tariffs can be cited as examples of a progressive agenda. On the other hand, the proposal to introduce new categories of products for special treatment (special products and sensitive products) and a new special safeguard mechanism (SSM) represent a degree of backsliding in the liberalisation process'.<sup>660</sup>

This thesis submits that the Bali Ministerial Conference affected domestic support to a greater extent than market access. It further argues that in order to afford improved market access to developing countries, further negotiations on this issue will be required at the next Ministerial Conference in 2017.

More recently, WTO members met with the Agriculture Committee on 5 June 2014 to discuss a way forward post-Bali. At this meeting, the USA proposed that the Secretariat compile data on members' agricultural tariffs (maximum tariff levels legally bound in the WTO and the actual tariffs charged, which can be lower), and their global share of agricultural imports and exports.<sup>661</sup> However other members argued that this data on trade and tariff profiles are already publicly available.<sup>662</sup> Eventually, members agreed that the Secretariat should proceed since the task would only involve repackaging the information to make it easier to use.<sup>663</sup>

In conclusion, market access is an important element of the AoA. World averages for agricultural tariffs are three times higher than the world average for non-agricultural tariffs.<sup>664</sup> This does not bode well for improving market access, especially for developing countries to gain market access to developed countries.<sup>665</sup> Measures should be adopted at the next Ministerial Conference to reduce agricultural tariffs, or global trade in foods and farm goods will fall short of its potential to meet the ultimate challenges of feeding the world, responding to price instability and adapting to weather-related events.<sup>666</sup>

Having discussed market access, the final element of the AoA is export subsidies.

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<sup>660</sup>Ibid 118.

<sup>661</sup>World Trade Organisation 'Agriculture Committee looks at new data on export subsidies, following Bali pledge' available at [http://wto.org/english/news\\_e/news14\\_e/agcom\\_05jun14\\_e.htm](http://wto.org/english/news_e/news14_e/agcom_05jun14_e.htm), accessed on 10 September 2014.

<sup>662</sup>Ibid.

<sup>663</sup>Ibid.

<sup>664</sup>Josling (note 584 above) 105.

<sup>665</sup>Ibid 105.

<sup>666</sup>Ibid 105.

## 5.4.2 Export Subsidies

In contrast to domestic support and market access, the solution proposed for export subsidies has been described as progressive by authors such as Desta as it entails the phasing out of all agricultural export subsidies.<sup>667</sup> Export subsidies have been controversial in agriculture negotiations since the early days of GATT.<sup>668</sup> Despite clear evidence that export subsidies distort global trade, both the GATT and later the WTO permitted members to use these subsidies in pursuit of increasing foreign market share.<sup>669</sup> This is demonstrated by the fact that export subsidies were banned in 1955 for all products under the WTO except agriculture.<sup>670</sup> Desta describes this as tarnishing the image of the GATT/WTO system as it rewards the strong and punishes the weak as well as favouring the agricultural sector over other sectors.<sup>671</sup>

With the recent increase in global market prices for agricultural products, agri-businesses have realised the potential for greater profit in foreign markets. This has decreased the need for governments to provide export subsidies as exports have been on a natural upward trend.<sup>672</sup> As a result, during the July 2004 package, members made a commitment to achieve the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.<sup>673</sup> Later in 2005, members at the Hong Kong Ministerial determined the ‘credible end date’ to be 31 December 2013.<sup>674</sup> Unfortunately 31 December 2013 has come and gone, and agricultural export subsidies still exist under the WTO regime. However Desta argues that change will come as the commercial need for export subsidies is diminishing and the WTO has come to realise that it can ill-afford to keep such a damaging anomaly in its rulebook.<sup>675</sup>

At the Bali Ministerial Conference, developing countries argued that demands that they commit to trade facilitation<sup>676</sup> were not matched by developed countries’ willingness to make

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<sup>667</sup>Desta (note 580 above) 113.

<sup>668</sup>Ibid 113.

<sup>669</sup>Ibid 114.

<sup>670</sup>Ibid 114.

<sup>671</sup>Ibid 113.

<sup>672</sup>Ibid 114.

<sup>673</sup>Ibid 114.

<sup>674</sup>Ibid 114.

<sup>675</sup>Ibid 114.

<sup>676</sup>World Trade Organisation (note 546 above).

commitments on export subsidies.<sup>677</sup> It is of concern that the Bali Ministerial Conference failed to deliver on export subsidies as no legally binding commitment was made to eliminate them. Instead members agreed to exercise the utmost restraint in using any form of export subsidy.<sup>678</sup> This thesis submits that these ‘commitments’ represent nothing more than political statements by members and will make no significant difference as this has been an on-going issue since the commencement of the Doha Round.

As indicated above, export subsidies remain a thorny issue amongst members. The WTO notes that little agreement has been reached on this issue despite the fact that it was the subject of much discussion among the delegates present in Geneva, Switzerland, especially given the difference between Argentina’s position, which favours the elimination or reduction of subsidies, and that of the USA and the EU.<sup>679</sup> This thesis submits that change will only occur when members make a firm decision to completely prohibit all forms of export subsidies. As such, the next Ministerial Conference in 2017 will be important.

More recently, WTO members met on 23 July 2014 to discuss further details regarding the package.<sup>680</sup> One of the major issues was again the use of the 2008 modalities as the way forward. Members of the G33 group argued that 2008 modalities are a useful platform to continue negotiations.<sup>681</sup> However without naming any members, the WTO notes that ‘some others’<sup>682</sup> believe that the 2008 modalities are too complex and that they would be open to alternative approaches.<sup>683</sup>

The chairperson, Ambassador John Adank stated that all the elements were interrelated and that agriculture would have to be dealt with as an overall package.<sup>684</sup> However, he

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<sup>677</sup>Ibid.

<sup>678</sup>The actual wording reads as “with the objective on export competition set out in the 2005 Hong Kong Ministerial Declaration in mind and with a view to maintaining the positive trend noted previously, we shall exercise utmost restraint with regard to any recourse to all forms of export subsidies and all export measures with equivalent effect.” Available at [https://mc9.wto.org/system/files/documents/w12\\_1.pdf](https://mc9.wto.org/system/files/documents/w12_1.pdf) accessed on 5 March 2015.

<sup>679</sup>Azofeifa (note 654 above) 2.

<sup>680</sup>World Trade Organisation ‘Agriculture negotiators edge into substantive discussion for post-Bali work programme’ available at [http://www.wto.org/english/news\\_e/news14\\_e/agng\\_23jul14\\_e.htm](http://www.wto.org/english/news_e/news14_e/agng_23jul14_e.htm), accessed on 11 September 2014.

<sup>681</sup>Ibid.

<sup>682</sup>Ibid.

<sup>683</sup>Ibid.

<sup>684</sup>Ibid.

emphasised that domestic support and market access require more in-depth discussion.<sup>685</sup> In order to facilitate these discussions the chairperson circulated a set of questions on the domestic support and market access pillars to members on 15 July 2014, stating that, ‘this is an initial effort to focus on the more detailed substance of the negotiations in these two areas’.<sup>686</sup>

## **5.5 SECTION D: RELEVANCE TO SOUTH AFRICA**

South Africa and India are part of the BRICS group of nations. This thesis submits that India’s spearheading of the G33 proposal will have positive repercussions on South Africa’s agricultural industry. As noted above, through the Bali Ministerial Conference, India established that food security programmes can be in harmony with WTO policies. Although South Africa cannot implement a food security programme due to the fact that it does not currently have one in place, it can nevertheless use its India’s programme through BRICS as a platform to further its objectives at the next Ministerial Conference in 2017.

An informal alliance has developed between South Africa and India. One of the elements of the Bali Package was the Agreement on Trade Facilitation. Wise reports that ‘the United States and other exporting countries have pushed hard for firm commitments from developing countries on trade facilitation, without even keeping the promises to finance the high costs of upgrading port facilities and procedures. Meanwhile, they have offered no reciprocal commitment to negotiate in good faith on the flaws in the existing WTO Agreement on Agriculture, or on the specific Bali issue of public food reserves for food security’.<sup>687</sup> Due to this double standard, both India and South Africa have insisted that the Bali decision on food security must be accorded the same importance as trade facilitation.<sup>688</sup> Along with the G33, both countries have demanded ‘that the Bali agreement jump-start the stalled Doha Round, restoring the original commitment to correct the biases against developing countries in the WTO’s Agreement on Agriculture and other chapters’.<sup>689</sup>

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<sup>685</sup>Ibid.

<sup>686</sup>Ibid.

<sup>687</sup>Wise (note 578 above).

<sup>688</sup>Ibid.

<sup>689</sup>Ibid.

Wise concurs and argues that South Africa and India are right to resist the abandonment of the single undertaking and the advancement of only exporters' economic interests.<sup>690</sup> Wise concludes: 'If that means the trade facilitation agreement needs to be held up or made 'provisional' subject to progress on other Bali issues, as India, South Africa and others have argued, so be it'.<sup>691</sup>

Furthermore, Indian Union Minister of Commerce and Industry, Mr Shri Anand Sharma has indicated that the reference prices for amber box domestic support need to be updated.<sup>692</sup> Since 2006, the G33 has been asking the WTO to reopen the AoA to update the reference price to account for inflation.<sup>693</sup> The USA has refused, and even after the commitment in Bali to resolve the issue, India and the G33 have seen no movement on the food security issue while trade facilitation has sped towards implementation.<sup>694</sup>

More recently, WTO members attended a meeting on 5 June 2014 to initiate informal consultations regarding the next Ministerial Conference. Proposals on a permanent solution following on Bali were also received this meeting. These proposals will play a key role in preparing issues for the next Ministerial Conference.

## 5.6 CONCLUSION

This chapter analysed the Ninth Ministerial Conference in Bali in order to determine the extent to which decisions taken at the Conference have and might continue to affect the AoA. It outlined the background to the Bali Ministerial Conference and presented an overview of what was on the negotiating table. Thereafter the chapter analysed how the Bali Ministerial Conference affected the main elements of the AoA, namely market access, domestic support and export subsidies. Research has shown that, among these elements, domestic support was most affected.

The decision on public stockholding for food security proved to be the most controversial agricultural issue at the Bali Ministerial Conference. WTO Members decided on an interim

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<sup>690</sup>Ibid.

<sup>691</sup>Ibid.

<sup>692</sup>MENA Report (note 605 above)

<sup>693</sup>Wise (note 578 above).

<sup>694</sup>Ibid.



solution, a peace clause allowing public stockholding subject to certain conditions. The key issue is that this is an interim solution; therefore, this decision may change as members attempt to find a permanent solution to the issue of food security. It is interesting to note that the Bali Ministerial Conference changed how WTO members would adopt food security policies. In particular, research has revealed that, as a result of the decision at the Bali Ministerial Conference, WTO members are now temporarily allowed to exceed their amber box commitments in terms of the AoA, subject to certain conditions. This has been a major change for developing countries. It remains to be seen whether a final solution will be adopted at the next Ministerial Conference.

It is disappointing that the elimination of agricultural export subsidies was not addressed at the Bali Ministerial Conference. Despite the benefits of trade facilitation, this thesis submits that the elimination of agricultural export subsidies would be of greater importance to developing countries. Trade facilitation was given immediate priority, whereas reducing agricultural export subsidies was subject to, 'we will try our best'.<sup>695</sup>

It is important for South Africa to carefully consider its trade strategy in order to align itself within BRICS and to any other trade opportunities that may present themselves outside of BRICS. Moreover, South Africa could use BRICS as a platform to further its trade objectives at the next WTO Ministerial Conference.<sup>696</sup> This would help South Africa to further establish its position on the international stage as the gateway to Southern Africa.<sup>697</sup> The end result would be an increase in foreign investors.<sup>698</sup>

While the multilateral trading system has been given a 'lifeline' through the success of the Bali Ministerial Conference, this thesis submits that there is cause for cautious optimism regarding the future of the multilateral trading system.<sup>699</sup> In the words of the Director General of the WTO, Roberto: 'this (Bali) package is not an end – rather the beginning of the more important task of implementing the decisions that were adopted in Bali.'<sup>700</sup>

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<sup>695</sup>B Vickers 'The WTO's Road from Bali: A South African Perspective' available at <http://www.igd.org.za/home/7655-the-wtos-road-from-bali-a-south-african-perspective> accessed on 15 October 2014.

<sup>696</sup>SAIIA 'South Africa and the Post-Bali Global Architecture' Available at <http://www.saiia.org.za/opinion-analysis/south-africa-and-the-post-bali-global-trading-architecture> accessed on 15 October 2014.

<sup>697</sup>Ibid.

<sup>698</sup>SAIIA (note 696 above).

<sup>699</sup>Jatkar & Mukumba (note 569 above) 2.

<sup>700</sup>Ibid.

## CHAPTER 6

### RECOMMENDATIONS

#### 6.1 INTRODUCTION

This thesis aimed to achieve five research objectives with a view to developing a holistic understanding of the Agreement on Agriculture (AoA) and its relationship with South Africa in the context of BRICS. The first objective was to critically reflect on the history and development of agricultural regulation within the International Trade Organisation (ITO), General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO). The second was to critically examine the core components of the AoA such as market access, domestic support and export subsidies, while the third objective sought to analyse criticisms and positive views of the AoA in respect of developing countries. Fourthly, the aim was to study the AoA in the context of the South African agricultural industry, and further explore how this sector may be impacted by the country's membership of BRICS. The final objective was to analyse the 9<sup>th</sup> Ministerial Conference in Bali with a view to determining the extent to which decisions taken at this Conference will affect the AoA. This chapter provides recommendations in respect of each research objective.

#### 6.2 RECOMMENDATIONS

##### **6.2.1 Critical reflection on the history and development of agricultural regulation within the ITO, GATT and the WTO**

The Multilateral Trade System (MTS) has been described as a political process involving the complex negotiation of trade rules between member countries.<sup>701</sup> The concept of an MTS to governing trade originated with the United States of America (USA); it later developed into the GATT and finally into the principle-based WTO. As noted previously, the WTO is the major body that regulates international trade by facilitating trade negotiations and encouraging the development of least-developed economies. Currently, parties are

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<sup>701</sup>Chapter 2 (note 32 above).

negotiating in the Doha Round which began in 2001 and has yet to be completed.<sup>702</sup> The overall objective of the Doha Round is to eliminate trade barriers and revise trade rules that will assist developing countries.<sup>703</sup>

A significant aspect of the MTS was the negotiation rounds, where members participated in agriculture negotiations, with the most successful being the Uruguay Round. As explained in the thesis, the Uruguay Round of negotiations produced the first ever AoA in the history of the MTS. This was important because agriculture was not adequately regulated under the GATT which resulted in various domestic support programmes such as the European Community's (EU) Common Agricultural Policy (CAP). These programs had an impact on global agricultural trade as they manipulated the demand and supply of food stocks.<sup>704</sup> As discussed in chapter three of this thesis, this resulted in subsidised agricultural products from developed countries being dumped on developing countries' markets.

In light of the various free trade agreements and the development of trade groups such as BRICS, this thesis submits that the MTS is currently at a very critical stage. The Bali Ministerial Conference offered a much welcome lifeline to the MTS, by demonstrating that the system can still negotiate and develop meaningful trade rules. However, it is important to note that the future of the MTS is still at stake because of the lacklustre Doha Round of trade negotiations, and the inability to agree on particular aspects of the AoA. It is therefore recommended that both developed and developing countries make trade-offs, such as eliminating export subsidies in exchange for trade facilitation, that will favour balanced outcomes of mutual benefit to both sides.<sup>705</sup>

It is further recommended that the WTO investigate a new model of trade negotiations within the MTS. The build-up to the Bali Conference was important in this regard as Ministers identified a small package of proposals on which there was a good chance of reaching agreement. This clearly demonstrated that the key to a successful outcome is to identify those issues that parties are willing to agree on and thereafter formalise an agreement. This

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<sup>702</sup>World Trade Organisation 'Doha Round: What are they negotiating?' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/update\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/update_e.htm) accessed on 19 October 2014.

<sup>703</sup>Ibid.

<sup>704</sup>Sharma (note 42 above).

<sup>705</sup>Jatkar & Mukumba (note 569 above) 21.

recommendation is reflected in a statement by the EU Commissioner for Trade, Karel De Gucht:

‘The limited agreement that was reached in Bali instead of a full deal as hoped, serves as a reminder that the objective of concluding the Round may once more face insurmountable obstacles. Moreover the choice of proceeding with sectorial agreements rather than defending the principle of the ‘Single undertaking’ (nothing is concluded until everything is concluded) has allowed for some advances on relatively easy and straightforward issues but makes it more arduous to successfully conclude the Round.’<sup>706</sup>

A possible disadvantage of this approach may be the fact that only easy straightforward issues are chosen for each negotiation session, and that the issues that face significant opposition by members may be side-lined. Nonetheless, it is recommended that future Ministerial Conferences should be dealt with on a sectorial basis, as was done in Bali, as this has been proven to achieve consensus between WTO members and may even lead to the conclusion of the Doha Round of trade negotiations.

### **6.2.2 Critical examination of the core AoA components**

The AoA came into being at the conclusion of the Uruguay Round in January 1995<sup>707</sup> with the long-term objective of establishing a fair, market-oriented agricultural trading system.<sup>708</sup> The AoA focuses on three main elements of agricultural reform: i) improving agricultural market access, ii) reducing domestic support for agricultural production, and iii) eliminating export subsidies on agricultural products.

With regard to market access, it is recommended that developing countries negotiate improved access to developed countries’ markets.<sup>709</sup> Thus, the WTO needs to encourage developed countries to facilitate increased market access for developing countries. Guidelines and procedures<sup>710</sup> should be put in place that make it easier and less cumbersome for developing countries to export their agricultural products to developed countries. In

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<sup>706</sup>R Bendini ‘WTO back on track after Bali’ (2013) European Parliament: Directorate-General for External Policies- Policy Department 3.

<sup>707</sup>WTO Secretariat (note 73 above) 3.

<sup>708</sup>Ibid.

<sup>709</sup>Desta (note 580 above).

<sup>710</sup>For example, policies that provide for fewer administrative burdens on developing countries when they want to export products.

exchange, developed countries could receive reciprocal openings in developing countries' markets.

With regard to domestic support, it is recommended that more freedom should be given to developing countries to increase their green box domestic support. This is due to the fact that this box has shown to have minimal impact on trade. An example is classifying financial and skills development support to emerging farmers in developing countries, such as South Africa, as green box support. This would assist developing countries to grow their agricultural sectors with necessarily violating AoA rules.

With regard to export subsidies, the most significant issue is the fact that agricultural export subsidies are still permitted under WTO rules, even though they have been outlawed in other sectors. It is thus recommended that both developed and developing countries reduce their domestic budgetary commitments to export subsidies to zero over the next five years.

### **6.2.3 Investigation and examination of positive views and criticisms of the AoA**

Grant and Boys found that accession to the AoA benefited member countries by 161 per cent.<sup>711</sup> However this thesis disputed this finding on the basis that the given percentage did not specify whether it was exclusive to developed, or developed country members. An impact-audit by the WTO is therefore recommended that focuses on determining the impact of the AoA on developing countries through statistical analysis.

Furthermore, it was noted that criticism of the AoA can be divided into two categories: a) criticism of the provisions of the AoA, and b) criticism directed towards its implementation.

With regard to criticism of the provisions of the AoA:

- i) The AoA has been criticised for failing to accommodate the needs of developing countries by adopting a 'one size fits all' approach<sup>712</sup>, and for imposing complex domestic support requirements which developing countries find challenging to

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<sup>711</sup>As discussed in chapter four.

<sup>712</sup>ActionAid (note 173 above).

implement.<sup>713</sup> This is contrary to the objective of the Doha Round to facilitate trade for developing countries. As noted above, it is recommended that more green box subsidies should be allocated to developing countries;

- ii) The AoA has, in effect, rewarded member countries for their use of non-tariff barriers during the tariffication process, by providing them with exclusive use of special safeguard measures.<sup>714</sup> This is surprising because the objective of the AoA is to establish a fair, market-oriented agricultural trading system.<sup>715</sup> Thus it is recommended that, at the very least, developing countries should be allowed to maintain their special safeguard measures due to the volatility of world markets and that developed countries should be prohibited from using special safeguard measures. In other words developing countries should be allowed to maintain special safeguard measures in order to protect their domestic industries from import surges or price depression.<sup>716</sup>
- iii) As discussed under the previous research objective, the AoA has been criticised for its provisions that allow for the exclusive use of export subsidies, which have been banned in other industries. There have been reduction commitments on export subsidies since the inception of the AoA in 1995. However, 19 years later, export subsidies still exist in international agricultural trade. The WTO needs to speed up the process of phasing out export subsidies. Due to their trade distortion effects, the elimination of export subsidies should be an urgent priority and all export subsidies from both developed and developing countries should be banned in the next five years.

With regard to criticism regarding the implementation of the AoA:

- a) Developed countries, particularly the USA, have been accused of using food aid to circumvent their commitments under the AoA.<sup>717</sup> Although this challenges the political status quo, this study recommends that the WTO establish a panel to

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<sup>713</sup>Ibid.

<sup>714</sup>Discussed in chapter three of this thesis.

<sup>715</sup>Preamble to the AoA.

<sup>716</sup>Discussed in chapter three of this thesis.

<sup>717</sup>Discussed in chapter three of this thesis.

investigate these allegations. Furthermore, based on the outcome of such investigation, it is recommended that the WTO take appropriate remedial action against the USA and institute measures to ensure that such conduct is not repeated by other members.

- b) The AoA's failure to regulate the dumping of agricultural goods. A recent issue has been poultry imports from Brazil into South Africa.<sup>718</sup> It is recommended that the WTO investigate allegations of dumping; take appropriate remedial action against members who have been found 'guilty' and institute measures to ensure that dumping is not repeated.
- c) Developing countries are not given an adequate voice in agricultural negotiations at the WTO. It is recommended that developing countries strengthen their negotiation resources. At the recent Bali Conference, India managed to persuade members, particularly the G33, to vote in favour of its stockholding decision. Based on this success, other developing countries should increase their negotiation leverage in order to persuade and 'strike' the right deals that favour their developmental objectives. This can be achieved by lobbying other developing country members to support their proposals at the WTO.

Ultimately, this thesis argues that global agricultural regulation is a complex process as it involves both political and technical issues. The divide between developed and developing countries continues to plague the negotiation process. However there is hope as article 20 of the AoA encourages further negotiations on agricultural trade liberalisation.<sup>719</sup>

#### **6.2.4 Critical description of the extent to which the AoA impacted on agricultural trade in South Africa and its trading partners with a particular focus on BRICS**

It is important to note that South Africa is compliant in all three main reform areas of the AoA. With regard to export subsidies, this thesis submits that South Africa is compliant because the country provides zero export subsidies.<sup>720</sup> With regard to market access, it is

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<sup>718</sup>Discussed in chapter four of this thesis.

<sup>719</sup>Discussed in chapter two of this thesis.

<sup>720</sup>Discussed in chapter four of this thesis.

submitted that South Africa is compliant because the country provides for minimum market access opportunities for 5 per cent of its domestic consumption.<sup>721</sup> With regard to domestic support, this thesis submits that South Africa is compliant because the country has not exceeded its Aggregate Measure of Support.<sup>722</sup>

Furthermore, it is estimated that 39.26 per cent of South Africa's population lives in rural areas.<sup>723</sup> Smallholder farming provides an important source of income to this segment of the population.<sup>724</sup> It is therefore recommended that South Africa develop its rural infrastructure to facilitate smallholder farming, particularly the transport and storage of agricultural products in rural areas as this will boost production which will further drive agricultural economic growth.<sup>725</sup>

South Africa is considered to be a developing country because of the many socio-economic issues confronting the country. These include high unemployment, high mortality rates due to HIV and Aids, and low levels of education. South Africa will have to address these factors in order to grow its agricultural industry. It is also recommended that national and provincial government provide more training and financial support programmes, through the green box, to assist emerging black farmers to enter mainstream commercial agriculture.<sup>726</sup>

The Southern African region is considered a water poor area, and it is ranked second in the world in terms of water shortages after the Middle East.<sup>727</sup> Irrigation significantly improves agricultural productivity by improving the yield and quality of crops.<sup>728</sup> However a mere 1,5 per cent of South Africa's land is under irrigation, which produces 30 per cent of the country's crops.<sup>729</sup> Due to the fact that South Africa has no surplus water, future irrigation will be constrained.<sup>730</sup> Furthermore, farmers will have to double their use of water by 2050 if

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<sup>721</sup> Discussed in chapter four of this thesis.

<sup>722</sup> Discussed in chapter four of this thesis.

<sup>723</sup> Abdu-Raheem *et al* (note 526 above) 93.

<sup>724</sup> *Ibid* 93.

<sup>725</sup> Ament 'Agricultural Trade Liberalization and Protection: Impact of Agricultural Trade Liberalization and Protection on South Africa' (2006) Agricultural Economics Department of the University of Free State 1, 44.

<sup>726</sup> South African Department of Trade and Industry *South African Trade Policy and Strategy Framework* (2010) Prepared by the International Trade and Economic Development Division of the Department of Trade and Industry, South Africa 20.

<sup>727</sup> Dr A Goldblatt 'Agriculture: Facts & Trends South Africa' WWF-SA 12.

<sup>728</sup> *Ibid* 12.

<sup>729</sup> *Ibid* 12.

<sup>730</sup> *Ibid* 12.



they are to meet growing food demands using current farming practices.<sup>731</sup> Therefore it is recommended that water supply be monitored carefully in order increase efficiency and promote irrigation of crops. This will result in increased yields and better quality crops.<sup>732</sup>

The global economy has undergone many changes in the past 20 years,<sup>733</sup> the most significant of which has been the mushrooming of emerging economies, most notably those of BRICS.<sup>734</sup> As noted above, these changes have had an impact on WTO negotiations with more developing countries gaining political clout at the highest levels.<sup>735</sup> By virtue of South Africa's membership of BRICS, Africa as a continent has established a stronger presence at the WTO table.<sup>736</sup> The time has come for South Africa to foster relationships within BRICS and, in particular, use the group as a platform to further its own development objectives at the WTO.

#### **6.2.5 Analysis of the 9<sup>th</sup> Ministerial Conference in Bali with a view to determining the extent to which decisions at the Conference will affect the AoA**

As noted in chapter five, the decision on public stockholding for food security proved to be the most controversial agricultural issue at the Bali Ministerial Conference. WTO Members decided on an interim solution, a peace clause allowing public stockholding subject to certain conditions. The key issue is that this is an interim solution; therefore this decision may change as members attempt to find a permanent solution to the issue of food security. It is important to note that the Bali Ministerial Conference changed how WTO members adopt food security policies. In particular, members are now temporarily allowed to exceed their amber box commitments in terms of the AoA, subject to certain conditions. This has been a major change for developing countries. While progress has been made, it is recommended that the interim food stockholding decision made in Bali should be maintained in the form of a 'permanent decision' taken at the next Ministerial Conference. In other words, countries should be permanently allowed to developed food security policies for domestic use, without being regarded as infringing amber box commitments.

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<sup>731</sup>Ibid 12.

<sup>732</sup>Ibid 12.

<sup>733</sup>C Zhuawu 'Ninth WTO Ministerial Conference: The Stakes for Africa' (2013) Economic Diplomacy Programme, SAIIA Policy Briefing No 79, 1.

<sup>734</sup>Ibid.

<sup>735</sup>Ibid.

<sup>736</sup>Ibid.

Finally, it is important for South Africa to carefully consider its trade strategy in order to align itself with BRICS and to any other trade opportunities. South Africa could use BRICS as a platform to further its trade objectives at the next WTO Ministerial Conference.<sup>737</sup> This would help the country to further establish its position on the international stage as the gateway to Southern Africa.<sup>738</sup> Ultimately this could result in an increase in foreign investors.<sup>739</sup>

The MTS has been given a ‘lifeline’ through the success of the Bali Ministerial Conference. However, this thesis submits that there is cause for cautious optimism regarding the future of the MTS as follow-up deliberations are required to ensure the further liberalisation of the international agricultural industry.<sup>740</sup>

### 6.3 CONCLUSION

This study has provided a holistic understanding of international agricultural regulation, by considering the historical development and analysing the main agreement that regulates international agricultural trade. It also contributed to knowledge by examining the AoA in the context of the South African agricultural industry, and exploring how this sector will be impacted by the country’s membership of BRICS.

The AoA set out to establish a fair and market-oriented agricultural trading system. Since its inception in 1995, progress has been made. However progress has not been as efficient and long-lasting as in other industries because the AoA has many inherent flaws and implementation issues. These issues will have to be addressed by members at the next Ministerial Conference. This thesis ultimately recommends that the AoA needs to be reformed and that developing countries should provide more input into a redrafted AoA that would promote their development objectives. It argues that developing countries are gaining more negotiating power at the WTO table, especially when one considers how India and the G33 argued their proposals at the last Ministerial Conference in Bali. Therefore, as a

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<sup>737</sup>SAIIA ‘South Africa and the Post-Bali Global Architecture’ available at <http://www.saiia.org.za/opinion-analysis/south-africa-and-the-post-bali-global-trading-architecture> accessed on 15 October 2014.

<sup>738</sup>Ibid.

<sup>739</sup>Ibid.

<sup>740</sup>Jatkar & Mukumba (note 569 above) 2.

developing country and a member of BRICS, South Africa has an opportunity to organize itself into a highly developed nation in time to come.

As the world moves further into this millennium, global demand for food will continue to grow; it is estimated that by 2050, the world will need to feed nine billion people.<sup>741</sup> Therefore the regulation of agriculture will become even more important. The policies that the international community puts in place can have the effect of increasing food production, thereby ensuring food security, or limiting producers' potential, causing food shortages. Therefore, in this millennium, effective agriculture policies will be more important than ever.

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<sup>741</sup> RT 'UN warns world must produce 60% more food by 2050 to avoid mass unrest' available at <http://rt.com/news/world-food-security-2050-846/> accessed on 20 October 2014.

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