



agriculture,
forestry & fisheries

Department:
Agriculture, Forestry and Fisheries
REPUBLIC OF SOUTH AFRICA



National Agricultural
Marketing Council

Promoting market access for South African agriculture

Markets and Economic Research Centre and Directorate of International Trade



Issue 59/September 2015

THIS ISSUE OF TRADEPROBE COVERS THE FOLLOWING TOPICS:

- *Product profile for spices*
- *South Africa's maize industry – what does the data say?*
- *Harmonising of international commercial law in Africa: Achievements and challenges*
- *Non-tariff measures in agricultural trade*
- *Intra-African foreign investment: The role of South Africa*

1. PRODUCT PROFILE FOR SPICES

Spices are known as non-leafy products used for seasoning and flavouring in food. Spices bring various pungent or aromatic plant substances in flavouring food or beverages. It is important to outline that spices are not only used in food but also in medicines, perfumes and even sacred rituals. Spices are extracted from various dried parts of plants, such as seeds, roots, fruit, bark, stems, rhizomes and flowers.

It is estimated that about **2.1 million tons** of spices are produced globally each year, with India, Bangladesh and Turkey as the largest producers. South Africa does not produce much of these products due to climatic conditions that do not allow for the production of spices. It has been reported, however, that some parts of the country such as KwaZulu-Natal, Limpopo, Western Cape and North West do produce spices.

Table 1 presents the leading importers of spices in the world, expressed in value terms (from 2010 to 2014). It is worth noting that global imports have been increasing over the period under review. In this regard, global imports grew by R247 billion which is equivalent to an average growth of 4 % per annum. The United States of America (USA) is ranked as the largest importer with a total of R83 billion, followed by Germany and France, with a share of 10.4 % and 6.6 % respectively in 2014.

Table 1: Main importers of spices

Importers	values in R' billion				
	2010	2011	2012	2013	2014
Total world imports	260	363	387	422	507
USA	42	66	66	67	83
Germany	31	43	44	43	53
France	15	20	22	29	34
Japan	14	19	18	20	22
Italy	11	15	17	18	21
Canada	9	13	14	15	18
Netherlands	7	9	10	13	17
UK	10	12	13	14	17
Spain	7	10	10	10	14
Russia	7	9	10	12	14

Source: Trademap

Table 2 shows the world's main exporters of spices between 2010 and 2014. It was reported that about R254 billion was exported on the global market, with Brazil as the largest exporter. Brazil's exports in 2014 amounted to a total of R71 billion, equivalent to a share of 13.5 %. Vietnam was the second largest exporter with a share of 9.2 %, followed by Germany with a share of 6.3 % and India with a share of 5.7 % in 2014.

Table 2: Main exporters of spices

Exporters	values in R' billion				
	2010	2011	2012	2013	2014
Total world exports	269	370	390	429	524
Brazil	39	60	49	48	71
Vietnam	18	27	38	36	48
Germany	17	24	25	29	34
India	15	21	22	28	30
Colombia	14	19	16	19	27
China	12	15	16	22	27
Switzerland	9	13	15	22	24
Sri Lanka	11	12	13	18	20
Indonesia	10	12	17	19	20
Italy	7	9	11	14	17

Source: Trademap

Figure 1 represents South Africa's trade performance in spices between 2010 and 2014. It can be noted that both exports and imports have been showing a positive growth trend under the reviewed period. A total of about R799 million worth of spices was exported in 2014 with an average growth rate of 13 % under the reviewed period. South Africa exported a total of about R796 billion in 2014 with an average growth rate of 15 % under the reviewed period.

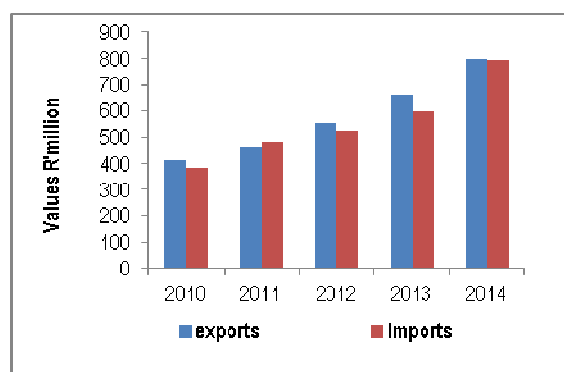


Figure 1: South Africa's trade performance in spices

Source: Trademap

Figure 2 shows that the most imported spice is pepper (HS 0904). The top three main suppliers of pepper to South Africa in 2013 were Vietnam with a 39.7 % share, followed by India with a share of 17.9 % and China with a share of 12.6 %. Other spices (HS 0910) include ginger, saffron, turmeric, thyme, bay leaves and curry leaves are the second most traded products, and the top three suppliers of these spices in 2014 were India with a share of 51.2 %, China with 16.3 % and Nigeria with a share of 7.8 %. Seeds of various plants (HS 0905) are rated the third most traded spices, and include seeds of anise, badian and fennel. In 2012, the top three

suppliers of seeds of various spices were India with a share of 66.6 %, followed by Morocco with a share of 6.9 % and the Netherlands with a share of 6.2 %.

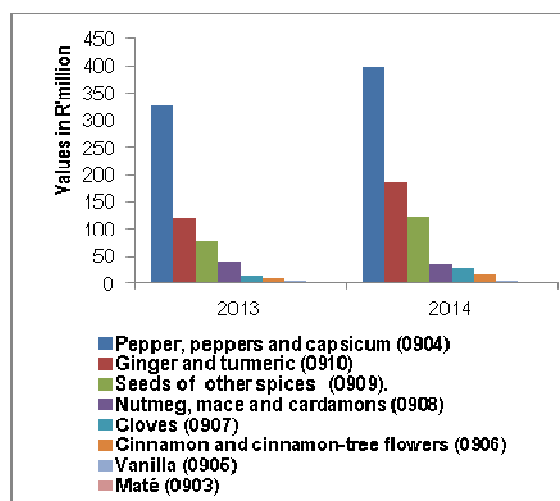


Figure 2: Main spices imported by South Africa
Source: Trade map

Figure 3 shows that most South African spices are exported under the HS 0910 classification, which includes the following spices: ginger, saffron, turmeric, thyme, bay leaves and curry leaves, with a total value of R605 million. The top three main destinations for South Africa's spices in 2014 were Botswana with a 24.1 % share, followed by Namibia with a share of 20.1 % and Lesotho with a share of 11.4 %. Other top exported spices include pepper, classified under HS 0904, which is the second most traded spice product in the country with a total value of R168 million.

The top three destinations for South African pepper in 2014 were the United States of America with a share of 19.5 %, the UK with a 16.5 % share and Australia with a share of 13 %. Vanilla beans (HS 0905) have been rated the third most traded spice product for a period of four years. In 2012 the top three destinations for South African vanilla were Sweden with a share of 64.5 %, followed by Germany with a share of 16 % and the United States of America with a share of 8.2 %.

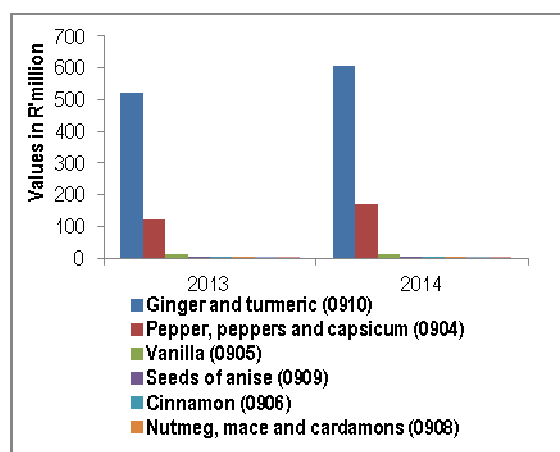


Figure 3: Main spice products exported by South Africa
Source: Trademap

Table 3 highlights potential markets for South African spice exports and South Africa's traditional markets. These markets are showing an increase in demand for these products. The strategy of selecting potential markets was based on the growth demand of imports for each country, tariff advantages and minimal exports to the mentioned markets. **Table 3** indicates potential markets for South African spices. Among the observed markets, the Netherlands shows the highest potential for spice exports due to a growth demand of 12 % on imports between 2009 and 2013.

However, it might be ideal to focus on both traditional and attractive markets, including Zambia, Lesotho, the Netherlands and Spain due to growth demand and tariff advantages. Regarding attractive markets, South Africa seems to also enjoy tariff advantages in Italy. Traditional markets such as Namibia and Botswana will remain important to South Africa owing to historical trading ties and tariff advantages. This indicates that South Africa should keep these markets due to fact that they are neighbouring countries, have political ties with the country and that there is a growth demand.

Table 3: South Africa's potential Market

Traditional markets				
Countries	Global import share (%)	SA's share of exports (%)	Growth of imports (%): 2010-2014	Tariff advantage
Botswana	0.1	19.4	3	0
Namibia	0.1	18.4	0	0
Zambia	0	9.1	16	0
Zimbabwe	0	8.5	-3	0
Lesotho	0	7.1	5	0
Attractive markets				
USA	16.5	4.2	3	0
Germany	10.4	0.8	0	0
Netherlands	6.6	1.1	12	0
UK	4.3	3.2	1	0
Spain	4.1	0.3	5	0

Source: Trademap



Author: Yolanda Potelwa is an Economist at the NAMC. Her work includes Trade Research under the MERC division. Currently, she is working on issues relating to non-tariff measures (NTMs), more particularly SPS issues in the fruit industry. She can be reached at: YPotelwa@namc.co.za or +27 (0) 12 341 1115

2. SOUTH AFRICA'S MAIZE INDUSTRY – WHAT DOES THE DATA SAY?

Globally, maize is one of the most planted crops, and is traded as either a feed crop or food staple (and more recently its uses have expanded to industrial uses). One of the important aspects of maize production is its exceptional adaptability, leading to its production spreading across the globe. Interesting is that there are only two broad categories of maize globally (white and yellow maize). White maize is generally considered a food crop while yellow maize is considered a feed crop. Significantly abnormal weather conditions leading to prolonged winters affects maize production negatively.

In **sub-Saharan Africa (SSA)** maize production takes up a reasonable amount of arable land (over 55 % in Eastern Africa). This is justified by the fact that, with the exception of West Africa, maize is the staple food in SSA. Fischer et al. (2014) concluded that maize production in SSA is underperforming with the exception of South Africa¹. South Africa's official figures on maize production exclude small-holder/communal farmers, hence the exception; otherwise the picture would be more or less the same as other SSA countries.

South Africa's maize production area (area planted) declined from **3.2 million hectares** in 2002/03 to **1.6 million hectares** in 2005/06, while production only started to decline in 2002/03. The area under maize production seems to vary between years and apparently follows world maize prices and weather conditions.

It is evident from **Figure 4** (see **Appendix A**) that maize production over the period under review (2000/01–2014/15) varied between 6 million tons and 14 million tons. The area under production remained more or less the same over time, with production increasing. To some degree, increases in production while the area planted was not necessarily increasing may be attributed to seed development, improvements in production practices and favourable weather conditions.

Figure 5 presents a picture of the maize yields from 2000 to 2013. It is clear that yields have been increasing: globally yields increased from 4.3 ton/ha in 2000 to 5.5 ton/ha in 2013, while South Africa's yields increased from 2.9 tons/ha in 2000 to 5.8 tons/ha in 2013. Genetically modified seed was introduced in 2001/02, accounting for only 0.3 % for white maize and 13.6 % for yellow maize. Over the period of ten years to 2011/12 the use of GM seed as a share of planted area increased to 68.8 % for white maize and 70.3 % yellow maize. During this

period, South Africa's yields increased around 3 tons/ha to over 5 tons/ha.

This may also be attributed to other developments within the grain industry such as effective insecticide use, correct use of fertilisers, and other practices. The world yield improvements seem to follow a smooth increase over the period with a slight decline in 2012, due to drought conditions in the United States. For South Africa yields have been increasing with declines in 2005 and 2006 as well as 2010. These declines can be attributed to dry weather conditions, especially in the western part of the country (North West Province and the north-west of the Free State).

Figure 6 presents the share of both white and yellow maize of the total maize crop from the 1990/91 season to the 2014/15 season. The period from 1990/91 to 1994/95 shows an interesting picture where the share of yellow maize was higher than that of white maize. This was particularly due to persistent dry weather conditions on the western side of the country which led to low production.

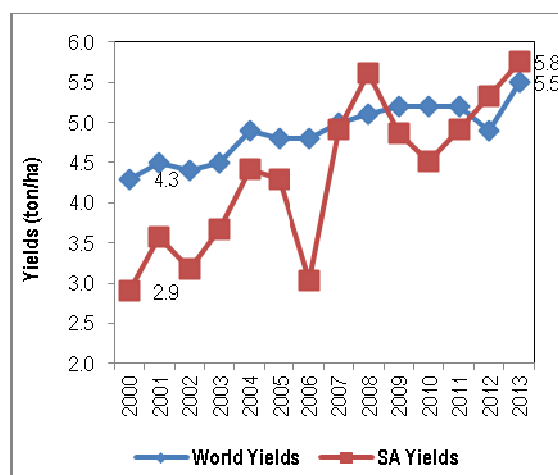


Figure 5: Trend of yields in maize production from 2000 to 2013 (world and South Africa)

Source: FAO (2015) and Grain SA (2015)

The western parts of South Africa mainly produce white maize, while the eastern parts produce mainly yellow maize. The impact of dry conditions is event from the yield levels. The average yields of white maize between 1990/91 to 1994/95 were 1.89 tons per hectare, while yellow maize yields were 2.27 tons per hectare.

From 1994/95 onwards the share of white maize was higher than for yellow maize. The gap continued to increase until 2003/04 and then started to decline. This particular decline was due to a decrease in hectares planted, from 2.2 million hectares the previous season to 1.8 million hectares in 2003/04. By 2013 the area started to change again with yellow maize commanding a bigger share, as market conditions started to favour more yellow maize. There was a growing demand from Japan and

¹ South Africa's maize production was only viewed in context of commercial farmers excluding the small-holder farmers.

Taiwan, as well as from the domestic feed industry. The demand for yellow maize from the domestic feed industry increased from 2.4 million tons in 2000/01 to 4.5 million tons in the 2013/14 marketing year. In the same period, yellow maize exports increased from 0.52 million tons to 1.13 million tons.

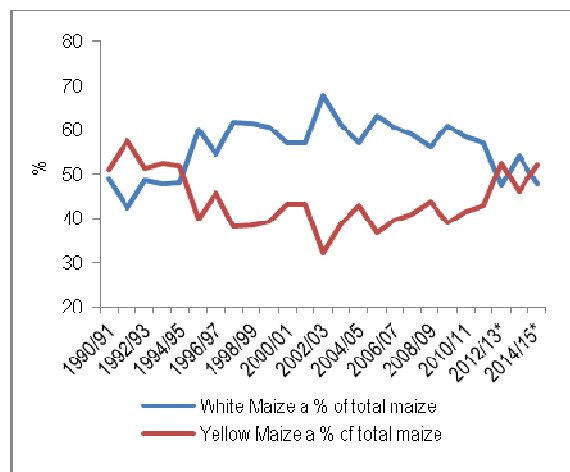


Figure 6: share of white and yellow maize in total maize crop from 1990/91 season to 2014/15 season
Source: Grain SA (2015)

Maize Trade (2014/15 marketing year) – volumes

South Africa's total maize exports for the 2014/15 marketing year totalled 1.95 million tons, with yellow maize accounting for 1.41 million tons and white maize at 0.54 million tons. **Figure 7** presents the yellow maize exports by destinations and share Taiwan, South Korea and Japan were leading importers with volumes accounting for 48 %, 15 % and 14 %, respectively. This means that 77 % of South African yellow maize went to the Far East (Taiwan, Japan and South Korea). Of interest was Saudi Arabia, which imported the largest quantity from South Africa since 2010. This trend is likely to continue in the next seasons, as feed demand in these respective countries continues to grow.

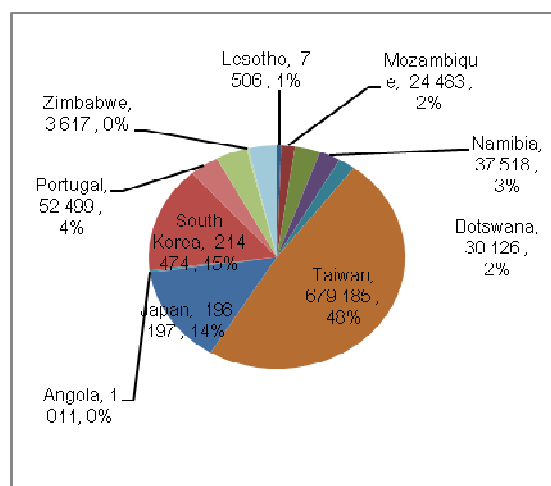


Figure 7: South African Yellow maize exports: 2014/15 marketing year (tons)
Source: Grain SA (2015)

South Africa's white maize exports accounted for only 28 % of 2014/15 exports. This was 41 % lower than the previous season's exports of 0.93 million tons. The main factor behind this decrease was the low demand from traditional markets (regional markets) and some sporadic markets such as Mexico, Venezuela, etc. The decrease in these countries' demand can be attributed to the increase in their production volumes on the back of favourable weather conditions. Moreover, government support, such as fertiliser to some countries, e.g. Malawi and Zambia has led to increased production, which in turn increased competition for South Africa in some of the traditional markets. Nonetheless, the BNLS (Botswana, Namibia, Lesotho and Swaziland) seem to be showing consistent demand.

Figure 9 presents the trend of South African white and yellow maize exports. From 1999/00 to 2014/15 marketing seasons, white maize exports grew by 10 %. In the same period, yellow maize exports grew by 3 788 %. This drastic increase is due to a low base of 0.036 million tons in 1999/00, rising to 1.4 million tons in 2014/15.

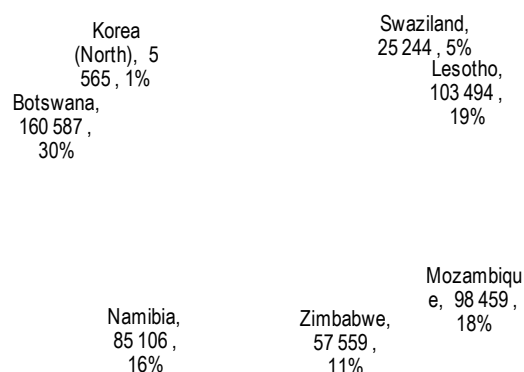


Figure 8: South African White maize exports: 2014/15 marketing year (tons)
Source: Grain SA (2015)

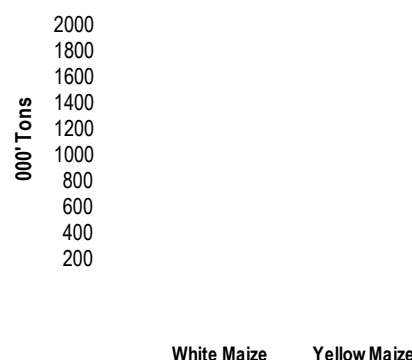


Figure 9: South Africa maize exports
Source: Grain SA (2015)

Conclusions

South Africa's maize production increases after the introduction of GM seed in 2001 was driven by seed development among other things. Increased yields

are visible in South Africa even leading to yields above the world average. The share between white and yellow maize closed in 2012/13 after a prolonged period where white maize has been taking a bigger share of production. On trade perspective, South African yellow maize exports are increasing at a fast rate while white maize exports face a decreasing trend. The white maize export trend, therefore presents an opportunity (and challenge) for the domestic industry to expand to new markets and increase domestic value-addition initiatives, which will also serve as a market for new entrants.

REFERENCES

Fischer, RA, Byerlee, D., & Edmeades, GO (2014). Crop yield and global food security: will yields increase continue to feed the world? Canberra: Canberra: Australian Centre for International Agricultural Research. Retrieved from <http://aci-ar.gov.au/publication/mn158>

Author: Mr. Bonani Nyhodo is a manager for Trade Research at the NAMC. His research work focuses on trade analysis and GTAP modelling. He can be contacted at Bonani@namc.co.za or +27 (0) The article was co-authored by Mr Wandile Sihlobo an economist at Grain SA (wandile.sihlobo@grainsa.co.za)

12 341 1115



3. HARMONISING OF INTERNATIONAL COMMERCIAL LAW IN AFRICA: ACHIEVEMENTS AND CHALLENGES

Harmonisation of cross-border business law: A crucial component of regional integration in Africa?

There are two dimensions to the legal paradigm governing international trade. Firstly, the public law dimension, which is primarily concerned with governing the interaction between sovereign states as well as international organisations, such as the WTO and United Nations (UN). Secondly, the private law dimension, referring to the body of conventions, model laws, domestic legal norms, legal guides as well as other documents and instruments that

regulate private relationships across national borders.²

It is this second dimension with which this discussion is concerned. While public international law is meant to foster cooperation and transparency between states, reducing conflict and optimising the use of resources by clearly defining the rights and obligations of participating nations, private international law strives to create certainty, reduce risk and promote investment by commercial actors in the private sphere. It constitutes a set of rules and regulations established or agreed upon by nationals of different countries to govern in the event of a dispute related to a private commercial transaction. Legal rules governing the conclusion and enforcement of contracts of sale across borders, enforcement of warrants, property rights and access to finance are typical examples of activities governed under the auspices of private international law.

Commercial patterns have had a significant influence on Africa's past and the interaction of Africans with foreigners as well as with each other.³ The development of commercial relations underscores the need for an effective regulatory framework to ensure the predictability and stability of said relations.⁴ The nature of private international law is inevitably dualistic, serving to strike a balance between international consensus and domestic incorporation as well as balancing government actions with those of the private sector.⁵ Pursuant to the economic theory of convergence,⁶ it is this phenomenon which has galvanised the development of international rules in the areas of trade, finance and taxation amongst others.⁷ According to Williamson and Forje⁸:

Globalisation will result in the equalisation of the macro-economic performance of national economies ... Trade, capital flows and diffusion of technology from industrial to non-industrial nations will lead to economic growth, levels of productivity, and the cost of production to equalize around the world.

As highlighted above, nations the world over have responded to globalisation by entering into relationships characterised by interdependence – i.e. by integrating at the regional level. Regionalism, in

² Don Ford, *Private International Law* (American Society of International Law, 2013) 3.

³ Mwangi Kimenyi and others, 'Accelerating growth through improved intra-African trade' (January 2012) Brookings Institute African Growth Initiative Report, 1 <http://www.brookings.edu/~media/research/files/reports/2012/1/intra%20african%20trade/01_intra_african_trade_full_report.pdf> accessed 12 February 2015.

⁴ Luca Castellani, (2008). 'Ensuring harmonisation of contract law at the regional and global level: the United Nations Convention on Contracts for the International Sale of Goods and the Role of UNCITRAL' Report presented at the Colloquium on 'The Harmonisation of Contract Law within OHADA', held in Ouagadougou (Burkina Faso) from 15 to 17 November 2007, 115 <<http://www.unidroit.org/english/publications/review/articles/2008-1&2/115-126.pdf>> accessed 18 May 2015.

⁵ Polina Dlagneva, (2009). 'The need to harmonise trade-related laws within the countries of the African Union: an introduction to the problem posed by legal divergence'. *Fundamina* 15(1), 1–2.

⁶ Jeffrey Williamson, (1996). 'Globalization, convergence and history'. *Journal of Economic History*, 300–302; also John Forje, (2004). 'Facing the challenges of globalisation and regional integration: problems and prospects for Africa at the dawn of the new millennium' African Identities, 16–17. It is explained that, in accordance with the theory of convergence, globalisation will ultimately lead to domestic, i.e. country-level, economic practices and institutions converging towards a (more or less) common body of rules, that is most conducive to growth.

⁷ n 4.

⁸ n 6.

essence, is rooted in the observation that small and fragmented markets hinder competitiveness in trade, and thus, economic advancement.⁹ Economic development, in turn, is measured by a given jurisdiction's ability to foster an environment wherein private enterprise can flourish and compete.¹⁰

In order to ensure the sustainability of trade and investment flows, a legal framework that serves the needs of contemporary commercial practice is vital. Within the ambit of WTO rules, the process of regional integration is typically conducted by establishing a free trade area (FTA), which later develops into a customs union.¹¹ The functionality of these inter-governmental partnerships hinges on the degree to which participating states harmonise their economic policies at both a domestic and a regional level.¹² This, however, is only one side of the equation.

As stated, one of the main reasons for incorporating regional integration into the governance structures of a state is to stimulate growth within the private sector. If this premise is accepted, it stands to reason that any governance structures adopted to serve this directive must also meet the needs of individual importers, exporters and investors who enter into commercial transactions across borders. If private actors routinely find themselves unable to defend their interests in a foreign jurisdiction, and/or subject to laws and regulations that are ill-suited to the realities of cross-border business dealings, any benefits that might have been derived from lower tariffs or more expedient customs procedures quickly evaporate.¹³

It is against the backdrop of this reality that the UN Secretary-General Report of 1966 advised developing countries with "a comparable stage of economic development to adopt, on certain subjects, uniform provisions which should be especially geared to the requirements of their economies."¹⁴ From a legal perspective, this trend typically gives rise to:

- i. **Decentralisation of domestic controls**, via the establishment of regional norms that dictate the movement of persons, goods, services and factors of production;

- ii. **Greater cohesion between legal regimes** applicable to cross-border economic activities, irrespective of the place of origin or execution;
- iii. **Clearly delineated frameworks of rights and obligations common** to all economic actors operating within the region;
- iv. **The establishment** of clear precedent with regard to the settlement of investment disputes.

All of these developments can assist in fostering an enabling environment for regional integration. Nevertheless, despite the long-standing focus on integrating African economies via public international law processes, the concurrent harmonisation of international business law for the empowerment of the private sector has not enjoyed the same prevalence.¹⁵ If the two commercial law treaties with broadest participation are to be used as a yardstick, i.e. the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)¹⁶ and the UN Convention on Contracts for the International Sale of Goods, 1980 (CISG), it is revealed that only 30 African countries are parties to the New York Convention, while a mere nine have ratified the CISG.¹⁷ African involvement in international economic treaty drafting processes appears to be suboptimal, despite global efforts to facilitate participation.¹⁸

This can be attributed to technical incapacity in this area of law-making, a degree of isolation from international legal developments in the field or commercial law and limited appreciation for the economic benefits to be derived from this process. The proliferation of regional rule-making bodies and their low level of coordination is also part of the problem. Many African countries belong to more than one REC, yet different RECs have sporadically promoted differing mechanisms for the regulation of cross-border trade, thus spurring a new source of disharmony.¹⁹

The response from governments has been to focus on policy, public ownership and central management of economic resources, while lacunae and inefficiencies in private international law have been left to languish.²⁰ Contributing factors range from ideologically driven economic management, to the influence of 'law and development' doctrines notoriously propagated as part of the Structural Adjustment Programmes (SAPs) of the 1990s and early 2000s.²¹ This has given rise to the status quo which emphasises the administrative aspects of

⁹ Michael J. Trebilcock and Mariana Monta Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (2011, Edward Elgar Publishing) 1—116, 224—250, 267—274; also Robert L. Paarlberg, 'Governance and Food Security in an Age of Globalisation' (February 2002) IFPRI Food, Agriculture, and the Environment Discussion Paper 36 <<http://www.ifpri.org/sites/default/files/publications/2020dp36.pdf>> accessed 30 May 2015.

¹⁰ n 4.

¹¹ A regional integration arrangement is a preferential (usually reciprocal) agreement among countries that reduces barriers to economic and non-economic transactions. Such an arrangement can take several forms, differing in the way discrimination is applied to non-members and in the depth and breadth of integration. Alpha Oumar Konaré & K.Y. Amoako (eds), 'Assessing regional integration in Africa I,' (2004) UNECA Policy Research Report, 11 <<http://www.uneca.org/publications/assessing-regional-integration-africa-1>> accessed 13 March 2015.

¹² *ibid.*

¹³ n 4.

¹⁴ Progressive Development of the Law of International Trade: Report of the Secretary-General of the United Nations, 1966 <http://www.un.org/Depts/los/un_ssg_report/development_1966/doc.html> accessed 22 June 2015.

¹⁵ n 33, 117.

¹⁶ United Nations, Treaty Series, vol. 330, 38. The New York Convention had 142 States Parties as of 1 January 2008.

¹⁷ n 3, 118.

¹⁸ *ibid.*

¹⁹ José Angelo Estrella Faria, 'Future directions of legal harmonisation and law reform: stormy seas or prosperous voyage?' (2009) *Unif. L. Rev.* 2009, 5.

²⁰ *ibid.*

²¹ Richard Sannerholm, 'Legal, judicial and administrative reforms in post-conflict societies: beyond the rule of law template' [2007] *JCSL* 12(1) 65.

economic law, to the detriment of commercial rules applicable to market entrepreneurs.²²

Africa's economic resurgence over the last decade has roused new interest in trade with the continent. Capitalising on this opportunity requires that obstacles to commerce must be eliminated. The need for an effective, uniform framework of commercial regulation cannot be underestimated.

Harmonisation in the contemporary African context

A notable exception to the general apathy toward the harmonisation of commercial law in Africa, is the work undertaken by the West African 'Organisation pour l'Harmonisation du Droit des Affaires en Afrique' (OHADA), translated as the Organisation for the Harmonisation of Business Law in Africa.²³ It is interesting to note that, unlike most African regional initiatives, the inception of OHADA was largely due to pressure African traders insisting that the regulatory and judicial environments pertaining to commerce in the region should be improved to better protect their businesses.²⁴

Established in October 1993, this intergovernmental organisation gives effect to the Treaty on the Harmonisation of Business Law in Africa, currently ratified by Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Gabon, Equatorial Guinea, Guinea-Bissau, Guinea, Mali, Niger, Senegal and Togo.²⁵ While OHADA offers a regional system of business laws, the influence of the civil law tradition, as present in the majority of its members, does feature prominently within its structures. OHADA operates via five regional organs, namely:²⁶

- i. **The Conference of Heads of State (CHS):** This is OHADA's most authoritative institution. The CHS is chaired by the president or other appointed official whose country chairs the Council of Ministers.
- ii. **The Council of Justice and Financial Ministers (CMJS):** This is OHADA's legislative body, charged with the adoption and amendment of OHADA's regional statutes, known as "uniform acts". The CMJS is assisted by the Permanent Secretariat.
- iii. **The Permanent Secretariat (the Secretariat):** This is OHADA's executive and the administrative arm. The Secretariat operates in fashion similar to most national parliaments. Among its many functions is the preparation of draft uniform acts.
- iv. **The Regional School of Magistracy (ERSUMA):** Dedicated to implementing the law of OHADA, the ERSUMA functions as a library as well as a training hub for legal practitioners and judges

from OHADA member states and the surrounding region.

- v. **The Common Court of Justice and Arbitration (CCJA):** The CCJA is the judicial arm of OHADA and one of the organisation's greatest innovations. Judgements of the CCJA are executable within the jurisdiction of all OHADA member states without prior recognition by domestic courts. This allows the CCJA to ensure consistency in the application and interpretation of the OHADA uniform acts across all member states. The CCJA operates as a supreme court with regard to the uniform acts and is authorised to review decisions handed down by national courts on matters relevant to OHADA law. It ensures that any arbitration proceedings are in conformity with the uniform act on arbitration irrespective of where the dispute arose. The CCJA also acts in an advisory capacity and hears matters concerning the interpretation of the uniform law referred to it either by domestic courts, or by representatives of the member states.

vi.

Since its inception, OHADA has produced nine uniform acts covering virtually all aspects of international transactions, with another three proposed bills currently being developed. The uniform acts can be categorised as follows:²⁷

- i. **Group 1 – Uniform Acts Facilitating Commercial Transactions:**
 - a. The Uniform Act on General Commercial Law
 - b. The Uniform Act Related to Commercial Companies and Economic Interest Groups, and
 - c. The Uniform Act Organising Securities.
- ii. **Group 2 – Uniform Acts Facilitating Registration and Operation of Commercial Companies:**
 - a. The Uniform Act Related to Commercial Companies and Economic Interest Groups
 - b. The Uniform Act Relating to the Transport of Goods by Road
 - c. The Uniform Act to Organise and Harmonise the Accounting Systems of Undertakings Operating in the Member States Parties to the Treaty on Harmonised Business Law in Africa, and
 - d. The Uniform Act Governing Cooperative Banks.
- iii. **Group 3 – Uniform Acts Facilitating the Settlement of Disputes:**
 - a. The Uniform Act on Arbitration Law
 - b. The Uniform Act Related to Simplified Recovery Procedures and Measures of Execution, and
 - c. The Uniform Act Related to the Collective Procedure for Debt Cancellation.

iv. Group 4 – Proposed Bills:

²² n 2.

²³ 'Introducing OHADA' (OHADA Legis, 2015) <<http://www.ohadalegis.com/anglais/presohadagb.htm>> accessed 6 May 2015.

²⁴ Alhousseini Mouloul, *Understanding OHADA* (OHADA Permanent Secretariat, 2nd ed, 2009) 8.

²⁵ Preamble, Treaty on the Harmonisation of Business Law in Africa, 1993.

²⁶ Foundation for a Unified Business Law in Africa, 'OHADA institutions' (*fabula.org*, 2015)

<<http://www.fubla.org/ohada/the-institutions>> accessed 6 May 2015.

²⁷ 'OHADA Law Enactments' (OHADA Legis, 2015) <<http://www.ohadalegis.com/anglais/legislohadaligneqb.htm>> accessed 6 May 2015.

- a. Consumer Law
- b. Labour Law, and
- c. Contract Law.

The most general benefits to be derived from a harmonised system of cross-border business law may be listed as follows.²⁸

- i. Improved efficiency in economic relationships:** This is achieved primarily by creating certainty in the marketplace. Harmonisation may serve to fill a legal vacuum by creating rules in a field where national law was previously non-existent, e.g. the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, or obscure, e.g. the draft Unidroit Convention of Security Rights in Mobile Equipment. In addition, by developing a single legal framework specific to the regulation of international transactions, conflict of laws (and recourse to the rather complex rules that govern international adjudication when relying on laws designed to govern domestic transactions) is averted.²⁹ Legal harmonisation tends to produce what Mistelis calls “neutral law”,³⁰ i.e. regulations that serve the interests of trading entities impartially and equitably.
- ii. Reduced transaction costs:** The certainty and equality created by effective legal harmonisation limits disputes, but also expedites resolution when they do arise. The simplification of cross-border regulation expedites the process of trading, eliminating the need for excessive due diligence investigations, which saves both time and revenue.
- iii. Maximises economies of scale in legal reform:** This concerns the costs of (effective) regulation. Prudent, well-informed, and responsive law-making is a costly process. In order to give effect to equitable, practical and legitimate rules, a legislature must:³¹
 - a. Gain a clear understanding of the real-world context whereon interactions to be regulated take place, through reliable analysis and empirical evidence
 - b. Evaluate a range of alternatives for each matter under consideration
 - c. Approximate the likely impact of such regulatory alternatives on the position of the actors affected
 - d. Commence the legislative drafting process
 - e. Undertake awareness campaigns to aver those affected of the new legislation and its impact on their position.

A substantial portion of the costs associated with this process would not vary significantly if the new law was to be adopted in a jurisdiction with a population

of one million, or in another with a population of 100 million, though the public finance burden imposed in the latter case (assuming like economic circumstance across the population) is significantly smaller.

An economic analysis of the economic growth effects of OHADA membership has yielded some interesting results. The immediate result of reform appears to be an increase in FDI while local and regional investment stagnates.³² Over the longer term, however, this trend is reversed, with significant increases in local and cross-border investment being observed within four to six years following implementation.³³

Understanding the reigning economic and legal complexities within the region is necessary to comprehend the role OHADA plays. Three RECs operate alongside OHADA within its jurisdiction, and all of its member states have concurrent membership to one or more of these, i.e. the West African Economic and Monetary Union (UEMOA), the Economic and Monetary Community of Central Africa (CEMAC) and the Economic Community of West African States (ECOWAS).³⁴

UEMOA, whose membership is comprised of Benin, Burkina Faso, Guinea-Bissau, Cote d'Ivoire, Niger, Mali, Togo and Senegal, was established to facilitate economic integration among countries sharing the CFA Franc as their common currency. In essence, UEMOA functions as a customs and monetary union.³⁵ The overarching objective of UEMOA is the creation of a common market based on the free movement of goods, services and capital. Overlap with OHADA occurs with regard to UEMOA's coordinating authority regarding certain national policies and harmonisation of commercial law relevant to its aims.³⁶

Likewise, CEMAC represents an economic grouping in Central Africa. It was established between the Central African Republic, Cameroon, Gabon, Equatorial Guinea, Chad and the Congo to promote economic integration among these nations.³⁷ CEMAC aims to encourage trade through the establishment of a common market between its members. At present, CEMAC members share a common financial, regulatory and governance structure.³⁸ They also maintain a common external

²⁸ Fernando Gómez Pomar, 'The harmonization of contract law through European rules: a law and economics perspective' [2008] InDret 2/2008 School of Law Universitat Pompeu Fabra, 5–10.

²⁹ Loukas Mistelis, 'Is Harmonisation a necessary evil? The future of harmonisation and new sources of international trade law' in Ian Fletcher, Loukas Mistelis and Marise Cremona (eds) *Foundations and Perspectives of International Trade Law* (London, Sweet & Maxwell, 2001) 3–27.

³⁰ *ibid.*

³¹ *n* 4.

³² Alexa Tiemann, 'OHADA membership and business reforms: a driver for growth?' (PhD thesis, University of St Gallen, December 2012) 16.

³³ *ibid.*

³⁴ Boris Martor, *Business Law in Africa* (UK, Eversheds, 2002) 289–300.

³⁵ Office of the United States Trade Representative Resource Centre, 'West African Economic and Monetary Union (UEMOA)' (ustr.gov, 2015) <<https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/west-african-economic-and-monetary-union-uemoa>> accessed 29 June 2015.

³⁶ *n* 33.

³⁷ *ibid.*

³⁸ 'The Central African Economic and Monetary Community' (internationaldemocracywatch.org, 2012) <<http://www.internationaldemocracywatch.org/index.php/central-african-economic-and-monetary-community>> accessed 29 June 2015.

tariff on imports from non-members. The CFA Franc currency is also shared by the CEMAC countries.³⁹

ECOWAS is a group of 15 states, consisting of Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. It was established to facilitate the creation of a customs union in West Africa through the total economic integration of all its members.⁴⁰ ECOWAS boasts an institutional framework comparable to that of OHADA, comprising of the Commission, the Community Parliament, the Community Court of Justice and the ECOWAS Bank for Investment and Development.⁴¹

A degree of complementarity exists between these organisations, but there is also competition. OHADA's exclusive focus on legal reform has allowed it to make significant strides in this area. Nevertheless, like most African regional bodies, OHADA's efforts are hampered by a lack of funding. While the CCJA has done much to maintain uniform precedent within the region, the overlap of its mandate with that of ECOWAS has created a regional conflict of laws that now adds to the very complexities that the process of legal harmonisation is intended to reduce.⁴²

In the face of the recent push to consolidate RECs into wider, better organised trade entities,⁴³ OHADA's future will be determined by the responsiveness of its legal reforms and the degree to which it is able to incorporate new (non-Francophone) members. At present, Chad and Cameroon are the only Anglophone representatives within the OHADA framework. Considered from an intra-African trade angle, strong incentives exist for the West African 'powerhouses' of Ghana and Nigeria, both of which have a legal tradition rooted in the common law, to sign on to OHADA.⁴⁴ While reflecting the civil law tradition of its members, OHADA does offer a more neutral system of commercial law, relative to the domestic law of most Francophone nations. Ghana and Nigeria are surrounded by such countries and OHADA membership would provide a useful vehicle for expanding cross-border investment.⁴⁵

In addition, one of the complementary effects of ECOWAS is that the amalgamation of French and English-speaking members has facilitated a natural avenue by which to incorporate OHADA into common law nations.⁴⁶ Such an expansion of OHADA membership is likely to promote FDI from

abroad as well as within the region, thus serving to further the aims of the other major RECs therein.

That said, striking a balance between the adaptability of the common law approach and the more structured, codification-based civil law will inevitably pose a challenge. Also, given the automatic enforceability of the CCJA's Judgements, linguistic barriers are also of concern. Any significant expansion into common law jurisdictions would require amendments to OHADA's mechanisms in order to create a unified framework that may be efficiently applied within both the civil and common law traditions. This is, of course, no small task.

In conclusion, OHADA has paved the way for legal and judicial certainty in its member states. However, there is still room for improvement, particularly with regards to the CCJA. It is often difficult to determine which court is competent in disputes involving OHADA rules and domestic laws and judges often favour national over OHADA laws in their interpretation, which diminishes the supposed supremacy of the CCJA. Furthermore, there also needs to be further clarity on how the OHADA institutions interact with similar structures in the CEMAC, UEMOA and ECOWAS.

Further harmonisation of the law affecting cross-border contracts, employment and consumer protection, coupled with an increase in OHADA's membership will ultimately serve to bolster the flow of intra-African investments and trade, with the added benefit of enhanced rule of law. In turn, this has the potential to strengthen political stability, attract additional FDI from abroad, facilitate economic growth and galvanise regional integration.⁴⁷



Author: Ms Stephanie van Walt is a senior economist at the National Agricultural Marketing Council. Her research work focuses on food law and food security issues. She can be contacted on Stephanie@namc.co.za or +2712 341 1115

4. NON-TARIFF MEASURES IN AGRICULTURAL TRADE

The emergence of non-tariff measures or NTMs and their potential impact on international trade was officially noticed by World Trade Organisation (WTO) in its Uruguay Round that ended in 1994. NTMs are defined as "*policy measures, other than ordinary customs, tariffs, that can have potentially economic effects on the international trade in goods, changing quantities traded or prices or both*" (UNCTAD, 2012). The application of NTMs is aimed at safeguarding the safety of imported commodities, safeguarding national security, and safeguarding revenue loss and

³⁹ *ibid.*

⁴⁰ 'Economic Community of West African States' (uneca.org, 2015) <<http://www.uneca.org/oria/pages/ecowas-economic-community-west-african-states>> accessed 29 June 2015.

⁴¹ n 33.

⁴² n 28.

⁴³ Trade Law Centre of Southern Africa, 'SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents' (tralac.org, 2015) <<http://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>> accessed 1 July 2015.

⁴⁴ n 31.

⁴⁵ International Finance Corporation Advisory Services in sub-Saharan Africa, 'Development Impact Report 2014' (2014) World Bank Group, Washington DC, 15–19 <<http://www.ifc.org/wps/wcm/connect/3610098044ea9573aa9caec66d9c728b/IFC+Africa+Development+Impact+Report+2014.pdf?MOD=AJPERES>> accessed 19 March 2015.

⁴⁶ n 33.

⁴⁷ n 31, 33 and 44.

protecting home industries and consumers (Okum & Nyokori, 2010).

Bheghin and Bureau (2001) argued that global elimination of tariffs and subsequent realisation that many countries had adopted a wide variety of restrictive trade policy(such as NTMs) as a perfect substitutes for tariffs. For example imposition of quota in a specific country can be used as rent seeking mechanisms for production of the local industry. Although NTMs sometimes as a protectionist mechanisms for the local industries. Under the multilateral rules, the application of NTMs is to ensure that there are set at an appropriate level to achieve legitimate objective with minimum impact in trade (Staiger, 2012).

The main purpose of this article is to assess types of NTMs that are widely used on the global market, the impact of NTBs on trade and cases of NTMs in South Africa.

Classification of NTMs

It is relevant to classify the different types of NTMs so as to ensure that they are properly documented by companies for compliance, harmonised across sectors and countries and for statistical analysis of NTMs across sectors and countries. International organisations such as the Food and Agricultural Organisation, the International Monetary Fund, the International Trade Centre, the Organisation for Economic Co-operation and Development, the United Nations Conference in Trade and Development, the World Bank and the World Trade Organisation provided groups of technical experts for the system of classifying NTMs (ITC, 2012).

The classification of NTMs includes broad categories of technical and non-technical measures used in trade. Technical measures of NTMs include sanitary and phytosanitary measures, technical barriers to trade (TBT) and pre-shipment inspection, non-technical measures and hard measures. These measures are mainly focused on the safety, environment and health aspects of traded commodities. The non-technical measures include price controls, finance measures, distribution resections, etc., as presented in **Table 4** (see **Appendix B**). These measures are more focused on price and quantity controls for traded commodities.

Technical measures are widely used in agricultural trade due to increasing consumer preferences regarding food safety, quality and health. The use of these measures is administered by the WTO so as to ensure that member states are not using them to serve their interests of protectionism. The rise of the use of the measures is also attributed to the improvement of incomes located in Europe and North America. The next section will give a clear understanding of the impacts of these measures on international markets.

Impacts of NTMs on international trade

In light of the different types of NTMs and their function in trade; however, these NTMs have implications for trade which have positive and negative outcomes. The impacts of NTMs can be evaluated in quantitative terms. In most cases, NTMs are applied to correct market failures such as information asymmetry and externalities between consumers and producers amongst trade. The economic implication of NTMs in trade are noted through trade distortion, cost of compliance for exporters and economic losses for importers. Furthermore, NTMs can normally be evaluated in quantitative terms such as trade revenues, welfare effects, global prices and distortion of trade flows in the global market (Bheghin and Bureau, 2001). The impacts of NTMs can be demonstrated through the forces of supply and demand mechanisms.

Figure 10 presents the theoretical framework of NTMs.

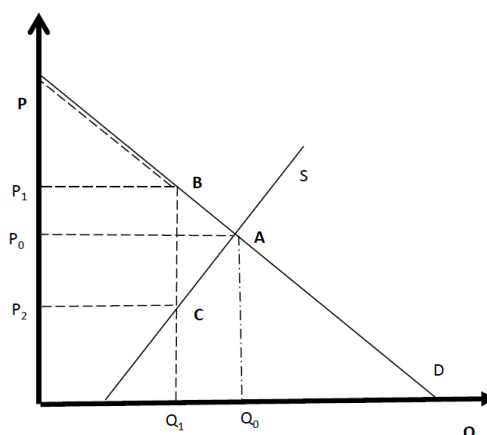


Figure 10: Theoretical framework of impacts of NTMs
Source: Adopted from UNCTAD

In the free global market, imported demand is equal to exported supply at a world price denoted by P_0 . The introduction of NTM regulation by the importing country will result in disequilibrium through a price increase denoted by P_1 . It is important to note that it is assumed that NTMs distort the same levels as tariffs, and therefore are equivalent to an *ad valorem* tariff. As shown in **Figure 1**, foreign producers will pay the price difference through the cost of complying with NTMs that are put in place. Domestic consumers will be worse off through the price increase of imported produce. Due to price increases, consumers will demand fewer imports. The domestic government will accrue benefits through the extra cost paid by foreign producers through compliance. This is an indication that foreign producers will have to increase the cost of production, which have implications for their export supply. The importing country will suffer the consequence of a shortage of imports due to an increase in the price that is paid by foreign producers in complying with NTM regulations.

However, the supply and demand mechanism does not reflect the properties of NTMs regulation, but illustrates the implications associated with

compliance with regulations. Therefore graphical representation is an alternative way of capturing the effects of NTM regulation through supply and demand responses.

Cases of NTMs for South Africa for the agricultural industry

South African poultry industry – Anti dumping measures

The poultry industry has been suffering the consequences of openness of trade in the country due dumping of chicken cuts by Brazil. ITAC imposed provisional anti-dumping duties on imports from Brazil. Anti-dumping measures are known to be applied as an action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing unnecessary competition. The importers impose an import duty through the establishment of a new price that is below the cost of production (UNCTAD, 2010). The Brazilians felt the measures were not applied correctly, and they challenged the country through a dispute mechanism in the WTO which was recovered by the South African Ministry of Trade and Industry. SAPA applied for an increase of general tariff varying from 12 % and 82 % for chicken cuts, which was approved. The tariff increase did not apply to the EU countries due to the TDCA between South Africa and EU. For the case of the EU, SAPA made an application to ITAC for anti-dumping of boneless chicken in safeguarding the poultry industry from EU competition. Tralac (2014) argued that if ITAC imposed the measures on imported chicken from EU member states, a dispute was likely to be declared. ITAC recommended that the measures should be imposed on imports from Germany, the Netherlands and the UK for protection of the poultry industry. This illustrates that South Africa has used these measures for the protection of the poultry industry from international competition.

South Africa's citrus industry – Sanitary and phytosanitary measures

South Africa currently exports more than one third of its citrus to European Union markets. This sector is the major contributor to the SA agriculture sector in terms of employment and export earnings. In recent years, the sector was faced by stricter Citrus Black Spot regulation in the EU. CBS is regarded as an important phytosanitary requirement for citrus import permission in the EU market (Carterns, et al., 2012). Phytosanitary measures are applied on the basis of food safety, plant health and environment. The EU had indicated that if South Africa exceeded more five allowable CBS interceptions it would be subjected to a ban. This measure was applied by the EU due to the fact that CBS has not occurred in this market. The EU had fears that the disease carried by South Africa's imports would spread in their territory. Citrus Research International has conducted a number of scientific studies indicating that there is no likelihood that the disease will occur in the EU due to their cold temperatures. The South African citrus producers and exporters were required to comply with CBS regulations to retain the market. However, both

producers and exporters have ensured compliance with CBS regulations by spraying their orchards and redirecting CBS affected fruit into non-CBS sensitive markets in the world. Although it is costly to comply with the requirements of the EU market, there is the likelihood that it will have positive returns for the South African industry in future.

Concluding remarks

Given the two cases that were highlighted in this article, it's clear that is difficult to distinguish whether NTMs are for protectionist reasons or to ensure that local industries are not harmed by international competition and food safety concerns. In a nutshell, these measures play a crucial role in trade through making sure that there is fair trade between countries, although it has been reported that they might cause distortions in trade.

References

- Bheghin, J. C., & Bereau, J. C. (2001).** Quantification of Sanitary and Phytosanitary and Technical barriers to Trade for Trade Policy Analysis. Ames, Iowa, USA: Working paper 1, Iowa State University.
- Carterns, E., Le Roux, M. A., Van Rooyen, L., Coetzee, J., Wentzel, R., Laubscher, W., et al. (2012).** Citrus Black Spot is absent in the Western Cape, Northern Cape and Free State Province. Stellenbosch: Working Paper, University of Stellenbosch.
- Okum, L., & Nyokori, J. C. (2010).** Non-tariff barriers in EAC custom union: Implications for trade between and other EAC countries. Economic Policy Research centre. Research series No.1.
- Staiger, R. W. (2012).** Non-Tariff Measures and the WTO. Geneva: WTO, Staff working paper.
- UNCTAD. (2012).** Classification of Non-Tariff Measures. Geneva, Switzerland: Division of international Trade and Commodities.



Author: Yolanda Potelwa is an Economist at the NAMC. Her work includes Trade Research under the MERC division. She can be reached at: YPotelwa@namc.co.za or +27 (0) 12 341 1115
The article was co-authored by Miss Ndindzulafhi Nengwenhuku a Master's student at the University of Pretoria

5. INTRA-AFRICAN FOREIGN INVESTMENT: THE ROLE OF SOUTH AFRICA

Overview

Foreign Direct Investment (FDI) from developing countries has risen sharply over the past two decades. Most FDI has been by Asian firms establishing footholds in other Asian countries but there has also been investment in developed countries such as the European Union. However, with the exception of South African investment, there

is little FDI stemming from sub-Saharan Africa. African investment is still only 0.2 % of the total, and only about 3 % of total developing country foreign investment.⁴⁸

Scope of FDI by South African investors

Research⁴⁹ by CIRAD reveals that South African nationals, be it companies or individuals, are the fifth⁵⁰ largest group contributing to foreign direct investment (FDI) in African agriculture. When viewed regionally, the contribution of South Africans is second only to that of the United Kingdom (UK) within the context of Southern Africa.⁵¹ A review of media reports, as verified by organised agriculture,⁵² reveals that South African investments aren't confined to this continent,⁵³ but also feature with some prominence in the agricultural sectors of countries in Europe⁵⁴ and North America.⁵⁵

As mentioned, South African investors span the spectrum from individuals to corporate multinationals. Exact statistical figures have yet to be compiled, but evidence suggests that most of these investors are maintaining operations within South Africa as well as abroad. However, some are withdrawing operations from South Africa altogether. It is generally assumed that the outputs of these "exiting investors" are transferred, whether through sale or redistribution, to a new investor with little disruption; however, it has been noted that land previously used for agricultural purposes may also be transferred to mining companies or urban developers, resulting in a net loss not only of expertise, but structural and natural resources for the agricultural sector.⁵⁶

The risks associated with FDI are well documented.⁵⁷ CIRAD cites failure rates of between 50 % and 70 % of all agricultural FDI projects, stating that rather than a "rush for [foreign] land," there is "a rush back home". Therefore, even in cases where an investor maintains an investment within South Africa, the possibility exists that, should the foreign investment fail, the resilience of operations in South Africa may suffer as a result.

Food security

In order to properly contextualise this discussion, it is important to note that South Africa has one of the highest ratios of food consumers relative to the number of food producers globally:⁵⁸ approximately 37 000 producers are responsible for the production of over 90 % of locally consumed food crops.⁵⁹ That amounts to one producer per an estimated 1 600 non-food producing South Africans, which is double the ratio shouldered by far larger and often subsidised, counterparts in more affluent parts of the world.⁶⁰

While diligent efforts are underway by both government and the private sector to increase the number of competitive food producers through BEE and other empowerment initiatives, as well as land redistribution, food security has become an ever more urgent concern to policy makers, with the Office of the President even listing the attainment thereof as a national priority.⁶¹ A 2012 report published by Statistics South Africa (Stats SA), estimates the national percentage of food insecure households at approximately 12 %.⁶² However, independent reports by a consortium of South African and Belgian experts⁶³ as well as the Development Bank of Southern Africa (DBSA), have found far higher rates on a provincial level, with figures as high as 70 % of total households in Limpopo and parts of KwaZulu-Natal being affected.

Food insecurity is a multi-faceted and intricate challenge, requiring a coordinated, inter-departmental and multidisciplinary approach to address effectively. For the purpose of this discussion, however, the role of food prices and the effect of import competition are of particular significance.

At present South Africa remains a net food exporting country overall, yet it has become a net importer of certain staples, notably wheat. Several food crop value chains⁶⁴ are currently under pressure due to high levels of import competition from the EU and also from other BRICS countries, particularly Brazil.⁶⁵ Given the scope of liberalisation that has taken place and the small size of the South African agricultural sector relative to that of its international competitors, a well-rounded and thoroughly informed approach to policy making, including an awareness of investment

⁴⁸ Eldis, 'Foreign investment by African countries' (updated 2014) <http://www.eldis.org/go/home&id=21154&type=Document#_VcRPU_mgqko> accessed 21 July 2015.

⁴⁹ Ward Anseeuw, "The global land rush, new investment models and agrarian change," presented at AEASA 2012, 3 October 2012.

⁵⁰ (1) China, (2) Saudi Arabia, (3) United Kingdom (UK), (4) India, (5) South Africa from a sample of the 27 most prominent investor home states.

⁵¹ n 2.

⁵² Mr. Theo de Jager (AgriSA), Gnr. Chris van Zyl (TAU), Mr. Bennie van Zyl (TAU)

⁵³ Particularly in the Democratic Republic of the Congo (DRC), Mozambique, Zambia, Namibia, Botswana and more recently countries as far afield as Nigeria and have expressed interest in attracting South African agricultural investors.

⁵⁴ Particularly within the Democratic Republic of Georgia and Portugal.

⁵⁵ Particularly within provinces of Canada, with Saskatchewan undertaking serious efforts to attract South African investors.

⁵⁶ Hein Lindeman, "Draft policy on the development and preservation of agricultural land," presented at the AgriSA conference on mining, 9 April 2013.

⁵⁷ M. Sornaraj, *The International Law of Foreign Investment* (2nd edn, Cambridge University Press, 2004) 77–87.

⁵⁸ Census of commercial agriculture 2007, Statistics South Africa.

⁵⁹ *ibid.*

⁶⁰ 'Feeding the nation: importance of SA's biggest farmers,' *Financial Mail*, 20 January 2012, pg. 30–37.

⁶¹ Of particular importance in this regard, is Outcomes 7 of the twelve deliverables identified in the National Development Strategy, which states the realisation of 'vibrant, equitable and sustainable rural communities with food security for all' as a political priority.

⁶² GHS Series Volume IV, Food security and agriculture 2002–2011: In-depth analysis of the General Household Survey data, Statistics South Africa, 2012. The report provides little detail as to the criteria used, however, an overall reading seems to indicate that, for the purposes of the report, and a person is deemed food insecure only once health is compromised due to insufficient caloric intake.

⁶³ D'Haese, Luc, (2011), 'Food insecurity vulnerability in South Africa: Limpopo case study,' NAMC et al, presented in Pretoria during November 2011.

⁶⁴ Notably potatoes, dairy and broiler meat.

⁶⁵ The South African sugar sector is under particular pressure from Brazil and India, but broiler meat from Brazil is an especially contentious issue.

trends, is critical to the sustainability of agriculture in South Africa.

Foreign investment from the home-front perspective

From a policy perspective, the purpose of gaining an understanding of the extent to which South African producers and businesses are investing abroad, is not to propose measures by which to prohibit expansion or movement of persons, but to better understand the overall impact should South African agricultural FDI be compromised, and to better inform FTA negotiations, such as in the SADC and the Tripartite FTA, which are set to include clauses on investment.

i. Rationale for protection

In the FDI-and-development discourse, much is said about the position of the “host state,” i.e. the countries in which the investment takes place. In contrast to this, discussions on the position of and benefits to the “home state,” i.e. the state from which the investor originates, are far less prominent. The following sections will make a preliminary attempt to address this void by considering the emerging role of particularly African investors on the FDI stage, as well as briefly highlighting potential FDI gains from a home state perspective.

ii. Shifting paradigms

*While FDI and portfolio flows from outside the [African] continent will continue to provide long-term capital, skills and technology, many believe [that] growing intraregional investment will create a virtuous cycle, encouraging greater foreign investment.*⁶⁶

– Tosin Sulaiman, Reporter for Business Day

The reason for the current lack of attention to the policy and development interests of home states may be found in the FDI trends of the 20th century, which were notoriously characterised by countries with robust economies acting as home states and the less advanced nations of the so-called “third world” acting as hosts.⁶⁷ As a consequence, the governance and regulatory paradigm that has emerged in what has been loosely-termed “the global south” focuses almost exclusively on the interest of host states, while the protection of investors abroad is regarded as the purview of “the global north”. This approach is not wholly without merit, given that – particularly in Africa – intra-regional FDI remains limited, accounting for only 12 % of total FDI flows to the continent in 2010.⁶⁸

Regarded *prima facie*, this number may seem negligibly low. However, a different picture emerges when one considers the findings of Ernst & Young,⁶⁹ stating that between 2003 and 2011, intra-African investment into new FDI projects rose at a 23 %

annual compound rate, reaching 32.5 % of FDI into Africa last year – i.e. more than double the growth in investment from non-African emerging markets and almost four times faster than FDI from developed markets.⁷⁰

Cross-border African investment is set to accelerate even further as local firms seek new markets, resource-rich countries launch sovereign wealth funds and assets held by pension funds grow.⁷¹ Underpinning this trend are the favourable demographics of sub-Saharan Africa – the world’s youngest region – which, according to the World Bank, will be the only region of the globe not to experience a decline in its saving rate by 2030.⁷²

As the above quote from *Business Day* highlights, “while FDI and portfolio flows from outside the continent will continue to provide long-term capital, skills and technology, many believe [that] growing intraregional investment will create a virtuous cycle, encouraging greater foreign investment.”⁷³ This view is supported by Gachao Kiuna, CE of a large Nairobi-based infrastructure company,⁷⁴ who notes that “Foreign investors are much happier putting their money behind local investors. Domestic investment is the real trigger towards driving high [regional] investment levels.”⁷⁵

Against this backdrop, it becomes clear that the perception of developing – and especially African – countries acting exclusively as hosts of FDI does not align with emerging trends. The next question that emerges is what does a home state stand to gain from investments by its nationals in the economy of another country?

Home state gains from FDI

The benefits of FDI to the home state are numerous and well documented, yet often overlooked in developing-world policies and regulatory measures on the issue.⁷⁶ Listed below are some of the overarching benefits of FDI to the home country:

a) **Cost advantages:** FDI has the potential to increase the competitiveness of domestic enterprises by allowing entrepreneurs to leverage the comparative advantages present in foreign territories. One frequently cited example, is that of direct access to certain resources, which may be abundantly available in another geographic location, at a lower cost than what could be achieved through imports. Stated differently, it is often cheaper to bring Mohammed to the mountain than it is to bring the mountain to Mohammed. In addition to this, if the investor is a

⁶⁶ Tosin Sulaiman, ‘From FDI to Africans Investing in Africa,’ *Business Day Live* (Africa, 9 August 2013) <<http://www.bdlive.co.za/africa/africanbusiness/2013/08/09/from-fdi-to-africans-investing-in-africa>> accessed 3 July 2015.

⁶⁷ Ibid.

⁶⁸ Most recent complete data as compiled by the United Nations Conference on Trade and Development (UNCTAD).

⁶⁹ Sulaiman (n 19).

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ TransCentury transport corporation, investing in countries such as Uganda, Mozambique and the Democratic Republic of Congo.

⁷⁵ Sulaiman (n 19).

⁷⁶ Sulaiman (n 19).

multinational corporation (MNC), it is highly possible that the investor is endowed with technology and expertise that allow for more efficient harvesting and even processing of the host country's resources, thus maximising utility and limiting wastage.

- b) **New markets:** FDI provides foreign investors with access to new markets as these foreign investors can produce and market their products and services in the domestic market of these hosts' countries. This is especially true for MNCs from developed economies like the US and UK who invest in emerging economies like India and China which have robust domestic markets. Firms from developed countries look at expanding their market by tapping new markets as the markets in developed countries are often saturated or have very slow growth.
- c) **Exposure to other countries:** MNCs prefer to have exposure to many countries. An MNC by definition is a company which operates in many countries, so carrying out operations in other countries helps them get exposure to such country-related economic cycles. The reason to get this exposure can also be attributed to the fact that as the number of countries the company operates in increases, that much more it becomes diversified, so diversification leads to the company having minimised its operational risks, meaning to say that if an MNC operates in 20 countries, say, during the course of the financial year due to some region-specific risk, and four countries suffer heavy losses, the company will not suffer much as the profits from the other 16 countries may more than offset the losses from these four countries. Thus this diversification helps protect the interests of the shareholders of the foreign investing entity.
- d) **International Relations:** International relations between countries tend to improve when there is a good amount of trade and investment flow which can be of strategic importance to the home country.



Author: Ms Stephanie van Walt is a senior economist at the National Agricultural Marketing Council. Her research work focuses on food laws and food security issues. She can be contacted on Stephanie@namc.co.za or +2712 341 1115

Appendix A

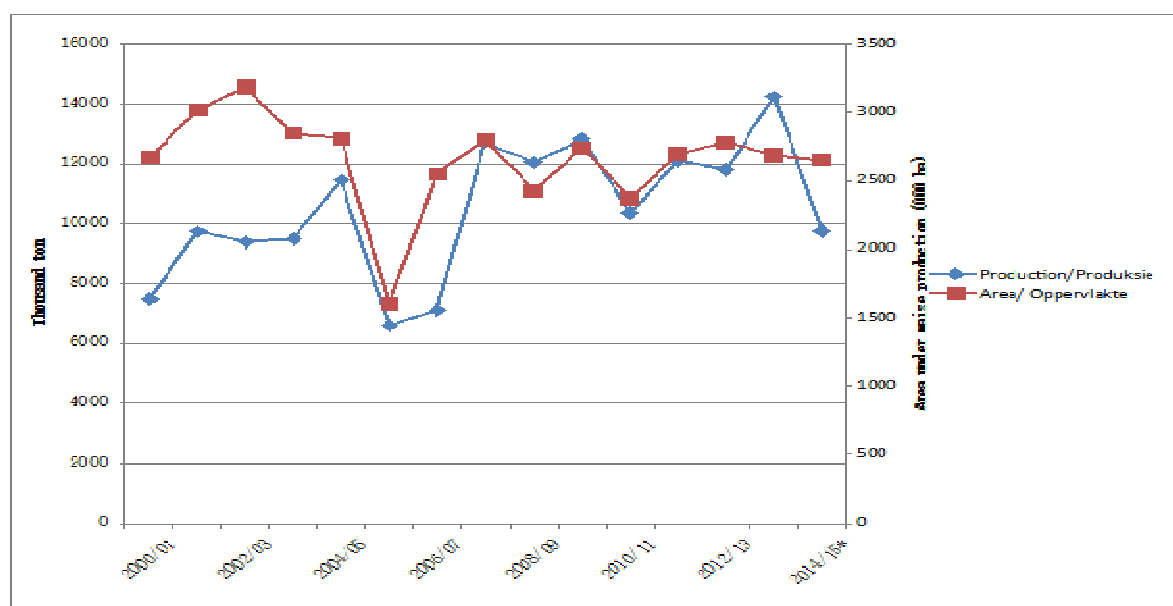


Figure 4: Maize production 2000/01–2014/15
Source: Grain SA (2014)

Appendix B

Table 4: MTNs classification

NTMS MEASURES	IMPORT MEASURES	TECHNICAL MEASURES	A. SPS B. TBT C. Pre-shipment inspection
		NON TECHNICAL MEASURES	D. Price controls E. License, quotas, prohibition and other quality control measures F. Charges, taxes and other para-tariffs measures G. Finance measures H. Anti-competitive measures I. Trade-related investments measures J. Distribution restriction K. Restrictions on post sales services L. Subsidies (excluding exports subsidies) M. Government procurement restrictions N. Intellectual property O. Rules of origins
	EXPORT MEASURES	P. Export-related measures (including export subsidies)	

Source: Adopted from UNCTAD, 2012

For correspondence:

Bonani Nyhodo

bonani@namc.co.za

+27 (0) 12 341 1115

© 2014. Published by the National Agricultural Marketing Council (NAMC) in co-operation with the Department of Agriculture, Forestry and Fisheries (DAFF), Republic of South Africa.

Disclaimer:

Although everything has been done to ensure the accuracy of the information in this TradeProbe, neither the NAMC nor the DAFF accept any responsibility for the accuracy of this publication or the opinions contained therein. Neither the NAMC nor the DAFF will be held accountable for the consequences of any actions taken on the basis of this information.