



Trade Probe

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Trade Probe is a quarterly report produced by National Agricultural Marketing Council and the Department of Agriculture, Forestry and Fisheries. It reports and analyses agricultural products, trade performance in local and international markets. This publication is widely used by exporters and importers.

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In this issue we cover the following topics:

Trade analysis of South Africa's fruit industry

South Africa faces stiff maize export competition

Dispute resolution and the protection of foreign investment: An overview of China

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Department:
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REPUBLIC OF SOUTH AFRICA



**National Agricultural
Marketing Council**
Promoting market access for South African agriculture



THIS ISSUE OF TRADEPROBE COVERS THE FOLLOWING TOPICS:

- *Trade profile of South Africa's fruit industry (HS: 08)*
- *Trade profile of cashew nuts (HS: 080132)*
- *Trade analysis of fresh persimmons (HS: 081070)*
- *Trade analysis of the South African pork industry (HS: 0203)*
- *South Africa faces stiff maize export competition*
- *Three broad types of international trade agreements – is AGOA still a unilateral agreement for South Africa?*
- *Dispute resolution and the protection of foreign investment: An overview of China and South Africa*

TRADE PROFILE OF SOUTH AFRICA'S FRUIT INDUSTRY

By
Lucius Phaleng

South Africa is among the world's largest producers of fresh fruit, and the South African fruit industry is the largest contributor, in terms of value, to the country's agricultural exports. Approximately 90% of South Africa's fruit is exported to the international market, with the remaining proportion being consumed locally and processed. A large share of South Africa's fresh fruit exports, dominated by citrus fruit, is destined for the European Union (EU). Between 2012 and 2015, the country was faced with the challenge of citrus black spot interceptions in the EU, thereby raising the level of concern for the South African fruit industry.

Table 1 highlights the world's leading importers of fruit in 2016, measured in million US dollars. World imports of fruit increased from US\$ 69 billion in 2007 to US\$ 116 billion in 2016, resulting in a positive growth rate of about 68%. The United States of America (USA) ranked as the largest importer of fruit with an estimated value of US\$ 16.7 billion (accounting for a 14.3 % share in value) in 2016, followed by Germany with a share value of 8.8 %, and then the Netherlands, the United Kingdom (UK) and China with a share value of 6.1 %, 5.4 % and 5.0 % respectively. There was no African country among the top 10 largest importers of fruit originating from South Africa.

Table 1: Leading importers of fruit products

Importers	Import value (in million US\$)		Share value (%)	Growth rate (%)
	2007	2016	2016	2007 - 2016
World	69 227	116 291		68.0
USA	8 240	16 718	14.3	102.9
Germany	7 494	10 222	8.8	36.4
Netherlands	4 066	7 104	6.1	74.7
UK	5 412	6 294	5.4	16.3
China	915	5 857	5.0	540.1
France	4 163	5 392	4.6	29.5
Canada	2 955	4 518	3.9	52.9
Hong Kong	1 254	4 279	3.7	241.1
Russian	3 738	3 831	3.3	2.5
Belgium	3 675	3 588	3.1	-2.4

Source: Trade Map (2017)

Table 2 shows the world's leading exporters of fruit between 2007 and 2016, measured in million US dollars. World exports of fruit increased from US\$ 61 billion in 2007 to US\$ 107 billion in 2016 (76.8 % growth rate). It is important to note that the USA was in the lead in terms of both world imports and exports during this period (see **Table 1** and **Table 2**). Spain was ranked as the second largest exporter of fruit with a share value of 8.4 %, followed by the Netherlands, Chile and Mexico with a growth rate of 98 %, 82.3 % and 168.7 % respectively. South Africa ranked tenth in 2016 with a positive growth rate of 95.1 % between 2007 and 2016.

Table 2: Leading exporters of fruit products

Exporters	Export value (in million US\$)		Share value (%)	Growth rate (%)
	2007	2016	2016	2007 - 2016
World	61 080	107 998		76.8
USA	7 420	14 062	13.0	89.5
Spain	6 519	9 058	8.4	38.9
Netherlands	3 393	6 719	6.2	98.0
Chile	3 225	5 880	5.4	82.3
Mexico	2 062	5 541	5.1	168.7
China	1 632	5 487	5.1	236.1
Italy	3 704	3 924	3.6	5.9
Turkey	2 671	3 874	3.6	45.1
Vietnam	762	3 151	2.9	313.4
South Africa	1 480	2 888	2.7	95.1

Source: Trade Map (2017)

Figure 1 highlights South Africa's trade performance (exports, imports and trade balance) in fruit over the past seven years. South Africa's fruit imports were far less than the exports, meaning that South Africa was a net exporter of fruits. Fruit exports increased during the period under review, while imports remained stable. In 2016, South Africa exported US\$ 2.9 billion worth of fruit, while imports were valued at US\$ 142 million, resulting in a positive trade balance of about US\$ 2.7 billion.



Figure 1: South Africa's trade performance, 2016

Source: Trade Map (2017)

Table 3 (see Appendix A) indicates fruit products imported by South Africa in 2016, measured in million US\$. It is shown that bananas excluding plantains (HS 080390) comprised the largest share of fruit imported by South Africa with a share value of 16.4 %. Almonds (HS 080212) comprised the second largest share with a share value of 14.9 %, followed by cashew nuts (HS 080132), grapes (HS 080610) and coconuts (HS 080111) with a share value of 12.5 %, 7.5 % and 6.3 % respectively. Five of the top 10 imported fruits experienced a negative growth rate between 2015 and 2016, namely, almonds, cashew nuts, banana plantains, kiwifruit and nuts in shell.

South Africa's top fruit exports are shown in **Table 4 (see Appendix A)**. Citrus fruits constituted the largest share of exported fruit, with a share value of 40.8 % collectively. Oranges topped the list of fruit exports by South Africa with a share value of 21.4 %, followed by table grapes, apples and lemons constituting a share value of 14.7 %, 12.4 % and 9.1 % respectively. In total, the top 10 fruits exported by South Africa constituted an 84.1 % share value of all fruit trade.

Figure 2 highlights the leading suppliers of fruit imported by South Africa in 2016. Mozambique was South Africa's largest supplier of fruit, constituting a 21.5 % share value of total imports. The second largest supplier was the USA constituting a share value of 15.2 %, followed by Spain (11.6 %) and Vietnam (9.4 %). About 4.2 % of fruit imported by South Africa were re-imported.

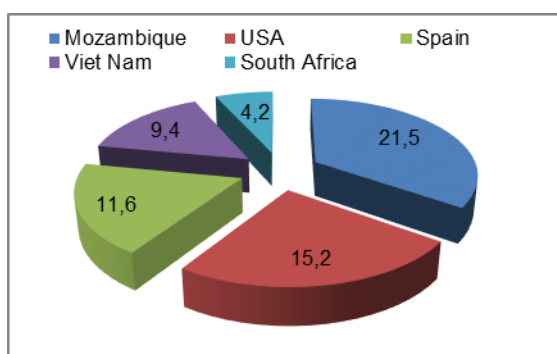


Figure 2: Percentage share value of leading suppliers of fruit imported by South Africa

Source: Trade Map (2017)

Figure 3 highlights the leading destinations of fruit exported by South Africa in 2016. The majority of fruit exports were destined for the EU. The Netherlands was ranked as the largest importing market for South Africa's fruit with a share value of 20.5 %, followed by the UK, Hong Kong, the United Arab Emirates (UAE) and Saudi Arabia with a collective share value of 33.1 %.

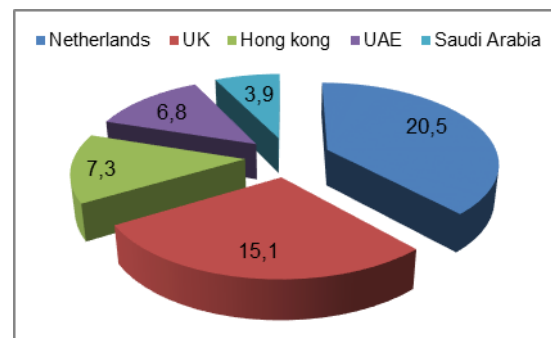


Figure 3: Percentage share value of leading destinations of fruit exported by South Africa

Source: Trade Map (2017)

Conclusion

It can be concluded that the global trade in fruit has increased over the years. The USA is a major role player in terms of fruit exports and imports, being the world's leading exporter and importer with a 13 % and 14.4 % share value respectively in 2016. The Netherlands and USA are considered important markets for South Africa's fresh fruit, being the leading export destinations with a collective share value of 35.6 %, while Mozambique and the USA are the main suppliers of fresh fruit imported by South Africa. Currently South Africa is a net exporter of fruit, with the bulk of exported fruit going to the European market where, in contrast to other agricultural products, it gains low-tariff access because of its seasonal advantage.



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TRADE PROFILE OF CASHEW NUTS (HS CODE 080132)

By
Fezeka Matebeni

The cashew tree, *Anacardium occidentale*, is a resilient and fast-growing evergreen tropical tree. Cashew is an important nut crop that provides food and can be used for reforestation and in preventing desertification, and also as a roadside buffer tree. Furthermore, cashew nuts are an important source of protein, oil and vitamins, especially thiamine, in the human diet. In South Africa, the Kwazulu-Natal coastal regions north of Empangeni, as well as the Pongola Valley, are suitable areas for cashew production. According to Farmers' Weekly (2013) South Africa is not a major player in the international tree nut market; locally, however, the demand for this tasty and nutritious treat is outgrowing production. Most cashew nuts are imported into South Africa to meet the large local demand, which is far from being satisfied.

Global trade overview of cashew nuts

Table 5 illustrates the world's leading importers of cashew nuts between 2012 and 2016. Global imports of cashew nuts increased by 20.8 % between 2012 and 2016. The USA, the Netherlands and Germany were the top three importers of cashew nuts with a share value of 31.4 %, 10.6 % and 10.3 % respectively in 2016. All top 10 importers listed showed positive growth, with Belgium, Germany and the UK dominating with 49.2 %, 47.8 % and 40.4 % respectively. It is noted that there was no African country among the top 10 importers of cashew nuts. South Africa is ranked 29th among the global import markets with a share of 0.5 %.

Table 5: World's leading importers of cashew nuts

Importers	Imported value in million US\$		Growth rate (%)	Share (%)
	2012	2016	2012&16	2016
World	2602	3798	45.9	
USA	818	1235	51	32.5
Netherlands	316	407	29	10.7
Germany	219	405	84.8	10.7
UAE	95	186	94.8	4.9
UK	97	174	78.2	4.6
Australia	112	131	17.1	3.5
Canada	73	106	44.4	2.8
France	49	84	72.4	2.2
Belgium	43	80	86.2	2.1
Japan	62	71	14.9	1.9

Source: Trade Map (2017)

The leading global exporters of cashew nuts between 2012 and 2016 are presented in **Table 6**. Global exports of cashew nuts increased from 431 thousand tons in 2012 to 477 thousand tons in 2016 (growth volume of 9.65 % between 2012 and 2016). Vietnam was ranked as the largest exporter of cashew nuts in 2016 with a share volume of 58.7 %. Vietnam was followed by India with a share volume of 17.4 % and the Netherlands with a share volume of 7.5 % in 2016. Côte d'Ivoire and Burkina Faso were the only African countries

among the top 10 exporters of cashew nuts. South Africa was ranked 45th with a 0.02 % market share of cashew nut exports.

Table 6: World's leading exporters of cashew nuts

Exporters	Exported value in million US\$		Growth rate (%)	Share (%)
	2012	2016	2012&16	2016
World	3048.8	3921.1	28.6	
Vietnam	1443.1	2289.2	58.6	58.4
India	765.6	731.0	-4.5	18.6
Netherlands	200.2	300.3	50.0	7.7
Germany	40.3	131.4	226.1	3.4
Brazil	185.7	129.6	-30.2	3.3
Indonesia	25.0	60.9	144.1	1.6
Côte d'Ivoire	16.2	45.3	179.4	1.2
Belgium	24.3	32.7	34.8	0.8
USA	11.3	24.8	118.7	0.6
UK	13.3	19.9	49.7	0.5

Source: Trade Map (2017)

South Africa's trade overview of cashew nuts

Figure 4 illustrates South Africa's trade (exports, imports and trade balance) trends for cashew nuts over the past five years. In 2016, South Africa's imports and exports were valued at US\$ 17 482 thousand and US\$ 446 thousand respectively. The figure depicts a negative trade balance from 2012 to 2016, implying that the country imported more than it exported.

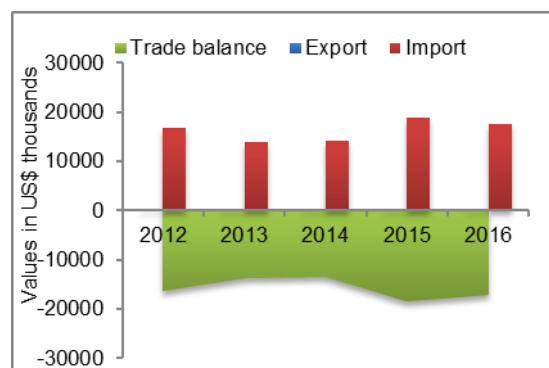


Figure 4: Exports, imports and trade balance

Source: Trade Map (2017)

Figure 5 shows the leading importers of cashew nuts from South Africa in 2016. All top five importers were African countries. Botswana and Namibia were the largest importers of cashew nuts from South Africa with a share value of 46 % and 28 % respectively, followed by Zimbabwe, Zambia and Lesotho with a share value of 16 %, 7 % and 3 % respectively. South Africa's cashew nuts exports have increased by 55.94 % between 2012 and 2016.

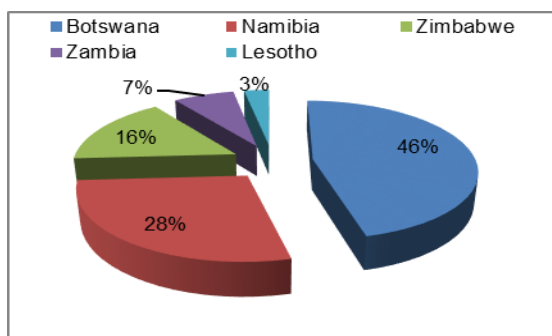


Figure 5: Main destinations for South Africa's cashew nut exports

Source: Trade Map (2017)

Figure 6 shows the leading exporters of cashew nuts imported by South Africa in 2016. Vietnam was the largest supplier of cashew nuts to South Africa, with a 61 % share value. Exports by Mozambique, India, Côte d'Ivoire and Brazil to South Africa accounted for 18 %, 15 %, 4 % and 2 % of the market share value respectively. Globally, South Africa's imports of cashew nuts have increased by about 4.7 % between 2012 and 2016.

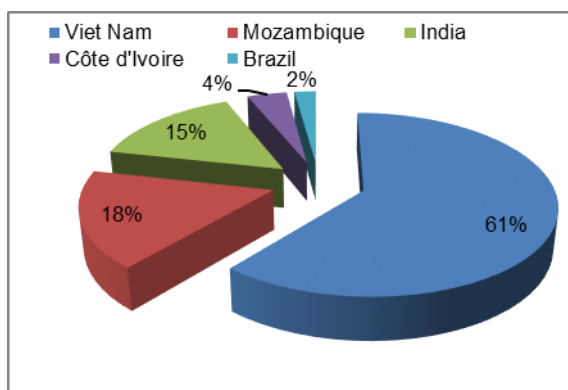


Figure 6: Market share of the main suppliers of cashew nuts to South Africa, 2016

Source: Trade Map (2017)

Conclusion

South Africa was a net importer of cashew nuts during the period under review. Vietnam was the leading exporter of cashew nuts, while the USA was the leading importer. Cashew nuts require minimal fertility and few production inputs to grow. South African farmers should see this as a real opportunity to increase cashew nut production to meet the local demand (Farmers' Weekly, 2013).



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TRADE ANALYSIS OF FRESH PERSIMMONS (HS: 081070)

By
Thandeka Ntshangase

The persimmon fruit is regarded as an exotic fruit, better known as Sharon fruit. It was introduced to South Africa in the late 1990s, but it was difficult to establish the regions in which the trees would produce optimally. In recent years, the industry has been consolidated and has decided to take advantage of new export markets. Named after the Sharon Plain in Israel, the Sharon fruit was introduced to South Africa's fruit industry more than 20 years ago by the Israeli company Mor International. Persimmon fruit trees were initially planted in the Western Cape in 1998, and it was evident that this province's environment had the best climatic conditions in which to grow the exotic fruit in South Africa. South Africa was ideally placed to fill the gap, as the Sharon fruit harvest starts in mid-March here and continues until the end of May. Currently, South Africa is the only country in the southern hemisphere to produce Sharon fruit (Farmers' Weekly, 2015).

After initially facing several challenges with the introduction of a "new" fruit in the market, the industry has since succeeded in overcoming them. This has resulted in an increased market share in South Africa, as well as a growing audience (market) internationally, with markets such as the UK and the Middle and Far East, as well as more recently the USA (Farmers' Weekly, 2015).

Global trade in fresh persimmons

Table 7 lists the world's leading exporters of fresh persimmon fruit in 2016. Globally, persimmon exports declined from US\$ 587 million in 2012 to US\$ 497 million in 2016, translating into a declining rate of 15.3 %. Spain was the leading exporter of persimmons in 2016, accounting for 40.6 % of the world's exports, which was also the highest share among the top 10 exports. China, as the second largest exporter of fresh persimmons, experienced the most significant growth, from US\$ 19 million to US\$ 88 million between 2012 and 2016. South Africa, which is ranked 6th among the top 10 exporting countries, held a 1.9 % share of global exports and experienced a 38.3 % decline from 2012 to 2016.

Table 7: Leading exporters of fresh persimmons

Exporters	Exported value in million US\$		Growth rate (%)
	2012	2016	
World Exports	587	497	-15.3
Spain	317	202	-36.4
China	19	88	371.2
Azerbaijan	86	67	-22.3
Uzbekistan	31	35	13.3
Netherlands	15	10	-32.5
South Africa	15	9	-38.3
Poland	13	9	-32.5
Korea, R	13	9	-32.4
France	9	7	-21.5
USA	8	7	-13.9

Source: Trade Map (2017)

Table 8 shows the world's leading importers of fresh persimmons in 2016. From a global perspective, the world is a net importer, where imports of fresh persimmons grew by 31.4 %, reaching over US\$ 14 billion in 2016 from about US\$ 10 billion in 2012. The USA was the leading importer of fresh persimmons in 2016, constituting a share of 19.3 % of global imports. According to Trade Map (2017), China was the second largest importer of fresh persimmons, with imports amounting to US\$ 1.9 billion in 2016, followed by Germany and the UK with import values of US\$ 963 million and US\$ 863 million respectively. South Africa was ranked 61st on the list of Sharon fruit importers.

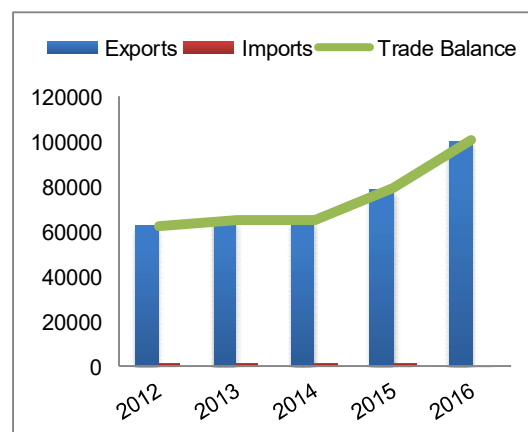
Table 8: Leading importers of fresh persimmons,

Importers	Imported value in million US\$		Growth rate (%)
	2012	2016	
World	10804	14195	31.4
USA	1555	27386	76.1
China	1344	1872	39.3
Germany	763	963	26.1
UK	5871	863	46.9
Canada	869	862	-0.8
Hong Kong	434	704	62
Netherlands	550	611	11
France	527	539	2.3
Belgium	338	444	31.5
Vietnam	165	421	2451.5

Source: Trade Map (2017)

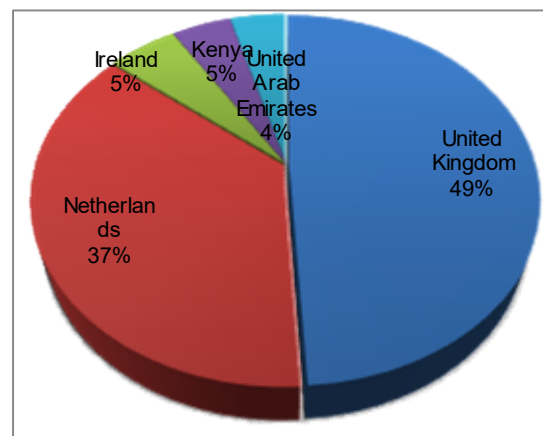
South Africa's trade in fresh persimmons

Figure 7 presents South Africa's trade in fresh persimmons over the past five years. It is evident that South Africa exports more fresh persimmons than it imports (thereby becoming a net exporter), with the highest value of exports realised in 2016 (US\$ 100 million) with no imports. It is also important to note that exports have been increasing at a much faster rate than imports, resulting in an increase in the terms of trade surplus (escalating the positive trade balance).

**Figure 7: South Africa's fresh persimmon trade performance (2012 – 2016)**

Source: Trade Map (2017)

Figure 8 represents the main market destinations for South Africa's fresh persimmons. It is clear that the vast majority of South African medicinal plant exports go to European countries (i.e. UK, the Netherlands and Ireland). This can be attributed to the fact that the EU is one of South Africa's largest trading partners, due to the Trade Development and Co-operation Agreement (TDCA) between the EU and South Africa. Collectively, the above-mentioned countries accounted for 70.9 % of South Africa's fresh persimmon exports, with Kenya and the UAE accounting for 5 % and 4 % respectively.

**Figure 8: Leading export destinations for South Africa's fresh persimmons**

Source: Trade Map (2017)

Figure 9 illustrates the suppliers of fresh persimmons imported by South Africa between 2012 and 2016. South Africa only imported from two markets during the period under review, namely Israel and South Africa itself. It is noteworthy that imports in 2012 were sourced from Israel, but a declining trend started in 2013, possibly due to South Africa's growing harvests of the product following the increasing cultivation of the crop. Hence, there were no imports in 2016,

while the imports in 2015 came from the country itself.

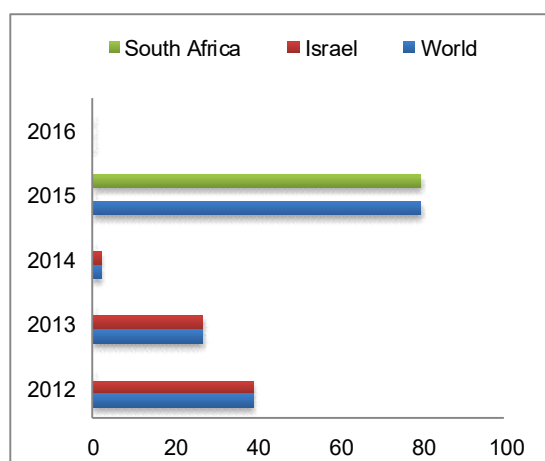


Figure 9: South Africa's fresh persimmon imports by supplying markets

Source: Trade Map (2017)

Conclusion

The exotic and delicious Sharon fruit still requires more acknowledgements by the fruit industry and farmers around the world. The world is currently a net importer of fresh persimmon fruit, thus highlighting its demand by consumers. South Africa has noticed this niche market and is currently exploiting it, given that the country exports more than it imports. This fruit can be a great opportunity for South African farmers to explore, as it is in demand around the world. There is also an opportunity for the industry to better market this fruit in more markets (e.g. BRICS and Africa), as well as the domestic market.



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TRADE ANALYSIS OF SOUTH AFRICA'S PORK INDUSTRY (HS: 0203)

By
Lucius Phaleng

The main elements of South Africa's pork industry involve getting the various pork products to consumers. The production of pork starts with the production of piglets, then flows through flattening and finishing, slaughterhouses and meat processors until the meat and meat products reach the consumer. The South African pork industry is relatively large in terms of the overall South African agricultural sector. It contributes around 2.5 % to the primary agricultural sector. This article is aimed at exploring South Africa's pork performance in the world.

According to the USDA (2017), China was ranked as the world's largest consumer of pork in 2016 with 54 980 tons, followed by the EU and the USA with 20 286 tons and 9 477 tons respectively. **Table 9** highlights the world's leading importers of pork in 2016. Global imports of pork increased between 2007 and 2016, from a value of US\$ 21 147 million to a value of US\$ 27 220.6 million. Japan was ranked as the world's leading importer of pork in 2016 with a value of US\$ 4 166.2 million, with a positive growth rate of 21.3 % between 2007 and 2016. China was ranked as the second largest importer with an 11.7 % share value, followed by Italy (7.3 %) and Germany (5.8 %).

Table 9: World's leading importers of pork, 2016

Importers	Imported value in million US\$		Share value (%)	Growth rate (%)
	2007	2016	2016	2007/16
World	21 147	27 221		28.7
Japan	3 435	4 166	15.3	21.3
China	123	3 189	11.7	2484.2
Italy	2 315	1 982	7.3	-14.4
Germany	2 065	1 592	5.8	-22.9
USA	841	1 330	4.9	58.2
Poland	598	1 315	4.8	119.9
Mexico	509	1 312	4.8	157.6
Korea, R	863	1 268	4.7	47
UK	1 392	1 051	3.9	-24.5
China	359	876	3.2	144

Source: Trade Map (2017)

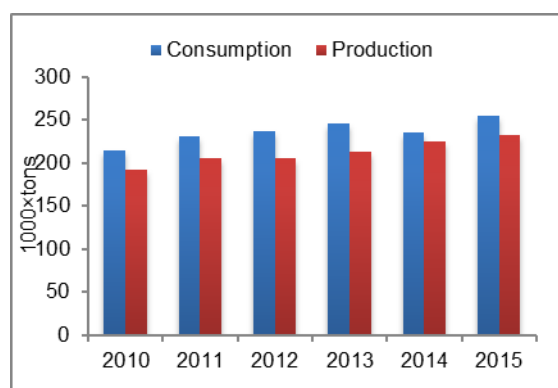
China was ranked as the world's largest producer of pork in 2016 with 52 990 tons, followed by the EU and USA with 20 286 tons and 9 477 tons respectively. **Table 10** highlights the world's leading exporters of pork in 2016, measured in US\$ million. Global exports of pork increased in value by 29.1 % between 2007 and 2016. Germany was ranked as the largest exporter of pork, with a growth rate of 52.1 % between 2007 and 2016. The USA was ranked as the second largest exporter with a share value of 15.5 %, followed by Spain and Denmark with a share value of 13 % and 9.6 % respectively. The top 10 exporters were dominated by European countries, followed by North and South America.

Table 10: World's leading exporters of pork, 2016

Exporters	Exported value in million US\$		Share value (%)	Growth rate (%)
	2007	2016	2016	2007/16
World	21 163	27 322		29.1
Germany	2 860	4 350	15.9	52.1
USA	2 488	4 229	15.5	70
Spain	1 714	3 550	13	107.2
Denmark	3 455	2 627	9.6	-24
Canada	1 791	2 387	8.7	33.2
Netherlands	1 833	1 782	6.5	-2.8
Brazil	1 162	1 350	4.9	16.1
Belgium	1 439	1 319	4.8	-8.4
France	1 044	879	3.2	-15.9
Poland	432	837	3.1	93.9

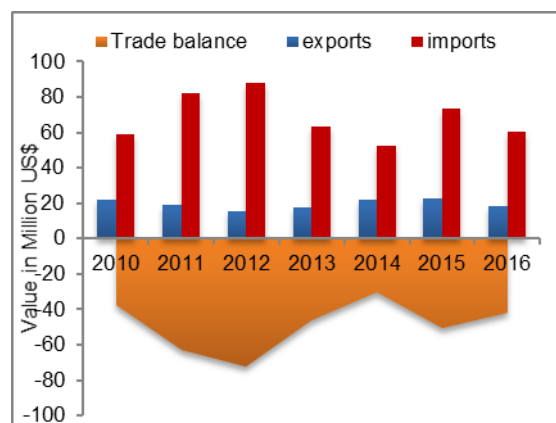
Source: Trade Map (2017)

Figure 10 depicts the local consumption of pork compared to production over the past six years. South Africa's consumption of pork is higher than its production, which results in South Africa relying on international imports. During the period under review, South Africa's production (by volume) of pork increased, while the volume consumed remained relatively stable. In 2015, South Africa produced 233 000 tons of pork, while the volume consumed amounted to 254 000 tons.

**Figure 10: South Africa's production and consumption of pork**

Source: Quantec (2017)

Figure 11 highlights South Africa's trade (exports, imports and trade balance) in pork between 2010 and 2016, measured in million US\$. South Africa's pork exports were far lower than its imports, making the country a net importer of pork. Spain and Germany were the main suppliers of pork imported by South Africa, with a share value of 36.3 % and 31.9 % respectively. Most of the pork products exported by South Africa were destined for African countries, namely Namibia (27.3 %), Mozambique (23.3 %) and Lesotho (16.2 %). In 2016, South Africa exported US\$ 18.4 million worth of pork, while imports were valued at US\$ 60.2 million, resulting in a negative trade balance (US\$ 41.8 million).

**Figure 11: South Africa's trade performance for pork**

Source: Trade Map (2017)

Table 11 shows the top pork products imported by South Africa in 2016. Frozen rib cuts ranked as the most imported product valued at US\$ 43 000. Frozen swine cuts ranked second with a share value of 29.1 %, followed by frozen hams & shoulders and fresh swine cuts with a share value of 0.7 % and 0.1 % respectively.

Table 11: South Africa's top imported pork products

Product label	2007	2016	Share value	Growth rate
	2007	2016	2016	2007/16
Frozen ribs	31356	42578	70.7	35.8
Swine cuts, frozen	9502	17520	29.1	84.4
Frozen hams & shoulders	2779	447	0.7	-83.9
Swine cuts, fresh	57	53	0.1	-7.0
Fresh hams & shoulders	0	7	0.0	N
Fresh ribs	68	0	0.0	-100

Source: Trade Map (2017)

Table 12 highlights the top pork products exported by South Africa in 2016. Frozen swine cuts ranked as the leading exported pork product with a share value of 34.2 %, followed by fresh carcasses and fresh swine cuts with a share value of 20.8 % and 17.6 % respectively. All pork products exported by South Africa registered a positive growth rate.

Table 12: South Africa's top exported pork products

Product label	2007	2016	Share value	Growth rate
	2007	2016	2016	2007/16
Swine cuts, frozen	1288	6273	34.2	387.0
Carcasses fresh	319	3817	20.8	1096.6
Swine cuts, fresh	268	3236	17.6	1107.5
Fresh ribs	99	1672	9.1	1588.9
Carcasses, frozen	33	994	5.4	2912.1
Frozen ribs	316	948	5.2	200.0
Frozen hams & shoulders	399	812	4.4	103.5
Fresh hams & shoulders	174	779	4.2	347.7

Source: Trade Map (2017)

Conclusion

In conclusion, South Africa exports far less pork than it imports, making the country a net importer of pork. During the period under review, South African pork was mainly exported to the SADC countries. Namibia commanded the greatest share of pork exported from South Africa during 2016, followed by Mozambique, Lesotho and Botswana. As highlighted in **Figure 2**, South African pork production has been increasing, but it remains below domestic consumption. The South African pork industry is a relatively small producer compared to major players like the USA and Europe, and there might be opportunities to explore new markets and trade partners in imports from the USA or Europe and exports to African countries.



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SOUTH AFRICA FACES STIFF MAIZE EXPORT COMPETITION

By

Wandile Sihlobo and Tinashe Kapuya

The South African maize industry has made a remarkable rebound and it is expecting a record crop this season. However, new developments have compelled us to revise parts of the recent maize export market analysis, published in *Business Day* on the 19 January 2017, particularly regarding maize export opportunities within the African continent.

The dynamics in African agricultural markets have changed dramatically. While South African maize farmers are struggling to break-even due to lower prices, white maize prices in East Africa are well above R7 200 a tonne, which is treble the current price on the Johannesburg Stock Exchange.

This notable uptick in East African maize prices is largely due to lower supplies in these respective geographies, caused by adverse weather conditions during the 2016/17 production season. Meanwhile, the South African maize market is depressed as a result of an expected 15.6 million tonnes harvest, which is well above an average production of 12.5 million tonnes in a normal season.

As a result, South Africa has regained its status as a net exporter of maize after being a net importer for two consecutive seasons - 2015/16 and

2016/17 marketing seasons. The 2017/18 exports are set to reach at least 3.0 million tonnes. About 52% of this is set to be white maize and 48% to be yellow maize.

This will be the largest maize export volume in two decades. The last time South Africa exported a volume of maize larger than the expected 2.7 million tonnes was in 1994/95 season – a volume of 4.7 million tonnes. The second biggest volume since then was in 1996/97 season - a 2.6 million tonnes, followed by 2.2 million tonnes in 2005/06 season.

Our initial expectation was that a part of these exports would be absorbed by the East African market and South Africa would benefit from the prevailing higher prices in those markets. However, this is unlikely to happen mainly due to competition from other African maize producing countries that produced above market expectations and Genetically Modified (GM) seed restrictions. Approximately 85% of South Africa's maize production is grown with GM seeds which could restrict the country from penetrating many African markets.

Despite fears that Fall Armyworm could decimate maize crops in Zambia and Malawi earlier this season, the pest caused minimal damage and bumper harvests are expected in both countries. As a result, even within markets that permit GM maize imports, South Africa will face stiff competition from the likes of Zambia and Malawi.

Maize production in Zambia and Malawi could reach 3.6 and 3.2 million tonnes this year, respectively which is an increase of 29% and 36%, respectively, from last year. Zambia and Malawi are expected to pose strong competition not only from upticks in production, but also from the lifting of maize export bans earlier this month.

Another major importer of white maize, Zimbabwe, is set to harvest a bumper maize crop of 1.8 million tonnes, which is treble last year's output of 512 000 tonnes. According to data from the United States Department of Agriculture, Zimbabwe's annual maize consumption is roughly 2.2 million tonnes, which means that there will be a need for imports later in the season of approximately 400 000 tonnes. This will be a notable improvement after last year's higher maize imports of 1.4 million tonnes.

The aforementioned developments resonate with the concern raised in a study by Sihlobo (2016) "*An evaluation of competitiveness of South African maize exports*". The study emphasised the need for South Africa's maize industry to penetrate new maize export markets, particularly outside the continent.

Sihlobo (2016) identified Japan, Mexico, Taiwan, the United Arab Emirates, Thailand and Zimbabwe as key and attractive markets that South Africa should prioritise to increase its export share in the short to medium term (see **figure 12: Appendix B**). That said, Mexico will most likely fall out of the

equation this year due to large domestic supplies, with recently imported maize volumes from South America buffing up the country's maize supplies.

One special feature of markets such as Japan, Taiwan, the United Arab Emirates and Thailand is that they typically import yellow maize for animal feed industries and will likely show a similar trend this year. This poses a further challenge for South Africa where 60% of maize produced is white.

Indonesia, Malaysia, Saudi Arabia, Mauritius, Iran, the Democratic Republic of Congo and Yemen were also identified as attractive markets for South African maize exports. However, they also have more appetite for yellow maize imports.

This is likely to be a challenging year for South Africa's white maize producers due to lower global demand. Meanwhile, yellow maize could potentially see a better uptake in the global markets. A possible short-term option is for South Africa to increase white maize consumption within the domestic animal feed market and export yellow maize. If that is done, white maize prices will remain depressed in the short to medium term and that will weigh on farmers' financials. In the longer-term, a possible shift towards more yellow maize production could prove to be a viable option.

Wandile Sihlobo and Tinashe Kapuya – Economists

THREE BROAD TYPES OF INTERNATIONAL TRADE AGREEMENTS – IS AGOA STILL A UNILATERAL AGREEMENT FOR SOUTH AFRICA?

By
Bonani Nyhodo

Introduction

AGOA remains a unilateral agreement, but the latest developments have tilted it toward a bilateral agreement for South Africa – this is as a direct result of the power of industry interests (lobby groups). This piece was put together to outline some of the features of bilateral trade agreements that ended up featuring in a unilateral agreement. The government of the United States of America (USA) extends preferential access to their market for a number of selected products coming from selected African countries under the African Growth Opportunity Act (AGOA). This is in addition to the Generalised System of Preferences (GSP) that the USA already offers to the selected African countries. In the context of trade agreements, both the GSP and AGOA are unilateral agreements (with no expectation of reciprocity).

However, the latest talks on the extension of AGOA led to an interesting feature regarding South Africa. The point this article outlines, or seeks to stimulate engagements on, is the issue of a unilateral agreement extension leading to talks on market access for the offering country to the country that is supposed to be the recipient. The

question is, has the line between unilateral, bilateral and multilateral agreements thinned or evaporated?

South Africa on alert – active trade engagements

Ordinarily, the granting of a preferential access (through an agreement) should have been granted without trade-related conditions of direct interest to the granting nation (**it is supposed to feel like a gift**). South Africa did not have that opportunity (to accept AGOA like a gift) during the last term of President B Obama, as the lobby groups in America managed to have their market access issues at the heart of whether or not to include South Africa. As such, the AGOA process for South Africa ended up like a bilateral engagement.

The Department of Trade and Industry (DTI), the Department of Agriculture, Forestry and Fisheries (DAFF), Department of International Relations and Cooperation (DIRCO) and industry stakeholders were involved in what appeared to be like a rescue mission for South Africa. There was the possibility of the completion of AGOA to exclude South Africa because of an antidumping duty that South Africa levies on the importation of frozen chicken (HS 0207149) from the USA. A high-level delegation led a process of engaging the poultry industry on what would not compromise their existence, and a flexibility on the antidumping duty (antidumping duty free) was granted for 65 000 tons of frozen chicken imports.

Unilateral trade agreements, often referred to as preferential trade agreements

The World Trade Organisation (WTO) describes a unilateral agreement as a treaty/agreement that is imposed by a nation on another or group of other nations (such as free access). In its simplest form, a unilateral agreement is not reciprocal. One of the best-known examples of unilateral agreements is the Generalised System of Preference (GSP) whereby developed countries grant duty-free access to their markets for a specific number of products. For example, the USA offers duty-free access for about 5 000 product lines from around 122 countries, with imports under this agreement amounting to over \$17 billion.

Bilateral trade agreements

Bilateral trade agreements are negotiated by two countries allowing themselves a favourable environment for market access while excluding others. Bilateral trade agreements come in the form of two somewhat well-entrenched systems: talks between two countries (such as South Africa and China) and talks between two or more countries in a region or between two trade blocks.

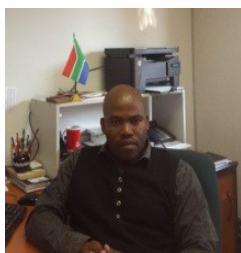
Multilateral trade agreements – under the World Trade Organisation

Multilateral trade agreements are negotiated under the WTO where the rules of trade between nations are negotiated. These rules are negotiated and agreed (signed by heads of state) and rectified by the member countries' parliaments. The agreement

on agriculture is one of the decisions of the WTO with commitments to cut tariffs and reduce subsidies (under three categories: developed countries, developing countries, and least developed countries). The commitments differ according to the category, with developed countries committing to heavy cuts, and the least developed countries being exempted for a specific period after which small cuts are expected to kick in.

Conclusions

Lobby groups (or industry stakeholders – poultry industry) in the USA used the opportunity afforded by the extension of AGOA to put their interests forward (regarding South Africa). As such, what ought to have been an offer (granting of access) ended up as talks (to the effect that “you will only receive preferential access if our matters are resolved regarding access to your market for a particular product”). South Africa’s antidumping duty on poultry was a point of contention (with even the possibility of South Africa being excluded from the conclusion of AGOA talks). As a result, South Africa was forced to lift the antidumping duty on a sizeable quantity of USA poultry meat imports (65 000 tons – antidumping duty-free access). This means that despite an antidumping duty having been applied to imports of USA poultry meat, South Africa was forced to grant access in order to be included in AGOA.



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DISPUTE RESOLUTION AND THE PROTECTION OF FOREIGN INVESTMENT: AN OVERVIEW OF CHINA AND SOUTH AFRICA

By
Stephanie van der Walt

Introduction

With the growing recognition of the successful experience of East and South-East Asia, it is useful for African countries to examine the lessons that could be drawn from the development paths followed in that region, and to consider ways and means of strengthening economic co-operation with Asian economies. One important area of interest in this respect relates to foreign direct

investment (FDI), which has played an increasingly important role in developing Asian economies.”¹

So reads the opening statement of the United Nations Conference on Trade and Development (UNCTAD) 2007 Report on Asian Foreign Direct Investment (FDI) in Africa.²

In the decade since this statement was made, scrutiny of Asian – and especially Chinese – investment on the African continent has gone from strength to strength. It is a topic that has formed the basis of many a debate, on every platform from economic policy to human rights, and has been heralded as everything from “the new face of South-South cooperation”³ to “neo-imperialism.”⁴ One thing that is evident is that Chinese investment outflows into Africa have been steadily maintained over the past 10 years, with China rivalling and even overtaking investment flows from Europe and the United States of America (USA) in several African economies.⁵

What is perhaps less known is the prevalence of FDI outflows from African enterprises into China. In 2006, South Africa had more investments in China than the other way around. As the then Deputy President Phumzile Mlambo-Ngcuka stated during a business co-operation gathering attended by close to a thousand Chinese and South African businesspeople: “[*This is*] something we must really fix.”⁶

While Chinese investment into the South African economy has risen significantly across a number of sectors, South African investments into China have also continued.

China and South Africa are both classified as emerging economies, each with divergent legal rules regarding the regulation of foreign investment, especially as far as dispute settlement is concerned. As FDI flows between the two countries increase, the analysis of the requirements set by both these domestic regimes is becoming not only increasingly relevant, but necessary. This article hopes to provide a brief overview of the dispute resolution mechanisms in place in both countries, with specific focus on arbitration and litigation, as well as the treaty law where relevant. This section considers the status quo in China, while the second part looks at the mechanisms in place in South Africa.

The focus is on the contractual relationship between traders in the private sphere. Joint ventures, which are still the most common vehicle for foreign investment in China, and which also

¹United Nations Conference on Trade and Development (UNCTAD): *Asian foreign direct investment in Africa: Toward a new era of cooperation among developing countries*, (2007) 1. (Last visited: 30 April 2017.) http://www.unctad.org/en/docs/iteia20071_en.pdf

² *Ibid.*

³ *Ibid.*

⁴Sudha Ramachandran: A new imperialism in Africa: China and India. *United Nations Politics Forum*, (14 July 2007). (Last visited: 30 April 2017.) <http://www.politicsforum.org/forum/viewtopic.php?t=79755&sid=cd2c1941d02126b069b84dd1e6a12748>

⁵ United Nations Conference on Trade and Development (UNCTAD): *Asian foreign direct investment in Africa: Toward a new era of cooperation among developing countries*, (2007) 52, Figure III.2. (Last visited: 30 April 2017.) http://www.unctad.org/en/docs/iteia20071_en.pdf

⁶ Lin Li: South Africa welcomes China’s investment. *China View*, 22 June 2006. (Last visited: 28 April 2017.) http://news.xinhuanet.com/english/2006-06/22/content_4734688.htm

form the basis of many an FDI project in South Africa,⁷ will serve as the launch pad for this analysis.⁸

Mechanisms of dispute resolution: Litigation versus arbitration

When investing in a foreign country, there are numerous advantages to taking on a local partner – cultural understanding, grassroots insight into the local market, and the potential surge in goodwill being among the most obvious. However, it is not without reason that these ventures are compared to “marriage” when referring to the long-term nature of the obligations they establish.

As is the case with a marriage, the possibility of a dispute arising between the foreign investor and its local partner is considered to be among the biggest risks of entering into a joint venture investment agreement. Such disputes are ultimately addressed in one of two ways: through arbitration or through litigation,⁹ each having its own set of pros and cons.¹⁰ The chosen method will ultimately depend on the contractual negotiations between the parties pertaining to the choice of forum and the choice of law. The main attractions of litigation are the relative predictability of the outcome, the general ease of enforcement, as well as the finality of the decision. However, especially in emerging economies where tales of corruption abound, these arguments do not always hold water.¹¹

The New York Times once described the Chinese court system as a “Chinese legal netherworld”¹² and, as pointed out in an article in the Illinois Business Law Journal, “many foreign business memoirs are packed with horror stories about corrupt judges and unenforceable court decisions”.¹³ Legal reforms in China have since come a long way; however, these remain murky waters for many foreign businesses. Unfortunately, the situation in South Africa is not much better, with the overburdened court rosters causing lengthy delays in a system whose tolerance for legal

wrangling already allows for a matter to be drawn out for years and even decades.

It is therefore understandable that arbitration is advocated by many a practitioner’s guide to be the best viable means of securing a client’s interests when drafting investment contracts.¹⁴ However, as the following the discussion will illustrate, this is not a truth that rings absolute. As stated above, this paper seeks to evaluate the dispute resolution options available in both China and South Africa by questioning the mainstream views when making the decision between arbitration and litigation, should a dispute arise.

Dispute resolution and the law in China

Resolving disputes by means of negotiation and discussion has long been part of the Chinese business tradition.¹⁵ However, as Frett states in her article on forum selection in China, one of the paramount concerns with which a practitioner is faced is the suggestion of alternatives when the more pleasant means of dispute resolution fail.¹⁶ According to Chinese law governing foreign investment, three options are available to foreign joint venture partners, namely to arbitrate in China,¹⁷ to arbitrate in a foreign country¹⁸ or to litigate in Chinese courts.

Frett lists four factors that tend to tip the scales in favour of arbitration when it comes to resolving joint venture disputes. These are independence, autonomy, expertise and privacy.

In China, courts have a long history of dependence on the executive. Local governments are charged not only with financing the courts, but also the appointment of judges. This leaves the judiciary wide open for political influence,¹⁹ which is clearly not an ideal status quo for impartiality to flourish. Arbitration tribunals, on the other hand – both Chinese and foreign – are overseen by panels chosen by the parties themselves. As Frett points out, these panels will often include foreigners,

⁷Macquarie: International strategic alliances. *Macquarie Business Page*, (2008). (Last visited: 30 April 2017.) http://www.macquarie.com.au/au/about_macquarie/company_profile/int_activities/alliances.htm

⁸ Rebecca Frett: Forum selection for resolution of foreign investment disputes in China. *Dispute Resolution Journal*, (1 February 2007). (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>

⁹ Due to the cost and time associated with both litigation and arbitration, these mechanisms are usually only employed after a process of mediation and reconciliation has failed to yield favourable results. Various other mechanisms, such as “rent-a-judge”, “mini-trial” and “amiable composition” are also sometimes employed in order to resolve conflicts. The goal of this paper, however, is simply to provide a brief overview of the main mechanisms available, and therefore an in-depth discussion of these alternatives falls beyond the scope of the analysis. For further information on the various methods of Alternative Dispute Resolution (ADR) available, please visit: Centre for Democracy and Governance. *Alternative Dispute Resolution: Practitioner’s Guide*, (March 1998), Appendix A. (Last visited: 21 April 2017.) http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf

¹⁰ Illinois Business Law Journal: Chinese commercial arbitration – alternative approach for resolving international disputes. *Illinois Business Law Journal Website*, (14 February 2017). (Last visited: 30 April 2017.) http://blsjournal.typepad.com/illinois_business_law_soc/2017/02/the-new-york-ti.html

¹¹ Hu Li: An introduction to commercial arbitration in China. *Dispute Resolution Journal*, May 2003. (Last visited: 24 April 2017.) http://findarticles.com/p/articles/mi_qe3923/is_200305/ai_n9282731

¹² Fiona D’Souza. The recognition and enforcement of commercial arbitral awards in the People’s Republic of China, 30. *Fordham Int’l L.J.* 1318, (April, 2007). See Joseph Kahn. Dispute leaves U.S. executive in the Chinese legal netherworld. *N.Y. Times*, Nov. 1, 2005 at A1 (reporting U.S. business executive deprived of liberty in P.R.C. and coerced into signing documents transferring property).

¹³ Illinois Business Law Journal: Chinese commercial arbitration – alternative approach for resolving international disputes. *Illinois Business Law Journal Website*, (14 February 2017). (Last visited: 30 April 2017.) http://blsjournal.typepad.com/illinois_business_law_soc/2017/02/the-new-york-ti.html. See No Dispute About It. *Econ. Intelligence Unit (Bus. China)*, 24 April 2006.

¹⁴ Rebecca Frett: Forum selection for resolution of foreign investment disputes in China. *Dispute Resolution Journal*, (1 February 2007). (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>

¹⁵ John Mills et al.: *China: A perspective on international arbitration*. (Last visited: 20 April 2017.) http://www.hunton.com/files/tbl_s47Details/FileUpload265/144/Int_Arb_Newsletter_winter2003-04.pdf

¹⁶ Rebecca Frett: *Forum selection for resolution of foreign investment disputes in China*. *Dispute Resolution Journal*, (1 February 2007). (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>

¹⁷ As discussed below, the decision to submit a matter to arbitration is generally included into the joint venture contract by means of an “arbitration clause”. The purpose of a valid arbitration clause is to exclude the jurisdiction of the courts. This exclusion rests on the same principle quoted from Somarajah below, namely that of party autonomy. In terms of prevalent international law on the subject, an arbitration clause is deemed to be valid if it is based on the consensus of the parties, the submission to arbitration is clearly stated, the parties negotiating the inclusion of the clause had the legal capacity to do so, the clause is in writing, the clause is based on a legal relationship giving rise to the arbitration, and lastly, the subject matter is arbitral. See Rebecca Frett. Forum selection for resolution of foreign investment disputes in China. *Dispute Resolution Journal*, (1 February 2007). (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>; note 18 below.

¹⁸ The decision to arbitrate in a foreign jurisdiction would generally be included in the joint venture contract under the “choice of law” clause; see Somarajah. *The International Law on Foreign Investment* 411, Cambridge Press Second Ed.

¹⁹ The assumption is that, as in the case of other international contracts, parties have autonomy to choose the law which is applicable to the foreign investment contract.”

If a foreign jurisdiction is not specified in the contract then Chinese law will generally enter into effect by default; however, nothing prevents the parties from entering into a “choice of law” agreement at a later date.

¹⁹ Rebecca Frett: *Forum selection for resolution of foreign investment disputes in China*. *Dispute Resolution Journal*, (1 February 2007). (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>

which better ensures that the weighing of interests is conducted on a balanced scale.²⁰

When bringing a matter before a Chinese court, the hearing will only be allowed to proceed in the language of China; only Chinese lawyers will have standing, and the judge and procedural rules will be dependent on Chinese law. Arbitration tribunals do not set the same restrictions, however. Because arbitration is driven by consensus, the contracting parties have the autonomy to decide contractually – to a degree²¹ – which language to use, who will be presenting their case, who will be presiding over it, and which procedures will be followed.²² Furthermore, the same premise allows parties to appoint arbitrators knowledgeable on aspects material to the dispute, whereas the prowess of judges in Chinese courts cannot be similarly guaranteed.²³

The issue of privacy can be related back to the questionable independence of Chinese courts. Arbitrators are under a “duty of confidentiality.” The result, as Frett words it, is that “facts related to the dispute and the existences of the dispute itself are less likely to become publicly known if the dispute is submitted to arbitration rather than litigation.”²⁴

A further benefit of choosing arbitration in China is the solid legal groundwork that has been laid over the years to accommodate it. As Hu Lin points out in a 2003 article in the *Dispute Resolution Journal*:

“As early as 1979, Chinese law (for example, the Law of the People’s Republic of China on Joint Venture Using Chinese and Foreign Investment 1979) has endorsed arbitration as a useful method for resolving international commercial and investment disputes.”²⁵

The main features of arbitration in China will be discussed below.

Sources of arbitral law in China

From the preceding discussion, it is clear why arbitration, especially in China, boasts so many proponents. The concept of international arbitration has a long history in the People’s Republic of China, with the first two international arbitration institutions – the China International Economic and Trade Arbitration Commission²⁶ (CIETAC) and the

China Maritime Arbitration Commission (CMAC) – dating back to the 1950’s.²⁷ However, despite the existence of these bodies, national law governing arbitration did not exist until 31 August 1994. This day heralded a change on the Chinese arbitration stage with the Standing Committee of the National People’s Congress of China enacting the country’s very first Arbitration Act (*the Act*).²⁸ As Mills *et al.* summarise it:

*“The Arbitration Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration...It lays down the basic principles of arbitration in China and, in doing so, reflects many of the fundamental principles of modern international arbitration.”*²⁹

One of the key features of the Act, which differentiates it from the system in South Africa, as will be discussed below, is that it distinguishes between national and international disputes. The distinction is regulated by Chapter VII of the Act. Article 65 of this Chapter contains special provisions relating to “all arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element.”³⁰ In cases where the Act does not address specifics of an international dispute, the provisions as they pertain to local disputes will apply.³¹ Article 2 of the Act makes provision for “contractual disputes and disputes over rights and interests in property” to be submitted for arbitration.³²

Aside from the Act, the main regulatory source governing international investment disputes in China is the CIETAC rules (*the Rules*).³³ In terms of the Rules, CIETAC’s jurisdiction is defined as dealing “independently and impartially, by means of arbitration, with disputes arising from economic and trade transactions of a contractual or non-contractual nature.”³⁴

The Rules have seen some revision on China’s path to World Trade Organization membership – one of the key amendments being that parties are allowed, “subject to the consent of CIETAC,”³⁵ to agree on procedures other than those of CIETAC. As Mills *et al.* note, however, “it seems

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ As Frett points out:

“Qualifications for becoming an arbitrator in China are stricter than those for becoming a judge. To attempt to address the perceived under-qualification of Chinese judges, jurisdiction over foreign-related commercial cases has been restricted to certain Intermediate People’s Courts, ensuring that more senior, qualified judges decide such cases. However, since arbitration allows the parties to select an arbitrator with specific expertise relevant to the dispute, an arbitrator is still more likely to have a better understanding of the dispute than a judge.”

See Rebecca Frett: Forum selection for resolution of foreign investment disputes in China. *Dispute Resolution Journal*, (1 February 2007). (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>

²⁴ *Ibid.*

²⁵ Hu Li: An introduction to commercial arbitration in China. *Dispute Resolution Journal*, May 2003. (Last visited: 24 April 2017.)

http://findarticles.com/p/articles/mi_qa3923/is_200305/ai_n9282731

²⁶ CIETAC is the main international arbitration body dealing with international disputes in China. It has been in existence since 1956, with its current name being adopted in 1988.

Besides CIETAC and CMAC, there are more than 140 local arbitration commissions which, prior to the adoption of the Arbitration Act, were only allowed to preside over local arbitrations. Since the Act’s adoption, however, these tribunals have gained the authority to hear international disputes subject to the consent of the parties. Of these, the Beijing Arbitration Commission is the most prevalent; see John Mills *et al.*: *China: A perspective on international arbitration*. (Last visited: 20 April 2017.) http://www.hunton.com/files/tbl_s47Details/FileUpload265/144/Int_Arb_Newsletter_winter2003-04.pdf

²⁷ Hu Li: An introduction to commercial arbitration in China. *Dispute Resolution Journal*, May 2003. (Last visited: 24 April 2017.)

http://findarticles.com/p/articles/mi_qa3923/is_200305/ai_n9282731

²⁸ John Mills *et al.*: *China: A perspective on international arbitration*. (Last visited: 20 April 2017.)

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²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² Hu Li: An introduction to commercial arbitration in China. *Dispute Resolution Journal*, May 2003. (Last visited: 24 April 2017.)

http://findarticles.com/p/articles/mi_qa3923/is_200305/ai_n9282731

³³ “As revised and adopted by the China Council for the Promotion of International Trade / China Chamber of International Commerce on 11 January 2005. Effective as of 1 May 2005”; see CIETAC Rules, English Version. (Last visited: 29 April 2017.) <http://www.cietac.org.cn/english/rules/rules.htm>

³⁴ Article 2(1), CIETAC Rules, English Version. (Last visited: 29 April 2017.) <http://www.cietac.org.cn/english/rules/rules.htm>

³⁵ John Mills *et al.*: *China: A perspective on international arbitration*. (Last visited: 20 April 2017.)

http://www.hunton.com/files/tbl_s47Details/FileUpload265/144/Int_Arb_Newsletter_winter2003-04.pdf

likely that in cases where CIETAC does not approve the selection of rules alternative to the CIETAC Rules, it would try to persuade the parties to negotiate a new agreement acceptable to it.”³⁶ Likewise, while CIETAC does allow parties more discretion than the courts in deciding matters of language, representation and who will preside over a case, this discretion is not absolute.³⁷

Enforcement

It is now that the reason for the difficulty in deciding between arbitration and litigation as a means of dispute settlement becomes apparent. As Frett stated, the party receiving an arbitral award has merely taken the first steps in gaining the outcome they desire.³⁸ In order for the relief to be effective, the losing party must comply with the arbitration tribunal’s decision.³⁹ In the vast majority of Chinese cases, this is done voluntarily; however, it remains possible for the disgruntled party to refuse to comply with the tribunal’s decision, in which case litigation will be the only vehicle remaining with which to seek enforcement.⁴⁰

If it indeed becomes necessary to enforce the award by means of Chinese courts – for instance in a case where a Chinese party does not possess sufficient assets outside of China to comply with the award – then all benefits gained from arbitration could very well be nullified.⁴¹ Frett summarises the pitfalls of this state of affairs as follows:

*“Enforcement proceedings could result in a total failure to enforce the award. In that case, the time and money invested in arbitration would be wasted. The quality and fairness of an arbitral decision is irrelevant if it cannot be enforced.”*⁴²

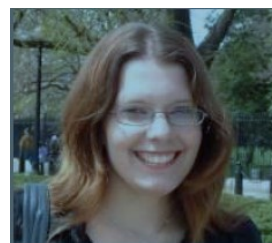
China and South Africa are both signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*). This convention allows for “analogous grounds”⁴³ whereupon a court can refuse to execute an award made by a foreign arbitration tribunal. These grounds are generally concerned with procedural issues, such as lack of capacity of a party, insufficient notice of proceedings, an award being granted beyond the scope of agreement, or illegal arbitration procedure to name a few.⁴⁴ This does serve to limit a court’s discretion in refusing to execute an award. It should, however, be kept in mind that Chinese courts are heavily dependent on the government and can therefore not be seen as strong entities. Article 260 of the Civil Procedure Law in China goes further, allowing courts to

“refuse to enforce an award if enforcement would be detrimental to the social or public interests of the country.”⁴⁵ Chinese courts, due to their dependence on the executive, tend to interpret this broadly, allowing for decisions that benefit the policies of the Chinese government rather than judicial fairness. According to Frett, while enforcing a foreign court decision is not without its obstacles in China, arbitral awards do prove to be the more troublesome of the two.⁴⁶

This flipside of this is the relative ease with which a Chinese party can enforce an arbitral award against a foreign investor in their home state. States such as South Africa, which have signed the New York Convention without reservation, are obliged to recognise and enforce foreign arbitral awards of all other states. The biggest threat to the enforcement of an arbitral award is insolvency. According to a study by Randall Peerenboom, cited by Frett, 43 % of cases where arbitral awards were not enforced by Chinese courts were the result of insolvency of the Chinese party. Frett summarises as follows:

“Insolvency is less of a problem for enforcement of court judgments, as property preservation measures are more effective in the context of litigation. Under Article 93 of the Civil Procedure Law, a party can apply for an order to preserve property prior to initiating court proceedings. However, when arbitration is selected, one can only apply for a property preservation order once arbitration proceedings commence.”⁴⁷

*“Foreign arbitration is sometimes suggested as an alternative to CIETAC, however according to the Peerenboom study, no great disparity exists between the enforcement rate of foreign awards in comparison to those granted by CIETAC. If the relatively low cost of CIETAC arbitration is considered, then it is difficult to see how foreign arbitration can be seen as a viable alternative.”*⁴⁸



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³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Rebecca Frett: Forum selection for resolution of foreign investment disputes in China. *Dispute Resolution Journal*, 1 February 2007. (Last visited: 30 April 2017.) <http://www.highbeam.com/doc/1P3-1248285011.html>

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

Appendix A

Table 3: South Africa's top imported fruits, 2016

Product label		Exported value in million US\$		Share value (%)	Growth rate (%)
HS code	Description	2015	2016	2016	2015/16
080390	Fresh bananas	5.4	23.3	16.4	326.9
080212	Almonds	22.4	21.1	14.9	-5.9
080132	Cashew nuts	20.8	17.7	12.5	-14.8
080610	Grapes	9.2	10.6	7.5	15.6
080111	Coconuts	8.4	8.9	6.3	6.7
080310	Bananas, plantains	20.7	5.6	3.9	-73.1
080440	Avocados	3.9	4.6	3.3	20.1
081050	Kiwifruit	4.6	4.1	2.9	-11.0
080261	Nuts, in shell	5.3	4.0	2.9	-24.0
080930	Peaches	2.4	2.7	1.9	13.8

Source: Trade Map (2017)

Table 4: South Africa's top exported fruits, 2016

Product label		Exported value in million US\$		Share value (%)	Growth rate (%)
HS code	Description	2015	2016	2016	2015/16
080510	Oranges	587.7	617.7	21.4	5.1
080610	Grapes	482.3	423.7	14.7	-12.2
080810	Apples	386.5	358.3	12.4	-7.3
080550	Lemons	246.5	263.4	9.1	6.8
080520	Mandarins	145.2	191.0	6.6	31.5
080830	Pears	171.1	184.4	6.4	7.8
080262	Nuts, shelled	128.2	108.3	3.7	-15.5
080540	Grapefruit	106.7	105.4	3.7	-1.2
080620	Grapes, dried	110.8	99.3	3.4	-10.4
080261	Nuts, in shell	119.5	79.1	2.7	-33.8

Source: Trade Map (2017)

Appendix B

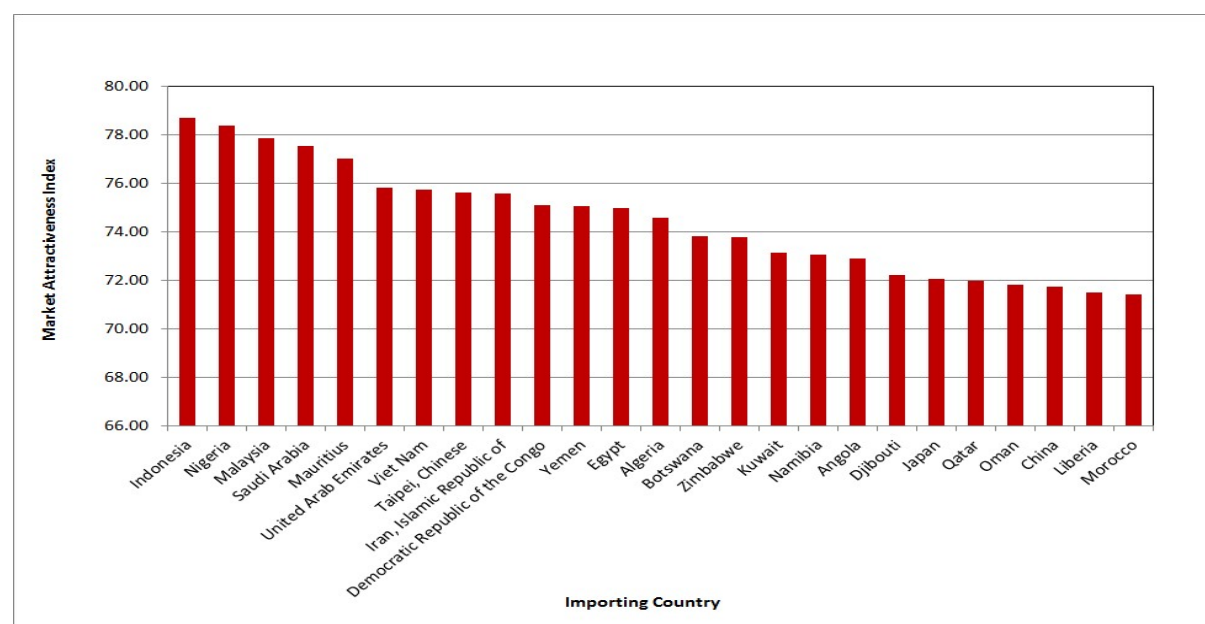


Figure 12: Market attractiveness index for South African maize exports

Source: Sihlobo (2016) and Trade Map (2017)

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