

**TRADE DISTORTING PROVISIONS UNDER THE MULTILATERAL AGREEMENT ON  
AGRICULTURE: ADDRESSING THE QUESTION OF AFRICA'S LIMITED  
PARTICIPATION IN AGRICULTURAL TRADE**

By

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A mini-dissertation submitted to the faculty of law, Centre for Human Rights, University of Pretoria, in partial fulfillment of the requirements for the award of Legum Magister (LL.M) in Trade and Investment Law in Africa.

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**31 MAY 2012**

## Declaration

I declare that this Mini-Dissertation- **Trade distorting provisions under the multilateral Agreement on Agriculture: addressing the question of Africa's limited participation in Agricultural Trade**- which is hereby submitted for the award of Legum Magister (LL.M) in Trade and Investment at International Development Law Unit, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution. The sources that have used or quoted have been indicated and duly acknowledged as complete references. The errors or omissions are solely the author's.

Chipasha Mulenga

Signed: .....

31 May 2012

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## **Key words**

Agreement on Agriculture, Agreement on Subsidies and Countervailing Measures, Developing Countries, Doha Development Agenda, Domestic Support, Export Subsidy, General Agreement on Tariffs and Trade, Least-developed Countries, Market Access, Special and Differential Treatment, Special Safeguard Mechanisms, Overall Trade-Distorting Support , Peace Clause, World Trade Organization.

## Abbreviations

|        |  |
|--------|--|
| AMS-   | Aggregate Measure of Support                               |
| AoA-   | Agreement on Agriculture                                   |
| DDA-   | Doha Development Agenda                                    |
| EC-    | European Communities                                       |
| FAO-   | Food and Agriculture Organization                          |
| GATT - | General Agreement on Tariffs and Trade                     |
| GDP-   | Gross Domestic Product                                     |
| ICTSD- | International Centre for Trade and Sustainable Development |
| IMF-   | International Monetary Fund                                |
| LDCs-  | Least Developed Countries                                  |
| MFN-   | Most Favoured Nation                                       |
| SCM-   | Agreement on Subsidies and Countervailing Measures         |
| SSG-   | Special Agricultural Safeguard                             |
| SSA-   | Sub-Saharan Africa   |
| SSM-   | Special Safeguard Mechanism                                |
| OTDS-  | Overall Trade-Distorting Support                           |
| UR-    | Uruguay Round  |
| US-    | United States of America                                   |
| WTO-   | World Trade Organization                                   |

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background to the study

Agriculture is Africa's major source of employment, income generation, rural development and foreign exchange.<sup>1</sup> The importance of agriculture as the primary source of livelihood for the vast majority of Africans underlines the centrality of the contribution of agriculture to food security. Agriculture is crucial to development, as the majority of the African population lives in rural areas, and at least 70 per cent of the workforce is engaged in agriculture.<sup>2</sup> In many African countries, growth in agriculture is the most effective strategy for reducing poverty, increasing food security and promoting overall economic growth.

Trade in agriculture under the World Trade Organization (WTO) is covered by the Agreement on Agriculture (AoA). For this purpose, the AoA provides for rules requiring WTO Members to make specific binding commitments in: market access, domestic support and export subsidies. The commitments, ranging from reduction of tariffs and tariff-quotas, tariffication of non-tariffs, to restrictions on domestic support and on export subsidies, are to reduce distortions in agricultural trade, to facilitate future agricultural negotiations, and to promote trade liberalization in agriculture. According to the preamble of the AoA, the objective is to establish a fair and market-oriented agricultural trading system. However, trade in agriculture is far from being free, and even further from being fair. Besides Africa's challenges of lack of infrastructure and scramble for land by developed or other developing countries, many African farmers also face lack of support in form of subsidies from their governments. This has had an impact on the growth and development of the agriculture sector which has failed to be or remain competitive in light of the

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<sup>1</sup> H Zunckel *The Southern African Response to Food Security and the Global Food Crisis: Policy Report No.7* (2010) 28

<sup>2</sup> Economic Commission for Africa *Agricultural Input Business Development in Africa: Opportunities, Issues and Challenges* (2000) 1; FAO *Some Issues Relating to Food Security in the Context of the WTO Negotiations on Agriculture* Discussion Paper, Geneva, July 2001

competition from developed countries' agricultural products which are highly subsidized.

Despite promoting the benefits of free trade in agriculture, the European Union (EU), the United States (US), Japan and other industrialised countries heavily protect their agriculture in order to ensure the production of basic staple foods.<sup>3</sup> Some proponents of agricultural subsidies argue that they are necessary because of the fluctuating nature of agricultural production which is dependent, *inter alia*, on the vagaries of the weather and unstable prices.<sup>4</sup> Subsidies also play a crucial role in stimulating development of any country through increased production, employment, investment and help to lower the domestic food prices. However, the use of subsidies in contravention to the WTO rules may have a negative effect on the global market and thus leading to increased competition placed on the small-scale farmer. This has a potential to lead to a loss of livelihood.<sup>5</sup>

Trade policies at the WTO remain producer driven, subject to numerous discriminatory trade distortions, without adequate disciplines on anti-competitiveness practices and are often abused for welfare reducing protectionism.<sup>6</sup> The inadequacy of the rules legitimizes and institutionalizes dumping.<sup>7</sup> The view has been expressed that practically everything exported from the US and EU involves some level of dumping<sup>8</sup> and this threatens the viability of agriculture and agriculture processing industries, particularly for small scale farming sector that does not receive state support.<sup>9</sup> It is estimated that farm subsidies cost poor countries about US\$50

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<sup>3</sup> J Ziegler et al *The Fight for the Right to Food: Lesson Learned* (2011) 69

<sup>4</sup> <http://www.scribd.com/doc/20244119/An-Agricultural-Subsidy-is-a-Governmental-Subsidy-Paid-to-Farmers> (accessed 10 January 2012)

<sup>5</sup> K Bertow & A Schultheis *Impact of EU's Agricultural Trade Policy on Smallholders in Africa* (2007) 37

<sup>6</sup> E-U Petersmann 'The Human Rights Approach Advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is It Relevant for WTO Law and Policy?' (2004) 7 (3) *Journal of International Economic Law* 605-627 at 611

<sup>7</sup> Article IV of the Anti-Dumping Agreement (ADA) defines dumping as introduction of products into the commerce of another country at less than the cost of production or normal value.

<sup>8</sup> P Einarsson *Agricultural Trade Policy as if Food Security and Ecological Sustainability Really Mattered* (2000) [http://web.forumsyd.se/Arkiv/Globala/FS\\_Globalastudier\\_upload/Agtrade.pdf](http://web.forumsyd.se/Arkiv/Globala/FS_Globalastudier_upload/Agtrade.pdf) (accessed 15 October 2011)

<sup>9</sup> D Mudenda *Zambia's Trade Situation: Implications for Debt and Poverty Reduction* (2005) 23 <http://www.jctr.org.zm/downloads/tradsitu0705.pdf> (accessed 5 May 2011)

billion a year in lost agricultural exports<sup>10</sup> - which is the equivalent of today's level of development assistance.<sup>11</sup> Subsidies depress the world market price thus leading to price volatility of commodities. Although consumers benefit from cheap food, it is the local or small-scale producer who suffers due to lack of financial support from their government. Put simply, subsidies impose a high burden on farmers and rural households in developing countries.<sup>12</sup>

The issue of use of subsidies in agriculture is at the core of negotiations under the Doha Round of Multilateral Negotiations which, among other things, seeks to reduce the subsidies of the developed countries that have made it difficult for Africa to compete in international markets, and flooded African markets with cheap imports.<sup>13</sup> Pascal Lamy opines that "Failure to reduce the trade distorting domestic subsidies of the developed countries will mean a missed opportunity to boost the expansion of agricultural production in Africa."<sup>14</sup> Of particular concern to Africa, is the import of highly subsidized food<sup>15</sup>- sugar and cotton subsidies which potentially threaten the viability of the agriculture sector. For instance, South Africa, Malawi, Mauritius, Swaziland and Zambia are all low-cost sugar producers with growing potential to tap important export markets in North Africa and the Middle East. Instead, those markets are being captured by the EU who can land their sugar at prices far lower than even the lowest-cost producers in Africa.<sup>16</sup> Similarly, cotton producers in West Africa- Benin, Burkina Faso, Chad and Mali- suffer the same fate due to the US subsidies on its cotton production. Cotton exports for these countries account for anywhere between 20 and 50% of their total export earnings, so cotton

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<sup>10</sup> Mark Malloch Brown, Former head of the United Nations Development Programme (UNDP)

<sup>11</sup> N Kristof 'Farm Subsidies That Kill' *New York Times* 5 July 2002

<sup>12</sup> 'Making Trade Work for Poor People' speech delivered by Nicholas Stern, senior Vice President and Chief Economist of the World Bank, to the National Council of Applied Economic Research, New Delhi, India, 28 November 2002. With specific reference to the EU, this may not be the case especially that prices on certain agricultural products are high despite significant agriculture subsidies.

<sup>13</sup> The Doha Round started in 2001 but has currently stalled due to the US, EU refusal to reduce subsidies and India's insistence not to grant market access

<sup>14</sup> WTO Director General, at the *Africa Investment Forum*, Johannesburg , 9-11 October 2006 available on: [http://www.wto.org/english/news\\_e/sppl\\_e/sppl42\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl42_e.htm) (accessed 10 November 2011)

<sup>15</sup> According to the Food Agriculture Organization (FAO) Report of 2009, Africa spends US\$ 19 billion per year on food imports and attracts the majority of worldwide emergency food aid

<sup>16</sup> [http://ipsnews.net/riomas10/2808\\_5.shtml](http://ipsnews.net/riomas10/2808_5.shtml) (accessed 27 January 2012)

subsidies in the US have significant impacts on them.<sup>17</sup> In fact, Benin and Chad joined as third parties in 2005 when Brazil challenged the US' cotton subsidies.<sup>18</sup>

Consequently, under the Doha Round, Africa's interests are therefore two-fold: some because of their barren lands need the subsidies maintained so they can access cheap food while others need the subsidies to be removed so that their agricultural sector can be allowed to become more competitive. The latter, have thus maintained a very offensive position in the agriculture negotiations because of its centrality to their economies. The reduction in subsidies by the developed countries (e.g. the EU, US and Japan) will help to level the playing field for Africa by correcting historical injustices in the world trade rule-book, which resulted in Africa moving from being a net exporter to a net importer of food.<sup>19</sup> Africa is still striving to become increasingly competitive, whilst dealing with the challenges unique to its region. Besides, looking forward to the results of the Doha Round, Africa not only wants to level the proverbial 'playing field', but also to plough that field, in order for the agricultural sector to become a global player to a much larger extent than is currently possible.<sup>20</sup>

## 1.2 Research problem

Developing a sound agriculture sector is often seen as an engine for promoting economic growth that leads to poverty reduction. Despite Africa being endowed with natural resources, trade in agriculture is still a challenge in light of the international policies and market trends coupled with competition faced with developed countries' heavily subsidized agricultural products on the global market.<sup>21</sup> The decreasing prices for agricultural products, due to high productivity growth in other parts of the world often supported by subsidies and protection particularly in

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<sup>17</sup> S Tokarick 'Dispelling some Misconceptions about Agricultural Trade Liberalization' (2008) *Journal of Economic Perspectives* (Volume 22 Number 1) pp. 199-216 at 212

<sup>18</sup> WT/DS267/AB/R, 3 March 2005

<sup>19</sup> Pascal Lamy, WTO Director-General at the conference 'Harnessing Agriculture for Development through Trade' Geneva 21 February 2011 [http://www.wto.org/english/news\\_e/sppl\\_e/sppl188\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl188_e.htm) (accessed 20 October 2011)

<sup>20</sup> JD Villiers 'Trends In The Grain Trade - Effects On The South African Food And Feed Milling Industry' IGC Conference, London (2004) 10

<sup>21</sup> ECOWAP *Regional Agricultural Policy for West Africa: Make agriculture the lever of regional integration* (2008) 4

developed countries, have weakened export earnings and sharpened the competition for local products. This has led most African developing and least developed countries (LDCs) to lament that provisions under the AoA are fraught with inequalities in that they have practically allowed the developed countries to highly subsidize their agricultural products to the detriment of the developing and LDCs thereby leading to agriculture trade distortion.

Despite commitments aimed at reducing tariffs, domestic support, and export subsidies, according to developing and LDCs, various loopholes in the AoA in fact reinforce inequities whose effect is that Africa's agriculture sector cannot properly compete on the global agricultural trade. The developing and LDCs also argue that the special and differential treatment (SDT) provisions which are considered a useful tool which recognizes the economic and developmental asymmetries among countries in order to provide special advantages to developing countries to help them benefit from trade liberalization and integrate into the multilateral trading system, has not been an effective instrument to promote development. Instead, the SDT provisions have contributed to trade distortions in global agriculture trade and rewarded inefficient producers.

### **1.3 Thesis statement**

Despite the laid down objectives of the AoA to establish a fair and market-oriented agricultural trading system, its provisions are skewed in favour of developed countries' interests to the disadvantage of the developing and LDCs.

### **1.4 Research questions**

In constructing the argument above, the dissertation will raise and address the following question (s):

- (i) Are certain provisions of the multilateral AoA trade distorting in their nature and application thereof?

- (ii) What kind of obligations do developed countries have under the AoA that LDCs could use to protect their own agricultural industries? – are these obligations best-endeavour or mandatory?; and
- (iii) Does the AoA give enough flexibility for a Member to use its domestic policies in its quest to promote agriculture production and trade? If so, to what extent is this possible?

## 1.5 Preliminary literature review

There are a number of views on the state of trade in agriculture but only two are relevant to issues addressed in this dissertation. One view argues that trade is a tool that enhances and promotes economic growth and thereby leading to poverty reduction.<sup>22</sup> The other view, to which the dissertation will be devoted, asserts that, trade is “of the rich” and “for the rich” but “by the poor” thus “a combination of policies in both rich and poor countries creates conditions for the rich to prosper and many of the poor to fall more deeply into destitution.”<sup>23</sup>

The literature that has been reviewed shows that some academic studies have been undertaken on this subject, but not in the same style and manner contemplated in this dissertation. A World Trade Organization Report<sup>24</sup> focussed on finding out the reasons why governments use subsidies by collecting “as much information as possible on what governments actually do by way of subsidization.” Delving into the subject, Ralf Peters centred on export subsidies in agriculture and the effects of their removal by the developed countries on developing economies.<sup>25</sup> Lee-David Carolissen discussed export subsidies by highlighting the inadequacies which exist in the current trade relationship between the EU and developing nations,

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<sup>22</sup>M Hayashikawa *Trading Out Of Poverty: How Aid For Trade Can Help* (2009) 11

<sup>23</sup>K Watkins et al *Trade Policies and Food Security* (2003) 1

<sup>24</sup>*Exploring the links between Subsidies, Trade and the WTO* (2006) iv

<sup>25</sup>*Roadblock to Reform: The Persistence of Agricultural Export Subsidies* (2006) 2

- in particular South Africa with regard to agricultural produce.<sup>26</sup> Steve Wiggins and Jonathan Brooks<sup>27</sup> concentrated on the rationale behind input subsidies by analysing different countries that used fertilizers subsidies and the effects thereof. Kym Anderson, despite distinguishing between policies of developed countries and those of developing countries, addressed the reduction and subsequent removal of trade-distorting production subsidies in agriculture.<sup>28</sup> While Fantu Ferris Mulleta<sup>29</sup> looked at the possible ways in which African countries can maximise their benefit from the existing SDT clauses for trade in agriculture, Anwarul Hoda opined that there is so much disparity in the use of trade distorting measures by the developing and developed countries that emphasis on SDT is not appropriate.<sup>30</sup> Hilton Zunckel looking at the possibility of reforming agricultural subsidies and concluded that, "it would be a logical progression to bring the subsidies provisions of the Agreement on Agriculture under the provisions of the Agreement on Subsidies and Countervailing Measures."<sup>31</sup>

The focus of this dissertation takes a different approach in that it will critically assess:

- (a) the trade distorting provisions under the AoA and the effects of subsidies on the developing and LDCs in Africa;
- (b) whether the removal of trade distorting subsidies by developed countries would enhance Africa's trade in agriculture;
- (c) whether the SDT provisions under the AoA or the General Agreement on Tariffs and Trade (GATT) are an effective tool that can be used by developing and least developed countries' quest for global trade in agriculture; and

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<sup>26</sup> 'An analysis of the impact of the European Union's Policy of Export Subsidies has on South Africa's agricultural sector' Unpublished LLM dissertation, University of Western Cape 2010 9

<sup>27</sup> 'The Use of Input Subsidies in Developing Countries' Global Forum on Agriculture 29-30 November 2010

<sup>28</sup> *Subsidies and Trade Barriers* (2004) 2, 17

<sup>29</sup> 'Special and Differential treatment for trade in agriculture: Does it answer the quest for Development in African countries?' Unpublished LLM dissertation, University of Western Cape, 2009 3-5

<sup>30</sup> *Special And Differential Treatment in Agricultural Negotiations* (2003) i

<sup>31</sup> 'The Reform of Agricultural Subsidies Lights upon Pandora's Boxes' Unpublished LLM Thesis, World Trade Institute, 2001 75

- (d) Whether the AoA gives enough flexibility to developing and least developed countries to use their domestic agricultural policies to enhance their quest for global trade in agriculture.

## **1.6 Objectives of the research**

The dissertation, apart from adding academic value to the subject, will make suggestions to Africa's policy makers and skeptics on how to approach the global agricultural trading system to make it more responsive to Africa's peculiar economic needs by providing tools that can help define an agriculture system that reduces dependence but encourages and supports agriculture growth.

Thus, the main objectives of this research are:

- (a) To identify the problems that hinder Sub-Saharan countries, especially LDCs from competing globally in agricultural trade and assess whether they can be remedied and how;
- (b) To identify any trade distorting provisions under the AoA and investigate whether their removal would assist developing and LDCs' quest for agriculture trade;
- (c) To analyse whether SDT provisions under the AoA guarantee fairness in agricultural trade for developing and LDCs; and
- (d) To analyse whether SDT provisions and domestic policy changes can be used as viable options in leveling the trade in agriculture playing field.

## **1.7 Methodology**

The dissertation will take a descriptive and analytical approach. Under the descriptive approach, it will inform the basis for fairness in agriculture trade by taking into

account the salient provisions under the AoA and it will explore the obligations of developed countries under the GATT. Under the analytical approach, it will argue that provisions of the AoA in practice do allow trade distorting subsidies and that SDT provisions are ineffective in enhancing Africa's trade in agriculture.

The method of research shall be desk review which consists of books, internet sources, published reports, published and unpublished papers, legislation, policy documents, scholarly articles and case law.

### **1.8 Limitation of the study**

Due to the complexity of the subject, the scope was limited to Sub-Saharan Africa (SSA). Besides the challenges of finding more data relevant to the subject, getting more recent and product specific agricultural trade statistics on Africa also proved to be a daunting task. Therefore, some reliance was placed on 'old' and 'abstract' figures in doing the analysis of Africa's global trade in agriculture.

### **1.9 Outline of chapters**

Chapter Two lays down the basis for global trade in agriculture by focusing on the AoA. It discusses the three main elements under the AoA- market access, domestic support and export competition. Furthermore, apart from looking at the statistics on Africa's global trade performance from the 1960's, consideration is given to the significant role that agriculture plays in the economies of most African countries.

Chapter Three focusses on trade distortion in global agricultural trade. It seeks to argue that the AoA is unbalanced as it contains trade distorting provisions which have allowed the developed countries to continue subsidizing to the detriment of the developing and least developed countries. It further argues that the presence of subsidies has made the playing field in agricultural trade un-level and therefore, the removal of or decrease in subsidies is of paramount importance. It also looks at the prospects of the Doha Development Agenda as it will have a bearing on the AoA.

Chapter Four centres on the SDT provisions under the AoA. In this chapter, it is argued that the SDT provisions under the AoA are ineffective tools, thus developing and LDCs cannot derive significant benefits from them.

Chapter Five concentrates on measures that can be implemented to level the playing field in agricultural trade. It discusses whether or not the AoA gives countries enough flexibility to implement domestic policies to foster agriculture production and trade. It argues that there are a range of domestic policies that could be used by African countries to level the playing field as well as mitigate the effects caused by the use of subsidies by the developed countries.

Chapter Six contains a summary of the conclusions made in each chapter and the recommendations made.

## CHAPTER 2

# THE AGREEMENT ON AGRICULTURE: TRADE IN AGRICULTURE AND ITS SIGNIFICANCE TO AFRICA

### 2.1 Introduction

Agriculture accounts for between 30 and 60% of the gross domestic product (GDP) among the LDCs; employs more people than any other sector (as much as 70% in most cases); represents a major source of foreign exchange<sup>32</sup>- supplies the bulk of basic food; and provides subsistence and other income to more than half of the LDCs' population.<sup>33</sup> The pivotal importance of agriculture as the primary source of livelihood of the vast majority of Africans underlines the centrality of the contribution of agriculture as the most effective strategy for reducing poverty and promoting overall economic growth.<sup>34</sup>

On a multilateral level, agriculture is under the auspices of the AoA. The roots of the AoA are to be found in the GATT 1947 which was established after World War II in the wake of other new multilateral institutions dedicated to international economic cooperation- notably the Bretton Woods institutions known as the World Bank and the International Monetary Fund. A comparable international institution for trade, named the International Trade Organization (ITO) was successfully negotiated. The ITO was to be a United Nations specialized agency and would address not only trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. But the ITO treaty was not approved by the US and a few other signatories and never went into effect.<sup>35</sup>

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<sup>32</sup> Economic Commission for Africa *Agricultural Input Business Development in Africa: Opportunities, Issues and Challenges* (2000) 1

<sup>33</sup> United Nations Ministerial Conference of the Least Developed Countries *Globalization, Agriculture and the Least Developed Countries: Making Globalization Work for the LDCs*, Istanbul 9-11 July 2007 1

<sup>34</sup> *ibid*

<sup>35</sup> I Fergusson *The World Trade Organization: Background and Issues* (2007) 2 available on <http://www.nationalaglawcenter.org/assets/crs/98-928.pdf> (accessed 01 March 2012)

The GATT was the only multilateral instrument governing international trade from 1948 until the WTO was established in 1995. Despite attempts in the mid-1950s and 1960s to create some form of institutional mechanism for international trade, the GATT continued to operate for almost half a century as a semi-institutionalized multilateral treaty regime on a provisional basis. There were seven rounds of negotiations that occurred under GATT. The first real GATT trade rounds concentrated on further reducing tariffs. Then, the Kennedy Round in the mid-1960s brought about a GATT Anti-dumping Agreement and a section on trade and development. The Tokyo Round during the 1970s was the first major attempt to tackle non-trade barriers and to improve the system. A series of agreements on non-tariff barriers were adopted. Some interpreted existing GATT rules, while others broke entirely new ground.

Before GATT's 40th anniversary, its members concluded that the GATT system was straining to adapt to new realities brought about by globalization. In response to the problems identified in the 1982 Ministerial Declaration, the Uruguay Round (UR) was launched in September 1986, in Punta del Este, Uruguay. The UR was the biggest negotiating mandate on trade ever agreed: the talks extended the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in the sensitive sectors of agriculture and textiles and clothing. Under the UR, members affirmed the importance of agriculture and declared that, "there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets."<sup>36</sup> This led to the conclusion of the AoA which came into effect in 1995. This brought world agriculture production and trade under multilateral trade rules and was supposed to herald a new era of trade liberalisation in the agriculture sector, as hitherto agriculture had been largely exempted from the disciplines of GATT.

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<sup>36</sup> GATT, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, adopted in Punta del Este, 20 September 1986 1623

The AoA is one of the two main sectoral agreements in the UR that provides for specific disciplines to remove distortions in the relevant sectors.<sup>37</sup> The provisions of the AoA are meant to subject trade in agriculture to market disciplines and facilitate 'free trade' by doing away with possible regulatory interferences with the free flow of goods and services.<sup>38</sup> Based on its affirmed goal of establishing a fair and market-oriented trading system in agriculture<sup>39</sup>, the AoA is binding on members and obliges them to enhance market access and reduce trade-distorting agricultural subsidies.

## 2.2 Main elements of the Agreement on Agriculture

The AoA has three main pillars: (i) market access; (ii) domestic support; and (iii) export competition. Trade liberalization commitments in these three areas are required for members of the WTO although LDCs are exempted. The commitments, which had been largely negotiated among countries before the end of the Uruguay Round, are reflected in the country schedules which are integral parts of the Agreement.<sup>40</sup>

### 2.2.1 Market Access

Market access entails the terms and conditions under which agricultural products can be imported into WTO Members. Article 4 obliges members to eliminate all their non-tariff barriers like import bans, import quotas or quantitative restrictions on imports, etc. and convert these to tariffs- this is called, in the WTO, "tariffication." The tariff rate should be equivalent to the barriers that were imposed in the base reference period of 1986-88. All Members have to bind their tariffs on all agricultural products and progressively reduce all tariffs starting from their initial bound rate in 1995 to their final bound rate at the end of the implementation period. The average

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<sup>37</sup> The other one was the Agreement on Textiles and Clothing which has since lapsed.

<sup>38</sup> C Dommen 'The WTO, International Trade and Human Rights' in Michael Windfuhr (ed.) *Mainstreaming Human Rights in Multilateral Institutions* (2004) pp.1-16 at 5

<sup>39</sup> According to the Marrakesh Agreement establishing the WTO, the institution's aims are to raise living standards, ensure full employment and increase incomes- the preamble of the AoA

<sup>40</sup> A Glipeo *The WTO-AoA: Impact on Farmers and Rural Women in Asia* (2003) 1

reduction for developed countries is 36% within six years and for developing countries, 24% within 10 years.

Limited exceptions to tariffication are allowed under Article 5 of the AoA- the special treatment clause for specific commodities. Under the Special Safeguard Mechanism (SSG) under this Article, a special safeguard measure can be invoked only for commodities which have been subjected to tariffication. This provision allows countries to apply additional duties on imports that should not exceed one-third of their existing normal custom duties, in the event of import surges or sudden fall in the world price of the affected commodities. The Special Treatment clause, like the safeguard clause, is a temporal measure to allow protection of specific commodities i.e. staple foods.

For developed countries, postponement was allowed until at least at the end of their implementation period which was 2000 and for developing countries until the 10th year or 2004. Another provision aimed at enhancing market access for countries is the one requiring members to maintain minimum and current access volumes. However, this is contained only in the modalities paper and is therefore legally binding only if it is reflected in the specific commitments and detailed in a member's country schedules. The minimum access obliges a country to provide access opportunities for agricultural products where there have been no significant imports in the past, at lower or minimal tariffs. This lower tariff is referred to as the "within-quota tariff" and the quantity of goods imported at this lower tariff is called the "tariff-rate quota" (TRQ). Generally, they have to comply with Article XIII of the GATT 1994.

### **2.2.2 Domestic Support**

Domestic support pertains to government support to domestic producers. Under this pillar, there are two broad categories of domestic support: support with little or no distorting effect on trade, and trade-distorting support. The objective of domestic support is to reduce the amount of money going into production of farm goods

regardless of whether the goods are exported or not. Although domestic support as a concept is used only in the AoA, it means essentially the same as the concept of “domestic subsidies”.

Governments provide support to their agricultural producers in different ways – ranging from direct budgetary transfers to highly disguised forms of market price support. Although the forms of support are diverse, they have certain features in common: they are intended to guarantee certain levels of income for agricultural producers; and they are implemented mainly by way of either setting minimum artificial prices on the market (which are necessarily higher than world market prices) or through direct budgetary transfers to agricultural producers.<sup>41</sup>

Article 3 (2) of the AoA provides that “Subject to the provisions of Article 6, a Member shall not provide support...in excess of commitment levels specified in Section I of part IV of its Schedule.” Article 6 (3) states that a member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers does not exceed the corresponding annual or final bound commitment level. The AoA divides domestic support into three “boxes,” each of which is subject to different WTO requirements- these are: Amber, Blue and Green box.

*Amber Box* – These are measures that are considered trade-distorting and are therefore subjected to reduction commitments. These are support that have an effect on production or trade such as price supports and input subsidies. Their amount is measured on the basis of an “Aggregate Measure of Support” (AMS), which attempts to calculate all the financial factors that influence a farmer to produce a certain product and are reduced in each year of the implementation period. This means that the annual reduction is computed based on the overall support in terms of the annual amounts and not on product-specific subsidies.<sup>42</sup> This provision stipulates for

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<sup>41</sup> MG Desta *Legal Issues in International Agricultural Trade: The Evolution of the WTO Agreement On Agriculture From Its Uruguay Round Origins To Its Post-Hong Kong Directions* (2006) 21

<sup>42</sup> A country is free to choose the product and the rates of subsidy subjected to reduction discipline within the over-all limit of the total amount of subsidy during that year.

a general *de minimis* exclusion from subsidy reduction, which is 5% of the value of production of a product for product-specific subsidies and 5% of the value of total agricultural production for non-product specific subsidies for developed countries and 10% for each of these subsidies for developing countries.

*Blue Box* – These are measures such as direct payments to farmers that are intended to limit the amount of production. Article 6.5 exempts from reduction commitments payments made under production-limiting programmes, which are paid out directly from the government's budget to producers (Blue Box measures) provided such payments are: (i) based on fixed area and yields; or (ii) made on 85% or less of the base level of production; or (iii) based on a fixed number of animals.<sup>43</sup> These payments are considered to be less trade-distorting, as they do not encourage overproduction and dumping of surpluses on the international markets and because of the restrictions on production needed to comply with the criteria of Article 6.5. Nevertheless, because they are based on animal numbers, area planted or crop yields, they do affect trade.

*Green Box* – These are measures which are assumed to have minimal or no effects on production levels and therefore considered not to be trade-distorting. They are acceptable under the AoA and are not subjected to reduction commitments. They include support for research, marketing assistance, infrastructure services, domestic food aid, payments linked to environmental programmes, pest and disease control. Therefore, provided that it complies with the provisions of Annex 2 of the AoA, a WTO Member has the right to: increase spending on existing measures; introduce new measures; or amend existing measures. To qualify as a Green Box measure, a programme must satisfy some general and specific criteria. The general criteria, as set out in paragraph 1 of Annex 2, are that such measures must: (i) have no, or at most minimal, trade-distorting effects or effects on production;(ii) be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers;

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<sup>43</sup> Although the Green Box covers payments that are decoupled from both prices and production, in the case of the Blue Box measures, they can be directly related to current production, provided that current production is limited.

and (iii) must not have the effect of providing price support to producers. Even with these general conditions, the scope of the Green Box is quite broad and it covers a fairly wide range of programmes but these must meet the relevant policy-specific criteria listed in paragraphs 2 to 13 of Annex 2.

### **2.2.3 Export Competition**

Under this pillar, the commitment is to reduce export subsidies. Article 1 (e) of the AoA defines export subsidies as “subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement.” The AoA’s approach to export subsidies is to list the export subsidies that WTO Members have to reduce, and to ban the introduction of new subsidies which are harmful as they directly support exporters. According to Article 9, export subsidies that are subject to reduction commitments are: (a) the provision by governments or their agencies of direct subsidies; (b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market; and (c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved. Developing countries are subject to fewer obligations in this regard, and enjoy longer implementation periods while LDCs are under no obligation to reduce export subsidies they may have.

Members providing direct export subsidies are obliged to reduce these subsidies from their 1988-1990 average level by 36% in value and 21% in volume for developed countries over 6 years and by 24% in value and 14% in volume for developing countries over 10 years. Members who do not provide any export subsidies and therefore did not reflect these in their schedules are not allowed to provide export subsidies in the future.

## 2.3 Africa's role in global agricultural trade

Agriculture currently accounts for about 25% of total exports of most African Countries. Countries such as Benin, Burkina Faso, Burundi, Comoros, Ethiopia, Guinea-Bissau, Liberia, Malawi and Solomon Islands depend largely on agriculture, often for more than half their exports. However, reliance on exports has declined in the last two decades for 22 LDCs, although Benin, Burkina Faso, Guinea-Bissau, Liberia, Solomon Islands, Togo and Zambia have become more dependent on agriculture for exports.<sup>44</sup> This trend holds true for developed, developing and LDCs alike. Thus, while developed countries experienced a smooth decline in the significance of agricultural trade in total merchandise trade, the changes experienced by LDCs has been far less stable e.g. agricultural imports in the LDCs jumped from 6% of merchandise imports in 1994 to 14% in 1995, yet dropped sharply from 10% in 2004 to 4% in the next year<sup>45</sup> and were at 3% in 2011.

The share of Africa's LDCs' participation in international agricultural trade is far from being satisfactory. Their share in world agricultural exports has dropped steadily, from 3.2% in 1970-1979 to 1.9% in 1980-1989 and a mere 0.9% in 2000-2004. Their share in world imports is more or less at the same low level of 1.9% since 1980 up to 2004.<sup>46</sup> In fact, during 2000-2004, world agricultural trade expanded at an average annual rate of over 10%. In 2007, African total merchandise trade amounted to over \$782 billion, accounting for 2.7% of world trade.<sup>47</sup> Equatorial Guinea registered the highest average growth rate (36%), followed by Chad (29%), then Sudan and Angola (22%), and Mozambique (18%). In contrast, Eritrea and Zimbabwe registered negative growth rates (-0.85%) and (-0.24%), respectively.<sup>48</sup>

Despite a sustained positive growth, Africa still accounts for a negligible 3% of world total exports. Exports increased by 15.6% between 2006 and 2007 compared

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<sup>44</sup> P Schure et al. *Challenges for Less Developed Countries: Agricultural Policies in the EU and the US* (2007) 9

<sup>45</sup> Ibid p. 6

<sup>46</sup> United Nations Ministerial Conference of Least Developed Countries *Globalization, Agriculture and the Least Developed Countries: Making Globalization Work for the LDCs* Istanbul 9-11 July 2007 7

<sup>47</sup> United Nations Economic Commission for Africa *Developing African Agriculture Through Regional Value Chains* (2009) 78

<sup>48</sup> ibid

to an average growth rate of 20% in the previous four years. Crude oil and minerals contribute about 70% and agriculture and manufacturing about 30% to GDP. Imports are mainly concentrated in manufactured goods (68%), followed by fuels and mining products (15.4%) and agricultural products (4%).

The LDCs rely, to some extent, largely on agriculture for economic growth and development. These countries require access to global agricultural markets to exchange the farm goods (in which they have a comparative advantage) for capital goods and other inputs (such as fertilizers and pesticides) that can help drive economic development.<sup>49</sup> Thus the major agricultural exports of the LDCs, among others include cocoa, coffee, tea, cotton, fish and seafood, tropical wood, spices and bananas, vegetables, fruits and nuts which are mostly in unprocessed form.<sup>50</sup> These products are particularly prone to changes in commodity markets. For instance, substantial cotton subsidies in certain developed countries inflicted enormous damage in some LDCs e.g. Benin, Chad and Mali lost 25% of their total export earnings following 34% drop in the world price of cotton in 1990-1992. Moreover, for African LDCs, exports are destined for (though not exclusively) a few markets, of which EU is the largest (about one-third), followed by US, Canada and Japan although China and India are emerging as important partners.

## 2.4 Significance of the agriculture sector to Africa

The importance of agriculture in lower income developing countries is undeniable due to the large percentage of the poor that live and work in agriculture and the positive multiplier effects of agriculture for the rest of the economy.<sup>51</sup> Agriculture is held to play a central and strategic role in the development of the continent's economy. Indeed, it is the key to economic growth, increased incomes, a better standard of living, poverty eradication, and increased food security.<sup>52</sup> In West Africa,

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<sup>49</sup> P Schure et al. (2007) 10

<sup>50</sup> United Nations Ministerial Conference of Least Developed Countries (2007) 8

<sup>51</sup> E Díaz-Bonilla and JF Ron *Food Security, Price Volatility and Trade: Some Reflections for Developing Countries* (2010) v

<sup>52</sup> African Development Bank Group *Improving Statistics for Food Security, Sustainable Agriculture, and Rural Development: An Action Plan for Africa 2011-2015* (2011) 1

agricultural exports constitute an important element for its foreign trade, generating around US\$ 6 billion or 16.3% of all the products and services exported from the region.<sup>53</sup> This agricultural export capacity brings in some of the foreign currency governments need to pay for imported consumer goods, capital equipment and intermediate goods for industry and services.

Trade in agriculture has inherent benefits which are understood to be a key to social and economic progress. From an economics perspective, it is seen as an essential element of global increases in growth and prosperity.<sup>54</sup> This is achieved by increased exports which, in turn, lead to increased revenues for both the state and individual farmers. Despite accounting for only less than 1% of the world trade share, Africa's agricultural sector is quite diverse and its economic contribution is important considering the stage of development of the countries on the continent. This is perhaps with the exception of South Africa whose contribution is very significant. The contribution of agricultural trade to the GDP ranges from a high of more than 50% for Burundi and Central African Republic to a low of less than 5% for South Africa and Botswana.<sup>55</sup> The importance of the agricultural sector is more pronounced for SSA, where it employs some 70% of the region's work force and generates an average 30% of the region's GDP.<sup>56</sup>

This contribution to GDP is also reflected in the sector's contribution to economic growth whose importance can be seen in the level of the active population that it employs. For instance, in Zambia, the agricultural sector still plays an important role in the labour market and contributes 22% to the GDP and has almost 72% of the active population still employed in the sector.<sup>57</sup> Agriculture in Ghana contributes between 36-40% to GDP while in Uganda it accounts for 21.4%. In South

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<sup>53</sup> ECOWAP *Regional Agricultural Policy for West Africa: Make agriculture the lever of regional integration* (2008) 3

<sup>54</sup> N McCulloch et al *Trade Liberalisation and Poverty: A Handbook* (2001) 5

<sup>55</sup> M Abdel et al. *Multilateral Agricultural liberalization: What's in it for Africa?* (2006) 6

<sup>56</sup> *ibid*

<sup>57</sup> E Jones 'Delivering on Development: A New Ten-Year Programme of Action for LDCs' *Commonwealth Hot trade topics (Issue 85)* (2011) 1 available at: <http://www.globaleconomicgovernance.org/wp-content/uploads/TradeHotTopics85.pdf> (accessed 9 March 2012)

Africa, only 10% are employed in the agriculture sector.<sup>58</sup> Similarly for Kenya, agriculture is still the backbone of the economy despite its relatively high industrialisation in an African context, as it is directly responsible for 26% of the GDP and 60% of the export earnings. The agriculture sector also indirectly contributes a further 27% to the GDP through linkages with manufacturing, distribution, and service related sectors. The agricultural sector accounts for 60 percent of total national employment, with women providing 75% of the labour force.<sup>59</sup>

The viability of the agricultural sector is pertinent to economies that depend on trade in agriculture. Statistics indicate that agricultural output in LDCs rose during 1990-2000 at an annual average rate of 2.8%, exceeding the rate of 1.9% in 1980-1990, with some slight improvements in per capita terms. However, statistics for 2000-05 indicate that there was virtually no increase in output, or even a slight decline.<sup>60</sup> Generally, Africa is considered as a net food-importing region<sup>61</sup>, except for a few countries such as South Africa which is food secure. The largest share of imported products consists of cereals, livestock and dairy products, and fruits and vegetables to a lesser extent. Exports of agricultural products constitute an important source of foreign currency for several African countries. Its contribution to total merchandise exports ranges from a high of more than 80% for Burundi and Sudan to a low of less than 1% for Equatorial-Guinea and Gabon.

Trade experts also recognise the importance of trade in agriculture- they state that it makes a positive contribution to poverty alleviation for it allows people to exploit their productive potential, assist economic growth, curtail arbitrary policy interventions and help to insulate against shocks.<sup>62</sup> Africa's LDCs are home to more than 800 million people, one in eight of the global population, and half of these

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<sup>58</sup> OECD 'Agricultural Policy Reform in South Africa' *Policy Brief* (2006) 1

<sup>59</sup> R Zimmermann; M Bruntrup; S Kolavalli and K Flaherty *Agricultural Policies in Sub-Saharan Africa: Understanding CAADP and APRM Policy Processes* (2009) 81

<sup>60</sup> United Nations Ministerial Conference of Least Developed Countries (2007) 2

<sup>61</sup> The continent imports 25% of its food, available at: [http://www.fpif.org/articles/destroying\\_african\\_agriculture](http://www.fpif.org/articles/destroying_african_agriculture) (accessed 24 November 2011)

<sup>62</sup> 'Globalization and Its Impact on the Full Enjoyment of Human Rights' (15 January 2002), E/CN.4/2002/54 (Report on the Agreement on Agriculture)

people live in extreme poverty while one-third do not have enough to eat.<sup>63</sup> Poverty levels were quite high during the periods 1995-1997 and 2002-2004, where the proportion of undernourished in total population in the LDCs increased from 34% to 41%, while the absolute number of undernourished is estimated to have increased from 116 million to 169 million.<sup>64</sup> Cervantes-Godoy observes that "Good agricultural performance operates to reduce measured poverty through both the income and the price channels. Because a greater proportion of the poor depends on agriculture for their incomes, it is natural to think that an increase in farm income would be poverty reducing..."<sup>65</sup>

## 2.5 Conclusion

Globally, agriculture trade falls under the auspices of the WTO and is based on three pillars: market access, domestic support and export competition. Agriculture is an important sector to most African countries as it employs at least 70% of the population and is seen as an effective tool for addressing poverty alleviation and stimulating economic growth. Statistics show that Africa was a large exporter of agricultural products in the 1960s-1970's.<sup>66</sup> However, there has been a decline since the 1990's. Currently, Africa's agriculture counts for less than 1% of world trade share with South Africa holding about three-quarters thereof. This is an undesirable situation that has now turned Africa from being a net exporter to a net importer of food- importing about 25% of its food from developed countries. Africa's largest trading partners in agricultural products are the EU, US, Japan and India.

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<sup>63</sup> E Jones 'Delivering on Development: A New Ten-Year Programme of Action for LDCs' *Commonwealth Hot trade topics* (Issue 85) (2011) 1

<sup>64</sup> FAO STAT, 2007

<sup>65</sup> D Cervantes-Godoy and J. Dewbre 'Economic Importance of Agriculture for Poverty Reduction' (2010) available on: <http://dx.doi.org/10.1787/5kmmv9s20944-en> (accessed 25 December 2011)

<sup>66</sup> Its exports averaging 1.3 million tons a year between 1966-70

## CHAPTER 3

# TRADE DISTORTING PROVISIONS UNDER THE AGREEMENT ON AGRICULTURE

### 3.1 Introduction

According to conventional wisdom, the original GATT, which lasted from 1947 to the end of 1994, was highly successful in reducing barriers to international trade in industrial goods, but it was a conspicuous failure in reducing barriers and other distortions to trade in agricultural products.<sup>67</sup> Thus agricultural trade became highly distorted especially with the use of export subsidies which would not normally have been allowed for industrial products.<sup>68</sup> The UR produced the first multilateral agreement dedicated to the sector and it was a significant first step towards order, fair competition and a less distorted sector. The UR agreement included a commitment to continue the reform through new negotiations which were launched in 2000, as required by the AoA.<sup>69</sup>

The AoA's core objective is to establish a fair and market-oriented agricultural trading system through substantial progressive reduction in agricultural support and protection.<sup>70</sup> Trade is not an end in itself, but a tool which can be useful for economic and social development, provided it is adequately regulated, taking the different contexts and interests into account.<sup>71</sup> Suffice to say that if the multilateral trading system claims to be based on any principle, it is fairness, transparency and equal opportunities for all on the basis of the economic law of comparative advantage. Therefore, fair trade is a cardinal requirement and without it, a weaker party tends to suffer at the whims and caprices of the stronger party.<sup>72</sup> Despite SSA

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<sup>67</sup> R Hudec *Does the Agreement on Agriculture Work? Agricultural Disputes after the Uruguay Round* (1999) 4

<sup>68</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm) (accessed 09 January 2012)

<sup>69</sup> Article 20

<sup>70</sup> Preamble of Agreement on Agriculture

<sup>71</sup> W Eide and U Kracht (eds.) *Food and Human Rights In Development: Volume 1* (2005) 35

<sup>72</sup> MG Desta *Legal Issue in International Agricultural Trade: The Evolution of the WTO Agreement on Agriculture from its Uruguay Round origins to Its Post-Hong Kong Directions* (2006) 30

being endowed with large tracts of arable land, fairly good weather and water resources, it has remained low on global trade, a situation attributed to by the effects of developed countries' heavily subsidized agricultural products that currently flood the LDCs- this is besides challenges of the IMF and World Bank structural adjustment in the 1990s, lack of infrastructure and support from the governments and the scramble for land by developed countries and other developing countries like China.

While promoting the benefits of free trade in agriculture, the EU, the US, Japan and other developed countries heavily protect their agriculture in order to ensure the production of basic staple foods- at an estimated amount of US\$300 billion per year.<sup>73</sup> The AoA has provisions that are meant to discipline the use of subsidies. However, the developing and LDCs have been dissatisfied with certain provisions of the AoA which they allege are iniquitous with benefits skewed in favour of developed countries who have economies of scale. Further that, instead of the AoA disciplining the use of subsidies by the developed countries, it has in practice allowed their use thus leading to trade distortion in the global agricultural trade.

The effect of trade distorting subsidies cannot be over-emphasised. Apart from artificially inflating the world price for agricultural products, subsidies by the developed economies lead to increased competition placed on the small-scale farmer in developing and LDCs. It also leads to LDCs and developed economies being locked in an un-level playing field thus threatening the viability of agriculture and agriculture processing industries which may lead to increased poverty, loss of livelihood and reduced economic growth.

Therefore, in this chapter, the focus is on the provisions in the AoA which are trade distorting in nature namely: (i) domestic support which has increased and not reduced; (ii) the weakness in the special agriculture safeguard (SSG); (iii) the continued use of export subsidies by the developed countries; and (iv) the weakness in the provisions of the AoA which have led to a failure by the developed countries to effectively reduce their trade distorting subsidies. The chapter also looks at the

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<sup>73</sup> J Ziegler et al *The Fight for the Right to Food: Lesson Learned* (2011) 69

effect that trade distorting subsidies have on the developing countries and LDCs' especially in their quest for global trade and whether (or how) they can challenge the use of trade distorting subsidies by the developed countries.

### 3.2 Facets of African Agriculture

According to the Overseas Development Institute (ODI), there are, in policy terms, two 'African agricultures'<sup>74</sup>: one kind comprises those farmers in a position to produce for the market— whether the 'farmer' is a large estate producing export standard fruit or a small plot holder producing vegetables for the local market. The other is subsistence farming where rural families partly rely on their crops and animals to keep themselves from poverty, with only tiny and occasional market sales. Unlike the first kind of agriculture, this one does require direct subsidization in order to encourage on-farm improvement and reverse what is often the declining productivity of land.

Africa as a continent is endowed with vast tracts of arable land, fairly good weather and water resources. Its agriculture sector was very viable in the 1970s thus making the continent the world's largest food exporter. However, during the years when 'structural adjustment' was in vogue, there was little dispute that government policies were holding back farmers and traders.<sup>75</sup> For instance, in the 1990's, Zambia liberalised well beyond its WTO commitments by lowering its tariffs, eliminating maize subsidies and dismantling agricultural extension and market support system.<sup>76</sup> An IMF evaluation recognised that the liberalisation in agriculture caused hardship for poor Zambians, with maize consumption falling by 20% between 1990 and 1997 as a result of increased poverty.<sup>77</sup> In Ghana, the IMF and World Bank loan programmes required Ghana to dismantle subsidies that the State provided to small

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<sup>74</sup> J Howell *Farm Subsidies: a problem for Africa too* (2005) 1 available at: <http://www.odi.org.uk/publications/opinions/47> (accessed 02 January 2011)

<sup>75</sup> The IMF and World Bank used formal loan conditionality and informal arm-twisting to persuade developing country governments to deregulate and liberalize their agricultural markets rapidly. In sub-Saharan Africa, for example, 80 per cent of loans were tied to agricultural pricing reform as a major component of their conditionality.

<sup>76</sup> J Ziegler et al (2011) 70

<sup>77</sup> IMF, External Evaluation of the ESAF (Enhanced Structural Adjustment Facility): Report by a Group of Independent Experts, Washington, IMF, June 1998

farmers producing tomatoes, rice and poultry.<sup>78</sup> Consequently, this led to cheap imports of poultry from the US and Europe, tomatoes from the EU, and rice from the US and Asia to flood its market. The lack of subsidies provision by the Ghana government reduced their local farmers' competitiveness, and consumers chose the cheaper, imported products, to the detriment of small-scale local producers.

The challenges of structural adjustment, lack of infrastructure, support from the governments and scramble for land by developed countries have affected agriculture in Africa. This has proved to be a constraint to subsistence farmers in SSA countries who, besides the aforementioned, also face stiff competition from the developed countries' heavily subsidized agricultural products. This has the potential and does in fact threaten the viability Africa's agriculture sector. In the words of South Africa's president, Jacob Zuma, "African agriculture has suffered for decades from the huge subsidies provided to developed country agriculture."<sup>79</sup>

### 3.3 Defining subsidies under the WTO

The term 'subsidy' is subject to various interpretations. The Oxford Online Dictionary defines it as "sums of money granted by the state or a public body to help an industry or business keep the price of a commodity or service low"<sup>80</sup> One aspect about the term 'subsidy' is that it distinguishes between two categories of recipients: producers and consumers.

It is noteworthy that neither the GATT nor the Tokyo Round Subsidies Code contained a definition of the term "subsidy". However, this changed when the WTO Agreement on Subsidies and Countervailing Measures (SCM) came into existence. Article 1 of the SCM spells out the circumstances under which a subsidy can be deemed to exist, that is to say: there must be a financial contribution by a

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<sup>78</sup> A Antwi, presentation at 3D THREE Workshop on 'Integrating Human Rights into the Future of Agriculture' November 2004, report available at: <http://www.3dthree.org/en/pages.php?IDcat=5> (accessed 24 July 2011)

<sup>79</sup> Speech at the World Economic Forum in Cape Town, on Wednesday 10 June 2009 available at: <http://www.iol.co.za/news/politics/speech-by-jacob-zuma-at-world-economic-forum-1.446021> (accessed 03 October 2011)

<sup>80</sup> <http://oxforddictionaries.com/definition/subsidy> (accessed 05 January 2012)

government or any public body i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to do so.

In addition to financial contributions by a government within the meaning of Article 1.1 (a)(1), SCM Article 1.1 (a)(2) mentions any form of income or price support in the sense of Article XVI of GATT 1994, i.e. support which operates directly or indirectly to increase exports of any product from, or reduce imports into, a Member's territory. SCM Article 1.1 (b) stipulates that any such financial contribution or income or price support pursuant to Article 1.1 (a) must confer a benefit to the recipient if it is to be considered a subsidy in the sense of the Agreement. In the *Canada - Dairy* report, the Appellate Body said that a "subsidy", within the meaning of Article 1.1 of the SCM Agreement, arises where the grantor makes a "financial contribution" which confers a "benefit" on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace.<sup>81</sup>

The AoA has not defined what an agricultural subsidy is. However, it has classified subsidies into three main categories according to a *traffic light* system. The most trade-distorting subsidies, those which were directly linked to production, are classified as *amber box* – countries are to 'slow down' with these and introduce the steepest cuts. *Green box* subsidies, those with no or at most minimal, trade-distorting effect were permitted and countries could 'go ahead' without undertaking any cuts. While the system included no *red box*, negotiators did add a *blue box*, for subsidies which result in lesser production: these were subjected to more moderate cuts. A *de minimis* level is permitted for all countries; they can maintain a small amount of trade-distorting support, provided it did not exceed certain levels. For purposes of this discussion, an agricultural subsidy is defined as a governmental

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<sup>81</sup> Appellate Body Report, Canada – Dairy, paragraph 87

subsidy paid to farmers and agribusinesses to supplement their income, manage the supply of agricultural commodities thus influencing the cost and supply of such commodities.

### 3.4 Rationale for Subsidies

There are two common ways of subsidizing agriculture: Firstly, governments may pay much higher prices for agricultural products than what the farmers can obtain under a free market environment; and secondly, by supplying the inputs at a price that is below the cost of supplying these especially in case of non-tradable inputs or below the price that would prevail in an open free trade environment.

Subsidies in agriculture are generally rationalised in the overall economic context that they play a crucial role in stimulating development of any country through increased production, employment and investment. They are also, particularly in developing countries, construed as more of an instrument promoting the risk-taking function of the farmers than anything else.<sup>82</sup> Under the AoA, Article 6.2 and Annex 2 spell out the circumstances and the mode of assistance that governments may use to subsidize their agriculture sector. The government measures of assistance may be direct or indirect but must be aimed at encouraging agricultural and rural development and investment.<sup>83</sup>

Some proponents of agricultural subsidies argue that they are necessary because of the fluctuating nature of agricultural trade. Domestic crop yield can fluctuate considerably depending on the local weather. International crop supply and prices also fluctuate considerably depending on weather (e.g. drought in Australia), politics (e.g. farm seizures in Zimbabwe), war, and other factors affecting crop yields in foreign countries.<sup>84</sup> As a result of these fluctuations in production levels and prices, there could be very large variations in farm revenues and food available

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<sup>82</sup> A Gulati and A Sharma 'Subsidy Syndrome in Indian Agriculture' (1995) *Economic and Political Weekly* (Volume 30 Number 39) pp. A93-A102 at A.93

<sup>83</sup> This is generally available to developing and low income countries.

<sup>84</sup> <http://www.scribd.com/doc/20244119/An-Agricultural-Subsidy-is-a-Governmental-Subsidy-Paid-to-Farmers> (accessed 10 January 2012)

for purchase on the global market. Therefore, price support and income guarantees can help to maintain a strong domestic farm sector and domestic food supply, by smoothing farmers' income over time and better ensure that farmers are not required to maintain a hefty float from year to year in order to maintain a consistent income.

Agricultural subsidies have the effect of transferring income from the general tax payers to farm owners. It is a reality that in some countries and without support from their government, domestic farmers would not be able to compete with imports. Thus, removing subsidies would therefore drive domestic farmers out of business, leaving the country with a much smaller (or possibly non-existent) agriculture sector with the implications for their food security. A country that is unable to domestically produce enough food to feed its people is at the mercy of the world market, and is more vulnerable to trade pressures, global food shortages and price shocks.<sup>85</sup> Therefore, the loss of the domestic farming industry is considered as undesirable on a variety of grounds i.e. unemployment and the loss of a traditional cultural way of life.

Depending on the nature of the subsidies, agricultural subsidies may have the effect of increasing agricultural production and/or driving down domestic food prices. This means domestic producers and consumers would pay less for their food. In this respect, agriculture subsidies could be considered an indirect means of transferring wealth to lower income individuals. Agricultural subsidies, resulting in lower food prices, and domestic overproduction, can also provide benefits for the poor i.e. as a way of fighting poverty.

### **3.5 Trade distortion under the Agreement on Agriculture**

The issue of subsidies is also complex in that there is no agreement even on what a subsidy is; how it can be measured; or how its effects can be measured. In the policy realm, there is no agreement on when subsidies are useful and when they are

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<sup>85</sup> ibid

harmful. Part of the reason for the lack of agreement is the complexity of the problem of evaluating the effects of subsidies on the economy and further, since subsidies are now being targeted for elimination, it may be politically unwise for a polity to admit that a policy implies a subsidy.<sup>86</sup>

Therefore, agriculture policies that countries adopt ought to be aimed at enhancing production and subsequent exports. However, some of these policies may have a negative impact on trade leading to what is widely known as trade distortion. The WTO Dictionary of Trade Policy Terms defines distortion as “a measure, policy or practice that shifts the market price of a product above or below what it would be if the product were traded in a competitive market. Measures causing distortions include subsidies, import restrictions and restrictive business practices”. In the context of agricultural trade this would mean that producers', companies', importers' and exporters' decisions are influenced by factors other than competitive market conditions. The operational definition of trade distortion involves comparing the existing trade with what would occur if support policies were removed.<sup>87</sup> The fundamental criterion for classifying a subsidy as “trade-distorting” is linkage between the subsidy and the incentive to produce.<sup>88</sup> Thus, subsidies that directly affect output or input prices, or vary with the quantity of output, are most likely to provide an incentive to expand production.

From the time the AoA came into effect in 1995, it has engendered widespread dissatisfaction among developing and least developed countries who say that it is *fraught with inequities and imbalances* in favour of developed countries.<sup>89</sup> It is perceived as allowing the US and the EU to continue to subsidize agricultural production and to dump surpluses on world markets at artificially depressed prices

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<sup>86</sup> *ibid*

<sup>87</sup> VO Roningen and PM Dixit *A Simple Measure Agricultural Trade Distortion* (1991) 2

<sup>88</sup> D Blandford and T Josling *Should the Green Box be Modified?* IPC Discussion Paper (2007) 4

<sup>89</sup> R Zhang ‘Food Security: Food Trade Regime And Food Aid Regime’ (2004) 7 *Journal Of International Economic Law* pp. 565-580 at 572

while requiring developing countries to open up their markets to ruinous and unfair competition from developed country producers.<sup>90</sup>

Despite commitments aimed at reducing tariffs, domestic support and export subsidies, various loopholes in the AoA actually reinforce inequities such as tariff peaks<sup>91</sup> and tariff escalations<sup>92</sup> and higher levels of subsidies in developed countries, fewer market opportunities for developing and least developed countries. The Third World Network<sup>93</sup> succinctly states:

The WTO Agreement on Agriculture has permitted the developed countries to increase their domestic subsidies (instead of reducing them), substantially continue with their export subsidies and provide special protection to their farmers in times of increased imports and diminished domestic prices. The developing countries, on the other hand, cannot use domestic subsidies beyond a *de minimis* level (except for very limited purposes), export subsidies and the special protection measures for their farmers. In essence, developed countries are allowed to continue with the distortion of agriculture trade to a substantial extent and even to enhance the distortion; whereas developing countries that had not been engaging in such distortion are not allowed the use of subsidies (except in a limited way) and special protection.

### 3.5.1 Domestic support

The main form of trade distortion is in the area of domestic support. Article 6 (1) provides that domestic support reduction commitments of each Member shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in that Article and in Annex 2 to the AoA. Article 6 (2) exempts from reduction commitments that are direct or indirect measures of assistance to encourage agricultural and rural development; investment subsidies which are generally available to agriculture in developing countries; agricultural input subsidies generally available to low-income or resource-poor producers in developing

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<sup>90</sup> CG Gonzalez 'Institutionalizing Inequality: the WTO, Agriculture and Developing Countries' (2002) *Columbia Journal of Environmental Law* (Volume 27 Number 2) pp. 431-487 at 436

<sup>91</sup> This is a tariff that is considerably above a predefined tariff cut level.

<sup>92</sup> Tariff escalation is a process by which relatively higher rates of tariffs are applied to successive stages of production- raw materials to final product.

<sup>93</sup> Third World Network *The Multilateral Trading System: A Development Perspective* (2001)

countries and domestic support to producers in developing countries to encourage diversification from growing illicit narcotic crops.

Deciphering Article 6.2 entails that developed countries have an obligation to reduce their subsidies while developing countries or low income producers can give domestic support to agriculture development. However, developed countries have not reduced their subsidies after the six-year implementation period. In fact, developed countries with high levels of domestic subsidies are allowed to continue these up to 80% of establishing amounts that they were providing. In contrast, most developing countries have had little or no subsidies due to their lack of resources. They are now prohibited from having subsidies beyond the *de minimis* level (10% of total agriculture value), except in a limited way.

While the developed countries reduced their amber box subsidies to 80%, they increased substantially the exempted subsidies (green box) at the same time. The result is that total domestic subsidies in developed countries are now much higher compared to the base level in 1986-1988.<sup>94</sup> The professed reason for exempting these subsidies in the developed countries from reduction is that they do not distort trade as it is in furtherance of supporting their sector as provided for in article 6 and annex 2 of the AoA. However, a close analysis of Annex 2 paragraph 1 (b) which states in part- "the support in question shall not have the effect of providing price support to producers"- may indicate otherwise. Such subsidies clearly enable the farmers to sell their products at lower prices than would have been possible without the subsidy. Thus farmers are kept in business by receiving subsidies and support from their government. In fact, the subsidies granted even fail to meet the requirements of the AoA. They are therefore trade-distorting in effect.

Some developed countries hide under the *green box* in perpetuating their subsidies. The question that arises is whether there can be trade distortion under the *green box*. In 2005, the EU notified its green box payments of \$90.75 billion.<sup>95</sup> In

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<sup>94</sup> M Khor The WTO Agriculture Agreement: Features, Negotiations and what is at stake (2004) 3

<sup>95</sup> \$27.55 billion was on decoupled income support

2007, the US also notified green box payments of US\$76.2 billion.<sup>96</sup> The US, EU and Japan are by far the largest providers of green box subsidies. Their recent notifications to the WTO suggest that the US had the highest level of green box spending; the EU came second and Japan third.<sup>97</sup>

One major concern with green box subsidies is whether or not payments made under this category meet compliance requirements described in paragraph 1 of Annex 2 of the AoA which states that: "Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production." The WTO Panel on the cotton dispute between the US and Brazil<sup>98</sup> for example found that direct payments for cotton farmers in the US did not qualify as green box because producers were prohibited from planting fruits and vegetables, and therefore effectively linked support with production. Beyond compliance issues, the basic question remains as to whether or not green box subsidies ultimately have distorting effects on production and trade. The WTO G-20 reiterates:

In the presence of distorting payments, 'green' policies do not properly perform their function. On the contrary, their neutral nature is being abused and they merely follow the general orientation of the distorting policy. As a consequence, 'green' money is merely added to 'blue' and 'amber' moneys and becomes undifferentiated in relation to them.<sup>99</sup>

Subsidies under the green box are trade distorting- *green box* spending now represents a large and increasingly important share of WTO Members' spending on domestic support. The Oxfam report reiterates: "By any standards, the AoA was an act of considerable generosity to the EU and the US. Under the AMS reduction commitments, both retained the right to provide around \$80bn in subsidies, in

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<sup>96</sup> Of this, US\$54.4 billion was on domestic food aid, which is widely seen as assisting poor consumers at the national level and having relatively little effect on international trade.

<sup>97</sup> International Centre for Trade and Sustainable Development *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 5

<sup>98</sup> United States- Subsidies on Upland Cotton WT/DS267, 3 March 2005

<sup>99</sup> WTO document JOB (06)/145 Committee on Agriculture, Special Session, and "G-20 Comments on the Chair Reference Paper on Green Box". May 16, 2006

addition to unlimited Green Box and Blue Box payments.”<sup>100</sup> The ability of the EU and the US to maintain high levels of support while complying with WTO rules has profoundly important implications for the structure of competition between producers in developed countries and those in developing countries.

### 3.5.2 Export subsidies

Export subsidies are attempts by the government to interfere with the free flow of exports. Similar to taxes, export subsidies can be specific (a fixed sum per unit) or ad valorem (a proportion of the value exported). The stated reasoning for export subsidies varies depending upon the product, but proponents frequently invoke the notion of self-sufficiency or national security concerns.<sup>101</sup> They are also a policy tool that is used to facilitate exportation of increased levels of production.<sup>102</sup> When effective, export subsidies reduce the price of goods for importers and cause domestic consumers to pay relatively higher prices. Thus they distort the pattern of trade away from production based on comparative advantage and, like tariffs and quotas, disrupt trade flows and reduce world economic welfare. They also have the effect of making the subsidised product so cheap in the importing country that farmers cannot compete and therefore cease production. In following years, when there are no export subsidies on the specific product, the farmers are no longer there and there is a shortage in the importing country, with the result that the product then has to be imported at prices far exceeding what it would have had to pay if its own farmers were still producing the product. Globally, agriculture is the industry most frequently subsidized.

Article 8 of the AoA provides the overall rule by stating that each Member undertakes not to provide export subsidies otherwise than in conformity with this

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<sup>100</sup> S Modwel ‘The WTO and Agriculture: Why Is India so Furious?’ *Journal of World Investment and Trade* (2004) pp.1-31 at 18 quoting Kevin Watkins *North Agricultural Policies and World Poverty* (2003) Conference Paper presented at ABCDE-Europe, London

<sup>101</sup> L Kerkela ‘The Impacts of WTO Export Subsidy Abolition on the Agri-Food Industry in the EU: A Preliminary Assessment’ VATT discussion paper, Helsinki, 2005

<sup>102</sup> R Sandrey ‘Agriculture and the World Trade Organization- what happened since 1995?’ in Trade Law Centre for Southern Africa *The World Trade Organization: An African Perspective, more than a decade later* (2009) 78

Agreement and with the commitments as specified in that Member's Schedule. Article 9 (1) of the AoA lists export subsidies that are subject to reduction commitments. These are:

- (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;
- (b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;
- (c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;
- (d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;
- (e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments; and
- (f) Subsidies on agricultural products contingent on their incorporation in exported products.

Article 9.2 (a) simply states that, subject to some flexibility provided for in 9.2 (b), the maximum quantity of the product in respect of which export subsidies may be granted and the maximum level of outlay for such subsidies are specified for each year in the Member's Schedule. These articles also imply that a Member that has no export subsidy commitment in the Schedule is not allowed to introduce them in the future. However, it is only for products on which they have commitments to reduce the subsidies. Currently, only 25 countries have the right under the AoA to subsidize exports.<sup>103</sup> These 25 Members have a total of 428 individual reduction commitments.<sup>104</sup> While some among them have decided to greatly reduce their subsidies, others have dropped them completely.

From the foregoing, the AoA prohibits export subsidies on agricultural products unless the subsidies are specified in a Member's lists of commitments. Where commitments are listed, the AoA requires WTO Members to cut both the amount of money they spend on export subsidies and the quantities of exports that receive subsidies. Using the base level (1986-1990), developed countries agreed to cut the value of export subsidies by 36% over the six years starting in 1995 (24% over 10 years for developing countries). The developed countries also agreed to reduce the quantities of subsidized exports by 21% over the six years (14% over 10 years for developing countries). During the six-year implementation period, developing countries were allowed under certain conditions to use subsidies to reduce the costs of marketing and transporting exports while least-developed countries were not required to make any cuts.

Export subsidies are trade distorting. Despite these commitments, however, the trend would continue to work towards the unfavourable and even after clearer and somewhat non-equivocal legislation was in place, export subsidies by major developed trading blocs, the EU and the US in particular, would increase - some even

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<sup>103</sup> These countries are: Australia, Brazil, Bulgaria, Canada, Colombia, Cyprus, Czech Republic, EU, US, Hungary, Iceland, Indonesia, Israel, Mexico, New Zealand, Norway, Panama, Poland, Romania, Slovak Republic, South Africa, Switzerland, Liechtenstein, Turkey, Uruguay and Venezuela. Available on: [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd08\\_export\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd08_export_e.htm) (accessed 30 March 2012)

<sup>104</sup> *ibid*

beyond earlier levels, which is not permitted by the AoA.<sup>105</sup> In *European Communities - Export Subsidies on Sugar*<sup>106</sup> the complainants, inter alia, claimed that the European Communities has, since 1995, been exporting quantities of subsidized sugar in excess of its annual commitment levels, contrary to AoA Articles 3 and 8. Specifically, the complainants claimed that the C sugar produced under the EC sugar regime is provided with an export subsidy, within the meaning of the AoA Article 9.1 (c), and that it is exported in excess of commitment levels, in violation of the AoA Articles 3.3 and 8. The Appellate Body upheld the Panel's finding that the European Communities acted inconsistently with Agriculture Agreement Articles 3.3 and 8 "by providing export subsidies on sugar in excess of its commitment levels specified in its Schedule."<sup>107</sup>

Export subsidies are still used by the EU and thus in 2007; the EU was the second largest producer all because of sugar subsidies. Conversely, Mozambique sugar farmers had a difficult time competing in world sugar markets despite their lower production costs because the EU subsidies artificially lowered the world price of sugar.<sup>108</sup> In this way, export subsidies often disrupt and impede economic development in LDCs. In addition, export subsidies can often lead individuals and countries to engage in legislative actions in order to mitigate the impact of export subsidies on them. These activities can include, among others, anti-dumping and countervailing legislation, retaliatory tariffs, and non-tariff barriers to entry. While these actions can sometimes lessen the negative impact of a subsidy on a particular group of individuals, the expenditure of resources in response to a previous intervention generally does not increase the overall economic welfare as the resources employed to mitigate the subsidy's effect could have been used elsewhere in the economy.

Export subsidies have immediate and direct impact on the world market and the subsidized export of agricultural surpluses has been a major source of international

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<sup>105</sup> n 101 above

<sup>106</sup> WT/DS265,266,283/AB/R

<sup>107</sup> Paragraph 290

<sup>108</sup> M Frith 'Bitter Harvest: How EU Sugar Subsidies Devastate Africa' *The Independent* 22 June 2005

trade disputes. The US and EU, for example, have had a number of disagreements and failed negotiations revolving around the issue of agricultural export subsidies. Europe's Common Agricultural Policy (CAP) has evolved into a large export subsidy program that harms most European consumers and taxpayers. The US has pushed for European agricultural reform in the interests of helping those harmed by the subsidies, but each step is met with threats of retaliatory protectionism by Europe. In addition to constant agricultural challenges, US textile manufacturers often claim that export subsidies on East Asian textiles place them at an "unfair" disadvantage.<sup>109</sup> The EU forwarded legislative proposals for reform of the CAP to the European Council and the European Parliament in October 2011.<sup>110</sup> These proposals make changes to the EU's system of direct payments to farmers, market management and rural development policies. In addition, parallel negotiations are taking place on the Commission's legislative proposal for a new medium-term financial framework for the EU budget for the period 2014-2020. However, this reform has not set a final date for the ending of export subsidies.

Like Europe and East Asia, the US has used export subsidies to the advantage of some industries e.g. the cotton industry. These subsidies to cotton producers encourage additional production beyond the scale of the original market for cotton thereby creating large surpluses. In order to eliminate these surpluses, the government then subsidizes agribusiness and manufacturers who buy cotton from the US.

While export subsidies remain a controversial and unresolved issue in international trade, there have been recent calls for the elimination of subsidies. A scholar, Robert E. Hudec, opined:

Most commentators have suggested that, despite all the loopholes in the rest of the Agreement, the export subsidy commitments did have enough rigors to bring about some meaningful reductions in the volume of subsidies. It was perhaps not surprising; therefore, that

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<sup>109</sup> [http://www.scottbeaulier.com/Export\\_Subsidies\\_jch1.doc](http://www.scottbeaulier.com/Export_Subsidies_jch1.doc) (accessed 25 January 2012)

<sup>110</sup> A Matthews *Post-2013 EU Common Agricultural Policy, Trade and Development: A Review of Legislative Proposals* (2011) viii

governments would start feeling the pinch of these commitments at an early time, and that in response they would start looking for ways to circumvent them.<sup>111</sup>

Article XVI of the General Agreement on Tariffs and Trade (GATT), for example, states that:

If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

The Doha Round of WTO negotiations have discussed the possibility of eliminating export subsidies altogether. At the Hong Kong Ministerial Meeting in December 2005, the Hong Kong Declaration set out “to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013.”<sup>112</sup> This represented a major shift in the position of the EU and US, who are the major users of export subsidies, and who had initially only agreed to negotiate a reduction in their use. On cotton, the US is offering to eliminate all forms of export subsidies, which is welcome, but this is already required by a WTO ruling and these payments only represent 10% of overall spending.<sup>113</sup> Yet, despite the WTO ruling, this has not happened and the chances are strong that Brazil will start with effective retaliation in 2012. However, this still leaves the four African countries in exactly the same position they were in when the dispute was originally brought in 2005 i.e. millions of farmers negatively affected. Reduction in quantity commitment levels is yet to be agreed<sup>114</sup>- they would either be reduced

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<sup>111</sup> *Does the Agreement on Agriculture Work? Agricultural Disputes after the Uruguay Round* (1999) 46

<sup>112</sup> <http://www.tcd.ie/iis/policycoherence/wto-agricultural-trade-rules/export-subsidies-reforms.php> (accessed 25 January 2012)

<sup>113</sup> [http://www.oxfam.org/en/news/pressreleases2005/pr051218\\_wto\\_betrayal](http://www.oxfam.org/en/news/pressreleases2005/pr051218_wto_betrayal) (accessed 25 January 2012)

<sup>114</sup> The EU is still resolute on abolishing as they want only a reduction

in equal annual instalments from the applicable commitment levels or applied as a standstill from the commencement until the end of the implementation period at the lower of either the then current actual applied quantity levels or the bound levels reduced by 20%. Developing countries would eliminate their remaining export subsidy entitlements by reducing to zero their scheduled export subsidy budgetary outlay and quantity commitment levels in equal annual instalments by the end of 2016.<sup>115</sup>

While momentum is building for reductions in export subsidies, strong political opposition to reform remains the biggest roadblock. Farming lobbies around the world remain well-organized and powerful, and politicians face strong disincentives to engage in agricultural reform. As a result, export subsidies will continue to be a challenging issue in future trade negotiations. Although there are no exact computation of the true extent of trade distortion caused by export subsidies exists, its negative effects on agriculture cannot be ignored. To this effect, Chisomo Kapulula reiterates:

Despite inexact conclusions from the obtaining computations on the effects of agricultural export subsidies, especially from the major trading blocs, there is general agreement that export subsidies do have trade distorting effects and that for particularly vulnerable blocs like Africa; they can lead to make or break scenarios. The mechanism of regulatory disciplines on export subsidies under the WTO framework has the potential to greatly help in protecting African countries, among other vulnerable blocs, from the negative impacts of heavy export subsidy programmes employed by the major trading powers, against which they have little capacity to prevail in the absence of a meaningful multilateral framework of protection.<sup>116</sup>

The developing and LDCs are eagerly awaiting the reduction in export subsidies as agreed in the UR. Apart from the direct economic effects, the total elimination of export subsidies may have another positive effect since many developing countries maintain high import tariffs in order to protect their farmers against cheap subsidized imports from developed countries. Developing countries would benefit

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<sup>115</sup> <http://www.tcd.ie/iis/policycoherence/wto-agricultural-trade-rules/export-subsidies-reforms.php> (accessed 25 January 2012)

<sup>116</sup> *The Politics of Export Subsidies under the WTO Framework: Impact on African Agricultural Trade?* Second Biennial Global Conference July 8 – 10 2010 27

from liberalizing their own markets and the elimination of export subsidies would make this more feasible without costly adjustments. Furthermore, a reinforcement of the rural population, which depends heavily on agricultural production and is in general disproportionately poor, may contribute to poverty alleviation.<sup>117</sup>

### **3.5.3 The Special Agricultural Safeguard (SSG)**

The SSG is a mechanism open to countries that underwent tariffication to provide temporary protection to domestic farmers when there are sudden surges of imports or falls in world prices. The process of tariffication as provided for under Article 4 of the AoA, was expected to create new opportunities for agricultural trade by removing measures pertaining to: quantitative import controls; variable import levies; minimum import prices; discretionary import licensing; voluntary export constraints; and other trade restrictions maintained by state enterprises. Therefore, the introduction of SSGs in the AoA was a new form of import protection which arose because of concerns by importing countries about the potential disruptive effects of increased import as a result of tariffication. They could be reasonably described as a trade measure for dealing with exceptional circumstances for they were designed to address situations where the competitive pressures from imports were deemed to be excessive.<sup>118</sup>

Article 5 (1) of the AoA provides that any Member may take recourse in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement (restriction of market access) have been converted into an ordinary customs duty and which is designated in its Schedule as being the subject of a concession in respect of which the provisions of this Article may be invoked, if: (a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity; or, but not concurrently: (b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as

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<sup>117</sup> R Peters *Roadblock to Reform: The Persistence of Agricultural Export Subsidies* (2006) 3

<sup>118</sup> D Harris *Special Safeguards and Agricultural Trade Liberalisation* (2008) 2

determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned.

Article 5 therefore makes a distinction on the nature of import surges thereby creating two kinds: volume (or quantity) and price surges. Under the volume-based SSG, the trigger volume derives from: (a) actual imports averaged over the preceding three years; (b) the share of imports in domestic consumption over the same period; and (c) the absolute volume change in consumption for the latest year with available data. The maximum extra duty may not exceed 30% of the ordinary customs duty in effect in the year the SSG is invoked. The volume-based SSG formula includes other variables in addition to the import volume, namely, consumption changes and the degree of market penetration e.g. the SSG formula implicitly rewards "openness" by using a scaling factor, the value of which is smaller, the larger the share of imports in domestic consumption.

While the use of volume-based SSG triggers has the advantage of being based on a verifiable event, the damage to the domestic sector is not volumes of imports, but the net producer income reduction related to the price decline.<sup>119</sup> However, it has its drawbacks i.e. many developing countries do not have the information resources to determine in real time import flows or the possibilities of import surges, and while an import surge can be broadly defined as a sharp, sudden, recent and significant increase in imports, the conceptual, operational and negotiating problem is: how to define what is "sharp," and "sudden," and "recent," and "significant"? Thus, a rise in imports due to domestic production declines would not imply any externally-induced injury to domestic producers, and would not be consistent with the principle of protecting potentially competitive sectors.

With regard to price based SSG trigger, there are five price levels. Additional duties may be imposed if the CIF price falls below the trigger level by a specified amount. The size of the extra import duty rises as the price gap generated by the

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<sup>119</sup> A Valdés and W Foster *The New SSM: A Price Floor Mechanism For Developing Countries* (2005) 15

formula rises: (a) there is no import duty imposed if the price gap is less than or equal to 10%; (b) if the price gap is between 10% and 40% a duty equal to 30% of the amount by which the price gap exceeds 10% may be imposed; (c) if the price gap is between 40% and 60% a duty equal to 50% of the amount by which the price gap exceeds 40% plus the extra duty allowed under (b) may be imposed; (d) if the price gap is between 60% and 75% a duty equal to 70% of the amount by which the price gap exceeds 60% plus the extra duty allowed under (b) and (c) may be imposed; and (e) if the price gap is greater 75% a duty equal to 90% of the amount by which the price gap exceeds 75% plus the extra duty allowed under (b), (c) and (d) may be imposed. The question which then arises is: what is the likelihood of any SSG to be imposed at this stage on the basis of the price trigger? The answer may lie in the fact that, the likelihood that prices will fall to below a reference price set 25 years ago are rather slim.

The rationale behind the SSG lies in the fact that agricultural markets are by nature cyclical and subject to wide variation. As countries reduce their tariffs, they become increasingly vulnerable to external agricultural market instability and to import surges that could wipe out viable, well-established or nascent agricultural production activities.<sup>120</sup> Thus the SSG enables action to be taken upfront when there are initial signs of import surges or price declines sufficient to trigger a possible SSG measure. For example, countries like Kenya experienced 45 cases of import surges in wheat (11 cases), rice (3), maize (5), vegetable oils (7), bovine meat (4), pig meat (6), poultry meat (5) and milk (4). Benin 43, Botswana 43, Burkina Faso 50, Cote d'Ivoire 41, Malawi 50, Mauritius 27, Uganda 41, Tanzania 50 and Zambia 41.<sup>121</sup>

The SSG has sparingly been used- of the 39 countries that have reserved the right to use the SSG for agricultural products; only 12 countries have made use of the safeguards between 1995 and 2012.<sup>122</sup> One reason that developing countries do

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<sup>120</sup> C Espinosa et al. *Special Products and the Special Safeguard Mechanism: Strategic Options for Developing Countries* (2005) 10

<sup>121</sup> M Khor *The Importance of a Special Safeguard Mechanism in Agriculture at The WTO for the Developing Countries* (2007) 3

<sup>122</sup> [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd11\\_ssg\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm) (accessed 15 March 2012). These countries are: Australia, Barbados, Botswana, Bulgaria, Canada, Colombia, Costa Rica, Czech Republic,

not use SSGs is that they were not able to reserve the right because they did not follow the tariffication process. This is due in part to many countries already having removed quantitative restriction (QRs) prior to the completion of the UR at the end of 1994, and having converted them to tariffs.<sup>123</sup> The other reason is expressed by Raul Montemayor who opines, “In addition to the restrictions on the use of the SSG, the SSG modality itself was perceived to be biased against developing countries. The complicated formulas – especially those for computing price-based SSG duties – probably discouraged many government officials from developing countries from pursuing opportunities for invoking the SSG.”<sup>124</sup> On the contrary, this does not appear to be entirely correct. Since LDCs are exempted from tariff reduction, their bound tariffs will remain at the UR level. This would entail that if the SSG does not allow the duty to be raised above the UR rates, and then the LDCs in effect cannot apply the SSG. However, in terms of the SSG an additional duty up to one third the bound tariff may be imposed, i.e. the SSG allows them to exceed bound tariffs.

Under Article 5, Members that undertook such tariffication for a product have been given the benefit of the “special safeguard” provision, which enables them to protect their farmers when imports rise above some specified limits or prices fall below some specified levels.<sup>125</sup> Those that did not undertake tariffication under the UR are not allowed to use the SSG.<sup>126</sup> This is clearly unfair to developing countries, which, with few exceptions, did not have any non-tariff measures and thus did not have to tariffy them. The result is that developed countries, which were engaging in trade-distorting methods, have been allowed to protect their farmers by granting subsidies, whereas developing countries, which were not engaging in such practices, cannot provide special protection to their farmers.<sup>127</sup> In SSA only Botswana, Namibia, South Africa and Swaziland have reserved the right to use SSG on agricultural

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Ecuador, El Salvador, EU, Guatemala, Hungary, Iceland, Indonesia, Israel, Japan, Korea, Malaysia, Mexico, Morocco, Namibia, New Zealand, Nicaragua, Norway, Panama, Philippines, Poland, Romania, Slovak Republic, South Africa, Swaziland, Switzerland-Liechtenstein, Chinese Taipei, Thailand, Tunisia, United States, Uruguay and Venezuela.

<sup>123</sup> A Valdes and W Foster *The New SSM: A Price Floor Mechanism for Developing Countries* (2005) 8

<sup>124</sup> R Montemayor *Implications of Proposed Modalities for the Special Safeguard Mechanism: A Simulation Exercise* (2007) 10

<sup>125</sup> The SSG is only available to 21 developing countries that reserved this right- it is not automatic.

<sup>126</sup> n 121 above, 3

<sup>127</sup> B Lal Das *The WTO Agreements: Deficiencies, Imbalances and Required Changes* (1998)

products.<sup>128</sup> As a result of this, a FAO report concluded that: "Indeed, import surges seem to be more common in product groups that are subject to high levels of subsidies in exporting countries, notably dairy/livestock products (milk powder, poultry parts), certain fruit and vegetable preparations and sugar."<sup>129</sup> To this end, Olivier De Schutter- was of the view that part of the reason for import surges is as a "result of the lowering of import tariff barriers at levels significantly below the tariffs bound under the AoA, which these countries consented to as part of the structural adjustment programs imposed on them as a conditionality to receive loans."<sup>130</sup>

### **3.5.4 Failure of developed countries to effectively reduce their agriculture protection or support**

The AoA was supposed to discipline the high levels of protection in the developed countries and, by doing so, offer very substantial benefits in terms of market access to many developing countries, as they have a comparative advantage in agricultural products. In reality, however, the developed countries have made little progress in reducing agriculture protection and subsidies. Action aid observes that, "Since the AoA came into effect, developed countries in the early 1990s have been juggling the way that subsidies are provided in order to avoid reduction commitments. The EU has progressively moved domestic subsidies from the Amber Box to the Blue and Green Boxes."<sup>131</sup> Oxfam reiterates:

This unfair way of trading has allowed the rich countries to maintain or raise their very high subsidies by switching from one kind of subsidy to another like a magician's trick and categorizing subsidies into trade-distorting domestic subsidies (the amber box) which have to be reduced, and non- trade distorting subsidies (blue and green boxes) which escape disciplines and thus can be increased.<sup>132</sup>

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<sup>128</sup> [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd11\\_ssg\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm) (accessed 15 March 2012)

<sup>129</sup> 'Some trade policy issues relating to trends in agricultural imports in the context of food security' (Paper) (2003)

<sup>130</sup> *International Trade in Agriculture and the Right to Food* (2009) 25. The countries referred to are the developing countries.

<sup>131</sup> *The WTO Agreement on Agriculture: Fight Poverty Together* (2003) 6

<sup>132</sup> [http://www.oxfam.org/en/news/pressreleases2005/pr051218\\_wto\\_betrayal](http://www.oxfam.org/en/news/pressreleases2005/pr051218_wto_betrayal) (accessed 15 August 2011)

Some scholars have argued in favour of box shifting from one box to another as a sign of success. David Blandford and Timothy Josling opine, "...“box-shifting” is a sign of success, not a loophole to be plugged; it should be made as easy as possible to facilitate the move away from price- and production-linked subsidies.”<sup>133</sup>

Although the AoA was supposed to result in decreases in domestic support in agriculture, in fact, the overall value of such support has increased. The AoA obliges developed countries to reduce the AMS. Article 6 (3) provides that:

A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

However, only some types of subsidies fall under the AMS, and two categories of subsidies are exempted. While developed countries reduced their AMS, they also increased their exempted subsidies significantly, thereby offsetting the AMS reduction and resulting in an increase in total domestic support.<sup>134</sup>

### **3.6 The effects of subsidies on developing and least developed countries**

Subsidies are discouraged and subject to discipline as they are potentially trade distorting. The effect of agriculture subsidies in developed countries is that their farm production levels are kept artificially high and their producers dispose of their surplus in other countries, often by dumping on world markets at less than the production cost. Farmers in developing countries incur losses in three ways: they lose export opportunities and revenues from having their market access blocked in the developed countries using the subsidies; they lose export opportunities in third countries, because the subsidising country is exporting to these countries at artificially low prices; and they lose their market share in their own domestic market,

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<sup>133</sup> *Should the Green Box be Modified?* IPC Discussion Paper (2007) 6

<sup>134</sup> B Lal Das *Agriculture talks must first set right UR inequities* SUNS #4704, 10 July 2000 p.2-3

and even lose their livelihoods, due to the inflow of artificially cheap subsidised imports.<sup>135</sup>

### 3.6.1 Dumping

Trade policies remain producer driven, subject to numerous discriminatory trade distortions, without adequate disciplines on anti-competitiveness practices and are often abused for welfare reducing protectionism.<sup>136</sup> This has the probability of leading to dumping which has been defined by the Anti-dumping Agreement (ADA) as the introduction of products into the commerce of another country at less than the cost of production or normal value.<sup>137</sup>

The ADA contain guidelines on how dumping may be countered if it causes or threatens to cause material injury to a domestic industry. Dumping could be perceived to take place if there are export subsidies- as the export price will then be lower than the domestic price. The complex box system has enabled developed countries to retain a large portion of their subsidies which has been said to lead to dumping. In the words of Devinder Sharma “the colourful band of boxes – green box, blue box and amber box – have come in handy for the rich countries to protect its subsidies to agriculture, and at the same time dump the surpluses all over the world.”<sup>138</sup> It is generally accepted that currently practically everything exported from the US and EU involves some level of dumping.<sup>139</sup> Dumping threatens the viability of any agricultural sector particularly the small scale farmer who does not receive state support.<sup>140</sup> Coupled with the reduced tariff barriers in the importing countries, it is

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<sup>135</sup> M Khor *Implications of Some WTO Rules on the Realisation of the MDGs* (2005) 14

<sup>136</sup> E-U Petersmann ‘The Human Rights Approach Advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is It Relevant for WTO Law and Policy’ (2004) 7 *Journal of International Economic Law* pp. 605-627 at 611

<sup>137</sup> Article VI.1 of GATT 1994

<sup>138</sup> D Sharma *WTO and Agriculture: The Great Trade Robbery* (2003) 2 also read: D Sharma ‘Agriculture: WTO Trading Food Insecurity’ *South Bulletin* (2004) 251

<sup>139</sup> P Einarsson *Agricultural Trade Policy as if Food Security and Ecological Sustainability Really Mattered* (2000) [http://web.forumsyd.se/Arkiv/Globala/FS\\_Globalastudier\\_upload/Agtrade.pdf](http://web.forumsyd.se/Arkiv/Globala/FS_Globalastudier_upload/Agtrade.pdf) (accessed 15 October 2011)

<sup>140</sup> D Mudenda *Zambia’s Trade Situation: Implications for Debt and Poverty Reduction* (2005) 23 available at: <http://www.jctr.org.zm/downloads/tradsitu0705.pdf> (accessed 05 May 2011)

easier for the developed countries to dump commodities in the developing countries, with disastrous consequences.<sup>141</sup>

### 3.6.2 Lack of market access

Market access is pertinent in agricultural trade and it is covered in article 4 of the AoA. Market protection is done through tariffs- applied and bound tariffs.<sup>142</sup> While developed countries have had access to African markets, the opposite may not be entirely true- the EU and US have high tariffs and other trade barriers such as stringent sanitary and phytosanitary measures that are used to keep agricultural imports out. The tariffs on agricultural goods in the EU and US are four to five times those applied to manufactured goods, and peaks in excess of 100 per cent- for groundnuts in the US and dairy produce in Europe, for example, - are common.<sup>143</sup> While the poorest African countries may not be able to produce an exportable surplus of dairy products, they could do so for beef, sugar and cotton. However, beef and sugar, are the most protected products in the EU while the US cotton policy hinders African countries whose main export is cotton. The average level of subsidization in the US cotton sector in 1998-2007 (50%) was at least twice as high as in any other sector except rice. In years with lower cotton world prices, the level of subsidization reached 70-90% of the value of production. In the EU, cotton subsidies were on average 71% as large as the value of production in 2000-2005, with a peak of 140% in 2003.<sup>144</sup>

In some instances, market access is limited only to primary and not semi-processed products e.g. Cameroon and other cocoa producing countries can export raw cocoa to the EU markets at 0% tariff but if they were to add value, they would be met with a tariff of 170%. Thabo Mbeki firmly laments:

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<sup>141</sup> D Sharma *Trade Liberalization in Agriculture: Lessons from the First 10 Years of the WTO* (2005) 18

<sup>142</sup> An applied tariff is the actual or fixed tariff rate while the bound tariff is the maximum rate of tariff allowed by the WTO to any Member state for imports from another Member state.

<sup>143</sup> K Watkins and J von Braun 'Time to stop dumping on the world's poor' (2002) *IFPRI Annual Report* available at: <http://www.ifpri.org/sites/default/files/publications/ar02e1.pdf> (accessed 10 February 2012)

<sup>144</sup> M Jales *How Would A Trade Deal On Cotton Affect Exporting And Importing Countries?* (2010) 2

Critical in this regard is access of our products into the food markets of the developed countries, some of which continue to subsidise their own agriculture in a context that verges on intellectual, economic and social obscenity and brutal selfishness.<sup>145</sup>

In fact, part of the reason why the Doha has stalled is due to lack of granting of market access by emerging economies like India, the stance taken by the US on domestic subsidies, and the EU on agricultural tariffs.<sup>146</sup>

### **3.6.3 Unfair and unmediated competition**

Most African countries maintained import substitution policies and state monopolies and support in various industries, including agriculture. However, this was failing and as such they turned to the World Bank and IMF in the 1980s for financial support. The World Bank and IMF put up structural adjustment programmes (SAPs) which were intended to help developing countries, among other things, manage their resources. Therefore, developing countries were required to reduce most of their trade barriers by dismantling their market supports and control. While this was the case with developing countries, the same cannot be said of developed countries. There is the suggestion that this has led to unwarranted and unjustified increased competition among small-scale farmers and subsidized and supported industrialized producers.<sup>147</sup> Deborah Scott<sup>148</sup> reiterates that "Increased competition from the EU's highly subsidised agricultural products... could mean the loss of domestic and regional markets for millions of African smallholder farmers. And loss of markets means loss of livelihoods, which in Africa often leads to loss of life altogether."

Further, the use of subsidies by developed countries often pushes poor farmers out of global agricultural trading markets. Small farmers in developing and LDCs suffer on several counts from developed countries' farm policies which lower prices for farm produce. Unable to compete against subsidized competition, the

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<sup>145</sup> Former President of South Africa in reaction to the Doha Declaration in 2001

<sup>146</sup> Pascal Lamy WTO Director General at the *Africa Investment Forum* Johannesburg, 9-11 October 2006 available at: [http://www.wto.org/english/news\\_e/sppl\\_e/sppl42\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl42_e.htm) (accessed 10 November 2011)

<sup>147</sup> TA Wise *The Limited Promise of Agricultural Trade Liberalization* (Discussion Paper No. 19) (2008) 13

<sup>148</sup> K Bertow & A Schultheis *Impact of EU's Agricultural Trade Policy on Smallholders in Africa* (2007) 37 available at: <http://www.germanwatch.org/handel/euaf> (accessed 04 May 2011)

small scale farmers are often pushed out of international and even domestic markets. The upshot is an agricultural trading system in which success depends less on comparative advantage than on comparative access to subsidies.<sup>149</sup>

### **3.6.4 Subsidies are in contravention of commitments**

Article 8 of the AoA does not permit a Member to provide export subsidies otherwise than in conformity with the Agreement and with the commitments as specified in that Member's Schedule. While article 9.1 lists the kind of export subsidies subject to reduction, article 10.1 provides that export subsidies not listed in article 9.1 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments. Therefore, subsidies are regarded as trade distorting if a country acts in contravention of its subsidy commitments.

In *US- Subsidies on Upland Cotton*<sup>150</sup>, Brazil requested consultations with the United States regarding prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the US producers, users and exporters of the US upland cotton industry. Brazil contended that these measures were inconsistent as applied with the obligations of the United States under the WTO. Brazil also contended that US' domestic support programmes were not protected by the Peace Clause, and this resulted in serious prejudice to Brazil's interests in the form of price suppression in the world market. The Panel ruled that, "regarding export credit guarantees issued under the revised GSM 102 programme after 1 July 2005 the United States acts inconsistently with Article 10.1 of the Agreement on Agriculture by applying export subsidies in a manner which results in the circumvention of United States' export subsidy commitments with respect to

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<sup>149</sup> K Watkins and J Von Braun *Time to Stop Dumping on the World's Poor* (2002) 5

<sup>150</sup> WT/DS267/AB/RW, 3 March 2005

certain unscheduled products and certain scheduled products, and as a result acts inconsistently with Article 8 of the Agreement on Agriculture.”<sup>151</sup>

The US is yet to implement the recommendations made by the Dispute Settlement Body (DSB). A study done by the International Centre for Trade and Sustainable Development (ICTSD) demonstrates that the average trade-distorting support provided to US cotton producers in 1998-2007 was US\$ 2,248 million. Had cotton subsidies and tariffs been reduced in 1998-2007, the world price of cotton would have increased by 6% on average, with a range between 2% and 10%.<sup>152</sup> Further, unilateral domestic reforms in US and EU cotton subsidies applied over the entire 1998-2007 period, the world price would have increased by 0.7% on average. Thus, farmers in developing and LDCs could have gained from an average 6% increase in world cotton prices over the same base period (1998-2007) considering the fact that cotton is one of the few sectors in which LDCs account for an important share of world exports.

Similarly, if African proposals that are included in the Doha draft were applied to trade flows over the ten-year period, the US and EU cotton production would have declined by 9% and 24% respectively.<sup>153</sup> This would have led to a 2% increase in production for Benin, Burkina Faso, Chad and Mali.

### **3.6.5 Net food exporter to net importer**

Trade in agricultural products, particularly foodstuffs, is of major importance to both importing and exporting countries and is vital for enhancing food security. Whereas developing countries in general, including Low-Income Food-Deficit Countries (LIFDCs), were previously net exporters of agricultural products, since the late 1970s there has been a sharply rising trend in their net food imports which has turned them into net importers of agricultural products.<sup>154</sup>

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<sup>151</sup> WT/DS267/AB/RW, 3 March 2005 at p.176

<sup>152</sup> M Jales *How would a trade deal affect exporting and importing countries?* (2010) vii

<sup>153</sup> *Ibid.* p.viii

<sup>154</sup> A net importer of food can be said to be a country or territory whose value of imported foods is higher than its value of exported foods over a given period of time.

Export subsidies have had the effect of driving down the price of commodities on the world market. Although it can provide cheap food for consumers in developing countries, low prices are also considered harmful to farmers not receiving the subsidy for it is usually wealthy countries that can afford domestic subsidies.<sup>155</sup> The net effect is promotion of poverty in developing countries by artificially driving down world agriculture crop prices.

Agriculture is one of the few areas where developing countries have a comparative advantage, but low market prices encourage developing countries to be dependent buyers of food from developed countries<sup>156</sup>.

While there may be no 'specific' literature to suggest that Africa's slump from being a net exporter to a net importer of food is as a result subsidies by the developed countries, it can be argued that such subsidies provided by rich countries have contributed to Africa becoming a net importer as it cannot trade effectively when the playing field in agricultural trade is not level.<sup>157</sup> In the words of Pascal Lamy, "While it is indeed interesting, if not vital, to understand how Africa moved from being a net-food exporter, to being a net-importer, the goal of this discussion should not be how to bring Africa back to export supremacy. Rather, the goal should be to see how African agriculture can become more efficient and competitive."<sup>158</sup> This statement is rather misguided and one may ask why Africa should not go back to export supremacy. The goal should be, in addition to seeing how African agriculture can become more efficient and competitive, to ensure that Africa returns to its export supremacy. This will not only lead to increased revenues and economic growth but also improvement in the livelihood of the farmers who depend on agriculture for income.

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<sup>155</sup> O De Schutter *International Trade in Agriculture and the Right to Food* (2009) 14

<sup>156</sup> So the local farmers, instead of improving the agricultural and economic self-sufficiency of their home country, are instead forced out of the market and perhaps even off their land.

<sup>157</sup> Some scholars argue that the US and EU, through a combination of domestic price supports and export subsidies, have transformed themselves from a net food importer to a net food exporter see: CG Gonzalez 'Institutionalizing Inequality: the WTO, Agriculture and Developing Countries' (2002) *Columbia Journal of Environmental Law* (Volume 27 Number 2) pp. 431-487 at 447

<sup>158</sup> At a Conference on 'Harnessing Agriculture for Development through Trade' Geneva, 21 February 2011 available at: [http://www.wto.org/english/news\\_e/sppl\\_e/sppl188\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl188_e.htm) (accessed 20 October 2011)

However, the use of subsidies by developed countries has contributed significantly to making sub-Saharan agriculture trade less efficient and uncompetitive. Farm subsidies in the developed countries cost poor countries about US\$50 billion a year in lost agricultural exports. It is estimated that developed countries spend US\$360 billion a year on protecting their agriculture with a network of subsidies and tariffs.<sup>159</sup>

### 3.6.6 Poor farmers pushed out of business

Agricultural subsidies in the developed world mostly go to the biggest farms that need subsidization the least. Thus, the large farms, which are the most profitable because they have economies of scale, receive the most money. Brian M. Riedl, with reference to the US, argues that large farms use their massive federal subsidies to purchase small farms and consolidate the agriculture industry, thus capitalizing on economies of scale and becoming more profitable.<sup>160</sup> In the US, over 90% of money goes to staple crops of corn, wheat, soya beans and rice, while growers of other crops get shut out completely. In the EU, the CAP encourages local varieties and pays out subsidies based upon total area and not production. These subsidies have kept US and EU farmers in business since their costs would otherwise be too high if forced to compete in undistorted markets. The effect is that poor farmers have been pushed out of business as they cannot compete. For instance, the EU pays out €5 billion to milk farmers and this has threatened farmers in developing countries.<sup>161</sup>

### 3.6.7 Flouts principle of fair trade

Prices are the signals by which farmers and other entrepreneurs find out what people want. Since profit is the difference between the value of inputs and the value of

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<sup>159</sup> N Kristof 'Farm Subsidies That Kill' *New York Times*, 5 July 2002

<sup>160</sup> BM Riedl 'Still at the Federal Trough: Farm subsidies for the Rich and Famous Shattered Records in 2001' (2002) available at: <http://www.heritage.org/research/reports/2002/04/farm-subsidies-for-the-rich-amp-famous-shattered-records-in-2001> (accessed 10 February 2012)

<sup>161</sup> <http://www.actionaid.org/eu/news/eu-agricultural-policy-putting-poor-farmers-out-business-says-actionaid-report> (accessed 16 March 2012)

outputs, attempting to maximize profits will cause a farmer to do that work which produces the greatest benefit to him at the least cost. Without the signals of profit and loss, the market has no way of distinguishing between a farmer who has made poor decisions and should change his or her business model, or to reward those farmers who have made good decisions. Thus subsidized farmers may well produce the same worthless product every year and dump it in the ocean, while turning a profit due to subsidies.<sup>162</sup> Unsubsidized farmers who produce a worthless product will eventually have to choose between going out of business and producing something that consumers want. In the long term, subsidies, particularly export subsidies, discourage local production in the importing countries, and create instead a dependency on international markets that represents a major source of vulnerability, particularly as the prices on international markets will be increasingly volatile.

### **3.6.8 Subsidies for political and not economic reasons**

In developed countries, there are strong lobby groups that benefit from agriculture subsidies. Consequently, subsidies at times may not be used for economic but political reasons too resulting in inflated prices at the world market. For instance, in 2008, France demanded that the EU pays its farmers £7 billion as farm subsidies before agreeing to allow for global free talks to take place.<sup>163</sup> It has also been stated that politician also pay out subsidies in order to gain votes and stay in political power. Daniel Griswold et al conclude:

The U.S. government continues to subsidize the production of rice, milk, sugar, cotton, peanuts, tobacco, and other commodities, while restricting imports to maintain artificially high domestic prices. The competition and innovation that have changed the face of the planet have been effectively locked out of America's farm economy by politicians who fear farm voters more than the dispersed consumers who subsidize them.<sup>164</sup>

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<sup>162</sup> O De Schutter *International Trade in Agriculture and the Right to Food* (2009) 15

<sup>163</sup> <http://www.telegraph.co.uk/news/worldnews/europe/3513511/France-demands-7bn-farm-subsidies-before-talks-begin.html> (accessed 16 March 2012)

<sup>164</sup> D Griswold, S Slivinski & C Preble 'Six Reasons to Kill Farm Subsidies and Trade Barriers: A no-nonsense Strategy' (2006) *Reason* available at: <http://reason.com/archives/2006/02/01/six-reasons-to-kill-farm-subsidies> (accessed 03 October 2011)

### 3.6.9 Loss of potential earnings

The use of subsidies by some developed countries has led to loss of potential earnings, livelihood and employment for African countries whose economies rely heavily on agriculture. Claire Godfrey criticizing the EU's CAP observed "Not only does the Common Agricultural Policy hit European shoppers in their pockets but strikes a blow against the heart of development in places like Africa. The CAP lavishes subsidies on the UK's wealthiest farmers and biggest landowners at the expense of millions of poorest farmers in the developing world."<sup>165</sup> For instance, while farmers in Europe are guaranteed a price for their sugar- which is three times higher than the world price-, the same cannot be said of some African countries that have a comparative advantage in producing the same product. Mozambique produces its sugar at less than £286 per tonne making it the world's most efficient producer but loses more than £70 million a year because of restrictions on importing into Europe coupled with the dumping of cheap exports at its door, while 12,000 workers in Swaziland have lost their jobs in 2008 because the local industry cannot compete.<sup>166</sup> It is estimated that sugar subsidies has caused the world prices to fall by 17%.<sup>167</sup> The International Food Policy Research Institute (IFPRI) estimates that the impact of subsidies cost developing countries US\$24 billion in lost incomes going to agricultural and agro-industrial production; and more than US\$40 billion is displaced from net agricultural exports.<sup>168</sup>

### 3.7 Challenging agricultural subsidies

The AoA has not been effective in disciplining the use of agriculture subsidies by the developed countries. The question which then arises is whether developing or LDCs can challenge the use of agriculture subsidies under the SCM. In the past, the developed countries were protected by Article 13 of the AoA- simply referred to as the 'peace clause'. The peace clause prohibited most challenges to agricultural

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<sup>165</sup> Trade Policy adviser for Oxfam. Available at: <http://www.independent.co.uk/news/world/politics/eu-subsidies-deny-africas-farmers-of-their-livelihood-478419.html> (accessed 27 January 2012)

<sup>166</sup> *ibid*

<sup>167</sup> [http://www.oxfam.org.uk/resources/policy/trade/downloads/bp31\\_dumping.pdf](http://www.oxfam.org.uk/resources/policy/trade/downloads/bp31_dumping.pdf) (accessed 27 January 2012)

<sup>168</sup> <http://www.ifpri.org/sites/default/files/pubs/media/trade/trade.pdf> (accessed 27 December 2012)

subsidies under the SCM as long as countries complied with their obligations under the AoA and did not exceed the level of support they provided to a specific commodity in 1992. However, the peace clause applied only “during the implementation period,” which expired on 1 January 2004.

Therefore, it can be stated that agricultural subsidies should fall within the disciplines of the SCM. Hilton Zunckel opines “it would be a logical progression to bring the subsidies provisions of the Agreement on Agriculture under the provisions of the Agreement on Subsidies and Countervailing Measures.”<sup>169</sup> Accordingly, all agricultural subsidies are now subject to challenge under the provisions of the SCM—regardless of whether they are categorized as export subsidies or Amber, Blue, or Green Box domestic support.<sup>170</sup> It has been suggested that agricultural subsidies are still protected from challenge under the SCM despite the expiration of the peace clause. This argument is based primarily on the contention that the AoA’s specific provisions on agricultural subsidies should prevail over the general subsidy rules of the SCM if the two conflict.<sup>171</sup>

Article 21 of the AoA provides that the provisions of GATT 1994 and of other Multilateral Trade Agreements (this includes the SCM) shall apply subject to the provisions of this AoA. In addressing the relationship between the AoA and the SCM, the Appellate Body in the *US-Subsidies on Upland Cotton* case rejected the argument made by the US that because these payments were consistent with the AoA provisions on domestic support, they were exempt from Article 3.1 (b) of the SCM Agreement’s prohibition on import substitution subsidies. The Appellate Body observed that: “[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. . . Article 3.1 (b) of the SCM Agreement can be read together with the Agreement on Agriculture provisions

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<sup>169</sup> ‘The Reform of Agricultural Subsidies Lights upon Pandora’s Boxes’ Unpublished LLM Thesis, World Trade Institute, 2001 75

<sup>170</sup> RH Steinberg and TE Josling ‘When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge’ (2003) *Journal of International Economic Law* (Volume 6 Number 2) pp. 369-417 at 388

<sup>171</sup> M Porterfield ‘U.S. Farm Subsidies and the Expiration of the WTO’s Peace Clause’ (2006) *University of Pennsylvania Journal of International Economic Law* (Volume 27 Number 4) pp. 1002-1042 at 1009

relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms.”<sup>172</sup>

Therefore, developing and LDCs can take action against the developed countries where it is established that: (i) the exports from a particular developed country is causing injury to its domestic agriculture, or (ii) the subsidy in the particular developed country is causing serious prejudice to the exports from that affected country. So far, sub-Saharan countries have only joined as third parties in a number of cases before WTO’s Dispute Settlement Body (DSB) e.g. Benin, Chad, Côte d’Ivoire, Kenya, Lesotho, Madagascar, Malawi, Mauritius, South Africa, Tanzania, Swaziland, and Egypt.<sup>173</sup>

### **3.8 Prospects under the Doha Development Agenda (DDA)**

The Doha Development Agenda (DDA) or Doha Round started in 2001 and was on-going as of 2012.<sup>174</sup> One of the key areas that the DDA seeks to achieve is to reduce the developed countries high subsidies which have made the playing field in agricultural trade uneven. Subsidies of the developed countries have affected Africa’s developing and LDCs agricultural trade on the global markets. It is hoped that the DDA will reduce the subsidies of the developed world that have made it difficult for Africa to compete on international markets and flooded African markets with cheap imports thereby helping to level the playing field for Africa by correcting historical injustices in the world trade rule-book.<sup>175</sup> In this vein, the 2008 Draft Modalities<sup>176</sup> shows advances on several of those issues:

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<sup>172</sup> Appellate Body Report, US- Subsidies on Upland Cotton WT/DS267/AB/R, 3 March 2005 at p. 549

<sup>173</sup> It is suggested the lack of participation could be due to the low share in world trade of 3%. They therefore export mostly a few commodities and the priority for them is to remove supply-side constraints which have prevented them from increasing and diversifying their exports. See: K Addo and E Kessie *African Countries and the WTO negotiations on the Dispute Settlement Understanding* (2009) 4

<sup>174</sup> For purposes of the discussion, the scope is limited to the issues raised in this paper- SDT, SSG and subsidies.

<sup>175</sup> [http://www.wto.org/english/news\\_e/sppl\\_e/sppl188\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl188_e.htm) (accessed 20 October 2011)

<sup>176</sup> World Trade Organization (WTO) 2008, TN/AG/W/4/Rev.3. The term “modalities” embraces a number of elements of the process by which the participating governments conduct negotiations for reduction of trade barriers. It includes the product coverage, the negotiating tool, the extent of reduction, the base level taken into consideration for applying the reduction, the period of implementation of agreed reductions etc.

- Overall Domestic Subsidies that are trade distorting (Aggregate Measure of Support (Amber) + *de minimis* + Blue), would be cut further, and per product Amber Box support is capped. Green Box provisions, particularly on income support, have been tightened to ensure that are really decoupled from production levels, and there are stricter rules for monitoring and surveillance;
- Market Access and tariffs would be cut according to a formula that imposes deeper cuts on higher tariffs. The Special Safeguard (SSG) will be eliminated in 7 years. Tariff escalation would also be reduced, and tariffs and tariff quotas should be simplified, and their administration will be better monitored. The liberalization of tropical products is also accelerated. Least developed countries would have duty-free and quota-free market access for at least 97% of products; and
- Export Subsidies in industrialized countries would be eliminated over a transition period of 5 years (with half of the elimination happening by the end of the second year). There are also tighter provisions on export credit, guarantees and insurance, international food aid (see below), and exports from state-owned trading enterprises.

Unfortunately, the Draft Modalities still maintains important levels of distorting domestic support in industrialized countries and leaves open several possibilities that may compromise market access for developing countries e.g. Sensitive Products (SP).

Furthermore, developed countries are expected to reduce their tariffs on the average by 54%, while developing countries by 36% LDCs are exempted from reduction commitments. Developed countries will reduce their OTDS by between 70-80% and all forms of export subsidies are supposed to be eliminated by 2013 and 2016, respectively by developed and developing countries.

LDCs are part of the Africa-Caribbean Pacific (ACP) Doha Negotiating Group in agriculture and they support special treatment for 'strategic products' for developing countries for food security and rural development.<sup>177</sup> Unlike many other LDCs, some LDCs' interest in agriculture negotiations is not confined to a single product as export concentration is low.<sup>178</sup> Thus, participation in the WTO agricultural negotiations is important because of its large potential to enhance agricultural production and exports. The sector has a vast potential for providing much-needed resources for development and also for poverty reduction.<sup>179</sup> It is hoped that the DDA can make a modest contribution in helping lift Africa's agriculture by giving LDCs duty-free, quota-free, access to export markets.

Under the DDA, there is also proposed a Special Safeguard Mechanism (SSM) which is seen as an important tool for developing countries to safeguard their vital agriculture sector for purposes of food security, livelihood security and rural development. The group leading the advocacy for SSM is the Group of 33, which comprises more than 40 developing countries in the WTO with mainly defensive interests in agriculture.<sup>180</sup> The G33 has so far succeeded in getting the SSM accepted in principle in the WTO's July 2004 Framework on Agriculture and the WTO's Hong Kong Ministerial Declaration of December 2005. Even though all WTO members have in principle accepted that a SSM will be established, some developed countries (particularly the United States) and some developing countries with an export interest in agriculture (such as Thailand, Argentina, Paraguay, Uruguay) have sought to restrict the use of the SSM, for example by limiting the number of times it can be used, and by limiting the remedy (i.e. the degree to which the SSM import tariffs can be raised).<sup>181</sup> A review of the SSG under the DDA is needed essentially because of the continuing distortions in the global agricultural market, caused by export subsidies

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<sup>177</sup> S Nair *The Doha Development Agenda Impacts on Trade and Poverty* (2004) 2

<sup>178</sup> For example Zambia

<sup>179</sup> Trade Policy Review for Zambia WT/TPR/S/219 at p.51

<sup>180</sup> The G-33 countries include Antigua and Barbuda, Barbados, Belize, Benin, Botswana, China, Congo, Cote d'Ivoire, Cuba, Dominican Republic, Grenada, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Mauritius, Madagascar, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, and Zimbabwe.

<sup>181</sup> M Khor *The Importance of a Special Safeguard Mechanism in Agriculture at the WTO for the developing countries* (2007) 2

and domestic subsidies, mainly in developed countries, that artificially depress prices and thus facilitate cheap imports into the developing countries.

Therefore, the completion of the Doha Round remains the most promising option for achieving agricultural trade for Africa. However, the Doha Round negotiations have stalled. With the stalemate, this may not be feasible. Pascal Lamy observes, "It is fair to note that in the current deadlock the main actors are the US on domestic subsidies, the EU on agricultural tariffs and emerging economies like India on market access also."<sup>182</sup> Opening up markets further is one of the most important contributions the Doha Round can make to stimulate the world economy and thus allowing all nations to benefit from global economic progress.<sup>183</sup> So dire is the situation that the LDCs will suffer the most if the round drags on and is not concluded any time soon.<sup>184</sup> Rupiah Banda<sup>185</sup> laments, "The Doha Agenda is an important platform to create reasonable progress towards the attainment of sustainability and equity in global trade. Delays in concluding the talks are of particular concern to our countries." Thus, alternative options may offer prospects for promoting agricultural reforms in the future and may need to serve as fallback options should the Doha Round not be completed.<sup>186</sup> The stall has led to suggestions that it is time for the international community to acknowledge the fact that the Doha is dead and move on.<sup>187</sup> Others have opined that while no government has yet declared that the Doha Round is dead, it is clearly on life support.<sup>188</sup>

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<sup>182</sup> Statement by Director General, Pascal Lamy at the *Africa Investment Forum*

<sup>183</sup> P Love and R Lattimore *International Trade: Free, Fair and Open?* (2009) 89

<sup>184</sup> <http://www.thestandard.co.zw/business/32029-integration-the-way-forward-for-sadc.html> (accessed 05 November 2011)

<sup>185</sup> Former President of Zambia on 'Harnessing Trade for Least Developed Development and Transformation' 10 May 2011, Istanbul, Turkey available at: <http://zambianewsfeatures.com/webblog/index.php/archives/929> (accessed 10 November 2011)

<sup>186</sup> C Perez del Castillo et al. *The Doha Round and Alternative Options for Creating a Fair and Market-Oriented Agricultural Trade System* (2009) 3

<sup>187</sup> S Schwab *After Doha: Why the negotiations are doomed and what we should do about it*, Foreign Affairs, May/June 2011 available at: <http://www.voxeu.org/index.php?q=node/6584> (accessed 05 November 2011)

<sup>188</sup> A Matthews *Life after the Doha Round* (2011) available at: <http://capreform.eu/life-after-the-doha-round/> (accessed 05 November 2011)

### 3.8 Conclusion

There is cruel irony at the heart of the current agricultural trading system. While in developed countries agriculture represents a small share of national income and employment (typically less than 2%), by contrast it accounts for an average of 25% GDP in Africa's developing and LDCs. Despite the fair market belief that ostensibly underlies the AoA; the Agreement has only enabled developed countries to maintain trade-distorting subsidies and import restrictions, and has thereby failed to achieve its stated objective of creating a "fair and market-oriented trading system". Thus, developed countries continue to systematically use subsidies to skew the benefits of agricultural trade in their favour. The domestic support provisions, use or maintaining of export subsidies by the EU, US, Japan etc., coupled with lack of effective subsidy reduction commitments by the developed countries have negatively affected the agricultural playing field. As a result, SSA' agricultural sector is limited in its quest to compete against subsidized agricultural products from the developed countries.

Although the SSG can be used in times of import surges of highly subsidized agricultural products, it is not available to most developing countries thus compromising their ability to protect their farmers against import surges or price declines in their markets. It is argued that a good agricultural trading system's success must be based on comparative advantage than on comparative access to subsidies. Africa is endowed with good weather and arable land thus affording the continent a comparative advantage over other continents e.g. South America. The peace clause which shielded some developed countries has since expired, hence developed and LDCs African countries can challenge developed countries' subsidies (either under the AoA or SCM) that affect their agriculture sector rather than only joining as third parties. Though, developing and LDCs can have recourse to Article XIX of the GATT and the SCM to protect their agricultural sector, the conditions are quiet onerous to satisfy. Perhaps, a glim of hope that was in the completion of the DDA is slowly fading due to the fact that it has stalled.

## CHAPTER 4

# THE OBLIGATIONS CREATED BY THE SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS UNDER THE AGREEMENT ON AGRICULTURE

### 4.1 Introduction

Global trade rules make a distinction between developed and developing countries and they do appear to recognize the special vulnerability of countries at lower levels of development and the need to fashion appropriate policies that are inclusive and that would ensure their full integration into the global trading system.<sup>189</sup> However, a closer look at the substantive and procedural rules of the system as they have evolved in the last fifty years suggests apathy, a lack of serious commitment to develop rules that would benefit poor countries, and a tendency towards exclusivity rather than inclusiveness.<sup>190</sup>

In response to serious concerns that arose during the decolonization period of the 1950 and 1960 about the fate of newly independent countries in Africa, Asia, and Latin America, some effort was made to fashion trade rules that were sensitive to the vulnerable situation of these countries; the concept of SDT emerged and encapsulated the totality of the responses to the development concerns within the multilateral trade system.<sup>191</sup> SDT, thus, refers to the set of trade rules that address the complex challenges of development and to respond to the inequitable distribution

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<sup>189</sup> U Ewelukwa ‘Special and Differential Treatment In International Trade Law: A Concept In Search Of Content’ (2003) *North Dakota Law Review (NDL Rev. 831)* pp. 831-878 at 833

<sup>190</sup> W Kerr ‘A Club No More - The WTO after Doha’ 3 *The Estey Centre J.Int'l L. & Trade Policy* 1 (arguing that since its inception, the GATT and its successor the WTO have been able to operate in a manner that is more consistent with a club that an inclusive organization that encouraged the active participation of all its members); see also Thomas MacBride “Rejuvenating the WTO: Why the U.S. Must Assist Developing Countries in Trade Disputes” 11 *Int'l Legal l Legal Perspective*. 65, 69 (Spring, 1999) (noting that many critics have accused developed nations of manipulating global trade rules to its sole benefits, with little regard for the needs of developing countries).

<sup>191</sup> n 174 above

of wealth among participants in the system. Even though the practice of bestowing special treatment to developing countries goes back to the 1950s, the term "special and more favourable" treatment first appeared in the 1979 Tokyo Round Declaration which recognized "the importance of the application of differential measures in developing countries in ways which will provide special and more favourable treatment for them in areas of negotiation where this is feasible".<sup>192</sup> The enabling clause was adopted in order to permit trading preferences targeted at developing and least developed countries which would otherwise violate Article I (Most Favoured Nation-MFN clause) of the GATT. The enabling clause allows developed countries to give preferential treatment to poorer countries i.e. LDCs. Article I (2) of the GATT provided for a Generalized System of Preferences (GSP).<sup>193</sup>

Since its introduction into international trade discourse, the concept of SDT has evolved through successive trade rounds and has undergone a series of changes, as views about the importance of free trade under the global trading system changed.<sup>194</sup> Traditionally, SDT was based on the recognition that developing countries faced conditions that were different from those in developed countries and that these conditions required that developing countries be treated differently under the multilateral trading system. Thus, the basic content of SDT provisions had three main parts: (i) better market access for products from developing countries so they could boost economic development through exports; (ii) a lower level of obligation for developing countries- providing them with necessary flexibility to protect their markets and pursue policy options appropriate for development and industrialization; and (iii) broad exemptions from various GATT agreements.<sup>195</sup>

The objective of this chapter is to examine in-depth the efficacy of the SDT provisions under the AoA. This will be done by focussing on certain SDT provisions in the AoA and GATT and scrutinizing whether they are effective tools that

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<sup>192</sup> *ibid*

<sup>193</sup> The GSP is a system of exemption from the MFN principle that obliges WTO member countries to treat the imports of all other WTO member countries no different than they treat the imports of other trading partners.

<sup>194</sup> n 174 above, 835

<sup>195</sup> *ibid*

developing and LDCs can benefit from in their quest to protect their agriculture industries.

## 4.2 Special and Differential Treatment (SDT) provisions

The preamble to the AoA recognises SDT to be an integral element of the negotiations and has taken into account the possible negative effects of the implementation of the reform programme on LDCs and net food-importing developing countries (NFIDCs). It mentions the need for the developed country members to provide for a greater improvement of opportunities and terms of access for agricultural products of particular interest to developing country members, including the fullest liberalisation of trade in tropical agricultural products and for products of particular importance to the diversification of production from the growing of illicit narcotic crops.

The SDT provisions have their inherent benefits for developing countries in terms of exemption and flexibility in the application of the rules: (a) there are lower reduction percentages and longer implementation periods for the main commitments entered into; (b) there is greater flexibility in the use of certain policy instruments such as investment subsidies and export subsidies; and (c) special commitments were entered into for NFIDCs and LDCs, known as the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*. The main SDT provisions under the AoA can be summarised as:

- Investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers are exempted from the calculation of aggregate measures of support (AMS) (Article 6.2);
- Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years while least developed country

Members shall not be required to undertake reduction commitments (Article 15.2);

- During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies, provided that these are not applied in a manner that would circumvent reduction commitments (Article 9.4);
- The *de minimis* level of trade-distorting domestic support permitted to developing countries (10 per cent) is higher than that permitted to developed countries (5 per cent) (Article 6.4b);
- Government stockholding programmes aimed at enhancing food security. The operation of such programmes must be transparent and in accordance with officially published criteria (Annex 2, paragraph 3 and footnote 5); and
- The provision of foodstuffs at subsidized prices, with the objective of meeting the food requirements of the urban and rural poor on a regular basis and at reasonable prices (Annex 2, paragraph 4 and footnotes 5 and 6).

From the foregoing, it appears that LDCs and developing countries are well covered by the SDT provisions under the AoA. As was discussed under chapter 3, it was observed that the LDCs and developing countries have lamented that they cannot trade fairly under the multilateral trade system and as such, they are the main recipients of highly subsidized agricultural products from developed countries, a situation that threatens the viability of their agricultural sector. This discontent is compounded by their perception of the fact that SDT are not enough protection given their peculiar circumstances and also that some SDT provisions are actually unenforceable, weak and ineffective.

However, considering these six issues, it is clear that developing countries cannot properly benefit from them. Thus, while investment subsidies are not counted

toward AMS, the fact is that even if they were, most developing countries would not exceed their AMS as they simply do not have the money for such subsidies. Developing countries cannot utilise the higher (10% *de minimis* levels) standard as they simply do not have the funds available.

Article XXXVII: 3 of the GATT states that developed countries shall "give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less-developed contracting parties...." The same article also says that developed countries shall "have special regard to the trade interests of developing contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems...." It must be stated that it is difficult to see how these "best-endeavour" provisions could be given legal force through dispute settlement.

In the *European Communities- anti-dumping duties on imports of cotton-type bed linen from India*<sup>196</sup>, the dispute concerned the imposition of definitive anti-dumping duties by the European Communities on cotton-type bed linen from India. Among the issues raised was article 15 of the Anti-dumping agreement (ADA), in particular, what is meant by "special regard given by developed country Members to the special situation of developing country Members." The Panel held that:

It is these facts which we must evaluate to determine whether the European Communities gave adequate consideration to, that is "explored" the possibility of entering into an undertaking with the Indian producers. As noted above, while the obligation is on the European Communities to explore possibilities, we do not consider that this entails acceptance of any particular offer that might be made.<sup>197</sup>

The question then is: should such provisions be considered as substantive components of SDT? The answer is probably that they should not, simply because the provisions are devoid of legal security and do not offer an opportunity, beyond moral persuasion, for putative beneficiaries to insist on their enforcement. Apart

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<sup>196</sup> WT/DS141/R/2000

<sup>197</sup> *ibid*

from being unenforceable, SDT provisions will eventually expire after a certain period of time, therefore the value of the provisions are declining either directly or indirectly. Furthermore, trade preferences under SDT provisions will eventually be eroded with further market liberalization under the WTO.<sup>198</sup>

The Ministers at Marrakesh that crafted the AoA acknowledged that the AoA would have negative impacts on LDCs and NFIDCs. They therefore adopted at the UR in 1994, the *Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed and Net Food-Importing Developing Countries*, as part of the WTO Agreement. While recognizing that implementation of the results of the UR as a whole would generate increasing opportunities for trade expansion and economic growth to the benefits of all participants, the *Decision* also recognizes that during the reform programme leading to greater liberalization of trade in agriculture, LDCs and NFIDCs may experience negative effects with respect to supplies of food imports on reasonable terms and conditions.

Article 16 of the AoA provides that: "Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries." By its very nature, the *Decision* only spells concern as well as frustration among potential beneficiaries, over the slow pace of implementation of the *Decision*.<sup>199</sup> To a large extent, this owes to its very nature - it represents a promise for assistance and is not legally binding. The response of the developed countries to the negative effects of their reforms is food aid and even this is only a promise. It is unclear whether any of the LDCs or NFIDCs has really made serious requests under the *Decision*.<sup>200</sup>

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<sup>198</sup> E Huan-Niemi *Special and Differential Treatment under the WTO Agreement on Agriculture* (2005) 9

<sup>199</sup> B. Vrolijk *Decision on Measures Concerning the Possible Negative Effects on LDCs and NFIDCs* available at: <http://www.fao.org/docrep/003/x7353e/x7353e09.htm> (accessed 13 October 2011)

<sup>200</sup> H Zunckel 'An African voice to fill African mouths: Improving the International Food-aid Regime' (2010) *Trade Negotiations Insights* (Issue 3 Volume 9) 1-15 at 11

### 4.3 Current status of Special and Differential Treatment (SDT) provisions

SDT provisions have been a subject of review under the DDR which proposes to make them more effective and operational.<sup>201</sup> At the WTO Ministerial Conference in Cancun, Members agreed that: "SDT for developing countries shall be an integral part of all elements of the negotiations (...) so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development."<sup>202</sup> The Members also reaffirmed a review of the effectiveness of all existing SDT provisions with a view to ensuring that individual SDT provisions are strengthened and made more precise, effective and operational.<sup>203</sup> In Paragraph 12 (i) of the Doha Decision on Implementation-Related Decisions and Concerns, developing countries sought to address this question. The mandate calls for Members "to identify those special and differential treatment provisions that are...non-binding in character, to consider the legal and practical implications ... of converting [them] into mandatory provisions, [and] to identify those that Members consider should be made mandatory..."

Although this was supposed to have been accomplished by July 2002, agreement has proved elusive. Even for the limited number of proposals on the table in respect of which agreement may be forthcoming as the Doha negotiations proceed, it remains far from clear whether a significant number of best-endeavour provisions will be converted into meaningful mandatory obligations.<sup>204</sup> Progress has also been limited because developed countries appear to have been reluctant to consider changing the balance of legal rights and obligations under any agreement outside the framework of negotiations.<sup>205</sup>

Therefore, unless key SDT provisions are binding and made enforceable through the dispute settlement system, effort directed at strengthening the existing

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<sup>201</sup> [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (accessed 16 March 2012)

<sup>202</sup> WTO, Doha Ministerial Declaration (DMD)– paragraph 15

<sup>203</sup> *ibid*, paragraph 44

<sup>204</sup> A Keck and P Low *Special and Differential Treatment in the WTO: Why, When and How?* (2004) 7

<sup>205</sup> *ibid*

SDT provisions as mandated by the Doha Declaration would be meaningless.<sup>206</sup> Thus it is pertinent that the question of SDT is confronted and addressed in a way which gives some security for the countries which have benefited from it and which creates a legally sound system for the future.<sup>207</sup>

#### **4.4 Conclusion**

The SDT provisions under the AoA, though held to offer some form of “exemption and protection” to the developing and LDCs’ quest for agricultural trade, cannot be held to be sacrosanct as they are ineffective and weak. Despite giving developing and LDCs flexibility and longer implementation periods, they have in practice permitted developed countries to ‘defeat’ the very purpose for which SDT provisions were intended. Though there is a move in the Doha Round to make them more effective, operational and mandatory, their true efficacy remains to be seen as some developed countries object to some of the proposals made by developing countries and LDCs in line with the Doha Ministerial Mandate.

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<sup>206</sup> n 174 above, 877

<sup>207</sup> S Page and P Kleen *Special and differential treatment for Developing Countries in the Doha Round: a forgotten issue?* (2005) 2

## CHAPTER 5

# FLEXIBILITY OF THE AGREEMENT ON AGRICULTURE PROVISIONS IN ENABLING AFRICA'S QUEST FOR TRADE IN AGRICULTURAL PRODUCTS

### 5.1 Introduction

Trade in agriculture is often seen as an effective tool to generate social and economic growth in Africa. However, Africa's share in world agricultural trade has not only remained low, but has decreased, a situation attributed to the effects of developed countries' heavily subsidized agricultural products that periodically flood the continent. Until now, it has been seen that the developed countries have been giving their farmers extra subsidies resulting in increased exports and their prosperity, while farmers in Africa have borne the brunt of these subsidies.<sup>208</sup> One cannot dispute the influence that developed nations have over developing nations. This has led to a situation where developed countries have locked developing and LDCs who are striving to ensure that they too become competitive in agricultural trade into an un-level playing field. Jannie de Villiers reiterates that, "We are still striving to become increasingly competitive as we improve on our productivity, whilst dealing with the challenges that are unique to our region. We are, however, looking forward to the results of the Doha Round of the World Trade Organisation negotiations. We hope to be allowed not only to level the proverbial 'playing field', but also to plough that field, in order for our industry to become a global player to a much larger extent than is currently possible."<sup>209</sup>

The idea of establishing a 'level playing field' is somewhat not as easy as said. The deepening of the reform program under the AoA (improved market access, limits on domestic support and the phasing out of export subsidies) will not result in

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<sup>208</sup> <http://www.inica.org/Agricultural-Subsidies-in-Africa.htm> (accessed 18 January 2012)

<sup>209</sup> Trends In The Grain Trade - Effects On The South African Food And Feed Milling Industry, IGC Conference, London 16 June 2004 10

agricultural producers from most developing countries being able to compete on equal terms with producers from industrialized countries or from the most competitive and highly mechanized producers of certain other developing countries<sup>210</sup>, unless certain aspects are addressed.

The question which is addressed in this chapter is: what can the developing countries and LDCs do in their quest to increase their participation in global agricultural trade? Therefore, the objective of this chapter is to explore one possibility- whether the provisions of the AoA give enough flexibility to developing and LDCs to use their domestic policies to enhance agriculture production and trade.

## 5.2 Agriculture policy changes

In the 1970s and 1980s, African countries exhibited a bias against direct agricultural support mainly due to economic adjustment and market reforms. Perhaps, a key feature of African agricultural policies at that time was that the state was intimately involved in agricultural sector policymaking and strong interventions were the undercurrent of African economic policies.<sup>211</sup> However, in the 1990's government's involvement in the sector reduced, partly due to the World Bank and IMF structural adjustment programs.<sup>212</sup>

The essence of an agricultural policy should be to promote increased competitiveness and, in doing so, avoid causing distortion to the market. Thus the aim of such policy should be to contribute to rural welfare by subsidizing the poor in ways that reduce their vulnerability i.e. direct incentives to increase production.<sup>213</sup> While the rules of international trade in the framework of the WTO have left developing countries with less protection, they also offer them a degree of flexibility

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<sup>210</sup> O De Schutter *International Trade in Agriculture and the Right to Food* (2009) 18

<sup>211</sup> L Nyagah *Agriculture Policies in Africa: Implications and Limitations for Development* (2011) 2 available at: [http://us-cdn.creamermedia.co.za/assets/articles/attachments/33263\\_idasa\\_agriculturepolicies.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/33263_idasa_agriculturepolicies.pdf) (accessed 10 January 2012)

<sup>212</sup> IMF, *External Evaluation of the ESAF (Enhanced Structural Adjustment Facility): Report by a Group of Independent Experts*, Washington, IMF, June 1998

<sup>213</sup> This is taking into account the fact that subsistence farmers are the ones who suffer the most from subsidies when they have excess that can be sold

in order to use trade policies in their sector development efforts.<sup>214</sup> The AoA actually gives developing countries, low and middle income countries enough flexibility to pursue developmental objectives. Article 6.2 provides:

In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops.

Deciphering Article 6.2 entails that developed countries only have an obligation to reduce their subsidies, while developing countries, low income or resource poor producers can give investment and input subsidies to encourage agriculture development. Therefore, a country will not be in violation of the AoA provision if it can establish that the subsidies it is providing pursuant to Article 6.2 are intended to foster or promote agriculture development, which could be: crop diversification, agriculture sector development or rural development. Article 6.2 is premised on the fact that a country is able to use its resources to foster agricultural production. Many African countries that are agrarian by nature are either growing the same crop within their region or busily requesting more aid for trade invariably subject themselves to the whims and caprices of donor nations. Some African countries can actually do better in concentrating on a product in which they have a comparative advantage in than wanting to grow 'everything'. For instance, Botswana and Namibia (beef), Chad (cotton), Lesotho (corn), Malawi (tobacco), Mauritania (millet and sorghum), Sudan (cotton), Tanzania (coffee) and Zambia (Maize).

The provisions of article 6 of the AoA are fortified by annex 2 which provides in paragraph 1, that: "Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they

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<sup>214</sup> HB Hammouda and MS Jallab 'Trade Liberalization and Development: Lessons for Africa' (2007) *Journal of World Investment and Trade* (Volume 8 Number 2) pp.269-287 at 286

have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

- (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and
- (b) the support in question shall not have the effect of providing price support to producers; plus policy-specific criteria and conditions as set out below.”

Paragraph 5 Annex 2 of AoA adds, “Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above....”

Africa therefore, has offensive interests in trying to limit the ample legal room industrialized countries have under current WTO rules to subsidize and protect their own agriculture (for which they also have substantial financial resources). The other way is taking a defensive approach by asking for additional exemptions (that is, “special and differential treatment”) to be able to subsidize and protect their agriculture sector.<sup>215</sup> The combination of offensive and defensive tactics varies by country and partly reflects the heterogeneity of developing countries in general and of their agriculture sectors in particular.

In Africa, Malawi has demonstrated that it is possible for a country to use its domestic policies in fostering agriculture production. Therefore, it is pertinent for purposes of this study that reference is made to Malawi whose government introduced the Agricultural Input Subsidy Programme (AISP) in 2005-2006. The AISP’s core objective has been to increase resource poor smallholder farmers’ access to improved agricultural inputs in order to achieve food self-sufficiency and to

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<sup>215</sup> E Díaz-Bonilla and A Gulati *Developing Countries and The WTO Negotiations* (2002) 21

increase resource poor smallholder farmers' incomes through increased food and cash crop production. The 2005- 2006 programme was politically very popular and widely considered to have been successful, and was consequently continued in subsequent years, with a number of changes in design, scale and implementation between years.<sup>216</sup> It is not surprising that in this context agricultural input subsidies have a long history and major political and economic significance in Malawi. The general price subsidies on smallholder maize seed and fertilisers were, with subsidised credit, a major component of Malawi's agricultural development policy during the 1970s and 80s.<sup>217</sup> The subsidies were phased out in the 1980s as part of World Bank and IMF structural adjustment programs that sought to reduce price distortions and promote diversification of the rural economy.<sup>218</sup> Structural adjustment dismantled the elaborate system of public agencies that provided farmers with access to land, credit, insurance inputs, and cooperative organization. The expectation was that removing the state would free the market for private actors to take over these functions—reducing their costs, improving their quality, and eliminating their regressive bias.<sup>219</sup>

The withdrawal of these subsidies was followed by their fitful reintroduction in response to maize shortages, record maize import, changing political pressures, rising domestic fertiliser prices and low maize productivity. The subsidy was implemented through the distribution of coupons for "smart" fertilizer which recipients could redeem at parastatal outlets at approximately one-third of the normal cash price. The implementation of input subsidies was termed "smart" in the sense that: (a) their benefits in terms of agricultural productivity and food security exceeded what could be achieved by investing the resources in other areas; and (b) they encouraged farmers' purchases of fertilizer on commercial terms, or at least did not impede it, which could result if government input subsidy programs crowded out commercial transactions or undermined investment in fertilizer distribution by

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<sup>216</sup> A Dorward and E Chirwa 'The Malawi Agricultural Input Subsidy Programme: 2005-6 to 2008-9' (2009) *International Journal of Agricultural Sustainability (IJAS)* (Volume 9 Number 1) pp. 1-21 at 4

<sup>217</sup> A Dorward et al. 'Towards 'smart' subsidies in agriculture? Lessons from recent experience in Malawi' (2008) *Natural Resource Perspectives* 3

<sup>218</sup> E Buffie and M Atolia *Agricultural Input Subsidies in Malawi: Good, Bad Or Hard To Tell?* (2009) 1

<sup>219</sup> W Bello *Destroying African Agriculture* (2008) 4 available at: [http://www.fpif.org/articles/destroying\\_african\\_agriculture](http://www.fpif.org/articles/destroying_african_agriculture) (accessed 24 November 2011)

suppliers and agro-dealers. Smart subsidies as those involving (S)pecific targeting to farmers who would not otherwise use purchased inputs (or to areas where added fertilizer can contribute most to yield improvement), (M)easurable impacts, (A)chievable goals, a (R)esults orientation, and a (T)imely duration of implementation, i.e., being time-bound or having a feasible exit strategy.<sup>220</sup> In addition to “smart” fertilizers, 6,000 tons of open-pollinated variety (OPV) maize seed were also offered for sale at a similar discount, but without coupons. This was financed from the government budget, supported by direct budgetary support.<sup>221</sup>

The key successes of Malawi’s subsidy programme arise where it relieves both affordability and profitability constraints to increased staple crop productivity from increased input use, and in doing this both raises land and labour productivity and improves food security for large numbers of poor households through some combination of increased real wages and reduced food prices.<sup>222</sup> It is clear that Malawi has led the way in Africa in demonstrating the opportunities and challenges of implementing a national input subsidy program.<sup>223</sup>

Although Malawi has recently experienced food crisis, this is largely due to erratic rainfall and not the failure of the program.<sup>224</sup> Despite the success, others have had a contrary view. Nicholas Minot and Todd Benson opine, “...the value of input vouchers is less clear. In particular, vouchers appear to be a poor choice for attaining social safety net and poverty reduction objectives, even in rural farming communities, particularly if they are implemented in an inconsistent manner”<sup>225</sup> However, Bingu Wa Mutharika<sup>226</sup> reiterates: “For a long time ... we were told poor African farmers in rural areas must compete through free market structures with

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<sup>220</sup>I Minde et al. *Promoting Fertilizer Use in Africa: Current Issues and Empirical Evidence from Malawi, Zambia, and Kenya* (2008) 5

<sup>221</sup> Ibid

<sup>222</sup> n 216 above, 17

<sup>223</sup> G Denning et al. *Input Subsidies to Improve Smallholder Maize Productivity in Malawi: Toward an African Green Revolution* (2009) (Volume 7 Issue 1) pp.1-9 at 7

available at: <http://www.plosbiology.org/article/info:doi/10.1371/journal.pbio.1000023> (accessed 10 January 2012)

<sup>224</sup><http://www.malawitoday.com/news/123378-ten-districts-hit-food-shortage-malawi-%E2%80%94-wfp> (accessed 12 March 2012)

<sup>225</sup> *Fertilizer Subsidies in Africa are vouchers the answer?* (2009) 7

<sup>226</sup> Former President of Malawi

highly advanced farmers in industrialised countries...How wrong we have been and what a price we have paid...Time has now come for Africa to stand up and take a decision to subsidise our poor farmers so that they can grow enough food beyond subsistence."<sup>227</sup>

### 5.3 Conclusion

While the rules of international trade in the framework of the WTO have left developing countries with less protection, they also offer them a degree of flexibility to use trade policies in their agriculture sector development efforts. Article 6.2 of the AoA allows them to provide investment and input subsidies to low income or resource poor farmers for crop diversification, agriculture sector development or rural development. Replicating the Malawi success requires realignment of domestic agriculture policies which could be a good move to make for imposing the competitiveness of African agriculture.<sup>228</sup> Even if the Doha Round is concluded today, they would still not benefit much if their policies and priorities in the agricultural sector are not right- implementing a wrong policy could spell disaster.<sup>229</sup> Though most countries may have policies, implementation is lacking.<sup>230</sup> Perhaps the perceived weakness in the Malawi case is the sustainability of the program but it is an entertainable and viable option in the absence of another sound option.<sup>231</sup> However, in the absence of viable options, it is a sound policy to follow in the short to medium term.

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<sup>227</sup> <http://af.reuters.com/article/topNews/idAFJJOE62S0IN20100329> (accessed 24 November 2011)

<sup>228</sup> A Oyejide 'African Agriculture in the World Trade Organization' in Ademola Oyejide & William Lyakurwa *Africa and the World Trading System: Selected Issues of the Doha Agenda (2005) (Volume 1)* pp. 107-127 at 125

<sup>229</sup> K Wong and G Heiduk *WTO and World Trade: Challenges In A New Era* (2005) 1

<sup>230</sup> A study done showed that though policies were present, the Zambian government has not implemented many of them. See: S Neubert, M Kömm, A Krumsiek, A Schulte, N Tatge and L Zeppenfeld *Agricultural Development in a Changing Climate: Increasing resilience to climate change and economic shocks in crop production* (2011) 41

<sup>231</sup> Kenya and Uganda's programs that could boost agriculture were not successful although Ghana succeeded in 2008 when it introduced fertilizer subsidies under its Economic Recovery Programme (ERP), see: R Zimmermann; M Bruntrup; S Kolavalli and K Flaherty *Agricultural Policies in Sub-Saharan Africa: Understanding CAADP and APRM Policy Processes* (2009) 83-88

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 Summary of findings

The dissertation's focus was on Africa's WTO member's participation in global trade in agriculture. While trade in agricultural products in the 1960s-1970s was at its peak and Africa was the leading World's net exporter, its participation has diminished in recent times and now stands at 1% in 2011 thus making the continent a net importer of agricultural products. The study discovered that Africa's limited participation can partly be attributed to the inequalities found in the provisions of the AoA which have practically allowed the developed countries' highly subsidized agricultural products on the domestic markets of the developing and LDCs. This has not only affected the viability of the developing and LDCs' agricultural sector, but also limited their participation on the global markets. Furthermore, the study found that, while developing and LDCs are accorded SDT, in the form of slightly lower tariff and subsidy reduction and longer implementation period, it remains totally insignificant compared to the huge concessions and exemptions that are made available to developed countries to protect their existing trade-distorting subsidies. Although the AoA provisions have been found to be iniquitous, flexibility is also granted to developing and LDCs under Article 6.2 of the AoA to use their domestic policies to enhance their agriculture production.

#### 6.2 Conclusions

Agriculture is an important sector to most African countries as it employs at least 70% of the population and is seen as an effective tool for addressing poverty alleviation and promoting economic growth. Globally, agriculture under the auspices of the AoA is hinged on three pillars: market access, domestic support and export competition.

The objectives of the AoA are premised on creating a fair and market-oriented trading system. However, this does not seem to be the case. The provisions of the AoA are unfair and weak. Their weaknesses can be seen from the fact that they have practically allowed the developed countries to systematically use subsidies to skew the benefits of agricultural trade in their favour i.e. 'abuse' of measures on domestic support. Notwithstanding the fact that green box measures are perceived not to be trade distorting, research has shown that they are in practice trade distorting. Export subsidies, though tightly controlled and potentially trade distorting and thereby forbidden, they are still being used especially by the US and the EU to support their exports. Furthermore, the failure to reduce agriculture support as agreed under the UR is also equally trade distorting. The situation is compounded by the fact that the SSG cannot be used effectively owing to its nature and which countries are entitled to invoke it i.e. those countries which underwent tariffication during the UR. The effects of the use of subsidies affect the viability of the agricultural sector in developing and LDCs which make them unable to compete due to the uneven agricultural trade playing field.

Despite the inequalities found in the AoA, the question then is whether the provisions of the AoA could be used effectively by African countries. As has been shown, though certain AoA and the GATT provisions *prima facie* appear to be useful to developing and LDCs, they are not in fact a proper tool that can be used by developing and LDCs in their pursuit to enhance their agricultural trade. The SDT provisions under the AoA, though held to offer some form of "exemption and protection" to the developing and LDCs, are ineffective and weak and appear not to be a concrete tool that can be used by developing and LDCs. Despite giving them flexibility and longer implementation periods, it is argued that other SDT provisions i.e. Article 16 of the AoA and GATT XXXVI.3 are weak and have in practice permitted developed countries to 'defeat' the very purpose for which SDT provisions were intended. Though there is a move in the Doha Round to make them more effective, operational and mandatory, their true efficacy remains to be seen as some developed countries object to some of the proposals made by developing countries and LDCs pursuant to Doha Ministerial Mandate.

The SSG which provides protection in times of import surges or price declines that are likely to threaten the viability of the agricultural sector of a Member is only available to developing countries that underwent tariffication under the UR. The LDCs cannot resort to the SSG thus they will continue to be negatively affected by the developed countries' exports of highly subsidized agricultural products. Though, developing and LDCs can have recourse to Article XIX of the GATT and the SCM to protect their agricultural sector, the conditions thereof are onerous to meet. The SSG is also under review in the Doha Round. It is trite that Africa is endowed with good weather and arable land thus affording the continent a comparative advantage over other continents e.g. South America. Therefore, Africa is looking forward to the successful completion of the Doha Round which has currently stalled.

While the rules of international trade under the framework of the WTO have left developing countries with less protection, they also offer them a degree of flexibility in order to use trade policies in their sector development efforts. Article 6.2 of the AoA allows them to provide investment and input subsidies to low income or resource poor farmers for crop diversification, agriculture sector development or rural development. It is opined that Article 6.2 should be used by the developing and LDCs to broadly support for the development of their agricultural sector. A pivotal example that can be used is the success of the subsidy input program in Malawi. Replicating the Malawi success requires realignment of domestic agriculture policies which could be a good move to make for imposing the competitiveness of African agriculture.

It is stated that even if the Doha Round is concluded today, developing and LDCs could still not benefit much if their policies and priorities in the agricultural sector are not right. Therefore, implementing the right policy is could be key while a wrong policy could spell disaster. Though most countries may have policies, implementation is lacking. Perhaps the perceived weakness in the Malawi case is the sustainability of the program but it is an entertainable and viable option in the

absence of another sound option. However, in the absence of viable options, it is a sound policy to follow in the short to medium term.

### **6.3 Recommendations**

Based on the findings and conclusions reached, the following measures could be taken into consideration in order to enhance the potential benefit accruing to SSA' developing and LDCs in global agricultural trade:

1. It must be stated from the onset that the success of the Malawi input subsidy program is very remarkable and points the direction which most African countries must take. However, the large concern points to its sustainability given the fact that most African countries depend on donors to a large extent. Though it is recommended that most countries should, in the short term, emulate the strides made by the Malawi government in enhancing agricultural food production, a new approach which is properly sustainable is also required. It is therefore recommended that Africa must put in place measures that are specifically designed to attract private investors in the agricultural sector. This will reduce government's role in subsidizing the sector thereby increasing its role in seeking better concessions and market access at the multilateral level.
2. To greatly make use of their comparative advantage in agricultural production, African countries need to create a strong link between their agricultural and industrial sectors as well as expand their export base from primary agricultural commodities to more value-added products. This can be attained through the provision of incentives for private investments on the production and export of processed and semi-processed agricultural commodities thereby effectively restricting developing countries from engaging in product diversification. Such investment is crucial to lessen the vulnerability of African countries from price volatility that is prevalent in the global market for primary agricultural commodities. Thus African countries

should also develop a strong position towards elimination of tariff peaks and tariff escalation on processed and semi-processed agricultural products which greatly discourage exportation of value-added and high priced agricultural commodities.

3. African countries should adopt a firm stand for a quicker elimination of trade distorting domestic support measures and export subsidies since only agricultural producers and exporters in a few developed countries are great beneficiaries of such support programmes while agricultural producers in most African countries are direct victims of the trade distorting effect of such support programmes. In this regard, it is recommended that African countries should not accept flexibilities for a greater provision of trade distorting domestic support measures and export subsidies as a compromise for the continued application of such trade distorting agricultural support programmes in developed countries since the very provision of export subsidies and trade distorting domestic support measures by most African countries is legally restricted under the AoA.
4. Trade distortion can also occur with respect to domestic support. To this end, it is recommended that the domestic support measures listed in paragraphs 5 to 13 of Annex 2 to the AoA (Green Box subsidies) and those listed in Article 6.5 (Blue Box subsidies) must be treated in similar fashion to the existing amber subsidies. In other words, countries should be required to undertake reduction and elimination commitments in respect of such subsidies.
5. The purported protection under the SSG has not been an effective tool which African countries can use to protect their domestic industries which suffer from the import surges of highly subsidized agricultural products that currently flood their markets. It is therefore recommended that the review of the SSG is hastened and its provisions enhanced to ensure protection to Africa's agricultural sector. To this end it is proposed that, first; the focus of Africa should be increased productivity and exports while safeguarding its

agricultural sector; and second, the criteria for triggering the SSG should be simplified for the developing countries e.g. a developing country may take SSG if the import level in a given year exceeds a specified percentage of the average of the previous three years' import. Similarly, for the price trigger, it may be prescribed that a developing country may take SSG if the price of the product falls below a specified percentage of the previous years' average price. Thus the proposed SSM is seen as an important tool for developing countries to safeguard their vital agriculture sector for purposes of food security, livelihood security and rural development.

6. The nature of concessions sought on a multilateral level also matter. It is recommended that African countries should have the political will to undertake tariff commitments in exchange for better market access for their agricultural commodities into major export destinations like the EU, US and India especially on sensitive and highly protected areas.
7. The expiration of the peace clause is advantageous especially to developing and LDCs and now enables them to challenge trade distorting subsidies not only under the AoA but the SCM as well. Therefore, it is recommended that developing and LDCs must be proactive and take action against developed countries' subsidies which threaten the viability of their domestic agriculture sector.
8. Ultimately, the successful conclusion of the Doha Round is a master key to levelling the playing field and gives agricultural products of African countries a chance to compete in global markets. It is reiterated that the success of the Round will depend, *inter alia*, on the ability of the key trading nations to agree on the appropriate levels of ambition in the Non-Agriculture Market Access (NAMA) negotiations as well as in the agriculture negotiations. Therefore, it is recommended that these issues be 'ironed' out so that the Doha round can be concluded.

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