

Report to the Maize Trust

concerning

South Africa's participation as Third Party in the dispute brought by Brazil and
Canada against the United States on agricultural subsidies

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dated

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I. BACKGROUND

i. The dispute

The Government of Canada requested consultations with the United States of America (US) on 8 January 2007 under the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU or Dispute Settlement Understanding) with respect to corn (maize) exports from the US under a host of agricultural subsidy programmes. As a producer and exporter of maize it was strongly suspected by the private sector participants (industry and counsel) in the South African maize value chain that the South African maize sector had a vested interest in the success of such an action. The maize industry raised this with the government. Thereafter, the South African Government indicated via the Minister of Agriculture's Agricultural Trade Forum (ATF) that it was prepared to consider joining such dispute if such initiation is forthcoming from the maize industry. A subsequent exploratory meeting was convened between industry representatives and the government. South Africa did not however join the consultations in Geneva.

During this time discussions had taken place between legal counsel and maize industry executives. In this mix the Maize Trust, being a judicial person acting in an impartial manner for the benefit of the maize value chain as a whole, found it prudent to determine whether there was a 'prima facie' case for the South African Government, together with the industry, to jointly become involved in the WTO dispute. The Trust thus commissioned an opinion to address this determination and to serve as a basis for evaluating the potential action. This was done and the document was made available to the South African Government to expedite the decision as regards official participation in the dispute by South Africa.

On 9 November 2007 Brazil and Canada requested a panel to be established to investigate their claim that the United States has breached its international obligations by providing subsidies that exceeded the levels allowed under the WTO Agreement on Agriculture. If the support was to be properly calculated in accordance with the provision of the Agreement on Agriculture, the US exceeded its commitment levels concerning the maximum amount of money to be paid in favour of agricultural producers in the form of trade distorting support in the six years 1999, 2000, 2001, 2002, 2004 and 2005. Both argued that these violations nullified and impaired the benefits accruing to them under the said Agreement. A single panel was established by the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO) on 17 December 2007.

The wider contextual logic of the dispute could well be regarded as strategically timed for two inter-related reasons. Firstly the WTO's Doha Round of trade talks remained stalled following the impasses that arose post July 2006. It was speculated

to what extent WTO Members would hold off on agricultural disputes, in the hope that the subsidies matter would be addressed and resolved through the negotiation process. The negotiating impasse thus provided an impetus to re-look at dispute options. In addition turning to dispute settlement has some impetus in prompting negotiators to resume the negotiations in order to settle subsidy rules that suit them as opposed to being placed in a position of having to tailor domestic policy to suit the outcome of adjudication. The second related element involves domestic policy considerations. The US legislation that enables the subsidy regime is the Farm Bill which is periodically updated. There was a 2007 update due to be before Congress, and the initial Canadian move could also be perceived as tactically placed to influence the look of the 2007 Farm Bill. To date it seems that neither of these plausible political aims were subsequently met.

ii. The timeline as the dispute unfolded:

The following table sets out an overview of the timeline of the dispute and the activities of the Consultation Group as it unfolded :

| Action | Date |
|--|-------------------|
| Canada requests consultations on claims related to serious prejudice, export subsidies and domestic support (overspending) | 8 January 2007 |
| Floor Inc (later TLC) delivers opinion commissioned by the Maize Trust on South Africa's possible participation | March 2007 |
| Canada requests establishment of panel on claims related to export subsidies and domestic support (overspending) | 7 June 2007 |
| Exploratory meeting held between NDA, DTI, Maize Trust, GrainSA and SAAPA on South Africa's participation | 9 July 2007 |
| Brazil requests consultations on claims related to export subsidies and domestic support (overspending) | 11 July 2007 |
| Inaugural meeting of the Task Team Steering Committee responsible for South Africa's participation held between NDA, Maize Trust, Floor Inc (now TLC), SAAPA –DTI could not attend | 28 August 2007 |
| Inaugural meeting of the Consultation Group responsible for the drafting of SA submission | 28 September 2007 |

| | |
|---|---|
| Request for the establishment of panel by Canada and Brazil on claim related to domestic support only (overspend) | 8 November 2007 |
| Canada withdraws its initial request for the establishment of a panel dated 7 June 2007 | 15 November 2007 |
| Second meeting of the Consultation Group | 10 December 2007 |
| Panel established – South Africa reserves its third party rights | 17 December 2007 |
| Various drafting engagements of the Core Drafting Team | Between meetings of the Consultation Group during 2008 and 2009 |
| Third meeting of the Consultation Group | 12 February 2008 |
| Fourth meeting of the Consultation Group | 18 March 2008 |
| Fifth meeting of the Consultation Group | 14 April 2008 |
| Consultation Group Panelist Workshop held together with the University of Pretoria and the University of the Witwatersrand | 14 April 2008 |
| Consultation Group Drafting Workshop with an International Law Firm specialising in international trade | 18-19 September 2008 |
| Anniversary of dispute– Panel has been established but not composed yet. | 17 December 2008 |
| Sixth and final meeting of the Consultation Group: Dispute remains inactive, but could potentially be revived again as it has not expired (refer to Article 12(12) of the Dispute Settlement Understanding) | 26 June 2009 |

iii. South Africa's participation

It was during the 17 December 2007 meeting of the DSB that South Africa reserved its right to participate in the dispute as a third party. It was the first time since the inception of the WTO in 1995 that South Africa exercised its third party rights in a trade dispute. Other WTO Members which also reserved their third party rights were Argentina, Australia, Chile, China, the European Communities, India, Japan, Mexico, New Zealand, Nicaragua, Chinese Taipei, Thailand, Turkey and Uruguay. As third party South Africa would be able to participate in the case by making written and oral inputs and appearing before the WTO tribunal, called a panel. In terms of the WTO procedures third party rights have to be fully considered in the dispute, without the

third party having to assume the same weight of litigation responsibility that the primary complainants would need to display.

Participation in the case fitted in well with South Africa's objective, including its efforts in the Doha negotiations to further discipline and reduce trade distorting agricultural subsidies. South Africa, and many other developing countries, has long contended that there is an uneven playing field for its farmers who have to compete against the large distorting agricultural subsidies provided by the United States and other developed nations.

South Africa assumed a supporting role appropriate to its experience in WTO dispute settlement and with a view to building capacity for enabling future South African interventions in the WTO's dispute settlement system. As one of the world's foremost producers, and more importantly exporters of maize, South Africa had a vested economic interest in the case, accentuated by the presence of a significant number of small scale farmers in the South African maize sector.

While the dispute is essentially a question as to whether the USA exceeded its notified AMS ceiling or not, the point behind this strictly legal question for South Africa was premised on the notion that, like Brazil, South Africa is disadvantaged because it cannot afford large subsidies. The excessive US subsidies – as the US Upland Cotton dispute found – cause lower prices and distorted market share. South African is at a significant disadvantage given these distortions. So, while this case is about AMS and not an adverse effects case like Upland Cotton was, it is really about preventing the kinds of distortions at issue in Cotton. One of the crucial disciplines that balances out the playing field for developing countries is ensuring that developed country Members like the US keep to their agreed limits.

The basis of the case is premised on the well founded contention that the United States has breached its international obligations by providing agricultural subsidies that exceed the levels allowed under the WTO Agreement on Agriculture. In this vein the establishment of the WTO panel will complement South Africa's efforts in the Doha negotiations to further discipline and reduce trade distorting agricultural subsidies. South Africa, and many other developing nations, has long contended that there is an uneven playing field for its farmers who have to compete against the large distorting agricultural subsidies provided by the United States and other developed nations.

The specific basis of the claim is that when trade distorting United States domestic support is properly accounted for under the WTO Agreement on Agriculture, the United States exceeded its WTO commitment for providing domestic subsidies to its farmers in the 6 years 1999, 2000, 2001, 2002, 2004 and 2005. While the United States has notified the WTO that it has kept within its spending limits, it is contended by the complaining countries that certain programmes have been incorrectly notified

and certain others have been omitted from notification altogether by the United States.

Under its Total Aggregate Measurement of Support (Total AMS) commitments under the WTO Agreement on Agriculture (the so-called 'amber box'), the United States agreed that its level of trade distorting domestic support would not exceed US\$19.9 billion for 1999 and US\$19.1 billion for each subsequent year. The United States claims that its WTO subsidy notifications show that its annual levels of trade distorting support have been within this US\$19 billion level and thus within its WTO commitment. Based on the precedent of the Cotton case that Brazil successfully brought against the United States in 2003, it is evident that when these subsidy programmes are properly accounted for under the WTO Agreement on Agriculture, the level of United States amber box subsidies exceeds the United States WTO commitments in all six years defined in the case claim.

While the exact mathematics of the excess would be for the primary complainants to determine in their submission, the South African team did perform an initial calculation to confirm in broad terms that the claim that the AMS was breached was in fact so. This initial calculation also provided a guide as to which the important programmes (by value) were. This was necessary because as a 3rd party South Africa would not address all 103 measures listed by Canada and Brazil, but only a selection of these. The logic was thus to draft arguments to back the reclassification of US programmes that made the biggest contribution to breaching the AMS limit. The following table sets out the initial calculation that the Core Drafting Team made. The programmes selected were drawn from the original Canadian claims in their panel request (8 June 2007) prior to Brazil's entry into the dispute):

| USA AMS Re-Calculation 1999-2005 | | | | | | | | | |
|--|---------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|--------------------|
| | <u>Status</u> | <u>1999</u> | <u>2000</u> | <u>2001</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> | <u>2005</u> | <u>Grand Total</u> |
| Product Specific AMS as declared | Not disputed | 16,862 | 16,803 | 14,413 | 9,637 | 6,950 | 11,629 | 12,938 | 89,232 |
| Production Flexibility Contract Payments | Declared Green (para 6) | 5,471 | 5,068 | 4,100 | 3,683 | - | - | - | 18,322 |
| Non-insured crop disaster assistance | Declared Green (para 6) | 44 | 73 | 166 | 226 | 111 | 109 | 59 | 788 |
| Crop Disaster Payments (Assistance) | Declared Green (para 8) | 1,239 | 1,834 | 771 | 1,741 | 1,295 | 1,160 | 3 | 8,043 |
| Emergency Feed | Declared Green (para 8) | 270 | 188 | 427 | - | - | - | - | 885 |
| Livestock Indemnity | Declared Green (para 8) | 4 | 5 | - | 100 | 267 | 267 | - | 643 |
| Tree Assistance | Declared Green (para 8) | 7 | 2 | 1 | - | 1,944 | - | - | 1,954 |
| Crop Marketing Loss Assistance (MLA) | Declared non specific AMS | 5,468 | 5,463 | 4,640 | - | - | - | - | 15,571 |
| Direct Payments | Declared Green (para 6) | - | - | - | 1,618 | 5,267 | 5,260 | 5,219 | 17,364 |
| Countercyclical Payments | Declared non specific AMS | - | - | - | 1,804 | 544 | 4,288 | 4,749 | 11,385 |
| Crop & Revenue Insurance | Declared non specific AMS | - | - | - | 2,889 | 1,862 | 1,123 | 756 | 6,630 |
| TOTAL AMS Revised | | 29,365 | 29,436 | 24,518 | 21,698 | 18,240 | 23,836 | 23,724 | 170,817 |
| Scheduled Limit | | 19,899 | 19,103 | 19,103 | 19,103 | 19,103 | 19,103 | 19,103 | |
| AMS Excess | | 9,466 | 10,333 | 5,415 | 2,595 | -863 | 4,732 | 4,620 | 36,298 |
| AMS Excess % | | 48% | 54% | 28% | 14% | -5% | 25% | 24% | |

This calculation proved that taking just 10 of the 103 subsidies listed by Canada and Brazil, the claim was in fact correct, and that using just these items, the US AMS ceiling was breached by between 14% and 48%. Further assurance was found in the fact that the calculation also confirmed the claimants' contention that in 2003 the ceiling was not breached. The highlighted programmes representing the 'high value' were thus selected for attention by the Core Drafting Team.

In addition the economic impacts of this breach were also scoped with a view to underlining South Africa's interest in the dispute. In the case of maize the initial literature survey indicated that in the absence of subsidies United States maize farmers would produce maize at a loss i.e. in the face of unencumbered market conditions they would cease production. The United States would move from the world's largest maize exporter to being a net importer of maize. The United States agricultural economics expert Professor Sumner (University of California Davis) makes the following observation based on recent United States maize crop years, based in part on the precedent of the recent WTO cotton dispute where Brazil successfully challenged US cotton subsidies:

"The fact remains that: price contingent subsidies alone for corn, wheat, and rice are still sizable relative to the total value of production. To put matters in perspective price-contingent subsidies for cotton during 2004–06 ranged from about 12 percent to 64 percent of production. By way of comparison, in 2006 price-contingent subsidies for corn will amount to about 33 percent of production, similar subsidies for wheat will amount to about 29 percent of production, and those for rice will amount to about 42 percent of production. In other words, the magnitude of price-contingent subsidies for these crops is comparable to that of the subsidies found to cause significant price suppression in the cotton case."

The University of Pretoria examined the prior work done by Sumner and then adapted their own Bureau for Food and Agricultural Policy (BFAP) model to fit the South African submission. The highlights of the modelling result were as follows:

A world price shock (increase of 10 percent) was introduced in the BFAP sector model to measure the difference in the revenue earned by the industry over the period under review by the Panel assuming the removal of United States maize subsidies. This quantification was done in order to indicate why it is of concern to South Africa that the United States remains within its agreed limits in providing trade distorting domestic support. The net result indicated a loss of \$600 million (R4.4 billion) to South Africa.

The depression of world maize prices due to United States subsidies had an effect on the South Africa maize industry under all market regimes examined. The South Africa markets were more affected in the years where the local industries were either

trading at import parity (e.g. 1999) or at export parity (e.g. 2005) than when markets were trading at autarky where local demand and supply conditions determine the equilibrium prices. On average a 10 percent increase in the world price of maize would have increased white maize prices by 6.15 percent and yellow maize prices by 6.52 percent. The increase in prices would have stimulated production and as a consequence exports would have grown and imports decreased.

The model assumed world prices for both yellow and white maize to be 10 percent higher than the actual levels. The results suggest that South Africa would have increased maize production by 1.29 million tons, over the period under review. This translates into an annual average increase of 2.02 percent in production and as a consequence a 17.54 percent increase in exports of white and yellow maize.

Finally, to determine the impact on total revenue the model then multiplied the respective maize prices by the tons produced. Not only did the net revenue increase due to increased production, but the actual crop would have been sold at a higher price. Therefore, the revenue calculation was split in two parts; first, the increase in revenue of the existing crop due to higher market prices and second, the increase in total revenue due to increased production at a higher market price. Over the period 1999 – 2005 (excluding 2003) United States subsidies have cost the South African maize industry \$600 million (R4.4 billion) in terms of unrealized revenue.

In the final version of the South African submission it was decided to include these modelling results in full as an annex to the submission.

iv. The support provided by the Maize Trust

South Africa's participation was supported by the South African government at a political level and funded by the maize value chain through a grant from the Maize Trust. South Africa did not, and still does not have, a specific legislative or administrative trigger mechanism whereby aggrieved domestic industries can approach the government to initiate or participate in a WTO dispute to remedy an international trade aggravation.

The WTO's dispute settlement mechanism is a purely government to government process, although Member governments can include representatives from private industry as part of its official delegation for the purposes of the particular dispute.

With this background senior industry executives such as Mr Jannie de Villiers were proactive in mobilizing the maize value chain and taking the lead in working with officials of the Department of Agriculture as well as the Department of Trade and Industry (the DTI) to obtain official endorsement for South Africa's participation.

This initiative displayed a clear foresight and a coming of age in reflecting the grain sector's ongoing attention to international trade affairs from a hands-on and bottom line orientated perspective. It was notable that the industry, through the Maize Trust, was funding South Africa's participation in the dispute. This is however not unusual as a recipe for enabling developing countries to participate in WTO disputes in other jurisdictions.

The commitment of financial resources to the project by the Maize Trust was done with two objectives in mind namely (1) to ensure that South Africa presents a draft submission of sufficient technical standard and quality as third party in the proceedings before the panel and (2) to ensure that capacity in WTO trade dispute settlement is built within the maize value chain, the South African government and within academia.

To this end the Trust agreed to a budget allowing for a total amount of R1,091,584 for the drafting of South Africa's third party submission and an additional amount of R500 000 for directly related capacity building initiatives.

The cost of the project to the Maize Trust, excluding any income derived from the William and Flora Hewlett Foundation, was R1 028 671.86. The Maize Trust received a total amount of R119 519.81 from the William and Flora Hewlett Foundation as a refund for moneys spent on capacity building initiatives (i.e. the Panelist Workshop and the drafting workshop with an international law firm - see below for a detailed summary of the financial support provided by the Foundation). In total the Maize Trust has provided financial support for the project to the value of R909 152.05. With the submission of this Report to the Maize Trust, the Trust's financial support for the project has come to a conclusion.

v. The support provided by the William and Flora Hewlett Foundation

Given that one of the key focuses initially defined by both the Maize Trust and the Department of Agriculture, was 'capacity building' so that South Africa might be enabled to participate in WTO disputes again in the future, separate attention was focussed on this aspect of the activities. The matter was discussed within the core drafting team and the Consultation Group and Counsel was requested to come up with a creative suggestion as regards wider capacity building activities.

As indicated South Africa was self funded to the point of making its official WTO submission. It had come to light on previous dispute settlement activities where Messer's Zunckel and Botha had been involved, that the Hewlett Foundation had a programme which supported activities relating to WTO dispute settlement. In particular this had been evident in the US Upland Cotton dispute. The Hewlett Foundation had also funded sector specific studies. These studies were subsequently discussed within South Africa regarding their possible future

applicability to South Africa. It was with this background that the Hewlett Foundation was approached with three interventions – two of a traditional capacity building nature and one for direct drafting support. The grant was made to Trade Law Chambers who then managed and executed the grant on behalf of and in consultation with the Maize Trust and the Consultation Group.

The events that formed the subject of the grant application are as follows:

1. A High Level Briefing hosted at a South African university where former South African Panelists could share their experiences ‘from the bench’ as systemic advice to the current South African case preparation team (there are 9 such ‘panelist alumni’ to date, one of whom is presently an Appellate Body Member).
2. A visit by lawyers from an international law firm specialising in international trade law to provide guidance to the Consultation Group with respect to the drafting of South Africa’s third party submission.
3. An initiative to coach a small group of trade law students in tandem with the dispute and then take them to attend the dispute proceedings in Geneva as the parties have agreed that these proceedings are going to be open to the public.

The budget for the grant was as follows in South African Rand and US Dollars:

| South Africa T-AMS 'Corn Dispute' Capacity Building Budget Summary | | |
|---|-------------------|--------------------|
| Interventions in Support & Alignment with South African WTO Case Preparation | | |
| <u>Budget Item</u> | <u>ZAR</u> | <u>US\$</u> |
| Briefing By Former South African Panelists | R 75 900 | USD 10 542 |
| Drafting assistance from an international law firm | R261 910 | USD 36 376 |
| Law Student Training Exposure to Dispute | R129 800 | USD 18 028 |
| TOTAL Capacity Building Costs Requested | R467 610 | USD 64 946 |

The Hewlett Foundation was most accommodating and approved all the activities in the amount of US\$ R65 000. The briefing by Panelists was conducted in April 2008 (separate report compiled) and the drafting assistance in September 2008. The law student element was not done due to the dispute not proceeding, and this funding was withdrawn. However the Foundation did agree to allow the unspent portion on the first two activities to be converted into support for a SPS dispute workshop during the second half of 2009.

The Grant essentially meant that the Maize Trust would be budget neutral on the R500 000 allocated to capacity building events.

II. THE PROCESS EXPLAINED

Representatives from the Maize Trust initially engaged with officials from the Department of Agriculture as well as the DTI to discuss the framework within which the private industry and government were to work together on the project.

From the commencement of the project the representatives of the Maize Trust indicated that the Trust regarded the drafting of the submission and consultation process between these stakeholders as a sufficient reason to support the project, irrespective of whether the case was to continue or not.

Following these preliminary meetings a Consultation Group was established consisting of representatives from the following stakeholder groups : Department of Agriculture : Directorate International Trade (Coordinator on the part of government) ; Department of Agriculture : Legal Division ; Department of Trade and Industry : International Trade & Economic Development Division ; The Maize Trust ; AGRISA ; NAFU SA ; TAU SA ; GRAINSA ; University of Pretoria : Department of Agricultural Economics, Extension and Rural Development – Bureau for Food and Agricultural Economics (BFAP) ; Trade Law Chambers (Technical Advisor to the Maize Trust for the purposes of the project) ; and SAAPA (Coordinator on the part of industry).

Every participant in the Consultation Group was given the opportunity to nominate a second representative from within the different stakeholder groups to broaden the exposure given by the project.

A core drafting team was established within the broader Consultation Group. This drafting team consisted of a representative from the Maize Trust, the Department of Agriculture: Directorate International Trade as well as the Legal Division, the DTI, the University of Pretoria, Trade Law Chambers and SAAPA.

The core drafting team was given the mandate by the Consultation Group to take responsibility for the drafting of the submission while keeping the Consultation Group informed about the progress being made.

Altogether six formal meetings of the Consultation Group were held over the duration of the project. This is in addition to the Panelist Workshop (*see below*) attended by members of the Consultation Group as well as the Consultation Group drafting workshop with the international law firm (*see below*). Agendas and minutes were duly kept for all formal meetings of the Group.

The core drafting group met as and when required to compliment the work being electronically done between its members.

III. THE OUTPUTS

i. Drafting of third party submission

Twenty-two versions of the draft submission were produced during the first phase of the drafting process, albeit that some revisions dealt more with editorial changes rather than technical amendments. The process of drafting following the Consultation Group drafting workshop i.e. the second phase of drafting resulted in 12 further versions including the final draft version.

In the absence of having access to any pleadings of the main parties, the core drafting team, with the approval of the Consultation Group, decided to structure the draft submission in the following manner: the submission commenced with setting out South Africa's claim, followed by a section exploring South Africa's interest in the case as third party substantiated by empirical evidence. Legal analyses of a selection of assistance measures provided by the United States concluded the main part of the submission. The main part of the submission accounted for 41 pages. Two annexes followed the main part of the submission: the first providing a disaggregation of subsidy payments whereas the second providing a descriptive note on the South African maize sector. In total the whole submission, with annexes amounted to 60 pages.

Prior to the drafting workshop a list of specific questions concerning issues mentioned in version 22 of the draft submission was prepared and provided to the international law firm to guide and inform discussions during the planned drafting workshop. Each member of the Consultation Group was provided with a copy of draft version 22 in preparation for the workshop.

Following the Consultation Group drafting workshop with the international law firm during September 2008, the core drafting team was mandated to redraft version 22.

The aim was to bring the draft submission into line with the guidelines provided during the workshop.

The main part of the submission was shortened to 18 pages, including the table of contents and reported cases referred to in the submission. With only one annex added to provide the descriptive note on the South African maize sector the submission totalled 36 pages.

The final version of the draft submission was forwarded to the international law firm for an overall assessment of the appropriateness of the format and substance of the final draft submission for purposes of South Africa's third party participation in the dispute. As a general comment it was observed that the draft certainly was reading and feeling much like a third party submission. Members of the core drafting team reviewed these comments and considered some comment received to be of particular relevance and importance to provide valuable guidance for future drafters of submissions in WTO disputes.

By now it was evident that the case was not proceeding beyond the establishment of a panel. No panelist has been selected to adjudicate the dispute and none of the main parties have taken further steps to revive the case. In view of these developments, the core drafting team, in consultation with the Maize Trust decided to conclude the drafting process with the final version which was sent to the international law firm for review.

This is not to say that the case could not be revived by either Brazil or Canada under the rules of the WTO dispute settlement mechanism. Despite the fact that the case has been "dormant" for some time, technically it has not "expired". As a result there is a continued need to deal with the draft South African submission in a confidential manner.

ii. Capacity building initiatives

The other main purpose for the Maize Trust in supporting the project was to ensure that capacity is created in government, in the maize value chain and academia in the area of WTO dispute settlement.

Several initiatives were undertaken by the Consultation Group to give effect to this aim. Some of these initiatives can be summarised as follows –

a. Capacity building within the Consultation Group

Dedicated sessions during meetings of the Consultation Group provided opportunities for members of the Group to become acquainted with the South African maize sector, the legal process of dispute settlement within the WTO including the

function and role of third parties; the treatment of factual and empirical evidence; legal analyses and legal drafting.

b. Enhancing an awareness of WTO dispute settlement proceedings within the Maize Trust

Mr Jannie de Villiers and Mr Leon du Plessis who represented the Maize Trust on the Consultation Group participated actively in the activities of the project. Mr du Plessis was also a member of the core drafting team.

In addition, a presentation and regular feedback on the project, including the issues and the legal processes involved were provided to the Trust during its Annual General Meetings in 2007 and 2008. Mr de Villiers also attended the Panelist Workshop held during April 2008 (*see below*) and both he and Mr du Plessis participated actively in the Consultation Group drafting workshop with the international law firm in September 2008 (*see below*).

c. Involving academia in the activities of the Consultation Group

Dr Ferdinand Meyer representing BFAP on the Consultation Group was a member of the core drafting team. Dr Meyer and his colleagues were responsible for the preparation of empirical analyses of the impact of US subsidies on the South African maize sector as well as providing a descriptive note on the maize industry in South Africa.

Members of the core drafting team participated in a Conference hosted by the Agricultural Economics Association of South Africa in Windhoek during August 2008. They presented participants with an overview of the WTO dispute settlement process as well as some of their observations related to the process of drafting a third party submission for South Africa.

Mr Zunckel was invited by the University of Stellenbosch (Political Science and Law) to address faculty and students on WTO dispute settlement and South Africa's participation in the maize case as third party. It was during this time that he and Prof Mustaqeem de Gama engaged on the broader systemic issue of creating a mechanism for South Africa's future participation in WTO disputes. Prof de Gama recently joined the DTI. He is currently responsible for drafting a framework for South Africa's future engagement in WTO and regional dispute settlement mechanisms.

d. Panelist Workshop

During April 2008 the Consultation Group hosted a Panelist Workshop at the Law Faculty of the University of Pretoria. Seven current and former South African Panelists in WTO cases shared their views and insights into the intricacies of WTO dispute settlement. Students from the Universities of Pretoria and the Witwatersrand

also attended the workshop. As part of this capacity building initiative, both Universities were responsible for the preparation of a report on the Workshop. Valuable inputs were shared with the core drafting team which were subsequently applied to drafting the third party submission (*see below*).

e. Consultation Group Drafting Workshop with an international law firm

The Consultation Group met with a lawyer from an international law firm which specialises in international trade law during September 2008. Fifteen members of the Consultation Group attended the drafting workshop. The purpose was to discuss and deliberate on several matters pertaining to the drafting of South Africa's third party submission. In addition members of the Consultation Group were given firsthand experience during small group discussions on legal interpretation and factual analyses.

IV. LESSONS LEARNED

The following are some of the more pertinent lessons learned from the project: –

i. Creating a mechanism within government for monitoring, reporting and consulting internally and with industry on potential disputes

No mechanism was in place which allowed South Africa to engage sooner in the consultation phase of the dispute. South Africa joined the dispute as third party even though it did not participate in the consultations being held between Canada and the United States on 7 February 2007 and Brazil and the United States on 22 August 2007. Partaking in the consultation phase could potentially offer the South African government with a good opportunity to decide whether to participate in a particular case or not, whether to participate as third party or to request its own consultations. There rests no obligation on South Africa to participate in a particular dispute beyond the consultation phase. The timeframe for requesting approval from the defending party to join the consultations is only 10 days calculated from the date when the complainants requested that consultations be held.

As mentioned previously, Prof. De Gama is currently working on a framework which will allow for the establishment of such a mechanism. A public stakeholders' workshop on the matter is scheduled to take place towards the end of 2009. Following the finalisation of a position paper within Government, a draft policy documents will be published for public comments.

ii. Ensuring sufficient capacity within Government and industry to collect and analyse trade data

One of the main challenges faced by the core drafting team in the project was to obtain access to data. Often economic and trade data within the hands of other parties to the dispute are needed to engage in meaningful legal and economic arguments. Sufficient capacity should be built within Government and industry to collect and analyse data of this nature. It will be very helpful not only for purposes of participation in trade disputes, but also for future trade negotiations.

iii. The role of government and private sector

The WTO dispute settlement system entails a government – to – government process. The private sector has no right of appearance before a panel in this system. It is therefore of crucial importance that the private sector should provide meaningful assistance to government, both in terms of financial support where needed as well as technical specific information relating to a particular sector of the economy affected by a potential trade dispute.

In some instances a dispute may not directly affect a particular industry/sector, but raises certain systemic issues of importance to South Africa. An example would be where the meaning of « risk assessment » in sanitary and phyto-sanitary matters is raised in the context of a particular dispute even though the product at issue is not of relevance to South Africa. In such instances it could be for the government to pro-actively pursue the matter further before the WTO.

Communication between the South African government and other parties, where appropriate, could also play an important and meaningful role. Even so, the private sector could engage with industry associations in other WTO members which have an interest in a particular case. There a number of ways other than the formal channels of communication by which cooperation with other interested parties could be pursued.

The project highlighted the importance for any industry to be well organised. The Maize Trust was well positioned to engage quickly and actively with the maize value chain and with government. Once a dispute has been triggered the relevant industry affected by the dispute must be able to respond without delay.

Finally, the mechanism should provide for a designated forum or contact point within Government to engage effectively and promptly on a political level with Government stakeholders and with the affected industry.

iv. Observations regarding the format and substance of a third party submission and oral presentation

a. The composition and role of the drafting team

Often trade disputes involve both issues of law and economics. It is important therefore to include both lawyers and economists as part of the drafting team. The core drafting team in this project involved two trade law practitioners and two agricultural economists.

The drafting team should preferably not get entangled in the political dynamics of the case. Their focus should primarily be on the technical aspects of the case and the contents of the submission.

b. The issue(s) to be addressed in the written submission

A third party does not need to support either the complainant or defendant. It can be selective with respect to the support it provides to either or both parties. The submission should focus on issues of real and future strategic importance to the third party. Typically, it should assist the panel in offering new perspectives on the interpretation of specific text of a WTO Agreement. It should not merely be repetitive of what the main parties put in their submissions. Moreover, the submission must be succinct and clear. The submission should steer away from being overtly political in its content and should avoid being aggressive in its tone. Finally, the submission should not elaborate too extensively on the factual basis for the case as this will be covered by the main parties in their submissions.

c. The format of the oral presentation before the panel

The oral statement to be made by the third party before the panel should not merely be a repetition of what is stated in its written submission. It must be assumed that the Panelists have read the submission beforehand.

d. The size of the delegation to be present before the panel

Care should be taken not to « overload » the delegation. On average the size of delegations ranges between two and four persons.

v. Dealing with the press

Due to the sensitive nature of the case, members of the Consultation Group did not release a press statement about South Africa's involvement as third party in the case. This was one of the arrangements made with government during the preliminary meetings between industry and government. It was only after the South African government made a press statement about its decision to join the case against the United States (see **Annex A** for a copy of the Government's press statement), that certain members of the Consultation Group released their own press statements.

News articles about the dispute were carried by the Business Day, SA Grain magazine, the Corporate Law Association of South Africa (CLASA) journal; and television/radio coverage was given on CNBC Africa and AgriTV.

vi. The issue of confidentiality

Each member of the Consultation Group, except for certain government officials (who are bound by the rules of confidentiality within government) signed a declaration of confidentiality. The Consultation Group deemed it important for at least two reasons namely (1) due to the inherent confidential nature of the drafting process itself and (2) to prevent information and data if to be shared by other parties involved in the dispute from becoming public knowledge.

vii. Building capacity within academia in the area of trade dispute settlement

The project underlined the importance of a rigorous understanding of international trade economics and regulation. More exposure in the form of academic programmes and internships with international bodies such as the WTO should be made available to students in this field. Closer cooperation between government departments, including the DTI and South African academic institutions offering academic programmes in this field should be encouraged.

V. CONCLUSION

The project provided a valuable opportunity for government and industry to explore ways on how to cooperate in preparation for a WTO dispute. The Maize Trust set an example in providing much needed financial support for the project. Hopefully this is only the beginning of a process whereby industry and government will work more closely together in the area of WTO dispute settlement. The Consultation Group are grateful for the financial support provided by the Maize Trust and the Hewlett Foundation. It also wishes to express its appreciation to the South African Government, especially the Ministers of Agriculture and Trade and Industry at the time for their political support and commitment to the project.

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ANNEX A



agriculture

Department:
Agriculture
REPUBLIC OF SOUTH AFRICA

Media Statement

Date: 19 December 2007

PARTICIPATION AS THIRD PARTY IN THE DISPUTE ON AGRICULTURAL SUBSIDIES BETWEEN THE USA AND CANADA

On 17 December 2007 the WTO Dispute Settlement Body (DSB) established a panel in the dispute between the United States of America and Canada on *Subsidies and other Domestic Support for Corn and other Agricultural Products*.

South Africa (SA), as a major producer and exporter of maize and other agricultural products today reserved its rights to participate in this dispute as a third party.

The participation as a third party in this panel is consistent with South Africa's approach in the WTO Doha Development Round of agricultural negotiations that seek to facilitate a substantial and real reduction in trade and production-distorting subsidies. SA believes that trade and production-distorting agricultural subsidies, mainly used by developed countries, negatively impact on the development of its agricultural sector and on the African continent.

South Africa's participation in the dispute is in close co-operation between the Departments of Trade and Industry and Agriculture and with support from the Maize Trust and other interest groups.

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“RENEWING OUR PLEDGE-
A NATIONAL PARTNERSHIP TO BUILD A BETTER LIFE FOR ALL”