"Confidential"

Opinion

The legality under WTO law of certain export measures

Prepared for

The Maize Trust

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1. Introduction

In June 2013 the Minister of Agriculture Forestry and Fisheries published proposed amendments to the 'Marketing of Agricultural Products Act' (Act 47 of 1996). This was done through the 'Marketing of Agricultural Products Amendment Bill' (the Bill)[1]. On the face of it these amendments confer certain powers to the Minister which could hold material implications for the maize, and other, sectors.

In particular the Maize Trust would like to establish whether a certain provision in the Bill (i.e. Sub-clause 14 (d)) purporting to impose potential restrictions on exports of agricultural products is compatible with South Africa's commitments under the WTO.

This opinion will address the legality under WTO law of Sub-clause 14 (d) of the Bill purporting to amend section 16 of the principal act i.e. the Marketing of Agricultural Products Act (Act 47 of 1996). Sub-clause 14 (d) of the Bill provides –

> "**(d) the addition after subsection (3) the following subsection:**
>
> > "**(4) The Director-General may allow the importation into or the exportation from the Republic, of agricultural, forestry and fisheries products under the authority of a permit issued by the Director-General on such conditions as the Director-General may determine and set out in such a permit.**" "

The opinion only focuses on Sub-clause 14 (d) of the Bill as it pertains to the exports of maize.

As a secondary activity; and assuming that Sub-clause 14 (d) of the Bill as it pertains to exports is contrary to South Africa's WTO obligations, the opinion comments as to steps that could be explored under international trade law and possibly also domestic law by interested parties that stand to be adversely affected should the Bill be enacted.

2. The WTO & the Bill in Summary

On the multilateral level the World Trade Organisation (WTO) frowns upon any form of quantitative restriction as a rule but it does make several exceptions, notably for serious food security needs. Under the WTO rules there are provisions both in the General Agreement on Tariffs and Trade (GATT) as well as under the Agreement on Agriculture (AoA) dealing with export restrictions. With regards to maize, it should be

[1] See Notice 610 in Government Gazette No. 36562 of 14 June 2013. We are advised that the Maize Trust has taken an overarching domestic legal opinion on the Bill and our instruction is accordingly circumscribed.

possible to accommodate an export restriction in terms of GATT Articles XI (1) and (2)(a) read together with Article 12 of the WTO Agreement on Agriculture (AoA). Essentially, for agricultural products, when these requirements are read together, export taxes (duties) are allowed as the general rule, unlike quantitative export restrictions (QR's), which include prohibitions (bans), which are in general prohibited.

As an example of the exceptions, QR's are allowed provided that they are only temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting country. There is a further non-constraining requirement that the country applying the ban must give 'due consideration' to the effects of the prohibition on the importing country's food security requirements. While this is textually laudable it is patently easy to 'consider' and then proceed as your own national interest dictates. Despite the general prohibition on QR's there is thus a definite and specific home for QR's under the WTO's current rules. In fact, the exceptions may be seen as rather pervasive in their number and related scope.

In this regard we find that sub-clause 14 (d) of the Bill represents a domestic enabling instrument which could allow South Africa to make use of WTO compatible quantitative restrictions which South Africa is entitled to use under its WTO rights. This would however represent an exception to South Africa's general obligations not to use quantitative restrictions. In doing so South Africa would therefore need to be particularly mindful of the conditions applicable to the use of QR's in the WTO and align the 'conditions' referred to in sub-clause 14 (d) of the Bill to these conditions accordingly. In short, this being done, South Africa can impose restrictions or even prohibitions on the exports of agricultural products, including maize, in a manner compatible with South Africa's commitments under the WTO. As the wording of the Bill's sub-clause 14(d) currently stands we are of the opinion that its deference to these conditionalities is less than clear.

3. The GATT 1994

Under the GATT (1994) we find expression of the classic principle of the WTO's 'tariffs only' world. The primary discipline in the WTO dealing with QR's is found in Article XI of the GATT. Article XI generally prohibits QR's on the importation or the exportation of any product, by requiring that no prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by WTO Members.

This having been said, the GATT does provide for exceptions to this principle. These exceptions permit the imposition of QR's under defined conditions and only if they are taken on policy grounds justifiable under the GATT. For current purposes one such example would be the existence of critical shortages of foodstuffs as catered for in GATT Article XI: 2(a). As long as these exceptions are invoked in accordance with GATT provisions, they cannot be cited as unfair or WTO incompatible trade measures **provided** that they are applied under prescribed conditions. Despite the general prohibition on QR's there is thus a definite and specific home for QR's under the WTO's current rules. In fact, the exceptions may be seen as rather pervasive in their number and related scope.

As said, the general prohibition on QR's is found in GATT Article XI. The relevant text[2] of Article XI pertaining to exports reads as follows:

> "Article XI
> General Elimination of Quantitative Restrictions
> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
> 2. The provisions of paragraph 1 of this Article shall not extend to the following:
>
> (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
>
> (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
>
> (c) Import restrictions on any agricultural or fisheries product, imported in any form*, necessary to the enforcement of governmental measures which operate:

[2] GATT Article XI represents the classic WTO 'footprint' in relation to quantitative restrictions. We thus quote the full text of the article as the footprint provides a necessary overall context. The extent to which some of the toe prints in the footprint will not apply specifically to exports is then addressed in the body of the work.

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned. The *ad* note to GATT article XI denoted by the asterisks "*" in the original text read as follows:

Ad note to Paragraph 2 (c):
The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.
Ad note to Paragraph 2 last subparagraph:
The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

> *Ad* note to Articles XI, XII, XIII, XIV and XVIII:
> Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations."

The main reason for the Article XI prohibition on QR's is that quantitative restrictions are considered to have a greater protective effect than tariff measures and are more likely to distort free trade. When an exporting country uses tariffs to restrict exports, it is still possible to increase exports as long as exported product remains price competitive enough to overcome the barriers created by the tariff. When an exporting country uses quantitative restrictions, however, it is impossible to export in excess of the quota or prohibition no matter how price competitive the exported products are. Due to this distortional economic effect the prohibition of QRs is one of the fundamental principles of the GATT.

The overall effect of GATT Article XI:1 is to implement a tariffs only regime (duties/taxes/charges i.e. these all represent forms of a financial levy). It specifically identifies 3 QR items that are not allowed, being:
QR's made effective through quotas, licences and other measures.

As regards quotas:
These are quantitative limits on the volume or value of products that can be imported or exported. That these measures are prohibited are non-contentious and well understood in the WTO system. An absolute quota (i.e. where the volume or value amount is nil) would be an import or export ban, a 'prohibition' in terms of Article XI:1. A volumetric or value limitation would be a 'restriction' in terms of Article XI:1.

As regards licenses:
To the extent that licensing (a document conferring the right to import or export) is used as a means of restricting trade, they are prohibited by GATT Article XI:1. Note that licensing (or permits) are not prohibited *per se* but only to the extent that they give effect to a QR (limitation on volumes or otherwise) or a prohibition (a ban).

As regards other measures:
This category represents a residual grouping of all other non-tariff border measures that covers any instrument that is not a quota or a licence by which effect is given to a QR. Some examples are trade restrictive practices by non-governmental actors condoned by the government, restrictive customs procedures, state trading activity, prior import deposits and minimum import prices.

The function of the 3 subparagraphs of GATT Article XI:2 is to set out exceptions to Article XI:1. Subparagraph 'a' deals only with exports, subparagraph 'b' deals with imports and exports whereas subparagraph 'c' deals only with imports – hence 'c' is not relevant for purposes of this opinion. In addition, subparagraphs 'a' and 'b' cover restrictions and prohibitions while subparagraph 'c' covers only restrictions, not prohibitions. Also, the first 2 ('a' and 'b') are general in their scope and the third ('c') is limited to agricultural and fisheries products.

For current purposes exception (a) is highly relevant as it would allow for the implementation of QR's to prevent or relieve a food security crisis. Note that in this sub-paragraph the requirements 'temporary', 'critical' and 'essential' impose a high standard of necessity on the ability to invoke the exception. In other words not just any food shortage will allow the evocation of this exception. The food shortage situation would need to be dire and exceptional to justify such a measure[3].

Some guidance on these stringency adjectives is to be found in the *China — Raw Materials* dispute[4] where the Appellate Body ruled that an export prohibition or restriction applied 'temporarily' in the sense of Article XI: 2(a) is a measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. The Appellate Body opined that such a restriction must be of a limited duration and not indefinite. Moreover, the Appellate Body found that the term 'critical shortages' refers to those deficiencies in quantity that are crucial and of decisive importance, or that reach a vitally important or decisive stage. On the basis of these findings, the Appellate Body concluded that China had not demonstrated that its export quota on the product at issue (bauxite) was 'temporarily applied' to either prevent or relieve a 'critical shortage'. It also found that a product may be 'essential' within the meaning of Article XI:2(a) when it is 'important' or 'necessary' or 'indispensable' to a particular Member. This may include a product that is used as an 'input' to an important product or industry. However, the determination of whether a particular product is 'essential' to a Member must take into consideration the particular circumstances faced by that Member at the time that a Member applied the restriction.

For current purposes exception (b) is also relevant in that it provides for the evocation of a QR to meet standards for classification, grading and subsequent marketing of products. The provision is likely to be more readily applicable to imports i.e. say the prohibition of entry of foreign maize products not meeting local grading, labelling or vitamin fortification requirements. However, this could be as applicable to export

[3] GATT Article XI:1(a) is specifically augmented by AoA Article 12.
[4] WTO document series DS395, DS396 and DS 398.

certification, but likely less so as it would not have a directly detrimental effect on the South African market. We note for example that in terms of the regulations for the control of the export of grains: 'no person shall export grains from the Republic unless each quantity thereof has been approved by the Executive Officer for that purpose'[5]. Conceivably exports not conforming with the export regulations may need to be prevented i.e. a prohibition on export (an Article XI:1 QR) would be sought by the government. Generally speaking, practical considerations would usually find these measures being pursued under the Agreement on Technical Barriers to Trade (the TBT Agreement).

For current purposes exception (c) is not relevant as it is only applicable to imports, and not to exports. Also, this exception has been overtaken by the more specific and later provisions of AoA Article 4[6] and has largely lost its relevance in WTO law today.

Given the observation in the preceding paragraph it is important to take note when considering the exceptions to GATT Article XI that these provisions have been augmented (and to some extent superseded) for agricultural products by the AoA. This would be so via its Articles 4.2, 12 and 21. This is especially so with respect to GATT Article XI 2(a)'s food security exception[7] and 2(c)'s governmental measures exception. The relevant provisions of the AoA are thus discussed separately in section 4 of this opinion.

It is evident that the extent of compatibility of domestic measures on QR's with WTO rules is heavily dependent on the construction of the measure and in the case of the Bill in particular this construction will be lead by the discretion that the Bill provides the government by way of the so-called 'conditions' that it deems appropriate and the ensuing administration of these conditions.

In addition to the exceptions of GATT Article XI, there are a host of other GATT provisions that would justify the use of a QR. The following provisions[8] are examples of these additional allowable exceptions to the general prohibition on QR's:

[5] See the regulations under the Agricultural Product Standards Act (1990 as amended) as published in Government Notice 38320 of 19 December 2014.
[6] MG Desta describes this phenomenon as follows: 'Thanks to the Uruguay Round, the exceptions provided under GATT Article XI:2(c) for non-tariff agricultural import restrictions have lost their relevance'. See 'The Law of International Trade in Agricultural Products', Kluwer Law (2002) at page 61.
[7] Van den Bossche, P: "The Law and Policy of the World Trade Organization", Cambridge University Press, 2005 at page 446 in their footnote number 175. That author contends that the AoA has 'set aside' GATT Article XI with respect to agricultural products. Our own reading is however that the provisions are more likely to have concurrent application, at least in part. There is some support for this reading in the Doha draft agricultural modalities text which is discussed in some detail in section 6 of this opinion. We do concur that the Article 4 of the AoA has replaced the agricultural specific exemption in GATT Article XI: 2 (c).
[8] There may be other provisions applicable and these examples are not intended as an exhaustive list.

- The suite of general exception clauses providing for items such as measures necessary to protect public morals or protect human, animal or plant life or health (GATT Article XX).
- Exceptions for security reasons (GATT Article XXI).
- Restrictions to safeguard the balance of payments (Article XII regarding all WTO Members[9]; and Article XVIII: B regarding developing WTO Members in the early stages of economic development).
- Quantitative restrictions necessary to the development of a particular industry by a WTO Member in the early stages of economic development or in certain other situations (GATT Article XVIII: C & D).
- Quantitative restrictions necessary to prevent sudden increases in imports from causing serious injury to domestic producers or to relieve producers who have suffered such injury (GATT Article XIX).
- Quantitative restrictions imposed with the authorization of the Dispute Settlement Body as retaliatory measures in the event that the recommendations and rulings of a panel are not implemented within a reasonable period of time (GATT Article XXIII:2).
- Quantitative restrictions imposed pursuant to a specific waiver of obligations granted in exceptional circumstances by the WTO Ministerial Conference (GATT Article XXV (5)).

4. The Agreement on Agriculture

It is well understood that the Agreement on Agriculture (AoA) negotiated in the Uruguay Round provides a dedicated set of trade rules related to agricultural products. The AoA textually confirms the hierarchy of applicability of its own provisions above those of the GATT and the other WTO agreements that apply to the suite of agreements generally applicable to trade in goods[10]. To this end Article 21 of the AoA reads as follows:

"Article 21
Final Provisions

[9] By way of interest: South Africa was involved in consultations in WTO Committee on Balance of Payments Restrictions under Article XII of the GATT for balance of payments surcharges imposed in June 1985. South Africa later eliminated the import surcharge and revoked the Article XII exception in October 1995.

[10] The WTO agreements applying to the trade in goods are found in Annex 1A to the WTO Agreement. The agreements included in Annex 1A include for example the Agreement on Agriculture, the SPS Agreement, and the Agreement on Import Licensing; these among others. Notably the general interpretative note to Annex 1A states that in the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the WTO Agreement, the provision of 'the other agreement' will prevail to the extent of the conflict.

1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply *subject to the provisions of this Agreement*."
[Own emphasis added.]

Legally speaking one would refer to the rules of the AoA as being *lex specialis*[11] to the GATT and the other WTO agreements when it comes to agricultural products. Thus, when considering the requirements of and exceptions to GATT Article XI, one needs to be cognisant that these have been partly augmented or superseded for agricultural products by the AoA (in particular AoA Articles 4.2, 12 and 21). This is especially so with respect to exceptions in paragraph 2[12] of GATT Article XI.

The relevant articles of the AoA read as follows:

"Article 4
Market Access

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties[1], except as otherwise provided for in Article 5 and Annex 5."

The footnote '1' to Article 4.2 provides important guidance as regards the interpretation and scope of the Article, and as such it might have been included in the substantive text at the time of drafting. The footnote reads as follows:

"These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement".

[11] *Lex specialis derogat legi generali*: The Latin phrase means 'the law governing a specific subject matter'. The maxim is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.
[12] Van den Bossche, P: "The Law and Policy of the World Trade Organization", Cambridge University Press, 2005 at page 447.

When assessing the applicability of the AoA to the present question we note that Annex 1 to the AoA delineates the product coverage of the AoA. Paragraph 1(i) of the Annex refers to: 'HS Chapters 1 to 24 less fish and fish products'. The HS classification for maize in terms of the World Customs Organization's classification nomenclature is in HS chapter 10 and processed maize (products) in HS chapter 11. Both these classifications fall within the range contemplated by Annex 1 of the AoA and the *lex specialis* rules will thus apply to maize and maize products.

The exception present in AoA Article 4.2 (read with Article 5 and Annex 5 of the AoA) deals with exceptions for products that were not converted into ordinary customs duties, or tariffied, during the Uruguay Round. Products to which this exemption applied are designated for 'special treatment' ('ST') on a country's schedule of concession. No such designation is present on South Africa's agricultural tariff schedule for maize, or any other product for that matter. The exception is thus not relevant for purposes of this opinion.

The AoA does make specific provision for the use of prohibitions and restrictions on the exportation of agricultural goods. In this regard AoA Article 12 is applicable and it reads as follows:

> "Article 12
> Disciplines on Export Prohibitions and Restrictions
>
> 1. Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:
>
> (a) the Member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing Members' food security;
>
> (b) before any Member institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure, and shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question. The Member instituting such export prohibition or restriction shall provide, upon request, such a Member with necessary information.

2. The provisions of this Article shall not apply to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned."

Article 12 of the AoA is to be read together with article XI 2(a) of the GATT. In other words it provides for specific rules which are both additional and complimentary to the GATT provision. Recall that GATT Article XI 2(a) is the exception to the general prohibition on QR's i.e. it condones the use of QR's that are applied on a temporary basis to either prevent or to relieve critical shortages of foodstuffs (and other products) considered as essential for the exporting country.

The provision enlightens us as follows:

1. The AoA does not prohibit an import restriction; to the contrary it specifically condones such a measure within the prescribed conditions set forth by the GATT Article XI and the other WTO agreements.
2. The provision has two 'soft law' conditions linked to the use of an export prohibition. Firstly the country applying the measure must consider the implications for other countries reliant upon the export of that product. Even though it provides for a binding constraint upon a country wanting to use an export restriction, the provision does not attempt to condition any decision made pursuant to having exercised the consideration. Secondly the country imposing the export restriction is required to notify and consult i.e. to notify the WTO's Committee on Agriculture and to consult with any Member who request a consultation. Again, neither of these requirements would prevent a Member from making use of the export restriction.
3. It could be argued that as a developing country South Africa would not even need to consider these AoA Article 12 'soft law' provisions as developing countries are exempted from having to do so. The question which arises is whether South Africa is a developing country for purposes of the AoA. While South Africa clearly negotiates in the WTO at present as if it were a developing country, the reality of its situation under the AoA is less than clear in that South Africa unambiguously has developed country AoA commitments if one examines its AoA schedules of commitment. This is however a matter worthy of a separate substantive analysis. Suffice to say that assuming the most restrictive result i.e. that South Africa is a developed country, then Article 12 still does not constrain it in the use of an export restriction as long as it considers, notifies and consults appropriately.

4. If South Africa has developing country status Article 12(1) could still bind it in the event that it is a net-food exporter for maize, which is the case more often than it is not.

The WTO does require notifications by Members of all QR's applied[13]. This is pursuant to 'The Decision on Notification Procedures for Quantitative Restrictions' as adopted by the Council for Trade in Goods in December 1995. It requires Members to make complete notifications of the quantitative restrictions which they maintain by January 1996 and at two-yearly intervals thereafter. It also requires Members to notify changes to their quantitative restrictions as and when these changes occur.

In examining the WTO notifications database we find that with respect to 'cereals' (HS chapter 10) there are only 2 notifications under the AoA, both by Japan. These are cited as being on imports for purposes of implementing Japan's competition legislation[14]. Perhaps the AoA Article 12 exception for developing countries might explain this lack of data to some extent. With respect to the GATT there are 30 notifications. Of these 16 deal with prohibitions and none of these deal with GATT Article XI but rather the GATT's general exemptions clause, Article XX (mainly Article XX (d) and then also Article XX (b) and (a))[15]. The only direct export prohibition that could be found with regards maize was an export quota (applicable to maize and to rice together with some mineral products).

The AoA has a separate notification system known as the Agriculture Information Management System. Between 1995 and 2015 there have been 22 notifications of export restrictions. It is unclear as to why there are differences between the 2 databases, but it may be due to Members simply notifying the measures under the more specific agreement, being the AoA.

A very early example of an export restriction is the following notification by Hungary, provided here because it deals with maize, notably for animal feed as opposed to human consumption:

> "Pursuant to Article XI, paragraph 2 (a) of GATT 1994 and in accordance with Article 12, paragraph 1 of the Agreement on Agriculture, Hungary will introduce temporary restrictions in respect of exports of maize (falling under heading HS 1005.90 005). The measure, applicable from 25 October 1995 until the conditions which made it necessary cease to persist, provides for the

[13] The WTO maintains a database of all such notifications. See < http://qr.wto.org/Reports/Home.aspx >.
[14] See: < http://qr.wto.org/Reports/QRsByMeasure.aspx > 'Prohibition of imports of the products constituting such act as prescribed in the Unfair Competition Prevention Act'.
[15] See: < http://qr.wto.org/Reports/QRsByProvision.aspx >.

imposition of a licensing requirement. Licenses will be issued on a non discriminatory basis.

In the recent past the world market of maize was characterized by an unusual high demand and as a result high prices which boosted Hungarian exports against the background of a lower than expected domestic yield. Hungary has adopted the above mentioned measure in order to prevent a serious shortage of the product in question and to forestall the disruption of the domestic animal feed market.

Hungary is prepared to enter into consultation, under Article 12, paragraph 1 (b) of the Agreement on Agriculture, with any Member having a substantial interest as an importer. The measure will apply while the conditions which made it necessary persist".

A more typical recent example of such a notification is the following made by Moldova in 2011[16]:

"Pursuant to Article XI, paragraph 2(a) of GATT 1994 and in accordance with Article 12, paragraph 1 of the Agreement on Agriculture, a temporary export ban was introduced in order to prevent a critical shortage in the domestic market resulting from a poor harvest of wheat in 2010 and to eliminate a significant imbalance in the domestic grain market. The export ban was a temporary measure and has been essential for food security and for the stability of the grain market. Due to the current balance of wheat and its derivatives on the domestic market and forecasts of export/import up to harvest time, the Government of the Republic of Moldova decided to repeal the Government Decision No. 52 regarding the export restriction on wheat through the Government Decision No. 320 of 4 May 2011".

A further example of an export restriction using a quota as opposed to a complete ban is the following made by the Ukraine, also in 2011. This notification included an export limitation on maize (corn)[17]:

[16] WTO document G/AG/N/MOL/3/Add.1 of 20 May 2011.
Note that no export restriction notifications have been reported to the WTO after 2011 i.e. within the last 4 years.
[17] WTO document G/AG/N/UKR/5/Add.1 of 10 January 2011.

Export quotas on certain agricultural products,
the exports of which are to be licensed until 31 March 2011

Product covered	HS code heading	Export quotas until 31 March 2011 (thousand tonnes)
Wheat and blend of wheat and rye (meslin), spelt	1001 10 00 90 1001 90 99 00	1,000
Corn	1005 90 00 00	3,000
Barley	1003 00 90 00	200
Rye	1002 00 00 00	1
Buckwheat	1008 10 00 00	1

While these examples are useful, it is evident that not all Members actually notify their export restrictions as they are required to do. For example we note that there are no export restriction notifications in the Agriculture Information Management System for Argentina. As a practical example we recall that South Africa has had some concern as regards the export prohibitions applied by Argentina on cereal exports in 2007. At the beginning of February 2008 South Africa rapidly imported 40 000 tons of wheat from Argentina as this became possible when Argentina (which was the world's 4th biggest wheat exporter at that time and is now below position 10) announced that it had lifted trade measures in the form of export restrictions on wheat and maize exports that were halted in 2007 so as to 'safeguard supplies for the local market' according to the Argentine government. These bans and restrictions have continued intermittently and in 2013/14 Argentina exported no wheat for the first time in over 25 years[18]. While these events have been widely reported upon, Argentina has never notified the WTO in this regard.

Following from our analysis it would appear that Argentina has justified this export ban under the food security exemption provided for under the GATT. It is however our view that based on the case law cited earlier it is insufficient to merely claim food security concerns as the GATT pertinently refers to the existence of a 'critical food shortage' which would infer more than a mere justification of action based on a possible low food stock situation on precautionary grounds. In addition we note that South Africa is a historical importer of Argentine grain, and South Africa is a net importer of wheat. This would then also require the Argentine to have given prior consideration to South Africa's food security requirements. To our knowledge no such indication was made at the time. In our view the Argentine export banning measure was fallible to WTO challenge. This would likely have been possible certainly under

[18] See: 'Argentina's wheat exports against the grain' in The Economist, 15 January 2014: http://www.economist.com/blogs/americasview/2014/01/argentinas-wheat-exports.

GATT Article XI 2(a); but perhaps less so under the AoA as Argentina does have developing country status and would have claimed the exemption of AoA Article 12(2).

5. Permits & Licensing Considerations

A licence is a document issued by a government authority as a pre-condition to the import or export of a product. Licensing has a wide range of policy objectives which can vary from something benign like gathering statistics or something untoward such as constituting an intentional restriction on trade. Typically a licence is used to manage a quota. In trade speak a licence is either automatic or discretionary. Typically licensing for restrictive (protectionist) purposes is discretionary and those for non-restrictive purposes are automatic[19]. Typically discretionary licensing can be applied for protectionist purposes and that is why the WTO rules are sceptical of these measures. For current purposes the Bill proposes a licensing regime through the use of a 'permit' issued by the Director General[20].

To the extent that licensing is used as a means of restricting trade, these licences are prohibited by GATT Article XI:1. It follows that any restrictive regime will always need to be justified by some form of exception otherwise it may not be maintained.

The WTO has a specific agreement on licensing known as the 'Agreement on Import Licensing Procedures'. This agreement requires Members to ensure that licensing should be simple, transparent and predictable and governments need to publish sufficient information for traders to know how and why the licences are granted. There is also an efficiency requirement in that agencies handling licensing should not normally take more than 30 days to deal with an application. Note however that this agreement is specifically read as applying to imports. While most of its provisions might logically also be considered as 'best practice' when considering licensing for the administration of export quotas, legally speaking countries are not bound to apply this agreement to exports. The discussions of the specific provisions of this agreement are thus not applicable to the possibility of limitations to the exports of maize from South Africa. However, this agreement certainly serves as a good point of reference for a regulator designing a licensing system, such as the designer of the Bill at issue here.

This said there is also a more general provision covering this subject matter under GATT Article XIII which is titled 'Non-discriminatory Administration of Quantitative

[19] This describes the 'typical' position. Note that a quota can also be administered through an automatic licence, say on a first-come-first-served basis where no discretion is involved save for the level of quota fill.

[20] The ordinary meaning of 'permit' includes the term 'licence' and for current purposes the terms may be considered as interchangeable. See the Collins English Dictionary, Harper Collins (2004) at page 1212: Permit: 'An official document granting authorisation, licence'.

Restrictions'. This article will come into play in the event that a Member has found grounds to apply a QR under some form of exception to GATT Article XI: 1. In essence Article XIII imposes a legal duty similar to an MFN obligation in the sense that if a Member imposes a QR on products imported from or exported to another Member then products from or to all other countries need to be curtailed in a similar manner i.e. a non-discrimination rule. This general principle is found in Article XIII (1) and reads as follows:

> "1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted".

The second core thrust of Article XIII provides rules relating to the distribution of trade under the provisions of a QR. The article favours the mimicking of the trade pattern absent of the QR for trade conducted within the QR. This is done by looking at a concept called 'substantial interest' which basically equates to allocating a QR based on historical trade patterns[21]. While the article speaks to imports in the main, we note that export restrictions are specifically brought within the ambit of the article in that paragraph 5 states that: 'in so far as applicable, the principles of this Article shall also extend to export restrictions'. The Appellate Body has also held that GATT Article XIII will apply to the allocation of quotas under the AoA[22].

For current purposes, suffice to say that in the case of the imposition of a QR under the Bill the Director General would have to ensure that functionaries adhered to these GATT Article XIII requirements in prescribing the actual administrative methodology by which the QR will operate. Should South Africa be found to be outside of the requirements of Article XIII, this would negate the WTO legality of the QR as an instrument per se, and would not only speak to the correctness in the administration of that instrument.

Some extracts from WTO case law shed light on the appropriate manner for the application of such discretion:

[21] Van den Bossche remarks that practice in the WTO is usually to use the 3-year period prior to the imposition of the QR (see op cit. at page 452). We note that this is similar to the South African methodology in allocating tariff rate quotas, which are also covered under the ambit of Article XIII in its paragraph 5.

[22] Appellate Body Report, EC — Bananas (III) at paragraph 157: '[W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994'.

In the *India - Quantitative Restrictions* dispute[23], the Panel examined the application of Article XI to India's discretionary import licensing system for items on a 'Negative List of Imports', as well as a 'Special Import Licence' system. The Panel held that discretionary or non-automatic import licensing systems are prohibited by Article XI:1. That panel observed that under the GATT 1947, panels had examined whether import and export licensing systems are restrictions under Article XI: 1. The panel found, for example, that under a regime where (i) products are subject (in principle) to a QR; (ii) for which permits are granted upon request; (iii) but for which no quota amount either in quantity or value had been set, that such a regime constituted an import licensing procedure which would amount to a prohibited quantitative restriction unless it provided for the automatic issuance of licenses.

In the *Korea — Various Measures on Beef* dispute[24] the Panel could not find that Korea's regulatory regime on beef imports via a licensing system, which by granting exclusive authority to certain Korean agencies to import beef, effectively established a non-automatic import licensing system in violation of Article XI: 1. The Panel held that discretionary licensing used in conjunction with a quantitative restriction does not necessarily constitute a restriction additional to the quantitative restriction.

In a later decision in the *China - Raw Materials* dispute[25], the Panel found that China's export licensing regime on various raw materials was inconsistent with Article XI:1 because it was operated in a restrictive manner. The Panel found that licences that are granted without condition or those that implement an underlying measure that is justified pursuant to another provision of the WTO Agreement (i.e. one giving effect to an exception such as GATT Articles XI: 2, XII, XVIII, XIX, XX or XXI) may be consistent with Article XI: 1, so long as the licence does not by its nature have a limiting or restrictive effect. Conversely, a licence requirement that results in a restriction additional to that inherent in a permissible exception measure would be inconsistent with GATT Article XI: 1. The Panel considered that such a restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence application.

[23] WTO document series DS90.
[24] WTO document series DS161 and DS169.
[25] WTO document series DS395, DS396 and DS398.

6. Doha Considerations

The current Doha Round of trade negotiations is addressing the export restriction rules with a view to adding extra discipline in their use. The current agriculture negotiating text[26] titled 'Revised Draft Modalities for Agriculture' has a specific section dealing with 'Export Prohibitions and Restrictions'. Note that the acceptability and/or possible implementation date of these modalities is still unknown. After seven years this text still remains the basis for negotiation for a Doha agriculture deal and thus represents the best indicator as to possible modalities yet to be agreed upon. The modalities seek to strengthen the existing disciplines on export prohibitions and restrictions of Article XI.2(a) of the GATT and Article 12 of the AoA. The modalities text provides some insight as to the bridge that Members see existing between the GATT and the AoA and one sees additional effort at drawing the general disciplines of the GATT into a more specific and more stringent level of application under a future Doha incarnation of the AoA.

The draft text is looking to add the following new disciplines on agricultural export restrictions:

- Firstly, the modalities seek to take an accurate stock of the position regarding existing measures. All prohibitions or restrictions under Article XI.2(a) of GATT will have to be notified to the Committee on Agriculture within 90 days of the coming into force of the new agreement. Recall that this is a re-emphasis of the notification requirements that already exist, but that as demonstrated earlier, are not always adhered to.

- Having clearly established what measures are in place the modalities then require that all existing export prohibitions and restrictions in foodstuffs and feeds under Article XI.2 (a) of GATT be eliminated by the end of the first year of implementation of the agreement.

- Thereafter any new export prohibitions or restrictions under Article XI.2 (a) of GATT will be limited to a period of 12 months. The period may be extended to an absolute maximum of 18 months, but the extension will only be permitted with the express consent of affected importers.

- There are several paragraphs which introduce enhanced notification and consultation obligations when using export prohibitions and restrictions.

[26] WTO document TN/AG/W/4/Rev.4 of 6 December 2008 at paragraphs 171-180. After seven years this text still remains the current basis for negotiation.

- The enhanced rules are intended to apply consistently with Article 12.2 of the AoA, implying that developing country members (unless they are net exporters of the product at issue), least-developed and net food-importing developing countries will not be subject to the notification requirements. It however appears that the essence of the new disciplines as regards starting with a clean slate then limiting duration to 12 months on any future measures will apply to developing countries. It is not clear from the proposal whether provision is made for back-to-back imposition of measures with respect to the same product. We would suggest that this needs to be clarified as the Doha negotiations progress.

- With regards notifications of export restrictions and prohibitions a counter notification facility is introduced. This means that a Member can notify a measure which it considers ought to have been notified by another Member but was not so notified.

In summary the proposed Doha disciplines would be tightened for introducing new export restrictions, with increased transparency, monitoring and consultation requirements. The essence of the current rules however remain in place in that export restrictions and prohibitions will not be eliminated and will still be allowed, albeit under somewhat tightened conditions.

7. Evaluation & Conclusion

For ease of reference we recall the text of the Bill at issue in this opinion:

> The Director-General may allow the importation into or the exportation from the Republic, of agricultural, forestry and fisheries products under the authority of a permit issued by the Director-General on such conditions as the Director-General may determine and set out in such a permit.

The quoted text of the Bill allows for the imposition of a WTO quantitative restriction assessed against GATT Article X1:1 enabled through a non-automatic licensing requirement. That said the Bill does not necessarily anticipate and facilitate an untoward situation. Essentially whether an untoward situation arises will depend as to how the Director General handles the exercise of her delegated authority, whether there is a justification for the QR under the (numerous) exceptions that have been pointed out, and how the permits are administered. The Director General may simply use the permit for aiding statistical compilations or the Director General may indeed apply a restriction on export volumes or value through a traditional quantitative

restriction ('QR'). In all likelihood an actual case by case evaluation would be required of the specific measure or regulation that came forth. Each evaluation can however be tested against some definite benchmarks both within the WTO rules as well as the WTO case law that has subsequently shed light on these provisions. It would be critical for the government to determine which exception category would be applicable and then to carefully craft the implementing instrument which would flow from Sub-clause 14 (d) of the Bill. Particularly important would be to assess whether the permit requirement is automatic or discretionary and how it would be administered.

Certain features of the current text of Sub-clause 14 (d) of the Bill run the risk of being WTO incompatible. These are the terms 'may allow' and the reference to 'such conditions as the Director-General may determine' as they infer that trade is restricted by default unless specifically 'allowed' for by permit; and secondly that the exercise of discretionary power under the sub-clause appears to be, in the words of the panel in the *China – Raw Materials* dispute, 'undefined and unfettered'[27].

Assuming hypothetically that the government did err in their construction of an export restriction on maize or maize products and the South African maize sector sought redress in terms of South Africa's WTO obligations. There would be two routes of redress available, the WTO route and the domestic route.

7.1 WTO Route

The WTO is an intergovernmental organization and as such private parties do not have legal standing before the organs of the WTO. The Maize Trust (or other South African natural or juristic person) could not approach the WTO to seek redress of an illegal QR. The Maize Trust would need to convince the South African trading partner adversely affected by the QR to take WTO action on its part. Typically one would do this via the foreign importers or the importers association, who would in turn take the matter up with the respective foreign government. Typically there would be some form of bilateral engagement, followed by raising the matter in one or more of the WTO Committees[28]. As a final option the aggrieved Member could launch a trade

[27] An alternative wording might be as follows ('~~o~~' = delete, 'o' = inset, '[o]' = optional):
"The Director-General may ~~allow~~ regulate the importation into or the exportation from the Republic, of agricultural, forestry and fisheries products. Such regulation may be performed under the authority of a permit issued by the Director-General on such conditions as the Director-General may determine and set out in such a permit with the express stipulation that such conditions and their application will be determined and applied in a fettered and defined manner compatible with South Africa's multilateral [trade] treaty obligations."
We note none the less that this 'tightening' is likely already required by the Constitution (see section 7.2).

[28] For example the Committee on Agriculture has a 'Q&A' facility where Members can question each others' policies as a standing item of the regular meetings of the committee. The SPS Committee has a facility where Members can raise an official 'trade concern', which also features as a standing agenda item for this committee.

dispute under the WTO's dispute settlement understanding (DSU). In the event that a dispute is initiated the Maize Trust could assist the foreign government directly or via the foreign importers' association. That assistance could range from moral support (press statements and the like), provision of data and statistics, procuring legal opinion and providing this to the complainant Member, or making a financial contribution to the running of their case. There is also an option of submitting written input to the Panel or the Appellate Body by way of an *amicus curia* brief[29]. The WTO adjudicators are however not obliged to accept this input. It would be solely at their discretion to do so or not.

7.2 Domestic Route

It seems trite, but we mention it by way of completeness, that the Maize Trust would firstly engage with the South African government in an attempt to have the undesirable export ban on maize revoked, hopefully before it is made effective, in an amicable manner using the numerous and well established liaison channels that the industry has for these purposes. Failing this step, the Maize Trust could consider a domestic legal action. The question then arises as to whether the Maize Trust would have grounds in domestic law to bring an action to force the South African government to comply with its international law obligations in the WTO. On face value this may seem fanciful, but it is not a comopletely unrealistic proposition.

It is well understood that a country cannot claim contrary domestic law as an excuse for not complying with its international obligations[30]. This would be one of the key theoretical premises in terms of which the hypothetical country in 7.1 above would proceed with its WTO action in the event that South Africa would attempt to 'justify' its failure to abide by the rules of the WTO by invoking its domestic legislation. The question here however is slightly different in that here the question is as to whether a domestic private citizen could invoke this same concept before a South African court.

South Africa follows a dualist system in relation to international law. This means that at an international law level, an international agreement binds South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement merely of a technical, administrative or executive nature[31]. However for a private citizen to enforce the rights and obligations under the international agreement before the domestic court, those rights and obligations must be first be enacted into domestic law. Any international agreement

[29] An *amicus curiae* is literally, friend of the court. The term describes someone who is not a party to a case and offers information that bears on the case, but who has usually not been solicited by any of the parties to assist a court.
[30] According to Article 27 of the Vienna Convention on the Law of Treaties, 1969, a party may not invoke the provisions of its internal law as a justification for its failure to perform under a treaty.
[31] In relation to this section see the 'Constitution of the Republic of South Africa (1996)' at Articles 231-233 titled 'International Law'.

becomes law in South Africa when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is effective in law (unless it is inconsistent with the Constitution or an Act of Parliament). When interpreting any South African legislation, courts must apply a reasonable interpretation of the legislation that is consistent with international law over any possible alternative interpretation that is inconsistent with international law.

The Marrakesh Agreement establishing the World Trade Organisation (the 'WTO Agreement'), inclusive of *inter alia* GATT, 1994 (which is based upon the text of the original GATT, 1947) and the AoA as part of Annex 1 of the WTO Agreement; was approved by Parliament on 6 April 1995 and is binding on South Africa in international law. However no rights are derived from the international agreements **themselves** because they have not been specifically enacted into municipal law[32]. In one particular instance courts have examined the legislation that has been enacted to give effect to the Anti-Dumping Agreement[33]. The Constitutional Court[34] examining the applicability of the WTO's anti-dumping rules in South Africa noted that Parliament has enacted legislation i.e. International Trade Administration Act (2002) and 'in turn, the Minister has prescribed Anti-Dumping Regulations' to give effect to the Anti-Dumping Agreement[35].

This implies that Article 12 of the AoA cannot be invoked before national courts, but what about Article XI of GATT, 1947? GATT, 1947 was incorporated into municipal law by means of The General Agreement on Tariffs and Trade Act (Act 29 of 1948). The general view is that GATT 1947, although not formally revoked ceased to exist and was 'taken up' in the GATT 1994. By the same token The General Agreement on Tariffs and Trade Act (Act 29 of 1948) is still in force although most of its provisions (including a provision allowing for the Act to be applied through proclamation) have been deleted. This raises serious questions regarding its enforceability in South Africa. Given these considerations, it is our view, that it is more likely than not that Article XI both as part of the original text of GATT, 1947 or as part of GATT, 1994 cannot be invoked before a domestic court, although this option cannot completely excluded.

The Maize Trust could consider contesting the interpretation to be given by the Minister in the exercise of her rights under the current wording of Sub-clause 14 (d) of the Bill. This would be done on the basis of a direct appeal to the Constitution in contending that her interpretation is inconsistent with South Africa's international

[32] Progress Office Machines CC v South African Revenue Services and Others 2008 (2) SA 13 (SCA) at paragraph 6.
[33] These circumstances also exist with respect to the Agreement on Safeguards & the Agreement on Subsidies and Countervailing Measures as they are also reflected (at least in part) in regulations under the ITA Act.
[34] The Constitutional Court judgement in' ITAC versus SCAW', Case CCT 59/09 [2010] ZACC 6.
[35] Quoting 'Progress Office Machines CC v South African Revenue Services and Others' 2008 (2) SA 13 (SCA) at paragraph 6.

law obligations under the WTO Agreement as per Section 233 of the Constitution[36]. In our view this would not be an easy exercise but again this option cannot completely excluded as an option.

In summary, both the international route (WTO processes) and the domestic route (South African courts) do present weak options for redress should the Maize Trust want to challenge a maize export restriction or prohibition imposed via legislation enacted upon the current wording of the Bill. Whether to pursue these options will depend upon the extent of the financial impact that the governmental action has on the maize sector and on the monetary means available to seek redress of such an egregious situation before the courts.

[Thus concludes the opinion]

[36] See Section 233 Constitution of the Republic of South Africa (1996 as amended) headed 'Application of international law':
'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

Ad note to this opinion:

We do note that the International Trade Administration Act (No. 71 of 2002) already empowers the government to prohibit the exportation of maize, absent of any developments that may ensue with the MAP Bill.

In this regard it is worth noting the text of section 6 of the International Trade Administration Act which reads as follows, with particular reference to Sections 6. (1)(c) & 6 (1)(d):

> Minister's power to regulate imports and exports
> 6. (1)
> The Minister may, by notice in the Gazette, prescribe that no goods of a specified class or kind, or no goods other than goods of a specified class or kind, may be-
> (a) Imported into the Republic;
> (b) Imported into the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission;
> (c) Exported from the Republic; or
> (d) Exported from the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission.

Mindful of the fact that we have not been requested to evaluate Section 6 of the International Trade Administration Act specifically, that the legality of this provision should be governed by the same legal considerations we have applied to sub-clause 14(d) of the Bill.

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