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SOUTH AFRICA'S UTILISATION OF THE WORLD TRADE ORGANISATIONS INSTRUMENTS IN THE PROTECTION OF THE TEXTILE AND POULTRY INDUSTRIES

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A Research Paper submitted in partial fulfilment of the requirement for the degree of Legum Magister (LLM), Faculty of Law, University of the Western Cape, South Africa

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DECLARATION

I, Charnall Lynn Eastland hereby declare that 'South Africa's Utilisation of the World Trade Organisations Instruments in the Protection of the Textile and Poultry Industry' is my own work and has not been submitted previously for any degree or examination in any other University or academic institution. All the sources used or quoted have been acknowledged and correctly referenced.

Student: Charnall Lynn Eastland

Signature: ……

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Supervisor: Prof Patricia Lenaghan

Signature: …….

Date: …….

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DEDICATION

This research paper is dedicated to my loving family, especially my father and mother, **William** and **Martha Eastland,** who taught me the value of hard work and not giving up during hard times.

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I thank my Lord and Saviour for His faithfulness and for giving me the strength to persevere through difficult times by placing in me the simple words of 'Keep Trying'. You never left me or forsook me, and I give all the glory and honour to You.

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LIST OF ABBREVIATIONS

AGOA	African Growth and Opportunity Act 2000
AMIE	Association of Meat Importers and Exporters of South Africa
ATC	Agreement on Textile and Clothing
BOP	Balance-of-payments
BTI	Board of Trade and Industries
BTT	Board of Tariffs and Trade
CEO	Chief Executive Officer
CLOTRADE	Clothing Trade Council of South Africa
DSU	Dispute Settlement Rules
DTI	Department of Trade and Industry and Agriculture, Forestry and Fisheries
EFTA	European Free Trade Association
EFTA	European Free Trade Association
EU	European Union
FAWU	Food and Allied Workers Union
GATT 1947	General Agreement on Tariffs and Trade
GATT 1994	General Agreement on Tariffs and Trade 1994
GDP	Gross Domestic Product
GNP	Gross National Product
GSP	Generalised System of Preferences
ITA ACT	International Trade Administration Act 71 of 2002
ITAC	International Trade Administration Commission of South Africa
ITEDD	International Trade and Economic Development Division
MFA	Multi Fibre Agreement
MFN	Most Favoured Nation Obligation
MOU	Memorandum of Understanding
NCC	National Chicken Council

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NT	National Treatment Obligation
NTBs	Non-Tariff Barriers
PRC	People's Republic of China
QRs	Quantitative Restrictions
RTA	Regional Trade Agreements
SA	South Africa
SACTWU	Southern African Clothing and Textile Workers Union
SACU	South African Custom Union
SAPA	South African Poultry Association
SATAC	South African Sustainable Textile Apparel Cluster
SPS	Sanitary and Phytosanitary Measures
SSA	Sub-Saharan African Countries
TRQ	Tariff Rate Quota
UK	United Kingdom
USA	United States of America
USAPEEC	USA Poultry and Egg Export Council
WTO	World Trade Organisation

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KEYWORDS

Poultry Industry

Clothing Industry

African Growth Opportunity Act

Anti-dumping actions

World Trade Organisation

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

CONTENTS

UNIVERSITY of the WESTERN CAPE
https://etd.uwc.ac.za/

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

LIST OF FIGURES

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

LIST OF TABLES

UNIVERSITY of the
WESTERN CAPE

https://etd.uwc.ac.za/

CHAPTER ONE

INTRODUCTION

1.1 Background

The World Trade Organisation (WTO) is the only global international organisation dealing with the rules of trade between nations.[1] The WTO agreements uphold certain principles; one such principle is the rule of the most-favoured-nation (MFN) obligation. This obligation requires WTO members, who grant certain favourable treatment to any given country, to grant that same favourable treatment to all other WTO members.[2] However, there are several exceptions, three of which include:

- actions taken against dumping (selling at an unfairly low price);
- subsidies and special 'countervailing' duties to offset the subsidies; and
- emergency measures, to limit imports temporarily - thus designed to 'safeguard' domestic industries.[3]

These exceptions serve as remedies both against fair - and unfair trade practices. An example of remedies against fair trade practices are safeguards, and examples of remedies against unfair trade practices are dumping and countervailing duties. Anti-dumping actions are trade remedies/mechanisms available to members of the WTO in facilitating the protection of the industries under certain circumstances. The WTO agreement, which sets out the anti-dumping remedy, is the agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), also known as the 'Anti-dumping Agreement'.[4] Article VI permits countries to take action against dumping and the 'Anti-dumping Agreement' clarifies and expands on Article VI. The two operate together.[5]

Dumping is viewed as price discrimination between the domestic and export markets and take place where the export price of a product is lower than the normal value of such product. The normal value is usually determined with reference to the domestic selling price in the exporting

[1] World Trade Organisation 'What is the WTO?' available at *https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm* (accessed 3 August 2016).
[2] Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organisation* 4 ed (2017) 39.
[3] The World Trade Organisation 'Understanding the WTO: The Agreements' 44 available at *https://www.wto.org/English/Thewto_E/whatis_E/tif_e/understanding_e.pdf* (accessed 11 April 2015).
[4] Agreement on the Implementation of Article VI of GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201. [hereinafter referred to as the WTO Anti-dumping Agreement].
[5] The World Trade Organisation (accessed 11 April 2015) 44.

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https://etd.uwc.ac.za/

country. Adjustments have to be made to the normal value and export price for differences that affect prices at the time that such prices are set, including differences in terms and conditions of sale, taxations, levels of trade and quantities. Finally, the margin of dumping is defined in South African legislation at the extent to which normal value is higher than the export price, after adjustments have been made for comparative purposes.[6]

The WTO agreement enables governments to act against dumping where there is a genuine (material) injury to the competing domestic industry. In order to achieve this, the government must be able to demonstrate that dumping is occurring, calculate the extent thereof (how much lower the export price is compared to the exporter's home market price), and then illustrate that the dumping is causing or threatening to cause injury. They allow countries to act in a manner, which would normally conflict with the GATT principles of binding a tariff and not discriminating between trading partners. Typically, anti-dumping action means charging extra import duty on the specific products from the exporting country in order to bring its price closer to the 'normal value' or to remove the injury to the domestic industry in the importing country.[7]

This research paper considers the South African Government's use of trade remedies in the protection of the Clothing and Textile industry (in respect of exports from China) and the Chicken industry (in respect of exports from the United States of America). Both industries are suitable for the economic climate in South Africa, is labour intensive and provides jobs for unskilled workers. Furthermore, one of the way both industries were impacted by foreign imports into South Africa is through significant job losses. Chapter 3 discusses the Chicken industry in greater detail and Chapter 4 considers the Clothing and Textile industry.

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In respect of South Africa's Clothing and Textile industry, Kruger opines that the South African Clothing and Textile industry was decimated by the failure of the South African Government to take appropriate steps to protect the industry.[8] More specifically, the government failed to utilise the available WTO mechanisms. This is a sound argument, given that since 2002, employment in the industry has declined from 200 000 to below 19 000 in 2017.[9] When the South African clothing manufacturers were unable to compete with the influx of cheaper

[6] Brink GF 'Determining the Weighted Average Margin of Dumping' (May 2011) tralac Trade Brief No SIITB08/2011 Stellenbosch: tralac 1.
[7] The World Trade Organisation (accessed 11 April 2015) 44.
[8] Kruger MC *The end of the Multifibre Agreement: A case study of South Africa and China* (unpublished LLM thesis, North-West University, 2011).
[9] 702 'SA clothing and textile industry drops from 200 000 to 19 000 jobs – researcher' available at *http://www.702.co.za/articles/251378/sa-clothing-and-textile-industry-drops-from-200-000-to-19-000-jobs-research* (accessed 12 October 2017).

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clothing from Asia, they were put out of business.[10] According to IndustriALL Global Union affiliate, the Southern African Clothing and Textile Workers Union (SACTWU), 2,000 to 3,000 workers have been losing their jobs annually.[11] Recently, there have been claims that the textile industry has been recovering. This leads to one of the purposes of this research paper, which is to consider which WTO remedies the government has employed during the period of the textile sector's collapse in order to prevent the decline, and further, which WTO measures have been employed to assist the textile sector to recover since its collapse.

Additionally, the most recent engagement of the South African Government with the United States of America (USA), in the context of the African Growth and Opportunity Act (AGOA),[12] will also be explored. AGOA is legislation approved by the USA Congress on 18 May 2000 as title 1 of the Trade and Development Act of 2000 (Public Law 106-200). Whether South Africa's (SA) response was appropriate and whether the outcome will result in the protection of the poultry industry and other affected industries will also be deliberated on.

During 2015, SA's eligibility came up for review. The crux of the reason why SA's eligibility was under review relates to a dispute between SA and the USA. This dispute concerns market access issues in SA for USA frozen chicken imports (HS 0207149), specifically the anti-dumping duties, which have been placed on the tariff line for the past 15 years.[13] The USA wanted duty-free access to SA's markets. Moreover, they wanted the South African Government to lift import taxes on poultry, should SA refuse, the USA threatened to not renew SA's membership into AGOA, which would have affected SA's duty-free access to the USA market for certain South African products. It has been estimated that SA's exclusion from AGOA would have resulted in a loss of US$2 billion for the South African economy.[14]

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WESTERN CAPE

One of the reasons for the South African Government's initial resistance towards the USA's demands for duty-free access for its frozen chicken imports, was to protect the poultry industry from suffering material damage due to the 'dumping' of products. The influx of poultry has the potential to irreparably harm the local industry and lead to large-scale job loss. Furthermore,

[10] Industriall Global Union 'FEATURE: A turnaround for South Africa's textile industry?' available at *http://www.industriall-union.org/a-turnaround-for-south-africas-textile-industry* (accessed 15 November 2018).
[11] Industriall Global Union (accessed 15 November 2018).
[12] Trade and Development Act of 2000 "also known as "Public Law 106-200" – May 18 2000 (Unites States Government, Published Date 1 May 2000). [hereinafter AGOA].

[13] Viljoen W 'AGOA deliberations –removal of anti-dumping duties or a loss of duty free access' 2 available at *https://www.tralac.org/discussions/article/7245-agoa-deliberations-removal-of-anti-dumping-duties-or-a-loss-of-duty-free-access.html* (accessed 9 April 2015).
[14] Viljoen W (accessed 9 April 2015).

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the USA is one of the largest producers of chicken meat in the world- in 2013 the USA produced approximately 17 million tons of chicken meat (18 per cent of world production), while SA produced roughly 1.5 million tons (1.6 per cent of world production). SA has had anti-dumping duties in place against the USA since 2000, nevertheless, between 2001 to 2014 exports from the USA into SA grew by 17.5 per cent.[15]

During a two-day meeting in June 2015 in Paris (France), SA and the USA agreed on a framework to restore market access (which included various agricultural issues) into the South African market for USA bone-in chicken cuts.[16] SA did not immediately implement the agreement reached. After further threats and pressure from the USA, on 15 September 2015 SA agreed to implement the Tariff Rate Quota (TRQ) of 65 000 tons as agreed in the Paris meeting.[17]

One of the concerns, which existed at that time regarding the poultry industry, was whether the concessions made by SA was too great and could result in the degradation of the poultry industry. The current poultry industry statistics show that there has been a weakening of the poultry industry. The degree to which this degradation is as a result of the South African Governments decision making in respect of the utilisation of the WTO instruments, will be considered.

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1.2 Problem statement

In the following composition, SA's utilisation or failure to utilise the WTO instruments in response to threats against its textile and poultry industry will be critically analysed. More specifically, the measures employed by the South African Government during the period of the textile sector's collapse will be deliberated on, and the WTO measures, if any, which have been utilised to prevent a decline in the poultry sector. In addition, the recent threats against the poultry industry and the South African Government's response to those threats will be considered. In doing so, AGOA and the South African Government's negotiations with the USA and the outcome of such negotiations in the context of the protection of SA's industries will be examined. Also, whether their response was appropriate and whether they acted within

[15] Viljoen W (accessed 9 April 2015).
[16] SouthAfrica.info 'South Africa US resolve chicken import issues' 8 June 2015 available at *http://www.southafrica.info/business/trade/relations/chicken-080615.htm#.V6MC403r26o* (accessed 4 August 2016).
[17] AGOA.info 'Breaking news: SA and US agree on protocol to address agricultural issues' 15 September 2015 available at *http://agoa.info/downloads/general/5851.html* (accessed 3 August 2016).

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the best interest of the poultry industry and other affected industries, and/or SA. The objective is, consequently, to explore lessons learnt from both scenarios and to consider when the action was taken, if such action was appropriate, whether it produced successful outcomes, and whether it has the potential of producing successful outcomes within SA.

1.3 Research questions

Has SA adequately protected the poultry industry through its use of WTO remedies, or will the poultry industry suffer the same devastation visited on the textile industry?

1. Which remedies, if any, did the South African Government utilise to protect the textile industry?
2. Which remedies, if any, did the South African Government utilise to protect the poultry industry?
3. What possible impact and consequences could there be to the poultry industry resulting from concessions made by the South African Government in favour of the USA during the AGOA negotiations?

1.4 Research methodology

Research on this topic shall be done in a conventional manner, by means of accumulating written text on the subject in the form of textbooks, legislation, jurisprudence, journal articles, internet sources, as well as, both national and international sources. The sources will be analysed individually, and where relevant and necessary, the viewpoints of the sources will be compared. Thereby, ensuring that the matter is explored from as many perspectives as possible and that a broader understanding of the intricacies of this topic is attained.

1.5 Sequence of chapters

The current topic for discussion shall be outlined in five chapters.

Chapter One: Introduction

This chapter shall serve as the roadmap to the paper by introducing the reader to the background and significance of the study. The research question will be explained, and the outline of the paper and subsequent chapters will be indicated.

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Chapter Two: World Trade Organisation

This chapter will introduce the reader to the concept of the WTO and provides the reader with an understanding of the WTO and its relevant agreements. It will consider the principles of liberalisation, which is the removal or reduction of restrictions or barriers on the free exchange of goods between nations.[18] Moreover, the permitted exceptions to liberalisation will be discussed. This chapter will also provide readers with an understanding of the trade remedies of anti-dumping actions, safeguards, and countervailing measures available to members under certain circumstances in the protection of countries industries.

Chapter Three: The Textile Industry

In this chapter, the decline of the textile industry will be considered along with the use of WTO remedies by the South African Government during the collapse in the prevention of the industries decline. Importantly, the present state of the industry will be reviewed and whether there have been any current measures employed by the South African Government.

Chapter Four: The Poultry Industry

In this chapter, the history and development of the poultry industry will be outlined. Previous WTO mechanisms employed by the South African Government in the protection of the industry will be contemplated. Also, AGOA will be discussed and its relevance and importance to SA. The issues surrounding the poultry dispute will be explored and the balancing act, which SA was forced to engage in, in the protection of its industries. Furthermore, commentary from various sources regarding the outcome and consequences of the agreement reached between SA and the USA concerning the poultry industry, and to a lesser extent, other affected industry, will be discussed.

Chapter Five: Conclusion and Recommendations

This part of the study will compare the South African Governments actions and decisions in relation to both industries in respect of its use of the WTO remedies. A conclusion will be drawn as to whether the decisions made were reasonable, unreasonable, excessive, or

[18] Investopedia.com 'Trade liberalisation' available at *http://www.investopedia.com/terms/t/trade-liberalization.asp* (accessed 10 September 2016).

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inadequate. Finally, lessons will be drawn from each engagement for deliberation and recommendations will be made.

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CHAPTER TWO

THE WORLD TRADE ORGANISATION AND THEORETICAL CONCEPTS

2.1 Introduction

The World Trade Organisation (WTO) is the only global international organisation dealing with the rules of trade between nations.[19] The WTO oversees approximately sixty different agreements, which have the status of international legal texts.[20] Its agreements prescribe the legal foundation for the international trading system used by the bulk of the world's trading nations.[21] This chapter begins with considering the WTO, its formation and the rules/principles, which comprises this international trading system. It also considers the exceptions to these rules, that is, under which conditions may these rules be circumvented. There will also be a discussion of fair and unfair trade practices and, where these trade practices cause harm to a WTO member's industries, which remedies are available to mitigate such harm. Finally, South Africa's (SA) legal framework and its engagement with the WTO's rules and remedies are discussed. This information is imperative to gain a comprehensive understanding of the South African Governments engagement with the WTO with respect to Chapters Three (the Textile Industry) and Four (the Poultry Industry's). Below the discussion begins with considering the formation of the WTO.

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2.2 The World Trade Organisation, the Uruguay Round, and South Africa's Trade Reform

Since 1947, the General Agreement on Tariffs and Trade (GATT 1947) has provided rules for the system (multilateral trading system).[22] Over the years, GATT evolved through several rounds of negotiations.[23] A 'Round' is a phase of trade negotiations between WTO members, of which each round has at its centre a different theme. The major Post-World II Global Trade Rounds achievements are:

[19] Economics Help 'Trade liberalisation' available at *http://www.economicshelp.org/blog/glossary/trade-liberalisation/* (accessed 28 June 2017).
[20]The World Trade Organisation (WTO) 'WTO Agreement Series' available at *https://www.wto.org/english/res_e/publications_e/wto_agree_series_e.htm* (accessed 28 June 2017).
[21] The World Trade Organisation (accessed 28 June 2017).
[22] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
[23] World Trade Organisation 'South Africa and the WTO' available at *https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm* (accessed 11 June 2017).

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Round	Participants	Key Achievements
1947	23	Tariff reduction.
1949	13	Tariff reduction.
1951	37	Tariff reduction.
1956	26	Tariff reduction.
1960-61, 'Dillon Round'	26	Tariff reduction.
1964-67, 'Kennedy Round'	62	Tariff reduction, agreement on anti-dumping practices.
1973-79, 'Tokyo Round'	102	Tariff reduction, elimination of non-tariff barriers, 'framework' agreements.
1986-94, 'Uruguay Round'	123	Tariff reduction, agreement to eliminate quotas in agriculture, agreement on intellectual property, agreement on dispute settlement, integration of textile, and apparel products into the agreement, creation of the WTO.
2001 – Present 'Doha Round'	146	Dubbed the 'Development Round', these negotiations focus on agriculture, trade of services, market access, intellectual property rights, investment, competition, transparency in government, procurement, trade facilitation, and WTO rules, and have so far been characterized by conflict between developed and developing countries.[24]

Figure 1: Major Post-World II Global Trade Rounds achievements

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[24] Globalisation 101 'Liberalisation of International Trade' *http://www.globalization101.org/liberalization-of-international-trade/* (accessed 30 June 2017).

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SA has been a member of GATT since 13 June 1948, and a WTO member since 1 January 1995.[25] The WTO in its current form officially commenced on 1 January 1995 under the Marrakesh Agreement, which was signed on 15 April 1994 by 123 nations, approving the General Agreement on Tariffs and Trade 1994 (GATT 1994).[26]

The Uruguay Round, which led to the WTO's creation, lasted from 1986 to 1994.[27] It was during this period, that SA underwent a trade reform by changing its trade policy from protectionism to trade liberalisation.[28] It is against this background of trade reform that the South African Government's utilisation of the WTO remedies, in the protection of its industries, will be considered and evaluated. However, the principles/rules in respect of trade liberalisation will first be explored.

2.3 The Law of the World Trade Organisation and the Principles/Rules of Trade Liberalisation

The law of the WTO addresses a broad spectrum of issues ranging from tariffs, import quotas and customs formalities to compulsory licensing, food safety regulations, and national security measures.[29] There are five basic rules of the WTO, which can be distinguished as follows: First, rules of non-discrimination; secondly, rules of market access; thirdly, rules of unfair trade; fourthly, rules on the conflict of between trade liberalisation and other societal values and interest; and finally, institutional and procedural rules including those relating to WTO decision-making, trade policy review, and dispute settlement.[30] The rules most relevant to this discussion relate to non-discrimination and unfair trade. In the succeeding chapter, the rules relating to non-discrimination and their exceptions will be discussed.

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2.3.1 Rules of non-discrimination

There are two basic rules of non-discrimination in WTO law: First, the most-favoured-nation (MFN) treatment obligation and secondly, the national treatment (NT) obligation.

[25] World Trade Organisation (accessed 11 June 2017).
[26] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144. [hereafter GATT 1994].
[27] World Trade Organisation (accessed 11 June 2017).
[28] Mills S 'Thrown in at the deep end: South Africa and the Uruguay round of multilateral trade negotiations,1986-1994' (2010) 29 *Politeia* 12-13.
[29] Van den Bossche P & Zdouc W (2017) 38.
[30] Van den Bossche P & Zdouc W (2017) 38.

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2.3.1.1 The Most Favoured-Nation Treatment Obligation

The MFN requires a WTO member, who grants certain favourable treatment to any given country, to confer the same favourable treatment to all other WTO members.[31] A WTO member is not allowed to discriminate between its trading partners by, for example, giving the products imported from certain countries more favourable treatment with respect to market access than the treatment it accords to the 'like' products of other members. Despite many exceptions and deviations from this obligation, the MFN is arguably the single most important rule in WTO law without which the multilateral trading system could not exist.[32]

2.3.1.2 The National Treatment Obligation

The NT requires a WTO member to treat a foreign product, service, and service supplier no less favourably than it treats 'like' domestic products, services, and service suppliers.[33] Where the NT applies, foreign products, for example, should, once they have crossed the border and entered the domestic market, not be subject to less favourable taxation or regulation than 'like' domestic products. Pursuant to the NT obligation, a WTO member is not allowed to discriminate against foreign products, services, and service suppliers.[34]

2.3.2 Exceptions

As previously mentioned, the MFN principle requires members not to discriminate among imported products from other members. The NT principle requires members not to discriminate against imported products, as opposed to, domestic products. Regarding market access for goods, members are required to act in accordance with their scheduled commitments on tariffs and not to apply tariffs beyond the bound levels unless these are renegotiated. In addition, members are not generally allowed to impose quantitative restrictions (QRs) on market access for goods and are required to ensure that their non-tariff barriers (NTBs), such as customs formalities, do not constitute unnecessary obstacles to trade.[35]

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[31] Article I of GATT 1994.
[32] Van den Bossche P & Zdouc W (2017) 39.
[33] Article III of GATT 1994.
[34] Van den Bossche P & Zdouc W (2017) 39.
[35] World Trade Organisation ' Module 8 – Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTA's) Balance – of –Payments (BOPs) & Waivers' available at *https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf* (accessed 2 July 2017).

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However, in certain circumstances, WTO members may derogate from these obligations, if they comply with certain conditions.[36] Examples of these exceptions are:

a) General exceptions – The right to take measures, which for example, are necessary to protect human, animal, or plant life or health, which may restrict trade in goods (GATT 1994).[37]
b) Security exceptions – The right to take measures to protect essential national security interests, which may restrict trade in goods (GATT 1994).[38]
c) Exceptions for Regional Trade Agreements (RTAs) – The right to depart from the MFN principle in order to grant preferential treatment to goods (GATT 1994).[39]
d) Balance-of-payments (BOP) – The right to take measures to safeguard a member's external financial position and its BOPs.[40]
e) Waivers – In exceptional circumstances, temporary waivers may be granted with the authorization of other members.[41]
f) The Enabling Clause[42] - The 1979 GATT decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, commonly known as the 'Enabling Clause'.[43]

The exception most relevant to this topic is the 'Enabling Clause', given that under this exception the United States of America (USA) approved the African Growth Opportunity Act (AGOA),[44] from which SA benefits and, which benefits were threatened by the USA in 2015.[45]

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2. 3.2.1 The Enabling Clause

An important exception for this discussion is the 'Enabling Clause', which was adopted under GATT in 1979.[46] It enables members to give differential and more favourable treatment to developing countries. The Enabling Clause, which is an integral part of GATT 1994, states in para 1 that:

[36] World Trade Organisation (accessed 2 July 2017).
[37] Article XX of GATT 1994.
[38] Article XXI of GATT 1994.
[39] Article XXIV:5 of GATT 1994.
[40] Article XII of GATT 1994.
[41] Article XXV:5 OF GATT 1994.
[42] GATT Document L/4903, dated 28 November 1979, BISD 26S/203.
[43] Van den Bossche P & Zdouc W (2017) 321.
[44] Trade and Development Act of 2000 (Public Law 106-200).
[45] Refer to s4.5.2. page 46.
[46] Van den Bossche P & Zdouc W (2017) 321.

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> 'Notwithstanding the provisions of Article, I:1 of the GATTS 1994 Members may accord differential and more favourable treatment to developing countries, without according such treatment to other Members.'[47]

The USA is entitled to grant preference to developing countries without extending the same preference to developed countries, due to the fact that the Enabling Clause creates this exception to the MFN treatment obligation, provided that the same preference is extended to all developing countries 'similarly situated'.[48] AGOA was approved by the USA Congress on 18 May 2000 as title 1 of the Trade and Development Act 2000.[49] The purpose of the legislation was to assist the economies of Sub-Saharan Africa (SSA) and to improve relations between the USA and the region. AGOA provides trade preferences for quota and duty-free entry into the USA for certain goods, expanding on the benefits under the Generalised System of Preferences (GSP) programme. The GSP is a USA trade program designed to promote economic growth in the developing world by providing preferential duty-free entry for up to 4,800 products from 129 designated beneficiary countries and territories.[50]

SA has been a beneficiary under AGOA since its inception. Chinembiri noted that AGOA provides SA with the opportunity to gain competitiveness in the world's largest market through the duty-free access to the USA markets for a range of manufactured goods and, as such, the AGOA dispensation is crucial for the USA and South African trade relationships.[51] According to Chinembiri, AGOA is largely beneficial to SA's overall economy- this statement has to be considered and evaluated in the context of the AGOA negotiations, which occurred in 2015 relating to market access into SA for USA frozen chicken imports.[52]

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[47] Paragraph 1, GATT Document L/4903, dated 28 November 1979, BISD 26S/203.
[48] Van den Bossche P & Zdouc W (2017) 324-325.
'Similarly situated' is described as: Similarly situated developing country members, who have the development, financial and trade needs to which additional preferential treatment is intended to respond.'
[49] International Trade Administration (accessed 23 May 2015).
[50] U.S. Customs and Border Protection 'Generalised System of Preferences (GSP)' available at https://help.cbp.gov/app/answers/detail/a_id/266/~/generalized-system-of-preferences-%28gsp%29 (accessed 13 December 2018).
[51] Chinembiri EWK *An analysis of South African exports to the United States under the African Growth Opportunity Act* (in partial fulfilment of the requirement for the degree M.Com in Management Practice (Trade Law & Policy), Graduate School of Business University of Cape Town, 2015) 52.
[52] Refer to s4.5.2. page 46.

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2.3.3 The rules of 'unfair trade'

WTO law does not provide for general rules on unfair trade practices, but it does have several detailed rules, which provide remedies in reaction to specific forms of 'unfair trade'. These rules deal with dumping and subsidised trade.[53] Dumping refers to the act of bringing a product into the market of another country at a price less than the normal value of that product; this is condemned but not prohibited under WTO law. However, when the dumping causes, or threatens to cause, material harm to the domestic industry of a member producing a 'like' product, WTO law allows that member to impose anti-dumping duties on the dumped product to offset the dumping.[54]

Subsidies are financial contributions by governments or public bodies, which confer a benefit. Certain subsidies, such as export and import substitution subsidies, are, as a rule, prohibited. Other subsidies are not prohibited, however, when they cause adverse effects to the interest of other members, the subsidising member should withdraw the subsidy or take appropriate steps to remove the adverse effects; if the subsidising member fails to do so, countermeasures commensurate with the degree and nature of the adverse effect may be authorised. If a prohibited or other subsidy cause, or threatens to cause, material injury to the domestic industry of a member producing a 'like' product, that member is authorised to impose countervailing duties on the subsidised product to offset the subsidisation.[55] These mechanisms/remedies against dumping and subsidies are known as anti-dumping remedies and countervailing measures respectively and are examined in more detail below in s2.3.3.1.

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2.3.3.1 Remedies against unfair trade practices

The remedies available to a member of WTO in facilitating the protection of its industry under certain circumstances are contained in the applicable WTO agreements and are discussed below. The remedy against dumping is discussed in para 2.3.3.1.1 and the remedy against subsidies are discussed subsequently in para 2.3.3.1.2.

2.3.3.1.1 Anti-dumping actions

The WTO agreement, which sets out the anti-dumping remedy, is the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT

[53] Van den Bossche P & Zdouc W (2017) 41.
[54] Van den Bossche P & Zdouc W (2017) 41.
[55] Van den Bossche P & Zdouc W (2017) 41.

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1994), also known as the 'Anti-dumping Agreement'. Article VI allows countries to act against dumping and the Anti-dumping Agreement clarifies and expands on Article VI. The two operate together. Dumping occurs when a company exports a product at a price lower than the price it normally charges in its home market; thus, it is said to be 'dumping the product'. Many governments act against dumping in order to defend their domestic industries. The legal definition of dumping is more precise, however, broadly speaking, the WTO agreement allows governments to act against dumping where there is a genuine (material) injury to the competing domestic industry. In order to achieve this, the government must be able to demonstrate that dumping is occurring, calculate the extent thereof (how much lower the export price is compared to the exporter's home market price), and then illustrate that the dumping is causing or threatening to cause injury. They allow countries to act in a manner, which would normally break the GATT principles of binding a tariff and not discriminating between trading partners. Typically, anti-dumping action means charging extra import duty on the product from the exporting country in order to bring its price closer to the 'normal value' or to remove the injury to domestic industry in the importing country.[56]

2.3.3.1.2 Agreement on Subsidies and Countervailing measures

The Agreement on Subsidies and Countervailing Measures,[57] which stipulate the rules relating to this remedy, accomplish two objectives: it disciplines the use of subsidies and regulates the actions, which countries may take to counter the effects of subsidies. It states that a country may use the WTO's dispute settlement procedures to seek the withdrawals of the subsidy or the removal of its adverse effects; alternatively, the country can launch its own investigation and ultimately charge extra duty ('countervailing duty') on subsidised imports, which are found to be harming domestic producers.[58]

Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures prohibits the use of export subsidies and provides that a member shall neither grant nor maintain such subsidies. Notably, this ban does not apply to least-developed countries and the group of developing countries listed in Annex VII(b) and only applies to other developing country members after a transition period of eight years (Article 27.1). Annex VII lists certain countries as exempt from

[56] The World Trade Organisation (accessed 11 April 2015) 44.
[57] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [Not reproduced in LLM]. [hereinafter WTO Agreement on Subsidies and Countervailing Measures].
[58] The World Trade Organisation (accessed 11 April 2015) 45.

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this prohibition until their Gross National Product (GNP) per capita reaches US$1.000. Developing countries were expected to phase out the subsidies during the period mentioned, preferably in a progressive manner (Article 27.4).[59]

For the purpose of this research paper, only the remedy against unfair trade practices and anti-dumping will be further discussed. This is in agreement with Brink's point of view expressed in his paper- One hundred Years of Anti-dumping in South Africa- which makes note of the fact that the then Minister of Trade indicated that countervailing action will never be undertaken against imports from China.[60] The discussion below relates to remedies in respect of fair trade practices.

2.3.3.2 Remedies against fair trade practices- Safeguards: emergency protection from imports

As previously mentioned, one of the cornerstones of the WTO is Article I of the GATT, which provides for MFN treatment. In terms of Article 11 of GATT, WTO members undertake 'to accord to the commerce of other contracting parties' treatment no less favourable than that provided for in the appropriate part of the schedule annexed to GATT.[61] Safeguards are an exception to these GATT rules as they remove the obligations, which a member has incurred under Article II of GATT and, may, under certain circumstances, also discriminate between WTO members.[62] A WTO member may restrict imports on products temporarily (take safeguard action) if its domestic industry is injured or threatened with an injury caused by a surge in imports. Here, the injury must be serious.[63]

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Article XIX of GATT, known as the Emergency Action on Imports of Particular Goods, provided for normal safeguards, whereas the Protocol of Accession of the People's Republic

[59] Thomas RH *Regional Arrangements on developing countries and the world trade organisation from a law and policy perspective: The case of the Southern African Development Community* (thesis submitted in completion of PhD University of the Witwatersrand, 2001) 113.
[60] Brink GF 'One hundred years of anti-dumping in South Africa' (2015) 49 *Journal of World Trade* 4.
[61] WTO ' Backbone of the multilateral trading system: WTO goods schedules' available at *https://www.wto.org/english/news_e/news17_e/mark_27jul17_e.pdf* (accessed 7 November 2017).
WTO schedules are legal instruments, which describe the treatment a member must provide to the trade of other WTO members. Schedules result from negotiations among members, both in the multilateral (among all WTO members) and plurilateral (among some members) context. Although practitioners typically refer to '*the*' schedule of a member, these concessions and commitments can be spread out over several legal instruments that, together, set out that member's obligations.
[62] Brink GF 'Safeguarding South Africa's clothing, textile and footwear industries' (May 2006) 1 tralac Trade Brief No 2/2006 Stellenbosch: tralac 1.
[63] Brink GF (May 2006) 3.

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of China provides for protocol safeguards,[64] which are safeguards conducted in terms of that country's Protocol of Accession to the WTO and aimed exclusively against imports from that country.[65] The remedies will be discussed in more detail in Chapters Three and Four in considering the protection of SA's Textile and Poultry Industry. However, SA's legal framework and its overall utilisation of the WTO trade remedies are discussed below. This information adds value to the discussions in Chapters Three and Four.

2.4 The International Trade Administration Commission of South Africa (ITAC)

ITAC is a schedule 3A Public Entity established in terms of the International Trade Administration Act 71 of 2002 and came into force on 1 June 2003. ITAC replaced its predecessor, the Board of Tariffs and Trade (BTT), which was established in 1986. The predecessor of the BTT is the Board of Trade and Industries (BTI), which dates to 1924.[66]

SA is one of the original signatories to the GATT and the Agreement Establishing the WTO. Parliament ratified the WTO Agreement in terms of s231(2) of the Constitution of the Republic of South Africa, Act 200 of 1993 on 6 April 1995. The WTO Agreement, including GATT 1994 and the WTO Anti-Dumping Agreement, thereby, binds SA under international law.[67]

Although GATT 1994 and the WTO Anti-Dumping Agreement binds SA under international law, they do not form part of SA's domestic laws. This results from the fact that GATT 1994 and the WTO Anti-Dumping Agreement were never enacted into South African law by national legislation and s231(4) of the Constitution of the Republic of South Africa, 1996 provides that an international agreement becomes law in the Republic only 'when it is enacted into law by national legislation.' Consequently, these agreements do not vest rights or impose obligations enforceable under South African domestic law.[68] This does not mean, however, that GATT 1994 and the WTO Anti-Dumping Agreement are irrelevant in anti-dumping investigations in SA, on the contrary, in light of s233 of the Constitution, these agreements serve as an interpretative aid to the relevant domestic legislation.[69]

[64] Refer to s3.5.1.2.
[65] Brink GF (May 2006) 1-2.
[66] ITAC 'An overview of ITAC' available at *http://www.itac.org.za/pages/about-itac/an-overview-of* (accessed 15 October 2017).
[67] ITAC 'Trade Remedies' available at *http://www.itac.org.za/pages/services/trade-remedies* (accessed 15 October 2017).
[68] ITAC 'Trade Remedies' (accessed 15 October 2017).
[69] ITAC 'Trade Remedies' (accessed 15 October 2017).

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Trade remedy investigations are conducted by the ITAC and are regulated by domestic legislation, namely the International Trade Administration Act 71 of 2002 (ITA Act),[70] and the relevant regulations. The anti-dumping regulations (AD Regulations)[71] were promulgated thereunder on 14 November 2003, and the safeguard regulations (SG Regulations) were promulgated on 27 August 2004[72] (as amended by the amended safeguard regulations),[73] and the countervailing regulations were promulgated on 15 April 2005.[74]

The core functions of ITAC are customs tariff investigations, trade remedies, and import and export control.[75] The process to complete an anti-dumping investigation is on average ten months from the date of initiation of an investigation and the procedure followed and the time it takes to complete an investigation in respect of countervailing measures are similar to that of an anti-dumping investigation. [76]

The investigation process in respect of trade remedies are:

a) The submission of a properly documented application submitted by the concerned South African Customs Union (SACU);[77]
b) Initiation of an investigation through the publication of a notice in the Government Gazette;
c) Response by exporters and importers and verification of information;
d) The preliminary determination by the Commission;
e) Final determination and recommendations to the Minister of Trade and Industry; and
f) Implementation of the final decision through publication in the Government Gazette.[78]

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SA has always been a prolific user of the anti-dumping remedies. Between 1995 and the end of 2014, SA initiated 229 investigations, ranking it amongst the top ten users. In 1998, it

[70] ITAC 'Trade Remedies' (accessed 15 October 2017).
[71] The International Trade Administration Commission, Anti-dumping regulations in GN 3197 *GG* 25684 of 14 November 2003. [hereinafter the AD regulations, 14 November 2003.]
[72] The International Trade Administration Commission, Safeguard regulations in GN 1801 *GG* 26715 of 27 August 2004.
[73] The International Trade Administration Commission Amended safeguard regulations in GN 662 *GG* 27762 of 8 July 2005.
[74] The International Trade Administration Commission, countervailing regulations in GN 356 *GG* 27475 of 15 July 2005.
[75] ITAC 'An Overview of ITAC' (accessed 15 October 2017).
[76] ITAC 'Trade Remedies' (accessed 15 October 2017).
[77] The South Africa Customs Union (SACU) consists of Botswana, Lesotho, Namibia, South Africa and 'Swaziland. The SACU Secretariat is in Windhoek, Namibia. SACU was established in 1910, making it the world's oldest Customs Union.
SACU Southern African Customs Union 'History of SACU' available at *http://www.sacu.int/show.php?id=394* (accessed 15 October 2017).
[78] ITAC 'Trade Remedies' (accessed 15 October 2017).

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initiated more cases than any other WTO member and for the period 1995–2004, it was by far the biggest user of the instrument when measured by the number of cases initiated by import value. The total initiated pre-WTO cases are 883 and the total under WTO is 229 resulting in the implementation of 134 measures.[79]

In contrast, SA's use of the safeguard measure has been minimal as it initiated its first safeguard investigation more than 12 years after becoming a WTO member and three years after promulgating the safeguard regulations on 11 May 2007.[80] This investigation had as its subject matter lysine.[81] Further investigations were initiated in relation to frozen potato chips on 21 June 2013, [82] on 24 March 2016 in hot rolled steel products,[83] and, finally, on 29 July 2016, the initiation of an investigation in cold-rolled steel products.[84]

In respect of countervailing investigations in the years 1995 - 2011, the Commission initiated 13 countervailing investigations.[85] Interestingly, Brink notes in his paper that the then Minister of Trade indicated that countervailing action will never be undertaken against imports from China.[86]

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[79] Brink GF (2015) 9.
[80] Brink GF 'Safeguards in South Africa: What lessons from the first investigation' 2007 *tralac Working Paper No 7/2007* 39.
[81] International Trade Administration Commission, 'Initiation of an investigation and preliminary determination in the investigation for remedial action in the form of safe guards against increase imports of lysine GN 560 *GG* 29874 of 11 May 2007' available at (accessed 12 November 2017). *https://www.greengazette.co.za/documents/government-gazette-29874-of-11-may-2007-vol-503_20070511-GGN-29874*
[82] International Trade Administration Commission, 'Notice of Initiation of an investigation into the alleged dumping of frozen potato chips originating in or imported from Belgium and Netherland GN 635 *GG* 36575 of 21 June 2013' available at *https://www.greengazette.co.za/notices/international-trade-administration-commission-notice-of-conclusion-of-an-investigation-into-the-alleged-dumping-of-frozen-potato-chips-originating-in-or-imported-from-belgium-and_20140808-GGN-37889-00634.pdf* (accessed 12 November 2017).
[83] International Trade Administration Commission, 'Notice of an initiation of the investigation for remedial action in the form of a safeguard against the increased imports of certain flat rolled products of iron, non-alloy steel or other alloy steel (not including stainless steel), whether or not in coils (including products cut-to-length and 'narrow strip'), not further worked than hot-rolled (hot-rolled flat), not clad, plated or coated excluding grain-oriented silicon electrical steel' GN149 *GG* 39860 of 24 March 2016' available at *http://www.itac.org.za/upload/Notice%20149%20of%202016%20Flat%20hot%20rolled%20steel%20products.pdf* (accessed 12 November 2017).
[84] International Trade Administration Commission, 'Notice of initiation of the investigation for remedial action in the form of safeguard against the increased imports of flat-rolled products of iron or non-alloy steel, or other alloy steel but excluding stainless steel, of all widths, cold rolled (cold-reduced), not clad, plated or coated and not worked than cold-rolled (cold reduced) GN 469 *GG* 40171 of 29 July 2016' available at *https://www.greengazette.co.za/notices/international-trade-administration-commission-notice-of-an-initiation-of-the-investigation-for-remedial-action_20160729-GGN-40171-00469.pdf* (accessed 12 November 2017).
[85] ITAC 'Briefing by ITAC to NEDLAC trade and industry Chamber, Date 15 March 2016' 12 available at *https://agbiz.co.za/uploads/AgbizNews17/170317_NEDLAC_Presentation.pdf* (accessed 12 November 2017).
[86] Brink GF (2015) 4.

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Finally, in spite of SA's prolific use of the anti-dumping remedy, it has a low-level WTO participation or involvement[87] within the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[88] To date, SA has never declared a dispute in terms of the WTO, nor has it participated in any dispute as a third country. Although it has been challenged in four cases, none of these cases proceeded to a panel as SA revoked the measure in question following consultation in three instances, while the others were not pursued.[89]

2.5 Conclusion

As mentioned previously, SA has benefited from the rules and obligations created by WTO, more specifically the Enabling Clause, one of the exceptions to the MFN and NT obligations. Furthermore, SA has been a prolific user of the anti-dumping remedies and have initiated several countervailing investigations, although, it should be noted that, countervailing measures were never initiated against China.[90] In respect of safeguard measures and the remedy against fair trade practices, SA has made minimal use of these. Furthermore, SA has never declared a dispute in the WTO, nor has it participated in any dispute as a third country and when challenged, SA revoked the measure in question. The picture that is forming in respect of SA's engagement in the use of WTO remedies is that SA has not been entirely consistent in its reliance on these remedies and mechanisms. How this approach has affected the protection of the clothing and poultry industries are explored in Chapters Three and Four. Firstly, however, SA's use of the WTO remedies in the protection of its textile industry is evaluated and considered in Chapter Three.

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[87] Brink GF (2015) 16.
[88] DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). [hereinafter DSU].
[89] Brink GF (2015) 16.
[90] Refer to s2.3.3.1.2, page 14.

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CHAPTER THREE

THE TEXTILE INDUSTRY

3.1 Introduction

The textile industry in South Africa (SA) suffered a rapid decline in the context of SA's accession to the World Trade Organisation (WTO) Agreements, more specifically, the Agreement on Textile and Clothing (ATC),[91] enforced from 1 January 1995 - 31 December 2004.[92] This decline became known as the 'textile crisis'. One of the main reasons for the decline in the textile industry has been identified as the importation of foreign clothing goods, more specifically, importations of goods from China.[93] In this chapter, the reasons for the decline in the industry will be examined with specific emphasis on foreign imports from China. Since trade remedies may be utilised in the protection of national industries, the extent to which the South African Governments utilised such remedies will also be considered.

Since the decline in the textile industry occurred in the context of SA's accession to the WTO Agreements, more specifically the ATC, in order to understand the collapse of the textile industry in SA, it is necessary to have an understanding of the historical context of the development of trade in the textile industry.

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3.2 The History and background of the development of trade within the textile industry in South Africa

Prior to the ATC, the textile industry was governed by the Multi Fibre Agreement (MFA), which governed the textile trade from 1974 until the end of the Uruguay Round (1974-94), when it was replaced by the ATC. The MFA was a framework for bilateral agreement or unilateral actions, which established quotas limiting imports into countries whose domestic industries were facing serious damage from rapidly increasing imports.[94] The MFA agreement violated the principles of the multilateral system by:

- violating the most favoured nation (MFN) principle;
- applying quantitative restrictions rather than tariffs;
- discriminating against developing countries; and

[91] Agreement on Textiles and Clothing 1868 U.N.T.S. [hereafter ATC].
[92] Refer to s3.2 on page 20.
[93] Refer to s3.4 on page 23.
[94] The World Trade Organisation (accessed 11 April 2015) 31.

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- being non-transparent.[95]

The ATC was a multilateral instrument agreed on within the WTO framework, which would provide for the regulated removal of quotas over a ten-year period starting on 1 January 1995 and terminating on 31 December 2004.[96] Upon termination of the ATC, all textile and clothing products were fully subject to multilateral disciplines under the rules of the WTO; which terminated the series of trade-distorting regimes that governed textiles and clothing trade over nearly four decades.[97]

The ATC requires the progressive elimination of all quantitative restrictions according to four stages over the ten-year period. Members were required to bring no less than 16 per cent of the products in question into conformity with multilateral trade rules, followed by an additional 17 per cent by 1998, and another 18 per cent by 2002. At this point, 51 per cent of the products would have had their quantitative restrictions eliminated. By 1 January 2005, members had to bring the remaining 49 per cent of their textile trade policy into full conformity with the ATC, at which point the textile sector was fully integrated into the multilateral trading system.[98] The ATC was 'self-destructive', as it ceased to exist after the mandated removal of quotas with no scope for renegotiations.[99]

As mentioned previously, the decline in the textile industry occurred in the context of SA's accession into the WTO Agreements. This decline has aptly been touted by several writers as the 'textile crisis'. The effect of the ATC on SA and the meaning of 'textile crisis' will be discussed below.

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3.3 The textile crisis

In a developing country, such as SA, the textile industry provides an opportunity to industrialise a sector with low-value-added goods. The textile industry consists of the textiles industry, clothing industry, footwear industry, and leather industry; therefore, when referring to either one of these industries, reference is made to the textile industry.

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[95] Nordás HK 'The Global Textile and Clothing Industry post the Agreement on Textile and Clothing' (2004) 13 available at *https://www.wto.org/english/res_e/booksp_e/discussion_papers5_e.pdf* (accessed 29 March 2015).
[96] Wolmarans J *The impact of trade policies on the South African clothing and textile industry: A focus on import quotas on Chinese goods* (unpublished MBA thesis, Stellenbosch University, 2011) 45-46.
[97] Wolmarans J (2011) 45-46.
[98] Global Trade Negotiations Home Page 'Textile and Clothing Summary' Center for International Development at Harvard University available at *http//www.cid.harvard.edu/cidtrade/issues/textiles.html* (accessed 31 March 2015).
[99] Wolmarans J (2011) 45-46.

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The industry is relevant and suitable for the economic climate in SA, as it is labour intensive and has the possibility of providing jobs for unskilled workers. However, at the time of the textile industries decline, it shifted from being one of SA's largest employers in the manufacturing sector to one of the smaller employers.[100] Statistics in respect of job-loss and factory closures, as discussed below, readily document the decline in the industry.

The overall official clothing employment decreased from 125 181 employees in 1994 to 113 464 employees in 1997 and then to 50 596 in 1998. SA's textiles employment recovered slightly in 1999, and in 2003 employment stood at 53 736.[101] In April 2017, Ettienne Vlok, Director of Research Southern African Clothing and Textile's Workers Union, stated that the number of people employed in the industry has declined from 200 000 (15 years ago) to about nineteen thousand in 2017.[102] Notably, Simon Appel, a textile industry researcher, stated that from 2011 job-loss began to taper off and within the last 18 months (from January 2018) there has been a slight recovery within the industry.[103]

Furthermore, several textile factories closed, eliminating the potential for future employment.[104] In March 2009, the largest textile producer in Southern Africa, Stewardess's Frame Textiles, collapsed, which resulted in the loss of a further 1400 jobs.[105]

There are several arguments postulated to explain the collapse of the textile industry during this period. These reasons include rapid liberalisation,[106] the South African Governments change in trade policy from protectionism to liberalisation[107] (as implemented by the ATC-

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[100] Business Partners 'The South African textile and clothing industry – overview' available at *https://www.businesspartners.co.za/en-za/entrepreneurs-growth-centre/useful-articles/manufacturing/the-south-african-textile-and-clothing-industry-%E2%80%93-an-overview* (accessed 26 August 2018).
[101] Morris M, Barness J & Essellar J 'Clothing and Textiles Paper An identification of strategic interventions at the Provincial Government level to secure the growth and development of the Western Cape Clothing and Textiles Industries' 16 available at *https://www.westerncape.gov.za/other/2005/10/final_paper_most_updated_printing_clothing_and_textiles.pdf* (accessed 15 November 2018).
[102] 702 (accessed 12 October 2017).
[103] Fin24 'SA aims to patch up threadbare clothing industry' available at *https://www.fin24.com/Economy/sa-aims-to-patch-up-threadbare-clothing-industry-20180117-2* (accessed 16 November 2019).
[104] Kruger MC (2011) 23.
[105] Kruger MC (2011) 23.
[106] Wolmarans J (2011) 45-46.
[107] Tregenna F & Kwaramba M 'A review of the international trade administration commission's tariff investigation role and capacity' (May 2014) 3-4 available at *http://www.nersa.org.za/Admin/Document/Editor/file/Notices/Upcoming%20Events/A%20review%20of%20the%20International%20Trade%20Administration%20Commission%E2%80%99s%20tariff%20investigation%20role%20and%20capacity_F%20Tragenna%20and%20M%20Kwaramba.pdf* (accessed 31 March 2015).

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discussed above), currency fluctuations,[108] labour policy and labour costs,[109] lack of competitiveness in the industry,[110] and importation competition- mainly the cheap imports from China. The only reasons relevant to this discussion is the importation of Chinese goods, given that one of the questions under consideration in this paper is the South African Governments use of trade remedies in the protection of the textile industry. Since China is not the only country to import textiles into SA, the degree and nature of the actual threat created by China must be considered.

3.4 The importation of Chinese goods into South Africa

China joined the WTO during 2001 and in the first four years (2001 - 2004), China's worldwide exports increased to approximately a quarter of the world total and sold US$42 billion worth of clothing and textiles in the first half of 2004.[111] In SA, at the beginning of the textile crisis, there was a radical increase in the importation of textiles. The importation of made-up textiles increased from 4900 tons in 2001, to 28 700 tons in 2006.[112] This constituted an increase of an estimated 500 per cent in made-up textiles. The import of clothing also increased from 139 million tons in 2001 to a staggering 567 million tons in 2006.[113] Previously, Europe, Taiwan, and South Korea had exported textiles and clothing to SA, however, since 2001, imports have chiefly originated from China. Of all the clothing and textiles imports, 3 per cent originated from India, 8 per cent from Europe, Taiwan, and South Korea and 89 per cent from China.[114]

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As can be deduced, Chinese imports placed severe pressure on the South African Clothing and Textile industry. Irrespective of whether China was winning ground in SA's clothing industry by fair or unfair trade practices, the South African Government had the option of deploying trade remedies to protect the industry. Whether or not SA did rely on these remedies are explored below. Moreover, the reasons for their action or inaction will be considered.

[108] DA 'Textile Sector Crisis –The DA's 8-step solution: Executive Summary' available at *www.da.org.za/docs/591/textilesectorcrisis_document.pdf* (accessed 25 April 2015).
[109] DA 'Textile Sector Crisis –The DA's 8-step solution' (accessed 25 April 2015).
[110] SAIIA Opinion & Analysis/Africa & The World, Trade and Investment 'SA's Clothing and Textile Sector post Chinese Quotas' available at *http://www.saiia.org.za/research/sas-clothing-and-textile-sector-post-chinese-quotas/* (accessed 28 August 2018).
[111] Morris M, Barness J & Essellar J (accessed 15 November 2018) 16.
[112] Kruger MC (2011) 24
[113] Kruger MC (2011) 24.
[114] Kruger MC (2011) 24.

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3.5 The use of World Trade Organisation remedies by the South African Government in the protection of the textile industry

The rapid increase of the importation of clothing and textile goods into SA from China[115] and its impact on the South African economy, as well as, its effect on employment[116] in the industry could be perceived as early as 2001. WTO trade remedies offered the South African Government the means to protect the industry, provided certain conditions were met. The discussion below considers the South African Governments utilisation of the remedies of anti-dumping actions and safeguard measures. Furthermore, if the South African Government failed to utilise these remedies the possible reasons for such inaction.

3.5.1 Anti-dumping actions

With reference to s2.3.3.1.1 above, Article 2 of the Agreement on Article VI on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994),[117] stipulates the basis upon which a determination of dumping can be made and Article 3 sets out when a determination of injury[118] can be made. Article 2(1) under the 'Determination of Dumping states:

> 'For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'[119]

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Article 3.7 under 'Determination of Injury' provides that upon determining the existence of material injury, the authorities should consider *inter alia* factors such as:

a) A significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation.
b) Enough freely disposable, or an imminent, substantial increase in the capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing member's market, considering the availability of other export markets to absorb any additional exports.
c) Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports.

[115] Refer to s3.4.
[116] Refer to s3.3.
[117] WTO Anti-Dumping Agreement, Article 2.
[118] WTO Anti-Dumping Agreement, Article 3.
[119] AD Regulations 14 November 2003 ss2.1.

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d) Inventories of the product being investigated.[120]

As previously mentioned, SA's current primary anti-dumping legislation is the International Trade Administration Act 71 of 2002 (ITA Act), and the anti-dumping regulations (AD Regulations).[121] The ITA Act defines dumping, normal value, and export price, however, it does not contain substantive or procedural provisions. The AD Regulations provide for the substantive issues, including the normal value methodology, constructed export price, the margin of dumping, material injury, and causality, as well as, the procedural.[122] Section 13.2 of the AD Regulations mention several factors, which should be considered in the determination of material injury, including market share and employment.[123] Upon consideration of the impact of Chinese textile imports into SA, the statistics mentioned in s3.3 above- in respect of the loss of employment and the shrinkage in factories, and s3.4- the increase of Chinese goods into SA, it is suggested that there was sufficient evidence for a prima facie case to be made out for dumping. However, in reference to the textile industry and actions taken against China, there was limited support in favour of imposing anti-dumping remedies against China, despite the fact that SA has always been a prolific user of the anti-dumping remedies.[124] The ITAC site indicates that there have been two anti-dumping actions taken against China in relation to the textile industry.[125] The first dumping action decision was concluded on 18 June 1999, before the promulgation of the AD Regulations, which occurred on 14 November 2003, and the second decision was on 28 May 2010, after the promulgation of the AD Regulations.

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The first dumping action was for Anti-dumping duties on acrylic blankets originating in/or imported from, the People's Republic of China (PRC) and Turkey. These duties were first imposed on 18 June 1999[126] against both the PRC and Turkey with retrospective effect from 18 December 1998.[127] Two sunset reviews have since been conducted with regard to the

[120] AD Regulations 14 November 2003 ss3.7.
[121] AD Regulations 14 November 2003.
[122] Brink GF (2015) 8.
[123] AD Regulations 14 November 2003 ss2.1.
[124] ITAC 'Government Gazette Notices' available at *http://www.itac.org.za/pages/services/trade-remedies/government-gazette-notices* (accessed 30 November 2017).
[125] ITAC 'Government Gazette Notices' available at *http://www.itac.org.za/pages/services/trade-remedies/government-gazette-notices* (accessed 30 November 2017).
[126] Customs and Excise Act, 1964, Amendment of Schedule No.2 (No 2/61), Part 1 of Schedule No 2, GN 791, *GG* 20226.
[127] ITAC Investigation Reports ' Report No:510, Title: Termination of the anti-dumping duties on Acrylic blankets originating or imported from the People's Republic of China and Turkey' available at *http://www.itac.org.za/pages/services/trade-remedies/investigation-reports?search=1&k=&rno=510&tno=&submit*= (accessed 17 November 2017).

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original anti-dumping duty, which occurred in 2004/05[128] and the second sunset review, which occurred in 2010/11.[129] In both instances, the anti-dumping duties were again imposed for a further period of five years. The final anti-dumping duties expired in 2016. The major manufacturers of acrylic blankets in the SACU did not request the Commission to review the duties prior to the expiry thereof. The reason being that the industry indicated it was unable to prove any material injury. The Commission, therefore, recommend to the Minister of Trade and Industry that the anti-dumping duty on acrylic blankets, originating in or imported from the PRC and Turkey, be terminated.[130]

The second decision in favour of imposing anti-dumping remedies was imposed on 28 May 2010 against 'Dumping of staple polyester fibre origination in or imported from the People's Republic of China'.[131] However, these duties expired on 27 May 2015,[132] despite the fact that the SACU industry brought an application for a sunset review- the Commission found that, among other reasons, the SACU industry did not provide sufficient evidence to substantiate their application.[133]

Although anti-dumping action was used to protect certain textile products, the research considered for this paper demonstrates that the nature of the harm suffered at the time of the textile crisis merited greater responsiveness and utilisation of the anti-dumping trade remedy from the South African Government. Possible reasons for this inaction are discussed in s3.5.3 below.

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3.5.2 Safeguard measures

As previously mentioned, anti-dumping measures are remedies against unfair trade practices and, in contrast, safeguard measures are remedies against fair trade practices available to WTO members for emergency protection against imports. There were two types of safeguards, which could be utilised by the South African Government at the time of the textile crisis, namely normal safeguards and protocol safeguards - with reference to s2.4 above, SA's use of the

[128] Customs and Excise Act, 1964, Amendment of Schedule No.2 (No 2/261), GN 578, *GG* 27691.
[129] Customs and Excise Act, 1964, Amendment of Schedule No.2 (No 2/333), GN 75, *GG* 33983.
[130] ITAC Investigation Reports (accessed 17 November 2017).
[131] Customs and Excise Act, 1964, Amendment of Schedule No.2 (No 2/325), GN 440, *GG* 33221.
[132] Customs and Excise Act, 1964, Amendment of Schedule No.2 (No 2/1/367), GN 440, *GG* 33221.
[133] ITAC Investigation Reports 'Report No: 496, Title: Termination of the anti-dumping duties on staple polyester fibre originating in or imported from the People's Republic of China' available at *http://www.itac.org.za/pages/services/trade-remedies/investigation-reports?search=1&k=&rno=496&tno=&submit*= (accessed 17 December 2017).

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safeguard measure has been minimal and the subject matter of these investigations were unrelated to the textile industry.

Normal safeguards are governed by Article XIX of GATT -entitled 'Emergency Action on Imports of Particular Goods', and the WTO Agreement on Safeguards.[134] In terms of Article XIX, safeguard action may only be taken where: [135]

> 'If, as a result of unforeseen developments and the effect of the obligations incurred by a contracting party under the Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.'[136]

The Agreement on Safeguards contains similar provisions, although it does not refer to unforeseen developments and the obligations of a member under the GATT. [137]

Brink argues that, although there is no clarity as to what 'unforeseen developments' would relate to, it could be argued that at the time of the WTO Agreement's conclusion, it was unforeseen that China would become a member of the WTO as quickly as it did.[138] Furthermore, it could be said that the rapid movement of the local currency (the rand) against major currencies, especially the strengthening of the rand since 2002, was an unforeseen development that had a major impact on the price of imported products.[139] Therefore, in relation to the protection of the textile industry, the South African Government had sufficient factors to consider in applying the WTO safeguard remedy in the protection of this industry. However, as noted previously, this was never pursued.

The South African Safeguard Regulations were promulgated on 27 August 2004, as amended by the amended safeguard regulations.[140] Section 4.1 of the Safeguard Regulations provide that 'a safeguard investigation shall only be initiated upon acceptance of a written application by or

[134]Agreement on Safeguards, Annex 1A to the Marrakesh Agreement (Covering Multilateral Agreements on Trade in Goods), 1869 U.N.T.S. 154. [hereinafter WTO Agreement on Safeguards.].
[135] Brink GF (May 2006) 2.
[136] Article XIX.1(a) of GATT 1994.
[137] Brink GF (May 2006) 2.
[138] Brink GF (May 2006) 2.
[139] Brink GF (May 2006) 2.
[140] Amended safeguard 8 July 2005.

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on behalf of the SACU industry'.[141] The industry is required to submit proof that it is suffering 'serious injury' as a result of significantly increased imports.[142] 'Serious injury' is defined as the significant overall impairment of the industry[143] and the industry is required to submit information[144] relating to its sales volume, profit and loss, output, market share, productivity, capacity utilisation, and employment, in addition to proving that the product is being imported, either in absolute terms or relative to production and demand in SACU in such increased quantities and under such conditions as to cause them serious injury.[145] Brink considers the injury[146] already experienced in relation to SA's textile industry and comes to the conclusion that there was sufficient evidence to establish a prima facie case of 'serious injury' to the industry.[147]

An alternative route that was available to the South African Government in the protection of the textile industry, as discussed by Brink,[148] was protocol safeguards. The Accession of the People's Republic of China to the WTO (the Protocol)[149] contains an Article on China-specific safeguard measures.[150] In the first paragraph thereof, it provides that 'where products of Chinese origin are being imported into the territory of any WTO member in such increased quantities or under such conditions as to cause or threaten to cause market disruption', that member 'may request consultations with China with a view to seeking a mutually satisfactory solution'.[151] Market disruption is defined as taking place where: 'imports of an article...are increasing rapidly...so as to be a significant cause of material injury...to the domestic industry.'[152] If the consultations do not lead to an agreement within 60 days, the importing member may withdraw concessions or limit imports to the extent necessary to prevent such market disruption.[153] However, once again, this remedy was never initiated by the South African Government.

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[141] Amended safeguard regulations 8 July 2005 ss4.1.
[142] Amended safeguard regulations 8 July 2005 ss4.1.
[143] Amended safeguard regulations 8 July 2005 ss8.1.
[144] Amended safeguard regulations 8 July 2005 ss8.3.
[145] Brink GF (May 2006) 8.
[146] Brink GF (May 2006) 15-17.
[147] Brink GF (May 2006)10.
[148] Brink GF (May 2006) 6.
[149] WTO Accession of the People's Republic of China (WT/L/432) (23 November 2001).
[150] WTO Accession of the People's Republic of China (WT/L/432) (23 November 2001) Article 16.
[151] WTO Accession of the People's Republic of China (WT/L/432) (23 November 2001) Article 16.1.
[152] WTO Accession of the People's Republic of China (WT/L/432) (23 November 2001) Article 16.4.
[153] WTO Accession of the People's Republic of China (WT/L/432) (23 November 2001) Article 16.3.

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Kruger notes that at that time of the start of the textile crisis, industries reacted and logged several anti-dumping and safeguard applications.[154] The industry's trade unions approached the South African Government through ITAC and the International Trade and Economic Development Division (ITEDD).[155] The Textile Federation (Texfed), lodged an anti-dumping application citing the imported textile products from China and emphasising the inability of the domestic market to compete with predatorily priced Chinese alternatives to their products with the Chinese products prices so low, local producers struggled to compete as a consumer will always purchase the cheapest alternative.[156]

In 2002, Clotrade initiated discussions with ITEDD regarding the imposition of safeguard measures against China.[157] After failing to reach a successful solution, Clotrade lodged a request from their members for safeguards to be imposed against textiles imported from China in 2004. After a further year of discussion, no progress had been made with the application and in 2005 ITEDD failed to open a formal investigation with ITAC in terms of the International Trade Administration Act 71 of 2002 (ITA). In addition, another union from the textile industry, SACTWU, lodged a safeguard application against China with ITAC.[158] The South African Government responded by starting to negotiate a textile clothing and material sector program with the unions, vendors, and manufacturers, They, however, abandoned the attempt in 2005 in favour of concluding a memorandum of understanding (MOU)[159] with China. [160]

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In summary, even though there was enough evidence to initiate the process of deploying anti-dumping or safeguard remedies, they were not utilised to their fullest potential. The reasoning for the South African Governments decision making in this regard is considered below.

[154] Kruger MC (2011).
[155] Kruger MC (2011) 25.
[156] Kruger MC (2011) 25-26.
[157] Clotrade means the Clothing Trade Council of SA, which was one of the major industry representative bodies, which transformed from the Clothing Federation of SA -which represented just less than half of the clothing industry workforce during 2002- into a national trade body with individual companies as members.
[158] Kruger MC (2011) 26.
[159] South Africa Revenue Service (2006) Custom and Excise Act, 1964. Amendment of Schedule No. 10 (No. 10/06): Memorandum of understanding between the government of the Republic of South Africa and the Government of the Peoples Republic of China on promoting bilateral trade and economic cooperation. Government Gazette 29185 and Department of Trade and Industry (2007) Import restrictions and regulations on textiles and clothing originating from the People's Republic of China. Government Gazette 29738.
[160] Kruger MC (2011) 27.

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3.5.3 Reasons for South Africa's failure to utilise the World Trade Organisation remedies

Kruger argues that the South African Government's failure to implement WTO remedies at the beginning of the textile crisis is due to the inadequacy of the domestic legislation to provide for the resolution of international trade disputes as it did not set out clear guidelines, rules, or regulations for government's and complainants when resolving these disputes.[161] This argument is reinforced by Brink, who noted that the WTO Agreement on Safeguards requires that one publicly make available the procedure, which will be followed in safeguard investigations prior to the conduct of such investigations. Since SA's Safeguard Regulations were only promulgated on 27 August 2004, and, given, that the procedures were only established in these regulations, no South African industry could apply for any safeguard measures prior to this date.[162]

Another argument presented as reasoning for the South African Government's failure to pursue Protocol Safeguards is due to political implications. The South African Government had embarked on a programme of negotiating free-trade agreements with several countries or trade blocs, such as the United States of America (USA), Mercosur,[163] and the European Free Trade Association (EFTA).[164] It also indicated its intention to conduct free trade negotiations with several other countries, including China. It, therefore, did not have the political will to take safeguard action aimed exclusively against China; that is, to use the Protocol safeguard as it might jeopardise future negotiations.[165] The South African Government's unwillingness to regulate trade under the WTO law could be seen by its decision to enter into the Memorandum of Understanding (MOU)[166] with China.

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[161] Kruger MC (2011) 13.
[162] Brink GF (May 2006) 3.
[163] The Southern Common Market (Mercosur- for its Spanish initials) is a regional integration process and an economic and political bloc comprising Argentina, Brazil, Paraguay, Uruguay, and Venezuela. Its main objective has been to promote a common space that generates business and investment opportunities through the competitive integration of national economies into the international market. As a result, it has established multiple agreements with countries or groups of countries, granting them, in some cases, the status of Associated States – this being the situation of the South American countries. These participate in activities and meetings of the Bloc and have trade preferences with the States Parties.
[164] Brink GF (May 2006) 20.
[165] Brink GF (May 2006) 20.
[166] South Africa Revenue Service (2006) Custom and Excise Act, 1964. Amendment of Schedule No. 10 (No. 10/06): Memorandum of understanding between the government of the Republic of South Africa and the Government of the Peoples Republic of China on promoting bilateral trade and economic cooperation. Government Gazette 29185 and Department of Trade and Industry (2007) Import restrictions and regulations on textiles and clothing originating from the People's Republic of China. Government Gazette 29738.

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The MOU between SA and China made provision for the textile, material, and apparel trading relationship and was signed in August 2006. Under the MOU Chinese clothing and textiles were subject to South African quotas for an 18-month period. This attempted protection came in the form of quantitative restrictions and it could, thus, be said that it is contrary to WTO law. In addition, under the MOU, the South African Government waived specific rights (the application of the Protocol 16 Safeguard) granted to it under China's WTO Accession Protocol. Section 3(3) of the MOU stated:

> 'In view of the arrangement made by the Parties pertaining to the textile and apparel trade, South Africa commits itself to not applying Section 16 of the· Protocol on Accession of China to the World Trade Organisation, and Paragraph 242 of the Report of the Working Party on the Accession of China against products originating from China, with the understanding that contentious trade issues shall be dealt with in an amicable manner.'[167]

Therefore, SA could not invoke Protocol safeguards against any products originating from China. Consequently, the South African Government could not reply on the specific WTO safeguard measures as they agreed to the 'amicable resolution' of SA/Chinese trade dispute. Thus, the Protocol safeguard, in terms of which China agreed to withdraw from a country, should its import of a product threaten the local industry, could not be invoked.[168]

Another argument as to why safeguards were never pursued by the South African Government may be that the industry was unable to collate the necessary information in the format required by the authorities. Brink opines that the European Union (EU) (that is the countries of Netherlands, United Kingdom, Spain, Belgium, Ireland, Hungary, Denmark, Germany, Poland and France), and the USA negotiated agreements with China outside the scope of the WTO; that is limiting imports from China through negotiations, rather than applying normal or Protocol safeguards. The industries indicated that the information required was of such a detailed nature that the industries would not be able to complete the relevant questionnaires. This is as a result of changes within the industry, including shifts in production as a result of fashion changes, employees manufacturing different products rather than being dedicated to specific products, and the variety of products manufactured making it impossible to properly allocate costs, investment, and profit.[169]

[167] Section 3(3) of the MOU.
[168] Kruger MC (2011) 33.
[169] Brink GF (May 2006) 9-10.

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More specifically, looking at SA's Safeguard Regulations, the regulations state that safeguard investigations 'shall only be initiated upon acceptance of a written application by or on behalf of the SACU industry.'[170] The industry is required to submit proof that the industry is suffering 'serious injury' as a result of significantly increased imports. 'Serious injury' is defined as the 'significant overall impairment in the position of the SACU industry.'[171] In terms of the Safeguard Regulations 8.3(b), the industry is also required to submit information relating to its sales volume, profit and loss, output, market share, productivity, capacity utilisation, employment, and other relevant factors.[172] This is in addition to the requirements stated in the preamble para (a), Regulations 1.2 and 8.3(a) of the Safeguard Regulations, thus, proving that the product is being imported either in absolute terms or relative to production and demand in SACU in such increased quantities and under such conditions as to cause them serious injury.[173] Further, in terms of Safeguard Regulation 11.3, the application must contain a complete description of the imported product, as well as, the SACU like and directly competitive product, industry standing, the factors on which the allegations of serious injury is based, the unforeseen developments that led to the increased imports, the efforts taken or planned to compete with the imports, and the relief sought.[174] Additional to the WTO requirements, the industry is also required to submit a plan indicating how it will adjust to increase its competitiveness within 60 days after initiation of the investigation.[175] These requirements appear to be placing an onerous burden of proof on the industries.

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As previously mentioned, in respect of the anti-dumping remedy, SA promulgated its anti-dumping regulations on 14 November 2003. Brink mentions reasons relating to substantive issues as to why anti-dumping remedies, in general, could possibly not have been implemented.[176] These reasons include defining the 'domestic industry'[177] and the need to supply injury information, defining 'like products,'[178] determining 'export price',[179] 'normal value',[180] 'fair comparison',[181] 'material injury'[182] and 'causality'.[183]

[170] Safeguard Regulations 4.1
[171] Safeguard Regulations 8.1.
[172] Brink GF (May 2006) 8.
[173] Brink GF (May 2006) 8.
[174] Brink GF (May 2006) 8-9.
[175] Brink GF (May 2006) 9.
[176] Brink GF 'Anti-Dumping in South Africa' (2012) *tralac Working Paper/ dp12wp07/2012.*
[177] Brink GF (2012) 12.
[178] Brink GF (2012) 13-14.
[179] Brink GF (2012) 15-17.
[180] Brink GF (2012) 17-19.
[181] Brink GF (2012) 19-21.
[182] Brink GF (2012) 22-23.
[183] Brink GF (2012) 24-25.

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It is evident that the South African Government has mostly chosen not to enforce WTO remedies against China in the protection of the textile industry. The reasons for this include, but is not limited to, the inadequacy of national legislation and the degree of complexity involved in pursuing these WTO remedies, as well as, politically motivated causes.

This does not mean that no action was taken to protect the industry. The South African Government has utilised other means to protect the industry; a few of the methods and strategies employed include the MOU with China, the quota system against Chinese products,[184] and several programmes such as the Structural Adjustment Programme,[185] the Duty Credit Certificate Scheme,[186] and the more recent South African Sustainable Textile Apparel Cluster (SATAC) -introduced in 2013,[187] which is a five-year business plan and R200 million grant funding for the establishment of a national cluster for the cotton, textile, and apparel sector. [188] These initiatives either had no or a minimal effect in protecting the industry and preventing job loss. However, these initiatives and programmes fall outside the scope of this discussion.

3.6 Conclusion

The textile crisis was caused by an influx of foreign goods, specifically from China. Although the South Africa Government utilised the WTO remedy of anti-dumping in two cases, the goods protected here was not the primary textile products under pressure and did nothing to reverse or stem the destruction of the industry. The WTO remedies of safeguards and countervailing measures were never utilised in the protection of this industry. Although several reasons are touted for the failure of the government to properly utilise the WTO remedies, the lack of the utilisation of the WTO remedies most assuredly contributed to the devastation of this industry.

In 2015, similar concerns arose in relation to the poultry industry, which has started speculation about the poultry crisis. In this regard, the importation of poultry products from the USA has

[184] Trade Law Chambers ' New Assistance Programme for the SA Clothing and Textile Industry A Stitch in Time' available at *https://www.tradelawchambers.com/raxo-what-s-on/33-new-assistance-programme-for-the-sa-clothing-and-textile-industry-a-stitch-in-time.html* (accessed 17 November 2017).
[185] Cotton SA 'Cluster Report 1/2017 Outlook on the South African Cotton Textile Industry' available at *cottonsa.org.za/wp-content/uploads/Outlook-on-Textiles-Q1-2017.pdf* (accessed 17 November 2017).
[186] DA 'Textile Sector Crisis –The DA's 8-step solution' (accessed 25 April 2015) 10.
[187] Cotton SA (accessed 17 November 2017).
[188] Cotton SA (accessed 17 November 2017).

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come under the spotlight. In Chapter Four, the protection of the poultry industry in the context of the use of WTO remedies is discussed.

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CHAPTER FOUR

THE POULTRY INDUSTRY

4.1 Introduction

In 2015, the dispute between South Africa (SA) and the United States of America (USA) in relation to trade remedies used by SA, in respect of the poultry industry, highlighted the importance and the impact of the World Trade Organisation (WTO) remedies in the protection of national industries. The engagement of the USA and SA in respect of the renewal of SA's benefits under the African Growth and Opportunity Act (AGOA) concerned SA's use of the WTO remedy. This is in contrast with the limited use of WTO remedies in the clothing industry.

This chapter considers the issues surrounding the poultry dispute and the balancing act, which SA was forced to engage in, in the protection of its industry. The nature of the USA's demands will be considered, specifically, whether their request was reasonable in the context of the WTO remedies available to countries in the protection of their industries. The current state of the poultry industry is considered in relation to the actual impact of the consensus made by the South African Government. As previously mentioned, there has recently been rumblings of a poultry crisis and the following chapters will contemplate the meaning of the poultry crisis.

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4.2 Poultry crisis in South Africa

The poultry industry is the largest segment of the South African agricultural sector, contributing more than 16 per cent of the sector's share of gross domestic product.[189] In relation to employment within the poultry industry, the South African Poultry Association (SAPA) in 2017 recorded that the indirect (supporting industries) employment numbered 58 383 and direct employment stood at 47 025, totalling 105 408.[190]

In March 2017, public hearings were hosted by Parliament's Portfolio Committee on Trade and Industry and stakeholders such as chicken producers, meat importers, and the Department of Trade and Industry and Agriculture, Forestry and Fisheries (DTI) made submissions

[189] International Trade Administration Commission of South Africa *Impact Evaluation Report. Performance of South African Poultry Industry* (2017) 1.
[190] South African Poultry Association 'Broiler Industry Stats Summary for 2017' 14 -15 available at *https://sapoultry.co.za/pdf-statistics/broiler-industry-summary.pdf* (accessed 22 July 2018).

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regarding the state of affairs in the industry. During the meeting, the DTI confirmed that they regarded the industry as being in crisis. In its presentation 'Summary of Challenges Facing the South African Poultry Sector' to the Portfolio Committee on Trade and Industry, the DTI identified several reasons for the poultry crisis in SA, such as:

a) Market dynamics - developed countries consume mainly white meat and export brown meat portions resulting in an increase in imports into third world countries of mostly brown meat portions.
b) Distortions in the global agriculture market – subsidies, - including 'hidden' subsidies upstream in the value chain, for example, feedstock.
c) Increase in key domestic input costs in the recent period:
    i. Feedstock (maize and soya);
    ii. Electricity (especially where municipalities add significant sometimes triple-digit premiums); and
    iii. Labour.
d) Increasing use of Sanitary and Phytosanitary Measures (SPS) in other jurisdictions as barriers to trade – limiting access to domestic poultry exporters.[191]

Other stakeholders, such as SAPA and the Food and Allied Workers Union (FAWU), argued that the large-scale job haemorrhaging in the sector is primarily due to imports and dumping of cheap chicken products.[192] Kevin Lovell, SAPA's Chief Executive Officer (CEO), stated that for every 10 000 tons of poultry meat imported into SA, 1069 direct and indirect jobs are shed.[193] In its representation, SAPA cited examples of companies retrenching workers, including Rainbow Chicken, which shed 1 350 workers, including managers in February 2017, and Daybreak- the first significant black-owned producer, which was in major financial

[191] The Department of Trade and Industry *Summary of Challenges Facing the SA Poultry Sector: Presentation to the Portofolio Committee on Trade and Industry* (23 March 2017) Pretoria: Department of Trade and Industry 4.
[192] Fin24 'Poultry crisis: What is the actual problem?' 23 March 2017 available at *https://www.fin24.com/Companies/Agribusiness/poultry-crisis-what-is-the-actual-problem-20170323-2* (accessed 17 September 2018).
[193] Fin24 'Revealed: The number of jobs lost to chicken imports' available at *https://www.fin24.com/Companies/Agribusiness/revealed-the-number-of-jobs-lost-for-importing-chicken-20170323* (accessed 21 July 2018).

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difficulty,[194] and, which was eventually acquired by the Public Investment Corporation[195] during October 2017.[196]

The DTI in its presentation further acknowledged that there has been a surge in imports in 2015 and the first half of 2016. More specifically, there was a spike in imports in the second quarter of 2016. The imports jumped from about 120 100 tons to nearly 160 000 tons. [197]

The issues surrounding SA's continuous inclusion into AGOA and the market access of certain of the USA poultry products arose in 2015. Therefore, in order to establish the role played by the USA in respect of the surge in poultry imports and the poultry crisis, it is necessary to consider the import environment in general, with specific reference to the USA poultry exports. Section 4.3 discusses the poultry imports into SA with a specific focus placed on exports from the USA.

4.3 Poultry imports into South Africa

Poultry meats are the third largest agriculture import into SA with R4.5 billion poultry products imported into SA in 2015.[198] Table A shows the growth of imports into SA per country for poultry products from the year 2015 to May 2018.[199] Table B reflects the updated figures for imports of poultry products into SA from 2016 to January 2019.

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[194] Fin24 'Revealed: The number of jobs lost to chicken imports' available at *https://www.fin24.com/Companies/Agribusiness/revealed-the-number-of-jobs-lost-for-importing-chicken-20170323* (accessed 21 July 2018).
[195] Public Investment Corporation 'About Us' available at *https://www.pic.gov.za/who-we-are/about-us* (accessed 9 November 2019).
The Public Investment Corporation SOC Limited (PIC) is described as 'as an asset management firm wholly owned by the government of the Republic of South Africa, represented by the Minister of Finance. PIC's clients are mostly public sector entities, which focus on provision of social security.' Amongst these are the Government Employees Pension Fund (GEPF), Unemployment Insurance Fund (UIF), Compensation Commissioner Fund (CC), Compensation Commissioner Pension Fund (CP), and Associated Institutions Pension Fund (AIPF).
[196] BusinessReport 'PIC takes full control of Daybreak' *available at https://www.iol.co.za/business-report/pic-takes-full-control-of-daybreak-11556803* (accessed 9 November 2019).
[197] The Department of Trade and Industry (23 March 2017) 3.
[198] Potelwa Y, Lubinga M, Sandrey R & Mwanza W 'The profile of South African imports of agricultural, forestry and fisheries products' in Schoeman A (ed) (2017) 15.
[199] South African Poultry Association 'Summary Report of Poultry Imports Report for May 2018' May 2018 4 available at *https://www.sapoultry.co.za/pdf-statistics/summary-imports-report.pdf* (accessed 20 July 2018.)

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Country	2015	2016	2017	2018 YTD
Brazil	241 180	233 787	337 476	148 335
Netherlands	61 995	110 344	112	159
United Kingdom	15 985	45 647	1 366	125
Spain	27 090	39 620	11 138	-
United States	**331**	**26 573**	**87 059**	**38 768**
Belgium	35 613	24 256	23 451	23
Argentina	27 718	18 713	32 816	15 113
Ireland	13 336	15 556	24 746	11 809
Hungary	10 547	13 174	0	-
Denmark	9 508	9 779	16 884	11 517
Canada	131	8 884	14 431	2 755
Germany	554	6 073	134	92
Poland	-	4 773	72	-
Thailand	7 616	2 078	4 019	3 437
Chile	408	360	1 770	1 523
Australia	264	254	984	22
France	24 895	105	4	3
Uruguay	182	0	25	332

Table A – Summary Report of Poultry Imports Report for May 2018 Imports (tons)[200]

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[200] South African Poultry Association (accessed 20 July 2018).

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Country	2016	2017	2018	2019 YTD
Brazil	233 787	337 476	348 155	19 219
Netherlands	110 344	112	323	0
United Kingdom	45 647	1 366	231	76
Spain	39 620	11 138	4 932	978
United States	**26 573**	**87 059**	**91 374**	**4 098**
Belgium	24 256	23 451	23	27
Argentina	18 713	32 816	33 278	1 275
Ireland	15 556	24 746	26 328	1 751
Hungary	13 174	0	0	0
Denmark	9 779	16 884	25 672	1 390
Canada	8 884	14 431	7 305	776
Germany	6 073	134	223	13
Poland	4 773	72	13 463	4 410
Thailand	2 078	4 019	9 011	892
Chile	360	1 770	4 362	269
Australia	254	984	553	0
France	105	4	5	0.4
Uruguay	0	25	359	0
Switzerland	0	0	97	0
Swaziland	0	24	485	<0.1

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Table B – South African Poultry Meat Imports: Country Report January 2019 Imports (tons)[201]

In 2015, Brazil was the main country of origin for South African poultry imports with 241 180 tons of total imports.[202] Exports from the European Union (EU) (that is the countries of Netherlands, United Kingdom, Spain, Belgium, Ireland, Hungary, Denmark, Germany, Poland and France), contributed 199 523 tons of total imports into SA in 2015.[203] During the same

[201] South African Poultry Association 'Summary Report of Poultry Imports for January 2019' 5 available at *http://www.sapoultry.co.za/pdf-statistics/summary-imports-report.pdf* (accessed 16 November 2019).
[202] South African Poultry Association (accessed 20 July 2018).
[203] South African Poultry Association (accessed 20 July 2018).

https://etd.uwc.ac.za/

period, the USA exported 331 tons of imports into SA (Refer to Table A).[204] However, notably, in 2018, even though Brazil remains the main country of origin for poultry imports- importing 348 155 tons into SA, with the EU trade being affected by avian influenza, the USA is now the second-largest importer into SA with 16.1 per cent or 91 374 tons[205] (Refer to Table B).

During the meeting held in March 2017,[206] the DTI indicated, in respect of the surge of import in 2015 and the first half of 2016,[207] that this growth was almost entirely due to exports from the EU.[208] They further noted that this increase is mainly of 'bone-in-quarters', which the poultry industry argues is a 'waste produce' in European process and market structure.[209] The DTI further confirmed that the exports from the USA are not the source of the poultry crisis in SA.[210]

Although, Brazil imports as at May 2018 was 61.5 per cent of the total imports in poultry products into SA, and as informed by the DTI, exports from the EU was the greatest threat against the industry with a surge of exports of the EU moving from 199 523 tons in 2015 to 269 327 tons in 2016; a discussion on the exports of poultry products from Brazil and the EU, and the South African Government's engagement in this regard does not fall within the scope of this discussion.

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In respect of the poultry exports from the USA, a surge is still observable, and even though the USA is not the main culprit in respect of harm to the South African industry, this does not negate the fact that the USA exports negatively impacted the South African poultry industry. Although the AGOA negotiations were concluded on 15 September 2015, the first poultry products from the USA only reached SA's shores on 26 February 2016,[211] the result of which can be clearly observed by the fact that in 2015 the poultry exports from the USA stood at 331 tons, which in 2016 increased to 26 573. Further, in 2018 the USA was the second-highest importer into SA. It would be reasonable to infer that the lifting of the anti-dumping duties

[204] South African Poultry Association (accessed 20 July 2018).
[205] South African Poultry Association (accessed 16 November 2019).
[206] Refer to s4.2 on page 35.
[207] Refer to s4.2.
[208] The Department of Trade and Industry (23 March 2017) 5. Refer to Table A –Imports (tons) on page 38.
[209] The Department of Trade and Industry (23 March 2017) 3.
[210] The Department of Trade and Industry (23 March 2017) 6.
[211] Refer to s4.5.2.

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against the USA in September 2015,[212] has significantly impacted the industry, despite the fact the exports from the USA is not considered the greatest threat.

The trade remedies imposed in 2000 on poultry products from the USA will now be considered, given that these anti-dumping duties were the subject matter of negotiations between the USA and SA regarding SA's continuous inclusion in AGOA.

4.4 Anti-dumping duties imposed against the United States of America

The USA is one of the largest producers of chicken meat in the world. In 2013 the USA exported 2.9 million tons of frozen chicken; 0.5 per cent of which was exported to SA. While SA mainly imports frozen chicken from the EU, the United Kingdom (UK) and South America, the main export destinations for the USA exports were Hong Kong, Angola, China, Mexico, and Cuba. However, despite this, the USA chicken exports into SA grew by 17.5 per cent between 2001 - 2014.[213]

It should be noted that between 2012 and 2013, USA chicken exports declined by 33 per cent. This decline could be attributed to the increase in anti-dumping duties.[214] Anti-dumping duties on USA frozen bone-in chicken exports, which were first implemented in 2000 (Government Gazette 21947), and subsequently extended in 2006 (Government Gazette 29319), and in 2012 (Government Gazette 35238), following sunset reviews. After the last review, the composition of the anti-dumping duty was adjusted to a single rate of duty (940c/kg) applicable to all USA exports of the specific tariff line. [215]

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Anti-dumping duty actions against the USA started in 1999 when Rainbow Farms, supported by SAPA, applied to the Board on Tariffs and Trade (BTT)[216] to have dumping duties imposed on chicken exports from the USA alleging that they were dumping chicken into the South African market. The period under investigation was from August 1998 - July 1999, and, in July 2000, the BTT imposed preliminary duties on the chicken leg portions from the USA. The investigation was finalised in December 2000 with the BTT deciding that the USA was indeed dumping chicken quarters into the market and that the South African poultry market had

[212] Refer to s4.5.2 for a discussion on the negotiations which resulted in the lifting of the anti-dumping duties against the USA.
[213] Viljoen W (accessed 9 April 2015).
[214] Viljoen W (accessed 9 April 2015).
[215] Viljoen W (accessed 9 April 2015).
[216] The Board on Tariffs and Trade (BTT) is a precursor to ITAC, which came into existence in 2003.

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experienced, and was in threat of, material harm due to the dumping of chicken pieces from the USA.[217]

One of the contentious points that the BTT had to address in the anti-dumping application brought by Rainbow Farms against the USA in 2000, was how the prices of brown meat and white meat, respectively, in relation to chicken exports, were to be calculated.[218] In their argument, SAPA alleged that the USA was dumping chicken pieces into the South African market based on the fact that the prices of the chicken pieces were lower than the net price of producing a chicken in the USA,[219] that is, the USA was selling the dark meat portions in SA at a lower price than the price the meat was being sold for in the USA. To account for the price differential between dark meat sold in SA, and dark meat sold in the USA, the USA chicken producers stated that they used the 'net realisable value' as a cost basis. In other words, rather than apportioning cost to different portions of the chicken, the USA chicken industry considered the cost of the whole chicken and applied the same methodology in apportioning the value to the different pieces. The BTT rejected this method of accounting for cost, instead, they determined that the appropriate way to reallocate costs was by weight. A cost was assigned to each cut of the bird, regardless of the type of meat (dark or white). Due to this differentiation in accounting for cost, the BTT concluded that the USA chicken exporters were importing chicken into SA at a price lower than the cost of production in the USA, hence, satisfying the first requirement of the Anti-dumping Agreement, which is selling an imported product below its normal value in the country of export. On the basis that the volume of chicken leg quarters from the USA had increased, the BTT found that the South African poultry industry had experienced material injury (in the form of depressed prices) and that they were threatened with further injury if the USA was allowed to continue to export leg quarters into the South African market.[220] As a result of the BTT findings, the USA chicken export numbers fell to US$307 000 in 2001, which was calculated to be a decline of 80 per cent.[221]

As noted by Viljoen, the terms of the WTO Anti-Dumping Agreement provide that an anti-dumping measure must be implemented only to the extent necessary to remedy the harm caused

[217] Mastara S (2015) *Anti- Dumping or Protection: An analysis of competition issues in dumping investigations* (unpublished MPhil thesis, University of Cape Town, 2015) 26.
[218] Ndlovu SS *To what extent does the condition in the African Growth Opportunity Act, 2000 requiring that Sub-Saharan African Countries Eliminate barriers to the United States of America Trade, lend itself to abuse at the instance of the USA?* (submitted in partial fulfilment of the requirement for LLM, University of Kwazulu-Natal, 2017) 12.
[219] Mastara S (2015) 26.
[220] Mastara S (2015) 26.
[221] Ndlovu SS (2017) 12.

https://etd.uwc.ac.za/

to the domestic industry (normally indicated by the dumping margin). She further pointed out that this was considered when the anti-dumping duty on chicken imports was imposed on the USA. She also predicted that SA, by offering a rebate on the anti-dumping duty, might cause further harm to the domestic chicken industry.[222] Although the South African Government acknowledged that the biggest threat, as noted in their 2017 report,[223] was the EU, it is clear that at the time the duties were imposed against the USA during 2000, there was a valid legal basis to implement these anti-dumping duties in the protection of the industry and the reduction of those duties has clearly contributed to further harm to the industry.[224]

Given the fact that SA utilised a valid WTO anti-dumping remedy, and its removal on 15 September 2015 has resulted in further harm to the industry, the factors and considerations involved in the decision making by the South African Government will be examined in s4.5.[225] This will be done in order to gain a better understanding of the South African Government's reasoning during the negotiations with the USA in respect of the anti-dumping duties imposed against USA chicken products and SA's continuous inclusion in AGOA, as well as, the pressures imposed, the concessions made, and the reasons therefore.

4.5 African Growth Opportunity Act legislation

AGOA is legislation approved by the USA's Congress on 18 May 2000 as title 1 of the Trade and Development Act 2000. AGOA is a non-reciprocal trade preference program, which provides duty-free treatment to USA imports of certain products from eligible Sub-Saharan African (SSA) countries.[226] The following sections consider the issues surrounding the poultry dispute, which arose in 2015 between SA, and the USA and the balancing act, which SA was forced to engage in, in the protection of its industries, versus securing its benefits under AGOA.

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[222] Viljoen W (accessed 9 April 2015).
[223] Refer to s4.3.
[224] Refer to s4.3.
[225] Refer to s4.5.2 for a discussion on the negotiations and eventual removal of the anti-dumping duties against the USA.
[226] Congressional Research Services Williams BR 'African Growth and Opportunity Act (AGOA): Background and Reauthorisation' available at *https://fas.org/sgp/crs/row/R43173.pdf* (accessed 18 July 2018).

https://etd.uwc.ac.za/

4.5.1 African Growth Opportunity Act

The USA Congress first authorised AGOA in 2000 to encourage export-led growth and economic development in SSA countries and improve economic relations within the region. Its initial authorisation was set to expire on 30 September 2015.[227] After completing its initial 15-year period of validity, with the approval of the Trade Preference Extension Act of 2015 (Extension Act), the AGOA legislation was extended on 29 June 2015 by a further ten years to 2025.[228] In terms of AGOA, the USA Congress requires the President to determine annually whether SSA countries are eligible for AGOA benefits based on progress in meeting certain criteria. The chief requirement for all beneficiaries is that they must be based in SSA and must be Generalised System of Preference (GSP) eligible. Moreover, contained in s104 of the AGOA legislation **(**Public Law 106/200**)**, there are a number of eligibility criteria, which a beneficiary country must meet or be working towards attaining. These eligibility criteria are summarised as:

a) A market-based economy incorporating a rules-based trading system.
b) Respect for the rule of law, political pluralism, and access to fair legal process.
c) The elimination of barriers to USA trade and investment, incorporating the protection of intellectual property, resolution of bilateral trade, and investment disputes.
d) Economic policies conducive to development.
e) A system to combat corruption based on a relevant international convention.
f) Protection of internationally recognised worker rights.
g) A country must not engage in activities that undermine the USA security interests.
h) A country should not engage in gross violation of internationally recognized property rights.

Qualifying SSA countries are allowed duty-free quota-free treatment to goods by extending preferences on approximately four thousand six hundred products that are eligible under the GSP regime, in addition to another 1800 product lines added by the AGOA legislation.[229] Notable product categories eligible for AGOA benefits include various automotive components, wines, chemicals, tobacco products, petroleum oil, footwear, glassware, steel products, watches, and so forth.[230]

[227] Congressional Research Services Williams BR (accessed 18 July 2018).
[228] Brookings Institution 'AGOA moves forward: Reviewing last week's reauthorization in the US Senate' available at *https://www.brookings.edu/blog/africa-in-focus/2015/05/20/agoa-moves-forward-reviewing-last-weeks-reauthorization-in-the-u-s-senate/* (accessed 18 October 2018).
[229] Chinembiri E (2015) 8.
[230] Chinembiri E (2015) 8.

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While the eligibility requirements are set out in the legislation, it is the USA which determines annually whether countries have met the published eligibility requirements. The beneficiary status may, therefore, be granted, or withdrawn, at the discretion of the USA President. Beneficiary countries have no recourse to dispute settlement in this regard, and this unpredictability is one aspect, which differentiates AGOA's non-reciprocal preferences to those contained in reciprocal and bilateral trade agreements.[231]

SA was first declared eligible for AGOA benefits on 2 October 2000.[232] Chinembiri, in his thesis on how AGOA has affected SA's trade, notes that trade statistics reveal that during 2011, SA's exports to the USA totalled US$8.2 billion.[233] Further, Ismail noted that during 2014 SA's exports amounted to US$3.1 billion.[234] In total during 2014, 38 per cent of SA's exports to the USA went under AGOA.[235] From the USA's perspective, during 2011 SA was ranked as the USA's 37th most important trade partner, with USA exports to SA totalling US$9.6 billion.[236]

When the dispute arose in 2015, it was estimated that the exclusion of SA from AGOA would result in a loss of US$2.5 billion (R30bn) for the South African economy.[237] This is mostly due to the loss of duty-free access to the USA market and the Most Favoured Nation (MFN) duties, which would then be applied to important South African export products, including citrus fruits, wine, and motor vehicles. If SA lost its duty-free access for those products it would have faced an average specific duty of 1.96c/kg on citrus fruit exports, an average specific duty of 14.16 c/litre on wine exports, and an average MFN rate of 2.5 per cent on the export of passenger vehicles. At that stage, the USA was the largest export destination for South African passenger vehicles (HS 8703) and the 6th and 8th largest export destination for wine and citrus fruits, respectively.[238]

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[231] AGOA.info 'AGOA Country Eligibility' available at *https://agoa.info/about-agoa/country-eligibility.html* (accessed 18 October 2018).
[232] International Trade Administration 'General Country Eligibility Provisions' available at *https://www.trade.gov/agoa/eligibility/index.asp* (accessed 18 October 2018).
[233] Chinembiri E (2015) 34.
[234] Ismail F 'The AGOA Extension and Enhancement Act of 2015, the SA–US AGOA negotiations and the Future of AGOA' (2017) 16 *World Trade Review* 534-535.
[235] Ismail F (2017) 536.
[236] Chinembiri E (2015) 50.
[237] BusinessReport 'Agoa: US lawmakers up the ante' available at *https://www.iol.co.za/business-report/economy/agoa-us-lawmakers-up-the-ante-1839717* (accessed 2 November 2018).
[238] Viljoen W (accessed 9 April 2015).

https://etd.uwc.ac.za/

When AGOA was renewed on 29 June 2015, in terms of the Extension Act new 'flexibilities' or 'conditions' were attached to SA's eligibility. A special provision in the Act, which specifically named SA called for a 30-day out-of-cycle review to be held on SA's eligibility. SA was required to satisfy the demands of all of the USA lobbies, which had specific concerns with SA's trade and investment laws and policies before it could fully qualify to remain in AGOA.[239] These special provisions and the manner in which it was utilised by the USA during the negotiations will be discussed in more detail in s4.5.2.

4.5.2 African Growth Opportunity Act negotiations

When the poultry dispute arose in 2015, the USA and SA's interests were in direct conflict. From the perspective of the USA, the duties hindered the USA poultry industry- the largest in the world, and in the light of the AGOA benefits, of which SA has been a beneficiary of since 2000, it was argued that SA should be relaxing its anti-dumping duties in accordance with AGOA conditionality requirements.[240] From SA's perspective, the duties levelled at the USA poultry industry were necessary in order to protect SA's own poultry industry.[241]

Internally, the dilemma, which SA faced was the conflicting interest of the poultry industry versus the interests of SA's other industries benefitting from AGOA preferences in the USA market. Two of the South African industries in the conflict was the poultry industry and the meat industry. SAPA believed the correct forum to address this issue would have been the WTO. They believed the inclusion of a 15-year-old dispute in AGOA's renewal was an attempt by the USA to bypass the WTO mechanism for resolving trade disputes- in this case, a dispute relating to the dumping of chicken, specifically bone-in portions, into the South African market'.[242] Further, the removal of the anti-dumping duties would result in job loss in the poultry industry.[243]

The Association of Meat Importers and Exporters of South Africa (AMIE) were of the opinion that the SAPA's concerns were based on spurious arguments.[244] David Wolpert, the chief executive of AMIE, said that ensuring that AGOA is renewed was crucial in advancing national

[239] Ismail F (2017) 536.
[240] Ndlovu SS (2017) 12.
[241] Ndlovu SS (2017) 12.
[242] BusinessReport 'Agoa: US lawmakers up the ante' available at *https://www.iol.co.za/business-report/economy/agoa-us-lawmakers-up-the-ante-1839717#.VSUKNfmUeCl* (accessed 2 November 2018).
[243] Refer to Chapter One.
[244] Viljoen W (accessed 9 April 2015).

https://etd.uwc.ac.za/

interest, and should AGOA not be renewed, thousands of local jobs (in industries benefiting from AGOA, for example, the citrus industries and automobile manufacturing)[245] would be in jeopardy.[246]

When AGOA came up for renewal in 2015, the debate on the extension of AGOA in the USA Congress was highly controversial. Specifically, in respect of SA, there were strong views in the USA Congress that SA was too large and developed an economy to continue to receive unilateral preferences from the USA, and that it should be graduated out of AGOA at the end of September 2015. In addition, there was a very powerful business lobby in the USA poultry industry that had a grievance against SA for imposing an anti-dumping action against USA exports of bone-in-chicken pieces to SA since 2000, thus, effectively blocking its exports.[247]

On 14 January 2014, William Roenigk, a senior consultant for the USA's National Chicken Council (NCC), appeared on behalf of the NCC before the United States International Trade Commission. In his presentation, he argued that SA's decision to pursue its anti-dumping investigation on a cost of production theory (re-allocating cost by weight, whereby a cost is assigned to each cut of the bird)[248] was unjustified.[249] He argued that this method went against international norms. If the cost of production methodologies is applied, differences in the values of parts of an animal are properly determined in accordance with the values normally associated with those parts on the books of a firm in the ordinary course of business, and SA's approach ignores this international rule.[250]

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This argument resulted in two USA Senators, Chris Coons, representing the State of Delaware, home of the USA Poultry and Egg Export Council (USAPEEC), and Johnny Isakson, representing the State of Georgia one of the largest Chicken producing states in the USA, making it very clear that they would block the passage of any extension of AGOA and the

[245] BusinessReport 'SA's AGOA benefits in peril?' available at *https://www.iol.co.za/business-report/economy/sas-agoa-benefits-in-peril-1941087* (accessed 4 November 2019).
[246] BusinessReport 'SA poultry war of word amid AGOA exclusion threat' available at *https://www.iol.co.za/business-report/economy/sa-poultry-war-of-words-amid-agoa-exclusion-threat-1830717* (accessed 31 November 2018).
[247] Ismail F (2017) 528.
[248] Refer to s4.4.
[249] African Growth and Opportunity Act Trade and Investment Performance Overview Before the United States International Trade Commission 'Testimony of William Roenigk On behalf of the National Chicken Council and the USA Poultry and Egg Export Council' 6 available at *https://www.nationalchickencouncil.org/wp-content/uploads/2014/01/NCC-USAPEEC-AGOA-Testimony.pdf* (accessed 17 October 2018).
[250] Roenigk W (accessed 17 October 2018).

https://etd.uwc.ac.za/

inclusion of SA.[251] Particularly, if the flow of USA chicken legs into SA was not resumed.[252] The USA Government, influenced by the powerful USA poultry industry, strategically decided not to initiate a case at the WTO.[253] From the outset of the negotiation, as admitted by Senator Isakson, the USA Senators' intention was to use the AGOA extension as an opportunity to re-open the South African market for USA bone-in chicken pieces.[254]

In the negotiation between the USA and the South African poultry industries, several offers were exchanged but the gap remained significant until a two-day negotiation meeting was held in Paris (France), on 4 - 5 June 2015, between the two industries led by the governments' of the USA and SA. The breakthrough in the negotiations was achieved when both sides agreed on a quota of 65,000 t/a. This agreement cleared the way for President Obama to include SA in the extension of AGOA.[255]

As mentioned above, the Extension Act has a special provision,[256] which specifically mentions SA, which called for a 30-day out-of-cycle review to be held on SA's eligibility.[257] This provision was used strategically by the USA to exert pressure on SA during the negotiations. On 21 July 2015, President Obama initiated an out-of-cycle review in accordance with this provision on the eligibility of SA to receive benefits under AGOA.[258] SA was required to satisfy the demands of all of the USA lobbies, which had concerns with its trade and investment laws and policies before it could fully qualify to remain in AGOA.[259] The South African Government eventually confirmed that during a bilateral meeting held between the USA and

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[251] AGOA.info 'Senators Coons, Isakson urge South African president to drop ban on US poultry or risk losing favoured trade status' available at *https://agoa.info/news/article/5565-senators-coons-isakson-urge-south-african-president-to-drop-ban-on-u-s-poultry-or-risk-losing-favored-trade-status.html* (accessed 1 February 2019).
[252] Ismail F (2017) 528.
[253] Tralac 'The Crisis in WTO Dispute Settlement' available at *https://www.tralac.org/blog/article/13530-the-crisis-in-wto-dispute-settlement.html* (accessed 11 November 2019).
The Dispute Settlement Understanding (DSU) of the WTO is described as:
The DSU was adopted as part of the Uruguay Round's "single undertaking". It ensures that trade disputes are resolved in terms of mutually agreed rules and procedures. Decisions are binding. The DSU sets out procedures for settling disputes about the application and interpretation of WTO obligations. If consultations among disputing WTO members fail to resolve a problem, the case is brought before an ad hoc panel whose decisions are binding unless appealed.
[254] Ismail F (2017) 535.
[255] Ismail F (2017) 535-536.
[256] Extension Act 2015 s105(d)(4)(E).
[257] Ismail F (2017) 536.
[258] US Federal Register 'African Growth and Opportunity Act: Notice of Initiation of an Out-of-Cycle Review of South Africa Eligibility for Benefits – Scheduling of Hearing, and Request for Public Comments' (2015) available at *https://www.regulations.gov/#!documentDetail;D=USTR-2015-0009-0020https://www.federalregister.gov/articles/2015/07/21/2015-17772/african-growth-and-opportunity-act-noticeof-initiation-of-an-out-of-cycle-review-of-south-africa.* (accessed 2 February 2019).
[259] Ismail F (2017) 537.

https://etd.uwc.ac.za/

SA on the margins of the Gabon AGOA Forum, which took place in August 2015, all issues were resolved, except for SA's concerns in respect of animal health regulations on poultry, beef, and pork.[260]

During negotiations on 5 November 2015, while the veterinarians from both sides were engaging on the animal health issues, President Obama informed the USA Congress that he would suspend SA's agricultural benefits if the outstanding issues were not resolved by 31 December 2015.[261] His reasons for this decision was that SA was not making continuous progress toward the elimination of barriers to USA trade and investment as required by s104 of AGOA.[262] Even though the USA extended the deadline to 15 March 2016, it refused to lift the threat of suspension until the poultry products were on SA shelves.[263] On 26 February 2016, the first shipment of USA poultry arrived in SA, allowing the USA poultry products to be placed on SA's shelves.[264]

Ndlovu argues that some of the eligibility requirements contained in AGOA lend themselves to abuse at the instance of the USA.[265] He argues that one of the conditions in AGOA speaks directly to the issue of removing all barriers to USA trade, and this seems to have been a well thought out strategy by the USA.[266] Sections 104(C) which according to Ndlovu, are Free Trade Agreement (FTA) type clauses that should not have made their way into the AGOA statute.[267]AGOA is a unilateral[268] arrangement and not a reciprocal one.[269] He further argues that SA's anti-dumping measure levelled at USA poultry exports are legal and form part of WTO law, therefore, they should not be construed as 'barriers' to the USA trade and investment.[270]

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[260] Department of Trade and Industry South Africa 'South Africa Meets All the Eligibility Criteria to Remain a Beneficiary of AGOA' available at *http://www.thedti.gov.za/editmedia.jsp?id=3559* (accessed 2 February 2019).
[261] Ismail F (2017) 537.
[262] Ismail F (2017) 537.
[263] Ismail F (2017) 538.
[264] Ismail F (2017) 538.
[265] Ndlovu SS (2017) 69-70.
[266] Ndlovu SS (2017) 13.
[267] Ndlovu SS (2017) 69.
[268] Fuhr D & Klughaupt Z 'The IMF and AGOA: A Comparative Analysis of Conditionality' (2004) 14 *Duke Journal of Comparative and International Law* 139-140.
The authors describe a 'unilateral' arrangement as follows:
'As AGOA is effectively a GSP Plus System, it does not include reciprocal obligations on its members. Unlike a multilateral free trade agreement, which imposes mutual rights and duties on its parties, the unilateral nature of AGOA lets both the developing countries of sub-Saharan Africa and the "benefactor," the United, off the hook'.
[269] Ndlovu SS (2017) 54-55.
[270] Ndlovu SS (2017) 69-70.

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In the poultry dispute between the USA and SA in 2015, it is evident that the USA employed the renewal of SA's AGOA's benefits as a negotiation tool. Upon consideration of the tactics employed by the USA regarding the poultry dispute and its strategic use of AGOA's eligibility criteria, the writer hereof agrees with Ndlovu's assessment that there has been an abuse of AGOA in respect of the poultry negotiations. SA was forced into a corner and had no choice but to negotiate with the USA, thus enabling the USA to bypass WTO disputes mechanisms. As discussed previously, these concessions have, in fact, contributed towards the South African industry crisis.

4.5.3 Recent developments with the African Growth and Opportunity Act and the South African Industries

One of the AGOA benefits, which SA was attempting to protect in its negotiations with the USA, was the steel and aluminium exports to the USA. South African exports of steel to the USA accounted for 5 per cent of South African production, equating to 7500 jobs in the steel value chain.[271] On 8 March 2018, USA President Trump issued two presidential proclamations-special duties of 25 per cent and 10 per cent, respectively would be applied on the imports of hundreds of different steel and aluminium tariff lines imported into the USA after 23 March 2018 for an indefinite period.[272] In March 2018, SA applied for an exemption from these tariffs but was refused.[273] In response to President Trump's decision, on 17 September 2018, SAPA filed a lawsuit in the Northern Gauteng High Court seeking to force the government to suspend the quota in response to Trumps administration's decision to impose tariffs on aluminum and steel exports from SA. They are arguing that tariffs of 25 per cent on steel and 10 per cent on aluminum imports imposed by the USA violate the quota agreement by curtailing AGOA benefits.[274] In response, the USA poultry industry said it will press its government to retaliate if SA suspends the quota.[275]

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Although SAPA's argument has some merit, experts are of the opinion that their argument might be unwise. SA exported US$618m worth of steel to the USA – an 82 per cent increase in 2016. None of which is affected by the new 25 per cent s232 import tariff.[276] The risk of suspending the poultry deal because of a 10 per cent import hike on US$154m worth of aluminium is that it could cost SA all its AGOA benefits. Pretoria is well aware of the danger; Trade and Industry Director-General, Lionel October, in September 2018, indicated to Parliament that his department would oppose SAPA's court application, stating that the department would explain to the court the importance of AGOA.[277] Subsequently, after further discussions between Rob Davies, Minister of Trade and Industry, and SAPA, the case was withdrawn by SAPA.[278]

In the subsequent chapter, a comparison will be drawn between the South Africa Government's actions and decision-making in relation to both industries in respect of its use of the WTO remedies. A conclusion will be drawn as to whether the decisions made were reasonable, excessive, or inadequate. Finally, lessons will be drawn from each engagement for deliberation, and recommendations will be made.

4.6 Conclusion

Since 2000, SA has utilised the WTO remedy of anti-dumping in the protection of the poultry industry. This protection had the desired effect of curbing damage to the industry. When the AGOA dispute arose in 2015, USA forced SA to negotiate outside the protection of the WTO dispute resolution mechanisms, with the threat of the loss of its AGOA benefits, and SA was forced to balance the interest of the poultry industry against those of its other industries, for example, the steel industry and meat industry. As a result of the concessions SA was forced to make, this has contributed to the erosion of the industry and the existence of the 'poultry crisis'. Recent events, in respect of new steel tariffs imposed by the USA, which erodes some of SA's benefits under AGOA, demonstrates that the USA is continuing with its pattern of disregard for the WTO remedies and its procedures.

[276] AGOA.info 'Protecting South Africa from US anti-trade action' available at *https://agoa.info/news/article/15525-protecting-south-africa-from-us-anti-trade-action.html* (accessed 6 November 2018).
[277] AGOA.info 'Protecting South Africa from US anti-trade action' available at *https://agoa.info/news/article/15525-protecting-south-africa-from-us-anti-trade-action.html* (accessed 6 November 2018).
[278] Confirmed by Mr Izaak Bretenbach, General Manager of SAPA, via e-mail correspondence on 13 November 2019.

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CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

In both industries, textile and poultry, there is mention of a crisis resulting from the influx of foreign goods. The crisis is observable through job loss, factory closures, and the shrinkage of the contribution of industries towards South Africa's (SA) gross domestic product (GDP). The purpose of this paper was to consider the South African Government's actions and decision making in relation to the textile and poultry industries in respect of its use of the World Trade Organisation (WTO) remedies. Whether the decisions made by the South African Government were reasonable, excessive, or inadequate.

5.2 Summary

Chapter Two discussed the development and formation of the WTO with the birth of the WTO during the Uruguay Round on 1 January 1995.[279] It further identifies two of the most important rules of the WTO- the most favoured national treatment (MFN) obligation and the national treatment (NT) obligation. It also identifies the exceptions to these rules and focuses on the most important exception, which for the purposes of this paper is the Enabling Clause,[280] under which the United States of America (USA) was entitled to create the African Growth Opportunity Act (AGOA).

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Furthermore, the rules of fair and unfair trade were considered and the applicable WTO Agreements. Dumping and subsidies were identified as unfair trade practices and the remedies against them are- anti-dumping duties and countervailing measures, respectively.[281] Safeguards are identified as the remedy against fair trade practices, which is available to WTO members if imported products, as a result of a surge of imports, injure or threatens to injure the domestic industry.[282] Finally, SA's trade legislation - the International Trade Administration Act 71 of 2000, and the applicable regulations, the anti-dumping regulations, the safeguard regulations, and the countervailing regulations were discussed. The International Trade Administration

[279] Refer to s2.2.
[280] Refer to s2.3.2.1 on page 11.
[281] Refer to s2.3.3.
[282] Refer to s2.3.3.2 on page 15.

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Commission of South Africa (ITAC) was identified as the public body whose core function is custom tariff investigation and import and export control.[283] It was noted that although SA is a prolific user of the anti-dumping remedy, its use of safeguards has been minimal and it has never declared a dispute at the WTO. Finally, in respect of the countervailing measures, the South African Government has stated that action will never be taken against China.

Chapter Three considered which WTO remedies, in the context of the textile industry, the South African Government utilised in the protection of the textile industry. This chapter began by considering the development of trade within the textile industry from the end of the Multi Fibre Agreement (MFA) in 1994 and its replacement by the Agreement on Textile and Clothing (ATC) from 1 January 1995 to 31 December 2004,[284] and that the decline in the textile industry occurred in the context of SA's accession to the WTO Agreement, more specifically, the ATC agreement. The reality of the textile crisis was confirmed by statistics from 1994 and onwards, illustrating large-scale job-loss and factory closures.[285] Regarding the clothing industry, the textile crisis was primarily caused by an influx of goods from China.[286] Although SA did utilise the WTO remedies, this was not adequately utilised, or with any degree of political will. There are several reasons given for the lack of utilisation of the WTO remedies by the South African Government, – such as an inadequacy at that time of the domestic legislation, change in the policy of protectionism to liberalisation, and the complexity and onerous requirements of the WTO rules.[287] It is noted that the South African Government attempted to utilise other means in the protection of the industry, which included quotes against Chinese goods, the Memorandum of Agreement (MOU) with China, and several governmental programmes. These, however, either had no or minimal effect on the industry. In conclusion, the South African Government's failure to adequately utilise the WTO remedies in the protection of this industry contributed to its erosion.

Chapter Four examined the possible impact and consequences of the concessions made by the South Africa Government in favour of the USA during the AGOA negotiations on the poultry industry. The nature of the current poultry crisis was examined, its reasons and the role USA exports played towards this crisis. The Department of Trade and Industry (DTI) in 2017 acknowledged that there was a surge of imports in 2015 and during the end of 2016, however,

[283] Refer to s2.4 on page 16.
[284] Refer to s3.2 on page 20 to 21.
[285] Refer to s3.3 on page 21.
[286] Refer to s3.4 on page 23.
[287] Refer to s3.5.3 on page 30 to 33.

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this surge, according to the DTI, was mostly from exports from the European Union (EU).[288] Although statistics confirmed this, it also shows a surge of exports from the USA between 2015 and 2016.[289] The AGOA negotiations concluded on 15 September 2015 and the first poultry products entered SA on 26 February 2016.[290] A conclusion can, therefore, be drawn that the concessions made by SA towards the USA have contributed to the current poultry crisis causing additional harm to the industry.

In contrast to the textile industry, the poultry industry has been protected by the WTO remedy of anti-dumping since 2000, and, as noted by Viljoen, an anti-dumping measure may only be implemented to the extent necessary to remedy harm caused to the domestic industry.[291] The necessity of this measure is observable by the fact that after the implementation of the measure in 2000, the industry saw relief. The AGOA negotiations are, therefore, examined closely.[292] The conclusion is drawn that the USA chose to use the AGOA benefits as a negotiation tool circumventing the WTO dispute resolution mechanisms, disregarding the validity of the WTO remedy imposed by SA. Their intention is made even more clear by the fact that when AGOA was renewed under the Extension Act, they triggered the 30-day out-of-cycle reviews to be held on SA's eligibility as a means to force SA to negotiate on additional demands from USA lobbies with respect to SA's investment laws and policies.

5.3 Conclusion

In conclusion, both the textile and poultry industries are in a crisis triggered by a surge of imports of foreign products. In the textile industry, the South African Government failed to adequately and fully utilise the WTO remedies in the protection of this industry. This is in contrast to the poultry industry, where the South African Government properly utilised the WTO remedies but was forced, in respect of AGOA, to play a balancing act in an attempt to protect not only the poultry industry but other industries affected by the AGOA benefits.

What can be deduced is that the WTO remedies are an effective means of protecting the domestic industry of a country under threat. However, its effectiveness is limited by a country's will to enforce such remedies; in the case of the textile industry, and in respect of the poultry industry, a country's willingness to disregard its rules in pursuit of its own self-interest. In

[288] Refer to s4.3 on page 37.
[289] Refer to s4.3 on page 37.
[290] Refer to s4.5.2. on page 46.
[291] Refer to s4.4 on page 41.
[292] Refer to s4.5.2. on page 46.

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respect of the poultry dispute, the USA's self-interest in finding and/or expanding its poultry export market, and with SA's its interest in retaining its benefits and preferential access to the USA market under AGOA, thus protecting thousands of jobs (for example the citrus industries and automobile manufacturing).[293] With regard to the textile industry, SA's political interest in negotiating a free trade agreement with China.[294]

5.4 Recommendation

In both the textile and poultry industries, the crises', which developed are linked to an legal instrument that the South African Government chose to subject itself too. In respect of the crisis that developed in the textile industry, it was the WTO Agreement, specifically the ATC, which resulted in the lifting of quotas, which contributed to SA concluding the MOU with China. In respect of the poultry crisis, SA was a beneficiary under AGOA, the USA's legislation whose purpose is to promote economic growth in economies of Sub-Sahara African (SSA) countries.

In terms of s3(3) of the MOU, the South African Government waived its rights to protect the textile industry as it could no longer invoke the protection offered by Protocol 16 of China's WTO Accession Protocol, in terms of which China agreed to withdraw from a country should its exports of a product threaten the local industry.[295] In essence, the South African Government reduced the protection offered through the WTO processes in terms of a direct contractual relationship with China.

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With respect to the poultry industry, although, SA has benefitted considerably under AGOA, it has also made itself vulnerable to the USA's self-interest in that, as mentioned by Ndlovu, AGOA in its current form lends itself to abuse, specifically, as it allowed the USA to circumvent the WTO remedies and procedures. According to Ndlovu, s104(C) of the AGOA is Free Trade Agreement (FTA) type clauses, which should not have made their way into the AGOA statute. AGOA is a unilateral arrangement and not a reciprocal one.[296]

The legal instruments, that is the MOU and AGOA, reduced or limited the protections offered by the WTO to South African industries. It is, therefore, recommended that:

[293] Refer to s4.5.1 on page 44 to 46.
[294] Refer to s3.5.3.
[295] Refer to s3.5.3 on page 30.
[296] Refer to s4.5.2 on page 46.

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a) Any future legal instruments, which the South African Government enters, must remain fully subject to the WTO processes, especially the right to invoke the WTO remedies in the protection of local industries and the right to the WTO dispute resolution processes.[297]
b) SA continues to pursue international arrangements with clauses, which ensure that both parties are on an equal legal footing and that the balance of power does not shift in favour of one of the parties, for example, reciprocal FTA's.[298]

A furthermore recommendation is that the South African Government be responsive to, and remain open to, dialogue with groups within SA, which serve the interest of a particular industry, for example, the South African Poultry Association (SAPA) and Southern African Clothing and Textile Workers Union (SACTWU), given that these groups will be the first to recognize and feel the effect of trade policy decisions within their particular industries.

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[297] Refer to s4.5.2. footnote 253 on page 48.
[298] Refer to s3.5.3. on page 30 to 33.

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