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The Law & Agriculture

EDITORIAL

It is difficult to talk about Zimbabwe's economy without mentioning 'agriculture'. This is because agriculture has historically been a significant contributor to the country's macro-economic well-being. Even in the last four years under the Government of National Unity (GNU) that followed almost a decade of economic regression, agriculture still emerged as an important catalyst in the country's economic recovery efforts. The Ministry of Finance in its 2013 budget statement noted that agriculture is the second largest contributor to the country's Gross Domestic Product (GDP), after mining. It is estimated that the sector currently contributes 20.3% to the country's overall GDP.

These facts speak to the centrality of agriculture in relation to the country's economic performance and development. Indeed, this importance is emphasized by the fact that agriculture is in itself a major contributor to the growth of other sectors such as manufacturing. The Food and Agricultural Organization of the United Nations (FAO), for instance, estimated that agriculture supplies 60% of the raw material required by the country's industrial sector.

Notwithstanding the apparent prominence of the sector in the country's economy and its consequent relevance to national socio-economic security, its continued viability is being hindered by various challenges. Research reveals that challenges such as: recurrent droughts, unavailability of agricultural financing, high costs of inputs, marketing challenges, and lack of infrastructure and technology; are amongst the major threats to the sector's continued competitiveness and sustainability.

These challenges can be categorized as predominantly 'agro-climatic and economic' in character. In such discussions, the law is not readily mentioned as a challenge; yet in reality it plays an important role in establishing an 'enabling environment' for sustained agricultural production and marketing. In this sense, the law can influence (for better or for worse) the overall productivity of a country's existing resources with implications for domestic and international agricultural markets.

While the significance of the law in creating an enabling environment may be appreciated by some, it is the nexus between the law and agricultural development that is often overlooked by many. This is because many hold a conventional perception of the law; one that views it as an abstract discipline that is only relevant when a dispute arises.

This limited view of the law ignores the reality of its regulatory function that influences desired action by actors in the agricultural value chain. It ignores the fact that the law can either facilitate or hinder agricultural production and marketing depending on its normative content and implementation approach.

It can be 'facilitative' if for example it contains normative provisions that are implemented to: promote the production of quality products, provide for simple regulatory compliance procedures, and is cognisant and responsive to the country's socio-economic situation at a given time. On the other hand, it can be 'inhibitive' if it: increases

the financial cost of production; places unreasonable administrative burden on actors in the value chain, and is not in tandem with internationally accepted production and marketing standards.

This edition of the CALR *Law & Development Bulletin* focuses on this linkage between 'the law and agriculture'. It contains five articles that provide an insight into some of the emerging challenges bedevilling the sector, for which the law can provide a solution.

The articles touch on the functions of the law (as it is and as it ought to be) in contributing to enhanced agricultural development. They discuss legal aspects related to: regional trade in agriculture; agricultural commodity exchange systems as an alternative marketing model; contract farming as an alternative agricultural financing model; anti-dumping safeguards and protection of domestic agro-industries; and biotechnology regulation. These articles are not exhaustive, by themselves, to provide a comprehensive depiction of the linkage between the law and agriculture. Rather they provide insights into some of the issues, with the purpose of promoting further debate and attention on the matter by government, the private sector, academics, civil society, and the general public. ■

Agriculture remains a significant contributor to Zimbabwe's macro-economic well-being. The sector contributes an estimated 20.3% to the country's overall GDP

Regional Economic Integration and Agric Development:

The Case for Harmonizing Agricultural Laws in SADC

The Southern African Development Community (SADC) is one of the several Regional Economic Communities (RECs) that Zimbabwe is party to. While its initial establishment was premised on the need to achieve greater political cooperation amongst Southern African countries in the 1980s, its purpose and scope has since been expanded to include the need for enhanced economic integration between member countries. The SADC Treaty of 1992 laid the foundation for such economic integration. It, amongst other things, established a commitment to create a 'Development Community' in the region that is premised on the need to integrate Member States' economies and markets to facilitate efficiencies in production, investment and trade with the ultimate objective of promoting development.

The SADC Treaty, its ancillary Protocols and related legal instruments (e.g. Charters, Pacts, Memoranda of Understanding, Declarations, and Regional Codes & Policies) constitute the 'SADC legal architecture' that is required to achieve such development-oriented economic integration. Article 21 of SADC Treaty stipulates the areas of cooperation and integration. These include the areas of: food security, land and agriculture; infrastructure and services; industry, trade, investment and finance; human resources development, science and technology; natural resources and environment; social welfare, information and culture; and politics, diplomacy, international relations, peace and security. The Treaty obligates Member States to conclude Protocols (i.e. Protocols to the Treaty)

to facilitate cooperation in these areas, which should spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration. The Protocols and related legal instruments are expected to facilitate coordination, rationalisation and harmonisation of macro-economic and sectoral policies and strategies, programmes and projects in the areas of co-operation.

Of all the areas of cooperation identified by the Treaty, it is not fortuitous that the area of food security, land and agriculture was identified as an important sector requiring integration as a matter of priority. This is because agriculture is a critical component of the region's economy. According to SADC statistics, agriculture contributes between 4% and 27% of individual Member States' Gross Domestic Product (GDP), and contributes to an average of 13% of total export earnings and about 66% of the value of intra-regional trade. Furthermore, it is estimated that about 70% of the region's population depend on agriculture for food, income and employment. These combined factors reflect a close nexus between agricultural performance on one hand, and the region's economic growth and stability, on the other. Notwithstanding this clear link, there is evidence that agricultural production has severely declined in the region. With low agricultural production levels, implications for the intended enhanced regional economic growth are apparent.

Although there are many factors that have led to subdued agricultural production levels, the lack of rationalized and harmonized agricultural policies and laws among Member States is often cited as a critical factor. This fact is recognized in the SADC Dar-es-Salaam Declaration on Agriculture and Food Security that was signed by SADC Heads of State in May 2004. The Declaration, amongst other things, acknowledges that inappropriate national agricultural policies and inadequate access by farmers to key agricultural inputs and markets are the main reasons for low agricultural production. As such, it commits Member

States to adopt a series of measures that are premised on strengthened sectoral cooperation through coherent harmonized agricultural policies, laws and programmes.

The need for coherent harmonized agricultural policies and laws is apparent. What is perhaps not so apparent is the process required to achieve a state of 'harmonization'. By definition, 'regional policy harmonization' refers to the process of bringing together different national approaches in policies and laws into a unified strategy for purposes of inter alia, reducing regulatory duplication, overlaps and divergence between Member States. Although harmonization is often misconstrued to mean creating uniform national regulations; it actually permits for differences in the form of national regulations, but emphasizes on the similarity of net results of 'commonly agreed principles'. Therefore, harmonization is not about enacting uniform laws in each SADC country, but it is about developing a common legal culture that is consistent with commonly agreed principles.

In the area of agriculture, this process should ordinarily be guided by commonly agreed principles embodied in a SADC 'Protocol on Agriculture'. A 'Protocol', in SADC legal parlance, is a legally binding document committing Member States to the objectives and specific procedures stated within it. However, such a Protocol on Agriculture has not yet been developed. What exist instead are 'soft law' and 'preliminary legal instruments'. These instruments are not necessarily legally binding, but have a politically persuasive effect. Examples of such instruments in the agriculture sector include amongst others: the SADC Dar-es-Salaam Declaration on Agriculture and Food Security (mentioned above); and the SADC Memorandum of Understanding (MoU) for the Implementation of the SADC Harmonised Seed Regulatory System.

The absence of a SADC Protocol on Agriculture that is legally binding is perhaps one of the reasons why agricultural policies and laws in the region remain fragmented. This is because 'soft laws' and 'preliminary legal instruments' that exist do not place a legal obligation on Member States to domesticate commonly agreed principles. Rather domestication of any commonly agreed principles contained in such instruments is largely voluntary and implemented at the pleasure of Member States. Under such circumstances where some Member States 'may choose to domesticate' and others 'not to domesticate'; it becomes increasingly difficult to achieve the objectives of harmonization. This observation seems to have been acknowledged by SADC. In a SADC Report on 'Country Summary Agricultural Policy Reviews' published in 2011, the need to develop a Regional Agricultural Policy (RAP) was clearly emphasized.

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The Minister of Finance recently confirmed that the government is finalising the setting up of the Commodity Exchange of Zimbabwe (COMEZ) and that the exchange is likely to be operational during the forthcoming harvesting season. COMEZ, which was launched over two years ago, took a long time to take off and commence operations. Most stakeholders across the agriculture value chain hope that the coming into force of the exchange will assist in resolving some of the challenges affecting agricultural marketing systems in the country.

The advantages likely to be derived from COMEZ are many and varied. They include, among others, the reduction of transaction and marketing costs and time; the provision of reliable and accurate market information; the identification of markets and the facilitation of transparent price discovery.

Zimbabwe's first attempt to establish a commodity exchange was through the Zimbabwe Agricultural Commodity Exchange (ZIMACE) which operated between 1994 and 2001. The ZIMACE is considered to be one of the most successful examples of the spot-cash agricultural commodity exchanges in Africa. The total value of contracts that were traded on the ZIMACE is estimated to be about US\$500 million. Despite its success, the exchange suspended its operations after the government introduced new measures to control the marketing of grain.

Over the past two decades, the African continent has witnessed many initiatives to liberalise trade in agriculture and promote commodity exchanges. Countries that have established commodity exchanges include Ethiopia, Malawi, Nigeria, South Africa, Uganda and Zambia. It is, however, sad to note that despite there being a general consensus on the reasons for establishing commodity exchanges in these countries and the potential benefits to be derived from them, most of the exchanges in these countries have not been successful in achieving these benefits. The South African Futures Exchange (SAFEX) is the only outstanding exception which has remained the most active and effective agriculture commodity exchange on the continent. Most exchanges in the above-mentioned countries have collapsed completely, while those that are still in existence remain underdeveloped.

Some of the obstacles that have affected the operations of most of these exchanges include the lack of infrastructure, small market size, underdeveloped financial services, excessive government interventions and weak legal and regulatory frameworks. While all these factors are equally important in creating an enabling environment for a properly functional commodity exchange, there is need to emphasise the importance of a legal and regulatory framework as a prerequisite for setting up a commodity exchange. An effective regulatory framework should properly define and provide for, among others, trade rules, contractual aspects, grading and standards setting, enforcement of contracts and dispute resolution mechanisms.

The Role of Dispute Resolution Mechanisms in Agriculture Commodity Exchanges

In the context of Zimbabwe's current attempts to set up COMEZ, it is important to take into account some of the legal and regulatory issues that will facilitate effective and efficient trading on the exchange once it starts operating. Of particular importance is the need to establish strong contract enforcement and dispute resolution mechanisms before any trading activities commence on the exchange. This is because despite the potential benefits that may be derived from trading on a

commodity exchange, stakeholder participation may be hindered or reduced by negative perceptions of contractual breaches. In the absence of contract enforcement mechanisms, buyers may take advantage of farmers (especially of small holder farmers) by refusing or failing to pay agreed prices. On the other hand, farmers may also fail to meet their obligations to deliver if they discover better markets elsewhere. Similar disputes arose during the 2012 marketing season, when disagreement arose between buyers and producers of contracted cotton. These contractual disputes are likely to recur in COMEZ, if a strong regulatory framework is not put in place.

Zimbabwe currently does not have a clear legal and regulatory framework on commodity exchanges. Apart from the Warehouse Receipts Act [Chapter 18: 25] which was enacted in 2007, there is no other law that is directly intended to regulate commodity exchanges. During the existence of ZIMACE, its trading activities were governed by a number of Acts of Parliament and common law principles of commercial and contract law. If the new COMEZ is to rely on these same laws for contract enforcement and dispute resolution, it will not adequately deal with risks associated with breaches of contractual obligations by market participants. This is because the contractual enforcement mechanisms in terms of the current Zimbabwean commercial laws and practices are not very conducive for business. According to the World Bank Ease of Doing Business Report for 2013, enforcing a contract in Zimbabwe through the normal litigation process takes 410 days, costs 113.1% of the value of the claim and requires 38 procedures. *Continued on page 4*

Regional Economic Integration and Agricultural Development:

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The RAP, it was noted, will form the basis for formulating a legally 'binding' instrument (i.e. the Protocol) containing defined commonly agreed objectives and measures to guide and support implementation of actions in agriculture at regional and national levels for enhanced regional integration.

Having said this, there are some harmonization processes that are being undertaken in the agricultural sector notwithstanding the absence of a 'legally binding' instrument. These initiatives however rely on the political commitment of Member States to voluntarily align their policies and laws to common principles contained in 'soft law' and 'preliminary legal instruments'. An example is the Harmonized Seed Security Project (HaSSP) being implemented by the Food, Agriculture and Natural Resources Policy Analysis Network (FANRPAN); that the Centre for Applied Legal Research (CALR) has been involved in provided technical legal support.

The initiative aims to establish a common legal framework through which seeds (as an agricultural commodity and input) are easily traded across national borders in southern Africa. It is based on the MoU for the Implementation of the SADC Harmonised Seed Regulatory System that was signed by Member States in February 2010. The MoU itself enjoins Member States to align their seed laws with commonly agreed seed standards, rules and procedures that are contained in three Technical Agreements, namely; Technical Agreements on: Seed Variety Release; Seed Certification and Quality Assurance; and Quarantine and Phytosanitary Measures. The rationale for this harmonization initiative is premised on the need to facilitate enhanced seed trade in the region and to increase the availability of high quality seed to farmers through rationalizing and removing national regulatory barriers for the movement of seed across borders. This is expected to promote economies of scale in seed supply and to reduce market uncertainty, through removing

technical barriers to trade in the regional seed market.

In conclusion, therefore, it is apparent that the concept of regional economic integration is important in achieving economic and developmental growth in the region. However, for this objective to be realized; serious consideration must be given to the 'legal mechanics' required to facilitate harmonization of national policies and laws. Indeed, without such harmonization, the vision of a common future for the region can be greatly compromised. For the agricultural sector particularly, which has enormous 'knock-on effects' on the wider economic and developmental growth of the region; the need for harmonization is even more imperative. While some progress in harmonization has been recorded in some instances, the process can be enhanced and hastened through the development and adoption of a legally binding instrument that legally obligates Member States to align their agricultural-related laws to commonly agreed principles. ■

Rethinking Contract Farming in Zimbabwe:

Some Legal Concerns

Contract Farming in Zimbabwe is increasingly becoming the preferred option for financing smallholder agricultural activities, especially under the current circumstances where ‘conventional bank loans’ to farmers are not easily accessible. Studies carried out in different countries have shown that when properly managed and regulated contract farming models help alleviate some of the challenges associated with access to inputs, skills and technology and access to reliable markets. Since its introduction in Zimbabwe, contract farming has contributed significantly towards the resuscitation of the agricultural sector. For instance, it is estimated that cotton production increased by 28% in 2010 and by about 13% in 2011. In the 2011/12 season a total of 282,347 farmers were contracted to grow cotton constituting about 96% of the total cotton growers for that season. In the tobacco sub-sector, an estimated 61% of the total mass of tobacco sold during the 2011/12 season was contract tobacco. According to reports, contract farming has resulted in small scale tobacco farmers increasing the national tobacco output up from an all-time low of 48.8 million kgs in 2008 to about 144 million kgs in 2012.

Definition of Contract Farming

Contract farming can be defined as agricultural production carried out according to an agreement between a buyer and farmers, which establishes conditions for the production and marketing of a farm product or products. Typically, the farmer agrees to provide agreed quantities of a specific agricultural product. These should meet the quality standards of the purchaser and be supplied at the time determined by the purchaser. In turn, the buyer commits to purchase the product and, in some cases, to support production through, for example, the supply of farm inputs, land preparation and the provision of technical advice.

Source: FAO, 2006

However, despite these significant gains, it has been affected by some challenges; which manifested

themselves, perhaps more clearly, in the past two agricultural marketing seasons. These challenges have mainly been centred on issues to do with ‘contract design’ and ‘contract enforcement’. Contract design concerns revolved around the issue pricing, and the framing of the clause that determines the price to be paid for the contracted harvest; while contract enforcement concerns revolved around the issue of dispute settlement mechanisms. During the 2012 marketing season; the marketing of contracted cotton was characterised by price disputes between cotton farmers and cotton ginners (buyers). Cotton farmers refused to sell their contracted crop citing low prices being offered by ginners as unfair and unreasonable; yet according to the ginners, the price is determined by international cotton prices for that particular year. This apparent dispute also revealed a gap in contract enforcement mechanisms. Whereas, ordinarily a contractual breach ought to be resolved through recourse to a dispute settlement forum of the parties’ choice; the dispute over cotton prices was ‘resolved’ through government intervention by way of a Statutory Instrument that declared the cotton harvest of that particular season a controlled commodity. Such government intervention, in a contractual relationship that ought to be private alludes to some structural weaknesses in contract farming enforcement mechanisms in the country. These challenges naturally establish a negative perception of risk in the sector in the minds of potential investors. Such negative perceptions are likely to hinder the progress and gains that have already been made. In order to build upon the successes of contract farming and to maximise its potential benefits for both farmers and agribusiness there is need to address some of the underlying legal concerns.

With regards to ‘contract design’, studies reveal that there is no standard format for framing/ designing contract farming contracts in Zimbabwe. Each contractor devises its own format, resulting in multiple formats being used for different farmers. Some of the contracts are concluded orally while some are reduced to writing. Some of those that are written do not contain

basic requisite clauses required for a valid contract. In some instances, important clauses (e.g. pricing clauses) are not clearly drafted resulting in ambiguity. This has the effect of removing an essential validity requirement in contract law i.e. consensus ad idem or the meeting of the minds between the parties to the contract. The cotton price dispute that occurred during the 2011/2012 marketing season is a revelation of the lack of the ‘meeting of the minds’ between farmers and ginners over the determination of prices and grading of crops produced.

With regards to ‘contract enforcement’, research reveals that the legal remedies and enforcement mechanisms that exist under the country’s judicial system have been criticized by both buyers and farmers, as being ill-suited to regulate contract farming disputes especially those involving small-holder farmers. The major concerns include: high cost of litigation, and the time it takes to enforce the contracts using the magistrates’ courts. According to the World Bank ‘Ease of Doing Business’ Index, between the periods 2007-2011 Zimbabwe was ranked 117 out of 185 with the rank of 1 being the country with the most business-friendly regulations. The cost of litigation in Zimbabwe is excessively high; and generally far in excess of the amount claimed. This makes litigation through the magistrates’ courts an economically unviable option. Magistrates’ courts are also inundated with cases due to court administration challenges. This results in matters taking long to be heard. Under such circumstances, where there is no viable contract enforcement mechanism for contract farming disputes; extra-judicial interventions by government can easily occur (as was the case in the cotton dispute during the 2011/2012 season) to the detriment of investor confidence.

These challenges naturally require a response embedded on an appropriate legal reform agenda aimed at enhancing contracting farming efficiency in the country. It should acknowledge the fact that the existing legal framework (that is characterized



Contract farming has a great potential to improve livelihoods

by fragmented legislation and common law principles) was not consciously configured to regulate contract farming models.

Legal Framework Regulating Contract Farming

General Legal Framework	Contract Farming
1. Common Law Doctrines of Contract Law 2. Contractual Penalties Act [Chapter 8:04] 3. General Law Amendment Act [Chapter 8:07] 4. Arbitration Act [Chapter 7:15] 5. Magistrates Court Act [Chapter 7:10] 6. Customary Law and Local Courts Act [Chapter 7:05]	Tobacco 1. Tobacco Income Tax Act (Marketing) 2000 2. Exchange Control Act (Finance) Or Cotton 1. Exchange Control Act 2008 SI 150 2. Agricultural Products (Seed Control) Act of 2009

As such, it does not establish an ‘enabling environment’ for contract farming activities. With this comprehension, there is need to develop a clear and consistent law that specifically regulates contract farming activities to avoid ambiguities and confusion. Such a law should provide for the use of standardized clauses in contract design that must be contained in contract farming contracts while leaving it up to the parties to determine the

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actual terms and conditions of their agreements. It should also provide guidelines on remedies for breach of contractual obligations, and provide for appropriate dispute settlement

Contract Farming	
Contract Farming Law	Government Policy
Contract Farming Industry and Marketing Order, 2000 SI 29 of 2000	1. Policy on Contract Farming
Contract Farming Control (Tobacco) Order, 2004 SI 61 of 2004	
Contract Farming Control (Cotton) Order, 2008 SI 142 of 2008	
Contract Farming Marketing Authority Order, 2009 SI 142 of 2009	

mechanisms and procedures. This approach has been adopted in other countries such as Tanzania under the Contract Farming Bill, and India under the Agricultural Produce Marketing Act. The proposed law can be implemented through crop-specific Statutory Instruments which will detail the crop specific regulatory issues for the different types of crops that may be subjected to contract farming. ■

The Role of Dispute Resolution Mechanisms in Agriculture Commodity Exchanges

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In the absence of a clear regulatory framework, market participants are likely to rely on this process which is costly and time consuming.

Commodity exchanges in some countries such as Malawi, South Africa and Zambia have put in place alternative dispute resolution mechanisms such as arbitration to deal with contractual disputes arising from trading activities. Arbitration is considered to be a more flexible, cost effective and speedy dispute resolution mechanism that may be tailor-made to suit the needs of parties to a particular dispute. Zimbabwe already has a modern Arbitration Act [Chapter 7:15] which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 which guarantees speedy dispute resolution and effective enforcement of arbitral awards. Since the enactment of the Arbitration Act, the use of arbitration in resolving commercial disputes in Zimbabwe has increased significantly.

In setting up COMEZ, there is also need to consider internalising arbitration processes within the structures of the commodity exchange. Although most contracts traded on most commodity exchanges already have arbitration clauses, the arbitration processes in these exchanges are not carried out within the structures of commodity exchange. The disputes are usually referred to outside arbitrators who might not have the technical knowledge on agricultural markets and the operations of an exchange. This affects the quality of decisions made by these arbitrators, leaving the parties to the dispute dissatisfied. There is also need to take into consideration the costs of dispute resolution. It is important for the commodity exchange to put in place a tariff system to ensure that arbitrators do not charge excessive fees. In other words, the commodity exchange should not rely on external arbitrators to determine the costs of the arbitration process. It is, therefore, strongly recommended that an internalised arbitration system be designed and set up with a list of accredited arbitrators, a set of rules of procedure and a clearly defined tariff for costs. Those who are appointed arbitrators should possess the necessary technical skills to deliberate over disputes presented

to them. The importance of such a framework should never be underestimated. The absence of good enforcement mechanisms is likely to affect other factors that are necessary for a commodity exchange to function properly. For instance, weak contractual enforcement mechanisms are likely to drive away potential market participants especially small-holder farmers who may be bullied by commercial entities and big players on the market. If these potential traders are driven away from participating on the exchange, the trading activity and market size of the exchange are also likely to be reduced.

Most exchanges rely on member subscription fees to cover costs associated with running the exchange. In order for the exchange to be efficient, there is need for these costs to be distributed over substantial trade volumes and a broad number of participants. If the market size is too small and the trade activity is low, the costs of running the exchange will end up being met by a few participants who will pay high participation costs as a result.

As noted earlier, one of the major benefits of establishing a commodity exchange is to reduce transaction and marketing costs but if participants end up paying more fees to cover the operational costs of the exchange, it defeats one of the major objectives of setting up the exchange. This is one of many likely scenarios that are likely to result from a weak regulatory framework. It serves to illustrate the importance of ensuring a supportive regulatory environment before a commodity exchange is set up.

As the setting up of COMEZ is currently being finalised, there is need to ensure that the legal and regulatory framework to be put in place does not act as a disincentive for stakeholders who are likely to participate on the exchange. In addition to many other factors, stakeholders are likely to be attracted to participate on an exchange that ensures enforceability of contractual obligations and cost effective dispute resolution. ■



Men at work at a tobacco auction floor in Harare

Biotechnology in Zimbabwe: Insights into Regulations

Biotechnology refers to the application of scientific techniques to modify and improve plants, animals, and microorganisms to enhance their value. Over the past decade or more, biotechnology has been applied to various disciplines such as ecology, agriculture, medicine and chemistry. The field of biotechnology encompasses a wide range of concepts that include genetic modification (often referred to as GMOs in Zimbabwe), nanotechnology, metabolic engineering, cloning and DNA-chip technology. The adoption of biotechnology particularly in agriculture has become a bone of contention the world over with those in favour arguing that biotechnologies such as genetically modified (GM) technologies have the potential to improve food production and human welfare. Those against GM technologies aver that they bring potential harm to humans and the environment. The perceived threats of biotechnology have given impetus to the regulation of safe application of these biotechnologies, often referred to as biosafety.

This article therefore seeks to give a brief insight into debates around adoption of biotechnologies in agriculture particularly GM technology and how the Zimbabwean law has responded to regulate safe use of biotechnology. The article will also reveal the divergence in views on application of biotechnologies in agriculture in Zimbabwe.

Proponents of GMOs in agriculture have argued that biotechnology has been in existence for many years only that it was traditional. For example, in some situations, crop varieties were deliberately crossed to produce a breed with desired qualities. The difference lies in that modern-day biotechnology involves the use of genetics and provides room for the elimination of undesirable traits from gene composition to come up with the desired outcome. As such, these supporters of GMOs argue that genetic modification offers new possibilities that are beneficial for agriculture. Some of the benefits include the production of disease resistant and drought tolerant crops which ultimately result

in increased crop productivity. Genetic engineering has also been proven to improve crop protection from pests particularly in maize, cotton and potatoes. The food processing industry has also benefitted from biotechnology as it is now possible to keep food fresh for longer periods particularly when transporting fresh farm produce. These benefits have led to the adoption of biotechnology in many countries as a strategy to improve food security and human welfare particularly in developing countries.

While the arguments pointed above on the benefits of genetic modification may have been proven to be so, there are still risks associated with biotechnology. Critics of biotechnology have highlighted the potential harm that GMOs have on human health and the environment. Some have argued that genetic engineering may result in the development of new diseases or allergens in food that was previously considered safe. Other arguments against GMOs relate to the minimum control people have on genetically engineered crops, for instance, after cross pollination, herbicide

The term genetically modified organism (GMO) refers to organisms whose genetic properties have been altered in a way that changes their natural composition.

resistant weeds may emerge. Genetic modification has also been suspected of causing harm to the environment, particularly killing other species within the ecosystem, loss of biodiversity and insect resistance.

The concerns raised by the critics have, however, been dismissed in some instances, on the basis that these are mere speculations which have not yet been proven.

Notwithstanding these arguments (for and against biotechnology), the Zimbabwean law has responded



Greenhouse production

to the issue of safe application of biotechnology (in line with international law) as will be revealed in this article. Zimbabwe recognizes the need to harness biotechnology for development particularly in the agricultural sector. In fact, agriculture is identified as one of the priority sectors for development using biotechnologies as stated in Zimbabwe's National Biosafety Policy (2005).

In 2005, Zimbabwe ratified the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Zimbabwe is one of the five Sub-Saharan countries (Burkina Faso, Mauritius, South Africa, Sudan and Zimbabwe) that have met the basic obligations of the Protocol through its setting up of a national biosafety framework. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity seeks to ensure the safe handling, transportation and use of living organisms resulting from modern biotechnology that may have adverse effects on biodiversity, taking also into account human health. Article 16, Section 5 (a) of the Protocol states that parties to the protocol should take part in "identifying living modified organisms or specific traits of living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health".

The Protocol further provides that competent national authorities and national focal points should be established to handle administrative functions required in this Protocol.

At national level, the need to regulate biosafety in Zimbabwe was acknowledged as far back as the 1990s when the Research Act (1986) was amended to include regulation of biosafety. The Research Act was further supported by the gazetted Statutory Instrument 20/2000 Research (Biosafety) Regulations which provided for the establishment of a Biosafety Board. These regulatory advancements on biosafety in Zimbabwe served as the foundation upon which later instruments and policies such as the National Biotechnology Policy of 2005 were grounded on. The regulations were centred on the recognition that although biotechnologies have the potential to aid human development, there are potential risks associated with such development particularly on human lives and the environment.

As a way to further improve the country's response to safe use of biotechnologies in line with international obligations, particularly the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Zimbabwe enacted the National Biotechnologies Authority Act in 2006.

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Regulating dumping of agricultural products in Zimbabwe: the appropriate legal response

Following the signing of the Global Political Agreement (GPA) in 2008 that established the Government of National Unity (GNU), Zimbabwe's economy has been gradually improving after almost a decade of economic regression. It is estimated, for instance, that during the period 2010-2011 the country recorded more than 9% real growth and a GDP per capita of USD 500 for 2010, 2011 and 2012. The agricultural sector, which also faced acute challenges during the regression period, is similarly showing clear signs of recovery. For example, the sector currently contributes 20.3% to the overall GDP. The sector's recovery has been sustained by enhanced production in sub-sectors such as tobacco, cotton, and poultry. With regards to poultry production, the Zimbabwe Poultry Association (ZPA) for example, estimated that day-old chick production in 2010 was approximately 721,600 per week. Broiler meat production, on the other hand, (based on statistics received from recognized abattoirs) in 2011, was approximately 25,000 metric tonnes (MT). In addition, there is a huge emerging small-scale producer contribution of approximately 44,000 MT. According to the ZPA broiler meat production in 2011 was at an average of 6,500 MT a month.

Notwithstanding the apparent increase in production, the sector is facing various challenges; chief being competition from cheap imports of poultry and poultry products. The Zimbabwe Statistical Office (ZIMSTATS) estimated that in 2011 25,500 MT of chicken imports entered the local market which had a combined valued of USD13.644 million. This translates to an average price of \$0.53/kg. The sheer volume alone represents 20% of the total national demand for chicken; and the price represents a *prima facie* case of 'dumping'. 'Dumping' generally refers to a situation where a company exports a product at a price lower than the price it normally charges on its own home market. This has dire implications on the sustainability of Zimbabwe's poultry sector, as local poultry producers cannot compete with the low prices of imports due to high local production costs.

While the obvious solution will be to focus on reducing production costs in order to make local poultry products competitive; this however does not negate the fact that cheap imports are also compounding the problem. Under such circumstances a multi-faceted approach may be required, which, on one hand, recognizes the need to make efforts to reduce local production costs; while utilizing the law to counter 'dumping' of cheap products on the market, on the other.

Zimbabwe has an impressive set of laws that regulate such cases of 'dumping'.

The Competition Act [Chapter 14:28] read together with the Competition (Anti-Dumping and Countervailing Duty) (Investigation) Regulations of 2002, basically constitute the national trade law regime that is intended to protect local industry from 'dumping' actions occasioned by companies

based in exporting countries. The Competition Act and the Anti-Dumping and Countervailing Duty Regulations are consistent with the World Trade Organization (WTO)'s Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (also known as the Anti-Dumping Agreement).

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Biotechnology in Zimbabwe: Insights into regulations

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity is an international agreement which aims to ensure the safe handling, transport and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on biological diversity, taking also into account risks to human health. It was adopted on 29 January 2000 and entered into force on 11 September 2003.

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The National Biotechnology Authority (NBA) Act seeks to actively promote biotechnology research, development and application in Zimbabwe and it sets agriculture, health, industry and the environment as priority sectors. The NBA Act sets a framework for the establishment of the National Biotechnology Authority (in place of the earlier instituted Biosafety Board) with the aim to "support and manage biotechnology research, development and application". The NBA Act also provides for the "establishment of the National Biotechnology Fund for the development of products of biotechnology and to provide for the fixing of standards of quality and other matters relating to products of biotechnology produced in Zimbabwe". The NBA Act replaced the Research Amendment Act (1998) and also repealed the Research (Biosafety) Regulations of 2000.

As set out in the NBA Act, the National Biotechnology Authority through its Board is responsible for supervising the safety aspects of the import and export of biotechnology products. The Board may issue biotechnology guidelines and standards for the "importation and exportation of products of biotechnology that are likely to have an adverse effect on human health, the environment, the economy, national security and social norms and values" (Section 22 2(k)). Products that are exempted from this control may also be outlined by the Board. Requirements for marketing or sell of products of biotechnology will also be authorised by the Board. With regards to research, the Board may issue guidelines and standards on the contents of risk assessment and environmental impact assessment. The Board will also set out procedures to be considered when undertaking research including requirements in setting up laboratories. The National Biotechnology Authority may also prohibit or declare that any research considered to be harmful to human life or the environment be stopped. The Authority is also responsible for registration and auditing of biotechnology facilities; ensuring adherence to

guidelines on biotechnology and supervising the contained use, trial release and general release of biotechnology products for example genetically modified organisms.

While the existence of a national legal framework on biosafety in Zimbabwe as illustrated above may have resulted in research work being undertaken in Zimbabwe for example on Bt cotton and Bt maize, there are divergent views on the application of biotechnologies particularly in agriculture. The application appears to be sector specific with the Ministry of Agriculture adopting a 'no' GMO policy (as quoted in various reports) while the Ministry of Science and Technology has in some instances publicly supported the adoption of biotechnologies including GMOs provided that precautionary measures are taken to protect people from adverse effects. The precautionary approach is evidenced by the government's adoption of a threshold level of 1 % for technically unavoidable presence of GMOs in food and feed. Products with less than 1% GM traces are not considered GMOs.

While these disparities exist at ministerial level, the national legal framework through the National Biotechnology Authority Act and the National Biotechnology policy is such that it promotes development and regulation of biotechnologies including GMOs. As such there is need to bring clarity across all sectors on the national approach to biotechnology. Considering that Zimbabwe's Agricultural policy of 1995-2020 has been overtaken by events, it may be worthwhile that its revised version is more specific when it comes to agricultural biotechnology and biosafety. There is need to open debate on issues of biotechnology in Zimbabwe as these discussions will help shape a comprehensive legal framework on biotechnology across all sectors. Thorough research on the part of the National Biotechnology Authority on risks and benefits from modern biotechnology should inform government response to biotechnology. ■

Regulating dumping of agricultural products in Zimbabwe: the appropriate legal response

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If a potential case of ‘dumping’ is identified, as in the case of the imports of poultry products; the Act empowers the Competition and Tariff Commission (CTC) to investigate such cases to ascertain the extent of threat they pose to the local industry. Section 34C (1) of the Competition Act establishes such powers. It states that: ‘...the Commission may make such investigations as it considers necessary...into any tariff charge or any [related] matter which [it] has reason to believe is causing or threatens to cause detriment to local industry’. It also states that the Commission may undertake such investigations ‘...in order to ascertain whether any tariff charge needs to be revised and the extent of any such revision, for the purpose of providing assistance or protection to local industry and additionally... redressing any imbalance in trade between Zimbabwe and any other country’. Perhaps more significantly the Act also allows the Commission to investigate such instances after receiving a complaint from private entities such as industry that ‘... as a result of the importation... of any goods...detriment has been, or will be, caused or threatened to an established local industry; or the establishment or expansion of local industry has been, or will be, detrimentally affected... where the commodities concerned...are or may be found to have been dumped’.

These provisions in essence empower the CTC whether on its own accord, or after receiving a complaint from industry regarding a potential dumping case; to investigate such a matter. However, investigations are only part of the legal response. The Act read together with the Regulations also authorizes the CTC, after compiling an investigation report, to take certain measures. These include making recommendations to the Minister responsible for Trade, who in turn is required by the Act to either refer the matter to the Minister of Finance; or declare such dumping instances by notice in the Gazette as ‘unfair trade practice’; or recommend that the Minister of Finance impose or amend any existing tariffs on the poultry imports concerned; or take any measures or actions that is deemed fit based on the report.

The specific measure recommended to the Minister of Finance, in this instance, is known as an anti-dumping duty that is imposed on the imported product. It is imposed after it is determined that the export price of the imported poultry products is less than normal value; and that prejudice or potential prejudice to the local poultry industry is being caused either through (a)



the fact that the imported poultry products are causing or threatening to cause material prejudice to the local industry; or (b) the fact that the poultry imports are materially impeding the establishment of the local poultry industry. The amount or level of duty imposed should be equal to the dumping margin that exists (i.e. the difference between the normal value and the export price of the imported poultry product). This measure does not necessarily have to be imposed after the finalization of investigations. The Act permits the imposition of provisional anti-dumping duties based on preliminary findings, pending the finalization of the investigations. This is designed to provide interim

protection to the local industry while full investigations are on-going.

Having said this, Zimbabwe has not been very astute in making use of these WTO-compliant national laws in order to protect local industry from instances of dumping. Although there has been general acknowledgement of the existence of such cases of dumping in the poultry sector by industry and government; reliance was not placed on anti-dumping legislation. The Minister of Finance, for example, in his 2013 Budget Statement noted that: “Due to unfair competition from imports of chicken, local breeders are increasingly cancelling orders for day-old chicks as they fail

to secure customers for their chicken as imports from outside the SADC/ COMESA region retail at prices significantly lower than locally produced chicken, notwithstanding the 40% duty levied on imported chicken... In order to level the playing field between imported and locally-produced chicken, I propose to review customs duty from 40% to \$1,50 per kg or 40%, whichever is higher, with effect from November 16 2012’. The economic rationale for increasing customs duty on imported chicken is very clear. However, unless such increases are made in line with the provisions and procedures prescribed by the Competition Act (described above); they run the risk of being viewed as ‘unilateral tariff increases’ which are challengeable under the WTO’s global trading system, which the Government of Zimbabwe (GoZ) is party to. This is because the Competition Act (read together with its Anti-dumping Regulations) is intended to ensure that the GoZ as a WTO member; demonstrates through clearly set out procedures involving investigations and pricing calculations that dumping is taking place and that it is causing material injury to local industry to the extent that justifies protection. To impose unilateral tariff increases, on the contrary, can be viewed as an arbitrary action that runs against the objectives of the WTO that aims to enhance free trade and the movement of goods and services between countries. ■

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