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Faculty of Law

Department of Commercial Law

A minor dissertation presented for the approval of Senate as part of the requirements for the Master of Laws (LLM) in Commercial Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a program of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University and that this dissertation conforms to those regulations.

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*A comparative analysis of the protection of women's labour rights
in the apparel industries of the Southern African Customs Union
member states of South Africa and Lesotho, under the African
Growth and Opportunity Act.*

By Tšoarelo Molapo

Cape Town, February 2014

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Abstract

The introduction of the African Growth and Opportunity Act agreements between the Government of the United States of America and eligible Sub-Saharan countries has helped to highlight the shortcomings of labour laws in certain African states. These shortcomings are particularly evident in the textiles and clothing industries of these developing African countries. Provisions were created by the act for eligible African countries to export products duty free to American markets. One of the products exported by Africa states are textiles.

This research aims to examine the shortcomings and benefits of labour laws of South Africa and Lesotho, two countries who have been granted access for their textile exports into the United States of America. An examination will also be done of the labour laws in China and Taiwan as predominant investors and owners in the apparel industries of South Africa and Lesotho where labour disputes have arisen between the Asian factory owners and local staff.

The research indicates that irrespective of geographic location, garment workers' labour rights are neglected the world over, (especially those of women) and that multinational corporations deliberately seek to subcontract garments from those countries with less labour regulation in order to source products cheaply.

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And finally for my best friend Alex. My experiences with studying law have been turbulent to say the least, of which you have probably bore the brunt of my frustrations. Thank you for being a constant source of encouragement and for holding my hand every step of the way.

List of acronyms and abbreviations

ACP	: Africa, Caribbean and Pacific
AGOA	: African Growth and Opportunity Act
ATC	: Agreement on Textiles and Clothing
BCEA	: Basic Conditions of Employment Act
CCMA	: Commission for Conciliation, Mediation and Arbitration
COIDA	: Compensation for Occupational Injuries and Diseases Act
CEDAW	: Convention on Elimination of all forms of Discrimination Against Women.
EEA	: Employment Equity Act
EU	: European Union
DDPR	: Directorate of Dispute Prevention & Resolution
GATT	: General Agreement on Tariffs and Trade
GDP	: Gross Domestic Product
GSP	: Generalized Systems of Preference
IFC	: International Finance Corporation
ILO	: International Labour Organisation
LDC	: Least Developed Country
LRA	: Labour Relations Act
MFA	: Multi Fibre Agreement
MFN	: Most Favoured Nation Principle
NEDLAC	: National Economic and Labour Council
NGO	: Non Governmental Organisation

NT	: National Treatment Principle
OHSA	: Occupational Health and Safety Act
PAJA	: Promotion of Administrative Justice Act.
PRC	: People's Republic of China
SACU	: Southern African Customs Union
SADC	: Southern African Development Community
T&C	: Textiles and Clothing
UIF	: Unemployment Insurance Fund
TDA	: Trade and Development Act of 2000
UN	: United Nations
USA	: United States of America
WTO	: World Trade Organisation

PART I:

Background

- i)** Chapter 1: An introduction and background to the study

- ii)** Chapter 2: Understanding the African Growth and Opportunity Act

Chapter 1

Introduction to the research topic

1.1 Objective and purpose of the study

This research is done utilizing concepts from International Economic Law, Labour Law and Human Rights Law.

This study attempts a comparative analysis assessing how the African Growth and Opportunity Act (AGOA) agreements with selected Southern African Customs Union (SACU) countries have benefited or disadvantaged their women garment workers in relation to their workplace environment in the garment industry.

The African Growth and Opportunity Act (AGOA) agreement is a preference extended by the United States Government to certain African countries. It is an agreement which is non-reciprocal and unilateral, the United States Government is the only party to the agreement with the authority to either extend or revoke this privilege. The agreement provides duty free access for a number of products, such as tobacco and apparel from Africa, into the United States market.¹ One of the effects of this agreement has been growth of the textiles and clothing industry in Africa.

The countries that constitute the Southern African Customs Union are Botswana; Lesotho; Namibia; Swaziland and South Africa all of whom are AGOA beneficiaries. However, the focus of this study is on the apparel industries of South Africa and Lesotho with an emphasis

¹ Office of the United States Trade Representative *African Growth and Opportunity Act*, available at <http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa>, accessed on 4 January 2014.

on the female employees of the textile and clothing (T &C) industries under the AGOA agreement because the majority of people employed there are women.²

AGOA eligibility is guided by a list of requirements set out in Section 104 of the United States Trade and Development Act (TDA) of 2000.³ This paper does not focus on all of the requirements listed in Section 104 of the Trade and Development Act. The focus is instead on Section 104 (f) of the agreement which is the requirement that there should be protection of internationally recognised workers rights and acceptable working conditions and whether there has been compliance.⁴ In spite of the United States Government stating that it is not necessary to meet all of the section 104 criteria, it has explained that it is not an excuse for African Governments to ignore the rest of the requirements set out in Section 104.

1.2 Significance of the study

The AGOA agreement has helped to highlight the existence of shortcomings with labour legislation in certain parts of Southern Africa that need to be rectified. Hopefully, lessons can be learnt from the comparative jurisdictions which can then be transplanted into either South Africa or Lesotho.

The study is significant because although the current AGOA term is set to expire at the end of 2015, there is talk of possible extension beyond this time.⁵ Given that AGOA was launched in 2000 till present, it means that for 14 years substantial efforts have not been made to secure the labour rights of women working in the garment industry.

² The New York City Bar Association Committee on African Affairs *Strengthening the African Growth and Opportunity Act: Delivering on Africa's Promise through NEPAD and the African Diaspora to Reinvigorate the Commercial Relationship Between the United States and Sub-Saharan Countries*, (August 2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072565-StrenghteningtheAfricanGrowthandOpportunityAct.pdf>, accessed on 4 January 2014.

³ Section 104 of the United States Trade and Development Act of 2000.

⁴ Section 104 (f) of the United States Trade and Development Act of 2000.

⁵ 'Business salutes Obama's support for AGOA extension,' *Business Day Online*, 02 July 2013, available at <http://www.bdlive.co.za/business/trade/2013/07/02/business-salutes-obamas-support-for-agoa-extension>, accessed on 15 July 2013.

Most literature available focuses on the economic and social impacts of the agreement, predominately examining the social and economic impacts of the agreement in Lesotho and Swaziland. The legal issues are often glossed over. As a result there is minimal information available to establish how the legal issues (including the labour law concerns) resulting out of the agreement ought to be addressed, and how legislation ought to be improved upon in order to enforce the necessary remedies.

In addition, it has been noted that working mothers in Lesotho participate in a labour market which does not respond adequately to their need to balance their work life with family responsibilities.⁶ Women are often formally employed but are also expected to be the primary care givers in the home. Many women who work in the textile and apparel factories are mothers or of child bearing age. There is therefore a need to accommodate the work-life balance of women not only for the purposes of bridging the gender inequality gap in the workplace, but also because women are considered important actors in poverty alleviation. Poverty alleviation is one of the AGOA objectives.⁷ The economic argument that has been made regarding women and poverty alleviation is that women are more likely to reinvest an income they receive in improving nutrition, health and education for their household members.⁸

The research findings may be useful to law students; government authorities; investors; gender promotion groups; labour dispute tribunals and local labour policy makers.

1.3 *The research question*

The research question is twofold. The first question is whether there exists adequate legal protection and enforcement of the labour rights of women in the garment industry in South Africa and Lesotho under the AGOA agreement and to pose the same question in the jurisdictions of China and Taiwan.

⁶ Ndumo, Mothepa Elizabeth "Towards a comprehensive regulation of work and family responsibilities in the Lesotho labour market: A case study of the banking sector" (2011) 32 *Industrial Law Journal* 1546

⁷ 'Heed warning on AGOA' Business Daily Online, (14 August 2013), available at <http://www.businessdailyafrica.com/Opinion-and-Analysis/Heed-warning-on-Agoa/-/539548/1948148/-/10et0jyz/-/index.html>, accessed on 4 February 2014.

⁸ Organisation for Economic Co-operation and Development, *Promoting Pro-Poor Growth: Employment*, (2009) available at <http://www.oecd.org/dac/povertyreduction/43280489.pdf>, accessed on 2 February 2014.

Once it is established that the necessary legislation exists, the next step is to try and identify the advantages and shortfalls with such pieces of legislation, - delving into actual clauses written in the legislation and assessing the implementation of such legislation.

The logic is that it would be pointless to promulgate laws if there are no adequate monitoring and enforcement mechanisms.

1.4 The rationale for the country comparisons

The primary focus is on the comparison between the labour laws in Lesotho and South Africa. Both countries are located within the SACU economic region. They contribute jointly to a common revenue pool which they share. They share common development challenges such as high unemployment levels and another characteristic the countries have in common are the similar legal systems combining Civil; Common and Customary Laws. They also have similar cultural backgrounds and are patriarchal societies.

The predominant investors and owners of the garment factories operating in Lesotho and South Africa are the Chinese; Taiwanese; and South Africans.⁹

An attempt is made to understand the working conditions and the labour law in China and Taiwan as this may provide insight into the type of work environment experienced there which may potentially be the source of labour disputes currently occurring between garment workers employed in Southern African apparel factories and their Asian employers. By understanding the Asian work culture and environment, one could learn to address and possibly prevent future labour disputes from arising.

1.5 The research methodology

The first part of the evaluation will be done by critically analysing the labour legislation of Lesotho and South Africa as well as their labour law enforcement mechanisms such as their methods of dispute settlement. The aim is to examine the laws and protection mechanisms

⁹ Better Work Better Work Lesotho: garment industry 2nd compliance synthesis report 2 April 2013, available at http://betterwork.org/global/wp-content/uploads/BWL_2nd_SR_02April2013.pdf-Adobe-Acrobat-Pro.pdf, accessed on 4 January 2014.

that exist there to determine whether either Lesotho or South Africa may borrow positive measures seen in either country to protect their garment workers.

This will be followed by a similar analysis of the labour laws and working conditions of apparel factory workers in China and Taiwan, as well as a minor discussion on Human Rights Law from the perspective of the Chinese and Taiwanese.

An in depth analysis will be done of various domestic labour regulation instruments; whilst a superficial evaluation will be done of various international instruments of the International Labour Organisation (ILO) and Southern African Development Community (SADC) to determine whether the countries to be examined in the study have signed and incorporated these instruments into their domestic legislation.

The research method utilized is desk research using primary and secondary sources. The research reviews journal articles; treaties; textbooks; both domestic and international legislation and newspaper articles.

1.6 Outline of the chapters in the dissertation and key questions to be answered.

Part I

Chapter 1: An introduction to the study.

- An explanation of the objective of the study, its purpose, significance and research method (s) to be adopted.

Chapter 2: Background to the study: Understanding the AGOA agreement and labour challenges posed by it.

- Introduction to the AGOA agreement.
- Determining country eligibility of AGOA.

- The proposed benefits of AGOA.
- Monitoring and evaluation of AGOA.
- The attraction to invest in the African manufacturing industry by Asian countries.
- Country specific problems that have arisen out of AGOA.
- Challenges of the apparel industry with regards to labour laws and the textiles and apparel industry globally.

Part II

Chapter 3: The protection and enforcement of labour law in the garment industries of Lesotho and South Africa.

- The African Growth and Opportunity Act in Lesotho.
- Key challenges facing the garment industry in Lesotho.
- The history of the apparel industry in Lesotho.
- Key challenges facing the garment industry in Lesotho
- Sources of labour law in Lesotho.
- Labour dispute mechanisms available in Lesotho,
- Challenges to labour enforcement in Lesotho.

Chapter 4: AGOA and South Africa.

- AGOA and South Africa
- Challenges to South African women in the apparel industry under AGOA.
- Sources of South African Labour law.

- Labour dispute resolution in South Africa.
- Effectiveness of labour dispute mechanisms in South Africa.
- Some differences between the labour laws in South Africa and Lesotho.

- The labour shortfalls of the AGOA agreement and involvement of the United States government.
- Corporate Social Responsibility and the role of private actors in securing workers rights.
- Evaluation of the success of the AGOA Generalised Systems of Preference (GSP) within the textile industry

Chapter 5: The recognition and protection of women’s labour rights in the apparel industry in China and Taiwan.

- The history of Asia- Africa relations
- Working conditions of women in Chinese and Taiwanese factories.
- Labour law in China and Taiwan.
- Work culture and human rights in China and Taiwan.

Chapter 6: Research findings, recommendations and suggestions for further study.

Chapter 2

Background to the study: understanding the AGOA agreement and the labour challenges posed by it

2.1 *Background to the study*

For a number of years the private sector; World Bank, International Monetary Fund (IMF), academics and other development think tanks have made attempts to alleviate poverty in the developing world. One of the suggestions that have been put forth by such think tanks is that in order for developing countries to catch up with developed countries there is a need for Least Developed Countries (LDCs) to industrialise using export oriented industrialization in order to boost economic growth and to develop their economies.¹⁰

Agriculture is often the economic driving force in developing countries. Three out of every four people in developing countries live in rural areas and therefore depend on agriculture as a source of livelihood.¹¹ Industrialisation is a term that is mostly associated with the development experience of countries in Western Europe and North America during the 18th to 20th centuries.¹² It referred to a departure from a subsistence economy that was largely agricultural towards a system that was more mechanised. Classical economists such as Adam Smith and Keynes suggested that industrialisation was driven by capital, investments, saving and technology.¹³ These were regarded as the ingredients to add value to land and labour and for a nation to attain wealth. However there has been controversy as to how industrialisation is to be achieved.

One of the criticisms levelled at Africa regarding its process of development has been that in spite of it being a resource rich continent having over 30 per cent of the world's extractive

¹⁰ United Nations Conference on Trade and Development *Export competitiveness and development in LDC's (2008)*, available at http://unctad.org/en/docs/aldc20081_en.pdf, accessed on 3 January 2014.

¹¹ World Bank *World Development Report 2008: Agriculture for development*, available at http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327599046334/WDR_00_book.pdf, accessed on 07 January 2014.

¹² Nzau, M. 'Africa's industrialisation debate: a critical analysis.' (2010) 2 (1) *The Journal of Language, Technology and Entrepreneurship in Africa* 146

¹³ *Ibid.*

resources,¹⁴ it has been encouraged to diversify its exports and not solely rely on exporting natural resources such as oil and gas for example, so it can fully participate in international trade. One of the avenues that LDCs have pursued is that of development through export-led trade.

One of the ways that export-led growth has been met is by developed countries creating provisions and extending unilateral trade preferences to developing countries through Generalised Systems of Preferences hereafter referred to as GSPs.

A Generalized System of Preference (GSP) is a programme which grants a wide range of industrial and agricultural products originating in developing countries, access to the markets of developed countries.¹⁵ Preferential treatment is usually given in the form of reduced or zero rates of customs duties.¹⁶ A classic example of a GSP is seen through the African Growth and Opportunity Act (AGOA) concluded between the United States government and several countries in Sub-Saharan Africa.

The Enabling Clause or the “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” was adopted under the General Agreement on Tariffs and Trade (GATT) in 1979.¹⁷ It formed the basis for allowing developed countries to give more favourable treatment to developing countries. The Enabling Clause is the legal foundation on which GSP’s are based.

¹⁴ ‘Africa must diversify to save itself from resource curse,’ *The Guardian Online*, (25 October 2012) available at <http://www.theguardian.com/global-development/2012/oct/25/africa-diversify-resource-curse-thinktank>, accessed on 3 January 2014.

¹⁵ Irish Tax and Customs *Generalized Systems of Preference: Information for Importers*, available at <http://www.revenue.ie/en/customs/leaflets/gsp-information-importers.html>, accessed on 15 August 2013.

¹⁶ Ibid.

¹⁷ The World Trade Organisation *Work on Special and Differential Provisions*, available at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, accessed on 4 February 2014.

The AGOA preferential access scheme is in direct contradiction with the MFN or Most Favoured Nation principle of the GATT and the World Trade Organisation (WTO). The GATT or General Agreement on Tariffs and Trade, is a multilateral agreement regulating international trade and is one of the earliest agreements which form a part of the WTO. It is an agreement that governs trade in goods and applies to all WTO member states.

The central pillars of the GATT are the Most Favoured Nation Principle and the National Treatment (NT) Principle. These are contained in articles I and III of the GATT.¹⁸ Collectively, they are known as the ‘non-discrimination principles.’¹⁹

Article I of the GATT reads as follows; “*With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*”²⁰

This means that every member state to the WTO must treat all the other member states equally as a most favoured trading partner. If a member extends a benefit to one country, it needs to extend the same benefit to all other WTO country members.²¹

¹⁸ Articles I and III of the General Agreement on Tariffs and Trade of 1947.

¹⁹ World Trade Organisation *Principles of the trading system*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, accessed on 3 January 2014.

²⁰ Articles I and III of the General Agreement on Tariffs and Trade of 1947.

²¹ World Trade Organisation *Understanding the WTO 2011*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm, accessed on 3 March 2013.

Article III (4) of the GATT says that “*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements.*”²² This provision prevents countries from discriminating against similar imports which are available within their domestic markets. An example would be applying tax to the sale of wine imported from country X even though country Y produced its own wine using the same grapes.

However, Article XXIV of the GATT allows for an exception to the MFN and NT principles. These are allowed in the cases of regional integration and in the creation of GSP’s.²³

2.2 *The African Growth and Opportunity Act and how it operates*

AGOA was signed into law by President Clinton on 18 May of 2000 as title 1 of the United States Trade and Development Act. It had three objectives.

The first was to expand trade and investment between the United States and Sub-Saharan Africa. The second was to stimulate economic growth in the region. Lastly it was to act as a tool to integrate Sub-Saharan Africa into the global economy.²⁴

It was signed into law in 2000 and was to last until 2008.²⁵ It is currently set to expire in 2015.

Since then, several amendments have been made from the first piece of AGOA legislation referred to as ‘AGOA I.’ The latest is ‘AGOA IV.’ The amendments in the legislation have

²² Article III (4) of the General Agreement on Tariffs and Trade of 1947.

²³ Article XXIV of General Agreement on Tariffs and Trade of 1947.

²⁴ Office of the United States Trade Representative *African Growth and Opportunity Act*, available at <http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa>, accessed on 15 August 2013.

²⁵ Trade Law Centre for Southern Africa *AGOA at 10: US-Africa Trade with a focus on SACU countries*, (October 2010), available at http://agoa.info/images/documents/2905/Eckart_Naumann_Agoa10yrs_20101125.pdf, accessed on 15 August 2013.

expanded the range of products that may be imported on preferential terms from Sub-Saharan Africa and have also extended the timeframe for the agreement.²⁶

Preferential access to the US market has been given for a number of products such as transportation equipment, crude oil and apparel.²⁷ Garment production has been significant in contributing to the economic growth of countries in SACU. There has been substantial investment in this area as it is an industry that requires low skilled labour and minimal capital expenditure.²⁸ Producers from AGOA eligible countries may export to the US but not all countries that are AGOA eligible get access to duty free exports. Certain criteria have to be met first.²⁹ One of the requirements is that if garments are made for export to the U.S market they must be made from U.S. yarn and fabric.³⁰ However, an exemption is created under the apparel provision for lesser developed countries. This provision is known as the 'Third Country Fabric Provision.' It exempts certain countries from the requirements that need to be met in order to be allowed to produce garments.

It allows countries with a Gross Domestic Product (GDP) of less than one thousand five hundred United States Dollars (\$ 1,500) to produce garments and export them to the United States duty free and quota free. These countries also do not have to make clothes from fabric and yarn originating in America.³¹ Poorer countries have attempted to take advantage of this provision to develop their markets using it as a tool for export led industrialization.

²⁶ Department of Commerce United States of America, *Summary of AGOA I*, available at <http://trade.gov/agoa/legislation/index.asp>, accessed on 15 August 2013.

²⁷ Trade Law Centre for Southern Africa *AGOA at 10: US-Africa Trade with a focus on SACU countries*: (October 2010), available at http://agoa.info/images/documents/2905/Eckart_Naumann_Agoa10yrs_20101125.pdf, accessed on 15 August 2013.

²⁸ Women In Informal Employment: Globalizing and Organising *Garment workers*, available at <http://wiego.org/informal-economy/occupational-groups/garment-workers>, accessed on 02 January 2014.

²⁹ Department of Commerce, United States of America, *Apparel Provisions*, available at <http://web.ita.doc.gov/tacqi/eamain.nsf/d511529a12d016de852573930057380b/1e85488eb01fd2fd852573940049047d?OpenDocument>, accessed on 1 September 2013.

³⁰ Ibid.

³¹ Ibid.

2.3 Eligibility under AGOA and its monitoring and evaluation

Eligibility for AGOA is a unilateral act decided by the President of the United States. He has the power to either grant or withdraw the benefit. The eligibility criteria are set out in terms of Section 104 of the Trade and Development Act of 2000.³² The act requires countries that benefit to be from Sub-Saharan Africa. The eligible country ought to have respect for the rule of law; a market based economy and protection of human and workers rights.³³

Each year the United States Administration re-examines whether the country named in the Act has continued to meet the AGOA eligibility criteria. It is not necessary that all the requirements are met.³⁴ However, this does not mean that African governments have the freedom to do as they like. It is an incentive for African governments to improve their respective political and economic policies.

2.4 The third country fabric exemption

The third country fabric exemption is a provision that allows for apparel eligible countries to source the yarn and fabric from any other country, other than the US and still qualify for preferential access. This provision expired in 2012. By having this extra provision helped to increase access for African textiles into the US market as eligible countries were able to source materials from different parts of the world where they were cheaper.

2.5 The proposed benefits of AGOA

The benefits for countries in Africa have included *inter alia*; increased trade with the United States; diversification of country exports; creation of employment and increased in Foreign Direct Investment.³⁵ AGOA has been responsible for supplying major retailers in the U.S

³² Section 104 United States Trade and Development Act of 2000.

³³ Ibid.

³⁴ Department Of Commerce United States of America, *African Growth and Opportunity Act*, available at <http://trade.gov/agoa/faq.asp#1>, accessed on 23 August 2013.

³⁵ Central Bank of Lesotho, *Economic Review: African Growth and Opportunities Act: Economic Impact and Future Prospects*, available at

such as Tommy Hilfiger, the GAP, Sears, Target and Wal-Mart etc. For U.S.A. it has improved political relationships with African States whilst creating more jobs in the American economy. Some American companies have found new investment opportunities in privatization of African state owned enterprises and have partnered with African companies on certain infrastructure building projects.³⁶

2.6 *The attraction to invest in the African garment manufacturing industry*

There existed an international trade agreement known as the Multi Fibre Agreement (MFA). This agreement was meant for the textile industry and ran from 1974 to 2004. Its conditions were such that it placed quotas on textile exports from developing countries going into developed countries. The MFA agreement was less restrictive on African imports, hence the rise in textile investment in Africa.³⁷

Investment in the garment industry is also driven by retailers who have the freedom to decide where production ought to take place. Some of the factors considered are labour costs, production time and trade barriers.³⁸ Favourable conditions were available in Southern Africa. The MFA was later replaced by the Agreement on Textiles and Clothing (ATC) when the World Trade Organisation (WTO) was formed in 1995.

2.7 *Country specific problems that have arisen out of the agreement in relation to the garment industry.*

The conditions for eligibility under AGOA are listed under section 104 of the act. Section 104 (f) states that a country ought to have, or be making efforts towards protecting

http://www.centralbank.org.ls/publications/MonthlyEconomicReviews/2011/Econo_Review_June_2011.pdf

accessed on 15 August 2013.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid

internationally recognised workers rights, that there are acceptable conditions of work and no gross human rights violations.³⁹

In spite of these requirements, countries that qualify for garment eligibility have reported a number of labour related violations. A brief explanation of South Africa and Lesotho country specific labour violations is to follow.

South Africa

South Africa's garment industry is predominately staffed by women. Their complaints have been related to human rights abuses and insufficient wages. Their garment industry as compared to the other countries is said to be better regulated in terms of having adequate ventilation, good lighting and basic safety measures.⁴⁰ South Africa's trade unions are currently trying to lobby for a wage increase and have threatened to shut down factories that refuse to comply.

Due in part to some of the pressure mounted by labour policy and trade unions in the Newcastle area, the area has gone down from operating one hundred plus factories to just below fifty. This is a problem for South Africa as this industry has at some point employed up to 200 000 employees generating about 32 billion Rand.⁴¹ South Africa currently does not have enough employers to create employment.⁴²

³⁹ Section 104 United States Trade and Development Act of 2000.

⁴⁰ 'Minimum Wage disputes: is it worth the fight in Newcastle?' *Mail and Guardian Online*, 30 May 2013 <http://mg.co.za/article/2013-05-29-made-in-newcastle-cut-from-a-different-cloth-china>, accessed on 25 August 2013.

⁴¹ Etienne Vlok, 'The Textile and Clothing Industry in South Africa' in Herbert Jauch and Rudolph Traub-Merz (Eds.), *The Future of the Clothing Industry in Sub-Saharan Africa*, Bonn: Freidrich-Ebert Stiftung, 2006.

⁴² 'Minimum Wage disputes: is it worth the fight in Newcastle?' *Mail and Guardian Online*, 30 May 2013 <http://mg.co.za/article/2013-05-29-made-in-newcastle-cut-from-a-different-cloth-china>, accessed on 25 August 2013.

A recent case in the Newcastle area also helps to highlight some of the challenges South Africa faces in this particular industry.⁴³ In the *Valuline* case, a collective agreement was signed between certain employer organisations and the National Bargaining Council for the clothing and textiles industry. The agreement contained certain provisions including those related to minimum wages which were to be paid to employees in that sector.⁴⁴ As a result, the Ministry of Labour sought to extend those provisions to all employees in the clothing sector. Business or the applicants in this case, were not party to the negotiations and therefore sought to set this agreement aside. One of the grounds on which business sought to challenge the decision of the Bargaining Councils and the government was on the basis of the principle of legality under the Promotion of Administrative Justice Act (PAJA) and also that some of their rights under the South African Constitution, had been infringed. Business owners were successful in their application, - not consulting them but expecting them to increase wages resulted in unfairness. The implication of this decision was that employers did not have to pay textile workers the minimum wage set out in the agreement they had been excluded from. This was interpreted by government and employees as textile companies having won the right to not comply with adequate labour standards as the basis of the agreement was to improve the living standards of textile employees.

Lesotho

In Lesotho the garment industry contributes to about 21 percent of its Gross Domestic Product (GDP) employing over 50,000 people. Textile factories are the largest private sector employers in the country.⁴⁵ It has also had repeat episodes of low wages, long working hours, violation of health standards, abuse by supervisors and sexual harassment.⁴⁶ Lesotho had repeat episodes of her own such as low wages, long working hours, violation of health

⁴³ *Valuline CC and Others v Minister of Labour and Others* (5642/2011)[2013] ZAKZPHC 9

⁴⁴ Ibid.

⁴⁵ 'Lesotho: Growth in textiles and clothing plays central role in job creation,' *The Financial Times (USA) Online* 18 April 2013 available at <http://aqa.info/news/article/5079-lesotho-growth-in-textiles-and-clothing-plays-central-role-in-jobs-creation.html> accessed on 23 August 2013.

⁴⁶ The Centre for Research on Multinational Corporations (SOMO), *Footloose Garment Investors in Southern and Eastern Africa*, available at http://www.somo.nl/publications-en/Publication_2477 accessed on 23 August 2013.

standards, abuse by supervisors and sexual harassment.⁴⁷ The apparel provisions of AGOA are alleged to have led to a proliferation of sweat shops in Sub-Saharan Africa. Sweatshops are places of employment where basic workers rights are not respected.⁴⁸

The concept of sweatshops first came about in the United States and England in the 19th century. After the industrial revolution, people began to flock to the cities in search of employment creating an excess of labour. This excess consisted mainly of women, children and immigrants.⁴⁹ Women worked in garment factories because at the time they lacked the options for economic advancement and were therefore willing to work in any kind of conditions.⁵⁰ Children were recruited as it was understood that they were willing to work for less money and were hired because they were less likely to complain because they required jobs in order to assist their parents who could not afford to sustain a family.⁵¹

In subsequent years American sweat shops were relocated from Los Angeles and New York to the Caribbean, Latin America and Asia. This was because the labour legislation in those regions was not stringent as that of the USA. Labour regulation was poor hence the relocation of manufacturing plants.

Globalization and Free trade agreements could be regarded as catalysts in the development of sweatshops where companies have sought cheap labour in order to stay competitive.⁵² There has been a rise in multinational corporations taking advantage of elimination of barriers to trade to access cheaper labour pools within regions with lax labour laws.⁵³

⁴⁷ Ibid.

⁴⁸ International Labour Rights Forum *Creating a sweat free world* available at <http://www.laborrights.org/creating-a-sweatfree-world>, accessed on 2 November 2013.

⁴⁹ Zwolinski, M *Sweatshops- Definitions, history and morality* available at http://home.sandiego.edu/~mzwolinski/Sweatshops_essay_web.pdf, accessed on 17 November 2013.

⁵⁰ Ibid.

⁵¹ Ibid

⁵² Ibid.

⁵³ Ibid.

2.8 Additional challenges to the apparel industry under the AGOA agreement

The garment provision of AGOA has resulted in garment eligible countries elbowing each other for investment opportunities, as is seen in Lesotho and Swaziland for example. These countries are desperate to attract investment that they even provide tax front and rear incentives to encourage investment.⁵⁴

Investment in garment manufacturing is unstable because factory owners will often depart countries where there are less stringent regulations in labour law. From a development perspective, the wages usually given are meant to assist in poverty alleviation but they do the opposite as in reality they are often lower than minimum wage.

Additionally, some AGOA garment eligible countries have had repeat instances of non-compliance with the other eligibility criteria such as failure to uphold the rule of law; not complying with intellectual property laws; corruption; bribery and other short falls. The apparel provision has also raised numerous environmental concerns regarding toxic refuse from factories in countries such as Kenya, Lesotho, Mauritius and Swaziland.

2.9 Examples of challenges faced in the apparel industry with regards to labour apparel globally.

The textile and clothing industry has been important for Europe for decades playing a crucial role in the European economy. In 2006 Europe had over twenty-two companies employing over two and a half million people with a turnover of about one hundred and ninety million Euros in the European Textile Industry.⁵⁵

In spite of having been overtaken by countries in Africa and Asia, Europe was once one of the first globally operating apparel industries. Even today, European countries still continue

⁵⁴ Ibid.

⁵⁵ *Business vibes Online* 17 November 2011, available at <http://www.businessvibes.com/blog/textile-industry-european-union>, accessed on 14 October 2013.

to make a significant contribution towards the apparel industry. The rest of the world continues to compete in terms of volume and output. While Europe instead attempts to compete in terms of variety, high design and quality of products.⁵⁶ Apparel manufacturing takes place in countries like Albania, Bulgaria, Italy, Portugal, and Turkey.⁵⁷

A number of countries in Europe are still in the business of manufacturing apparel. Bulgaria is one of those countries.

Bulgaria is not as economically advanced as some of the countries located in Western Europe and it is currently the poorest country in the European Union.⁵⁸ In 1999, the working conditions in apparel factories in Bulgaria were similar to those in Latin America and Asia. Turkish and Muslim women are employed there as they tend to be cheaper labour.

Employees were not allowed to join trade unions; they were locked in unless order quotas were met. They were not paid overtime and employees were subjected to working in cold noisy work rooms.⁵⁹

Some women were afraid to show their affiliation to trade unions as some factory owners do not tolerate the presence of unions. There was also found to be underage employees and sexual harassment occurred.⁶⁰ Employees complained that they arrived for work during the day but could never be sure how long a work day might be. The average wage in 2001 was €56 per month when the social minimum for a family of four is €550.⁶¹

⁵⁶ Hilger, J 'Creativity at Work: The Apparel Industry in West Europe' (November 2008), *Creative Encounters online*, available at <http://openarchive.cbs.dk/bitstream/handle/10398/7771/Creative%20Encounters%20Working%20Papers%2022.pdf?sequence=1>, accessed on 7 November 2013.

⁵⁷ Ibid.

⁵⁸ 'Bulgaria's economy in a rough region' *The Economist Online*, 7 July 2012 available at <http://www.economist.com/node/21558288>, accessed on 20 November 2013.

⁵⁹ Musiolek, B. "Garment and Sportswear Production: Working conditions and Worker Representation in Bulgaria," (1999) 3 *South East Europe Review for Labour and Social Affairs* 157.

⁶⁰ Musiolek, B *Made in Eastern Europe 2004*, available at <http://digitalcommons.ilr.cornell.edu/cqj/viewcontent.cgi?article=2063&context=globaldocs>, accessed on 09 October 2013.

⁶¹ Ibid.

Subsequent studies conducted in 2005 revealed that women were still working 10 - 14 hours six or seven days a week. Numerous accidents occurred due to non-compliance with occupational health and safety regulations with⁶² low wages and salary calculations uncertain. Membership of trade unions resulted in punishment of employees. Men enjoy a more privileged status than women as they are thought to be more reliable with less family responsibilities, i.e. a woman would normally be expected to be a breadwinner, mother and housekeeper. Employers ignore the codes of conduct that have been implemented by companies sourcing the garments.

Women work for 2 -3 years before being allowed to get pregnant.⁶³ In some factories women were earning €48 per month after tax and were fined for being late or for talking.⁶⁴ Employees are also often hired on short-term contracts not being recruited directly from unemployment agencies. This is done to enable employers to dodge paying social contributions owed to employees.

Similar problems are encountered in the textile industries in Bangladesh with a recent collapse of the Rana Plaza textile factory and other factories breaking out in fire in 2013 killing over 1,000 employees.⁶⁵ The minimum wage in Bangladesh is thirty-eight Dollars a month.

The owners of factories in the Bangladesh cases had been warned that a crack in the building was a serious issue or that the factory was a fire hazard, yet they still ordered employees to come back to work the following day.⁶⁶

⁶² Clean Clothes Campaign *Workers Voices: The situation of women in the Eastern European and Turkish Garment Industries (2005)* available at <http://www.ci-romero.de/fileadmin/media/informieren-themen/studien/kleidung/workers-voice.pdf>, accessed on 10 October 2013.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ 'Bangladesh garment factory warned of danger before fatal fire' *Age World Online*, (5 January 2014) available at <http://www.theage.com.au/world/bangladesh-garment-factory-warned-of-danger-before-fatal-fire-20140104-30ay9.html>, accessed on 4 January 2014.

⁶⁶ Ibid

2.10 Summary and conclusion

The World Trade Organisation agreements contain provisions to award special rights to developing countries with respect to trade. Included in these is the granting of Generalised Systems of Preferences. These provisions have been designed to encourage poverty alleviation through export led industrialisation. Least Developed Countries in Africa have benefitted from the Third Country Fabric exemption which has assisted them even further to grow their textile industries. Industrialisation and growing consumption has led to expansion of the apparel industry with the process of production now being fragmented to different places around the world. The labour challenges are common irrespective of global region. Europe continues to be a competitor in the industry and the working conditions in that industry continue to be just as bad as elsewhere in the world.

In the global garment industry mostly women are employed; there exist poor wages; ill treatment from management and cheaper labour pools with poor labour laws are actively sought by multinationals on purpose to carry out production.

PART II:

The apparel industry: AGOA in Lesotho and South Africa

- i) Chapter 3: Labour law and its challenges under the AGOA agreement in Lesotho
- ii) Chapter 4: South Africa, AGOA and the labour law.

Chapter 3

Labour law and challenges faced under the AGOA agreement in the apparel industries of Lesotho

3.1 *The African Growth and Opportunity Act (AGOA)*

AGOA has been crucial in terms of the United States trade and investment policy for sub-Saharan Africa as well as an important tool for US foreign policy towards Africa. The purpose of the agreement was to foster economic and political development in Africa by expanding access of African products into the US market. The specific objectives of the act were:

- to increase trade and investment between the United States and Africa;
- to promote economic development and reform in Africa and
- to promote increased access and opportunities for US investors and businesses in Africa.⁶⁷

A discussion will commence below looking at the impact of the implementation of AGOA in Lesotho and in the next chapter South Africa, looking more specifically at the labour concerns that have arisen out of the agreement together with an assessment of each countries domestic labour provisions at attempting to mitigate any negative labour effects that have arisen out of the agreement.

⁶⁷ The Brookings Institution *The African Growth and Opportunity Act: Towards 2015 and beyond* available at http://www.brookings.edu/~media/research/files/reports/2011/6/02%20agoa%20beyond%20kimenyi/0602_agoa_beyond.pdf, accessed on 1 December 2013.

3.2 *AGOA and Lesotho*

A major factor that has contributed to foreign companies opening up factories in Lesotho has been the introduction of the United States African Growth and Opportunity Act (AGOA). This agreement has allowed countries in sub-Saharan Africa to export goods into the United States market tariff free. Apparel has been one of the items that have been granted this preference. Lesotho was granted AGOA eligibility on the 2nd October 2000.⁶⁸

The apparel industry has become Lesotho's largest private sector employer. With a population size of about 1.9 million people, in 2008, thirty-six apparel factories employ around 40,000 workers with women constituting between 80 – 85% of the garment industry workforce.⁶⁹ Due to Lesotho's migration history where a large percentage of men went to work in South African mines, women were forced to become more active in employment in the country.⁷⁰ Textiles and clothing contribute to about 45% of the countries' exports and in 2008 Lesotho exported about \$350 million worth of garments to the United States.⁷¹ The sector is a crucial source of employment as the country currently has an unemployment rate of 25.3% and therefore many people are desperate for work. One hired textile employee supports at least four or five other people with their wages.⁷² At present, the garment and textiles industry employs about 22, 000 people working in about 33 factories.⁷³ The decrease

⁶⁸ AGOA.INFO AGOA *country eligibility* available at <http://agoa.info/about-agoa/country-eligibility.html>, accessed on 8 October 2013.

⁶⁹ International Labour Organisation *Making decent work a reality in Lesotho* available at <http://www.ilo.org/public/english/bureau/program/dwcp/download/lesotho.pdf>, accessed on 1 December 2013.

⁷⁰ United Nations Conference on Trade and Development *Who is benefitting from trade liberalisation in Lesotho? A Gender Perspective 2012* available at http://unctad.org/en/PublicationsLibrary/osg2012d2_en.pdf, accessed on 2 December 2013.

⁷¹ World Bank *Apparel Exports in Lesotho: The state's role in building critical mass for competitiveness*, available at <http://siteresources.worldbank.org/AFRICAEXT/Resources/258643-1271798012256/Lesotho-apparel.pdf>, accessed on 1 December 2013.

⁷² Lesotho Bureau of Statistics *Key indicators* available at <http://www.bos.gov.ls/>, accessed on 1 December 2013.

⁷³ Lesotho National Development Corporation *Textile and garment sector*, available at <http://www.lndc.org.ls/opportunities/default.ph>, accessed on 4 January 2014.

in the number of employees and manufacturing plants was due in part to low demand for products following the economic recession in 2008 and a stronger South African Rand to which Lesotho's currency the Loti (plural Maloti) which is pegged to the Rand, and increased competition from Asian producers.⁷⁴

3.3 *The history of the apparel industry in Lesotho*

The garment industry in Lesotho commenced in the 1980s as a way for South African companies to circumvent trade sanctions that had been imposed on them by the international community who refused to import South African manufactured products. The South African apparel companies were owned by South – East Asians who then transferred their businesses to Lesotho. During that time Lesotho enjoyed many trade advantages over South Africa with the West.⁷⁵ The majority of the factories in Lesotho are owned by Asians or South Africans. None are owned by Basotho. Management and supervision is done by the foreigners as well.⁷⁶ During the 1990's, further investment was stimulated by Taiwanese investors who moved to Lesotho to take advantage of duty free access for clothing originating under the ACP - EU agreement,- the Africa, Caribbean and Pacific (ACP) countries and European Union agreement.⁷⁷ Lesotho gained even further competitiveness over other garment manufacturing developing countries through AGOA as it was allowed to export its garments both quota free and duty free into the United States. The nature of the textile and apparel industry is that it is labour intensive making it easy for developing countries to compete with

⁷⁴ United Nations Public Information Africa Section Lesotho's economy catches flu from big brother's sneeze, available at <http://www.un.org/africarenewal/magazine/december-2011/lesotho%E2%80%99s-economy-catches-flu-%E2%80%94-big-brother%E2%80%99s-sneeze>, accessed on 10 January 2014.

⁷⁵ Overseas Development Institute *Aid for Trade in Lesotho: ComMark's Lesotho Textile and Apparel Sector Programme*, (2009), available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5948.pdf>, accessed on 1 December 2013.

⁷⁶ 'Chinese trade cuts both ways for Africa' *The Financial Times Online*, 25 March 2013 available at <http://www.ft.com/cms/s/0/06773548-9081-11e2-a456-00144feabdc0.html#axzz2qV3ToCxy>, accessed on 10 January 2014.

⁷⁷ African Development Bank *Kingdom of Lesotho country strategy paper*, (February 2013), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2017%20-%20Lesotho%20-%20Country%20Strategy%20Paper.pdf>, accessed on 4 January 2014.

developed countries in manufacturing in spite of lacking technology and it is an industry that has acted as a basis for industrial development in other parts of the world.⁷⁸

3.4 *Key challenges facing the garment industry in Lesotho*

Some of the current challenges facing the industry are the adverse economic developments in the American economy leading to a reduction in the number of imports from Lesotho. Consequently, several factories have shut down.

There exists the risk that the AGOA agreement between the American government and Lesotho may not be renewed as it is set to expire in 2015. There is also competition from the Asian garment manufacturing industry as its production costs are much lower than those in Lesotho.

The technology skills for operating the factories remain in the hands of foreigners with no active transfer of skills to local employees.

Finally, factory working conditions in Lesotho have raised numerous environmental and labour concerns. Employees complain of poor ventilation; safety hazards at work, unhygienic wash rooms, being fired if they join trade unions, verbal abuse and receiving a meagre \$100 per month.⁷⁹

Women have also often complained of dismissals if they showed visible signs of pregnancy and not being given lighter duties in the event that they were pregnant. Sexual harassment

⁷⁸ Ibid.

⁷⁹ 'Lesotho aims to be ethical alternative to Asian sweatshops' *The Globe and Mail Online*, 15 July 2013, available at <http://www.theglobeandmail.com/news/world/lesotho-aims-to-be-ethical-alternative-to-asian-sweatshops/article13238763/>, accessed on 1 December 2013.

occurs in the workplace where women are often harassed by their supervisors and women are unhappy about the body searches carried out when entering and exiting the business premises. Women living with HIV complained of being discriminated against and males complain that there is a preference to hire women over men as there is the perception by employers that women know how to operate the machines and are easier to work with.⁸⁰ Workers in Lesotho are also not given any time off to balance their professional lives with any personal incidences or family responsibilities which may arise.

3.5 *Sources of labour law in Lesotho*

The 1993 Constitution

The Constitution of Lesotho guarantees certain labour rights. Section 4 of the Constitution of 1993 guarantees fundamental rights including freedom from inhuman treatment, freedom from slavery and forced labour and freedom of association.⁸¹

Although no direct reference is made to gender equality; the Constitution states that the government shall take appropriate steps to promote equality and opportunities for disadvantaged groups of people.⁸² One can infer that this means that women are included in this category.

The Constitution also states that Lesotho will adopt policies aimed at encouraging just and favourable work conditions aimed at protecting workers rights and interests.⁸³

⁸⁰ International Labour Organisation and International Finance Cooperation *Lesotho: Baseline report worker perspectives from the factory and beyond*, (2012) available at <http://betterwork.com/global/wp-content/uploads/Impact-Research-Lesotho-Baseline-Report-Worker-Perspectives-from-the-Factory-and-Beyond.pdf>, accessed on 1 December 2013.

⁸¹ Section 4 the Constitution of Lesotho of 1993.

⁸² Section 26 (2) the Constitution of Lesotho of 1993.

⁸³ Sections 30 and 31 the Constitution of Lesotho of 1993.

International Labour Organisation (ILO) and other international conventions

Lesotho has ratified the ILO conventions on Occupational Health and Safety; the Right to Organise and Collective Bargaining; the Employment Discrimination Convention and others.⁸⁴ There is a Family Responsibility Convention which Lesotho has not ratified.

It has also ratified the Convention on Elimination of all forms of discrimination against women (CEDAW); the 2004 African Union Declaration on Gender Equality in Africa and the SADC Declaration on Gender and Development. The purpose of this declaration is to commit to enshrine equality and amend domestic laws in line with this vision.

There is also the Charter of Fundamental Social Rights in the Southern African Development Community.

The primary sources of labour legislation in Lesotho include the Labour Code of 1992 and its subsequent amendment of 2006.

Section 5 of the Labour Code prohibits sexual discrimination and states that there should be equal pay for the same kind of work for both men and women.

Section 6 states that freedom of association is guaranteed for all workers.

For purposes of health and safety at work, Section 93 requires employers to take measures that are reasonably practicable to ensure the health and welfare of employees. The act does not define what constitutes ‘reasonably practicable.’

⁸⁴ International Labour Organisation *Ratifications for Lesotho* available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103188, accessed on 1 December 2013.

Sections 117 -118 explain pay for overtime; i.e. how an employer is to request overtime and that an employee is required to rest at least 24 hours once a week.

Part 9 of the act has a small section dedicated to women and young people at work. Any person who employs a child under the age of 15 is subject to a fine of 300 Maloti (equivalent to 30 US Dollars) or 3 months in prison or both.⁸⁵

Sections 133 (2) and 134 make provision for maternity leave, giving women 6 weeks maternity leave before giving birth and 6 weeks after. However, employers are not obliged to pay women for maternity leave. Similarly, contravening this section of the code means that an employer is subject to a 300 Maloti fine or three months imprisonment or both.

Section 136 states that any dismissal that occurs while a woman is pregnant is deemed unfair dismissal.

Section 168 of the Labour Code also allows for freedom of association and trade union activity. The law also prohibits anti-union discrimination from employers.

In terms of the Labour Code Wages Amendment of 2011, the minimum salary of the least paid textile worker is 44 Maloti or \$0.44 per day for a general textile worker and a trained machine operator being the best paid earning 980 Maloti per month or \$100 per month.⁸⁶

Employees who have completed more than one year of continuous employment with the same employer in the textile industry are only entitled to two weeks paid maternity leave.⁸⁷ Those employed for less than 12 months are not entitled to paid leave. Lesotho does not have any social insurance scheme like an unemployment fund.

⁸⁵ Section 124 (4) the Labour Code of Lesotho of 1992.

⁸⁶ Schedule A Labour Code Wages Amendment Act of Lesotho of 2011.

⁸⁷ Schedule K (1) Labour Code Wages Amendment Act of Lesotho of 2011.

3.6 *Labour dispute mechanisms*

There exists a separate Labour Court, Labour Appeal Court and a Directorate of Dispute Prevention and Resolution (DDPR). The powers and jurisdiction of the Labour Courts are set out in Section 24 of the Labour Code of 1992. The specialist court is a forum where labour disputes are settled thus reducing the burden that exists on the country's judiciary.

The Labour Court was established to settle industrial disputes between employers and employees with appeals being made to the specialist Labour Appeal Court. Legal representation is allowed in the Labour Court.

The DDPR office is made up of independent officers consisting of arbiters and conciliators who attempt to prevent, resolve labour disputes and expedite the labour dispute resolution process and is a simpler and cheaper method than costly litigation. Its offices are found throughout the 10 districts in Lesotho.

Application of the labour laws is also done by inspectors of the Ministry of Labour in Lesotho. Several other clothing brands such as Levi Strauss, Wal-Mart and Sears regularly inspect the working conditions of garment workers in Lesotho.⁸⁸

3.7 *The challenges of dispute settlement in Lesotho for women*

An important challenge to women employed in Lesotho is access and enforcement of labour awards. This is even more problematic for women who work in the textiles industry.⁸⁹ This is

⁸⁸ Lesotho Textile Exporters Association *Labour Conditions*, available at http://www.lesothotextiles.com/Pages/Labour-Conditions.asp?linkPath=3&IID=3_1, accessed on 10 January 2014.

⁸⁹ African Union *Solemn Declaration on Gender Equality in Africa: Lesotho Report 2006*, available at www.africa-union.org/root/au/Conferences/.../2006/.../Report-Lesotho, accessed on 1 January 2014.

because it is speculated that the Government does not have enough authority to force foreign investors to comply with domestic legislation as it is reluctant to expel them from investing.

This weakness in the labour enforcement system actually aggravates gender inequality. For example, even if a positive award is granted to an aggrieved litigant, one cannot say with certainty that it will be enforced.

Another important challenge is that workers are not well informed about their labour rights but even if they were; it may be difficult to convey to employees the intricacies of the international trading system and that in order for them to have employment it is important that a balance is retained between social objectives and economic incentives for investors. Employers also do not seem to understand the provisions of the Labour code. The same problem exists with regards to arbiters of labour disputes.⁹⁰ The ILO's Better Work Lesotho (BWL) program is trying to remedy this. Better Work is a partnership agreement between the International Finance Corporation (IFC) and the International Labour Organisation (ILO) to improve compliance in labour standards and competitiveness in global supply chains.⁹¹

Unions have also been accused of lacking independence and at times being influenced by local politicians. There are 5 trade unions in the garment industry. They do not represent the majority of the workforce.⁹²

Women are also unfamiliar with the dispute settlement procedure and courts are thought to not be a 'woman's place.' The majority of the cases brought to the Labour Courts are introduced by the unions on behalf of women. The Labour Court is also not independent of the department of labour as it is dependent on it for finance. Some female employees have been falsely accused and dismissed for allegedly participating in illegal strikes⁹³, while others

⁹⁰ *Nienhsing International Lesotho (Pty) Ltd v Dillane and Another* (LC/REV/123/07)

⁹¹ Better Work *About Us*, available at http://betterwork.org/global/?page_id=300, accessed on 2 January 2014.

⁹² Lesotho Textile Exporters Association *Labour Conditions*, available at http://www.lesothotextiles.com/Pages/Labour-Conditions.asp?linkPath=3&IID=3_1, accessed on 10 January 2014.

⁹³ *Tebello Thandazo and Others v Nien Hsing International Lesotho (Pty) Ltd* LC 39/10 (No.2)

were dismissed for utilizing the courts for legal matters were suspended from work for absenteeism.⁹⁴

Some litigants have complained that delays in the labour courts could be attributed to lawyers who schedule numerous court appearances in more than one day and the courts have allowed them to get away with. Some disputes were settled without the knowledge of employees and therefore they went along with the decision simply because they were desperate for an outcome.

Some unions reported that although union activity is allowed in law, employers have refused them entry to factory premises to represent employees in disputes. Most apparel factory owners rejected unions.⁹⁵ Unions have also felt unsupported by Government.

The labour laws do not address the issue of maternity leave and the reconciliation of work and family responsibility adequately. Either the provisions are none-existent or provide minimal protection. Similarly the sanctions for non-compliance with labour laws are minimal. As mentioned earlier, one of the fines for non-compliance with the labour law is 300 Maloti which is the equivalent to \$30 for dismissing someone unfairly. Some cases have been lodged by the Labour Department to the courts, with no follow up.

While offices of the DDPR are located in different districts across the country there is only one labour court which is located in the capital city Maseru. This presents a potential problem for transports costs for litigation for those who are not resident in Maseru.

⁹⁴ Women and Law in Southern Africa *Trust In Search of Justice: Where do women in Lesotho Go?* Morija: Morija Printing Works, (2000) 162 -168

⁹⁵ US Department of State Bureau of Democracy, Human Rights and Labour *Country reports on human rights practices: Lesotho (2012)* available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>, accessed on 1 December 2013.

The courts and DDPR enforce remedies but they are subject to lengthy delays and appeals. Cases are reported to be resolved on average nine months with some cases taking up to eighteen months, because of staffing and other resources.⁹⁶

The Government Department of Labour has some labour inspectors that are allocated to specific industries. The labour inspectors are expected to ensure that labour and health standards are being complied with in the workplace. However, the officers have been found to be overburdened with too many different tasks making it difficult for them to engage in inspections.⁹⁷ There have also been reported cases involving regarding labour inspectors in factories hence employee concerns are never adequately addressed. A contributory and aggravating factor is due in part to the low salaries government employees are paid. There is also no work plan for each district and monitoring and evaluation of conditions has been inconsistent and inadequate.⁹⁸ Only 40 inspectors exist for the entire country.⁹⁹

Recruitment of labour inspectors is done through the Public Service Commission where the employee hired is often the one with the highest qualification. Inspectors receive their in service training from other colleagues; their training is possibly inadequate thus aggravating inefficiency.¹⁰⁰ As a result labour inspectors have often been found to lack an understanding of the expected occupational health and safety standards, labour laws and even actual writing up of accident reports.¹⁰¹

⁹⁶ Ibid.

⁹⁷ International Labour Organisation *Lesotho: labour inspection, structure and organisation* (March 2009) available at http://www.ilo.org/labadmin/info/WCMS_112603/lang-en/index.htm, accessed on 1 December 2013.

⁹⁸ Ibid.

⁹⁹ International Union Rights *Special focus Southern Africa* (2009) available at http://www.ictur.org/pdf/Southern_Africa.pdf, accessed on 1 October 2013.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

The cost of litigation for someone who earns at most \$100 a month places the justice system out of reach. Legal fees are likely to cost between 200 to 500 Maloti per hour i.e. for consultation, not counting the additional court fees and litigation fees.¹⁰²

The system itself is flawed as even attempting to find information to put together the research paper was difficult with no access to the necessary information from Government websites. Also, due to the fact that secondary sources were used and no interviews were done suggests that there may be some problems with the quality of some of the information used in this chapter.

¹⁰² The Open Society Initiative for Southern Africa *Lesotho: Justice sector and the rule of law* (March 2013) available at http://www.osisa.org/sites/default/files/afrimap_lesotho_justice.pdf, accessed on 1 December 2013.

Chapter 4

The apparel industry in South Africa under AGOA

4.1 AGOA and South Africa

In South Africa the textile industry has played a role in keeping a number of families from desperate poverty by employing its members.¹⁰³ The South African Government considers the industry very important for the economy. The textiles and apparel industries hires about 120, 000 people in terms of direct employment which constitutes about 11 per cent of the manufacturing industry. The employment numbers with regards to indirect employment are about 320,000, a turnover of about 35 billion Rand which contributes to about 3 per cent of the country's Gross Domestic Product (GDP).¹⁰⁴

There are approximately 2,000 active clothing, textiles, foot wear and leather companies registered.¹⁰⁵ Ownership of the textiles factories is distributed amongst Asian entrepreneurs, German companies and those owned by South African's.¹⁰⁶ Like Lesotho, the industry also employs a significant amount of women. Women account for about 67 per cent of the industry. The wages paid here are also the lowest in the manufacturing sector in South Africa. The wages being paid in South Africa vary. Some companies pay about \$220 per month as compared to Bangladesh where wages are about \$38 per month and \$80 in Cambodia.¹⁰⁷ Being granted AGOA eligibility in 2000 as well as preferential access to European Union markets has helped to grow the South African apparel industry.

¹⁰³ Truett, L.J & Truett, D. B 'New challenges for the South African textile and apparel industries in the global economy.' (2010) 35 (4) *Journal of Economic Development* 73

¹⁰⁴ South African Department of Trade and Industry *Textiles, Clothing, Leather & Foot wear presentation to PPC*, available at http://www.thedti.gov.za/parliament/clothing_and_textile.pdf, accessed on 4 January 2014.

¹⁰⁵ Italian Trade Commission *The textile Industry in South Africa and Ethiopia (2011)*, available at <http://www.ice.gov.it/paes/afrika/repudafricana/upload/111/ICE%20Textile%20machinery%20Final%20Report%20Dec%202011%2030%2001%202012.pdf>, accessed on 30 November 2013.

¹⁰⁶ Volk, E 'The Textile and Clothing Industry in South Africa' in Jauch, H & Traub-Merz (eds.) *The Future of the Textile and Clothing Industry in Sub-Saharan Africa*, Bonn: Friedrich-Ebert-Stiftung, (2006) 228 -229

¹⁰⁷ 'Labour laws keep SA's textile industry struggling along' *Mail and Guardian Online*, 16 May 2013 available at <http://mg.co.za/article/2013-05-16-labour-laws-keep-sas-textile-industry-struggling-along>, accessed on 3 January 2013.

4.2 *Challenges for South African women working in the textile industry*

Like other women employed in a similar industry, the South African apparel industry is plagued by the same problems. Emergency exits are not adequately demarcated; women are subject to degrading strip searches; toilet facilities are insufficient and shared by a large number of employees. There are instances of illegal immigrants being bought in to work and non-contribution to the UIF (Unemployment Insurance Fund) in spite of deductions being made to the wages of these immigrant employees.¹⁰⁸

While the South African apparel industry has lower wages, there have been demands for increases by 6.5 per cent for textile workers. As a result, investors are opting to move to other countries like Lesotho, Mozambique and Swaziland. Investors are worried that there is no room for their companies to grow and want higher returns.¹⁰⁹ The labour cost to produce a shirt in South Africa is 65 cents while it costs 19 cents in Lesotho. South Africa pays tariffs on textiles exported to the United States, whilst Lesotho does not which increases the production costs.¹¹⁰

South Africa is also characterised by frequent industry strikes; onerous labour obligations and unions that are aligned with government so they are able to sway leadership in textile companies.

¹⁰⁸ 'Raid highlights factory abuses' *Mail and Guardian Online*, 14 October 2011 available at <http://mg.co.za/article/2011-10-14-raid-highlights-factory-abuses>, accessed on 2 December 2013.

¹⁰⁹ 'South Africa textile firms in tatters' *The Wall Street Journal* 9 August 2011 available at <http://online.wsj.com/news/articles/SB10001424053111904233404576457652301071940>, accessed on 10 November 2013.

¹¹⁰ Ibid

4.3 Sources of South African labour law

ILO Conventions

South Africa has ratified quite a number of ILO conventions. Some of the conventions that it has ratified include; the convention on occupational health and safety, forced labour convention, right to organise and collective bargaining convention and the abolition on forced labour convention.¹¹¹

The South African Constitution of 1996

The South African Constitution of 1996 has several labour rights contained in it. These include the freedom of association found in section 18 as well as section 23 which states that everyone has the right to fair labour practices, every worker has the right to strike and that every employer organisation or trade union has the right to engage in collective bargaining. The Constitution is the supreme law of South Africa and any law inconsistent with it is invalid and any obligations imposed by it must be fulfilled.¹¹²

The pieces of legislation described below form a part of the South African labour laws, together with case law and codes of practice. These laws were enacted in the post-apartheid era and were negotiated between government, business and unions under the auspices of the National Economic Development and Labour Council (NEDLAC).¹¹³ NEDLAC is a body where government comes together with relevant stakeholders and interested parties at a national level to try and negotiate issues of social, labour and economic policy.

¹¹¹ International Labour Organisation *Ratifications for South Africa*, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888, accessed on 1 December 2013.

¹¹² Section 2 The Constitution of South Africa of 1996.

¹¹³ Benjamin, Paul 'Enforcement and sanctions to promote compliance of South African labour legislation,' (2011) 32 *Industrial Law Journal* 805

The Labour Relations Act 66 of 1995 (LRA)

The act regulates unions, encourages employee participation in work place decisions; establishes dispute resolution mechanisms that are simpler as well as other incidental labour matters. The legislation allows workplace forums, bargaining councils and explains the procedures for dispute resolution.

The Basic Conditions of Employment Act of 1997 [amended in 2002] (BCEA)

The purpose of the BCEA is to enhance economic development, social justice, to give effect to section 23 of the Constitution and the obligations of the ILO. The BCEA applies to all workers with a few exceptions with a threshold annual salary of R193 805.¹¹⁴

The act makes provision for women's labour rights by allowing for at least 4 months maternity leave that during pregnancy and 6 months after, a woman cannot engage in hazardous work. It also allows her time off work for family responsibilities.¹¹⁵ Non-compliance with provisions may result in imprisonment or a fine for employers. Fines may include 1 to 3 years imprisonment or payment of a certain amount of money per employee in respect of whom the failure to comply applies to.¹¹⁶

The Employment Equity Act 55 of 1998 (EEA)

South Africa has a separate act dedicated to achieving equal opportunities, equality and to remove unfair discrimination in the workplace.¹¹⁷ This is the purpose of the EEA. It applies to all employees excluding those working in national security or the secret service.

The act makes reference to "designated groups" these include people with disabilities, black people and women.

¹¹⁴ Grogan, John *Workplace Law* 10 ed (2009) Cape Town: Juta pg. 59

¹¹⁵ Sections 25 -27 Basic Conditions of Employment Act South Africa of 1997.

¹¹⁶ S 93 and Schedule 2 of the Basic Conditions of Employment Act of South Africa of 1997.

¹¹⁷ Section 2 Employment Equity Act of South Africa of 1998.

Section 7 prohibits medical testing of employees unless permitted by legislation and section 10 explains the necessary process for labour disputes, - that both parties need to be informed of the dispute and that it needs to be resolved within a reasonable time. No definition is given of what constitutes a reasonable time.

Sections 13 and 20 place an obligation on employers to produce an affirmative action plan that is to be monitored and implemented with a precise timetable and objectives. In the event that the act is contravened, the onus rests not only on unions to raise issues of non-compliance but individual employees have the capacity to do so if they wish.¹¹⁸ Fines for non-compliance are attached to the first schedule of the act and range between R500, 000 to R900, 000 for non-compliance.

The Unemployment Insurance Act 63 of 2001

This act establishes a fund for employees to benefit in the event of unemployment. Women on maternity leave are eligible to claim from this fund.

The Occupational Health and Safety Act 85 of 1993

Here sections are included to ensure that employers act as is reasonably practical to ensure that people are not exposed to health and safety hazards. Provision is also made for health and safety representatives in terms of section 17, who review and make representations to health inspectors.

The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

This act makes provisions for employees that have been injured at work.

¹¹⁸ S 34 of the South African Employment Equity Act of 1998.

4.4 Labour dispute resolution in South Africa

The LRA makes provision for the resolution of disputes in sections 112 -183. The main bodies for settlement of disputes include; the Labour Court, Labour Appeal Court, Bargaining Councils, Accredited Councils, private agencies and the Commission for Conciliation, Mediation and Arbitration (CCMA).

The BCEA allows for a labour inspectorate who monitors and enforces compliance with the BCEA. The labour inspectors have the authority to enter the workplace and examine documents to ensure compliance with labour law. He is allowed to enter workplace premises without notice.¹¹⁹ Unlike in Lesotho, most labour inspectors in South Africa do not hold university degrees, equally the labour department is understaffed.¹²⁰ The Public Service Ministry of South Africa is said to be remedying this by attempting to turn around its inspectorate office by classifying inspectors into generalists, experts and specialists. It has trained a small set of inspectors to focus on understanding the EEA and the labour department has undergone restructuring to ensure efficiency by splitting into different divisions that deal with legal issues; employment conditions; labour inspection; planning and support, replicating these structures at provincial level too.¹²¹

In terms of the BCEA deductions from an employee's remuneration are not allowed unless the employee has agreed to this or they are required or permitted by law, collective agreement or arbitral award.¹²² Punitive fines for negligence or misconduct are not allowed.

The CCMA procedure is straight forward. One has to contact them directly within 30days or longer depending on the type of claim, fill out an application form to lodge a complaint and ensure that the other party is informed, i.e. via registered mail or other means. The CCMA

¹¹⁹ Benjamin, Paul *Enforcement and sanctions to promote compliance of South African labour legislation* (2011) 32 *Industrial Law Journal* 805

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Section 34 The Basic Conditions of Employment Act of 1997

then contacts both parties for the date of a hearing.¹²³ The decisions of the CCMA are subject to review not appeal.

There are also workplace forums which consist of employee representatives to deal with work related concerns. Employers are obligated to meet regularly with these forums and at times decisions cannot be made by employers without consensus from these workplace forums.¹²⁴ Bargaining Councils have two functions. Collective bargaining and a dispute settlement function. They generally deal with matters related to wages and conditions of work.¹²⁵ Generally the process is to go through the Bargaining Council and CCMA before applying to the specialized labour court. The labour court can decline disputes if the parties have not gone for conciliation first.¹²⁶

Problems have arisen with regards to the use of these Bargaining Councils as they are large in number (especially those of public servants), and in the case of a dispute, it becomes difficult to reach a settlement. Bargaining Councils have also led to massive strikes by public service unions since their formation.

Bargaining Councils agreements are entered into agreements by business owners and unions. They agree to set the acceptable standards of work. It has been found that sometimes the obligations are too onerous on small businesses which could potentially bankrupt them thus leading to unemployment in South Africa.¹²⁷

4.5 Effectiveness of labour dispute mechanisms in South Africa

Although the South African labour legislation is comprehensive it has still received some criticism. According to Hanneli: 2006, some of its criticisms have been that it has made the settlement of disputes more accessible to people but now there is a higher number of disputes.

¹²³ Commission for Conciliation, Mediation and Arbitration *referring a dispute*, available at <http://www.ccma.org.za/Display.asp?L1=32&L2=9>, accessed on 1 December 2013.

¹²⁴ Grogan, John *Workplace Law* 10 ed (2009) Cape Town: Juta pg.7

¹²⁵ Bendix, Sonia *Industrial Relations in South Africa* (2001) Cape Town: Juta p 273

¹²⁶ Ibid 363

¹²⁷ 'How and why the FMF's challenging the bargaining council system' *Politics Web Online*, 21 March 2013 available at <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=365427&sn=Detail&pid=71616>, accessed on 5 February 2014.

Employers are not knowledgeable about the requirements of the law as it is too technical and sophisticated.

The conciliation process at times has been criticized for worsening the labour relationship in the event of reinstatement of employment. Employers have found that they are constantly being referred to the CCMA for minor misunderstandings and the CCMA is said to have high referral rates, case overload and bad settlement of disputes.¹²⁸ Also, with reference to the law of dismissals the requirements to demonstrate that a fair dismissal has taken place are more onerous on the employer.

However, South African labour legislation offers better protection to its employees potentially reducing the chances of exploitation by employers, for example, it is harder to dismiss an employee.

Having several acts in place has ensured that a number of labour issues are addressed and also states how realisation and implementation of rights is to be done. Women are afforded maternity rights and family responsibility rights. Having stronger unions has meant negotiation for better wages of employees. The laws are also well documented with the court system being decentralised,- every province has a CCMA office and there are several labour courts throughout the country. Labour guides exist to explain the law as to government department websites.

The CCMA gives an outcome after 14 days of an arbitration hearing and 30 days after a conciliation meeting.

¹²⁸ Bendeman, H. 'An analysis of the labour dispute resolution system in South Africa.' (2006) 2 (1) *African Journal on Conflict Resolution* 81

There exist women's legal centres and legal resources centres across the country which serves to provide free legal services specifically for women. There also exists an independent commission for gender equality and a South African human rights commission.

4.6 Examples of some differences between the labour law in Lesotho and South Africa

- Lesotho does not have basic conditions of employment or a comprehensive occupational health and safety act like South Africa. Instead all the labour requirements are listed in the Labour Code and the Mine Safety Act. The Code makes reference to similar issues as those contained in the BCEA however it is not as precise. For example, part 7 of the Code makes provisions for workplace safety. Section 93 (1) of the act states that every employer shall as far as is reasonably practicable; ensure the health and safety of its employees. The act does not define what constitutes 'reasonably practicable.' However, looking at South Africa's OHSA its preamble defines what is meant by 'reasonably practicable,' 'safe' and 'occupational hygiene.'
- South Africa has an act dedicated to equity in the workplace which prohibits both direct and indirect discrimination on grounds set out in section 6 of the EEA. The grounds include race; gender; sex; pregnancy and marital status etc. The Labour Code does not expressly make reference to these grounds. Section 5 of the Labour Code simply prohibits sexual discrimination while the Constitution of Lesotho simply states that the government will adopt policies aimed at creating an equal society and justice for disadvantaged groups. No explicit provisions are given to create equality for women in the workplace.
- South Africa' EEA in sections 2 and 17 has made provision for an employment equity plan in order for employers to achieve equality in the workplace. Lesotho does not indicate in its labour legislation how it proposes to advance disadvantaged groups.
- Lesotho's Wages Amendment Act of 2011 has recently given employees in the textile sector paid maternity leave for up to 2 weeks which never existed before. South Africa has the UIF where paid maternity leave can be claimed for 17 weeks or just over 4 months. Employees that miscarry in the third trimester or have a still born child

being allowed to claim for 6 weeks maternity leave. This is in terms of section 24 of the UIF act. Lesotho does not give the same benefits or still births and the maternity benefits are for a shorter period.

- There are several CCMA offices and more than one labour court in South Africa as well as legal aid centres to assist indigent clients.

These examples listed about clearly give an indication that the labour laws in Lesotho are far less demanding than those found in South Africa.

4.7 The labour shortfalls of the AGOA agreement and the involvement of the United States Government

The US Government is aware and has acknowledged lax enforcement of the minimum wage and employee benefits in Lesotho.¹²⁹ However, it has been argued that multi-nationals say that they pay low wages by Western standards but domestically, the wages are sufficient.¹³⁰ Determining wages becomes difficult as it requires consideration of a number of factors where Governments would have to need to balance economic incentives and policy objectives.

As stated in section 104 of the TDA, it is not necessary for eligible countries to meet all of the requirements set out in terms of section 104(f) of the agreement they are required to make progress towards realising those eligibility requirements. However, the act places two obligations on the US Government in terms of monitoring the eligibility requirements.

¹²⁹ McCormick, R 'The African Growth and Opportunity Act: The Perils of Pursuing African Development through U.S Trade Law' (2006) (41) *Texas International Law Journal*, 339

¹³⁰ Ibid.

The first is that the President is obligated to determine whether a country is making continual progress towards meeting the eligibility criteria and if not then the country can be removed from the AGOA program. This is in terms of S 104(b) of the AGOA act.

Secondly, a forum is established by the office of the President of the United States where meetings or forums are held with African states to discuss AGOA related issues at least once every two years.¹³¹

Additionally, the United States Government has an administrative division that monitors human rights and labour reports for each country. Presumably this implies that they know of labour abuses in most AGOA beneficiary countries.

Section 104(f) has only been enforced twice in relation to labour violations; first in Swaziland where it required Swaziland to amend its labour legislation accordingly and in Uganda where factory abuses were reported and America advised the country to effect labour changes with a threat to lose its trade benefit.¹³²

4.8 Corporate social responsibility and the role of private actors in securing women's labour rights in the apparel industry

Some companies for example the GAP and Tommy Hilfiger have opted to protect employees by forming partnerships with NGO's in the local area to ensure the well being of employees. They have established complaints procedures and codes of conduct for vendors. Sometimes they bring in regional managers and independent auditors to assess the situation in respective countries. Manufacturing companies are attempting to demonstrate that they can retain their competitive edge and generate profits while doing so in an ethically compliant manner. Some

¹³¹ S 105 the Trade and Development Act of 2000.

¹³² Ibid.

retailers from the United States have attempted to do so in Lesotho for example by inspecting the working conditions of factories, however this is often only done on occasion.¹³³

The problem with the codes that have been established by retailers is that these codes simply require compliance with existing national laws. They just require suppliers to enforce and not improve upon working conditions. These codes end up becoming minimum standards rather than best practices.

Suppliers are also said to source fabric and products from other factories which retailers are unaware of making it difficult to monitor the process. The problem also arises that if retailers stop production or cancel orders as ultimately it is the employees who suffer the most.¹³⁴

4.9 *The success of AGOA as a GSP in the textile industry*

AGOA was meant to be used to jump start a number of economies in Africa who were making progress in terms of economic and political reform. However, its success as a GSP has received mixed reviews.

The AGOA agreement helped to grow the textile industry in Lesotho contributing to over a third of the country's GDP and 3 per cent of South Africa's GDP.¹³⁵ During its peak in Lesotho, it managed to create a manufacturing industry that employed over 53,000 people in 2004 which helped to increase the levels of employment. Yet despite the increases in employment, the country remains poor. There have also been labour rights violations and low wages. The argument has been raised that in spite of the wages that multinational

¹³³ 'Lesotho aims to be ethical alternative to Asian sweatshops' *The Globe and Mail Online*, 15 July 2013 available at <http://www.theglobeandmail.com/news/world/lesotho-aims-to-be-ethical-alternative-to-asian-sweatshops/article13238763/>, accessed on 3 February 2014

¹³⁴ *Lesotho's Apparel Industry : what is the role for better work?*, (2011), available at <http://betterwork.org/global/?p=1335>, accessed on 10 December 2013.

¹³⁵ The Brenthurst Foundation *Lesotho after AGOA: From textile booms to sustainable development* (2012), available at http://www.thebrenthurstfoundation.org/a_sndmsg/news_view.asp?l=127525&PG=288, accessed on 13 December 2013.

corporations pay for labour being low, they ate higher than other wages that would be received domestically and that employees have the freedom to choose whether or not they want to work in sweatshop conditions. One could argue that it is not a legitimate excuse to treat workers unfairly. Similarly, one could presume that it would make sense to have a healthier and happier workforce in order to boost productivity in a given business.

The apparel concessions that have been granted under AGOA have led to growing the textile industry in a number of countries including South Africa; Kenya and Mauritius making the apparel industry one of the largest industrialised sectors on the continent.¹³⁶ Since the preference was extended, it has lead to the creation of over 200, 000 jobs in the garment industry in Sub-Saharan Africa mostly for women.¹³⁷

The benefits of the program have been that it has increased access for African products into the US market especially with regards to petroleum supplies. In addition, jobs have also been created for example in the car manufacturing industry in South Africa as well as in the apparel and textiles industry in Lesotho.¹³⁸ About 70 per cent of imports have been allowed to enter America tariff free. It has helped to generate growth in some non-traditional sectors as well as in some countries that have taken full advantage of the trade preference.

Some criticisms of it as a GSP have been that it has shortcomings to provide market access to products that some Africa states are good at producing, for example in the area of agriculture. Certain agricultural products are excluded from the preferential scheme. Agriculture forms a small part of exports from Africa to the US yet it has been identified as a key driver for poverty alleviation and economic growth. Some critics have even argued that because the bulk of exports from Africa to USA are in oil and petroleum, having the AGOA agreement

¹³⁶ 'West Africa Trade Hub AGOA forum 2012: Expiration of third country fabric exemption threatens gains' *West Africa Trade Hub Online*, 11 June 2012 available at <http://www.watradehub.com/activities/tradewinds/jun12/agoa-forum-2012-expiration-third-country-fabric-exemption-threatens-gain>, accessed on 10 January 2014.

¹³⁷ Ibid.

¹³⁸ African Development Bank Group, *Strategies to Enhance Gains of AGOA November 2013*, available at <http://www.afdb.org/en/blogs/integrating-africa/post/strategies-to-enhance-gains-of-agoa-12545/>, accessed on 10 December 2013.

was not necessary and did not provide any benefits as there is a strong demand for petroleum and the export tariff rates are low anyway so America would still have traded with Africa.¹³⁹

It has also been criticised for not providing sustainable economic development gains and in terms of apparel, it has been argued that Asian entrepreneurs have benefited more under the scheme than Africans. A further criticism of the textile and apparel industry has been that if people are paid low wages that does not contribute towards poverty alleviation as employees incur more debt due to their inability to sustain themselves on their poor wages which just exacerbates the poverty cycle.

There also exists the uncertainty of whether or not the agreement is likely to be renewed post 2015 in which case countries that have benefitted under the agreement will be have to find alternative solutions to handle the levels of unemployment that would be created should the United States Government choose to not renew the agreement.

South Africa's labour law is too progressive in order for them to be more globally competitive in apparel. The irony is that it seems as though the better the labour market policies the less likely a country is to gain interested investors.

4.10 *Summary and conclusion*

AGOA has attempted to play a role in Africa's development and to foster better relations between USA and Africa. Granting both South Africa and Lesotho apparel eligibility has led to increasing the levels of employment.

In both Lesotho and South Africa the apparel sector is largely dominated by women where wages are low and employees are often ill-treated by factory owners.

¹³⁹ The International Food and Agriculture Policy Council, *AGOA and Agriculture August 2009*, available at http://www.agritrade.org/Publications/documents/PCHPAIPC_JointPolicyBrief_Aug3.pdf, accessed on 10 December 2013.

The labour law in Lesotho is not stringent with even poorer enforcement mechanisms and this evidenced by an exodus of firms leaving South Africa to relocate to Lesotho. Conclusively, labour legislation exists in Lesotho but it is weak and has many loopholes.

South Africa's labour law is more comprehensive with harsher penalties for none-compliance with the labour law. It stipulates sanction steps towards protection and enforcement of women's rights at work. The unions in South Africa have been both a blessing and a curse. They are strong enough to negotiate conditions with employers while at the same time being too strong in that they scare off investors. Some sourcing companies are aware of the poor working conditions in the countries from which it contracts for its apparel products and have attempted to take steps to mitigate conditions found there. The success of AGOA as a GSP has been met with mixed reactions.

PART III:

The apparel industry: China and Taiwan

- i) Chapter 5: Recognition and Protection of Women's labour rights in China and Taiwan.

Chapter 5

Recognition and protection of women's labour rights in the Chinese and Taiwanese apparel industries

There are a number of reasons as to why Chinese and Taiwanese businessmen have sought to open up businesses in apparel in Africa. In spite of all the business they have bought, Chinese business owners have been met with a lot of negativity from their African employees. They have been accused of circumventing local labour laws and treating their African employees badly.

This chapter seeks to examine the legislation and factory work conditions seen in China and Taiwan in order to see whether the treatment received in African factories is something that is unique to the Chinese doing business in Africa or whether the same type of behaviour is seen in China and why this has happened. A brief discussion is also included about the challenges faced by Chinese entrepreneurs in Africa which seems to have been ignored in the literature on the topic.

5.1 *Background to Chinese involvement in Africa and the relationship between China and Taiwan*

China's relationship with Africa has taken place in three different phases for different reasons.

The first phase dates to as far back as the tenth century B.C when the Egyptian city of Alexandria began to trade with China¹⁴⁰ and as a result, Chinese and African traders came into contact with each other. However, it was only during the 1950's that China and Africa re-discovered and established a more meaningful relationship. This was the second phase of

¹⁴⁰ Jianjun, T 'Sino- African Relations: Historical development and long term challenges.' (2008) 6 (2) *China: An International Journal* 330

relations. In the 1950's Communist China was in need of international recognition and political allies against the capitalist west. A meeting was held in Bandung, Indonesia in 1955 called the Bandung conference. Several Asian and African States undertook to promote cultural and economic relations between the two continents.¹⁴¹ After the conference, China began to support African countries with financial and military support for various liberation movements throughout the African continent to end colonialism.¹⁴² The People's Republic of China (PRC) was in ideological conflict with the West and until 1971 most countries outside of the Soviet Bloc recognised Taiwan as the legitimate government of China.¹⁴³ In a move to cement the Beijing governments' legitimacy, Beijing offered African states an alliance based on third-world cooperation and an ideological belief that opposed colonialism.¹⁴⁴

The third and current stage of Chinese relations with Africa is seen in post 1989 after the Tiananmen Square incident where there was a protest for democratic reform in China and the Chinese army killed several hundred people.¹⁴⁵ There was a lot of hostility and resentment from the West whilst the African response was fairly muted. Furthermore the end of the Cold War meant no perceived communist threat and the West abandoned Africa which China took as an opportunity to re-establish relations.

The current relationship between mainland China and Taiwan is characterised by hostility and tension due to disputes over political control and ideological struggles that have existed for a long period of time. China and Taiwan have thus been in a competition for allies for

¹⁴¹ Mancuso, S 'China in Africa and the Law.' (2012) 18 (1) *Annual Survey of International and Comparative Law* 243 .

¹⁴² Jianjun, T 'Sino- African Relations: Historical development and long term challenges.' (2008) 6 (2) *China: An International Journal* 330

¹⁴³ 'China and Taiwan in Africa' *Hii Dunia online*, April 2010 available at <http://www.hiidunia.com/2010/04/china-and-taiwan-in-africa/>, accessed on 14 October 2013.

¹⁴⁴ Jianjun, T 'Sino- African Relations: Historical development and long term challenges.' (2008) 6 (2) *China: An International Journal* 330 -343.

¹⁴⁵ '1989: Massacre in Tiananmen Square' *BBC Home Online*, available at http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm, accessed on 13 October 2013.

over 50 years sometimes using Africa as a chessboard to compete against each other.¹⁴⁶ Some African states have been proficient at playing the rivals off against each other to gain benefits such as grants or even access to technology.¹⁴⁷ The PRC government in Beijing does not tolerate any country having diplomatic relations with itself and with Taiwan therefore countries have to choose whether or not they recognise the PRC as the legitimate government of China seated in Beijing, or recognise the Republic of China or Taiwan as the legitimate government.

The Chinese Nationalist Government of General Chiang Kai Shek was overthrown by the Communists led by Mao Tse Tung in 1947. The Nationalist Government retreated to Formosa (Taiwan) whilst the Communist government occupied Beijing and the whole of China. They are of the same nationality.

5.2 *The motivation for Chinese-Taiwanese investment in the apparel industry in Southern Africa*

The Taiwanese decided to set up businesses in the garment industry in Southern Africa primarily for a number of reasons. One of the reasons was that in the 1980's the Taiwanese economy enjoyed high economic growth and the government relaxed its exchange controls. This encouraged Taiwanese companies to invest abroad.¹⁴⁸ At the same time that this happened, South Africa was under an apartheid government which introduced a number of incentives to encourage foreign investment in the country including tax breaks which led to

¹⁴⁶ 'The Big China and Taiwan Tussle: Dollar Diplomacy Returns to Latin America' *Council on Hemispheric Affairs Online*, 19 September 2008, available at <http://www.coha.org/the-big-china-and-taiwan-tussle-dollar-diplomacy-debuts-in-latin-america/>, accessed on 13 October 2013.

¹⁴⁷ 'China and Taiwan in Africa' *Hii Dunia online*, April 2010 available at <http://www.hiidunia.com/2010/04/china-and-taiwan-in-africa/>, accessed on 14 October 2013.

¹⁴⁸ 'Taiwanese investment spurs growth in Southern Africa' *Taiwan Aujourd 'Hui Online*, 4 July 2003 available at <http://taiwanauj.nat.gov.tw/ct.asp?xItem=20112&CtNode=103> accessed on 12 October 2013.

the Taiwanese establishing businesses there. Having set up business in South Africa, Taiwanese entrepreneurs met with many challenges working with South Africa. These included problems with the unions; increasing crime levels; and the inconvenience of providing work permits for Taiwanese labourers. Business owners then decided to relocate businesses in neighbouring countries such as Namibia, Lesotho and Swaziland.¹⁴⁹ The introduction of AGOA and AGOA eligibility in Southern Africa led to an even greater number of Taiwanese willing to invest in the garment industry in Southern Africa.

Swaziland only had three Taiwanese factories before the AGOA agreement in 2000. Within three years of being granted AGOA eligibility twenty more companies opened in the garment industry in Swaziland, employing almost 20,000 people.¹⁵⁰ Lesotho now has over thirty companies that have invested in its garment industry. The AGOA agreement and the Lesotho Government providing tax incentives have led to an influx of Taiwanese businesses operating in Lesotho.¹⁵¹ The organisation and structure of trade unions in Lesotho is not as sophisticated as those in South Africa which has led to easier labour relations.¹⁵²

Foreign investments by Chinese companies started growing in the 1990's. They began by investing in small business in neighbouring Asian countries because they were new to the global economy and lacked the knowledge and experience needed for global operations.¹⁵³ The AGOA privilege led to many Asian companies including China taking advantage of the access to new markets and setting up many textile factories all over Africa.¹⁵⁴

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ 'A Continent vs. a Country: China Putting Strain on Africa's Clothing and Textile Industry', *Responsify Online*, 06 September 2012, available at <http://www.responsify.org/nyhet/a-continent-vs-a-country-china-putting-strain-on-africa>, accessed on 15 October 2013

5.3 Factory working conditions in Taiwan and China

As China has become increasingly incorporated into the world economy it has developed into something of a world workshop manufacturing a wide range of products using cheap labour for its global markets.¹⁵⁵ Many of China's labourers are women under the age of 25 who come from rural areas. There is a lot of competition between local governments in China for foreign investment which has led to many local governments openly neglecting labour regulations.¹⁵⁶

Working conditions in Chinese factories have included physical punishment; low wages; verbal threats, draconian sick leave policies; prohibitions on pregnancy and marriage and no overtime pay.¹⁵⁷

China also has a household registration system that separates its urban and rural inhabitants. People coming in from the rural areas are treated as 'foreigners' or 'guest workers' where they need to return to their place of origin once employment is terminated. This means that people living in rural areas need permits to work and live in urban areas.¹⁵⁸ The issue of permits often leads to victimization. Some employers have bonded labour in order to retain workers. For example, a worker may be asked to surrender an identity document or pay a sum of money to secure employment which is to be returned upon termination of the employment agreement.¹⁵⁹ This money is forfeited if employment is terminated before the agreed time. Consequently, even if working conditions are bad, employees cannot quit because they will lose their deposits. In the event that some workers cannot afford to pay for the permit, the

¹⁵⁵ Ngai, P. 'Women workers and precarious employment in Shenzhen special economic zone, China.' (2004) 12(2) *Gender and Development Journal* 29

¹⁵⁶ Ibid.

¹⁵⁷ Chan, A & Sener, R. A 'China's Troubled Workers.' (1997) 76 (2) *Council On Foreign Affairs Journal* 104

¹⁵⁸ P, Ngai. 'Women workers and precarious employment in Shenzhen special economic zone, China.' (2004) 12(2) *Gender and Development Journal* 29

¹⁵⁹ Ibid.

company pays for the permit in advance where they then enter into a bonded relationship.¹⁶⁰ Companies are able to exploit employees as most of these businesses are owned by government or government affiliates.¹⁶¹ Examples of minimum wages have been seen in Shenzhen set at \$54 per month, \$36 in Beijing and \$39 in Shanghai.¹⁶²

At most workers are eligible for one to two days off work in a month. Private guards are also hired to police factories, they are often linked to the police and are usually sent into the factories in cases of an industrial dispute.¹⁶³

A wage system has been established founded on deductions and fines. One can be fined for negligence at work, going to the toilet more than twice in a day or talking and laughing.¹⁶⁴

If an employee works for a business that does not provide an itemised payslip then they are likely to not know what they are going to earn. Most factories also have a secretive wage system where nobody knows what their colleague earns and knowing co-workers earnings is considered a violation and is subject to a penalty.¹⁶⁵ This makes it harder to complain about labour standards. There are millions of migrant workers who are unemployed and desperate for employment which makes exploitation easier.

The demographic employed in the factories are young females because the perception is that they are unlikely to turn against management in mass protest and are therefore easier to exploit. Women tend to face over 150 hours of overtime per month working anything

¹⁶⁰ Ibid.

¹⁶¹ P, Ngai. 'Women workers and precarious employment in Shenzhen special economic zone, China.' (2004) 12(2) *Gender and Development Journal* 29-36.

¹⁶² Chan, A 'Labour Standards and Human Rights: The Case of Chinese Workers under Market Socialism.' (1998) 20 (4) *Human Rights Quarterly* 886

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

between 10 -16 hours a day and one or two days off per month.¹⁶⁶ Wages in the garment industry are reported to be worse than other manufacturing industries in China where employees are often paid less than the minimum wage.

Health and safety standards are often ignored with toxic glues being used in shoe factories in poorly ventilated areas and there is reportedly no provision of masks and gloves. Working conditions in Taiwan are very similar to mainland China; often characterized by harsh standards of management where the freedom and rights of employees are often restricted; physical punishments are common occurrence and not treating employees humanly is encouraged as it is said to increase productivity.¹⁶⁷

5.4 *Chinese and Taiwanese legislative protection for unskilled labourers*

Chinese labour law

Labour law in China is changing alongside economic reform. The most relevant pieces of legislation are the Labour law of 1995 and the Trade Union Law of 1992.¹⁶⁸ These are not the only pieces of legislation that regulate employment protection. The Labour Ministry, State Council and other relevant ministries have regulations in place for labour.¹⁶⁹ There is an Enterprise law of 1988 and Labour Contract Law of 2008. Each of the different thirty-one local governments that exist in China have enacted their own local employment regulations and many cities under the provinces issue their own regulations or rules of government which has often led to discrepancies in the legislation.¹⁷⁰

¹⁶⁶ 'Briefing on the Chinese garment industry' (2007), available at http://www.eldis.org/go/display&id=31179&type=Document#.Uph_7CeaXHW, accessed on 09 September 2013.

¹⁶⁷ Chan, A 'The Impact of the State on Workers Conditions: Comparing Taiwanese Factories in China and Vietnam.' (2004) 77 (4) *Pacific Affairs Online* 629

¹⁶⁸ Feng, L. 'Employment Law in China' in Guiguo, W and Mo, J (eds.) *Chinese Law* London: Klawer Law International Ltd, (1999) 447.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

Individual employment contracts offer the standard features of many found in the West. They contain provisions on hours of work, wages and termination of employment. Employees are also free to jointly amend their employment contracts with their employer.¹⁷¹

There are also special provisions that exist in the labour law for women like the 1988 Female Employee Protection Act and the Regulations on the Scope of Labour Prohibited for Female Employees. Here intense physical work is not allowed for pregnant or nursing women.¹⁷² Three chapters of the Chinese labour law are dedicated to health and safety, sanitation and the special protection of female workers.

In factories, owners are required to implement health and safety facilities before commencing business otherwise business operating licenses are unlikely to be issued.¹⁷³ If employees find themselves working in dangerous conditions they are allowed to refuse to work. Labour inspectors are assigned, but in practise they come once a year to inspect the factory premises or if a complaint has been lodged.¹⁷⁴

There exists a Trade Union law of 1992. Trade unions in China are required to act in the best interests of the State.¹⁷⁵ The unions are also used to ensure employees hold their employers attitudes towards work. The problem with trade unions in China is that they lack independence. The All China Federation of Trade Unions (ACFTU) works at central and local government level and is a part of the government. It is the only union that is recognised and therefore has monopoly on representation. Trade Union representatives work as representatives and are also involved in management.¹⁷⁶ If one wishes to have a labour dispute resolved they have to go back to the place where they originally come from to lodge a complaint and many migrant workers cannot afford to do so.

¹⁷¹ Ibid 450.

¹⁷² Ibid 459.

¹⁷³ Ibid 458

¹⁷⁴ Ibid.

¹⁷⁵ Article 2 Trade Union Law of China 1992.

¹⁷⁶ Gallagher, M. E 'Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness,'(2006) *Law and Society Review*, 40 (4) 783

China has ratified the United Nations Convention on Economic, Social and Cultural rights but it has reservations on the right to organise trade unions. It has not ratified the International Labour Organisation convention on freedom of association and the right to collectively bargain.¹⁷⁷

The right to strike is not mentioned in Chinese labour legislation. Striking is considered to be a highly political issue and therefore the concept of even striking is not acknowledged.¹⁷⁸ The word strike is instead replaced with ‘accidental events’ and accidental events include strike activity. Strikes are very rare and most have only occurred in the enterprises owned by foreigners. There are also problems with regards to monitoring and reporting strikes as local government discourages the reporting of strikes as it may potentially affect their interests.¹⁷⁹ Strikes are discouraged because it is believed that they may scare away investors.

Workers who strike are at risk of violent repression and imprisonment. They can be sentenced to what is known as ‘re-education through labour’ which is a form of administrative detention without trial or appeal.¹⁸⁰

There is currently a proposal to regulate collective bargaining under the Proposed Regulation on Wage Collective Negotiation of 2000. It has been argued that this proposal focuses more on collective issues rather than improving the autonomy of workers to settle disputes.¹⁸¹

¹⁷⁷ International Labour Organisation *Ratifications for China* available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103404 accessed on 14 November 2013.

¹⁷⁸ Feng, L. ‘Employment Law in China’ in W. Guiguo and J. Mo (eds.) *Chinese Law* London: Kluwer Law International Ltd, (1999) 472.

¹⁷⁹ Ibid 474.

¹⁸⁰ ‘Labour Behind the Label’ (February 2007), *Business and Human Rights Resource Center*, available at <http://www.business-humanrights.org/Links/Repository/462121>, accessed on 15 October 2013.

¹⁸¹ Scherrer, C. *China’s Labour Question* Munchen: Rainer Hamp Verlag, (2011) 60.

Taiwanese labour law

The provisions of the Taiwanese Constitution make reference to labour law. References include the requirement that the state provide labour protection laws and allowing for the freedom of assembly and association.¹⁸² The Taiwanese Constitution requires that the state establish labour protection laws and implement policies to protect women and children.¹⁸³

There is also the Gender Equality Act of 2002, Labour Inspection Act of 1931, Settlement of Labour Disputes Act of 1928 and the Labour Union Act of 1929 which regulate labour.

Employees are only allowed to work for 48 hours per week failing which permission is needed from the employee to work overtime.¹⁸⁴ Labour unions are allowed to be formed, but many different types of employees such as teachers and civil servants are not allowed to join them. The problem with the trade union regulation is that much like China, there is extensive supervision from the labour administrative authorities made up of the government. These administrators oversee the formation of the trade unions; day to day business; funding and qualification of members.¹⁸⁵ Authorities are also allowed to dissolve trade unions.

Similarly, in the government's effort to secure foreign investment, like mainland China, they reduce labour costs to encourage investment. The rights and labour interests of individuals were also suppressed by the government.¹⁸⁶ The government intervenes a lot in industrial disputes. It is also difficult to strike in Taiwan as the law makes it a long and complex

¹⁸² Taiwan Constitution of 2000 article 14 and article 153.

¹⁸³ Article 153 Constitution of Taiwan of 2000

¹⁸⁴ Article 30 and 32 Constitution of Taiwan of 2000

¹⁸⁵ Pong, L 'Taiwan' in R Blanpain (ed). *The Process of Industrialization and the Role of the Labour Law in Asian Countries* The Hague: Kluwer Law International, (1999) 141

¹⁸⁶ Ibid 156.

procedure.¹⁸⁷ Trade unions can only strike over matters related to compensation or work schedules.¹⁸⁸

Taiwan has ratified the ILO convention on right to organise and collective bargaining. It has also ratified the labour convention on the abolition of forced labour yet it still continues to confiscate work permits or withhold salaries of some employees. Many immigrants fail to join unions as they are scared they may be deported.¹⁸⁹ Prior to the Work place Act of 2008, women were required to resign if they got pregnant or married.¹⁹⁰ Migrant labourers are paid far less and they also engage in bonded labour.

Labour enforcement mechanisms in China and Taiwan

China adopts a system of ‘one arbitration and two trials’ when it comes to the resolution of labour disputes. There are three steps that have to be undertaken in order to resolve a labour dispute,- mediation, arbitration and litigation.¹⁹¹ Mediation is voluntary whereas arbitration is mandatory. The problem with mediation is that if one party seeks arbitration then mediation becomes irrelevant. Mediation agreements are also not binding.¹⁹²

Article 2 of the labour law of 1995 reads as follows:

“This law applies to all enterprises and individual economic entities (hereafter referring to employing units) within the boundary of the People’s Republic of China, and to labourers who form a labour relationship therewith.

State organs, institutional organisations and social groups as well as labourers who form a labour contract relationship therein shall follow this law.”

¹⁸⁷ International Trade Confederation *Internationally recognised core labour standards in Chinese Taipei* available at http://www.ituc-csi.org/IMG/pdf/ITUC_Report_Internationally_Recognised_Core_Labour_Standards_in_Chinese_Taipei.pdf, accessed on 10 October 2013.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Lu, H *The Right to Work in China* Cambridge: Intersentia Ltd (2011) 24

¹⁹² Ibid 28

This means that when it comes to bringing a labour dispute; a relationship needs to exist before one can institute a claim. The act does not define what constitutes a labour relationship. If one cannot establish a relationship then it means that one cannot bring a claim. There are certain categories of employees that are excluded from the labour dispute system. These include; public servants, farmers and members of the military and those that are self employed.¹⁹³ In practice it is often difficult to prove that the labour relationship exists. One way to counter this is to have an employment contract. However, employers particularly those who own small enterprises often do not sign them which is often to the detriment of the employee as it excludes them from the labour dispute process.

If a business is not registered with the relevant authority administration for industry or commerce then it is presumed that there is no labour relationship and the workers are considered self-employed.¹⁹⁴

The process of having arbitration and mediation before trial means that it makes the dispute settlement process more expensive for individuals who are less likely to litigate or will often reach an unsatisfactory compromise at the mediation stage.

Trials are also said to run for up to three years being presided over by individuals who have no expertise in labour law. There is also the continued influence from government who may intervene in civil trials.¹⁹⁵ Chinese labour laws are also poorly drafted and the courts are under resourced therefore if an award is given in favour of a litigant, the courts do not have the means to ensure that it is implemented.¹⁹⁶

¹⁹³ Ibid 28 -29

¹⁹⁴ Ibid 29

¹⁹⁵ Ibid 36

¹⁹⁶ Ibid

5.5 The work culture in China and Taiwan

The work culture in Taiwan is characterised by long hours ranking as one of the countries in the world with the longest working days. Working hard is also considered important for economic development. In spite of the law attempting to protect employees, employers ignore the laws as they feel that no one is going to check that they are being followed. The penalties for non-compliance with labour laws are also said to be very light.¹⁹⁷ Both China and Taiwan share Confucianist values towards work which emphasize respect for the group in which you belong; loyalty to the group; respect for age and hierarchy; avoidance of conflict and the need for harmony. Workers in Asia are also more willing to work towards a common goal or for the common good.¹⁹⁸ The work culture is also task-oriented. No employee stops working until the task is completed.

5.6 Human rights in China and Taiwan

The concept of human rights is Western in nature stemming from Western liberal thought. Traditional Chinese law does not recognise individuals much less define rights.¹⁹⁹ Rights as we understand them are not defined individually, but are collective involving ethics; duties and relationships.²⁰⁰ The individual in China identifies not with rights, but rather with relationships with the family. The Constitution in China is a political document used to further government objectives and is not regarded as having direct legal application.²⁰¹ The Chinese discourse on human rights is that they are grounded in the community and in obligations towards others. China is more interested in economic development with

¹⁹⁷ 'Deaths Spotlight Taiwan's Overwork Culture' *BBC Online*, 20 March 2012 available at <http://www.bbc.co.uk/news/world-asia-16834258>, accessed on 15 October 2013.

¹⁹⁸ '3 Main Differences in the Management Culture between the US and China' (10 May 2011) *ELM Experts in Labour Mobility* available at <http://www.labourmobility.com/three-differences-in-management-culture-between-the-us-and-china/>, accessed on 15 October 2013.

¹⁹⁹ Hsiao, W 'The Development of Human Rights in Republic of China on Taiwan: Ramifications of Recent Democratic Reforms and Problems of Enforcement.' (1995) 5 (1) *Pacific Rim Law & Policy Journal* 161

²⁰⁰ Ibid

²⁰¹ 'Constitutionalism with Chinese Characteristics.' (February 2008) *Indiana University Research Centre for Chinese Politics and Business* available at http://www.indiana.edu/~rccpb/Working_Paper/RCCPB_WP1_Kellogg_Feb_08.pdf, accessed on 15 October 2013.

everything else being subordinate to this.²⁰² To the Chinese, the rights to food, clothing, shelter, economic development and security are more important than political liberties.²⁰³ The concept of human rights has been included in the amendment to its 2004 Constitution with the meaning of human rights to them being survival and development.²⁰⁴ China states that its focus on economic development is in line with the article 25 of UN Declaration on Human Rights which states that everyone has the right to an adequate standard of living, including food, clothing and social services.²⁰⁵

Taiwan has a western style democratic constitution but with authoritarian rule from the government. The law there is a tool that is used to further the interests of the government. Taiwan has not signed the agreement on civil and political rights²⁰⁶ and it is a none UN member meaning it is not obligated to comply with UN conventions nor is it accountable to the international community.

5.7 *The challenges to trading in Africa faced by Chinese business men*

Chinese traders in Africa cited several challenges. One of the accusations levelled at Chinese traders is that they bring in staff from China. This practice is said to be done because it makes more economic sense to recruit a skilled worker than to train a local one. Chinese workers are familiar with the technology and there are fewer language and cultural barriers.²⁰⁷

²⁰² Taylor, I. 'Sino-Africa Relations and the Problem of Human Rights.' (2008) 107 (426)*African Affairs*, 63

²⁰³ Ibid

²⁰⁴ Ibid.

²⁰⁵ Article 25 The Universal Declaration of Human Rights 1948

²⁰⁶ Ibid Pg 174

²⁰⁷ Ashan, L 'China and Africa: Policies and Challenges.' (2007) 3 (3) *China Securit*, 69

Chinese employees are also said to be better as they are more accustomed to the demands of what is required at work, e.g. the long hours and overtime until tasks are completed. The Chinese entrepreneurs also found that bringing in labour from home means that they are less likely to be entangled in local laws.²⁰⁸ Chinese entrepreneurs have also been found to lack knowledge of the local labour laws. They have expressed the fact that they have found African employees to be lazy, not willing to work hard and long hours to accomplish tasks. In terms of dispute resolution the Chinese adopt in Africa the lessons that they have learnt from home. That they only need to maintain good relations with the government and that local government will ensure that all stake holders are happy. The local government will act on their behalf to ensure that everything is fair in the case of labour disputes.²⁰⁹

Most traders come to Africa because there is less competition than in China. Ironically perceptions are that China is colonizing Africa and yet China is one of the places with the least Chinese immigrants.

Chinese traders have been said to be prudent with their money and this has often been interpreted by employees as being stingy. They have also been accused of paying employees the bare minimum. This they agree with but they argue that they need to so in order to remain competitive.²¹⁰ They have also been the victims of crime and corruption especially with the police more so because they have been unable to defend themselves as they do not speak the language.²¹¹ They also speak of distrust of employees. Individual traders feel they have been ignored by government to protect them.

The Chinese government's foreign policy of non-involvement policy also means they are less likely to get involved in the internal affairs of a country related to corruption and human rights for example.

²⁰⁸ Ibid.

²⁰⁹ 'China dialogue' 11 July 2003 available <https://www.chinadialogue.net/article/show/single/en/6194-Shifting-production-overseas-brings-problems-for-Chinese-companies>, accessed on 10 November 2013.

²¹⁰ The Brenthurst Foundation, 'Africa in their words 2012/13: A study of Chinese traders in South Africa, Lesotho, Botswana, Zambia and Angola.' available at http://www.thebrenthurstfoundation.org/files/brenthurst_commissioned_reports/Brenthurst-paper-201203-Africa-in-their-Words-A-Study-of-Chinese-Traders.pdf, accessed on 10 October 2013.

²¹¹ Ibid.

5.8 *Summary and Conclusion*

The Chinese have a long established history of trade relations with Africa. Southern African countries being granted AGOA eligibility has contributed significantly to the Taiwanese and Chinese setting up textile factories in Africa.

The working conditions identified in China and Taiwan are almost identical to those found in Southern Africa,- disregard for labour laws, poor working conditions and limited labour protection. The attitude towards work is also very different to that found in Africa and in Europe as is the understanding of human rights.

In spite of actual labour standards being formally established by law, their enforcement and regulation is poor. People are desperate for employment and are unlikely to complain about work conditions, the judiciary lacks knowledge of labour law and litigation is expensive. The courts also lack the capacity to implement awards and there is a lack of judicial independence and impartiality of trade unions as the government often intervenes and has a reputation for being oppressive.

There is widespread non-compliance and essentially employees are ill informed about their labour rights and they are too scared to challenge the state. This means that individual rights cannot be protected. The competitiveness of the Chinese garment industry lies in its efficiency and ability to manufacture products within a short space of time.

PART IV:

Chapter 6: **Research findings**

- i) Research findings, recommendations and suggestions for further study.
- ii) Bibliography

Chapter 6

Research findings and conclusion

This chapter discusses the research findings, limitations to the study and recommendations to be implemented by countries in Southern Africa and Lesotho in order to reform their respective labour laws.

6.1 *Limitations to the study*

While one of the benefits of conducting desk research is that it saves time because the information is already available, this method of research still has flaws.

One of them is that a researcher has less control over data collection and as a result there are some biases which may exist in the available literature. One has to question the quality of information that is available.

There may also be instances where the data or information in the questions sought to be answered is unavailable which occurred some of the time while conducting the study for example in attempting to find more recent labour law research in Lesotho.

6.2 *Summary of the Research findings*

AGOA is a preferential trade agreement that was meant to help facilitate economic development in Africa by providing exports from Africa preferential access to United States markets. The success of the program as a whole has been met with mixed reactions. Americans have argued that it has created jobs in Africa especially in textiles and apparels, whilst Africans have felt that the program has not really introduced sustainable development as it prophesied to do.

In the apparel industry the program has led to the proliferation of factories being built all over Africa in countries like Kenya, Mauritius, Lesotho and South Africa. Factories have

been able to open in these places as the manufacturing of apparel is labour intensive and these countries have high unemployment rates and have thus been able to take advantage of this concession that has been granted by America. Eligibility is subject to approval by the United States president upon meeting certain criteria mainly related to political and economic reform in African states.

The apparel industry in Africa has been met with many challenges. There have been environmental concerns raised about the toxic refuse which comes from factories but more pressing have been the labour abuses that have occurred against the industry's workers who are predominately young females. South Africa and Lesotho are two areas that employ large numbers of people in this particular industry. The complaints levelled against employers have been similar. Employees have complained of sexual harassment, inconsistent wage determinations systems and poor working conditions suffered at the hands of Chinese and Taiwanese factory owners.

In Lesotho, the labour law exists to protect women and employees in general. It has also ratified several ILO conventions and regional agreements on gender and human rights. The provisions contained in Lesotho's labour legislation to help realise these rights are few, with little to no labour inspection and very weak enforcement systems. The penalties for non-compliance are minimal. The problem with this is that it presents a conundrum especially for the government on how to improve labour relations whilst at the same time not scaring away investors. The irony is that Lesotho's competitiveness in the apparel industry lies in the fact that the labour is very cheap and the labour laws are weak. It is because the government is so heavily dependent on the apparel industry that it has been so hesitant to react. If the government changes the laws factory owners will up and leave to elsewhere.

South Africa also has labour legislation and mechanisms in place to protect employees. The violations that happen in Lesotho also happen in South Africa although collective bargaining is better in South Africa as employees are better shielded by more organised trade unions which Lesotho does not have.

South Africa has various pieces of legislation that protect labour and women at work; there are provisions enshrined in its constitution, it has an unemployment fund to cater for women on maternity leave and the sanctions that it imposes on non-compliance with labour law are more significant than those paid in Lesotho. The labour laws are also specific about how the realisation of women's labour rights is to be conducted in the work place and a framework for doing so.

The cost of labour is cheaper in Lesotho than in South Africa, however, South African textile workers still remain some of the worst paid workers in the manufacturing industry. South Africa's labour legislation has been criticised for being too sophisticated in that employers do not properly understand its requirements. Due to the fact that the legislation is comprehensive many investors have relocated to places like Lesotho and Swaziland where the labour law is weak.

Bulgaria which is an apparel manufacturing power house in Europe. The research findings in Bulgaria and Bangladesh revealed that their situations was still similar to those in Southern Africa. The apparel industries there also predominately employs women, poor working conditions exist as do violations of labour and human rights.

The majority of manufacturing works that are available in Africa are owned by Asians, (especially the Chinese and Taiwanese who have been constantly criticised by Africans in their investment endeavours), it was fitting to evaluate the conditions of work in that particular region.

The research revealed the same thing, poor working conditions, the employment of young women and inadequate wages. In spite of the unacceptable working conditions in China and Taiwan one might even argue that Africa's factories have slightly better conditions. The law exists in China but the nature of the law is that it is more a tool of the government to do as it pleases with too much state intervention being involved in labour disputes and a lack of independence from the state on the part of labour unions and dispute settlement bodies. The

work culture and work ethic was different to that experienced in Southern Africa as was the Chinese interpretation of what constitutes human rights.

Apparel work all over the world therefore appears to have the same characteristics of poor labour conditions; poor labour law enforcement; it is dominated by women and in order to stay competitive it appears as though countries need to retain those poor labour laws to not discourage investors.

Initially the presumption was that it was the Asian employees that were at fault for making the working conditions so bad but as a matter of fact it seems as though it is more the client who asks for the apparel to be manufactured that is the problem. Multinational cooperation's seek to generate a profit hence they move production to areas where the labour is cheaper. In order to stay competitive the Chinese and Taiwanese business owners are required to keep their costs as low as possible especially with the possibility that even cheaper labour can be sought in Asia in places like China and Bangladesh.

6.3 Recommendations for Lesotho and South Africa

- In terms of ensuring that women are not discriminated against in the workplace, South Africa has implemented a time line and a plan for policy reform as set out in section 17 of its Employment Equity Act. Lesotho could adopt the same measure. Similarly section 6 of the same EEA defines the grounds on which discrimination may occur. Section 200 of the Labour Code of Lesotho could be amended accordingly.
- The court system needs to be decentralised. This may not be feasible owing to the fact that the department of labour is under resourced but more needs to be done to ensure that people who live outside of Maseru have access to the labour courts. Given that factories do not exist in the entire country but can be found in two towns, Maseru and Maputsoe. Perhaps opening up another labour court in Maputsoe would increase efficiency in the resolution of disputes.

- Programs need to be launched to educate people on their labour rights as well as alternative forms to resolve dispute, for example the DDPR and how to access it.
- Lesotho could also benefit from having health and safety representatives who report to the unions or departments of labour.
- Just as South African labour law makes provisions for family responsibility through the UIF when on maternity leave for example, these clauses also need to be inserted into Lesotho's labour code. While the time off may not be the same, it is fair to give employees a few days off in case of family emergencies and to still pay them at the same time.
- While a lot of the solutions require money to implement, it does not cost anything for managers to supervise their employees in a dignified manner.
- The Department of Labour in Lesotho needs to document its information more efficiently. One of the challenges to completing the research was that there was very little information that was available directly from the government and alternative international websites had to be used.
- More research and publication needs to be done regarding labour laws and the labour dispute mechanisms in Lesotho as the information that was available was little in terms of quantity and a lot of it was outdated.

- Harsher penalties need to be imposed for non-compliance with labour standards. Expecting employers to pay 300 Maloti for a labour law violation is too low. It should be high enough to act as a deterrent.
- If there was some form of harmonization or regional integration and convergence of labour laws in the region it may help to establish equal work place standards across the region. There may also be power in the ability of states to bargain for better working conditions collectively. Similarly, there could be regional trade unions established to strengthen negotiation between employers and employees and to establish the same regional labour standards.
- There needs to be some form of dialogue between stakeholders and workers in the same way that South Africa has done. An example of where this can be seen is with the 'Better Work' campaign which has been implemented in Lesotho. This is a multi stakeholder initiative aimed at improving labour standards by collaborating with a number of different actors in the apparel industry.
- The introduction of bargaining councils in Lesotho may also be helpful to reduce the burden of the courts.
- There needs to be a way to engage managers to improve on standards rather than to make them feel as though they are under attack.
- It is also important for companies that source the products to take action to ensure fair labour practices as the client. They ought to know of wages and labour conditions in order to effect changes. More pressure needs to be placed on retailers.

- There also needs to be a way to have some sort of cultural dialogue between Asians and African employees as there appear to be some cultural clashes in terms of expectations at work.
- Retailers can utilize certain reputable contractors or factory owners to ensure compliance with appropriate labour standards.
- There could be criminal sanctions for joint and several liabilities for both retailers and manufacturers to stop either of them from saying they were unaware of labour violations.
- Provisions could be created for anonymous complaints against employers.
- The government could perhaps intervene in Lesotho to assist in the payment of maternity benefits so the responsibility can be shared with the employer.
- Like South Africa only a handful of people could be trained as labour specialists especially because Lesotho's population is small, to ensure proper handling of labour disputes and record keeping.

- Both the governments of Lesotho and South Africa should be aggressively pursuing policies to encourage entrepreneurship within those countries as there is the risk that the AGOA agreement may not be renewed.
- Europe has opted to create clothing that is of better quality with more complicated designs in order to stay competitive, this is something both Lesotho and South Africa may want to consider especially when facing competition for cheaper labour from countries in Asia.

6.4.1 Suggestions for further study

Some suggestions for further study could include conducting a feasibility study to determine what the outcome would be if factories gave workers slight increases in their salaries and how much it would affect their profit margins.

More work could be done to evaluate the role of the ILO in terms of maintaining international labour standards.

Suggestions may be sought from the labour legislation in Botswana and Namibia as neighbouring states, perhaps further study could be done to examine how those countries have dealt with labour concerns under the AGOA agreement.

The question still arises as to how to inform people that for now it is the nature of the industry that working conditions are poor and they have to remain that way in order for people to be able to retain employment.

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