Has South Africa been handed a poisoned chalice? Assessing the legal implications of the African Growth and Opportunity Act (AGOA) for South Africa's trade policy.

by

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Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LLM) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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M. Mafu

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List of Acronyms

AB Appellate Body
AD Anti-Dumping
AGOA Africa Growth and Opportunity Act
BIT Bilateral Investment Treaty
BLNS Botswana Lesotho Namibia Swaziland
BRICS Brazil, Russia, India, China, South Africa
BTT Board for Tariffs and Trade
C/lb Cents per pound
CRS Congressional Research Service
DAFF Department of Agriculture, Forestry and Fisheries
DSB Dispute Settlement Body
EC European Communities
EPA Economic Partnership Agreement
EU European Union
FDI Foreign Direct Investment
FTA Free Trade Area
GATS General Agreement on Trade in Services
GATT General Agreement on Tariffs and Trade
GSP Generalised Scheme of Preferences
HPAI Highly Pathogenic Avian Influenza
HS Harmonised System
ITAC International Trade Administration Commission
LDCs Least Developed Countries
MFN Most Favoured Nation
NAFTA North America Free Trade Area
NTBs Non-Trade Barriers
NTMs Non-Trade Measures

OIE World Organization of Animal Health

PSIRA Private Security Industry Regulation Act

RoO Rules of Origin

SADC Southern African Development Community

SACU Southern African Customs Union

SDT Special and Differential Treatment

SOE State Owned Enterprise

SPS Sanitary and Phyto-Sanitary

SSA Sub-Saharan Africa

TDCA Trade and Development Co-operation Agreement

TIDCA Trade and Investment Development Co-operation Agreement

TIFA Trade and Investment Framework Agreement

TRIPS Trade-Related Intellectual Property Rights

TRQ Tariff Rate Quota

USA United States of America

USTR United States Trade Representative

WTO World Trade Organisation

Abstract

AGOA is a US trade policy which defines and underpins the trade and investment relations between the US and sub-Saharan Africa. Essentially, AGOA extends duty free treatment to exports from eligible sub Saharan African countries. These preferences are aimed at promoting sub-Saharan African export earnings and stimulating their economic growth by giving them improved access to the US market. South Africa is one the few sub-Saharan African countries with a high utilization rate of the AGOA preferences, and has substantially benefited from AGOA. However, in order to ensure compliance with the eligibility requirements, an eligible sub-Saharan African country is subjected to constant, on-going surveillance and monitoring through the out of cycle review mechanism. Importantly, the US President has the prerogative to determine whether a sub-Saharan African country is eligible or remains eligible for the AGOA preferential treatment.

The strict eligibility requirements and out of cycle review mechanism as well as the unilateral nature of AGOA deprive it of the necessary stability, certainty and predictability. Importantly, the out of cycle review mechanism has a chilling effect on trade policies of eligible sub-Saharan African countries. This is particularly true in respect of South Africa, whose trade policy is the primary subject of the study. Notwithstanding the economic benefits, the disadvantages and or risks associated with AGOA overwhelm same. The disadvantages and or risks are amply demonstrated by the recent development in which South Africa was compelled to remove Anti-Dumping duties and Sanitary and Phyto-Sanitary measures it had validly imposed on US poultry in return for retaining AGOA preferences. Consequently, it is contended that AGOA is not a non-reciprocal preferential scheme that it purports to be. Instead, it is de facto reciprocal or has reverse preferences embedded in it. This study therefore argues that South Africa is entitled to impose Anti-Dumping duties and the Sanitary and Phyo-Sanitary measures, provided that specific requirements are met and that the measures imposed by South Africa on US poultry are legal under the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO law as long as the procedural and substantive requirements have been fulfilled. Consequently, the consistency thereof can only be tested using the WTO dispute settlement mechanism. Further, the study highlights the implications of removing the above-mentioned measures for South Africa's trade policy and explores various alternative trade arrangements which South Africa and other sub-Saharan African countries may pursue in order to ensure or secure a stable, transparent, reciprocal trade relation with the US.

Table of Contents **Page**

CHAPTER 1
GENERAL INTRODUCTION

1.1 Background to the study

AGOA was initially enacted in 2000 by United States (US) President Bill Clinton. It has since undergone various amendments, the latest of which is the AGOA Extension and Enhancement Act. AGOA is a unilateral, nonreciprocal trade preference programme which provides duty free treatment for US imports of certain goods from eligible sub Saharan African countries (SSA).[1] Currently, there are 39 eligible SSA countries.[2] Its over-arching objective is to stimulate market-led economic growth and development in SSA and deepen US trade and investment ties in the region.[3] In order to be eligible for preferences, the SSA country must be an existing beneficiary of the US General Scheme of Preferences (GSP).[4] More importantly, it must satisfy certain requirements which include; establishment of a market- based economy, incorporating rules-based trading system, elimination of barriers to US trade and investment, incorporating the protection of intellectual property, rule of law and political pluralism and respect for human rights.

Compliance with AGOA is subject to continuous monitoring by the US.[5] The US President ("President") is empowered to initiate an out of cycle review of whether a beneficiary SSA country is making continual progress in meeting the above requirements.[6] Such review is initiated at any time and could be triggered by a petition from any interested person.[7] The out of cycle review is intended to provide for closer monitoring and scrutiny with respect to SSA countries' meeting AGOA's eligibility requirements on an on-going basis.[8] If, pursuant to the out of cycle review, the President determines that the beneficiary SSA country does not meet the above-mentioned requirements, he is obliged to terminate the designation of the country as a beneficiary,

[1] ER Williams 'African Growth Opportunity Act (AGOA) Background and Reauthorization' (2015) CRS Report 1
[2] The 39 AGOA eligible SSA countries are: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Comoros, Republic of Congo, Democratic Republic of Congo, Djibouti, Ethiopia, Gabon, The Gambia, Ghana, Guinea Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia
[3] Williams (n1 above) 1
[4] E Naumann 'Some bigger picture implications of SA trade policies' (2015) Tralac 2
[5] Section 105
[6] Section 105
[7] Section 105 (c)(3)(A)
[8] Naumann (n4 above) 25

or withdraw, suspend or limit the application of duty free treatment with respect to eligible products from the country, subject to providing the affected country with a 60 day notice.[9]

South Africa is one the major beneficiaries of AGOA's preferences. It has substantially benefited from the scheme, particularly in relation to agricultural and automotive products. For example in 2014, its automobile exports to the US under AGOA amounted to R23 billion.[10] However, South Africa's future as a beneficiary hangs precariously by virtue of certain policies and measures which the US is aggrieved with. The measures include Anti-Dumping (AD) duties and Sanitary and Phyto Sanitary (SPS) measures which were imposed by South Africa on US poultry. The former were imposed in 2000.

Subsequent to the extension of AGOA during 2015, South Africa was placed under a special out of cycle review by the US, which review led to determination that South Africa was not complying with the eligibility requirements, particularly the requirement relating to the elimination of barriers to US trade and investment. The alleged breach related to the above-mentioned measures.[11] As a result, South Africa's eligible agricultural products were suspended from AGOA preferential treatment. However, the suspension has since been lifted following an agreement in terms of which AD duties were removed on qualifying US poultry imports.[12] SPS measures were removed as well.

1.2 Research problem

As discussed above, South Africa's future as a beneficiary of AGOA's preferences hanged precariously by virtue of certain policies and measures which the US was aggrieved with. The measures include the AD duties and SPS measures which South Africa imposed on US poultry. These measures were deemed to constitute a breach of eligibility requirements, in particular, the requirement relating to the elimination of barriers to US trade and investment. As a result, South Africa was placed under a special out of cycle review by the US, which review led to determination that South Africa was not complying with the eligibility requirements. South Africa was subsequently given an ultimatum by the US President, in terms of which it was required to remove the above-mentioned measures, failing which certain AGOA preferences would be withdrawn.

[9] Section 105(4)(E)
[10] G Erasmus 'The AGOA Saga in a Trade Governance Context' (2016) Tralac 22
[11] Erasmus (n10 above) 8
[12] The agreement establishes a quota system in terms of which 65 000 metric tonnes of US poultry will be exempt from AD duties

Notably, the AD duties had been in force since 2000 and were imposed consistently with the relevant rules of the World Trade Organization (WTO). Further, the AD duties have been subjected to a sunset review and extended in accordance with the WTO law. The same applies to SPS measures. They were imposed consistently with the WTO rules.

The issue here is that the legality of the AD duties and the SPS measures was never challenged by the US through the WTO Dispute Settlement Body (DSB) before South Africa was compelled, through AGOA, to remove the said measures which were validly imposed on US poultry, in exchange for retaining or preserving AGOA preferences. The removal of the said measures has far-reaching legal implications for South Africa's trade policy and the integrity thereof. Importantly, it raises critical issues relating to the non- reciprocity of AGOA. It is against this background that the study seeks to examine the legal implications of AGOA for South Africa's trade policy with particular focus on AD duties and SPS measures. The ultimate objective of the study is to determine, from a legal perspective, if AGOA is a benefit to South Africa which is worth retaining or merely a poisoned chalice. The study will also explore some alternative reciprocal trade agreements which South Africa could pursue with the US in order to establish a stable, transparent and mutually beneficial economic relationship.

1.3 Research question

The broad research question which this study seeks to answer is that, from a legal perspective, is AGOA beneficial to South Africa thus worth retaining or a poisoned chalice? However, in answering the above broad question, the following pertinent sub-questions will also be interrogated:

a) What are the advantages and disadvantages of AGOA to South Africa?

b) How has South Africa used the AD duties and SPS measures as trade policy instruments and why has this engendered a dispute with the US?

c) What are the legal implications of removing the AD duties and SPS measures against US poultry for South Africa's trade policy and the integrity thereof?

d) What are possible alternatives to AGOA?

1.4 Thesis statement

This study argues that South Africa is entitled to impose AD duties and SPS measures, provided that specific requirements are met and that the measures imposed by South Africa on US poultry are legal under the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO law as long as the procedural and substantive requirements have been fulfilled. Consequently, the consistency thereof can only be tested using the WTO dispute settlement mechanism.

1.5 Justification

AGOA is a very topical issue, both from an economic and legal perspective. As indicated above, there are substantial economic benefits that have accrued to South Africa from AGOA hence AGOA is regarded in some quarters as an indispensable programme.[13] Apparently, AGOA occupies an important position in South Africa's trade and industrial policy. In order to objectively determine whether AGOA is a benefit to South Africa which is worthy clinging on to, it is important to assess it in a more holistic manner, that is, from both an economic and legal perspective. While economic benefits are the fruits falling from the AGOA tree, it is important to assess the legal nature of the tree itself and the consequences of reaping its fruits.

The aim of this study is to provide an objective legal analysis of AGOA. Such analysis could assist South Africa and other AGOA beneficiaries in making informed decisions regarding their participation in AGOA and the implications thereof. This is particularly important if attention is paid to AGOA's strict eligibility requirements and out of cycle review mechanism and the recent developments in terms of which South Africa was compelled by the US to remove AD duties and SPS measures imposed on US poultry in exchange for retaining the AGOA preferences. These have far-reaching legal implications for South Africa's trade policy. For example, the out of cycle review implies that South Africa must, at all times, comply with the eligibility requirements in order to continue as a beneficiary. This may have a chilling effect on its trade policy. Other than having a chilling effect on South Africa's trade policy, the out of cycle review means that South Africa's continued eligibility for AGOA benefits is uncertain. Already, there are other concerns which the US has on

[13] M Kalaba 'Opinion on why South Africa needs the US for its agricultural trade'(2015) Tralac 1

South Africa's policies, which concerns may lead to South Africa's suspension or withdrawal from AGOA.[14] Given the uncertain and unpredictable nature of AGOA, it is critical for South Africa to establish a more secure, transparent and reciprocal trade agreement with the US. In this regard, research into viable, alternative agreements that could be pursued by both parties is important. This study will investigate such alternatives.

1.6 Literature review

There is a large body of literature on AGOA. However, the bulk thereof focuses on the economic aspects of AGOA, particularly the economic benefits accruing to eligible SSA countries. With regard to AGOA, Naumann argues that "AGOA has brought much greater level of certainty to Africa's preferential access to the US market".[15] Further, he argues that the improved predictability of AGOA is something on which business relies.[16] The issue of certainty to which Naumann refers, is however, controversial. The strict eligibility requirements and the out of cycle review as well as the unilateral withdrawal of preferences deprive AGOA of the necessary predictability and certainty. In this regard, Lenaghan argues that " this one sided determination of eligibility as well as the reviewing a country's status every year, with the US to withdraw eligibility status any time causes uncertainty and instability and keeps African trade vulnerable to US politics."[17] Arguably, the out of cycle reviews have aggravated the instability and uncertainty.

Lenaghan's view is echoed by Viljoen who argues that the out of cycle review, while welcomed by the US private sector, has been described as a battering ram by several African countries.[18] The out of cycle review has the potential to negatively affect African economies in terms of transparency, predictability and continuity of AGOA benefits.[19] Viljoen further observes that as a result of wide ranging concerns by the US private and public sector, South Africa can lose its status as a beneficiary or its duty free access can be withdrawn, suspended or limited.[20] In other words, South Africa's future under AGOA is uncertain as a result of a plethora of concerns relating to its policies.

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[14] These concerns, include, the Private Security Industry Regulation Amendment Bill and the draft intellectual property policy. The Bill provides for the transfer of 51% equity in foreign -owned security companies to South African citizens. The draft intellectual property bill seeks to modernize the South Africa intellectual property regime. It also intends to domesticate the flexibilities provided for in the TRIPs Agreement.

[15] Naumann (n4 above) 39

[16] Naumann (n4 above) 39

[17] PM Lenaghan 'Trade Negotiations or Capitulations'(2006) 17 Berkeley LA Raza Law Journal 122

[18] W Viljoen 'Implications of AGOA out of cycle review for South Africa' (2015) Tralac 1

[19] Viljoen (n18 above) 1

[20] Viljoen (n18 above)1

Further, Naumann argues that AGOA's "strings attached" provisions mean that the preferences are not a free gift.[21] SSA countries must comply with an assortment of eligibility requirements, whose main thrust is the promotion of US's interests. For example, some eligibility conditions require that SSA countries adopt free market economies and open up their markets to US trade. Lenaghan argues that this constitutes economic patriarchy.[22] Lenaghan further argues that "the supposedly altruistic aspects of AGOA are recognized as furthering the interests of the dominant US."[23] Bhagwati is very critical about preferential schemes such as AGOA. He argues that the one way preferences granted under the GSP are riddled with flaws, which flaws include limited product eligibility, termination of preferences when exports from developing countries are successful and reverse preferences are almost always built into these schemes.[24] He further argues that both the European Union (EU) and the US have used these preferential schemes to extract not just preferential trade concessions but also a number of unrelated concessions.[25] A close examination of AGOA reveals that it bears the characteristics described by Bhagwati.

Preferential schemes derive their legal basis from the Enabling Clause, officially called the Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries. The Enabling Clause was adopted by the Contracting Parties during the Tokyo Round of negotiations in 1979. Stamberger notes that the Enabling Clause suspends the Most Favoured Nation (MFN) rule and allows developed country members to grant differential and more favourable treatment to developing countries. This is done through the GSP under which developed country members give non-reciprocal preferential treatment to exports from developing countries.[26] According to Kessie, the Enabling Clause created a permanent legal basis for (1) special and differential treatment with regard to tariff preferences granted under the GSP schemes, (2) non-tariff measures among developing countries, in the framework of regional or global trade arrangements and (3) deeper preferences, in the context of GSP, for least-developed countries (LDCs).[27] The extension of preferences is voluntary and developed countries have a wide discretion in both the scope and design of preferences.[28]

[21] Naumann (n4 above) 39
[22] Lenaghan (n17 above) 123
[23] Lenaghan (n17 above) 119
[24] J Bhagwati 'Reshaping the WTO'(2005) Far East Economic Review 29
[25] Bhagwati (n24 above) 29
[26] JL Stamberger 'The legality of conditional preferences to developing countries under the GATT Enabling Clause' (2008) 4 Chicago Journal of International Law 607
[27] E Kessie 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in GA Berman et al (eds) WTO Law and Developing Countries (2007) 18
[28] Stamberger (n26 above) 610

In European Communities (EC) - Tariff Preferences case,[29] the Appellate Body (AB) held *inter-alia* that the Enabling Clause allows developed countries to treat developing countries within its GSP system differently, provided that "similarly situated" GSP beneficiaries are offered the same treatment.[30] The AB confirmed that the Enabling Clause is an exception to the MFN rule. Stamberger argues that a closer scrutiny of the AB's decision in the EC-Tariff Preferences case reveals that a number of special preference regimes, including AGOA, probably violate the AB's interpretation of the WTO obligations.[31] This view is shared by Moss who argues that AGOA is inconsistent with the Enabling Clause by virtue of the fact that it, *inter-alia* has a closed list of beneficiaries.[32] The writer endorses this view.

The poultry dispute between South Africa and the US was engendered by the decision by the Board of Tariffs and Trade (BTT) to impose AD duties on US poultry. There are divergent views on this issue. Carim argues that the weight based methodology used by the BTT is legal under the WTO law. [33] As such, the BTT's decision is valid. On the contrary, Watson argues that the poultry case presents a "good example for how authorities can abuse the complexities of anti-dumping law to justify duties that have no meaningful relationship to actual market conditions."[34] He describes the AD duties as "egregious."[35] Further, he argues that "the way South African authorities justified steep duties on US chicken is a particularly egregious example of the larger global phenomenon of anti- dumping abuse."[36] The writer adds his voice to the growing calls for the AD dispute to be referred to the DSB for a definitive decision. The DSB would offer some insightful analysis of critical issues underlying the dispute. In the absence of a challenge, the controversy relating to the BTT's decision will linger for ever and speculation on the possible outcome will prevail.

[29] European Communities – Conditions for the Granting of Preferential Tariffs to Developing Countries WTO/DS246
[30] This case involves a complaint by India against the European Communities regarding the conditions under which the European Communities offer tariff preferences to developing countries pursuant to the Council Regulation No: 2501. The Regulation provided *inter-alia* for special incentives for the protection of labour rights, the environment and combating drug production and trafficking (for details refer to the case. Available at https://www.wto.org>tratop_e>dispu_e)
[31] Stamberger (n26 above) 667
[32] K Moss 'The Consequences of the WTO Appellate Body Decision in EC-Tariff Preferences for the Africa Growth and Opportunity Act' 38 Intl Law and Politics 699
[33] Carim X (2014) Don't let chicken stand in the way of AGOA, 25 March 2014 Business Day
[34] KW Watson 'Antidumping Fowls Out: South Africa Chicken Dispute Highlights the Need for Global Reform (2015) 62 Free Trade Bulletin.1.Available on http://www. cato.org (accessed 20 March 2016)
[35] Watson (n34 above) 1
[36] Watson (n34 above) 1

1.7 Research methodology

The writer relies on desktop and library research. Primary sources used, include AGOA, the GATT 1994, Agreement on SPS and Agreement on AD duties. The secondary sources used, include academic books, journals and articles. WTO case law is also used. In the study, the writer primarily uses both the descriptive and the analytic approach.

1.8 Overview of Chapters

The study will be divided into the following chapters;

Chapter 1 deals with the background to the study, the research problem, the research question, thesis statement, justification, literature review, research methodology and an overview of Chapters. Chapter 2 provides an analysis of AGOA, *inter-alia* its background, objectives, eligibility requirements, out of cycle review and the legal implications thereof for South Africa's trade policy. The Chapter also examines the advantages and disadvantages of AGOA for South Africa as well as the relationship between AGOA and the Enabling Clause. Chapter 3 provides an analysis of the dispute between South Africa and the US relating to the AD duties and SPS measures imposed by the former on the latter's poultry. Contrasting views on the merits of the BTT's decision are offered. The chapter also explores the legal remedies available under the WTO for the resolution of trade disputes and why the US did not invoke or has not invoked such remedies in settling the said dispute. Chapter 4 briefly explores South Africa's trade policy relating to AD duties and SPS measures. Importantly, it explores the implications of South Africa's removal of AD duties and SPS measures on its trade policy and its integrity thereof. Chapter 5 explores alternative, reciprocal trade agreements that South Africa may pursue, in the place of AGOA. Chapter 6 deals with the conclusion and recommendations.

CHAPTER 2
AGOA AND ITS EFFECTS ON SOUTH AFRICA

2.1 Introduction

AGOA has been billed as the cornerstone or bed rock upon which US-Africa trade and investment is built.[37] It has been credited with ensuring that Africa's access to the US market is substantially enhanced. Notwithstanding its non-reciprocal status, AGOA is not unconditional. As discussed in Chapter 1, eligible SSA countries must comply with certain conditions in order to continue accessing the preferences. Further, their continued participation in AGOA is subject to constant, on-going surveillance and monitoring.

While AGOA has been hailed as a catalyst for the economic growth of SSA countries, certain criticisms have been levelled against it. These criticisms relate, *inter alia* to its eligibility requirements which are viewed as strict and inherently counter-productive. Further, there is an exclusion of products of export interest to the beneficiaries, particularly agricultural products.[38] Furthermore, as a non-reciprocal preferential scheme, AGOA's consistency with the Enabling Clause[39] is in dispute. This Chapter will examine AGOA, *inter-alia*, its background, objectives, legal provisions as well as advantages and disadvantages. Particular focus will be on South Africa. The Chapter will also examine the consistency of AGOA with the Enabling Clause.

2.2 AGOA's background: An overview

In 2000, AGOA was signed into law by former US President Clinton as part of the Trade and Development Act of 2000. Since its enactment, AGOA has undergone various amendments, the latest of which is the AGOA Extension and Enhancement Act of 2015. The AGOA Extension and Enhancement Act (AGOA) was signed into law by President Obama in September 2015. In relation to AGOA, the US Congress made the following findings, *inter-alia;*

[37] Section 102 of AGOA
[38] William (n1 above) 17
[39] Moss (n32 above) 69

a) Since its enactment, AGOA has been the centerpiece of trade relations between the US and SSA and has enhanced trade, investment, job creation and democratic institutions throughout Africa.

b) Trade and investment, as facilitated by AGOA, promote economic growth, development, poverty reduction, democracy and stability in SSA.

c) Trade between the US and SSA has more than tripled since 2000 and the US investment in SSA has grown almost six fold.

d) It is in the interest of the US to engage and compete in the emerging markets in SSA countries, to boost trade and investment between the US and SSA countries and to renew and strengthen AGOA.

e) The long term economic security of the US is enhanced by strong economies and political ties with the fastest growing economies in the world, many of which are in SSA.

f) It is the goal of the US to further integrate SSA countries into the global economy, stimulate economic development in Africa, and diversify sources of growth in SSA.

g) The elimination of barriers to trade and investment in SSA, including high tariffs, forced localization requirements, restrictions on investment, and customs barriers will create opportunities for workers, businesses, farmers and ranchers in the US and SSA[40]

From the above Congressional findings, the following observations can be made;

a) Prior to AGOA, the US-SSA relationship was focused more on aid than trade and economic development. Therefore, AGOA represents a fundamental paradigm shift in US policy towards and engagement with African countries.[41]

[40] Section 102 of AGOA par 1- 9
[41] E Naumann 'An overview of AGOA's performance, beneficiaries, renewal provisions and the status of South Africa' (2015) Tralac 1

b) AGOA contemplates the liberalization of eligible SSA countries' markets through the elimination of barriers to US trade and investment and the adoption of free market economies. As a result, AGOA may be said to be *de facto* reciprocal. The fact that AGOA is *de facto* reciprocal is not surprising. It is similar to the US GSP which contains de facto requirements of reciprocity.[42]

c) In a multilateral context, liberalization of trade and investment is usually a negotiated process. Since AGOA is a unilateral Act, it is inconceivable how SSA countries would liberalize their markets without being coerced or strong armed through use of AGOA as leverage.

2.3 Purpose and objectives

The purpose and objective of AGOA is to expand the US trade and investment within SSA, stimulate economic growth and encourage economic integration of SSA countries into the global economy.[43] However, there are other non-economic purposes which include the promotion of democracy and stability, respect for human and labour rights, rule of law as well as the safeguarding of US national security. For present purposes, focus shall be on the economic purpose and objectives. In order to catalyze the economic growth of the SSA countries, AGOA provides for preferential treatment of exports from SSA countries in the form of duty free and largely quota free access to US markets.[44] By providing duty free and largely quota free access of SSA exports to the US market, AGOA is expected to promote exports from SSA countries as well as attract investments to Africa, thereby helping to stimulate economic growth.[45] Notably, AGOA provides duty free and largely quota free treatment to selected exports from SSA countries additional to that allowed under the US GSP, provided such exports are not deemed to be import sensitive.[46] Other than tariff preferences, AGOA provides technical assistance to SSA countries.

2.4 Eligibility requirements

For an SSA country to be eligible for AGOA, it must satisfy certain eligibility requirements which include*:*

[42] NB Dos Santos et al 'Generalized System of Preferences in General Agreement on Tariffs and Trade/WTO: History and Current Issues' (2005) Journal of World Trade 657
[43] Subban (2016) AGOA sword will keep hanging above South Africa 29 March 2016 Business Day
[44] L Paez etal " A Decade (2000-2010) of African-US Trade under the Growth and Opportunity Act (AGOA): Challenges, Opportunities and a Framework for Post AGOA Engagement'(2010) 3
[45] Paez (n44 above) 3
[46] Paez (n44 above) 3

a) Establishing a market based economy that protects private property, incorporates an open, rules-based trading system, and minimizes government interference in the economy through such measures as price controls, subsidies and government ownership of economic assets.

b) Elimination of barriers to US trade and investment, incorporating the provision of national treatment and measures to create an environment conducive to domestic and foreign investment, protection of intellectual property and the resolution of bilateral trade and investment disputes.

c) Observing the rule of law and political pluralism.

d) Respect for political, civil and human rights.

e) Protection of workers' rights; and

f) Desisting from activities that undermine US national or foreign policy interests.

The SSA countries' continued eligibility for AGOA preferences is now subject to enhanced, on-going scrutiny and or surveillance in the form of public comments and hearings, petitions and out of cycle review by the President. The provisions are discussed as follows-

2.4.1 Public comments and hearings

AGOA provides that the President, in carrying out the review shall publish annually in the Federal Register notice of review and request for public comments on whether beneficiary SSA countries are meeting the eligibility requirements set forth in section 104 of AGOA and 502 of the Trade and Development Act.[47]

The US Trade Representative (USTR) is obliged to hold public hearings, within 30 days of publication of the notice of review and request for public comments.[48] The US public is entitled to comment on whether SSA

[47] Section 105

countries are meeting the eligibility requirements provided in AGOA.[49] It is not clear if this public participation in compliance monitoring is unique to AGOA or it is a universal requirement in relation to other US trade policies.

2.4.2 Petitions

AGOA provides for the establishment, within 60 days of its enactment, of the process to allow *any interested* person, at *any time*, to file a petition with the office of the USTR with respect to the compliance of any SSA country with the eligibility requirements. The President is obliged to take into account the petitions in the review process. What constitutes an interested person is not clear. AGOA contains broad and extensive eligibility requirements and as such the definition of an interested person could include broad and diverse persons or group of persons. Importantly, petitions are a potent and effective legal tool in the hands of lobby groups or special interest groups by virtue of the fact that the President is obliged to consider them during the review. Petitions can also trigger a review.

2.4.3 Out of cycle reviews

AGOA, for the first time, makes provision for out of cycle reviews. It provides that the President may, at any time, initiate an out of cycle review of whether a beneficiary SSA country is making sufficient progress in meeting the eligibility requirements. As aforesaid, the President is obliged to give due consideration to petitions in determining whether to initiate an out of cycle review.[50] The initiation of an out of cycle review is subject to Congressional notification.[51]

2.4.4 Special out of cycle review

AGOA provides for an initiation of out of cycle review for certain countries. The first casualty of this provision was South Africa. South Africa was targeted for a mandatory special review because certain concerns had been raised regarding its compliance with the eligibility requirements provided in section 104(a) of AGOA. The concerns related *inter-alia* to the AD duties which South Africa imposed on US poultry in

[48] Section 105
[49] Section 105
[50] Section 105
[51] Section 105

2000. These duties were viewed as barriers to US trade. Notably, the SSA country which is a subject of the review does not participate in the review process and neither can it challenge the outcome thereof. This is a result of the fact that AGOA is a unilateral Act and importantly, it does not provide for bilateral consultations and a dispute settlement mechanism in the event of an alleged breach by an SSA country. In other words, an SSA country has no voice in the determination of its fate.

The President is empowered to withdraw, suspend, or limit the application of duty free treatment provided for any eligible products if he determines that withdrawing, suspending or limiting such duty free treatment would be more effective in promoting compliance by the country with the eligibility requirements than terminating the designation of the country as a beneficiary SSA country.[52] Further, the President may not act against the offending SSA country unless 60 days before such action, he or she notifies Congress and the country of the breach and of his intention to withdraw, suspend, or limit such duty free treatment, together with considerations entering into the decision to terminate such designation.[53] In other words, the President provides notice and the grounds for the decision to terminate, suspend or limit preferences. It is unclear what the rationale for the 60 days is, since AGOA does not provide for formal bilateral consultations or a cooperative process or mechanism for resolving concerns before eligibility for AGOA is withdrawn or suspended.[54]

The decision to withdraw, suspend and limit access to the preferences is unilateral. The use of the word '*may*' indicates that no obligation is placed upon the President to notify Congress or the offending SSA country before taking action. Further, the notification requirement appears to be purely procedural. As a result of the unilateral nature of AGOA, the President is not legally obliged to enter into consultations with or invite or accept representations from the offending SSA country prior to making a decision to withdraw, suspend or limit access to duty free preferential treatment. This is so because AGOA does not bestow any justiciable rights on SSA countries. The recent suspension of South Africa's eligible agricultural products is an example.[55] In this case, the US and South Africa entered into voluntary bilateral consultations *post facto.*

[52] Section 105
[53] Section 105
[54] MG Snyder 'GSP and Development: Increasing the effectiveness on non-reciprocal preferences' (2012) 33 Michigan Journal of International Law 842
[55] South Africa's eligible agricultural products were suspended from AGOA preferential treatment during 2016 after South Africa and the US failed to conclude an agreement relating to the removal of AD duties and SPS measures on US poultry within the stipulated time frame.

2.5 Rules of Origin

For products from SSA countries to qualify for duty free treatment, they must meet certain rules of origin (RoO) requirements.[56] The requirements, include, *inter-alia* that the product is imported directly into the US from the eligible SSA country and that at least 35% of the appraised value of the product must be " the growth, product or manufacture of the beneficiary developing country, as defined by the sum of (1) the cost or value of materials produced in the beneficiary developing country or any two or more beneficiary countries that are members of the same association or countries that are treated as one country for the purposes of the US law plus (2) the direct costs of processing in the country.[57] Up to 15% of the appraised value of the 35% threshold may be of US origin.[58] More importantly, the RoO permit regional cumulation. In other words, any amount of production in the other eligible SSA countries may contribute to the value-added requirements.[59]

2.6 Economic Benefits for South Africa

South Africa is one of the major beneficiaries of AGOA. It is the leading exporter of non-oil products under AGOA.[60] South Africa has been able to leverage AGOA to grow its exports to the US in sectors other than natural resources, notably automotive, chemicals and agricultural sectors (representing 28%, 14% and 6% of total exports in 2014, respectively).[61] Between 2000 and 2014, South Africa doubled the value of its exports to the US, totaling $8.27 billion in 2014, of which 40% benefitted from AGOA and GSP preferences.[62] In 2014, South Africa's main agricultural exports to the US were oranges ($41 million), wine ($33 million) and macadamia nuts ($31.8 million).[63] It is estimated that AGOA generated 62 395 jobs directly and indirectly.[64] From the above statistics, it is evident that;

a) South Africa is a major non-oil beneficiary of AGOA.

b) South Africa has been able to effectively utilize the AGOA preferences.

[56] RoO are critical in, *inter-alia* preventing dilution of preferences.
[57] Williams (n1 above) 2
[58] Williams (n1 above) 2
[59] Williams (n1 above) 2
[60] JB Cronje ' US suspends SA's AGOA benefits' (2015) Tralac 1
[61] C Prinsloo 'AGOA and the future of US-Africa relations' South Africa Institute of International Affairs 1 Available on http//www.saiia.org.za (accessed on 4 April 2016)
[62] Prinsloo (n61 above) 1
[63] Cronje (n60 above) 1
[64] Carim (n33 above)

c) South Africa is one of the few SSA beneficiaries who have managed to diversify their exports to the US under AGOA.

d) AGOA plays a critical role in supporting South African jobs and industrialization objectives.[65]

e) Withdrawal of the AGOA benefits will impact negatively on the South African economy and jobs.

2.7 Critique of AGOA

It is trite that AGOA has made some valuable contribution to the economic development of certain SSA countries, South Africa in particular. Notwithstanding the economic benefits, it has some critical shortcomings, which include strict eligibility requirements, de facto reciprocity, unilateral withdrawal of benefits, strict review procedures, limitation of beneficiaries' policy space, limited product coverage, especially in respect of products of export interest to SSA beneficiaries. In assessing the shortcomings of AGOA, particular focus will be placed on South Africa.

2.7.1 Country eligibility requirements

Some of the country eligibility requirements are not based purely on economic criteria. These non-economic requirements include, *inter-alia* establishment of a system to combat corruption and bribery such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, protection of labour rights and not engaging in activities that undermine the US national security or foreign policy interests. The inclusion of these non- economic or non- trade requirements in a preferential trade scheme such as AGOA is very controversial. Apparently, the US is using AGOA as an instrument to promote certain foreign policy objectives.[66] However, the inclusion of these non-economic or non-trade requirements in AGOA inadvertently engenders uncertainty and unpredictability. It makes the eligibility requirements unnecessarily complex and strict. As a result, it makes it increasingly difficult for beneficiaries to comply with these requirements and makes their continued eligibility uncertain. The writer is of the view that non-trade eligibility requirements have no place or relevance in preferential trade schemes. If anything, they

[65] Carim (33 above)
[66] G Erasmus 'The AGOA saga in trade governance context' (2016) Tralac 4

are used by preference grantors for self-serving and opportunistic purposes. Controversial eligibility requirements include, *inter-alia*,

i. Elimination of barriers to US trade and investment

This is arguably a market access requirement. The elimination of barriers to US trade entails removal of tariffs and non-tariff barriers. It implies that eligible SSA countries must liberalize or open up their markets to US trade and investments. Beneficiaries are required to adopt and maintain trade policies which are favourable to the US trade and investment. Trade encompasses trade in goods and services. Non- tariff barriers include AD duties, technical regulations and standards as well as SPS measures. Barriers to US investment include the pre-establishment requirements, local content requirements and limitations on capital repatriation. In the case of South Africa, programmes like the Renewable Energy Independent Power Producer Procurement programme may fall foul of this requirement. The programme contains local content requirements.

On tariffs, the US complains that its imports face higher MFN tariffs in South Africa than the European Union (EU) counterparts.[67] Goods originating from the EU enjoy preferential tariff treatment as a result of the South Africa-EU Trade and Development Co-operation Agreement (TDCA). Tariffs for eligible EU tariff lines average 4.5 percent on an unweighted average while the general tariffs faced by US imports averages 19.5 percent on similar tariff lines.[68] It is expected that the EU-SADC Economic Partnership Agreement (EPA) will further affect the competitiveness of US imports in South Africa.[69] The issue of tariffs is a contentious issue in the Doha Round negotiations. More importantly, South Africa has adopted a cautious and calculated approach towards further tariff reductions. In this context, it would be interesting to see how the US will use AGOA as leverage to extract tariff concessions outside of a multilateral framework and in the absence of a Free Trade Agreement (FTA) between the two parties.

Other than requiring liberalization or opening up of SSA markets to US trade and investment, the requirement also entails according national treatment to US firms and investments. This entails according treatment to US products, services and investments which is no less favourable than that accorded to domestic products, services and investments. National treatment is one of the core principles enshrined in the GATT 1994 and the

[67] 'National Estimate Report on Foreign Trade Barriers' (2015) 361
[68] n67 above 361
[69] n67 above 361

General Agreement on Trade in Services (GATS). However, on the investment front, according national treatment to US investors and their investments may negatively affect certain SSA countries hence developing countries are opposed to the inclusion of investment in the Doha Round negotiations.

Technically, eligible SSA countries are not required to reciprocate AGOA tariff preferences. However, the fact that they are required to liberalize or open up their markets to US trade and investment constitutes a reverse preference or de facto reciprocity. It is for this reason that preferential schemes are criticized for having built in reverse preferences.[70] Arguably, AGOA typifies such preferential schemes. In essence, AGOA's supposed altruism has been recognized as furthering the US's interests.[71]

It is also interesting to note that AGOA provides no exception for non- tariff barriers such as AD duties which beneficiaries have validly instituted pursuant to and in accordance with the WTO law and are unchallenged. Also interesting is the fact that investment is included in AGOA. Developing countries, including South Africa, have consistently and vehemently opposed the inclusion of the so called Singapore issues in the Doha Round negotiations. Singapore issues include investment, government procurement and competition. Arguably, by participating in AGOA, the SSA countries have implicitly acquiesced to the investment issue and the implications thereof. If they have consented to liberalize their investment markets to the US, it would be interesting to see how they will continue resisting negotiations on investment at a multilateral level, without risking loss of credibility. In the circumstances, by participating in AGOA, SSA countries have compromised their position on investment.

Other than the AD duties and the SPS measures, the USTR has identified various barriers to US trade and investment in South Africa, which barriers include the Minerals and Petroleum Resources Development Act of 2002[72] and transformation charters in various sectors such finance and mining.[73] These alleged barriers may affect South Africa's continued eligibility for AGOA preferences.

[70] Bhagwati (n24 above) 29
[71] Lenaghan (n17 above) 119
[72] The Act provides *inter-alia* for beneficiation.
[73] n67 above 364

ii. Establishment of a market based economy that protects private property

To be eligible for AGOA preferences, SSA countries are required to establish a market based economy and such economy must protect private property. In essence, AGOA requires the establishment of a free market economy. Prescribing the form of economy that an SSA country must adopt in order to be eligible for AGOA preferences constitutes economic patriarchy.[74] The ability of eligible, elected SSA governments to adopt and pursue the form of the economy they want is constrained if they wish to trade with the US.[75] AGOA effectively discourages state intervention in the economy. Subsidies and price controls are effectively discouraged as well. Ironically, the US substantially subsidizes its agricultural sector. SSA countries, such as South Africa, could be prejudiced by this requirement. In South Africa, the state is an active player in the economy through, for example, State Owned Enterprises (SOEs). Further, subsidies form part of South Africa's trade policy. Importantly, the above requirement has the effect of undermining the sovereignty of eligible SSA countries. It significantly constrains their ability to pursue economic and or trade policies which they deem appropriate or necessary for their socio-economic development.

The US requires eligible SSA countries to pursue economic policies that protect private property. The requirement contemplates protection of private property from nationalization and expropriation without compensation. It is in this context that the US raised concerns relating to South Africa's Private Security Industry Regulation Amendment Bill (PSIRA Bill). It is alleged that the piece of legislation poses a threat to private property rights. As a result, the piece of legislation is likely to be the subject of a future AGOA review. Importantly, the fact that South Africa has a liberal and or progressive constitution which guarantees protection of private property and compensation in the event of expropriation does not insulate it from this requirement.[76]

iii. Protection of Intellectual Property (IP)

Developing countries such as the SSA enjoy certain flexibilities under the Trade-Related Intellectual Property Agreement (TRIPS).For example, the Paragraph 6 flexibilities.[77]

[74] Lenaghan (n17 above) 123
[75] Lenaghan (n17 above) 123
[76] Section 25 of the South African Constitution.
[77] Paragraph 6 flexibilities relate to IP and access to public health.

In order to modernize its IP regime and domesticate the said flexibilities, South Africa recently produced a draft IP policy.[78] The US has raised certain concerns relating to the said policy.[79] Apparently, the issue of the draft IP policy was one of the issues that were raised during the recent out of cycle review of South Africa under AGOA. A review may ensue if South Africa proceeds with the policy.

iv. Strict Review Procedures

In order to enforce compliance, AGOA provides for strict and demanding out of cycle reviews. These out of cycle reviews create uncertainty and unpredictability with regard to an SSA country's continued eligibility for AGOA. This is particularly true for South Africa, whose policies have engendered concerns from the US. As a result of the review procedures, South Africa's continued participation in AGOA is uncertain. Uncertainty and unpredictability inevitably affect long term investments, particularly investments which seek to take advantage of the preferences afforded by AGOA.[80] The out of cycle reviews also have a chilling effect on the beneficiaries' policies in general and trade policies in particular.

2.7.2 Length of reauthorization of AGOA

AGOA has been reauthorized for 10 years and is set to lapse in September 2025. The US is not legally obliged to extend the AGOA preferences in perpetuity. Reauthorization beyond 2025 is, therefore, not guaranteed. Arguably, the current duration of the reauthorization is reasonable. However, for long range investments, this period may not be adequate. Therefore, uncertainty of continued preferential treatment dilutes AGOA's effectiveness.[81]

2.7.3 Unilateral withdrawal of preferences

AGOA provides for a unilateral withdrawal of preferences from a beneficiary where a determination has been made to the effect that such beneficiary has breached the eligibility requirement(s).

[78] See n16 above
[79] It is alleged that the policy threatens patent rights, particularly pharmaceutical patent rights, through compulsory licensing etc.
[80] Stamberger (n26 above) 675
[81] Stamberger (n26 above) 675

As aforesaid, the fundamental weakness of AGOA is that it does not provide for a formal co-operative process for resolving concerns before benefits are withdrawn or suspended.[82] It does not provide for a dispute settlement mechanism as well.

Unlike the US, the EU provides for a defined procedure which include consultation and other collaborative measures before preferences are suspended.[83] Effectively, an SSA beneficiary country whose eligibility for AGOA has been withdrawn or suspended has no legal recourse. This renders SSA countries vulnerable. Importantly, the unilateral withdrawal of benefits creates uncertainty and impacts negatively on private long term investment decisions that are particularly motivated by exploitation of duty-free and quota-free opportunities.[84] The unilateral withdrawal of preferences keeps beneficiaries in a state of flux and or permanent insecurity.[85]

2.7.4 Product Coverage

The AGOA preferences currently apply to 7000 tariff lines at HS8 digit level.[86] However, it does not sufficiently cover certain products which are of export interest to SSA countries, in particular agricultural and textile products.[87] Further, certain agricultural products are completely excluded. Over 200 agricultural tariff lines, which represent roughly 17% of dutiable agricultural lines, are excluded from duty free treatment under either AGOA or the GSP.[88] The US applies tariff rate quota (TRQs) to certain agricultural products.[89] Notably, agricultural products subject to TQRs remain ineligible for duty free treatment both under AGOA and the US GSP.[90] Effectively, duty free treatment is granted only to in-quota quantities of certain agricultural products like peanuts, beef and others. Consequently, TRQs negatively affect the utilization of preferences.[91] In the case of South Africa, sensitive products, such as sugar, which are important to South Africa, are excluded.[92] Importantly, South Africa's textiles are affected by stringent RoO relating to same. This is by virtue of the fact that South Africa is not defined as lesser developed and, as such, it cannot utilize AGOA's third country fabric

[82] Snyder (n54 above) 842
[83] Snyder (n54above) 842
[84] Paez (n44 above) 7
[85] T Fritz 'Special and Differential Treatment for Developing Countries' (2005) Hendrich Boll Foundation 14
[86] Agoa.info (accessed on 20 March2016)
[87] Paez (n44 above) 13
[88] Snyder (n54 above) 844
[89] TRQs apply a lower tariff to a certain in-quota quantity of exports and a higher tariff to additional imports over this quantity.
[90] Williams (n1 above) at 2
[91] Snyder (n54 above) 844
[92] R Sandrey et al 'South Africa's way ahead: trade policy options' (2007) Tralac & AusAid 34

provisions. South Africa is subject to more stringent RoO which require that garments must be made locally and producers must utilize local fabric which in turn is made from US or African yarn.[93]

2.7.5 Erosion of preferences

The mega-regional FTAs which the US is negotiating with countries from the Pacific region and the EU pose a significant threat to the preferences currently enjoyed by South Africa and other SSA countries.[94] Subsidies provided by the US to the domestic producers also have the effect of diluting the AGOA preferences.[95]

2.7.6 Non -Tariff Measures (NTMs)

There are various NTMs which act as barriers to South African exports under AGOA, including, SPS measures as well lengthy standards and compliance requirements which add to the costs and concomitant reduction of benefits.[96] South African exports are also vulnerable to AD measures. Arguably, the fact that the US wanted South Africa to remove AD duties on its poultry imports is ironic and hypocritical if regard is had to the fact that the US is one of the fervent users and supporters of AD duties.

2.8 AGOA and the Enabling Clause

Preference schemes have their genesis in the Enabling Clause whose original purpose was to stimulate the economic growth of developing countries and to facilitate their integration into the multilateral trading system. This was done through the relaxation of the MFN rule which prohibits discrimination against like foreign products. The relaxation of the MFN rule was intended to enable the implementation of the SDT in favour of developing countries, by affording them preferential market access to developed country markets. The Enabling Clause provided legal cover for the GSP and became the vehicle through which developed countries would grant preferential market access to exports from developing countries, without reciprocal liberalization by them.[97]

[93] Naumann (n41 above) 5
[94] The mega regional FTAs are the Trans- Atlantic Trade and Investment Partnership and the Trans-Pacific Partnership.
[95] Paez (n44 above) 20
[96] R Chutha et al 'The Africa Growth and Opportunity Act : Towards 2015 and Beyond'(2011) Brookings 7
[97] Dos Santos (n42 above) 637

The GSP was intended to be a step towards a more balanced and integrated global trade partnership.[98] The Enabling Clause, therefore, constitutes a fundamental legal basis by which individual WTO members may unilaterally grant preferences to developing countries.[99] In the EC-Preferences case, the AB affirmed that the Enabling Clause is an exception to GATT Article 1:1 which sets out the MFN rule.[100] Further, the AB held that the Enabling Clause does not require developed countries to offer GSP preferences to all developing countries. Further, the AB held that the Enabling Clause allows developed countries to treat developing countries within its GSP system differently, provided "similarly situated" GSP beneficiaries are offered the same treatment.[101]

Based on the EC-Tariff Preferences case, it is argued that the "on its face, the AGOA is a violation of the MFN provisions of Article 1:1. The scheme does not extend its preferential treatment to all WTO Members; rather it is limited to designated countries in sub-Saharan Africa"[102] AGOA has a closed list of beneficiaries and does not provide objective criteria for removing and adding beneficiaries.[103] As a result, AGOA is not covered by the Enabling Clause. Members offering targeted or regional non-reciprocal preferences must seek waiver of their WTO obligations.[104] Hence the US has sought and obtained a waiver.

2.9 Conclusion

AGOA extends duty free treatment to exports from SSA countries. These preferences are aimed at promoting SSA export earnings and stimulating their economic growth by giving them improved access to the US market. South Africa is one the few SSA countries which have a high utilization rate of the AGOA preferences. It has managed to leverage AGOA to increase its exports to the US, particularly in relation to automotive and agricultural products. Hence AGOA occupies a critical position in its trade policy. While there are economic advantages which accrue from AGOA, there are critical disadvantages as well. Participation in AGOA is not a free ride. There are certain strict requirements with which SSA countries must comply in order to be eligible for AGOA preferences. These requirements include economic and political requirements such as eliminating barriers to US trade and investment, establishing market based economies that protect private

[98] Dos Santos (n42 above) 638
[99] Lenaghan (n17 above) 118
[100] For details refer to the AB Report on the case. Available at http://www.wto.org>cases_e>ds246_e
[101] Moss (n32 above) 667
[102] Moss (n32 above) 698
[103] Moss (n342above) 698
[104] Snyder (n54 above) 839

property and respect for political and civil rights. Arguably, these requirements are used to extract certain concessions from SSA countries. As a result, AGOA is arguably de facto reciprocal or has reverse preferences embedded in it.

The strict review procedures to which SSA countries are subjected, are inherently counter-productive. These review procedures have the effect of creating uncertainty relating to the SSA countries' continued eligibility for AGOA preferences. Uncertainty discourages investment, particularly investment with a long gestation period. Importantly, the strict review procedures have a chilling effect on beneficiaries' trade policies. Uncertainty is also heightened by the unilateral nature of AGOA, particularly the fact that preferences can be suspended or withdrawn at any time subsequent to a determination that an SSA country is in breach of the eligibility requirements. The lack of bilateral consultation and a dispute settlement mechanism may also affect the stability of the scheme. Ideally, an offending SSA country should, at least, be given an opportunity to be heard. An abrupt withdrawal or suspension of preferences has negative and disruptive consequences for investments. In this regard, Snyder argues;

> To effectively promote long term development and economic growth, preferential access through a non-reciprocal preference scheme needs to be stable and predictable.[105]

The recent development in which South Africa was compelled to remove AD duties and SPS measures imposed on US poultry in return for retaining AGOA preferences highlights, *inter-alia* the risks and consequences of participating in a unilateral scheme. More importantly, it should serve as a wake up call for South Africa and other SSA countries to look beyond AGOA by considering, *inter-alia* concluding reciprocal trade and investment agreements with the US.

[105] Snyder (n54 above) 829

CHAPTER 3
LEGAL ANALYSIS OF SOUTH AFRICA-US POULTRY DISPUTE

3.1 Introduction

In 2000, the BTT imposed AD duties on poultry imports from the US. The AD duties were imposed pursuant to a complaint by the Southern African Customs Union (SACU) domestic poultry industry alleging that the US poultry was being dumped into the SACU market, resulting in material injury to the domestic industry. Investigations were subsequently initiated by the BTT, which ultimately decided that the US poultry was being dumped into the SACU market. The WTO AD Agreement defines dumping as the introduction into the commerce of another country of a product at a price which is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[106]

The decision by the BTT has been criticized as being unreasonable and legally unsound. Notwithstanding the criticism, the decision has not been challenged by the US through the WTO DSB. The failure by the US to challenge the decision is quite strange given the fact that it has constantly complained about the AD duties. Recently, the US decided to use AGOA to compel South Africa to remove the said AD duties. This conduct by the US is controversial, if regard is had to the fact that it has failed to use the WTO dispute settlement mechanism and that unless otherwise decided to the contrary, it can be assumed that the AD duties were validly imposed in terms of or in accordance with the AD Agreement.

In this Chapter, the writer will examine *inter-alia* the background of the poultry dispute between South Africa and the US, the WTO dispute mechanism and why the US did not use the said mechanism. The Chapter will also briefly discuss the SPS measures which, together with the AD duties, were the subject of the recent South Africa –US dispute.

[106] Article 2 of the AD Agreement

2.2 Background of the South Africa-US Poultry Dispute

The South Africa-US poultry dispute (poultry dispute) has its genesis in the decision by the BTT to impose AD duties on the poultry originating in the US. The decision to impose AD duties was taken in 2000, after the SACU poultry industry, represented by Rainbow Farms Pty Ltd, filed a petition with the BTT in which it alleged that poultry from the US was being dumped into the SACU market and that such imports were causing material injury to the domestic poultry industry. The poultry that was allegedly dumped consisted of chicken leg quarters, thighs and backs (brown meat). It was alleged that the brown meat was sold in the SACU market at prices less than the normal value in the US.[107]

Pursuant to the petition, the BTT initiated an investigation and invited all the interested parties to provide the relevant information. The US poultry exporters which were invited included, Tyson Foods, Boston Agrex and Gold Kist. After considering the information from the interested parties, the BTT made a preliminary determination to the effect that poultry was being imported from the US at dumped prices and thereby causing material injury to the SACU industry. Provisional AD duties were imposed on US poultry.[108]

The preliminary report was published and interested parties were invited to submit comments. After considering the comments, the BTT confirmed its preliminary determination and recommended the imposition of definitive AD duties. The BTT's findings include the following;

a) The US domestic market is a particular market situation where a strong preference for white meat exists over that of brown meat and that the former was sold at significant premium prices. Notably, the BTT acknowledged that the preference for white meat was not peculiar to the US. It was found in other countries such as Canada and the European Union.[109]

b) Sales in the US were generally not 'in the ordinary course of trade' as the sales of brown meat were considered to be at prices below per unit (fixed and variable) costs of production plus selling, general and administrative costs (SGA). In the US, chicken products are costed according to their

[107] Board of Tariffs and Trade Report No. 4088 Investigation into the alleged dumping of fowls of the species Gallus Domesticus, originating from the United States of America (USA): Final determination (2000) 3
[108] n107 above 4
[109] n107 above 20

earning capabilities. White meat attracted higher production costs than brown meat because the former attracted premium prices. As a result, the BTT concluded that this costing method does not reasonably reflect the actual costs associated with the production and sale of the brown meat and consequently rejected the method. Notably, the costing method was rejected, notwithstanding the finding that it was consistent with the generally accepted international accounting practices.[110] Ultimately, the BTT decided to base the normal value on the cost of production methodology.[111]

c) The petitioners met the domestic industry requirement contemplated in Article 5.4 of the AD Agreement.[112] The BTT held that 46 percent constituted the major proportion of the domestic industry.[113]

d) SACU industry was suffering material injury in that it experienced, *inter-alia* price undercutting, price suppression, decline in profit and market share and negative return on market share.[114]

e) There was no evidence that there were other factors affecting domestic prices.[115]

f) There was a causal link between dumped imports and the material injury as evidenced by, *inter-alia* the decline in the market.[116]

g) On other factors causing the injury, the BTT concluded that factors such as development in technology, competition between domestic producers, shortcomings and lack of competiveness of the domestic industry did not detract from the casual link between the dumped imports and material injury.[117]

[110] n107 above 31
[111] n 107 above 35
[112] Article 5.4 of the AD Agreement reads, in part "The application shall be considered to have been made" by or behalf the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the domestic industry expressing either support or opposition to the application.
[113] n107 above 13
[114] n107 above 13
[115] n107 above 75
[116] n107 above 75
[117] n107 above 86,89

On the issue of the dumping margin, the BTT determined that imports from Gold Kist, Tyson and other exports had the margins of 55.80US c/lb., 37.37US c/lb. and 52.29US c/lb. respectively. Finally, the BTT recommended AD duties ranging from 209 percent to 375 percent.[118] Notably, The US poultry imports were already liable for an additional 37 percent import duty. As a result, there was a drastic decline of US poultry imports (to almost zero levels).

In 2006, the AD duties were subjected to the mandatory sunset reviews by the International Trade Administration Commission (ITAC).[119] ITAC confirmed the findings of the BTT and decided to extend the AD duties on the basis that the expiry of the AD duties was likely to lead to the recurrence of dumping and material injury.[120] In general, South Africa revoked AD measures within the mandatory five year cycle.[121] This is a result of the fact that the requirements to have AD duties extended following a sunset review have become more onerous. [122] Therefore, the AD duties on US poultry exemplify measures that have extended beyond the mandatory five year cycle. Notably, the AD duties also survived the South African Supreme Court of Appeal ruling which invalidated many AD duties in 2007.[123] Importantly, the finding by ITAC to the effect that dumping and material injury were likely to recur is controversial. Firstly, if the domestic poultry industry is efficient or has achieved the necessary level of efficiency, how will material injury recur? Secondly, is the likely recurrence of material injury measured against an objective standard? These are some of the issues which require further analysis.

3.3 Intersection between AD duties on US poultry and AGOA

Since the imposition of the AD duties in 2000, there has been a simmering tension between South Africa and the US.[124] The tension came to a head during the recent re-authorization of AGOA. An intense debate, spearheaded by the chicken lobby group, raised concerns regarding South Africa's continued participation in AGOA. The lobby group was led by Senator Coon of Delaware and Senator Isaakson of Georgia. It was felt

[118] Watson (n34 above) 1
[119] ITAC is the successor to the BTT
[120] For details on the sun set review, refer to the Report No. 195 titled "Sunset review of anti-dumping duties on frozen meat of fowls of species Gallus Domesticus cut in pieces with bone in originating in/ imported from the United States of America".
[121] L Edwards 'Anti-dumping in South Africa: From Proliferation to Moderation' (2011) CEPR 10
[122] Edwards (n121 above) 10
[123] The Supreme Court of Appeal ruled that the AD duties which were the subject of litigation had become extant at the time when sun set reviews were undertaken by ITAC.
[124] Naumann (n4 above)

that South Africa benefited from AGOA, yet it erected and maintained trade barriers (AD duties) against US imports, particularly the poultry imports.

Ultimately, South Africa was included in AGOA under strict terms.[125] South Africa was subsequently subjected to a special review. As a result of the review, it was determined that South Africa was in breach of the AGOA eligibility requirements. It was given until January 2015 to remove the said AD duties, failing which its eligible agricultural products were to be suspended from AGOA preferential tariff rates. It was subsequently determined that South Africa was not complying with the eligibility requirements. As a result, the eligible agricultural products were suspended effective from March 15 2015. However, an agreement was eventually reached which provides for, *inter-alia;*

a) An annual import quota for US bone in chicken of 65 000 metric tonnes.

b) An annual growth factor as determined by the Department of Agriculture, Forests and Fisheries (DAFF) shall be applied to the above quota with effect from 1 April 2017.

c) Termination or suspension of the import quota in the event that South Africa's benefits under AGOA are suspended.

The following observations can be made in respect of the above agreement;

a) The in-quota chicken imports are exempted from AD duties. Out of quota chicken imports will be subjected to the AD duties.

b) The agreement does not contemplate a permanent removal of AD duties. It is contingent upon South Africa's continued participation in AGOA. This effectively means that AD duties on all US poultry imports will be reinstated if South Africa's participation in AGOA is suspended or terminated. By including this proviso, South Africa tried to secure its continued participation in AGOA. However, the effectiveness of this proviso is yet to be seen in view of the fact that AGOA is a unilateral Act. As

[125] Erasmus (n10 above) 8

such, the proviso has no legal effect on AGOA. South Africa will still be subjected to the mandatory reviews and its future as an AGOA beneficiary remains uncertain, notwithstanding the proviso.

c) Arguably, the agreement is not provided for in the AD Agreement. It does not constitute a review provided for in Article 11 of the AD Agreement. Article 11 provides for a review of AD duties by the administrative authorities *mero motu* (own initiative), or by request by any interested party which submits positive information substantiating the need for a review. This Article contemplates a substantive review of AD duties by the administrative authorities. On the contrary, the agreement bears the hallmarks of a political settlement. Arguably, this agreement highlights the risks of settling trade disputes outside of the WTO legal framework.

3.4 SPS measures on US beef and poultry

Other than the AD duties, the US raised concerns regarding the SPS measures imposed by South Africa on US beef and poultry imports. South Africa had imposed SPS measures on US poultry as a result of the avian influenza (HPAI) in the US. In fact, poultry imports from the US were banned as a result thereof. The US was aggrieved by the fact that South Africa had imposed a blanket national ban.[126] The US demanded that the ban be regionalized and that poultry imports from regions which were HPAI free be allowed, consistent with the World Organization for Animal Health (OIE) guidelines.[127] The treatment of porcine reproductive and respiratory syndrome in the US was also a bone of contention.[128]

On the beef issue, South Africa banned beef imports from the US as a result of the mad cow disease in 2003 and the US wanted South Africa to change standards relating to the disease.[129] The US viewed the mad cow disease risk as negligible.[130] As stated in Chapter 2, the said SPS measures were viewed as a barrier to US trade. The US demanded their removal and used AGOA as leverage. The complexity of the SPS issue is reflected in the following statement by Rob Davies:[131]

[126] http://www.thepoultrysite.com/poultrynews (accessed on 25 March 2016)
[127] National Trade Estimate Report on Foreign Trade Barrier 360
[128] n 127 above 360
[129] n 127 above360
[130] n 127 above 360
[131] Rob Davies is South Africa's Minister of Trade and Industry

> Our objective is to stay in AGOA for the benefit of this country and for the benefit of the bilateral economic relations. At the same time, we do this in such a way that we do not subject our animals or our people to any unacceptable risk[132]

Like the AD duties, South Africa had imposed the SPS measures in terms of, and in accordance with the SPS Agreement. The right to impose SPS measures is enshrined in Article 2 of the SPS Agreement.[133] More importantly, the consistency of the SPS measures with the SPS Agreement had not been tested. The US has not filed a dispute with the DSB concerning the legality of these measures.

3.5 AD duties on US poultry: Legitimate use or abuse?

The decision of the BTT to impose AD duties on US poultry is contentious. On one hand, it is viewed as reasonable and justified and on the other hand, as legally unsound and protectionist. In support of the BTT's decision and the findings thereof, Carim[134] argues that;

> The US producers have mistakenly claimed that the methodology used by South Africa in calculating antidumping duties on US imports of chicken portions (the so- called weight based allocation) is illegal under WTO rules. In making this argument, reference is made to a recent decision by the WTO dispute panel on a similar matter between the US and China.[135].
>
> The US prevailed in that case but for reasons not related to the methodology. Indeed, the panel said methodologies based on "sales value" or "weight" are not unreasonable and clarified that South Africa's practice is not inconsistent with the WTO rules.[136]

The gist of Carim's argument is that the weight-based methodology that was employed by the BTT is valid and legal under the WTO law. It must, however, be noted that notwithstanding the fact that the Panel found that neither the value based nor the weight based methodology was unreasonable, it made an adverse finding

[132] B Ginindza (2016) 'New hurdles block AGOA deal' IOL 5 January 2016 Business News. Available on http:// www.iol.co.za
[133] Article 2 of the SPS Agreement provides that " Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement"
[134] Xavier Carim is the former Deputy Director General at the South African department of trade and industry and the current ambassador of South Africa at the WTO.
[135] The case referred hereto is the China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (China- Broiler Products) WTO DS427.
[136] Carim (n33 above)

against China's use of the latter methodology. It has been argued that the poultry case "offers a good example for how authorities can abuse the complexities of anti-dumping law to justify duties that have no meaningful relationship to actual market conditions"[137] The methodology employed by the BTT has been criticized as an "illogical and result-oriented method of determining whether US producers were "dumping" chicken".[138] The AD duties have been described as "particularly egregious".[139] It is argued that the BTT erred in a number of ways, including:

a) The export price was higher than the home market price. This was by virtue of the fact that, in South Africa, consumers prefer brown meat whereas in the US, consumers prefer white meat. Consequently, US chicken producers were able to sell certain brown meat products for a higher price in the export market than they would sell them in the domestic market. As a result, a no dumping finding should have been made by the BTT. [140]

b) The BTT was able to arrive at the above AD duties by ignoring the US producers' domestic market sales and, instead, used the constructed value methodology, which estimates normal value by calculating the costs of production and adding estimated amount for profit. [141]

c) The BTT unreasonably rejected the net realizable value technique used by the US chicken producers, in terms of which the high valued white meat received the high cost and the low valued brown meat received low cost.[142] The records provided by the US poultry industry were consistent with this technique. Importantly, the technique was consistent with the generally accepted international accounting practices, a fact which the BTT conceded. [143]

[137] Watson (n34 above)1
[138] Watson (n34 above)1
[139] Watson (n34 above)1
[140] Watson (n34 above)1
[141] Watson (n34 above)1
[142] KG Kulkarni 'Antidumping Laws as a Trade Barrier: A Case of South African Poultry Imports from USA' Indian Journal of Economics and Business (2005) 9
[143] Kulkarni (n142 above) 9

d) Instead of using the net realizable value technique, the BTT decided to assign cost based on weight. As a result of the weight-based costing methodology, the brown meat was allocated the highest cost.[144] Inevitably, a dumping finding was made.[145]

e) The reallocation of costs and use of the constructed normal value resulted in the brown meat being allocated a higher cost than they were being sold at their domestic US market. As a result, the difference between the normal price (constructed value), and the export price was high.[146]

f) Designation of the consumer preference for white meat in the US as constituting a particular market situation led to the erroneous rejection of cost allocations based on the net realizable value.[147]

Notably, the majority of arguments criticizing the BTT's decision are not new. They were raised by the US poultry producers and were ultimately rejected by the BTT. It seems that the key issue is not necessarily the legality of the weight-based cost allocation methodology but the substitution of the net realizable value costing methodology with the former. Article 2.2.1.1 of the AD Agreement provides that costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. This is the norm. However, derogation from the norm is permissible, provided that there is an adequate justification for doing so.

The decision by the BTT to reject the books and records kept by the US poultry producers and the value based methodology used by same has come under increased scrutiny as a result of the China-Broiler Products case. The poultry dispute and the China Broiler Products case share certain similarities. For example, in both cases, the administering authorities (1) rejected the books and accounts of the US poultry producers on the basis that same did not reasonably reflect the costs associated with the production and sale of US poultry and (2) substituted the value based methodology used by the said producers with the weight based methodology.

[144] Kulkarni (n142 above) 10
[145] Kulkarni (n142 above)11
[146] Kulkarni (n142 above)12
[147] Kulkarni (n142 above) 11

With regard to the US-South Africa poultry dispute, the relevant questions that arise include, (1) whether or not the explanation proffered by the BTT for derogating from the obligation to use the books and records of the US poultry producers in calculating costs is well- reasoned and adequate, (2) whether or not it considered all available evidence to arrive at the proper allocation of costs and (3) whether or not the weight based methodology it applied constitutes a was proper allocation of costs.[148] These are some of the issues which require an analysis from a WTO Panel.

The AD duties imposed by South Africa on the US poultry are also criticized as" a clear cut case of protectionism."[149] It has been alleged that the over-arching purpose of the AD duties in this case appeared to be the protection of an inefficient domestic poultry industry. The domestic poultry industry is "plagued by high production costs that can be attributed to various factors," which factors include, highly inefficient production process, poorly trained labour force, disruptive activities of unions and high feed costs as a result of a low grain yield and erratic rainfall.[150] As a result of these factors, the South African (SACU) poultry industry is unable to compete with its US counterparts because the latter is highly competitive as a result of its vertically integrated nature, use of modern technology and highly efficient production process.[151]

The behavior of the SACU poultry industry requires serious and objective scrutiny by ITAC. This is particularly important if regard is had to the fact that, notwithstanding the imposition of what has been described as punitive AD duties on US poultry, the industry has proceeded and requested further protection from the Brazilian and EU poultry imports. During June 2011, ITAC initiated investigations on frozen poultry imports from Brazil after the domestic poultry industry had complained of dumping. In 2012, ITAC imposed provisional AD duties on Brazilian poultry imports.

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[148] In the China- Broiler Products case, it was held that in conducting an objective assessment of the findings or determinations of the administering authority, the Panel must review whether the authority has provided a reasoned and adequate explanation of how the evidence on the record is supportive of its factual findings and how the factual findings support the overall determination (par 7.162). Further, it was held that the administering authority is obliged to objectively consider all available evidence, including the alternative allocation methodologies presented by the respondents (par 7.194). The administering authority must, *inter-alia* adequately explain why the allocation methodology it chooses is preferable over alternative methodologies. The Panel found, *inter-alia* that China acted inconsistently with the first sentence of Article 2.2.1.1 by declining to use Tyson and Keystone's books and records in calculating the cost of production for determining the normal value. Further, it found that China acted inconsistently with the second sentence of Article 2.2.1.1 when it failed to consider the alternative allocation methodologies offered by the respondents and applied its own allocation methodology that did not reflect the costs associated with the production and sale of products under consideration.

[149] Watson (n34 above)1

[150] Kulkarni (n142 above)7

[151] Kulkarni (n142 above)11

Brazil subsequently filed a dispute at the WTO and requested consultations. Brazil argued, *inter-alia* that the imposition of the AD duties was inconsistent with Article 2.4 of the AD Agreement by virtue of the fact that South Africa did not make a fair comparison between the export price and normal value, including the establishment of the residual margin.[152] However, the dispute was amicably settled, resulting in the removal of the AD duties.

Curiously, in its request for consultations, Brazil alleged that "South Africa did not make an objective examination, based on positive evidence, of the impact of the alleged imports on domestic producers, as the overwhelming majority of domestic injury indicators for whole chicken and for boneless chicken cuts were positive or showed positive trends."[153] Notwithstanding the fact that the allegation was not proven, it is a serious allegation relating to use of AD duties for protectionist purposes. With regard to the EU, ITAC imposed AD duties on poultry imports from Germany, Netherlands and the United Kingdom, following an investigation and a finding to the effect that poultry imports from these countries were being dumped into the SACU market. AD duties ranging from 31.3 percent and 73.33 percent were imposed. Arguably, the behavior by the SACU poultry industry may be a significant indicator of either deep rooted, systemic inefficiency or an industry with abusive protectionist inclination. ITAC is exhorted to seriously consider this issue when new applications for AD duties are made by the industry or during sunset reviews. AD duties may be addictive, particularly, if they are not subjected to objective scrutiny.

The criticism of the BTT's decision may be well-grounded. However, in the absence of a challenge through the DSB, the decision stands and is effective. Therefore, if the US is aggrieved by the decision, it is incumbent upon it to challenge the decision through the DSB. The poultry case is loaded with critical legal issues which require clarification. Arguably, by not challenging the BTT's decision, the US deprived the WTO of a vital opportunity to enrich its jurisprudence on AD duties.

[152] South Africa-Anti-Dumping Duties on Frozen Meat of Fowls from Brazil DS439 1
[153] n152 above 2

3.6 WTO remedies on AD duties

The WTO provides remedies against the unlawful imposition of AD duties. Effectively, an aggrieved party (complaining Member) can refer the dispute to the DSB for adjudication. Article 17 of the AD Agreement provides a detailed dispute settlement procedure. It provides for a mandatory consultation. Any member which considers that any benefit accruing to it directly or indirectly from the AD Agreement is being nullified or impaired, can with a view to reaching a mutually satisfactory solution, request consultation from the other member (respondent). The respondent is obliged to give a sympathetic consideration to the complaining Member's grievance.[154] If the consultations fail, and more importantly, if a final determination has been made by the respondent's administering authorities to levy definitive AD duties or accept price undertakings, the complaining Member may refer the matter to the DSB.

The complaining Member can also refer a provisional measure to the DSB if such measure has a significant impact and is considered by the said Member to have been imposed contrary to the provisions of paragraph 1 of Article 7 of the AD Agreement.[155] Paragraph 1 of article 7 establishes the requirements which a provisional measure must meet in order to be valid. Such conditions include, the initiation of investigations by the administering authorities, inviting inputs from the relevant or interested parties, making of a preliminary affirmative determination of dumping and material injury as well as judgment to the effect that a provisional measure is necessary to prevent injury pending the investigations.

The DSB must, at the request of the complaining Member, establish a panel. Article 17.6 of the AD Agreement spells out the role of the Panel. The Article provides as follows;

(i) In its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of the facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

[154] Article 17(1)-(3) of the AD Agreement.
[155] Article 17(4) of the AD Agreement.

(ii) The panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations**.**

As stated above, in conducting an objective assessment of the findings or determinations of the administering authorities, the Panel must review whether the authorities provided a reasoned and adequate explanation of how the evidence on the record is supportive of their factual findings and how the factual findings support their overall determination. This is how the BTT's decision will be evaluated if the US refers the dispute to the DSB.

3.7 Why has the US not reverted to the DSB?

As indicated above, the GATT 1994 provides for a dispute settlement mechanism for the resolution of AD disputes. Notwithstanding, many AD duties are never challenged.[156] This is despite the fact that "the DSB has rarely found the measures as applied to be acceptable."[157] Notably, out of fifty-six AD duties challenged before the WTO between 1996 and 2004, only two were upheld. [158] Legal capacity is often cited as one of the obstacles to challenging AD measures.[159] This is a result of the legally complex DSB proceedings. The issue of legal capacity is not applicable to the US. The US possesses sufficient financial and human resources and the legal expertise to deal with the complexities and costs associated with the DSB proceedings.

Regarding the merits of the case, it has been argued that the US would have, without doubt, won the case had it challenged it.[160] It is further argued that the case must be challenged because it sets "a dangerous precedent."[161] In response to the US victory in the China-Broiler Products case, Pritzker[162] said the following;

[156] RM Bolton 'Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the WTO through Heightened Scrutiny' (2011) 29 Berkeley Journal of International Law 78
[157] Bolton (n156 above) 78
[158] Bolton (n156 above) 78
[159] Bolton (n156) above 79
[160] Kulkarni (n142 above) 16
[161] Kulkarni (n142 above) 16
[162] US Secretary for Commerce

> When US producers or exporters face antidumping or countervailing duty investigations abroad, the Department of Commerce stands ready to help them understand their rights and secure a fair process.[163]

If the US challenged the AD duties imposed by China on its poultry imports on the basis that it wanted fairness to prevail, its failure to challenge the BTT's decision is difficult to explain. In the absence of a challenge, it is increasingly difficult to prejudge, with certainty, the outcome of the case. The Brazilian case, referred to above, illustrates the importance and effect of challenging AD duties at the WTO. Arguably, had the US challenged the AD duties imposed by South Africa on its poultry, it is possible, although not guaranteed, that a mutually satisfactory settlement may have been secured. The recent removal of the AD duties, through AGOA, is a strong indication that the poultry dispute is capable of being resolved at the WTO, without the use of strong arm tactics or intimidation. On the other hand, it could be that the US sees a loophole. A ruling in favour of South Africa would make it difficult for the US to later use AGOA to force South Africa to withdraw alleged barriers.[164]

3.8 Conclusion

The poultry dispute between South Africa and the US has been festering for a number of years. This is primarily as a result of the controversial decision by the BTT, which decision found that there was dumping of US poultry into the SACU market and that there was a causal link between dumping and the material injury suffered by the poultry industry. The controversy relates to the manner in which the BTT interpreted and applied the WTO AD law in relation to, *inter alia*, the determination of normal value and the quantification of dumping margins. The bone of contention relates, *inter alia,* to the use of the constructed value pursuant to a finding that the sales of the brown meat in the US did not constitute sales done in the normal course of trade and that the US represented a particular market situation. Also contentious was the decision by the BTT to substitute the net realizable cost methodology used by the US poultry producers with the weight based methodology.

[163] Available at ustr.gov/US-Wins-Trade-Enforcement-Case-American-Farmers-Proves-Export-Blocking-Chinese-Duties-Unjustified-Under-WTO-Rule (accessed on 20 March 2016)
[164] Edwin Kessie's comment on the first draft of this study

Notwithstanding the controversy regarding the decision and its implications for the US poultry industry, the decision has never been challenged by the US through the DSB. The same applies to the SPS measures imposed by South Africa on US beef and poultry. It is unclear why the US has not challenged the AD duties and the SPS measures. Instead, the US has used AGOA as leverage to compel South Africa to remove the AD duties and SPS measures on its poultry. This conduct by the US is controversial. It demonstrates the extent to which unilateral preferential schemes, such as AGOA, have been manipulated to extract concessions from developing country beneficiaries. It also highlights the risks of placing such schemes at the centre of a beneficiary country's trade policy. More importantly, it highlights the need to subject unilateral preferential schemes to enhanced scrutiny at the WTO. Failing to do so may jettison some fundamental objectives and principles of the WTO. For South Africa, the said conduct by the US sounds a clarion call for the review of its position on AGOA. More importantly, it calls for a serious consideration of a reciprocal trade agreement with the US.

CHAPTER 4

AD DUTIES AND SPS MEASURES AS TRADE POLICY INSTRUMENTS IN SOUTH AFRICA

4.1 Introduction

AD duties are a legitimate trade remedy or trade policy tool that can be used to protect a country's domestic industry from unfair trade. They are permissible under Article VI of the GATT 1994 and the AD Agreement and their use is subject to strict disciplines. Globally, there has been an increased use of AD duties. This phenomenon could be attributed to trade liberalization.[165] As tariffs are reduced, domestic industries are increasingly exposed to foreign or international competition. International trade comes in the form of fair and unfair trade. AD duties are intended to prevent the latter. As a result, AD duties occupy an important position in many countries' trade policies. South Africa is no exception. In South Africa, the AD duties are provided for in the International Trade Administration Act (ITAC Act), which Act establishes ITAC and entrusts it with the responsibility of implementing South Africa's trade policy.

SPS measures also play an important role in the trade policy matrix. Unlike AD duties, SPS measures are not a trade remedy. They are measures which WTO Members are permitted to maintain in order to "ensure that food is safe for consumers and to prevent the spread of pests and diseases among animals and plants." [166] These measures are provided for in the SPS Agreement whose primary objective is to ensure that while WTO members have a sovereign right to determine their appropriate level of health protection, they do not use these measures for protectionist purposes and that such measures do not result in unnecessary barriers to trade.[167] By virtue of the fact that SPS measures are inherently non-trade barriers, they play an important role in a country's trade policy. Like AD duties, SPS measures play an important role in South Africa's trade policy.[168]

In view of the important role that AD duties and SPS measures play in South Africa's trade policy, the recent developments in which South Africa was compelled by the US to remove these measures on US poultry have

[165] According to Edwards (n121 above) page 1, in the South African case, there is empirical evidence to the effect that AD measures were not used to directly offset the decline in protection associated with trade liberalization. However, the issue is contentious.
[166] http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (accessed on 20 March 2016)
[167] http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (accessed on 20 March 2016)
[168] The administration of SPS measures cuts across various departments, which departments include, the departments of health, agriculture and trade and industry.

serious implications for South Africa's trade policy relating to these measures and the integrity thereof. The removal of these measures engenders the following questions, *inter-alia*;

a) What inference can be drawn regarding the legitimacy of these measures? In other words, were these measures imposed for legitimate purposes, in the first place, or for protectionist purposes?

b) If South Africa was convinced about the legitimacy of these measures, why did it not, at least, insist on the resolution of the disputes relating to these measures through the WTO?

c) What precedent does the removal of these measures set?

d) Importantly, what are the implications of the eligibility condition requiring the elimination or removal of these measures for South Africa's trade policy relating to these measures?

In this Chapter, the writer will briefly explore South Africa's trade policy relating to AD duties and SPS measures. Importantly, the writer will explore the implications of South Africa's removal of AD measures and SPS measures for its trade policy relating to these measures, taking into account the questions raised above.

4.2 AD duties and SPS measures as trade policy instruments in South Africa

South Africa has been using AD duties as a trade policy instrument for a long time. In 1914, South Africa became the fourth country after Canada, Australia and New Zealand to enact AD legislation.[169] Subsequent to the enactment of the AD legislation, there was a relatively intense use of AD duties and countervailing measures.[170] In the 1970s, the use of AD duties to protect the domestic industries was relaxed because "it was considered that the high tariffs at the time provided sufficient protection to domestic companies."[171] In 1978, all AD duties were removed. Disruptive competition was dealt with through formula duties.[172] Notably, there was a fundamental trade policy shift when the WTO was established in 1995 and South Africa acceded to it.

[169] G Brink 'Anti-Dumping in South Africa' (2012) Tralac 2
[170] Edwards (n121 above) 4
[171] Edwards (n121 above) 4
[172] Edwards (n121 above) 4

During the Uruguay Round, South Africa made its tariff offers as a developed country, "resulting in an ambitious outward oriented reform programme that 'locked in' steep tariff cuts.[173] South Africa's average MFN tariff rates for all goods fell from over 14% in 1996 to 8% in 2001; the MFN rates for industrial goods also fell by 50% and 55% for textiles and clothing respectively over the same period. The weighted average MFN tariff rate came down from a level of 8.6% in 1996 to 5%.[174] All marketing and price support for farmers were dismantled, resulting in a deregulated and liberalized agricultural sector.[175] Trade liberalization exposed domestic industries to increased competition from imports. An increase in imports is also attributed to various FTAs that South Africa entered into and the preferential tariffs that emanated from such FTAs.[176]

In order to protect domestic industries, the AD and countervailing measures became exceedingly important.[177] As nations embark on a liberalization process, tariffs are reduced, and then AD measures begin to take a more pronounced role in the trade policy of these countries.[178] The same seems to be true with regard to South Africa. AD duties are an essential part of its trade policy. In fact, South Africa is regarded as one of the major users of AD duties. Between 1995 and 2004, South Africa initiated 173 AD investigations.[179] Recently, it has initiated AD investigations against countries such as Brazil, India, the EU, China and Pakistan. Interestingly, developing countries and BRICS member states have not escaped the wrath of South Africa's AD investigations.

In general, various economic justifications exist for AD duties. These justifications, include, *inter-alia* the use of AD duties to prevent predatory pricing dumping,[180] and strategic dumping.[181] AD laws seek to defend against predatory pricing by preventing the sale of imports "at less than fair value"[182] AD measures are, therefore, used to create an even playing field against the foreign producers, when dumping is actually occurring.[183]

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[173] B Vickers 'Towards a Trade Policy for Development: the Political economy of South Africa's External Trade,1994-2014' 36 Strategic Review for Southern Africa 60
[174] Vickers (n173 above) 60
[175] Vickers (n173 above) 60
[176] South Africa concluded various regional FTAs, *inter-alia* the SADC Trade Protocol and the TDCA (with the EU)
[177] Vickers (n173 above) 60
[178] M Moore et al 'Trade Liberalization and Anti-dumping: Is there a substitution effect?' (2008) Institute for International Economic Policy 1
[179] B Debroy et al 'Uses and Misuses on Anti-Dumping Provisions in World Trade: A cross country perspective' (2006) Academic Foundation 35
[180] Bolton (n156 above) 72
[181] Strategic dumping happens where exporters are protected from competition at home and thus can sell their exports at a lower price than they sell at in their domestic market (refer to Bolton n71 page 72)
[182] NG Mankiw 'Antidumping: The Third Rail of Trade Policy' (2005) Foreign Affairs 84
[183] Kulkarni (n142 above) 2

On the other hand, AD duties are criticized for, *inter-alia* encouraging inefficiency among domestic industries, being a significant barrier to international trade and depriving consumers of the benefits of a healthy and robust competition. It is argued that AD duties have replaced tariffs.[184] Consequently, the AD duties threaten to reverse the gains that were painstakingly obtained through trade liberalization. It is argued that AD laws are the fox among the chickens.[185]

The ITAC Act[186]provides a legal basis for AD duties. The Act is supported by various regulations, the scope of which is beyond this study. ITAC is responsible for implementing the trade policy in relation to tariffs and trade remedies. On the latter, ITAC " administers the trade remedies through investigation of alleged dumping, subsidised imports and a surge of imports into SACU, in accordance with the domestic legislation and consistent with WTO Rules"[187] Essentially, in administering trade remedies, ITAC is guided by the ITAC Act and its underlying regulations and the relevant WTO Agreements.

With regard to the SPS measures, South Africa has a plethora of SPS requirements with which imports must comply. The SPS legal framework spreads or cuts across different ministries or departments including, Health, Agriculture, Forests and Fisheries and Trade and Industry. SPS measures are developed on the basis of science and harmonization with the relevant international standards.[188] The WTO Trade Policy Review Report on South Africa notes;

> South Africa's SPS regime pursues the objectives of enhancing and strengthening its ability to satisfy its obligations under the WTO SPS Agreement; providing adequate protection against risks threatening human, animal and plant life and health; and enhancing its competitiveness to fully benefit from market access opportunities.[189]

Arguably, the above statement constitutes a summation of South Africa's trade policy on SPS measures.

[184] Kulkarni (n142 above) 2
[185] Debroy (n179) 34
[186] Act 71 of 2002
[187] http://www.itac.org.za/pages/services/trade-remedies (accessed on 30 March 2016)
[188] http://www.wto.org (accessed on 30 March 2016)
[189] http://www.wto.org(accessed on 30 March 2016)

4.3 The implications of removal of the AD duties and SPS measures imposed on US poultry

Arguably, the removal, by South Africa, of AD duties and SPS measures imposed on US poultry has the following implications, *inter-alia*;

4.3.1 Legitimacy of the measures

The removal, through AGOA, of AD duties and SPS measures could have a detrimental effect on the integrity of South Africa's trade policy relating to these measures. Arguably, the removal has a delegitimizing and or discrediting effect on South Africa's trade policy as regards these measures. It engenders an inference that the said measures served no legitimate purpose prior to their removal. In other words, these measures were imposed primarily for protectionist purposes rather than for the protection of South Africa's domestic poultry industry against unfair trade and for the protection of human, animal and plant health and safety respectively. As discussed in Chapter 3, the AD duties have been variously described as a "clear cut case of protectionism"[190] as well as being egregious.[191]

Like the AD duties, the SPS measures have not escaped criticism. During the WTO Trade Policy Review of SACU in 2015, the US commented as follows;

> Firstly, according to the Secretariat's report, South Africa bases its animal health requirements on World Organization of Animal Health (OIE) guidelines and on risks assessments. In light of South Africa's commitments under the WTO SPS Agreement, the United States remains extremely concerned regarding South Africa's non-science based requirements that impact the import of poultry meat from countries affected by highly pathogenic avian influenza (HPAI), import requirements concerning salmonella in poultry, import requirements for beef and finally import requirements concerning animal health issues related to pork, including trichinae, pseudo rabies and porcine reproductive and respiratory syndrome.[192]

The US believes that the AD duties and the SPS measures were not imposed for a legitimate purpose and consistent with the WTO law. Therefore, the removal of these measures outside of the WTO legal framework

[190] Watson (n34 above) 1
[191] Watson (n34 above) 1
[192] Minutes of the WTO Trade Policy Review meeting. Available at docs.wto.org

could give credence to the arguments that the measures were technically flawed and were imposed for protectionist purposes.[193] They were, therefore, unnecessary barriers to international trade. The writer is of the view that, in the interest of protecting the legitimacy and integrity of its measures and trade policy, South Africa should have, at least, insisted on the resolution of the disputes or concerns relating to these measures through the WTO legal framework. Ironically, the US has consistently and stubbornly defended its AD legal framework and has refused to negotiate on AD laws outside of the WTO.[194]

4.3.2 Bad precedence

The removal of the AD duties and SPS measures sets a bad precedent for South Africa. Arguably, it may open a floodgate for further US demands. The fact that South Africa has relented in relation to the removal of AD duties and SPS measures may embolden the US to make further demands. The manner in which South Africa has been compelled to remove these measures constitutes a blue print on how matters will handled under AGOA in future.[195] Already, as aforesaid, there are various concerns which the US has expressed regarding some of South Africa's policies in general and trade policies in particular. Therefore, there is a real possibility that the US will continue to extract concessions from South Africa, using AGOA as leverage. AGOA arguably presents a greater leverage for the US.[196] As a result, South Africa's trade policy or policies could be compromised.

4.3.3 Trade policy space

The AGOA eligibility condition requiring the elimination of barriers to US trade has had an immediate and direct impact on South Africa's trade policy relating to AD duties and SPS measures. AD duties and SPS measures are NTMs. In terms of this requirement, South Africa has been required to eliminate, *inter-alia* AD duties and SPS measures on US goods. In essence, if South Africa intends to remain as an AGOA beneficiary, it will have to review and change its trade policy on AD duties and SPS measures in relation to US goods. Importantly, South Africa may not impose new AD duties and SPS measures on US goods. Effectively, South

[193] E Naumann 'South and AGOA: Recent developments 2015-2016 and possible suspension' (2016) Tralac 9
[194] Apparently, during the SACU-US FTA negotiations, the US ruled out the discussion of its AD laws outside the WTO.
[195] Prinsloo (n61 above) 1
[196] Prinsloo (n61 above) 1. Arguably, other trade partners will seek to employ similar tactics in trade disputes with South Africa (Edwin Kessie)

Africa's trade policy space in relation to AD duties and SPS measures is constrained as far as the US is concerned. This extends to the whole trade policy spectrum (tariffs and other NTBs).

Importantly, as argued in Chapter 2, the elimination of barriers to US trade entails liberalizing or opening up South Africa's market to US trade, which would inevitably affect its domestic industries. As a result of the above requirement, South Africa may be hamstrung from using AD duties to protect its domestic industries from unfair US trade. The same applies to SPS measures. This situation is aggravated by the fact that AGOA does not provide exceptions for AD duties and SPS measures which have been validly imposed on US goods in accordance with the AD and SPS Agreements respectively.

Other than the above-mentioned eligibility requirement, the out of cycle review has serious implications for South Africa's trade policy in general and AD duties and SPS measures in particular. As stated in Chapter 2, the out of cycle review means that South Africa's trade policies are constantly under scrutiny and surveillance from the US. If South Africa establishes or implements a trade policy which the US views as inimical to its trade interests, a review of South Africa continued eligibility for AGOA benefits will ensue. As aforesaid, this has a chilling effect on South African trade policy. Effectively, South Africa may not be able to pursue and/or implement trade policies which it deems appropriate for its developmental needs.

4.3.4 Multilateral forums

In multilateral trade negotiations, South Africa is vocal on the issue of policy space for developmental purposes. The importance of policy space is highlighted in the South African Department of Trade and Industry's Trade Policy and Strategy Framework which provides as follows:

> South Africa, as with most countries in the world, is involved in ongoing multilateral and bilateral trade negotiations. It is necessary to approach these negotiations strategically to defend policy space needed to promote industrial development.[197]

As a developing country, South Africa needs policy space to pursue its developmental agenda. However, by virtue of AGOA's strict eligibility requirements, it could be exceedingly difficult for South Africa to pursue the policy space imperative. Inevitably, a choice has to be made between preserving the policy space for

[197] A South African Trade Policy and Strategy Framework (2010) 19

developmental objectives and participating in AGOA. Admittedly, this is a difficult choice to make if regard is had to the economic benefits which have accrued to South Africa from AGOA and policy space as a developmental imperative. Arguably, preservation of policy space and participation in AGOA seem to be mutually incompatible. Arguably, South Africa has sacrificed its policy space on the altar of the AGOA preferences and the benefits thereof.

4.4 AD duties and SPS measures within the WTO framework

AD duties are a legitimate trade policy instrument, provided for in the AD Agreement. As a WTO Member, South Africa has a right to impose AD duties in order to protect its domestic industries from unfair trade. Preventing South Africa from using a WTO sanctioned trade remedy, through AGOA, is a travesty. South Africa is also legally entitled to take SPS measures necessary to protect human, animal and plant life or health, provided that it complies with the SPS Agreement.[198] More importantly, as argued in Chapter 1, the DSB is the appropriate forum to settle trade disputes. Therefore, restricting South Africa from exercising its rights to use trade policy instruments and measures permissible under the WTO law constitutes an unfair limitation of its rights, which are enshrined in WTO law. In this regard, the writer is of the view that it was inappropriate for the US to use AGOA to compel South Africa to remove these measures. Consequently, AGOA is arguably a trade- enhancing, but rights-diminishing preferential scheme.

4.5 Conclusion

AD duties are entrenched in South Africa's international economic history and, more importantly, they constitute an important part of South Africa's trade policy. These measures have become increasingly important as a result of trade liberalization which South Africa undertook during and post Uruguay Round. Inevitably, as countries liberalize, tariffs decline significantly and AD duties become important in protecting domestic industries rendered vulnerable as a result thereof. SPS measures play an important role as well in the protection of human, plant and animal health and safety. Importantly, as a non-trade barrier, SPS measures have market access implications and therefore play an important part in South Africa's trade policy.

[198] Article 2 of the SPS Agreement

Given the important role that AD duties and SPS measures play in South Africa's trade policy, any scheme that seeks to circumscribe its rights and capacity to use these instruments and measures will have negative implications. The removal of these measures has a delegitimizing or discrediting effect on its trade policy. It engenders an inference that the measures were not used for legitimate purposes prior to their removal. The removal of these measures also sets a bad precedent. It may engender demands by the US for further concessions, which would compromise South Africa's trade policy. More importantly, the removal of measures that have been validly imposed in terms of and in accordance with the WTO law constitutes an unfair limitation of South Africa's rights to use these measures.

The strict eligibility requirements mean that South Africa may not introduce trade policies which are inimical to US trade interests. This effectively restricts South Africa's trade policy space. Having regard to the above considerations, if South Africa is intent on preserving the sanctity and integrity of its trade policies as well as its rights entrenched in the WTO Agreements, it may be in its interest to objectively and critically reflect on its future participation in AGOA.

CHAPTER 5
ALTERNATIVE RECIPROCAL TRADE AGREEMENTS

5.1 Introduction

In Chapter 2, it was stated that South Africa's future as an AGOA beneficiary hangs precariously. This is as a result of the strict eligibility requirements that South Africa has to comply with in order to secure continued eligibility for AGOA benefits.[199] South Africa's continued eligibility is also rendered precarious by the mandatory compliance monitoring mechanisms that have been incorporated into AGOA in the form of out of cycle reviews. The effect thereof is the creation of uncertainty and unpredictability in respect of AGOA. The uncertainty is heightened by the fact that AGOA preferences can be unilaterally withdrawn by the US.

South Africa's vulnerability is also highlighted by the poultry dispute discussed in Chapter 3 and the recent suspension of its eligible agricultural products from AGOA preferences as a result of the poultry dispute. Further, South Africa may have survived the out of cycle review with regard to the poultry dispute, but its position on other issues is likely to be interrogated in the mandatory annual reviews, or trigger out of cycle reviews and ultimately scupper its AGOA benefits.[200] The poultry issue creates a blue print on how future issues could be handled, using AGOA as a leverage both in South Africa and other SSA countries.[201]

This Chapter briefly explores the trade relationship between South Africa and the US. More importantly, it explores, in detail, possible alternative trade arrangements which South Africa and the US could pursue in order to establish a more secure, stable, predictable, reciprocal trade relationship.

[199] The eligibility requirements are discussed extensively in Chapter 2 above
[200] Subban (n43 above)
[201] Prinsloo (n61 above) 1

5.2 Trade Relations between South Africa and the US

The US is one the major trading partners of South Africa. South Africa is currently the 40th largest export market for US goods. In 2014, the US goods exports to South Africa amounted to $6.4 billion. On the other hand, South Africa's exports to the US amounted to $8.3 billion.[202] In 2013, the US services exports to South Africa stood at $3 billion and South Africa's services exports stood at $1.7 billion.[203] The stock of US Foreign Direct Investment (FDI) stood at $5.2 billion in 2013.[204]

As stated in Chapter 2, South Africa has benefitted substantially from its participation in AGOA.[205] However, besides AGOA, there is no other formal, substantive and reciprocal FTA between South Africa and the US. Therefore, AGOA forms the bed rock of South Africa-US trade and investment relations. It is argued that AGOA constitutes a disincentive for the conclusion of a bilateral reciprocal trade agreement between South Africa and US or an FTA between the US and SACU.[206] South Africa seems to be enjoying the deceptively low hanging fruits from AGOA.

On the investment front, there is no formal bilateral investment treaty (BIT) between South Africa and the US. This appears to be an oddity, in view of the fact that South Africa has concluded BITs with most of its major trading partners. The converse is true about the US. However, notwithstanding the absence of a BIT, South Africa has and continues to receive considerable FDI from the US.

5.3 Possible alternative trade agreements to AGOA

In order to establish a deeper, secure and lasting reciprocal trade relationship, there are various possible alternative trade agreements that South Africa and the US can pursue.

[202] National Estimate Report on Foreign Trade Barriers (n67 above) 359
[203] n67 above363
[204] n67 above363
[205] Chapter 2 above
[206] D Langton 'United States-Southern African Customs Union (SACU) Free Trade Area Negotiations: Backgrounds and Potential Issues' (2008) 5

AGOA provides for such alternatives. Section 108 of AGOA provides that it is the policy of the US to continue to, *inter-alia*

a) Seek to deepen and expand trade and investment ties between sub-Saharan Africa and the United States, including through the negotiation of accession by Sub-Saharan African countries to the World Trade Organization and the negotiation of trade and investment framework agreements, bilateral investment treaties, and free trade agreements, as such agreements have the potential to catalyze greater trade and investment, facilitate additional investment in sub-Saharan Africa, further poverty reduction efforts, and promote economic growth.

b) Seek to negotiate agreements with individual sub-Saharan countries as well with the Regional Economic Communities, as appropriate.

From the above provisions, it is clear that the US trade policy towards SSA extends beyond AGOA. The US envisions the deepening and strengthening of trade and investment relations with SSA through conclusion of reciprocal, mutually beneficial trade agreements such as the FTAs, Trade and Investment Framework Agreements (TIFAs) and BITs. Arguably, this is an ambitious and laudable trade policy. However, it remains to be seen if the SSA countries, particularly South Africa, endorse and or share the US vision. Seemingly, some SSA countries have short sighted trade policies which do not see beyond AGOA. Hence, it has been argued that AGOA apparently creates a disincentive for some SSA countries, including South Africa, to negotiate long term, stable, reciprocal trade agreements with the US.[207]

SACU and the US have previously attempted to conclude an FTA.FTA negotiations commenced on 3 June 2003. Apparently, the negotiations enjoyed the support of some US and South African business communities. It was supported by the US- South Africa Business Council as well as the Corporate Council on South Africa.[208] The proposed FTA was viewed as a ground breaker as far as the US-Southern African trade relations are concerned.

[207] Langton (n206 above) 5
[208] Langton (n206 above) 2

However, the FTA had critics as well, which critics included the US civil society.[209] After some sluggish progress, the FTA negotiations were suspended indefinitely in 2006. The suspension of the negotiations is attributed to a number of factors. Firstly, the parties could not agree on the scope of the negotiations. The US wanted a comprehensive FTA which incorporates, *inter alia*, intellectual property rights, government procurement, investment and services. On the contrary, SACU objected to the inclusion of these issues in the negotiation agenda. SACU wanted market access commitments first, and negotiations on other issues later.[210]

Further, with regard to industrial sectors to be included in the negotiations, the US wanted a negative list while SACU wanted a positive list.[211] It has been speculated that South Africa was reluctant to negotiate issues that are subject of the Doha negotiations, so as not to influence their positions in the WTO.[212] These issues included the so called Singapore issues and or 'new generation issues.'[213] Lack of trade policy harmony within SACU has also been cited as an obstacle to the conclusion of negotiations.[214] The following observations can be made with regard to the failed FTA negotiations;

a) The Singapore and or new generation issues which the US wanted to include in the negotiation agenda are contentious. Some developing countries, including South Africa, are opposed to negotiations on these issues at a multilateral level. It has been argued that in the aftermath of Cancun, the US shifted its attention to bilateral and regional FTAs as platforms to negotiate these sticky issues. The inclusion of Singapore issues in FTAs is therefore part of the US post-Cancun strategy.[215]

[209] Apparently, some sections of the US civil society were concerned that the FTA would have negative consequences for poor Southern Africans, citing adjustment costs, possible restrictions on HIV medication etc.
[210] Langton (n206 above) 5
[211] A negative list means that all industrial sectors are negotiable, except specifically excluded. On the other hand, a positive list means industries to be negotiated on are specified in advance. In most FTA negotiations, countries use a negative list. Parties reduce their tariffs on the basis of their applied rates. It is in services and investment, that there is no coherent practice. Recently concluded agreements tend to use a negative list on both services and investment (Edwin Kessie)
[212] Langton (n206 above) 5
[213] Singapore issues include investment, competition, government procurement and trade facilitation. Other issues included IP, environmental protection and trade remedies
[214] Langton (n206 above) 5
[215] P Draper et al 'US Trade Strategy after Cancun: Prospects and Implications for the SACU-US FTA' (2004) SAIIA Trade Report 4, 14

b) The negotiations were ill-fated. The parties were poles apart in terms of their mandates and there was little or no room for flexibility. For example, the US has been accused of using a template to negotiate, hence its insistence on a comprehensive, NAFTA-like FTA. The failed negotiations could be a manifestation of the limitations associated with a mandate-based approach to negotiations. Arguably, an interests-based approach could have yielded a different, mutually beneficial outcome. This is by virtue of the fact that an FTA between SACU and the US is in the interest of both parties.

c) Importantly, it could be argued that the US has achieved significant concessions from SACU through AGOA, which concessions it could not extract during the FTA negotiations. For example, as argued above, the AGOA eligibility requirement which requires SSA countries to liberalize or open up their markets to US trade and investment, through elimination of market access barriers contemplates total economic liberalization. Arguably, it would be illogical for SACU to continue insisting on a positive list and resisting the inclusion, in the negotiations, of some Singapore issues such as investment.

d) The failed FTA negotiations represent a missed opportunity to conclude a stable, predictable, reciprocal FTA; an FTA which would build on the successes of AGOA, while addressing its shortcomings.[216] Arguably, the advantages of a reciprocal FTA between SACU and the US far outstrip the benefits of AGOA. Certainty, stability and predictability are critical ingredients for long term investment and economic growth.

It would, however, be simplistic to under-estimate the increased complexity of the issues that were the subject of the negotiations and the underlying reasons for the failure thereof. For example, at SACU, negotiations are increasingly difficult as a result of asymmetrical levels of development among the constituents.[217] Further, comparatively speaking, trade negotiations involving the US are generally protracted and agonizing, even if such

[216] Draper (n215 above) 17
[217] Draper (n215 above) 2

negotiations involve other developed countries, such as the EU, with whom it shares common views on issues such as the Singapore issues.

In lieu of an FTA, SACU and the US concluded a Trade and Investment Development Co-operation Agreement (TIDCA). The objective of the TIDCA is to promote an investment climate and to expand and diversify trade between SACU and the US.[218] The TIDCA establishes a consultative group, comprising of senior officials from each party.[219] The over-arching functions of the consultative group include, *inter-alia*;

a) Endeavoring to conclude mutually beneficial trade and investment-enhancing agreements between SACU and the US, such as memoranda of understanding, mutual assistance agreements, and co-operation agreements in areas of common interest.

b) Monitoring trade and investment relations between SACU and the US, identifying opportunities for expanding trade and investment and relevant issues affecting trade for further discussion.

c) Identifying and working to improve impediments to trade and investment between SACU and the US.

The TIDCA further provides that any party may raise, for consultation, any specific matter relating to trade or investment between SACU and the US to the consultative group and the requesting party shall endeavor to provide an opportunity for the consultative group to consider, before taking actions that could adversely affect trade and investment interests of the other party. [220] The following observations can be made with regard to the TIDCA;

a) The TIDCA is a pale shadow of and a far cry from the ambitious FTA that SACU and the US intended to conclude. The TIDCA is a co-operative agreement, with no

[218] Article 1
[219] Article 2
[220] Article 4

binding legal commitments on substantive trade and investment issues. As a result, the TIDCA is disappointingly less ambitious and ineffective.

b) It was hoped that the TIDCA will act as a building block for a future FTA.[221] However, notwithstanding the fact that the TIDCA was signed in 2008, the negotiations on the FTA remain suspended.

c) The TIDCA was intended to be a consultative platform through which trade and investment issues between SACU and the US would be resolved. This is provided for in the preamble of the TIDCA.[222] Further, the TIDCA makes reference to the US GSP and AGOA as invaluable tools for promoting trade between SACU and the US.[223] Notably, the poultry dispute implicates SACU.[224] If the TIDCA was intended to be a consultative platform through which trade and investment issues are resolved between the parties, it is expected that the poultry issue should, at least, have been discussed through the TIDCA consultative platform before agriculture-related preferences were suspended by the US. Arguably, this demonstrates the impotence and ineffectiveness of the TIDCA.

5.4 Resuscitation of FTA Negotiations

The writer is of the view that the SACU-US FTA negotiations are capable of being resuscitated. The resuscitation of negotiations and conclusion of the FTA is in the interest of the parties.[225] On the part of the US, the FTA, *inter-alia* "would bring additional benefits to the US trade and investment and restore a more equal playing field compared to the position played by the EU".[226] Currently, the EU enjoys preferential access to the South African market through the Trade and Development Co-operation Agreement (TDCA). Further, the EU and SADC recently concluded and signed a reciprocal Economic Partnership Agreement

[221] Southern African Customs Union, Office of the USTR. Available at https//ustr.gov/countries/Africa/region
[222] Preamble reads 'Reaffirming and acknowledging their desire to resolve trade and investment issues that arise between SACU and the United States through consultation and dialogue as expeditiously as possible.'
[223] Preamble reads " Convinced of the importance of the United States' Generalized System of Preferences and the African Growth and Opportunity Act as invaluable tools for promoting trade between SACU and the United States"
[224] As stated in Chapter 3 above, the AD duties were imposed at the instance of the SACU poultry industry.
[225] According to the USTR, the FTA remains a long-term objective of SACU and the US.
[226] Erasmus (n10 above)

(EPA).[227] This should provide an added impetus for the US to pursue an FTA with SACU. The FTA would significantly improve the competitiveness of US exports into SACU.

With regard to South Africa, the FTA will effectively address its precarious and or vulnerable position as an AGOA beneficiary and restore its position as an equal trading partner of the US. More importantly, the conclusion of the FTA is in line with the New Growth Path which states that "South Africa's trade policy should become focused, identifying opportunities for exports in external markets and using trade agreements and facilitation to achieve these."[228] It would be ideal to pursue the FTA while South Africa is still a beneficiary of AGOA. Resuming the FTA negotiations after the withdrawal or suspension of the AGOA privileges may place South Africa under pressure and consequently compromise its interests.

For renewed negotiations to be successful, the parties will need to adopt a more realistic, flexible and pragmatic approach. As indicated above, an interests-based approach to negotiations will be ideal. It is understandable that mandates are important during negotiations. However, in certain circumstances, mandates are increasingly difficult to accomplish, especially where differences between the parties are fundamental. Further, one size- fits- all negotiation templates are inherently presumptuous and unrealistic. There are certain fundamental country and regional dynamics that must be taken into account when negotiating an FTA. For example, SACU consists of BLNS[229] countries whose economies are small and less sophisticated, industrially. Therefore, it would be unrealistic to expect such countries to open up their markets to the US trade over-night.

However, notwithstanding the fact that the BLNS economies are small, the FTA must comply with Article XXIV of the GATT 1994, which requires the elimination of duties and other restrictive regulations of commerce on substantially all the trade between the constituent territories in products originating in such territories.[230] To address the issue of the asymmetrical development of the parties, it has been suggested that the FTA could use the TDCA as a model as it provides for free trade with asymmetrical coverage of all trade and

[227] The EPA was signed on 10 June 2016 at Kasane, Botswana
[228] L Edwards (2012) 128 South African Institute of International Affairs Occasional Paper 1
[229] BLNS refers to Botswana, Lesotho, Namibia and Swaziland
[230] Article XXIV 8(b) of the GATT 1994

sectors.[231] In this regard, the US will make the speediest and deepest reductions to offset bilateral trade imbalances.[232] However, the US may not accept this proposal by virtue of the fact that its principled position is that an FTA must entail elimination of duties and regulations of commerce substantially on all trade. Notwithstanding, the above proposal is worth considering by virtue of its practical and realistic nature.

With regard to the contentious Singapore issues, it has been argued that South Africa has already made concessions on some of the Singapore issues through AGOA. As argued in Chapter 2, AGOA contemplates the liberalization or opening up of the South African market to US trade and investment. The same applies to Botswana, Lesotho and Namibia.[233] Arguably, it would be inconceivable for South Africa or SACU to continue resisting the inclusion of some Singapore issues in the negotiations agenda. Singapore issues are incredibly complex and policy laden. However, the writer is of the view that these issues are critical and, as such, they should be seriously considered. An escapist attitude towards these issues is unhelpful. The issues can neither be eternally resisted nor wished away. It is hoped that South Africa will continue to engage with these issues positively and intelligently.

The US appears to be trailing the EU in terms of regional trade policy ingenuity. The EU is moving away from unilateral preferential schemes. For example, it has abandoned the Lomé Convention and the Cotonou Agreement in favour of reciprocal EPAs. To this end, the EU has concluded or is in the process of concluding EPAs with various developing countries from the African, Caribbean and Pacific regions. Recently, the EU concluded an EPA with certain SADC countries.[234] The SADC-EU EPA provides for, *inter-alia*

a) Respect for the principle of asymmetry. The Agreement takes into account the different level of economic development among the parties.[235]

[231] Draper (n215 above) 35
[232] Draper (n215 above) 35
[233] Swaziland's eligibility to AGOA was suspended for allegedly violating, *inter-alia* the labour -related eligibility requirement.
[234] South Africa, Botswana, Lesotho, Namibia, Swaziland and Mozambique.
[235] Article 19(2)

b) Protection for infant industries in BLNS and Mozambique. The agreement takes into account the effects of liberalization on infant industries in BLNS and Mozambique and incorporates an infant industry protection clause.[236]

c) The provision by, the EU, of duty free, quota free treatment to eligible products originating from BLNS and Mozambique.[237]

d) Provisional safeguards against EU imports for BLNS and Mozambique.[238]

e) Commitment to co-operate in or negotiate Singapore issues in future.

The SADC-EU EPA could be used as a creative model for the SACU-US FTA. What is noteworthy about the EPA is that it is a product of incredible compromise and ingenuity. Like the US, the EU initially wanted the Singapore issues to be included in the EPA. South Africa objected on the basis that more time was needed to negotiate these issues.[239] More importantly, by embracing the asymmetry principle, the EPA is realistic and sensitive to the developmental dynamics of the parties. In this regard, it is submitted that if SACU and the US adopted the EPA negotiation model, with the necessary variations, the prospects of concluding an FTA may be enhanced. Notwithstanding the fact that this model may fall short of the US's deeper market access expectations, it appears to be more practical and workable.

The FTA could also be negotiated between the US and SADC, of which South Africa is part. However, this alternative could be difficult to accomplish. SADC seems to be fragmented. The fragmentation was manifested during the negotiation of the SADC-EU EPA. As indicated above, the EPA was ultimately concluded between EU and SACU plus Mozambique.

[236] Article 23
[237] Article 25
[238] Article 27 TER
[239] G Nunez '15 Year Review-Trade Policy in SA' (2008)TIPS, 7-8

5.5 Trade and Investment Framework Agreement

The US and South Africa have concluded a Trade and Investment Framework Agreement (TIFA). TIFAs provide strategic frameworks and principles for dialogue on trade and investment issues between the US and other contracting parties.[240] The TIFA, like the TIDCA, provides for consultation and co-operation between the US and South Africa on any trade and investment matter. To facilitate consultation between the parties, a Council on Trade and Investment (Council) is established.[241]

The function of the Council is to ensure the fulfilment of the objectives of the TIFA, which objectives, include, expansion of trade in goods and services as well as to encourage private sector investment.[242] The Council is also intended to provide a forum for consultation and dialogue on specific trade and investment matters of interest to the parties as well as identifying and working towards the removal of impediments to trade and investment flows. The recent impasse relating to the poultry dispute is clearly a matter of interest between the parties. It is not clear what role, if any, the Council played in the settlement of the poultry dispute. If it did not play any role, its relevance is doubtful.

It is noteworthy that the language of the TIFA is strictly co-operative. There are no substantive commitments on critical trade and investment issues. Therefore, the TIFA, by virtue of its substantive sterility and strictly co-operative nature, cannot be a substitute for an FTA. It could, perhaps, be a fore runner to an FTA. However, a lot of work has to be done in order to ensure that it achieves that purpose.

5.6 Bilateral Investment Treaty

A BIT can also be considered in respect of investment issues. However, such a treaty may be exceedingly difficult to achieve by virtue of the fact that South Africa recently decided not to

[240] Agoa.info/bilaterals/agreements.html (accessed on 6 April 2016)
[241] Article 2 of TIFA
[242] Article 2 and Article 1 of TIFA

enter into BITs, unless there are compelling circumstances. More importantly, there is considerable FDI stock from the US, notwithstanding the absence of a BIT between the parties. Notably, a BIT is not a comprehensive agreement by virtue of the fact that it only covers investments. Consequently, an FTA is preferable.

5.7 Conclusion

South Africa's continued eligibility for AGOA privileges hanged precariously as a result of concerns regarding its compliance with the eligibility requirements. Its privileges could be withdrawn, at any time, by the US President if it was determined that South Africa was in default. In view of the shortcomings of AGOA and South Africa's precarious position regarding its future participation in AGOA, it is in its interests to look beyond AGOA as far as its trade relationship with the US is concerned. The withdrawal of privileges will have negative economic repercussions for South Africa. In order to establish a more secure, predictable economic relationship with the US, there is a pressing need for a bilateral, reciprocal and mutually beneficial trade agreement. The establishment of the trade agreement could entail resuscitating the stalled FTA negotiations. To succeed, the parties will need to recalibrate their approach to negotiations. They need to adopt a more realistic, flexible and pragmatic approach. An interests-based approach to negotiations may be ideal.

There is an existing TIFA between South Africa and the US. The parties could use it as a building block for a more comprehensive agreement. However, more substantive flesh needs to be added to the skeletal agreement. To achieve a substantively superior TIFA, the parties will need to engage with issues open mindedly, objectively and intelligently. Ultimately, a reciprocal agreement will help address South Africa's precarious position under AGOA. Further, it will ensure that equilibrium is achieved as far as South Africa-US trade and economic relations are concerned. More importantly, it will secure the credibility and integrity of South Africa's trade policy.

CHAPTER 6
CONCLUSION

6.1 Conclusion

The research problem is premised on the fact that South Africa's future as a beneficiary of AGOA's preferences hanged precariously by virtue of certain policies and measures which the US was aggrieved with. The measures included the AD duties and SPS measures which South Africa imposed on US poultry. These measures were deemed to constitute a breach of eligibility requirements, in particular, the requirement relating to the elimination of barriers to US trade and investment. As a result, South Africa was placed under a special out of cycle review by the US, which review led to determination that South Africa was not complying with the eligibility requirements. South Africa was required to remove the above-mentioned measures, failing which certain agriculture-related AGOA preferences would be withdrawn. The preferences were subsequently withdrawn provisionally but later reinstated after the AD duties and SPS measures were removed.

The critical issue was that the legality of the AD duties and the SPS measures was never challenged by the US through the WTO DSB before South Africa was compelled, through AGOA, to remove the AD duties and SPS measures which were validly imposed on US poultry, in exchange for retaining or preserving AGOA preferences. The removal of the said measures has far-reaching legal implications for South Africa's trade policy and the integrity thereof. It was against this background that the study sought to examine the legal implications of AGOA for South Africa's trade policy with particular focus on AD duties and SPS measures. The ultimate objective of the study was to determine, from a legal perspective, if AGOA was a benefit to South Africa which was worth retaining or merely a poisoned chalice.

Chapter 2 entailed a descriptive consideration and critical analysis of AGOA and its effects on SSA in general and South Africa, in particular. It was noted that the AGOA preferences were aimed at promoting export earnings of SSA countries and stimulating their economic growth by giving them improved access to a developed US market. It was also noted that South Africa had benefitted significantly from AGOA. It was one the few SSA countries which have a high utilization rate of AGOA preferences. As a result of AGOA, it had

managed to pursue and achieve some of its industrialization objectives. Consequently, AGOA occupied a special place in South Africa's trade policy.

It was also noted that while AGOA granted preferential treatment to exports from SSA countries, it was not unconditional. They were certain requirements which SSA countries must comply with in order to be eligible or remain eligible for AGOA preferences. These requirements, included, establishing a market based economy that protected private property, incorporated a rules-based trading system and limited government interference in the economy, elimination of barriers to US trade and investment, respect for the rule of law and democracy. It was argued that the inclusion of non-economic or non-trade requirements was controversial. It aggravated the uncertainty and unpredictability of AGOA. It made compliance with the eligibility requirements complex and burdensome. It was also argued that the non-economic or non-trade eligibility requirements had no place in preferential trade schemes. If anything, there were used for self-serving and opportunistic purposes. Importantly, they demonstrated the extent to which the discretion conferred on preference grantors has been abused to achieve other non-trade objectives.

With regard to the out of cycle review mechanism, it was observed that this mechanism was built into AGOA to ensure that there was enhanced monitoring of compliance with eligibility requirements. It was also observed that the involvement of the US public in monitoring compliance by eligible SSA countries was a unique feature of AGOA. It ensured democratic participation in trade policy implementation. On the other hand, it could have negative ramifications for eligible SSA countries. They may be deterred from implementing trade and other policies which may antagonize the US public. It was unclear why AGOA has been singled out for such enhanced monitoring.

With regard to the eligibility requirements and the out of cycle reviews, it was argued that they were strict and oppressive. They created uncertainty and instability in relation to the SSA countries' continued eligibility for AGOA preferences. This was particularly true in respect of South Africa whose policies and laws had engendered concerns from the US. Uncertainty and unpredictability discouraged investment, particularly long term, transaction based investment. Importantly, the strict review procedures had a chilling effect on the trade policies of the eligible SSA countries. Fear of out of cycle reviews could discourage eligible

SSA countries from implementing trade and other policies which are critical for their socio-economic development.

It was also noted that AGOA was a unilateral Act, not a treaty. The implications thereof are that an SSA country's eligibility for AGOA could be revoked at any time subject to the provision of a 60 day notice. The rationale for such a notice was not clear by virtue of the fact that AGOA did not provide for bilateral consultations prior to the suspension or withdrawal of preferences. Importantly, AGOA did not provide for a dispute settlement mechanism. Effectively, an offending SSA could not defend itself against allegations of non-compliance with the eligibility requirements. It had no voice and made no input in the determination of its future under AGOA. Consequently, the unilateral nature of AGOA deprived it of the necessary certainty and stability. It was argued that the risks associated with the unilateral nature of AGOA were highlighted by the recent suspension of South Africa's eligible agricultural products after it was determined that the AD duties and SPS measures imposed on US poultry constituted a breach of the AGOA eligibility requirements. The suspension should serve as a wakeup call for South Africa and other SSA countries to look beyond AGOA by considering concluding reciprocal trade and investment agreements with the US.

With regard to the issue of non-reciprocity, it was argued that AGOA, although technically a non-reciprocal preferential scheme, was *de facto* reciprocal. In return for improved market access to the developed US market, preference beneficiaries were required, *inter-alia* to adopt free market economies, accord national treatment to US goods, services and investments. Importantly, they were required to eliminate barriers to US trade and investments. The requirement contemplated a liberalization of SSA markets for US trade and investment. As a result, it was argued that AGOA has reverse preferences embedded or built into it. It was argued that the liberalization of SSA markets could have negative effects on their economies. The consistence of AGOA with the Enabling Clause was discussed in the context of the GATT 1994, particularly Article 1:1 and the EC-Preferences case. The writer endorsed the view that AGOA was inconsistent with the findings of the EC-Preferences case, particularly the findings relating to non-discrimination. This was by virtue of the fact that AGOA had a closed list of beneficiaries.

Chapter 3 entailed an analysis of the South Africa-US poultry dispute. It was noted that the demand, by the US, that South Africa remove the AD duties imposed on its poultry in return

for preserving access to AGOA preferences, was a culmination of a dispute which started in 2000 when the BTT imposed AD duties on US poultry. It was also noted that the decision by the BTT to impose AD duties had attracted severe criticism. The decision has been characterized as illogical, unfathomable and legally unsound. The duties have been described as egregious. Arguments for and against the decision were explored and critical issues requiring further clarification from a WTO Panel were identified. The issues requiring clarification included, 1) whether or not the explanation proffered by the BTT for derogating from the obligation to use the books and records of the US poultry producers in calculating costs was well- reasoned and adequate, (2) whether or not it considered all available evidence to arrive at the proper allocation of costs and (3) whether or not the weight based methodology it applied constitutes a was proper allocation of costs. Having analysed the arguments for and against the decision, it was acknowledged that the argument against the decision could be well grounded. However, it was argued that in order to get a definitive ruling, it was important for the dispute to be referred to the WTO. It was also noted that notwithstanding the removal of the AD duties, the dispute had not been permanently settled. South Africa had indicated that it would reinstate the AD duties if its eligibility for AGOA preferences was revoked. With regard to the SACU poultry industry, ITAC was exhorted to shine a spotlight on the industry by virtue of the fact it exhibited protectionist characteristics.

Chapter 4 entailed a discussion on the implications of removing AD and SPS measure for South Africa's trade policy. It was noted that these measures, particularly the AD duties were entrenched in South Africa's international economic history. AD duties played a critical and pronounced role in South Africa's trade policy. In fact, South Africa was regarded as one of the prolific users of AD duties. Apparently, there was a correlation between trade liberalization and the proliferation of AD duties.

On SPS measures, it was argued that SPS measures also played a critical role in South Africa's trade policy. They had market access implications hence their importance in trade policy. It was argued that the removal of the AD duties and SPS measures has serious implications for South Africa's trade policy and the integrity thereof. The removal of the measures raised questions regarding the legitimacy of these measures. It raised questions as to whether these measures were legitimate, in the first instance or prior to their removal, or were used for protectionist purposes. Importantly, the removal gave credence to the US belief that the measures were not used for legitimate purposes and in accordance with WTO law.

Ultimately, it was argued that the removal of the measures had a de-legitimizing or discrediting effect on these measures.

It was also argued that the removal of the measures sets a bad precedent. It may embolden the US to demand further concessions which may compromise South Africa's trade policy. Other trading partners may be emboldened too. Importantly, the removal of measures that were validly instituted in accordance with the WTO law, in return for preserving AGOA preferences constituted an abuse of preference schemes. It also had a restrictive effect on South Africa's trade policy space. The removal was also ironic in view of the fact that the US was a fervent user of AD duties and SPS measures.

Chapter 5 entailed a discussion on the alternative arrangements to AGOA. It was argued that in order to address the shortcomings of AGOA, it was critical for South Africa or SACU to seriously consider concluding an FTA with the US. This would ensure that a lasting, transparent, reciprocal trade relationship was secured. With regard to the previous, failed FTA negotiations between SACU and the US, it was observed that the negotiations were ill fated by virtue of the fact that the parties were poles apart in terms of their mandate and ambition and there was little or no room for flexibility. For example, the one-size-fits all, template- based approach adopted by the US was presumptuous and unrealistic.

It was also observed that the failed negotiations represented a missed opportunity to conclude a lasting, transparent reciprocal trade agreement. With regard to the TIDCA which was ultimately concluded between SACU and the US, it was argued that same was a pale shadow and a far cry from the FTA that the parties wanted to conclude. The TIDCA lacked ambition, substance and, importantly, it had failed to meet the parties' expectations. It was argued that in order for SACU and the US to succeed in concluding an FTA, they would need to adopt a more realistic, flexible and pragmatic approach. An interests-based approach to negotiations was recommended. It was also recommended that the SADC-EU EPA could be used as a creative negotiation model by virtue of its practical and flexible nature. On contentious Singapore issues, South Africa or SACU was exhorted to adopt an open minded and intelligent approach to the issues. These issues were increasingly important and could not be eternally ignored or evaded.

Having analyzed the advantages or benefits of AGOA versus its disadvantages or risks, the writer concludes that AGOA is a poisoned chalice that has been handed to South Africa. Advantages or benefits are overwhelmed by the disadvantages or risks.

6.3 Recommendations

The following recommendations are made:

6.3.1 Review participation in AGOA

While South Africa has economically benefited from AGOA, it should objectively review its participation in the scheme. As indicated above, there are other critical legal and policy considerations that should be taken into account, other than economics. The review is in the interest of protecting the sanctity and integrity of South Africa's trade policies.

6.3. 2 Conclusion of a reciprocal FTA with the US

In order to establish a more secure, stable, predictable and permanent trade relationship with the US, South Africa should seriously and objectively consider concluding a reciprocal FTA with the US. The recent experience relating to the removal of the AD duties and the SPS measures, and more importantly, the fact that South Africa's continued participation in AGOA is not guaranteed, should provide the necessary incentive or impetus to revive the stalled FTA negotiations with the US.

6.3.3 Increased scrutiny of preferential schemes

At the multilateral level, it is high time that preferential schemes such, as AGOA, should be subjected to increased scrutiny to prevent abuse of same to achieve non-trade objectives and, more importantly, to prevent the adulteration and/or subversion of the SDT principle.

6.3.4 Resuscitation of Doha negotiations

While it is true that Doha negotiations are increasingly complex, it is equally true that there are tangible benefits that could accrue from the negotiations. Such benefits, include, *inter-*

alia further reduction of MFN tariffs. A significant reduction of MFN tariffs may, *inter-alia* render, preferential schemes, such as AGOA, redundant.

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