THE AFRICAN GROWTH AND OPPORTUNITY ACT: A POISONED CHALICE HANDED TO SOUTH AFRICA?

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1 Introduction

The African Growth and Opportunity Act (AGOA) was signed into law by the then president of the United States (US), Bill Clinton, on 18 May 2000. Since then, it has undergone various amendments, the latest of which is the Trade Preferences Extension Act of 2015. AGOA is a unilateral, non-reciprocal trade preference programme that provides duty-free treatment for US imports of certain goods from eligible sub-Saharan African countries (SSA).[1] Currently, there are 38 eligible SSA countries.[2] Its overarching objective is to stimulate market-based economic growth and development in SSA countries and to deepen US trade and investment ties in the region.[3] Notably, in order to be eligible for preferences, an SSA country must be an existing beneficiary of the US General Scheme of Preferences (GSP).[4] More importantly, it must satisfy certain essential requirements or conditions, which include the establishment of a market-based economy, incorporating a rules-based trading system; elimination of barriers to US trade and investment;

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1 BR Williams 'African Growth and Opportunity Act (AGOA): Background and Reauthorization' 2015 *Congressional Research Service* Report 1.

2 The 39 AGOA eligible SSA countries are: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Comoros, Republic of the Congo, Côte d'Ivoire, Djibouti, Ethiopia, Gabon, Guinea, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, South Africa, Tanzania, Togo, Uganda and Zambia.

3 Williams (note 1 above) 1.

4 G Erasmus 'Some Bigger Picture Implications of South African Trade Policies' 2014 *Tralac* available at @ https://www.tralac.org/discussions/article/5354-some-bigger-picture-implications-of-south-african-trade-policies.html (accessed 18 August 2017) 2.

incorporation of the protection of intellectual property; adherence to the 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 regarding whether an existing AGOA country is making continual progress in meeting the above requirements.[6] Such a review can be initiated at any time and can be triggered by a petition from any interested person.[7] The out-of-cycle review is intended to provide for closer monitoring and scrutiny, ensuring that the SSA countries continuously meet AGOA's eligibility requirements.[8] If, pursuant to the out-of-cycle review, the president determines that an existing AGOA member does not meet the above-mentioned requirements, he is obliged to provide that country with a 60 day notice period and must consequently make an appropriate decision based on the review. The president may therefore either terminate the designation of the country as a beneficiary, or withdraw, suspend or limit the application of duty-free treatment with regard to eligible products from that country.[9]

2 South Africa and the AGOA Review

South Africa is one of the major beneficiaries of AGOA's preferences. It has benefited substantially 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 currently hangs precariously in the balance due to its adoption and implementation of certain policies and measures which have aggrieved the US. These measures include anti-dumping (AD) duties as well as sanitary and phytosanitary (SPS) measures, which were imposed on US poultry by South Africa.

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 subjected to a special out-of-cycle review by the US. The review induced the determination that South Africa did not comply with the eligibility

5 S 105 of AGOA available at @https://agoa.info/images/documents/2/AGOA_legal_text.pdf.

6 Ibid.

7 Id s 105(c)(3)(A).

8 Erasmus (note 4 above) 25.

9 S 105(4)(E) of AGOA.

10 G Erasmus 'The AGOA Saga in a Trade Governance Context' 2016 *Tralac* available at https://www.tralac.org/publications/article/9024-the-agoa-saga-in-a-trade-governance-context.html (accessed 18 August 2017) 22.

requirements. As a result, South Africa was given an ultimatum by the US president, which required South Africa to remove the above-mentioned duties and measures, failing which certain AGOA preferences would be withdrawn. It must be noted that the AD duties had been in force since 2000 and were imposed in accordance with the relevant rules of the World Trade Organization (WTO). Moreover, both the AD duties and the SPS measures have been subjected to a sunset review and extended in accordance with the WTO law.

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 in exchange for retaining or preserving AGOA preferences. The removal of the said measures has far-reaching legal implications for the integrity of South Africa's trade policy. Importantly, it raises critical issues relating to the non-reciprocity of AGOA. It is within this context that this paper seeks to examine the legal implications of AGOA for South Africa's trade policy, with particular focus on its position regarding AD duties and SPS measures. It will also determine, from a legal perspective, whether AGOA is sufficiently beneficial to South Africa and worth retaining, or whether it constitutes a poisoned chalice.

3 The Nature and Context of AGOA as a Unilateral and Non-reciprocal Preferential Trade Scheme

3.1 Background Information

Generally, the purpose and objective of AGOA is to expand US trade and investment within SSA, to stimulate economic growth and to encourage economic integration of SSA countries into the global economy.[11] However, there are other non-economic purposes, which include the promotion of democracy and stability, respect for human right, labour rights and the rule of law as well as the safeguarding of US national security.

In order to catalyse the economic growth of the SSA countries, AGOA provides for preferential treatment of exports from SSA countries in the form of duty-free and, mostly, quota-free access to the US market.[12]

11 'AGOA sword will keep hanging above South Africa' *Business Day* 29 March 2016.

12 L Páez et al 'A Decade (2000–2010) of African-US Trade under the African Growth Opportunities Act (AGOA): Challenges, Opportunities and a Framework for Post AGOA Engagement' (2010) 81 *African Trade Policy Centre* 3 available at https://www.afdb.org/en/aec-2010/papers/a-decade-2000-2010-of-african-us-trade-under-the-african-growth-opportunities-act-agoa-challenges-opportunities-and-a-framework-for-post-agoa-engagement/(accessed 18 August 2017).

The aim of this preferential treatment is to promote exports from SSA countries and to attract investments to SSA thereby helping to stimulate economic growth in the region.[13] Notably, these preferences are in addition to those allowed under the US GSP, provided such exports are not deemed to be import sensitive.[14] In addition to tariff preferences, AGOA also provides technical assistance to help SSA countries qualify for benefits under the preferential trade framework.

AGOA is the cornerstone of US-Africa trade and investment.[15] It has been credited with ensuring the substantial enhancement of Africa's access to the US market. Nevertheless, there are some contentious conditions imposed on SSA countries to qualify for trade with the US in terms of the AGOA framework. To be eligible, a state must

(a) establish a market-based economy that protects private property, incorporates an open, rules-based trading system, and minimises government interference in the economy through such measures as price controls, subsidies and government ownership of economic assets;
(b) eliminate barriers to US trade and investment, incorporate the provision of national treatment and measures to create an environment conducive to domestic and foreign investment and protect intellectual property as well as the resolution of bilateral trade and investment disputes;
(c) observe the rule of law and political pluralism;
(d) uphold respect for political, civil and human rights;
(e) protect workers' rights; and
(f) desist from activities that undermine US national or foreign policy interests.

The SSA countries' continued eligibility for AGOA preferences is now subject to enhanced, ongoing scrutiny and/or surveillance in the form of public comments and hearings, petitions and out-of-cycle reviews by the president. The measures for enhanced, ongoing scrutiny are discussed below.

13 Id 3.
14 Ibid. An import-sensitive product refers to 'a product that is susceptible to competition from imports from other country suppliers and they generally receive longer phase-in periods for tariff reduction or elimination in trade agreements' https://definition.uslegal.com/i/import-sensitive-producers/(last accessed 2 August 2017).
15 S 102 of AGOA.

3.1.1 Public Comments and Hearings

AGOA provides that the president, in carrying out the review, will annually publish a notice of review in the federal register and request public comments on whether beneficiary SSA countries comply with the eligibility requirements set forth in section 104 of AGOA and section 502 of the Trade and Development Act.[16]

The US Trade Representative (USTR) is obliged to hold public hearings within 30 days of publication of the said notice of review and request further public comments.[17] The US public is legally entitled to comment on whether SSA countries comply with the eligibility requirements provided for in AGOA.[18] It is not clear if this public participation process in compliance monitoring or enforcement is unique to AGOA or if it is a universal requirement applicable to other US trade policies.

3.1.2 Petitions

Section 105 of AGOA provides for the establishment, within 60 days of the enactment of AGOA, of a process to allow any interested person at any time to file a petition with the office of the USTR regarding the compliance by any SSA country with the eligibility requirements. The president is obliged to take into account such petitions in the review process. In view of the fact that AGOA contains broad and extensive eligibility requirements, interested persons could include broad and diverse categories of persons or groups of persons with their own particular agendas. Importantly, petitions are a potent and effective legal tool in the hands of lobby groups or special interest groups, especially since the president is obliged to consider it during the review. Notably, petitions can also trigger a review.

3.1.3 Out-of-Cycle Reviews

On 14 May 2015, the Senate of the United States approved the African Growth and Opportunity (AGOA) Extension and Enhancement Act of 2015. This new piece of legislation, 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 concerning whether a beneficiary SSA country meets the eligibility requirements.[19] Importantly, the initiation of an out-of-cycle review is subject to prior congressional notification

16 Id s 105. The African Growth and Opportunity Act (AGOA) was signed into law on 18 May 2000 as Title 1 of The Trade and Development Act of 2000.

17 S105 of AGOA.

18 Ibid.

19 Ibid.

and consultation.[20] Further, after each review, the president is obliged to submit a report regarding that country to the Committee on Ways and Means of the House of Representatives.

Section 105(4)(E) of AGOA provides for an initiation of a special out-of-cycle review for certain SSA countries. This was pursuant to compliance concerns raised with regard to specific SSA 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. Among others, the concerns related to the AD duties that South Africa had imposed on US poultry in 2000. These duties were viewed as barriers to US trade. It was felt that South Africa benefitted from AGOA while it erected barriers to US trade.

Notably, the SSA country that is the subject of an out-of-cycle review does not participate in the review process, nor can it challenge the outcome thereof; this is a result of AGOA being a unilateral act. Moreover, AGOA does not provide for bilateral consultations or 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 of any eligible products if he is of the view that this would be more effective in promoting compliance than the termination of the country's membership from AGOA.[21] When weighing these two latter options against each other, the identification of such eligible products is important. Eligible products that are of strategic importance to an offending SSA country are likely to be primary targets, otherwise the measure would be ineffective.[22]

The president *may* not act against the offending SSA country unless he notifies both Congress and the offending country 60 days in advance of his intention to withdraw, suspend or limit such duty-free treatment; this notice should also include the factors which were taken into consideration in making the decision to terminate such designation.[23] In other words, the president should provide a notice and the grounds for the decision to withdraw, suspend or limit preferences. The use of the word 'may' indicates that the president is under no obligation to notify Congress or the offending SSA country before taking action. Further, the notification requirement appears to be purely procedural.

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20 Ibid.

21 Ibid.

22 For example, in the case of South Africa, eligible agricultural products were identified to be of strategic economic importance.

23 S 105 of AGOA.

It is also 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 duty-free treatment is limited, suspended or withdrawn.[24] Without the possibility of prior bilateral consultations or the opportunity for the offending SSA country to offer mitigating circumstances, the factors considered when deciding to terminate that country's eligibility may not necessarily be objective and/or balanced.

The decision to withdraw, suspend or limit access to the preferences is unilateral. As a result, the president is not legally obliged to enter into consultations with, or invite or accept representations from, the offending SSA country prior to taking such decision. This is so because AGOA does not bestow any justiciable rights on SSA countries. The suspension of South Africa's eligible agricultural products from duty-free trade is an example.[25] In this case, the US and South Africa entered into voluntary bilateral consultations *ex post facto*.

3.2 Rules of Origin (RoO)

For products from SSA countries to qualify for duty-free treatment, they must meet certain strict rules of origin (RoO) requirements.[26] Among others, the requirements stipulate that the product must be imported directly into the US from the eligible SSA country and that at least 35 per cent of the appraised value of the product must be 'the growth, product or manufacture of a beneficiary 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; and (2) the direct costs of processing in the country.[27]

Up to 15 per cent of the appraised value of the 35 per cent threshold may be of US origin.[28] 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.[29]

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24 MG Snyder 'GSP and Development: Increasing the Effectiveness on Nonreciprocal Preferences' (2012) 33 *Michigan Journal of International Law* 821 842.

25 In 2016 South Africa's eligible agricultural products were suspended from AGOA preferential treatment 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 timeframe.

26 RoO are critical in preventing the dilution of preferences.

27 Williams (note 1 above) 2.

28 Ibid.

29 Ibid.

3.3 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.[30] South Africa has been able to leverage AGOA to grow its exports to the US in sectors other than natural resources, notably the automotive, chemical and agricultural sectors (representing 28 per cent, 14 per cent and 6 per cent, respectively, of the total exports in 2014).[31] Between 2000 and 2014, South Africa doubled the value of its exports to the US, totalling US$8,27 billion in 2014, of which 40 per cent benefitted from AGOA and GSP preferences.[32] In 2014, South Africa's main agricultural exports to the US were oranges (US$41 million), wine (US$33 million) and macadamia nuts (US$31,8 million).[33] It is estimated that AGOA directly and indirectly generated 62 395 jobs.[34]

From the above statistics, it is evident that South Africa is a major non-oil beneficiary of AGOA and has been able to utilise the AGOA preferences effectively. Also, South Africa is one of the few SSA beneficiaries who have managed to diversify their exports to the US under AGOA. Moreover, AGOA plays a critical role in supporting South African jobs and industrialisation objectives.[35] As such, the enforced withdrawal of AGOA benefits would negatively affect not only the South African economy, but also employment opportunities.

3.4 Critique of AGOA

Without doubt, AGOA has made some valuable contributions to the economic development of certain SSA countries, and in particular South Africa. Notwithstanding its economic benefits, AGOA has some critical shortcomings. These include strict eligibility requirements; *de facto* reciprocity; the possibility of unilateral withdrawal of benefits by the US; strict review procedures; the limitation of the policy space of beneficiaries; and the limitation of product coverage, especially with regard to export products of interest to SSA beneficiaries.

For purposes of this paper, particular focus will be placed on South Africa in the assessment of the shortcomings of AGOA.

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30 JB Cronje 'US to Suspend SA's AGOA Benefits' 2015 *Tralac* available at https://www.tralac.org/discussions/article/8475-u-s-to-suspend-south-africa-s-agoa-benefits.html (accessed 26 June 2016) 1.

31 C Prinsloo 'AGOA and the Future of US-Africa Relations' 2016 available at http//www.saiia.org.za (accessed 4 April 2016).

32 Ibid.

33 Cronjé (note 30 above) 1.

34 'Don't let Chicken Stand in the Way of AGOA' *Business Day* 24 March 2014.

35 Cronjé (note 30 above).

Some of the requirements regarding the eligibility of a country are not based purely on economic criteria. For example, some non-economic criteria require the establishment of a system to combat corruption and bribery, such as the signing and implementing of the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the protection of labour rights; and non-involvement with 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 controversial. Ostensibly, the US is using AGOA as an instrument to promote certain foreign-policy objectives.[36] Furthermore, this inadvertently engenders uncertainty and unpredictability by making it increasingly difficult for beneficiaries to comply with the eligibility requirements. Moreover, such non-trade requirements in themselves contribute to unnecessarily complex and strict eligibility requirements. The controversial AGOA eligibility requirements include the elimination of barriers to trade and investment; the establishment of a market-based economy that protects private property; the protection of intellectual property; and strict review procedures. The authors are of the view that non-trade eligibility requirements have no place or relevance in a preferential trade scheme such as AGOA. If anything, they may be abused by preference grantors for self-serving and opportunistic purposes.

3.4.1 Elimination of Barriers to US Trade and Investment

This is arguably a market-access requirement and entails removal of tariffs and non-tariff barriers. It implies that eligible SSA countries must liberalise or open up their markets to US trade and investment. Beneficiaries are required to adopt and maintain trade policies that are favourable to US trade and investment. In this context, trade includes both goods and services. Non-tariff barriers include AD duties, technical regulations and standards as well as SPS measures. Barriers to US investment include pre-establishment requirements, local content requirements and limitations on capital repatriation.

In the review, the US has complained that, with regard to tariffs, its imports face higher most-favoured-nation (MFN) tariffs in South Africa than the European Union (EU) counterparts.[37] The US pointed out that goods originating from the EU enjoy preferential tariff treatment because of the South Africa-EU Trade and Development Co-operation Agreement

[36] Erasmus (note 10 above) 4.

[37] 'National Trade Estimate Report on Foreign Trade Barriers' (2015) available at https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2015/2015-national-trade-estimate (accessed 15 August 2017) 361.

(TDCA). Eligible EU tariff lines average 4,5 per cent on an unweighted average, while the general tariffs faced by US imports average 19,5 per cent on similar tariff lines.[38] It is expected that the EU-SADC Economic Partnership Agreement (EPA) will further affect the competitiveness of US imports to South Africa.[39] Further tariff reductions is a contentious issue at the Doha Development Round negotiations. Similarly, South Africa has adopted a cautious and calculated approach towards the contentious issue of further reductions in tariffs. In this context, it would be interesting to see how the US will use AGOA to leverage the extraction of tariff concessions outside of a multilateral framework and in the absence of a free trade agreement (FTA) between the two parties.

Other than requiring liberalisation or opening up of SSA markets to US trade and investment, the requirement of elimination of barriers to US trade and investment also entails according national treatment to US firms and investments. This means that US products, services and investments are not to be treated less favourably than its domestic counterparts. While national treatment is one of the core principles enshrined in the 1994 General Agreement on Trade and Tariffs (GATT) and the 1995 General Agreement on Trade in Services (GATS), it may negatively affect certain SSA countries in the area of investment. Affording national treatment to US investments may necessitate SSA countries to review their investment policies. This, in turn, may require the opening up of sectors to foreign investment where this had previously been restricted. In the South African context, programmes such as the Independent Power Producer Procurement Programme, which contain local content requirements, may fall foul of the national treatment requirement. Other transformative policies such as the Black Economic Empowerment Programme may also fall foul of the said requirement. Similarly, without the necessary qualification and caution, national treatment of US investments may be detrimental to the developmental and economic interests of the SSA countries.

Technically, eligible SSA countries are not required to reciprocate AGOA tariff preferences. However, the fact that they are required to liberalise 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 criticised for having built-in reverse preferences.[40] To be sure, AGOA typifies such preferential schemes. In

38 Ibid.

39 Ibid.

40 J Bhagwati 'Reshaping the WTO' 2005 *Far Eastern Economic Review* 25 29.

essence, AGOA's supposed altruism does not disguise the furthering of the US's interests.[41]

It is also interesting to note that AGOA does not provide an exception for otherwise valid and unchallenged non-tariff barriers such as AD duties and SPS measures instituted by beneficiaries as a result of and in accordance with the WTO law. The inclusion of investment in AGOA is also an interesting development. Developing countries (including South Africa) have been fierce and consistent in their resistance to the debate on the so-called 'Singapore issues' in the Doha Development Round negotiations. Preservation of policy space underlies and informs their resistance to these issues. The Singapore issues include aspects such as investment, government procurement and competition law. It is arguable that by participating in AGOA, the SSA countries have implicitly acquiesced to the investment issue and the implications thereof. It would be interesting to see how these countries, that have consented to liberalise their investment markets in favour of the US, will continue to resist negotiations on investment at a multilateral level without risking a loss of credibility. In these 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. These barriers include the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) as well as transformation charters in various sectors such as finance and mining.[42] The MPRDA is a controversial Act. The controversy stems from the fact that it places mineral and petroleum resources into the custody of the state. As a result, the contention is that the Act is expropriatory in its nature.[43] Notably, the transformation thread (Black Economic Empowerment) runs through the MPRDA and the various transformation charters. These indigenisation or Black Economic Empowerment requirements are a source of concern for US firms and investors. Accordingly, they may affect South Africa's continued eligibility for AGOA preferences.

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41 PM Lenaghan 'Trade Negotiations or Capitulations: An African Experience' (2006) 17 *Berkeley La Raza Law Journal* 117 119.

42 'National Trade Estimate Report' (note 37 above) 364.

43 The constitutionality of the MPRDA was challenged in the case of *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), 2013 (7) BCLR 727. The Act was challenged for its effect of expropriating the mineral rights of the holders. However, the Constitutional Court dismissed the action on the basis that the state did not acquire ownership of the mineral rights concerned — a finding that is not immune to criticism.

3.4.2 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 to protect private property. Essentially, 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.[44] The ability of the elected governments of eligible sovereign countries to adopt and pursue their preferred form of economy is constrained if they wish to trade with the US.[45] AGOA effectively discourages state intervention in the economy. Subsidies and price controls are inevitably discouraged as well. Ironically, the US substantially subsidises its own agricultural sector. SSA countries, such as South Africa, could face prejudice because of this requirement. Moreover, in South Africa, the state is an active player in the economy through state-owned enterprises (SOEs), such as Eskom and South African Airways. Further, subsidies, such as the Automotive Production and Development Programme, constitute an essential part of South Africa's industrial and/or trade policy. Importantly, the requirement regarding a market-based economy that protects private property has the effect of undermining the sovereignty of eligible SSA countries. It significantly constrains their ability to pursue economic and/or trade policies that 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 nationalisation 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 B27B of 2012 (the PSIRA Bill). The concerns stem particularly from section 20(c) of the Bill, which requires that South Africans hold at least 51 per cent of the ownership, equity and control of private security enterprises.[46] The said amendment is quite controversial and is criticised for falling foul

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44 Lenaghan (note 41 above) 123.

45 Ibid.

46 Before the introduction of the controversial PSIRA Bill, a security business could only be registered as a security-service provider if all the persons performing executive or managing functions in respect of the security business are registered as security-service providers; and in the case of a security business which is a company, close corporation, partnership, business trust or foundation, if every director of the company, every member of the close corporation, every partner of the partnership, every trustee of the business trust and every administrator of the foundation (as the case may be) was registered as a security-service provider. See s 20(2) of the Private Security Industry Regulation Act 56 of 2001.

of South Africa's GATS commitments, which require that foreign-security providers have unrestricted market access and the right to have national treatment accorded to them. It is also argued that the said amendment falls foul of section 25 of the Constitution of the Republic of South Africa, 1996 on the basis that it amounts to expropriation. In the case of expropriation in the national interest, the Constitution requires that just and equitable compensation be paid. In the absence of prescribed compensation, the PSIRA Bill is likely to be the subject of a future out-of-cycle review. Importantly, the fact that South Africa has a liberal and progressive Constitution, which guarantees protection of private property and compensation in the event of expropriation, does not insulate it from the above requirement.[47]

3.4.3 Protection of Intellectual Property (IP)

The 1994 Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) provides for a minimum standard of IP protection. Importantly, WTO members enjoy certain flexibilities that have been built into the agreement. These flexibilities include transitional periods; compulsory licensing; public non-commercial use of patents (for government use); interpretation and implementation of the patentability criteria; and determining one's own regime for the exhaustion of IP rights. These flexibilities are critical policy tools, which developing countries, such as the SSA countries can use in pursuit of their socio-economic and developmental goals. For example, SSA countries could use compulsory licensing to improve access to public health as well as to ensure the security of the supply of essential medicines or pharmaceutical products. The least developed SSA countries may also capitalise on the transitional period for pharmaceuticals in order to develop its manufacturing capacity.

AGOA does not have extensive provisions relating to the protection of IP. However, the US invariably insists on 'TRIPS plus provisions' in free-trade agreements to which it is a party. It is likely that the US may raise a concern if, for example, an eligible SSA country decides to utilise, in an adversarial manner, compulsory licensing as a policy tool to achieve a public health objective. Ultimately, AGOA must not affect the ability of eligible SSA countries to exploit and implement the said flexibilities in pursuit of their legitimate socio-economic and developmental goals.

47 S 25 of the Constitution of the Republic of South Africa, 1996.

3.4.4 Strict Review Procedures

In order to enforce compliance, AGOA provides for strict and demanding out-of-cycle reviews. These reviews create uncertainty and unpredictability regarding an SSA country's continued eligibility for AGOA. This is particularly true for South Africa, whose policies have engendered concerns by 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 those that seek to take advantage of the preferences afforded by AGOA.[48] The out-of-cycle reviews also have a chilling effect on the beneficiaries' policies in general and on trade policies in particular.

3.5 Length of Re-authorisation of AGOA

AGOA has been reauthorised for ten years and is set to lapse in September 2025. The US is not legally obliged to extend the AGOA preferences in perpetuity and re-authorisation beyond 2025 is, therefore, not guaranteed. The duration of the current re-authorisation is reasonable. However, for long-range investments, this period may not be adequate. Therefore, uncertainty of continued preferential treatment dilutes AGOA's effectiveness.[49]

As already stated above, AGOA provides for a unilateral withdrawal of preferences from a beneficiary if the latter breaches the eligibility requirement. 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.[50] Neither does it provide for a dispute-settlement mechanism.

Unlike the US, the EU provides for a defined procedure which includes consultation and other collaborative measures before preferences are suspended.[51] In contrast, 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 motivated specifically by the exploitation of duty-free and quota-free opportunities.[52] The unilateral

48 JL Stamberger 'The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause' (2003) 4 *Chicago Journal of International Law* 607.

49 Ibid.

50 Snyder (note 24 above) 842.

51 Ibid.

52 Páez (note 12 above) 7.

withdrawal of preferences keeps beneficiaries in a state of permanent insecurity.[53]

3.6 Product Coverage

The AGOA preferences currently apply to 7000 tariff lines at the 8 digit level of the Harmonized Commodity Description and Coding System for classifying goods.[54] However, it does not sufficiently cover certain products, in particular agricultural and textile products that are of export interest to SSA countries.[55] Moreover, certain agricultural products are completely excluded: over 200 agricultural tariff lines, representing roughly 17 per cent of dutiable agricultural lines, are excluded from duty-free treatment under either AGOA or the GSP.[56] The US applies a tariff-rate quota (TRQ) to certain agricultural products.[57] Agricultural products subject to TRQs remain ineligible for duty-free treatment under both AGOA and the GSP.[58] 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 utilisation of preferences.[59] In the case of South Africa, the quota excludes sensitive products, such as sugar, despite the fact that South Africa is one of the leading producers and exporters of high quality sugar in the world.[60] Similarly, stringent RoO relating to the TRQs affects South Africa's textiles, because South Africa is not characterised as least developed and, therefore, cannot utilise AGOA's provisions relating to textiles from third-world countries. Instead, South Africa is subject to more stringent RoO, which require that garments be made locally and from local textiles, which in turn is made from either US or African yarn.[61]

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53 T Fritz 'Special and Differential Treatment for Developing Countries' (2005) 18 *Global Issue Papers* 1 available at https://germanwatch.org/tw/sdt05e.pdf (accessed 18 August 2017) 14.

54 See http://www.agoa.info (accessed 20 March 2016).

55 Páez (note 12 above) 13.

56 Snyder (note 24 above) 844.

57 TRQs apply a lower tariff to a certain in-quota quantity of exports and a higher tariff to additional imports over this quantity.

58 Williams (note 1 above) 2.

59 Snyder (note 24 above) 844.

60 R Sandrey et al *South Africa's Way Ahead: Trade Policy Options, Tralac's Monograph* (2008) 34.

61 E Naumann 'An overview of AGOA's Performance, Beneficiaries, Renewal Provisions and the Status of South Africa' 2015 *Tralac* 1 available at https://www.tralac.org/publications/article/8048-an-overview-of-agoa-s-performance-beneficiaries-renewal-provisions-and-the-status-of-south-africa.html (accessed 18 August 2017) 5.

3.7 Erosion of Preferences

The mega-regional free trade agreements, which the US is negotiating with countries from the Pacific region as well as the EU, pose a significant threat to the preferences currently enjoyed by South Africa and other SSA countries.[62] Subsidies provided by the US to certain domestic producers also have the effect of diluting the AGOA preferences.[63]

3.8 Non-tariff Measures (NTMs)

There are various NTMs that act as barriers to South African exports under AGOA. These include SPS measures and lengthy standards and compliance requirements, which add to the costs and concomitant reduction of benefits.[64] South African exports are also vulnerable to AD measures. The fact that the US wanted South Africa to remove AD duties from its poultry imports is ironic and hypocritical as the US is one of the most fervent users and supporters of AD duties.

3.9 AGOA and the Enabling Clause[65]

Preference schemes have their genesis in the Enabling Clause, of which the 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 most-favoured nation (MFN) rule, which prohibits discrimination against similar foreign products. The relaxation of this rule was intended to enable the implementation of special and differential treatment (SDT) in favour of developing countries, by according them preferential market access to developed country markets.

The Enabling Clause provides legal cover for the GSP and has become the vehicle through which developed countries grant preferential market access to exports from developing countries without reciprocal liberalisation by them.[66] The GSP was intended as a step towards a more

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62 The mega-regional free-trade agreements are the Trans-Atlantic Trade and Investment Partnership and the Trans-Pacific Partnership.

63 Páez (note 12 above) 20.

64 R Chutha & MS Kimenyi 'The Africa Growth and Opportunities Act: Towards 2015 and Beyond' 2011 available at https://www.brookings.edu/wp-content/uploads/2016/06/0602_agoa_beyond.pdf (accessed 18 August 2017) 7.

65 The Enabling Clause is the WTO legal basis for the Generalized System of Preferences (GSP). Officially called the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', it was adopted under GATT in 1979 and enables developed members to give differential and more favourable treatment to developing countries.

66 NB Dos Santos et al 'Generalized System of Preferences in General Agreement on

balanced and integrated global trade partnership.[67] The Enabling Clause, therefore, constitutes a fundamental legal basis by which individual WTO members may unilaterally grant preferences to developing countries.[68] In the *EC-Preferences* case,[69] the Appellate Body of the WTO (AB) affirmed that the Enabling Clause is an exception to article 1:1 of the GATT, which sets out the MFN rule. It was further 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 that similarly-situated GSP beneficiaries are offered the same treatment.[70]

Based on the *EC-Preferences* case, it is argued that 'AGOA is a violation of the MFN provisions of article 1:1 [because] the scheme does not extend its preferential treatment to all WTO members; rather it is limited to designated countries in SSA'.[71] AGOA has a closed list of beneficiaries and does not provide objective criteria for removing and adding beneficiaries.[72] As a result, the Enabling Clause does not encompass AGOA. Members offering targeted or regional non-reciprocal preferences must seek a waiver of their WTO obligations[73] as the US has done under the WTO framework.

4 Legal Analysis of the South Africa-US Poultry Dispute

4.1 Background to the South Africa-US Poultry Dispute

The South Africa-US poultry dispute (poultry dispute) started when the Board of Tariffs and Trade (BTT)[74] decided in 2000 to impose AD

Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39 *Journal of World Trade* 637.

67 Id 638.

68 Lenaghan (note 41 above) 118.

69 *European Communities — Conditions for the Granting of Preferential Tariffs to Developing Countries* WTO DS24 available at https://www.wto/english/tratop_e/dispu_e/ds246_e.htm (accessed 23 September 2017).

70 K Moss 'The Consequences of the WTO Appellate Body Decision in *EC–Tariff Preferences* for the African Growth Opportunity Act and Sub-Saharan Africa' (2006) 38 *New York University Journal of International Law and Politics* 665 667.

71 Id 698.

72 Ibid.

73 Snyder (note 24 above) 839.

74 The International Trade Administration Commission of South Africa (ITAC) replaced the Board of Tariffs and Trade (BTT). The International Trade Administration Commission of South Africa (ITAC) is a schedule 3A public entity established in terms of the International Trade Administration Act 71 of 2002, came into force on 1 June 2003 and technically replaced its predecessor, the Board of Tariffs and

duties on poultry originating in the US. The decision followed a petition, filed by the Southern Africa Customs Union (SACU)[75] poultry industry and represented by Rainbow Farms (Pty) Ltd, claiming that poultry from the US was being dumped onto the SACU market and that such imports were causing material injury to the SACU poultry industry. The poultry allegedly being dumped consisted of so-called brown meat, which is chicken leg quarters, thighs and backs. The petition further claimed that the brown meat was sold on the SACU market at prices less than the normal value in the US.[76]

In response, the BTT initiated an investigation and invited all interested parties to provide relevant information. The US poultry exporters who were invited included Tyson Foods, Boston Agrex and Gold Kist. After considering the information provided by the interested parties, the BTT made a preliminary determination in terms of which it found that dumping of poultry originating in the US had indeed taken place, and, as a result, imposed provisional AD duties on US poultry.[77]

The preliminary report was published and interested parties were invited to submit comments. After considering these comments, the BTT decided to confirm the preliminary finding. The BTT's final decision included the following points:

(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 is consequently sold at significant premium prices. Notably, the BTT acknowledged that this preference for white meat is not unique to the US, but is found also in other markets, such as Canada and the European Union.[78]

(b) Brown meat is not sold in the ordinary course of trade in the US. Rather, brown meat is sold there at prices below per-unit costs of production plus general and administrative selling costs. In the US,

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Trade (BTT) that was established in 1986.

75 SACU consists of Botswana, Lesotho, Namibia, South Africa and Swaziland. The SACU Secretariat is located in Windhoek, Namibia. Historically, SACU was established in 1910, making it the world's oldest customs union. The economic structure of the Union links the member states by a single tariff and no customs duties between them. The member states form a single customs territory in which tariffs and other barriers are eliminated substantially on all the trade between the member states for products originating in these countries; and there is a common external tariff that applies to non-members of SACU.

76 BTT Report No 4088 'Investigation into the Alleged Dumping of Meat of Fowls of the species *Gallus Domesticus,* Originating in or Imported from the United States of America (USA): Final Determination' (2000) 3.

77 Id 4.

78 Id 20.

chicken products are priced according to their earning capabilities. White meat incurs higher production costs than brown meat, because the former attracts premium prices. The BTT therefore 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, notwithstanding the finding that it was consistent with generally accepted international accounting practices.[79] Ultimately, the BTT decided to base the normal value on the cost of production methodology.[80]

(c) The petitioners meet the domestic-industry requirement contemplated in Article 5.4 of the AD Agreement.[81] The BTT held that 46 percent of local poultry constitutes the major proportion of the domestic industry.[82]

(d) The SACU industry was suffering material injury in that it experienced, among others, price undercutting, price suppression, decline in profit and market share as well as a negative return on market share.[83]

(e) There was no evidence that there were other factors affecting domestic prices.[84]

(f) There was a causal link between dumped imports and the material injury as evidenced by, among others, market decline.[85]

(g) The BTT concluded that factors, such as development in technology, competition between domestic producers as well as shortcomings and lack of competiveness of the domestic industry, did not detract from the casual link between the dumped imports and the material injury.[86]

(h) On the issue of the dumping margin, the BTT determined that imports from Gold Kist, Tyson and other exports had the margins of US55,80c/lb, US37,37c/lb and US52,29c/lb respectively.

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79 Id 31.

80 Id 35.

81 Art 5.4 of the AD Agreement reads, in part, that 'the application shall be considered to have been made by or on behalf of 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'. See the 1994 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

82 BTT Report (note 76 above) 13.

83 Ibid.

84 Id 75.

85 Ibid.

86 Id 86 and 89.

(i) Finally, the BTT recommended AD duties ranging from 209 per cent to 375 per cent.[87]

Notably, the US poultry imports were already liable for an additional 37 per cent import duty. As a result of the BTT's decision, there was a drastic decline of US poultry imports (to almost zero).

In 2006, the AD duties were subject to the mandatory sunset reviews by the International Trade Administration Commission (ITAC). ITAC confirmed the findings of the BTT and decided to extend the AD duties on the basis that its expiry was likely to lead to the recurrence of dumping and material injury.[88] In general, South Africa revoked AD measures within the mandatory five-year cycle,[89] because the requirements for extending AD duties following a sunset review have become more onerous.[90] Therefore, the AD duties on US poultry exemplify measures that have extended beyond the mandatory five-year cycle. The AD duties also survived the South African Supreme Court of Appeal ruling,[91] which invalidated many AD duties of 2007.[92] Importantly, the finding by ITAC that dumping and material injury were likely to recur, is not without controversy. First, if the domestic poultry industry is efficient or has achieved the necessary level of efficiency, it does not explain how material injury would recur. Secondly, it raises the question whether the likely recurrence of material injury is measured against an objective standard. These are some of the issues that require further analysis.

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87 KW Watson 'Antidumping Fowls Out: US-South Africa Chicken Dispute Highlights the Need for Global Reform' (2015) 62 *Cato Institute Free Trade Bulletin* 1 available at http://www.cato.org (accessed 20 March 2016).

88 For details on the sunset review, refer to ITAC Report No 195 'Sunset Review of the Anti-dumping Duties on Frozen Meat of Fowls of the Species *Gallus Domesticus* Cut in Pieces with Bone-in Originating in or Imported from the United States of America' (2006).

89 L Edwards 'South Africa: From Proliferation to Moderation' in CP Bown (ed) *The Great Recession and Import Protection: The Role of Temporary Trade Barriers* (2011) 429.

90 Ibid.

91 *Association of Meat Importers and Exporters and others v ITAC and Others* (769, 770, 771/12) [2013] ZASCA 108, 2014 (4) BCLR 439 (SCA).

92 The Supreme Court of Appeal ruled that the AD duties, which were the subject of litigation, had become extant at the time when ITAC undertook the sunset reviews.

4.2 Intersection between AD duties on US poultry and AGOA

The imposition of the AD duties on US poultry in 2000 has led to tension between South Africa and the US.[93] The tension came to a head during the recent re-authorisation of AGOA. An intense debate, spearheaded by the chicken lobby group, raised concerns regarding South Africa's continued participation in AGOA. Senator Coon of Delaware and Senator Isaakson of Georgia represented the lobby group. It was felt that although South Africa benefits from AGOA, it erects and maintains trade barriers (such as AD duties) against US imports, particularly with regard to poultry imports.

South Africa was eventually again included in AGOA under strict terms,[94] but was subsequently subjected to a special review. The review resulted in the determination that South Africa was in breach of the AGOA eligibility requirements. South Africa was required to remove the said AD duties before January 2015, failing which its eligible agricultural products would 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 15 March 2015. However, in 2015, following a period of intensive negotiations between US and South Africa, an agreement was eventually reached that provides for, first, an annual import quota for US bone in chicken of 65 000 metric tonnes; secondly, an annual growth factor as determined by the Department of Agriculture, Forests and Fisheries (DAFF) to be applied to the above quota with effect from 1 April 2017; and, thirdly, termination or suspension of the import quota in the event that South Africa's benefits under AGOA are suspended.[95]

The following observations can be made with regard to the above agreement:

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

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93 Erasmus (note 4 above).

94 Id 8.

95 Following a period of intensive negotiations between US and South African counterparts, South African Trade and Industries Minister Rob Davies announced that all outstanding technical and health and safety issues had been resolved. This was followed by another declaration from President Obama that unless the negotiated agreement were implemented (evidenced by US chicken exports on South African shop floors) by mid-March 2016, South Africa would lose trade preferences extended under AGOA for its agricultural exports.

(b) The agreement does not contemplate a permanent removal of AD duties. The agreement 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 such, the proviso has no direct legal effect on AGOA. Notwithstanding the proviso, South Africa is still subject to the mandatory reviews and its future as an AGOA beneficiary remains uncertain.

(c) Arguably, this agreement (of 2015) is not provided for in the AD Agreement and 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* or by request of any interested party who submits sufficient information substantiating the need for a review. Whereas article 11 contemplates a substantive review of AD duties by the administrative authorities, in reality the agreement bears the hallmarks of a political settlement. This agreement highlights the risks of settling trade disputes outside of the WTO legal framework.

4.3 SPS Measures on US Beef and Poultry

Apart from 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 consequent to the avian influenza epidemic (HPAI) in the US. Indeed, poultry imports from the US were banned as a result of HPAI. The US was aggrieved by the fact that South Africa had imposed a blanket national ban.[96] The US demanded that the ban be regionalised and that poultry imports from regions that were HPAI free be allowed, in accordance with the World Organization

[96] See http://www.thepoultrysite.com/poultrynews (accessed 25 March 2016). See, also, the recently decided WTO case, *European Union-Russian Federation — Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (*EU*) (DS475), which is relevant to and/or has ramifications for the US-South Africa SPS issue. Briefly, the EU-Russia dispute relates to the SPS measures imposed by Russia in 2014 on imports of pigs, pork and other pig products from the EU, because of concerns relating to African swine fever. Russia imposed an EU-wide ban. The EU challenged the EU-wide ban as being inconsistent with arts 6.1, 6.2 and 6.3, among others. The Appellate Body found that the EU-wide ban was inconsistent with art 6.1 of the SPS Agreement. This case bolsters the argument that the WTO is the appropriate forum to deal with substantive trade disputes.

for Animal Health (OIE) guidelines.[97] Similarly, the treatment of porcine reproductive and respiratory syndrome in the US was also a bone of contention.[98]

In 2003 South Africa also banned beef imports from the US due to the mad-cow disease outbreak there. The US views the mad-cow disease risk as negligible[99] and had requested South Africa to change its standards relating to the disease.[100] As mentioned earlier, the US saw these SPS measures as a barrier to US trade and had demanded its removal, using AGOA as leverage.

As with the AD duties, South Africa had imposed the SPS measures in terms of, and in accordance with, the SPS Agreement.[101] The right to impose SPS measures is enshrined in article 2 of the SPS Agreement.[102] Nevertheless, the consistency between the SPS measures and the SPS Agreement had not been tested. To date, the US has not filed a dispute with the DSB concerning the legality of these measures.

4.3.1 AD Duties on US Poultry: Legitimate Use or Abuse?

The decision of the BTT to impose AD duties on US poultry is contentious. While some view the decision as reasonable and justified, others see it as legally unsound and protectionist.[103] For example, Carim[104] supports the decision and its findings and 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.[105] The

97 'National Trade Estimate Report' (note 37 above) 360.
98 Ibid.
99 Ibid.
100 Ibid.
101 The Agreement on the Application of Sanitary and Phytosanitary Measures (the 'SPS Agreement') entered into force with the establishment of the World Trade Organization on 1 January 1995. It concerns the application of food safety and animal and plant health regulations.
102 Art 2 of the SPS Agreement provides that '[m]embers 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'.
103 See Watson (note 87 above) and notes 107–110 below.
104 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.
105 The case referred to here is *China-anti-dumping and Countervailing Duty*

> 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.[106]

The gist of Carim's argument is that the weight-based methodology 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 on China's use of the latter methodology. A convincing argument has been made 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'.[107]

The AD duties have been described as 'particularly egregious'.[108] The argument is thus that the BTT erred in a number of ways:

(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 while consumers in the US prefer white meat. This is why US chicken producers were able to sell certain brown-meat products for a higher price in the export market than they could have done in their domestic market. As a result, a no-dumping finding should have been made by the BTT. [109]

(b) The BTT was able to arrive at the above AD duties by ignoring the US producers' domestic market sales and, instead, by using the constructed-value methodology, which estimates normal value by calculating the costs of production and adding an estimated amount for profit. [110]

(c) The BTT unreasonably rejected the net realisable-value technique used by the US chicken producers, in terms of which the high-value white meat received the high cost and the low-value brown meat received the low cost.[111] The records provided by the US poultry industry were consistent with this technique. Importantly, the

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Measures on Broiler Products from the United States case (*China-Broiler Products*) WTO DS427.

106 *Business Day* (note 34 above).

107 Watson (note 87 above) 1.

108 Ibid.

109 Ibid.

110 Ibid.

111 KG Kulkarni & A Strear 'Anti-dumping Law as a Trade Barrier: A Case of South African Poultry Imports from USA' 2005 paper presented at Applied Business and Entrepreneurship International, available at http://www.kulkarnibooks.com/

technique was consistent with the generally accepted international accounting practices, a fact that the BTT conceded.[112]

(d) Instead of using the net realisable-value technique, the BTT decided to assign cost based on weight. Due to the weight-based costing methodology, the brown meat was allocated the highest cost.[113] Inevitably, the BTT made a finding that dumping had taken place.[114]

(e) The re-allocation of costs and the use of the constructed normal value resulted in the brown meat having a higher cost allocated to it than the price at which it was being sold in the domestic US market. As a result, the difference between the normal price (constructed value) and the export price was large.[115]

(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 realisable value.[116]

It must be noted that the majority of arguments criticising 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 realisable value-costing methodology with the former. Article 2.2.1.1 of the AD Agreement provides that costs are usually 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 them has come under increased scrutiny as a result of the *China-Broiler Products* case.[117] The *Poultry* case 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

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assets/downloads/kishore_papers/antidumpingpaperfinaldraft.pdf 9 (accessed 22 May 2017).

112 Ibid.

113 Id 10.

114 Id 11.

115 Id 12.

116 Id 9.

117 See note 104 above.

on the basis that it 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.

With regard to the *US-Poultry* case, the relevant questions that arise are (1) whether 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 it considered all available evidence to arrive at the proper allocation of costs?; and (3) whether the weight-based methodology applied by the BTT constituted a proper allocation of costs?[118]

The AD duties imposed by South Africa on US poultry are also criticised as constituting 'a clear cut case of protectionism.'[119] It has been alleged that the over-arching purpose of the AD duties in this case appeared to protect an inefficient domestic poultry industry. The domestic poultry industry is 'plagued by high production costs that can be attributed to various factors', which include highly inefficient production processes, a poorly trained labour force, disruptive activities of unions and high feeding costs as a result of a low grain yield and erratic rainfall.[120] Inevitably, due to these factors, the South African poultry industry (SACU) is unable to compete with its US counterparts; the latter is highly competitive as a result of its vertically integrated nature, its use of modern technology and highly efficient production processes.[121]

The behaviour of the domestic poultry industry requires serious and objective scrutiny by ITAC. This is particularly important, because,

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[118] In the *China-Broiler Products* case (note 105 above), 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 record is supportive of its factual findings and how the factual findings support the overall determination (para 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 (para 7.194). The administering authority must adequately explain why the allocation methodology it chooses is preferable over alternative methodologies. The panel found that China had acted inconsistently with the first sentence of art 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 art 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.

[119] Watson (note 87 above) 1.

[120] Kulkarni & Strear (note 111 above) 7.

[121] Ibid.

notwithstanding the AD duties on US poultry being described as punitive, the industry has now also 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.

Brazil subsequently filed a dispute at the WTO and requested consultations. Brazil argued, among other points, 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 fairly compare the export price and the normal value, including the establishment of the residual margin.[122] However, an amicable settlement to the dispute ensued, 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 the whole chicken and for boneless chicken cuts were positive or showed positive trends.[123]

Although not proven, this is a serious allegation relating to the use of AD duties for protectionist purposes. With regard to the EU, ITAC imposed AD duties (ranging from 31,3 per cent to 73,33 per cent) on poultry imports from Germany, the Netherlands and the United Kingdom, following an investigation and a finding to the effect that poultry imports from these countries were being dumped on the SACU market. Arguably, the behaviour by the domestic poultry industry may be a significant indicator of either deep-rooted, systemic inefficiency or an industry with abusive protectionist inclinations. 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.

Even though the criticism of the BTT's decision may be well founded, in the absence of a challenge through the Dispute Settlement Body (DSB), the decision stands and is effective. Therefore, if the US is aggrieved by the decision, it should challenge the decision through the DSB. The poultry case is loaded with critical legal issues that require clarification. Arguably, by not challenging the BTT's decision, the US has deprived the WTO of a vital opportunity to enrich its jurisprudence on AD duties.

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[122] *South Africa — Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* DS439 1.
[123] Ibid 2.

4.3.2 WTO Remedies for AD Duties

The WTO provides remedies against the unlawful imposition of AD duties. Effectively, an aggrieved party (the complaining member) can refer the dispute to the DSB under the WTO framework for adjudication. Article 17 of the AD Agreement provides a detailed dispute-settlement procedure that entails mandatory consultation. Any member who is of the opinion that any benefit accruing to it directly or indirectly from the AD Agreement is being nullified or impaired, can, with a view towards reaching a mutually satisfactory solution, request consultations from the other member (the respondent). The respondent is obliged to give 'sympathetic consideration to the complaining member's grievance'.[124] 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 may 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.[125] This latter proviso establishes the requirements for a valid provisional measure. These requirements include the initiation of investigations by the administering authorities; inviting inputs from relevant or interested parties; a preliminary affirmative determination of dumping and material injury; as well as a finding 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.

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 record is supportive of their (the administering authorities') factual findings and how this in turn supports their overall determination. This is how the BTT's decision will be evaluated if the US refers the dispute to the DSB.

4.3.3 Why has the US not reverted to the DSB?

As indicated above, GATT provides for a dispute settlement mechanism for the resolution of AD disputes. Nevertheless, and despite the fact that 'the DSB has rarely found the measures as applied to be acceptable',[126]

[124] Art 17(1)–(3) of the AD Agreement.
[125] Art 17(4) of the AD Agreement.
[126] Ibid.

many AD duties are never challenged.[127] Notably, out of 56 instances where AD duties were challenged before the WTO between 1996 and 2004, only two were upheld.[128] Legal capacity is often cited as one of the obstacles to challenging AD measures.[129] This is because of the complexity of the DSB proceedings. The issue of legal capacity is not applicable to the US. The US possesses sufficient financial and human resources as well as the legal expertise to deal with the complexities and costs associated with the DSB proceedings.

On the merits of the case, it has been argued that the US would have, without a doubt, won the case had it challenged the decision.[130] Indeed, the case should be challenged because it sets 'a dangerous precedent'.[131]

It is difficult to explain the failure of the US to challenge the decision of the BTT, especially bearing in mind that the US challenged the AD duties imposed by China on its poultry imports on the basis that it wanted fairness to prevail. 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 might have been secured. The recent removal of the AD duties, through AGOA, is a strong indication that the poultry dispute can be resolved at the WTO, without the use of strong-arm tactics or intimidation. On the other hand, it could be that the US is aware of a loophole and for this reason has not yet challenged the decision. A ruling in favour of South Africa would make it difficult for the US to subsequently rely on AGOA to force South Africa to withdraw alleged barriers.

4.3.4 AD Duties and SPS Measures as Trade-policy Instruments in South Africa

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. AD duties are permissible under article VI of GATT and the AD Agreement, but its use is subject to strict disciplines. Globally, there has been an

127 RM Bolton 'Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the WTO through Heightened Scrutiny' (2011) 29 *Berkeley Journal of International Law* 66 78.

128 Ibid.

129 Id 79.

130 Kulkarni & Strear (note 111 above) 16.

131 Ibid.

increased use of AD duties. This phenomenon could be attributed to trade liberalisation.[132] As tariffs are reduced, domestic industries are increasingly exposed to foreign or international competition. International trade takes 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 71 of 2002 (the ITAC Act), which established ITAC and entrusts it with the responsibility of implementing South Africa's trade policy.

However, 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'.[133] These measures are provided for in the SPS Agreement, of which the 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 that can result in unnecessary barriers to trade.[134] SPS measures play an important role in a country's trade policy, because they are inherently non-trade barriers. Therefore, as is the case with AD duties, SPS measures play an important role also in South Africa's trade policy.[135]

It is within this context that the recent developments in which South Africa was compelled by the US to remove these measures on US poultry, highlight the serious implications for South Africa's trade policy and the integrity thereof.

In the next section, the authors will briefly explore South Africa's trade policy relating to AD duties and SPS measures. In particular, the implications for South Africa's removal of the AD measures and the SPS measures on its trade policy will be examined.

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[132] According to Edwards (note 89 above) 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 liberalisation. However, the issue is contentious.

[133] See http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (accessed 20 March 2016).

[134] Ibid.

[135] The administration of SPS measures cuts across various departments, including the Departments of Health, Agriculture and Trade and Industry.

5 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.[136] Thereafter followed a period of relatively intense use of AD duties and countervailing measures.[137] 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'.[138] In 1978, all AD duties were removed. Disruptive competition was dealt with by way of formula duties.[139] Notably, there was a fundamental trade-policy shift when South Africa acceded to the WTO, established in 1995.

During the Uruguay Round,[140] South Africa made its tariff offers as a developed country, 'resulting in an ambitious outward oriented reform programme that "locked in" steep tariff cuts'.[141] South Africa's average MFN tariff rates for all goods fell from over 14 per cent in 1996 to 8 per cent in 2001. The MFN rates for industrial goods also fell by 50 per cent and by 55 per cent for textiles and clothing over the same period. The weighted average MFN tariff rate came down from a level of 8,6 per cent in 1996 to 5 per cent over the same period.[142] All marketing and price support for farmers was dismantled, resulting in a deregulated and liberalised agricultural sector.[143] Trade liberalisation exposed domestic industries to increased competition from imports. The increase in imports is attributed to various FTAs that South Africa entered into and the preferential tariffs that emanated from these FTAs.[144]

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136 G Brink 'Anti-Dumping in South Africa' 2012 *Tralac* 1 available at www.tralac.org (accessed 18 August 2017) 2. See s 8 (1) of the Customs Tariff Act 26 of 1984.

137 Edwards (note 89 above) 4.

138 Ibid.

139 Ibid.

140 The Uruguay Round was the eighth round of multilateral trade negotiations (MTN) conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986 to 1994 and embracing 123 countries as 'contracting parties'.

141 B Vickers 'Towards a Trade Policy for Development: The Political Economy of South Africa's External Trade, 1994–2014' (2014) 36 *Strategic Review for Southern Africa* 60.

142 Ibid.

143 Ibid.

144 South Africa concluded various regional FTAs, such as the SADC Trade Protocol and the TDCA (with the EU).

In order to protect domestic industries, the AD and countervailing measures became exceedingly important.[145] As nations embark on a liberalisation process, tariffs are exponentially reduced and AD measures begin to take a more pronounced role in the trade policy of these countries.[146] 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.[147]

In general, various economic justifications exist for AD duties. These justifications include the preventing predatory price dumping[148] and strategic dumping.[149] AD laws seek to defend against predatory-pricing by preventing the sale of imports 'at less than fair value'.[150] AD measures are, therefore, used to create an even playing field against foreign producers when dumping is actually occurring.[151]

Nevertheless, AD duties are criticised for encouraging inefficiency among domestic industries, being a significant barrier to international trade and depriving consumers of the benefits of healthy and robust competition. It is contended that AD duties have replaced tariffs.[152] Consequently, the AD duties threaten to reverse the gains that were painstakingly obtained through trade liberalisation. The argument here is that AD laws are the proverbial fox among the chickens.[153]

The ITAC Act[154] provides a legal basis for AD duties. The Act is supported by various regulations, the scope of which is beyond this paper. ITAC is responsible for implementing the trade policy in relation to tariffs and trade remedies. With regard to 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

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145 Vickers (note 141 above) 60.

146 M Moore & M Zanardi 'Trade Liberalization and Antidumping: Is There a Substitution Effect?' 2008 *Institute for International Economic Policy* 1 available at www.citeseerx.ist.psu.edu (accessed 6 June 2016).

147 B Debroy & D Chakraborty (eds) *Uses and Misuses of Anti-Dumping Provisions in World Trade: A Cross Country Perspective* (2006) 35.

148 Bolton (note 127 above) 72.

149 Ibid. According to Bolton, strategic dumping happens when exporters are protected from competition at home and can thus sell their exports at a lower price than in their domestic market.

150 NG Mankiw & P Swagel 'Antidumping: The Third Rail of Trade Policy' (2005) 84 *Foreign Affairs* 107.

151 Kulkarni & Strear (note 111 above) 2.

152 Ibid.

153 Debroy & Chakraborty (note 147 above) 34.

154 Act 71 of 2002.

domestic legislation and consistent with WTO Rules'.[155] Essentially, in administering trade remedies, ITAC is guided by the ITAC Act, its underlying regulations and the relevant WTO Agreements.

In addition, South Africa has a plethora of SPS requirements that imports must comply with. The SPS legal framework spreads across different ministries or departments including Health, Agriculture, Forests and Fisheries as well as Trade and Industry. SPS measures are developed on the basis of science and must be in harmony with the relevant international standards.[156]

6 The Implications of the Removal of AD Duties and SPS Measures Imposed on US Poultry

In this section the possible implications of South Africa's removal of AD duties and SPS measures imposed on US poultry are discussed.

6.1 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. The removal of the measures arguably has a delegitimising and/or discrediting effect on South Africa's trade policy. 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 and not for the protection of South Africa's domestic poultry industry against unfair trade or the protection of human, animal and plant health and safety. As already stated, the AD duties have been variously described as a 'clear cut case of protectionism'[157] as well as being egregious.[158]

As with the AD duties, the SPS measures have not escaped criticism. The US believes that the AD duties and the SPS measures were not imposed for a legitimate purpose and are not consistent with the WTO law. Therefore, the removal of these measures outside of the WTO legal framework could give credence to the arguments that the measures were technically flawed and were imposed for protectionist purposes.[159] They

[155] See http://www.itac.org.za/pages/services/trade-remedies (accessed 30 March 2016).

[156] See http://www.wto.org (accessed 30 March 2016).

[157] Watson (note 87 above) 1.

[158] Ibid.

[159] E Naumann 'South Africa and AGOA: Recent Developments 2015–2016 and Possible Suspension' 2016 *Tralac* available at https://www.tralac.org/publications/article/9025-south-africa-and-agoa-recent-developments-2015-2016-and-possible-suspension.html (accessed 18 August 2017) 9.

were, therefore, unnecessary barriers to international trade. The authors are of the opinion that, in the interests of protecting the legitimacy and integrity of its measures and trade policy, South Africa should at least have 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.[160]

6.2 Bad Precedent

The removal of the AD duties and SPS measures sets a bad precedent for South Africa. It is contended here that it may open a floodgate for further US demands. The fact that South Africa has relented and removed the AD duties and SPS measures may embolden the US to make further demands in future. The way in which South Africa has been compelled to remove these measures constitutes a pointer to how matters under AGOA will be handled in future.[161] Already, as mentioned above, the US has expressed various concerns regarding some of South Africa's policies in general and its 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 to the US.[162] As a result, one or more of South Africa's trade policies could be compromised.

6.3 Trade-policy Space

As a developing country, South Africa needs policy space to pursue its developmental agenda. However, by virtue of the strict eligibility requirements, it could be exceedingly difficult for South Africa to pursue the policy-space imperative. Inevitably, South Africa has to make a choice between preserving policy space for its developmental objectives or participating in AGOA. Admittedly, this is a difficult choice, especially when comparing the economic benefits that have accrued to South Africa as a result of AGOA and policy space as a developmental imperative.

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, both of which are NTMs. In terms of this requirement, South Africa has been required to eliminate,

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[160] During the SACU-US FTA negotiations, the US ruled out the discussion of its AD laws outside of the WTO framework.

[161] Prinsloo (note 31 above) 1.

[162] Ibid. Presumably, other trade partners will seek to employ similar tactics in trade disputes with South Africa.

among others, AD duties and SPS measures on US goods. In essence, if South Africa intends to remain 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 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).

Significantly, as pointed out above, the elimination of barriers to US trade entails liberalising or opening up South Africa's market to US trade, which would inevitably affect its domestic industries. This will result in South Africa being 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 that have been validly imposed on US goods in accordance with the AD and SPS Agreements, respectively.

Other than the abovementioned eligibility requirement, the out-of-cycle review has serious implications for South Africa's trade policy in general and its AD duties and SPS measures in particular. 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 that the US views as inimical to its trade interests, a review of South Africa's continued eligibility for AGOA benefits will ensue. As stated, this has a chilling effect on South Africa's trade policy. Effectively, South Africa may not be able to pursue and/or implement trade policies that it deems appropriate for its developmental needs.

From the foregoing, it is arguable that preservation of policy space and participation in AGOA seem to be mutually incompatible. South Africa has sacrificed its policy space on the altar of the AGOA preferences and its benefits.

7 AD Duties and SPS Measures within the WTO framework

AD duties are a legitimate trade-policy instrument and are provided for in the AD Agreement. As a member of the WTO, 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 the SPS measures necessary to protect human, animal and plant life or health, provided that it complies with the SPS Agreement.[163] More importantly, as pointed out above, the DSB is the appropriate forum to

[163] Art 2 of the SPS Agreement.

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 as enshrined in WTO law. In this regard, the authors are of the view that it was inappropriate for the US to use AGOA to compel South Africa to remove these measures. For this reason, AGOA may more accurately be described as a rights-diminishing preferential trade scheme.

Given the important role that AD duties and SPS measures play in South African 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 delegitimising 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 warrant 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, WTO law, constitutes an unfair limitation of South Africa's rights to use these measures.

8 Alternative Reciprocal Trade Agreements

As indicated above, South Africa's future as an AGOA beneficiary hangs precariously in the balance. This is as a direct result of the strict eligibility requirements that South Africa must comply with.[164] 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. This creates uncertainty and unpredictability regarding South Africa's continued membership of AGOA. The uncertainty is heightened by the fact that AGOA preferences can be unilaterally withdrawn by 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.

In the next section the trade relationship between South Africa and the US will first be explored, and the possible alternative trade arrangements, which South Africa and the US could pursue in order to establish a more secure, stable, predictable and reciprocal trade relationship, will then be interrogated.

[164] These eligibility requirements have been canvassed in depth in the first part of this paper.

8.1 Trade Relations between South Africa and the US

The US is one of South Africa's major trading partners. South Africa is currently the 40th largest export market for US goods. In 2014, US goods exports to South Africa amounted to US$6,4 billion. In return, South Africa's exports to the US amounted to US$8,3 billion dollars.[165] In 2013, the US services exports to South Africa stood at US$3 billion and South Africa's services exports stood at US$1,7 billion.[166] The stock of US Foreign Direct Investment (FDI) stood at US$5,2 billion in 2013.[167]

As stated above, South Africa has benefitted substantially from its participation in AGOA. However, AGOA is the only formal, substantive and reciprocal FTA between South Africa and the US. Therefore, AGOA forms the bedrock of South Africa-US trade and investment relations. It could therefore be argued that AGOA constitutes a disincentive for the conclusion of either a bilateral, reciprocal trade agreement between South Africa and the US, or an FTA between the US and SACU.[168] South Africa seems to be enjoying the deceptive low hanging fruits from AGOA.

8.2 Possible Alternative Trade Agreements to AGOA

In order to establish a more secure and lasting reciprocal trade relationship with the US, there are various possible alternative trade agreements that South Africa and the US could pursue. Indeed, AGOA provides for such alternatives. Section 108 of AGOA provides that it is the policy of the US to continue to seek to deepen and expand trade and investment ties between SSA and the US, including through the negotiation of accession by SSA countries to the WTO and the negotiation of trade- and investment-framework agreements, bilateral investment treaties and free-trade agreements. AGOA is designed to enable the US to seek to negotiate agreements, where appropriate, with individual SSA countries and with the Regional Economic Communities. The motivation for this is that such agreements have the potential to catalyse greater trade and investment, facilitate additional investment in SSA, further poverty-reduction efforts and promote economic growth.

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 the conclusion of reciprocal, mutually beneficial trade agreements such as

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165 'National Trade Estimate Report' (note 37 above) 359.

166 Id 363.

167 Ibid.

168 D Langton *United States-Southern African Customs Union* (*SACU*) *Free Trade Agreement Negotiations: Background and Potential Issues* (2005) 5.

FTAs, trade-and-investment framework agreements (TIFAs) and Bilateral Investment Treaties (BITs). Arguably, this is an ambitious and laudable trade policy. It remains to be seen whether the SSA countries, particularly South Africa, endorse and/or share the US' vision. Seemingly, some SSA countries have short-sighted trade policies that 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 and reciprocal trade agreements with the US.[169]

SACU and the US have previously attempted to conclude an FTA. The FTA negotiations commenced on 3 June 2003. The negotiations appeared to have enjoyed the support of some US and South African business communities. It was further supported by the US-South Africa Business Council, as well as the Corporate Counsel Association of South Africa.[170] The proposed FTA was viewed as ground-breaking as far as the US-Southern African trade relations were concerned. After some sluggish progress, the FTA negotiations were indefinitely suspended in 2006. The suspension of the negotiations is attributed to a number of factors, among which include the fact that the parties could not agree on the scope of the negotiations. The US wanted a comprehensive FTA that incorporates intellectual-property rights, government procurement, investment and services. In contrast, SACU objected to the inclusion of these issues in the negotiation agenda. SACU wanted market-access commitments first and negotiations on other issues later.[171]

Further, with regard to industrial sectors to be included in the negotiations, the US wanted a negative list, while SACU wanted a positive list.[172] It has been speculated that South Africa was reluctant to negotiate matters that were the subject of the Doha negotiations, so as not to impact on these matters there.[173] These included the so-called Singapore issues and the so-called new-generation issues.[174] Lack of

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169 Ibid.

170 Id 2.

171 Id 5.

172 A negative list means that all industrial sectors are negotiable, except those specifically excluded. In contrast, a positive list means that those industries to be negotiated on are specified in advance. In most FTA negotiations, countries use a negative list as this allows parties to reduce their tariffs on the basis of their applied rates. However, in services and investment there is no coherent practice. Recently concluded agreements tend to use a negative list on both services and investment.

173 Langton (note 168 above) 5.

174 The Singapore issues include investment, competition, government procurement and trade facilitation. Other issues included IP, environmental protection and trade remedies.

trade-policy harmony within SACU has also been cited as an obstacle to the conclusion of the negotiations.[175]

It would, however, be simplistic to underestimate 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 becoming increasingly difficult, because of asymmetrical levels of development among the constituents.[176] Further, trade negotiations involving the US are generally protracted and agonising, even if such negotiations involve other developed countries and economic communities such as the EU with whom it shares common views on matters such as the Singapore issues.

In lieu of an FTA, SACU and the US concluded a trade-and-investment development co-operation agreement (TIDCA) in 2008. The objective of TIDCA is to promote an investment climate and to expand and diversify trade between SACU and the US.[177] TIDCA established a consultative group, comprising of senior officials from each party.[178] The overarching functions of the consultative group include endeavouring 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; 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; as well as identifying and working to remove impediments to trade and investment between SACU and the US.

TIDCA further provides that any party may raise for consultation any specific matter relating to trade or investment between SACU and the US before the consultative group. The requesting party should endeavour to provide an opportunity for the consultative group to consider the matter, before taking actions that could adversely affect trade and the investment interests of the other party. [179]

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[175] Langton (note 168 above) 5.

[176] P Draper & M Soko 'US Trade Strategy after Cancun: Prospects and Implications for the SACU-US FTA' 2004 South African Institute of International Affairs Trade Report No 4.

[177] Art 1 of TIDCA.

[178] Art 2 of TIDCA.

[179] Art 4 of TIDCA.

8.3 Resuscitation of FTA negotiations

The authors are of the view that the SACU-US FTA negotiations are capable of being resuscitated. The resuscitation of negotiations and the conclusion of the FTA is in the interests of both parties.[180]

For the US, the FTA 'would bring additional benefits to US trade and investment and restore a more equal playing field compared to the position played by the EU'.[181] Currently, the EU enjoys preferential access to the South African market through the Trade, Development and Cooperation Agreement (TDCA) that came into effect in 2004. Further, the EU and SADC recently concluded and signed a reciprocal Economic Partnership Agreement (EPA).[182] 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 to SACU.

For 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 will be 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'.[183] 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-specific dynamics that must be taken into account when negotiating an FTA. For example, SACU consists of BLNS[184]

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[180] According to the USTR, the FTA remains a long-term objective of SACU and the US.

[181] Erasmus (note 10 above).

[182] The EPA was signed on 10 June 2016 at Kasane, Botswana.

[183] L Edwards & R Lawrence 'South African Trade Policy and the Future Global Trading Environment' 2012 *South African Institute of International Affairs* Occasional Paper 128 available at https://www.saiia.org.za/occasional-papers/20-south-african-trade-policy-and-the-future-global-trading-environment/file 20 (accessed 18 August 2017).

[184] BLNS refers to Botswana, Lesotho, Namibia and Swaziland.

countries, whose economies are small and industrially less sophisticated. Therefore, it would be unrealistic to expect these countries to open up their markets to US trade overnight.

However, notwithstanding the fact that the BLNS economies are small, the FTA must comply with article XXIV of GATT, which requires substantial elimination of duties and other restrictive regulations of commerce on all the trade between the constituent territories in products originating in these territories.[185] To address the issue of the asymmetrical development of the parties, it has been suggested that the FTA could use TDCA as a model since it provides for free trade with asymmetrical coverage of all trade and sectors.[186] In this regard, the US will make the speediest and deepest reductions to offset bilateral trade imbalances.[187] However, the US may not accept this proposal since its principled position is that an FTA must entail the substantial elimination of duties and regulations of commerce on all trade. Notwithstanding this, the above proposal is worth considering by virtue of its practical and realistic nature.

The FTA could also be negotiated between the US and SADC, of which South Africa is a member.

It should be noted that under WTO rules, member states are allowed to enter into other smaller trade agreements in addition to membership of the multilateral body. Usually these arrangements could take several forms, including FTAs, preferential-trade agreements (PTAs) or regional trade agreements (RTAs). Specifically, these kinds of agreements are regulated by article XXIV of GATT, by article V of GATS and the enabling clause. Under these provisions, five kinds of agreements are recognised. These are: free-trade areas in which members liberalise trade among themselves in addition to their obligations under the WTO framework;[188] customs unions which are FTAs with a common external commercial policy;[189] interim agreements that usually precede FTAs and customs unions;[190] PTAs which lead to more trade liberalisation among the less developed countries;[191] and economic-integration agreements.[192]

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185 Art XXIV 8(b) of GATT.

186 Draper & Soko (note 176 above) 35.

187 Ibid.

188 The 1947 General Agreement on Tariffs and Trade, which came into effect on 1 January 1948 at para 8, art XXIV [GATT, 47].

189 Id para 5(a).

190 Id paras 5(a) and 5(b).

191 GATT, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) 28 November 1979 GATT Doc L/4903 para 2(c).

192 GATS was signed on 15 April 1994 and became effective on 1 January 1995.

One legal implication of these agreements is that they are inherently discriminatory.[193] They allow member states to derogate from the standard most-favoured-nation (MFN) obligation, which is one of the fundamental principles that underpin the extant multilaterals-trading architecture. They also lower trade barriers for their members, but these are not extended to non-members.[194] For instance, parties to FTAs are allowed to lower their tariffs below the WTO baseline without extending these privileges to other members of WTO.[195] The same principle applies to PTAs. However, this derogation is not the rule, but an exception.

It should be noted that the US and South Africa concluded a trade and investment framework agreement (TIFA) on 18 February 1999. TIFAs provide strategic frameworks and principles for dialogue on trade-and-investment issues between the US and other contracting parties.[196] TIFA, like TIDCA, provides for consultation and co-operation between the US and South Africa on any trade-and-investment matter.[197]

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

9 Conclusion

This paper has explored, in detail, the substantive provisions of AGOA, its benefits and shortcomings. This analysis of AGOA follows on the recent development in which South Africa was compelled by the US to remove AD duties and SPS measures on US poultry, in return for continued access to AGOA preferences. Having compared the advantages or benefits of AGOA with its disadvantages or risks, the authors conclude that AGOA is a poisoned chalice that has been handed to South Africa.

While South Africa has economically benefited from AGOA, it should objectively review its participation in AGOA.[198] As indicated above, apart from economic considerations, there are other critical legal and policy

193 JN Bhagwati *Termites in the Trading System — How Preferential Agreements Undermine Free Trade* (2008) xi.

194 Ibid.

195 M Panezi 'The WTO and the Spaghetti Bowl of Free Trade Agreements — Four Proposals for Moving Forward' (2016) 87 *CIGI Policy Brief* 1 2.

196 See http://www.agoa.info/bilaterals/agreements.html (accessed 6 April 2016).

197 Art 2 of TIFA.

198 Prinsloo (note 31 above) 1 argues that as the AGOA deadline looms, South Africa and other SSA countries should seriously consider their economic relations with the US.

considerations that should be taken into account. The review is in the interest of protecting the sanctity and integrity of South Africa's trade policies.

It is therefore the considered opinion of the authors that 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 for concluding a reciprocal FTA with the US.