



UNIVERSITY OF KWAZULU-NATAL

COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

***'TO WHAT EXTENT DOES THE CONDITION IN THE AFRICAN GROWTH OPPORTUNITY
ACT, 2000 REQUIRING THAT SUB-SAHARAN AFRICAN COUNTRIES ELIMINATE BARRIERS
TO UNITED STATES OF AMERICA TRADE, LEND ITSELF TO ABUSE AT THE INSTANCE OF
THE USA?'***

SUBMITTED BY:

STEVEN SIYABONGA NDLOVU (STUDENT NO: 215080870)

PREPARED UNDER THE SUPERVISION OF:

MRS CLYDENIA STEVENS

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE, MASTER OF
LAW**

MARCH 2017

TABLE OF CONTENTS

1. CHAPTER 1 – INTRODUCTION (RESEARCH PROPOSAL)	6
1.1 KEY WORDS	5
1.2 BRIEF INTRODUCTION TO AGOA	10
1.3 BACKGROUND TO THE USA AND SA POULTRY DISPUTE	11
1.4 THE PURPOSE OF THIS DISSERTATION	13
1.5 RESEARCH QUESTIONS	13
1.6 LITERATURE REVIEW	15
1.7 RESEARCH METHODOLOGY	20
1.8 CONCEPTUAL FRAMEWORK	21
1.9 ANTICIPATED LIMITATIONS	23
2. CHAPTER 2 – THE HISTORY OF GATT AND THE WTO AND THE UNEVEN POSITIONS OF DEVELOPED AND DEVELOPING COUNTRIES IN INTERNATIONAL	25
2.1 INTRODUCTION	25
2.2 INTERNATIONAL TRADE ORGANIZATION NEGOTIATIONS	26
2.3 DEVELOPING COUNTRIES AND THEIR INTERACTIONS WITH THE GATT TRADING SYSTEM.....	27
2.4 THE HABERLER REPORT.....	32
2.5 THE GENERAL SYSTEM OF PREFERENCES AND ITS INTERACTIONS WITH DEVELOPING COUNTRIES.....	34
2.6 THE TOKYO ROUNDS AND DEVELOPING COUNTRIES	39
2.7 THE URUGUAY ROUNDS AND DEVELOPING COUNTRIES.....	40
2.8 CONCLUSION.....	42
3. CHAPTER 3 – THE UNITED STATES OF AMERICA’S TRADE RELATIONSHIP WITH SOUTH AFRICA AND WITH SUB-SAHARAN AFRICAN COUNTRIES: A POLICY PERSPECTIVE	44
3.1 INTRODUCTION	44
3.2 POLICY HISTORY OF THE UNITED STATES OF AMERICA AND SOUTH AFRICA	44
3.3 THE FORMALIZATION OF THE UNITED STATES OF AMERICA POLICY TOWARDS SUB SAHARAN AFRICA AND SOUTH AFRICA	49
3.4 ANALYSIS OF THE AFRICAN GROWTH AND OPPORTUNITY ACT AND THE REQUIREMENTS OF REPROCITY.....	53
3.5 POULTRY DISPUTES BETWEEN THE UNITED STATES OF AMERICA AND SOUTH AFRICA.....	60

3.6 CONCLUSION.....	64
4. CHAPTER 4 – CONCLUSION AND RECOMMENDATIONS	67
4.1 INTRODUCTION.....	67
4.2 CONCLUSIONS.....	67
4.3 RECOMMENDATIONS.....	71

ACKNOWLEDGMENTS

Writing this thesis has been a personal journey of growth, perseverance and learning. I was particularly inspired by these quoted words:

*'Hudec loved nothing better than to "transcend the ostensible." He felt strongly that the key to superior scholarship is the instinct and ability to look behind the conventional explanations of legal conclusions in search of a better understanding of what the law is, and why. According to Hudec, this approach requires a critical, or sceptical, posture toward conventional explanations, asking the more rigorous questions whether they are in fact logical, coherent, persuasive, and grounded in reality. It is a perspective that seeks to identify something wrong, or something missing, and it makes significant demands on the scholar. It requires the closest attention to detail, and sensitivity to nuances of facts and argument. Moreover, it requires great modesty and integrity....'*¹

There are hardly better words than the above quotation to describe the intellectual tussles that I endured through reading the works of various scholars and formulating my own arguments, in an attempt to answer my research questions.

I would like to thank my supervisor, Mrs Clydenia Stevens, whom at all times led me with her insightful comments and her incredibly responsive approach throughout this personal journey. I would also like to extend a special thanks to Doctor Caroline Goodier, whom patiently introduced and expounded upon the art of research methodology. Lastly, I would like to thank my family for their consistent support and morale, my studies would lack any meaning were it not for their encouragement.

¹Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 8.

KEY WORDS

- **AGOA** African Growth and Opportunity Act of 2000;
- **EPA** Economic Partnership Agreement;
- **GATT** the General Agreement on Trade and Tariffs, 1947;
- **GSP** the General System of Preferences;
- **ICTSD** the International Centre for Trade and Sustainable Development;
- **ITO** the International Trade Organization;
- **OECD** the Organization for Economic Cooperation and Development;
- **SA** South Africa;
- **SSA** Sub-Saharan Africa;
- **UK** the United Kingdom;
- **UNCTAD** the United Nations Conference on Trade And Development;
- **US** the United States of America (when used as an acronym);
- **USA** the United States of America;
- **WTO** the World Trade Organization.

CHAPTER ONE – INTRODUCTION (RESEARCH PROPOSAL)

1.1 RESEARCH TOPIC

To what extent does the condition in the African Growth Opportunity Act, 2000 requiring that Sub-Saharan African countries eliminate barriers to United States of America trade, lend itself to abuse at the instance of the USA?

1.2 BACKGROUND, THE POSITION OF DEVELOPING COUNTRIES WITHIN THE MULTILATERAL TRADING SYSTEM

In the context of international trade, historically developing countries have been placed on an un-even playing field, due to their lack of trade capacity, expertise and limited resources. Adding to this, developing countries' desire to form part of the mainstream trade community has condemned developing countries to only average results.²

Historically, discussions and negotiations between developed countries and developing countries can be traced back to the International Trade Organisation (ITO) negotiations. The ITO Charter – the Proposed Charter contained no special rules or exceptions for developing countries, in this regard the United States of America (USA) proposed that the special rules or exceptions for developing countries be contained in the Economic Development Sub-Commission of the United Nations Social Council³. The USA submitted a draft resolution to the Economic and Social Council for it to convene the ITO negotiations. In this resolution, no mention was made of any special rules or exceptions for developing countries.⁴ When the UN Economic and Social Council responded to the draft resolution that it had received from the USA, it requested an amendment to the

²Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C. Page 20. 1987.

³Ibid (fn 2).

⁴Ibid (fn 2).

resolution so that it would include the following wording⁵

'[t]ake into account the special conditions which prevail in countries whose manufacturing industry is still in the initial stages of development'.

The USA ignored the proposed amendment made by the Economic and Social Council and then in later months, the USA published a more detailed resolution which was called the '*Suggested Charter*', but the wording specific to developing countries was still absent.⁶ The USA therefore, showed early signs of apathy towards developing countries and their so-called 'special needs', and this is illustrated by their actions building up to the ITO negotiations.

To be exact, developing countries wanted the following out of the ITO negotiations:

- *'protection of infant industries, with measures that were not recognized and hence not available;*
- *receiving new tariff preferences from other developed or developing countries⁷; and*
- *The right to benefit from developed country tariff concessions without having to offer equivalent tariff concessions of their own'.*

The USA opposed the position of the developing countries and was of the view that the special rules or exceptions allegedly required by developing countries would only serve to promote the creation of inefficient local industries.⁸ Unlike the USA, the United Kingdom (UK) and France were of the view that market distortions in the form of special rules or exceptions were needed to help developing countries.⁹ It must be pointed out that the UK and France's view were probably only aided by the fact that they both wanted to retain their own preferential tariff regimes.¹⁰ The UK and France also both wished to use protection and discrimination to foster the process of post-war economic reconstruction.¹¹ The divergence between the USA, the UK and France illustrates that the

⁵ Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C. Page 21. 1987.

⁶Ibid (fn 5).

⁷Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C. Page 22. 1987.

⁸Ibid (fn 7).

⁹Ibid (fn 7).

¹⁰Ibid (fn 7).

¹¹Ibid (fn 7).

developed world had differing views on whether policy should recognise the special needs of developing countries.

The ITO Charter was not accepted and therefore, the more extensive legal privileges developing countries had gained during the ITO negotiations did not materialise.¹² However, this would only have limited adverse effects because the trade policy rules of the ITO would survive and resonate in the General Agreement Trade and Tariffs (GATT).¹³ GATT incorporated the ITO Charter's infant-industry exceptions for tariffs and quantitative import restrictions and thus, it can be said that developing countries succeeded in gaining recognition for the legitimacy of their basic argument which from the onset was that the special needs of developing countries justified recognition and reliance on ITO-GATT legal dispensation.¹⁴ The recognition of developing countries' basic argument was of utmost importance because this argument would feature with even more rigour in future trade policy discussions and subsequent inquiries.

During the GATT meeting of Ministers convened in November 1957 with the objective of considering the general state of and prospects of international trade, the Minister's decision cited the following three major concerns:

- *'the failure of the trade of less developed countries to develop as rapidly as that of developed countries;*
- *excessive short-term fluctuations in prices of primary products; and*
- *widespread resort to agricultural protection'.¹⁵*

In 1958, the Ministers commissioned a group of experts to look into the concerns noted in the 1957 meeting of Ministers. The findings of the group of experts culminated in the Haberler Report.¹⁶ The main findings of the Haberler Report pointed out that the export earnings of developing countries were unsatisfactory and not at the level required to

¹²Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C. Page 24. 1987.

¹³Ibid (fn 12).

¹⁴Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 25. 1987.

¹⁵Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 43. 1987.

¹⁶Trends in International Trade, October 1958, Sales No. GATT/1958-3. Also known as the *'Haberler Report'* after Gottfried Haberler, its chairman. The other Panel members were Roberto da Oliveira Campos, James Meade, and Jan Tinbergen.

foster economic development.¹⁷ The Haberler Report also focused on the need to open markets of developed countries so that developing countries could have easier access to these markets and thereby, improve on their export earnings.¹⁸ The findings of the Haberler Report were crucial because they added substance to the arguments that were at all times made by developing countries in relation to their special circumstances and needs.

The Haberler Report culminated into the Action Programme which had as one of its main objectives the expansion of developing countries' export earnings.¹⁹ In order to achieve this objective, the Action Programme needed to focus on ensuring that developed countries did not insist on much reciprocity and conceded to unilateral trade liberalization without negotiation and reciprocity.²⁰ Currently, in modern international trade law, non-reciprocity is still recognized as being important and necessary from the perspective of developing countries, but this principle is still causing much debate and discomfort among developed countries, on the basis that it is against the World Trade Organisation (WTO) principle of trade liberalization.

The above discussion or information illustrates that developing countries started-off trade negotiations with a very poor negotiating posture, but over the years and through more negotiations, discussions and investigations, the negotiating posture of developing countries would improve and indeed become quite attractive as evidenced in international trading instruments such as GATT, the WTO and African Growth Opportunity Act (AGOA).

¹⁷Ibid (fn 15).

¹⁸Ibid (fn 15).

¹⁹Ibid (fn 15).

²⁰Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 44. 1987.

1.3 BRIEF INTRODUCTION TO AGOA

The USA Congress passed AGOA and it was signed by the then president, Bill Clinton. Title I is entitled, '*African Growth and Opportunity Act*' and the purpose of AGOA is to grant preferential trade treatment to certain products originating in eligible SSA countries, for a limited period.²¹

The pertinent parts of Section 103 of AGOA²² outlines the statement of policy as being Congresses' support towards:

'encouraging increased trade and investment between the United States and sub-Saharan Africa;

reducing tariff and nontariff barriers and other obstacles to sub-Saharan African and United States trade;

expanding United States assistance to sub-Saharan Africa's regional integration efforts;

negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of sub-Saharan Africa;

focusing on countries committed to the rule of law, economic reform, and eradication of poverty'.

'AGOA authorises the President of the USA to grant reforming sub-Saharan African countries duty-free access to the USA market in respect of 1800 items, which is in addition to the 4600 products contained under the GSP offered to other developing countries'.²³

This thesis will look into the following conditionality requirements that must be met in order for SSA countries to qualify for AGOA eligibility:

'the elimination of barriers to United States trade and investment, including by –

²¹Bhala, R. '*The Limits of American Generosity*', Fordham International Law Journal, page 310. Volume 29.

²²Section 103 (Statement of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²³Fuhr D. and Klughaupt Z., '*The IMF and AGOA: A Comparative Analysis of Conditionality*'. Duke Journal of Comparative and International Law. Volume 14:125. Page 137. 2004.

- *the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;*
- *the protection of intellectual property; and*
- *the resolution of bilateral trade and investment disputes’.*²⁴

In academic literature the above conditions have been criticized for not being commercially viable and only setting out to achieve the narrow interest of the USA.²⁵ On a reading of section 104 of AGOA,²⁶ this thesis argues that section 104 (1)(C) (Eligibility Requirements)²⁷ appears out of touch with the manifest purpose of the remainder of section 104 of AGOA.²⁸ To elaborate on this point, the remainder of section 104 of AGOA confines itself to what appear to be reasonable expectations of reform, compliance with the rule of law, compliance with internationally recognized labour standards and economic policies aimed at reducing poverty.²⁹ These arguments will be elaborated in the dissertation.

1.4 BACKGROUND TO THE USA AND SA POULTRY DISPUTE

The trade dispute between the USA and South Africa (SA), in the context of the poultry industry has its roots in the anti-dumping duties that SA (referred to as the Duties, in this thesis), acting through the SA Board on Tariffs and Trade (BTT) imposed on US poultry in 1999.³⁰ In 1999, the SA BTT initiated a case against the USA, for selling poultry below fair value.³¹ One of the contentious points needing to be addressed as part of the matter was how the prices for dark meat and white meat, respectively, in relation to chickens for export were to be calculated. As could have been reasonably expected, the USA used a

²⁴Section 104(1)(C)(iii) (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

²⁵Bhala, R. ‘*The Limits of American Generosity*’, Fordham International Law Journal, Volume 29, Issue 2. Page 334-335. 2006.

²⁶Section 104(1)(C) (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

²⁷Section 104(1)(C) (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

²⁸Section 104 (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

²⁹Sections 104 (1)(A), (B), (C), (D), (E), (F), section 104(2) and section 104(3), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

³⁰Mankiw G., and Swagel P.L., ‘*Anti-dumping: the third rail of trade policy*’. Foreign Affairs. Volume 84(4). Page 107-119. 2005.

³¹Mankiw G., and Swagel P.L., ‘*Anti-dumping: the third rail of trade policy*’. Foreign Affairs. Volume 84(4). Paragraph 115. 2005.

formula that it was familiar with, likewise, SA used a formula that it was familiar with.³² The SA BTT found that two USA exporters of chicken were involved in the dumping of dark chicken, by margins of 209 percent and 357 percent, respectively.³³ It is submitted that as a result of the SA BTT findings, the US chicken export numbers fell to 307 000 US Dollars in 2001 which was calculated to be a decline of 80 percent.³⁴

From the perspective of the USA, the Duties have been contentious for two primary reasons. Firstly, the Duties hinder the USA poultry industry, the largest in the world.³⁵ Secondly, In the light of the AGOA benefits of which SA is a beneficiary of, it is argued that SA should be relaxing its anti-dumping duties in accordance with AGOA conditionality requirements. SA has been benefitting under AGOA since the year 2000, being granted the privilege of exporting, duty-free, products such as wines, nuts, fruits and automobiles.³⁶

From SA's perspective, the views are that the duties levelled at the USA poultry industry are necessary in order to protect SA's own poultry industry.³⁷ SA also relies on the WTO anti-dumping measures, which allow countries to impose levies on a product if that product is introduced into a market at less than normal value.³⁸ The perspectives of the USA and SA have culminated into a dead-lock, with neither party willing to give-into what are in its views, rational policy positions. This deadlock is deserving of closer attention and raises various important issues. One important matter is whether SA should cease to protect its own poultry industry, through using internationally recognized measures such as the anti-dumping measures of the WTO, simply because the USA is not in agreement with such a move?

³²Mankiw G., and Swagel P.L., *'Anti-dumping: the third rail of trade policy'*. Foreign Affairs. Volume 84(4). Paragraph 116. 2005.

³³Ibid (fn 32).

³⁴Ibid (fn 32).

³⁵Kulkarni, k., *'Anti-Dumping Law as a trade barrier: a case of South-African poultry imports from U.S.A'*. The Indian Journal of Economics. Page 6. 2005.

³⁶Schneidman W. and Lewis Z.A, *'The African Growth Opportunity Act: Looking back, looking forward'*. Africa Growth Initiative Brookings Institution. Page 33. 2012.

³⁷Ncube P., *'Development of the animal feed to poultry value chain across Botswana, South Africa, and Zimbabwe'*. United Nations University World Institute for Development Economics Research. Page 15. 2016.

³⁸Article 2 (Determination of Dumping) of the Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994.

It is concerning when the USA believes it's at liberty to prevent a developing country from using entrenched rights, it becomes problematic and begins to meddle with the very essence of an international trade law system. On this point, it is interesting to note that one of the conditions in AGOA, speaks directly to the issue of removing all barriers to USA trade, and this seems to have been a well thought out strategy by the USA. This condition will be discussed at length in the thesis.

1.5 THE PURPOSE OF THIS DISSERTATION

The purpose of this dissertation is to critically analyse some of the conditionality requirements outlined in AGOA and whether the enforcement of these has lent itself to abuse at the instance of the USA.

Whether the conditionality requirements have lent themselves to abuse matters, because if they have, they will likely continue to do so in years to come which could possibly harm the future prospects of US and SA trade. If the conditionality requirements in AGOA lend themselves to abuse, then this also necessitates closer scrutiny of conditionality requirements, in unilateral trade agreements, and the deletion of conditions that serve no legitimate purpose other than to solely advance the narrow interests of USA trade.

1.6 RESEARCH QUESTIONS

General research question

'To what extent does the condition in the African Growth Opportunity Act, 2000 requiring that Sub-Saharan African countries eliminate barriers to United States of America trade, lend itself to abuse at the instance of the USA?'

Chapter 2 – *'The history of GATT and the WTO and the uneven positions of the developed countries and the developing countries in international trade'*.

Chapter 2 – Research questions:

- *'What is the policy position of developing countries in the context of international trade law?;*
- *'What are the stated challenges faced by developing countries?;*
- *'Have the stated challenges of developing countries been given recognition in any international trade law instruments?;*
- *'How has the international community responded to the needs of developing countries?'*

Chapter 3 – *'The history of the trade relationship between SA and USA and USA and SSA countries and analysis of AGOA'.*

Chapter 3 – Research questions:

- *'From a policy perspective, what is the nature of the relationship between the USA and SA?;*
- *'From a policy perspective, what is the nature of the relationship between the USA and SSA countries?;*
- *'Has the trade relationship between the USA and SA been formalized?;*
- *'Are there any noticeable trade disputes between the USA and SA?'*
- *'What is the legal nature of AGOA?;*
- *'From the perspective of the USA, what is the policy stance of AGOA?;*
- *'What are the eligibility criteria of AGOA?;*
- *'Are the eligibility criteria rational?'*

Chapter 4 – *'Recommendations and Conclusions'*

Chapter 4 – Research questions:

- *'Is AGOA entirely generous?;*
- *'Is AGOA fair and reasonable from the perspective of international trade?;*
- *'Are there other ways in which the USA through AGOA can achieve its stated policy objectives?;*
- *'Are there any reasonable amendments that can be made to AGOA?'*

1.7 LITERATURE REVIEW

Bhala is of the view that generosity³⁹ in the context of international trade does matter.⁴⁰ It is submitted that if generosity in the context of international trade law does matter, then it ought to be preserved and not dressed up as something else that is not in line with what generosity stands for, such as narrow self-interests.⁴¹

Remarking specifically on the AGOA conditionality requirements, Bhala states that, '*It is not difficult to mount a case that the AGOA eligibility requirements are self-interested, indeed nakedly so*'.⁴² If one considers the AGOA conditionality requirements and the poultry dispute between the USA and SA, it appears reasonably clear that these requirements only have as their objective, the removal of SA's anti-dumping measures levelled at USA poultry. Accepting that AGOA is a unilateral preference trade programme that does not require reciprocity at the instance of the beneficiary countries, it appears contradictory that AGOA requires SSAs to eliminate all barriers to, '*USA trade and investment, including national treatment of foreign investors and the protection of intellectual property rights*'.⁴³ It also does not follow that AGOA requires SA to eliminate all barriers to USA trade and investment, such as anti-dumping measures, notwithstanding their legal recognition at the level of the WTO.⁴⁴ Considering Bhala's views and my observations in light of the USA poultry dispute, the AGOA conditionality requirements have lent themselves to abuse at the instance of the USA.

Bhala suggests that generosity granted by developed countries to developing countries might even lead to a dispensation in the context of international trade where developing countries become wholly dependent on developed countries. Bhala's reasoning is that under preferential trade programmes, developing countries are often required to make

³⁹ In his works, '*The Limits of American Generosity*'. Fordham International Law Journal, Volume 29, Issue 2 (page 299) (2005), Bhala R. cites from the Oxford American Dictionary, synonyms for the word '*generosity*'. Some of the synonyms are as follows: '1. Giving or given freely. 2. Magnanimous; noble-minded; unprejudiced. 3. Ample; abundant; copious. 4. Bountiful, charitable, lavish, openhanded, free, liberal, unstinting, ungrudging...'

⁴⁰Bhala, R. '*The Limits of American Generosity*', Fordham International Law Journal, Volume 29, Issue 2. Page 301. 2006.

⁴¹Bhala, R. '*The Limits of American Generosity*', Fordham International Law Journal, Volume 29, Issue 2. Page 334-335. 2006.

⁴²Bhala, R. '*The Limits of American Generosity*', Fordham International Law Journal, Volume 29, Issue. Page 331. 2006.

⁴³Ibid (fn 24).

⁴⁴Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994. See Article 2 (determination of dumping).

*'market based reforms'*⁴⁵ that they may not be ready for. Stated differently, developing countries may be required to adopt market based reforms that fail to adequately protect the infant markets of developing countries.

The dependency argument substantiates this thesis argument that the AGOA conditionality requirements may lend themselves to abuse at the instance of the USA. Furthermore, if the spirit of generosity is adhered to, then developing countries should not be required to make market reforms, all in the name of being eligible for AGOA benefits.

The Haberler Report found that developing countries were experiencing challenges in the context of International trade, due to their dependence on primary products and the import barriers that are prevalent on developed country's shores.⁴⁶ Also, of great significance, the Haberler Report found that developing country's export earnings were insufficient to foster their economic development. Although the Haberler Report didn't express itself on these terms, it implied that developing countries needed to be afforded the opportunity to protect their markets while at the same time improving on their export earnings. The result of all of this would be economic development. In support of the argument immediately above, the United Nations Conference on Trade and Employment (UNCTE) stated that⁴⁷:

'the high degree of economic development attained by certain countries has been in no small measure due to the use of tariffs and other regulatory devices; and it is only proper that the use of these instruments should not be denied to countries that have just started on the path of development'.

The statement of the UNCTE legitimized the need for developing countries to adopt policy measures designed to protect their own industries. Understood in the context of AGOA, the Haberler Report is also significant. The AGOA conditionality requirements contradict the essence of the Haberler Report, namely, that developing countries' challenges in the context of international trade, culminate in developing countries not being able to foster

⁴⁵Ibid (fn 42).

⁴⁶Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Oxford: Hart Pub. Page 58. 2010.

⁴⁷The United Conference on Trade and Employment, *'Preparatory Committee of the United Nations on Trade and Employment'*: Verbatim Report of the Fourteenth Meeting of the Procedures Sub-Committee II, 18 November, E/PC/T/33.

economic development. Furthermore, when the AGOA conditionality requirements are read in the context of the Haberler Report, it becomes clear that they have been applied arbitrarily, especially when one considers the recent USA and SA poultry dispute.

Ozden⁴⁸ writes on the negative effects of GSP and in Ozden's view, preferences and their beneficial effects are limited by the protectionist practices of developed countries and in any event, once a developing country begins to rapidly improve its export capabilities, the preferences may be revoked by the donor country. On the issue of the revocation of preferences by donor countries, Ozden points out that the challenge with GSP preferences is that they fall outside the ambit of the GATT legal system, and as such, can be unilaterally changed and cancelled by donor countries at any time.

The AGOA conditionality requirements, appear to be a prime example of the protectionism referred to by Ozden. The AGOA conditionality requirements are self-defeating from the perspective of a developing country, because, in order for a developing country to be eligible for AGOA benefits, then that developing country must amongst other things, *'eliminate all barriers to USA trade and investment, including national treatment of foreign investors and the protection of intellectual property rights'*. It is not clear what is meant by *'barriers to USA trade'*, for example, does this include removing legally recognized protectionist measures such as the WTO anti-dumping measures?

Ozden also writes on what he terms, the basics of GSP, where he explains that GSP preferences are granted to the developing world by the developed world, on a non-reciprocal basis, which means that the beneficiary (developing country) is not required to reciprocate by inter alia granting liberalized market access. Read in this light, it appears clear that the AGOA conditionality requirements were drafted to serve the narrow interests of the USA, and were not drafted in a commercially clear and meaningful manner.⁴⁹

Ozden also attempts to argue that in the context of international trade law and integrating developing countries into the global trade system, reciprocity works better than non-

⁴⁸Ozden C. and Reinhardt E., *'The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies'*, 1976-2000. The World Bank Development Research Group, Working Paper. Page 2. 2003.

⁴⁹Jones. V.C. *'Trade Preferences: Economic Issues and Policy Options'*. Congressional Research Services, 7-5700 series. Page 21. 2013.

reciprocity found in GSP type preference programmes.⁵⁰ Ozden also argues that countries involved in GSP preference programmes are less likely to liberalize than those that are not involved in the GSP programme.⁵¹

This thesis argues that Ozden relies on technical information which is primarily comprised of formulae and algebra. While this thorough method is commendable, it detracts from what the real issues are in the context of international trade law and the integration of developing countries into the global trade system. Perhaps Gregory Bowman⁵² stated what has been argued more succinctly, when he stated the following:

'International Trade regulation is a highly technical and hyper-specialised area of the law, and in my experience there can be a scholarly tendency in the discipline to focus on technical matters at the expense of larger themes...'

What Bowman means is that, as commendable as illustrating the technical matters may be, the bigger picture might not get the focus and attention that it undoubtedly requires. For example, Ozden tends to not appreciate that it is an accepted principle that developing countries have, in the context of international trade, experienced vast economic, developmental difficulties.⁵³ Ozden also tends to not appreciate that the Enabling Clause⁵⁴ in GATT allowed for developed countries to give preferential treatment to developing countries owing to the challenges outlined above.

The crux of Ozden's arguments is that developing countries need to liberalize by reciprocating in accordance with WTO or GATT dispensation, instead of relying too heavily on GSP preferences. The reasoning given above can be used to argue against the author's position. Furthermore, the OECD clarified that developing countries are reliant on trade taxes as a source of revenue.⁵⁵ Therefore, to argue that developing countries should be

⁵⁰Ozden C. and Reinhardt E., *'The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies', 1976-2000*. The World Bank Development Research Group, Working Paper. Page 19-20. 2003.

⁵¹Ibid (fn 50).

⁵²Bowman G. W., *'Of haves and have-nots: A review of Donatella Allesandrini; Developing Countries and the failure of the Multilateral Trade Regime: the failure and promise of the WTO's development mission'*. Trade Law and Development, Volume 3(1), page 235-236. 2011.

⁵³*'Decision Regarding Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, December 4, 1979'*. GATT B.I.S.D. (26th Supp). Page 191-193. 1980.

⁵⁴Ibid (fn 53).

⁵⁵Kowalski P., Organisation for Economic Cooperation and Development, *'Impact of Changes in Tariffs on Developing Countries' Government Revenue 9'*. OECD Trade Policy, Working Paper No. 18. 2005.

reciprocating undermines developing countries' needs to derive revenue from its trade taxes, it also undermines the principle of non-reciprocity endorsed by GATT and the Enabling Clause.

The author's views demonstrate that although developing countries' needs have been documented and accepted, in practice the needs of developing countries are not upheld and protected. The AGOA conditionality requirements bare further testament to the view raised in this paragraph, in that they demand reciprocity by amongst other things, demanding that developing countries eliminate all barriers to USA trade.

McCormick⁵⁶ writes on the difficulties of pursuing African development through trade relationships with developed countries, suggesting that, in the context of developing countries, trading with developed countries with the objective of achieving African development is not a perfect solution. In the context of the developmental goals of developing countries, McCormick points out that the international trade community is aligned in its thinking that there is a need to help developing countries penetrate developed country markets while at the same time, affording developing countries the opportunity to preserve taxes and tariffs on imports, which is a vital source of revenue.⁵⁷

McCormick's views are supported by a working paper of the OECD which stated the following:

*'For many African states, trade taxes are the largest source of tax revenue. In African least developed countries, for example, the Organisation for Economic Cooperation and Development has noted that import duties accounted for 34 percent of total government revenue over the three-year period of 1999-2001 and exceeded 50 percent of total government revenue in a number of states.'*⁵⁸

Read in the light of McCormick's views and the work of the OECD, the AGOA conditionality requirements appear to be malicious and could be seen as undermining developing countries' rights to protect their infant markets. AGOA is non-reciprocal, meaning that the

⁵⁶McCormick R., 'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law. The Texas International Law Journal, Volume 41:339. 2006.

⁵⁷McCormick R., 'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law. The Texas International Law Journal, Volume 41:339. Page 363-364. 2006.

⁵⁸Kowalski P., Organisation for Economic Cooperation and Development, 'Impact of Changes in Tariffs on Developing Countries' Government Revenue 9'. OECD Trade Policy, Working Paper No. 18. Page 23. 2005.

beneficiaries to AGOA were never meant to reciprocate the benefits that were given to them under AGOA. During an interview conducted by the International Centre for Trade and Sustainable Development (ICTSD) Dr Witney Schneidman⁵⁹ revealed that in his view, the USA would have to rethink its strategy as it relates to trade with Africa. This was according to Dr Schneidman, due to the fact that the EU had concluded EPAs with African regional communities, in all probability threatening the USA's market share of the African continent.⁶⁰

Bhagwati⁶¹ argues that the aggressive push by developed countries, for reciprocity from developing countries is an issue that ought to be treated with due care and caution. If not, Bhagwati argues, the push for reciprocity will clash with the ideal of a free trading system and in doing so, make fair trade and enemy unto itself, instead of an ally unto itself.⁶² Bhagwati's argument is crucial as a foundation for some of the arguments that will be made throughout this thesis particularly in chapters 2 and 3.

1.8 RESEARCH METHODOLOGY

This study will be an outright desk-top literature study. The researcher will rely on primary and secondary sources of data. This study will involve perusal of at least the following, and any developments thereof:

- AGOA;
- General System of Preferences;
- Agreement establishing the World Trade Organization;
- General Agreement on Tariffs and Trade, 1947 and the interpretive text thereof;
- International Trade case law;
- Other relevant case studies relating to the US and SA in their capacity as international trading nations.

⁵⁹International Centre for Trade and Sustainable Development, 'Talking AGOA with Witney Schneidman'. Bridges Africa, Volume 4. Page 3. 2015.

⁶⁰Ibid (fn 61).

⁶¹J. Bhagwati and D. Irwin, *'The Return of the Reciprocitarians'*. US Trade Policy Today. Page 126. 1987.

⁶²Ibid (fn 61).

The researcher also intends to make use of reliable internet sources covering the poultry dispute relating to the USA and SA. This study will to a large extent refer to journal articles relating to the bullet points above and such journal articles will either be accessed from internet sources or from the library of the University of Kwa-Zulu-Natal.

1.9 CONCEPTUAL FRAMEWORK

Preference programs and the advancement of Least Developed Countries

In theory, all trade preference programs, such as AGOA have as their main aim, the development of least developed countries through improving their export capacity.⁶³ To elaborate on this point, Raul Prebisch⁶⁴, UNCTAD's first Secretary General held the view that a system of generalized, non-reciprocal trade preferences needed to be established in order to benefit developing countries.⁶⁵ Prebisch argued that allowing developing countries preferential access to developed country markets would result in developing countries benefitting from export led growth.⁶⁶ According to UNCTAD, the proposed preference system would address the disparity between developing and developed countries by promoting industrialisation, increasing their export earnings, and

⁶³Jones V. C. *et al*, 'Trade Preferences: Economic Issues and Policy Options.' Congressional Research Service, 7-5700. Page 8-9. 2013. See also, *The Contracting Parties to the General Agreement on Tariffs and Trade, Trends in International Trade: A Report by International Experts*, Sales No. GATT/1958-3 (1958). Trends in International Trade is known as the Haberler Report in honour of Professor Gottfried Haberler, Chairman of the GATT appointed experts. The experts were appointed for a study on the challenges that are faced by developing countries. During the Second Special Session of the Contracting Parties held on 8 February 1965, the Chairman stated the following when he sought to introduce part IV on Trade and Development:

'This new Part showed clearly that the promotion of the trade of less-developed countries and the provision of increased access for their products in world markets, were among the primary objectives of the CONTRACTING PARTIES. These objectives were now set forth in a new Article XXXVI. Article XXXVII laid down the commitments in the field of commercial policy which contracting parties would accept in order to promote these objectives. Article XXXVIII provided for joint action by the contracting parties, both within the framework of the GATT and in collaboration with other intergovernmental bodies, to further the objectives.'

The development of the trade capacity of developing countries was thus formalized and Contracting Parties were obliged to participate in the development of developing countries.

⁶⁴ Moss K., 'The Consequences of the WTO Appellate Body Decision in EC – Tariff Preferences for the African Growth Opportunity Act and Sub-Saharan Africa'. New York University Journal of International Law and Politics. Page 669. 2006.

⁶⁵Ibid (fn 66).

⁶⁶Ibid (fn 64).

accelerating developing countries' rates of economic growth.⁶⁷

The non-reciprocal nature of AGOA

AGOA is non-reciprocal, meaning that the beneficiaries to AGOA were never meant to reciprocate the benefits that were given to them under AGOA.

Conditions contained in Preference Programs

In practice, conditionality or eligibility requirements may form part of a preference program, stated differently. AGOA for example, contains several conditions and the one that I will be focusing on requires, in respect of SSA nations, *'the elimination of barriers to United States trade and investment, including national treatment of foreign investors and the protection of intellectual property rights'*.

What is less clear and less accepted is whether conditionality requirements serve a transparent and legitimate purpose. To expound on this statement, this thesis relies on the works of, Keven C. Kennedy⁶⁸ who states the following in this regard:

'Some commentators have singled out U.S GSP conditionality for special condemnation on the ground that as a policy instrument, it exceeds the bounds of rational policy making by including conditions that have no relationship to promoting human rights (for example, Intellectual Property Rights protection and U.S investor protection).'

Summary of the conceptual framework

The conceptual framework reveals a number of important issues and founding principles and they are as follows:

- Preference programs were designed to assist developing countries in reaching their developmental needs by promoting industrialisation, increasing their export earnings and accelerating developing countries' rates of economic growth.⁶⁹

⁶⁷Ibid (fn 64).

⁶⁸ Kennedy K. C, *'The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preference'*. Volume 20:3. Page 634-635. 2012.

⁶⁹Ibid (fn 64).

- AGOA was intended to be a non-reciprocal preference program, preference programs are 'generous'⁷⁰ by their nature, requiring generosity of the donor nation to the beneficiary nation. Generosity does not in principle entail an element of reciprocity, or taking back, this is contrary to the manner in which AGOA has been enforced by the US in relation to South Africa and the poultry dispute.
- The existence of conditions in AGOA or any other preference programs does not raise questions of legality or immorality. However, the existence of some conditions in AGOA, coupled with the manner in which the USA has applied these, raises questions about the USA's true intentions and their good faith (or a lack thereof). *Raj Bhala* states the following in respect of the AGOA conditions:

'It is not difficult to mount a case that the AGOA eligibility requirements are self-interested, indeed, nakedly so'.⁷¹

The above quotation is an illustration of some of the criticism that is levelled at AGOA conditions and the manner in which these conditions are enforced.

1.10 ANTICIPATED LIMITATIONS

There is scarce literature dealing specifically with the AGOA conditionality requirements. The overwhelming majority of the literature merely mentions the AGOA conditionality requirements, without going into great depth on what these conditions means and most importantly, how they have been applied. Raj Bhala is one of the leading authors critiquing AGOA conditions, in relation to the AGOA condition requiring that SA remove all barriers to USA trade, Raj Bhala states the following –

'the third requirement is designed to help the United States gain access in SSA.'⁷²

This thesis argues that what Raj Bhala means is that, the condition requiring that SSA

⁷⁰ \In his works, *'The Limits of American Generosity'*. Fordham International Law Journal, Volume 29, Issue 2. Page 299. 2005. Bhala R. cites from the Oxford American Dictionary, synonyms for the word 'generosity'. Some of the synonyms are as follows:

'1. Giving of given freely. 2. Magnanimous; noble-minded; unprejudiced. 3. Ample; abundant; copious. 4. Bountiful, charitable, lavish, openhanded, free, liberal, unstinting, ungrudging...'

⁷¹Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 334. 1987.

⁷²Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 335. 1987.

nations remove all barriers to USA trade⁷³ serves no legitimate objective other than to further the narrow interests of the USA.

Kevin C. Kennedy also argues against the conditionality requirements contained in AGOA, and states the following in that regard –

*‘In short, conditionality is a stage for bad political theater, and its impact on the beneficiary level is arguably negligible. The elimination of conditionality in all donor-country GSP programs should be given serious consideration’.*⁷⁴

This thesis argues that, unfortunately the author’s statement is difficult to understand, especially where he states that conditionality’s impact on beneficiary nations is negligible. This is at odds with the remainder of the statement which suggests that conditionality lends itself to political abuse, and this is one of the reasons that this thesis argues conditionality requirements in AGOA ought to be reconsidered, so that they can have a more meaningful role to play than just to serve the interests of the USA.

1.11 CHAPTER OUTLINE

- **Chapter 1** – *‘Introduction (Research Proposal)’*;
- **Chapter 2** – *‘The history of GATT and the WTO and the uneven positions of the developed countries and the developing countries in international trade’*;
- **Chapter 3** – *‘The history of the trade relationship between SA and USA and USA and SSA countries and a legal analysis of AGOA, as it relates to the poultry industry’*;
- **Chapter 4** – *‘Recommendations and conclusion’*.

⁷³Ibid (fn 24).

⁷⁴Kennedy K. C., *‘The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preferences’*. The Michigan State International Law Review. Volume 20. Page 641. 2012.

CHAPTER TWO – THE HISTORY OF GATT AND THE WTO AND THE UNEVEN POSITIONS OF DEVELOPED AND DEVELOPING COUNTRIES IN INTERNATIONAL TRADE

2.1 INTRODUCTION

This chapter seeks to review the policy position of developing countries in the context of international trade law. This chapter will also review some of the challenges faced by developing countries and whether these have been given recognition in any international trade law instruments. Lastly, this chapter will analyse how the international community has responded to the needs of developing countries.

This chapter aims to determine the extent to which the multilateral trading system developed to co-ordinate the relationship between developed and developing countries, from a policy perspective. Thus, this chapter will briefly summarize the various policy positions gained by developing countries in terms of various policy documents and milestone events in the context of international trade law. The policy positions gained by developing countries are essential to understanding firstly, the starting negotiating positions of developing countries in international trade law, and secondly, to what extent if any, the negotiating positions of developing countries have improved over time. The negotiating positions of developing countries are in turn crucial because they could potentially add to the discussion on whether the condition in the AGOA requiring that Sub-Saharan African (SSA) countries eliminate barriers to United States of America (USA) trade,⁷⁵ has lent itself to abuse at the instance of the USA.

J Scott⁷⁶ who explains the importance of understanding the developing countries negotiating positions slightly differently, is of the view that in order to understand a country's views it is necessary to understand the ideas that inform these views and that a countries' past experiences contribute a great deal to its present day views and stances that manifest during trade negotiations. Scott's views are crucial for purposes of this chapter because ultimately

⁷⁵Ibid (fn 24).

⁷⁶Scott. J., '*Developing Countries in the ITO and GATT Negotiations*'. Brooks World Poverty Institute. Page 3-5. 2009.

the chapter intends to argue that the USA has always been prejudiced by its own policy interests in the field of international trade law. Accepting Scott's arguments and other authors on the importance of understanding the ideas that inform a country's views, it is important to understand why the USA has displayed a consistently prejudicial stance towards developing countries, especially like South Africa.

2.2 THE ITO NEGOTIATIONS

This chapter outlines that, although the ITO negotiations did not materialise into hard rules, the ITO negotiations were nevertheless significant from the perspective of developing countries.⁷⁷ At the time of the ITO negotiations, much of the world power was held by the USA.⁷⁸ This is evidenced by the fact that the USA controlled three-quarters of the world's monetary gold and was responsible for one-third of the world's exports.⁷⁹ The UK and its large empire were also significant even if this significance did not quite match-up with that of the USA.⁸⁰ The power and significance of the USA and the UK is relevant to this thesis, and more specifically, this chapter as much of the negotiations (especially with the ITO) took the mould of the views of the developed countries such as the USA and the UK.

From the ITO negotiations, the developing countries had sought protection of infant industries, with measures that were not recognized, and hence not available, receiving new tariff preferences from other developed or developing countries and, the right to benefit from developed country tariff concessions without having to offer equivalent tariff concessions of their own.⁸¹ Notwithstanding opposition by the USA, some of the protections sought by the developing countries were incorporated in GATT. These included, the ITO Charter's infant-industry exception for tariffs and the quantitative import restrictions.⁸² The ITO negotiations

⁷⁷Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 24. 1987.

⁷⁸Scott. J., *'Developing Countries in the ITO and GATT Negotiations'*. Brooks World Poverty Institute. Page 4. 2009.

⁷⁹Ibid (fn 78).

⁸⁰Ibid (fn 78).

⁸¹Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 22. 1987.

⁸²Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 25. 1987.

presented developing countries an opportunity to argue what their needs were.⁸³ In the words of Capling,⁸⁴

'Most of the countries at Havana had not been a party to the earlier negotiations and the hard-fought compromises. Now it was their turn to denounce the Charter⁸⁵, to seek exemptions from its provisions, and to demand exceptions based on their own particular problems'.

From a policy perspective and from a negotiation perspective, this chapter argues that all that was required by developing countries at the time required was an acknowledgment from the developed countries that developing countries did have unique challenges that required a measure of special treatment.

Having established the position of developing countries at the level of the ITO negotiations, this chapter will now argue that the negotiating positions that the developing countries secured in the various negotiating rounds,⁸⁶ such as the ITO discussions, the Tokyo Rounds and the Uruguay Rounds were strong and ensured to a large extent, that such countries would be able to protect their interests for years to come.

2.3 DEVELOPING COUNTRIES AND THEIR INTERACTIONS WITH THE GATT TRADING SYSTEM

This chapter focuses on the GATT round of negotiations and the three primary challenges that these presented for developing countries. These challenges were the principle of reciprocity, the primary supplier rule, and the limitation to tariffs only in negotiations.⁸⁷

⁸³Scott. J., *'Developing Countries in the ITO and GATT Negotiations'*. Brooks World Poverty Institute. Page 4-8. 2009.

⁸⁴Capling. A., *'The 'enfant terrible': Australia and the reconstruction of the multilateral trade system'*. Australian Economic History Review. Volume 40(1). Page 21. 2000.

⁸⁵The reference to Charter is a reference to the International Trade Organization Charter. The Charter was primarily crafted by the U.S and the United Kingdom (UK) and by definition favoured the negotiating positions of the U.S and the UK.

⁸⁶Since 1947, seven rounds of multilateral tariff and trade negotiations have been completed with GATT and these are as follows – 1947 (Geneva), 1949 (France), 1951 (England), 1956 (Geneva), 1960 – 1961 (Geneva, the Dillon Round), 1964 – 1967 (Geneva, Kennedy Round), 1973 – 1979 (Geneva, Tokyo Round). The eight round of multilateral negotiations, the Uruguay Round, was launched in Punta del Este, Uruguay in September 1986 and the Final Act was signed at Marrakesh, Morocco, 15 April 1995.

⁸⁷Ismail F., *'Rediscovering the Role of Developing Countries in GATT before the Doha Round'*. Research and Information System for Developing Countries. Page 9. 2008.

At the ITO negotiations the USA were adamant that the principle of reciprocity should form the founding principle of GATT.⁸⁸ Developing countries such as India objected to the USA demand for reciprocity by pointing out that developing countries' markets were much smaller in size and as such, did not have the bargaining power required to make the tariff concessions required by the USA.⁸⁹ Furthermore, developing countries required the ability to be able to protect their infant industries due to their early stage in the process of industrialization.⁹⁰ Moreover, in 1947, many tariffs of developing countries were lower on average than those of developed countries. From this perspective, it therefore, seemed strange that developing countries would be required to make further concessions.⁹¹ Furthermore, exports of developing countries were primarily to be found in raw materials which in any event were accepted in duty-free markets; concessions from this perspective also appeared not to be rational.⁹² In direct contrast, for those goods where developing countries were likely most competitive, such as agricultural goods, developed countries were implementing non-tariff barriers, such as high internal taxes and subsidies to remain competitive.⁹³ This position hampered developing countries whom could not effectively compete against such non-tariff barriers. From the perspective of developing countries, again, it ceased to make any sense why developing countries were expected to make tariff concessions when the developed world, the USA a case in point, seemed at liberty to implement what measures they deemed appropriate.

To be clear, developing countries did accept the overall principle of tariff liberalisation, with a reservation coming from one un-named nation.⁹⁴ At the heart of the issue of accepting the principle of trade liberalization was the word 'substantial' and what actually constituted a 'substantial' reduction in tariffs.⁹⁵ Amongst the developing countries' objections, India's objection was particularly well phrased, contextualizing why the word 'substantial' caused controversy. India asked the following question in this regard:

⁸⁸Ibid (fn 87).

⁸⁹Ibid (fn 87).

⁹⁰Ibid (fn 87).

⁹¹Scott. J., *'Developing Countries in the ITO and GATT Negotiations'*. Brooks World Poverty Institute. Page 17. 2009.

⁹²Ibid (fn 91).

⁹³Ibid (fn 91).

⁹⁴ Ibid (fn 91).

⁹⁵ Ibid (fn 91).

*'Are we going to declare the country to be a defaulter because the performance made by it does not come up to the performance made by other countries which may be in an entirely different position, in an entirely different state of economic development, or because the performance is not what can be described as substantial?'*⁹⁶

This chapter argues that the '*substantial*' requirement was always going to be controversial because the term would mean something different for a particular developed country and something different for a particular developing country (mainly due to their different level of development). Moreover, the term '*substantial*' only served to look after the interest of the developed countries because the interpretation of this term would have in most cases skewed towards the interpretation of developed countries. This argument can be supported by the proposal to have a so-called Tariff Committee to assist with interpretational issues.⁹⁷ It is difficult to envision many cases where the interpretation of '*substantial*' would have gone in the favour of developing countries. Indeed, it would be naïve to even suggest that a Tariff Committee with the design and thinking of developed countries would be in favour of developing countries more than for developed countries. It comes as no surprise that the proposed Tariff Committee was abandoned in favour of rather establishing an Executive Board which would have guaranteed seats for developing countries.⁹⁸

By the late 1940s, development in the GATT system was a universally accepted construction and the thinking underlying the construction of development under GATT was that it would lead to economic growth, provided that there was industrialization driven by trade liberalization.⁹⁹ Developing countries grew discontent with the theoretical underpinnings of GATT as they learnt more of the structural imbalances of the international trading regime.¹⁰⁰ This thesis argues that the dissatisfaction of GATT among developing countries was twofold. Firstly, GATT supported the rhetoric that economic development by developing countries would best be attained by trade liberalization and secondly, GATT policy was contradictory

⁹⁶The United Conference on Trade and Employment, '*Preparatory Committee of the United Nations on Trade and Employment*': Verbatim Report of the Fourteenth Meeting of the Procedures Sub-Committee II, 18 November, E/PC/T/33.

⁹⁷Ibid (fn 91).

⁹⁸Ibid (fn 91).

⁹⁹Allesandrini. D., '*Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTO's Developmental Mission*'. Studies in International Trade Law. Page 55. 2006.

¹⁰⁰Allesandrini. D., '*Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission*'. Oxford: Hart Pub. Page 56. 2010.

and confused in that it spoke against protectionism, yet at the same time, the USA exempted agriculture and fisheries from the prohibition of quantitative restrictions.¹⁰¹

The trading position for developing countries under GATT was in fact quite worrisome for the following reasons. They struggled to export primary products such as agricultural products to the shores of developed countries, and was due to the discriminatory measures that developed countries imposed on these agricultural products.¹⁰² This situation was outrageous and contradictory, surely in scenarios where developing countries sought to export products where they had a comparative advantage, they ought to have been supported by the international trade community, specifically the GATT system? Furthermore, under GATT, the principle of reciprocity implied tariff reductions given by developed countries needed to be paid for by developing countries.¹⁰³ The position of developing countries being undisputed, it was not realistic for the USA and the GATT trading system to expect that developing countries would be able to reciprocate, at such an aggressive rate.

It is important to remember that at no point in trade negotiations did developing countries become submissive and accept the international trading system as is. Actually, deep into the GATT negotiations, the developing countries resisted the imbalances of the GATT regime and sought to reform its rules.¹⁰⁴ Key to reforming the GATT rules in any way was always going to be challenging, and correcting the GATT's skewed view on developing countries and their unique needs.¹⁰⁵ Perhaps the most significant view of GATT, purely due to the implications that it held for developing countries, was that, in order for developing countries to reach the heights that were reached by industrialised countries, developing countries needed to liberalise their trade, as had been done by industrialised countries.¹⁰⁶ The GATT view was fundamentally flawed for two reasons. Firstly, it operated under the assumption that developed countries owed their successes to completely liberalizing their trade. This assumption is largely incorrect as the USA, UK and France all implemented various policy

¹⁰¹Ibid (fn 100).

¹⁰²Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Oxford: Hart Pub. Page 58. 2010.

¹⁰³Ibid (fn 100).

¹⁰⁴Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Oxford: Hart Pub. Page 57. 2010.

¹⁰⁵Ibid (fn 100).

¹⁰⁶Ibid (fn 102).

measures in order to protect their industries.¹⁰⁷ Secondly, it failed to appreciate the difficulties that were in fact faced by developing countries, highlighted in the Haberler Report.

Deep into the GATT negotiations, the developing countries resisted the imbalances of the GATT regime and sought to reform its rules.¹⁰⁸ Key to reforming the GATT rules in any way was always going to be challenging as was correcting the GATT's skewed view on developing countries and their unique needs.¹⁰⁹ Perhaps the most significant view of GATT, purely due to the implications that it held for developing countries was that, in order for developing countries to reach the heights that were reached by industrialised countries, developing countries needed to liberalise their trade, as had been done by industrialised countries.¹¹⁰

The GATT view was fundamentally flawed for two reasons. Firstly, it operated under the assumption that developed countries owed their successes to completely liberalizing their trade. This assumption is largely incorrect as the USA, UK and France all implemented various policy measures in order to protect their industries.¹¹¹ Secondly, it failed to appreciate the difficulties that were in fact faced by developing countries, highlighted in the Haberler Report.

The persistence of developing countries culminated in GATT eventually recognizing the special circumstances of developing countries. Acceptance culminated in GATT conceding that developing countries were allowed some leniency in so far as the enforceability of GATT provisions was concerned. Various amendments to GATT provisions were effected on the back of arguments made by developing countries.¹¹² Unfortunately, notwithstanding the persistence of developing countries and the various amendments that were made to GATT, developed countries continued to discriminate against the trade of developing countries.¹¹³

¹⁰⁷Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 22. 1987.

¹⁰⁸Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Oxford: Hart Pub. Page 57. 2010.

¹⁰⁹Ibid (fn 100).

¹¹⁰Ibid (fn 102).

¹¹¹Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 22. 1987.

¹¹²Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Oxford: Hart Pub. Page 57. 2010.

¹¹³Ibid (fn 112).

2.4 HABERLER REPORT

The work of the Haberler Report was crucial from the perspective of international trade, but more so from the perspective of developing countries. Although traces of acknowledgment of the developmental requirements of developing countries could be identified at ITO level and GATT level, no institution had formally committed to paper, precisely what the position of developing countries was, the challenges and precisely what needed to be done in an attempt to address these stated challenges.

The Haberler Report was published in 1958 and was mandated with studying the contracting parties' compliance with the GATT rules of conduct;¹¹⁴ more importantly, it sought to study the reasons for developing countries so-called failure. This was important because up to the advent of the Haberler Report, the assumption was that developing countries were the masters of their own demise. Part of this assumption was that developing countries could not perform well in trade for as long as they failed to liberalise their trade and that to achieve the heights of the developed countries, developing countries needed to liberalise like the developed countries had done and continued to do.

The Haberler Report was also significant because developing countries were caricatured by the developed world and many of its academics as being resistant to GATT discipline, and wanting nothing else but exceptions and special treatment from any negotiation rounds that they were privy to. Simply put, developing countries were caricatured as non-conformists.¹¹⁵ The caricaturing of developing countries as non-conformists is deeply significant and worrisome for two reasons. Firstly, if developing countries were understood by developed countries as been non-conformists, then this undermined the position of developing countries in a sense that their legitimate needs would in most cases simply be ignored and dismissed. Secondly, any legitimate arguments made by developing countries would be clouded by their caricaturing as non-conformists.

Contrary to the assumptions and caricaturing outlined above, the Haberler Report found that some of the challenges faced by developing countries were regional trading blocks, instability

¹¹⁴Ibid (fn 102).

¹¹⁵Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 73. 1987.

of commodity prices and the discrimination that was being practiced by developed countries against developing countries (which came in the form of agricultural protectionism).¹¹⁶ Although hardly expressed in these terms, the findings outlined in the Haberler Report were an indictment on the developed countries, since for some time, these countries had been aggressively pushing developing countries to liberalise their trade as developed countries had supposedly done.

To address the issues that were outlined in the Haberler Report, the GATT contracting parties established an expansion programme and the expansion programme's committee (referred to as Committee III) was tasked with looking into the discriminatory measures that were being used by developed countries. Committee III findings were quite startling and revealed that developed countries had actively participated in frustrating the trade of less-developed countries.¹¹⁷ The practice deployed by developed countries was to frustrate both traditional exports and exports of manufacture, by way of tariffs, quantitative restrictions, internal taxes, state trading and import monopolies.¹¹⁸ Furthermore, Committee III found that developing countries faced high-tariffs on their major exports, such as, vegetable oil, coffee, tea, cocoa products, jute products, cotton products, sporting goods and leather goods.¹¹⁹

Thus, the Haberler Report revealed that the conduct of developed countries was not consistent with GATT principles, and in fact it flouted everything that GATT stood for. This was not the only problem, as there was a larger problem and theme, and this was that developed countries were failing to do the same things that they so proudly and aggressively pushed for, such as trade liberalization. Therefore, the Haberler Report's most significant contributions were that it clearly defined what challenges were being faced by developing countries and the nature of these challenges. Also, the assumptions underlying the so-called failure of developing countries were now laid to rest, and the caricaturing of developing countries and non-conformists could now also be laid to rest.

¹¹⁶Ibid (fn 102).

¹¹⁷Ibid (fn 102).

¹¹⁸Ibid (fn 102).

¹¹⁹Ibid (fn 102).

2.5 THE GSP AND ITS INTERACTIONS WITH DEVELOPING COUNTRIES

The General System of Preferences (GSP) is comprised of trade preferences that are granted by developed countries to donor countries.¹²⁰ One of the key characteristics of GSP is that the donor country is not required to reciprocate on the benefits that it has been granted. GSP was first proposed at the first United Nations Conference on Trade and Development (UNCTAD) in 1964.¹²¹ At the second session of UNCTAD in 1968, a resolution was unanimously adopted, in terms of which '*a mutually acceptable system of generalized, non-reciprocal and non-discriminatory trade preferences which would be beneficial to the developing countries*', would be implemented.¹²² In 1970, a Special Committee on preferences was established and in the same year adopted the Agreed Conclusions which outlined the details of the GSP arrangement.¹²³

GSP was seen by UNCTAD as a means of encouraging the participation of developing countries in GATT.¹²⁴ Dr. Supachai Panitchpakdi, current Secretary-General of the U.N Conference on Trade and Development and former Director-General of the World Trade Organization (WTO), summarized the purpose of GSP as follows¹²⁵ –

'The Generalized System of Preferences was established on the basis of the economic theory that preferential tariff rates in developed-country markets could promote export-driven industry growth in developing countries. It was believed that this, in turn, would help free beneficiaries from heavy dependence on trade in primary products, the slow long-term growth and price instability of which contributed to the chronic trade deficits. It was thought that only the larger markets of industrialized trading partners were big enough to provide the economic stimulus needed to attain these goals.'

¹²⁰Ozden C. and Reinhardt E., '*The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies*', 1976-2000. The World Bank Development Research Group, Working Paper. Page 4. 2003.

¹²¹Ibid (fn 66).

¹²²McKenzie. M., '*European Communities – Conditions for the granting of tariff preferences to developing countries*'. Melbourne Journal of International Law. Volume 6. 2005.

¹²³Ibid (fn 122).

¹²⁴Ibid (fn 120).

¹²⁵Snyder. M., '*GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences*'. Michigan Journal of International Law. Volume 33. Page 822. 2012.

According to Snyder,¹²⁶ '*GSP was seen as part of a larger development strategy that included measures such as import-substitution policies, infant industry protection and preferential access to developed countries' markets*'.¹²⁷ This chapter argues that the intended purpose of the GSP as being a larger developmental strategy, is important for conceptualizing AGOA.

The key enabling tool allowing developing countries to make full use of GSP is the provision of '*better-than-Most Favoured Nation (MFN) treatment*' to imports from qualifying donor countries.¹²⁸ An example of the better than MFN treatment is the GSP established by the USA, this GSP program set a zero tariff on 6,409 articles from beneficiary states (out of a total of 15,467 tariff lines), while other countries were subject to normal tariffs, which were ultimately the higher MFN tariffs.¹²⁹

One of the most controversial GSP discussions in trade literature is that GSP clashes with two principles of the multilateral trading system.¹³⁰ Firstly, GSP contradicts the principle of reciprocity because the donor country is not expected to reciprocate.¹³¹ Secondly, the GSP contradicts the principle of non-discrimination in trade.¹³² The two fundamental challenges presented by the GSP were rectified temporarily in 1971, with the advent of the special GSP waivers which were granted by GATT members.¹³³ In 1979, the challenges brought about by the GSP were resolved by the, '*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries decision*' also known as the '*Enabling Clause*' of the Tokyo Round agreements.¹³⁴

Paragraph one of the Enabling Clause¹³⁵ provides that contracting parties may accord special and differential treatment to developing countries 'notwithstanding' article 1 of GATT 1947. With reference to paragraph 2(a),¹³⁶ the exemption outlined in the Enabling Clause is understood to apply to, '*preferential tariff treatment accorded by developed contracting*

¹²⁶Snyder M., '*GSP and Development: Increasing the Effectiveness of Non-Reciprocal Preferences*'. Michigan Journal of International Law. Volume 33. Page 821. 2012.

¹²⁷Ibid (fn 126).

¹²⁸Ibid (fn 120).

¹²⁹Ibid (fn 120).

¹³⁰Ibid (fn 120).

¹³¹Ibid (fn 120).

¹³²Ibid (fn 120).

¹³³Ibid (fn 120).

¹³⁴Ibid (fn 120).

¹³⁵Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903). Page 191.)

¹³⁶Ibid (fn 137).

parties to products originating in developing countries in accordance with the General Preferences'. Footnote 3 to paragraph 2(a), which speaks of the 1971 Waiver Decision, describes the GSP as a system of, '*generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries*'.¹³⁷ It is understood that it is this description of the GSP as '*non-discriminatory*' that is at the heart of the contentions that formed part of the Appellate Body's decision in *EC – Tariff Preferences*.

A brief summary of the *EC – Tariff Preferences* decision is as follows. The dispute concerned a case initiated by the Government of India, at the WTO against the European Union (EU). The Government of India alleged that the EC's special tariff preference arrangement to combat drug production and trafficking (EC Tariff Preference Drug Arrangements) violated the Most Favoured Nation (MFN) principle of Article I:1 of GATT¹³⁸. The Government of India further argued that the EC Tariff Preference Drug Arrangements was not permitted in terms of the Enabling Clause. In terms of the EC Tariff Preference Drug Arrangements, twelve GSP beneficiary countries were granted greater tariff reductions than what were offered to other developing countries in terms of the EC's GSP.¹³⁹ India argued that the EC Tariff Preference Drug Arrangements also violated the WTO obligations.¹⁴⁰ The WTO agreed with India, and held that the Enabling Clause requires that, '*identical tariff preferences under GSP schemes be provided to all developing countries without differentiation*'.¹⁴¹ The effect of the *EC – Tariff Preferences* decision was therefore that the EC Tariff Preference Drug Arrangements ought to have applied to all developing countries, even those developing countries that were not deemed by developed countries as GSP beneficiaries.¹⁴²

As was to be expected given the magnitude of the *EC – Tariff Preferences* and what was actually at stake, the EC appealed the WTO's decision and the WTO Appellate Body (Appellate

¹³⁷McKenzie. M., '*European Communities – Conditions for the granting of tariff preferences to developing countries*'. Melbourne Journal of International Law. Volume 6. Page 4. 2005.

¹³⁸The MFN principle requires "any advantage, favour, privilege or impunity granted by any contracting party to any product originating in or destined for any other country, to be accorded immediately and unconditionally to the like product originating in or destined for territories of all other contracting parties." See General Agreement on Tariffs and Trade, Oct. 20, 1947, art I:1, 61 Stat, A-11, 55 U.N.T.S. 194.

¹³⁹Moss K., '*The Consequences of the WTO Appellate Body Decision In EC – Tariff Preferences for the African Growth Opportunity Act And Sub-Saharan Africa*'. New York University Journal of International Law and Politics. Page 669. 2006.

¹⁴⁰*Ibid* (fn 139).

¹⁴¹*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT BISD, 203, GATT Doc L/4903 (1979) (Multilateral Trade Negotiations Decision, adopted on 28 November 1979 ('Enabling Clause').

¹⁴²*Ibid* (fn 139).

Body) reversed the Panel's decision and held that the Enabling Clause does not require developed countries to offer GSP preferences to all developing countries.¹⁴³ Instead, the Appellate Body found that the Enabling Clause permits developed countries to treat developing countries within its GSP system differently, provided that similarly situated GSP beneficiaries are offered equal treatment.¹⁴⁴ The decision of the Appellate Body was considered a victory for the reason that it paved the way for continued use and reliance on GSP type programs by developing countries who were fortunate enough to be identified and selected on these programmes.

This thesis argues that the *EC – Tariff Preferences* decision was significant for three primary reasons. Firstly, the GSP was a fundamental departure from the MFN principle. Secondly, the GSP was a fundamental departure from the principle of non-discrimination. Thirdly, the *EC – Tariff Preferences* decision potentially had serious ramifications for already existing GSP programs as well as any future GSP programmes. If the Appellate Body ruled against the GSP Preferences, then already existing GSP programmes could be successfully challengeable by opposing countries.¹⁴⁵ If the Appellate Body ruled in favour of GSP, then existing and future GSP programmes would be difficult to challenge successfully, in future, on legal grounds, because a precedent would have been set by the Appellate Body.¹⁴⁶ This thesis argues that AGOA is a GSP type programme and thus it should allow for GSP type exceptions at the instance of developing countries, such as import-substitution policies, infant industry protection, and preferential access to developed countries' markets.¹⁴⁷ This thesis will argue in chapter 4 (Legal analysis of AGOA, as it relates to the poultry industry), that AGOA does not uphold the principles that form the foundation of GSP type programmes.

As was alluded to earlier in this chapter, it is important to understand that the GSP was intended to bolster a larger developmental agenda.¹⁴⁸ Furthermore, in terms of this developmental agenda, measures such as import-substitution policies, infant industry

¹⁴³Ibid (fn 139).

¹⁴⁴Appellate Body Report, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, 128, 173, WT/DS246/AB/R (Apr. 7, 2004).

¹⁴⁵Ibid (fn 139).

¹⁴⁶Ibid (fn 139).

¹⁴⁷Snyder M., 'GSP and Development: Increasing the Effectiveness of Non-Reciprocal Preferences'. Michigan Journal of International Law. Page 821. Volume 33. 2012.

¹⁴⁸Ibid (fn 147).

protection, and preferential access to developed countries' markets, were all envisioned.¹⁴⁹ When one considers AGOA and the recent poultry dispute between the USA and SA, the initial intent of GSP programs seem to have been undermined and even contradicted. For example, the AGOA condition requiring that SSAs eliminate all barriers to USA trade and investment, including national treatment of foreign investors and the protection of intellectual property rights,¹⁵⁰ seems at odds with the stated developmental agenda of GSP programmes. Commenting on GSP eligibility criteria, Snyder¹⁵¹ points out that some eligibility criteria are ambiguous and he uses various examples such as, beneficiaries that, '*engage in activities that undermine United States national security or foreign policy interests*'¹⁵² or do not provide, '*adequate and effective protection of intellectual property rights*',¹⁵³ risk having their benefits suspended.¹⁵⁴ This chapter argues that these conditions are vague and open to interpretation and that it is no co-incidence that these conditions are vague and open to interpretation, as it appears to have been a well-crafted strategy by the USA. Bearing in mind that, AGOA being part of the USA GSP programme, falls outside the WTO and the effect of this is that these conditions would be subject to the USA government instead of a WTO panel. Further arguments in respect of AGOA conditionally requirements will be made in chapter 4 (Legal analysis of AGOA, as it relates to the poultry industry) of this chapter.

2.6 THE TOKYO ROUNDS AND DEVELOPING COUNTRIES

From the perspectives of developing countries, the Tokyo Rounds of Negotiations (Tokyo Rounds) resembled something of a victory, due to the fact that as it had been the case since 1947, developing countries had managed to get something out of this negotiation round. The overarching purpose of the Tokyo Rounds of negotiations was to try and carve out an alternative to GATT strictures, this alternative would come in the form of framework agreements.¹⁵⁵

¹⁴⁹Snyder M., '*GSP and Development: Increasing the Effectiveness of Non-Reciprocal Preferences*'. Michigan Journal of International Law. Page 821. Volume 33. 2012.

¹⁵⁰Section 104(1)(C)(i) (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

¹⁵¹Ibid (fn 149).

¹⁵²Ibid (fn 150).

¹⁵³Section 104(1)(C)(i) (Eligibility Requirements), 2462 (c)(5) (2000). The African Growth and Opportunity Act, 2000.

¹⁵⁴Ibid (fn 149).

¹⁵⁵Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C, page 74. 1987.

From the perspective of developing countries, the framework agreements were hugely significant because they gave birth to the Enabling Clause, which was discussed earlier in this dissertation. The Enabling Clause paved the way for permanent legal authorization of the following¹⁵⁶ –

- GSP preferences;
- Preferences in trade between developing countries;
- ‘more favourable’ treatment for developing countries in other GATT rules dealing with non-tariff trade barriers; and
- Special favourable treatment for the least-developed countries.

The framework agreements also solidified the ‘infant-industry’ protections that developing countries had expended lots of energy arguing for and justifying to developed countries.¹⁵⁷ The ‘non-reciprocity’ principle that developing countries had also tried very hard to argue and justify to developed countries had also gained much needed traction and political clout under the Tokyo Rounds.¹⁵⁸ Notwithstanding the significant concessions that developing countries had managed to carve-out under the Tokyo Rounds, the developed countries did manage to get developing countries to make a few concessions of their own by stating that¹⁵⁹ –

‘Less developed contracting parties expect that their capacity to make contributions or negotiated concessions or to take other mutually agreed action... would improve with the progressive development of their economies and improvement in their trade-situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement’.

What the above developing country concession meant was that, developing countries were agreeing that once the state of their economies and growth had reached a level where they could start participating in international trade, requiring less concessions from developed countries and less reliance on protection measures such as, infant industry protection and non-reciprocity, then developing countries would in effect ‘graduate’ from their developing

¹⁵⁶Hudec. R. ‘Developing Countries in the GATT / WTO Legal System’. Cordell Hull Institute, Washington, D.C, page 74. 1987.

¹⁵⁷Ibid (fn 156).

¹⁵⁸Hudec. R. ‘Developing Countries in the GATT / WTO Legal System’. Cordell Hull Institute, Washington, D.C, page 75. 1987.

¹⁵⁹Ibid (fn 158).

country status and in doing so, relinquish all the protections that they had managed to seal under various negotiating rounds. This thesis argues that the developing country concession was problematic for two primary reasons. Firstly, who would be tasked with deciding that a developing country had indeed '*graduated*'? Secondly, how would this actor know with certainty that a particular developing country was indeed ready for '*graduation*'?

From the perspective of developed countries, the Tokyo Rounds had little desired effect. As was alluded to earlier in this chapter, the Tokyo Rounds were supposed to grant developed countries a new type of option to contain developing countries, seen as GATT discipline tended to favour developing countries.¹⁶⁰ This outcome was not achieved and in fact, developing countries came out of the negotiations with further concessions and acknowledgements. From the perspective of developing countries, little had changed, in a sense developing countries continued to win concessions, exceptions and acknowledgements, as they had done since the days of the ITO Negotiations.

2.7 URUGUAY ROUNDS AND DEVELOPING COUNTRIES

The Uruguay Round of multilateral trade negotiations (Uruguay Round) began in Punta del Este, Uruguay, in 1986 and concluded in 1994.¹⁶¹ The Uruguay Round represented a significant departure from previous negotiating rounds in that it was seen as a '*one size fits all*' type of arrangement¹⁶², devoid of all the exceptions and special treatment prominently featured in previous negotiating rounds. From the perspective of developed countries, the Uruguay Round represented the type of legal discipline that the developed countries had sought to attain under previous negotiation rounds.¹⁶³

The shortcomings of dispute settlement under GATT 1947 and under the Tokyo Round Codes prompted developing countries and developed countries to discuss improvements to the GATT 1947 dispute settlement regime.¹⁶⁴ Subsequently, negotiations on dispute settlement

¹⁶⁰Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C, page 79. 1987.

¹⁶¹Fieleke, N., '*The Uruguay Round of Trade Negotiations: An Overview*'. New England Economic Review. Page 3. 1995.

¹⁶²Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C, page 100. 1987.

¹⁶³Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C, page 100. 1987.

¹⁶⁴The World Trade Organization Secretariat, '*A handbook on the WTO Dispute Settlement System*'. Cambridge: University Press. Page 12. 2004.

were given priority and included in the agenda of the Uruguay Rounds.¹⁶⁵ One of the outcomes of the Uruguay Rounds manifested itself in the year of 1989, when the contracting parties adopted the, *Decision of 12 April 1989, on Improvements to the GATT 1947 Dispute Settlement Rules and Procedures* (Decision). The Decision contained *inter alia*, the right to a panel and strict time-frames for panel proceedings.¹⁶⁶

Furthermore, the Uruguay Round resulted in strengthened dispute settlement mechanisms, detailed procedures in respect of the various stages of a dispute, and stringent time frames that sought to ensure, *inter alia*, prompt settlement of disputes.¹⁶⁷ The newly strengthened dispute mechanisms also applied to all of the covered agreements.¹⁶⁸

One of the most prominent features of the strengthened dispute settlement mechanisms was the contracting party's inability to block the establishment of a panel, through the exercise of a veto right.¹⁶⁹ Under the improved dispute settlement mechanisms, the Dispute Settlement Board (DSB) automatically established a panel and adopted panel and Appellate Body reports, unless there was an agreement not to do so.

From the perspective of developing countries, the strengthened dispute settlement mechanism actually meant that developed countries had new arms in their midst, these new arms could be used whenever developing countries sought not to comply with the now, WTO dispensation.¹⁷⁰ Perhaps one of the most impactful additions made by the Uruguay Rounds was the jettisoning of special and differential treatment and replacing it with '*technical assistance*' mechanism.¹⁷¹ This modification was significant because, special and differential treatment was definitive in nature, understood by developing countries and developed countries. In contrast, the notion of technical assistance was vague and ambiguous and not well understood by developing countries.¹⁷²

¹⁶⁵The World Trade Organization Secretariat, '*A handbook on the WTO Dispute Settlement System*'. Cambridge: University Press. Page 12. 2004.

¹⁶⁶*Ibid* (fn 165).

¹⁶⁷*Ibid* (fn 165).

¹⁶⁸*Ibid* (fn 165).

¹⁶⁹*Ibid* (fn 165).

¹⁷⁰Hudec. R. '*Developing Countries in the GATT / WTO Legal System*'. Cordell Hull Institute, Washington, D.C, page 108. 1987.

¹⁷¹*Ibid* (fn 170).

¹⁷²*Ibid* (fn 170).

2.8 CONCLUSION

The significance and importance of chapter 2 is that it outlines the journey that developed and developing countries have endured through the history of international trade and various trade negotiations. This chapter argues that it is important to understand the negotiating positions of both developed and developing countries in order to understand why the USA and SA have conducted themselves the way that they have during the AGOA renegotiations and poultry disputes. This type of appreciation should also be useful in formulating proposals as to how the USA and SA should conduct themselves in future AGOA negotiations and other trade discussions. Put slightly differently, the journeys of the developed countries and developing countries have shaped their attitudes in trade, and in the absence of an appreciation of this journey, it is difficult to understand these attitudes and why they are what they are. Scott¹⁷³ states that –

‘the legacy of colonialism and the resulting scepticism felt by developing countries towards the trade plans of the colonial states is largely ignored. Yet understanding the lasting impact of this experience on the attitudes of developing countries is critical to understanding their interaction with GATT...’

According to Scott, the attitudes of developing countries during the negotiation rounds has been as a result of their experiences throughout their colonial past, where developing countries had little say in the happenings of policy and economics.

As has already been alluded to, developing countries at least had something to take away, from each of the negotiation rounds. However, at the advent of the Uruguay Rounds and the WTO, developing countries arguably took away less and less, as special and differential treatment, non-reciprocity, and the introduction of the vague technical assistance mechanism, had meant that developing countries had in effect lost the protections that they once had and that they were once able to place heavy reliance on.

¹⁷³Scott. J., *‘Developing Countries in the ITO and GATT Negotiations’*. Brooks World Poverty Institute. Page 17. 2009.

Chapter 3 will discuss the trade relationship between the USA and SA and the USA and SSA countries. This chapter will also look into how the USA's policies towards SA have evolved over time.

CHAPTER THREE – THE UNITED STATES TRADE RELATIONSHIP WITH SOUTH AFRICA AND WITH SUB SAHARAN AFRICAN COUNTRIES: A POLICY PERSPECTIVE

3.1 INTRODUCTION

This chapter will analyse how the trade relationship between SA and USA has developed over the years. An analysis of how AGOA and the implementation thereof has developed, since it's inception, will also take place. This chapter will also review the condition in AGOA requiring that SSA countries remove barriers to US trade, and whether this condition has lent itself to abuse at the instance of the USA. An analysis will be done on how the relationship between SA and the USA has developed, specifically in respect of the SA poultry industry and in the light of the recent disputes thereof. Lastly, this chapter will look at possible legal and policy considerations that must be re-considered and implemented with the aim of ensuring that SSA countries, specifically SA, are able to fully utilize AGOA.

This chapter argues that it is vital to formulate an understanding of the policy history as it relates to the USA and SA and the USA and SSA, because at the heart of AGOA and the decisions to draft this agreement were various policy discussions and subsequent policy decisions. In the absence of this understanding, this chapter argues that understanding USA and SA trade relations and USA and SSA trade relations, as they relate to AGOA, becomes increasingly difficult and the danger of being misled by well documented assumptions and misunderstanding important issues, lurks.¹⁷⁴

3.2 POLICY HISTORY OF THE USA AND SA

USA policy towards SSA nations is predicated on the prospect of there being an economic benefit for the USA, derived from increased commerce between the USA and SA.¹⁷⁵ According

¹⁷⁴Scott. J., *'Developing Countries in the ITO and GATT Negotiations'*. Brooks World Poverty Institute. Page 3. 2009.

¹⁷⁵Langton D., *'U.S Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act and beyond'*. CRS Report for Congress. Page 1. 2008. Also see Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 94. 1987. The author details the characteristics of the USA's GSP program, in particular the powers given to the President to limit GSP benefits under the *'competitive need'* standard, and the President's power to waive these limitations where he deems it in the best interests of the USA to do so. The Report of the Ways and Means Committee in the House of Representatives, explained that rationale of the President's powers as follows –

to Langton,¹⁷⁶ the interest displayed by the USA in increasing bilateral commerce between itself and SA, began after the end of the apartheid era in South Africa, in the early 1990s.¹⁷⁷ Furthermore, according to Langton,¹⁷⁸ in 1993, Congress formalized its approval of the end to anti-apartheid restrictions and this approval was preceded by Commerce Secretary Ron Brown leading a business delegation to SA. According to Mills and Stremlau,¹⁷⁹ delegations sent from the USA to SA were comprised of Republicans and Democrats, demonstrating that relations with SA were backed with political clout and were of the utmost importance. In a speech to the Parliamentary Portfolio Committee on Foreign Affairs, the then Minister Nzo,¹⁸⁰ stated the following –

‘South Africa has features both of the developed and developing worlds. It is truly at the point of intersection between both worlds – an industrialised state of the South which can communicate with the North on equal terms to articulate the needs, the concerns and the fears of the developing world. Conversely we can interpret the concerns and the fears of the developed world’.

The Minister’s statement showed that South Africa at the time sought to reciprocate the faith and interest that the USA displayed towards it. Although the statement can be criticized for self-claiming a fairly big role and importance for South Africa, the statement is important for understanding how South Africa understood its role on the African continent *vis-à-vis* the developed world. According to Schneidman,¹⁸¹ it was Bill Clinton who was responsible for introducing a fundamental change to US policy as it related to SSA nations, when he signed AGOA into law on May 18, 2000.

According to Schneidman,¹⁸² before the USA’s shift in policy towards SSA nations, USA relations with Africa were in the main, defined by Cold War calculations, donor-recipient

‘the purpose of granting the President this waiver authority is to provide him with additional tools to achieve United States trade interests with Beneficiary Developing Countries, such as greater market access for United States exports...’

¹⁷⁶Langton D., ‘U.S Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act and beyond’. CRS Report for Congress. Page 1. 2008.

¹⁷⁷Ibid (fn 176).

¹⁷⁸Ibid (fn 176).

¹⁷⁹Mills G. and Stremlau J., ‘The reality behind the rhetoric: the United States, South Africa and Africa’. South Africa Institute of International Affairs and the Centre for Strategic and International Studies. 2000.

¹⁸⁰Statement by the Minister Nzo before the Portfolio Committee on Foreign Affairs, 14 March 1995.

¹⁸¹Schneidman W., ‘The African Growth and Opportunity Act: Looking Back, Looking Forward’. Africa Growth Initiative, Brookings Institution. Page 1. 2012.

¹⁸²Ibid (fn 181).

relations, aid for poverty alleviation and emergency relief. Schneidman¹⁸³ also points out that at the advent of AGOA, little thought was expended on USA exports to the African continent and the manner in which the USA would actually interact with the African market. This chapter argues that the point made by Schneidman is of huge significance for the following reasons. Schneidman's point reveals that at the advent of AGOA the USA did not consider exports to the African continent as being hugely important, also reciprocity was not given much attention.

In addition to the earlier arguments, Schneidman's point also reveals a shift in policy, which is evidenced by the fact that during recent discussions between the USA and SA, in relation to the SA poultry industry, the USA was angered and frustrated by SA's perceived refusal to reciprocate on AGOA, by granting the USA duty free access to the SA poultry market.¹⁸⁴ As has already been alluded to, reciprocity at the instance of SSA nations was never an express provision of AGOA, thus three years after making the above points, Schneidman revealed another different angle on USA thinking and policy during a one-on-one interview conducted by the International Centre for Trade and Sustainable Development (ICTSD),¹⁸⁵ where the ICTSD put the following to Schneidman –

'The EU concluded their Economic Partnership Agreements (EPAs) with three African regional communities last year. Such a move has obliged the U.S to rethink its competitive positioning in Africa since AGOA, unlike the EPAs, is non-reciprocal in nature.'

¹⁸³ibid (fn 181).

¹⁸⁴See, Chicken Tax Strains U.S – South Africa Relationship. Available at, <http://blogs.cfr.org/campbell/2015/03/05/chicken-tax-strains-u-s-south-africa-relationship>. Accessed on March 2015.

Here the author, John Campbell, reported as follows,
'Despite the grumblings among the members of Congress, South Africa has been reluctant to remove the poultry tax. In part, the South African government claims that removing the tax would undermine local producers as U.S poultry is cheaper than South African poultry. Additionally, South African officials have found justification in the World Trade Organization's protectionist "anti-dumping" laws, which permit countries to impose levies on a product if it is introduced into a market at less than normal value... Though the poultry tax is intended to protect the local poultry industry, it has unintended consequences. It raises prices because local suppliers do not provide enough poultry to meet local demand... Senator Coons has gone so far as to recommend that the United States discontinue its AGOA partnership with South Africa... If Coons succeeds, the US – South Africa bilateral relationship along with South Africa's trade benefits and economic opportunities may change for the worse.'

¹⁸⁵International Centre for Trade and Sustainable Development, *'Talking AGOA with Witney Schneidman'*. Bridges Africa. Volume 4. Page 3. 2015.

Dr Schneidman's response to what was put to him by the ICTSD was as follows –

'Well I think this goes to the heart of the U.S-Africa trade relationship because when we initiated AGOA, it was designed to accelerate economic development on the continent. We originally did not ask African countries to reciprocate. Now the EU has come forward with their EPAs. On the one hand, many African governments have resisted the EPAs and on the other hand, the EU threatened them with the loss of their preferential access... In all cases this situation has created a very difficult environment for the US to remain competitive within the African market! I think that we have to start a new conversation about our trade relationship in Africa. This is an issue that is going to have to be dealt with after the renewal of AGOA'.

What Schneidman's response reveals is that the USA realized that its African market share was under threat by the European Partnership Agreements (EPAs) concluded between EU and African countries.¹⁸⁶ The USA had to respond to this imminent threat, and it was most convenient to respond by seeking reciprocity under AGOA.¹⁸⁷ This chapter argues that this was a tactically astute response for a number of reasons. Firstly, requesting reciprocity under AGOA seemed fair given the substantial gains that AGOA has introduced to SSA nations,

¹⁸⁶Office of the United States Trade Representative, U.S. Trade Representative, Michael Froman., *'Beyond AGOA Looking to the Future of U.S. – Africa Trade and Investment.'* Page 23. 2016. In this USA policy document, the U.S discusses the need to conclude agreements that are more reciprocal in nature, with African countries. The U.S acknowledges that it now needs to re-think the manner in which it trades with Africa, due to the developmental potential evident on the African continent. The USA is also at pains to point out its fear of falling behind one of its primary competitors, the E.U, this is captured in the following quotation –

'And, in the case of the EPAs, the tariff elimination obligations are also asymmetrical—under the agreements, the EU undertakes to provide tariff elimination on significantly more lines than its sub-Saharan trading partners. As they are implemented, these agreements also stand to put U.S. exporters in many sectors at a competitive disadvantage vis-à-vis their foreign counterparts. As the African market grows and gains in importance globally, these competitive pressures will likely increase. As a result, United States will likely have an increasing interest in identifying trade policies that will help equalize the conditions of competition and level the playing field for American businesses'.

Also see, US complains of disadvantage as EU-SADC trade deal kicks in. Available at, <https://agoa.info/news/article/6280-us-complains-of-disadvantage-as-eu-sadc-trade-deal-kicks-in.html>. Accessed on October 2016. In response to the EU-Southern African Development Community's economic partnership agreement taking place. The Obama administration raised concerns that US companies risked being left at a competitive disadvantage because of SA's unwillingness to negotiate an equivalent trade deal with the US.

¹⁸⁷J. Bhagwati and D. Irwin, *'The Return of the Reciprocitarians'*. US Trade Policy Today. Page 126. 1987. According to Bhagwati the USA are very good at demanding reciprocity as was evidenced in the case where the USA put pressure on Japan to open up her markets to USA beef by increasing the USA quota on beef.

specifically SA, over the years.¹⁸⁸ Secondly, AGOA already contained somewhat vague and ambiguous conditionality requirements that the USA could utilize to threaten SA.¹⁸⁹ Thirdly, economically and commercially, SA could ill afford to lose out on AGOA eligibility and on this basis, would do its level best to remain on the programme.

Schneidman's narrations on the nature of USA policy towards Africa are supported by McCormick¹⁹⁰ who states that the troubles of East West relations and the fall of the Berlin Wall in 1989 were the cause of sudden democratic attention being given to SSA nations. This democratic attention also resulted in the USA redirecting its policy away from geopolitics and towards support for democracy and free elections.¹⁹¹ McCormick argues that the USA's sudden attention on Africa and its demands on African governments to improve governance and create a new environment characterized by liberalised politics, was calculated at persuading African governments on, '*repudiating authoritarian structures and aggressively adopting Western principles of liberal democratic government*'.¹⁹² According to McCormick, the ideals canvassed in the quote immediately above can be traced in the AGOA texts, specifically the conditionality requirements of the AGOA text.¹⁹³

Faber and Orbie¹⁹⁴ argue that the approach followed by the USA was to pursue 'soft reciprocity', through for example, AGOA, while the EU aggressively went in pursuit of reciprocity through the use of FTAs. Faber and Orbie further argue that this policy decision was driven by the USA's fear of FTAs being fully optimized by developing countries, to the extent where the USA would have been required to reciprocate, possibly exposing its import sensitive markets such as agriculture and textiles. That reciprocity was not given much attention by the USA is further supported by the fact that AGOA is hardly clear on the principle of reciprocity, perhaps the most clarity that AGOA provides in respect of reciprocity is the following paragraph that appears from the text of AGOA –

'encouraging the reciprocal reduction of trade and investment barriers in Africa will

¹⁸⁸Schneidman W., '*The African Growth and Opportunity Act: Looking Back, Looking Forward*'. Africa Growth Initiative, Brookings Institution. Page 6. 2012.

¹⁸⁹Bhala, R. '*The Limits of American Generosity*', Fordham International Law Journal, Volume 29, Issue 2. Page 330. 2006.

¹⁹⁰McCormick R., '*The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law*'. The Texas International Law Journal, Volume 41:339, page 346. 2006.

¹⁹¹Ibid (fn 190).

¹⁹²Ibid (fn 190).

¹⁹³Section 104(1)(C) (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000.

¹⁹⁴Faber G. and Orbie J., '*European Union Trade Politics and Development: Everything but Arms Unravelling*'.

enhance the benefits of trade and investment for the region as well as enhance commercial and political ties between the United States and sub-Saharan Africa'.¹⁹⁵

This thesis argues that the above paragraph is vague and ambiguous and that it is open to almost any interpretation that a reader would deem fit.¹⁹⁶ On the basis of the works quoted above, USA policy towards Africa and SSA was founded on a number of considerations and these considerations are, the Cold War and geo-politics, the fall of the apartheid era in SA, economic considerations, opportunism, pressure within the political rank of the USA and perceived burgeoning economic opportunities in Africa for the USA, presumably caused by the EUs more aggressive investment strategy. Agreements such as AGOA and FTAs have also played a significant role in developing USA policy towards SSA nations. This is because these agreements have provided a platform for the USA to articulate its policy stances. AGOA is unilateral in nature and as such is supposed to embody unilateral trade principles only, but as will be discussed later in this chapter, AGOA contains FTA type provisions.

3.3 THE FORMALIZATION OF USA POLICY TOWARDS SSA AND SA

In the year 2000, Congress passed AGOA, a USA trade preference program.¹⁹⁷ According to Williams,¹⁹⁸ AGOA is a USA trade preference program which is intended to bolster market-led economic growth and development in SSA and strengthen US trade and investment ties with SSA. According to the United States Trade Representative (USTR), '*AGOA has been the cornerstone of America's economic engagement with sub-Saharan Africa over the past fourteen years*'.¹⁹⁹

From SA's perspective and other SSA nations, AGOA is important because it has reduced USA barriers to trade and thereby, granting easier access to USA export markets.²⁰⁰ To recap, as far back as the

¹⁹⁵Section 102(10) (Findings), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

¹⁹⁶Bhala, R. '*The Limits of American Generosity*', Fordham International Law Journal, Volume 29, Issue 2, page 320. 2006. To be clear, Bhala states the following on AGOA eligibility requirements –

'As for the AGOA eligibility requirements, associated with each one of the eight of them are criteria, which ostensibly help clarify the interpretation and application of the requirements. Yet, the criteria tend to be ambiguous. Consequently, the requirements themselves are eminently malleable to suit the interests of the United States, and easily susceptible to American self-interest'.

¹⁹⁷Williams B., '*African Growth and Opportunity Act: Background and Reauthorization*'. Congressional Research Service. Page 1. 2015.

¹⁹⁸Ibid (fn 197).

¹⁹⁹Hearing Testimony by Ambassador Michael Froman, US Congress, Senate Committee on Finance, *The African Growth and Opportunity Act at 14: The Road Ahead*, 113th Cong., 2nd sess., July 30, 2014, <http://www.finance.senate.gov/hearing/?id=f5251f60-5056-a032-52f0-742dc672610d>.

²⁰⁰McCormick R., '*The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law*'. The Texas International Law Journal, Volume 41:339. Page 359. 2006.

Haberler Report of 1958, it was already documented that developing countries' needed to improve on their export earnings in order to facilitate growth and development. Furthermore, Committee III, a culmination of the Haberler Report, lamented the discriminatory practices implemented by developed countries, such as import restrictions, trading and import monopolies as well as the frustration of traditional exports such as agriculture. To an extent, AGOA has succeeded in most of the challenges that Committee III identified that required resolution.

To be precise, AGOA authorizes, with the exception of textiles and apparel, the granting by the president of the USA duty-free treatment for articles that are the 'growth, product, or manufacture' of a beneficiary if, after receiving the advice of the International Trade Commission, the president determines that the article is not import sensitive.²⁰¹

This thesis argues that in order to fully appreciate AGOA, AGOAs path before it became legislation is important to understand because this path was largely responsible for shaping AGOA. To be clear, there were competing USA domestic interest groups when it came to the question of whether AGOA should be enacted as law.²⁰² These competing interests were the pro-Africa constituency, the protectionist constituency and the trade-oriented business community.

The pro-Africa constituency

The pro-Africa constituency adopted normative, political and economic arguments in favour of the promulgation of AGOA.²⁰³ According to McCormick²⁰⁴ the democratization wave of the early 1990s, the fall of apartheid, and the emergence of a new class of leaders that were in favour of reform, instilled ²⁰⁵ the belief that Africa was on the brink of a renaissance. The Letter addressed by President Clinton to Congressman Rangel also inspired the belief that Africa was newly reformed and was a continent filled with fresh opportunities for the taking. The letter to Congressman Rangel stated the following –

'Africa is a continent on the doorstep of a new era of democracy and prosperity, and many countries have adopted market-oriented economic and political reforms in the past seven years. A stronger, stable, prosperous Africa will be a better economic partner, a better partner for security and peace, and a better partner in the fight against drug trafficking, international

²⁰¹Section 111(a)(1), Trade and Development Act of 2000.

²⁰²McCormick R., 'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law'. The Texas International Law Journal, Volume 41:339, page 350. 2006.

²⁰³Ibid (fn 202).

²⁰⁴Ibid (fn 202).

²⁰⁵McCormick R., 'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law'. The Texas International Law Journal, Volume 41:339, page 351. 2006.

crime, terrorism, the spread of disease and environmental degradation. Africa is already an important trading partner for the United States...'

In addition, America has its own special reasons to contribute to Africa's economic development. Over thirty million Americans have ancestral origins in Africa. We should work to help African nations achieve greater prosperity and stronger democracies, which will improve the lives of the African people. This bill helps us do that.

This bill is supported by a bipartisan and diverse cross-section of Americans and concerned groups We face a historic opportunity to assist the renaissance in Africa'.

The letter to Congressman Rangel is important for the insight that it gives into US policy towards Africa, at the time. The letter reveals that the USA saw Africa as a potential business destination, and this was owing to the increasingly stabilized political climate that was submitting itself to reform. The letter also reveals a normative stance that the USA was adopting, and this was that the USA was home to over thirty million citizens who had their ancestral roots in Africa.²⁰⁶ It is important to note that at this stage, there was no stated intention that the USA would approach a trade relationship with Africa with the intention of securing the utmost of advantages and benefits.

The protectionist constituency

The protectionist constituency did not view the prospects of trade with Africa in the same light that the pro-Africa constituency did. For the protectionist constituency, trade with Africa was fraught with risks that would adversely affect the interests of USA business. The primary argument of USA business was that low-cost African imports would directly compete with established industries such as American textiles and apparel resulting in job losses for American people.²⁰⁷ The comments of Senator John Breaux during a Senate Finance Committee hearing on AGOA provide insight on the views of the protectionist constituency, specifically regarding labour issues. Senator John Breaux stated the following –

'From a trade standpoint, the only thing we are giving is that they will be getting stronger, and in the future, maybe, will be able to buy more of our products. That is not quite enough when I have people who are losing jobs by the thousands... I want to be for it, but I am not going to be for it unless we address the thousands of people in this country, many of which are African Americans who are on the edge of poverty who have lost their jobs. And I am going to go back

²⁰⁶Ibid (fn 205).

²⁰⁷McCormick R., 'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law'. The Texas International Law Journal, Volume 41:339. Page 353. 2006.

and say, we are going to liberalize trade with sub-Saharan Africa? That is good, but I have to find something that I can say to Louisianans that I am going to help them as well'.²⁰⁸

This thesis argues that the comments of Senator Breaux characterized the protectionist approach of the protectionist constituency. It is also not clear to what extent the Senator's claims on job losses were supported with facts. For the protectionist constituency, there were barely any other considerations to their arguments other than the loss of US jobs and this makes it difficult to attach any weight to the arguments made by this constituency. Furthermore, this thesis argues that the protectionist constituency failed to appreciate that African trade could have a positive impact for both the USA and Africa at large.

The trade orientated constituency

For the trade oriented constituency, trade with Africa would come with a number of tangible benefits, such as tariff-free importation of African apparel which would result in lower costs for end retailers of clothing products.²⁰⁹

This thesis argues that the trade oriented constituency unlike the protectionist constituency interrogated AGOA and were able to identify possible value-add for US trade value chains. For example, US retail executives were of the view that AGOA would potentially lead to USA firms sourcing their apparel imports from SSA countries instead of Asian countries, a presumably cheaper strategy.²¹⁰

Pro-Africa constituency, protectionist constituency and trade oriented constituency

The various constituencies and their interests were important in shaping AGOA and evidence of this is the manner in which AGOA was finally crafted. AGOA is comprised of a combination of pro-Africanism, USA protectionism and trade oriented or free market type thinking, the various sections that characterize AGOA are discussed in more detail later on in this chapter.

²⁰⁸Ibid (fn 207).

²⁰⁹McCormick R., 'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law'. The Texas International Law Journal, Volume 41:339. Page 354. 2006.

²¹⁰Ibid (fn 205).

3.4 ANALYSIS OF AGOA AND THE REQUIREMENT OF RECIPROCITY

This chapter argues that reciprocity was never required under AGOA, but rather, reciprocity²¹¹ was contemplated, in soft terms.²¹² There are a number of provisions in AGOA that support this argument. Section 103 (Statement of Policy), section 104 (Eligibility Criteria), section 116 (Free Trade Agreements with Sub-Saharan African Countries)²¹³ along with various paragraphs under section 116 support this argument. Section 103 (Statement of Policy) states the following –

The AGOA statement of policy is comprised of the following points²¹⁴ –

'Congress supports:

- (1) encouraging increased trade and investment between the United States and sub-Saharan Africa;*
- (2) reducing tariff and non-tariff barriers and other obstacles to sub-Saharan African and United States trade;*
- (3) expanding United States assistance to sub-Saharan Africa's regional integration efforts;*
- (4) negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of sub-Saharan Africa;*
- (5) focusing on countries committed to the rule of law, economic reform, and the eradication of poverty;*
- (6) strengthening and expanding the private sector in sub-Saharan Africa, especially enterprises owned by women and small businesses;*
- (7) facilitating the development of civil societies and political freedom in sub-Saharan Africa;*
- (8) establishing a United States-Sub-Saharan Africa Trade and Economic Cooperation Forum; and the accession of the countries in sub-Saharan Africa to the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions'.*

²¹¹B Williams, 'African Growth and Opportunity Act (AGOA): Background and Reauthorization'. Congressional Research Service. Page 2. 2015. AGOA is a non-reciprocal agreement and according to Williams, this means that preferences under AGOA apply to USA imports (or SA exports to USA) and not to USA exports (SA imports from the USA). Williams also writes that these type of preferences are usually afforded to developing countries, with the aim of bolstering export led growth.

²¹²See Williams B., 'African Growth and Opportunity Act (AGOA): Background and Reauthorization'. Congressional Research Service. Page 2. 2015. Williams notes that AGOA includes provisions that enable the President to explore FTA negotiations with interested AGOA beneficiaries. Williams is of the view that these provisions on FTAs suggest that Congress envisioned AGOA as a stepping stone to more liberalized trading pacts with African countries.

²¹³Section 103 (Statement of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²¹⁴Ibid (fn 213).

The AGOA statement of policy is important for a number of reasons, namely, it gives insight into US policy as it relates to SSA nations, and it outlines the basis on which the USA must at all times interact with the SSA nations.

In the relevant parts, section 104 (Eligibility Requirements) of AGOA states that –

'The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country:

(1) has established, or is making continual progress toward establishing,

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

(B) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;

(C) the elimination of barriers to United States trade and investment, including by— (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment; (ii) the protection of intellectual property; and (iii) the resolution of bilateral trade and invest disputes...'

Hickel²¹⁵ is of the view that US policy, part of which is contained in section 104 (Eligibility Requirements), contains a great deal of rhetoric, in that it makes references to reform measures and other governance issues that are not strictly adhered to by the USA in practice. Hickel²¹⁶ uses the example of Chad who enjoy AGOA eligibility notwithstanding their history of corruption and tradition of arbitrary detentions and extra-judicial killings. Hickel argues that Chad enjoys AGOA eligibility due to its strategic oil alliance with Cameroon, which has culminated in the two countries being net exporters of oil to the USA.²¹⁷ Another feature of USA policy and enforcement are the inconsistencies in the application and enforcement of

²¹⁵Trading with the Enemy. Available at, http://fpif.org/trading_with_enemy/. Accessed on February 2011.

²¹⁶Ibid (fn 215).

²¹⁷See Fuhr D. and Klughaupt., *'The IMF and AGOA: A Comparative Analysis of Conditionality'*. Duke Journal of Comparative and International Law. Volume 14:125. Page 144. 2004. Here the authors cite the example of Eritrea, which enjoys AGOA eligibility notwithstanding its shortcomings on the political, economic and human rights fronts.

the AGOA eligibility criteria. To elaborate on this point, countries such as Chad and Cameroon and Eritrea all enjoy AGOA eligibility, notwithstanding that they fall short on the political, economic, and human rights fronts, having violated these standards on multiple occasions. The Bureau of Economic and Business Affairs, 2016 writes extensively on the poor investment climate that prevails in Chad and reports that Chad suffers from corruption and is rated 147 out of 168, in the TI Corruption Perceptions Index for 2015.²¹⁸ In contrast, a much smaller and much less influential Swaziland lost out on its AGOA eligibility due to its alleged failure to resolve worker's rights issues.²¹⁹ This is notwithstanding that Swaziland has been a top exporter under AGOA, the 5th largest with the exclusion of energy products, in 2014.²²⁰ This chapter argues that the only reasonable inference to be drawn here, is that Chad's favourable position with AGOA eligibility is primarily attributable to the fact that it exports crude oil, a resource of huge strategic importance to the USA. This chapter argues that Swaziland, on the other hand lacks the strategic importance enjoyed by Chad, in that it exported textiles to the USA, a product that is in fact market sensitive.²²¹ The decision to exclude Swaziland from AGOA was thus easier and far less contentious than it would have been to exclude the strategically significant Chad or Cameroon.

It is also important to point out that certain provisions in AGOA contain FTA type wording, such as section 104²²², paragraphs (C)(i), (ii) and (iii). This is significant for a number of reasons, firstly, AGOA only makes reference to the possibility of negotiating FTAs and there is no promise of the USA entering into these. Secondly AGOA is a unilateral²²³ arrangement and

²¹⁸Corruption Perception Index, 2015. Available at, <https://www.transparency.org/cpi2015/results>. Accessed on February 2016.

²¹⁹Drawing Lessons from Swaziland's AGOA exclusion. Available at, <https://www.tralac.org/discussions/article/5855-drawing-lessons-from-swaziland-s-agoa-exclusion.html>. Accessed on July 2014.

²²⁰Williams B., 'African Growth and Opportunity Act (AGOA): Background and Reauthorization'. Congressional Research Service. Page 7. 2015.

²²¹Section 112 (Treatment of Certain Textiles and Apparel) and section 113 (Protection Against Transshipment) 19 U.S.C 3702. The African Growth and Opportunity Act, 2000. These sections outline multiple circumstances under which textiles and apparel will not receive preferential tariff treatment under AGOA.

²²²Section 104 (Eligibility Requirements) 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²²³Fuhr D. and Klughaupt Z., 'The IMF and AGOA: A Comparative Analysis of Conditionality'. Duke Journal of Comparative and International Law. Volume 14:125. Page 139-140. 2004. The authors describe a 'unilateral' arrangement as follows –

'As AGOA is effectively a GSP Plus System, it does not include reciprocal obligations on its members. Unlike a multilateral free trade agreement, which imposes mutual rights and duties on its parties, the unilateral nature of AGOA lets both the developing countries of sub-Saharan Africa and the "benefactor," the United, off the hook'.

not a reciprocal one. Therefore, any provisions implying or expressing reciprocity are out of kilter with the stated purpose. Thirdly, having FTA²²⁴ wording in a unilateral agreement brings into question the USA's true intentions. With respect to the third point, Bhala²²⁵ makes the observation that, the eligibility criteria²²⁶ are found in multilateral treaties whereas AGOA is a unilateral, discretionary programme.²²⁷ Bhala therefore, supports the view that the eligibility criteria in AGOA seem out of place. It is however, unfortunate that he does not provide any detailed reasoning to this effect. Kennedy²²⁸ bemoans the fact that by linking AGOA benefits to market access for goods, services, capital and to Intellectual Property Rights Protection, the conditionality requirements introduce elements of reciprocity not meant for a unilateral arrangement such as AGOA. Hicel²²⁹ argues that the conditionality requirements, in particular, the ones requiring that AGOA beneficiaries eliminate barriers to USA trade, constitute mild economic deregulation. Furthermore, Hicel²³⁰ argues that the AGOA

Also see Williams B., 'African Growth and Opportunity Act (AGOA): Background and Reauthorization'. Congressional Research Service. Page 2. 2015. The authors in this work perhaps describe unilateral in a more comprehensive manner when they state the following –

'AGOA, like other U.S. trade preference programs, is nonreciprocal and unilateral. The preferences apply to U.S. imports and not to U.S. exports, so reauthorization only requires action by the U.S. government. These one-way preferences are granted to developing countries with the goal of enhancing export-led economic growth, and typically exclude items that may be considered import sensitive. This distinguishes them from other U.S. trade liberalization efforts such as free trade agreements (FTAs) or multilateral agreements through the World Trade Organization (WTO), which reduce and/or eliminate tariffs for both U.S. imports and exports.'

²²⁴Office of the United States Trade Representative, U.S. Trade Representative, Michael Froman., 'Beyond AGOA Looking to the Future of U.S. – Africa Trade and Investment.' Page 52. 2016. According to this USA policy document, 'U.S. FTAs include obligations to eliminate customs duties on qualifying goods and to provide equivalent treatment to U.S. goods as that which they provide their own nationals, in addition to provisions concerning the elimination of import and export restrictions, performance requirements, import licensing, and export subsidies, among other measures'.

²²⁵Bhala, R. 'The Limits of American Generosity', Fordham International Law Journal, Volume 29, Issue 2. Page 332. 2006.

²²⁶The eligibility criteria outlined in Section 104(1)(C)(i) (Eligibility Requirements), 19 U.S.C 3703. The African Growth and Opportunity Act, 2000, require, 'the elimination of barriers to United States trade and investment, including by –

- (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;
- (ii) the protection of intellectual property; and
- (iii) the resolution of bilateral trade and investment disputes'.

²²⁷Office of the United States Trade Representative, U.S. Trade Representative, Michael Froman., 'Beyond AGOA Looking to the Future of U.S. – Africa Trade and Investment.' Page 63. 2016. According to this USA policy document, USA-FTA type standards are the preferred option for, 'the more forward-leaning countries ready to embark on an agreement with economy-wide effects'. This statement is far from clear, who are the 'more forward-leaning countries'? Who determines who these are, and, what is an agreement with so-called, 'economy-wide effects'?

²²⁸Kennedy K. C., 'The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preferences'. The Michigan State International Law Review. Volume 20. Page 588. 2012.

²²⁹Ibid (fn 215).

²³⁰Ibid (fn 231).

conditionality requirements, *'constitute outright destruction of any and all tariff protections, flinging open African markets to a flood of American goods that inevitably undermine local industry'*.

This chapter argues that it is by no coincidence that these eligibility criteria made it onto AGOA, but rather, this was a well thought out strategy by the USA. It is necessary at this point to outline some of the general features of FTAs with the purpose of showing why such provisions do not belong in a unilateral arrangement such as AGOA. Furthermore, by highlighting these features, the intentions of the USA in inserting this wording into AGOA can hopefully be better understood.

From the perspective of developing countries, Taylor points out a number of problems that are caused by USA type FTAs. According to Taylor²³¹ FTAs recognize that developing countries often receive high levels of duty free access to USA markets and so, *'claw-back'* these preferences through requirements for reciprocity. Taylor²³² also points out that developing countries are historically without sufficient leverage to enter developed country markets and as such are unable to exploit the greatest trade benefits. The developing countries' lack of leverage is amplified by the fact that the USA refuses to negotiate on issues that would grant easier access to agricultural markets.²³³ Furthermore, Taylor points out that developing countries lose traction with their own domestic policies when they accept USA FTAs. Investment restrictions, government procurement policies, intellectual property rights (IPRs) and the subsidization of exports are some of the policies that are adversely affected by USA FTAs.²³⁴ According to Al Nasa'²³⁵ in her commentary on the Jordan-US FTA (JUSFTA), the stringent IPR clauses in JUSFTA are a cause for concern and are akin to *'TRIPS Plus'* provisions in that they grant more IPR protections than what is to be found in the WTO's Agreement on

²³¹Taylor C. *'Of Free Trade Agreements and Models'*. The Indiana International and Comparative Law Review. Volume 19:3. Page 597. 2009.

²³²Taylor, C. *'Of Free Trade Agreements and Models'*. The Indiana International and Comparative Law Review. Volume 19:3. Page 601. 2009.

²³³Ibid (fn 232).

²³⁴Taylor, C. *'Of Free Trade Agreements and Models'*. The Indiana International and Comparative Law Review. Volume 19:3. Page 602. 2009.

²³⁵Al Nasa *et al*, *'The Jordan-U.S. Free Trade Agreement: Eight Years Later'*. The University of Michigan. Page 12. 2008.

Trade Related Aspects of Intellectual Property Rights.²³⁶ According to Stevens²³⁷ there is not enough evidence available to show a link between FTAs and policy adjustments that developing countries make pursuant to FTAs. Stevens²³⁸ holds the view that there is a tendency to attribute policy shifts to the adoption of FTAs is often misleading. This chapter argues that Stevens' views fail to take into account the simple fact that FTAs more often than not, require the beneficiary country to make various reforms, such as eliminating tariffs on substantially all the trade between the participating countries within a reasonable length of time.²³⁹

Section 116(a) (Declaration of Policy) of AGOA,²⁴⁰ states the following –

'Congress declares that free trade agreements should be negotiated, where feasible, with interested countries in sub-Saharan Africa, in order to serve as the catalyst for increasing trade between the United States and sub-Saharan Africa and increasing private sector investment in sub-Saharan Africa'.

The above section is relevant to this chapter because a plain reading of the words captured, clearly shows that the reciprocity which is common place in free trade agreements (FTAs) was not intended to form part of AGOA. Rather, what was intended by Congress was that where feasible, FTAs would be negotiated.²⁴¹ It is important to also take notice that the word '*should*' was preferred over the word '*must*', indicating that the negotiation and conclusion of FTAs was not a guaranteed event, but was rather contingent on a number of other events taking their course, such as successful negotiations with affected SSA nations' governments.²⁴²

²³⁶Annexure 1C to the Agreement Establishing the World Trade Organization – The Agreement on Trade-Related Aspects of Intellectual Property.

²³⁷Stevens, C et al., '*The Impact of Free Trade Agreements between Developed and Developing Countries on Economic Development in Developing Countries: A Rapid Evidence Assessment*'. Overseas Development Institute. Page 26. 2015.

²³⁸Ibid (fn 239).

²³⁹Section 8c and 5b, General Agreement on Trade and Tariffs, 1956.

²⁴⁰Section 116(a) (Free Trade Agreements with Sub-Saharan African Countries – Declaration of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²⁴¹Ibid (fn 215). Hickel describes the AGOA conditionality requirements as 'draconian' and further remarks that, '*essentially, AGOA amounts to a coercive free trade agreement...*'

²⁴²Section 116 (1)(b) (Free Trade Agreements with Sub-Saharan African Countries – Plan requirement), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

Section 116(b)(1)²⁴³ of AGOA states the following –

'In general – The President, taking into account the provisions of the treaty establishing the African Economic Community and the willingness of the governments of sub-Saharan African countries to engage in negotiations to enter into free trade agreements, shall develop a plan for the purpose of negotiating and entering into one or more trade agreements with interested beneficiary sub-Saharan African countries'.

In the relevant parts, section 116(F)(iv)²⁴⁴ states that the Plan contemplated under section 116(b) of AGOA must contain procedures that make it possible to cater for –

'adequate consultations with the relevant African governments and African regional and sub-regional intergovernmental organizations during the negotiation of the agreement or agreements'.

With respect to the FTAs and in particular section 116²⁴⁵ of AGOA, on 4 November 2002, the USTR, Robert Zoellick notified Congress of the Administration's intention to proceed with negotiations for an FTA with the Southern African Customs Union (SACU), which is comprised of Botswana, Namibia, Lesotho, South Africa and Swaziland.²⁴⁶ The first round of negotiations in respect of the SACU FTA commenced on 3 June 2003, in Johannesburg. The negotiations were characterised by a series of delays and US scepticism,²⁴⁷ which was founded upon fear of the effect the SACU FTA would have on US business, US job losses, and the lack of transparency especially in SA government procurement procedures.²⁴⁸ With hardly any noticeable progress, the negotiations for a SACU FTA were suspended in April 2006. This chapter argues that the delays in negotiating and finalizing FTAs, together with the reasons resulting in these delays, has cast further doubt on the viability of concluding FTAs with SSA nations. This chapter further argues that the credibility that the whole negotiating process as

²⁴³Ibid (fn 242).

²⁴⁴Section 116 (F)(iv) (Free Trade Agreements with Sub-Saharan African Countries – Plan requirement), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²⁴⁵Section 116 (Free Trade Agreements with Sub-Saharan African Countries – Declaration of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²⁴⁶Langton D., *'United States-Southern African Customs Union (SACU) Free Trade Agreement Negotiations: Background and Potential Issues'*. CRS Report for Congress. Page 1. 2008.

²⁴⁷Ibid (fn 246).

²⁴⁸Langton D., *'United States-Southern African Customs Union (SACU) Free Trade Agreement Negotiations: Background and Potential Issues'*. CRS Report for Congress. Page 2. 2008.

it relates to FTAs has also suffered.

This chapter argues that the manner in which the USA aggressively pushed for reciprocity, rendered free trade an enemy unto itself and not an ally unto itself, as warned by Bhagwati.²⁴⁹ Based on a strict reading of AGOA, it appears that reciprocity of trade with SA was not a priority but rather it was an item for negotiation at a later stage. In pushing for reciprocity in the manner that it did, the USA failed to appreciate the position of SA as a developing country, and as such was unable to negotiate reciprocity gradually and in a manner that would not require SA to make concessions that may compromise certain of its domestic industries.

3.5 POULTRY DISPUTES BETWEEN THE USA AND SA

At this point it is necessary to give a brief overview of the poultry industries of the USA and SA. This overview will hopefully place the poultry disputes between the USA and SA into context.

According to Ncube, the SA poultry industry is a net importer of poultry products and as such, has a trade deficit of approximately US\$270 million, or approximately 15 per cent of local demand.²⁵⁰ Ncube's assessments are supported by Esterhuizen²⁵¹ who states that SA imported 436 000 tons of broiler meat in 2015. Furthermore, according to Ncube, SA's trade deficit position is in part as a result of SA not producing some of poultry's key inputs such as oil cakes which are imported from South America and the EU, and soya.

In contrast, according to the AGOA implementation subcommittee's representations to the United States Trade Representative Trade Policy Staff Committee, the USA is one of the most efficient poultry producers in the world.²⁵² The AGOA implementation subcommittee relies on the fact that the USA produces in the region of 19 million Metric Tonnes of poultry per year, the value of which was US\$38 million in 2014.²⁵³

²⁴⁹J. Bhagwati and D. Irwin, *'The Return of the Reciprocitarians'*. US Trade Policy Today. 1987. Page 126.

²⁵⁰Ncube P., *'Development of the animal feed to poultry value chain across Botswana, South Africa, and Zimbabwe'*. United Nations University World Institute for Development Economics Research. Page 3. 2016.

²⁵¹Esterhuizen D., *'Poultry and Product Annual'*. USDA Foreign Agricultural Service. Page 2. 2016.

²⁵²Representations by the AGOA Implementation Sub-Committee to the Office of the United States Trade Representative Trade Policy Staff Committee, *'Out-Of-Cycle Review of South Africa Eligibility for Benefits'*. Docket Number USTR-2015-0009. Page 1. 2015.

²⁵³Ibid (fn 252).

Based on the above, it is clear that compared to SA, the USA poultry industry yields far greater economic power and influence than SA. This begs the question, given that the USA has one of the biggest poultry exporting economies in the world, then why was it so important for it to secure a mere 65 000 ton per annum quota into the SA poultry market? The AGOA implementation committee also holds the view that the 65 000 ton per annum quota is small, representing only 3.7 percent of domestic consumption. The committee points out that the USA was nevertheless willing to accept the quota in the interest of resuming AGOA talks, but also saw the acceptance of this quota as a way of starting trade discussions afresh.

Having given an overview of the poultry industries of each of the USA and SA, this chapter will focus on the poultry anti-dumping dispute of 1991 between the USA and SA, and the more recent poultry disputes between the USA and SA. The difference between the poultry dispute of 1991 and the more recent AGOA poultry disputes is that, the 1991 dispute primarily involved the correct application of anti-dumping laws.²⁵⁴ In contrast, the more recent disputes have primarily involved whether SA should remain as an AGOA beneficiary, considering that it was allegedly in breach of various AGOA conditionality requirements. Discussing the various disputes between these countries is necessary for this chapter because these disputes give insight into the differing policy stances of the USA and SA. Furthermore, it will be shown that historically, the USA and SA poultry disputes are no different in principle, from more recent trade disputes between the USA and SA, in that the USA has at all times pursued a bargaining position at odds with the law and international trade policy.

In the year 1999 the Southern African Poultry Association (SAPA), together with Rainbow Farms approached the South African Board on Tariffs and Trade (SA BTT) in pursuit of a dumping²⁵⁵ investigation as it related to the importation of chicken leg quarters from the USA.²⁵⁶ After conducting an investigation based on the allegations brought forward, the SA BTT proceeded to impose an injunction on tariffs against the chicken leg quarters exported

²⁵⁴Kulkarini, k., *'Anti-Dumping Law as a trade barrier: a case of South-African poultry imports from U.S.A'*. The Indian Journal of Economics. Page 7. 2005.

²⁵⁵Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2 (Determination of Dumping), defines "dumping" as *–'a product is to be considered as being dumped, i.e introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'*.

²⁵⁶Kulkarini, k., *'Anti-Dumping Law as a trade barrier: a case of South-African poultry imports from U.S.A'*. The Indian Journal of Economics. Page 7-11. 2005.

by the USA to SA.²⁵⁷ Then, in 2000, the SA BTT finalized the anti-dumping duties after it concluded that the USA had dumped chicken leg quarters into the SA market and as a result, the SA poultry industry had experienced material injury.²⁵⁸

One of the contentious points needing to be addressed as part of the matter was how the prices for brown meat²⁵⁹ and white meat, respectively, in relation to chickens for export were to be calculated. As could have been reasonably expected, the USA used a formula that it was familiar with, likewise, SA used a formula that it was familiar with.²⁶⁰ The SA BTT found that two USA exporters of chicken were involved in the dumping of dark chicken, by margins of 209 percent and 357 percent, respectively.²⁶¹ It is submitted that as a result of the SA BTT findings, the USA chicken export numbers fell to 307 000 USA Dollars in 2001 which was calculated to be a decline of 80 percent.²⁶²

Kulkarni,²⁶³ Mankiw²⁶⁴ and Watson²⁶⁵ all argue that the BTT's decision and subsequent implementation of antidumping duties against the USA were unfair due to the allegedly

²⁵⁷Kulkarni, k., 'Anti-Dumping Law as a trade barrier: a case of South-African poultry imports from U.S.A'. The Indian Journal of Economics. Page 11. 2005.

²⁵⁸ Ibid (fn 257).

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2 (Determination of Dumping), prescribes that –

'a determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products'.

²⁵⁹South African Poultry Association, '2014 Industry Profile'. Page 18. 2014. Brown meat includes bone-in portions, such as leg quarters, drumsticks, wings, thighs, and white meat refers to breast meat. The relevance of this distinction is that the wider USA population prefers the white meat to the dark meat, resulting in a huge demand for the white meat. In contrast, the demand for dark meat in the USA is nowhere near that of the white meat. Commercially, this affords the USA a business case to export the dark meat to nations like SA where there is significant demand for darker meat. This business case is made attractive by a number of factors, namely, the dark meat can be produced at the lowest cost possible owing to the fact that it forms part of the production process of the white meat (it is not possible to produce a whole chicken that has no drumsticks and thighs). Furthermore, the USA is among the most advanced and efficient poultry producers in the world, this further ensures that the production costs are kept low.

²⁶⁰Mankiw G., and Swagel P.L., 'Anti-dumping: the third rail of trade policy'. Foreign Affairs. Volume 84(4). Paragraph 116. 2005.

²⁶¹Ibid (fn 260).

²⁶²Ibid (fn 260).

²⁶³Kulkarni, k., 'Anti-Dumping Law as a trade barrier: a case of South-African poultry imports from U.S.A'. The Indian Journal of Economics.

²⁶⁴Ibid (fn 260).

²⁶⁵Watson W., 'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform'. The Cato Institute. Free Trade Bulletin, Number 62. Page 1. 2015.

incorrect formula used by the BTT. Viljoen²⁶⁶ argues that anti-dumping duties are a valid trade remedy that may be used in order to protect a domestic industry from the injury that can be caused by dumping practices by exporters. Viljoen further argues that in the event that there is dissatisfaction among exporters, arising from what they deem to be incorrect implementation of anti-dumping measures, then this ought to be raised with the WTO, through the WTO Dispute Settlement Mechanism.²⁶⁷ This chapter argues that having failed to raise their concerns through the WTO, it was disingenuous of the USA to cry foul of the SA BTT's decision and subsequent implementation of anti-dumping duties.

The more recent AGOA poultry dispute concerns whether SA should remain on the AGOA programme, considering that it refuses to remove anti-dumping duties levelled at USA poultry.²⁶⁸ The USA relies on section 104(C)²⁶⁹ of AGOA which provides for the following –

'the elimination of barriers to United States trade and investment, including by –

- (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;*
- (ii) the protection of intellectual property; and*
- (iii) the resolution of bilateral trade and investment disputes'.*

In essence, section 104(C)²⁷⁰ requires SA to forfeit its rights afforded by the WTO.²⁷¹ Furthermore, as has been alluded to earlier, section 104(C) is problematic because it is comprised of wording that is more common-place in FTAs. The AGOA wording envisioned that FTAs would strictly be subject to negotiations and the inputs of African governments. The USA's recent conduct, namely coercing SA into eliminating tariffs imposed on the USA, is at odds with what AGOA envisioned. In coercing SA as described, the USA made the FTA provisions in AGOA, which were never meant to be included in the first place, immediately enforceable. This notwithstanding that no negotiations with African governments had

²⁶⁶AGOA deliberations – removal of anti-dumping duties or a loss of duty free access? Available at, <https://www.tralac.org/discussions/article/7245-agoa-deliberations-removal-of-anti-dumping-duties-or-a-loss-of-duty-free-access.html>. Accessed on April 2015.

²⁶⁷Ibid (fn 266).

²⁶⁸Ibid (fn 269).

²⁶⁹Section 104 (Eligibility Requirements), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²⁷⁰Ibid (fn 269).

²⁷¹Ibid (fn 269).

authorised this approach. This chapter argues that these factors support the view that the USA has abused the section 104 AGOA eligibility criteria.

From the perspective of the USA, section 104 (C) of AGOA has yielded results in that the Department of Trade and Industry allocated a quota on USA imported bone-in-chicken.²⁷² The effect of the quota is that the USA will be entitled to a Most Favoured Nation tariff of 37%, for 65 000²⁷³ tons per annum, of poultry imported by SA. The quota came into effect on April 2016, will lapse on March 2017 and will be split up so that 16250 tons are allocated for each quarter, until the lapsing date. This thesis argues that, in light of the fact that AGOA is a unilateral arrangement, in terms where the beneficiary nation is not required to reciprocate, the 65 000 tons per annum quota granted to the USA is significant. This thesis further argues that the USA flouted the AGOA policy statement when it aggressively pushed for this quota. As stated elsewhere in this thesis, AGOA only contemplated that reciprocity discussions with SSA nations would take place at a later stage. There is nothing in AGOA stating that the USA would at any point in time have a right to call for reciprocity. This thesis argues that the approach adopted by the USA contradicted AGOA, was heavy handed, and was not befitting of a nation that prides itself on respecting the rule of law.²⁷⁴

3.6 CONCLUSION

The contribution of this chapter to this thesis is as follows. Reciprocity with SSA countries was only stated as an objective that at some stage would be negotiated between the USA and SSA countries, it was never the default position.²⁷⁵ There is no support in policy or otherwise for

²⁷²Government Gazette Number 39643, Department of Agriculture, Forestry and Fisheries. 2 February 2016

²⁷³President Obama's Chicken War. Available at, <http://politicsofpoverty.oxfamamerica.org/2015/11/president-obama-launches-a-chicken-war/>. Accessed on November 2015. According to Gawain Kripke, 'what's at stake is 65,000 tons of chicken per year, which is less than 5% of US poultry exports (about 3 million tons) and less than 1% of US poultry production (about 18 million tons) annually'. This seems insubstantial considering the sheer size and power of the USA poultry industry, it also raises questions as to why the USA has pushed so hard for what seems a fairly small deal.

²⁷⁴Representations by the AGOA Implementation Sub-Committee to the Office of the United States Trade Representative Trade Policy Staff Committee, 'Out-Of-Cycle Review of South Africa Eligibility for Benefits'. Docket Number USTR-2015-0009. Page 1. 2015. During its representations, the AGOA Implementation Sub-Committee claimed that, 'the United States has been the leading champion of the rule of law in international trade since 1946 when it initiated the international discussions that led to the formation of the General Agreement on Tariffs and Trade a year later in 1947'.

²⁷⁵See section 103(4) of AGOA, 19 U.S.C 3702, stating that –

'Congress supports negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interest of both the United States and the countries of Sub-Saharan Africa'.

the USA to demand reciprocity under AGOA, in the manner that they did during the recent AGOA poultry disputes. This thesis argues that the best way in terms of written policy and law for the USA to pursue reciprocity, would have been through FTAs with SSA countries and in particular, SA. These however were never concluded due to the reasons that have already been outlined.

This chapter identifies the policy goals of AGOA and how these have been implemented, in this regard, the section 104 (C) eligibility criteria inserted in AGOA are criteria that are common-place in FTAs and not unilateral agreements such as AGOA. In fact, AGOA only contemplated that FTAs may be negotiated with SSA countries at a later stage, therefore, it is surprising that FTA type obligations found their way onto the AGOA statute. This also raises questions about USA transparency and good faith. Furthermore, section 104 (C) eligibility criteria have required that SA forfeit their rights in terms of WTO law, an indictment on a country requiring that SSA countries submit themselves to the Rule of Law.²⁷⁶ This chapter argues that negotiating poultry FTAs in accordance with the provisions in AGOA would have been a far more transparent approach by the USA, and would have been consistent with the policy goals and provisions contained in AGOA. On this point, this chapter argues that negotiating FTAs was not convenient enough for the USA as they were rapidly losing market share to the EU, who had recently concluded EPAs with SA.²⁷⁷ It was far more convenient for the USA to force SA to poultry concessions, instead of negotiating reform that could have been beneficial in the long run, to both the USA and SA.²⁷⁸

This chapter also outlined that the USA's poultry industry is far bigger in size, economic power, and influence when compared to that of SA's poultry industry. Even taking into account the reasoning offered by the AGOA implementation committee, as to why the USA pushed so hard for a mere 65 000 ton per annum quota, it doesn't make sense that a powerhouse like

²⁷⁶See section 104 (B) (Eligibility Criteria) of AGOA, requiring that AGOA beneficiaries must, '*be making continual progress toward establishing the rule of law, political pluralism, and the right to due process.*'

²⁷⁷International Centre for Trade and Sustainable Development, 'Talking AGOA with Witney Schneidman'. Bridges Africa, Volume 4. Page 3. 2015. Also see Williams B., '*African Growth and Opportunity Act (AGO): Background and Reauthorization*'. Congressional Research Service. Page 1. 2015. The author is of the view that the EPAs that the EU has concluded with several African countries, are likely to place the USA at a competitive disadvantage.

²⁷⁸Watson W., '*Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform*'. The Cato Institute. Free Trade Bulletin, Number 62. Page 3. 2015.

the USA poultry industry, would flout its own policies, the rule of law, and its own reputation, for a 3.7 percent stake in the SA poultry imports market.

CHAPTER FOUR – CONCLUSIONS AND RECOMMENDATIONS

4.1 INTRODUCTION

This thesis detailed the history of developing countries within the GATT system, with the aim of understanding firstly, what the position of developing countries in the multilateral trading system was, and secondly, how this developed over the years, through the various trade negotiation rounds. This was necessary because without understanding what developing countries negotiated for in the various trading rounds, it is near impossible to understand why they have objected to the trade demands of developed countries, as evidenced in AGOA. It also then becomes nearly impossible to appreciate the difficult and often compromised position of developing countries vis-à-vis developed countries.

This thesis documented the relationship between the USA, SA and SSA nations, from a policy perspective, with the aim of appreciating the policies that informed USA trade with SA and SSA nations. This was necessary to ascertain whether USA policy has been adhered to or deviated from during the recent AGOA poultry disputes. This chapter will also rely on the policy positions of the USA outlined in AGOA, the GSP and various policy makers, in order to show whether the USA deviated from its own policy positions and ultimately abused the application of the AGOA statute.

4.2 CONCLUSIONS

This thesis found that the USA deviated from its own stated policies, articulated by Bill Clinton, the GSP system and AGOA. At the outset, trade with SA and SSA was intended to foster a better trade environment and relationship to the benefit of the USA and SA. It was never the initial intention that the USA would force SA into reciprocating USA trade. The AGOA statement of policy supports these arguments, in particular section 103(4), which states that, *'Congress supports negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of Sub-Saharan Africa'*.²⁷⁹ It is clear from the quotation that the intention of US policy makers was to make reciprocity a subject for negotiation and that there would have to be a separate agreement outlining these negotiated reciprocity provisions. AGOA is

²⁷⁹Section 103 (Statement of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

clearly not the agreement intended to speak to reciprocity and how this would at all times be applied.

The research found that it is important to understand the negotiating positions of both developed and developing countries in order to understand why the USA and SA have conducted themselves the way that they have during the AGOA poultry disputes. This dispute required and very much still requires a great deal of thorough analysis because of both the political and economic impact it has especially for a developing nation like South Africa. In particular this thesis concludes that, the various trade negotiating rounds set the scene for trade between the developed world and the developing world. Developing countries were from the onset, required to convince the developed countries that they had special needs, and why these special needs should be recognized. Further, it was also noted that developing countries lacked apathy from developed countries who seemed intent on ignoring the developmental needs of developing countries. This is notwithstanding that developed countries sought to adopt protectionist measures in order to protect their domestic industries, at the expense of developing countries.²⁸⁰ The mandate of developing countries was nobler in nature as they sought, from the negotiating rounds, recognition of their special needs supplemented with legal mechanisms that would help advance their needs.²⁸¹ Yet developed countries continuously sought to delegitimize the special needs of developing countries, even going as far as caricaturing developing countries as non-conformists.

This thesis showed with reference to the recent poultry disputes that, not much has changed in trade relations between the developed world and the developing world. In particular, the manner in which the USA has conducted itself with SA in respect of AGOA, is no different from the various negotiating rounds. In demanding reciprocity under a unilateral arrangement such as AGOA, and inserting FTA type wording in AGOA, the USA contradicted its own policies some of which are clearly spelt out in AGOA.²⁸² The USA also displayed the type of apathy that it displayed during the ITO negotiations, where it consistently declined to recognize the special needs of developing countries.

²⁸⁰Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Studies in International Trade Law. Page 58. 2006.

²⁸¹Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C, page 22. 1987.

²⁸²Section 103 (Statement of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

This thesis argued that it is of utmost importance in the first place to understand why the USA decided to trade in SA. The reasons quoted by Clinton in his letter to Congressman Rangel were in the main based on a developmental agenda and principles founded on good governance.²⁸³ This thesis concludes that from a policy perspective, it is not clear that the USA sought to derive maximum profits through trade with SA. Therefore, the shift that saw the USA looking to derive maximum profits from SA, through demanding reciprocity, was not transparent, appeared heavy handed and seemed to not be in-line with stated US policy reflected in AGOA.²⁸⁴

This thesis analysed AGOA and in particular, the various provisions containing conditionality requirements. This was necessary to answer the question of whether the AGOA conditionality requirements lend themselves to abuse at the instance of the USA. In particular, this thesis analysed the following AGOA conditionality requirements, requiring the following from SSA nations –

- ‘(C) the elimination of barriers to United States trade and investment, including by—*
- (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;*
 - (ii) the protection of intellectual property; and*
 - (iii) the resolution of bilateral trade and invest disputes...’*

Throughout the analysis, it became apparent that the AGOA conditionality requirements lend themselves to abuse because they are vague, lack commercial meaning and in any event are FTA type clauses that should have never made their way onto the AGOA statute. As such, the vagaries of the conditionality requirements have only played into the hands of the USA, because there has been no guidance on, for example the provisions requiring that SSA countries eliminate all barriers to USA trade, and how these are to be appropriately applied.²⁸⁵ South Africa’s anti-dumping measures levelled at USA poultry exports are legal and

²⁸³McCormick R., *‘The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law’*. The Texas International Law Journal, Volume 41:339. Page 351. 2006.

²⁸⁴Section 103 (Statement of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000.

²⁸⁵Bhala, R. *‘The Limits of American Generosity’*, Fordham International Law Journal, Volume 29, Issue 2. Page 331. 2006.

form part of WTO law, therefore these should not be construed as *'barriers to United States trade and investment'*.

This thesis also observed that there is a lack of consistency when it comes to applying the full might of conditionality requirements. This thesis established that the USA has continued to grant AGOA eligibility to countries, even where such countries continuously display their inability to keep in touch with the political, economic and law reforms that are required in terms of AGOA.²⁸⁶ This thesis used the examples of Chad and Cameroon, who have terrible track records when it comes to human rights violations and corruption, as well as poor political stability. It was argued that Chad continues to enjoy AGOA eligibility primarily because of its status as oil exporters, a resource of significant strategic importance to the USA. In contrast, this thesis made the observation that a smaller country, Swaziland, had its AGOA eligibility benefits taken away, on account of alleged worker's rights issues. This thesis argued that removing Swaziland from the AGOA programme was likely less contentious due to the fact that Swaziland exported textiles, a product that in any event is noted as a sensitive one under AGOA. This thesis further argued that, taking AGOA eligibility away from either Cameroon or Chad would have been far more contentious, due to the strategic importance of the oil that they both export under AGOA.

As for the FTA nature of the conditionality requirements, this thesis argued that this has also played into the hands of the USA and has lent itself to abuse at the instance of the USA, because instead of FTAs being negotiated as set out in AGOA, these provisions were instead enforced prematurely, by the USA.²⁸⁷ This thesis concludes that this was no coincidence as negotiating FTAs with SSA countries would have taken the USA many years, effectively putting the USA out of the race with the EU for SSA countries market share.²⁸⁸ It was therefore, strategic and opportunistic for the USA to enforce these FTA provisions without undergoing FTA negotiations as provided for in the AGOA statement of policy.

²⁸⁶Corruption Perception Index, 2015. Available at, <https://www.transparency.org/cpi2015/results>. Accessed on February 2016.

²⁸⁷Section 103 (Statement of Policy), 19 U.S.C 3702. The African Growth and Opportunity Act, 2000. See in particular sub-section (4) stating – *'negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of sub-Saharan Africa'*.

²⁸⁸International Centre for Trade and Sustainable Development, *'Talking AGOA with Witney Schneidman'*. Bridges Africa, Volume 4 Page 3. 2015.

4.3 RECOMMENDATIONS

It would be naïve to suggest that AGOA has not been beneficial to SA trade, however, there are a number of issues that need to be addressed to ensure that AGOA yields even better trade results between the USA and SA and that the trade relationship between these two nations is enhanced. The issues requiring further thought and attention will be discussed below.

Unilateral Trade Arrangements

Unilateral trade arrangements have their origins in the Haberler Report, GATT and the General System of Preferences, and therefore, these arrangements are absent any arbitrariness and are not the concoctions of developing countries. This being the case, to the extent that the USA no longer sees unilateral arrangements such as AGOA as being beneficial to the USA, then the AGOA Forum²⁸⁹ should be used as a platform to tackle this stance. It is however, not conducive to fostering a healthy trade environment if the USA sees fit to resolve its issues by way of heavy handed tactics, which include threats of AGOA expulsion.

Free Trade Agreements

This thesis made the observation that AGOA contains FTA type wording which does not belong in AGOA, but rather, is suited to an FTA. Furthermore, if one considers that the USA seeks more '*meaningful*' trade with SSA nations²⁹⁰ and sees AGOA as not being the long-term solution for trade with SSA nations, then the resumption of the FTA negotiations that were aborted in the year 2006, would be appropriate. These negotiations would allow the USA to make representations on how it would like for trade with SSA nations to be improved. For example, setting the parameters for reciprocal trade. Likewise, SSA nations would be presented with an opportunity to make rebuttal representations to the USA, on amongst

²⁸⁹Section 105 (United States-Sub Saharan Africa Trade and Economic Cooperation Forum) of AGOA, 19 U.S.C 3702. The African Growth and Opportunity Act, 2000. This United States-Sub Saharan Africa Trade and Economic Cooperation Forum, is also referred to as the AGOA Forum.

²⁹⁰Office of the United States Trade Representative, U.S. Trade Representative, Michael Froman., '*Beyond AGOA Looking to the Future of U.S. – Africa Trade and Investment*'. Page 2. 2016.

other things, reciprocal trade. From the perspective of the SSA nations, the negotiations would be required to take into account the developmental states of SSA nations. From the perspective of the USA, the negotiations would be required to take into account that unilateral trade is one sided and this is not sustainable, nor is it conducive to building strong trade relations.

Further Amendments to AGOA

This thesis argued that some of the eligibility requirements contained in AGOA lend themselves to abuse at the instance of the USA. In particular, this thesis argued that the condition requiring that SSA nations eliminate barriers to USA trade is problematic because there is no guidance on what was meant by the chosen words. It was also argued that this condition is contentious because in effect, it requires of an AGOA beneficiary to forgo its WTO rights. This condition is better off deleted, to the extent that the USA is of the view that certain protectionist measures are unlawfully implemented by an SSA nation, then it should enforce its rights at WTO level.

Beyond AGOA

AGOA comes to an end in the year 2025, this gives the USA and all AGOA beneficiaries just under 10 years to formulate ideas on what the next steps will be at the termination date and beyond. There is broad consensus that AGOA, although beneficial, is not the long-term solution for the USA and SSA nations. To this end, AGOA beneficiaries and the USA should make use of the AGOA forum to discuss the way forward as it relates to the fast-approaching expiry date of AGOA. This discussion should form part of the agenda each time the AGOA Forum convenes. It is proposed that some of the long-term solutions, once AGOA has expired could be well negotiated, fair and balanced FTAs, and special preferences for those nations that on economic grounds, are not ready for an expansive FTA are better suited to more mature economies. Special programmes could be designed for SSA nations to focus purely on exports of manufactured goods and value-added agricultural products with the objective of developing SSA nations export led growth and integrating them into global trade.

From Net Importer of Poultry to Net Exporter of Poultry

With SA being a net importer of poultry there exists an opportunity to balance-out the trade deficit and ultimately turn this into a trade surplus. To achieve this, SA would have to become a net producer of poultry which would require among other things, better efficiencies within the poultry market's value chains, and solutions to ensure that maize costs and oil cake costs do not drive up the production costs of poultry more than what is necessary.²⁹¹ Conclusively, working towards this position would provide SA with an opportunity to integrate its poultry market into global markets, and thereby, creating further job opportunities for SA citizens.

²⁹¹Ncube P., *'Development of the animal feed to poultry value chain across Botswana, South Africa, and Zimbabwe'*. United Nations University World Institute for Development Economics Research. Page 2. 2016. The author writes extensively on the value chains of the SA poultry industry.

BIBLIOGRAPHY

INTERNATIONAL AGREEMENTS

- Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994.
- The Agreement on Trade-Related Aspects of Intellectual Property (Annexure 1C of the Marrakesh Agreement Establishing the World Trade Organization).

INTERNATIONAL LAW DECISIONS

- Appellate Body Report, European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, 128, 173, WT/DS246/AB/R (Apr. 7, 2004).
- Decision Regarding Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, December 4, 1979'. GATT B.I.S.D. (26th Supp).
- Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903).
- Trends in International Trade, October 1958, Sales No. GATT/1958-3.

FOREIGN LAW

- African Growth and Opportunity Act, 2000. 19 U.S.C 3702.

DOMESTIC LAW

- Government Gazette Number 39643, Department of Agriculture, Forestry and Fisheries. 2016.

BOOKS

- Allesandrini. D., *'Developing Countries and the Multilateral Trade Regime, the Failures and Promises of the WTOs Developmental Mission'*. Oxford: Hart Pub. 2010.
- Faber G. and Orbie J., *'European Union Trade Politics and Development: Everything but Arms Unravelling'*. New York: Routledge Press. 2007.

- Hudec. R. *'Developing Countries in the GATT / WTO Legal System'*. Cordell Hull Institute, Washington, D.C. 1987.
- The World Trade Organization Secretariat, *'A handbook on the WTO Dispute Settlement System'*. Cambridge: University Press. 2004.

JOURNAL ARTICLES

- Al Nasa et al, *'The Jordan-U.S. Free Trade Agreement: Eight Years Later'*. The University of Michigan. 2008.
- Bhala, R. *'The Limits of American Generosity'*, Fordham International Law Journal. 2006.
- Bowman G. W., *'Of haves and have-nots: A review of Donatella Allesandrini; Developing Countries and the failure of the Multilateral Trade Regime: the failure and promise of the WTO's development mission'*. Trade Law and Development. 2011.
- Capling. A., *'The enfant terrible': Australia and the reconstruction of the multilateral trade system'*. Australian Economic History Review. 2000.
- Esterhuizen D., *'Poultry and Product Annual'*. USDA Foreign Agricultural Service. Page 2. 2016.
- Fieleke, N., *'The Uruguay Round of Trade Negotiations: An Overview'*. New England Economic Review. 1995.
- Fuhr D. and Klughaupt Z., *'The IMF and AGOA: A Comparative Analysis of Conditionality'*. Duke Journal of Comparative and International Law. 2004.
- International Centre for Trade and Sustainable Development, *'Talking AGOA with Witney Schneidman'*. Bridges Africa. 2015.
- Ismail F., *'Rediscovering the Role of Developing Countries in GATT before the Doha Round'*. Research and Information System for Developing Countries. 2008.
- J. Bhagwati and D. Irwin, *'The Return of the Reciprocitarians'*. US Trade Policy Today. 1987.
- Jones. V.C. *'Trade Preferences: Economic Issues and Policy Options'*. Congressional Research Services. 2013.
- Ozden C. and Reinhardt E., *'The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies'*, 1976-2000. The World Bank Development Research Group, Working Paper. 2003.

- Kennedy K. C., *'The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preferences'*. The Michigan State International Law Review. 2012.
- Kulkarni, k., *'Anti-Dumping Law as a trade barrier: a case of South-African poultry imports from U.S.A'*. The Indian Journal of Economics. 2005.
- Kowalski P., Organisation for Economic Cooperation and Development, *'Impact of Changes in Tariffs on Developing Countries' Government Revenue 9'*. OECD Trade Policy, Working Paper. 2005.
- Langton D., *'U.S Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act and beyond'*. CRS Report for Congress. 2008.
- Mankiw G., and Swagel P.L., *'Anti-dumping: the third rail of trade policy'*. Foreign Affairs. 2005.
- Mills G. and Stremlau J., *'The reality behind the rhetoric: the United States, South Africa and Africa'*. South Africa Institute of International Affairs and the Centre for Strategic and International Studies. 2000.
- McCormick R., *'The African Growth Opportunity Act: The perils of pursuing African development through U.S Trade Law'*. The Texas International Law Journal. 2006.
- McKenzie. M., *'European Communities – Conditions for the granting of tariff preferences to developing countries'*. Melbourne Journal of International Law. 2005.
- Moss K., *'The Consequences of the WTO Appellate Body Decision in EC – Tariff Preferences for the African Growth Opportunity Act and Sub-Saharan Africa'*. New York University Journal of International Law and Politics. 2006.
- Ncube P., *'Development of the animal feed to poultry value chain across Botswana, South Africa, and Zimbabwe'*. United Nations University World Institute for Development Economics Research. 2016.
- Schneidman W., *'The African Growth and Opportunity Act: Looking Back, Looking Forward'*. Africa Growth Initiative, Brookings Institution. 2012.
- Scott. J., *'Developing Countries in the ITO and GATT Negotiations'*. Brooks World Poverty Institute. 2009.
- Stevens, C et al., *'The Impact of Free Trade Agreements between Developed and Developing Countries on Economic Development in Developing Countries: A Rapid Evidence Assessment'*. Overseas Development Institute. 2015.

- Snyder. M., *'GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences'*. Michigan Journal of International Law. 2012.
- Taylor C. *'Of Free Trade Agreements and Models'*. The Indiana International and Comparative Law Review. 2009.
- Watson W., *'Antidumping Fowls Out: US – South Africa Chicken Dispute Highlights the Need for Global Reform'*. The Cato Institute. Free Trade Bulletin. 2015.
- Williams B., *'African Growth and Opportunity Act (AGOA): Background and Reauthorization'*. Congressional Research Service. 2015.

REPRESENTATIONS

- Representations by the AGOA Implementation Sub-Committee to the Office of the United States Trade Representative Trade Policy Staff Committee, *'Out-Of-Cycle Review of South Africa Eligibility for Benefits'*.
- The United Conference on Trade and Employment, *'Preparatory Committee of the United Nations on Trade and Employment'*: Verbatim Report of the Fourteenth Meeting of the Procedures Sub-Committee II, 18 November, E/PC/T/33. 1946.
- Hearing Testimony by Ambassador Michael Froman, US Congress, Senate Committee on Finance, The African Growth and Opportunity Act at 14: The Road Ahead, 113th Cong., 2nd sess., July 30, 2014. Available at, <http://www.finance.senate.gov/hearing/?id=f5251f60-5056-a032-52f0-742dc672610d>. Accessed on July 2016.

USA POLICY DOCUMENTS

- Office of the United States Trade Representative, U.S. Trade Representative, Michael Froman., *'Beyond AGOA Looking to the Future of U.S. – Africa Trade and Investment'*. 2016.

WEB LINKS

- US complains of disadvantage as EU-SADC trade deal kicks in. Available at, <https://agoa.info/news/article/6280-us-complains-of-disadvantage-as-eu-sadc-trade-deal-kicks-in.html>. Accessed on October 2016.
- Hearing Testimony by Ambassador Michael Froman, US Congress, Senate Committee on Finance, The African Growth and Opportunity Act at 14: The Road Ahead, 113th Cong., 2nd sess., July 30, 2014. Available at, <http://www.finance.senate.gov/hearing/?id=f5251f60-5056-a032-52f0-742dc672610d>

60-5056-a032-52f0-742dc672610d. Accessed on July 2014.

- Corruption Perception Index, 2015. Available at, <https://www.transparency.org/cpi2015/results>. Accessed on February 2016.
- AGOA deliberations – removal of anti-dumping duties or a loss of duty free access? Available at, <https://www.tralac.org/discussions/article/7245-agoa-deliberations-removal-of-anti-dumping-duties-or-a-loss-of-duty-free-access.html>. Accessed on April 2015.
- Chicken Tax Strains U.S – South Africa Relationship. Available at, <http://blogs.cfr.org/campbell/2015/03/05/chicken-tax-strains-u-s-south-africa-relationship>. Accessed on March 2015.
- Drawing Lessons from Swaziland’s AGOA exclusion. Available at, <https://www.tralac.org/discussions/article/5855-drawing-lessons-from-swaziland-s-agoa-exclusion.html>. Accessed on July 2014.
- President Obama’s Chicken War. Available at, <http://politicsofpoverty.oxfamamerica.org/2015/11/president-obama-launches-a-chicken-war/>. Accessed on November 2015.
- Trading with the Enemy. Available at, https://fpif.org/trading_with_enemy/. Accessed on February 2011.

26 October 2016

Mr Steven Siyabonga Ndlovu (215080870)
School of Law
Howard College Campus

Dear Mr Ndlovu,

Protocol reference number: HSS/1797/016M

Project title: To what extent does the condition in the African Growth Opportunity Act, 2000 requiring that Sub-Saharan African countries eliminate barriers to United States of America trade, lend itself to abuse at the instance of the US?

Full Approval – No Risk / Exempt Application

In response to your application received on 27 September 2016, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Dr Clydenia Stevens
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

Dr Shenuka Singh (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 290 3587/8360/4557 Facsimile: +27 (0) 31 290 4609 Email: ximbap@ukzn.ac.za / snymann@ukzn.ac.za / mohuno@ukzn.ac.za

Website: www.ukzn.ac.za



1910 - 2010
100 YEARS OF ACADEMIC EXCELLENCE


Founding Campuses:  Edgewood  Howard College  Medical School  Pietermaritzburg  Westville

~ i ~

DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.
I declare that this Dissertation contains my own work except where specifically acknowledged.

Nhlakanipho Macmillan Zikalala (209527098)

Signed 

Date 29 DECEMBER 2014