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COLLEGE OF LAW AND MANAGEMENT STUDIES
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***TOWARDS DEVELOPMENT-CENTRED TRADE
RELATIONS: A STUDY OF SOUTH AFRICA AND THE USA
TRADE RELATIONS WITH PARTICULAR FOCUS ON THE
AFRICAN GROWTH AND OPPORTUNITY ACT (AGOA)***

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

FEBRUARY 2019

DECLARATION

I, Nhlakanipho Mkhwanazi, declare that:

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ABSTRACT

With trade taking place continuously on a daily basis, its often-reported success gives the impression that all participants involved are to a certain extent somewhat successful too. This dissertation draws attention to the discrepancies that have often gone unnoticed throughout the decades and the effects that have arisen as a result. South Africa's (SA) and the United States of America's (US) trade relationship through the African Growth and Opportunity Act (AGOA) is the focus of this study, with this relationship being analysed from as far back as history has been recorded to the modern day.

Least developed countries (LDCs) are an integral part of this study because most trade-related activities involve them, and they contain most of the world's natural resources, but most importantly they also make up a large portion of the world's population. It's baffling to see that where these factors are present, there's also inequality. Seemingly, there are efforts that deal specifically with the challenges faced by developing countries, but what is concerning is these solutions are formulated by developed countries which created them and continue to perpetuate them.

The approach adopted was mostly that of contrasting events that have involved trade over the decades and a discussion of how these events have shaped international, political and trade relations, that is, the existing status quo. Examples include the two World Wars; oppressive regimes such as apartheid; and the formation of global institutions ranging from the International Trade Organization (ITO) to the General Agreement on Tariffs and Trade (GATT), and the World Trade Organization (WTO).

The first three chapters contain an introduction, a background focus on development and the history of relations between South Africa and the United States of America. The last two chapters contain a discussion on AGOA as well as findings and recommendations that can be implemented to assist with this issue. What this dissertation was aiming to establish was the perpetual involvement of developed countries in the affairs of developing countries. This is illustrated through the renegotiation of the AGOA in 2015, where SA had to accept ultimatums set for it by the US.

This dissertation further shows that such tactics are nothing new when the US is involved, as is evidenced by its involvement in major global events that have shaped the course of history. This approach is not only harmful but also stagnates development, as developing countries must adhere to agreements that sometimes are not to their benefit. The findings indicate a contradictory pattern: when solutions to challenges faced by developing countries are presented, they translate instead into a further stronghold over developing countries because of past atrocities such as colonisation and apartheid.

What appears throughout the dissertation are the ever-present structures that are intended to perform functions supposed to be for the improved good of developing countries, but which result in those countries facing never-ending challenges, some of which are self-inflicted through alliances such as the AGOA with developed countries.

Key words:

South Africa (SA); United States of America (US or USA); AGOA; development; least developed countries (LDCs); trade; trade relations; apartheid; dumping; WTO; developing countries; developed countries

ACRONYMS and ABBREVIATIONS

ABCFM	American Board of Commissioners for Foreign Missions
ACP	African, Caribbean and Pacific Countries
ACOA	American Committee on Africa
ACTE	African Competitiveness and Trade Expansion
AD	Anti-dumping
AfDB	African Development Bank
AGOA	African Growth and Opportunity Act
AGOA III	AGOA Acceleration Act of 2004
ANC	African National Congress
AU	African Union
AUC	African Union Commission
BRICS	Brazil, Russia, India, China, South Africa
BTT	Board on Tariffs and Trade
CAAA	Comprehensive Anti-Apartheid Act
CORE	Congress on Racial Equality
CPA	Cotonou Partnership Agreement
CSI	corporate social investment
CSR	corporate social responsibility
CTD	Committee on Trade and Development
DDA	Doha Development Agenda
DEIC	Dutch East India Company
DSU	Dispute Settlement Understanding
EEC	European Economic Community
EPA	European Preference Agreement
EU	European Union
FTA	free trade area
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GNP	gross national product
GSP	General System of Preferences
ICTSD	International Centre for Trade and Sustainable Development
IMF	International Monetary Fund
ITAC	International Trade Administration Commission (of South Africa)
ITO	International Trade Organisation
MCC	Millennium Challenge Corporation
MFA	Multifibre Agreement
MFN	Most-favoured-Nation
MTS	Multilateral Trade System
NAACP	National Association for the Advancement of Coloured People
NEPAD	New Partnership for Africa's Development

NPCA	NEPAD Planning and Coordinating Agency
NTB	Non-tariff Barrier
OECD	Organisation for Economic Co-operation and Development
OAU	Organisation of African Unity
OPEC	Organization of the Petroleum Exporting Countries
PAC	Pan African Congress
ROO	Rule of Origins
SA	South Africa
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADTSA	South African Democratic Transition Support Act
SAPA	South African Poultry Association
SMMEs	small, medium and micro enterprises
SSA	Sub-Saharan Africa
TCFP	Third Country Fabric Provision
TDCA	Trade, Development and Cooperation Agreement
TIDCA	Trade, Investment and Development Cooperation Agreement
TIFA	Trade and Investment Framework Agreement
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNECA	UN Economic Commission for Africa
US	United States
USAID	US Agency for International Development
USTR	United States Trade Representative
World Bank	Bank of Reconstruction and Development
WTO	World Trade Organization
WW I	World War I
WW II	World War II

CHAPTER ONE:

INTRODUCTION/RESEARCH PROPOSAL

1.1 Background

The AGOA is legislation enacted by the United States (US) Government with the intention of allowing access to its markets for African countries that are members of the agreement. Initially enacted from May 2000 up until September 2015, it was recently up for renegotiation and reauthorisation for a further 10-year period until September 2025.¹ The introduction to the Preamble of the Act enacted in 2000 states that the parties to this agreement are sub-Saharan African (SSA) countries as well as those in the Caribbean Basin.² The focus of AGOA is to authorise a new trade investment policy for the former and to expand trade benefits for the latter.³

With the recent anti-dumping duty disagreement regarding poultry products imported from the US, several authors⁴ argue that the terms of the renewed agreement are not beneficial to the South African poultry industry.⁵ The US put SA into a position where it had to lower trade barriers to continue being a part of the AGOA agreement. This resulted in the dumping of 65 000 tonnes of tariff-free bone-in chicken. Taking into consideration that SA was somewhat pressurised into accepting this agreement and allowing the importation of poultry which was considered by the South African Poultry Association (SAPA)⁶ as being dumped into the Southern African Customs Union (SACU) market,⁷ to what extent can such influence be wielded by a single country, and what does that entail for the development prospects of a country involved in such a scenario?

Therefore, this research proposal is aimed at studying the effect that lowering trade barriers has had on SA's trade relationship with the US, with the focus being on the extent to which South African development has been affected.⁸ This study raises the question of whether the change in the trade terms between the respective countries could be an indicator of the actual trade relationship. The perception held and often

¹ E Naumann 'An overview of AGOA's performance, beneficiaries, renewal provisions and the status of South Africa' (2015) *Stellenbosch: tralac*. 23.

² The African Growth and Opportunity Act of the 106th Congress of the United States of America, 2000 251.

³ Ibid.

⁴ W Gumede 'Strict AGOA rules put African policies and trade on the line' *African Independent*, Tuesday, 19 September 2017. Available at <https://agoa.info/news/article/15265-strict-agoa-rules-put-african-policies-and-trade-on-the-line-columnist.html>, accessed on 20 February 2018; Naumann note 1 23.; C Prinsloo 'AGOA and the future of US-Africa relations' South Africa Institute of International Affairs 1 Available at <http://www.saiia.org.za>, accessed on 16 October 2018; A Carroll 'Forging a New Era in US-South African Relations' *Atlantic Council Africa Center* (2017) 14.

⁵ Gumede note 4.

⁶ The SAPA deals with tariffs, agricultural trade policy, food safety issues, monitoring of developments in the industry and any matter the poultry industry wishes to address collectively.

⁷ O Oluyeju and M Mafu 'The African Growth and Opportunity Act: A Poisoned Chalice Handed to South Africa?' (2016) *South African Yearbook of International Law* 47.

⁸ T Bolton 'The state of the South African poultry industry' *Supermarket & Retailer* (2015) 17.

portrayed is that there is an equal standing when negotiations take place. Events such as the poultry dispute suggest otherwise. This has a bearing on the extent to which a country is able to develop and sustain development. Moreover, development on its own is a process which is at times a lengthy one. Therefore, the question that needs to be pondered over is: is AGOA in fact helping with SA's development; or is their concern a tool used to gain control over SA's markets? These among other questions are what this dissertation intends on researching. Previously scholars have explored the affect this agreement has on the trade relationship between the US and SA. The stance taken by the US to leverage SA into agreeing to lower safety standards to remain a part of the agreement shows the power it holds. Some have called for the AGOA to be reviewed and renegotiated in totality to allow SA an opportunity to determine how it conducts trade as opposed to being dictated to in return for trade benefits. In future SA must take stringent measures to avoid entering into similar agreements if it intends on remaining in control of its major economic industries and developing in the manner in which it intends to.

The research problem this dissertation intends on posing is investigating the effect on trade relations between SA and the US in relation to the AGOA. It aims to explore the historical context of developed and developing countries' trade relations, with specific consideration being given to the provisions of the AGOA, as well as how the ongoing trade relations between SA and US affect development, using the abovementioned examples as points of references from SA and various international sources.

1.2 Preliminary literature study

The Preamble to the AGOA reads as follows:

*'An Act: To authorize a new trade and investment policy for sub-Saharan Africa, expand trade benefits to the countries in the Caribbean Basin, renew the generalized system of preferences, and reauthorize the trade adjustment assistance programs.'*⁹

Further to this, according to the International Centre for Trade and Sustainable Development (ICTSD), the AGOA is a unilateral agreement that provides to eligible sub-Saharan African countries duty-free and quota-free access to the US market for close to 6 500 products.¹⁰ The two main purposes served by enacting AGOA were to promote trade with qualifying African countries, which would in turn see the establishment of strategic business partnerships within the sub-Saharan African region. The Act also serves to provide duty-free market access for exports from

⁹ The African Growth and Opportunity Act, 2000 note 2.

¹⁰ International Centre for Trade and Sustainable Development (ICTSD). Trump decides to suspend trade preferences for clothing products from Rwanda. Available at <https://www.ictsd.org/bridges-news/bridges-africa/news/trump-decides-to-suspend-trade-preferences-for-clothing-products>, accessed on 11 April 2018.

African partner countries.¹¹ The definition of AGOA provided for in the Act is different from how the US in a variety of instances has conducted its trade operations – its conduct has been contrary to what this definition suggests. The primary examples are SA and more recently Rwanda.¹² South African authors¹³ share the view that SA should take on more responsibility for its economic emancipation with regard to the recent position that SA was put in when it had to accept unfavourable terms to remain a part of the agreement.¹⁴

SA is integrated firmly into the AGOA and pulling out at any moment during the renegotiation would have had severe repercussions for the South African economy, seeing that the Act already generates a considerable amount of the national GDP. In 2014 alone, the value of exports SA sent to the USA amounted to US\$8 billion, and 40 percent of that amount was a result of preferential benefits derived from AGOA.¹⁵ Agriculture exports proportionally amounted to US\$300 million, of which 75 percent is AGOA preferential benefits.¹⁶

Benefits are conferred on member countries of this Act:

*'In 2015, South Africa was under immense pressure to meet the US' conditions or lose out on the preferential trade benefits offered by the AGOA.'*¹⁷

These benefits can be withdrawn by the US government if members conduct themselves contrary to the provisions provided for in AGOA. One of these is the eligibility for duty-free treatment for all agricultural goods under the AGOA.¹⁸ Other considerations under the Act are the position with regard to non-economic issues, that certain benefits are also suspended if they are in contravention of basic human rights and founding democratic principles, which are mutually beneficial to all parties concerned.¹⁹ Section 103 of the Act has a statement policy which states that:

*'Congress supports negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas (FTAs) that serve the interests of both the USA and SSA.'*²⁰

¹¹ BC Mbenyane *The role of business and government in shaping South Africa's food safety regime between 2000 and 2015* (published LLM thesis) (2016) University of the Witwatersrand 55.

¹² Rwanda was threatened that it would lose its trade benefits by President Trump unless it complied with the Act.

¹³ Naumann note 1; Prinsloo note 4.

¹⁴ Naumann *ibid* 28.

¹⁵ SAIIA: South Africa and AGOA: What is at stake? <http://www.saiia.org.za/opinion-analysis/south-africa-and-agoa-what-is-at-stake>, accessed on 11 April 2018.

¹⁶ *Ibid*.

¹⁷ Mbenyane note 11 57.

¹⁸ International Centre for Trade and Sustainable Development (ICTSD). South Africa at risk of losing AGOA agriculture benefits over poultry row. Available at <https://www.ictsd.org/bridges-news/bridges-africa/news/south-africa-at-risk-of-losing-agoa-agriculture-benefits-over>, accessed on 11 April 2018.

¹⁹ The African Growth and Opportunity Act, 2000 note 2 s 104.

²⁰ *Ibid.*, note 2.

The holding up of the renewal of AGOA legislation agreement was a second development that was deemed the ‘elephant in the room’ – this was SA’s status under a future AGOA arrangement. The argument which arose from members of Congress is that SA was not lowering barriers enough for the US to have access to its markets. This lengthened negotiations and led to then US President Barack Obama threatening to retract benefits derived under AGOA if the deal which was on offer at that point in negotiations was not accepted. However, SA’s renewed inclusion in the Act was announced in March 2015, which left SA and the US with less than a year to reach an agreement that would activate SA’s formal inclusion in the agreement.²¹ Naumann²² wrote about the updated renewal terms contained in the new agreement ending September 2025, as follows:

‘The new deal contained a new term to expiry, a restructuring of the percentages regarding the rules of origin in relation to apparel materials, updated legislations on monitoring and reviewing, the promotion of the role of women in social and economic development, AGOA utilisation strategies, agricultural assistance provisions and a host of other interventions and expressions of US trade policy objectives.’

With this renewed inclusion, Prinsloo noted a few arbitrary requirements that are included as a part of the Act. He notes that these demonstrate the position taken by the US and what the outlook going forward translates to for other members:

‘Considering that the US offers trade preferences under AGOA to sub-Saharan African countries unilaterally, without any specific negotiated preferences in return, the leveraging of AGOA in this manner came as a surprise. It also raises the possibility of the US leveraging AGOA in a similar manner for other perceived trade barriers that the US private sector has complained about.’²³

Prinsloo further states that the only alternative to continued subjugation in this manner is the formulation of a new trade agreement, perhaps post-2025, like the Trade, Development and Cooperation Agreement (TDCA) between SA and the European Union where there is room to negotiate terms.²⁴

Naumann observed that other restrictions that the US deemed unacceptable were around foreign ownership and investment in the private security industry. Another concern was a proposed overhaul of South Africa’s intellectual property (IP) laws.²⁵ Whether the US will take a similar approach to address these issues is unknown as

²¹ Mbenyane note 11 56.

²² Naumann note 1 24.

²³ SAIIA note 15.

²⁴ Ibid.

²⁵ Naumann note 1 24.

yet since because they have not raised them as points of concern. Gumede²⁶ notes that the US uses its position to dictate to other member nations how trade agreements are to be drafted and implemented as can be seen with the US' provision which provides it with the ability to review country eligibility as it wishes. Further, the countries in this position are unable to challenge with threats of backlash from influential allies that could result in sanctions for dissenting nations. As a result of this, sub-Saharan countries are unable to develop their trade industries in a manner which is beneficial to them.

Another example of the dictating terms of the US can be seen with the recent suspension of trade preferences for Rwanda by the US owing to their raising of trade barriers to limit the import of second-hand clothing to strengthen their markets. The US President, Donald Trump, decided in the final week of March 2018 to suspend duty-free treatment on US imports of apparel products from Rwanda under AGOA.²⁷ The sanction, which was set to take effect in early June 2018, was imposed in reaction to the East African country's decision to raise tariffs on second-hand clothing with a view to phasing out imports and encouraging the development of local manufacturing capacity in the clothing sector.²⁸

On the other hand, similarly, Carroll's point of view offers a different approach to the trade relations between SA and the US. He is already looking beyond the recently reauthorized and renegotiated agreement. His view is that the political landscape in SA has a potentially immense task ahead of itself to maintain healthy relations post-2025 when the current agreement expires. He states that the US should maintain a healthy relationship with SA as it is the gateway through which it can present itself as a viable trade partner for other African states. SA is viewed as a leader within the African continent and success with it will encourage other states to follow suit and potentially trade with the US. Hence, the position taken by the US with AGOA may potentially harm its ambitions in the long run. His reasons for his assertions are:

*'South Africa has used the trade preferences provided by AGOA more effectively than any other nation – its exports to the United States have steadily increased over the years and it is increasingly becoming a market for US goods and services. Notably, US-South African relations have always been complex. During the apartheid era, the United States was viewed with antipathy in equal measure by the national government, domestic opposition, and the ANC.'*²⁹

Mbenyane³⁰ goes on to say:

²⁶ Gumede note 4.

²⁷ International Centre for Trade and Sustainable Development (ICTSD). Trump decides to suspend trade preferences for clothing products from Rwanda. Available at <https://www.ictsd.org/bridges-news/bridges-africa/news/trump-decides-to-suspend-trade-preferences-for-clothing-products>, accessed on 11 April 2018.

²⁸ Ibid.

²⁹ Carroll note 4.

³⁰ Mbenyane note 11 13.

'The AGOA Poultry Trade Debacle is the most significant and most recent combined effort by the South African government and the private food industry to collaborate in an extended economic and diplomatic battle between South Africa and the United States of America.'

An interesting view regarding multilateral trading systems and trade policies involving developed and developing nations is one taken by Van Grastek in his book titled *The History and the Future of the World Trade Organization*.³¹ He quotes Hamid Mamdouh, a diplomat to the WTO from Egypt in 1989, as follows:

*'Developing nations face a strong temptation to dance with the devil (the major players) and succumb to their divide-and-rule tactics; and reaping the potential benefits of doing so is generally uppermost on their agendas. One of the main bargaining chips they can offer in this process is the influence they can exert on other developing countries, particularly through regional and other groupings.'*³²

This can be said to be the case involving the US and SA. It appears to have become the norm that such a stance is taken when parties sit around a negotiating table. Such a scenario is presented to onlookers as a democratic process, the form of governance favoured by the West, with it eventually becoming the status quo. This in turn leaves SA in a precarious position that gradually erodes its ability to determine the path it intends to follow to achieve its objectives. With AGOA, a demonstration of what could possibly happen in future is being illustrated, therefore putting SA in an unfavourable position. If this becomes the norm from here onwards, recent developments suggest an eerie dawn going forward.

1.3 Research problems and objectives

The key questions that will support this research will take a historical look at the trade relationship between South Africa and the United States.

- To what extent has development been a key focus in the trade relationship between developed and developing countries?
- What were the trade dynamics during the apartheid regime between South Africa and the United States and to what extent the USA accommodate the governmental change post-1994?
- How does the implementation of AGOA– referring to specific cases and events – affect the current trade relations *status quo* between South Africa and the USA?

1.4 Principal theories

³¹ C van Grastek *The History and Future of the World Trade Organization* (2013) 97.

³² Ibid.

The following theories are what modern trade is based on. The world is moving towards globalisation which interlinks operations the world over. These theories have been used to explain the various operation of trade as developed and also been affected /integrated by seamlessly with technology. Looking forward, there is promise of increased growth for developing countries, however, the rate is a concern as we continue seeing the west dominating all aspects of events and developing nations only coming after to innovation. This leads to the position in which we found ourselves in under AGOA.

1.4.1 Comparative Advantage Theory

Comparative advantage in an international trade context involves a country specializing in producing and exporting goods in which its comparative advantage is greatest, or its comparative disadvantage is the least, and it should import goods in which its comparative disadvantage is the most.³³ In layman's terms, this means understanding what you are good at and being able to produce this to your advantage, whether it is a service, product or newly developed format of trade done virtually through the Internet using online shopping, applications, and the like.³⁴ This theory was written about by David Ricardo in his book *The Principles of Political Economy*, which was published in 1817.³⁵ What he wrote is still applicable today in the form of conventional international trade theory.³⁶

The relevance of this theory to my study is that the reason AGOA came into existence could be based on this theory, the reasoning being that trade between the US and developing countries is not for the purpose of granting market access only but for trading in products and services that the other is lacking in.³⁷ This is what the comparative advantage theory is based on.³⁸ can also be seen as an ideological foundation of the World Trade Organization (WTO).³⁹

1.4.2 Development Theory

Development is a widely mooted term used mostly in relation to developing countries as a term to illustrate the distance that mostly non-European and non-American countries seemingly ought to cover prior to achieving first-world status. Looking from a bird's-eye view, this is not a pattern which a disadvantaged party would be pleased with. With wars, famine, plagues and global catastrophes not in minimal numbers, although there has been a lot of progress, the approach to how innovation is distributed is never horizontal. With the majority of the world living in a hierarchical

³³ MJ Trebilcock & R Howse *The regulation of international trade* 3rd ed (2005) 4.

³⁴ MJ Trebilcock, R Howse & A Alison *The regulation of international trade* 4th ed (2013).

³⁵ D Ricardo, *The Principles of Political Economy* (1817)

³⁶ Trebilcock & Howse note 33 3.

³⁷ BR Williams 'African Growth and Opportunity Act (AGOA): Background and Reauthorization' *Congressional Research Service* (2014) 1.

³⁸ Trebilcock & Howse note 33 3.

³⁹ D Collins *The World Trade Organization: A beginner's guide* (2015) 3.

structure, the benefits seemingly flow in this manner as well which sees them trickle down only to a certain point.

At this rate, development will undoubtedly occur when the authorities allow it to. This is not a good omen, with the promises of prosperity and a better brighter future for all being a promised land that is seemingly never reached and a sunset that is slowly edging nearer by the second. These theories link to the study in that conclusions can be drawn as to where such a relationship is derived from.

The development theory is relevant to my study because it is a crucial aspect that developing countries have been championing for since the creation of the General Agreement on Trade and Tariffs (GATT). It has been an important consideration as a dispute settlement mechanism came into existence at that time. Developing countries have been assisted at every turn to make sure they can trade with developed countries without losing the important benefits of trade. The WTO has therefore created mechanisms such as the Committee on Trade and Development (CTD)⁴⁰, as well as Aid for Trade⁴¹ provisions, among others.

1.5 Research methodology

This research will be desktop based and will make use of primary sources that include the AGOA, WTO Agreements and other official documents. Furthermore, published material or secondary sources such as journal articles, textbooks, legislation, trade briefs and other online sources will also be used.

Among methods that will be assisting the researcher are critically reading material and thereafter analysing with the intention of comparing, differentiating and finding contrasting views on the AGOA and the development of LDCs and trade relations.

⁴⁰ The Committee on Trade and Development (CTD) serves as a focal point for the consideration and coordination of work on development in the WTO.

⁴¹ Aid for Trade helps developing countries, and particularly least developed countries, trade by assisting them with overcoming a range of supply-side and trade-related infrastructure obstacles which constrains their ability to engage in international trade.

1.6 Dissertation structure

The following headings will form chapters in this thesis/dissertation:

Chapter One – INTRODUCTION/RESEARCH PROPOSAL: This a brief introduction to the topic, including the background and the rationale for the study. It provides the underlying reasons for choosing this topic.

Chapter Two – DEVELOPMENT IN THE MULTILATERAL TRADING SYSTEM: This chapter will provide an overview of the trading relationship between developed and developing countries within the multilateral trading system to ascertain the extent to which development has been a key focus in the multilateral trading system.

Chapter Three – OVERVIEW OF THE TRADE AND POLITICAL RELATIONS BETWEEN SOUTH AFRICA AND THE UNITED STATES OF AMERICA: This chapter will provide an overview of the trade relationship between South Africa and the United States of America. Further, the chapter will focus on the dynamics in the trade relations between these countries during the apartheid regime and how the US adjusted to SA's position after 1994.

Chapter Four – THE AGOA AND THE OVERALL IMPLICATIONS IN RELATION TO AFRICAN COUNTRIES – This chapter will discuss the extent to which AGOA implementation has affected the relationship between the countries by referring to specific cases and events.

Chapter Five – RECOMMENDATIONS AND CONCLUSION: This chapter will provide an overview of the main research questions and submit relevant recommendations.

1.7 Conclusion

Therefore, overall, this study is going to be enquiring about the effects of Western influence on developmental aspects of African countries, particularly the relationship between SA and the US through AGOA. The intention of the AGOA is to grant market access for SSA countries to the US which in return grants benefits to selected products and goods. With the reauthorisation in 2015, some of SA's authors agreed that in future there ought to be a more reciprocal function in this agreement in order to avoid the dictates that were made by the US taking in place in future. The AGOA already confers significant power to the US and this has the opposite effect on the long-term development of African countries. Such tactics can easily be used again in future and become the status quo.

In chapter 2 a discussion on Development in the Multilateral Trading System follows. Included are the history of the ITO, GATT and the WTO and how they incorporated development into their functions. The African Union and Agenda 2063 are also discussed, where a vision Africa has for itself is expanded on. Thereafter, prior to the conclusion, there is a discussion on development and how it affects trade.

CHAPTER TWO: DEVELOPMENT IN THE MULTILATERAL TRADING SYSTEM

2.1 Introduction

As briefly mentioned in chapter 1, the African Growth and Opportunity Act (AGOA) agreement is a unilateral trade agreement between the United States of America (US) and mainly sub-Saharan African (SSA) countries, among others. As such, the Act confers benefits on members in exchange for market access granted by the US as a trade arrangement that encourages business relations between the US and these countries. This dissertation aims to discuss how truly beneficial this agreement has been, especially in the context of Africa's developing and least developed countries.

In order to answer this question, the chapter will have to elaborate on the meaning and relevance of development. Development has undoubtedly been a widespread issue affecting the entire world. It is regularly mentioned in different contexts under various disciplines as a result of its open-ended interpretation. In most cases you would find that it is usual to refer to the circumstances and situations surrounding developing countries. This can be interpreted in many different ways and what can be drawn from this is that it suggests that the world can be in a better position than it currently is. Therefore, more can and should be done.

Usually in cases involving development there is an intended goal that is a target to be reached, which can happen incrementally over a period of time. Looking at it from an individual perspective, it can often seem jarring when intending to effect development on a global scale because of the various factors involved. The focus of this chapter is to discuss the extent that development has influenced negotiations and the overall functioning of the multilateral trade system (MTS), with particular focus on the position of African countries that form part of sub-Saharan Africa (SSA). Further, this chapter will provide an overview of the trading relationship between developed and developing countries within the MTS, which will be done through a discussion on the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).

2.2 A brief background

During the early 1900s, a series of events, which will be elaborated on in the chapter, contributed to delayed development of the trading system. The role of developing countries in the evolution of the MTS, from prior to, during and after GATT 1947 to the conclusion of the Uruguay Round of multilateral trade negotiation and the establishment of the WTO was interrupted by the First World War.⁴² This among other global catastrophic events, and ended the process of global integration

⁴² TN Srinivasan & SC Park Jr. 'Developing countries in the world trading system: From GATT, 1947 to the third ministerial meeting of WTO, 1999' 4.

that had been going on from the second half of the nineteenth century.⁴³ Around the 1930s and 1940s, events such as the Great Depression (1929-1939), World War II (WW II) (1 September 1939 to 2 September 1945), and the involvement of developed countries in these events indirectly caused a delay in the development of developing countries.⁴⁴ Subsequently, after the end of this dark period, attempts were made in order to propel the world into not only rebuilding the structures that had been destroyed as a result of these events, but also to ensure that a repeat of the wars would be unnecessary. During the subsistence of WW II, the US was engaged in discussions with the United Kingdom (UK) concerning the problems and possible solutions regarding the post-war economic order.⁴⁵ This period saw the creation of institutions such as the United Nations (UN), which officially came into existence on 24 October 1945 and replaced the ineffective League of Nations,⁴⁶ and the formulation of agreements of negotiation such as the GATT which was formerly intended to be the International Trade Organization (ITO) and is nowadays known as the WTO. The US government representatives met several times with representatives of other major nations to design a post-war international trading system that would parallel the international monetary system.⁴⁷ The primary purpose of these meetings was first to draft a charter for the ITO and second to negotiate the substance of an ITO agreement consisting specifically of rules governing international trade and reductions in tariffs.⁴⁸

2.2.1 The International Trade Organization (ITO)

This charter was to be called the Havana Charter but it never came into existence because it was not ratified as domestic opposition to the Truman Administration in the US led to efforts to obtain congressional backing for the ITO being abandoned towards the end of the year 1950.⁴⁹ Despite its being successfully negotiated between the countries present, the British were unenthusiastic about the proposal and the US felt the outcome was mixed in relation to its interests.⁵⁰ For example, the charter had provisions that insisted that foreign investments should be expropriated or nationalised only under 'just', 'reasonable', or 'appropriate' conditions, which the US saw as weakening of the protection of its investments abroad, where the US had previously enjoyed considerable success.⁵¹ From the US point of view, agreements made about stabilising commodity prices were inconsistent with the other provisions

⁴³ Ibid.

⁴⁴ CP Bown *Self-enforcing trade: Developing countries and WTO dispute settlement* (2009) 11.

⁴⁵ Van Grastek note 31 43.

⁴⁶ The League of Nations was an international diplomatic group developed after World War I as a way of solving disputes between countries before they erupted into open warfare. It was a precursor to the United Nations. Available at <https://www.history.com/topics/world-war-i/league-of-nations>, accessed on 12 November 2018.

⁴⁷ Crowley note 47 43.

⁴⁸ Ibid.

⁴⁹ R Toye 'The International Trade Organization' in *The Oxford Handbook on the World Trade Organization* (2012) 85.

⁵⁰ Toye note 49 93.

⁵¹ Ibid. 96.

of the charter; but there was a belief that this would be alleviated by primary producing countries entering into them.⁵² There was also a belief that it would be beneficial to lay down 'rules of the road' to eliminate the worst characteristics of such agreements. These provisions became the subject of intense scrutiny and criticism within the US even though 53 countries – including Britain – had already signed it.⁵³ All these factors contributed to the result of ratification being delayed, which saw other countries that looked to the US for direction as the de facto leader of the free world also holding back in order to see which position the US would take.⁵⁴ This was partly due to the US holding indisputable power during ITO negotiations, where it controlled as much as three-quarters of the world's monetary gold and accounted for one-third of global exports while only importing only one-tenth.⁵⁵

During testimonials in front of the Senate, Will Clayton – who was the chairman of the US delegation – argued that the exchange controls, their import quotas and further restrictions were anticipated to disappear under the ITO because of the world recovering economically.⁵⁶ However, protectionists were of the opinion that intervention by states in foreign trade matters was unacceptable, but believed that an International Trade Organization would be an incipient 'super state' that eventually would infringe on the national sovereignty of the US.⁵⁷ This attachment that countries had to their sovereignty was one which they were not willing to surrender easily.⁵⁸ For instance, the National Association of Manufacturers⁵⁹ supported free trade but opposed the charter even though they felt that there was a need for an organisation of some sort; they felt that plans drawn up at that time would be more harmful than beneficial.⁶⁰

On the other hand, Clair Wilcox, a US negotiator in the ITO charter discussions, attempted to paint a positive picture to non-governmental advisors that the charter would not hamper any operations the US had undergone and wished to undertake in future.⁶¹ Although this had the potential to be persuasive to a domestic audience in the US, third world countries in Latin America were waiting to see how the US would act. The US ratifying the charter would have made it seem as if the US believed they would get a good deal – which they did not.⁶² Therefore, it can be said that the

⁵² Ibid.

⁵³ Ibid.

⁵⁴ I Trofimov 'The failure of the International Trade Organization (ITO): A policy entrepreneurship perspective' (2012) 5(1) *Journal of Politics and Law* 57.

⁵⁵ J Scott 'Developing countries in the ITO and GATT negotiations' *Brooks World Poverty Institute Working Paper* 95 (2009) 4.

⁵⁶ Toye note 49 97.

⁵⁷ Trofimov note 54 57.

⁵⁸ Van Grastek note 31 10.

⁵⁹ The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Available at <http://www.nam.org/About/>, accessed on 12 November 2018.

⁶⁰ D Drache 'The short but significant life of the International Trade Organization: Lessons for our time' *Coventry: University of Warwick. Centre for the Study of Globalisation and Regionalisation Working Papers* (2000) 3.

⁶¹ Toye note 49 85.

⁶² Ibid. 98.

international game the Truman administration had to play hampered its domestic efforts to secure ratification. In 1948 Truman had requested that Congress enact a resolution to approve the charter which he later withdrew after two years of legislative inaction.⁶³ What eventually sealed the fate of the charter was congressional occupation with the Cold War in Korea, which saw the announcement made in December of that year that the US would not be ratifying the ITO charter.⁶⁴

2.2.2 The General Agreement on Tariffs and Trade (GATT)

Instead, the formulation of GATT was the result of these meetings and although the attempts to create the ITO failed, they were significant for the effort to establish the GATT which in turn led to the eventual creation of the WTO.⁶⁵ The GATT came into being after the first attempt at creating the ITO as a body to perform the function of regulating international trade among the world's countries had not been successful.⁶⁶ The concept of the GATT had initially originated from the Bretton Woods Conference⁶⁷ at the end of World War II.⁶⁸ This is where a gathering of finance ministers from the Allied Nations⁶⁹ discussed the failings of the World War I Versailles Treaty⁷⁰. What also took place was discussions about the possibility of creating a new international monetary system and whose aim would be to support post-war reconstruction, peace and economic stability.⁷¹ This is where two of the modern world's premier financial institutions were created: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank), which formed part of the Bretton Woods Institutions.⁷²

After the war, 23 countries led by the US, Canada and the UK negotiated the GATT.⁷³ Their goal was the formulation of an agreement that would stabilise the world after the war and avoid repeating the mistakes which led to its breakout.⁷⁴ GATT 1947 was created by a round table consisting of the world's countries that were looking to devise plans on the regulation of trade.⁷⁵ GATT was the initial step

⁶³ Van Grastek note 31 44.

⁶⁴ Toye note 49 98.

⁶⁵ Ibid. 85.

⁶⁶ Bown note 44 15.

⁶⁷ The Bretton Woods Conference (July 1944) created the International Monetary Fund (IMF) and the World Bank.

⁶⁸ Crowley note 47 42.

⁶⁹ The Allied Nations were the countries that together opposed the Axis powers during World War II (1939–1945).

⁷⁰ The World War I Versailles Treaty was the most important of the peace treaties that brought World War I to an end. The Treaty ended the state of war between Germany and the Allied Powers.

⁷¹ Crowley note 47 42.

⁷² The Bretton Woods Institutions are the World Bank, and the International Monetary Fund (IMF) and were set up at a meeting of 43 countries in Bretton Woods, New Hampshire, USA in July 1944. Their aims were to help rebuild the shattered post-war economy and to promote international economic cooperation.

⁷³ Crowley note 47 11.

⁷⁴ Ibid. 11.

⁷⁵ Van Grastek note 31 7.

in negotiations for cutting tariffs that would translate throughout subsequent negotiations leading to the formulation of various agreements.⁷⁶ The GATT did not create a formal institution, instead a small GATT Secretariat consisting of limited institutional apparatus and was headquartered in Geneva to administer the problems, issues and complaints that arose among members.⁷⁷ GATT was a multilateral trade agreement with the authority to regulate the trade regulations of its member governments as an international treaty.⁷⁸ It had no authority over individuals, private firms, or public corporations and it governed the interactions of countries that voluntarily agreed to abide by its rules.⁷⁹ During the majority of the 1900s the GATT was on an international scale the main multilateral forum for tariff reduction negotiation and tariff-related issues.⁸⁰ The reduction of tariffs among member nations was evident as early as 1952.⁸¹

(a) *Rounds*

Throughout the period from 1947 to 1961, GATT's development involved the first five rounds where additions were made to fill in areas left open by the ITO's failure to come into existence.⁸² These negotiating rounds were held in Geneva (1947), Torquay (1951), Geneva (1956) again and Dillon (1960-61).⁸³ The additions were addressed through rounds which included the Kennedy Round (1964-67), the Tokyo Round (1973-79) and the Uruguay Round (1986-1994).⁸⁴ Under these negotiation stages, various approaches were taken to address certain trade-related issues among developing and developed countries. Each round had its unique distinction and objective, even if some never materialised, for instance the Ancey Round of 1949 and the Torquay round of 1951 expanded GATT membership but with minimal progress in reducing tariffs.⁸⁵

(i) *Geneva and Kennedy rounds*

The initial round for GATT negotiations was called the Geneva Round of 1947, where the original rules and the 24 founding Articles of the GATT were formulated, which resulted in the first set of standards.⁸⁶ The fundamental principle of the agreement referred to as the Most-Favoured-Nation (MFN) Treatment provided for in Article I of the GATT stated that rights and obligations should apply uniformly to all

⁷⁶ Bown note 44 15.

⁷⁷ Crowley note 47 43.

⁷⁸ Crowley note 47 53.

⁷⁹ Ibid.

⁸⁰ Zeiler 'Expanding the mandate of the GATT: The first seven rounds' in *The Oxford Handbook on The World Trade Organization* Oxford University Press (2012) 145.

⁸¹ Bown note 44 12.

⁸² Ibid.

⁸³ P Van den Bossche *The law and policy of the World Trade Organization: Text, cases and materials* (2005) 82.

⁸⁴ Ibid.

⁸⁵ DA Irwin 'The GATT in historical perspective' (1995) 85(2) *Historical Perspectives on International Institutions* 325

⁸⁶ D Irwin, P Mavroidis & O Sykes *The genesis of the GATT C* (2008) 5.

contracting parties.⁸⁷ Reciprocity is the principle that is applied in GATT negotiating rounds, and it operates on the basis that where a country offers to reduce a barrier to trade, another country 'reciprocates' by offering to reduce one of its own trade barriers.⁸⁸ Article III together with the MFN principle are two of the most important basic rules of negotiations.⁸⁹ Arguments put forward by papers written by Bagwell and Staiger⁹⁰ state that these principles together work towards increasing the efficiency of the world trading systems.⁹¹

In Geneva, from May 1964 until June 1967, the Kennedy Round continued with tariff reductions which began in 1947 after WW II.⁹² Issues that were focused on involved eliminating non-tariff barriers, reducing all rates for all products by 50 percent instead of negotiating for individual items - this included additional agricultural and industrial products.⁹³ At the end of discussions, participants agreed to reduce rates on most industrial items by 35 percent over 5 years except for steel and textiles with the US also reducing its rates for chemicals by 50 percent compared to the Europeans' 35 percent.⁹⁴ For agricultural commodities, rates decreased by 15 to 18 percent and negotiators agreed to a strong antidumping resolution which prohibited the below-cost price sale of goods.⁹⁵ This was brought about by the GATT Anti-Dumping Agreement, which had a section on development in the 1960s.⁹⁶ It also prevented industrial nations from entering into trade agreements with less-developed nations that would be reciprocal in nature.⁹⁷ The US, which had in the past had a trade surplus, moved towards a trade deficit after the Kennedy Round implementations were made.⁹⁸

During the Kennedy Round, there was an attempt made by contracting states to reduce the impact on non-tariff barriers (NTBs), which were addressed as Codes in smaller agreements, separately, as well as an attempt to address major concerns including interests of developing countries by expanding the GATT.⁹⁹ There was also the formulation of 'plurilateral agreements' which were binding only on signatories to this agreement as well as the creation of special rules for developing countries under the Principle of Reciprocity.¹⁰⁰ The benefits that were afforded to developing countries in this round were more theoretical than practical, for example, tariff

⁸⁷ The General Agreement on Tariffs and Trade (GATT) of 1947.

⁸⁸ Crowley note 47 44.

⁸⁹ Bown note 44 15.

⁹⁰ K Bagwell & RW Staiger 'An economic theory of GATT' (1999) 89(1) *American Economic Review* 215-248.

⁹¹ Crowley note 47 44.

⁹² What-When-How In-Depth Tutorials and Information. Available at <http://what-when-how.com/the-american-economy/kennedy-round-1964-1967/>, date accessed 15 August 2018.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ World Trade Organization. Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm, date accessed 15 August 2018.

⁹⁷ What-When-How In-Depth Tutorials and Information note 92.

⁹⁸ Ibid.

⁹⁹ Zeiler note 80 152.

¹⁰⁰ Toye note 49 124.

concessions on special interest products were not granted even though they were crucial to their economies.¹⁰¹ Items that were of particular interest to LDCs were treated less favourably than goods traded by their developed counterparts, such as tariff cuts on semi-manufactures. This did not assist LDCs with an interest in such an industry, with the most significant losses coming from chemicals, machinery and transport equipment, which at the time were not major interests of LDCs.¹⁰² The inability of LDCs to offer reciprocal concessions was seen as a major barrier that in turn limited developed countries from opening up their own markets as well.¹⁰³ Also, exporters of processed raw materials faced higher tariffs than on unprocessed raw materials, which was a mechanism used to protect processing firms in the importing country as well as to discourage developing countries from establishing their own processing industries.¹⁰⁴

(ii) *The Tokyo round*

As a result, the Tokyo Declaration of 1973 stated that the basic goals of this round's negotiations were firstly to expand and liberalise world trade and secondly to improve developing countries' trading strength.¹⁰⁵ Even though developed countries had granted preferences, albeit begrudgingly so, their effectiveness was limited through the use of exemptions, tariff quotas, and market disruption clauses.¹⁰⁶ The Tokyo Rounds of 1973-79 brought about a change of approach as developing countries focused on negotiating for 'special and favourable treatment' in areas where they thought that these provisions needed to be applicable.¹⁰⁷ These negotiations were intense and developed countries were of the opinion that this intervention into the original GATT business was uncalled for. However, developing countries viewed GATT 1947 as an agreement for the developed and wealthier contracting states because political savviness was valued ahead of the rule of law, including a system which would adhere to it.¹⁰⁸

This led to the development of Codes relating to NTBs, technical barriers to trade, import licensing procedures and customs valuations, which were designed to fill gaps in the GATT rules by clarifying the operation of existing procedures and helping to ensure that all industrialised countries accepted the same obligations.¹⁰⁹ The protectionism that developed countries had covered in the cloak of their economic needs and had been operating under was challenged by developing countries in

¹⁰¹ R Hudec *Developing countries in the GATT legal system* (2010) 46.

¹⁰² Overseas Development Institute: *The Tokyo Round and Developing Countries 1977*. Available at <https://www.odi.org/publications/5363-gatt-tokyo-round-developing-countries> accessed on 16 December 2018.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ GM Meier 'The Tokyo round of multilateral trade negotiations and the developing countries' (1981) 13(2) *Cornell International Law Journal* 239.

¹⁰⁶ Meier note 105 240.

¹⁰⁷ K Morton & P Tulloch *Trade and developing countries* 1st ed (2011) 57. J

¹⁰⁸ J Pauwelyn 'The transformation of world trade' (2005) 104(1) *Michigan Law Review* 11.

¹⁰⁹ MA Kakabadse 'The Tokyo round and after' (1981) 37(7) *The World Today/The Royal Institute of International Affairs* 309.

their insistence on the need for special and favourable treatment where this was deemed feasible and appropriate in order to address their economic vulnerability; the need for a relationship which leaned more towards moral justness rather than reciprocity; with the most important fact of all being that technical barriers were more of a stumbling block than tariff barriers regarding the ability to trade.¹¹⁰

(iii) *The Uruguay round*

Notably, during the Uruguay Round (UR), held in Punta del Este, for the first time, developing nations reached agreement to take into recognition patents, copyrights, and other forms of intellectual property while also bringing trade in services and trade-related health and safety regulations under a multilateral¹¹¹ set of rules.¹¹² These were in exchange for developed countries agreeing to remove barriers to trade in agriculture, textiles, and apparel, which harmed lower-cost producers from developing nations.¹¹³ During this landmark round, further attempts were made to develop provisions that would lower unfair agricultural subsidies as well as address developed countries' disruptive practices in the developing world's agricultural sector. This was the first time that issues pertaining to agriculture had been discussed and this led to 'special treatment' being afforded to certain agricultural products by means of exemption from various GATT rules.¹¹⁴ As such, this round's most prominent feature was the discussion relating to agricultural produce and lowering the barriers, that is, tariffs that hampered trade in agricultural goods.¹¹⁵ Also, during this round, the US was of the opinion that developing countries ought to graduate from their needs of needing 'special and differential treatment' due to the progressive economies of the developing world.¹¹⁶ It was also during this Round that the Dispute Settlement Understanding (DSU) was formalised, which has been used mostly by developing countries since its inception.¹¹⁷ This assisted developing countries with their negotiation standpoint and assisted them in reining in developed countries which regularly transgressed particular rules in the WTO Agreements that had been put in place to assist trade.

There were several pertinent issues which led to the creation of the WTO. These were discussed during the UR which began in 1986. They had been borne out of the loopholes which had been created by the GATT apparatus. Among them was the dispute resolution mechanism which was not functioning as had been envisioned.

¹¹⁰ Hudec note 101 73.

¹¹¹ Included were Tariffs, Agriculture, Standards and safety, Textiles, Services, Intellectual property, Anti-dumping, subsidies etc, Non-tariff barriers, Plurilaterals and Trade policy reviews.

¹¹² World Trade Organization: The Uruguay Round. Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, accessed on 16 November 2018.

¹¹³ T Kelly 'Why are developing countries still negotiating? The WTO's successes at the Doha round' (2005) 48(3) *Economic Growth* 110.

¹¹⁴ South Africa-US Relations <http://www.globalsecurity.org/military/world/rsa/forrel-us.htm>, accessed on 13 November 2018.

¹¹⁵ World Trade Organization note 112.

¹¹⁶ E Preeg 'The Uruguay rounds negotiations and the creation of the WTO' in *The Oxford Handbook on The World Trade Organization* (2012) 168.

¹¹⁷ Van den Bossche note 83 53.

Also, a wide variety of products were not covered under the GATT and therefore provision was made for them during this round: agricultural products and textiles. There was also the realisation that administered trade protection was restricting trade in the form of anti-dumping (AD) duties, voluntary export restraints and countervailing duties which were distorting trade patterns in important sectors.¹¹⁸ Further, there was an emergence in trade in services in relation to which the GATT had no rules, including issues such as intellectual property, which had minimal regulation in developing countries. Finally, rules regarding trade-related investment measures were also a hot topic in dispute.¹¹⁹

2.3 World Trade Organization (WTO)

The biggest-ever round of GATT negotiations is what led to the creation of the WTO.¹²⁰ The agreement which effectively established the WTO was signed in Marrakesh in April 1994 and came into force on 1 January 1995.¹²¹ The WTO was a response to a set of challenges which confronted the international community.¹²² The WTO forms part of a global system where countries are aligned differently from the GATT period - not only in trade but in other matters too.¹²³ It has three prominent interrelated functions, which involve negotiation, illumination and litigation.¹²⁴ The two most important aspects of the mandate of the WTO involve its objectives and its function, which are contained in the Preamble of the WTO agreement. The ultimate objectives are:

'the increase of standards of living, the attainment of full employment, the growth of real income and effective demand, and the expansion of production of, and trade in, goods and services'.¹²⁵

The WTO's other functions include a list of activities involving implementation of WTO agreements, negotiation of new agreements, settlement of disputes, review of trade policies, co-operation with other organisations and technical assistance to developing countries.¹²⁶ Negotiations within the WTO are an ongoing process, which can last for years at a time; currently the 9th round, which began in Doha,¹²⁷ is still ongoing.¹²⁸ The doors of the WTO were opened initially with a number of 128

¹¹⁸ Crowley note 47 43.

¹¹⁹ Crowley note 47 43–44.

¹²⁰ EC Schlemmer 'South Africa and the WTO ten years into democracy' (2004) 29 *South African Yearbook of International Law* 125.

¹²¹ Van den Bossche note 83 85.

¹²² Van Grastek note 31 8.

¹²³ Ibid. 10.

¹²⁴ Bown note 44 10.

¹²⁵ Agreement Establishing the World Trade Organization. Available at https://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed on 16 December 2018.

¹²⁶ Van den Bossche note 83 86, 89.

¹²⁷ The name refers to where the rounds began but they usually commence in different places around the globe after the initial meeting.

¹²⁸ Collins note 39 10.

members.¹²⁹ In 2002, there were 146 members, which comprised approximately 97 percent of the region in world trade.¹³⁰ Around 2015, the membership of the WTO was believed to be in the region of 161 member countries.¹³¹ But since then, over 164 countries had signed and acceded to the agreement as at 29 July 2016.¹³²

What takes place is the negotiation of an individually tailored agreement referred to as an Accession Protocol, which sets out the precise terms under which said country is agreeing to join the WTO community.¹³³ Approval must be granted by all existing members. This is accompanied by common conditions such as phase-in periods for countries that are not yet full market economies. Accession negotiations can take several years. This reflects how important WTO membership has become as well as the challenge for some nations to align their trade-related intentions with the principles of the WTO. It has become a form of recognition of maturity to be able to take part in discussions that involve economic activities on the world stage.¹³⁴

The WTO is often believed to only pay special attention to the problems of more developed countries.¹³⁵ To address this concern, the Committee on Trade and Development (CTD), established in the Agreement establishing the WTO,¹³⁶ is the focal point for the work relating to development in the WTO and exists under it to assist developing countries as trade partners.¹³⁷ The four areas specifically focused on by the CTD are the Technical Assistance Programs, Special and Differential Treatment Provisions, Small Economies and Aid for Trade.¹³⁸ There are additional works¹³⁹ that form the supporting framework.¹⁴⁰ The CTD has a Sub-Committee on LDCs to assist with specialised attention targeting areas where focus lacks in order to facilitate trade on a much larger scale in industries that require development.¹⁴¹ The Sub-Committee on LDCs was established in July 1995 - 6 months after the

¹²⁹ Members can only be countries and not companies, cities or non-governmental organizations (NGOs). Joining is formally known as accession and differs for each new member country.

¹³⁰ Crowley note 47 42.

¹³¹ Collins note 39 8.

¹³² Members and Observers. Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed on 13 November 2018.

¹³³ The accession process – the procedures and how they have been applied. Available at https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s10p1_e.htm, accessed on 16 December 2018.

¹³⁴ Collins note 39 8.

¹³⁵ E-notes. Available at <https://www.enotes.com/homework-help/what-focus-wto-committee-trade-development-click-426437>, accessed on 15 April 2018.

¹³⁶ Committee on Trade and Development of the WTO, 1 May 1997, International Centre for Trade and Sustainable Development (ICTSD). Available at <https://www.ictsd.org/bridges-news/bridges/news/the-committee-on-trade-and-development-of-the-wto>, accessed 17 August 2018.

¹³⁷ World Trade Organization, https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm, accessed on 17 August 2018.

¹³⁸ World Trade Organization note 137.

¹³⁹ The additional works are the Eighth Ministerial Conference, Regional Trade Agreements and Preferential Schemes, Electronic Commerce, Duty-free Quota-free Implementation Review, Developing Countries and Multilateral Trading Systems.

¹⁴⁰ World Trade Organization note 137.

¹⁴¹ World Trade Organization note 137.

establishment of the CTD - to bring to the attention of the WTO the challenges it faced. The Sub-Committee reports to the CTD and conducts its work similarly.¹⁴²

The Dispute Settling Mechanism is one of the most revered systems to come out of the formulation of the WTO.¹⁴³ Whenever a dispute cannot be resolved among members, it's referred to a panel of three judges.¹⁴⁴ When found to be in violation of the GATT rules and obligations, there are three options available to members.¹⁴⁵ A complainant can appeal and have the case retried in front of an appellate body or it can amend its laws in transgression with the DSU and bring them in line with GATT, or it can keep the laws as they are and face 'measured retaliation' from the aggrieved partners.¹⁴⁶ The WTO institution does not enforce any of its policies on countries but instead it is an institution with a set of self-enforcing agreements which are challenged by member countries by identifying one another's missteps through formal dispute settlement.¹⁴⁷

2.4 The African Union

The African Union (AU) was formed in 2002 after having operated as the Organisation of African Unity (OAU) since 1963.¹⁴⁸ Its aim is to protect the continent instead of the sovereignty of individual states.¹⁴⁹ It has focused its work on reinforcing African independence from European countries which had ruled forcefully over Africa for decades.¹⁵⁰ Its distinguishable from the OAU due to its different focus which leans towards democracy, human rights and economic development.¹⁵¹ It moved away from supporting struggle movements for freedom from colonialism and apartheid and is now working towards development integration on the African continent.¹⁵² It consists of 53 member countries and is modelled on the structure of the European Union (EU).¹⁵³ The AU is recognised the world over as the only international organisation which allows intervention in a member state on the basis of humanitarian grounds.¹⁵⁴ The AU's vision is to:

¹⁴² World Trade Organization note 137.

¹⁴³ Van den Bossche note 83 53.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Bown note 44 20.

¹⁴⁸ The African Union Commission (AUC): Agenda 2063 – 'The Africa We Want' *Draft Document 6*. Available at <http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf>, accessed on 16 December 2018.

¹⁴⁹ S Hanson 'The African Union'. Available at http://www.elegantbrain.com/edu4/classes/readings/327readings_fall09/r22_africanunion.pdf, accessed on 4 December 2018.

¹⁵⁰ DL Badejo, *The African Union* New York: Chelsea House Publishers (2008) 12.

¹⁵¹ Ibid.

¹⁵² AU in a nutshell. Available at <https://au.int/en/au-nutshell> accessed on 4 December 2018.

¹⁵³ Hanson note 149.

¹⁵⁴ R Cohen & WG O'Neill 'Last stand in Sudan?' (2006) *Bulletin of Atomic Scientists* 52.

'build an integrated, prosperous and peaceful Africa, an Africa driven and managed by its own citizens and representing a dynamic force in the international arena'.¹⁵⁵

2.4.1 Agenda 2063

The AU has made efforts towards assisting development through the formulation of Agenda 2063. It was formulated by the African Union (AU) at its 50th anniversary in 2013 – the Golden Jubilee of the inception of the African Union (AU).¹⁵⁶ This framework is aimed at assisting socioeconomic transformation on the African continent over the next 50 years, having begun in 2013.¹⁵⁷ It builds on past and current initiatives¹⁵⁸ that outline how it intends to achieve the objectives it has set out for itself. Agenda 2063 was inspired by the Lagos Plan of Action,¹⁵⁹ the Abuja Treaty¹⁶⁰ and the New Partnership for Africa's Development (NEPAD¹⁶¹).¹⁶² At this Summit, the African Union Commission (AUC) was tasked to create this continental agenda, which is a people-driven process, together with the New Partnership for Africa's Development's (NEPAD) Planning and Coordinating Agency (NPCA), the African Development Bank (AfDB) and the UN Economic Commission for Africa (UNECA).¹⁶³ Areas identified for progress are listed as The Eight Priorities of the 50th Anniversary Solemn Declaration, which are a definition of the 'continental agenda and are to be integrated into various regional and national development plans'.¹⁶⁴

Agenda 2063 considers past achievements as well as the global and continental context under which these have been achieved and how these affect the implementation of transformation efforts.¹⁶⁵ It is described as the '*continuation of the*

¹⁵⁵ Different consultations were made with the following stakeholders: Academicians and Think Tanks, Civil Society, Planning Experts from Ministries of Planning, Women, Youth, Media, Private sector, and RECs representatives.

¹⁵⁶ The African Union Commission (AUC): Agenda 2063 note 148 6.

¹⁵⁷ Agenda 2063 note 148.

¹⁵⁸ The Lagos Plan of Action, The Abuja Treaty, The Minimum Integration Programme, the Programme for Infrastructural Development in Africa (PIDA), the Comprehensive Africa Agricultural Development Programme (CAADP), The New Partnership for Africa's Development (NEPAD), Regional Plans and Programmes and National Plans.

¹⁵⁹ The Lagos Plan of Action (officially the Lagos Plan of Action for the Economic Development of Africa, 1980–2000) was an Organisation of African Unity-backed plan to increase Africa's self-sufficiency.

¹⁶⁰ The Abuja Treaty was a treaty signed by member nations of the OAU (now AU) in 1991. The aim was to establish and promote economic, social and cultural development between African states.

¹⁶¹ NEPAD is the implementing agency of the African Union, facilitating and coordinating the development of continent-wide programmes and projects, mobilising resources and engaging the global community, regional economic communities and countries in transforming Africa.

¹⁶² S Turner, J Cilliers & B Hughes 'Reducing poverty in Africa: Realistic targets for the post-2015 MDGs and Agenda 2063.' (2014) *Institute for Security Studies* 1.

¹⁶³ The African Union Commission (AUC): Agenda 2063 note 148 1.

¹⁶⁴ These priorities are African Identity and Renaissance; Continue the struggle against colonialism and the right to self-determination; The Integration Agenda; Agenda for Social and Economic Development; Peace and Security Agenda; Democratic Governance; Determining Africa's Destiny; and Africa's Place in the World.

¹⁶⁵ The African Union Commission (AUC): Agenda 2063 note 148 6.

Pan African drive for self-determination, freedom, progress and collective prosperity in the draft document.¹⁶⁶ The aim of Agenda 2063 is 'to integrate national and regional development to ensure growth and sustainable development through the use of the continent's natural resources to the benefit of all Africans'.¹⁶⁷ One of the unique points of this Agenda is its bottom-up approach which considers the voice of the African people and what they want as opposed to the usual bureaucratic methods.¹⁶⁸ There is a set of milestones that are based on a timeframe which the Agenda intends to achieve which require the participation of African people.¹⁶⁹ These targets aim at the distant future and the Africa which Africans desire to see for themselves and their offspring. This can be achieved through the intended integration and development of the AU through Agenda 2063, which makes mention of an '*African approach to development and transformation*' of which the only shortcoming is that it does not outline what this is and how it will be realised.¹⁷⁰

2.5 Development within multilateral trading systems

2.5.1 Definition of development

The concept of development is almost as old as civilisation itself and has developed continuously throughout the centuries from as far back as the 17th century, when several authors such as Leibniz (1646-1716) inaugurated it as the concept of infinite progress, and with Buffon (1707-1788) arguing in the mid-18th century that the benchmark for civilisation and development is the European standard.¹⁷¹ The Marquis of Condorcet (1734-1794) took it a step further and suggested Europeans would compensate countries they colonised through developing them, which was the predominant idea that lasted throughout until the mid- to late 19th century.¹⁷² Fast forward into the 20th century, and these ideas had metamorphosed into decolonisation of previously colonised countries in the 1960s, which led to the placing of the need for development of what was referred to then as the Third World to the forefront.¹⁷³ Considerable steps were taken in the 20th century to address the development question, such as the creation of the United Nation Conference on Trade and Development (UNCTAD) in December 1964, which was created to bridge the gap not covered by institutions that had been created because of the WW II.¹⁷⁴ This was a result of the continued perseverance of developing countries in voicing their concerns which culminated in UNCTAD which is a permanent forum, with a

¹⁶⁶ Ibid. 8.

¹⁶⁷ CC Ngang 'Towards a right-to-development governance in Africa' (2018) *Journal of Human Rights* 107.

¹⁶⁸ About Agenda 2063. Available at <https://au.int/agenda2063/about> accessed on 4 December 2018.

¹⁶⁹ Ngang note 167 107.

¹⁷⁰ Ngang note 167 115.

¹⁷¹ J Soares Jr & R H Quintella 'Development: An analysis of concepts, measurement and indicators' (2008) (5)2 *Brazilian Administration Review* 105.

¹⁷² Soares & Quintella note 171 105.

¹⁷³ Ibid. 106.

¹⁷⁴ Ibid.

governing board that worked principally in promoting international trade.¹⁷⁵ Its intention is accelerating economic development, formulation of the principles and policies on international trade, and problems related to economic development.¹⁷⁶ Nowadays there is a variety of contemporary definitions of development varying from economic growth development, to development as a fiction, to sustainable development. As quoted in the United Nations Development Program (UNDP) development is defined as:

*‘expanding the range of choices for the population that allows development to become more democratic and participative in access to income, participation in decisions and enjoyment of human, economic and political liberties’.*¹⁷⁷

Despite its being used widely, an actual set definition of development is still elusive owing to its varying scope, as it can be found in a variety of fields.¹⁷⁸ The definition of the term ‘development’ is still vague, but it has often been used to refer to a set of beliefs and assumptions regarding the nature of social progress.¹⁷⁹ It is often narrowed down to a perspective which is more focused on economic growth.¹⁸⁰ It is believed that the modern version has its origin in politics where it was used as a tool by President Truman who intended to include it as an ‘original’ point in his 1949 Inaugural Address speech.¹⁸¹ Ngang states that there exists a right to development which is not dependent on international co-operation but is instead an assertion of self-determination of cultural and socioeconomic circumstances of Africa.¹⁸² Measures including foreign investment, lowering and raising of trade barriers, well-digging and literacy campaigns were legitimised in the hope that they would aid development, even making extremely contradictory policies look like they would by existing improve the lives of poor people.¹⁸³

2.5.2 Trade and development

Numerous discussions around links between trade and development exist that involve professionals such as economists, development practitioners, academics and policy makers who have made significant contributions to the discourse.¹⁸⁴ There are still questions remaining about the positive impact of international trade on development, specifically liberalised trade and how it relates to developing countries, because of the obstacle-filled process relating to trade, sustainable growth and

¹⁷⁵ Ibid. 106.

¹⁷⁶ UNCTAD – Final Act, UN Document E/CoNF.46/141, 1964.

¹⁷⁷ Soares & Quintella note 171 108.

¹⁷⁸ G Rist ‘Development as a buzzword’ (2007) 17(4–5) *Development in Practice* 485.

¹⁷⁹ Rist note 178 485.

¹⁸⁰ Ngang note 167 108.

¹⁸¹ Rist note 178 485.

¹⁸² Ngang note 167 112.

¹⁸³ Rist note 178 486.

¹⁸⁴ The Link: Trade and Development Part One. Available at <http://www.acs-aec.org/index.php?q=trade/the-link-trade-and-development-part-one>, accessed on 22 August 2018.

ultimately development.¹⁸⁵ However, the structure/framework of international trade has evolved and become multi-dimensional in its links to development and its process in which it has a crucial role to play.¹⁸⁶ Regardless of this, Ngang argues that the implementation of development in least developed and developing African countries as envisioned in Article 22 of the African Charter has remained stagnant because of the inability to decipher how to realise these provisions practically.¹⁸⁷ Trade is an important aspect to the holistic path of development, so much so that more countries are pursuing it because of its relation to a myriad of dimensions¹⁸⁸ in the development sphere.¹⁸⁹ However, it is important to note that there is no guarantee that participation in the multilateral trading systems leads to development.¹⁹⁰

The GATT being the first multilateral mechanism for trade relations would have had development incorporated into it. Acknowledgement and implementation of this aspect has been the conundrum needing solving. This is similar to the problems faced by African initiatives such as the Lagos Plan of Action and the Abuja treaty.¹⁹¹ Development includes factors like the environment, economy as well as social and political factors which have been stated to, amongst other things raise the standards of living, ensure full employment and a large, steadily-growing volume of real income and effective demand.¹⁹² The GATT's mandate was not to directly address underdevelopment as this would have limited its capacity and functional relevancy in addressing symptoms of underdevelopment such as inadequacy of the trade of developing countries; unsatisfactory, or unfair terms of trade; and unsustainable structures of trade relations.¹⁹³ Instead, it contributed in other ways through the special treatment of developing countries - exempting developing countries from certain aspects of the GATT's discipline through according them preferential treatment.¹⁹⁴ Lehloenya and Mpya argue that the inclusion of citizens through the operation of civil society organisations¹⁹⁵ as well as the integration of small, medium and micro enterprises (SMMEs) into the regional economies of African countries can assist in strengthening ties and bridging the gap.¹⁹⁶

Although mainstream scholars ignore the origins of the African concept of development, its necessity was born from how industrialised countries exploited

¹⁸⁵ The Link: Trade and Development Part One note 184.

¹⁸⁶ Ibid.

¹⁸⁷ Ngang note 167 108.

¹⁸⁸ i.e. poverty, employment, gender, productive capacity, investment, facilitation, agriculture and environment which are a few areas that development has a direct linkage to.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ PM Lehloenya & MN Mpya 'Exploring the citizen inclusiveness and micro-economic empowerment aspects of regional integration in Africa' (2016) 20 *Law, Democracy and Development* 94.

¹⁹² AK Abu-Akeel 'The relationship between trade and development, with particular reference to the service trade' (2005) *The Journal of World Intellectual Property* 383.

¹⁹³ Abu-Akeel note 192 386.

¹⁹⁴ Abu-Akeel note 192 388.

¹⁹⁵ Lehloenya & Mpya note 191 95.

¹⁹⁶ Ibid. 101.

Africa during colonisation.¹⁹⁷ Since the formation of the GATT, developing countries have long been campaigning for their interests, seeking fulfilment of their demands for greater market access, removal of barriers and developmental situations to be given more consideration regarding their exports to developed countries.¹⁹⁸ It was during the discussion of the Doha Development Agenda (DDA) that industrialised countries took the decision to take the concerns of developing countries more seriously, especially after the unsuccessful negotiating round that took place in Seattle in 1999, where developing countries were opposed to numerous submissions that were made.¹⁹⁹ These demands would require significant political incentives that would motivate developed countries to induce a significant move in this direction. This was further assisted by convincing demonstrations that economic difficulties of developing countries were linked to commercial practices by developed countries - this confirmed in the publication of the 'Panel of Experts Report' or the 'Harberler Report'.²⁰⁰ It contained strong evidence indicating that developing countries were in dire need of increasing revenues from exports if significant economic progress was to be made with the trade policies of developed countries.²⁰¹

Action programmes were followed by the GATT and the creation of an institutional mechanism called the Committee III, which was to focus on developmental aspects of trade and ways to expand developing country trade relations.²⁰² Furthermore, developed countries made more concessions as a way to lessen alienation of developing countries and proceeded with the strengthening of the legal and institutional basis through the 'creation of Part IV, entitled Trade and Development, which gave to developing countries a great deal of verbiage but fewer precise commitments.'²⁰³ Ngang rightly argues that other developmentally intended models have not been able to propel Africa in a direction which supports its development.²⁰⁴ In addition, Kenneth Dam believed the inclusion of Part IV did not achieve a lot in relation to precise commitments similar to the way in which the Special and Differential Treatment enabling clause formulated in the Tokyo Round led to the belief that the GATT was indifferent to the interests of developing countries.²⁰⁵ What is considered the most legally important statement of Part IV was that developed countries should not expect reciprocity for commitments they have made in trade negotiations.²⁰⁶ This subsequently paved the way for the General System of

¹⁹⁷ Ngang note 167 108.

¹⁹⁸ F Ismail 'The role of developing countries in GATT before the Doha round' (2008) 1(1) *Law & Development Review* 50.

¹⁹⁹ S Pfahl 'The European Union' in Blouin C ... et al *The Reality of Trade: The WTO and Developing Countries* (2002) 28.

²⁰⁰ Abu-Akeel note 192 389.

²⁰¹ G Haberler et al., *Trends in international trade: Report by a panel of experts*, GATT Secretariat, Geneva (1958).

²⁰² GATT, BISD, 7th Supplement, 1959.

²⁰³ Abu-Akeel note 192 390.

²⁰⁴ Ngang note 167 113.

²⁰⁵ Srinivasan & Park note 42 9–10.

²⁰⁶ Special and differential treatment provisions. Available at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, accessed on 24 February 2019.

Preferences (GSP), where developed countries agreed to grant trade preferences to developing countries.²⁰⁷ However, developing African countries engaged in trade with developed countries still face challenges,²⁰⁸ and Ngang advocates for the right to development as an approach which could emancipate least developed and developing African countries from seeking assistance from developed countries for their own problems.²⁰⁹

Developed countries, such as those in the EU, have different approaches to their trade policy with developing countries from other developed countries as they aim to increase exports of developing countries, as is observed with the Trade, Development and Cooperation Agreement (TDCA).²¹⁰ The requirement for this to take place is that for preferential market access to be granted, the competitive advantage of the EU must not be threatened by these increased imports.²¹¹ This is one of the restrictive provisions identified by Lehloenya that limit the flexibility of developing African countries as they have to tread lightly and not transgress the obligations of prior international agreements into which they have entered.²¹² Additionally, what assists developing countries is that there are potential gains to be derived from large-scale production, particularly in specialisation.²¹³ This ranges from the learning process involved in trade, as well as from international competition when the home market is too small to allow such competition, thereby enabling growth in sectors that have potential to thrive globally.²¹⁴ Apart from manufacturing, developing countries' shares in world exports of manufactured goods are small, or even tiny, and the scope for increase correspondingly large.²¹⁵ Therefore, increased exports from developing countries would be suffocated by the restrictions of developed country markets. For instance, developing countries supply three-quarters of the world exports of sugar; however, their exports are limited to one-fifth of the world production of sugar.²¹⁶ Observers representing the interests of poor countries are more inclined to believe that participation in the UR and in the WTO have thus far produced few benefits for developing countries.²¹⁷

2.6 Conclusion

²⁰⁷ Part IV – World Trade Organization.

²⁰⁸ Including education, healthcare, water and sanitation, shelter and land redistribution as well as the promotion of gender equality.

²⁰⁹ Ngang note 167 116–117.

²¹⁰ Pfahl note 199 28.

²¹¹ Ibid.

²¹² PM Lehloenya 'Africa must walk before she runs: The case for agricultural stability in sub-Saharan Africa in advance of global trade' (2013) 10(1) *Manchester Journal of International Economic Law* 29.

²¹³ S Pfahl 'The European Union' in C Blouin ...et al *The Reality of Trade: The WTO and Developing Countries* (2002) 28.

²¹⁴ I Little, T Scitovsky & M Scott *Industry and trade in some developing countries* (1970) 237.

²¹⁵ Little, Scitovsky & Scott note 214 237.

²¹⁶ Ibid.

²¹⁷ CP Bown and R McCulloch 'Developing countries, dispute settlement, and the Advisory Centre on WTO Law' (2010) 19(1) *The Journal of International Trade & Economic Development* 34.

Development has undoubtedly been an important aspect of trade over several decades. This was an agenda that was championed fully by countries that were in need of this mechanism. Although it is a concept which was largely founded by developed countries, they are in a large part responsible for this need. Had it not been for the legacy of colonialism, perhaps developing countries would not be labelled as such and would be in a far more favourable position. Throughout the various rounds of the GATT and subsequently the WTO, developing countries realised that they could achieve more as a collective as it came to light that they were all in similar positions. Tactics of divide-and-conquer used by developed nations were slowly being realised by developing countries and they used the platform afforded to them to speak out against this through the demands which they made through the mechanisms that they had advocated.

Although this has been a work in progress, the intention is to reach a stage where developing countries no longer have to seek benefits such as preferences but instead will be able to stand as individual countries and to negotiate without seeking assistance from their fellow countrymen. The purpose is to now look forward into the future and to take the necessary steps in order to ensure that this objective is reached. The underlying factor in all of this is to alleviate circumstances of poverty, unemployment and low quality of life which are predominantly present in developing countries. The irony is that it is developing countries which have the vast majority of natural resources the world over, but it is still the developed countries that seem instead to benefit in the long run.

This chapter aimed to show to what extent development has been a factor between developed and developing countries. It cannot be denied that this is an important aspect with regard to trade relations. Inequality is still rife in the majority of the world and the need for its acceleration is urgent now, more than ever. What has been established is that this concept of development has had a constant presence between the two aisles consisting of developed and developing countries. This has been the case to such an extent that legislation and forums as well as organisations have been formed in order to establish it.

This chapter has shown that overall or sustained development of developing countries is an ongoing topic of discussion when there is interaction or discussions between developed and developing countries. What is concerning, however, is the rate at which it takes place which needs improvement. The next chapter will deal with an overview of political and trade relations between SA and the US.

CHAPTER THREE: OVERVIEW OF THE TRADE AND POLITICAL RELATIONS BETWEEN SOUTH AFRICA AND THE UNITED STATES OF AMERICA

3.1 Introduction

South Africa (SA) and the United States of America (US) seemed to be great allies during the early days of democracy when Presidents Nelson Mandela and Bill Clinton shared a publicly well-known friendship.²¹⁸ This gave the impression to onlookers that relations between the two countries were in good condition and could only get better. The reasoning behind this perception was important as bridges were being built and relations being mended following the apartheid era, which had seen SA's exclusion from major trade relations with numerous countries. As such, post-apartheid SA, with former President Mandela at the helm, was eager for the country to establish its economic and political position.

This study seeks to determine whether this was indeed always the nature of relations or whether it was an opportunity to capitalise on the dawn of democracy. After all, SA's new-found freedom and the subsequent changes that ensued had all the ingredients of a story that would be told for many generations to come. The narrative when this story is relayed has largely been around how the release of Nelson Mandela brought freedom to the people of SA as it was the first step which led to his election as the first president of the new democratic dispensation. There are ample explanations for the international communities' lack of a collective approach towards SA and the apartheid system which are discussed below. One of them is that despite the stance of certain groups, countries and organisations, the literature reveals that such countries collectively lacked the political and economic will to make a decisive stand. With SA being rich in mineral resources and key agricultural outputs, this made it a key trade partner for some states.

Against this background, this chapter seeks to determine the trade dynamics during the apartheid regime between SA and the US and the extent to which the US has thus far assimilated itself into SA since the governmental change post-1994. Many of the functions of modern systems being made use of today derive a considerable amount of their foundations from previous regimes. It is naturally the logical thing to do when a transformation takes place that utilisation of helpful material, although used arbitrarily previously, is the point of departure in charting a new course. It is commonly argued that the apartheid system exploited most indigenous peoples and was able to build the infrastructure present today.

²¹⁸ 'Bill Clinton talks about his friendship with Nelson Mandela' *CBS News* 5 December 2013. Available at <https://www.cbsnews.com/news/bill-clinton-talks-about-his-friendship-with-nelson-mandela/>, accessed on 20 September 2018.

3.2 A brief history of trade between South Africa and the United States

Interestingly, trade between these two countries can be traced as far back as in the 1680s, when American ships transported slaves from Madagascar via the Cape Colony, where the Dutch East India Company (DEIC) had set up victualling and repair facilities.²¹⁹ SA was known of by the US in the 17th century because of its reputation for slaves – which evidence suggests were from Mozambique – and as the gateway to the Indian Ocean to other colonies where the US had other economic interests.²²⁰ According to Thomson, the 19th century was when regular trade began to be conducted between the US and SA.²²¹ The former's ships brought with them lumber, wheat, and tobacco and in exchange received wine, ostrich feathers and Asian re-exports.²²² The most valuable commodities traded during this period were wool and hides.²²³

Various other countries would use Cape Town as a way station and occasionally US trading ships would be found there where they would be supplied with fresh water and a place to rest and replenish their energy.²²⁴ Other groups active in that area at that time were the whalers.²²⁵ Missionaries and prospectors were also found in SA with the former through the American Board of Commissioners for Foreign Missions (ABCFM),²²⁶ which was the leading church in the US at the time. As such, Whytock explains that the relations between these two countries date back to 1799 when the US established one of its first diplomatic posts as a new country in Cape Town.²²⁷

Fast forward to the period in which the discovery of diamonds in Kimberly during the 1860s and gold in the 1870s caused thousands of experienced American miner immigrants to descend on SA.²²⁸ Using their expertise, they eventually became the management of half the mines²²⁹ and naturally this resulted in the passing on of various lucrative contracts to the US companies²³⁰ that were operational in this market.²³¹ This carried on for several decades and saw various American companies²³² establishing bases in what was then referred to as the Union of South

²¹⁹ RW Hull, *RW American enterprise in South Africa: Historical dimensions of engagement and disengagement* (1990) 2 and 5.

²²⁰ *AM United States policy towards South Africa 1969-1980: American ideals and responses to apartheid* (published IR thesis Mahatma Gandhi University (1993) 74.

²²¹ Thomas note 220 10.

²²² Hull note 219 2 & 5.

²²³ TJ Noer, *Briton, Boer, and Yankee: The United States and South Africa 1870-1914* (1978) 4.

²²⁴ Thomas note 220 74.

²²⁵ Whaling is the practice or industry of hunting and killing whales for their oil, meat, or whalebone.

²²⁶ The American Board of Commissioners for Foreign Missions was among the first American Christian missionary organisations. It was created in 1810.

²²⁷ IA Whytock 'South Africa's home policy and its foreign relations: A study of transitions since 1990' (unpublished MA thesis, Stellenbosch University (2015) 3.

²²⁸ CC Spence *Mining engineers and the American west: The lace boot brigade 1849–1933* 1st ed New Haven: Yale University Press (1970) 304.

²²⁹ A Thomson *U.S. Foreign policy towards apartheid South Africa, 1948-1994* (2008) 10.

²³⁰ The Ingersoll Rock Drill Company (later Ingersoll-Rand); General Electric and Standard Oil Corporation.

²³¹ Thomson note 229 10.

Africa,²³³ and later the Republic of South Africa,²³⁴ which served their interests very well through until post-World War I (WW I).²³⁵ The main attraction of SA to US transnational corporations was based on the potential return on their investments, which averaged around 13.72 percent from 1950 through to 1990.²³⁶ This was considerably better than the return it received worldwide, which stood slightly lower at 11.2 percent, which is a jarring observation when considering all the countries the US traded with back then.²³⁷

South Africa at that time had arguably the biggest and most developed economy in Africa with a large population size and a GDP of \$4,395 billion in 1960, \$9,422 billion in 1969, \$11,339 billion in 1971 and \$26,210 billion in 1977.²³⁸ This was accounted for partially by 17 percent of imports and 13 percent of exports from the US in 1971, and which by 1980 were 1.3 percent and 1.1 percent respectively of overall trade between the two countries.²³⁹ In 1976 there was a considerable trade surplus between the US and SA, where the latter's trade deficit was as high as \$423 million. By 1978, SA had spent over \$500 million more on American goods than the next biggest customer, Egypt.²⁴⁰ These astronomical figures translated into a positive reputation for SA as a safe country for foreign investment with its being extremely profitable and also having the potential to grow even further.²⁴¹ The US held 20 percent of SA's foreign-held assets during this time²⁴² and interestingly, in the 1980s there were over 350 American multinational corporations in SA, averaging a foreign direct investment of \$2 billion.²⁴³

²³² Coca-Cola, Johnson and Johnson, Colombia Records, Metro Goldwyn Mayer, and Colgate-Palmolive.

²³³ SA became a Union on 31 May 1910. Available at <https://www.sahistory.org.za/topic/union-south-africa-1910>

²³⁴ SA became a Republic on 31 May 1961. Available at <https://www.sahistory.org.za/dated-event/republic-south-africa-established>

²³⁵ Thomson note 229 11.

²³⁶ US Department of Commerce: Bureau of Economic Analysis. *Survey of Current Business* 1956-1994.

²³⁷ Ibid.

²³⁸ United Nations Yearbook of National Account Statistics 1972 Vol. 2 (New York: United Nations) (1974) 354.

²³⁹ Southern Africa: Proposals for Americans: A Report of the National Policy Panel established by the United Nations Association of the United States of America (1971) 18.

²⁴⁰ Thomas note 220 35.

²⁴¹ J Blashill *The Proper Role of US Corporations in South Africa* (1972) 49.

²⁴² Thomas note 220 39.

²⁴³ HF Jackson *From Congo to Soweto: US Foreign Policy Toward Africa Since 1960* 1st ed (1982) 223.

On the political and human rights front, the similarity shared between the two countries was that of legislated racial segregation and separation respectively.²⁴⁴ This put the US in a dilemma as to what its foreign policy should be towards a country practising racial discrimination, considering the substantial investments that had been made by multinationals from the US in SA.²⁴⁵ Clearly, this contradicted their stance on democracy, freedom and equality when compared to the action taken in relation to racial issues in SA and Africa as a whole.²⁴⁶ Organisations including trade unions, universities and other groups developed well organised strategies to pressurise the US government and corporations which had established themselves in SA.²⁴⁷ The influence extended across borders as more African states²⁴⁸ that had recently gained independence were becoming industrialised to a varying extent.²⁴⁹ This affected the global image of the US negatively as it had interests in natural resources, particularly oil, which were available in countries such as Nigeria; but it could not form fruitful bilateral treaties because Nigeria refused to engage with the US as long as it supported the status quo in SA.²⁵⁰

As mentioned earlier, business and trade were the main aspects of relations between SA and the US throughout the 1900s, with the concern being mainly for new business opportunities and returns on investment that were profitable,²⁵¹ so much so that the US had no other concern than maintaining the 'excellent' trading relationship it had created with SA.²⁵² Therefore, any questioning of the methods employed by the apartheid government at the time would have severely hampered the literal goldmine the US had stumbled on and subsequently proceeded to build upon.²⁵³ Further, World War II brought with it hostilities and a disruption of the traditional ties SA had had with the British, which saw trade linkages between the US and SA strengthen as a result.²⁵⁴ With the economy emerging healthy after the war, the relationship increased trade between the two countries.²⁵⁵ With this continued economic relationship, US transnational corporations penetrated the Union of SA as they had done earlier in the 1920s and 1930s. Their continued establishment and continuous investment meant further prosperity for these nations even though this was at the expense of a subjugated race of people.²⁵⁶

²⁴⁴ Thomas note 220 21.

²⁴⁵ Ibid.

²⁴⁶ CV Crabb *Policy-makers critics: Conflicting theories of American foreign policy* (1976) 60.

²⁴⁷ AO Hero & J Barratt *The American People and South Africa: Public, Elites and Policymaking Processes* (1981).

²⁴⁸ Gabon, Kenya, Ivory Coast and Nigeria in H Bienan 'US Foreign Policy in a Changing Africa' (1978) 93(3) *Political Science Quarterly* 445.

²⁴⁹ Thomas note 220 30.

²⁵⁰ HE Newsum & O Abengunrin *United States Foreign Policy Towards Southern Africa: Andrew Young and Beyond* (1987) 80.

²⁵¹ S Jorde 'The Foreign Relations of South Africa between 1973-1978' (published History thesis, University of Oslo) (2005) 23.

²⁵² Jorde note 251 23.

²⁵³ Thomas note 220 12.

²⁵⁴ Ibid. 21.

²⁵⁵ Ibid.

²⁵⁶ Thomas note 220 22.

3.3 Apartheid

It was in the year 1948 that apartheid was formally introduced after the National Party's general election victory in which only white people were allowed to participate.²⁵⁷ Moreover, the apartheid system saw the implementation of discriminatory legislation and policies with the sole purpose of separating races.²⁵⁸ The apartheid government was a valuable ally for the US to have because of its stance on communism; the Cape sea route through which the majority of trade heading east passed; reserves of rare minerals; and a multitude of transnational US corporations which found the SA market to be profitable.²⁵⁹ Locally there was a somewhat hostile attitude towards the US, not only from the African National Congress (ANC), but also from the national government and domestic opposition.²⁶⁰ This was because of the notion that all the US was concerned about was having SA as an ally against the Soviet Union's aggression in the region as well as economic benefits.²⁶¹ In return, this saw the US condone the atrocious human rights violations perpetuated by the apartheid regime.²⁶²

In practice, the approach of the US to SA and the rest of the world was solely based on cold war demands and profitable economic ties rather than speaking out against apartheid.²⁶³ Furthermore, the relationship between the countries during this period was somewhat of a balancing act, although the apartheid system it had condoned was in contradiction with what the US supposedly stood for, with the economic benefits of maintaining friendly relations with the apartheid government far outweighing the former.²⁶⁴ Apartheid was clearly good for business, as 42 US firms established local subsidiaries in SA between the beginning of apartheid in 1948 and through until 1960, which took the overall total of USA businesses that were operating directly in the South African market to 160.²⁶⁵ Private direct investment and exports from the USA doubled in the 1950s. As a result of this activity and most importantly, the ties between these countries grew even stronger, with SA seeking industrial guidance and financial aid, which ominously indicated that this relationship was far from over.²⁶⁶ Further, USA investment and trade continued to rise rapidly with direct investment starting off at \$51 million in 1943 to \$140 million in 1950 to \$232

²⁵⁷ *Apartheid and limits: Non-violent resistance 1948-1960*. Available at <http://www.sahistory.org.za/liberation-struggles-south-africa/apartheid-and-limits-non-violent-resistance-1948-1960>, accessed on 20 September 2018.

²⁵⁸ A Saule *The impact of the United States (US) and South Africa's trade relationship on Botswana, Lesotho, Namibia and Swaziland (BLNS) [1999-2013]* (published MA thesis, University of the Witwatersrand) (2014) 14.

²⁵⁹ Thomson note 229 2.

²⁶⁰ Carroll note 4.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ W Minter & Sylvia Hill Minter, W & Hill, S 'Anti-apartheid solidarity in United States-South Africa relations: From the margins to the mainstream' in *The Road to Democracy in South Africa, Vol. 3, International Solidarity, Part II* (2008) 750.

²⁶⁴ Thomas note 220 5.

²⁶⁵ D Perkins *The American approach to foreign policy* (1962) 76 & 84.

²⁶⁶ Thomson note 229 22.

million in 1959.²⁶⁷ USA corporate boardrooms were unbothered with human rights violations at this point because as Thomson simply puts it that he priority was financial gain at all costs, which would later become a thorn in both these countries' sides.²⁶⁸

3.3.1 Initiation of sanctions

There was always opposition against the apartheid system, but it took the Sharpeville massacre of 21 March 1960²⁶⁹ to get the world's attention. This event portrayed how violent a system apartheid was towards the indigenous people of SA.²⁷⁰ There were calls in the United Nations (UN) for sanctions against the apartheid government because of the massacre.²⁷¹ In 1962, during the General Assembly of the UN, an initiation of a vote took place where there was a suggestion that SA should be boycotted through member states withdrawing diplomatic representation, embargoing the ports and airspaces, preventing South African goods being sold in various territories and barring SA exports. The US, however, was particularly not in favour of these suggestions.²⁷² This attempt unfortunately did not succeed because the Security Council of the UN members consisting of Britain, France and the US refused to comply with this request, using their veto powers.²⁷³ Through these actions Coleman-Adebayo accuses these countries of being a faithful ally of the then racist apartheid regime.²⁷⁴ Unsurprisingly, during this period, no major US politician, whether Democrat or Republican, openly supported the calls for sanctions, albeit for various reasons.²⁷⁵ Countries which voted against the resolution mostly consisted of imperialist and capitalist regimes such as Western Europe and Spain, whose fascism and reactionary approaches were well known throughout the world.²⁷⁶

At grassroots level, actions against apartheid were in isolation and at a much smaller scale. For example, picketing took place in San Francisco, where a ship carrying South African goods was to be unloaded, involving members of organisations like the American Committee on Africa (ACOA), the National Association for the Advancement of Coloured People (NAACP) and the Congress on Racial Equality

²⁶⁷ Minter & Hill note 263.

²⁶⁸ Thomson note 229 22.

²⁶⁹ Currently this is known as Human Rights Day and is used as a reminder of the massacre that took place in Sharpeville on the same day in 1960 and that such atrocities no longer need to occur now as we have the Constitution that protects freedom of movement as well as human dignity, making us all equal before the law regardless of race, gender, sex, religion etc.

²⁷⁰ 'Apartheid and limits: Non-violent resistance 1948-1960' note 257.

²⁷¹ Sharpeville Massacre and its historic significance. Available at <http://www.sahistory.org.za/archive/sharpevillemassacre-its-historic-significance-struggle-against-apartheid>, accessed on 24 September 2018.

²⁷² Thomson note 229 39.

²⁷³ Saule note 258 15.

²⁷⁴ Ibid.

²⁷⁵ Minter & Hill note 263 746.

²⁷⁶ C Hefti & E Staehelin-Witt *Economic sanctions against South Africa and the importance of Switzerland* Swiss National Science Foundation (2013) 1.

(CORE) in January 1963.²⁷⁷ These were some of the more successful groups in raising awareness about the anti-apartheid movement.²⁷⁸ Although countries the world over were agreeing to the boycotting of all forms of relations with SA and its apartheid government, according to Van Roekel, the imperialist countries of Britain, the US and France continued to support it through extended trade, capital investments and the continued supply of arms and equipment, which as a result kept apartheid operational.²⁷⁹ The US, SA and Britain were economically interdependent – among other aspects – upon one another for various reasons, such as SA's gold production. Prior to the US dollar becoming the reserve for most of the world's currency, its value was derived from gold.²⁸⁰ In order to maintain the stability of their currencies, the US and Britain had to ensure the continued production of gold. These two countries were also reliant on uranium for their nuclear industry during the 1960s, which was also imported from SA, which illustrates why they would refuse to permit sanctions to be implemented as they were heavily invested in the outcome and how it would affect them.²⁸¹

There were three types of industries which were identified as crucial to maintaining SA's apartheid regime – oil, arms and finance.²⁸² These functions were crucial to the administration as they directly affected the economy and the operation of the apartheid regime, particularly oil and arms, because they were used to neutralise and contain any public unrest.²⁸³ Finance was essential for economic growth and oil for domestic transport and without these, overall operations would grind to a halt.²⁸⁴ The arms embargo was initiated to stop apartheid and SA's aggressive attitude, often resulting in military conflicts with surrounding countries such as Namibia.²⁸⁵ SA was using the military on the battlefield and also as a means to maintain apartheid; therefore, the international community saw this as a way to neutralise both issues.²⁸⁶ The nature of the embargo was voluntary as opposed to mandatory at this stage due to the US' and UK's refusal to pursue the latter.²⁸⁷

Oil production was a weakness for SA because it had no existing oil reserves which trade partners would use as an opportunity to send a message through cutting off their supply.²⁸⁸ The Organization of the Petroleum Exporting Countries (OPEC) imposed an embargo which came into effect in 1973 because of apartheid and SA's

²⁷⁷ Minter & Hill note 263 767.

²⁷⁸ Hefti & Staehelin-Witt note 276 3.

²⁷⁹ C van Roekel *South Africa and a close look at the sanctions against apartheid: Did they work?* (2016) 12.

²⁸⁰ N Crawford & A Klotz *How sanctions work: Lessons from South Africa* (1999) 86.

²⁸¹ Van Roekel note 279 8.

²⁸² Crawford & Klotz note 280 103.

²⁸³ Ibid.

²⁸⁴ R Riddell *Sanctions and the South African economy*. London: Overseas Development Institute. (1986). Available at <https://www.odi.org>, accessed on 16 November 2018.

²⁸⁵ Resolution 435. Available at search engine for The United Nations Security Council Relations <http://unscr.com/en/resolutions/435>, accessed on 4 December 2018.

²⁸⁶ Van Roekel note 279 4.

²⁸⁷ MP Doxey *Economic Sanctions and International Enforcement* (1980) 106–124.

²⁸⁸ Van Roekel note 279 3.

relationship with Israel.²⁸⁹ Supplying almost half of SA's crude oil, Qatar, Saudi Arabia and Iraq ceased all oil exports to SA.²⁹⁰ The UN General Assembly also attempted to enforce sanctions through Resolution 1899 but were unable to persuade the Security Council to do this mandatorily.²⁹¹ Eventually some countries²⁹² voluntarily imposed sanctions.

SA was a developing country which required foreign investment to grow further, and this in turn needed machinery and transport imports. SA also borrowed money from the IMF and private banks, measures on which financial sanctions would have put a significant strain.²⁹³ Some countries had already proceeded with these on their own accord.²⁹⁴ In 1983, sanctions were imposed internationally when the IMF refused to grant SA further funds.²⁹⁵ The US, using its influence in the IMF, refused to grant new direct and portfolio investments, as well as loan credits under the Comprehensive Anti-Apartheid Act (CAAA), with the European Economic Community (EEC) and the Commonwealth banning new investments in 1986.²⁹⁶

3.3.2 Delayed action and potential alternatives to sanctions

There was very little momentum gained in the first half of the 1960s in relation to economic disengagement towards the apartheid government, which had been suggested by the then ANC leader Albert Luthuli.²⁹⁷ This resulted from a lack of significant consumer imports from SA to other countries as well as there being no support in the US Congress for this action.²⁹⁸ Also, there were arguments tabled in the US Congress which suggested that sanctions were not the most constructive method and approach to diffuse tensions if the intention was to build a non-racial harmonious society. Instead, negotiation was the best possible avenue to attempt to end apartheid.²⁹⁹ The reasoning was that it was the very same people that the General Assembly of the UN was attempting to assist – the oppressed indigenous people of SA – that would be most negatively impacted if economic sanctions were to be passed.³⁰⁰ Heads of government in Britain and Germany concurred that sanctions were not the best approach to encourage political change in SA.³⁰¹ The

²⁸⁹ Oil embargo 1973, 1974. Available at <https://history.state.gov/milestones/1969-1976/oil-embargo> accessed on 4 December 2018.

²⁹⁰ Crawford & Klotz note 280 106.

²⁹¹ S Chesterman, T M Franck & D Malone *Law and practice of the United Nations: Documents and commentary* (2008) 373.

²⁹² Denmark, Norway, the European Economic Community (EEC) in 1985 and the US through the Comprehensive Anti-Apartheid Act (CAAA) in 1986.

²⁹³ Van Roekel note 279 4.

²⁹⁴ Japan: direct investment in 1964 and loans in 1975; Denmark Finland, Norway, Sweden, Switzerland: loans in the 1970s

²⁹⁵ Van Roekel note 279 4.

²⁹⁶ Hefti & Staehelin-Witt note 276 1–3.

²⁹⁷ Minter & Hill note 263 767.

²⁹⁸ Ibid.

²⁹⁹ Thomson note 229 39

³⁰⁰ Statement of Francis T.P. Plimpton before the U.N. General Assembly Special Political Committee, 19 October 1962. *DSB*. 1962, 47(1221), 794.

³⁰¹ Hefti & Staehelin-Witt note 276 1.

idea of sanctioning a country in which there was an attempt to influence its operations and direction seemed contradictory, to say the very least.³⁰² Ambassador Satterthwaite was of the opinion that instead those sections of the white minority which sought to bring about an evolution in racial relations and eventual equality should be approached and build upon the already strengthened ties with these groups instead.³⁰³ There were several deliberations that explored alternative solutions, but in effect, the apartheid experiment was to continue, with the justification being that an international ban on South African trade and investment would result in unsavoury humanitarian consequences.³⁰⁴ This 'constructive engagement' approach did not lead to the ending of apartheid for years, which is how sanctions eventually seemed the only viable solution.³⁰⁵

The following landmark event that highlighted the plight of indigenous South Africans under the racist apartheid regime was to be the Soweto uprising on 16 June³⁰⁶ 1976, which took place in Soweto.³⁰⁷ This event gave effect to the to a voluntary arms embargo which was put in place in 1963 and had not become mandatory until this massacre.³⁰⁸ In 1977 the UN imposed it under Security Council Resolution 418, which included imports as well as exports.³⁰⁹ In 1984 Resolution 558 was created and required members to cease importing ammunition, arms and military vehicles from SA.³¹⁰ The uprising led to such a build-up of tension and strife in the nation that by the 1980s an institution of a state of emergency in 1986 by the apartheid government was the eventual result.³¹¹ The apartheid model was coming under continuous scrutiny and this as a result culminated in domestic pressure from within the US to pass overall sanctions against SA.³¹² The administration of Ronald Reagan was opposed to sanctions on SA, which this was evident in their approach by implementing a limited export ban.³¹³ In 1986, the US Congress passed the CAAA,³¹⁴ which President Ronald Reagan had attempted to veto, albeit unsuccessfully.³¹⁵ 'This Act contained a list banning importing materials from SA which included iron, steel, coal, uranium, textiles and agricultural goods, while excluding strategic materials such as diamonds and most forms of gold.'³¹⁶ This measure is considered

³⁰² Thomson note 229 39.

³⁰³ Cable, Satterthwaite to State, 18 December 1962. Cited in De Vos *Politikon* 107.

³⁰⁴ Thomson note 229 40–41.

³⁰⁵ Hefti & Staehelin-Witt note 276 2.

³⁰⁶ Nowadays referred to as Youth Day and is used to commemorate those who died on the day in 1976 while protesting the education system used, which was referred to as Bantu Education

³⁰⁷ Saule note 258 15.

³⁰⁸ A Guelke *Rethinking the rise and fall of apartheid: South Africa and world politics* (2005) 195.

³⁰⁹ Resolution 418. Available at search engine for The United Nations Security Council Relations <http://unscr.com/en/resolutions/418> accessed on 4 December 2018.

³¹⁰ Resolution 558. Available at search engine of The United Nations Security Council Relations <http://unscr.com/en/resolutions/558> accessed on 4 December 2018.

³¹¹ Saule note 258 15.

³¹² Carroll note 4.

³¹³ P I Levy 'Sanctions on South Africa: What did they do?' (1999) *Economic Growth Center: Yale University* 6.

³¹⁴ Saule note 258 15.

³¹⁵ Levy note 313 7.

³¹⁶ Ibid.

one of the decisive blows that motivated the apartheid regime to take into consideration the circumstances around them and bring them to the negotiating table.³¹⁷

The direct impact of the trade-related sanctions was limited because SA created methods to circumvent the sanctions, which at times was costly as it was through import substitution.³¹⁸ Countries³¹⁹ that did not participate in the embargo allowed SA to transship through them.³²⁰ As a result, terms of trade suffered, but export volumes increased between 1985 and 1989 by 26 percent.³²¹ It is estimated that the marginal costs resulting from the trade sanctions amounted to the tune of \$354 million or 0.5 percent of the Gross National Product (GNP).³²² These events caused a mass exodus of companies,³²³ investors and bank loans as a result of uncertainty of their investments, and also protest action as activists made their opinions known with regard to the oppression that had been taking place.³²⁴ As a result of these internal and external boycotts, the SA economy struggled.³²⁵ Evenett, using the gravity model from 1978-1999, found that exports from the European Community (EC) and the US decreased by 27 percent and 34 percent respectively during this period of time.³²⁶

3.3.3 *Lifting of sanctions*

Sanctions against the South African apartheid government continued to be enforced across administrations as George Bush Sr assumed the presidency after Ronald Reagan.³²⁷ On the South African front, FW de Klerk had assumed office as the South African President and he was viewed as a pragmatic individual by the US because of his rhetoric.³²⁸ He demonstrated this through his conduct by unbanning the ANC and the Pan African Congress (PAC), the release of Nelson Mandela and the commencement of the transition negotiations.³²⁹ These were three of six prerequisites under section 311(a) of the CAAA which had to be met for sanctions to be lifted, with the remaining being *'the calling off of the state of emergency; repealing of unjust Acts of Parliament; and the initiation of transition negotiations in good faith'*, which were deemed to have been complied with in June 1991.³³⁰

³¹⁷ Minter & Hill note 263 746.

³¹⁸ Levy note 313 7.

³¹⁹ To a certain extent the European Community, Japan and the US.

³²⁰ Levy note 313 7.

³²¹ Ibid.

³²² Ibid.

³²³ Coca-Cola, General Electric, GTE, Phillips Petroleum, Eaton and Bell & Howell. Available at http://articles.latimes.com/1986-09-18/news/mn-11241_1_south-africa/2.

³²⁴ Carroll note 4.

³²⁵ Saule note 258 15.

³²⁶ L Edwards 'Trade Policy in South Africa' in Aron, J., Kahn, B. and Kingdon, G. (eds.) *South African Economic Policy Under Democracy* (2009) 16.

³²⁷ Thomson note 229 159.

³²⁸ Statement of Herman J. Cohen before the Senate Committee on Foreign Relations, 3 October 1989. U.S. Congress. Senate. Committee on Foreign Relations. *U.S. policy toward South Africa: hearing...* [101st Congress: 1st session: October 1989]. Washington DC: U.S. GPO, 1990. 14.

³²⁹ Thomson note 229 160.

³³⁰ Ibid. 161.

Subsequently, in February 1992, there was the authorisation by President Bush that the US Export-Import Bank could now offer guarantees and loans on contracts of South African origin.³³¹ The Clinton administration enacted the South African Democratic Transition Support Act (SADTSA) in November 1993, which repealed the remaining punitive provisions of sanctions, enforced under the CAAA and removed all Export-Import Bank restrictions in relation to SA.³³² The removal of sanctions did not lead to a full recovery in exports to the US in particular, which suggests that adverse consequences of sanctions still remained after their removal.³³³

3.4 Democratic South Africa

For the newly formed democratic SA, the main priority was and still is to this day economic growth, equal distribution of wealth, socioeconomic improvements and service delivery, among other issues.³³⁴ Relations between SA and the US were analysed and found to have been negatively impacted by Cold War politics and the apartheid regime.³³⁵ This caused the incoming democratically elected South African government to be wary of the intentions of the US, and it often tried to refrain from agreeing with the US on issues in order to avoid appearing as if it were the puppet of the US in the view of other African states that assisted it during the struggle for freedom from apartheid.³³⁶ The ANC winning SA's first democratic election saw the US ramp up its assistance with regard to development.³³⁷ With the pending 'rainbow nation' under the new dispensation, excitement surrounding the country's first-ever democratic elections saw some companies³³⁸ that had left as a result of the CAAA return; many of them which had previously left perhaps did not anticipate an era under which they would enjoy as much unprecedented success as they had previously.³³⁹

Surprisingly, the US had its own reservations in relation to the ties SA had and disagreed with the relations the Mandela government had with regimes it found to be objectionable.³⁴⁰ These included links with Russia (formerly known as the Soviet Union), Cuba, Iran and Libya.³⁴¹ Despite this, the US and SA were somewhat expected to be trade partners because of the economic and international views on SA as well as the Mandela regime. The proposition that 'all men are created equal' is stated in the Declaration of Independence³⁴² and underpins the similar history of SA

³³¹ Ibid. 162.

³³² Ibid. 166.

³³³ Edwards note 326 16.

³³⁴ Saule note 258 51.

³³⁵ Ibid. 3.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Coca-Cola, General Electric, GTE, Phillips Petroleum, Eaton and Bell & Howell. Available at http://articles.latimes.com/1986-09-18/news/mn-11241_1_south-africa/2.

³³⁹ Carroll note 4.

³⁴⁰ Carroll note 4.

³⁴¹ Saule note 258 3.

³⁴² The 1776 *Declaration of Independence* states: 'All men are created equal'. Available at <http://www.ushistory.org/declaration/document/>, accessed on 21 September 2018.

and the US which involved the transition from a legislated racist regime to a non-racial society.³⁴³ Also, at the dawn of its democracy, SA needed to develop trade relations with trade partners both old and new to signify its reincarnation as a democratic country with new objectives that were different from those of the apartheid regime.³⁴⁴

This led African countries, particularly those which had assisted SA during the apartheid struggle, to the suggestion of the notion and belief that SA was a puppet of the US.³⁴⁵ The reason for this was its willingness to comply with rules of entry set by potential investors and multilateral organisations that included liberalisation, privatisation and tax reform.³⁴⁶ This could well have been true, because concurrently, South African officials wanted to build trade relations as well as receive financial aid from the US, but they were concerned with the terms and conditions which would accompany this.³⁴⁷ SA was in a difficult position of having to set an example as a leading country in Africa after recently liberating itself from apartheid rule as well as maintaining good relations with African countries that assisted it during the struggle. Moving forward, SA also had to engage in international relations, which was not a straightforward transition.

The sanctions imposed for apartheid on SA affected the economy negatively and the new government set out to fix this by opening up its market through the signing of several bilateral and multinational agreements.³⁴⁸ Trevor Manuel, as Trade and Industry Minister from 1994-1996, drastically removed tariff walls, that kept imports out from Europe and the US, sooner than the World Trade Organization (WTO) had required.³⁴⁹ This led to SA losing preferential trade responsibilities because it was consistently importing far more goods from the US than it was selling locally.³⁵⁰ In 1995, there was pressure from Anglo American that led to steel tariffs rising high enough to justify new (highly subsidised) investments.³⁵¹ In 1996, the US government was not pleased with SA violating 'the spirit of the WTO' to which it had recently assented, and also for the lack of transparency in its involvement in what it termed the 'consistent misappropriation of internationally-known trademarks' (software piracy was alarmingly rife).³⁵²

From 1998-1999, collusion involving pharmaceutical companies attempting to influence the South African Health Ministry to end its attempt through the 1997

³⁴³ G Mills & J Stremlau *The reality behind the rhetoric: The United States, South Africa and Africa*. (2000) 7.

³⁴⁴ Saule note 258 16–17.

³⁴⁵ P Fabricius 'U.S. South Africa relations: A view from both sides' in *US South Africa relations and the Pariah States*. (1997) SAIIA Reports No 2 26.

³⁴⁶ Saule note 258 54.

³⁴⁷ Mills & Stremlau note 343 7.

³⁴⁸ Saule note 258 51.

³⁴⁹ P Bond *The elite transition from apartheid to neoliberalism in South Africa* (2000) 49.

³⁵⁰ Ibid. 48.

³⁵¹ Ibid. 49.

³⁵² Ibid.

Medicines Act to import cheap antiretroviral (ARV) HIV/AIDS medicine came to light.³⁵³ (See the *Treatment Action Campaign (TAC) case*.³⁵⁴) These companies wanted SA to license the ARVs locally as an alternative to relying on products of multinational drug companies.³⁵⁵ This was described by the State Department in a February 1999 report as a 'full court press' tactic against the sovereignty of South African medicines.³⁵⁶ Even though the US talked of supporting the newly democratically liberated country, this act was a demonstration to SA of how the US wielded international economic power.³⁵⁷

Despite the above issues, the trade relationship between the US and SA became an important one over the years (with the inception of the African Growth and Opportunity Act (AGOA) in 2001), as total trade had almost doubled.³⁵⁸ With AGOA already operational, the US attempted and failed to conclude a regional free trade area (FTA) between itself, SA and the neighbouring Southern African Customs Union (SACU) states as a result of rancour and resentment between the negotiating parties from the different states.³⁵⁹ The main reason these negotiations did not succeed was SACU's view that the US was inflexible in the manner in which it approached negotiations. SACU was also concerned of the prospects about matters including protection of intellectual property rights (drug and seed patents); technical standards and data management; agricultural subsidies; and government procurement and investment.³⁶⁰

Regardless, trade and investment between SA and the US has increased significantly over the past two decades, with total trade including imports and exports having grown from under \$3.3 billion in 1985 to a staggering \$16.8 billion in 2011. It decreased to \$12.7 billion in 2015 because at that time SA became a part of BRICS (an acronym for the grouping of the world's leading emerging economies, namely Brazil, Russia, India, China and South Africa), and China became SA's biggest trading partner, with the US coming in second.³⁶¹ There has been a positive and steady trade balance for most of this period, with exports not being limited to primary commodities but also including agricultural and manufactured goods.³⁶² In addition, there was a delegation of American foreigners which visited SA between 1994 and

³⁵³ ZS Gabela *The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa and Cameroon* (published LLM thesis, University of Pretoria) (2005) 14–27.

³⁵⁴ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC).

³⁵⁵ Bond note 349 49.

³⁵⁶ Below the Beltway K Street Gore. Available at http://www.campaignfinance.org/federal/html/k_street_gore.html, accessed on 22 September 2018.

³⁵⁷ Bond note 349 49.

³⁵⁸ C Prinsloo & C Ncube 'Deepening trade and investment relations post-AGOA – Three options for South Africa' (2016) *SALIA Policy Insights* 36 1.

³⁵⁹ Carroll note 4.

³⁶⁰ 'SA-US trade relations – from chicken wars to Trump and beyond'. Available at <http://wtochairs.org/sites/default/files/TRADE%20-%20SACU-US%20Trade%20Relations%2C%20Trump%20and%20Chicken%20%286%20June%202012%29.pdf>, accessed on 7 September 2018.

³⁶¹ Prinsloo & Ncube note 358 2.

³⁶² Ibid.

2000 every three months, which indicated the high regard and robustness of the relationship between the two countries.³⁶³

According to Fabricius, the relationship between the two countries during the democratic dispensation has been led more by the US, which has defined how SA interacts with its other trade partners in the Southern African Development Community (SADC) and the SACU.³⁶⁴ In recent years this relationship has somewhat become fractious owing to what SA views as the US' 'heavy handedness in its attempts to gain further access to South African markets', as is evidenced in the alleged dumping of US chicken products, which has led to considerable consequences for the chicken farmers of SA.³⁶⁵ The cause of disagreement in these circumstances is that the US is pushing for a more reciprocal trade agreement between the two countries as it believes SA is too developed to be benefiting still from the AGOA agreement.³⁶⁶ Another reason the US is pushing for a more reciprocal trade agreement between these two countries is the success the EU has had in concluding and mostly implementing numerous European Partnership Agreements (EPAs) with other African countries with SA being one of them under the Trade, Development and Cooperation Agreement (TDCA).³⁶⁷ However, there are several trade and investment agreements between SA and the US, which include the African Growth and Opportunity Act (AGOA) scheme; the Generalised System of Preferences (GSP);³⁶⁸ the Trade, Investment and Development Cooperation Agreement (TIDCA)³⁶⁹ and the Trade and Investment Framework Agreement (TIFA),³⁷⁰ but the most prominent of the four are the GSP and AGOA.³⁷¹

The trade relationship between these two countries has matured since 1994, enduring the expected ups and downs of any trade relationship which can at times be accompanied by the occasional scuffle, but has overall remained stable as a result of agreement on issues such as trade and development.³⁷² The relationship between SA and the US has in no doubt been a complicated one which has undergone significant changes that began during the apartheid government's

³⁶³ Saule note 258 52.

³⁶⁴ Ibid. 53.

³⁶⁵ 'SA-US trade relations – from chicken wars to Trump and beyond' note 360.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Generalized System of Preferences — programmes by developed countries granting preferential tariffs to imports from developing countries. Available at https://www.wto.org/english/thewto_e/glossary_e/gsp_e.htm, accessed on 21 September 2018.

³⁶⁹ Trade, Investment and Development Cooperation Agreement — a Cooperative Agreement to promote investment and expand and diversify trade. Available at <https://www.tralac.org/resources/by-region/sacu.html>, accessed on 21 September 2018.

³⁷⁰ Trade and Investment Framework Agreements – function to provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other contracting parties. Available at <https://agoa.info/bilaterals/agreements.html>, accessed on 21 September 2018.

³⁷¹ 'SA-US trade relations – from chicken wars to Trump and beyond' note 360.

³⁷² Saule note 258 55.

regime, which turned somewhat sour after the passage of economic sanctions and thereafter a return to a healthy relationship with the post-apartheid government.³⁷³

3.5 Conclusion

Trade relations between SA and the US have been turbulent to say the very least. What has been demonstrated above is the complexity that this relationship has endured over the past decades. The US has been an undoubted beneficiary as a result of its influential position derived from its early involvement in barter and trade in opposition to SA. It was during apartheid that the US gained a stronghold on the South African economy, as demonstrated through the significant foreign investment it had in SA. The position it took with regard to sanctions was one which was beneficial to it because of its vast financial resources in the South African economy. This shows that the US is usually inclined to look after its interests above others' in most circumstances – even basic human rights.

Trade relations with the US are always mooted as being beneficial for underdeveloped or least developed countries, the premise being that with its already established position as a super power in the global order, it ought to assist other nations to reach similar status. With this, however, comes a point where independence and development for many of these previously least developed countries becomes a necessity that can no longer be ignored. This would see the US lose its influential position in institutions and organisations that govern global affairs. Other nations would not be as reliant on the relationship and ties with the US as they would have been previously. With a potential significant decrease in economic power, influence and status, the manner in which the US has already conducted itself through history would suggest that such a scenario would result in heightened tension. Therefore, it is difficult to see the US supporting other nations in an attempt to see to the development of less developed countries.

This chapter has taken a look at the historic relations between the US and SA with a closer look at the activity during one of the most strenuous periods in modern history where moral values ought to have persevered – apartheid – but to no avail. There is a contrast between the two periods under which these countries have sustained their relations: apartheid and democracy.

The results of apartheid and their effects on trade have been touched on, in particular sanctions imposed against SA as a result of its apartheid activities; as well as the results of the various responses of the allies of the apartheid government all over the world. This chapter serves as the foundation for the discussion of AGOA which takes place in the following chapter and will further illustrate the role of the US in trade relations with Africa and SA.

³⁷³ Ibid. 14.

CHAPTER FOUR: THE AGOA AND THE OVERALL IMPLICATIONS IN RELATION TO AFRICAN COUNTRIES

4.1 Introduction

The African Growth and Opportunity Act (AGOA) has been a part of trade relations between the US and African countries since its enactment in 2000³⁷⁴ and its emergence has to a certain extent contributed to ties between these very economically different countries. This relationship came at a time when the 20th century was coming to an end and most countries were looking to set the tone for the new millennium. There were quite a few significant revolutionary events that took place on the African continent during the 1900s; for instance, several African countries gained independence from colonial rule in the 1960s.³⁷⁵ African countries seemed to be awakening from a long slumber as SA also unshackled itself from the apartheid regime only in 1994.

At international forums such as the United Nations (UN) and during the General Agreement on Tariffs and Trade (GATT) negotiations, African countries were voicing their concerns over their lack of development and the difficult economic positions they found themselves in, especially in relation to trade. It was only fitting that historically 'developed' countries would acknowledge these concerns and act accordingly as perceived leaders. There was a formulation of agreements (GATT) and the creation of institutions (such as the WTO) that were intended to assist 'developing' countries to overcome the challenges with which they were faced, but also included developed countries as part of the solution. The irony here is that help was being sought from the same places from where, it can be argued, the challenges indirectly originated. Developed countries set the tone for what is considered acceptable and have portrayed themselves as leaders and pioneers since the beginning of time.

The AGOA is another example of a 'developed' country portraying itself in the guise of a saviour attempting to assist lesser developed countries, which perpetuates this narrative. This chapter will focus on certain aspects in relation to this Act in order to determine to what extent it has influenced trade relations between SA and the US. This will include the background to the formulation of the AGOA agreement and what its relationship is to Africa as a whole and then specifically to SA. This will be done through an analysis of cases and events in relation to this Act to gauge what impact it has had on all parties involved. This chapter will discuss these aspects by discussing the background of the AGOA, the initiation of the Act and what motivated its promulgation. This will also include the purpose, participants and benefits derived

³⁷⁴ The African Growth and Opportunity Act, 2000 note 2.

³⁷⁵ 1960: The Year of Independence. Available at <https://www.france24.com/en/20100214-1960-year-independence>, accessed on 17 December 2018.

from the Act. Thereafter, AGOA and its effects on Africa will be analysed by examining various aspects by means of which this Act has affected and influenced as well as benefited the African continent as a whole.

4.2 Background to AGOA

On a wider spectrum, the formulation of AGOA was borne out of necessity for the US as opposed to assisting with the economic growth and development of the African continent. The latter benefits came as a sort of 'selling point' to persuade countries to open their markets to the US.³⁷⁶ African countries, on the other hand, were also interested in establishing an alternative trade partner from their colonially established European ties, who had been dominating trade on the continent and for the most part had been in control of the African market for raw materials for centuries at that point.³⁷⁷ Furthermore, the US was seeking to establish itself as a prominent country on many fronts, with trade being one of them. Such circumstances created the perfect opportunity for the US to formulate a strategy to infiltrate the African continent.³⁷⁸ The platform to engage on AGOA was at the US Congress, where the initiation, discussions and debates took place to determine the benefits and potential drawbacks of enacting legislation of this nature.

With the end of apartheid in SA, the US sought to strike the iron while it was hot and actively sought to increase economic relations with surrounding sub-Saharan African (SSA) countries.³⁷⁹ Substantial efforts were made by the former President Bill Clinton to signify intent of building relations with SSA countries, especially SA. In 1994, the year SA held its first democratic elections, an aid and investment package worth \$600 million was announced.³⁸⁰ What followed in 1995 was the creation of a bill that was debated for no less than five years and would later become the AGOA found under Title II of Trade and Development.³⁸¹ The motivation behind this bill was improving relations with the African continent by making use of the Uruguay Round (UR)-styled multilateral trade agreements.³⁸² In 1997 there was a proposal for there to be a Partnership for Economic Growth and Opportunity in Africa, which offered different types of economic benefits to SSA countries, depending on their economic reform measures – which was a signal of things to come.³⁸³

In actual fact, there were several attempts that eventually resulted in the creation of AGOA. The initial steps in its creation was a series of reports compiled by President

³⁷⁶ R McCormick McCormick, R 'The African Growth and Opportunity Act: The perils of pursuing African development through U.S. trade law' (2006) *Texas International Law Journal* 341.

³⁷⁷ W Scheidman & Z Lewis 'The African Growth and Opportunity Act (AGO): Looking back, looking forward' (2012) *Africa Growth Initiative Publications, Number 7 of 43* 26.

³⁷⁸ E Obua 'North-South cooperation: An assessment of US multilateral trade arrangement with sub-Saharan Africa under AGOA' (2007) *Journal of Sustainable Development in Africa* 68.

³⁷⁹ D Langton 'U.S. Trade and investment relationship with sub-Saharan Africa: The African Growth and Opportunity Act and beyond' (2008) *Congressional Research Service Report for Congress* 1.

³⁸⁰ *Ibid.* 1.

³⁸¹ Obua note 378 69.

³⁸² Langton note 379 1.

³⁸³ *Ibid.*

Clinton's administration as directed by Congress on a strategy of how to penetrate African markets.³⁸⁴ The responses were not received well by Congress, which argued that these were a 'compilation of existing policy' that did not address the debt burden that was faced by Africa at the time.³⁸⁵ Thereafter, members of Congress formed a caucus that was to review and revisit the policies suggested by President Clinton. They came up with a bill called the African Growth and Opportunity: The End of Dependency Act.³⁸⁶ The matter was not deliberated on again until the administration submitted a further report in February 1997 which again was criticised for not having clear implementation strategies and was further revised later that year.³⁸⁷ Eventually parties that were advocating for African trade preferences as well as those seeking to protect domestic industries threatened by the purported import of African 'goods' came to a compromise, which resulted in the AGOA.³⁸⁸

The AGOA is a unilateral, non-reciprocal trade preference programme providing duty-free treatment for imports of certain goods from eligible sub-Saharan African countries to the US.³⁸⁹ It was signed into law by President Bill Clinton on 18 May 2000, with various subsequent amendments thereafter.³⁹⁰ It was initially intended to be operational for a period of between eight and nine years, starting from 1 October 2000 to the end of September in 2009. However, it is still operational to this day.³⁹¹ This is due to former President George W Bush's signing of the AGOA Acceleration Act of 2004, popularly known as AGOA III, which extended its operation to 30 September 2015, having come into effect on 8 July 2004.³⁹² This was the second time that an extension had taken place, with the first one having occurred in 2002.³⁹³ The intention was to increase market access even further than had initially been intended in the original agreement.³⁹⁴ In 2006, there was a further amendment to AGOA which was to extend provisions concerning textile and apparel imports to the year 2012.³⁹⁵ AGOA was due to be renegotiated and reauthorized in 2015 as it was due to expire as per the provisions under section 7 of AGOA III.³⁹⁶ This took place and after a lengthy process SA was eventually included as a beneficiary once more

³⁸⁴ McCormick note 376 348.

³⁸⁵ Ibid.

³⁸⁶ McCormick note 376 349.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Oluyeju & Mafu note 7 30.

³⁹⁰ Ibid.

³⁹¹ H L Tigere Can the African Growth and Opportunity Act (AGOA) Initiative between the USA and eligible sub-Saharan countries be considered a success? (Unpublished LLM thesis, University of KwaZulu Natal) (2005) 1.

³⁹² O C Ojione 'Constraints to the embrace of the African Growth and Opportunity Act (AGOA) by beneficiary African states' 42(1) 2012 *Africa Insight* 45.

³⁹³ Obua note 378 73.

³⁹⁴ Langton note 379 2.

³⁹⁵ Ibid.

³⁹⁶ AGOA Acceleration Act of 2004 Section 7. Extension of African Growth and Opportunity Act. (a) Generalized System of Preferences — (1) Extension of Program — Section 506B of the Trade Act of 1974 (19 U.S.C. 2466b) is amended by striking out '2008' and inserting '2015'.

after it had made some concessions with relation to AD duties imposed on US poultry imports.³⁹⁷

4.2.1 Purpose of AGOA

AGOA has three standout features, namely, the way in which it benefits African countries; the positive effect it has on US business; and the conditions set for eligibility in order to enjoy the benefits.³⁹⁸ However, the purported and stated main purpose of AGOA is to '*enhance economic growth and development in SSA countries with the intention of deepening US trade and investment ties*'.³⁹⁹ This is intended to be achieved through the liberalising of trade between Africa and the US.⁴⁰⁰ The rationale of the underlying principles was that the elimination of barriers would result in unrestricted trade and investment into SSA countries which in turn would result in strong private sector development that would in turn create economic opportunities for Africans.⁴⁰¹ Up until its enactment, the US mainly utilised its Aid program in assisting poor African countries.⁴⁰² The underlying target – economic growth – is a prevalent feature of unilateral trade agreements,⁴⁰³ as these types of agreements are usually established between developed and developing countries.⁴⁰⁴

As such, section 103 sets out the objectives which AGOA intends the US and participant countries to achieve. These are:

1. Encourage increased trade and investment between the US and SSA;
2. Reduce tariff and non-tariff barriers and other obstacles to SSA and US trade;
3. Expand US assistance to SSA regional integration efforts;
4. Negotiate reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interest of both the US and the countries of SSA;
5. Focus on countries committed to the rule of law, economic reform, and the eradication of poverty;
6. Strengthen and expand the private sector in SSA, especially enterprises owned by women and small business;

³⁹⁷ F Ismail 'The AGOA Extension and Enhancement Act of 2015, the SA-US AGOA negotiations and the future of AGOA' (2017) 16(3) *World Trade Review* 535.

³⁹⁸ A Gerstenfeld & R J Njoroge 'African Growth and Opportunity Act (AGOA)' (2002) *Department of Education, Business and International Education (BIE) Program* 7.

³⁹⁹³⁹⁹ Oluyaju & Mafu note 7.

⁴⁰⁰ Ojione note 392 45.

⁴⁰¹ Obua note 378 69.

⁴⁰² Ismail note 397 528.

⁴⁰³ Other non-reciprocal preferential trade agreements include the Caribbean Basin Initiative, the Andean Trade Preference Act and the Everything but Arms initiative.

⁴⁰⁴ TM Zappile 'Nonreciprocal trade agreements and trade: Does the African Growth and Opportunity Act (AGOA) increase trade?' (2011) *International Studies Perspective* 50.

7. Facilitate the development of civil societies and political freedom in SSA;
8. Establish a US-SSA Trade and Economic Forum; and
9. Accession of the countries of SSA to the Organisation for Economic Cooperation and Development (OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁴⁰⁵

The strategy that was adopted by the US government is that the AGOA would be focused on expanding trade, economic growth and free markets through creating stable economies and democratically operative governments in Africa.⁴⁰⁶ Additionally, with the US far more experienced and developed on aspects relating to trade, it could offer support and expertise which ideally would open a channel of communication between the US and the African continent that could address trade, investment and policy concerns that might arise.⁴⁰⁷ An interesting point to note is that another reason for AGOA's existence was to balance out the share of countries trading with the Europeans through the Cotonou Partnership Agreement (CPA) which included African, Caribbean and Pacific (ACP) countries (see Annexure One)⁴⁰⁸ and was based on preferential trade.⁴⁰⁹

Compliance with AGOA is measured through continuous monitoring by the US, through its sitting President,⁴¹⁰ who can review whether a country is making progress in meeting the abovementioned requirements.⁴¹¹ One of the earlier reviews was carried out by former President George W Bush on 31 December 2001, where 35 countries were certified.⁴¹² Reviews can be initiated at any time during the subsistence of the agreement and can also be brought about through a petition⁴¹³ by any interested person.⁴¹⁴ This is done to ensure that countries are continuously *au fait* with AGOA's eligibility conditions. Essentially, if the president determines that the requirements are not being met by a particular country, he then has to issue a 60-day notice and thereafter make a decision based on the review.⁴¹⁵ 'This decision will either be to terminate the designation of the country as a beneficiary, or to withdraw, suspend, or limit the application of duty-free treatment with regard to eligible products from said country.'⁴¹⁶

4.2.2 Participants

⁴⁰⁵ The African Growth and Opportunity Act, 2000 note 2.

⁴⁰⁶ Tigere note 391 1.

⁴⁰⁷ Zappile note 404 47.

⁴⁰⁸ See Annexure One with list of countries forming part of the ACP.

⁴⁰⁹ TA Mushita 'An African Response to AGOA' (2001) 14(6) *Southern African Economist* 17.

⁴¹⁰ Section 104(3) (b) Continuing Compliance — If the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country made pursuant to subsection (a).

⁴¹¹ Oluyeju & Mafu note 7 31.

⁴¹² Ojjone note 392 46.

⁴¹³ Section 407. Revision of Retaliation List or Other Remedial Action.

⁴¹⁴ Oluyeju & Mafu note 7 31.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

There are currently 39 eligible SSA countries.⁴¹⁷ Eligibility is granted through an SSA country being an existing beneficiary of the US General Scheme of Preferences (GSP⁴¹⁸).⁴¹⁹ To qualify as an eligible country, there must be compliance with and satisfaction of certain essential requirements. Economically, included is the establishing of a market-based economy, a rules-based trading system, and US trade and investment borders being eliminated and the protection of intellectual property.⁴²⁰ Among the non-economic purposes are adherence to the rule of law, political pluralism, the promotion of democracy and stability, labour rights and respect for basic human rights.⁴²¹ These are explained in far more detail under section 104⁴²² of the AGOA.⁴²³

The US annually determines which countries have met the eligibility requirements. Beneficiary countries have no recourse for dispute settlement, which essentially means the US dictates terms to member countries.⁴²⁴ This list is ever-changing as review processes are conducted by the US President and countries have been barred at times from the scheme for allegedly not making the desired progress or violating the required eligibility criteria.⁴²⁵ The US has stayed true to form in relation to its power-wielding abilities as through the years several other countries have lost their AGOA status.⁴²⁶

Initially there were 34 SSA countries that received trade benefits⁴²⁷ under AGOA. Thereafter other countries trickled through slowly as Swaziland joined on 18 January 2001 as the 35th country, the Ivory Coast became the 36th on 16 May 2002 (they had lost their status and regained it) and Gambia joined along with the Democratic Republic of Congo (DRC) on 1 January 2003.⁴²⁸ The Seychelles have since

⁴¹⁷ The 39 AGOA eligible SSA countries are: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Comoros, Republic of Congo, Democratic Republic of Congo, Djibouti, Ethiopia, Gabon, The Gambia, Ghana, Guinea Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia.

⁴¹⁸ This will be elaborated on later on in this chapter. In terms of the GSP, 'duty' refers to taxes levied on imported or exported goods and on the other hand, tariff refers to 'import duties' charged at the time goods are imported. Benefits have been awarded to as many as 41 countries since the inception of the AGOA in 2000.

⁴¹⁹ Oluyeju & Mafu note 7 30.

⁴²⁰ Ibid. 31.

⁴²¹ Ibid. 32.

⁴²² Section 104 of the African Growth and Opportunity Act consists of 'Eligibility Requirements'.

⁴²³ The African Growth and Opportunity Act, 2000 note 2.

⁴²⁴ Section 407. Revision of Retaliation List or Other Remedial Action.

⁴²⁵ Central African Republic in 2004, Cote d'Ivoire in 2005, Eritrea in 2004, and Mauritania in 2006.

⁴²⁶ The Central African Republic (CAR) and Eritrea lost their status on 31 December 2003 (the CAR having regained its status as recently as 15 December 2016), with Mali, Mauritania and Angola losing theirs as well. The likes of Niger, Madagascar (later regained in 2014), Swaziland and Guinea have also been suspended after having formed part of the scheme for not meeting political and economic requirements.

⁴²⁷ Other additions include Burkina Faso, Burundi, Republic of Liberia, South Sudan (which later lost it in 2015 along with Gambia).

⁴²⁸ 'AGOA Country Eligibility'. Available at <https://agoa.info/about-agoa/country-eligibility.html>, accessed on 12 October 2018.

graduated from AGOA as they have reached the status of a developing country.⁴²⁹ Countries were identified through social monitoring research that evaluated predetermined criteria that have been mentioned earlier in this chapter.⁴³⁰ Eligibility was determined through the research of data, such as per capita income and consultations with the US embassy with other stakeholders, to gauge the levels of corruption and human rights violations among potential participants.⁴³¹

4.2.3 Benefits

As mentioned above, from the onset the crux of this Act has been that in order to be eligible and qualify for benefits, a country ought to meet certain requirements. In this respect, AGOA offers incentives that encourage participation from member countries by reinforcing reform efforts on the African continent; make available the technical and credit expertise of the US; and allows dialogue regarding trade and investment between the US and the Africa.⁴³² It also provides duty-free access, and in some cases tariff- and quota-free access to the US markets.⁴³³ What is supposedly beneficial from an African country's perspective are incentives that encourage the continued liberalising of African economies and building free markets focused on trade rather than financial aid.⁴³⁴ From the US point of view, AGOA enables an increase in market opportunities and formations of new commercial partnerships as well as the privatisation of African state-owned companies (SOEs) and infrastructure projects.⁴³⁵ The creation of this agreement saw the US alter its Harmonized Tariff Schedule (HTS) to accommodate apparel and textile trade preferences that were provided for under section 112.⁴³⁶ In 2008, the HTS stood at 10 500 individual tariff lines for US imports with only 3 800 not having the Most Favoured Nation (MFN) tariff.⁴³⁷

Among further benefits are duty-free access for most goods that are exported to the US from eligible countries.⁴³⁸ This coverage is for additional commodities included as part of those covered under the GSP.⁴³⁹ Duty-free treatment is extended under AGOA to certain apparel and footwear products not eligible to qualify for it under GSP, including LDCs.⁴⁴⁰ As mentioned earlier, another benefit derived from the Act is the GSP, which is a 'US trade-preference programme that applies to over 120

⁴²⁹ Ibid.

⁴³⁰ Gerstenfeld & R J Njoroge note 398 8.

⁴³¹ Ibid. 9.

⁴³² Gerstenfeld & R J Njoroge note 398 7.

⁴³³ Duty refers to taxes levied on imported or exported goods. On the other hand, tariff refers to 'import duties' charged at the time goods are imported. Benefits have been awarded to as many as 41 countries since the inception of the AGOA in 2000. 'AGOA Country Eligibility' note 428.

⁴³⁴ Tigere note 391 1.

⁴³⁵ Gerstenfeld & R J Njoroge note 398 7.

⁴³⁶ Obua note 378 69.

⁴³⁷ BR Williams 'African Growth and Opportunity Act (AGOA): Background and Reauthorization' *Congressional Research Service* (2014) 3.

⁴³⁸ Ibid. 2.

⁴³⁹ Zappile note 404 50.

⁴⁴⁰ Williams note 437 3.

developing countries.⁴⁴¹ Under the new Act,⁴⁴² GSP coverage was extended to 2015, which ensured that later preferences did not replace tariff preferences which had expired under the initial GSP.⁴⁴³ Interestingly, the GSP in general removes tariffs on 3 400 products but significantly more (4 800) for least developed countries (LDCs).⁴⁴⁴ Under the reauthorised agreement, approximately 6 800 tariff lines are offered under the preferential programme.⁴⁴⁵ Further, AGOA covers 1 800 tariff lines beyond the GSP,⁴⁴⁶ and overall in 2017, these tariff lines total approximately 6 800.⁴⁴⁷ However, what is fundamental to AGOA are tariff benefits from where duty-free access comes from.⁴⁴⁸ The AGOA's tariff benefits include all GSP-covered products and other additional products determined by the sitting US President as not being sensitive to imports relating to SSA products.⁴⁴⁹ Moreover, 90 percent of AGOA benefits are already tariff free under the GSP when imported from qualifying LDCs,⁴⁵⁰ and beneficiaries are exempt from caps allowed on imports that are duty-free under the GSP.⁴⁵¹

Textiles and Apparel are sectors that are heavily focused on by AGOA owing to their emergence and potential in Africa. They are therefore the primary consideration for trade benefits.⁴⁵² Textile benefits are considered to be the most prominent benefits under AGOA because they are more selective than general AGOA criteria and are available to only a few members.⁴⁵³ However, these benefits are subject to the Rule of Origins (ROO) provisions which are protectionist in nature because they allow only 25 percent of foreign materials to be eligible for duty-free access.⁴⁵⁴ ROO was intended to help manufacturers of eligible African countries to use more of their local and regional fabrics.⁴⁵⁵ Textiles were the second largest non-oil beneficiary in 2014 with trade valued at \$1 billion, and in terms of non-oil exports were surpassed only by the export of motor vehicles, and became for many countries their largest manufacturing export.⁴⁵⁶ SA is a non-LDC apparel producer and because of this a stricter 'yarn forward' ROO applies, where the yarn or fabric has to be produced either in an AGOA beneficiary country or the US for the overall garment to qualify for benefits.⁴⁵⁷ Apparel products are considered to have economic significance to LDCs because special provisions are granted in respect of these under the Third Country

⁴⁴¹ Ibid. 1.

⁴⁴² The AGOA Acceleration Act of 2004 of the 108th Congress of the United States of America.

⁴⁴³ Zappile note 404 50.

⁴⁴⁴ Williams note 437 3.

⁴⁴⁵ Ismail note 397 529.

⁴⁴⁶ Zappile note 404 50.

⁴⁴⁷⁴⁴⁷ Ismail note 397 529.

⁴⁴⁸ Williams note 437 2.

⁴⁴⁹ Ibid. 3.

⁴⁵⁰ McCormick note 376 365.

⁴⁵¹ Williams note 437 3.

⁴⁵² L Paez S Karingi M Kimenyi & M Paulos 'A Decade (2000-2010) of African-U.S. Trade under the African Growth Opportunities Act (AGOA): Challenges, Opportunities and a Framework for Post-AGOA Engagement' (2010) 4.

⁴⁵³ Zappile note 404 50.

⁴⁵⁴ Ibid. 52.

⁴⁵⁵ Naumann note 1 14.

⁴⁵⁶ Naumann note 1 13.

Fabric Provision (TCFP).⁴⁵⁸ These have been extended on three occasions, first to 2008, then to 2012, and after that to 2015, with a further extension granted for a further 10 years to 2025.⁴⁵⁹ Not all beneficiaries of AGOA are eligible to receive benefits under the provisions made for apparel.⁴⁶⁰ There is a further condition placed on countries which is that they can 'graduate' on economic development criteria such as having a threshold of US\$1 500 Gross National Product (GNP) per capita which countries including Gabon, Mauritius, Seychelles and SA possess.⁴⁶¹ They therefore cannot benefit from the Special Rule for Apparel under AGOA.⁴⁶² Apparel has the most diversified exports because the majority of countries who use AGOA benefit when compared to other sectors. In 2014 there were ten countries which were able to export \$1 million in exports each among themselves.⁴⁶³ In order to be eligible for duty-free treatment for apparel, a country has to adopt and implement a visa-tracking system that prevents unlawful transshipments.⁴⁶⁴ Also, enforcement and verification procedures for customs controls must be instituted.⁴⁶⁵ The standards of the visa system are established by the US Customs Service.⁴⁶⁶

What is considered as apparel that ought to receive benefits for duty-free treatment includes:

- Apparel assembled in one or more AGOA beneficiary countries from US yarn and fabric;
- Apparel made of SSA (regional) yarns and fabrics, which was subject to a cap until 2015;
- Apparel made in a designated LDC of third-country yarns and fabrics, which was subject to a cap until 2015;
- Apparel made of yarns and fabrics not produced in commercial quantities in the US (determination must be made that the yarn or fabric cannot be supplied by the US industry in a timely manner, and to extend preferential treatment to the eligible fabric);
- Certain cashmere and merino wool sweaters; and

⁴⁵⁷ GA Pigman 'AGOA IV and the future of US-Africa Trade Relations' (2016) *Commonwealth Hot Topics*, Issue 127, March 2016. Available at <http://www.thecommonwealth-ilibrary.org/commonwealth/imprints/2016>, accessed on 4 December 2018.

⁴⁵⁸ Williams note 437 2.

⁴⁵⁹ Naumann note 1 14.

⁴⁶⁰ Williams note 437 4.

⁴⁶¹ Paez et al note 452 5.

⁴⁶² Ibid.

⁴⁶³ Naumann note 1 13.

⁴⁶⁴ Williams note 437 4.

⁴⁶⁵ Tigere note 391 5.

⁴⁶⁶ Scheidman & Lewis note 377 4.

- Certain handloomed, handmade, ethnic printed fabrics, or folklore articles (certain countries only).⁴⁶⁷

In this respect, a 2014 US Congressional report stated that the overall total for US apparel exports from Africa is less than \$1 billion, compared to \$30.7 billion from China and \$9.2 billion from Vietnam.⁴⁶⁸ It would appear that reviews on benefits and how countries have made use of them is mixed, because there are industries which report significant growth in numbers, while for others there is still room for improvement. Countries such as Kenya are intending to focus on other areas within their economies which can help them derive more of the benefits that are offered by AGOA.⁴⁶⁹ This will see the Act further entrenched within Africa.

4.3 General operation of the AGOA in Africa

In the opinion of US officials, AGOA has encouraged investment and job creation in Africa.⁴⁷⁰ However, after six years into operation, there was no consensus on whether AGOA had contributed to African development and economic growth.⁴⁷¹ Although there are some African countries⁴⁷² that have been able to attract foreign investment while increasing production and exports, most have not been as successful.⁴⁷³ For instance, the provisions enshrined under section 104 are arbitrary to African countries because they require submissiveness to the US, in addition to challenges⁴⁷⁴ arising from implementing WTO agreements.⁴⁷⁵ As a result, African governments have abandoned social safety nets through cutting down on basic social services and the reduction of domestic food production.⁴⁷⁶

However, case studies show that the textile industries of Kenya and Lesotho have derived benefits from these industries and form a part of AGOA which has affected trade positively in these countries.⁴⁷⁷ With the beginning of AGOA, trade between the US and Kenya saw an upswing in trade activity. However, soon thereafter, with the expiry of the Multifibre Agreement (MFA),⁴⁷⁸ there was a downturn.⁴⁷⁹ Kenya's largest trade concentration under AGOA is apparel, with fresh fruits and nuts and cut flowers

⁴⁶⁷ Department of Commerce, Office of Textiles and Apparel (OTEXA) Summary of AGOA textile and apparel provisions at OTEXA. Available at <http://otexa.ita.doc.gov>, accessed on 17 December 2018.

⁴⁶⁸ B Williams 'African Growth and Opportunity Act (AGOA): Background and Reauthorization', *Congressional Research Service*, 22 April 2015. (2015) 9.

⁴⁶⁹ Kenya looks beyond apparel to double earnings from AGOA. Available at <https://agoa.info/news/article/15528-kenya-looks-beyond-apparel-to-double-earnings-from-agoa.html> accessed on 17 October 2018.

⁴⁷⁰ Ojione note 392 46.

⁴⁷¹ McCormick note 376 361.

⁴⁷² South Africa, Kenya, Lesotho, Ghana, Mauritius, Namibia, Ethiopia, and Cameroon.

⁴⁷³ Ismail note 397 530.

⁴⁷⁴ High tariffs on selected products ('tariff peaks') in important markets that continue to obstruct their important exports. Examples include tariff peaks on textiles, clothing, and fish and fish products and tariff escalation where an importing country protects its processing or manufacturing industry by setting lower duties on imports of raw materials and components, and higher duties on finished products.

⁴⁷⁵ Mushita note 409 17.

⁴⁷⁶ Ibid. 18.

⁴⁷⁷ Zappile note 404 48.

making up the rest of the total.⁴⁸⁰ Of late, Kenya is looking beyond apparel to increase its earnings under AGOA and will attempt to boost processed food, coffee and tea exports to achieve this.⁴⁸¹

Lesotho was producing apparel in great numbers in February 2006, when over two million pairs of jeans and six million knitted garments were being exported for US brands and retailers,⁴⁸² with growth having been between \$50 million dollars in 1996 to \$456 million in 2004, generated through apparel workers.⁴⁸³ Lesotho has also seen significant job growth in the economic sector as a result of duty-free treatment, with jobs increasing from 19 000 in 1999 to 45 700 in June 2011.⁴⁸⁴ Furthermore, in 2013, countries such as Kenya, Lesotho, Ghana, Mauritius, Namibia, Ethiopia and Cameroon had exports exceeding the \$100 million threshold of apparel, which made up less than 1 percent of the total US imports.⁴⁸⁵

African countries receive funding from the US Agency for International Development (USAID) and the Millennium Challenge Corporation fund (MCC).⁴⁸⁶ The MCC assists the USAID by creating the African Competitiveness and Trade Expansion (ACTE) and with its annual budget of \$30 million has created three African Trade Hubs in Ghana, Kenya and Botswana intended to help support capacity building towards AGOA beneficiaries' exports into the US.⁴⁸⁷ Earlier in the negotiations for reauthorisation there was an introduction by Senators Jim Inhofe and Chris Coons of the African Free Trade Initiative Act which would work in conjunction with the MCC and USAID to implement objectives set by the president under the FTA, which included a mechanism of how to negotiate and enter into FTAs with SSA countries.⁴⁸⁸ Thus far a list has been compiled as instructed by Congress which includes countries that would be interested in the formation of a FTA; however, there continue to be reminders of the failed attempt with SACU in 2003.⁴⁸⁹

⁴⁷⁸ This was a framework for bilateral agreements or unilateral actions that established quotas limiting imports into countries whose domestic industries were facing serious damage from rapidly increasing imports.

⁴⁷⁹ M *Impact of AGOA on the Textile Industry in Kenya* (2010) African Cotton & Textile Industries Federation 28.

⁴⁸⁰ Naumann note 1 21.

⁴⁸¹ Kenya looks beyond apparel to double earnings, 30 September 2018. Available at <https://agoa.info/news/article/15528-kenya-looks-beyond-apparel-to-double-earnings-from-agoa.html>, accessed on 17 October 2018.

⁴⁸² These brands and retailers included GAP, Wal-Mart, Levi Strauss and Jones Apparel.

⁴⁸³ K E Noble 'The Complete Guide to Understanding the U.S.-sub-Saharan African Trade Relationship: Analysis and Opinions on the Ghanaian Implementation of the African Growth & Opportunity Act (AGOA)—A Case Study' (Unpublished Doctor of Philosophy dissertation, Miami University) (2006) 50.

⁴⁸⁴ Williams note 468 13.

⁴⁸⁵ Ismail note 397 531.

⁴⁸⁶ Williams note 468 8.

⁴⁸⁷ *Ibid.* 8.

⁴⁸⁸ International Centre for Trade and Sustainable Development (ICTSD). 'US Senators Introduce Amendment to Enter Reciprocal Trade with African Countries', 27 May 2015. Available at <http://www.ictsd.org/bridges-news/bridges-africa/news/us-senators-introduce-amendment-to-enter-reciprocal-trade-with>, accessed on 22 October 2018.

⁴⁸⁹ United States Trade Representative (USTR), 'Remarks by Ambassador Froman and the Beyond AGOA Hearing', 28 January 2016. Available at

Even though under AGOA there are extensive rights and benefits to multinational corporations operating in the African continent, there is no guarantee that workers and businesses will benefit from expanded trade, with no protection for the environment either.⁴⁹⁰ Further areas for concern are that there is no technology sharing between participants and the US. There is a relationship of give-and-take where the US decides what it deems to be suitable to give or share, which leaves potential for the exploitation of African countries.⁴⁹¹

4.4 AGOA and South Africa

South Africa, a developing African country, is arguably the largest exporter of various products to the US, especially those falling under the non-oil category.⁴⁹² This had helped SA to increase its exports in high-value growth sectors in the SA economy. These include automobiles, chemicals and agricultural products, which include citrus, macadamia nuts and wine.⁴⁹³ A little over 10 years ago SA was responsible for more than half of the US imports from eligible countries.⁴⁹⁴ There was a trade surplus of over \$2.7 billion, with exports from the US to SA exceeding those of any other country, which indicated the interest of gaining access to the market in SA.⁴⁹⁵ The most significant exports under AGOA from SA are gold, silver and precious metals.⁴⁹⁶ However, things have somewhat changed since SA's exports mostly consisted of minerals and metals, with no agricultural products exceeding the R100 million threshold.⁴⁹⁷ In 2004 SA accounted for 18 percent of agricultural export produce from the whole African continent.⁴⁹⁸ Further, the main agricultural exports to the US for the year 2014 were oranges, wine and macadamia nuts to the values of \$41, \$33 and \$31.8 million respectively.⁴⁹⁹ This is a long way to come from the time when the US put in place high MFN tariffs in order to suffocate agricultural imports from SA.⁵⁰⁰

Since the year 2000 and up until 2014, SA was able to double the value of exports to the US. These reached \$8.27 billion, of which 40 percent were listed as beneficiaries under AGOA and the GSP preferences.⁵⁰¹ According to Carim, approximately 62 395

<https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/January/Remarks-Ambassador-Froman-Beyond-AGOA-Hearing>, accessed on 22 October 2018.

⁴⁹⁰ Mushita note 409 19.

⁴⁹¹ Ibid.

⁴⁹² JB Cronje 'US suspends SA's AGOA benefits' (2015) *tralac* 1.

⁴⁹³ Williams note 468.

⁴⁹⁴ B Tadesse & B Fayissa 'Assessing the Impact of Development Cooperation: The Case of African Growth and Opportunity Act (AGOA) and U.S. Imports from Sub-Saharan Africa' (2007) *A Department of Economics and Finance Working Paper Series* 15.

⁴⁹⁵ Noble note 483 50.

⁴⁹⁶ EFA Cooke 'A skeptic's view of the AGOA preferences of the USA: A propensity score matching approach' (2012) *Munich Personal RePEc Archive* 39.

⁴⁹⁷ M Stern and N Netshitomboni 'AGOA, Africa and Agriculture South Africa's Experience' (2004) *SAIIA Trade Policy Report No. 3* 5.

⁴⁹⁸ Ibid. 1.

⁴⁹⁹ Cronje note 492 1.

⁵⁰⁰ Stern & Netshitomboni note 497 7.

⁵⁰¹ S Mafu 'Has South Africa been handed a poisoned chalice? Assessing the legal implications of the African Growth and Opportunity Act (AGOA) for South Africa's trade policy.' (Unpublished LLM thesis, University of Pretoria) (2016) 15.

jobs were created directly or indirectly from AGOA, and it thus plays a critical role in South African jobs and its objective to industrialise further.⁵⁰² SA has been able to utilise AGOA effectively and is one of the few beneficiaries which have managed to diversify exports to the US.⁵⁰³ A huge contributing factor to this is that SA enjoys a special advantage over a majority of the goods that are covered in AGOA.⁵⁰⁴ Also, SA is the first country to undergo a special out-of-cycle review because of the concern that was raised in relation to eligibility requirements provided for under section 104(A) of AGOA. This was partially a result of the AD duties that were imposed by SA on US poultry products intended for SA.⁵⁰⁵ This was specifically provided for under subsection 3(E) titled 'Sense of Congress', which led to the out-of-cycle review.⁵⁰⁶

It was suggested as recently as September 2015 by the US Congress that SA has a large and well-developed economy and should therefore graduate from being under the AGOA.⁵⁰⁷ This was a view suggested during the reauthorisation negotiations by African trade expert Whitney Schneidman, who went as far as suggesting a reciprocal trade agreement should be preferred instead.⁵⁰⁸ This was partially due to the fact that in 2013, with the exception of the oil exports, SA had the largest exports to the US, which amounted to \$8.1 billion, with AGOA being responsible for \$3.1 billion including GSP.⁵⁰⁹ Another contributor to this notion held by the US is the trade relationship SA has with the EU through the Trade and Development Cooperation Agreement, where SA reduced its tariffs *vis-à-vis* the EU.⁵¹⁰ Furthermore, SA's relationship with BRICS (Brazil, Russia, India, China, South Africa) nations may also have contributed to the recent actions of the US. The US was of the opinion that it has the right to request terms that are favourable to it because the European Preference Agreements (EPAs) that African countries have entered into are similar to what it is seeking, and it has submitted a list of 387 products' tariff lines where it feels the EU has the upper hand.⁵¹¹

Furthermore, AGOA identifies several industries which include natural resources, automotive, chemical and agricultural products.⁵¹² SA is considered as a middle-income market with 'well-developed financial, legal, communications, energy and transport sectors and a stock exchange that is the 15th largest in the world'.⁵¹³ In

⁵⁰² X Carim Don't let chicken wars get in the way of AGOA, 25 March 2014 *Business Day* (2014). Available at <https://agoa.info/news/article/5382-don-t-let-chicken-wars-get-in-the-way-of-agoa-south-africa.html>, accessed on 15 February 2019.

⁵⁰³ Mafu note 501 16.

⁵⁰⁴ Noble note 483 52.

⁵⁰⁵ Mafu note 501 13.

⁵⁰⁶ Ismail note 397 534.

⁵⁰⁷ *Ibid.* 528.

⁵⁰⁸ Scheidman & Lewis note 377 4.

⁵⁰⁹ Ismail note 397 531.

⁵¹⁰ *Ibid.* 540.

⁵¹¹ Williams note 468 16.

⁵¹² Prinsloo note 4.

⁵¹³ Trade Profile. Available at <https://agoa.info/profiles/south-africa.html>, accessed on 22 October 2018.

2003 the South African automobile industry was thriving under AGOA as it increased sixteen-fold with the creation of 15 000 jobs.⁵¹⁴ Other industries are cosmetics, plastics, textiles, trucks and agricultural machinery where the US faces a threat in goods from the EU that are found in SA's markets.⁵¹⁵

The different sectors of SA's industries are divided into portions the size of which is determined by their Gross Domestic Product (GDP). They are as follow:

- The mining sector employs a greater number of workers than all other sectors and is the 5th largest contributor to the GDP.⁵¹⁶
- The manufacturing sector makes up 14 percent of the GDP and is the 4th-largest contributor to the economy. Goods produced consist of processed food, textiles, electronics, chemicals, technology, and automobiles. Automobiles make up 12 percent of this sector and contribute 6,7 percent to the GDP. 29 percent of manufacturing companies produce for the automobile industry while also being responsible for 84 percent of all motor vehicles produced in Africa. The sector produces both parts as well as completed motors cars, while employing 300 000 people. Cars are the second most exported products making up 7.6 percent of all products at \$5.23 billion.⁵¹⁷
- The export economy is the 33rd largest in the world with the US being the second largest export destination, with totals reaching \$5.47 billion. The largest export category is mineral products at \$14 billion, with refined petroleum consisting of 2.4 percent of all exports at \$1.65 billion.⁵¹⁸

⁵¹⁴ Noble note 483 50.

⁵¹⁵ Scheidman & Lewis note 377 25.

⁵¹⁶ 'The biggest Industries in South Africa' 16 May 2018. Available at <https://www.worldatlas.com/articles/the-biggest-industries-in-south-africa.html>, accessed on 22 October 2018.

⁵¹⁷ 'The biggest Industries in South Africa' note 516.

⁵¹⁸ Ibid.

4.5 Recent issues involving South Africa and the United States

As with every interaction involving countries and the exchange of goods, or relations between them or even diplomacy, there are bound to be disagreements. The reauthorisation of the AGOA saw the resurgence of matters which appeared to have been dealt with – such as the chicken dispute.⁵¹⁹ These and other issues are either a result of AGOA or are initiated due to the effect that they might have on the agreement in the long run. In particular, these issues involved, the chicken AD (anti-dumping) duties (as mentioned above), the new steel provisions and aluminium provisions as well as the recent expropriation of land without compensation motion which was passed as a resolution at a recent 54th African National Congress (ANC) National Conference which was held at Nasrec Expo Centre in December 2017.⁵²⁰

First, the poultry dispute between SA and the US stretches back to the inception of AGOA with the then Board on Tariffs and Trade (BTT),⁵²¹ now known as the International Trade Administration Commission of South Africa (ITAC),⁵²² imposing anti-dumping duties on poultry products from the US.⁵²³ This was the result of a petition filed by the South African Customs Union (SACU)⁵²⁴ representing the poultry industries of these countries on their behalf by Rainbow Farms (Pty) Ltd.⁵²⁵ There was an allegation that there was a dumping of 'brown meat'⁵²⁶ and that it was being sold below the US market price.⁵²⁷ There was an investigation initiated by the BTT where US poultry exporters Tyson Foods, Boston Agrex and Gold Kist were invited to decipher the provided information and a preliminary determination found that dumping had indeed taken place and therefore preliminary AD duties were imposed on the US.⁵²⁸

This, in retrospect, is responsible for the tension between SA and the US which recently arose during the renegotiation and reauthorisation of AGOA.⁵²⁹ The argument raised by Senators Coon from Delaware and Isaakson from Georgia

⁵¹⁹ The US had for the duration of the AGOA agreement complied with the AD duties imposed on them regarding chicken exports to SA, however the reauthorization negotiations saw this issue being raised again as non-compliance with provisions of the Act.

⁵²⁰ 54th ANC National Conference Report and Resolutions. Available at http://www.anc.org.za/content/54th-national-conference-report-and-resolutions-0_ accessed on 14 November 2018.

⁵²¹ Established in 1986.

⁵²² Established on 1 June 2003 by schedule 3A public entity established in terms of the international trade Administration Act 71 of 2002.

⁵²³ Oluyeju & Mafu note 7 47.

⁵²⁴ SACU consists of Botswana, Lesotho, Namibia, SA, and Swaziland.

⁵²⁵ Oluyeju & Mafu note 7 47.

⁵²⁶ Brown meat consists of chicken leg quarters, thighs and backs.

⁵²⁷ BTT Report no 4088 'Investigation into the Alleged Dumping of Meat of Fowls of the Species *Gallus Domesticus*, originating in or imported from the United States of America (USA): Final Determination' (2000) 3.

⁵²⁸ Oluyeju & Mafu note 7 47.

⁵²⁹ G Erasmus 'Some bigger picture implications of South African trade policies' (2014) *tralac*. Available at <https://www.tralac.org/discussions/article/5354-some-bigger-picture-implications-of-south-african-trade-policies.html>, accessed on 16 October 2018 2.

respectively was that SA was benefiting from AGOA and maintaining trade barriers (AD) against US imports.⁵³⁰ Because of these contentions, SA was included under strict terms,⁵³¹ subject to a special review.⁵³² The review came to the conclusion that SA was in breach of the eligibility requirements and had to remove the AD duties before January 2015 or suffer the consequences of losing preferential tariff rates on eligible agricultural products. This subsequently was the case and the products were suspended from 15 March 2015.⁵³³ What is interesting to note here are the methods used by the US not to make use of the WTO's dispute settlement mechanism and to wait instead until the renegotiations for reauthorisation to raise this issue.⁵³⁴ This was followed by renegotiations where an agreement was reached that there would be:

- '1. an annual import quota for US in bone chicken to the scale of 65000 metric tonnes;*
- 2. an annual growth factor as determined by the Department of Agriculture, Forests and Fisheries (DAFF) to be applied to the above quota with effect from 1 April 2017;*
- 3. termination or suspension of the import quota in the event that South Africa's benefits under AGOA are suspended'.⁵³⁵*

Recently, the South African Poultry Association (SAPA) filed an application with the Gauteng Division of the High Court of SA seeking the granting of an order whereby the Minister of Trade and Industry, Rob Davies, was instructed to set aside the implementation of the AGOA because of the steel and aluminium proclamation imposed by President Trump.⁵³⁶ The Minister opposed the application. SAPA is seeking for AD that were initially implemented the first time AGOA was being negotiated to be reinstated and to end the special quota of 65 000 tonnes of bone-in chicken being imported into SA.⁵³⁷ If the application were to be successful it would see a disruption in the operation of AGOA because it is a package deal, and benefits received by other industries will be affected. It is interesting to note that no other industry is supporting this application, especially SA's steel and aluminium exporters.⁵³⁸

⁵³⁰ Oluyeju & Mafu note 7 50.

⁵³¹ The SSA country that is the subject of an out-of-cycle review does not participate in the review process, nor can it challenge the outcome thereof. Also, AGOA does not provide for bilateral consultations, a cooperative process or a dispute-settlement mechanism in the event of an alleged breach by an SSA country. The President is judge, jury and executioner. The factors considered when deciding to terminate that country's eligibility may not necessarily be objective and/or balanced due to this. The decision to withdraw, suspend or limit access to the preferences is unilateral.

⁵³² Section 105(4)(e) of AGOA.

⁵³³ Oluyeju & Mafu note 7 50.

⁵³⁴ S Barber 'Chicken Dispute Unlikely to Scuttle Trade Boon' 20 April 2015. Available at <http://www.bdlive.co.za/business/trade/2015/04/20/chicken-dispute-unlikely-to-scuttle-trade-boon>, accessed on 19 October 2018.

⁵³⁵ Oluyeju & Mafu note 7 50.

⁵³⁶ Erasmus note 529.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

In 2014 iron and steel products were the second largest exports under AGOA, making up 16.5 percent of all non-oil exports where 99 percent of exports under this category in AGOA are attributed to SA.⁵³⁹ Exports to the US of this product are responsible for less than 1 percent of total US imports and 0.3 percent of total US steel demand.⁵⁴⁰ Although minute in the grand scheme of things, these exports account for 5 percent of SA's overall production which is the equivalent of 7500 jobs in the steel value chain.⁵⁴¹

On 8 March 2018, US President Donald Trump issued two presidential proclamations applicable indefinitely to special duties at levels of 25 and 10 percent respectively on imports of different steels and aluminium to the US, which began on 23 March 2018.⁵⁴² The reason is said to be an attempt at supporting the domestic steel and aluminium manufacturing sectors by encouraging them to make use of available production lines to revitalise and sustain their operation in order to ensure greater long-term sustainability, which in turn would serve US security.⁵⁴³ The US President signed a proclamation that granted exemptions to certain countries⁵⁴⁴ until 1 June 2018.⁵⁴⁵ SA attempted to apply for an exemption as well but was denied this after making representations to the US.⁵⁴⁶

As it stands, it appears that SA is the only country that benefits under AGOA that is exporting products that are covered under the proclamation. These proclamations override preferences offered under AGOA and no beneficiaries are exempt.⁵⁴⁷ In 2017 there was no preferential access claimed by products and therefore no direct impact on AGOA. As such, SA still exported \$278 million worth of steel products covered under the standard MFN market access.⁵⁴⁸ However, under aluminium, SA exported \$378 million worth in products to the US, with \$153 million worth of exports obtaining AGOA preferences.⁵⁴⁹ President Trump has stated that this decision is not

⁵³⁹ Naumann note 1 11.

⁵⁴⁰ Ibid.

⁵⁴¹ South Africa's Minister Davies: Steel and aluminium exports to US no threat to national security, 15 July 2018. Available at <https://agoa.info/news/article/15486-sa-minister-davies-steel-and-aluminium-exports-to-us-no-threat-to-national-security.html> accessed on 17 October 2018.

⁵⁴² E Naumann 'Trump's steel and aluminium tariff action: Putting America first?' 7 May 2018. Available at <https://www.tralac.org/publications/article/13008-trump-s-steel-and-aluminium-tariff-action-putting-america-first.html>, accessed on 17 October 2018.

⁵⁴³ Ibid.

⁵⁴⁴ The European Union, Mexico, South Korea, Australia, Argentina, Brazil and Canada.

⁵⁴⁵ L Omarjee 'SA loses out on Trump's steel tariff exemption'. Available at <https://www.fin24.com/Economy/sa-loses-out-on-trumps-steel-tariff-exemption-20180501> accessed on 4 December 2018.

⁵⁴⁶ P Fabricius 'Act of Retaliation: Trump rejects SA's appeal for exemptions to high steel and aluminium import tariffs'. Available at <https://www.dailymaverick.co.za/article/2018-05-02-trump-rejects-sas-appeal-for-exemptions-to-high-steel-and-aluminium-import-tariffs/>, accessed on 4 December 2018.

⁵⁴⁷ Infographic. Available at <https://www.tralac.org/publications/article/13008-trump-s-steel-and-aluminium-tariff-action-putting-america-first.html> accessed on 17 October 2018.

⁵⁴⁸ Infographic. Available at <https://www.tralac.org/publications/article/13008-trump-s-steel-and-aluminium-tariff-action-putting-america-first.html> accessed on 17 October 2018.

⁵⁴⁹ Infographic. Available at <https://www.tralac.org/publications/article/13008-trump-s-steel-and-aluminium-tariff-action-putting-america-first.html> accessed on 17 October 2018.

in any way linked to AGOA but instead is about protecting the United States' national security and their interest as well as position in global trade.⁵⁵⁰

The last contentious issue between the countries involve the recent decision on land expropriation. In this respect, Minister Davies has stated that the US does not plan to strip SA of any benefits in the event that it implements expropriation of land without compensation.⁵⁵¹ Trade union Solidarity, however, believe differently, in that the resolution of the ruling party, the ANC, to expropriate land without compensation could result in a loss of these benefits.⁵⁵² Other experts such as senior analyst on the political economy at Tutwa Consulting Group, Azwimpheleli Langalanga, emphasise that this is unlikely to take place because it did not threaten the national interests of US.⁵⁵³ This matter is a fairly recent issue, having been ratified as a resolution as recently as December 2017.⁵⁵⁴ Despite the limited academic analysis in relation to this matter, commercial industries such as the law firm, Herbert Smith Freehills, have put forward a hypothesis of what could be the outcome of this. They are of the opinion that this approach is a violation of international law and treaties to which SA is a party. Lawyers Peter Leon, Hannah Ambrose and Ernst Müller argue that such an amendment would deter investors from SA.⁵⁵⁵ They cite the burdensome activity of current foreign investors seeking alternative avenues under international law to lessen any potential negative effect land expropriation without compensation might have on their interests.⁵⁵⁶

⁵⁵⁰ G Erasmus 'Trump's Trade War: Are the Brakes Failing?' 27 June 2018. Available at <https://www.tralac.org/blog/article/13196-trump-s-trade-war-are-the-brakes-failing.html>, accessed on 17 October 2018.

⁵⁵¹ R Vollgraaff 'South Africa: 'US confirms it's not using AGOA as leverage over land expropriation'' 5 September 2018. Available at <https://agoa.info/news/article/15518-south-africa-us-confirms-it-s-not-using-agoa-as-leverage-over-land-expropriation.html>, accessed on 17 October 2018.

⁵⁵² Ibid.

⁵⁵³ S Njobeni 'Local union warns South Africa that AGOA eligibility under threat if land expropriation goes ahead' 7 August 2018. Available at <https://agoa.info/news/article/15499-local-union-warns-south-africa-that-agoa-eligibility-under-threat-if-land-expropriation-goes-ahead.html>, accessed on 17 October 2018.

⁵⁵⁴ 54th ANC National Conference Report and Resolutions note 520.

⁵⁵⁵ Njobeni note 553.

⁵⁵⁶ Ibid.

4.6 Conclusion

The importance of AGOA is not to be overlooked in any way, as the above discussion suggests. Thus far, considering the position of African countries, it has been a fairly beneficial agreement for African countries although it can improve in certain areas, particularly the unilateral nature of the Act. One of the reasons this Act came into existence is because the US was looking to compete with the EU and the position it held with regard to trade relations in Africa, in the form of EPAs and, as mentioned above, the TDCA, which it entered into with SA. If the US wants to compete with the EU, it needs to improve or establish a similar or even better relationship and trade terms with African countries. The future of AGOA at the moment is uncertain as it still has seven years to run and there have been suggestions of a transition to a more balanced and reciprocal trade relationship similar to that of the EU.⁵⁵⁷

It would be in the best interests of the US to remain in the position that it currently occupies because it is from there that it has wielded the most influence for centuries. The saying 'power corrupts, but absolute power corrupts absolutely'⁵⁵⁸ comes to mind when viewing the circumstances. When dealings involving the US are examined closely, one is most likely to find an irregular pattern which has gone almost unquestioned for centuries. The US has been for an extended period of time the biggest economy in the world owing to its ability to infiltrate many a nation and exert its influence, often establishing a method of doing things, and entrenching it deeply to such an extent that these countries end up adopting its way of life and suggestions with their becoming the norm. Looking at historical events, Africa seems to be caught in an endless cycle of reliance on its colonisers to be its saviour. By now it should be clear that developed countries are merely continuing their agenda, except that now it is no longer as blatant as it previously was.

The discussion on SA and the US has revealed a different side to the intentions of the US. As per the discussion, it is clear that SA still going to be face ample upheavals. As a side note, the actions of the US are based rather on political than economic substance. Having provided this detailed discussion on AGOA, the US and Africa, with particular focus on SA, the final chapter will provide some recommendations.

⁵⁵⁷ Ismail note 397 540.

⁵⁵⁸ Quote from historian and moralist Lord Acton, who expressed this opinion in a letter to Bishop Mandell Creighton in 1887.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

Even though we should forgive, we should never forget that...

US President Bill Clinton once said:

*'The lines between our [US] domestic and foreign policies have increasingly disappeared – that we [US] must revitalize our economy if we [US] are to sustain our military forces, foreign initiatives, and global influence, and that we must engage actively abroad if we are to open foreign markets and create jobs for our people.'*⁵⁵⁹

5.1 Introduction

The main objective of this research was to discuss the extent to which the United States of America (US) wields influence in Africa, more particularly in respect of AGOA, and the extent to which this affects African countries that enter into the AGOA agreement, with particular reference to South Africa (SA). This was done through a discussion of topics such as to what extent development has been a factor in the multilateral trading system, the history of the relations between the US and SA, and a general overview of the operation of the AGOA in Africa and SA – especially with regard to its reauthorisation. The inspiration for this study was the procedure and outcome of the reauthorisation negotiations, which resulted in a 'special out-of-cycle review' that saw SA remove anti-dumping (AD) duties that it had imposed on poultry imports from the US at the inception of the Act.⁵⁶⁰ These factors prompted the question as to when developing countries will be able to emancipate themselves from the remnants of colonial rule? This could help developing countries to determine their own future on their own terms.

To put the matter into context, the study identified particular research questions that assisted in determining the extent to which development has been a factor in trade-related negotiations, with particular focus on the position of African countries that form part of Sub-Saharan Africa (SSA). Thus, against this background, this final chapter will first discuss the main findings of the relevant chapters and will thereafter provide some recommendations.

⁵⁵⁹ Obua note 378 68.

⁵⁶⁰ Chapter 4: The AGOA and the Overall Implications in Relation to African Countries, 14.

5.2 Findings

The findings of the dissertation are revisited in this section chapter by chapter. This section will state the findings of each of the chapters under their respective headings.

5.2.1 Chapter 2

In this chapter the study focused on the origins of the GATT and the WTO with a focus on the extent to which development has been the focus of developing countries. As discussed above, development was a key concern of this study and this chapter found that it has remained a topical issue for decades, ever since the establishment of organisations that formulate strategies intended to resolve global issues. While reading for the chapter, it became clear that in international trade, diplomacy plays a significant role, as it provides an alternative to previously unsuccessful approaches, such as war. Through diplomacy, all relevant stakeholders can voice their concerns in a manner that is intended to place all parties on an equal footing. However, this chapter also identified that the underlying fabric in forums that host trade negotiations between developed and developing countries is economic, political and generational power, which dictates at which end of the totem pole members tend to lie.⁵⁶¹

The chapter further found that inequality in international trade relations has been present for decades. This can be seen, for instance, through those countries which are usually at the forefront of big global events.⁵⁶² This chapter included the negotiation in relation to the creation of institutions, the ending of the World Wars and the Great Depression, among others.⁵⁶³ The chapter also found that developed countries wield influence that affects many of the world's countries because of the various interests within them. The chapter illustrated that it is from these positions that it can be 'established' that developed countries influence proceedings considerably. This chapter also highlighted that at times, developing countries would form coalitions with developed countries, sometimes negotiating against their own interests to garner possible reciprocal favour in the future and neglecting countries in similar positions to themselves.

Furthermore, the chapter found that with diplomacy having become the established practice, it is inevitable that developed status will remain among a select few developed countries, while developing countries will be hampered by the continuous delays and the proverbial 'shifting of goal posts' as well as targets. What is of great concern is that it became apparent that at this rate, developing countries will remain

⁵⁶¹ Van Grastek note 31 43.

⁵⁶² Examples of these include the World Wars, negotiation of the International Trade Organisation (ITO), formation of the League of Nations and the subsequent UN.

⁵⁶³ Chapter 2 Development in The Multilateral Trading System, 1–2.

on the back foot and on an unlevel playing field if proceedings involving trade and negotiation, which indirectly affect development, remain as they are. These concerns were proved when this chapter found that during the negotiation rounds of the GATT, for example, the number of rounds that took place as well as the time periods between them illustrated what a lengthy process this can be. Also, the issues discussed are vast and vary across a wide spectrum of each country's position which often lengthens proceedings, although this is assisted by the formation of coalitions and partnerships. As such, the tactics and strategies utilised by developed countries are often based on the above-mentioned factors of economic and political power and tip the scales in favour of those who wield this to a greater degree. All of this laid the foundation for unequal standing, the leveraging of developing countries to the will of the developed countries, as well as the proliferation of least developed and developing countries' current economic position as the reauthorisation negotiations for AGOA illustrated. Ultimately chapter 2 found that institutions such as the WTO are concerned only with the challenges of developed countries because of the continued struggle developing countries have in implementing the policies formulated towards their development.

5.2.2 Chapter 3

Chapter 3 provided an overview of the trade relationship between SA and the US with focus on the dynamics in the trade relations between the countries during the apartheid regime and how these dynamics affected the current position as well as how the US adjusted to SA's position after 1994. This was to show the pattern that the US has always operated in the way it currently does. Therefore, when they present legislation such as AGOA, these should be viewed with a certain level of scepticism.

Continuing from chapter two, chapter three discussed a regime that previously thrived as a result of oppression and confirmed that similar patterns in trade have emerged throughout history. Again, the chapter reaffirmed that apartheid is an atrocious crime the role of which continued the trend of inequality responsible for the success and progression of certain select groups. The apartheid regime was supported by a wide variety of developed countries because of how it benefited their economies. This chapter showed that countries that were participating in apartheid trade relations were also the same countries who eventually supported calls for sanctions, albeit after a substantial delay in taking this step, a step of which the US formed a part. What was also found in this chapter is that the only way that effective change can take place is through paradigm-shifting events. This is the opposite of what is being promoted as the purpose of global organisations that attempt to resolve the world's issues.

Interestingly, the chapter found that there were initiatives introduced at every turn by developing countries that were billed as the answer to SA's apartheid challenges, but these did not result in the desired effect. For example, it took mass demonstration in

the US through picketing by organisations⁵⁶⁴ where South African goods were to be unloaded;⁵⁶⁵ sanctions on SA's products, services and goods;⁵⁶⁶ and absolute necessity on the part of countries with economic interests in SA that were being affected negatively by sanctions to bring to a halt one of the most brutal and dehumanising experiences in human history. The chapter found that apartheid played a significant role in the position in which SA finds itself in today. It created a system of separation that still has remnants and knock-on effects to this day. Like the AGOA, the US states that it is for the benefit of SSA countries and its operation is meant to effect change; but thus far it has done little, or not enough, of what it was intended to do. Of much greater concern, this chapter identified that economic interests and the self-interest of a select few developed countries end up being prioritised, while developing countries such as SA and least developed countries which are part of AGOA must find a way to work around this after having put faith in individuals who were expected to represent their interests.⁵⁶⁷

This chapter recognises that trade is a piece of the overall puzzle as it is the basis for the economic reality of most countries. Although developed countries might be in much suitable positions due to the demand of the products and services they render, this should not be an indicator of superiority that can be leveraged in their favour. The chapter found that SA has most of its infrastructure, markets and institutions because of the apartheid era, which is why it was for a long time the most developed economy in Africa.⁵⁶⁸ It can be argued that being leveraged stems from foreign interests which have considerable investments in SA, and have partially contributed to the development of sectors which in turn further support their interests, and most likely will see them do all they can in order not to lose or have them negatively affected. This study found that such signs of this appeared as early as during the *Treatment Action Campaign* (TAC) case.⁵⁶⁹ The study found further that it was only resistance during the Free Trade Agreement (FTA) negotiations with the South African Customs Union (SACU) countries voicing their concerns on various topics which ultimately led to unsuccessful negotiations.⁵⁷⁰ Seemingly there is strength in numbers when negotiating with a country considered to be a superpower.

5.2.3 Chapter 4

Having laid the foundation for the discussion, chapter 4 sought to focus on aspects in relation to AGOA in order to determine to what extent its influence has had on trade relations between SA and the US. Ultimately, the research sought to discuss whether trade relations between SA and the US have been beneficial towards

⁵⁶⁴ The American Committee on Africa (ACOA), the National Association for the Advancement of Coloured People (NAACP) and the Congress on Racial Equality (CORE).

⁵⁶⁵ Chapter 3: Overview of The Trade and Political Relations Between South Africa and The United States of America, 6.

⁵⁶⁶ Ibid. 5.

⁵⁶⁷ Mafu note 501 13.

⁵⁶⁸ Chapter 3 note 565 3.

⁵⁶⁹ Ibid. 13.

⁵⁷⁰ Ibid.

development on the African continent through the implementation and operation of the AGOA. The study identified issues that needed addressing to shift the position of developing African countries, which will be discussed below. Inequality in international trade is still prevalent in the modern era and is still a huge factor that contributes to perpetuating the existing status quo. The study found that although the intention may often be altruistic, the implementation and results thereof can be disheartening, especially in terms of redress to prevent potential exploitation. This study shows that impressive statistics are often reported, but a closer look shows that equal standing is somewhat askew. As such, the study found that Institutions and organisations such as the UN and WTO are intended to perform objectively but sometimes, they also fall prey to the power of developed countries. This study found that loopholes exist in international trade processes the world over, but these are intentionally exploited instead of being addressed accordingly.⁵⁷¹ For example, the study highlighted that the US supported the SA apartheid regime but at the dawn of democracy offered another form of subjugation which came in the form of aid to show its supposed good will, which the study found was nothing but another tactic to secure its own economic interests and further strengthen them.

This study also found that features of the AGOA such as the eligibility requirement should be unnecessary for participation in trade as it promotes exclusion from the onset.⁵⁷² This further grants powers to the US and enables it to dictate further the course of events which indirectly causes division among developing countries in Africa. This continues the trend of seeking approval from previous colonisers for matters that affect African countries. Eligibility that is determined by a foreign country is an ominous exercise as it creates the opportunity to exploit developing African countries with vast resources which are often coveted by developed countries. In addition, requiring nations with different needs and objectives to adhere to a particular set of requirements contradicts the intention of assisting with development because development should not be restricted to the extent in which it benefits only one or a few parties.

The study further found that what AGOA seems to give with one hand it takes away with the other, because not all countries involved in the agreement are able to attract foreign investment.⁵⁷³ Thus, a country that has comparative advantage over the products and services of the US will attract peak tariffs in order to avoid disrupting the important exports of the US.⁵⁷⁴ Furthermore, an importing country such as the US, for example, would protect its manufacturing industries through lowering duties on imports of raw materials, and higher duties on finished products.⁵⁷⁵ This would in turn see fewer benefits for the manufacturing country as in some instances, this could result in trade deficits.⁵⁷⁶ Additionally, there is no guarantee in benefits towards

⁵⁷¹Chapter 3 note 565 4.

⁵⁷² Chapter 4: The AGOA and the Overall Implications in Relation to African Countries, 6–7.

⁵⁷³ Ibid 11.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

workers and businesses that are a result of expanded trade. The US now also seeks payment from beneficiaries for preferences under the newly reauthorized AGOA, which removes the position of accountability for perpetuating colonial rule under which the US had first entered the AGOA.

This study further found that the stance of the US that the AD duties imposed on it by SA were not in line with the eligibility requirements for the AGOA enables its increased control in trade relations between these two countries.⁵⁷⁷ This is a result of the new legislation which gives power to the United States Trade Representative (USTR) to Act in the interest of lobby groups that can petition the President of the US regarding concerns about an AGOA beneficiary entering into an agreement with a third party that conflicts with the economic interests of these parties.⁵⁷⁸ This study found that the ability to create such mechanisms gives further leverage to US companies and organisations with interests on the African continent.⁵⁷⁹ It also creates further tension as opposed to harmonic co-operation regarding trade relations and serves as an indicator in which direction relations between Africa and the US are headed.

This chapter further found that the US is insistent on the negotiation of FTAs as it has made provision for them in the reauthorised AGOA of 2015.⁵⁸⁰ The US has never been comfortable with the idea of granting preferences, as far as back as negotiations for the General Agreement on Tariffs and Trade (GATT) in 1947.⁵⁸¹ The reauthorised AGOA states that the first opportunity available to negotiate reciprocal FTAs will be taken because of the progress made by the European Union (EU) with regard to European Preference Agreements (EPAs) with African countries and sub-regions.⁵⁸² The US is also threatened by emerging markets, especially that of China, and has instructed the USTR to oppose these specifically, further illustrating the intention of maintaining a foothold in its position rather than contribute to the development of lesser countries.

The study ultimately found that AGOA is a contradictory piece of legislation the fabric of which is arbitrary towards African countries.⁵⁸³ This is illustrated by the existence of inequality in the trade relationship between the US, SA and African states as a whole because of historical events that have shaped these countries. The interests of the US are at the forefront of its operations and any other agenda comes second to this. This was illustrated in the way in which it conducted itself during the reauthorisation negotiations with SA. The AGOA does not assist African participants with development but instead increases how it can better position itself prior to assisting with development. Ultimately, the chapter found that the US intends to

⁵⁷⁷ Chapter 4 note 572 17.

⁵⁷⁸ Ismail note 397 539.

⁵⁷⁹ Ibid. 534.

⁵⁸⁰ Chapter 4 note 572 12.

⁵⁸¹ Ismail note 397 539.

⁵⁸² Chapter 4 note 572 14.

⁵⁸³ Ibid. 11.

increase the strength of its position further as it sees other leading countries in a more suitable position than itself.

5.3 Recommendations

Although the intentions of developed countries are portrayed as being altruistic and beneficial towards developing countries, the evidence at times suggests the contrary. Reports of increased revenue, growth in various industries and employment opportunities indicate positive progress, but the cost seems to be the marginalisation of a country's sovereignty.⁵⁸⁴ Unilateral trade agreements to a certain extent limit this because their nature is such that the provider of benefits tends to determine the way in which they operate. For instance, AGOA members must adhere to the provisions of the Act without question or query and have no remedy available if the Act is arbitrary towards them. Furthermore, its presentation is misconstrued as its operation is contrary to the provisions on these aspects. This seemingly continues the status quo even though it is in a somewhat subtle manner. Therefore, questions such as: 'How can development be to the satisfaction of only one party when there are multiple stakeholders involved?' and 'How do developing countries such as SA emancipate themselves from the circumstances under which they find themselves?' arise. This section suggests/presents recommendations which could address these problems, identified in the research.

5.3.1 A new development strategy

Thus far there have been incremental steps taken to ensure that the position of dependency of developing countries on developed countries changes as academics and authors have put forward their own suggestions.⁵⁸⁵ What is key is that development should be constantly, relentlessly and continually pursued, albeit under circumstances more suitable for the development of African countries, especially for developing countries. Development begins from the bottom up with individuals and not from the top of institutions downwards. An alternative approach could be beneficial in this case because it is often simpler (in relation to the task) and more effective to convince smaller groups of institutions such as regional and local governments and communities of developing countries to pursue a certain path than it would be to attempt to influence millions of people at once. In lieu of this, the study recommends that Institutions such as the WTO should consider empowering communities through targeted initiatives that address shortcomings in relation to trade as a start to effecting change on a larger scale. This approach will therefore influence African governments via individuals and communities as opposed to having states being influenced by developed countries and having to implement policies and legislation based on such influence. What should be the ideal circumstance is objective and balanced trade where challenges and benefits are treated alike, which has not been the norm thus far.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ngang note 167; Lehloenyia & Mpya note 191.

5.3.2 Role of stakeholders along with the private and public sectors

As identified in the chapters, stakeholders such as corporations are central to the process that involves trade relations as they produce and manufacture the goods and services that are bartered with other countries. Most would have to alter the way they operate for a more strongly all-encompassing and beneficial outcome, with businesses in the private sector shifting from the sole purpose of making profit and moving towards incorporating reinvestment and community building initiatives. In recent times corporate social responsibility/investment (CSR/I) has become fundamental for businesses as this is how they measure their socio-economic impact on communities.⁵⁸⁶ This requires SA's businesses to dedicate a certain portion of their operations and profits to 'giving back' to communities through initiatives that are beneficial and would be self-sustainable long after the business is no longer involved. Reinvestment in communities should be a crucial requirement in gauging how effective trade operations are on a larger scale. This effectiveness can be monitored through periodic or continuous assessments to measure progress by a new institution that will deal directly with reinvestment. Reinvestment should be a requirement between trading countries, especially if it is between a developed and a developing country. Developed countries should reinvest a portion of their profits in improving the industry in which they are trading with developing countries to get it to a world-class standard or one like that of a developed country.

Where targets are not met or irregular conduct involving underhand proceedings takes place between countries and communities, sanctions and fines should be issued to transgressors. This would be conducted through the WTO's committee on budget, finance and administration together with the Committee on Trade and Development.⁵⁸⁷ These institutions would be dealing with reinvestment, where all corporations and countries involved in trade are required to pledge a certain percentage of their profits back into communities. Where reinvestment takes place will be determined by the institution through research and statistics, but most importantly will consult communities at grass roots-level about their needs. The institutions will function as a link between communities, countries and the WTO and will need all stakeholders to co-operate. This will aim to help developing African countries to have a mandate to follow that relates to them directly when negotiating trade. Deviating from it will mean deviating from development.

⁵⁸⁶ MdH Kabir, J Mukuddem-Petersen, MA Petersen 'Corporate social responsibility evolution in South Africa' (2015) 13(4) *Problems and Perspectives in Management* 281.

⁵⁸⁷ Committee on Budget, Financing and Administration. Available at https://www.wto.org/english/thewto_e/cbfa_e/cbfa_e.htm, accessed on 24 February 2019.

Essentially, this recommendation involves many aspects because of the nature of how development is defined. Its all-encompassing nature needs ancillary support from other fields for it to be truly effective. Deterrents to this could be the size and scale at which implementation could take place. This could be overcome by delegating duties to branches of the WTO institutions that will deal specifically with challenges that arise and will form part of the CTD and committee on budget, finance and administration's structures. African government departments along with regional institutions that are relevant to an area/region or to the extent that functions are relevant to an area will interact with the WTO institutions and aim at making operations as seamless as possible. Another challenge under the current reality is that negotiating for such changes to take effect can seem like an endless cycle that sees a return to bureaucracy, which can result in further delays in implementing impactful and potentially life-changing methods. This will regulate the approach of developed countries such as the US to focus not only on their own benefit but also to factor in their developing country trade partners.

5.3.3 Addressing the deficiencies in AGOA

There are ample concerns regarding AGOA. First, the research identified, as mentioned above, that what is lacking in AGOA is a Dispute Resolution Mechanism. Thus, the study recommends its creation and operation, which would ensure that countries are not left without the opportunity to challenge overbearing and unjust conduct. It could help to avoid leaving countries in a stagnant or worse-off position than they had been in prior to entering into the agreement. The WTO already provides for this mechanism, but the nature of the AGOA is that the President of the US is the 'commander in chief' along with petitioners in the form of US lobby groups and business interests which form the chain of command.⁵⁸⁸ It seems with the reauthorisation that this will remain intact until the expiration of this Act. If the US is willing to put mechanisms in place such as biennial trade reviews and monitor them to an extent that ensures its interests are met, it can also make provision which will in turn ensure that this takes place in a constructive manner which benefits participating countries. Perhaps the overall aim of trade relations and all forms of interaction with other countries should be human advancement and benefit on a larger scale as the barometer for whether the outcome is successful. This aspect seems not even to have come up in the discussions at all, while these provisions have been described as the underlying aim in order to achieve human advancement and meaningful benefit to developing countries.

It has also been mooted that the creation of reciprocal terms can be the solution to alleviate some of the challenges that developing countries face. However, this approach is impractical as not all African countries are at the stage where they can reciprocate, and they are dependent on these 'special terms' that allow them ample leeway. Most of these suggestions come from the US, which is seeking to fulfil its

⁵⁸⁸ Chapter 4 note 572 5.

own economic ambitions by keeping up with the EU and China. A compromise can be found to negotiate FTAs with countries who feel this would be more suited to their position and needs. There was an instruction to USTR Ambassador Froman by the US Congress as recently as 2016 to compile such a list of countries, but the dark cloud of the unsuccessful negotiations with SACU in 2003 hang over this conversation whenever it is raised.⁵⁸⁹ The argument of the EU having been able to implement FTAs with African countries is a solid argument on the part of the US and could stand it in good stead when revisiting this issue.⁵⁹⁰

5.3.4 Role of regional agendas

As identified in chapter 2, an agenda which seems to be taking responsibility for its own initiatives and future is that of Agenda 2063. African countries can use this as a benchmark when engaging in trade with countries such as the US. The intention of conducting trade with the US or any developed country should be towards the achievement of the aims outlined by Agenda 2063. Identification of pertinent challenges will go a long way to assist in addressing them, which Agenda 2063 does. This comes in the form of consideration of the development dynamics which are in relation to Africa those that involve social and human development. In order to achieve its targets, the agenda includes the premise that understanding the history and current challenges of Africa is crucial to achieving its goals. Agenda 2063 recognises education as a component of this end goal, having identified the low enrolment rates in all three levels of schooling from primary, secondary to tertiary as being at 17.8 percent, 44.1 percent and 7.7 percent respectively in 2011.⁵⁹¹ Education indeed needs accelerated attention as the majority of the population on the African continent is young people. The agenda does a stellar job of identifying the detailed challenges and opportunities that can address the various aspects in which Africa can improve. Strategies to ensure that goals are achieved are the 10-year perspective plans that 'place emphasis on accelerating the implementation of key continental frameworks as' well as fast tracking the integration agenda.⁵⁹² These are the benchmark and standards against which negotiations with developed countries such as the US should be held. If they do not result in solutions that aim to achieve these objectives, then they should be deemed ineffective.

⁵⁸⁹ Ismail note 397 541.

⁵⁹⁰ Chapter 4 note 572 14.

⁵⁹¹ The African Union Commission (AUC): Agenda 2063 note 148 24.

⁵⁹² Ibid. 53.

5.4 Conclusion

The conclusions reached on this topic are drawn from the initial research question of the extent to which development has been the focus on trade relations between SA and the US in terms of AGOA. The research undertaken in this dissertation has served to illustrate that there has not been very much focus on development in terms of this Act, with the common thread revealing that it is mostly self-interest that drives the US. On the other hand, there is a renaissance taking place in Africa which is incrementally influencing the perception that Africans have of themselves. There is a sense of pride in being African and this is shown through initiatives such as Agenda 2063, which aims to build Africa in an image that portrays itself as the potentially wealth-laden continent which it is.

The past trade relations between SA and the US can be the foundation for the direction which determines the future of a country. What can be said about Africa is that regardless of all the adversity it has faced and continues to face, it seems to keep rising continuously. This indicates the immense potential of things to come as we further develop and realise that we need one another more than before. As a continent we can certainly achieve more. With the continued forces such as the US that seem to prefer keeping Africa in the position it previously was and is in, it is seemingly a matter of time that true intentions come to light in African countries. This should not deter Africans and its partners from working towards the realisation that we are what we need.

With that said, every cloud has a silver lining and it is hoped that as we progress and evolve further in every aspect, the dignity and development of countries who are in need of it should take centre stage as the most important consideration, as opposed to putting economy and power at the forefront and as the crux of every underlying motivation between countries. Understandably, development in most places does take place over a lengthy period. There are signs of improvement present on paper but much of it is not materially and physically manifested for Africa's developing countries.

This dissertation has been about how development is centred on trade relations and this study has illustrated that there is a lack of it through the relationship between the US and SA, with particular focus being on AGOA.

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ANNEXURE ONE: COUNTRIES FORMING PART OF THE ACP

Africa

CEMAC plus São Tomé and Príncipe, DR Congo group (ECCAS related)

- Cameroon
- Central African Republic
- Chad
- Democratic Republic of the Congo
- Republic of the Congo
- Equatorial Guinea
- Gabon
- São Tomé and Príncipe

EAC Group

- Burundi
- Kenya
- Rwanda
- Tanzania
- Uganda

Eastern and Southern Africa Group (COMESA related)

- Comoros
- Djibouti
- Eritrea
- Ethiopia
- Madagascar
- Malawi
- Mauritius
- Seychelles
- Somalia
- Sudan
- Zambia
- Zimbabwe

SADC Group

- Angola
- Botswana
- Lesotho
- Mozambique
- Namibia
- South Africa
- Swaziland

West Africa Group (ECOWAS plus Mauritania)

- Benin
- Burkina Faso
- Cabo Verde
- Côte d'Ivoire
- Gambia
- Ghana
- Guinea
- Guinea-Bissau
- Liberia
- Mali
- Mauritania
- Niger
- Nigeria
- Senegal
- Sierra Leone
- Togo

Caribbean

- Antigua and Barbuda
- Bahamas
- Barbados
- Belize
- Cuba
- Dominica
- Dominican Republic

- Grenada
- Guyana
- Haiti
- Jamaica
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Suriname
- Trinidad and Tobago

Pacific

- Fiji
- Cook Islands
- Kiribati
- Marshall Islands
- Federal States of Micronesia
- Nauru
- Niue
- Palau
- Papua New Guinea
- Samoa
- Solomon Islands
- Timor-Leste
- Tonga
- Tuvalu
- Vanuatu

3 September 2018

Mr Nhlakanipho Mkhwanazi 211532275
School of Law
Howard College Campus

Dear Mr Mkhwanazi

Protocol reference number: HSS/1405/018M

Project title: Towards development centred trade relations: A study of South African and the USA trade relations with particular focus on the African Growth and Opportunity Act(AGOA)

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has 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



.....
Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Mr CE Stevens
cc. Academic Leader Research: Dr Shannon Bosch
cc. School Administrator: Ms Robynne Louw/ Mr P Ramsewak

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