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South Africa and AGOA: Recent developments 2015-2016 and possible suspension

by Eckart Naumann

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South Africa and AGOA: Recent developments 2015-2016 and possible suspension

by Eckart Naumann

Introduction

The African Growth and Opportunity Act (AGOA) has received much publicity and attention over the past year in particular, for two main reasons: (a) the legislation was set to expire at the end of September 2015 amid uncertainty and many questions about whether it should be renewed, and in which format, and (b) the legislation's eligibility requirements were brought to the fore amid serious questions around South Africa's continued compliance with these underlying provisions. South Africa had in the meanwhile become the largest and most diversified AGOA beneficiary.

Fast-forward to end 2015. AGOA has since been renewed by ten years, and South Africa remains in the fold, albeit on somewhat precarious ground, and very much in the spotlight. Special provisions targeting South Africa – in the sense of compelling a mandatory formal review of South Africa's compliance with AGOA's eligibility provisions – were included in the new legislation. Overhauled eligibility requirements and associated processes and reviews, as well as possible sanctions for non-compliance, feature in the new AGOA.

The process relating to South Africa was partly concluded in November 2015 when President Obama wrote to Congress, in line with the provisions of the new AGOA legislation, to give advance-warning of an intention to suspend some of South Africa's market preferences under AGOA. In January 2016, Obama followed-through with this threat and formally suspended South Africa's AGOA preferences for agricultural exports amid a new 60-day notice period, as required by the legislation, effective 15 March 2016. Until then, South Africa has a final opportunity to rectify, implement or finalise the few remaining issues to which this suspension relates.

This Working Paper aims to provide a relatively non-technical and accessible overview of recent events (and those that preceded the current situation), look at the potential trade impact of the proposed sanction and associated vulnerable sectors, as well as inform on South Africa's rebate system relating to the agreed chicken quota that has become available to South African importers regarding chicken imports from the United States.

1. AGOA: Legislative overview and relationship with GSP

1.1 What is AGOA, and what is it not?

The African Growth and Opportunity Act, commonly known as AGOA, forms a part of United States national legislation. Former US President Bill Clinton originally signed AGOA into law on 18 May 2000, as Public Law 106-200¹ [See download link in footnote²]. AGOA has subsequently been extended a number of times, most recently to 2025. AGOA provides preferential market access to the US market for countries from Sub-Saharan Africa, provided that qualifying countries meet AGOA's eligibility criteria.

In turn, the AGOA legislation is based to a large extent on the United States' Generalised System of Preferences (GSP); arguably it is an extension thereof, an enhanced GSP with a little added security and predictability. This GSP programme is one of a number of similar non-reciprocal schemes offered by developed countries – including the European Union, Canada, Australia, Japan and others – and which offers qualifying developing countries preferential access to the US market. These schemes differ from country to country: while some countries open their market to virtually all imports from qualifying least-developed (LDC) or developing countries (DC), or both, other schemes are more limited by applying preferences only to LDC exports, or to a far more limited range of products.

The US GSP provides preferences to approximately 5,000 tariff lines, a number that fluctuates over time and which has increased in recent years (from approximately 4,600 lines when AGOA was first implemented). This number comprises GSP preferences to developing countries (3,500 tariff lines) plus GSP preferences to least-developed countries (an additional 1,500 tariff lines). These tariff lines are based on the US version of the Harmonised System nomenclature (the 'HTS'), a global standard up to a certain level of classification for purposes of trade flow classification and for other purposes. AGOA is built on the GSP categories, by adding a further approximately 1,800 tariff lines in which AGOA beneficiaries would also receive preferential market access.

Additionally, a special apparel provision allows countries that have fulfilled certain "textile visa" requirements and on application, to also export clothing to the US under AGOA. Thus, the 'AGOA' component – comprising the new, true AGOA benefit - comprises a little over 2,000 tariff lines, while the GSP comprises approximately 5,000 tariff lines. GSP products thus effectively have a dual GSP/AGOA status.

¹ '106' denotes the 106th sitting of Congress and '200' the law's unique number within that Congress.

² <http://agoa.info/downloads/legal/2385.html>

There are some provisos to this: the GSP is subject to periodic expiry and renewal by the US Congress. Renewal can be months or years after the programme has lapsed, even though its application (upon delayed renewal) tends to be made retrospective and is backdated to when it lapsed. Most recently, the US GSP was renewed (on 29 July 2015) to December 31, 2017³. There are also other differences between GSP and AGOA eligibility status, for example that GSP preferences distinguish between developing countries and least-developed countries, in terms of product coverage, the competitive need limitations (CNL) which potentially restrict certain imports, and so forth.

A GSP beneficiary that gains AGOA status therefore does so on the basis of non-reciprocity, but not un-conditionality. Since AGOA is not an agreement between the US and African countries, this means that eligible African beneficiaries are not required to open their own markets to US goods on a similarly preferential basis, or necessarily make other concessions (unless special barriers to US trade and investment are in place). Put simply, African beneficiaries *take* the preferences that are available under AGOA. A beneficiary country also does not have recourse to independent arbitration or dispute settlement mechanism, as might be the case within a trade agreement; the US Administration is the sole administrator and executor of this function and decides at its discretion whether a country should receive, maintain or lose eligibility status for all or some of the products covered by AGOA.

1.2 AGOA eligibility criteria

Despite the generous benefits that AGOA offers, it is not entirely a ‘free lunch’ and its preferences are linked to a respective beneficiary country meeting various eligibility requirements.

AGOA’s eligibility requirements contain a number of criteria involving (respect for) the rule of law, democratic institutions, human rights and so forth, but also require that a beneficiary country may not put in place special barriers to US trade and investment. In other words, while AGOA does not necessarily impede normal national policy space and its resultant outcomes, an AGOA beneficiary country may not erect barriers that disadvantage US traders and investors, particularly over others in the course of non-preferential trade relations. This means that, for example, a country may well maintain tariff barriers on global imports within its WTO commitments but may not unreasonably go beyond this and discriminate against US interests.

The AGOA legislation specifically requires that

³ The US GSP was renewed at the same time as AGOA

- (a) countries meet the eligibility criteria as set out in the AGOA legislation⁴, and
- (b) countries meet the eligibility criteria as set out in Section 502 of the United States Trade Act of 1974 (as amended).⁵

While a detailed list of all AGOA and associated eligibility criteria is beyond the scope of this trade brief, a few notable requirements are listed hereunder:

AGOA legislation:

- a market based economy that protects private property rights
- elimination of barriers to US trade and investment, including...the protection of intellectual property...the provision of national treatment (i.e. non-discrimination against foreign stakeholders and investors)
- protection of internationally recognised worker rights
- (not) to undermine US national security or foreign policy interests

US Trade Act of 1974:

- country may not form part of an arrangement that restricts supplies of a vital commodity in international trade
- country may not afford preferential treatment to products of a developed country, other than the US, which is likely to have a significant adverse effect on US commerce
- country may not have nationalised, expropriated, or otherwise seized ownership or control of property owned by US citizens or companies that are more than 50% beneficially owned by US citizens
- country may not impose taxes or other extractions or operational conditions with respect to (US) property, the effect of which is to nationalise, expropriate or otherwise seize ownership

1.3 Events leading up to the most recent renewal and implications for the design of AGOA

AGOA was originally set to expire on 30 September 2015. While there was certainly wide-ranging support for a renewal of the legislation, by African countries and the United States, from civil society to the private sector to the US Administration, this was happening against a backdrop of a changed business and political climate as well as reflection on AGOA's successes and 'performance' to date.

⁴ Copy of original AGOA legislation: <http://agoa.info/downloads/legal/2385.html> [Refer specifically to Section 104]

⁵ Copy of legislation: <http://agoa.info/downloads/legal/5952.html> [Refer specifically to Section 502 – page 222]

Questions were being raised about how AGOA had benefited African countries, and how this benefit was distributed among the group of beneficiaries. Over the 15 years of AGOA's life, a number of countries have been suspended for a period of time, or indefinitely, as a result of non-compliance with AGOA's eligibility provisions. Now, the 'elephant in the room' was South Africa, and questions around the country's continued eligibility and indeed desirability to be included for future preferences. South Africa has to date been AGOA's largest beneficiary: while not necessarily topping the list of exporters in terms of trade volumes (but always featuring in the top 3), the country was by far the largest and most diversified non-oil exporter utilising AGOA preferences.

Essentially, two issues were at stake:

- (a) questions around whether South Africa is economically too advanced to be reasonably considered a deserving beneficiary of AGOA's non-reciprocal preferences
- (b) concerns around South Africa's compliance with respect to AGOA's eligibility requirements

In terms of the former, South Africa's economic status as a 'developing country', not least in terms of per capita GNP (and notwithstanding its self-declared developed country status under WTO disciplines) appears to have helped to keep the country safe in this respect; also it being party to a customs union with four developing and least-developed countries played a role. In terms of the latter, a number of issues were raised as potentially making South Africa non-compliant with the AGOA provisions. These include:

- (1) South Africa's treatment of certain imports of poultry from the United States, with anti-dumping measures being applied over the past 15 years, and at times also blanket bans on US imports of poultry following an outbreak of disease (in some States);
- (2) South Africa's import treatment (at times resulting in a total ban) of certain cuts of pork and beef;
- (3) South Africa's proposed private security industry legislation, which could force foreign (including United States) companies to sell majority shares in a host of security and related industries (not just the security industry itself, but possibly also in component and related equipment suppliers);
- (4) South Africa's proposed amendments to its intellectual property laws, which could in effect undermine US companies that hold certain patents.

The main opposition to South Africa's continued eligibility under AGOA came primarily from US Senators Johnny Isakson (State of Georgia), and Chris Coons (State of Delaware); both representing States with strong agricultural interests, including chicken farming. Pork and beef producers, as well as representatives from the pharmaceutical and security industries, all voiced similar opposition, using the elevated profile and interest that this matter had generated to press home their own concerns about South Africa.

The new AGOA legislation was eventually passed, following a number of earlier legislative attempts to do so, but with an unprecedented review of South Africa's eligibility being ordered as part of the new legislation. For this purpose, the AGOA legislation amends the US Trade Act (under Section 506A) by compelling an out-of-cycle review of South Africa with respect to further AGOA eligibility. The legislation also contains revised guidelines for such a review, and how such a review can be instituted. This is discussed in the following section.

1.4 AGOA country reviews – the basic nuts and bolts of it

Under the new AGOA legislation, the US President has been granted new options with respect to the application and withdrawal of preferences. Whereas under the old regime AGOA benefits could be suspended in full (i.e. a country's beneficiary status was terminated) when a country was found to be non-compliant with the eligibility criteria, the new AGOA allows for:

- (a) a selective withdrawal, suspension, termination or limitation of any duty-free treatment granted under the Act
- (b) any such action to be preceded by a 60-day advance notification, issued by the President to Congress and the (beneficiary) country.

The new legislation also provides for greater public participation in any AGOA country reviews, which are to take place annually. In this regard, a few processes have been revised:

- (a) the President is required to publish an annual notice of review in the Federal Register as well as a request for public comments (on whether beneficiary countries are meeting the eligibility requirements of AGOA)
- (b) the US Trade Representative (USTR) is required to hold public hearings within 30 days on such review and request public comments, and publish time and place for such hearings in the Federal Register

- (c) through a petition process, any interested person may at any time also file a petition with the Office of the USTR with respect to eligibility compliance, with such petitions to be considered when determining a countries' (continued) eligibility

Provision is also made for out-of-cycle reviews: the President may at any time initiate – after notifying and consulting with Congress – an out-of-cycle review on whether a country continues to comply with (and be making continual progress towards) AGOA's eligibility criteria. Due regard is to be taken of any petitions having been received from any 'interested persons' with regard to a country's eligibility. In essence, the process is as follows:

- (a) the President considers an out-of-cycle review based on own prerogatives while considering any petitions received from interested parties;
- (b) Congress is notified and consulted;
- (c) a review is undertaken, and a determination made on whether a beneficiary country (still) meets AGOA's eligibility requirements;
- (d) a report is submitted to the two chambers of Congress: to the Senate *Finance Committee* and to the House of Representatives *Ways and Means Committee*. This report carries a determination on a country's termination, suspension or partial suspension from AGOA preferences;
- (e) where a country's benefits are curtailed or withdrawn, a 60-day advance notice period must be given to Congress and to the country concerned.

South Africa is the first country to be subject to an out-of-cycle review under the new AGOA legislation, although provision is made for other countries to also be reviewed. However, no such country is specifically mentioned, while the legislation required such a review of South Africa within 30 days of the new legislation being signed into law in late June 2015.

1.5 Advance notification to South Africa of potential loss of AGOA preferences

On 5 November, President Obama wrote⁶ to Congress and South Africa of the *intention* to suspend some of South Africa's AGOA preferences, for failing to adequately address and resolve issues that had been subject to South Africa's out-of-cycle country review in August. Specifically, some of these

⁶ See official text of notification: <http://agoa.info/news/article/5902-letter-from-the-president-suspension-of-the-application-of-duty-free-treatment-to-all-agoa-eligible-goods.html>

issues (including agreement on an avian influenza trade protocol regarding US exports to South Africa) needed to be resolved by mid-October 2015.

Details of the notification are as follows:

- (1) The notification signals an ‘intent’ (rather than a final decision) of the US to suspend AGOA preferences, while leaving open the possibility that South Africa can avoid the suspension if it meets the AGOA compliance criteria as set out in Section 104 of the legislation;
- (2) The advance notice provides 60 days before possible suspension of preferences, a notice period that is in line with what is stipulated under the new AGOA legislation;
- (3) South Africa’s possible suspension of its AGOA preferences relates only to agricultural products benefiting from AGOA, and not other products;
- (4) While a complete suspension or termination from AGOA would have been possible, the US has chosen to utilise the option of partial suspension of preferences as foreseen by the legislation;
- (5) The US has left the door open for additional suspension, if in its view South Africa continues to not comply with AGOA’s eligibility criteria.

2. The chicken and other ‘issues’

2.1 The chicken issue

The ‘chicken’ issue – and a few others – as well as associated processes to remedy the situation gained extensive political traction and associated media coverage in the run-up to AGOA’s pending expiry, and subsequent renewal. While the underlying issues were not new, in fact they had been on-going for over a decade already, the AGOA renewal debate provided the aggrieved parties in this issue with a unique opportunity to prominently elevate this. Besides, Congress effectively had to endorse all AGOA provisions as well as country coverage when deciding on whether to renew the legislation.

At issue was South Africa’s treatment of US bone-in chicken exports, treatment that was considered to (also) fall foul of AGOA’s eligibility criteria, and thus became a central sticking point.

The ‘revolt’ against South Africa’s continued and largely unconditional inclusion under AGOA was driven primarily by the US chicken caucus, represented by the two Senators (Isakson and Coons) from

the ‘chicken’ States Georgia and Delaware, respectively. In 2014, 13 US Senators similarly wrote to South Africa expressing their concern about the country’s imposition of these targeted and discriminatory duties on imports from the US. At the heart of the matter was South Africa’s treatment of certain bone-in chicken imports from the United States, against which additional anti-dumping duties have been levied (over and above high standard import duties) since around the time that AGOA was enacted. US-produced bone-in chicken attracts not only the standard 37% duty that South Africa imposes on all such imports, but also an additional duty of R9.40 (approximately \$ 0.60) per kilogram anti-dumping duty.

Whereas South Africa believed that its stance involves a legitimate action to protect its industry against ‘dumped’ product, the US in turn considered the basis on which South Africa implemented this anti-dumping treatment to be technically flawed, and indeed contrary to internationally accepted norms and laws.

Fact of the matter is that US-produced bone-in chicken – like chicken drumsticks – are far less desirable in the US than is ‘white meat’ such as chicken breasts; consequently, the (local, US) market for the former is limited and prices are very low. Exports are booming as a result, with various countries around the world including in Africa proving to be ready recipients. In South Africa, bone-in chicken has a large market and represents very much mainstream fare.

While South Africa, for purposes of triggering anti-dumping action, measured the value and associated cost structures of a chicken in totality, the US considers the reference point to be linked to the specific chicken cut. Bone-in poultry or so-called ‘brown’ meat would thus have a different reference price basis than the more valuable ‘white’ meat such as chicken breast. South Africa has been using a hybrid weighted-cost of production basis to determine a the general reference price, while the US contends that such a basis should only be used in the absence of relevant domestic sales data which allocates a more accurate market-driven price to the product. The US also contends that the basis for anti-dumping action should be when domestic sales prices are higher than the price same products are sold into export markets (in other words, are sold below market value). Similarly, it also considers that the various different cuts of poultry need to be considered on a differentiated basis, in other words, that the reference point is the value of the individual cuts (white meat, drum sticks etc.).

The US has a recent history in chicken-related disputes, having fought (and to a large extent won) an extended battle with China in a dispute brought before the WTO. This follows China having initiated anti-dumping and countervailing investigations against US chicken in September 2009, and imposing

special duties in this regard a year later. This case (see 1-page summary⁷) bears some resemblance to the US-South Africa chicken issue in that one of the areas of contention was the basis on which broiler production cost (and that of certain parts of a chicken) was determined in the context of China levying anti-dumping duties against US chicken. The WTO panel report in favour of the US was adopted in September 2013.

South Africa and the US agreed, at a two-day meeting held early June in Paris, to allow an annual quota of US bone-in chicken to be imported into South Africa without paying the anti-dumping duties normally applicable on these goods.

In effect, the parties continued to disagree on the underlying methodology used in arriving at the anti-dumping duty but agreed that:

- an annual quota of 65,000 tons of bone-in chicken would be allowed in from the US;
- such imports would still be subject to standard South African import duties;
- the quota would initially be pro-rata for the incomplete year, and then be adjusted annually based on verified and supplied production and consumption growth or shrinkage, based on the 2015 baseline;
- the quota will be administered by South Africa, specifically the Department of Agriculture, Forestry and Fisheries (DAFF), along with the revenue services (SARS) and the Department of Trade and Industry (DTI);
- a considerable import quota on affected products will be allocated to Historically Disadvantaged Individuals (HDIs) (see later section for details).

Part of the agreement involves the US and South Africa agreeing on mechanisms to manage sanitary and phyto-sanitary (SPS) issues relating to the movement of chicken, but also on pork, beef and other products. While progress has been made on these, at the time of writing these had not yet been fully concluded.

An additional challenge to the process, and resolution of issues preventing or undermining certain US poultry exports to South Africa, was an outbreak of avian influenza in some US States, effectively blocking any poultry exports from being allowed into South Africa (this ban appears to have been in place since late 2014). This came at a time when the veterinary services from South Africa and the US

⁷ https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds427sum_e.pdf

were still developing a protocol that would facilitate US exports to South Africa under the recently agreed special quota regime. Progress has been made to resolve the outstanding issues, while the main contention was that South Africa (in the absence of an agreed avian trade protocol) wanted to block all US poultry exports while the US insisted on dealing with this issue through the concept of ‘regionalisation’. In other words, South Africa had to keep its market open for US poultry exports from US States that were not affected by avian influenza. Regionalisation involves a restriction on imports from regions and States affected by avian influenza, without an automatic national ban being extended to all poultry imports from the US.

South Africa initially resisted such a proposal, notwithstanding the country apparently embracing regionalisation with respect to other import sources (for example poultry imports from the Netherlands⁸). According to the US Ambassador to South Africa, “138 countries accept US poultry, 100 of them without any protocols, while 38 follow regionalisation protocols”.⁹

2.2 Other issues

While chicken appeared to be at the heart of the AGOA dilemma involving South Africa, it was by no means the only one. South Africa had restrictions in place for other agricultural products, such as pork and beef, and these were being dealt with at the same time. Some of these were resolved prior to the country’s AGOA review. The key other issues were as follows:

- (1) **Beef:** South Africa had banned the importation of boned beef from countries where bovine spongiform encephalopathy (BSE) occurred. The South African cabinet approved the lifting of this ban in June 2015, with the necessary formalities to be concluded by the respective animal health authorities. US beef had been blocked from the South African market for the past dozen years.
- (2) **Pork:** South Africa has restrictions on the importation of certain pork cuts, owing to concerns about at least three diseases, namely Trichinella, Porcine Reproductive & Respiratory Syndrome (PRRS) as well as Aujeszky. South Africa’s concerns involve the transmission of the disease from imported pork products to domestic livestock. The US contends that it is being unfairly treated by South Africa since the country readily imports similar cuts from other

⁸ See a presentation by the Dutch Ministry of Economic Affairs. [Online]: http://www.aphis.usda.gov/animal_health/animal_dis_spec/poultry/downloads/mtg/presentations/wed1_bruschke_control%26prevention_of_hpai_in_the_netherlands.pdf

⁹ See article: <http://beta.iol.co.za/business/news/sas-agoa-benefits-in-peril-1941087>

sources. Most affected were pork shoulder cuts, which are of key economic importance to US exporters.

- (3) **Proposed new restrictions on foreign ownership in the South African private security industry:** South Africa has for some time been considering changes to the laws regulating the private security industry (the Private Security Industry Regulation Amendment Bill¹⁰); one such amendment includes a restriction on any foreign ownership of commercial interests and investments in this sector to no more than 49%. The proposed legislation also makes provision for prescribing a different “percentage of ownership and control”, at the discretion of the Minister (of Safety and Security), which might be entirely different to the 49% threshold. The new laws have been passed by parliament but have yet to be signed into law by the South African president (the legislation has been in this stage since January 2014). Should such a restriction be put in place, this would essentially require US companies to divest their (controlling) shareholdings in this sector.

A number of large US companies are active in the South African market, and some are listed on the local bourse. The US would consider any such measures to be a barrier to investment and in breach of the principle of national treatment, and potentially be akin to expropriation; it would most likely fall foul of a number of AGOA eligibility criteria. The legislation in its current format would also almost certainly place the country in breach of its GATS obligations under the WTO, where it guarantees full market access and national treatment for foreign investors in this sector (in other words, it treats foreign investors and local investors alike, without discriminating against the one or the other). It may also fall foul various bilateral investment treaties (albeit that South Africa has given notice of non-renewal on some of them). Since this legislation has not (yet) been enacted by South Africa, it was not directly considered as a reason in terms of the notice of withdrawal of AGOA preferences. Indications are that South Africa will review the contentious clauses.

- (4) **Intellectual property rights and patent protection:** South Africa has been embarking on a process of reform of its intellectual property laws (through the proposed National Policy on Intellectual Property Bill), which would *inter alia* include the country’s patent laws specifically with regard to the pharmaceutical industry. Some of the proposals involve an easing of regulations regarding generic medicines while reducing the reach of pharmaceutical

¹⁰ The bill can be downloaded at the following link: https://jutralaw.co.za/media/filestore/2013/11/B27B_2012.pdf

patents (for example dealing with the problem of ‘ever-greening’, which takes place when patents that are about to expire are renewed through a variety of strategies, like slight recipe changes to the underlying pharmaceutical product to allow renewals of long-held patents¹¹. The US government under President Clinton has previously committed itself not to seek a revision of intellectual property laws in a sub-Saharan African country in the context of HIV/AIDS policies provided that these laws remain consistent with WTO disciplines. While this issue was dealt with in the South Africa review, it was not explicitly raised in the advance notice of suspension of benefits, clearly (as is the case with the security industry regulations) since these laws had not yet been promulgated.

3. Loss of AGOA preference – what impact on South Africa’s agric. exports?

South Africa may lose AGOA preference for its AGOA-eligible agricultural exports by 15 March 2016, depending on whether US poultry (bone-in) can be imported into South Africa without being subjected to anti-dumping duties. South Africa had earlier failed to convince the US that the country had met (or made sufficient progress in meeting) the outstanding issues that make it non-compliant with AGOA’s eligibility criteria. As a later section will outline, while most points of contention have for now been resolved, the proof is in the pudding when it comes to actual trade taking place. While the original notice in November 2015 of the US’ intention to suspend some of South Africa’s AGOA preferences (and subsequent formal notification on 11 January to partially suspend AGOA access) is based on specific issues and target dates mainly around agricultural issues, there is every likelihood that irrespective of the final outcome and actions under this particular review, that other issues remain in place which potentially will lead to a repeat scenario going forward. The proposed amendments to both the private security industry and intellectual property legislation are two such examples which could yet trigger a formal response.

Under the proposed suspension of agricultural preferences, only a limited – and relatively small – palette of South Africa’s total exports to the US is potentially impacted. At this point it is also worth reflecting back on the inter-related nature of AGOA with the GSP programme: AGOA is in effect an extension of the GSP, available only to qualifying Sub-Saharan African countries. Many non-African countries are GSP beneficiaries. Some agricultural products are first and foremost (also) GSP eligible, and it appears from the notification that the US is intending to suspend the removal of “AGOA preferences” for the agricultural sector. This would still maintain the GSP status on certain products

¹¹ Also see [Online] <https://en.wikipedia.org/wiki/Evergreening>

(including those with *de facto* dual GSP/AGOA preferences). A portion of South Africa's agricultural exports to the US falls outside of any preferences and takes place under normal tariff relations, and some takes place under GSP. However, the bulk of South Africa's exports in this sector take place under AGOA (and does not qualify for any other preferences). A removal of preferences certainly does not prevent South Africa from exporting agricultural products under normal tariff relations (to the US); in key sectors these tariffs are very low.

The following overview of the key trade figures provides some context to the intended suspension of AGOA agricultural preferences for South Africa (also see Section 3.3 regarding agricultural exports).

3.1 AGOA in aggregates

In 2014, a combined \$14.3 billion worth of goods were exported from all AGOA-eligible countries to the US under AGOA preferences. As the table below shows, the largest share of this represents oil and related exports, while \$4.4 billion represents non-oil exports. This number has grown since AGOA's inception, and has not been subject to the nominally large and distorting fluctuations in oil exports. Taking away oil, two to three times as many goods were shipped without claiming any preferences compared to those falling under AGOA.

Table 1. AGOA trade 2001 – 2014

| | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|-------------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|
| AGOA incl. GSP | 9,7 | 9,0 | 14,1 | 26,6 | 38,1 | 44,2 | 51,1 | 66,3 | 33,7 | 44,3 | 54,0 | 34,7 | 26,9 | 14,3 |
| - - AGOA: Oil | 6,8 | 6,8 | 11,2 | 23,1 | 35,2 | 41,1 | 47,7 | 61,2 | 30,3 | 40,2 | 49,0 | 29,9 | 22,0 | 9,9 |
| - - AGOA: Non-Oil | 2,8 | 2,2 | 2,9 | 3,5 | 2,9 | 3,2 | 3,4 | 5,1 | 3,4 | 4,1 | 5,0 | 4,8 | 4,9 | 4,4 |
| No preferences | 7,6 | 5,1 | 6,1 | 7,8 | 8,8 | 11,8 | 13,5 | 15,2 | 10,2 | 16,2 | 18,4 | 12,8 | 11,3 | 11,3 |

Source: Extracted from USITC Dataweb

Broken down by sector, oil exports under AGOA accounted for approximately 70% of all AGOA exports during 2014. Among the non-oil exports, motor vehicles represent the largest share (30.8%), followed by apparel (28.3%), iron and steel (16.5%), and aluminium (10.7%).

Table 2. Top 20 exports under AGOA by Chapter – all countries (Year: 2014; rounded to \$ million)

| HS Chapter | Description | AGOA excl. GSP | GSP | Combined | Percentage of non-oil exports (AGOA incl. GSP) |
|------------|---|----------------|--------------|---------------|--|
| 27 | Mineral fuels and oils | 9 012 | 845 | 9 857 | - |
| 87 | Motor vehicles and parts | 1 307 | 46 | 1 353 | 30,8% |
| 72 | Iron and steel | 186 | 538 | 724 | 16,5% |
| 62 | Apparel, not knitted or crocheted | 518 | 0 | 518 | 11,8% |
| 61 | Apparel, not knitted or crocheted | 468 | 0 | 468 | 10,7% |
| 76 | Aluminium and articles thereof | 0 | 179 | 179 | 4,1% |
| 28 | Inorganic chemicals | 0 | 177 | 177 | 4,0% |
| 8 | Edible fruit and nuts | 137 | 2 | 139 | 3,2% |
| 29 | Organic chemicals | 0 | 132 | 132 | 3,0% |
| 84 | Machinery, appliances and parts | 0 | 86 | 86 | 2,0% |
| 18 | Cocoa and cocoa preparations | 0 | 85 | 85 | 1,9% |
| 22 | Beverages, spirits and vinegar | 52 | 10 | 62 | 1,4% |
| 17 | Sugar and sugar confectionary | 0 | 55 | 55 | 1,3% |
| 24 | Tobacco and tobacco products | 48 | 0 | 48 | 1,1% |
| 38 | Miscellaneous chemical products | 46 | 2 | 48 | 1,1% |
| 71 | Natural pearls, precious stones & metals, jewellery | 0 | 48 | 48 | 1,1% |
| 20 | Preparations of fruit and vegetables | 27 | 2 | 29 | 0,7% |
| 85 | Electrical machinery and parts | 0 | 26 | 26 | 0,6% |
| 81 | Base metals nesoi | 25 | 0 | 25 | 0,6% |
| 64 | Footwear etc. | 20 | 0 | 20 | 0,5% |
| | Rest | 28 | 143 | 171 | 3,9% |
| | Total | 11 874 | 2 376 | 14 250 | - |
| | Total (excluding Chapter 27) | 2 862 | 1 531 | 4 393 | 100,0% |

Source: Extracted from USITC Dataweb

3.2 South Africa's trade indicators under AGOA

South Africa is the leading recipient of non-oil AGOA preferences. Since AGOA's inception, only Nigeria and Angola have at times exceeded South Africa's AGOA exports, but with both of these countries, virtually all trade took place in oil products. In 2014, aggregate AGOA exports from all countries was valued at \$ 14.3 billion, and of this, \$4.4 billion represents non-oil AGOA exports. South Africa's share of non-oil AGOA exports was \$3.1 billion. Of the \$4.4 billion non-oil exports, \$2.9 billion represents AGOA trade in tariff lines not otherwise eligible under the GSP scheme. South Africa's share of non-oil non-GSP AGOA exports was \$1.75 billion in 2014, representing 61% of the

total. In other words, almost two thirds of the ‘new’ AGOA benefits (excluding oil) accrued to South Africa in 2014.

South Africa has been the largest overall beneficiary of AGOA preferences in the non-oil categories, well ahead of Kenya, Lesotho, Mauritius and Swaziland who (in 2014) are the next largest non-oil AGOA beneficiaries albeit that their exports are mainly in the apparel sector (whose share tends to be between 90-100%).

Table 3. Key AGOA data for South Africa

| | Aggregate AGOA inc. GSP | Aggregate AGOA inc. GSP but excl. oil | AGOA excl. GSP | AGOA excl. GSP excl. oil |
|------------------------|----------------------------|--|-----------------|-----------------------------|
| All AGOA beneficiaries | \$ 14.3 billion | \$ 4.4 billion | \$ 11.9 billion | \$ 2.9 billion |
| South Africa | \$ 3,1 billion | \$3.1 billion | \$ 1.75 billion | \$ 1.75 billion |
| | 21.7% | 70% | 15% | 60% |

Source: Extracted from USITC Dataweb

3.3 South Africa’s agricultural exports to the United States

The South African agriculture sector has been in the AGOA spotlight not only due to the ongoing issues around market access for US chicken, beef and pork, but also because this sector is the target of the first sector-specific suspension notification under the new AGOA legislation. South Africa is a significant exporter of a relatively diverse palette of agricultural products to the US, the majority of which benefit from the preferences provided by AGOA.

In reviewing the value of agricultural market preferences under AGOA, it is important to set out what products are potentially impacted, and what value of agricultural exports are shipped to the US based on the 2014 reference year (the most recent year for which full year data is available, at the time of writing).

In 2014, South Africa’s combined AGOA+GSP exports to the US were valued at \$3.1 billion. Of this, \$1.75 billion was in categories that could be classified as ‘purely’ AGOA, in other words, not (also) classified under the GSP preference scheme. South Africa’s aggregate AGOA “exposure” at present can thus be considered as the lower amount of \$1.75 billion, albeit with the usual caveat that the GSP preferences are also subject to congressional approval and this scheme has in recent years been allowed to lapse on more than one occasion (upon renewal, the GSP preferences have generally been back-dated to the earlier date of expiry). The GSP is currently valid to end 2017.

South Africa's exports of agricultural products to the US in 2014 were valued at \$305 million (with year-to-date data to October 2015 suggesting a 3.6% overall increase for 2015). Of this aggregate amount, \$80 million (26% of total agricultural exports) entered the US under normal tariff relations; in other words, no preferences were claimed for these goods. Some of these products would already be subject to a standard duty of 0% based on the general US tariff regime. A further \$50 million (16%) worth of agricultural goods consists of GSP trade; some of this could also have entered the US under AGOA preference, just like some AGOA trade could have chosen to utilise GSP status where there is overlap and both classifications apply. The remainder, \$175 million (58%) claimed AGOA status upon entry into the US.

South Africa's AGOA exports (excluding those goods that claimed GSP status) in the agriculture sector thus accounted for approximately 10% of the country's total AGOA exports in 2014 (\$175 million, out of \$1.75 billion, but excluding trade that claimed GSP status). South Africa's total exports to the US in 2014 were valued at \$8.3 billion (combined AGOA/GSP and non-preferential trade), with the agricultural exports under AGOA accounting for approximately 2% of this total.

Table 4. Key agricultural export data (2014 values) for South Africa

| Total exports South Africa to US (agric + non-agric) | Total AGOA/ GSP exports (agric+non-agric) | Total AGOA/GSP exports of agric products | AGOA (excl GSP) agric exports | GSP agric exports to US | Total agric exports – no preferences claimed |
|--|---|--|---|--|--|
| \$8.271 billion | \$3.115 billion | \$305 million = (10% of AGOA/GSP) = 3.7% total exports | \$175 million = 57% of SA's agric exports to US = 2.1% of SA's total exports to US | \$ 50 million = 16% of SA's agric exports to US and 22% of its agric exports under preference (AGOA/GSP) | \$80 million = 26% of SA's agric exports to US |

Source: Extracted from USITC Dataweb

The table above places South Africa's agricultural exports to the US into some perspective, with respect to the country's total exports to the US. It also shows what value entered the US specifically under AGOA preferences. The advance notification of South Africa's possible loss of AGOA preferences for its agricultural exports to the US would thus impact on approximately 2.1% of the country's combined exports to the US in 2014 (in terms of their AGOA eligibility), based on 2014 agricultural export value that didn't otherwise qualify for preferences (GSP) or had entered the US under normal tariff relations. The agricultural sector overall accounts for approximately 10% of South Africa's US-bound exports, while 26% of agricultural exports did not qualify for any preferences. In

other words, three quarters of South Africa's US-bound agricultural exports entered the US under preference.

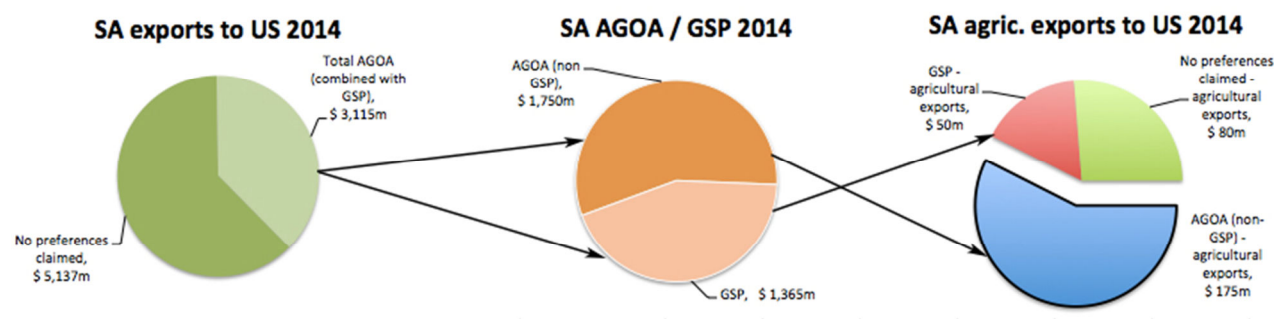


Table 5. South Africa's leading AGOA (non-GSP) agricultural export categories to the US in 2014, with over \$1 million worth of exports in each

| South Africa's leading AGOA (excluding GSP) exports to the US in 2014 , by tariff line | Standard duty if not using AGOA | AGOA (excluding GSP) \$ million (2014) |
|--|---------------------------------|--|
| Oranges, fresh or dried | 1.9c (US) / kg | 41 |
| Wine other than Tokay (not carbonated), not over 14% alcohol, in containers not over 2 liters | 6.3c / Liter | 33 |
| Macadamia nuts, shelled | 5c / kg | 32 |
| Undenatured ethyl alcohol of 80 percent vol. alcohol or higher, for nonbeverage purposes | 2.5% | 17 |
| Mandarins; clementines, wilkings and similar citrus hybrids, fresh or dried | 1.9c / kg | 9 |
| Edible ice, except ice cream, not described in add US note 1 to Ch. 4, nesi | 17% | 6 |
| Citrus juice of any single citrus fruit (other than orange, grapefruit or lime), concentrated, unfermented | 7.9c / Liter | 6 |
| Pimientos, prepared or preserved otherwise than by vinegar or acetic acid, not frozen | 8.1% | 5 |
| Nuts nesi, fresh or dried, shelled | 5c / kg | 5 |
| Raisins, made from dried seedless grapes | 1.8c / kg | 5 |
| Citrus juice of any single citrus fruit (other than orange, grapefruit or lime), unfermented | 7.9c / Liter | 4 |
| Pears, otherwise prepared or preserved, nesi | 15.3% | 3 |
| Grape wine, other than sparkling, not over 14% vol. alcohol, in containers holding over 4 liters | 14c / liter | 2 |
| Mixtures of fruit juices, or mixtures of vegetable and fruit juices, concentrated or not concentrated | 7.4c / Liter | 2 |
| Grapefruit, fresh or dried, entered during the period August 1 through September 30, inclusive | 1.9c / kg | 1 |
| Pears, fresh, if entered during the period from July 1 through the following March 31, inclusive | 0.3c / kg | 1 |
| Fruit pastes and purees, nesi, and nut pastes and purees, being cooked preparations | 10% | 1 |
| Cereals nesi (including wild rice) | 1.1% | 1 |

Source: Extracted from USITC Dataweb

A withdrawal of AGOA preferences for the South African agricultural sector would thus potentially affect \$175 million in exports (based on 2014 data, with 2015 data year-to-date to October showing a 12% increase for the year).

Not all agricultural trade would be affected (a sizeable portion is exported without preference and the remainder enters under GSP preferences); the magnitude of the impact in terms of trade flows depends on a number of factors, including:

- the competitive position and value proposition of each of South Africa's agricultural export commodities currently utilizing AGOA in the US market;
- competing suppliers from other countries, and the cost of US buyers switching to other sources/supplier countries (including considerations around SPS issues relating to 'new' or 'alternative' supplier markets);
- the ability of importers to absorb or pass on the duty, or more likely, the ability of South African exporters to reduce prices to absorb the duty-impact;
- the price in South African currency of these export commodities, given the depreciation of the South African currency vis-à-vis the US\$ particularly during the second half of 2015 (this may have increased South Africa's competitive position in the US market given that the exchange rate decline has significantly exceeded that compared with many competing supplier countries¹²).

Given the above factors, it is likely that the overall impact on South Africa's aggregate exports to the US following a withdrawal of AGOA preferences for South Africa's agricultural exports would be relatively small.

The overall value of agricultural export trade potentially impacted at this stage appears to be approximately 2% of South Africa's total exports to the US (based on 2014 trade flow data). However in reality only some of this may be adversely affected and (be) lost to South African producers.

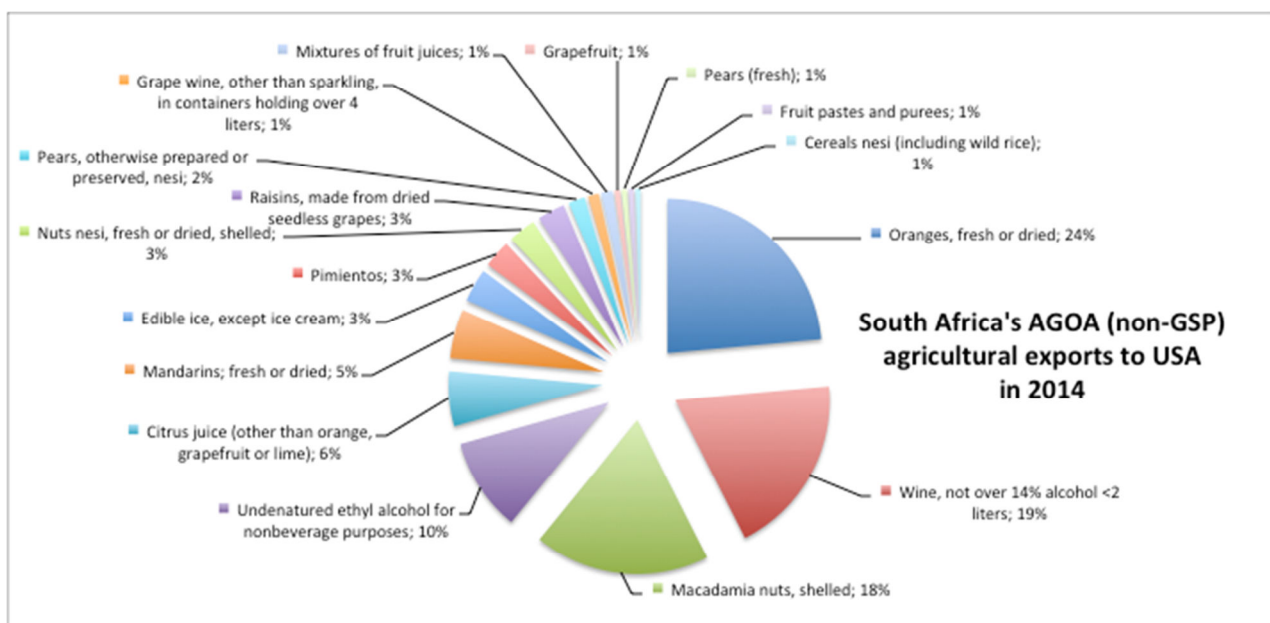
Almost 80% of South Africa's agricultural exports that are utilizing AGOA (the portion of trade that is 'threatened' by a withdrawal of preferences) consist of citrus fruit (mainly oranges), nuts (mainly macademia) and wine. Citrus fruit is the largest beneficiary, a commodity that is grown in various

¹² For example, Chile is the largest foreign supplier of oranges to the US (38% of total), followed by South Africa (32% of total). The Chilean peso depreciated by 15% versus the US\$ during 2015 whereas the South African Rand lost 38% of its value versus the US\$ over the same period. The US MFN tariff on oranges is 1.9c / kg.

parts of South Africa, but exports are mainly from the Western Cape province; this is as a result of its compliance with US SPS regulations and status as being free of citrus black spot disease for export-purposes. Likewise, wine is produced mainly in the Western Cape province, and a withdrawal of AGOA preferences from this sector is likely to significantly undermine the competitive position of exporters.

Grape wine represents South Africa's second largest export category under AGOA, with \$35 million entering the US under AGOA while a further \$9 million entering under GSP preference. There are some differences within the broader AGOA/GSP coverage, with AGOA covering mainly wine containing less than 14% alcohol by volume, including bulk wine, with the US GSP preference scheme covering wine over 14% alcohol by volume in containers holding less than 2 liters, as well as sparkling wine. Withdrawal of AGOA preferences would thus affect mainly wine '*not over 14% alcohol in containers less than 2 liters*', South Africa's main export category.

Macademia nuts comprise the bulk of South Africa's nut exports under AGOA; the country is considered the largest macademia nut producer in the world. South Africa accounts for just under 40% of the total US import market of macademia nuts.



4. South Africa's response to the 'chicken issue': a special quota regime on US chicken

South Africa and the US agreed, in early June 2015 (at the "Paris meeting"), to implement a 65,000t quota on certain bone-in chicken imports from the US and which would be exempt via a rebate from the anti-dumping tariff that is currently being levied on such imports. The anti-dumping tariff applies

only to certain chicken imports sourced from the US, and the proposed quota would also only be in relation to this (although SARS records show that certain anti-dumping measures are also still in place on imports from Germany, the Netherlands and the UK¹³). The quota would not however do away with South Africa's standard import tariffs and merely deal with the R9.80/kg anti-dumping duty.

To place this quota into some context with respect to South Africa's overall poultry exports, 2015 data quoted by the South African Poultry Association (SAPA)¹⁴, based on verified statistical data from South Africa's Revenue Services (SARS), shows that in the 11-month period January-November 2015, total chicken imports into South Africa amounted to 415,000t.

Key figures for the period under review involve the following:

- total SA imports of chicken: 415,000t
- total SA imports of bone-in chicken under HS classification 0207.14.90: 173,000t
- leading three source countries: Brazil, Netherlands, UK (representing two-thirds of total poultry imports into SA)
- total SA imports of bone-in chicken from the EU: 138,000t

September 2015: The two countries agreed on a framework that would enable the importation of US chicken to South Africa particularly when there has been an outbreak of avian influenza. For much of 2015, South Africa had placed a ban on US chicken imports as a result of outbreaks of avian influenza in the US. In September 2015, the South African Department of Trade and Industry (DTI) released the following press statement:

“The parties agree to finalize a protocol for export of poultry meat and day old chicks based on surveillance compliant with the OIE chapter on Avian influenza in a specified area, biosecurity measures in specified premises and traceability of products to slaughter establishments. South Africa and the United States will finalize terms and conditions and the USDA FSIS poultry certificate for export by 15th October 2015 to enable contracting and shipments of US poultry exports to entire RSA prior to the end of 2015.”

November 2015: The International Trade Administration Commission of South Africa (ITAC) on 2 November publishes draft guidelines for the proposed rebate provisions, with a 2-week period

¹³ SARS Schedule 2, Part 1 – Anti-dumping duties on imported goods. [Online] <http://www.sars.gov.za/AllDocs/LegalDoclib/SCEA1964/LAPD-LPrim-Tariff-2012-15%20-%20Schedule%20No%202.pdf>

¹⁴ <http://www.sapoultry.co.za/pdf-statistics/summary-imports-report.pdf>

provided for comments from interested and affected stakeholders. It is worth bearing in mind that this was now 5 months after the June “Paris agreement”.

[**November 2015:** US President Obama notifies Congress of his intention to suspend AGOA preferences for agricultural products exported by South Africa, after the country had not made adequate progress to address various underlying issues relating to its AGOA eligibility.]

December 2015: On 18 November, the South African government publishes in the official Government Gazette the guidelines pertaining to the administration of the rebate system¹⁵; this provides for a full rebate on the anti-dumping duties on bone-in cuts of chicken (*Gallus Domesticus*) falling under HS sub-heading 0207.14.9.

By end 2015, no actual chicken imports under the rebate system (or in any other way with a waiver of the anti-dumping duties levied against US bone-in chicken imports) had entered South Africa. The US administration took this into account when considering whether South Africa had fulfilled or rectified within 60 days the outstanding AGOA eligibility requirements and associated issues as per the advance notice that the US published on 5 November 2015. On 11 January 2016, the US issued a formal Presidential Proclamation finding that South Africa did not meet the country eligibility requirements under the AGOA legislation and the US Trade Act of 1974 (as described in Section 506(a)(1) of the legislation), and that South Africa would lose its AGOA privileges for agricultural products effective 15 March 2016. Further details about this Proclamation are described in the next section.

The chicken rebate system: key details

During the drawn-out and often acrimonious negotiations on how to address the ‘chicken issue’, with arguments from both sides involving political, economic, legal and academic arguments, the negotiated outcome of a rebate provision on US bone-in chicken imports did little to resolve or fully address the underlying argument on the legalities or otherwise of South Africa’s application of anti-dumping duties levied on US chicken imports. In essence, it appears that the parties ‘agreed to disagree’ on this matter and that the issue would be addressed via the South African rebate system which would remove US anti-dumping duties (but not any normal duties that the countries levies on such products) within an annual quota of 65,000 tons.

¹⁵ Government Gazette, 18 December 2015, Notice No. 1242 See copy: [Online] <http://agoa.info/downloads/5966.html>

The technical details of the ‘temporary’ rebate system as published on 18 December 2015 are fairly complex and administratively cumbersome¹⁶. It is worth noting that they also include a strong developmental provision that seeks to address issues around economic empowerment and transformation, and the development of historically disadvantaged persons (HDI) in South Africa. A large share of the quota is thus only available to persons classified as HDI.

- **Time period and starting date:** The rebate system would start on 1 April 2016 and each quota year would run from 1 April to 31 March of the following year; however between 18 December 2015 (date of publication of rebate) and 31 March 2016 meat falling under this provision would be allowed into South Africa on a first-come-first-served and pro-rata basis (stipulated as 16,250 metric tons) in terms of the annual quota. It is only necessary (for imports up until 31 March 2016) to clear the goods under the rebate item and there to be sufficient quota left; no special forms or applications are required.
- **Applicability:** The rebate applies only to imports of chicken (*‘Gallus Domesticus’*) from the United States, classified under HS tariff code 0207.14.9
- **Non-circulation to BLNS States:** No meat imported under this provision may be circulated outside of South Africa’s borders for consumption in the BLNS countries
- **Suspension of rebate:** Should South Africa have any of its AGOA benefits to the US market suspended or terminated, the chicken rebate would in turn likewise be suspended or terminated, upon the South African Minister of Trade and Industry confirming same to the Minister of Finance
- **Transferability of benefits prohibited:** Any rebate permits may not be transferred to another person not named in the respective permit
- **Limitation and non-binding nature of rebate:** The rebate is only applicable to the anti-dumping duty levied on certain bone-in chicken imports from the US, and does not impact or remove standard South African import duties or any other duties and taxes; the rebate may also not be used as argument in any review, reduction, termination or other amendment to South Africa’s application of anti-dumping duties on such products.

¹⁶ The quota has been implemented through the creation of **Rebate Item 460.03/0207.14.9/01.07**

- **Applicability of the rebate:** An allocation of at least 50% (this may be reviewed later) of the quota will initially be allocated to historically disadvantaged individuals while the Department of Forestry and Fisheries, who will be managing the quota allocation, will also take into account South Africa's *Broad Based Black Economic Empowerment* (BBBEE) guidelines for the agricultural sector in allocating quotas. The remaining quota will be allocated to historic importers of bone-in chicken importers who must also be fully BBBEE compliant. The market share for existing importers will be derived from historical data while the market share for HDIs will be derived from capacity. Actual allocation will depend on factors such as the total quota being applied for, the number of applicants and the quota available, plus applicants meeting a host of administrative and reporting requirements (as set out in great detail in the Government Notice of 18 December 2015).

5. Notice of suspension of South Africa's AGOA preferences

When, on 5 November 2015 President Obama wrote to Congress setting out his intention to suspend South Africa's AGOA preferences for the agricultural sector, the gravity of the situation involving the unresolved agricultural issues between South Africa and the US was significantly amplified. A 60-day notification must be given can have its AGOA access terminated, or partially suspended. The November notification was not a formal decision to suspend South Africa, but expressed intent, should South Africa not adequately address certain matters by the end of 2015. The advance notification specifically refers to South Africa not having removed "several longstanding barriers to US trade..."

It was recognised that this related primarily to the 'chicken issue' but also to other US agricultural exports (such as beef and certain cuts of pork); informally it was understood that a key benchmark related to actual US bone-in chicken being cleared for import into South Africa under the agreed 65,000 ton quota and associated rebate. While the quota system modalities had been finalised and published in the *Government Gazette*, other matters had at the conclusion of the advance notice period not been fully agreed or completed, especially technicalities around the veterinary protocols underlying any chicken and other meat trade, including those dealing with salmonella and so forth. These matters were subsequently concluded, and on 7 January 2016 (a few days after the expired

deadline), South Africa confirmed at a press conference that negotiations pertaining to animal health had been signed¹⁷.

On 11 January 2016, the President issued a formal proclamation that South Africa is (still) not meeting AGOA's eligibility requirements along with those of the United States Trade Act of 1974 (the US GSP, AGOA and other trade legislation is entered into the 'US Code' and in this case relates specifically to the US Trade Act). This also sets out the eligibility requirements for the US GSP on which AGOA is based. The notification sets in motion the suspension of South Africa's agricultural preferences in 60 days, determined to be effective on 15 March 2016.

However, this suspension – which again only targets the agricultural sector in the sense of removing only some AGOA preferences for South Africa – is entirely dependent on South Africa fully meeting the AGOA eligibility requirements. These, on paper at least, appear meanwhile to have been met by now, with South Africa and the US having concluded the relevant veterinary protocols that will ensure that affected products – those covered by the bone-in chicken products rebate as well as others such as pork and beef – are adequately covered within a rules-based environment.

Final confirmation of compliance with respect to chicken products will be when American products covered by the bone-in chicken products rebate enter South Africa under the newly established quota system. The US ambassador to South Africa and others confirmed that the pending suspension would not take place if trade in poultry resumes by 15 March¹⁸.

While both the US and South Africa have indicated that actual imports under the rebate are now a mere formality (considering that it takes a few weeks for relevant goods to be shipped to South Africa), it is anticipated that South Africa's AGOA preferences will not be suspended middle of March. However, the potential sanction was specific and related to issues that were at hand – actual barriers to US trade in affected product categories – but it is well known that other concerns remain and could yet affect South Africa's AGOA eligibility status.

The private security industry legislation has (still) not, as of January 2016, been signed into law despite having been passed by South Africa's parliament more than two years ago, and while there appears to be a significant chance of it being sent back to parliament for review and amendment, could yet become a major stumbling block if South Africa wishes to ensure continued AGOA preferences.

¹⁷ See press statement: <http://agoa.co.za/news/article/5988-agoa-suspension-will-be-lifted-on-arrival-of-us-poultry-south-african-dti.html>

¹⁸ See press statement: <https://za.usembassy.gov/statement-from-u-s-embassy-pretoria-regarding-president-obamas-january-11-2016-proclamation-on-agoa/>

In fact, it's almost a given that should this legislation be passed in its present form, and the forced dilution, divestment or expropriation of US-owned investments in this sector become a reality, that South Africa will lose its AGOA status. Similarly issues around planned changes to the intellectual property and associated pharmaceutical patent legislation, which could cause South Africa to breach other aspects of AGOA's eligibility requirements. The ball seems firmly in South Africa's court.

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Annex 1. Presidential Proclamation regarding South Africa's suspension from AGOA preferences for agricultural exports

Source: <https://www.whitehouse.gov/the-press-office/2016/01/11/presidential-proclamation-take-certain-actions-under-african-growth-and>

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The White House, Office of the Press Secretary *For Immediate Release January 11, 2016*

Presidential Proclamation -- To Take Certain Actions Under the African Growth and Opportunity Act

1. In Proclamation 7350 of October 2, 2000, the President designated the Republic of South Africa (South Africa) as a beneficiary sub-Saharan African country for purposes of section 506A(a)(1) of the Trade Act of 1974 (the "1974 Act") (**19 U.S.C. 2466a(a)(1)**), as added by section 111(a) of the African Growth and Opportunity Act (title I of Public Law 106-200) (AGOA).
2. Sections 506A(d)(4)(C) (**19 U.S.C. 2466a(d)(4)(C)**) and 506A(c)(1) (**19 U.S.C. 2466a(c)(1)**) of the 1974 Act authorize the President to suspend the application of duty-free treatment provided for any article described in section 506A(b)(1) of the 1974 Act (**19 U.S.C. 2466a(b)(1)**) or **19 U.S.C. 3721** with respect to a beneficiary sub-Saharan African country if he determines that the beneficiary country is not meeting the requirements described in section 506A(a)(1) of the 1974 Act and that suspending such duty-free treatment would be more effective in promoting compliance by the country with those requirements than terminating the designation of the country as a beneficiary sub-Saharan African country for purposes of section 506A of the 1974 Act.
3. Pursuant to section 506A(c)(1) of the 1974 Act, I have determined that South Africa is not meeting the requirements described in section 506A(a)(1) of the 1974 Act and that suspending the application of duty-free treatment to certain goods would be more effective in promoting compliance by South Africa with such requirements than terminating the designation of South Africa as a beneficiary sub-Saharan African country. Accordingly, I have decided to suspend the application of duty-free treatment for all AGOA-eligible goods in the agricultural sector from South Africa for purposes of section 506A of the 1974 Act, effective on March 15, 2016.
4. Section 604 of the 1974 Act (**19 U.S.C. 2483**) authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTS) the substance of the relevant provisions

of that Act, and of other Acts affecting import treatment, and actions thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including but not limited to sections 506A(d)(4)(C), 506A(c)(1), and 604 of the 1974 Act, do proclaim that:

(1) The application of duty-free treatment for all AGOA-eligible goods in the agricultural sector from South Africa is suspended for purposes of section 506A of the 1974 Act, effective on March 15, 2016.

(2) In order to reflect in the HTS that beginning on March 15, 2016, the application of duty-free treatment for all AGOA-eligible goods in the agricultural sector from South Africa shall be suspended, the HTS is modified as set forth in the Annex to this proclamation.

(3) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this eleventh day of January, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

BARACK OBAMA

Link to US legislative code

For ease of reference, the following links provide access to some of the US legislative code referred to in the proclamation above.

19 U.S.C. 2466a

[http://uscode.house.gov/view.xhtml?req=\(title:19%20section:2466a%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:19%20section:2466a%20edition:prelim))

19 U.S.C. 3721

<http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title19-section2703&num=0&edition=prelim>

19 U.S.C. 2483

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