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WHAT ARE THE PREFERENTIAL TRADE IMPLICATIONS FOR SOUTH AFRICA'S CHANGE IN STATUS FROM DEVELOPING TO DEVELOPED IN US LAW?

By

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DECLARATION

I declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws in the field of INTERNATIONAL LAW at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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ABSTRACT

This paper addresses the question: what are the preferential trade implications for South Africa's change in status from a developing country to a developed country in US law? To answer this question, this paper considers international agreements and US legislation. This essay examines the implications of being a developed country by considering the background of developing and developed countries, and the difference in advantages of these countries in trade treaty negotiations. To address international trade concerns, the GATT was established. This essay briefly considers the GATT as the non-discrimination principle is currently incorporated in the WTO. This essay addresses the non-discrimination principle, by considering the Most Favoured Nation principle and its exception – the Enabling Clause. Thereafter, this essay examines the Trade Act as US legislation that incorporates special and differential treatment provisions. This essay discusses the US Generalized System of Preferences (GSP) as a condition under the Enabling Clause, that allows for preferential treatment of developing countries. Furthermore, this essay discusses the AGOA as it is beneficial to South Africa since South African products – such as textiles and apparel – benefit the most from it. This essay argues that South Africa's agricultural sector will be impacted, if South Africa's designation changes. This essay considers the IIPA's petition to place South Africa's GSP eligibility under review, and additionally it examines the standard of implementation of the TRIPS Agreement. This essay submits that the African Continental Free Trade Area Agreement may be turned to, which may divert developing countries' reliance on preferential schemes, to each other.

CONTENTS

WHAT ARE THE PREFERENTIAL TRADE IMPLICATIONS OF THE CHANGE IN SOUTH AFRICA'S STATUS FROM 'DEVELOPING' TO 'DEVELOPED' IN US LAW?

I INTRODUCTION

The designation of 'developing' country in United States ('US') law helps to promote economic integration through preferential trade schemes. South Africa is one of the states that currently benefits from the US' designation of it as a 'developing' country. However, there is no universally accepted definition of a 'developed' and 'developing' country. Andre explains that 'underdeveloped' countries are dependent on developed countries and refers to this as the 'dependency theory.'[1] He further elaborates that this is a result of colonialism.[2] Colonisation policies created sets of frameworks – one being to transfer resources from the colony to the coloniser, and another being Europeans settling within the colonies.[3] Acemoglu states that this resulted in inequalities and an imbalance of powers between countries.[4] Hence, I argue that colonised countries were less developed and dependent on developed countries. Deere argues that in the development of international IP treaties, developing countries were uninvolved and several of the treaties were negotiated in the colonial era.[5] Additionally, developing and developed countries provided lower standards of protection in the negotiation of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS).[6] Deere further argues that some developing countries lacked modern IP laws.[7] I submit that as a result of colonialism, developing countries were uninvolved in core treaty negotiations which impacted their post-colonial development and treaty negotiations.

The World Trade Organisation (WTO) is an organisation that recognises the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with

[1] Jan P Nederveen *Pieterse Empire and Emancipation: Power and Liberation on a World Scale* (1989) 10.
[2] Ibid.
[3] Daron Acemoglu et al 'The Colonial Origins of Comparative Development: An Empirical Investigation (2001) 91 *The American Economic Review* 1369 at 1370.
[4] Daron Acemoglu and James A. Robinson 'The Economic Impact of Colonisation' in Stelios Michalopoulos and Elias Papaioannou (eds) *The long economic and political shadow of history - Volume I. A global view* 83.
[5] Carolyn Deere *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (2009) 8.
[6] Ibid.
[7] Ibid.

the needs of their economic development.'[8] The WTO created one of the biggest international trade reforms since World War II as it dealt with trade in services and intellectual property.[9] Since the WTO does not define 'developing' and 'developed', states have resorted to self-designation – which impacts the conduct of trade between countries.[10] In the case of the US, the Trade Act of 1974 guides the US President in establishing the status of a country.[11] Low states that preferential treatment towards a country is based on country designation.[12] Preferential treatment is where a preference-granting country offers unilateral and non-contractual tariff preferences to certain developing countries – this being according to a developed country's preferential scheme.[13] The US designated South Africa as a 'developing' country which helps provide South Africa with preferential treatment in terms of the Generalized System of Preferences (GSP) and the African Growth Opportunity Act (AGOA).[14] The WTO Panel in *US – Steels Safeguard* indicated that self-selection was not binding and preference-giving countries can determine contrary or in agreement with the self-selection.[15] In 2019, the International Intellectual Property Alliance (IIPA) filed a petition to the Office of the United States Trade Representative (USTR) that requested the 'U.S. Government review the eligibility of South Africa as a GSP beneficiary developing country'[16] due to the failure to protect intellectual property rights.[17] If South Africa's designation changes, the benefits accorded to South Africa under the GSP and AGOA would also change.

This paper aims to address the implication of the change in status from 'developing' to 'developed' in US law by briefly discussing, first, the colonial historical background attributed to developing and developed countries' development. Secondly, this essay will discuss the General Agreement on Trade and Tariffs (GATT) and thereafter the Most

[8] Marrakesh Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) UNTS 154.
[9] World Trade Organisation, < https://www.wto.org/english/thewto_e/history_e/history_e.htm>.
[10] B.N. Pandey and Prabhat Kumar Saha 'Special and Differential Treatment In the WTO' (2019) 61 *Journal of the Indian Law Institute* 463 at 465.
[11] Trade Law Act of 1974.
[12] P Low 'Is the WTO doing Enough for Developing Countries?' in George A. Bermann and Petros C. Mavroidis (eds) *WTO Law and Developing Countries* (2007) 243.
[13]Ibid 243.
[14] The Office of the United States Trade Representative, available at *https://ustr.gov/countries-regions/africa/southern-africa/south-africa,* accessed on 15 June 2023.
[15] R Y Simo 'Developing Countries and special and differential treatment' in Kholofelo Kugler & Franziska Sucker (eds) *International Economic Law (southern) African perspectives and priorities* (2021) 258.
[16] "Generalized System of Preferences (GSP): Notice Regarding a Hearing for Country Practice Reviews of Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa, and Uzbekistan, and for the Country Designation Review of Laos (Notice of Public Hearing and request for comments)" Federal Register 84:223 (November 19, 2019) p63955.
[17] Ibid.

Favoured Nation (MFN) principle as they form the foundation of preferential trade. This paper considers the exception to the MFN principle – which permits trading preferences amongst developing and least developed countries – known as the Enabling Clause. Thereafter, the Trade Act of 1974 will be analysed in furthering the discussion concerning the enabling clause in the context of the US. The GSP will be examined as it is a preferential trade agreement under US law. In addition, the effectiveness of the GSP will be discussed – this gives context as to whether the scheme is beneficial to developing countries. The AGOA – which is an extension of the GSP – is further discussed as it is one of the main preferential treatment schemes that South Africa benefits from. Within the GSP and AGOA agreements, rules of origin are contained as these give preferential treatment to products. This essay briefly considers the rules of origin as they benefit sub-Saharan African based products. The impact of the GSP and AGOA in South Africa is discussed as this shows the importance of these preferential schemes within South Africa. Thereafter, this essay considers the reason that South Africa's eligibility has been placed on review. To address the reason for South Africa being on review and defend developing countries against demands for higher levels of intellectual property protection, this essay discusses the TRIPS Agreement. Lastly, taking into consideration the discussion throughout this paper, the implication of the change in status of South Africa from a 'developing' to a 'developed' country and possible solutions including the African Continental Free Trade Agreement (AfCFTA) will be considered.

II WHAT ARE A DEVELOPING COUNTRY AND A DEVELOPED COUNTRY?

(a) Background

The expansion of Europe in America, Asia and Africa was historically through sea.[18] The expansion of Europe was attributed to its violent conquests of nations.[19] The superiority of Western religion and knowledge was exerted through Europe's conquests,[20] hence, colonising these nations. This expansion advanced Europe's economic growth.[21] Williams states that England and France's import and export trade increased by 500 to 600 percent.[22] This

[18] Ram Prakash Anand *International Law and the Developing Countries* (1987) 11.
[19] Brett Bowden 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization' (2005) 7 *Journal of the History of International Law* 3
[20] Robert A. Williams Jr. *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990) 6.
[21] Ibid.
[22] Ibid.

illustrated the growth of international trade and the dominating power of European states throughout history. Upon this background, certain states were more 'developed' than others.[23]

(b) Implications of being a developed country

I argue that developed countries took advantage of developing countries during treaty negotiations. I submit that an example of this is the US, European, and Japanese multinational corporations' draft of the TRIPS Agreement.[24] The negotiating of the TRIPS Agreement occurred in the 1990s when five draft texts (four from Northern countries and one from a Southern country) were submitted to the negotiating group.[25] The Dunkel draft – a combination of these five drafts – was advantageous to developed countries.[26] Sell argues that before TRIPS, states' IP laws were reflective of their economic development levels.[27] Sell further argues that TRIPS is not as flexible due to its promotion of 'universality in IP rights protection.'[28] In addition, the autonomy of states in the decisions concerning their IP protection levels was reduced as a result of this change in the system.[29]

This essay considers South Africa's identification in the multilateral trading system to identify whether it was impacted by the history of developing countries and whether preferential treatment applies to South Africa.

(c) South Africa's identification

South Africa self-identified as a 'developed' country in 1993.[30] This self-identification impacted South Africa's eligibility for regional economic development trade benefits such as preferential trade duties.[31] This self-identification is in the context of South Africa's apartheid regime. Lowenberg argues that during the late 1980s, South Africa's economy was negatively impacted by sanctions and domestic policies that made South Africa reliant on foreign investment.[32] I submit that this creates uncertainty in South Africa's self-designation during that period, since the economy was negatively impacted.

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[23] Jayashree Watal *Intellectual Property Rights in the WTO and Developing countries* (2001) 27.
[24] Peter Drahos *Information Feudalism: Who Owns The Knowledge Economy?* (2002) 28.
[25] Ibid.
[26] Ibid.
[27] Susan Sell *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003) 12.
[28] Ibid.
[29] Ibid.
[30] GATT Trade Policy Review Mechanism The Republic of South Africa Report by the Government (3 May 1993) C/RM/G/37 106.
[31] Ibid at 48.
[32] Anton Lowenberg 'Why South Africa's apartheid economy failed' (1997) 15 *Contemporary Economic Policy* 69.

The United Nations Conference on Trade and Development (UNCTAD) was established due to developing countries' call for 'development-friendly international regimes' in 1964.[33] In terms of UNCTAD, South Africa was designated as a 'developing' country,[34] and thus falls within the developing countries bloc that needed 'development-friendly international regimes.' The establishment of UNCTAD contributed towards furthering developing countries' interests, especially when it incorporated special and differential treatment favouring developing countries within the GATT.[35]

This essay will discuss the GATT as it is one of the main stepping-stones in the multilateral trading system and special and differential treatment.

III GENERAL AGREEMENT ON TARIFFS AND TRADE

The General Agreement on Tariffs and Trade (GATT 1947) is a multilateral trade agreement before the WTO.[36] An update on the trade in goods was made on the GATT 1947, and hence it is what the current GATT (GATT 1994) refers to.[37] However, intellectual property rights were first referred to in GATT 1947's provisions.[38] I submit that the GATT is an important consideration as it provides the relevant provisions for preferential trade in the international trade system – as mentioned, the provisions for intellectual property rights.

The GATT dealt with countries' issues of international trade since there were no international organisation for trade.[39] It was successful in reducing tariff barriers but non-tariff barriers proved difficult to reduce.[40] This resulted in negotiations and discussions within Uruguay to explore ways of strengthening compliance with GATT rules.[41] In 1990, Canada proposed the establishment of the WTO – this replaced the GATT and was proposed to be a 'fully-fledged international organisation which was to administer the different multilateral instruments related to international trade.'[42] As a result of the Uruguay negotiations, an updated

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[33] Deere op cit note 5 at 43.
[34] UNCTADStat 'Classification' available at *https://unctadstat.unctad.org/en/classifications.html#:~:text=The%20developing%20economies%20broadly%20comprise,%2C%20Australia%2C%20and%20New%20Zealand* , accessed on 15 May 2023.
[35] Deere op cit note 5.
[36] Anthony Taubman, Hannu Wager and Jayashreee Watal (Eds) *A handbook on the WTO TRIPS Agreement* (2012) 4.
[37] Ibid at 5.
[38] Ibid.
[39] Peter Van den Bossche & Werner Zdouc *The Law and Policy of the World Trade Organization* 4 ed (2017) 84.
[40] Ibid.
[41] Ibid.
[42] Bossche op cit note 39 at 86.

General Agreement presently exists as the 'WTO's umbrella treaty for trade in goods.'[43] I submit that the importance of the GATT lies within the WTO Agreement being a revision of the GATT. Thus, GATT principles are presently incorporated within the WTO.[44] An example would be the concept of non-discrimination – which manifested the MFN principle. I will now turn to a discussion of the MFN principle.

(a) Most Favoured Nation

Limao argues that the multilateral trading system is built upon the concept of non-discrimination across trading partners – the MFN within Article I of the GATT enshrines this.[45] Article I of the GATT provides that any advantage given to another state should be granted to all other states.[46] This provision is indicative of the harmonizing effect of the MFN principle – with the obligation of states to provide the same beneficial treatment that they give to one state, to that of third-party states. Ustor states that the MFN clause creates favourable conditions which rely on two factors: 'the granting of favours' and 'the elimination of discrimination.'[47] It is for these reasons, *inter alia*, that the WTO Panel in *Canada – Autos* noted that the MFN is the 'corner store of the GATT' and 'one of the pillars of the WTO trading system.'[48] This illustrates the international law obligation that WTO members have of non-discrimination.

(b) Enabling clause

The signatories to GATT decided to deviate from the MFN treatment obligation in 1979.[49] This was due to developing countries raising their concerns regarding their economies which required access to larger markets without harming their domestic market.[50] As discussed above, colonisation impacted the development of states and reduced their economic growth and market. The UNCTAD argued that the GATT rules were biased towards developed countries,

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[43] WTO, available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm*, accessed on 20 August 2023.
[44] WTO, available *at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm*, accessed on 17 July 2023.
[45] N Limao & M Olarreaga 'Trade Preferences to Small and Developing Countries and the Welfare Costs of Lost Multilateral Liberalization' in George A Bermann & Petros C Mavroidis (eds) *WTO Law and Developing Countries* (2007) 36.
[46] The General Agreement on Trade and Tariffs (15 April 1994, entered into force 1 January 1995) 1867 U.N.T.S. 187 Article I:1.
[47] Endre Ustor 'The Most-favoured-Nation clause in the law of treaties' II (1968) *Yearbook of the International Law Commission* para 17.
[48] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* WTO Doc. WT/DS142/AB/R (adopted 19 June 2000) para 69.
[49] Abdulqawi A Yusuf 'Differential and more favourable treatment: The GATT Enabling Clause' (1980) *Journal of World Trade* 491.
[50] James Thuo Gathii *African Regional Trade Agreements as Legal Regimes* (2011) 121.

and therefore, developing countries required rules that took into consideration their position.[51] This deviation is known as the 'Enabling Clause' and it provides as follows:

> '1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according to such treatment to other contracting parties.'[52]

A 'framework' group was established in 1976 that aimed at 'negotiat[ing] improvements in the international framework for the conduct of World Trade, particularly concerning trade between developed and developing countries, and differential and more favourable treatment to be adopted in such trade.'[53] The permanent legal framework concerning the Enabling Clause was set up by this Group.[54] I submit that this was the beginning of special and differential treatment.

I submit that the special and differential treatment was supported globally. The European Communities stated that special and differential treatment was necessary to achieve the purpose and objectives of the WTO Agreement – the economic development needs of developing countries were to be in proportion with the growth of international trade.[55] The US agreed with this view and stated that it '"encourages" developed-country Members to grant preferences to developing-country Members.'[56] The WTO Panel in the *European Communities* case concluded that the Enabling Clause legally permitted a derogation from GATT Article I:1 to provide preferential treatment by developed countries of developing countries.[57] The Enabling Clause illustrated a 'positive effort' in terms of developed countries economically helping developing countries as per the agreement by parties under the WTO Agreement.[58] This indicates that developed countries supported special and differential treatment. I now turn to the Trade Act in discussing special and differential trade further in the context of the US.

IV THE TRADE ACT OF 1974

The Trade Act of 1974 ('Trade Act') provides for the factors affecting the designation of beneficiary developing countries and the designation of eligible articles, which are to be

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[51] Gathii op cit note 50.
[52] Ibid.
[53] Ibid at 20.
[54] Ibid.
[55] *European Communities – Conditions for the granting of tariff preferences to developing countries* WT/DS246/AB/R (7 April 2004) para 15.
[56] Ibid para 74.
[57] Ibid para 80.
[58] WTO Agreement supra note 8.

determined by the US President.[59] The US amended section 502 in 1984 to advantage the US.[60] This advantage included giving 'the US President the authority to withdraw trade benefits from a country or impose duties on its goods if it [the country receiving preference] failed to provide "adequate and effective" protection for US intellectual property.'[61] In addition, the 'self-initiated' section 301 actions could be taken by the USTR against foreign countries.[62] Under section 301, the actions the USTR is authorised to take include to 'suspend, withdraw, or prevent the application of benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection.'[63] The USTR created two categories of watchlists under section 301 provisions – first, the 'watch list', and second, the 'priority watch list.'[64] States that are placed on these watchlists indicate the problems concerning 'IPR protection, enforcement, or market access for persons relying on intellectual property.'[65] I submit that placement on either watch list allows for the USTR to take the aforementioned action under section 301.

I submit that the Trade Act established the US GSP, and thus the US GSP is important for consideration as it set out the eligibility requirements for preferential trade.[66] I turn to the US GSP for further discussion.

V GENERALIZED SYSTEM OF PREFERENCES

The GSP is one of the conditions under the Enabling Clause that entrenches the principle that 'special and differential treatment' should be afforded to developing countries.[67] The Enabling Clause refers to the GSP by providing:

> '2. The provisions of paragraph 1 apply to the following: (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences'[68]

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[59] Customs Duties Chapter 12 - Trade Act Of 1974 - Subchapter V Generalized System Of Preferences.
[60] Drahos op cit note 24 at 13.
[61] Trade Act supra note 59 at sec 502(c)(5).
[62] Drahos op cit note 24 at 13.
[63] Trade Act supra note 59 at sec 301(c)(1)(A).
[64] USTR.gov 'Background on special 301' available at *https://ustr.gov/sites/default/files/asset_upload_file694_11120.pdf*, accessed on 27 September 2023.
[65] Ibid.
[66] Eckart Naumann 'South Africa and the United States Generalised System of Preferences Country Practice Review: What implications for preferential access to US market?' Working Paper No.US20WP04/2020 15.
[67] Emanuel Ornelas & Marcos Ritel 'The not-so-generalised effects of the Generalized System of Preferences' (2002) *The World Economic* 1809.
[68] Differential And More Favourable Treatment Reciprocity And Fuller Participation Of Developing Countries ("Enabling Clause") Decision of 28 November 1979 (L/4903) Article 2(a).

In 1970, the GSP was settled within the UNCTAD and, a year later, the GATT adopted the waivers permitting the preference schemes.[69] This meant that developed countries ('preference-giving countries') were obligated to grant developing countries preferential tariff treatment.[70] These preference-giving countries could choose: 'the beneficiary countries; the products, as well as the quantities thereof; eligibility for such treatment; and to impose various other conditions.'[71] Section 502(c) of the Trade Act provides for 'factors affecting country designation' such as the country expression to be designated, the economic development level of the country, and 'the extent to which such country is providing adequate and effective protection of intellectual property rights.'[72] I argue that the unilateral nature of these schemes allows for preference-giving countries to unilaterally change these factors.

Hudec argues that a danger inherent in GSP schemes would be the ability of developed countries to discriminate against developing countries selectively.[73] Major country beneficiaries such as India, who were part of the system, have been removed recently.[74] In April 2018, India was placed under eligibility review as the USTR deemed it to be increasing trade barriers – trade barriers violate Section 2462(c)(6)(B) of the Trade Act which provides that countries must eliminate trade barriers.[75] India was one of the US' largest beneficiaries – with approximately 190 million dollars worth of products receiving duty-free access into the US market.[76] Kathuria explains that this occurred during America's former President Trump's administration, and Trump's persistence in increasing tariffs to protect the American economy impacted this removal.[77] Furthermore, after Trump's administration, the USTR and India discussed the possibility of restoring India's GSP eligibility.[78] The removal and restoration of

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[69] Robert E Hudec *Developing Countries in the GATT Legal system* (2011) 70.
[70] R. E. Baldwin and T. Murray 'MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP' (1977) 87 *The Economic Journal* at 30.
[71] Beverly M Carl *Trade and the Developing Word in the 21st Century* (2001) 86.
[72] Trade Act supra note 59 section 502(c).
[73] Hudec op cit note 69 at 106.
[74] The office of the United States Trade Representative, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/united-states-will-terminate-gsp#:~:text=Trump%2C%20U.S.%20Trade%20Representative%20Robert,with%20the%20statutory%20eligibility%20criteria, accessed on 20 July 2023.
[75] Trade Act supra note 59.
[76] ET Bureau 'US stops duty benefits for $5.6 billion of Indian exports' *The Economic Times* 6 March 2019 available at *https://economictimes.indiatimes.com//news/economy/foreign-trade/us-stops-duty-benefits-for-5-6-billion-of-indian-exports/articleshow/68279030.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst*, accessed on 11 May 2023.
[77] Sanjay Kathuria 'The U.S. Should Stop Nickel and Diming India and Bangladesh' 13 April 2022 available at *https://foreignpolicy.com/2022/04/13/us-india-bangladesh-trade-gsp/* , accessed on 16 May 2023.
[78] The Economic Times, https://economictimes.indiatimes.com/news/india/restoration-of-gsp-benefits-by-us-to-india-is-need-of-the-hour-cii-exim-committee-chairman/articleshow/101505570.cms, accessed on 25 July 2023.

India's GSP illustrates possible selective discrimination by the US and the flexibility of the US GSP. I submit that this illustrates that South Africa's eligibility may be restored if removed.

I consider the effectiveness of the GSP to provide clarity on the impact it currently has on developing countries.

(a) The effectiveness of the GSP

Dowlah argues that the purpose of the GSP was to encourage integration from developing countries into developed countries by increasing imports from the former into the latter.[79] He further argues that this promoted industrialisation and economic growth in developing countries.[80] I submit that scholars have speculated the effectiveness of the GSP – scholars such as Hudec believe the GSP is a tool that is used to influence the relations between states.[81] Whilst Nguyen argues that the low rate of GSP use and non-tariff barriers contribute to its ineffectiveness.[82] The non-tariff barriers are 'non-tax measures imposed by governments to favor domestic over foreign suppliers.'[83] I submit that governments favouring of domestic suppliers negatively impacts the effectiveness of the GSP as foreign products under the GSP would be discriminated against. Additionally, Nguyen argues that the exclusion of apparel limits US GSP effectiveness.[84] I submit that these are a few of the factors that scholars speculate upon concerning the ineffectiveness of the GSP.

I argue that developed countries' ability to alter their schemes works in favour of developed countries and provides a possibility for discrimination. However, there are situations where alteration is plausible. An example is the prioritization of least developed or poorer countries – developed countries alter their schemes to do this.[85] I submit that an example is the alteration of the European GSP in 2014 which resulted in large exporters such as Russia not having access to this preferential treatment. [86] In this case, discrimination can be seen as

[79] Caf Dowlah 'Trade Preferences and Economic Growth: An assessment of the US GSP Schemes in the Context of Least Developed Countries' in Yong-Shik Lee et al (eds) *Law and Development Perspective on International Trade Law* (2011) 334.
[80] Ibid.
[81] Hudec op cit note 69 at 109.
[82] Josephine Nguyen *The Generalized System of Preferences* (unpublished paper, the George Washington University, 2008) 4.
[83] Cletus Coughlin 'An Introduction to Non-Tariff Barriers to Trade' (1989) *Federal Reserve Bank of St. Louis Review* 33.
[84] Nguyen op cit note 83 above.
[85] Ornelas & Ritel op cit note 67 at 1816.
[86] Ibid.

plausible – preference for a least developed country would be required more than that for a developing country.

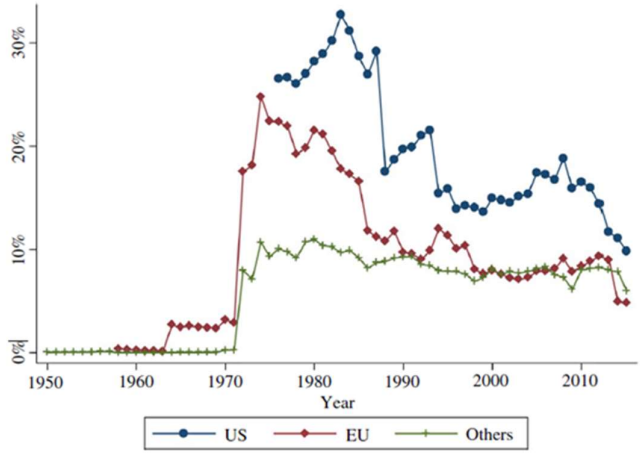

Figure 1: NRTP imports (2019, 1816)

Figure 1 above indicates the imports as per Non-Reciprocal Trade Agreements when the importers are US, EU, or other preference-giving countries.[87] Interpreting from the graph, there is an increase during the 1970s (which were the years that countries had implemented their GSP), followed by a decrease. Ornelas argues that the effectiveness of GSPs decreased over time.[88] In addition, the wide scale of free market access in a developed country caused an increase in imports during the first years of implementation.[89] Ornelas argues that states were smaller in comparison to present days, hence the effectiveness of the GSP may have increased as a result of the lack of development and access to markets.[90] However, participation within the multilateral trading system is required for these developing countries to benefit from rich economies.[91] Hence, I submit that during the beneficial years of GSP, smaller states were more active in participating due to their need to grow their economy.

Whilst the effectiveness of the GSP has been argued, the US established an extension of the GSP to promote economic development in sub-Saharan Africa.[92] This was known as the African Growth and Opportunity Act, which I will discuss further.

[87] Ornelas & Ritel op cit note 67 at 1816.
[88] Ibid at 1831.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Olufemi Babarinde and Stephen Wright 'Africa and the United States: Assessing AGOA' (2017) 64 *Africa Today* 22 at 23.

VI THE AFRICAN GROWTH AND OPPORTUNITY ACT

The AGOA was passed in 2000 by the US Congress to promote economic growth and market access in sub-Saharan Africa.[93] The USTR stated that the AGOA is important in maintaining engagement between the US and sub-Saharan Africa.[94] It is a regional preference program that has been built upon the US GSP. [95] As an extension of the GSP, its purpose is to promote economic development by accommodating unilateral free trade from eligible African countries into the US – which has increased US investment flow into Africa.[96]

As the AGOA is an extension of the GSP, AGOA eligibility co-exists with the US GSP eligibility – US GSP eligibility removal results in AGOA eligibility removal. This is provided within Chapter 4 of AGOA, which states that to qualify for eligibility, a State is to meet the criteria under 'section 104 of AGOA (19 U.S.C. 3703); and (2) section 502 of the Trade Act of 1974.'[97] The criteria under section 104 of AGOA are as follows:

> '(a) The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country (1) has established, or is making continual progress toward establishing-- (A) a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimises government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets … (C) the elimination of barriers to United States trade and investment, including by-- …(ii) the protection of intellectual property…'[98]

The protection of intellectual property to eliminate barriers to US trade and investment is an eligibility requirement under section 104(a)(1)(C)(ii) of the AGOA.[99] This parallels the GSP's protection of intellectual property requirement, and this illustrates that intellectual property rights protection cannot be ignored in considering GSP and AGOA eligibility. I turn to the Rules of Origin to discuss its product-based benefits for South Africa.

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[93] Brock R Williams 'African Growth and Opportunity Act (AGOA): Background and Reauthorization' (2015) Congressional Research Service at 1.
[94] Ibid.
[95] Congressional Research Service 'Generalized System of Preferences (GSP): Overview and Issues for Congress' (2022).
[96] Babarinde & Wright op cit note 92 at 23.
[97] African Growth and Opportunity Act 19 USC 3701.
[98] Ibid.
[99] Ibid.

VII THE RULES OF ORIGIN

In addressing the eligibility for preferential tariff rates, at the UNCTAD it was argued that a set of rules of origin is needed in determining product eligibility.[100] The Special Committee stated that 'multiple rules of origin would obviously cause practical difficulties for the developing countries, and would be likely to hinder an expansion in the exports of these countries.'[101] Hence, the preference-giving country established the rules of origin contained in their preferential scheme.[102] Since the US is the preference-giving country in the AGOA, the rules of origin are established by the US.

South Africa is one of sub-Saharan Africa's main exporters of AGOA-based products to the US.[103] The AGOA includes preferential treatment to products that are not included within the US GSP product eligibility. This includes products such as textile and apparel goods.[104] Preferential treatment is dependent on the origin of the fabric used, which is an AGOA rule of origin.[105] South Africa currently has approximately 1,243.09 million dollars in AGOA product exports into the US.[106] This illustrates a high level of market access in the US which indicates a high amount of textile and apparel goods are receiving preferential treatment as a result of their origin. I submit that using other free trade agreements would not have the same rules of origin and may not value South African goods at the same level entering the US.

The rules of origin are a form of a non-tariff barrier – the UNCTAD includes it as one within its non-tariff measures categorization list.[107] Krishna states that the rules of origin are to be documented and it is expensive – even where the product complies with the origin, importers may choose to pay the tariff instead of documenting.[108] However, I argue that non-complying states can import as there is the ability to avoid documentation and pay a tariff instead. Kniahin states that the obtainment of a certificate of origin requires the payment of

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[100] Stefano Inama *Rules of Origin in International Trade* (2009) 10.
[101] Ibid at 11.
[102] Ibid at 177.
[103] Eckart Naumann 'Update on the African Growth and Opportunity Act (AGOA) and related developments' available at https://www.tralac.org/blog/article/15522-update-on-the-african-growth-and-opportunity-act-agoa-and-related-developments.html, accessed on 25 August 2023.
[104] Inama op cit note 100 at 206.
[105] Ibid.
[106] AGOA.info 'AGOA and GSP exporters to the United States' available at https://agoa.info/data/trade.html, accessed on 26 August 2023.
[107] UNCTAD 'International Classification of Non-Tariff Measures' (2012) UNCTAD/DITC/TAB/2012/2/Rev.1
[108] Kala Krishna 'Understanding Rules of Origin' (2005) *National Bureau of Economic Research* 6.

compliant costs – documented interviews reported within the International Trade Centre have showed that the obtainment of this certificate is complicated to achieve.[109] I submit that the complexities and costs of this certificate are a challenge for exporters especially within developing states. When it comes to GSP and AGOA, I argue that since it's duty-free, exporting states may choose to pay the tariff. However, in terms of preferential and free trade agreements, there are trade tariffs that are not free.[110] I submit that it may become difficult for exporting states to pay in addition to the current reduced tariff, another tariff. This may be the case if South Africa is removed from eligibility of GSP and AGOA preferences – which may result in a strain of trade flow.

VIII GSP AND AGOA IMPACT IN SOUTH AFRICA

As discussed above, the purpose of the GSP is the promotion of economic integration between developed and developing countries' economies. It is important to take into consideration each country on a case-by-case basis to determine the effectiveness based on the usage of the GSP. This requires considering factors such as the Normal Trade Relations Imports and comparing the imports benefited through the GSP.

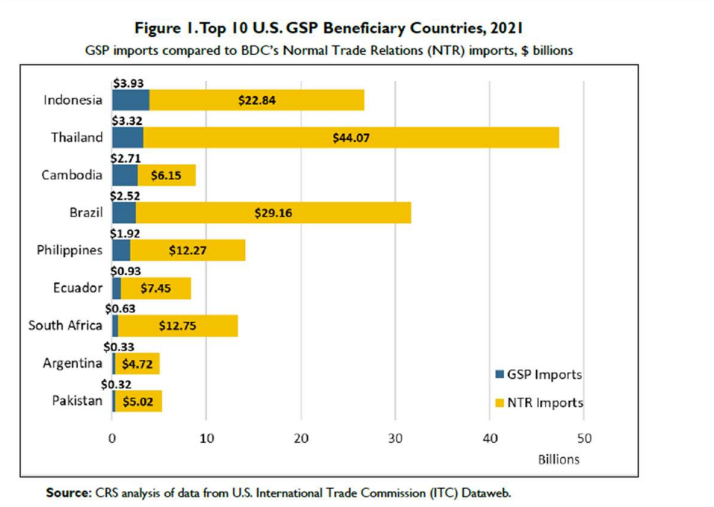

Figure 2: Normal Trade Relations Imports and GSP Imports (2021, 11)

Normal Trade Relations imports make up for most of US' imports from South Africa. As seen in Figure 2, in 2021 South Africa's GSP imports made up approximately 4.7 per cent of imports

[109] Dzmitry Kniahin and Jaime de Melo 'A Primer on Rules of Origin as Non-Tariff Barriers' (2022) 15 *Journal of Risk and Financial Management* 18.
[110] Ibid.

from South Africa.[111] This indicates that the majority of South Africa's trade with the US is based on normal tariffs and not that of the preferential trade schemes. Hence, if the US withdraws its GSP benefits, South Africa will still enjoy a surplus under normal trade relations imports. However, as discussed above, the US GSP eligibility is a requirement for AGOA preferences eligibility. I submit and discuss further that the removal from AGOA preference eligibility would impact South Africa's trade.

I argue that the issue with the GSP is that it limits the main products that may be exported. A country may have a large export within textiles and apparel, however, as per Section 2463(b)(1)(A) of the Trade Act, the eligibility of textiles and apparel is limited.[112] I argue that the limitation of one of the biggest industries that a developing country has, limits the purpose of the GSP – being able to integrate a developing country into the market of a developed country. The AGOA provides eligibility for certain textiles and apparel, however, it is according to the Rules of Origin.[113] South Africa is eligible to export hand-loomed/handmade apparel/textile and ethnic printed fabrics.[114] As I have mentioned above, the GSP and AGOA are interlinked – for a country to be eligible for AGOA benefits, it must qualify under the Trade Act's section 502. Thus, if South Africa's intellectual property rights are reviewed to be inadequate by the USTR, South Africa will not qualify for preferential treatment under the Trade Act's section 502. Hence, I argue that South Africa's eligibility under AGOA will be impacted as one of its requirements will not be fulfilled.

Dunoff argues that countries would resort to FTA if removed from the trade preference scheme eligibility.[115] I submit that a possible FTA African countries would resort to is the African Continental Free Trade Area Agreement (AfCFTA) which was established in 2018 in the context of the consolidation of the 1980 Lagos Plan of Action and the Abuja Treaty which envisaged an African Economy Community.[116] Sucker indicates that more than the majority of African Union States have signed the AfCFTA, however, less than 50 per cent have ratified it.[117] All countries would have to ratify this Agreement for it to be effective as its

[111] Congressional Research Service op cit note 95 at 11.
[112] Trade Act supra note 59.
[113] AGOA supra note 97 section 506A(b)(2).
[114] Ibid.
[115] J L Dunoff 'Dysfunction, diversion, and the debate over preferences: (How) do Preferential Trade Policies Work?' in Chantal Thomas & Joel P Trachtman (eds) *Developing Countries in the WTO Legal System* (2009) 63.
[116] Franziska Sucker 'Towards Developmental Integration, Safeguards and Beyond: The Main Features of South Africa's Preferential Trade Agreements' (2019) *The Journal of World Investment & Trade* 726 at 732.
[117] Ibid.

provisions can only apply to a State when it 'enters into force.'[118] This agreement aims to create a continental free trade market that would take into consideration the differential socioeconomics and levels of industrialisation or development of each country.[119]

The ability of an FTA to replace and provide better benefits than the AGOA has been critiqued.[120] In June 2003, five SACU communities with the US negotiated to conclude an FTA.[121] Under the AGOA, South African Customs Union (SACU) economies are the main suppliers of non-fuel goods to the US, with imports composing 'more than a third of US non-fuel goods imports from qualifying sub-Saharan African countries.'[122] This shows that the AGOA has demonstrated good outcomes.

I submit that the agricultural export sector would be affected by the removal from AGOA – approximately 70 per cent of agricultural trade taken under the AGOA.[123] South Africa's agricultural sector in terms of exports depends heavily on AGOA preference. In 2018, South Africa's agricultural sector claimed 71 per cent of AGOA trade preferences, with 6 per cent under GSP trade preferences.[124] This is a major trading sector that would be impacted by South Africa's change in status from a 'developing' to a 'developed' country. I argue that the impact of the removal of AGOA may impact the agricultural sector, and as a result, exporters may turn to preferential trade agreements.

As the possible implications of being removed from the US GSP and AGOA have been briefly discussed, it is important to have clarity and reason as to why South Africa has been placed under review.

[118] Agreement Establishing The African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) Article 8.2.
[119] Ibid.
[120] Chris Alden & Mills Soko 'South Africa's Economic Relations with Africa: Hegemony and Its Discontents' (2005) 43 *The Journal of Modern African Studies* 367 at 373.
[121] Ibid at 95.
[122] Ibid.
[123] Eckart Naumann 'South Africa under GSP country review: what implications for preferential exports to the United States?' Tralac Trade Brief No. US20TB01/2020 14.
[124] Ibid at 9.

IX WHY IS SOUTH AFRICA'S ELIGIBILITY PLACED ON REVIEW?

South Africa's GSP eligibility and AGOA eligibility are under review due to its 'inadequate protection' of intellectual property rights[125] and its relations with Russia.[126] The Copyright Amendment Bill B13-2017 ('CAB') is a piece of draft legislation to reform the Copyright Act 98 of 1978 in a manner that will protect 'works and rights of authors in the digital environment.'[127] The USTR reviewed the CAB in 2018 – and the International Intellectual Property Alliance (IIPA) stated that the CAB was 'non-compliant with South Africa's international intellectual property (IP) obligations under Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Berne Convention for the Protection of Literary and Artistic Works.'[128] Hence, South Africa's IP practice has since been under review.[129] In addition, the AGOA is under review due to South Africa's relationship with Russia. Senior US legislators perceived South Africa as supporting Russia due to South Africa's neutrality about the Russia-Ukraine war.[130]

I argue that the usage of 'adequate and effective' in the US GSP provides for a lenient interpretive scope and that this allows for developing countries to apply the TRIPS Agreement's 'minimum standards' as a maximum standard. Ruse-Khan states that 'minimum standards' may be interpreted as the that states are free to 'provide additional, more extensive protection.'[131] Article 1 of the TRIPS Agreement provides a defence for developing states that are asked to increase their levels of protection.[132] It provides that Members are not obliged to implement higher standards of protection.[133] Hence, I submit that this indicates a minimum level of adequacy and effectiveness, which developing countries are to abide by.

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[125] GSP Hearing op cit note 16.
[126] Sara-Jayne Makwala King 'South Africa's part in AGOA could be under threat due to country's 'relationship' with Russia' available at *https://agoa.info/news/article/16237-south-africa-s-part-in-agoa-could-be-under-threat-due-to-country-s-relationship-with-russia.html*, accessed on 23 September 2023.
[127] Copyright Amendment Bill B13-2017.
[128] Hilda Thopacu 'Validating South Africa's Copyright Reform through the Lens of US GSP: The Need to Abolish Reciprocal Requirements' (2020) 84 *Policy Insights* 2.
[129] Ibid.
[130] Tamika Goundan 'During Agoa Talks, SA Questioned Over Russia Relations, Reveals Patel' available at https://ewn.co.za/2023/07/27/during-agoa-talks-sa-questioned-over-russia-relations-reveals-patel, accessed on 20 August 2023.
[131] HG Ruse-Khan 'Time for a Paradigm Shift - Exploring Maximum Standards in International Intellectual Property Protection' (2009*) Trade, Law and Development* 58.
[132] Carlos M Correa *Intellectual Property Rights, the WTO and Developing Countries* (2000) 8.
[133] Trade-related Aspects of Intellectual Property Agreement (adopted 15 April 1994, entered into force 1 January 1995) Article 1.

I submit that the comparison of South Africa's copyright protection with the US's copyright protection would be demanding South Africa to increase its copyright protection levels. Sell states that 'provisions that either exceed the requirements of TRIPS or eliminate TRIPS flexibilities' are known as TRIPs-Plus.[134] This essay will discuss the implementation of the TRIPs Agreement further.

(a) The implementation of the TRIPS Agreement

Gervais argues that the implementation of the TRIPS agreement contributed towards the development of countries – as national innovation policies were altered accordingly.[135] However, this is linked to the idea that with the adoption of intellectual property rights, technology will develop.[136] In terms of transitional periods for developed countries and developing countries, the former had to comply with the TRIPS Agreement since 1 January 1996,[137] however, the latter had, per Article 65.2 of the TRIPS Agreement, a transition period of 5 years which was until 1 January 2000.[138] Developing countries could postpone protection for a further 5 years – that is until 1 January 2005.[139] These different transitional periods indicate the realisation of different developmental stages of countries and their need for different implementation times.

Reichman argues that developed countries had a goal to have the rest of the world follow a 'comprehensive set of intellectual property standards' – this was not a 'minimum standard' since developed countries agreed among themselves on these standards.[140] I submit that the approach taken by developed countries does not appropriately take into consideration the application to developing countries. The TRIPS Agreement has required developing countries to implement its provisions within a short period.[141] This short period does not take into consideration the different developmental circumstances that developing countries have. However, this argument is limited.

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[134] Susan Sell 'TRIPS-PLUS free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 52.
[135] D J Gervais 'Police Calibration and Innovation Displacement' in Chantal Thomas & Joel P Trachtman (eds) *Developing Countries in the WTO legal system* (2009) 389.
[136] G Ghidini 'On TRIPS' impact on 'least developed countries': The effects of a 'double standards' approach' in Gustavo Ghidini et al (eds) *TRIPS and Developing Countries* (2014) 135.
[137] Taubman op cit note 36 at 21.
[138] TRIPS supra note 133.
[139] D Gervais *The Trips Agreement – Drafting History and Analysis* (2012) 687.
[140] Jerome H Reichman 'Securing compliance with the TRIPS agreement after US v India' (1998) *Journal of International Economic Law* 585.
[141] Ghidini op cit note 136 at 133.

The 1967 Convention Establishing the World Intellectual Property Organization established WIPO.[142] However, the origins of WIPO predate the UN, with the Industrial Revolution highlighting 'the need for an international framework for intellectual property rights.'[143] WIPO is a specialised forum on IP rights and it promotes the evolution of international IPR law.[144] In forums such as the WIPO, alongside the UNCTAD and UNESCO, developed countries such as the US feared that developing countries would advance on their own in terms of intellectual property.[145] Drahos argues that this is because developing countries had already pushed a reform agenda at the Paris Convention regarding access to the technology of multinationals.[146] The Paris Convention was never completely revised, and thus, the US feared that developing countries would continue to push a reform agenda.[147] It is for this reason that the US argued that intellectual property protection is subject to the GATT, and thus, the GATT was where the US was the most influential state.[148] In GATT, developing and developed countries could not vote in blocs of their own – as was done within WIPO – which proved to be an advantage to the US since voting was done on consensus.[149] The final TRIPS Agreement was lodged within GATT and not WIPO, which the developing countries had rooted for.[150] Helfer argues that the process of moving from a specialised forum on IPR such as WIPO to that of GATT illustrates the power the US has to shape trade bargains.[151] Furthermore, the change in South Africa's status from a 'developing' country to a 'developed' country will not impact South Africa's voting power or influence within the international law field.

The African Group requested the TRIPS Council to deal with the relationship between the TRIPS Agreement and public health in 2001.[152] This was a result of the access to pharmaceutical drugs conflicting with the recognition of IPRs, during the HIV crisis in sub-Saharan Africa.[153] States agreed in the Doha Declaration that 'each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed,

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[142] Paul Salmon 'Cooperation between the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)' (2003) 17 *Journal of Civil Rights and Economic Development* 430.
[143] Ibid.
[144] Salmon op cit note 142.
[145] P Drahos 'Negotiating Intellectual Property Rights' in Peter Drahos and Ruth Mayne (eds) *Global Intellectual Property Rights: Knowledge, Access and Development* (2002) 166.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Watal op cit note 23 at 22.
[150] Ibid at 58.
[151] Laurence Helfer 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 21.
[152] Carlos M. Correa *Implications of the DOHA Agreement on the TRIPS Agreement and Public Health* (2002) 1.
[153] Ibid.

in particular, in its objectives and principles.'[154] Moreover, states agreed to flexible interpretation and implementation of TRIPs to support 'WTO members' right to protect public health.'[155] The WIPO Development Agenda was launched in 2006, as a result of the concerns held about the WIPO's technical assistance in terms of the bias towards developed countries and developed countries' IP rights holders.[156] The development agenda provides that the approach to IP by WIPO is to be in 'the context of broader societal interests and especially development-oriented concerns.'[157] I submit that these two instances indicate examples of challenges to developed countries and their IPR international regulations, for public health and the development of developing countries.

I argue that the TRIPS Agreement implementation has proven to be challenging for developing countries. In terms of social costs, especially within the short and medium term, it is costly for developing countries as they ought to pay to lessen the technological gap.[158] The UNCTAD states that developing countries are to pay for the resources required to adapt some of the necessary legislation and institutional structures.[159] Whilst the long-term benefit would be that a legal worldwide balance between developing and developed countries may arise,[160] I argue that the issues that developing countries currently have that prevent them from completely obliging with the TRIPS Agreement – such as developing countries' economy in a deficit – will not completely be resolved by full implementation. Hence, I argue that the 'minimum' standards that the TRIPS Agreement provides for, should be implemented as a maximum for developing countries. I argue that this standard of application is compliant with the TRIPS Agreement as it provides in Article 1 that 'Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.'[161]

Over time, there has been a change in the approach taken to the TRIPS Agreement. Gervais argues that there has been recognition that not all developing countries are the same, that 'high levels of intellectual property will not generate positive impacts' and that

[154] Declaration on the TRIPS agreement and public health (14 November 2001) WT/MIN(01)/DEC/2 para 5.
[155] Ibid at para 4.
[156] Deere op cit note 5 at 186.
[157] WIPO Development Agenda, available at *https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2021-22-en-wipo-development-agenda.pdf* , accessed on 25 September 2023.
[158] Reichman op cit note 140 at 587.
[159] UNCTAD 'The TRIPS Agreement and Developing countries' UN 96.II.D.10 (Geneva 1997) para 71.
[160] Reichman op cit note 140 at 587.
[161] TRIPS supra note 133 Article 1.

developmental goals cannot be achieved only through intellectual property rights.[162] This indicates that within the trade realm, intellectual property has been incorporated into trade negotiations.[163] I argue that discussions and taking different approaches to the TRIPS Agreement illustrate a positive change within the legal trade realm.

One of the goals provided by Article 41 of the TRIPS Agreement is that barriers to legitimate trade should not be created by the measures taken to enforce IPRs.[164] An objective provided within Article 7 of the TRIPS Agreement stipulates that the 'protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology.'[165] Samtani argues that Article 7 provides for a 'harmonious interpretation of states' common human rights obligations.'[166] In addition, the TRIPS Agreement provides in Article 8 that measures may be taken to prevent right-holders from resorting to 'practices which unreasonably restrain trade or adversely affect the international transfer of technology.'[167] Taking into consideration these factors, I submit that the enforcement of IPRs as per the TRIPS Agreement lays on the foundation that enforcement should promote technological advancement, however, it should not create or be a form of barrier to legitimate trade. Furthermore, I argue that the CAB does fulfil this scope as it does not create a barrier to legitimate trade, and it may benefit South Africa.

X WHAT ARE THE IMPLICATIONS FOR SOUTH AFRICA AND WHAT ARE POSSIBLE SOLUTIONS?

Whether South Africa has its country eligibility changed or certain products' eligibility suspended, I argue that the implications it has would be the creation of a multitude of Free Trade Agreements that increase the 'spaghetti bowl'. The 'spaghetti bowl' refers to the mixing of the diversity of regional agreements due to the increasing number of FTAs.[168] As discussed above, the AfCFTA has been established to integrate Africa's trade markets into a free-trade regional bloc, however, its impact and possible effects are to be discussed.

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[162] Gervais op cit note 139 at 367.
[163] Ibid.
[164] TRIPS supra note 133 Article 41.
[165] Ibid Article 7.
[166] Sanya Samtani 'Human rights, harmonious interpretation and the hegemonic international trade regime: the case of the covid-19 trips waiver proposals' (2022) 10 *South African Intellectual Property Law Journal* 92.
[167] TRIPS supra note 133 Article 8(2).
[168] Arne Melchior 'GSP in the "Spaghetti bowl" of trade preferences' (2005) *683 Norwegian Institute of International Affairs* 1; Brad Kloewer 'The Spaghetti Bowl Of Preferential Trade Agreements And The Declining Relevance Of The WTO' (2016) 44 *Denver Journal of International Law and Policy* 429.

As I have discussed above, the GSP and AGOA include the Rules of Origin principle which prevents non-beneficiary countries' products from receiving preferential treatment, however, the same cannot be said for preferential trade agreements. In the case of free trade agreements, the members provide for their external tariffs and thus the applicability of the rules of origin would differ.[169] I argue that as there will be a further increase in free trade agreements, possibly distorting the trading process, especially in terms of Rules of Origin since certain agreements may have different percentages of which products are to originate. I argue that this may result in nonbeneficiary states having their products included in the trading process. However, in the case of South Africa's agricultural sector, Flatter argues that free trade agreements with the South African Development Community (SADC), require that 'primary agricultural products must be wholly produced in a member state' to qualify for preferential tariffs.[170] This prevents agricultural products that have been produced elsewhere, from receiving preferential tariffs. Flatter explains that due to the applicability of the AGOA, in terms of apparel and textile, SADC rules of origin are 'redundant in the face of restrictive rules imposed by AGOA.'[171] The South African Customs Unions' rules of origin subject members to no tariffs,[172] whilst competition is prevented by imposing heavy penalties on MFN tariffs on raw material inputs for non-SACU members.[173] Furthermore, tariff reductions do not help to take advantage of AGOA[174] – I argue that this contributes towards the argument presented above that provides that FTA's would not be able to provide the same or better benefits than that of the AGOA.

I argue that the adoption of restrictive rules of origin by SADC may harm the country's international trading system.[175] Over the years Africa has developed, in comparison to what is now considered a developed country – Turkey – Flatter argues that SADC's market is relatively smaller and industrialisation is less diverse.[176] Thus, applying restrictive rules of origin would prevent regional integration and would heighten trade tariff barriers rather than

[169] Krishna op cit note 111 at 2.
[170] Frank Flatters & Robert Kirk 'Rules of Origin as Tools of Development? Some Lessons from SADC' (2003) paper presented at the IDB-CEPR-DELTA/INRA conference 8.
[171] Ibid at 22.
[172] South African Development Community, available at *https://www.sadc.int/pillars/customs*, accessed on 29 July 2023.
[173] Flatters op cit note 170 at 8.
[174] Ibid.
[175] Ibid at 23.
[176] Flatters op cit note 170 at 23.

lower them. However, whilst current SADC rules of origin may help in the event of South Africa losing AGOA eligibility, it would not be able to achieve the same results as the AGOA.

Thopacu states that the reason developed countries place countries under review in terms of the GSP is to increase reciprocal trade concessions.[177] However, I disagree as US legislation provides that review measures are to prevent unfair trade practices. Under the 1988 Omnibus Trade and Competitiveness Act,[178] unfair trade practices – including IPR infringements – are to be included in an annual report devised by the United States Trade Representative.[179] In addition, the TRIPS Agreement provides that 'appropriate measures' are to be taken to prevent 'practices which unreasonably restrain trade.'[180] This indicates that developed countries like the US, have placed these review measures within their domestic law to prevent or stop unfair trade practices. I submit that this illustrates that the US' review measures are compliant with the TRIPS Agreement and are necessary.

I argue that the decision-making between the US and South Africa may be a concerning the CAB. As discussed above, the TRIPS Agreement is within a phase whereby discussions surrounding how developed and developing countries are not alike and incorporation of TRIPS cannot be applied in the same way to all countries. As explained by Samtani, the harmonious interpretation of TRIPS provisions allows for flexibility, and it involves developed countries considering the impact of their 'promotion and enforcement of intellectual property rights' on developing countries.[181] I submit that this harmonious interpretation approach takes into consideration the differences between developed and developing countries. However, there are still concerns that the US would dominate South Africa due to the authority and power dynamics between a developed and a developing country which makes space for 'uncertainty, unpredictability, and unfairness during the administrative review process.'[182] As discussed above, there is the importance of compliance with the TRIPS Agreement's principles and obligations – the TRIPS Agreement provides that states are not obliged to 'implement in their law more extensive protection than is required by this

[177] Thopacu op cit note 128 at 7.
[178] Watal op cit note 23 at 24.
[179] Omnibus Trade and Competiveness Act of 1988 section 4102(4).
[180] TRIPS supra note 133 Article 8.
[181] Samtani op cit note 166.
[182] Thopacu op cit note 128 at 7.

Agreement.[183] Beiter concludes that the CAB is compliant with the TRIPS Agreement, and South Africa is not obliged to implement more extensive protection.[184]

The US submitted two proposals to the WTO General Council in 2019 concerning special and differential treatments – the US wants to remove these treatments to developing countries as it is of the view that the programs have 'served their purpose in elevating developing countries.'[185] Accordingly, countries that are to be removed from these provisions are 'countr[ies] that [are] a member of the G20 or any WTO member that accounts for no less than 0.5% of global merchandise trade (import and export).'[186] South Africa is a member of the G20 and under that, the US would have South Africa removed from special and differential provisions.[187] According to the World Trade Statistical Review 2022, South Africa accounted for 0.6 per cent of global merchandise trade (import and export) in 2021.[188] I argue that this increases South Africa's possibility of being removed from special and differential treatment provisions. I submit that other African countries, which have the factors mentioned above to be removed, face the same ordeal as South Africa – this being the possible removal from the GSP and AGOA if the US proposal succeeds. South Africa, Kenya, and other developing countries opposed this proposal in February 2023, arguing that developing countries still face challenges that make special and differential treatment necessary and relevant.[189] This indicates the support that developing countries have for the system, and more so, are reliant upon it.

Adebola argues that Africa's intellectual property system's fragmentation may pose a problem to the diversification of Africa's economy.[190] As discussed above, the adoption of the TRIPS agreement has contributed to the development of countries – however, Africa's IP system is fragmented to the extent that there are different regulations at national and regional levels.[191] Whilst some African states have developed accordingly with TRIPS due to trade

[183] TRIPS supra note 133 Article 1(1).
[184] Klaus D Beiter et al 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B2017]' (2022) 25 *Pioneer in peer-reviewed, open access online law publications* 10.
[185] Thopacu op cit note 128 at 9.
[186] Ibid.
[187] G20 'G20 Members' available at https://www.g20.org/en/about-g20/ , accessed on 20 May 2023.
[188] WTO *World Trade Statistical Review* (2022) 58.
[189] WTO General Council 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness' WT/GC/W/765/Rev.2 (4 March 2019) para 2.1.
[190] Titilayo Adebola 'Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol' (2020) 1 African Journal of International Economic Law 234.
[191] Ibid.

concessions, there are other states which have not. I argue that this imbalance causes Africa to not adequately integrate – thus, a constant cycle of African States relying on developed States and their unilateral preferential schemes which may be revoked when the latter State deems appropriate. Adebola suggests that the African Union should take into consideration the strategies that the IP Protocol of the AfCFTA will be built upon.[192]

For developing countries in Africa to not have their main trading export systems – such as the agriculture sector – affected by changes in labels provided to them by the US, they will have to become less or have no reliance on unilateral preferences provided to them by the US. However, as mentioned, the ACFTA will have to be developed accordingly and adequately to provide for a continental free trade system – taking into consideration, *inter alia*, the provisions surrounding intellectual property.

(a) The African Continental Free Trade Agreement

I argue that the AfCFTA has the potential to elevate African states, especially since a free trade continental market implies that African states would be less reliant on US GSP and AGOA schemes. However, the AfCFTA has deficiencies – such as 'technical capacity, financial resources, physical infrastructure, and the elimination of non-tariff measures' *inter alia* – which will need to be addressed to accommodate effective trading.[193] As mentioned, this Agreement has potential, however, the framework needs to be addressed.

Piccioto argues that developing countries should adopt a 'common stand to resist bilateral pressures and insist that TRIPS be treated as a maximum and not a minimum.'[194] I argue that this common stand is through regional blocs – such as the AfCFTA. The Council of Ministers of Trade and States has established within 2021 a Committee on Intellectual Property Rights which is preparing to develop the AfCFTA IPR Protocol.[195] As the AfCFTA IPR Protocol is still in its beginning stages of development and drafting, it may be plausible to include a provision that the TRIPS be treated as a maximum. The IPRs will be protected, and African developing countries will be less reliant on US preferential trade.

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[192] Adebola op cit note 190.
[193] Olabisi D Akinkugbe 'A critical appraisal of the African Continental Free Trade Area Agreement' in Kholofelo Kugler & Franziska Sucker (eds) *International Economic Law (southern) African perspectives and priorities* (2021) 296.
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XI CONCLUSION

The aim of this paper is to address the preferential trade implications for South Africa's change in status from a developing to a developed country in US law. To address this sufficiently, the factors surrounding preferential trade and the designation of countries as developed and developing were discussed.

As mentioned, there is no universal definition of a developing country and a developed country. However, in the trade arena, this designation matters. In terms of the US trade law, its designation comes with preferential trade benefits such as free trade under the GSP and AGOA. South Africa benefits from these preferential trade schemes to a certain extent, as I argued that most African States' exports are under normal trade tariffs and not that of the GSP. The effectiveness – or perhaps, usage of the GSP – is not efficient in South Africa. However, it has been speculated that this is more so because GSP limits what products may be exported – the majority of the limited exports are in sectors that are large in developing countries.

Nevertheless, South Africa does benefit from the AGOA in terms of its agricultural sector. Most agricultural exports to the US enjoy AGOA preferential treatment. Hence, if the US changes South Africa's designation, South Africa will lose benefits in terms of this sector. Furthermore, South Africa's intellectual property rights provisions have been placed under review by the USTR. I argued that TRIPS should be applied as a maximum standard, to the extent that developing countries enforce it at their discretion – however, aligning with TRIPS obligations and principles. The intersectional discussions around the TRIPS Agreement illustrates a way forward in terms of developing countries and technological advances, and there have been organizational bodies and conferences held that support developing countries and illustrate the flexibility of TRIPS.

In terms of preferential trade, South Africa may be inclined to join preferential trade agreements which would contribute towards the spaghetti bowl of agreements. However, it has been argued that preferential trade agreements are not as effective as GSP schemes as they would not be afforded the same duty-free treatment.

For developing countries to prevent losses due to unilateral non-binding preferential agreements, it has been suggested that they work towards continental integration in terms of the AfCFTA and its IPR Protocol. However, the effectiveness of this is unknown.

In the case of South Africa, currently, the CAB should be passed and determined as complying with the US GSP, for South Africa to retain its benefits from the GSP and AGOA.

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